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## How California Can Harmonize A Tenant's State Rights and A Landlord's Right To Go Out Of Business Pursuant To The Ellis Act

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## COMMENT

# HOW CALIFORNIA CAN HARMONIZE A TENANT'S STATE RIGHTS AND A LANDLORD'S RIGHT TO GO OUT OF BUSINESS PURSUANT TO THE ELLIS ACT

### I. INTRODUCTION

California landlords doing business in cities with strict rent control laws have found a way to get around such laws and capitalize on the tight housing market.<sup>1</sup> As of 1998 California landlords have simply relied on the utility of the Ellis Act,<sup>2</sup> which has been in the California law books since 1986 and prohibits government agencies from interfering with a landlord's decision to evict tenants and withdraw rental units from the market.<sup>3</sup> For example, in San Francisco, a city with strict rent control laws, 205 buildings were Ellised from July 1998 to June 1999; a jump from 1995, when only 5 buildings were Ellised.<sup>4</sup>

The recent trend of Ellis evictions raises several legal issues about a landlord's right to go out of business pursuant to the Ellis Act. Judicial review of the Ellis Act focuses mainly on the intent of the Ellis Act and its effect on local ordinances.<sup>5</sup> Recently, the First Appellate District of the Califor-

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<sup>1</sup> See Edward Epstein, *Better Protection Urged for Evicted S.F. Tenants*, S.F. Chron. Dec. 7, 1999, at A16; Dan Levy, *New Law Gives Disabled, Older Tenants a Break*, S.F. Chron., Oct. 9, 1999, at A18.

<sup>2</sup> See Levy, *supra* note 1, at A18.

<sup>3</sup> See CAL. GOV'T CODE § 7060 (West 2000).

<sup>4</sup> See Levy, *supra* note 1, at A18.

<sup>5</sup> See *City of Santa Monica v. Yarmark*, 203 Cal. App. 3d 153 (1988); *Javidzad v. City of Santa Monica*, 204 Cal. App. 3d 524 (1988).

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nia Court of Appeal balanced the relationship between the Ellis Act and a state statutory law prohibiting retaliatory evictions.<sup>6</sup> The First Appellate District held that a tenant may not assert the retaliatory eviction defense to an Ellis eviction if the landlord complied with the procedural requirements of the Act.<sup>7</sup>

Although the First Appellate District of the California Court of Appeal stated that a tenant retains the right to sue a landlord under the retaliatory eviction statute, the practical ability for a tenant to sue for retaliation is slim.<sup>8</sup> As such, the First Appellate District in essence upheld a landlord's right under the Ellis Act at the expense of a tenant's substantive right.<sup>9</sup> The approach places the retaliatory eviction statute, and other substantive tenants' rights, in jeopardy if California courts follow the First Appellate District of the California Court of Appeal.

To overcome the unbalanced approach taken by the First Appellate District, persuasive California judicial authority exists for courts to harmonize the right given to a landlord under the Ellis Act and the rights given to tenants under state law without limiting the rights of either a landlord or a tenant.<sup>10</sup> Specifically, the procedural requirements for an Ellis eviction can be viewed as tenant-protections that supplement rights given to tenants by state law, rather than a limit on those rights.<sup>11</sup> This approach is consistent with the express language of the Ellis Act, its legislative history and case law.

## II. BACKGROUND

### A. EVENTS LEADING TO THE ELLIS ACT

The California state legislature enacted the Ellis Act in 1986.<sup>12</sup> The Act prohibits a public entity from interfering with

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<sup>6</sup> See *Drouet v. Sup. Ct.*, 2001 WL 102304 (Ct. App. 1 Dist. February 7, 2001).

<sup>7</sup> See *id.*

<sup>8</sup> See Robert Selna, *Tenants Lose Powerful Tool in Fighting Ellis Evictions*, S.F. Daily Journal, Feb. 9, 2001, at 1.

<sup>9</sup> See *id.* at 3.

<sup>10</sup> See *Rich v. Schwab*, 63 Cal. App. 4th 803 (1998).

<sup>11</sup> See *id.*

<sup>12</sup> See CAL. GOV'T CODE § 7060.

a landlord's decision to withdraw its rental accommodations from the market and go out of the rental business.<sup>13</sup> The legislature drafted and passed the Act in direct response to the California Supreme Court's decision in *Nash v. City of Santa Monica*.<sup>14</sup>

In *Nash*, a Santa Monica landlord challenged the constitutionality of a Santa Monica ordinance that required a landlord who desired to remove rental units from the market, by demolition or conversion, to obtain a permit from the city's rent board.<sup>15</sup> Permits were authorized only if the landlord could show that: 1) the unit was not occupied by a person or family of very low, low, or moderate income, 2) the unit was not affordable to persons or families of very low, low, or moderate income, 3) the removal would not adversely affect the housing supply in the city, and 4) the landlord could not make a fair return by renting the unit.<sup>16</sup> *Nash*, the landlord, claimed that the ordinance deprived him of his property without due process of law.<sup>17</sup>

