Docket No. 12-17749

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RANCHO DE CALISTOGA, a
California General Partnership,

Petitioner and Appellant,

v.

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

Respondents and Appellees.

Appeal from the United States District Court
Northern District of California
The Honorable Jeffrey S. White, District Judge
District Court No. C11-05015 JSW

APPELLANT'S REPLY BRIEF

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I. INTRODUCTORY STATEMENT

The Parkowner is not seeking a trial in the district court. Similarly, the Parkowner is not challenging the ordinance on its face and has no interest in debating the wisdom of the City Council's decision to adopt rent control. Nor does the Parkowner seek to set the rent at the level that could occur in the absence of rent control. (ER 142, ¶ 85).

The Parkowner is seeking judicial review with respect to a number of federal questions that were raised during an administrative hearing that has already occurred. The Supreme Court has ruled that federal district courts have jurisdiction to review such federal questions, even if the state provides its own procedure for obtaining judicial review. *City of Chicago v. International College of Surgeons,* 522 U.S. 156, 163-174 (1997).

The City of Calistoga and the California League of Cities have attempted to distort the issues, and to raise new issues that could have been raised, but were not, during the underlying administrative hearing. As will be demonstrated by the use of two analogies in the following sections of this brief, a federal court can provide the type of judicial review the Parkowner is seeking without running afoul of the concerns

the City and its supporters have raised. Accordingly, this Court should reverse the district court's ruling and order it to review the evidence submitted in the underlying administrative hearing, to determine whether the Parkowner's federal constitutional rights have been violated.

II. THE RIGHT TO JUDICIAL REVIEW

A. The Federal Courts Have Jurisdiction to Review the Decisions of Local Administrative Agencies if a Federal Question is Raised.

In *City of Chicago v. International College of Surgeons,* 522 U.S. 156 (1997), the Supreme Court held that federal district courts have jurisdiction to decide federal questions arising out of local administrative proceedings, even where the state provides its own procedure for review of those proceedings. (*Id.* at 163-174). In this case, the Parkowner alleges that the City's ordinance has been applied in a manner that results in a violation of its rights under the takings, due process and equal protection clauses of the federal constitution. Accordingly, this Court should order the district court to review the evidence actually submitted in those proceedings, to determine whether

the Parkowner's federal constitutional rights have been violated.

In an attempt to persuade this Court not to review those proceedings, the City argues that the district court is not required to provide the Parkowner with a "trial." (City's Opposition Brief, Pg. 21). The City's argument is a red herring, aimed at preventing an inquiry into the constitutionality of its conduct.

The Parkowner does not seek a "trial" in the traditional sense of that word, with witnesses, cross-examination and deliberation by a jury. The Parkowner seeks judicial review of a hearing that has already occurred, to determine whether that hearing resulted in a violation of its federal constitutional rights. The City's attempt to persuade this Court otherwise must be rejected.

III. THE WRONGFUL TERMINATION ANALOGY

A. A Party to an Administrative Hearing May Seek Judicial Review Without Challenging the Ordinance on its Face, or the Wisdom of any Underlying Policy.

Analogies are often helpful in the determination of legal issues. *Goodstein v. Continental Casualty Company,* 509 F. 3d 1042, 1057 (9th Cir. 2007); see also *Alaska v. EEOC,* 564 F. 3d 1062, 1065, fn. 1 (9th

Cir. 2009). Although the City contends that the Parkowner seeks to debate the wisdom of rent control, it is the City that has relied heavily on policy considerations in an attempt to make political arguments to this Court. Of course, the amicus brief submitted by the California League of Cities also devotes many pages to the policies justifying the imposition of rent control in more than 100 jurisdictions, while simultaneously attempting to introduce new evidence, which the Parkowner has no opportunity to test, cross-examine or refute.

From the Parkowner's perspective, it appears that the City is determined to confuse the issues by arguing the very policy issues it claims should not be considered. Accordingly, the Parkowner will demonstrate its point regarding the relief it is seeking through the use of an analogy regarding an administrative hearing having nothing to do with rent control.

To begin, it is assumed that the Calistoga School District has adopted a regulation prohibiting school bus drivers from exceeding thirty-five miles per hours, or driving recklessly. The purpose of the regulation is to protect the health and safety of students. In the event of an alleged violation, the offending driver may appear at an

administrative hearing. The administrative hearing officer has discretion to do "what is reasonable under the circumstances," just as the hearing officer may do in an administrative hearing under the Calistoga rent control ordinance. (ER 110, Section 2.22.110A).

