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Rent Control: End of an Era

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End of an era

Fisher should put an end to facial attacks on rent control laws

by Myron Moskovitz

For the past four years California courts have been inundated with cases challenging recently enacted rent control laws. For the most part, trial courts have viewed rent laws with hostility, accepting the landlords' argument that the rent ordinances are unconstitutional on their face. But a recent comprehensive Supreme Court decision that upheld Berkeley's 5-year-old rent control ordinance may have finally put to rest this persistent line of attack. *Fisher v Berkeley* (1984) 37 C3d 644. (The case, however, is now on appeal to the U.S. Supreme Court).

The court rejected a long list of prima facie attacks on Berkeley's rent ordinance, including the argument that the law violated the Sherman Antitrust Law by fixing rental prices. The court's message seems clear: Unless a rent control ordinance prevents a rent board from granting a fair rent increase, the law will be sustained. If and when the rent board mistreats a landlord, then the board's action will be reviewed—the same way the court reviews an arbitrary action by any other administrative agency.

The defeat of these facial attacks marks the end of an era that began with *Birkenfeld v City of Berkeley* ((1976) 17 C3d 129, 130 CR 465), when a California appellate court

for the first time sustained a prima facie attack on a rent control law. The case dealt with a 1972 Berkeley rent law—the first one passed in the state since the end of World War II. The law froze rents in most housing units, allowing landlords to increase rents to recover cost increases only after receiving permission from a five-member rent board.

By 1980 almost half the state's tenants were covered by some type of rent control.

Before the board began operating, Berkeley landlords filed suit, claiming that the rent control law denied them due process of law. The trial court agreed with them, finding that there was no "emergency" in Berkeley's rental housing supply that justified rent control.

On appeal, the California Supreme Court upheld the power of California cities to enact rent control, even in the absence of an "emergency," so long as housing shortages justified the city's decision to regulate rent increases.

But the court said that the rent board should be able to grant legitimate rent increases to landlords within a reasonable time. Berkeley's law lacked such a mechanism, the court said, because the city's part-time board did not have the power

to grant general increases to all landlords, and hearing officers could not rule on landlords' petitions. It could take years for some landlords to get their petitions before the board.

After *Birkenfeld*, the rent control issue remained dormant until the passage of Proposition 13 in 1978. At that time, Howard Jarvis persuaded many California tenants that landlords would pass on property tax savings by lowering rents. But rents went up after the passage of Proposition 13, and tenants were furious. Rent control ordinances popped up like dandelions all over the state. By 1980, almost half the state's tenants were covered by some type of rent control, ranging from "strict" controls in Berkeley and Santa Monica, to the mild "vacancy decontrol" ordinances in San Francisco, to the even milder "arbitration" ordinances in San Jose and Oakland. In addition, about 40 small cities enacted controls for rentals of spaces in mobile home parks.

Reviving the facial attack

Since the facial attack worked in *Birkenfeld*, the landlords reasoned, why shouldn't they try it again? Around the state landlords quickly filed a variety of legal challenges to rent control ordinances. And they discovered that trial courts had the welcome mat out for them. In the great majority of the cases, courts found these ordinances unconstitutional: The ordinances confiscated property, denied non-exempt

Myron Moskovitz, a law professor at Golden Gate University in San Francisco, helped draft the Berkeley rent law and represents the city in *Fisher v Berkeley*.

Court Perspective

landlords equal protection of the laws, were preempted by state mobile home statutes, improperly delegated legislative power to administrative boards, invaded rights to privacy, created excessive delays for decisions on rent increase applications, and imposed involuntary servitude on landlords.

But it was a different story at the appellate level. Every one of these trial court decisions was later reversed. While the dramatic disparity in judicial attitudes between trial court and appellate judges raises some interesting questions, the reason for the different attitudes may simply be timing. When these cases were heard in the trial courts, rent control was quite new to California and local initiative campaigns against the ordinances were laden with rhetoric.

Appellate judges have treated rent control as another form of economic legislation.