The Superior Court of Los Angeles County agreed with *Nash* and determined the ordinance to be unconstitutional.<sup>18</sup> Subsequently, the City of Santa Monica appealed the Superior Court's decision to the California Supreme Court.<sup>19</sup> Whether a landlord has the right to go out of the rental business was an issue of first impression for the California Supreme Court.<sup>20</sup>

The California Supreme Court analyzed the issue by applying a "rational relationship" test, which requires ordinances and statutes to bear a substantial connection to public health, safety, morals, or public welfare.<sup>21</sup> The California Supreme Court determined that the ordinance was in response to the housing crisis in the City of Santa Monica, therefore,

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<sup>13</sup> See *id.* § 7060 (a).

<sup>14</sup> "It is the intent of the Legislature in enacting this chapter to supersede any holding or portion of any holding in *Nash* . . . to the extent that the holding, or portion of the holding, conflicts with this chapter, so as to permit landlords to go out of business." *Id.* § 7060.7. See *Nash v. City of Santa Monica*, 37 Cal. 3d 97 (1984).

<sup>15</sup> See *Nash*, 37 Cal. 3d at 100-01.

<sup>16</sup> See *id.* at 101.

<sup>17</sup> See *id.* at 102.

<sup>18</sup> See *id.*

<sup>19</sup> See *id.*

<sup>20</sup> See *Nash*, 37 Cal. 3d at 102.

<sup>21</sup> See *id.* at 103.

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bearing a substantial connection to the public welfare.<sup>22</sup> In addition, the ordinance placed an indirect minimal burden upon the landlord's liberty interest to demolish the unit.<sup>23</sup> As such, the California Supreme Court held that a landlord did not have a constitutional right, free from government interference, to go out of business.<sup>24</sup>

Landlords in California did not view *Nash* favorably.<sup>25</sup> *Nash* stood as an impediment for landlords who chose to withdraw rental units from the market without obtaining prior government approval.<sup>26</sup> Consequently, the California state legislature addressed and resolved this concern through the enactment of the Ellis Act.<sup>27</sup>

## B. THE ELLIS ACT

California Senator Jim Ellis (R-San Diego) brought the concern of landlords to the state legislature and introduced Senate Bill 505 (The Ellis Act) in 1985.<sup>28</sup> The bill successfully passed through the Senate in 1986.<sup>29</sup> Subsequently, George Dukmejian, then Governor of California, approved and signed the bill into law.<sup>30</sup>

The express provisions of the Ellis Act prohibit a public entity from compelling a landlord to remain in the residential rental business when a landlord seeks to withdraw all such accommodations from the market pursuant to the Act.<sup>31</sup> How-

<sup>22</sup> See *id.* at 104.

<sup>23</sup> See *id.*

<sup>24</sup> See *id.*

<sup>25</sup> See California Ass'n of Realtors, *Right to Cease Business As A Landlord of Residential Property: A Statement of Support by the California Association of Realtors*, at 3, ¶ 3 (1985).

<sup>26</sup> See *id.*

<sup>27</sup> "It is the intent of the Legislature in enacting this chapter to supersede any holding or portion of any holding in *Nash* . . . to the extent that the holding, or portion of the holding, conflicts with this chapter, so as to permit landlords to go out of business." CAL. GOV'T CODE § 7060.7.

<sup>28</sup> See Letter from Jim Ellis, California Senator, 39th district, to George Deukmejian, Governor of California (Sept. 13, 1985) (on file with the California Secretary of State) stating that he is the author of S.B. 505.

<sup>29</sup> See *id.*

<sup>30</sup> See *id.*

<sup>31</sup> "No public entity . . . shall . . . compel the owner of any residential real property to offer, or to continue to offer, accommodations in the property for rent or

ever, local government is permitted to adopt notice requirements, consistent with the procedural guidelines of the Ellis Act, when a landlord seeks to withdraw its rental units from the rental market pursuant to the Act.<sup>32</sup> Under the Ellis Act, landlords choosing to evict tenants are required to file their intent to withdraw rental accommodations from the market with local rent boards.<sup>33</sup> Furthermore, the Act does permit land use regulation under certain circumstances.<sup>34</sup> Specifically, the Act permits the government to enforce environmental standards, require approval for conversions of property from one type to another, and require permits for the demolition of a structure.<sup>35</sup>

In addition, the legislature provided protections to tenants facing an Ellis eviction. Section 7060.1(d) of the Act states that the Act, in effect, does not supersede substantive tenant rights under the Unruh Civil Rights Act, the Fair Employment and Housing Act, the Unfair Business Practices Act, and the Civil Code.<sup>36</sup> The latter includes, among other things, the California statute prohibiting retaliatory evictions.<sup>37</sup> Section 7060.6 of the Act, the only section addressing tenant defenses, permits tenants to raise procedural defects as an af-

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lease." CAL. GOV'T CODE § 7060(a).