It is assumed further that a bus driver named Jose Gonzalez is cited for exceeding the thirty-five miles per hour limit. At the administrative hearing, Mr. Gonzales provides radar gun readings, a video recording of the speedometer and several eyewitness accounts, conclusively demonstrating that he was driving only thirty miles per hour. Because there is no evidence that Mr. Gonzalez was exceeding the thirty-five miles per hour limit, the hearing officer determines that Mr. Gonzalez was not driving in excess of the speed limit.

Not satisfied, the Calistoga School District amends its complaint, now claiming that even if Mr. Gonzalez was not speeding, he was driving recklessly, alleging that it was pouring rain and extremely foggy, making it unsafe to drive more than twenty-five miles per hour. Mr. Gonzalez submits weather reports, photographs and eyewitness accounts, all demonstrating that in reality it was a dry, sunny day.

Several dozen parents from Calistoga and the Mayor attend the

administrative hearing, demanding that Mr. Gonzalez be fired, because he supposedly endangered the lives of their children. By contrast, Mr. Gonzalez contends that the parents' concern for their children's safety in this particular case is "pretext" and that he is being prosecuted not because of his driving, but because he is Hispanic. In fact, Mr. Gonzalez submits evidence demonstrating that the complaining parents and the Mayor have made disparaging comments about Hispanics and that no other Hispanics have been hired by the Calistoga School District.

Although there is no evidence Mr. Gonzalez drove in excess of the speed limit or drove recklessly, the hearing officer bows to the political pressure and finds that Mr. Gonzalez must be fired, because (1) the Calistoga School District has a legitimate interest in prohibiting speeding and reckless driving and (2) only a court can determine whether any laws prohibiting discrimination have been violated.

In order to appeal such a decision, Mr. Gonzalez need not challenge the regulation on its face, nor argue that the Calistoga School District does not have a legitimate interest in preventing either speeding or reckless driving. Similarly, Mr. Gonzalez need not argue that the thirty-five miles per hour speed limit is not working, nor debate whether

it should be applied to him. To the contrary, even if Mr. Gonzalez is reinstated in his position, Mr. Gonzalez concedes the regulation will continue to prevent him and all other bus drivers in the Calistoga School District from speeding or driving recklessly.

In order to prevail on appeal all Mr. Gonzalez need do is demonstrate to a reviewing court (1) that the hearing officer's reliance on the purpose of the regulation was "pretext" and (2) that he was actually terminated because of his ethnicity, as there was ***no*** evidence he exceeded the speed limit or drove recklessly in that particular case, at that particular point in time.

In this case, the City of Calistoga's rent control ordinance states that rents may be increased if reasonable under the circumstances. The ordinance provides also that its purpose is to prohibit excessive rents, and to prevent parkowners from exerting unequal bargaining power over the tenants. (ER 110, ER 99).

Just as Mr. Gonzalez was able to demonstrate that he was not driving his bus in excess of the thirty-five miles per hour speed limit, the Parkowner submitted evidence that the proposed rent of $625 was not above market, but in fact was at least $25 below market.

However, the Parkowner recognized that some courts have indicated that the market rent may be excessive, if it results from an abuse of monopoly power. *Pennell v. City of San Jose,* 485 U.S. 1, 11 (1988). Accordingly, just as Mr. Gonzalez was able to demonstrate that he was not driving recklessly either, the Parkowner submitted evidence demonstrating that the requested rent of $625 per month was not monopolistic either. (ER 132-135, ¶¶'s 47-58).

As in the case of Mr. Gonzalez, the Mayor and some interested tenants attended the administrative hearing. (ER 136, fn. 1). As in the case of Mr. Gonzalez, although there was no evidence that the proposed rate of $625 per month was above market or the result of monopoly power, the hearing officer refused to grant the requested rent increase, relying on the purposes of the ordinance and ruling that only the courts can determine whether the Parkowner's constitutional rights have been violated. (ER 139, ¶ 79 - ER 140, ¶ 73).

In order to appeal the hearing officer's decision, the Parkowner need not challenge the ordinance on its face, nor argue that the City of Calistoga does not have a legitimate interest in preventing rents that are above market, or the result of monopoly power. Similarly, the

Parkowner need not argue that the ordinance is not working, nor debate whether it should be applied at Rancho de Calistoga. To the contrary, even after the rents are increased to the non-excessive and non-monopolistic rate of $625 per month, the ordinance will continue to prevent all parkowners from charging excessive or monopolistic rents.

In short, in order to prevail on appeal the Parkowner is not required to show that the ordinance is unconstitutional on its face, or that it cannot achieve its stated goals. Because the Parkowner is seeking judicial review of an administrative hearing that has already occurred, the City's attempts to mis-characterize the nature of these proceedings must be rejected by this Court.

IV. THE FAIR RETURN ANALOGY

A. A Party to a Rent Control Hearing May Seek Judicial Review Without Challenging the Ordinance on its Face, or the Wisdom of any Underlying Policy.

