Appeal No. 12-17749

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NORTHERN DISTRICT OF CALIFORNIA

RANCHO DE CALISTOGA,
a California General Partnership,

Petitioner - Appellant,

vs.

CITY OF CALISTOGA; W. SCOTT SNOWDEN,
Hearing Officer, The City of Calistoga,

Respondents - Appellees.

On Appeal From the United States District Court
for the Northern District of California
Hon. Jeffrey S. White
Case No. C11-05015 JSW (ADR)

APPELLEES CITY OF CALISTOGA AND W. SCOTT SNOWDEN'S ANSWERING BRIEF

Michelle Marchetta Kenyon, City Attorney (SBN 127969)
CITY OF CALISTOGA
Amy E. Hoyt, (SBN 149789)
BURKE, WILLIAMS & SORENSEN
1901 Harrison Street, Suite 900
Oakland, California 94612-3501
Tel: 510-273-8780 / Fax: 510-839-9104

Attorneys for Respondents - Appellees
CITY OF CALISTOGA and W. SCOTT SNOWDEN

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellees City of Calistoga, a municipal corporation, and W. Scott Snowden, an individual sued in his capacity as administrative hearing officer, state that (1) they are not corporations; (2) they have no parent companies, subsidiaries or affiliates; and (3) they do not issue stock to the public.

Dated: June 24, 2013

Michelle Marchetta Kenyon, City Attorney CITY OF CALISTOGA and BURKE WILLIAMS & SORENSEN

By: /s/ Amy E. Hoyt
Amy E. Hoyt
Attorneys for Respondents – Appellees CITY OF CALISTOGA and W. SCOTT SNOWDEN

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. STATEMENT OF JURISDICTION 4

III. ISSUES PRESENTED 4

IV. SUMMARY OF APPELLEES' ARGUMENT 5

V. STATEMENT OF FACTS AND PROCEDURE 6

A. Recognizing The Unique And Vulnerable Position Of Mobilehome Park Residents, The City Adopted The Ordinance To Stabilize Mobile Home Park Rents 6

B. Rancho Sought To Increase The Space Rent From $471.39 A Month To $625 A Month 7

C. Rancho Filed Its Petition In This Action 7

D. The District Court Granted Appellees' Motion To Dismiss, Giving Rancho Leave To Amend Its Private Takings, Due Process And Equal Protection Claims 8

E. The District Court Granted Appellees' Motion To Dismiss Rancho's First Amended Petition Without Leave To Amend 9

VI. STANDARD OF REVIEW 11

VII. LEGAL ARGUMENT 13

A. Rancho's Regulatory Takings Claim Is Properly Dismissed As Unripe 13

1. Rancho's regulatory takings claim is unripe because it is undisputed that Rancho has not exhausted state procedures for recovering its alleged economic loss 13

2. It is settled that California law provides an adequate state court remedy 17

TABLE OF CONTENTS
(continued)

Page

3. Even assuming *arguendo* that *Williamson* is a prudential doctrine, this Court is not free to disregard ripeness considerations....19

4. Rancho Is Not Entitled To A Trial To Prove That The Requested Rent Is Not Excessive, Monopolistic Or Contrary To Some Other Legitimate Public Purpose....21

B. Rancho Has Not And Cannot State A Cognizable Claim For Private Takings....22

1. Private takings claims are reviewed under a highly deferential standard....22

2. Under *Kelo* and its progeny, Rancho has not and cannot state a viable claim for private takings....24

3. Rancho has not and cannot allege a viable claim of pretext....26

a. Rancho's allegations do not demonstrate sham or pretext; rather they go to the Ordinance's efficacy and impact....27

b. The cases that Rancho cites are inapt....30

4. Rancho's arguments regarding the prohibition on gifts of public funds and the City's decision not to adopt a subsidy program are meritless....33

C. Rancho Has Not And Cannot State A Cognizable Claim For Either Due Process Or Equal Protection Violation....34

1. Rancho's due process and equal protection claims are subsumed in the takings claim....34

2. Under The Deferential Rational Basis Standard Of Review, Rancho Has Not And Cannot State Cognizable Claims For Due Process Or Equal Protection Violation....36

TABLE OF CONTENTS
(continued)

Page

a. Rancho has not and cannot state a claim for due process violation 36

b. Rancho has not and cannot state a claim for equal protection violation 38

3. Rancho and the PLF's arguments to the contrary are meritless 39

4. WMA's contention that Rancho has stated a due process claim is meritless 41

D. Because Rancho Has Not And Cannot State A Valid Claim For Relief Under Any Legal Theory, WMA's Notice Pleading Argument Fails 45

VIII. CONCLUSION 46

TABLE OF AUTHORITIES

Page

FEDERAL CASES

99 Cents Only Stores v. Lancaster Redevelopment Agency,
237 F.Supp.2d 1123 (C.D. Cal. 2001) 30, 31, 32

Action Apt. Ass'n v. Santa Monica Rent Control Opinion Bd.,
509 F.3d 1020 (9th Cir. 2007) .....passim

Adam Bros. Farming, Inc. v. County of Santa Barbara,
604 F.3d 1142 (9th Cir. 2010) 20

Armendariz v. Penman,
75 F.3d 1311 (9th Cir. 1996) 30, 31, 32

Berman v. Parker,
348 U.S. 26 (1954).....23

Berry v. Dept. of Social Services,
447 F.3d 642 (9th Cir. 2006) 11

Carson Harbor Village, Ltd. v. City of Carson,
353 F.3d 824 (9th Cir., 2004) 19

Cine SK8, Inc. v. Town of Henrietta,
507 F.3d 778 (2d Cir. 2007) 41, 42, 43, 44

Colony Cove Props., LLC v. City of Carson,
640 F.3d 948 (9th Cir. 2011) .....passim

Concrete Pipe and Prods. v. Construction Laborers Pension Trust,
508 U.S. 602 (1993).....16

Cottonwood Christian Center v. Cypress Redevelopment Agency,
218 F.Supp.2d 1203 (C.D. 2002).....30, 31, 32

Crown Point Dev., Inc. v. City of Sun Valley,
506 F.3d 851 (9th Cir. 2007) 39, 40

Duquesne Light Co. v. Barasch,
488 U.S. 299 (1989).....35

Equity Lifestyle Props., Inc. v. County of San Luis Obispo,
548 F.3d 1184 (9th Cir. 2008) .....passim

Euclid v. Ambler Realty Co.,
272 U.S. 365 (1926).....16

Evans v. Chater,
110 F.3d 1480 (9th Cir. 1997) 12

Federal Home Loan Mortg. Corp v. New York State Div. of Housing and Comm. Renewal,
83 F.3d 45 (2d Cir. 1996) 16

Guggenheim v. City of Goleta,
638 F.3d 1111 (9th Cir. 2010) .....passim

Hacienda Valley Mobile Estates v. City of Morgan Hill,
353 F.3d 651 (9th Cir. 2003) 18

Hadacheck v. Sebastian,
239 U.S. 394 (1915).....16

Hawaii Housing Authority v. Midkiff,
467 U.S. 229 (1984).....22, 23, 28

Hotel & Motel Ass'n of Oakland v. City of Oakland,
344 F.3d 959 (9th Cir. 2003) 13, 15, 22, 38

Kaiser Aetna v. United States,
444 U.S. 164 (1979).....12, 30

Kelo v. City of New London,
545 U.S. 469 (2005).....passim

Lingle v. Chevron U.S.A. Inc.,
544 U.S. 528 (2005).....passim

Lockary v. Kayfetz,
917 F.2d 1150 (9th Cir. 1990) 40

Lucas v. Forty-Fourth General Assembly,
377 U.S. 713 (1964).....40

Lujan v. National Wildlife Fed'n,
497 U.S. 871(1990).....45, 46

Manufactured Home Comtys., Inc. v. City of San Jose,
420 F.3d 1022 (9th Cir. 2005) 15

MHC Fin. L.P. v. City of San Rafael,
714 F.3d 1118 (9th Cir. 2013) .....passim

Nordlinger v. Hahn,
505 U.S. 1 (1992).....38

Paramount Contrs.& Developers, Inc. v. City of Los Angeles,
805 F.Supp.2d 977 (C.D. Cal. 2011) 19

Penn Central Transp. Co. v. New York City,
438 U.S. 104 (1978).....passim

Pennell v. San Jose,
485 U.S. 1 (1988).....passim

Peters v. Clifton,
498 F.3d 727 (7th Cir. 2007) 19

Richardson v. City and County of Honolulu,
124 F.3d 1150 (9th Cir. 1997) 23

Ruckelshaus v. Monsanto Co.,
467 U.S. 986 (1984).....23

San Remo Hotel v. City and County of San Francisco,
145 F.3d 1095 (9th Cir. 1998) 14

Schnuck v. Santa Monica,
935 F.2d 171 (9th Cir. 1991) 26

Sinaloa Lake Owners Ass'n v. Simi Valley,
864 F.2d 1475 (9th Cir. 1989) 12

Sprewell v. Golden State Warriors,
266 F.3d 979 (9th Cir. 2001) 11

Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.,
130 S. Ct. 2592 (2010).....34

Tolle v. Carroll Touch, Inc.,
977 F.2d 1129 (9th Cir. 1992) 45

United States v. Gamboa-Cardenas,
508 F.3d 491 (9th Cir. 2007) 33

Ventura Mobilehome Communities Owners Ass'n v. City of San Buenaventura,
371 F.3d 1046 (9th Cir. 2004) 18

Western Mining Council v. Watt,
643 F.2d 618 (9th Cir. 1981) 11

Williamson County Reg'l Planning Comm'n v. Hamilton Bank,
473 U.S. 172 (1985).....passim

STATE CASES

Besaro Mobile Home Park, LLC v. City of Fremont,
204 Cal.App.4th 345 (2012) 2, 17, 18

Birkenfeld v. City of Berkeley,
17 Cal. 3d 129 (1976) 33

Galland v. City of Clovis,
24 Cal.4th 1003 (2001) 14, 19

Gregory v. City of San Juan Capistrano,
142 Cal. App.3d 72 (1983) 30

Kavanau v. Santa Monica Rent Control Bd.,
16 Cal.4th 761 (1997) 5, 8, 14, 18

RULES

Rules 12(b)(1) and 12(b)(6) 8, 15, 37, 38

I. INTRODUCTION

More than one hundred jurisdictions in California have adopted laws to protect mobilehome park residents from unreasonable rent increases. The United States Supreme Court and this Circuit have repeatedly found rent control laws to be constitutional so long as the park owner receives a fair return on investment. In so holding, the courts have stressed that the federal judiciary may neither sit as a rent control board nor second-guess the wisdom and efficacy of any particular rent control ordinance.

