Litigation Update

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CALIFORNIA SUPREME COURT REJECTS JUST COMPENSATION CLAIM

(*San Remo Hotel v. City and County of San Francisco*)

The California Supreme Court rejected arguments by the Washington Legal Foundation (WLF) that a government regulation requiring hotel owners to pay exaction fees to ease the shortage of low-income housing in San Francisco constituted a taking of private property requiring just compensation. The opinion was written by Justice Werdegar and joined by Chief Justice George and Justices Moreno and Kennard. A concurring and dissenting opinion was written by Judge Baxter, with a vigorous dissent by Justice Brown.

This case arose from a San Francisco ordinance called the Residential Hotel Unit Conversion and Demolition Ordinance (HCO). Because the city identified what it regarded as a crisis in available housing, it issued a temporary moratorium in September 1979 that prohibited hotel owners from renting any more rooms to tourists than they had done on that date. Before September 23, 1979, San Remo could rent to tourists or tenants, as it wished. That "temporary" moratorium eventually took on a life of its own: it was enacted as a permanent ordinance and persists, with amendments, to this day. Supposedly "in order to accommodate hotel owners who desire to convert to permanent tourist use," the HCO "allows an owner to convert by replacing the lost housing." The lost housing is replaced, according to the city, by imposing a fee on owners who want to increase the number of rooms available for rent to tourists. That fee is exorbitant: it equals between 40% and 80% of the cost of replacing that unit elsewhere in the city.

The HCO hit the San Remo Hotel particularly hard. San Remo had long rented most of its rooms to tourists. But in 1979 when the city surveyed all hotels to determine the proportion of tourist and long-term tenant use, San Remo's hotel manager mistakenly reported that the hotel rented all of its rooms to long-term tenants. Consequently, when San Remo later attempted to "convert" its rooms for tourist use, the city demanded $567,000. San Remo paid the fee, protested administratively, and initiated this lawsuit to recover the property taken because of the HCO. After a complicated set of federal and state proceedings, San Remo lost in the trial court but prevailed in the court of appeal. The city then appealed to the California Supreme Court, where the case is now pending.

In its brief filed with the court, WLF raised three arguments. First, it argued that U.S. Supreme Court decisions interpreting the Takings Clause have reduced the discretion of local

land use authorities, such as those responsible for administering the HCO. Contrary to San Francisco's assertions, Supreme Court case law does not leave local land use authorities free to trample on property rights. Second, WLF demonstrated that monetary exactions, government demands for the payment of money as a condition for obtaining a government permit, require heightened judicial scrutiny. If it were otherwise, the government could use its permitting authority to impose unwarranted financial conditions on the property owner seeking permission to use or develop his property. Third, WLF pointed out that the city cannot evade its constitutional duty to pay compensation through the simple device of redefining San Remo's property rights. Otherwise, the city's power to define property rights could be used to "opt out" of the Takings Clause.

In its opinion, the California Supreme Court ruled that there need be no heightened scrutiny of the exaction fee of $567,000 since the fee was imposed as required by legislative directive rather than at the discretion of the permitting agency. More importantly, the Court ruled that no taking of private property occurred because the property owner is merely being required to compensate the city for discontinuing a service, namely, providing low-cost housing, and can still operate a hotel for tourists.

In her dissent, Justice Brown sharply criticized the majority for trampling upon private property rights which she said is "already an endangered species in California." Justice Brown described the HCO scheme as one where the government is saying in effect: "We have the power; therefore, pay us to leave you alone. By any measure, that is extortion. Moreover, it turns the takings clause on its head. Instead of the government having to pay compensation to property owners, the government now wants property owners to compensate *it* to get back the fair value of property the government took away through regulation."

WLF is a public interest law and policy center with supporters in all fifty states. It devotes a significant portion of its resources to defending and promoting the principles of free enterprise and individual rights. WLF is currently briefing an important takings case in *McQueen v. South Carolina Dep't of Health and Environmental Control* before the South Carolina Supreme Court. In that case, WLF's client was not permitted to develop two residential lots in Myrtle Beach, South Carolina, because of wetland restrictions imposed on the property after Mr. McQueen purchased the lots.

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