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## REGULATORY TAKINGS LAW: NINTH CIRCUIT PANEL HOLDS A MOBILE HOME RENT CONTROL ORDINANCE IS SUBJECT TO A "FACIAL CHALLENGE" AND AWARDS COMPENSATION TO PROPERTY OWNERS

*Guggenheim v. City of Goleta* (9th Circuit, No. 06-56306, 9/28/2009).

By [Dave Lanferman](#) and [Deborah Rosenthal](#)

According to a panel of the federal Ninth Circuit Court of Appeal, the City of Goleta owes compensation to mobile home park owners for economic losses resulting from the enactment of a mobile home rent control ordinance. In *Guggenheim v. City of Goleta*, the panel held that, on its face, the rent control ordinance effectuated a “naked transfer” of approximately 90% of the value of the property from the park owner to the tenants. The court declared that “a facial challenge [to an ordinance] exists as a viable legal claim” under the ad hoc, multi-factor standards first described by the U. S. Supreme Court in 1978, in *Penn Central v. City of New York* (1978) (438 U.S. 104). Based on the unusual circumstances of this case, the court addressed the merits of the claim and found that this severe loss of value was a compensable regulatory “taking,” even though the park owners continued to earn positive annual returns.

“Regulatory takings” litigation involves claims, usually by property owners or developers, that land use regulations decrease use or value to such an extent as to “take” property interests and require payment of “just compensation” under the Fifth Amendment to the U. S. Constitution and similar state constitutional guarantees. A “facial challenge” is based on a claim that the mere enactment of the regulation constitutes a compensable taking of protected rights or interests. Regulations that diminish, but do not wipe out, property values are analyzed under *Penn Central*.

The *Guggenheim* decision addressed many of the most hotly debated issues in current regulatory takings law. In most such cases, procedural hurdles keep plaintiffs out of federal court, on the ground that their claims are not “ripe” for review until there is a final state court decision under the still controversial *Williamson County v. Hamilton Bank* (1985) 473 U.S. 172. The court majority concluded that “the unusual and lengthy development of the case” (including two earlier rounds of litigation in federal court and at least one round in state court) allowed the court to address the merits of the owner’s claims for the first time.

The opinion broke new ground by holding that a “facial challenge” to a regulation can be pursued as a taking

under *Penn Central*. The majority opinion, by Judge Bybee, addressed and analyzed a wide range of takings issues, including:

1. Standing: The court held that the plaintiffs had standing to raise the facial challenge, even though they had purchased the mobile home park long after it was subject to the County's mobile home rent control. The court distinguished cases denying standing to plaintiffs in facial challenges where the plaintiffs came to the property after the regulations were in place, and held that the owners here had demonstrated "actual injury" from the ordinance. [Note: the City did not raise standing in the District Court, which many have affected the result.]
2. Ripeness: The court held that the "ripeness" requirement for suing in federal court under *Williamson County* was "prudential" rather than "jurisdictional." Accordingly, the court could (and did) find that the ripeness defense may be waived. Nonetheless, the court addressed ripeness on its own, and found that the extensive litigation history demonstrated a final state position on the owner's taking claims, even without a final state court decision.
3. A Facial Challenge to Regulation Under *Penn Central* Is Viable: The court concluded that *Penn Central* applies where mere enactment of a regulation results in a significant (but less than total) economic loss. Although the court acknowledged that such facial challenges to partial takings remain "difficult," they are viable for the range of claims involving diminution in value resulting from regulation which are not total wipe outs, but nevertheless arguably "go too far" under *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393. The court then considered whether the rent control ordinance effected a "regulatory taking" under the three-part *Penn Central* test:

(a) Economic Impact of the Regulation: First, the court found that the evidence showed the rent control ordinance caused "significant economic loss" to the park owners—an 80% discount in rental value of the park and a 90% "wealth transfer" from the owners to the tenants. Even if other evidence showed owners earning up to 10% annual returns on their investment, a taking could be found if the owner could have earned substantially more in the absence of the regulation. This was a significant finding, and in notable contrast to many prior takings cases.