In *Besaro Mobile Home Park, LLC v. City of Fremont,* 204 Cal. App. 4th 345, 356-361 (2012), a California Appellate Court determined that a parkowner could not establish a regulatory taking under the California Constitution, even though the parkowner had invested in the

park long before the enactment of rent control. However, the *Besaro* Court noted also that several years earlier the City of Fremont's hearing officer awarded a rent increase of $159.80 per space (or thirty-one percent), because such an increase was required to provide the constitutionally required fair return on investment. (*Id.* at 350).

The Parkowner asks this Court to assume that instead of granting the $159.80 "fair return" rent increase, the hearing officer in *Besaro* had denied it in its entirety. If the requested rent increase had been denied, there can be no doubt that the parkowner could have sought judicial review of that decision, without challenging the ordinance on its face, or arguing that rent control was not working.

Moreover, if the parkowner were successful on appeal, it would have been entitled to implement the $159.80 "fair return" increase, even if some tenants could not have afforded such a rent increase. Of course, as also evidenced by *Besaro*, that parkowner would have remained subject to the ordinance and could not raise rents again, unless authorized by law to do so.

As in the above "fair return" analogy, the Parkowner in this case does not seek to have the City of Calistoga's ordinance declared

unconstitutional on its face, nor debate the wisdom of the City Council's decision to adopt rent control. The Parkowner seeks judicial review of an administrative hearing that has already occurred, to determine whether the hearing officer's decision has resulted in a violation of its rights under the takings, due process and equal protection clauses of the federal constitution.[1]

B. The Parkowner Does Not Mean to Suggest that a Claim Based on the Denial of a "Fair Return" is Immediately Ripe for Review in Federal Court.

In the above analogy, it is assumed that a parkowner is seeking judicial review of the denial of a "fair return" on investment. By using a "fair return" analogy, the Parkowner does not mean to suggest that administrative review of a "fair return" claim would be ripe for review in federal court, regardless of any remedies the state court may provide. Rather, by using a "fair return" analogy, the Parkowner seeks to demonstrate that an administrative decision may be appealed without

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[1] It must be noted also that the parkowner in *Besaro* reserved its right to have its federal claims heard in federal court, so the *Besaro* Court only considered that parkowner's claims under the California Constitution. *Besaro Mobile Home Park, LLC v. City of Fremont,* 204 Cal. App. 4th 345, 354 (2012).

challenging the ordinance on its face, or debating the wisdom of the decision to control rents in the first place. The determination of whether the claim is ripe for review is a separate issue, which has been discussed extensively in the Parkowner's opening brief, and which is discussed further in Sections VIII and IX of this brief.

C. The Parkowner Has Not Conceded that it is Making a "Fair Return," because the Evidence Regarding its Initial Investment No Longer Exists.

In *Besaro Mobile Home Park, LLC v. City of Fremont,* 204 Cal. App. 4th 345, (2012), the Court "emphasized" that one of the reasons that parkowner could not establish a taking under the California Constitution was that it admitted it was making more than a fair return on its investment. (*Id.* at 362). In its opposition brief in this case, the City asks this Court to go further, claiming that the owner of a rent controlled property has ***no*** constitutional rights with respect to the manner in which a rent control ordinance is applied, except the right to a fair return. (City's Opposition Brief, Pg. 46).

In essence, the City is arguing that the "reasonableness" of the rent charged is irrelevant under a local rent control ordinance, so long

as the property owner is making a fair return. However, under the City's analysis, ***no*** purpose would be required to regulate rents. Instead, all a local government need do is establish a procedure by which property owners have the right to apply for a fair return on investment, without regard to the rents actually charged.

In other words, instead of rent control, local governments could engage in profit control, providing discounts to whomever it pleases, whenever it pleases, for no reason at all. Again, from the Parkowner's perspective, any ruling by this Court that renders irrelevant the "reasonableness" of the rent charged would leave nothing remaining except "a law that takes property from A and gives it to B." *Calder v. Bull,* 3 U.S. 386, 388 (1798).

Moreover, unlike *Besaro*, the Parkowner in this case does not concede that it is making a fair return on investment. Rather, the Parkowner is not able to apply for a fair return on investment, because (1) the documents regarding the investment in the park were destroyed more than thirty years ago, and (2) the only witnesses with knowledge of those documents are dead. (ER 125, ¶ 15). For each of the above reasons, this Court must reject any claim that the owner of a rent

controlled property has ***no*** constitutional rights, other than the right to a fair return on investment.

V. REGULATORY TAKINGS

A. The Ninth Circuit Has Determined that Post-Rent Control Investors Have No Reasonable Expectation of Acquiring the Unfettered Discretion to Increase Rents.

