MOBILE HOME RENT CONTROL:

Protecting Local Regulation

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The right of local governments to control mobile home park abuses was confirmed this year when the U.S. Supreme Court in *Yee v. City of Escondido* (___ U.S. ___, 112 S.Ct. 1522, (1992) upheld a municipal mobile home rent control ordinance against claims that the ordinance represented an uncompensated physical “taking" under the U.S. Constitution. The *Yee* decision preserves the right of local governments to enact a wide range of regulations that are designed to protect the public interest, without concern that such regulations will be construed *post hoc* to represent "physical takings," thus entitling affected landholders to compensation regardless of the importance of the public interest protected.

In contrast, however, stands the recent Supreme Court decision in *Lucas v. South Carolina Coastal Council* (___ U.S. ___, 112 S. Ct. 2886 (1992)), which preserved the right of some landholders to gain compensation for a "regulatory taking," even in those instances where no physical invasion occurs. The *Lucas* decision preserves the right of landholders to gain compensation when government regulations leave the landowner with no economically viable use of her land. The only response to a claim for

compensation in such circumstances, *Lucas* said, is that the use of land would otherwise have been subject to prohibition under a claim of public nuisance even in the absence of the government regulation.

The Supreme Court decisions in *Yee* and *Lucas* will undoubtedly give rise to substantial commentary on the law of “takings," as the newly conservative Supreme Court will construe it. This article, however, will use the occasion of the Yee decision to consider not whether local governments "may" regulate mobile home parks, but rather the more fundamental issue of whether local governments "should" regulate mobile home parks. The article will further make recommendations on what local governments should do at the time they adopt an ordinance to protect against constitutional “takings" challenges.

THE RATIONALE BEHIND MOBILE HOME PARK REGULATION

Recognized abuses in the provision of mobile home housing have led to corrective legislation in many states, counties and municipalities with large mobile home park populations. This legislation has generally outlawed certain types of landlord abuses; in some cities where housing markets are particularly tight, mobile home park

rent control has been imposed. In enacting mobile home rent control, or other regulatory constraints designed to eliminate abusive practices, a local government should seek to articulate and document:

- the abuses it seeks to control,
- the market power exercised in the absence of governmental actions, and
- the consumer interests it seeks to protect.

Each of these factors is briefly discussed below.

The Abuses Subject to Control

One important goal of local control over mobile home park practices is to place limits on the ability of the landlord to act capriciously in dealing with its tenants on the issue of eviction. This local control may, for example, seek to constrain the practices of mobile home *retailers* who also own or control a mobile home park.[1] These owners have been are found to evict an existing tenant in order to facilitate a sale of a mobile home to a new tenant in conjunction with the right to occupy a place in the

[1] *Cal. Civ. Code*, §798.58 (West 1991).

controlled park.[2] This practice has been particularly remunerative for mobile home retailers during times when housing was tight. The adverse impact on existing tenants, often forced to sell their mobile homes back to the retailer at rock bottom prices, is profound.

Another aspect of eviction control is to address the practice of mobile home park owners who refuse to allow an existing tenant to sell her mobile home to a prospective purchaser/tenant unless the existing tenant pays a fee to the owner for the right to make the sale of a coach in place.[3] When very tight housing markets provide the landlord with substantial market power, and in those instances when for some reason the outgoing tenant *has* to relocate, the fee charged may well approximate the entire value of the mobile home.

> Historically, market power of this sort, restricted only by the forces of "supply and demand" in a context of housing shortage, has led to dramatic abuses. Landlords, enforcing their "right" to choose who occupies a space in their park, have evicted tenants

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[2] *Cal. Civ. Code*, §798.58 (West 1991).

[3] *Cal. Civ. Code*, §§798.72-798.78 (West 1991).

> when the landlord knew there were no spaces available in other parks, with the purpose in mind of forcing the tenants to sell their coach to the landlord at virtually zero price.[4]

Landlords who were also in the business of retailing new mobile homes have been known to entice buyers into buying a mobile home with the promise of a space to locate it in the owner's park. Once the sale is made, the landlord then evicts; an existing tenant, buys back that tenant's mobile home at a minimal value under forced sale conditions, and then installs the new, but alas also temporary, tenant.[5] The process is then repeated.[6]

Yet another widespread abuse has been for the landlord to refuse to allow the tenant who decides to leave the park, or who was being evicted for inability to pay escalating rents, to sell to any buyer other than the park

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[4] Thomas G. Moukawsher, “Mobile Home Parks and Connecticut’s Regulatory Scheme: A Takings Analysis,” 17 *Connecticut Law Review* 814-815 (1985).

