



League of California Cities

1400 K Street, Suite 400 • Sacramento, California 95814
Phone: (916) 658-8200 Fax: (916) 658-8240
www.cacities.org

BY OVERNIGHT MAIL

September 5, 2001

The Honorable Chief Justice Ronald M. George
Honorable Associate Justices
California Supreme Court
350 McAllister Street, Room 1295
San Francisco, California 94102-4712

Re: *Cwynar v. City and County of San Francisco*, No. S100031 (1st Dist. June 6, 2001)
Request for Depublication

Dear Chief Justice George and Associate Justices:

The Legal Advocacy Committee of the League of California Cities¹ respectfully submits this letter in support of the request of the City and County of San Francisco that this Court order the appellate opinion in the above-referenced case decertified from publication. (*See* Cal. R. Ct. 979(a).) The opinion makes a negative contribution to the legal literature because it conflicts with decades of precedent that (1) narrowly limits the per se takings rule for government-compelled physical occupations of property; (2) requires deferential judicial review of generally applicable laws; and (3) allows for demurrers in regulatory takings cases where appropriate. By disregarding these binding precedents, the ruling threatens to undermine legitimate community protections and generate needless and expensive trials on meritless claims.

I. The Court's Opinion Moves Takings Jurisprudence Backward by Radically Expanding the "Very Narrow" Per Se Rule for Government-Compelled, Permanent Occupations.

The Court of Appeal held that San Francisco's restrictions on owner/relative move-in evictions may constitute a per se taking as a government-compelled, permanent physical

¹ The League of California Cities is an association of all California cities united in promoting the general welfare of cities and their citizens. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys representing all 16 divisions of the League from all parts of the state. The committee monitors appellate litigation affecting municipalities and identifies those cases that are of statewide significance.

occupation of property. The court so ruled even though the landlords voluntarily leased the property to the existing tenants and the landlords may avoid any occupation by evicting the tenants and converting the property to a non-rental use, a right protected by the Ellis Act.² The Court of Appeal effectively held that the landlords have a constitutional "right" under the Takings Clause to select their own tenants, at least where the tenant of their choosing is the landlord or a relative. This result flies in the face of repeated rulings by the U.S. Supreme Court that preserve the legislature's ability to protect fair access to public accommodations.

In its historic decision in *Heart of Atlanta Motel, Inc. v. United States* (1964) 379 U.S. 241, the Court unanimously rejected a takings challenge to federal laws that prohibit invidious discrimination by public lodging facilities. The Heart of Atlanta Motel alleged, among other things, that these civil rights laws took its property because it was "deprived of the right to choose its customers and operate its business as it wishes." (*Id.* at pp. 244.) In language that could not be clearer, the Court repudiated the claim, stressing that a place of public accommodation "has no 'right' to select its guests as it sees fit, free from government regulation." (*Id.* at pp. 259, 261.)

Modern takings jurisprudence preserves the government's ability to restrict such unfair exclusions and evictions. In *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, the Court articulated a "very narrow" per se rule of takings liability for a government-compelled, permanent physical occupation of property. (*Id.* at p. 441.) But the *Loretto* Court expressly distinguished *Heart of Atlanta Motel* and related cases by observing that in none of these cases "did the government authorize the permanent occupation of the landlord's property by a third party." (*Id.* at p. 440.)

The clearest reaffirmation of the government's authority to restrict unfair evictions comes in *Yee v. City of Escondido* (1992) 503 U.S. 519. There, mobile home park operators argued that a rent control law, in combination with a state residency law that restricted evictions, effected a per se physical taking of their property. (*Id.* at pp. 526-27.) The *Yee* Court rejected the claim, emphasizing that "[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land. 'This element of required acquiescence is at the heart of the concept of occupation.'" (*Id.* at p. 527 [quoting *FCC v. Florida Power Corp.* (1987) 480 U.S. 245, 252].)

In language especially relevant to the case at bar, the *Yee* Court stressed that neither of the challenged laws "compels [the claimants], once they have rented their property to tenants, to continue doing so." (*Id.* at pp. 527-28.) The Court emphasized "that a park owner who wishes to change the use of his land may evict his tenants" (*Id.* at p. 528) "Put bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by the government." (*Id.* at p. 528.)