The City argues that whether a property owner acquires a mobilehome park before or after the adoption of rent control should not be the primary focus of a regulatory taking analysis. (City's Brief, Pg. 17, fn. 8). The City's argument is contrary to the two most recent decisions from the Ninth Circuit on that subject.

In *Guggenheim v. City of Goleta*, 638 F. 3d 1111, 1113-1114 (9th Cir. 2010), Mr. and Mrs. Guggenheim claimed that the City of Goleta's mobilehome rent control ordinance resulted in a regulatory taking, because it did not provide them with the unfettered discretion to increase the rent whenever a new tenant moves into the park. The Ninth Circuit determined that the Guggenheims could not assert a regulatory taking claim because they purchased the park knowing it was subject to rent control. In fact, the *Guggenheim* Court determined the date of

acquisition was the 'primary factor' in its analysis, writing as follows:

> "That 'primary factor,' 'the extent to which the regulation has interfered with distinct investment backed expectations,' ***is fatal to the Guggenheims' claim***. . . .
>
> The Guggenheims bought a trailer park burdened by rent control, and had no concrete reason to believe they would get something more valuable, because of hoped-for legal changes, than what they had." (*Id.* at 1121-1122). (Emphasis added).

Similarly, in *MHC Financing Limited Partnership v. City of San Rafael*, 714 F. 3d. 1118 (9th Cir. 2013), an investor purchased a mobilehome park with full knowledge of rent control and later sued, claiming that the City's denial of the right to charge whatever rent it wanted resulted in a regulatory taking. Although the district court found that a regulatory taking had occurred, the Ninth Circuit reversed:

> "[The district court's analysis] assumes MHC purchased the property prior to the enactment of the original ordinance, when it did not. The ordinance was in effect when MHC acquired the property. . . .
>
> Indeed, sitting en banc in *Guggenheim v. City of Goleta*, we recently held that the 'primary factor,' 'the extent to which the regulation has interfered with distinct investment backed expectations,' to be fatal to the Guggenheims'

> takings claim, where the Guggenheims purchased a mobilehome park ***with a rent control ordinance already in place."*** (*Id.* at 1127-1128). (Emphasis added).

In this case, the Parkowner developed the mobilehome park long before the enactment of rent control. In view of the two recently published decisions from this Court finding that the date of acquisition is the 'primary factor' under a *Penn Central* analysis, the City's arguments regarding this issue are without merit.

B. The California Courts Have Determined that Pre-Rent Control Investors Have No Reasonable Expectation of Charging Market Rents.

In *Besaro Mobile Home Park, LLC v. City of Fremont,* 204 Cal. App. 4th 345 (2012), the parkowner developed a mobilehome park during the 1970's, years before the adoption of rent control in 1987. (*Id.* at 1149-1150). Nevertheless, the *Besaro* Court held that the parkowner could ***not*** establish a regulatory taking under the California Constitution, due in part to the subsequently adopted rent control ordinance. The *Besaro* Court addressed this issue as follows:

> "Besaro cannot claim a 'reasonable' expectation in greater profits in light of ***the ordinance itself*** and the heavily-regulated

> nature of mobilehome occupancy . . . The City's decision to enact the ordinance serves a legitimate purpose of protecting renters in a captive market from ***excessive rent increases."*** (*Id.* at 359). (Emphasis added).

With all due respect to the *Besaro* Court, raising rents to the non-excessive and non-monopolistic rate of $625 is not "circular," because the Parkowner concedes that once the rents are increased, it may not increase them again, unless authorized by law to do so. Rather, it is the *Besaro* Court's finding that is illogical, because increasing rent to the non-excessive and non-monopolistic rate of $625 does ***not*** in any way interfere with the "legitimate purpose of protecting renters in a captive market from excessive rent increases."

Based on the holding in *Besaro Mobile Home Park, LLC v. City of Fremont,* 204 Cal. App. 4th 345 (2012), it would be futile to proceed with a regulatory taking claim in the California Courts. Because the Parkowner has demonstrated that it would be futile to pursue a regulatory taking claim in the California courts under the California constitution, the Parkowner must be allowed to seek judicial review in the federal courts. *Manufactured Home Communities, Inc. v. City of San Jose,* 420 F. 3d 1022, 1035-1036 (9th Cir. 2005).

VI. RENTS WITHOUT RENT CONTROL

The City argues that the Parkowner is seeking to set rents at the level that would exist in the absence of rent control. Again, nothing could be further than the truth. In the absence of rent control an unscrupulous parkowner would be free to set rents at an excessive and monopolistic level, thereby destroying the value of the tenants' mobilehomes. Contrary to the City's argument, the Parkowner seeks no such right. (ER 142-143, ¶¶ 85-86).