[5] Thomas G. Moukawsher, “Mobile Home Parks and Connecticut’s Regulatory Scheme: A Takings Analysis,” 17 *Connecticut Law Review* 811, 814 notes 18 & 19 (1985).

[6] Robert S. Stubbs, “The Necessity for Specific State Legislation to Deal With the Mobile Home Park Landlord-Tenant Relationship,” 9 *Georgia Law Review* 212, 220 (1974); see also Consumer Reports, “Tyranny in Mobile-Home Land,” 440-442, 441 (July 1973).

owner.[7] This creates an instant "monopsony," with the attendant power on the landlord's part to dictate price.

Landlord abuses have taken the form of requiring tenants to patronize only companies affiliated with the landlord for various services--fuel oil and kerosene are examples--offered at exorbitant prices, and involving monetary payments back to the landlords.[8]

Moreover, landlords have discovered that in times of shortage they are able to levy various fees, in cash or in kind, on a captive population struggling to stay settled and also to keep their largest single asset--their mobile home--from being expropriated by landlords pursuing the very highest market rent, or the very highest fees, or the very greatest gain through a plan of predatory evictions. One consumer publication reports that “tenants have been assessed for the planting of trees, charged extra for

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[7] Robert S. Stubbs, “The Necessity for Specific State Legislation to Deal With the Mobile Home Park Landlord-Tenant Relationship,” 9 *Georgia Law Review* 212, 218-219 (1974).

[8] *See, Southland Development Corp. v. Ehrler’s Dairy*, 468 S.W. 2d 284 (Ky. 1984) holding such practices illegal; *see also* Robert S. Stubbs, “The Necessity for Specific State Legislation to Deal With the Mobile Home Park Landlord-Tenant Relationship,” 9 *Georgia Law Review* 212, 220 (1974); Stubbs sites F. Sparer, *How to Build Mobile Home Parks* 383 (1971), for the counsel to park owners that they sharply restrict the business that could do business with mobile home owners in the park.

having guests overnight, and told to pay for the privilege of having pets. They have paid entrance fees to get into the parks and exit fees to get out again."[9]

Because for many residents the decision to buy a mobile home in a mobile home park most often entails the expenditure of their life's savings in the purchase of the coach and improvements, and since many of these residents are at the stage of their lives when their economic flexibility is at a minimum, the purchase of a mobile home in a park where they will be the renter of the pad poses a special problem with respect to security of tenure. It is this problem which has been addressed by the remedial legislation to be described below.

Thus, local mobile home ordinances should include responses to distinct but related abuses. On the one hand, an ordinance should undertake to prevent the landlord from appropriating all or part of the sale value of the outgoing tenant's coach by charging a sale transaction fee. On the other hand, an ordinance should prevent the landlord from making the same appropriation via substantially higher rents to the incoming tenant (the equivalent of pro-rating

[9] *Consumer Reports*, "Tyranny in Mobile-Home Land," 440, 441 (July 1973).

a lump-sum transaction fee and collecting it as a periodic payment).

Eviction controls, as well as vacancy control of rents, are important to both efforts. The purpose of continuing rent control on vacancy is not primarily to protect prospective tenants from higher rents, but to protect existing tenants from abuse aimed at forcing them out. Experience has shown that dangling the vacancy decontrol carrot before landlords in times of housing shortage--when they know that they could obtain substantially higher "monopoly" rents if existing tenants were to "elect" to move--provides a potent incentive for landlords to engage in a variety of abuses to force tenants out. One local regulatory response is to attempt to control the great variety of these abuses through detailed legislation and litigation controlling the process of eviction. It is simpler and more effective, however, for government to prevent these abuses of existing tenants by simply not allowing vacancy decontrol, thereby removing the incentive for the abusive behavior.

The Market Power of Mobile Home Park Owners

The notion that competition can and should displace direct governmental intervention in economic affairs has some facial attractiveness. Since time immemorial, the doctrine that competition is the "life of trade" and that competition is the proper method and means of allocating resources--financial and natural--has been taught. As is discussed in detail below, however, conditions exist in the mobile home industry that inhibit competition (indeed, often prevent it altogether). In these situations, it is appropriate for local government to exert regulatory control over the availability and pricing of the affected housing.