<sup>32</sup> See *id.* § 7060.4(a)(b) (West Supp. 2000).

<sup>33</sup> "Any public entity which . . . has in effect any control or system of control on the price at which accommodations are offered for rent . . . may require . . . the owner notify the entity of an intention to withdraw those accommodations from rent." *id.* § 7060.4(a).

<sup>34</sup> See *id.* § 7060.7(a)(b).

<sup>35</sup> "[T]his act is not otherwise intended to do any of the following: (a) Interfere with . . . government authority over land use, including regulation of the conversion of existing housing to condominiums or other subdivided interests or to other nonresidential use following its withdrawal from rent or lease . . . (b) Preempt local . . . environmental or land use regulations . . . that govern the demolition and redevelopment of residential property." *Id.*

<sup>36</sup> "Notwithstanding section 7060, nothing in this chapter does any of the following: . . . (d) Supersedes any provision of Chapter 16 (commencing with Section 7260), part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of this code, Chapter 5 (commencing with Section 17200) of Part 2 of Division 7 of the Business and Professions Code, Part 2 (commencing with Section 43) of Division 1 of the Civil Code, Title 5 (commencing with Section 1925) of Part 4 of Division 3 of the Civil Code, Chapter 4 (commencing with Section 1159) of Title 3 of Part 3 of the Code of Civil Procedure, or Division 24 (commencing with Section 33000) of the Health and Safety Code." CAL. GOV'T CODE § 7060.1(d).

<sup>37</sup> See *id.*

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firmative defense to an Ellis eviction.<sup>38</sup>

### C. AMENDMENTS TO THE ELLIS ACT

Ellis evictions increased drastically during the latter half of the 1990s,<sup>39</sup> decreasing the availability of residential housing in California.<sup>40</sup> The California Senate approached the problem by amending the notice requirements provided by the Ellis Act.<sup>41</sup> Initially, the Act required landlords to serve tenants, being displaced pursuant to the Ellis Act, with a 60-day eviction notice.<sup>42</sup> As an attempt to slow down Ellis evictions, the amendment increased the eviction notice date from 60 to 120 days.<sup>43</sup> If a tenant is elderly or disabled, the tenant, upon being served with an eviction notice has up to 60 days to extend the eviction notice from 120 days to one year from the time the eviction notice was served.<sup>44</sup>

In addition to amending the notice requirements, the legislature amended the Ellis Act to allow local governments with rent control ordinances to enforce such ordinances if, after two years from being withdrawn, the rental units were placed back on the rental market.<sup>45</sup> Furthermore, if a landlord offers to rent the accommodations for residential purposes within ten years from the time the accommodations were originally withdrawn from the market, the landlord must give the displaced tenant the first right of refusal.<sup>46</sup>

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<sup>38</sup> "If an owner seeks to displace a tenant . . . from accommodations withdrawn from rent or lease pursuant to this chapter by an unlawful detainer proceeding, the tenant or lessee may appear and answer or demur

. . . and may assert by way of defense that the owner has not complied with the applicable provisions of this chapter, or statutes, ordinances, or regulations of public entities adopted to implement this chapter, as authorized by this chapter." *Id.* § 7060.6.

<sup>39</sup> For example, in San Francisco 205 buildings were Ellised from July 1998 to June 1999 - a jump from 1995, when only 5 buildings were Ellised. *See Levy, supra* note 1, at A18.

<sup>40</sup> *See id.*

<sup>41</sup> *See id.*

<sup>42</sup> *See* CAL. GOV'T CODE § 7060.4(a).

<sup>43</sup> *See id.* § 7060.4(b) (West Supp. 2000).

<sup>44</sup> *See id.*

<sup>45</sup> *See id.* § 7060.2(a).

<sup>46</sup> *See id.* § 7060.2(a)(4).

## III. DISCUSSION

The California appellate courts have considered the effect of the Ellis Act on local ordinances and state laws.<sup>47</sup> In *City of Santa Monica v. Yarmark*<sup>48</sup> and *Javidzad v. City of Santa Monica*,<sup>49</sup> the Second Appellate District of the California Court of Appeal addressed whether local governments could limit or restrict Ellis evictions.<sup>50</sup> After examining the intent of the Ellis Act, the court declared that a landlord has an unfettered right under the Ellis Act to go out of business without government interference.<sup>51</sup>