But second-guess is precisely what Appellant Rancho de Calistoga ("Rancho") asks this Court to do. Rancho contends that if the amount of rent requested is at or below "market rent"—which Rancho defines as the amount of rent that can be charged in an open and unregulated market absent rent control (ER 130)—that rent is necessarily (a) not excessive; (b) not caused by monopoly conditions; and (c) not contrary to some other legitimate public interest. According to Rancho, any ordinance that prevents a park owner from charging non-excessive and non-monopolistic "market rent" is unconstitutional because it does not further the purpose of rent control, which, Rancho claims, is to prevent excessive and monopolistic rents. Rancho further argues that it is the federal courts' duty to decide whether a requested rent is excessive, monopolistic or contrary to some other legitimate public purpose.

Observing that the "circularity of this argument is its downfall," at least one

state court decision has already rejected this "market rent" theory: *Besaro Mobile Home Park, LLC v. City of Fremont*, 204 Cal.App.4th 345 (2012) ("*Besaro*").[1] In *Besaro*, the park owner, like Rancho, began with the premise that because it could obtain the requested rent in the market absent rent control, the requested rent could not be considered excessive. *Id.* at 358. But the municipality in *Besaro*, like Appellee City of Calistoga ("City"), enacted rent control "precisely because the circumstances specific to mobilehome ownership created an imbalance between landlords and tenants in that sector of the housing market." *Id.* Given this imbalance, the *Besaro* Court concluded that unregulated market rent cannot be the yardstick to measure constitutionality.

The federal courts have likewise noted this imbalance. As this Circuit explained *en banc*, "[m]obilehomes have the peculiar characteristic of separating ownership of homes that are, as a practical matter, affixed to the land, from the land itself. Because the owner of the mobilehome cannot readily move it to get a lower rent, the owner of the land has the owner of the mobilehome over a barrel." *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1113-14 (9th Cir. 2010); *cert denied*, 131 S.Ct. 2455 (2011) ("*Guggenheim*"). To hold that a rent control regulation is unconstitutional simply because the landlord could obtain a higher rent absent regulation ignores this imbalance and would render such regulations

[1] Anthony Rodriguez, Rancho's counsel in this matter, also represented the park owner in *Besaro*. Rancho relies on *Besaro* to support its position, but as Appellees will explain, *Besaro* does not aid Rancho's cause.

meaningless.

Although Rancho denies it, its appeal presents simply another iteration of the argument that rent control is unconstitutional because it does not achieve its purpose—an argument that the Supreme Court and this Circuit have repeatedly rejected, whether phrased as a takings, a due process violation or an equal protection violation. *See, Kelo v. City of New London*, 545 U.S. 469, 488 (2005)("*Kelo*"); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 544 (2005)("*Lingle*"); and *Guggenheim*, 638 F.3d at 1113-14.

Here, the district court saw through Rancho's transparent effort to repackage arguments that precedent expressly forecloses. As the district court properly concluded, under settled law: (1) Rancho has not and cannot state a claim for regulatory takings because it concededly has not exhausted state court remedies and the claim is therefore not ripe; (2) Rancho has not and cannot state a claim for private takings because the challenged ordinance is rationally related to a conceivable public purpose; (3) Rancho has not and cannot state claims for due process or equal protection violation because such claims are subsumed in the unripe takings claim; and (4) even if not subsumed, Rancho has not and cannot state claims for either due process or equal protection violation because the challenged ordinance is rationally related to a legitimate public purpose. Judgment should therefore be affirmed.

II. STATEMENT OF JURISDICTION

Subject to and without waiving their ripeness arguments, the City and Appellee W. Scott Snowden ("Hearing Officer") agree with Rancho's statement of jurisdiction.

III. ISSUES PRESENTED

1. Is Rancho's regulatory takings claims ripe for federal adjudication when Rancho has not sought and been denied compensation through state court procedures as *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) ("*Williamson*") requires?

2. Can Rancho bypass *Williamson* ripeness requirements by alleging that California's state law compensation remedies are futile and inadequate, when Rancho has not exhausted such remedies and when the Ninth Circuit has repeatedly held such remedies to be adequate?

3. Is Rancho's private takings claim legally cognizable when the deferential rational basis test applies and when the Ninth Circuit has recently rejected a private takings claim like Rancho's, holding that regulations such as the challenged ordinance are rationally related to a legitimate public purpose?

4. Are Rancho's substantive due process and equal protection claims subsumed in the takings claim when those claims merely assert that Rancho has been denied sufficient compensation?

5. Are Rancho's substantive due process and equal protection claims

legally cognizable when the deferential rational basis test applies and when the Ninth Circuit has held that regulations such as the challenged ordinance are rationally related to a legitimate public purpose?

IV. SUMMARY OF APPELLEES' ARGUMENT

1. Rancho's regulatory takings claim is unripe because Rancho has not been denied compensation in a final state court judgment, in either a "*Kavanau*" adjustment proceeding or an inverse condemnation action.

2. Rancho's futility arguments are meritless because this Circuit has repeatedly held that California's state court procedures are adequate.

3. Rancho's private takings claim is not legally cognizable because the courts, applying the deferential rational basis test, have held that regulations such as the challenged ordinance have a rational relationship to a legitimate public purpose.

4. Rancho's due process and equal protection claims are subsumed in the takings claim because those claims simply assert that Rancho has been denied sufficient compensation.

5. Even if not subsumed, Rancho's due process and equal protection claims are not viable because the courts, again applying the deferential rational basis test, have held that regulations such as the challenged ordinance have a rational relationship to a legitimate public purpose.

V. STATEMENT OF FACTS AND PROCEDURE

A. Recognizing The Unique And Vulnerable Position Of Mobilehome Park Residents, The City Adopted The Ordinance To Stabilize Mobile Home Park Rents.

In 1984, the City adopted Ordinance No. 400, entitled "Mobile Home Park Rent Stabilization." (ER 126). The City amended the rent stabilization ordinance in 1993 and 2007. (ER 127). On October 2, 2007, the City adopted Ordinance No. 644, titled "Mobile Home Park Rent Stabilization" ("Ordinance"), which Rancho challenges in this action. (ER 127). The Ordinance amended and re-adopted Chapter 2.22 of the City's Municipal Code. (ER 98).

In the Ordinance, the City made specific findings regarding the unique position facing mobilehome park residents. In that regard, the City determined that unlike residents of other rental housing, mobilehome park residents make a "substantial investment" in the mobilehome for which the space is rented. (Section 2.22.010B.1;[2] ER 98-99). But because moving a mobilehome is both costly and likely to damage the home, mobilehome park residents would suffer undue hardship from unreasonable rent increases. (Section 2.22.010.B; ER 98-99). Indeed, mobilehome park residents are essentially captives of the parks. The City thus found that the Ordinance was necessary to "protect mobilehome homeowners and residents of mobilehome parks from unreasonable rent increases and at the same

[2] Citations are to Chapter 2.22 of the City's Municipal Code, which is incorporated verbatim in the Ordinance. Appellees sought (and were granted) judicial notice of the Ordinance in the district court and a copy of the Ordinance is attached as an exhibit to that request and is included in the Excerpts of Record at p. 97 to 118. In addition, Rancho included the Ordinance in its Addendum, as Exhibit A8.

time recognize the rights of mobilehome park owners to maintain their property and to receive just and reasonable return on their investments." (Section 2.22.010B.4; ER 99).

The Ordinance authorizes a yearly increase in rent equal to the lesser of (1) 100% of the percent change in CPI; or (2) 6% of the base rent. (Section 2.22.070.A; ER 105). If the park owner wishes to increase the space rent above this amount, the Ordinance creates an administrative process to consider such requests. (Section 2.22.080; ER 106-107).

B. Rancho Sought To Increase The Space Rent From $471.39 A Month To $625 A Month.

Since 1977, Rancho has owned and operated an age-restricted mobilehome park for seniors in the City. (ER 122, 125). In July 2010, Rancho sought to increase the space rent from $471.39 a month to $625 a month. (ER 127-128). Pursuant to the Ordinance, the City appointed a hearing officer, Appellee Snowden, who conducted evidentiary hearings regarding the requested rent increase. (ER 139). On July 14, 2010, the Hearing Officer issued a written decision denying Rancho's requested increase and instead awarding an increase of $60 a month, to bring the rent to $537.59 a month. (ER 139).

C. Rancho Filed Its Petition In This Action.

On October 11, 2011, Rancho filed a Petition for Writ of Mandamus in state court. (ER 249). Rather than litigate that writ action to completion and obtain just

compensation and recovery for its purported economic losses through California's well-established *Kavanau*[3] procedure and/or an inverse condemnation action, Rancho concurrently filed the underlying Petition for Writ of Administrative Mandamus ("Petition") in district court. (ER 274-292). The Petition asserts that the Ordinance violates the "takings, due process and equal protection clauses of the United States Constitution." (ER 288). In the prayer for relief, Rancho requests that the Ordinance be declared "unconstitutional on its face and/or as applied." (ER 291).