One of the primary foundations for economic regulation is the presence of monopoly power over the offer of essential services. Under such circumstances, the law is necessary to stand between the provider of services and the abuse that unfettered monopoly power might portend. Clearly, however, the lack of competition alone is not now and never has been the *sole* determinant of whether public control is to be exerted over a business. Neither is the monopoly control of an essential service necessarily sufficient, standing alone, to justify regulation. The

monopoly provider of coal, for example, has never been subjected to regulation. Nor would a community's sole physician be subject to regulation because of her monopoly status.

The courts have recognized that the justification for regulation *may* turn on monopoly control of an essential good, but generally "something more" is involved. The U.S. Supreme Court on several occasions has expressly held that monopoly control, unto itself, was neither necessary nor sufficient to justify the public control of business.[10] Not even in the case in which economic regulation in the United States was first judicially approved (*Munn v. Illinois*, 94 U.S. 113, 125, 126 (1876)), did the Supreme Court specially predicate the power to regulate on the existence of a monopoly by the affected industry. Indeed, the Supreme Court held in words still applicable today that it was the public nature, and not the monopolistic character, of the grain industry that justified its regulation in the 1800s.

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[10] In *German Alliance Insurance Company v. Lewis,* 233 U.S. 389 (1914), the U.S. Supreme Court relied simply on the facts that fire insurance was an important industry and that many people were affected to justify regulation. So, too, in both *Budd v. New York,* 143 U.S. 517 (1891), and *Brass v. North Dakota,* 153 U.S. 391 (1894), did the U.S. Supreme Court expressly hold that monopoly control, unto itself, was neither necessary nor sufficient to justify the public control of business.

Monopoly control of essential services is a factor to consider in deciding whether or not to regulate an industry including the mobile home park industry. It may be sufficient by itself to justify imposing regulatory economic constraints. Nevertheless, monopoly control does not serve as the basis for *all* regulation.

The sheer magnitude of public harm should particular industries *not* be subject to governmental control has also served as the basis for public regulation. Certain industries are seen to hold a "special relationship" to the public. Because of the "unique public position" of these industries, the public would suffer disproportionate harm should abuses arise. The proposition is stated differently at different times. Tugwell stated as early as 1922 that “there might conceivably be a clear monopoly in the business of supplying the public with watch cases for instance but that business might not be regulated because it was not sufficiently important to the public interest."[11] In contrast, the U.S. Supreme Court stated it like this: "in some degree the public interest is concerned in every transaction between men, the sum of the transactions

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[11] Tugwell, *The Economic Basis of Public Interest*, 65 (1922).

constituting the activities of life. But there is something more special than this, something of more definite consequence which makes the public interest that justifies regulatory legislation." (*German Alliance Insurance Co. v. Lewis*, 233 U.S. 389 (1914)). The "something more," the Court said, was found to be the power and opportunity for an industry to engage in "imposition and oppression."

Unquestionably, government not only may, but must, regulate to protect the public's health and safety. In addition, if an industry is such that the public can be subjected to economic imposition and oppression, that industry is subject to public control through economic regulation. Under this approach, the opportunity and ability of the industry may arise because of the number of people affected, because of the magnitude of the payments made by the public to the industry, because of the high proportion of individual household income devoted to paying the industry, because of the life-sustaining necessity of the industry, or because of some similar factor.

Each basis for regulation discussed above offers assistance to a determination of the appropriateness of regulating the mobile home industry. The monopoly

justification, while incomplete, offers the "clear choice." If competition does not exist in the mobile home industry at the local level, municipal regulation of the pricing and availability of such housing may follow. The remaining "public harm" justification requires a more extended analysis. Nevertheless, regulation may be called for even though a "competitive" industry might exist. It may be necessary simply to prevent a substantial consumer harm.

The Consumer Interests at Stake

The prevention of public harm seems best suited as a justification for the local regulation of the mobile home industry if no monopoly is present. Local officials need not focus their sole attention on the business. Rather, they may consider also the social setting of the business, its market, and the spread of the consequences of non-regulation. Under this rationale, these decision-makers may also consider the extent of the consumer's disadvantage should the postulated abuses from non-regulation actually arise. These factors should be given considerable weight in any debate over the legitimacy of mobile home controls.

The provision of mobile home housing is without question an industry affected with a public interest.

Mobile home owners renting space in mobile home parks are peculiarly at the mercy of "profit maximizing" mobile home park owners. This arises out of several factors. The first is that "mobile" homes are, contrary to their names, not mobile at all. The second is that owners of mobile homes are generally elderly and generally long-term, well settled, residents in their parks; and third, in most areas there is no place to go, were the mobile home owner to desire, or be forced, to move.