Recently in *Drouet v. Superior Court*,<sup>52</sup> the First Appellate District for the California Court of Appeal addressed whether state statutory rights given to tenants, rather than by local ordinances, limit the Ellis Act. In *Drouet* the court interpreted the relationship between the Ellis Act and the state statutory right prohibiting retaliatory evictions.<sup>53</sup> The court held that a tenant may not assert the retaliatory eviction defense in an Ellis Act unlawful detainer proceeding where the landlord complies with the procedural requirements of the Act.<sup>54</sup> The court stated that a tenant asserting the retaliatory eviction defense interfered with the right of a landlord to go out of business under the Ellis Act.<sup>55</sup> The court noted that a tenant could, however, bring a cause of action for retaliation after the tenant has vacated the rental unit.<sup>56</sup>

## A. CITY OF SANTA MONICA V. YARMARK

In *Yarmark*, Yarmark sought to withdraw his rental units from the market under the Ellis Act and served a 30 day notice to his tenants, as required for month to month tenan-

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<sup>47</sup> See *Yarmark*, 203 Cal. App. 3d at 153; *Javidzad*, 204 Cal. App. 3d at 524; *Drouet*, 2001 WL 102304 at 1.

<sup>48</sup> See *Yarmark*, 203 Cal. App. 3d at 153.

<sup>49</sup> See *Javidzad*, 204 Cal. App. 3d at 524.

<sup>50</sup> See *id.* See also *Yarmark*, 203 Cal. App. 3d at 153.

<sup>51</sup> See *Yarmark*, 203 Cal. App. 3d at 162. See also *Javidzad*, 204 Cal. App. 3d at 524.

<sup>52</sup> See *Drouet*, 2001 WL 102304 at 1.

<sup>53</sup> See *id.*

<sup>54</sup> See *id.* at 13.

<sup>55</sup> See *id.* at 11.

<sup>56</sup> See *id.* at 13.

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cies.<sup>57</sup> However, Yarmark did not obtain any of the required permits or comply with any of the limitations for evictions required by the City of Santa Monica ordinance.<sup>58</sup> Consequently, the City of Santa Monica filed suit against Yarmark for declaratory and injunctive relief contending the evictions violated city ordinances.<sup>59</sup> Yarmark defended on the grounds that the city ordinances violated the Ellis Act.<sup>60</sup>

The Second Appellate District of the California Court of Appeal agreed with Yarmark and invalidated the city ordinances.<sup>61</sup> The court determined that the Ellis Act has two essential purposes: 1) to prevent public entities from interfering with a landlord who decides to withdraw units from the rental residential business and complies with the Act's terms and 2) to permit landlords the unfettered right to remove all residential rental units from the market, consistent with the guidelines set forth in the Act and adopted by local governments.<sup>62</sup> Because the ordinance interfered with a landlord's right to withdraw his rental units in accordance with the Act, the California Court of Appeal invalidated the local ordinances.<sup>63</sup>

### B. *JAVIDZAD V. CITY OF SANTA MONICA*

In *Javidzad*, the California Court of Appeal invalidated another provision of the same ordinance at issue in *Yarmark*.<sup>64</sup> There, Javidzad sought to withdraw the rental units from the market and demolish the building.<sup>65</sup> However, a City of Santa Monica ordinance required Javidzad to obtain a permit from the local rent board upon a showing that he could not make a fair return by continuing to rent the property, or that the property was uninhabitable and incapable of being habitable.<sup>66</sup> Consequently, Javidzad challenged the ordi-

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<sup>57</sup> See *Yarmark*, 203 Cal. App. 3d at 157-58.

<sup>58</sup> See *id.* at 158-59.

<sup>59</sup> See *id.*

<sup>60</sup> See *id.*

<sup>61</sup> See *id.* at 153.

<sup>62</sup> See *Yarmark*, 203 Cal. App. 3d at 164-66.

<sup>63</sup> See *id.*

<sup>64</sup> See *Javidzad*, 204 Cal. App. 3d at 524.

<sup>65</sup> See *id.* at 528.

<sup>66</sup> See *id.* at 526-27.

nance as a violation of the Ellis Act.<sup>67</sup>

The trial court ruled in favor of Javidzad, stating that the permit requirements did not allow landlords to simply go out of the rental business.<sup>68</sup> As such, the trial court held that the ordinance compelled landlords to stay in the rental market in violation of the Ellis Act.<sup>69</sup> Therefore, the trial court mandated the rent board to process the demolition permit without requiring Javidzad to obtain a removal permit from the board.<sup>70</sup>

The rent board appealed to the California Court of Appeal arguing that the Ellis Act permits local governments to regulate land use.<sup>71</sup> In its opinion, the court stated that while the Ellis Act permits local governments to regulate the subsequent use of the property once the property has been properly removed under the Ellis Act, the city ordinance placed impermissible burdens on a landlord's right to go out of business and did not regulate the subsequent use of the property.<sup>72</sup> Therefore, the court affirmed the trial court's decision.<sup>73</sup>

### III. *DROUET V. SUPERIOR COURT*

In *Drouet v. Superior Court*, the First Appellate District of the California Court of Appeal considered the relationship between the Ellis Act and a state statutory right given to tenants.<sup>74</sup> In *Drouet*, Joel Drouet owned a two unit apartment building in San Francisco.<sup>75</sup> In 1999, tenants complained to Drouet about a leaking shower wall, sewage drain, and a deteriorating back stairway, however, Drouet failed to make the repairs.<sup>76</sup> Shortly thereafter, Drouet initiated the procedural steps required to make an Ellis eviction by filing with the local rent board his intent to withdraw rental units off the market, providing the tenants with an eviction notice, and filing

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<sup>67</sup> See *id.* at 528.

