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May 18, 2017

The Honorable Chief Justice Tani G. Cantil-Sakauye
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102 – 4797

Re: Martin J. Coyne v. City and County of San Francisco
9 Cal. App.5th.1215 (2017)
Request for Depublication

Dear Chief Justice Tani G. Cantil-Sakauye and Associate Justices:

Pursuant to California Rule of Court, Rule 8.1225(a), Bay Federal Credit Union ("Bay Federal") and the City of Carson hereby requests the depublication of the Opinion in the above-referenced case ("the opinion").

A. Nature of Bay Federal's and the City of Carson's Interests

Bay Federal is a not-for-profit financial institution with a commitment to providing financing in the moderate and low-income housing market. Bay Federal is the largest provider of manufactured home purchase mortgages in the Central Coast area of California, currently funding more than $115,000,000 in manufactured home loans to 1017 low and moderate income households.

The Opinion held that a San Francisco ordinance's mitigation requirement of two years' worth of rental payment differentials to compensate tenants who were displaced by the removal of their rentals under the Ellis Act was preempted by the Act under the "prohibitive price – compulsion" preemption standard because they were in conflict with it. The Opinion stated that this required payment would be preempted under this standard if it was "so high that landlords can't in practice pay it or even that it will materially deter them from evicting under the Ellis Act." (Id., at pp. 597-598, citing *San Francisco Apartment Assn. v. City and County of San Francisco* (2016) 3 Cal.App. 5th. 463, 482.)

However, after first stating that it would be applying the prohibitive price preemption standard, the Opinion conflated it with the standard that was applied in the Federal District Court opinion in *Daniel Levin v. City and County of San Francisco* (2014) 71 F.Supp3d 1072, which had held that the much larger rental payment differentials in the City's prior ordinance were an unconstitutional exaction because it could not be shown that the landlord's direct action of evicting the tenants caused the harm, for which the landlord was being required to compensate the tenants. The Opinion then applied *Levin* and ruled that the rent differential payments, which was based on the area's higher market rents for which the rental payment compensated the tenants, was preempted by

prohibitive price preemption because it was not caused by the landlord's direct action of evicting the tenants but had been, instead, caused by the external circumstance of the City's rent control policy purposely causing the displaced "tenants rent to be artificially below market rate. [Id., at p. 601.] By applying that standard from *Levin*, the Opinion ignored the prohibitive price preemption standard that it stated that it was applying: whether or not the price was "so high that the landlord can in practice pay it" or that it would "materially deter them from evicting under the Ellis Act." [Id., at pp. 597-598.]

The Opinion then escalated this mistake by also holding that any amount of a rental payment differential was a "categorical infringement" that imposed a prohibitive price on a landlord's right to go out of the residential rental business and, therefore, that it was irrelevant to consider "what particular relocation payment threshold imposes a prohibitive price," so it stated no conclusion on that threshold issue. [Id., at p 603.] Thus, the Opinion has re-written the prohibitive price preemption test and turned it on its head. This is not only bad law but also bad public policy that could have devastating consequences if it is left published and applied and extended further.

In that regard, attorneys representing the owners of manufactured home parks are now using the Opinion to argue that the most important mitigation benefit provided by most local manufactured home park conversion and closure ordinances in California, the payment of the cost of purchasing a comparable manufactured home in a comparable manufactured home park, is, likewise, prohibited under the prohibitive price preemption standard by Government Code sections 65863.7's and 60427.4's "reasonable cost of relocation" limit. They are arguing that this required benefit is preempted because the market price of those replacement mobile homes was not caused by the displaced mobile home park owner's decision to close their park and evict them but by rent control and market forces that were not affected by their park owners' decision to close their park.

Bay Federal Credit Union, its members, and other financial institutions who have manufactured-home lending programs in California have substantial interests in the depublication of this faulty Opinion. Particularly in jeopardy are Bay Federal's low and moderate income member households who will be directly affected by the outcome if this Opinion is not depublished and if it is then applied to manufactured home park conversions. If that occurs, they would likely lose all of the equity that they have invested in their homes. Of equal importance, as a financial institution, is the fact that Bay Federal has funded millions of dollars in manufactured home loans to its membership--low and moderate-income homeowners who live in manufactured home parks--to finance their homes in those parks. Bay Federal and it members have a huge investment that is at risk and likely to be lost if the Opinion remains published and is applied to manufactured home parks because it would prevent local jurisdictions from requiring park owners to adequately compensate displaced manufactured home owners for the full value of obtaining a replacement manufactured home on the open market, which would include protecting their current loans. Under such a circumstance, Bay Federal's--and other lenders'--ability to continue their manufactured home mortgage programs will be put at serious risk, since they will not be able to protect the future security of the loans. This could destroy the important manufactured-home lending market in California, making this form of low- and moderate-income homeownership in California unavailable to the low- and moderate- income households who rely on it for obtaining that housing. The City of Carson joins in this request for depublication since almost all of its affordable housing is located in mobile home parks and without adequate

compensation to obtain replacement mobile homes, the low income owners of these mobile homes could not afford any replacement housing and this could occur if the Opinion is not depublished.