Lack of mobility: The term "mobile home" is actually a leftover from the period 1930-1950, when "mobile homes" were more like the recreational travel trailers of today than the modern residential mobile home. Indeed, moving today's residential mobile home, especially if long established in its current location, is more akin in process and cost to moving a traditional single family dwelling than moving a pickup drawn travel trailer.

The immobility of the modern "mobile home" is due to several factors. The most significant of these is that today's mobile home is ***designed*** to be permanently placed on a pad and maintained there for its useful life. Most mobile homes, for example, are not manufactured with permanent undercarriages. Temporary axles and wheels are bolted to

the frame by professional movers and then removed once the mobile home is delivered and set on its chocks or placed on a foundation.

The majority of modern mobile homes are either double-wide or triple-wide, and many have other rooms or discrete additions added on. This means that the typical mobile home in a mobile home park was manufactured in two, three or more parts, delivered in sections, and then aligned, bolted, sealed, roofed, carpeted, wired and plumbed on-site at the park. In order to move a double- or triple-wide mobile home, the process has to be repeated in reverse. Added complications thus include that the home will then have its full complement of personal property to shift, that plumbing connections relatively easy to make when new will have to be separated when old, and the like.

The costs associated with moving a mobile home (both dollar and otherwise) can be, and generally are, substantial, especially in the context of elderly or fixed income residents. Moving and re-installing the mobile home itself may run from three to ten thousand dollars, depending on the number of components, the amount of disassembly required, the distance, and the site preparation required at the other end. This does not

include the value of the additional investment required to reproduce the permanent improvements made by the tenant but claimed by the landlord as fixtures. These might include, for example, decks, porches, carports, paving, gardens, ornamental fountains and other stonework, and the like. These costs, of course, can, and often do, run to several thousands of dollars.

Elderly, long-term residents: The demographics of the mobile home owning population also adds to its relative immobility. The statistics indicate that mobile home tenants are more likely to be older and thus more likely to live on fixed incomes than the apartment renting population. The 1984 Hamilton, Rabinovitz Rental Housing Study prepared for the City of Los Angeles concluded as follows:

> With respect to age, the head of the household in more than three-quarters of the mobile home households is at least 62 years old. The mean age of the head of household in mobile home tenant families is 67 years, 25 more than for apartment renters. Two thirds of the

mobile home households have at least one elderly member.[12]

The same study also indicated that 43 percent of all mobile home households are headed by women, mostly elderly. Approximately 95 percent of all mobile home park tenants own their own mobile homes.

Most mobile homes are located on only one site during their useful life. One recent study, again using California data, indicated that "only about 3% of mobile home coaches in California were ever moved during their lifetime, following their original installation."[13] Yet another study puts the figure at 1 percent.[14]

National figures closely mirror this California data. Nearly 4.0 million households resided in mobile homes in the United States in 1983, 3.2 million of whom lived in owner-occupied homes. Of these households living in owner-occupied mobile homes, nearly 660,000 heads of household were 65 years or older. When tenants are included also, 2.0

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[12] Hamilton-Rabinovitz, *Los Angeles Rental Housing Study*, at 6.

[13] Werner Z. Hirsch, "An Inquiry into Effects of Mobile Home Park Control," 24 *Journal of Urban Economics* 214 (1988).

[14] W.Z. Hirsch & J.G. Hirsch, "Legal-Economic Analyses of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol," 35 *UCLA Law Review* 405 (1988).

million mobile homes were occupied by elderly households. The most recent American Housing Survey indicates that 43 percent of older residents of mobile homes have annual incomes below $10,000, and nearly 80 percent have annual incomes below $20,000. Nearly half of the older residents of mobile homes nationwide live alone, and most of these residents are widows.[15]

No place to go: There is a shortage of adequate and affordable housing in many areas of the nation where growth has been substantial, including the greater Los Angeles area, where very high prices for standard housing has led to greater demand for mobile home park locations. This has produced mobile home park pad vacancy rates in the 1.5 percent range, very low by any standard. The immobility of the mobile home, and the immobility of the typical mobile home resident, are exacerbated by very low vacancy rates, since finding a vacant pad to move to is a necessary part of any plan to move a mobile home.

As can be seen, due to the confluence of several factors, some having to do with the mobile home market and

[15] U.S. Department of Commerce and U.S. Department of Housing and Urban Development, *American Housing Survey for the United States in 1989*, at Tables 7-9 *et seq.* (1991).

others having to do with mobile home park owners, the tenants of mobile home parks are often "at risk" and in need of protection. The owners of mobile home parks have both the incentive, and the opportunity, to engage in monopoly-supported pricing, as well as abusive consumer practices. Under such circumstances, local governments not only may, but should, consider rent control coupled with vacancy control regulations.