D. The District Court Granted Appellees' Motion To Dismiss, Giving Rancho Leave To Amend Its Private Takings, Due Process And Equal Protection Claims.

The City and the Hearing Officer filed a Motion to Dismiss the Petition pursuant to Rules 12(b)(1) and (b)(6). (ER 199-267). Appellees argued that (1) Rancho's regulatory takings, due process and equal protection claims are unripe under *Williamson* because Rancho has not been denied just compensation or recovery for its alleged economic losses in state court; (2) Rancho's facial challenge to the Ordinance is time-barred; (3) Rancho failed to allege a private takings claim because precedent establishes that the Ordinance is rationally related to a legitimate governmental purpose; (4) Rancho's due process and equal protection claims are not cognizable because they are subsumed by the takings claim; and (5) even if the due process and equal protection claims are not subsumed, they fail as a matter of law

[3] *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal.4th 761 (1997).

under the deferential rational basis review applicable to such claims because again, precedent establishes that these types of laws are rationally related to a legitimate governmental purpose.

On June 27, 2012, the district court granted Appellees' Motion to Dismiss. The court ruled that (1) Rancho's facial challenges are time-barred; (2) Rancho failed to allege legally-cognizable claims for private takings, due process violation or equal protection violation; and (3) Rancho's regulatory takings claim is not ripe. (ER 11-20). The court granted Rancho leave to amend the private takings, due process and equal protection claims. (ER 20).

E. The District Court Granted Appellees' Motion To Dismiss Rancho's First Amended Petition Without Leave To Amend.

On July 25, 2012, Rancho filed its First Amended Petition for Writ of Administrative Mandamus ("FAP"). (ER 121-147). The FAP amends only Rancho's private takings claim. Although the FAP does not delete the due process and equal protection allegations that the district court previously found legally insufficient, the FAP makes no attempt to amend or modify them, nor the facial challenge claims. (ER 146-147). Rather, the FAP states that Rancho "does not challenge the District Court's findings at this time with respect to the facial challenges or the regulatory taking claim." (ER 146-147). The FAP continues that it is Rancho's "intention to attempt to plead a private takings claim and then request that the matter be stayed until such time as its state court remedies have

been exhausted."[4] (ER 147).

In the FAP, Rancho asserts that "market rent" is the "most probable rent that a property should bring in a competitive and open market," absent government regulation through rent control. (ER 130). Rancho further alleges that the requested rent increase was slightly below "market rent," and as such, the requested rent "was not excessive" or the result of a monopoly. (ER 132, 135). Rancho asserts that because the proposed rent "is neither excessive, monopolistic nor exploitative, and because there is no means testing under the ordinance, mandating rents below" the requested amount "serves no legitimate public purpose." (ER 140). Rancho alleges that the Ordinance, as applied, is a private and regulatory taking, as well as a due process and equal protection violation.

Appellees filed a Motion to Dismiss the FAP, contending that Rancho still failed to plead legally cognizable claims for takings, equal protection violation and due process violation. (ER 75-92).

On November 15, 2012, the district court issued its Order Granting Motion to Dismiss First Amended Petition for Writ of Mandamus. (ER 3-9). The court ruled that Rancho's private takings claim was not cognizable because Rancho still failed to allege "facts that would be sufficient to show pretext" despite being granted leave to amend. (ER 7). The court thus dismissed the private takings

[4] In the FAP, Rancho also stated that it "reserves any other rights it may have, including any right it may have to seek reconsideration and/or appellate review of any of the District Court's rulings." (ER 147).

claim. The court also ruled that the equal protection and due process claims were subsumed by the takings claim, and dismissed those claims as well. (ER 8-9). The court entered judgment in Appellees' favor on November 15, 2012.

Rancho filed a notice of appeal on December 14, 2012. (ER 21). In its Opening Brief, Rancho concedes that its facial challenge is time barred (AOB, p. 2-3, 28, 67) and does not challenge that part of the judgment.

VI. STANDARD OF REVIEW

Review of constitutional issues, including Rancho's takings, due process and equal protection claims, is de novo. *See, Kelo*, 545 U.S. at 477-90 (2005); and *Berry v. Dept. of Social Services*, 447 F.3d 642, 648 (9th Cir. 2006).

Upon review from a motion to dismiss, this Court must accept all properly pled factual allegations in the FAP as true, but need not accept Rancho's characterizations of the Ordinance. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). The Court need not accept as true allegations that contradict facts that may be judicially noticed. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Similarly, the Court need not accept as true conclusory allegations or legal conclusions posing as factual allegations. *Colony Cove Props., LLC v. City of Carson*, 640 F.3d 948, 955 (9th Cir. 2011); *cert. denied*, 132 S.Ct. 456 (2011)("*Colony Cove*").[5]

[5] Rancho argues that the Court must accept as true its assertion that the requested rent is not excessive, monopolistic or contrary to some other legitimate public purpose. (AOB, p. 27). Because these are legal conclusions dressed as factual

This Court may affirm the decision on any ground. So long as the decision is correct on any theory, the judgment should be affirmed even if the district court relied on the wrong grounds or faulty reasoning. *Evans v. Chater*, 110 F.3d 1480, 1481 (9th Cir. 1997).

As it did in the district court, Rancho asserts in its Opening Brief that this Court must view Appellees' motion to dismiss with skepticism, claiming that an "'ad hoc' factual inquiry" into the substantive basis of its allegations is required. (AOB, p. 26). But Rancho misstates the standard of review and relies on cases that are inapt. Rancho cites *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)("*Penn Central*") and *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), but neither supports Rancho's assertion. Those cases describe the ad hoc factual inquiry applicable to the merits of regulatory takings analysis. Those cases are inapplicable here, where the merits of a regulatory takings claim is not at issue because the claim is unripe and not properly before the court. *Sinaloa Lake Owners Ass'n v. Simi Valley*, 864 F.2d 1475 (9th Cir. 1989) is also inapt. *Sinaloa Lake* dealt with a physical invasion of property, not an alleged regulatory taking. *Id.* at 1477.

Rancho's argument also ignores the fact that in *Kelo*, the United States Supreme Court cautioned against an ad hoc factual inquiry when analyzing private

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allegations, the Court is under no such obligation. Nonetheless, even if these allegations are assumed to be true, Rancho's claims still fail as a matter of law because Rancho has not alleged legally cognizable claims for private takings, regulatory takings, due process violation or equal protection violation.

takings claims. Indeed, in *Kelo,* the Court stressed that federal courts may not engage in factual inquiry regarding the efficacy of governmental action that seeks to promote public purpose. *Kelo*, 545 U.S. at 487-89.

Quite simply, contrary to Rancho's arguments, federal courts routinely evaluate and grant motions to dismiss—including motions to dismiss challenges to mobilehome rent control—without reference to any special "skepticism." *See e.g., Colony Cove,* 640 F.3d at 959; *Equity Lifestyle Props., Inc. v. County of San Luis Obispo*, 548 F.3d 1184 (9th Cir. 2008)("*Equity Lifestyle*"); and *Hotel & Motel Ass'n of Oakland v. City of Oakland,* 344 F.3d 959 (9th Cir. 2003)("*Hotel & Motel Ass'n of Oakland*").

Here, utilizing the applicable standard of review, Rancho's claims fail as a matter of law.

VII. LEGAL ARGUMENT

A. Rancho's Regulatory Takings Claim Is Properly Dismissed As Unripe.

1. Rancho's regulatory takings claim is unripe because it is undisputed that Rancho has not exhausted state procedures for recovering its alleged economic loss.

First, Rancho's regulatory takings claim is unripe.[6] In *Williamson,* the

[6] Rancho offers an extended discussion regarding ripeness of its private takings and due process claims. (AOB, p. 29-32). Appellees do not contend that the private takings claim is unripe, nor did the district court dismiss the private takings claim on ripeness grounds. With respect to the due process and equal protection claims, to the extent that those claims are entirely subsumed in the regulatory takings claim, those claims not only fail to state viable causes of action, but they also fail on ripeness grounds for the same reason that the regulatory takings claim does: Rancho has not been denied compensation in state court.

United States Supreme Court held that a regulatory takings case is only ripe for federal adjudication if two conditions are satisfied: (1) the government entity charged with implementing the regulation must have reached a final decision regarding the regulation's application to the property; and (2) the property owner must have "unsuccessfully attempted to obtain just compensation through the procedures provided by the state." *Williamson*, 473 U.S. at 187, 195. Until the plaintiff has unsuccessfully sought compensation for the taking in state court, there simply is no constitutional injury. *San Remo Hotel v. City and County of San Francisco,* 145 F.3d 1095, 1102 (9th Cir. 1998).

The California Supreme Court has established state procedures for obtaining compensation. Under that process, a property owner must challenge the city's actions through a writ of mandamus in state court; if the writ is granted, the property owner must then seek a "*Kavanau*" adjustment of future rents. *Kavanau v. Santa Monica Rent Control Bd.,* 16 Cal.4th 761, 783-84 (1997)("*Kavanau*"); *Galland v. City of Clovis,* 24 Cal.4th 1003, 1022, 1025 (2001). If the *Kavanau* adjustment proves inadequate, the property owner may then bring a state law inverse condemnation action. *Colony Cove,* 640 F.3d at 959.

