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Complaint alleging that city ordinance prohibiting rental property owners from evicting tenants to move into their own property states cause of action for regulatory taking.
*Cwynar v City & County of San Francisco* (2001) 90 CA4th 637, 109 CR2d 233

Rental property owners (plaintiffs) challenged a San Francisco (City) ordinance (Prop G) that restricts a property owner’s ability to evict a tenant from a residential unit to permit the owner or close family member to occupy the unit. Plaintiffs sued for inverse condemnation, among other causes, claiming that the ordinance was unconstitutional in that it deprived them of the right to occupy their private property and to exclude others from it. The trial court sustained the City’s demurrer.

The court of appeal reversed. The state and federal constitutions guarantee property owners just compensation if their property is taken for public use, including a taking by government regulation. A per se taking occurs as a matter of law when government action brings about a permanent physical invasion of the property or when it deprives the owner of all economically beneficial or productive use of the land. Regulation that falls short of a per se taking may still constitute a regulatory taking if government action (1) does not substantially advance legitimate state interests, or (2) disproportionately affects the property owner, compared with the community at large.

Plaintiffs argued that Prop G constituted a per se physical taking because it deprived plaintiffs of their right to occupy their own property and exclude others; tenants, in effect, had a right to lifetime occupancy. The court agreed—“at this [demurrer] stage of the proceedings”—holding that the taking was both direct and permanent. The City had argued that the tenancies were not coerced as a matter of law. Although most plaintiffs had voluntarily rented out their property, some had purchased occupied rental property already subject to Prop G. The court held that plaintiffs should have the opportunity to prove that the challenged ordinance compels them to rent the property and forever refrain from terminating the tenancy. The court rejected the City’s contention that the Ellis Act (Govt C §§7060–7060.7) counteracted the coercive aspects of Proposition G by preserving a landlord’s right to get out of the rental business. “The question is not whether the property owner is a landlord by choice. The question is whether the regulation at issue authorizes a compelled permanent physical occupation of the landlord’s property.” 109 CR2d at 250.

Regarding the regulatory taking theory, the court expressed doubt as to whether the City could show that the regulation substantially advanced a legitimate state interest—namely, whether there was a “sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance.” 109 CR2d at 250. The City argued that the court’s review of the ordinance should be deferential. The court disagreed, because (1) Prop G differed from typical rent ordinances—it doesn’t simply regulate rents, it regulates occupancy—and (2) Prop G was not generally applicable—it created several different categories of property and owners (e.g.,
depending on the date of acquisition of the property and the number of owners). Therefore, the ordinance does not qualify for deference, but should be closely scrutinized because it directly affects possessory property rights of an arbitrary category of property owners. Furthermore, the record does not establish that the ordinance substantially advances a legitimate government interest.

Finally, the court found that plaintiffs had alleged facts sufficient to support a possible finding of regulatory taking under the ordinance: (1) substantial interference with their rightful use and enjoyment of the properties in conflict with their expectations (including occupancy by close relatives); (2) no counterbalancing rights or benefits to mitigate their burdens under the ordinance; and (3) no hardship provision or procedure for individualized treatment or consideration.

The court rejected various grounds advanced opposing a regulatory taking, holding that the City’s arguments were based on per se taking rules rather than a regulatory taking analysis. The court remanded to the trial court for further proceedings.

**THE EDITOR’S TAKE:** After more or less ripping San Francisco’s anti-owner-move-in ordinance to shreds, the court of appeal says property-owning plaintiffs “must allege facts establishing not only government authorized coercion, but also permanent occupation of their rental property,” adding that this may be “difficult” to do. Given the tenor of the opinion, I don’t see what the difficulty is.

The City’s regulation was indefinite in terms of duration. That is to be expected since short-term protection would not give tenants much solace. Absent any kind of sunset provision in the ordinance, it looks to me as though the permanence feature is as “per se” as is the taking itself. (An ordinance that merely interposed some kind of delay into the eviction process might survive the “permanence” standard and might also give tenants some helpful breathing time to find replacement premises in a crowded, expensive market, but it would not prevent their ultimate removal, and would achieve nothing like what this ordinance sought to do.)

Furthermore, although these judges did not say so explicitly, it appears to me that they have also held that the ordinance effects a per se taking of the landlord’s right to possess her property through “government authorized coercion.” If the plaintiffs have only to show that “the challenged ordinance has the effect of compelling them to rent property or to refrain in perpetuity from terminating a tenancy,” what more is there to prove: The wording of the ordinance declares that it does exactly what the court declares the plaintiffs have to prove that it does. (The court’s position is so strong on this point that it makes me wonder whether even a just-cause eviction requirement, common in so many rent control ordinances, could survive this test; since both just-cause and owner-move-in limitations have that same compulsory and lifetiming effect.)

Given these concerns, I can see why the City felt the need to hide behind the affirmative defenses that (1) the landlords had voluntarily put themselves in that position and (2) the Ellis Act afforded them sufficient protection. But, since the plaintiffs had cleverly included in their party an owner whose purchase came after the unit she wanted to occupy was already rented, they could easily evade the “voluntary” argument. Although the ordinance could be amended to
bar owner-move-ins only where the owner had done the leasing, that stratagem could be circumvented by having those validly restricted owners merely sell their building to new owners desirous of occupying. (And even the preexisting landlords could argue that the voluntary terms of their leasing never included waivers of owner-move-in rights, which existed before any new ordinance restrictions took effect.)