Yee controls the instant case. Just as there was no physical taking in *Yee* because the mobile home park operators could evict all the tenants and change the use of the land, there is no

² See Cal. Gov't Code § 7060 *et seq.*

physical taking here because the Ellis Act allows the claimants to evict all tenants and avoid any occupation. And just as the mobile home park operators in *Yee* voluntarily assumed the occupations by making their land available to the public for lease, the landlords here voluntarily assumed the challenged occupations by leasing their apartments.

There is no suggestion in *Yee*, *Loretto*, or *Heart of Atlanta Motel* that a different rule applies where a landowner wishes to exclude a member of the public for the benefit of the landowner or a relative. Indeed, it is absurd to think that a landowner could exclude someone from a motel or apartment on the basis of race, color, or religion simply because the landowner planned to replace the excluded person with a relative. The appeal court's ruling, however, raises precisely this specter by holding that government restrictions on such exclusions amount to a permanent physical occupation of property.

The appeal court stated that there might be the requisite government compulsion regarding "at least some plaintiffs" who allege that the property was already rented out when they purchased it and that they therefore did not voluntarily rent the property themselves. But when an owner voluntarily purchases rental property, the owner necessarily makes a voluntary choice to engage in the landlord business. In the eyes of the law, the new landlord steps into the shoes of the previous landlord, succeeding to all existing privileges and obligations. Moreover, regardless of which owner initiated the leaseholds, the claimants' ability to evict all tenants under the Ellis Act precludes any claim of government compulsion.

The appeal court further stated that there might be the requisite government compulsion because the claimants "do not have the option to cease renting only the units that were allegedly taken from them" (Slip Op. at p. 15.) But *Yee* is not so easily evaded. Indeed, the claimant in *Yee* might well have wanted to lease some portions of his land but not others. *Yee* makes plain that the fatal flaw in that claim, and in the claims at bar, is that the ability to evict all tenants removes the element of government compulsion, the sine qua non of a physical taking claim.

In an attempt to distinguish *Yee*, the appeal court wrote that *Yee* involved the right to select tenants, whereas this case involves the "right" of landlords to live on their own property. This is a distinction without a difference. Like the ordinance at issue here, the law challenged in *Yee* restricted the grounds a mobile home park owner could use to terminate tenancies. Allowable grounds included nonpayment of rent, violation of park rules, or an owner's desire to change the use of the entire park. (*Yee*, 503 U.S. at p. 524 [citing Cal. Civ. Code § 798.56].) An owner's desire to move into one of the park pads, or to allow a relative to do so, did not constitute permissible grounds to terminate a tenancy. (*Id.*) Following *Heart of Atlanta Motel*, *Yee* reaffirmed that there is no right to select one's tenants.

Due to its blatant disregard of *Yee*, the appeal court concluded that "plaintiffs' status as voluntary landlords does not preclude them from establishing that Proposition G, as applied to them, effects a permanent physical taking of the portions of their property that they are precluded from occupying." (Slip Op. at p. 19.) In fact *Yee* precludes exactly that: "Because they voluntarily open their property to occupation by others, petitioners cannot assert a *per se*

right to compensation based on their inability to exclude particular individuals." (*Yee*, 503 U.S. at p. 531.)

By ignoring settled law, the appeal court's ruling undoubtedly will invite landlords to test the boundaries of this radical approach to per se, physical takings claims by challenging all manner of landlord-tenant controls. The ruling takes a large step backward in takings jurisprudence by running roughshod over carefully crafted principles that balance legitimate landowner rights with equally legitimate protections for tenants and the general public. Its publication would plainly detract from takings jurisprudence by undermining the balance and predictability afforded by existing precedent to landlords and tenants alike.

II. The Appeal Court Ruling Generates Confusion by Misapplying Heightened Scrutiny to a Generally Applicable Law.

The Court of Appeal recognized that generally applicable laws are subject to deferential judicial review (Slip Op. at p. 20), but it found that Proposition G is not generally applicable because it does not apply to buildings constructed after June 1979. The court also observed that the law does not subject landlords to "identical treatment" because, for example, a resident landlord may evict a tenant to make room for a family member, but a nonresident landlord may not. (Slip Op. at p. 21.)

The court's refusal to give Proposition G appropriate deference on these grounds is truly remarkable. The distinctions in the law to which the Court refers are precisely the kind of reasonable, nuanced policy choices that should be *encouraged*, not penalized through the application of heightened scrutiny. To take the court's own example, it makes perfect sense to conclude that special consideration should be given to a resident landlord who needs to care for a close relative, as opposed to a nonresident landlord who would not be onsite to provide care. Under the appeal court's approach, deference would be afforded only to ham-fisted, one-size-fits-all laws that draw no reasonable distinctions among regulated landowners.