Here, it is undisputed that Rancho has failed to exhaust state court procedures for obtaining its requested rent increase and remedying its alleged economic losses. Rancho filed a writ of mandamus in state court concurrently with filing this action. (ER 249-272). That writ action is still pending. Further, Rancho

has not brought an inverse condemnation action. As such, Rancho has not been denied just compensation through state procedures. Accordingly, Rancho has not met *Williamson's* second prong, rendering its regulatory takings claim unripe and properly dismissed. See, e.g., *Colony Cove*, 640 F.3d at 959 (affirming dismissal of as-applied takings claim as unripe on Rule 12(b)(1) and (b)(6) motion); *Equity Lifestyle*, 548 F.3d at 1192 (same); and *Hotel & Motel Ass'n. of Oakland,* 344 F.3d at 963 (affirming dismissal pursuant to Rule 12(b)(6) of facial takings claim as unripe.)

In the district court proceedings, Rancho attempted to distinguish itself from *Colony Cove* by arguing that, unlike the park owner in *Colony Cove*, it is not asserting a "fair return on investment claim."[7] (ER 196). But Rancho ignores the fact that "fair return" is the applicable standard for analyzing a regulatory takings claim. *Penn Central*, 438 U.S. at 136 (rejecting regulatory takings claim, and observing that the property owner "not only profit[ed] from the Terminal but also obtain[ed] a 'reasonable return' on investment."); and *Manufactured Home Comtys., Inc. v. City of San Jose,* 420 F.3d 1022, 1028, 1031 (9th Cir. 2005) (holding that Ninth Circuit was bound by state court's determination that a rent control regulation provided fair return on investment).

Fair return on investment is the appropriate standard because there is no

[7] Although Rancho does not overtly assert that the Ordinance precludes it from receiving a "fair return on investment," Rancho complains that it is losing over $248,000 a year in rental income and has lost over $3.9 million in market value, all due to the Ordinance—in essence alleging that it has not received a "fair return on investment." (ER 140).

constitutionally-protected right to maximum profitability. The *Penn Central* Court rejected such an argument, commenting that allowing a property owner to "establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable." *Penn Central*, 438 U.S. at 130.

Moreover, the courts have made it abundantly clear that government regulation may diminish the economic value of property, even substantially, without violating the takings clause. See, e.g., *Concrete Pipe and Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993) (46% payment of shareholder equity not a taking); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (reduction in value from $10,000 per acre to $2,500 per acre not a taking); *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (reduction in value from $800,000 to $60,000 not a taking); and *MHC Fin. L.P. v. City of San Rafael*, 714 F.3d 1118, 1127-1128 (9th Cir. 2013)("*MHC Financing*")(81% diminution in value not a taking); see also, *Federal Home Loan Mortg. Corp v. New York State Div. of Housing and Comm. Renewal*, 83 F.3d 45, 48 (2d Cir. 1996)("Although FHLMC will not profit as much as it would under a market-based system, it may still rent apartments and collect the regulated rents.").

In sum, just as in *Colony Cove*, the regulatory takings claim in this case must be dismissed as unripe.

2. It is settled that California law provides an adequate state court remedy.

Implicitly conceding its failure to comply with *Williamson*, Rancho attempts to evade the ripeness hurdle by claiming that it would be futile to exhaust state court remedies. Would-be amicus curiae Pacific Legal Foundation ("PLF") makes a similar claim, contending that the state court does not provide an inverse condemnation remedy. They are both incorrect.

Citing *Besaro,* Rancho contends that California courts have determined that it is not possible to state a regulatory takings claim under the California Constitution even if the property owner purchased the park before rent control. Rancho misstates *Besaro.*[8] *Besaro* does not suggest, much less hold, that there is no regulatory takings claim available under California law.

In *Besaro*, the park owner argued, like Rancho, that "because rent control is designed to prevent excessive rents, it may not be used to stop owners from charging the market rate when the market rate is not excessive." *Besaro*, 204 Cal.App.4th at 358. Like Rancho, the park owner in *Besaro* defined market rate as the amount "a willing renter not currently protected by rent control would be willing to pay." *Id.* Again, like Rancho, the park owner in *Besaro* argued that because the requested rent increase was not above the market rate, it was not

[8] Rancho also misstates *Guggenheim's* holding. Rancho argues that the Court in *Guggenheim* "determined that a parkowner [sic] can establish that a rent control has been applied in a manner that results in a regulatory taking . . . , provided the parkowner [sic] invested in the property prior to the enactment of rent control." (AOB, p. 33). That is not the holding of *Guggenheim. Guggenheim* applied the three *Penn Central* factors and did not only focus, as Rancho suggests, on when the park owner purchased the property.

excessive. The park owner asserted violations of the due process and takings provisions of the California Constitution.

The California Court of Appeal rejected both claims. The Court observed that the due process and takings clauses "protect a property owner's right to earn a fair return on investment." *Id*. at 359. Because the park owner in *Besaro* was earning a fair return on its investment, the Court held that the challenged ordinance did not violate either the California Constitution's takings or due process provisions. *Id.* Thus, *Besaro* stands for the proposition that when a park owner is earning a fair return on investment, there is no regulatory taking. This is not a novel concept—as discussed above, the fair return on investment is the applicable standard under federal law as well. *Besaro* simply does not support Rancho's argument that no regulatory takings claim is cognizable under California law.

In addition to misstating *Besaro*, Rancho and PLF also ignore the fact that this Circuit has repeatedly held the "*Kavanau*" adjustment process to provide an adequate procedure for remedying alleged economic loss and seeking just compensation. See, *Colony Cove*, 640 F.3d at 958; *Equity Lifestyle*, 548 F.3d at 1192 (9th Cir. 2008); *Ventura Mobilehome Communities Owners Ass'n v. City of San Buenaventura*, 371 F.3d 1046, 1053 (9th Cir. 2004); and *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 657-661 (9th Cir. 2003).

Further, this Circuit has also held that a state law inverse condemnation action is similarly available in California and must be pursued before heading to

federal court. See, *Colony Cove*, 640 F.3d at 959; and *Carson Harbor Village, Ltd. v. City of Carson*, 353 F.3d 824, 829 (9th Cir., 2004)("*CHV II*"). In *CHV II*, this Court stated that because inverse condemnation "appears to remain viable," state law remedies were adequate. *Id.* at 829; see also, *Galland v. City of Clovis*, 24 Cal.4th at 1022 (2001) (acknowledging that a state court action for damages against a municipality may be brought after exhausting state court writ procedures).

Quite simply, under established precedent, Rancho's futility arguments fail. So too does the PLF's claim that California does not provide an adequate remedy.

3. Even assuming *arguendo* that *Williamson* is a prudential doctrine, this Court is not free to disregard ripeness considerations.

Finally, Rancho suggests that *Williamson* is prudential and this Court may and should disregard it. (AOB, p. 34). Not so. Even assuming *arguendo* that *Williamson's* ripeness requirement is prudential, that does not mean the Court may simply disregard it. To the contrary, the "prudential character of the *Williamson County* requirements [does] not . . . give the lower federal courts license to disregard them. The Supreme Court has determined, as a matter of law, when federal takings claims are ripe and has set forth a rule in *Williamson County* that this court is bound to follow." *Peters v. Clifton*, 498 F.3d 727, 734 (7th Cir. 2007). See also, *Paramount Contrs.& Developers, Inc. v. City of Los Angeles*, 805 F.Supp.2d 977, 1004-05 (C.D. Cal. 2011).

To support its position, Rancho cites *Adam Bros. Farming, Inc. v. County of Santa Barbara,* 604 F.3d 1142 (9th Cir. 2010) and *Guggenheim.* But neither case stands for the proposition that the federal courts are free to disregard *Williamson* and its ripeness requirements. In *Adam Bros.*, the Ninth Circuit declined to decide the issue of whether a state court action that sought relief on federal grounds, not on state inverse condemnation grounds, was sufficient to satisfy *Williamson*. *Adam Bros*, 604 F.3d at 1148. The Court instead affirmed dismissal on other grounds. *Id.* at 1148, 1150.

In *Guggenheim,* the Ninth Circuit assumed without deciding that the claims were ripe, citing two reasons: first, the park owner in that case had in fact litigated and then settled a state court action; and second, the *Guggenheim* Court concluded that because it was rejecting plaintiff's claim on the merits, there was no point in forcing the plaintiff to litigate again in state court. *Guggenheim*, 638 F.3d at 1118. Under those unique circumstances, the *Guggenheim* Court found that a "second trip" to state court was not warranted. *Id.*

No such unique circumstances exist here. Unlike the property owners in *Adam Bros.* and *Guggenheim,* Rancho has not litigated the matter to final judgment in state court. Moreover, in both *Adam Bros.* and *Guggenheim*, the Courts assumed the claims were ripe because they were dismissing them on other grounds.[9] Neither the *Adam Bros.* Court nor the *Guggenheim* Court did what

[9] In *MCH Financing*, this Court followed the same approach and assumed a *Penn*

Rancho asks this Court to do: deny dismissal and force a city to defend against claims that are clearly and concededly unripe under *Williamson*. In fact, Rancho has not cited a single case where an appellate court has overturned dismissal of an unripe claim and compelled a city to litigate that claim on the merits.

In short, Rancho has provided no authority whatsoever to support its request that this Court disregard *Williamson's* ripeness requirement. As such, judgment dismissing the regulatory takings claim as unripe must be affirmed.

4. Rancho Is Not Entitled To A Trial To Prove That The Requested Rent Is Not Excessive, Monopolistic Or Contrary To Some Other Legitimate Public Purpose.

Finally, Rancho also argues that the regulatory takings claim may not be dismissed because it is entitled to a trial on the merits of its unripe regulatory takings claim. Arguing that "the right to be free from private and regulatory takings is entitled to the same respect as the right to a fair return on investment," Rancho contends it has the right to prove that the Ordinance goes too far because the requested rent is not excessive, monopolistic or contrary to some other legitimate public purpose. (AOB, p. 59-60).