Regarding the Ellis Act defense, the City’s attempt to convert the Act from a sword into a shield clearly didn’t work. The court rejected that argument, first, on the ground that the Act does not entitle a landlord to pick out a single unit in a larger building and pull that one off the market, and, second, by holding that the right to remove property from the market is no defense to a claim that the government has already taken that property by prohibiting eviction of the tenant. With respect to the first refutation, I’m not that sure that the Act does not permit a multi-unit owner to pull a single unit off the market, but that will have to wait until it comes up on its own merits. (New York landlords “warehouse” a lot of residential units, hoping to tip the voting balance favorably when they try to condominiumize a building.) Regarding the second, it would have been surprising if the legislature’s desire to prevent cities from forcing their landlords to stay in the rental business had then been turned against those landlords and interpreted to mean that the legislated ability to leave the market was intended to destroy the constitutional ability to claim that other local regulations imposed on them took their property.

All of the above concerned only the per se physical taking issue. The court’s holdings on regulatory takings seem even more ominous for the City. First, there is to be no deferential review, because the case involves rights to possession rather than rights to increased income. In the past, deferential review saved a lot of rent control regulation from the academic and empirical attacks of economists and demographers (see, for instance, the concurring opinion of Judge Posner in *Chicago Bd. of Realtors v City of Chicago* (7th Cir 1987) 819 F2d 732), and its loss is surely a blow to the activities of many rent-controlled communities.

Second, coverage is adjudged arbitrary because buildings built after the enactment of rent control are exempt, and because multi-owner buildings are treated differently from single-owner ones. Those will be difficult features to correct. New construction generally has to be exempted from rent control rules, or else no one will build; and applying restrictions to post-1979 buildings as well as pre-1979 ones (the ordinance specifically does not apply to rental units in buildings constructed after June 13, 1979) can easily deter new construction. Conversely, on the multi-/single-owner distinction, extending the exemption for single owners to larger groups of owners only means abandonment of the City’s many attempts to prohibit tenancy-in-common (TIC) conversions, a currently popular way to acquire ownership of a residential unit at an affordable price.

Third, the City failed to show that the ordinance achieved a “reasonable balance between owner occupied and rental housing.” In a city whose housing units are acknowledged as already mostly rental, it seems unlikely that adequate proof of such a conclusion will be forthcoming at a trial. (And such proof is complicated by the court’s additional observations that the City did not take into account either the landlords’ individual needs or the fact that the ordinance makes it easier for wealthier single owners to evict than for poorer multiple TIC owners to do so.)
Fourth, the City’s claim that the ordinance ensured protection of affordable rental housing was held contradicted by the prospect that (1) it might encourage more Ellis Acting, which would reduce the sum total of such housing, (2) poorer potential owners won’t be able to form TIC groups to buy multi-unit buildings, (3) landlords won’t be able to let their children move into their own (landlords’) buildings, and (4) rich tenants will get as much protection as poor ones (as has certainly turned out to be the case in much of the rent-controlled housing in New York City). What kind of proof can the City offer to refute those observations?

Fifth, the City’s goal of protecting elderly and disabled tenants perhaps was held to come at the cost of “displacing elderly, ill, or disabled property owners and/or relatives of property owners who are desperately in need of a home.” How does San Francisco show that that isn’t so? Can it produce evidence that there are no elderly or disabled landlords in town, or that they don’t really need to move into their own buildings?

Sixth, the ordinance was said to impose a disproportionate burden on owners by “essentially requiring them to forfeit their own homes in order to create public housing.” Forfeiture may be a rather strong word here, since the ordinance does not terminate landlords’ right to receive rents (although related rent control features compel landlords to forfeit much of the conventional profit associated with most economic activities), but it is certainly true that the right to live in what you own is eliminated for many tenants in common. And, again, I don’t know what kind of evidence will help the City favorably resolve this balancing issue.

Finally, the ordinance was held to contain no effective mechanism for making hardship exceptions. Theoretically, this might be cured by amendment, but I doubt whether the City can devise an escape mechanism speedy enough to satisfy the court about protecting landlords, which at the same time would be palatable to the two-thirds of the voters who are tenants. The speed of an eviction is a zero-sum equation between landlord and tenant.

And then, after all those criticisms, remain the plaintiffs’ other constitutional claims—equal protection, right to travel, family living, right to privacy, and vagueness. These are mentioned but not discussed in this opinion, but they lurk in the background as additional threats.

A decade ago, New York’s high court threw out a somewhat similar New York City ordinance requiring landlords of single-room occupancy buildings to continue renting them at controlled rents. See Seawall Assocs. v City of New York (1989) 544 NYS2d 542, 542 NE2d 1059. It did so by way of summary judgment rather than on the pleadings, giving its decision far more effectiveness and finality than the one in this case. But the language of the California Court of Appeal shows that it has no more patience with what San Francisco did than the New York Court of Appeals had with the Big Apple’s approach. —Roger Bernhardt