A. In the Absence of Rent Control the Calistoga Parkowners Could in Theory Charge Rents in Excess of the Non-Excessive and Non-Monopolistic Rate.

In *Guggenheim v. City of Goleta*, 638 F. 3d 1111, 1113-1114 (9th Cir. 2010), Mr. and Mrs. Guggenheim sought the unfettered discretion to charge whatever rent the existing tenants were willing to pay. The Ninth Circuit rejected the Guggenheims' request for such unfettered discretion, finding that "[b]ecause 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."

The City relies on the above quotation from *Guggenheim*, arguing

that the Parkowner is seeking to charge the rent that could be charged in the absence of rent control. The City argues also that granting the requested rent increase would render rent control meaningless. (City's Brief, Pgs. 2-3). Once again, the City has mis-characterized the issues before this Court.

The Parkowner readily admits that in the absence of rent control, an unscrupulous landlord could lure tenants into a park with fair market rents. If there were no rent control the unscrupulous landlord could in theory raise the rent to an excessive or monopolistic rate, because "the owner of the land has the owner of the mobilehome over a barrel." (*Id.* at 1113-1114).

In this case, the Parkowner is not seeking the same rent that could be charged in the absence of rent control. To the contrary, the Parkowner has no interest in charging an excessive or a monopolistic rent. Similarly, the Parkowner has no interest in exploiting any of its tenants, nor preventing them from selling their mobilehomes at prices in excess of their depreciated value. (ER 143, lines 7-9).

Again, the Parkowner readily concedes that the City has a legitimate interest in prohibiting the excessive and monopolistic rents

that would leave its tenants "over a barrel." However, the mere fact that the City has the right to prohibit excessive and monopolistic rents does not mean that the enforcement agency may apply the ordinance in a way that results either in a private taking, or a violation of any other constitutional right. See also *Lochary v. Kayfetz,* 917 F. 2d 1150, 1155-1156 (9th Cir. 1990).

B. In the Absence of Rent Control the Calistoga Parkowners Could in Theory Destroy the Value of the Tenants' Mobilehomes.

Again, in *Guggenheim v. City of Goleta*, 638 F. 3d 1111, 1113-1114 (9th Cir. 2010), Mr. and Mrs. Guggenheim sought the unfettered discretion to charge whatever rent the existing tenants were willing to pay. In addition to preventing the Guggenheims from having their tenants "over a barrel," the Ninth Circuit rejected their claim because such unfettered discretion could destroy the tenants' investment in their mobilehomes. The *Guggenheim* Court addressed this issue as follows:

> "Ending rent control would be a windfall to the Guggenheims, and a disaster for the tenants who bought their mobile homes after rent control was imposed in the 70's and 80's. . . . The tenants who purchased during the rent control regime have invested on average, over

> $100,000 each in reliance on the stability of government policy. Leaving the ordinance in place impairs no investment backed-expectation of the Guggenheims, ***but nullifying it would destroy the value these tenants thought they were buying."*** (*Id.* at 1122). (Emphasis added).

The evidence in this case demonstrates ***no*** such destruction in the value of the tenants' mobilehomes would occur. To the contrary, a survey of mobilehome sales in Napa County demonstrated that during the 24 months prior to the hearing, title to 239 of the mobilehomes at the 3,339 spaces surveyed changed hands, or 7.16%, while during that same period 17 of the 184 mobilehomes at Rancho de Calistoga changed hands, or 9.24%. (ER 140, ¶ 75).

Moreover, the average price of the 239 mobilehomes sold in Napa County during that two year period actually increased by 33.58%, from $44,166.64 to $58,998.13, while during that same period the average price of the 17 mobilehomes sold at Rancho de Calistoga increased by 156.73%, from $24,161.06 to $62,029.41. (ER 141, ¶ 76).

Of course, the above described sales activity took place at mobilehome parks in Napa County that although subject to rent control, had rents significantly in excess of those allowed at Rancho de

Calistoga. (ER 131, lines 4-13). In short, unlike *Guggenheim*, there is no evidence that increasing the rent at Rancho de Calistoga to the non-excessive and non-monopolistic rate of $625 would either "leave the tenants over a barrel," or cause the value of their mobilehomes "to be destroyed."

C. The City Has Attempted to Blur the Distinction Between Non-Excessive Rents and Non-Monopolistic Rents.

In addition to claiming that the Parkowner is attempting to charge the rents that could be charged in the absence of rent control, the City ignores the distinction between excessive and monopolistic rents, treating them as if they are the same. Once again, the City's mis-characterization of the issues is contrary to law, and contrary to the facts alleged in the first amended petition.