<sup>68</sup> See *id.*

<sup>69</sup> See *Javidzad*, 204 Cal. App. 3d at 528-29.

<sup>70</sup> See *id.*

<sup>71</sup> See *id.* at 529.

<sup>72</sup> See *id.*

<sup>73</sup> See *id.* at 531.

<sup>74</sup> See *Drouet*, 2001 WL 102304 at 1.

<sup>75</sup> See *id.*

<sup>76</sup> See *id.*

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with the local rent board a second notice of intent.<sup>77</sup>

After being served with the eviction notice, the tenants failed to evacuate the apartment unit.<sup>78</sup> Consequently, Drouet filed a complaint for unlawful detainer to evict the tenants.<sup>79</sup> The tenants answered the complaint and asserted four defenses, including the retaliatory eviction defense.<sup>80</sup> Drouet moved for summary judgment on each of the defenses.<sup>81</sup> The trial court granted the motion in part but denied the motion as to retaliatory eviction.<sup>82</sup>

Drouet then filed a writ of mandate with the Appellate Division of the Superior Court of San Francisco and sought to compel the trial court to grant the summary judgment motion.<sup>83</sup> The Appellate Division granted Drouet's writ and held that a tenant cannot assert the retaliatory eviction defense if the landlord complied with the procedural requirements of the Ellis Act.<sup>84</sup> The tenants filed a writ with the First Appellate District of the California Court of Appeal and appealed the decision.<sup>85</sup>

The First Appellate District of the California Court of Appeal agreed with the Appellate Division of the San Francisco Superior Court and held that a tenant may not assert the retaliatory eviction defense to an Ellis eviction.<sup>86</sup> The court concluded that a tenant may assert as a defense to an Ellis eviction only that the landlord failed to comply with the procedural requirement of the Ellis Act.<sup>87</sup> The court noted, however, that a tenant is not barred from filing a cause of action against the tenant for retaliation.<sup>88</sup>

The court approached the issue with the purpose of giving effect to the overriding legislative intent of the Ellis Act and

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<sup>77</sup> *See id.* at 2.

<sup>78</sup> *See id.*

<sup>79</sup> *See Drouet*, 2001 WL 102304 at 2.

<sup>80</sup> *See id.*

<sup>81</sup> *See id.*

<sup>82</sup> *See id.*

<sup>83</sup> *See id.*

<sup>84</sup> *See Drouet*, 2001 WL 102304 at 2.

<sup>85</sup> *See id.*

<sup>86</sup> *See id.* at 13.

<sup>87</sup> *See id.*

<sup>88</sup> *See id.*

the retaliatory eviction statute.<sup>89</sup> In doing so, the court determined that the legislature did not intend to restrict a landlord's right to go out of the rental market by permitting tenants to assert the defense of retaliatory eviction.<sup>90</sup> According to the court, if a tenant is permitted to assert the defense, an unintended and massive barrier is created between the right of the landlord to go out of business and the ability to bring that right to fruition in accordance with the Ellis Act.<sup>91</sup>

The court stated that the explicit provisions of the Act do not permit a tenant to assert the defense of retaliatory eviction.<sup>92</sup> Section 7060.1(d) of the Act states that the right granted to a landlord does not "supersede" several substantive state rights, including the Civil Code.<sup>93</sup> The court determined that the term "supersede," in reference to the Civil Code, did not mean that the retaliatory eviction defense — found in a single statute — remained applicable.<sup>94</sup> The court reasoned that to hold otherwise would frustrate the intent of the Ellis Act.<sup>95</sup> The court also explained that, because a landlord is not obligated to maintain a habitable premise once the landlord's building is Ellised, the landlord is not subject to an eviction defense.<sup>96</sup>

The court explained further that a distinction exists between an Ellis Act unlawful detainer proceeding and one filed in the ordinary course of a landlord-tenant relationship.<sup>97</sup> In a typical retaliatory eviction scenario, the landlord fails to fulfill the legal obligation to provide a habitable rental unit and files an unlawful detainer proceeding to evict the tenant.<sup>98</sup> In that scenario, the landlord intends to remain in the rental market and use the property to generate income.<sup>99</sup> The deterrent effect of the retaliatory eviction statute remains in full

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<sup>89</sup> See *Drouet*, 2001 WL 102304 at 10.