B. Reasons Compelling Depublication

1. The Opinion Applied the Wrong Standard to Prohibitive Price Preemption

The Opinion concerns a San Francisco ordinance that required a landlord evicting tenants under the Ellis Act to regain possession of their rental unit and to pay those tenants a "rental payment differential," which it defined as "the difference between the tenant's current rent and the prevailing rent for a comparable apartment in San Francisco over a two-year period." [Id., at p. 592.] In its final version, that was invalidated by the Opinion, Ordinance 68 – 15, the payments would range from a $4,500 per person maximum "relocation payment," granted under the prior ordinance 21 – 05, to the new current per-evicted-household maximum of $45,000 adopted under ordinance 68 – 15. The Opinion held that the proper standard for evaluating whether or not this provision was preempted by the Ellis Act was the "prohibitive price – compulsion standard" that would prohibit relocation benefits if their amount was "so high that landlords can't in practice pay it or even that it will materially deter them from evicting under the Ellis Act," [Ellis Act. Id., at pp. 597-598], citing *Javidzad v. City of Santa Monica* (1988) 204 Cal.App.3d 524 – 531 and *San Francisco Apartments Assn. v. City and County of San Francisco* (2016) 3 Cal.App.3d, 463 – 482.]

However, the Opinion then conflated that standard with the standard that was applied by the Federal District Court Opinion in *Levin,* that the rental payment differential requirement was an unlawful exaction because the high market rental payments that the rent differential was compensating displaced tenants for could not be demonstrated to be caused entirely by the landlord's direct action of evicting the tenants because they were, instead, caused by the City's rent control policy purposely causing the displaced "tenants' rent to be artificially below market rate. [Id., at p. 601.] By applying that standard from *Levin,* the Opinion ignored the prohibitive price preemption standard that it stated that it was applying: that standard being based upon whether or not the price was "so high that the landlord cannot, in practice, pay it" or that it would "materially deter them from evicting under the Ellis Act." [Id., at pp. 597-598.]

2. The Exaction Analysis that the Opinion Applied from *Levin* Is Incorrect under Nollan/Dolan and Koontz.

The two problems with applying *Levin's* unconstitutional exaction analysis to prohibitive price preemption is that *Levin* is a Federal District Court decision, which provides only persuasive, but not binding, precedent, and it applied the wrong standard for the takings exaction analysis! Even if disregarding that, its standard also has no relevance to California's prohibitive price preemption standard under *Javidzad* and *San Francisco Apartments Assn.* [Id.]

Levin applied the *Nollan/ Dolan* unconstitutional exactions-takings test to a two-year rent differential payment requirement, at $117,958.89, that was required under the prior version of San

Francisco's Ordinance in that regard, Ordinance 54-14.[1] *Levin* held that, under this test, the payment had to "have an essential nexus with, and *(be)* roughly proportional to the harm caused by the property owner's withdrawal of the unit from the rental market," and that it did not meet this standard because "the property owner's decision to repossess the rental unit had not caused the rent differential gap to which the tenant is now exposed." [*Levin*, 71F.Supp at 1084-1085] Instead, it determined that the rent differential was caused by "the limited supply—and correspondingly high price—of rental units in San Francisco," which was "caused by entrenched market forces and structural decisions made by the city long ago in the management of its housing stock" and "the regulated rent that the tenant currently enjoys." [Id. at 1086]

However, *Levin* misconstrued the *Nollan/Dolan* unconstitutional exactions analysis. The correct *Nollan/Dolan* unconstitutional exactions analysis demands that there must be found that there is an "essential nexus" between the required relocation lump-sum rent differential payments and a "legitimate public purpose." [*See Dolan v. City of Tigard*, 512 U.S. 374, 387 (1994).] The *Levin* opinion misapplied this test by stating that the nexus did not exist because the landlord's actions of withdrawing the units did not cause the higher priced rents that required the rent differential payments. [Id.] However, under *Nollan/Dolan* and *Koontz*, the question is **not** whether the property owner is in some sense responsible for existing conditions (here, high-market rents and in *Nollan/Dollan and Koontz* lack of access, traffic congestion and general loss of wetlands) but rather, taking those background conditions as given, what is the marginal impact of the landlord's proposed action of withdrawing the rentals from rent control and whether the proposed exaction has an essential nexus and rough proportionality to those impacts. [*See Koontz* v *St. Johns River Water Management District* 133 S. Ct at 2586 at 2595 (2013).] In *Levin*, the essential nexus between the relocation assistance payments and the impact of the landlords' decision to withdraw the property from the rental market would be that, **but for** the landlords' withdrawal of the property from the rental housing market, Levin's tenants would have continued to enjoy and inhabit their existing rent-controlled apartment and would not have been forced to pay market rents.