As demonstrated in the Parkowner's opening brief, the Courts have recognized that the market rent may be excessive, because the market may allow monopolistic rents. In recognition of the case law on that subject, the Parkowner submitted evidence at the hearing showing (1) that the proposed rent was below market, ***and*** (2), that the proposed rent was not the result of monopoly power. (ER 132 ¶ 47). The

Parkowner's allegations regarding this "two step" process are set forth at paragraph 47 of the first amended petition:

> "Having established that the requested rent of $625 per month was not excessive, but was slightly below market, ***the Petitioner was still required to show that the proposed rent was not the result of monopoly power.*** In order to determine whether the proposed rent was competitive or monopolistic, the Petitioner requested an economist named Richard Fabrikant to provide an empirical analysis with respect to that issue." (ER 132, ¶ 47). (Emphasis added).

In summary, the Parkowner does not seek to charge the excessive or the monopolistic rents that an unscrupulous landlord could charge in the absence of rent control. To the contrary, the Parkowner submitted evidence demonstrating that the proposed rent of $625 was neither excessive, monopolistic, nor in violation of any other legitimate public purpose. Accordingly, the City's attempts to mis-characterize the legal and the evidentiary issues that have been raised must be rejected by this Court. (In addition, see ER 139, lines 3-4: "The uncontradicted evidence demonstrated also that a non regulated rent is not necessarily excessive.").

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VII. NEW EVIDENCE AND WITNESS CREDIBILITY

The California League of Cities attempts to raise new arguments, based on evidence that was not submitted to the hearing officer. The California League of Cities argues also that the expert testimony submitted by the Parkowner should not be considered, simply because it was submitted by the Parkowner. This Court must reject all such attempts to prevent the Parkowner from obtaining judicial review of the already completed administrative hearing.

A. The California League of Cities May Not Submit New Evidence at this Late Date.

A party to a quasi judicial administrative hearing "must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal." *United States v. Florida East Coast Railway Company,* 410 U.S. 224, 237 (1973). In order to provide due process in such proceedings, it has long been held that "[n]othing can be treated as evidence which is not introduced as such." *Morgan v. United States,* 298 U.S. 468, 480 (1936).

The California League of Cities has attempted to introduce

numerous facts that are outside the scope of these proceedings. For example, without any support at all, the California League of Cities claims that there are only 370,000 mobilehome spaces in the state of California. (Amicus Brief, Pg. 4). In addition, the California League of Cities has submitted a fourteen (14) year old article published by "National Appraisal Guides," claiming that it is wrong to assume that mobilehomes depreciate in value. (Amicus Brief, Appendix A).

Although the Parkowner would have been able to test, explain and refute such evidence if it had been introduced at the underlying hearing, no such opportunity is available here. Accordingly, the Parkowner must object to any attempt to introduce new evidence at this late date.

B. It Cannot be Determined Whether the Evidence Submitted by the Parkowner's Experts is Biased Until that Evidence is Examined.

The California League of Cities suggests also that the opinions of the Parkowner's experts should not be considered, because those experts were paid by the Parkowner. (Amicus Brief, Pg. 12, line 4). However, in determining whether a price controlled entity is earning a fair return on investment, the courts have repeatedly held that the determination of

a fair rate "[i]s the product of expert judgment which carries a presumption of validity." *Power Comm'n v. Hope Gas Co.,* 320 U.S. 591, 602 (1943).

It is ironic that while the City claims no "ad hoc" factual inquiry is necessary, the California League of Cities seeks to introduce new facts to this Court, so as to make the City's case. If the district court is ordered to review the expert reports submitted at the already concluded administrative hearing, it can determine at that time whether the opinions of the Parkowner's experts were tainted by bias. However, such a determination cannot be made at this time, because that evidence is not before this Court.

VIII. COLONY COVE AND KAVANAU

A. The City's Reliance on *Colony Cove* and *Kavanau* is Misplaced Because the Claims in Those Cases are Not the Same as the Claims in this Case.

The City relies heavily on the Ninth Circuit Court of Appeal's decision in *Colony Cove Properties, LLC v. City of Carson*, 640 F. 3d 948 (9th Cir. 2011). As will demonstrated below, the claims asserted by the parkowner in that case were far different from the claims in this case.

Accordingly, the City's reliance on *Colony Cove* is misplaced.

First, in *Colony Cove* the parkowner requested a rent increase on the ground that it was not receiving a fair return on investment under four "alternative methodologies and theories." (*Id.* at 953). The Parkowner has made ***no*** such "fair return" argument in this case. Rather, the Parkowner contends that the ordinance has been applied in a manner that results in either a "private taking" of property, or a violation of the due process clause.