<sup>90</sup> See *id.* at 11.

<sup>91</sup> See *id.*

<sup>92</sup> See *id.* at 9.

<sup>93</sup> See *id.*

<sup>94</sup> See *Drouet*, 2001 WL 102304 at 9.

<sup>95</sup> See *id.*

<sup>96</sup> See *id.* at 12.

<sup>97</sup> See *id.* at 11.

<sup>98</sup> See *id.*

<sup>99</sup> See *Drouet*, 2001 WL 102304 at 11.

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force under such circumstances.<sup>100</sup> According to the court, a landlord is not, however, in the rental market when filing an Ellis Act unlawful detainer proceeding.<sup>101</sup> The court stated that when the landlord complies with all procedural requirements of the Ellis Act and the tenant does not vacate after the 120 day grace period, then the tenancy ceases to exist.<sup>102</sup>

In addition, the court found the legislative history of the Ellis Act inconclusive on how to resolve the tension between the Ellis Act and the retaliatory eviction statute.<sup>103</sup> In a footnote, the court emphasized portions of the legislative reports which stated that a landlord is “probably” prohibited from evicting tenants under the Act, if the eviction is a response to a tenant’s request for repairs or housing code violations.<sup>104</sup> The reports state that, under such circumstance the eviction “could” be deemed a prohibited retaliatory eviction.<sup>105</sup> The court qualified the terms “probably” and “could” as equivocal and found the use of such terms in the legislative history to be uncertain about the consequences of the statutory language.<sup>106</sup> The court concluded that the reasonable solution for resolving the tension between the Ellis Act and the retaliatory eviction statute is to permit tenants to sue landlords for damages, not to assert the retaliatory eviction defense.<sup>107</sup>

## IV. CRITIQUE

The First Appellate District of the California Court of Appeal in *Drouet* upheld the right of landlords under the Ellis Act while trumping the rights of tenants completely under the retaliatory eviction statute.<sup>108</sup> In *Drouet*, the court suggested a distorted image of the truth about what rights remain for tenants under the retaliatory eviction statute when faced with an Ellis eviction. Although the court notes that a tenant retains the right to sue for damages for retaliatory eviction, the

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<sup>100</sup> See *id.*

<sup>101</sup> See *id.*

<sup>102</sup> See *id.*

<sup>103</sup> See *id.* at 13 n.9.

<sup>104</sup> See *Drouet*, 2001 WL 102304 at 13 n.9.

<sup>105</sup> See *id.*

<sup>106</sup> See *id.*

<sup>107</sup> See *id.* at 12.

<sup>108</sup> See Selna, *supra* note 8, at 3.

right is practically nonexistent.<sup>109</sup> The First Appellate District in *Drouet* imposed a harsh blow to tenants without a complete consideration of the Ellis Act. The text of the Ellis Act and its legislative history suggest that other California appellate courts, including the Supreme Court and other appellate districts, should not follow the First Appellate District of the California Court of Appeal when balancing the rights granted to a tenant by state law and the right granted to a landlord by the Ellis Act.

#### A. TEXT OF THE ELLIS ACT

The Ellis Act was a direct response to *Nash*, where the local government placed complete discretion into the hands of its rent control board to decide when and how a landlord may withdraw its rental units from the market.<sup>110</sup> It is this type of local control that the Ellis Act intends to prohibit. A close examination of the express language of the Ellis Act supports this view.

Textually, the express language of the Ellis Act prohibits a "public entity" from compelling a landlord to remain in the rental market.<sup>111</sup> The California Government Code defines a "public entity" as government and not a private individual.<sup>112</sup> Thus, the express language of the Ellis Act does not prohibit individuals from asserting their substantive rights in an Ellis proceeding as a defense to an eviction. Even if the effect of asserting such rights is to compel landlords to remain in the rental market and force them to oblige by their duties as landlords, the Ellis Act offers no protection to the landlord when the eviction is in violation of tenants' rights. As section 7060.1(d) states, the right granted to landlords does not supersede several substantive tenants' rights, including the retaliatory eviction statute.<sup>113</sup> Instead, the Ellis Act prohibits only a "public entity", i.e., government, from forcing a land-

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<sup>109</sup> See *id.*

<sup>110</sup> See CAL. GOV'T CODE § 7060.7.

<sup>111</sup> See *id.* § 7060.

<sup>112</sup> "Public entity" includes the State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State." *Id.* § 811.2.

<sup>113</sup> See *id.* § 7060.1(d).