But Rancho does not cite a single case to support the notion that a property owner must be allowed a trial to litigate the merits of an unripe regulatory takings claim. Rather, case after case has held that unripe regulatory takings claims are properly dismissed at the pleading state. See, *Colony Cove*, 640 F.3d at 959;

Central regulatory takings claim was ripe because it was rejecting the claim on the merits. *MHC Financing,* 714 F.3d at 1129.

Equity Lifestyle, 548 F.3d at 1192; and *Hotel & Motel Ass'n of Oakland*, 344 F.3d at 965-66. Under this well-settled law, Rancho's regulatory takings claim is properly dismissed as unripe.

B. Rancho Has Not And Cannot State A Cognizable Claim For Private Takings.

1. Private takings claims are reviewed under a highly deferential standard.

Rancho's private takings claim likewise fails as a matter of law. Citing the Fifth Amendment's rule that no "private property [shall] be taken for public use, without just compensation," Rancho alleges that the Ordinance serves no public use because (1) the rent it requests is neither excessive or monopolistic; (2) it is impossible for Rancho to exploit the tenants because the rent is purportedly below market; and (3) there is no "means testing" under the Ordinance. (ER 284). These allegations are legally insufficient as a matter of law, however, because private takings claims are reviewed under the highly deferential rational basis standard. And utilizing that standard, the Ninth Circuit has repeatedly held that mobile home rent control is rationally related to a conceivable and legitimate public purpose.

The Fifth Amendment's "public use" requirement is co-extensive with the government's police powers and thus subject to a deferential rational basis review. *Kelo*, 545 U.S. at 488. This test is not exacting: the city's action must simply be "rationally related to a conceivable public purpose." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240-241 (1984). As long as the Ordinance has a

"conceivable public character," the public use requirement is satisfied. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014 (1984)("*Ruckelshaus*").

As the United States Supreme Court has made clear, the Fifth Amendment provides "legislatures broad latitude in determining what public needs justify the use of the takings power." *Kelo*, 545 U.S. at 483. Applying this flexible and deferential standard, the courts have repeatedly held in general that regulating rent is a legitimate exercise of a city's police power, and specifically that mobile home rent control is rationally related to legitimate governmental purposes. *See, Pennell v. San Jose*, 485 U.S. 1, 13 (1988)("*Pennell*"); *Guggenheim*, 638 F.3d at 1123, n. 52; *Action Apt. Ass'n v. Santa Monica Rent Control Opinion Bd.*, 509 F.3d 1020, 1024 (9th Cir. 2007)("*Action Apt.*"); *Equity Lifestyle*, 548 F.3d at 1194; and *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1158 (9th Cir. 1997). And Rancho expressly concedes that preventing excessive, monopolistic and coercive rents are legitimate public goals. (AOB, p. 67).

Kelo is instructive. In *Kelo*, the United States Supreme Court emphatically re-affirmed the deferential standard of review applicable to private taking claims, a deferential standard that the Court previously enunciated in *Berman v. Parker*, 348 U.S. 26 (1954), *Hawaii Housing Authority, supra*, and *Ruckelhaus, supra*. Recognizing that long line of cases, the Court in *Kelo* stated that "[w]ithout exception, our cases have defined" public purpose "broadly, reflecting our longstanding policy of deference to legislative judgments in this field." *Kelo*, 545

U.S. at 480. The Court emphasized that when "the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts." *Id.* at 488.

2. Under *Kelo* and its progeny, Rancho has not and cannot state a viable claim for private takings.

Under *Kelo* and its progeny, Rancho has not and cannot state a viable claim for private takings. In fact, the *Kelo* Court rejected arguments similar to those that Rancho advances here.

For example, in *Kelo*, the property owner argued that there was no public purpose because private individuals would benefit from the regulation. Rancho makes a similar claim that the Ordinance lacks public purpose because it supposedly provides a subsidy to park residents without means testing, thereby benefitting private parties. (AOB, p. 52). The *Kelo* Court flatly rejected the argument, stating that "the government's pursuit of a public purpose will often benefit individual private parties," and this reality does not transform the government's purpose from public to private. *Kelo*, 545 U.S. at 487.

In addition, the *Kelo* Court considered an argument, again similar to Rancho's, that a private taking occurs when the government's action does not in fact achieve the stated purpose. The Court disagreed with the contention that the government must show that the expected public benefits will actually accrue.

Kelo, 545 U.S. at 488. Noting that it had recently rejected the similar "substantially advances" formula for regulatory takings in *Lingle*, the *Kelo* Court held that applying such a "means-end" rule in the private takings context would be a great departure from precedent. *Kelo,* 545 U.S. at 488. The Court declined to "second-guess the City's considered judgment about the efficacy of its" regulation. *Id.*

Following *Kelo,* this Circuit has rejected claims that rent control constitutes a private taking. For example, in *MHC Financing,* this Circuit recently held that a mobilehome rent control regulation was not a private taking. Stressing the highly deferential standard of review applicable to private takings claims, the *MHC Financing* Court held that because the challenged rent control regulation was rationally related to a conceivable public purpose, the regulation was not a private taking. *MHC Financing*, 714 F.3d at 1128-1129.

Action Apt. is also dispositive of Rancho's private takings claim. In that case, landlords alleged that a rent control ordinance did not meet the "public use" component of the takings clause. *Action Apt.*, 509 F.3d at 1022. Like the City's Ordinance, the ordinance at issue in *Action Apt.* was aimed at controlling rapidly rising rents and a housing shortage. *Id.* The Court in *Action Apt.* rejected the landlords' contention that these goals did not meet the "public use" requirement, stating that "there can be little doubt" that a city's "desire to control rising rents and to remedy housing shortages constitutes a legitimate public purpose." *Id.* at 1023.

See also, *Schnuck v. Santa Monica*, 935 F.2d 171, 172 (9th Cir. 1991).

Under this settled authority, and considering the Ordinance's purposes, Rancho simply cannot state a viable private takings claim. The purpose of the Ordinance is "to stabilize mobile home park spaces." (Ordinance, Section 2.22.101.D; ER 228.) The Ordinance further states that it is intended to (1) "[p]revent exploitation of the shortage of vacant mobile home park spaces;" (2) "[p]revent excessive and unreasonable mobile home park space rent increases;" and (3) "[p]rovide a process for insuring [sic] mobile home park owners a fair, just, and reasonable rate of return on their parks where the annual space rent increase provided by this chapter proves insufficient." (Ordinance Section 2.22.010.D; ER 228-229). These purposes and goals mirror those upheld in *Action Apt.*

Quite simply, the Supreme Court's decision in *Kelo*, coupled with this Court's decisions in *MHC Financing* and *Action Apt.*, foreclose Rancho's private takings claim. See, *MHC Financing*, 714 F.3d at 1128-1129 (holding that a mobilehome rent control ordinance was rationally related to a legitimate public purpose); *Action Apt.* 509 F.3d at 1022 (same).

3. Rancho has not and cannot allege a viable claim of pretext.

In an effort to avoid settled precedent, Rancho focuses on a paragraph in *Kelo* that discusses the unusual situation where the purpose identified for governmental action is a sham or pretext; situations where there is a "one-to-one transfer of property, executed outside the confines of an integrated development

plan . . . ." *Kelo,* U.S. at 486-87. Describing such situations as an "aberration," the *Kelo* Court stated that "such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot," but such situations should be dealt with on a case by case basis. *Id.* at 487, and n. 17.

Here, the Ordinance—which applies City-wide to all mobilehome parks in its jurisdiction—is not a one-to-one transfer of property, executed outside the confines of an integrated plan. To the contrary, the Ordinance is part of an overarching rent control procedure, first adopted in 1984 pursuant to the City's clearly identified policy determinations, in a legitimate exercise of its police powers. Nor is it an unusual exercise of governmental powers. After all, over 100 jurisdictions in California have adopted rent regulations. The facts here simply do not present the "aberration" described in *Kelo.*

Nonetheless, Rancho attempts to cast the Ordinance as an aberration by contending the Ordinance was adopted as a sham or pretext to give Rancho's money to the park residents. This argument fails for two reasons: first, the allegations are not sufficient to state a claim of pretext or sham; and second, the cases that Rancho relies on are inapt.

a. Rancho's allegations do not demonstrate sham or pretext; rather they go to the Ordinance's efficacy and impact.

In *Kelo,* the Supreme Court explained that "'it is only the taking's purpose, and not its mechanics . . . that matters in determining public use.'" *Kelo,* 545 U.S.

at 482, citing *Midkiff*, 467 U.S. at 244. Rancho ignores this and asserts that the Ordinance lacks a valid public purpose because its operation does not achieve the Ordinance's purpose—in other words, because of its mechanics. (AOB, p. 50, arguing that "it is pure pretext to deny a rent increase when there is no evidence the proposed rent is either excessive or monopolistic . . . .").

Specifically, Rancho alleges that the Ordinance was a sham or pretext because: (1) although the Ordinance's purpose is to prevent excessive and monopolistic rent, the requested rent is not excessive or monopolistic (AOB, p. 55); (2) although the Ordinance's purpose is to prevent exploitation of tenants, it is not possible to exploit a tenant unless rent is above market or monopolistic (AOB, p. 51); (3) although the Ordinance was adopted in part because a mobilehome owner cannot readily move the mobilehome, the difficulties involved in selling or moving a mobilehome exist regardless of the amount of rent charged (AOB, p. 52-54); and (4) although the Ordinance was adopted in part because many mobilehome park residents are elderly or of low income, the Ordinance imposes a subsidy regardless of the residents' age, health or income. (AOB, p. 54-55).

Rancho thus alleges that the Ordinance is a sham because, as applied to Rancho, the Ordinance does not achieve its stated purposes of preventing excessive and exploitative rent charges to elderly mobilehome park residents who cannot readily move their mobilehomes. Rancho thus alleges that the Ordinance is a sham because it does not achieve its purposes as applied to Rancho and hence does not

work.