PROTECTING AGAINST A CONSTITUTIONAL CHALLENGE

Whenever local governments seek to protect local land use ordinances against a constitutional “takings" challenge, two types of “takings" must be considered: (1) a "physical taking," as discussed in cases such as *Loretto*,[16] *First Lutheran*,[17] *Nollan*[18] and *Yee*; and (2) a "regulatory taking," as discussed in the seminal *Penn Central* decision[19]

[16] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

[17] *First Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304 (1987).

[18] *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

[19] 438 U.S. 104 (1978).

as well as more recently in *Lucas*.[20] Each will be briefly examined below.

Physical Takings

For a mobile home park owner to be successful in a challenge to a mobile home rent control ordinance, based on a constitutional theory of a "physical taking," the park owner must first convince the court that she has a "separate independent property interest" at stake. State law establishes whether such a "separate independent property interest" exists.

"Property interests" that are subject to a physical taking can come in many different forms. On the one hand, an interest might involve an actual "thing," such as underground coal which a state or city has prohibited a company from mining; a building, part of which has been physically occupied for purposes of cable television cables; or a parcel of land, part of which has been physically occupied (even if only temporarily) as an easement on property. On the other hand, more recent efforts by conservative economists have sought to gain

[20] ___ U.S. ___, 112 S.Ct. 2886 (1992).

recognition of "dominion interests" as a legally cognizable separate "property interest" subject to taking. Dominion interests involve the power to exercise control--or dominion--over one's property. Dominion interests include, for example, the right to choose who may occupy a parcel of land (and, conversely, who may be excluded). It was this type of "dominion interest" that was at issue in *Yee*.

The existence of a property interest does not depend on any local government action. No local government action can create an interest where it does not exist. Nor may a local government action deny the existence of a property interest recognized by state law. Accordingly, that element of a "physical takings" challenge--whether or not a property interest exists in the first instance--is not discussed below. Instead, the discussion below will assume the existence of a property interest[21] and discuss what specific actions are available to make it less likely that a challenger will prevail in allegations that the property

[21] This is not to concede the existence of a property interest. This simply asserts that whether or not a property interest exists is a matter of state law, to be argued to a court. Local governments cannot take specific actions to affect the outcome of this litigation.

interest has been totally destroyed and thus "physically taken."

For a "physical taking" challenge to be successful, the property holder must demonstrate that her separate independent property interest has been “totally destroyed." If the government action simply restricts an interest, even if the restriction is substantial, the interest has not been taken. Hence, for example, a prohibition on the sale of eagle feathers was not considered a taking of the feathers, since the law only restricted one means of transferring ownership in such feathers (*i.e.*, selling), while permitting other means of transfer. Similarly, restrictions on a landowner's right to exclude tenants for non-economic reasons is supportable, as well, since the landowner's right to exclude has not been totally destroyed. If a current or prospective tenant does not or cannot pay the rent, or refuses to abide by the reasonable regulations of the landholder, for example, that tenant is subject to exclusion. As can be seen, one important task for a local government to undertake is to document the ways in which the property interest asserted by the landholder has been preserved, even if restricted.

A second important task for the local government to undertake is to carefully document the means by which the landholder is voluntarily holding her property out for public consumption. At the heart of any "physical taking" challenge must lie an allegation that there is a local government action that results in a "physical occupation" of the claimed property interest. In turn, what is at the heart of the "physical occupation" is a "required acquiescence." (*F.C.C. v. Florida Power Corp.*, 480 U.S. 245 (1987)). If instead of a "required acquiescence," there is a voluntary invitation for the property to be in the public domain, with the manner of the public use being subject to governmentally-imposed restrictions, there is no "required acquiescence."[22] Hence with mobile home rent control ordinances, even those involving vacancy controls, there can be no "physical taking" just because the park operator, after inviting a homeowner to rent space in her park at a particular rent, receives a lower rent as a result of a local ordinance, and that same rent is then paid by a subsequent purchaser of the mobile home.

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[22] Compare *Loretto, supra*, to *Florida Power, supra*. *See also, PruneYard Shopping Center v. Robins*, 447 U.S. 74, 84 (1980); *Marsh v. Alabama*, 326 U.S. 501, 506 (1946).