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lord to stay in the rental market, as in *Nash*.<sup>114</sup>

Both *Yarmark* and *Javidzad* support the interpretation that the Ellis Act bars only government from interfering with a landlord's decision to go out of business. In each case the focus is on government ordinances adopted to limit a landlord's right under the Ellis Act.<sup>115</sup> For example, in *Javidzad* and *Yarmark*, the Second District of the California Court of Appeal held that an ordinance requiring landlords to obtain permits prior to withdrawing rental units from the market forces a landlord to remain in the rental market and is therefore in violation of the Ellis Act.<sup>116</sup>

## B. LEGISLATIVE HISTORY

From a historical stance, the legislative committee reports on the Ellis Act are consistent with the understanding that the Ellis Act bars public entities, not individuals, from compelling a landlord to remain in business.<sup>117</sup> For example, in a statement of support, the California Association of Realtors (CAR) stated that the Act prohibits *government* from compelling a landlord to remain in business.<sup>118</sup> CAR's concern was to limit the ability of *local governments* from interfering with a landlord's business decision to go out of the rental market. CAR explained that the *government* should not interfere with a landlord's financial and psychological demands, which affect a landlord's willingness to stay in the rental market.<sup>119</sup> A landlord, not a government agency, is better situated

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<sup>114</sup> "No public entity, as defined in Section 811.2, shall . . . compel the owner of any residential real property . . . to continue to offer . . . accommodations in the property for rent or lease."

CAL. GOV'T CODE § 7060.

<sup>115</sup> See *Yarmark*, 203 Cal. App. 3d at 153. See also *Javidzad*, 204 Cal. App. 3d at 524.

<sup>116</sup> See *id.*

<sup>117</sup> See California Ass'n of Realtors, *supra*, note 25, ¶ 5 at 1.

<sup>118</sup> In its report CAR argued that the Ellis Act "[l]imits its application to *actions of the state or any . . . political subdivisions . . . or regulation or administrative action implementing such statute . . .*" See *id.*

<sup>119</sup> "Requiring a person to continue to offer . . . property for rent is a requirement that . . . involves . . . personal liability (including . . . strict liability) . . . and a continued devotion of personal services . . . including psychological demands . . . as evidenced by the pressures of tenant relations . . . and contrary to sound public policy affecting involuntary servitudes." *Id.* at 3, ¶ 2.

to handle those demands appropriately.<sup>120</sup>

In addition, the Ellis Act clearly states that the right granted to landlords does not supersede any of the substantive state rights afforded to tenants in the Unruh Civil Rights Act, Fair Employment and Housing Act, Community Redevelopment Law, Business Professions Code, and the Civil Code, including the retaliatory eviction defense.<sup>121</sup> The legislative committee reports on the Ellis Act clearly explain this provision of the Ellis Act.<sup>122</sup> It states that "[t]his provision would limit a landlord's right to go out of business if the exercise of that right would jeopardize a tenant's rights under state law."<sup>123</sup> As an example of the limitation placed on the Ellis Act, the legislative reports provide that if a tenant were evicted in retaliation for complaining to authorities of dilapidations, the landlord would probably not be permitted to evict the tenant under the Ellis Act.<sup>124</sup>

## V. PROPOSAL

If the legislature intends to leave the tenant defense against retaliatory evictions intact, and other substantive tenants' rights, the legislature should amend the Ellis Act and make its intention clear. Until the legislature amends the statute, the California courts should approach the issue with the intent of harmonizing both the procedural guidelines provided in the Ellis Act and the right given to tenants under the California Civil Code prohibition against retaliatory evictions, and other substantive tenants' rights. This approach is

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<sup>120</sup> CAR argued in its report that "[t]he right to terminate a business involves a personal decision concerning the individual's ability to use his or her talents and resources in a manner best suited to bring reasonable satisfaction to that individual in the application and utilization of that person's time and efforts, and a determination by them of their economic security." *See id.* at 3, ¶ 3.

<sup>121</sup> *See* CAL. GOV'T CODE § 7060.1(d).

<sup>122</sup> Sen. Com. on Judiciary, Analysis of Sen. Bill No. 505 (1985-1986 Reg. Sess.) as amended May 15, 1985.

<sup>123</sup> *See id.* at 3.

<sup>124</sup> "This provision would limit a landlord's right to go out of business if the exercise of that right would jeopardize a tenant's rights under state law. For example, this provision would probably prohibit a landlord from going out of business if the tenant had requested repairs or reported housing code violations. An eviction of the tenant under such circumstances could be deemed a prohibited retaliatory eviction." *Id.*

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preferable over upholding one statute and trumping another. The goal should be to permit the exercise of statutory rights afforded to both tenants and landlords, not to create a situation where it appears the legislature gives rights to its citizenry with one hand but takes it away with the other.