Such allegations, however, are not evidence of sham or pretext. Rather, the allegations simply represent Rancho's disagreement with the City's policy determination that rent control is a good idea, as well as Rancho's opinion that mobilehome rent control is unwarranted, unnecessary, and ineffective. But, precedent holds that rent control is a valid and legitimate public purpose. See, *Pennell*, 485, U.S. at 13; *Guggenheim*, 638 F.3d at 1123, n. 52; *Action Apt.*, 509 F.3d at 1024; and *Equity Lifestyle*, 548 F.3d at 94.

Moreover, these allegations are simply a reincarnation of the "substantially advances" test expressly rejected in *Lingle.* As the Supreme Court explained in *Lingle,* the substantially advances test is untenable in the takings context. *Lingle*, 544 U.S. at 544. The "substantially advances" test impermissibly requires "courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited. Moreover, it would empower—and might often require—courts to substitute their predictive judgments for those of the elected legislatures and expert agencies." *Id.*

As this Circuit stated in *Guggenheim* and confirmed in *Colony Cove,* whether a city's "economic theory for rent control is sound or not, and whether rent control will serve the purposes stated in the ordinance of protecting tenants from housing shortages and abusively high rents . . . is not for" the federal courts to decide. *Colony Cove,* 640 F.3d at 961; *Guggenheim,* 648 F.3d at 1123.

In sum, Rancho's allegations fall far short of asserting a viable private takings claim. Like the rent control regulation that this Court very recently upheld in *MHC Financing*, the Ordinance passes muster under the deferential standard of review applicable to private takings claims. *MHC Financing*, 714 F.3d at 1128-1129.

b. The cases that Rancho cites are inapt.

Second, just as Rancho's allegations are legally insufficient, the cases it cites are also inapt. Relying on *Kaiser Aetna v. United States*, 444 U.S. 164 (1979)("*Kaiser*"); *Gregory v. City of San Juan Capistrano*, 142 Cal. App.3d 72 (1983)("*Gregory*"); *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996)("*Armendariz*"); *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F.Supp.2d 1123 (C.D. Cal. 2001)("*99 Cents Only*"); and *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203 (C.D. 2002)("*Cottonwood*"), Rancho contends that it has alleged a viable claim for private takings that must be decided on the merits after trial. Rancho is mistaken.

First, *Kaiser* and *Gregory* do not deal with private taking allegations at all, much less allegations of pretext.[10] They are therefore inapplicable. Moreover, *Armendariz*, *99 Cents Only*, and *Cottonwood* involved one-to-one transfers of property and unique facts that bear no resemblance to those presented here.

[10]The issue in *Kaiser* was whether a pond was a navigable water of the United States such that it was subject to Congressional regulation. In *Gregory*, the issues were preemption, fair return on investment, right to privacy and regulatory takings.

In *Armendariz*, a city suddenly commenced vigorous code enforcement actions in an area dominated by low-income housing, shutting down numerous buildings, evicting tenants, and failing to timely identify the alleged violations so they could be cured. The property owners asserted that the code enforcement sweep was a pretext to deprive them of their property by either forced sale or foreclosure, with the goal of allowing a developer to buy the property at fire sale prices and then construct a shopping center. *Armendariz,* 75 F.3d at 1321. Decrying this scheme as a "raw misuse of power" for a private purpose, this Circuit observed that the city could have proceeded by way of eminent domain, had it adopted an ordinance stating that a shopping center on plaintiffs' property would serve a public use. *Id.* Here, the City's adoption of the Ordinance—which applies to all mobilehome parks in the City—in no way resembles the abusive and selective code enforcement actions in *Armendariz.* Further, the City proceeded by way of an ordinance, which *Armendariz* suggests is the proper approach.

Equally inapplicable are *99 Cents Only* and *Cottonwood*. In *99 Cents Only*, a city condemned the plaintiff's store and then gave that property to another store in the shopping center, the anchor tenant Costco, which had threatened to relocate unless it was able to expand into the 99 Cents Only location. The city contended that the loss of Costco might cause future blight, and it identified this possible future blight as its public purpose for the taking. *99 Cents Only*, 237 F.Supp.2d at 1130. The district court, however, concluded that avoiding possible future blight

was not a legitimate public use, describing it as "entirely speculative." *Id.* at 1131. These facts, which the Supreme Court in *Kelo* described as an "aberration," are not remotely similar to Rancho's allegations. *Kelo*, 545 U.S. at 487 and n. 17

Similarly, in *Cottonwood*, the property owner alleged that a city condemned its property "to turn it over to a Costco." *Cottonwood*, 218 F.Supp.2d at 1229. The *Cottonwood* Court observed that the facts were "strikingly similar" to *99 Cents Only*, and concluded that the property owner had pled sufficient facts to state a claim for private takings. Once again, the facts here are not in the same ballpark as those in *Cottonwood*. Unlike *99 Cents Only* and *Cottonwood*, this case involves a rent control regulation, not a direct condemnation of property and transfer of that property to another entity.

Rancho also cites *Armendariz*, *99 Cents*, and *Cottonwood* for the proposition that the court must hear evidence regarding pretext. But as explained above, those cases represent the "aberration" referenced in *Kelo*. They do not stand for the proposition that a factual inquiry must be held every time a private taking is alleged.

In sum, Rancho does not cite any case where a regulation, such as rent control, that applies City-wide was found to be evidence of a sham or pretext sufficient to support a private takings claim.[11]

[11] Moreover, *MHC Financing* observed that the Court was not aware of any case recognizing a "regulatory private taking." *MHC Financing*, 714 F.3d at 1129, n. 5.

4. Rancho's arguments regarding the prohibition on gifts of public funds and the City's decision not to adopt a subsidy program are meritless.

Finally, Rancho offers two red herring arguments, neither of which demonstrates a viable private takings claim.

First, Rancho points out that California law prevents a city from making a gift of public funds, and suggests that the Ordinance is an indirect gift of public funds, and therefore unconstitutional. Second, Rancho complains that the City declined to create a public subsidy for mobilehome park residents, and suggests this somehow demonstrates the Ordinance's unconstitutionality. Rancho, however, does not offer any legal support for either of these novel claims and accordingly they should be rejected. *United States v. Gamboa-Cardenas*, 508 F.3d 491, 502 (9th Cir. 2007).

Moreover, the arguments are irrelevant under the applicable deferential standard of review, which limits the inquiry to whether the Ordinance is rationally related to a conceivable public purpose. And as noted above, the United States and California Supreme Courts have long established that rent control regulation is rationally related to a legitimate governmental purpose. See, e.g., *Pennell*, 485 U.S. at 13; *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 158-61 (1976).

In sum, utilizing the deferential *Kelo* standard, and in light of precedent holding that rent control is rationally related to a legitimate governmental purpose (see, e.g., *Pennell*, 485 U.S. at 13; *Guggenheim,* 638 F.3d at 1123, n. 52; *Action Apt.*, 509 F.3d at 1024; and *Equity Lifestyle*, 548 F.3d at 1194), Rancho's FAP

simply does not state a claim for private taking. See also, *MHC Financing*, 714 F.3d 1128-29 (holding that a mobilehome rent control regulation was not a private taking).

C. Rancho Has Not And Cannot State A Cognizable Claim For Either Due Process Or Equal Protection Violation.

Finally Rancho's due process and equal protection claims are similarly not legally cognizable.

1. Rancho's due process and equal protection claims are subsumed in the takings claim.

Rancho premises its due process and equal protection claims on the assertion that the Ordinance results in "below market" rents, which in turn decreases the park's property value and reduces Rancho's rental income. (ER 142, FAP, ¶ 84). Under Ninth Circuit precedent, these claims are not cognizable under either the due process or equal protection clauses because they simply duplicate the takings claim and are therefore subsumed in the takings claim.

Justice Scalia explained the reasoning behind not allowing due process or equal protection claims that merely duplicate takings claims. In his concurrence in *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot*., 130 S. Ct. 2592, 2606 (2010) (Scalia) (Roberts, Thomas, and Alito joining), Justice Scalia explained that "[t]he first problem with using Substantive Due Process to do the work of the Takings Clause is that we have held it cannot be done. 'Where a particular Amendment 'provides an explicit textual source of constitutional

protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." . . . [citations omitted]. The second problem is that we have held for many years (logically or not) that the 'liberties' protected by Substantive Due Process do not include economic liberties. . . . [citations omitted]."

Recognizing that due process and equal protection cannot do the work of the takings clause, this Circuit has held that to the extent a property owner challenges a rent stabilization ordinance on the ground that it does not sufficiently compensate the owner, such a claim is subsumed by the takings clause. *Colony Cove,* 640 F.3d at 960; *see also, Duquesne Light Co. v. Barasch,* 488 U.S. 299, 308 (1989) ("stating that '[i]f the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments.")

And that is precisely what Rancho contends here: that the Ordinance violates the due process and equal protection clauses by imposing below market rents, which in turn has resulted in decreased property value and lost income—in other words, that the Ordinance prevents Rancho from being adequately compensated. (ER 142, FAP, ¶ 84). Rancho's due process and equal protection claims rehash its regulatory takings claim, asserting that the Ordinance prevents it from receiving sufficient compensation, which Rancho defines as "market rent."

Thus, under well established precedent, Rancho's due process and equal

protection claims are subsumed in the regulatory takings claim.

2. Under The Deferential Rational Basis Standard Of Review, Rancho Has Not And Cannot State Cognizable Claims For Due Process Or Equal Protection Violation.