This Court's ruling in *Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 966, *cert denied*, 526 U.S. 1131, makes clear that generally applicable laws that do not require a dedication of property warrant "the most deferential review" under the Takings Clause. Deferential review is appropriate for these laws because they do not raise the risk of the extortionate use of police power to exact an unconstitutional condition. (*Id.*) Deferential review also prevents courts from being thrust into the "distinctively legislative role" of weighing the wisdom of competing policy choices. (*Id.* at p. 973; *see also Landgate v. California Coastal Comm'n* (1998) 17 Cal.4th 1006, 1022, *cert. denied*, 525 U.S. 876.)

Nothing in *Santa Monica Beach* suggests that deference is appropriate only where legislators refuse to make reasonable distinctions. Indeed, the *Santa Monica Beach* Court expressly recognized that landlord-tenants laws must make reasonable distinctions to avoid undue

hardships on specially situated landlords. (19 Cal.4th at p. 963 [*e.g.*, individualized rent adjustments].)

If published, the appeal court refusal to afford deference would threaten serious confusion among lower courts on this critical issue, thereby undermining the separation of powers in the federal and California constitutions that *Santa Monica Beach* and other rulings by this Court seek to preserve.³

III. The Appeal Court Ruling Threatens to Eliminate the Appropriate Role of Demurrers in Regulatory Takings Cases.

The Court of Appeal criticized the trial court's sustaining of the City's demurrer as "premised on a fundamental misunderstanding of a regulatory takings analysis." (Slip Op. at p. 27) According to the appeal court, an attempt to sustain a demurrer in a takings case is "simply inconsistent with the *ad hoc* analysis that applies to regulatory takings claims." (*Id.*)

It is the appeal court ruling, however, that reflects a "fundamental misunderstanding" of regulatory takings, for as the City demonstrates in its Petition for Review (p. 15), this Court and many others routinely sustain demurrers in regulatory takings cases notwithstanding the *ad hoc* nature of the inquiry. This case provides a clear example of a takings claim that is controlled by the well-settled rules set forth in *Yee*, *Heart of Atlanta Motel*, and *Santa Monica Beach*. No trial is necessary to apply these clear rules to the undisputed facts and conclude that the plaintiffs cannot state a valid takings claim. The appeal court's approach

³ The appeal court also attempted to justify the application of heightened scrutiny because, in its view, Proposition G implicates the landlords' possessory rights. (Slip Op. at p. 21.) As shown in Section I, however, the landlords voluntarily ceded those possessory rights and continue to do so by not evicting all tenants as the Ellis Act permits them to do. This voluntary action by the landlords does not trigger heightened scrutiny.

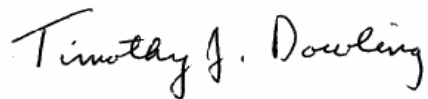
The appeal court purports to conclude that it would have reached the same result regardless of the degree of deference applied (Slip Op. at p. 21), but it is plain that the court applied heightened scrutiny by endorsing attacks on Proposition G that are strikingly similar to those rejected under deferential review by the *Santa Monica Beach* Court. (*Compare* Slip Op. at pp. 21-24 *with Santa Monica Beach*, 19 Cal.4th at pp. 969-71.)

would result in unnecessary, expensive litigation and deprive local governments of the ability to dispose of meritless takings claims in a timely fashion.

IV. Conclusion

The appeal court ruling departs from unanimous precedent by dramatically expanding the test for per se physical occupations of property, severely limiting the appropriate scope of deferential judicial review of legislative policy choices, and virtually eliminating the role of demurrers in regulatory takings cases. The League's Legal Advocacy Committee urges this Court to decertify the appeal court opinion from publication. (*See* Cal. R. Ct. 976(b)(4) [publication warranted when the opinion "makes a significant contribution to the legal literature"].)

Respectfully submitted,



Timothy J. Dowling
Community Rights Counsel
1726 M Street NW
Suite 703
Washington, D.C. 20036
(202) 296-6889

William Higgins
League of California Cities
1400 K Street, Suite 400
Sacramento, CA 95814
(916) 658-8250
California Bar Number: 183214

TJD:hcf
Attachment: Proof of Service by Mail