(b) Investment-Backed Expectations of Subsequent Purchasers: Next, the court applied *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, holding that even a plaintiff who buys land already subject to regulation may pursue a takings claim. The court acknowledged that a purchaser who paid less for regulated property may have lower "investment-backed expectations," but required those to be weighed as one factor under *Penn Central*. The court in *Guggenheim* found that the owners' investment-backed expectations were not determinative when considered in tandem with the "economic impact of the regulation."

[Note: The dissent disagreed on this point, contending that the City’s ordinance did not “take” anything from the owners, since the City’s ordinance was merely a re-enactment of a County rent control ordinance in effect when the plaintiffs bought the mobile home park was subjected to rent control.]

(c) Character of the Governmental Action: Finally, the court found that the ordinance effected a “wealth transfer” from one identifiable class to another and therefore is more like a “classic taking” than a mere shifting of regulatory burdens. Mobile home park owners were singled out for disproportionate burdens of trying to provide affordable housing, and the court noted that other forms of housing were not subject to similar rent controls. The court also noted that this ordinance may serve other, less noble, objectives:

The [ordinance] also benefits another group: those who would like to support affordable housing initiatives without paying for it themselves, for example, owners and developers or other forms of housing such as apartments that might otherwise be forced to provide subsidized housing, and taxpayers who want to subsidize affordable housing without actually increasing their own tax liability.

(Slip Opinion at pp. 13851-13852.)

4. Evidence: The court then discussed what type of evidence is appropriate in such a facial challenge— noting that a plaintiff must be allowed to put in enough evidence of personal economic harm to demonstrate standing to sue (and is not limited to the text of the ordinance itself), but not so much as to convert the case into an “as-applied” challenge. The panel held that the District Court had erred by refusing to allow the plaintiff to put on any evidence. The court noted that both sides had submitted evidence acknowledging some degree of economic loss to the owners from the regulation, which was important to the court’s finding that a taking had occurred.
5. Compensable Taking: The court found enough evidence in the extensive record of this case to demonstrate the “taking” of the owners’ property interest in what it described as a “transfer premium” the context of rent-controlled mobile home park leases. The rent control regulations create a “below market rent” situation, and the transfer premium represents the current value of enjoying a below market rate lease on a mobile home park space. The City’s ordinance had the undisputed effect of transferring this asset from the park owners to the current tenants. The majority held that the City may lawfully take this approach to attempting to increase the availability of affordable housing -- but the Fifth Amendment requires compensation to the park owners for the value of the loss. The court remanded for determination of the value of the lost

premium. [Note: The dissent expressed concern that a repeal of the rent control ordinance would unfairly harm the current tenants, who had paid premiums (to earlier tenants) in excess of \$85,000 per unit to buy coaches subject to rent controls.]

6. Due Process & Equal Protection: The court affirmed the trial court's rejection of plaintiffs' due process and equal protection claims, noting that current precedents merely require that regulations be reasonably designed to try to achieve a legitimate governmental objective (such as the provision of affordable housing) and do not require that rent control regulations actually achieve the desired outcomes.
7. "Affordable Housing": The court observed that state and local governments have a legitimate interest in increasing the availability of affordable housing for their citizens. "Translating that interest into effective public policy, however, has proven difficult." The court concluded by noting the Supreme Court's admonition that some well-intended governmental actions will be found to have gone too far, and to require compensation, if they improperly "force some people alone to bear public burdens which in all fairness and justice should be borne by the public as a whole," citing *Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, 537 (quoting *Armstrong v. United States* (1960) 364 U.S. 40, 49).

Dissent: The dissent by Justice Kleinfeld agreed that the case was ripe, and that rent control ordinance would be a regulatory taking under *Penn Central*, but thought that there was no injury to the plaintiffs because they bought the park with the rent control ordinance in place, "after the takings that mattered."

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