But even if the due process and equal protection claims are not subsumed in the takings claim, Rancho's due process and equal protection claims still fail as a matter of law. Rancho's due process and equal protections claims are subject to the deferential rational basis test, like its private takings claim. And as with the private takings claim, the law is settled that rent control measures like the Ordinance do not violate either the due process or equal protection clauses.

a. Rancho has not and cannot state a claim for due process violation.

With respect to the due process claim, *Colony Cove* is once again dispositive. In that case, the Court rejected a due process claim premised on the arguments that (1) the challenged regulation failed to serve a legitimate governmental interest; and (2) the city acted arbitrarily in applying the regulation. The Court explained that "in light of the purpose and provisions of [the challenged rent control regulation] . . . and the rents allowed under the [challenged regulation] . . . ," no viable due process claim could be alleged. *Colony Cove*, 640 F.3d at 961-62.

Colony Cove does not stand in isolation. To the contrary, the United States Supreme Court and Ninth Circuit have repeatedly rejected due process challenges to rent control regulations such as the Ordinance. In *Pennell*, the Supreme Court rejected a due process challenge to a rent control measure at the pleadings stage.

Pennell, 485 U.S. at 13. The Court concluded that the rent control regulation "represents a rational attempt to accommodate the conflicting interests of protecting tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed a fair return on their investment." *Id.*

Similarly, in *Equity Lifestyle*, the Ninth Circuit affirmed the district court's granting of a Rule 12(b)(1) and (b)(6) motion to dismiss a due process challenge to a rent control ordinance. The Court stated that a rent control ordinance will survive a due process challenge if it is "'designed to accomplish an objective within the government's police power, and if a rational relationship existed between the provisions and the purpose of the ordinances.'" *Equity Lifestyle*, 548 F.3d at 1194 (citations omitted). In *Equity Lifestyle*, the purpose of the challenged rent control ordinance was to "'protect the owners and occupiers of mobilehomes from unreasonable rent increases, while at the same time recognizing the need of park owners to receive a suitable profit.'" *Id.* The Ninth Circuit upheld dismissal of a due process claim, holding that "such an ordinance is rationally related to a legitimate public purpose." *Id.* See also, *MHC Financing*, 714 F.3d at 1130-31.

The purpose of the Ordinance here is virtually identical to the rent regulations upheld in *Equity Lifestyle* and *MHC Financing*. The Ordinance is aimed at stabilizing park spaces, preventing exploitation of the shortage of spaces, preventing excessive rent increases and ensuring park owners a fair return. (Section 2.22.010.D, ER 99). Rancho's due process claim thus fails as a matter of

law because it is settled that a regulation such as the Ordinance is rationally related to a legitimate public purpose. *MHC Financing*, 714 F.3d at 1130-31; *Equity Lifestyle*, 548 F.3d at 1194; and *Guggenheim*, 638 F.3d at 1123 (rejecting due process claim to rent control ordinance, stating that "we are bound by precedent establishing that such laws do have a rational basis.").

b. Rancho has not and cannot state a claim for equal protection violation.

Just as precedent forecloses Rancho's due process claim, so too precedent forecloses Rancho's equal protection claim. Rancho's equal protection challenge to the Ordinance is subject to a deferential rational basis review; as the Ninth Circuit held, "mobilehome park owners are not a suspect class." *Equity Lifestyle*, 638 F.3d at 1195. Under this standard, the classification must "rationally further a legitimate state interest." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Where a "group possesses 'distinguishing characteristics relevant to interests the State has the authority to implement,' a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Hotel & Motel Ass'n of Oakland*, 344 F.3d at 971 (citations omitted).

In *Equity Lifestyle* the Court upheld the granting of a Rule 12 (b)(1) and (b)(6) motion dismissing an equal protection challenge to a rent control ordinance. The Court observed that the ordinance "sought to regulate mobilehome park rents because of the 'shortage of spaces for the location of existing mobilehomes' . . . and the 'high costs and impracticability of moving mobilehomes [and] the potential

for damage resulting there from.'" *Equity Lifestyle,* 548 F.3d at 1195. The Court held that these reasons "appear to constitute 'distinguishing characteristics relevant to interests the State has the authority to implement.'" *Id.* (citations omitted).

The Ordinance at issue here provides the same reasons for the classification that the Ninth Circuit approved in *Equity Lifestyle*. (Section 2.22.010.B.1; Section 2.22.010.D.1; ER 99-100). Thus, just as in *Equity Lifestyle*, an equal protection claim is simply not viable. *See also, Guggenheim,* 683 F.3d at 1123 (rejecting an equal protection claim, noting that "mobile parks differ from most other property in the separation of ownership of the land from the improvements affixed to the land.")

Under controlling precedent, Rancho has not and cannot state viable claims for either due process or equal protection violation.

3. Rancho and the PLF's arguments to the contrary are meritless.

Rancho and PLF attempt to rescue the due process and equal protection claims, but their efforts fail.

First, Rancho and PLF contend that under *Lingle* and *Crown Point Dev., Inc. v. City of Sun Valley,* 506 F.3d 851 (9th Cir. 2007), a property owner may pursue both a regulatory takings and a due process claim. But they miss the point: Appellees did not and do not take the position that the Fifth Amendment invariably preempts a due process claim. Rather, Appellees contend and the district court concluded that under *Colony Cove,* because Rancho's due process (and equal

protection) claims challenge the sufficiency of the compensation Rancho earns from the mobilehome park, the claims are subsumed in the takings cause of action, a point that *Crown Point* agrees with. *Crown Point*, 506 F.3d at 855 (stating that a due process claim will be subsumed if it alleges a permanent physical invasion of property, deprives the property owner of all economically viable use of the property; or where the *Penn Central* factors are met).

Rancho also contends that its due process and equal protection claims should survive because it must be permitted to demonstrate that the City's findings made in support of the Ordinance are not true. To support this contention, Rancho cites *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713 (1964)("*Lucas*") and *Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir. 1990)("*Lockary*"). Neither case addresses the issue of whether due process and equal protection claims are subsumed in a takings claim.

Lockary simply affirms the principle that government conduct that is "malicious, irrational or plainly arbitrary" will not survive the rational relation test. And *Lucas* merely states that an initiative measure does not automatically pass muster under the equal protection clause just because a majority of the electorate voted for it. Neither case is on point.

Here, because Rancho's due process and equal protection claims are in reality contentions that the Ordinance prevents it from obtaining sufficient compensation, they do not state valid claims for malicious, irrational or plainly

arbitrary action on which to base due process and equal protection causes of action.

4. WMA's contention that Rancho has stated a due process claim is meritless.

Finally, would-be *amicus curiae* Western Manufactured Housing Communities Association ("WMA") argues that Rancho's due process claim is viable under *Lingle*, *Action Apt.* and *Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778 (2d Cir. 2007)("*Cine SK8*"). WMA is incorrect.

First and foremost, WMA distorts the holding in *Lingle*. According to WMA, *Lingle* holds that "when a property owner challenges a regulation . . . on the basis that the city's less-than-requested increase in allowable rent caused the park owner to be deprived of its rights, and that the allowed increase was a pretext to transfer property to tenants," the property owner has stated a claim for due process violation. (WMA Brief, p. 5, 7, citing *Lingle*, 555 U.S. at 540.) Not true. In fact, no such holding is found at page 540 of *Lingle*, or any other page of that case.

Rather, the *Lingle* Court stated "[w]e hold that the 'substantially advances' formula is not a valid takings test, and indeed conclude that it has no proper place in our takings jurisprudence." *Lingle*, 544 U.S. at 548. Contrary to WMA's assertion (WMA Brief, p. 5, 7), *Lingle* did not hold that a rent control measure may be challenged under the due process clause by alleging that the regulation does not achieve its purpose. Rather, the *Lingle* Court stated that a "regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause." *Lingle*, 544 U.S. at 542. Nor does Justice

Kennedy's concurrence validate Rancho's due process claim. The concurrence noted the possibility that a "regulation might be so arbitrary or irrational as to violate due process." *Lingle, 544 U.S. at 548.*

Lingle simply does not authorize the type of judicial second-guessing that WMA and Rancho call for. Indeed, nothing in *Lingle* supports the notion that a federal court may determine whether a particular rent increase request will achieve the rent regulation's objectives. And case after case has held to the contrary—that it is expressly not within the federal courts' purview to make such determinations in the guise of a due process analysis. See, *Pennell,* 485 U.S.1t 13 (rejecting due process challenge to rent regulation); *MHC Financing,* 714 F.3d at 1130-31 (same); *Colony Cove*, 640 F.3d at 961-62 (same); and *Equity Lifestyle*, 548 F.3d at 1194 (same).

Nor does *Cine SK8* rescue Rancho's due process claim. In fact, *Cine SK8* is not remotely on point. *Cine SK8* involved a town's revocation of a special use permit that allowed teen dances; the property owner presented evidence that racial animus motivated the revocation. *Cine SK8*, 507 F.3d at 784. The Second Circuit held that the property owner in *Cine SK8* had alleged a viable due process claim because the evidence showed that several members of the town council made racially-discriminatory comments regarding the ethnicity of the teenagers attending the dances under the special use permit. *Id.* at 787-88. Given this evidence, the Second Circuit concluded that whether racial animus motivated the revocation was

a factual question for a jury to decide. *Id.* at 789.

WMA offers no explanation of how that fact pattern is relevant to this case, which involves a rent control regulation that applies City-wide and that involves no allegations of racial animus to raise the possibility of a higher standard of scrutiny. Nor does WMA explain how that Second Circuit decision should overrule Supreme Court and Ninth Circuit precedent holding that rent regulations such as the Ordinance pass muster under due process clause. See, e.g., *Pennell*, 485 U.S. at 13; *MHC Financing*, 714 F.3d at 1130-31; *Colony Cove*, 640 F.3d at 960; and *Equity Lifestyle*, 548 F.3d at 1194.