As explained in the Parkowner's opening brief, the Supreme Court has determined that where governmental action "fails to meet the 'public use' requirement or is so arbitrary as to violate due process," that is the end of the inquiry, because "[n]o amount of compensation can authorize such action." *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 543 (2005). Because no amount of compensation can justify either type of action, there is no need to exhaust any state remedies that may exist before proceeding with those claims in federal court.

Of course, the parkowner in *Colony Cove* did not claim that the ordinance was being ***applied*** in a manner that resulted in a private taking. To the contrary, in *Colony Cove* the parkowner's "private use"

challenge was limited to a facial attack, which was determined to be time barred. (*Supra,* 640 F. 3d at 955-956). Because the Parkowner in this case claims that the ordinance is being "applied" in a manner that results in either a private taking, or a due process violation, those claims are ripe. *Armendariz v. Penman*, 75 F. 3d 1311, 1321, n.5 (9th Cir. 1996); See also *MHC Financing Limited Partnership v. City of San Rafael*, 714 F. 3d. 1118, 1130, fn. 7 (9th Cir. 2013).

Next, with respect to the Parkowner's regulatory taking claim, *Colony Cove* could not possibly have considered the state court's decision in *Besaro Mobile Home Park, LLC v. City of Fremont,* 204 Cal. App. 4th 345, 356-361 (2012), because that decision did not exist at that time. Because *Colony Cove* did not address the "futility" issue raised by the California Court's decision in *Besaro*, it could not possibly bar such an argument in this case.

Finally, *Colony Cove* relied also on that parkowner's failure to seek a *Kavanau* adjustment. In addition to the fact that no amount of compensation can justify a purely private taking, the California Courts have specifically held that a *Kavanau* adjustment applies ***only*** where the landlord has been denied a fair return on investment. *Hillsboro*

Properties, Inc. v. City of Rohnert Park, 138 Cal. App. 4th 379, 392 (2006). ["If despite the invalidity of the ordinance the landlord received a fair return, there is ***no*** basis for a *Kavanau* adjustment."]. Again, because the Parkowner is not seeking a "fair return" in this case, neither *Colony Cove* nor *Kavanau* apply.

B. The City Has Attempted to Blur the Distinction Between Facial and As Applied Challenges.

The City claims that the adoption of a local rent control ordinance need only be "rationally related to a conceivable public purpose." (City's Brief, Page 22). Although that is the test for determining whether an ordinance is valid on its face, no court has ever held that an otherwise valid rent control ordinance may be applied in a manner that violates a constitutional right. See also *Lochary v. Kayfetz,* 917 F. 2d 1150, 1155-1156 (9th Cir. 1990).

In this case, the Parkowner does not allege that the ordinance is invalid on its face. Rather, the Parkowner alleges that the enforcement agency has applied the ordinance in a manner that results in either a private taking, or a due process violation. The courts have recognized the distinction between those concepts on more than one occasion. As

explained by the Ninth Circuit in *Armendariz v. Penman*, 75 F. 3d 1311, 1321 (9th Cir. 1996):

> "While the *Midkiff* court noted that 'where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be protected by the Public Use Clause,' 467 U.S. at 241, 104 S. Ct. at 2329, what plaintiffs allege here is an uncompensated taking through a raw misuse of government power . . . ***Thus, the usual extreme deference that courts owe to legislative determinations of public use . . . is not appropriate here."*** (*Id.* at 1321). (Emphasis added).

The City for the most part glosses over the cases where the enforcement agency applies an otherwise valid ordinance in a manner that results in the violation of a constitutional right. Where the City does discuss those cases, it suggests that an ordinance cannot be applied in violation of a constitutional right, unless extreme ill will is involved. (City's Brief, Pgs. 31-32).

The test is not whether the enforcement agency has applied the ordinance in a manner that is "malicious ***and*** irrational ***and*** plainly arbitrary." The test is whether the enforcement agency has applied the ordinance is a manner that results either in a private taking, or in a way

that is "malicious, irrational ***or*** plainly arbitrary." *Lochary v. Kayfetz,* 917 F. 2d 1150, 1155-1156 (9th Cir. 1990).

For example, assume that the hearing officer's mother lives at the mobilehome park. Assume further that the hearing officer declines to grant an otherwise allowable rent increase, because he loves his mother. As the above analogy demonstrates, even a decision that is made because of love or empathy cannot justify either a private taking, or a decision that is irrational or plainly arbitrary. Any suggestion that "ill will" is a necessary component of such a constitutional violation must be rejected by this Court.