The California Court of Appeal in *Rich v Schwab* followed this approach in a similar context.<sup>125</sup> In *Rich*, the California Court of Appeal addressed the availability of the California Civil Code prohibition against retaliatory evictions within the context of mobile home tenants and the Mobile Home Residency Law (MHRL).<sup>126</sup> In *Rich*, mobile home tenants faced an increase in rent after complaining to local authorities of a previous rent increase.<sup>127</sup> Although the landlord followed the procedural steps for rent increases outlined in MHRL, the tenants refused to pay the increase and instead brought a class action suit against the landlord alleging a violation of the California Civil Code prohibition of retaliatory evictions.<sup>128</sup> The landlord argued that the mobile home tenants could sue under the MHRL only for failure to comply with procedure outlined in MHRL.<sup>129</sup>

The Fourth Appellate District of the California Court of Appeal disagreed with the landlord.<sup>130</sup> The court explained that where separate statutes relating to the same subject matter are in conflict the court is to construe them together and harmonize.<sup>131</sup> The California Court of Appeal would not presume that the legislature enacted a statute with the intent of overruling long-established principles of law, unless the statute clearly declares such an overthrow.<sup>132</sup>

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<sup>125</sup> See *Rich*, 63 Cal. App. 4th at 803.

<sup>126</sup> The MHRL grants owners of mobile homes occupied within mobile home parks greater notice protection for rent increases, changes in the terms of their tenancy, and limits the circumstances under which they may be evicted. See *id.* at 813; See also CAL. CIV. CODE §§ 798.30, 798.55.

<sup>127</sup> See *id.* at 808-09.

The retaliatory eviction statute also prohibits rent increases against a tenant for the purpose of retaliating against a tenant who asserts its rights as a tenant. See CAL. CIV. CODE § 1942.5.

<sup>128</sup> See *Rich*, 63 Cal. App. 4th at 808-09.

<sup>129</sup> See *id.* at 811-12.

<sup>130</sup> See *id.* at 814.

<sup>131</sup> See *id.* (quoting *Palmer v. Agee*, 87 Cal. App. 3d 377, 383 (1978)).

<sup>132</sup> See *id.*

The California Court of Appeal determined that, although the MHRL provides a basis for a mobile home tenant to sue a landlord, it is not exclusive.<sup>133</sup> The court also determined that the procedural protections afforded to mobile home tenants under the MHRL did not affect the rights afforded to mobile home tenants under the California Civil Code prohibition of retaliatory evictions.<sup>134</sup> The court explained that the procedural protections in the MHRL were supplemental, and not a limitation, on the rights afforded to mobile home tenants under the California Civil Code's prohibition against retaliatory evictions.<sup>135</sup> Therefore, the tenants still retained the full protections of the California Civil Code prohibition of retaliatory evictions.<sup>136</sup>

The procedural protections under the MHRL at issue in *Rich* are similar to the procedural protections of the Ellis Act. Although the Ellis Act was created to protect landlords, not tenants, the landlord is subject to several limitations outlined by the Act itself.<sup>137</sup> Included in those limitations are the procedural requirements for evicting a tenant under the Ellis Act.<sup>138</sup> The procedural guidelines of the Act are notice requirements given to tenants designed essentially for their own protection.<sup>139</sup> As such, the procedural guidelines in the Ellis Act are the equivalent of the procedural protections found in the MHRL at issue in *Rich*.<sup>140</sup>

Accordingly, *Rich* is persuasive authority for arguing that the procedural protections under the Ellis Act are supplemental to, rather than a limitation upon the defenses available to a tenant facing an Ellis eviction. Implicit in this proposal is the requirement that a landlord exercise its rights without trampling on the rights of others. Such an implication is not the equivalent of giving a landlord the right to go out of business and then taking it away. The landlord would still have the right under the Ellis Act to go out of business, free from

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<sup>133</sup> See *Rich*, 63 Cal. App. 4th at 814.

<sup>134</sup> See *id.*

<sup>135</sup> See *id.*

<sup>136</sup> See *id.*

<sup>137</sup> See CAL. GOV'T CODE § 7060.

<sup>138</sup> See *id.* § § 7060.4, 7060.6

<sup>139</sup> See *id.* § 7060.6.

<sup>140</sup> See *Rich*, 63 Cal. App. 4th at 813.

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government interference. However, the landlord may not do so to retaliate for a tenant's actions or other proper assertion of rights afforded to a tenant by state law. This proposal merely places landlords within the realm of the law and not above it. In doing so, this proposal protects the right given to landlords under the Ellis Act and the right granted to tenants by state law, including the California Civil Code prohibition against retaliatory evictions, without compromising the rights of either a landlord or a tenant.

VI. CONCLUSION

Based on the legislative intent of the Ellis Act and persuasive California judicial authority, the procedural guidelines of the Ellis Act are not the exclusive protections available to a tenant during an Ellis proceeding. The procedural requirements of the Ellis Act can be considered tenant-protections that are supplemental to rights granted to a tenant by state law — the latter includes the California Civil Code prohibition against retaliatory evictions. This approach alleviates tension between the rights granted to tenants by state law and the right granted to landlords under the Ellis Act.

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