Finally, *Action Apt.* does not rescue Rancho's due process claim. In that case, the property owner alleged that a regulation violated the due process clause because "no rational legislator could have expected the more stringent eviction requirements to remedy Santa Monica's housing difficulties . . . ." *Action Apt.*, 509 F.3d at 1022. The *Action Apt.* Court determined that those allegations were sufficient to state a due process claim, but then rejected the claim on ripeness grounds.

Here, in contrast, precedent forecloses the argument that no rational legislator could have believed the Ordinance, at the time of enactment, would promote its objective of preventing unreasonable rent increases while still allowing a fair return on investment. See, *MHC Financing*, 714 F.3d at 1130-31 (affirming district court's judgment that mobilehome rent control does not violate substantive

due process because "a rational legislator could have believed that the rent control ordinance would further the stated goals . . . .").

Indeed, in *Colony Cove*, the Court held that a park owner failed to state a viable due process challenge to mobilehome rent control regulation enacted for the purpose of preventing excessive rents while still allowing park owners a fair return on investment—purposes identical to those identified in the Ordinance. *Colony Cove*, 640 F.3d at 960.

Similarly, in *Equity Lifestyle*, this Circuit held that a park owner failed to state a viable due process claim challenging a mobilehome rent control ordinance that was intended to protect against unreasonable rent increases while recognizing the park owner's need for a suitable profit. *Equity Lifestyle*, 548 F.3d at 1194.

The *Equity Lifestyle* Court relied heavily on the Supreme Court's opinion in *Pennell*. In *Pennell*, the Supreme Court upheld a rent control law against a due process challenge, stating the regulation "represents a rational attempt to accommodate the conflicting interests of protecting tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed a fair return on their investment." *Pennell*, 485 U.S. at 13.

In sum, *Lingle*, *Cine SK8* and *Action Apartment* cannot breathe life into Rancho's due process claim.

D. Because Rancho Has Not And Cannot State A Valid Claim For Relief Under Any Legal Theory, WMA's Notice Pleading Argument Fails.

WMA also contends that under the notice pleading rule, the district court erred in dismissing the FAP. Specifically, WMA contends that under the notice pleading theory, (1) Rancho has pled sufficient facts to put Appellees on notice of the claims against them; and (2) Rancho's claims may not dismissed simply because they are labeled with an incorrect legal theory. (WMA Brief, p. 9-11). These contentions are meritless. The issue is not whether Appellees are on notice of the contentions against them; rather, the issue is whether those contentions are legally viable under any constitutional theory. As explained above, as a matter of settled precedent, they are not.

To support its contention, WMA cites *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990)("*Lujan*") and *Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129 (9th Cir. 1992)("*Tolle*"). Neither case stands for the proposition that a claim for relief that is not valid under any legal theory must nonetheless still proceed to trial.

In *Tolle,* the Seventh Circuit explained that so long as "'relief is possible under any set of facts that could be established consistent with the allegations,'" the failure to cite the correct legal theory was not fatal. *Tolle*, 977 F.2d at 1134. In *Tolle*, the plaintiff had alleged sufficient facts to state claims for relief under ERISA, even though the plaintiff failed to expressly cite the correct ERISA provision. Here, as explained above, Rancho has not simply mislabeled its claims.

To the contrary, Rancho's allegations, even if assumed to be true, do not state a viable claim for relief under any constitutional theory.

Lujan is even more off point. WMA cites the dissent's comment in a footnote that a motion's substance and not its title should determine its legal effect. (WMA Brief, p. 11, citing *Lujan*, 497 U.S. at 909, n. 10.) Again, the district court did not dismiss the FAP because of an improperly titled motion. Instead, the district court correctly dismissed the FAP because (1) precedent establishes that Rancho's regulatory takings claim is unripe; (2) precedent forecloses Rancho's private takings claim; and (3) precedent forecloses Rancho's due process and equal protection claims.

VIII. CONCLUSION

Rancho's appeal borders on frivolous. The Supreme Court and Ninth Circuit have repeatedly held that rent control, including mobile home rent control, is a legitimate exercise of the police power, and therefore it does not constitute a private taking, due process violation or equal protection violation so long as the park owner receives a fair return. And although a park owner may bring a *Penn Central* regulatory takings claim, it can only do so after exhausting state court remedies, which Rancho has concededly failed to do.

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As the district court concluded, the FAP fails as a matter of law: the regulatory takings claim is unripe; and the private takings, due process and equal protection claims simply are not cognizable. Judgment in Appellees' favor should be affirmed.

Dated: June 24, 2013

Michelle Marchetta Kenyon, City Attorney CITY OF CALISTOGA and BURKE WILLIAMS & SORENSEN

By: /s/ Amy E. Hoyt
Amy E. Hoyt
Attorneys for Respondents – Appellees CITY OF CALISTOGA and W. SCOTT SNOWDEN

STATEMENT OF RELATED CASES PURSUANT TO RULE 28-2.6

The Appellees are not aware of any pending cases in this Court that are related to this case, as that term is defined in Rule 28-2.6.

Dated: June 24, 2013

Michelle Marchetta Kenyon, City Attorney CITY OF CALISTOGA and BURKE WILLIAMS & SORENSEN

By: /s/ Amy E. Hoyt
Amy E. Hoyt
Attorneys for Respondents – Appellees CITY OF CALISTOGA and W. SCOTT SNOWDEN

CERTIFICATE OF COMPLIANCE

I, Amy E. Hoyt, certify that:

1. Pursuant to Federal Rules of Appellate Procedure, rule 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Appellees' Answering Brief is proportionately spaced, has a typeface of 14 points or more and contains 10,948 words, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure, rule 32(a)(7)(B)(iii).

2. The attached Brief of Appellee complies with the typeface requirements of Federal Rules of Appellate Procedure, rule 32(a)(5), and the type style requirements of Federal Rules of Appellate Procedure, rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, in 14 point font size, and Times New Roman type style.

Dated: June 24, 2013

Michelle Marchetta Kenyon, City Attorney CITY OF CALISTOGA and BURKE WILLIAMS & SORENSEN

By: */s/ Amy E. Hoyt*
Amy E. Hoyt
Attorneys for Respondents – Appellees CITY OF CALISTOGA and W. SCOTT SNOWDEN

PROOF OF SERVICE

I declare that I am over the age of eighteen (18) and not a party to this action. My business address is 2280 Market Street, Suite 300, Riverside, California 92501.

On **June 24, 2013**, I served the following document(s): **ANSWERING BRIEF OF APPELLEES CITY OF CALISTOGA AND W. SCOTT SNOWDEN** on the interested parties in this action by placing a true and correct copy of such document, enclosed in a sealed envelope, addressed as follows:

SERVICE LIST
(Update: 06-20-13)
Rancho de Calistoga vs. The City of Calistoga, et al.
9th Circuit Court of Appeal Case No. 12-17749
(USDC Case No.: C11-05015 JSW ADR)

COUNSEL:	**REPRESENTING:**
Anthony C. Rodriguez, Esq. **LAW OFFICE OF ANTHONY C. RODRIGUEZ** 1425 Leimert Boulevard, Suite 101 Oakland, California 94602	**Attorneys for Appellant and Petitioner** **RANCHO DE CALISTOGA, a California General Partnership** **TEL : (510) 336-1536** **FAX : (510) 336-1537** **E-mail: arodesq@pacbell.net**
Clerk of the Court Office of the Clerk James R. Browning Courthouse **U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT** 95 Seventh Street San Francisco, California 94103-1526	**Original Filed Electronically with the Ninth Circuit Court of Appeals**
R. S. Radford, Esq. **PACIFIC LEGAL FOUNDATION** 930 G Street Sacramento, California 95814	**Attorneys for Amicus Curiae** **PACIFIC LEGAL FOUNDATION** TEL : (916) 419-7111 FAX : (916) 419-7747 E-mail: rsr@pacificlegal.org

COUNSEL:	REPRESENTING:
Robert H. Thomas, Esq. Bethany C.K. Ace, Esq. **DAMON KEY LEONG KUPHAK HASTERT** 1003 Bishop Street, Suite 1600 Honolulu, Hawaii 96813	**Attorneys for Amicus Curiae WESTERN MANUFACTURED HOUSING COMMUNITIES ASSOCIATION** **TEL : (808) 531-8031** **FAX : (808)** **E-mail: rht@hawaiilawyer.com**

(X) **BY COURT CASE MANAGEMENT/ ELECTRONIC CASE FILES (CM/ECF) SYSTEM,** By submitting the document listed above as a Portable Document Format (PDF), by uploading an electronic version via CM/ECF System case filing which automatically generates a Notice of Electronic Filing or NEF which allows recipients to retrieve the document(s) automatically, pursuant to the Court's Administrative Order Regarding Electronic Filing. I certify that said transmission was completed and that all pages contained therein were received. [CRC, Rule 2.250(5) and 2.253(a)]

( ) **BY U.S. MAIL.** I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelope was sealed and, with postage thereon fully prepaid, placed for collection and mailing on this date in the United States mail at Riverside, California. [CCP § 1012; 1013; 1013a]

( ) **BY OVERNIGHT COURIER**, I caused the above-referenced document(s) to be deposited in a box or other facility regularly maintained by the overnight courier, or I delivered the above-referenced document(s) to an overnight courier service, for delivery to the above addressee(s). [CCP §1013]

( ) **BY EMAIL.** I caused the document (without enclosures) described above, to be sent via email in PDF format to the above-referenced person(s) at the email addresses listed. **[Pursuant to _____ Agreement between counsel – electronic service pursuant to Rule 2.260, CRC]**

Executed **June 24, 2013**, Riverside, California.

(X) **(Federal)** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

/s/ Mary E. Hensley
MARY E. HENSLEY