IX. REGULATORY PRIVATE TAKINGS

In *MHC Financing Limited Partnership v. City of San Rafael*, 714 F. 3d. 1118 (9th Cir. 2013), an investor purchased a mobilehome park with full knowledge of rent control and later sued, claiming that the City's denial of the right to charge whatever rent it wanted resulted in a private taking. At footnote 5 of its decision, the *MHC* Court stated that it was assuming, without deciding, that it was possible to allege a "regulatory private taking." (*Id.* at 1129).

It is unclear what the *MHC* Court meant by a "regulatory private

taking." What is clear is that the *MHC* Court analyzed the claim as if it involved a ***facial*** challenge, holding that "[b]ecause we conclude that the Ordinance is rationally related to a conceivable public purpose, the Ordinance does not amount to a private taking." (*Id.* at 1129). Thus, the standard applied to the "regulatory private taking" in *MHC* was far different than the standard applied to the "as applied" private taking in *Armendariz v. Penman*, 75 F. 3d 1311, 1321 (9th Cir. 1996) ["Thus, the usual extreme deference that courts owe to legislative determinations of public use . . . . is not appropriate here."].

Again, in this case the Parkowner does not seek the unfettered right to increase the rent to whatever level it chooses, as if rent control did not exist. Nor does the Parkowner challenge the ordinance on its face. The Parkowner seeks only to charge the below market rate of $625 per month at all 184 spaces at its park, which the evidence demonstrated was neither an excessive nor a monopolistic rate, and would not result in the exploitation of anyone.

Although the *MHC* Court stated that it was not aware of any cases where a "regulatory private taking" had been recognized, there are at least four published cases where an enforcement agency has ***applied*** an

ordinance that was valid on its face in a manner that resulted in either a private taking, or a violation of the due process clause. *Lochary v. Kayfetz,* 917 F. 2d 1150, 1155-1156 (9th Cir. 1990); *Armendariz v. Penman*, 75 F. 3d 1311, 1321 (9th Cir. 1996); *99 Cents Only Stores v. Lancaster Redevelopment Agency,* 237 F. Supp. 2d 1123, 1129-1130 (CD Cal. 2001)*; Cottonwood Christian Center v. Cypress Redevelopment Agency,* 218 F. Supp. 2d 1203, 1229-1230 (C.D. Cal. 2002).

Whatever the *MHC* Court may have meant by a "regulatory private taking," a property owner must be allowed to demonstrate that an otherwise valid ordinance has been "applied" by an enforcement agency in a manner that results in an impermissible private taking of property, or an arbitrary violation of the due process clause. Unless this Court is willing to hold that it is ***legally impossible*** for a rent control ordinance to be "applied" by the enforcement agency in a manner that results in such violations, the district court's granting of the City's motion to dismiss must be reversed.

X. CONCLUSION

The City contends that the owners of rent controlled properties

have ***no*** constitutional rights, other than the right to a fair return on investment. According to the City, the reasonableness of the rent is irrelevant, provided the ordinance contains a procedure for obtaining a fair return. If this Court determines that the reasonableness of rent is irrelevant, a local government could adopt profit control, mandating reductions in the price of any good or service, for no reason at all.

Based on all of the above, it is apparent that the City is ***not*** satisfied with a rent control ordinance that prohibits excessive and monopolistic rents. What the City wants is the ability to provide the tenants with significant subsidies in perpetuity, without regard to need, at the Parkowner's expense. Because the ordinance is being applied to compel such a subsidy without regard to whether the rent is excessive, monopolistic, or in violation of any other legitimate public purpose, the Parkowner's constitutional rights have been violated.

Although the City has tried to confuse the issues, the Parkowner is not seeking a trial in the district court. Similarly, the Parkowner does not seek to challenge the ordinance on its face, nor debate the wisdom of the City Council's decision to adopt rent controls in the first place. The Parkowner seeks only judicial review with respect to each of the

federal questions it raised during an administrative hearing that has already taken place. Because the Parkowner has alleged facts demonstrating that the hearing officer applied the ordinance in a manner that results in a violation of the takings, due process and equal protection clauses of the federal constitution, the decision of the district court must be reversed.

Dated: July 8, 2013

Respectfully submitted,

s/Anthony C. Rodriguez
Anthony C. Rodriguez
Attorney for the Appellant

STATEMENT OF RELATED CASES
PURSUANT TO RULE 28-2.6

The Appellant is 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.

CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE 32(a)

This brief complies with the type-volume limitation of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure, because it contains 6,858 words, excluding the parts of the brief the Rule exempts from limitation. This brief complies also with the typeface and type style requirements of Rule 32(a)(5) and (6), because it is in a proportionally spaced typeface with a 14 point Times New Roman font.

Dated: July 8, 2013

Respectfully submitted,

s/Anthony C. Rodriguez
Anthony C. Rodriguez
Attorney for the Appellant

9th Circuit Case Number(s) 12-17749

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