Notwithstanding these means of protecting against a "physical takings" challenge, there are certain actions that a local government may not do. In *Nollan v. California Coastal Commission* (483 U.S. 825 (1987)), the prospective purchasers of a beachfront lot had sought to tear down an existing bungalow and replace it with a larger house. The Nollan property, however, lay between an oceanside county park located north of their property and another public beach somewhat south of their property. Pursuant to state law, in order to engage in construction work for their new home, the Nollans were required to obtain a coastal development permit from the California Coastal Commission. The Commission approved the permit conditioned on the Nollan's granting an easement across their beach so that the public could move from one public park to the other.

In a Scalia decision, the Supreme Court disallowed the condition on the permit. Had the state, the Court said, simply required the Nollans to make a permanent easement across their beach available to the public, there would unquestionably have been a taking. Imposing the easement as a "condition" on the building permit did not change its essential character. Moreover, the Court said, “to say that the appropriation of a public easement across a landowner's

premises does not constitute the taking of a property interest but rather 'a mere restriction on its use' is to use words in a manner that deprives them of all their ordinary meaning."

The *Nollan* decision was one of the first to directly address the existence of "dominion interests" as a separate independent property interest. "The right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" (*Id*., at 831, quoting, *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 433 (1982)). The necessary "permanent physical occupation" required by *Loretto* as part of a physical taking is satisfied by granting individuals "a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed even though no particular individual is permitted to station himself permanently upon the premises." (*Id*., at 832). Most importantly, *Nollan* indicates that a local government may not couch a prohibited taking in the form of a "condition" to a permitted activity and expect it to withstand constitutional scrutiny.

Regulatory Takings

Given the Supreme Court's decision in *Yee* that mobile home rent controls, including vacancy control, do not run afoul of constitutional restrictions on physical takings, it is important to consider also whether such ordinances might be subject to an argument that there is a "regulatory taking." Any analysis of regulatory takings must begin with the Supreme Court's seminal decision in *Penn Central*,[23] and then extend through the recent decision *in Lucas v. South Carolina Coastal Commission*.[24]

Allegations of regulatory takings differ sharply from allegations of physical takings, in that a regulatory takings analysis "necessarily requires. a weighing of private and public interests." (*Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980)).[25] By definition, government regulation involves the "adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property."

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[23] *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

[24] ___ U.S. ___, 112 S.Ct. 2886 (1992).

[25] In contrast, according to *Lucas*, "in general (at least with regard to permanent invasions), no matter how minute the

(Andrus v. Allard, 444 U.S. 51, 65 (1979)). In undertaking this weighing, the public benefit arising from the regulation is considered in light of the nature and extent of the interference with the rights of a property holder. The government action must promote a legitimate government interest and may not deny the property holder a reasonable return on investment when the parcel is considered as a whole. The decision in *Penn Central* suggested some factors to consider in a multifactor inquiry: "The economic impact of the regulation on the claimant," the "extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action." (*Penn Central*, 438 U.S. at 124).

The most recent guidance on regulatory takings came in the June 1992 *Lucas* decision. In *Lucas*, complainant had purchased two lots on a South Carolina barrier island with the intent to build two single-family homes. At the time of the purchase, the barrier islands were not subject to the state's coastal zone building permit requirements. When the state enacted legislation in 1988 barring the construction of any permanent habitable structures on his land, *Lucas*

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intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Id*., at 2886.

filed suit alleging that the ban deprived him of all "economically viable use" of his property. That allegation was not disputed by the state, and, accordingly, the legal issue presented was the circumstances under which such a total economic deprivation could occur without compensation.

Two circumstances exist under which compensation is required pursuant to the takings clause of the constitution, the *Lucas* Court said (*Id.*, at 2893). The first involves a physical appropriation of property. The second involves where regulation deprives the landholder of all "economically feasible use" of her property. "Regrettably," the *Lucas* Court said, “the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision" (*Id.*, at 2894). The justification for the rule, however, is simply that “total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." (*Id.*). Moreover, regulations that leave a property owner without any economically viable use of her land, "carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." (*Id.*).

It is *not* the case, however, as made clear in *Lucas*, that a property owner who shows the lack of an economically viable use is automatically entitled to compensation. "Many of our prior opinions have suggested," the *Lucas* court said, "that 'harmful or noxious uses' of property may be proscribed by government without the requirement of compensation." (*Id*., at 1297). This historical use of an analysis of harmful or noxious uses, *Lucas* continued, "was* * *simply the progenitor of our more contemporary statements that 'land-use regulation does not effect a taking if it substantially advance[s] legitimate state interests'* * *."

