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Roger Bernhardt

Golden Gate University School of Law, rbernhardt@ggu.edu

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Roger Bernhardt

San Remo Hotel, L.P. v City & County of San Francisco (2002) 27 C4th 643, 117 CR2d 269

In response to a housing shortage for low-income and elderly residents, assertedly caused by the conversion of the city's residential hotels to nonresidential hotels or condominiums, the city enacted a hotel conversion ordinance (HCO), which placed substantial restrictions on such conversions by owners of residential hotels. The owner of the San Remo Hotel (hotel) obtained approval from the city, under the HCO, to convert its "residential" rooms to short-term use (*i.e.*, less than seven days), conditioned on (1) obtaining a conditional use permit (CUP) to operate as a tourist hotel, and (2) replacing the residential units that would be "lost" by the conversion by paying an in-lieu fee to a city fund for the construction of low- and moderate-income housing. The HCO allowed hotel owners to meet this latter requirement by providing new replacement residential units.

The owner challenged the CUP requirement by petition for a writ of mandate, and challenged the housing replacement requirement on the ground that the taking of private property without just compensation violated Cal Const art I, §19. Holding for the city, the trial court denied the writ petition and sustained a demurrer to the takings counts. The court of appeal reversed, holding that the owner properly alleged an unconstitutional taking.

The supreme court reversed, holding that the trial court had properly denied the petition for a writ of mandate and sustained the demurrer as to the remaining causes of action. The court found that the city had properly required the hotel owner to obtain a CUP for full tourist use of the hotel. Even if some tourist use had previously lawfully existed, a permit was required if any of the hotel's rooms had previously been committed to residential use, because a CUP would be issued for the entire hotel and not just for each individual room. Moreover, there was no basis for "grandfathering" tourist use in either the entire hotel or individual rooms.

The court also held that the housing replacement fee was not subject to a "heightened scrutiny" analysis. Although certain governmentally imposed fees are subject to heightened scrutiny because of their discretionary nature, the administering agencies have no discretion regarding the imposition or size of the housing replacement fee. Under the HCO, the responsible city agency "shall . . . deny" an application to convert residential units to tourist use if the housing replacement requirement is not satisfied, and "shall issue" the permit only if the ordinance's requirements, including that for housing replacement, are met.

The applicant for conversion had the option of satisfying the replacement requirement by (1) constructing or bringing onto the market new units; (2) sponsoring such construction through a public or nonprofit developer; or (3) paying, in lieu of such construction, a commensurate fee to the city housing fund. An applicant choosing the in-lieu fee would pay an amount determined according to a set formula based on replacement cost. Accordingly, no meaningful government discretion was pertinent to either the imposition or calculation of the in-lieu fee. Further, the

court found that the HCO was legislation that generally applied, without discretion or discrimination, to every residential hotel in the city seeking conversion.

Finally, as to the merits of the owner's taking claims, the court rejected the owner's contention that there was no connection between the housing replacement fees and the housing lost by conversion to tourist use. To the contrary, the court found that the housing replacement fees bore a reasonable relationship to loss of housing: "A mitigation fee measured by the resulting loss of housing units was . . . reasonably related to the impacts of [the hotel owner's] proposed change in use." The court also rejected the owner's claim that the HCO did not preserve available housing. Although a single room without a private bath and kitchen might not be an ideal form of housing, those units accommodated many whose only other options might be sleeping in public spaces or in a city shelter.

►**THE EDITOR'S TAKE:** Because most of the majority opinion is devoted to arguing with the dissent on the significance of property rights in the United States, there is little actual guidance to communities seeking to enforce restrictions like this, or to owners trying to resist them.

The court's substantive conclusion is that "the housing replacement fees bear a reasonable relationship to loss of housing"; but on what basis was that determination made? Readers are told there was a formula based on the number of rooms as of a given date, but that merely relates to the multiplier, not to the basic fee charged per room. The real issue—whether a city can impose the full cost of creating a replacement unit elsewhere on a hotel owner who wants to convert a residential unit into a tourist unit—seems to go almost undiscussed in the majority opinion. The court's answer has to be yes, since the ordinance is upheld, but some explanation would have helped. Is the court upholding the right of a community to impose the entire replacement cost of any desirable activity upon the person who proposes to abandon it? (If so, is this just a further working out of the formula in *Ehrlich v City of Culver City* (1996) 12 C4th 854, 117 CR2d 269. Can an additional charge be tacked on if the replacement activity is, for example, placed in a less convenient locale, or if some of the original amenities are lost along the way?)

It is hard enough to quantify how much a developer should be charged to mitigate the perceived harm caused by its new activity introduced into the community; to calculate a proper charge to cover the loss of the old beneficial activity, now foregone, seems twice as difficult. Is it conceivable that we will next see a fee imposed both to cover the loss of old benefits (*e.g.*, affordable housing) and to mitigate the effects of the replacement activity (*e.g.*, price increases resulting from increased tourist spending in the community)?

As with so many land use mechanisms, judicial legalization does not mean the end of litigation. It merely moves the battleground from the earlier abstract level to the practical arena: how much can be charged or taken? *Roger Bernhardt*