In the two to four years it took for these cases to be heard in the appellate courts, however, rent control became fully operative in some of our largest cities and it seemed apparent that it was not causing the disastrous effects predicted by landlords. Rent control boards seemed to be no better or worse than the many administrative agencies whose decisions are regularly reviewed by the courts. Appellate judges have thus treated rent control as merely another form of economic legislation, which has traditionally been upheld since the late 1930s.

Commercial rent control upheld

A decision by the State Court of Appeals for the First District broke new ground when it became the first California case to uphold rent control on commercial property. It was also the first case to hold that a rent control law could alter existing

leases. *Rue-Ell Enterprises Inc. v City of Berkeley* ((1983) 147 CA3d 81, 194 CR 919). The ordinance considered in that case compelled landlords to reduce rents for one year by 80 percent of the property tax savings gained from the passage of Proposition 13.

Under the rent law, Rue-Ell Enterprises would have received less rent than it had coming to it under a pre-existing long-term lease. Rue-Ell claimed that the rent ordinance violated the constitutional prohibition against the impairment of contracts. The court disagreed, holding that any impairment was not substantial and the temporary rent reduction was more than offset by Proposition 13's permanent reduction in Rue-Ell's costs.

In another significant decision by the First District, the court rejected the argument that rent control was an unconstitutional confiscation of property. *Cotati Alliance for Better Housing v Cotati* (1983) 148 CA3d 280, 195 CR 825. The ordinance allowed a rent board to grant a general rent increase annually to all landlords, and also allowed landlords to petition individually for an additional increase. A landlord could be granted the additional increase if it was shown that his rents did not give him a fair return on investment. Landlords argued that this standard was confiscatory and that due process required rent increases to be based on a fair return on the market value of the property. The court rejected the argument. Market value, it said, is dependent on market rents. Whenever market rents rose, so would the market value, allowing the landlord to raise rents. Because this circular formula would make allowable rents depend on market rents, the court concluded that "rent control using this [market value] standard is no rent control at all."

Another facial attack on rent control was rejected in *Carson Mobilehome Park Owners Ass'n v Carson* ((1983) 35 C3d 184, 197 CR 284), a case dealing with spaces in mobile home parks. Under the ordinance, the rent board had no power to grant general increases to all landlords, but could hear rent in-



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crease requests by individual landlords. Landlords claimed that the omission of a general increase procedure violated Birkenfeld's requirement for a workable and timely rent increase mechanism. The court held that such a mechanism may not require a general rent increase, particularly where the small number of landlords affected "allows the Board to ensure that rent increases are tied to the owner's actual costs and expenses, rather than to average costs of the industry."

Fisher arrives

With the Fisher decision, the Supreme Court was ready to dispose of many of these facial attacks. Besides rejecting the landlord's anti-trust arguments, the court once again held that the "fair return on investment" standard was not confiscatory. The court also held that the ordinance did not constitute a restraint on alienation and that the rent increase mechanism did not cause unreasonable delays.

Additionally, provisions that allowed tenants to withhold rent—either because the landlords failed to register with the rent board or charged excessive rents—were upheld because the provisions did not violate due process protections and were not preempted by state law. The court's basic attitude seems to be summed up in a short passage:

As we made clear in *Birkenfeld*, whether rent regulations are fair or confiscatory depends ultimately on the result reached [by the rent board]. That determination, of course, can only be made by analyzing a challenge to the regulation as applied. 37 C3d at 680.

My prognosis is that facial attacks on rent control have finally been exhausted. But like a physician confronted with a persistent virus, I have some nagging doubts. I might be underestimating the tenacity and creativity of landlords and their

attorneys.

In one early rent control case, for example, a bold landlord's lawyer claimed that a federal rent control statute was "the insulator and hatchery of swarms of bureaucrats to be quartered as storm troopers upon the people in violation of Amendment III of the United States Constitution." *U.S. v Valenzuela* (SD Cal 1951) 95 F Supp 363, 366. With commendable kindness, the court merely found this claim to be without precedent or merit, eschewing any further comment.

If one lawyer can attempt to create a Third Amendment claim against rent control, another might also consider the First Amendment—a religious belief in high rents? Or the Fourth—rent control "seizes" rents without probable cause? The recent history of California's appellate decisions on rent control, however, gives little hope for such arguments—although temporary success in the trial courts may be a distinct possibility. □

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