Nonetheless, the *Lucas* Court said that recitations of legitimate state interests in regulation are an insufficient basis upon which to avoid paying compensation in those instances where regulation eliminates all economically feasible use of a property.

> When it is understood that 'prevention of harmful use' was merely our early formulation of the police power justification necessary to sustain (without compensation) any regulatory diminution in value; and that the distinction between regulation that 'prevents harmful use' and that which 'confers benefits' is

> difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory 'takings'--which require compensation--from regulatory deprivations that do not require compensation.

(*Id.*, at 2899). The Court then warned that "a fortiori the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated." (*Id.*). The Court then held that "any regulations that prohibit all economically beneficial use of land* * *,"

> cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law or property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts--by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary

> power to abate nuisances that affect the public generally, or otherwise.

(*Id.*, at 2900). A regulation, *Lucas* said,

> may well have the effect of eliminating the land's only economically productive use, but it does not proscribe productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was always unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit.

(*Id.*, at 2900).

The inquiry to be engaged in "will ordinarily entail," *Lucas* said, analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, the social value of the claimant's activities and their suitability to the locality in question, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners alike). (*Id.*, at 2901).

Local governments faced with a regulatory takings challenge under Lucas must present more than a factual analysis consistent with the principles stated above. The local government must be capable of "identify[ing] the background principles of nuisance and property law that prohibit the uses [the property holder] now intends in the circumstances in which the property is presently found." (*Id.*, at 2901). Where the State seeks to sustain regulation that deprives land of all economically beneficial use, the Court said, "we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." (*Id.*, at 2899).

The restrictions of the *Lucas* decision, however, should not be taken too far by local government officials concerned about the prospect of facing challenges based on regulatory takings analysis. For example, the *Lucas* case provides absolutely no form of assistance to mobile home park owners who might wish to challenge rent control ordinances, whether with or without vacancy control provisions. *Lucas* does not require an effective finding of a public nuisance to support any diminution of value that might arise from a local regulatory scheme. By its terms,

the Lucas decision is limited to those circumstances where "regulations* * *prohibit all economically beneficial use of land." (*Id*., at 2900). The decision is directed to regulations that "have the effect of eliminating the land's only economically productive use." (*Id*.). There must be a "total taking." (*Id*., at 2901). The fact that "no productive or economically beneficial use of land is permitted," the *Lucas* Court noted, is not commonly found, but would instead involve an "extraordinary circumstance." (*Id*., at 2894).

Moreover, the Court said, while "the fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition," although "changed circumstances or new knowledge may make what was previously permissible no longer so." (*Id*., at 2901). A local government is thus not inextricably bound by past inaction by local decisionmakers. The government may always react to "changed circumstances" and "new knowledge." What is important for local decisionmakers to glean from this *Lucas* language, however, is the need to identify explicitly, and with precision, what those "changed circumstances" might be and what that "new knowledge" might entail.

It is also important to remember, even in light of *Lucas*, that when seeking to protect a local ordinance against a claim of a regulatory taking by a mobile home park owner, a local government should precisely define what the mobile home park owner is claiming to be "taken." Most frequently, the claimed property interest is in lost rents or in the lost value of property. The value of property, of course, is simply the capitalized stream of future income and is thus merely an alternative means of claiming lost rents. If in fact the landholder bases her constitutional challenge on a claim of lost revenue, a regulatory taking has not likely occurred. The Supreme Court has made clear that "government may execute laws or programs that adversely affect recognized economic values." (*Penn Central*, 438 U.S. at 125). Particularly with regard to the regulation of landlord-tenant relations and housing conditions, the Court has "consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." (*Loretto*, 458 U.S. at 440; *Pennell*, 485 U.S. at 11-12).

A final important task for the local government is to document how its local ordinance fits together with other local schemes. A local government should consider and document, in other words, whether any particular ordinance is simply trying to undo some harm that necessarily results from a *prior* action of the government.[26] It has long been established that where local government actions create a problem, that government can take substantial steps seeking to redress the problem. How this principle operates is particularly clear in the enactment of rent control ordinances (incorporating vacancy control components) within the mobile home park context.

In affirmatively protecting against a takings challenge levied against these ordinances, local officials should carefully consider whether other local ordinances have contributed to the market power which support landlord abuses with which to begin. Scarcity in mobile home park spaces might provide a mobile home park owner with sufficient monopoly market power both to capriciously evict

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[26] *See, Cider Barrel Mobile Home Court v. Eader*, 287 Md. 571, 574 (1980) (zoning severely limits mobile home parks. Accordingly, mobile home park owner can dictate unfavorable rental terms and conditions). *See also, Eamillo v. Liberty Sales*, 208 Conn. 620, 648 (1988).

existing tenants, and to seek to exact monopoly rents from existing and prospective tenants. The underlying mobile home housing scarcity, however, might exist largely because of government regulation such as zoning, licensing, and other restrictions on mobile home parks in the first instance. It may well have been these government actions, in other words, that helped create the scarcity of mobile home park housing that the park owners now seek to exploit. Without these siting and licensing restrictions, if one mobile home park owner were to act unreasonably--either by seeking monopoly-rents or in engaging in abusive tenant practices--someone else who would not engage in such activities could enter the market and draw business away by refusing to engage in such activities. The abusive landlord would not survive. Because of governmental restrictions, however, this cleansing process cannot happen.

To document the created scarcity is thus important. Having created the ability of the landlord to exclude on other than economic grounds, local government can either restrict or reclaim that ability by rent control ordinances (including ordinances extending vacancy control).

A related, but separate, step local decision-makers should take is to document how the mobile home park

restrictions might be necessary to preserve the integrity of other consumer protections enacted by the city. Municipalities may impose rent control without running afoul of constitutional constraints. In its 1988 decision in *Pennell v. City of San Jose* (485 U.S. 1 (1988)), the U.S. Supreme Court upheld San Jose's rent control ordinance and its "hardship review" provision, which established a means for tenants to object to rental increases. Reaffirming its long-standing view that rent controls are constitutional, the Court upheld the ordinance, acknowledging that a "legitimate and rational goal of price or rate regulation is the protection of consumer welfare." Thus, rent control is a legitimate form of rate regulation designed to protect tenants from "rates or prices that are artificially inflated as a result of the existence of a monopoly or near monopoly."

Given the legitimacy of the rent control ordinance in the first instance, local governments must be given great latitude in making legislative determinations of how to ensure that the rent control provisions are not evaded, particularly when substantial opportunity exists for such evasion. The vacancy control provisions in many California rent control ordinances, for example, can be viewed as a

means to prevent evasion of the rent control provisions. The courts have made clear that even if there are alternative ways to insure against statutory evasion, legislative decision-makers are free to choose the method they find most efficacious and convenient.

Drafters of a local rent control ordinance may well consider evasion of the rent control provisions through unjust evictions, harassment, and the like a serious potential danger. Accordingly, while not prohibiting evictions in their entirety, and while not prohibiting the mobile home park owner from being able to exercise some control over new mobile home park residents, a single strand of the mobile home park owner's "right to exclude" has been regulated, indeed eliminated: the right to exclude at the sole discretion of the owner, without just cause and without commercially reasonable objections. In this case, even if the right to exclude on other than economic grounds is viewed as a separate property strand, that strand cannot be viewed independently of the right of a city to enforce its rent control ordinance so as to prevent evasion.

CONCLUSION

In sum, when a local government enacts an ordinance setting forth regulations for mobile home parks, including mobile home park rent control ordinances, the local government should assure itself that it has asked at least the following questions:

1. What abuses are being subjected to control;
2. To what extent do mobile home park owners exert substantial local market power;
3. What is the vacancy rate for (1) new; and (2) used mobile homes;
4. Is there a "special relationship" which mobile home park owners have with the public, either because of the number of people affected, because of the magnitude of the payments made by the public to the industry, because of the high proportion of individual household income devoted to paying the industry, because of the life-sustaining necessity of the industry, or because of some similar factor;
5. What are the demographics of local mobile home park residents;

6. Are there other ordinances which tie into the mobile home park ordinance, or which rely on the mobile home park ordinance as a means to prevent evasion;
7. Has the market power, if any, of mobile home park owners been created or sustained in any fashion by local government action;
8. Does the mobile home park ordinance interfere with an owner's right to receive an adequate return on her investment; and
9. What are the ways in which the landowner held the property out to be available for public consumption?

Local governments wanting more information on how to protect their local mobile home park ordinances against legal challenge may request copies of the materials FSC prepared for the City of Los Angeles in support of that city's mobile home park rent control ordinance. Officials may request FSC's mobile home park vacancy survey (done in Forest Grove, Oregon), as well, to determine how a municipal government may develop data on that issue. Order publications by writing FSC, 33126 S.W. Callahan Road,

Scappoose, OR 97056 (or FAX a request to 503-543-7172). These materials will be provided free.

Requests for assistance on developing a rent control ordinance, as well as developing the necessary rationale for supporting it, can be directed to FSC at that same address and phone.