Similarly, *Levin* applied the "rough proportionality" requirement incorrectly. Even though the "rough proportionality" test from *Dolan* uses the term "proportional," it does not require that the amount of the relocation benefits be proportional in their size to the harm caused entirely by the landlord's action rather than by outside market rents, which were not under the landlord's control. Instead, it merely conditions its approval upon a finding that the required relocation assistance "will, or is likely to, offset some of" the tenant hardship caused by the displacement, rather than that those payments merely "could offset some" of that tenant hardship. [*See Dolan*, 512 U.S. at 391.]. Thus, *Levin* applied the wrong standard under *Nollan/Dolan* and Koontz, and that standard should not have been extended in *Coyne*, for that reason alone.

3. Regardless of Levin's Exaction Standard's Correctness or Not, It Still Would Have No Applicability to California's Prohibitive Price Preemption Analysis.

[1] San Francisco's Ordinance was amended and the large rent differential payments, which the *Levin* decision objected to, were greatly reduced and then capped under Ordinance 68 – 15, which is the version of the ordinance that the court was considering in this Opinion.

Even if *Levin* had applied the correct *Nollan/Dolan* unconstitutional exactions analysis, it would nevertheless have no application to the prohibitive price preemption analysis under *Javidzad* and *San Francisco Apartments Assn.* The reason is that the prohibitive price preemption analysis's focus is upon whether or not the amount of the relocation benefits is "so high that landlords can't in practice pay it or even that it will materially deter them from evicting under the Ellis Act" rather than upon examining who created the problem that the benefits are intended to mitigate. *[Javidzad v. City of Santa Monica* (1988) 204 Cal.App.3d 524 – 531 and *San Francisco Apartments Assn. v. City and County of San Francisco* (2016) 3 Cal.App.3d 463 – 482]

The Opinion then cemented this mistake when it went on to hold that any amount of a rent differential payment was a "categorical infringement which opposes the prohibitive price on the landlord's right to exercise his rights to go out of the residential rental business" and that, therefore, it was irrelevant to consider "what particular relocation payment threshold imposes a prohibitive price," so that, in effect, the Opinion would be making no conclusion on that issue. [Id., at p 603.]

4. If the Opinion Is Not Depublished, There will Be a Risk That it Could be Extended into Other Areas of Law, Where It Would Create Conflicts with Long-Established Precedent. It Could Also Cause the Low and Moderate Income Affordable Manufactured Home Loan Market in California to Become Financially Untenable to Lenders.

Attorneys representing the owners of manufactured home parks are now using the Opinion to argue that the most important mitigation benefit provided by most manufactured home park conversion and closure ordinances in California–that of payment of the cost of purchasing a comparable manufactured home in a comparable manufactured home park–is likewise prohibited by "prohibitive price preemption" under Government Code sections 65863.7's and 60427.4's "reasonable cost of relocation limit." They are incorrectly arguing that it is preempted because the market value of those replacement homes was not caused by the displaced homeowners' mobile home park owner's decision to close their park and evict them and their homes but by market forces and rent control. The circumstances of mobile home owners facing mobile home park closures are far different from those of the usual tenants in Ellis Act evictions, as the California Supreme Court and Federal Courts in California have recognized that mobile home owners are co-investors with their park owners and typically make a much larger investment in their mobile homes and their spaces than does their park owner. [*See Galland v. County of Clovis* (2001) 24 Cal.4th 1003, 1009 and *Adamson Companies v. County of Malibu*, 854 F.Supp. 1476, 1489 (1994, U.S.Dist.Ct., Central Dist. California.] This distinction should entitle them to at least be able to receive sufficient compensation to purchase an adequate replacement mobile home in another mobile home park, even if it is outside market forces rather than their individual park owner's closing of their park that caused the high market price of those replacement homes. Such payments are justified because the mobile home owners provided the larger aggregate share of their co-investment in their parks but have no say in the closure of their parks and do not share in the enormous profits that their park owner usually makes from closing their parks and redeveloping them into higher-end housing.

However, under the Opinion's flawed analysis this circumstance might not matter if it is

extended to mobile home park conversions and closures and attorneys representing park owners are now vigorously using the Opinion seeking its extension to mobile home park conversions and closures.

Although the Ellis Act does not apply to manufactured home park conversions because it specifically excludes them, the two statutes that do, Government Code sections 65863.7 and 66427.4, both include in their provisions a requirement that the benefits must be reasonably related to the cost of relocation, and park owners' attorneys are now arguing that, under the Opinion, they are not because a park owner's decision to close a park, they argue, does not cause the high market price of replacement mobile homes in other parks. So, as long as the Opinion remains published, it will pose a threat that it can be applied to that area of law, as well as to other areas of law, since it changes the long-established test for "prohibitive price preemption" from being that the price of the mitigation is so high that it prevents or materially impacts someone's decision to exercise their right under a statute to that it has to be demonstrated that they have entirely caused the circumstance that requires the mitigation.

As has been explained above, the Bay Federal Credit Union and the City of Carson have significant concerns regarding this extension and its potential to destroy the mobile home loan market in California, which low and moderate income mobile homeowners entirely depend on for obtaining this source of scarce affordable housing. The Opinion could also have far-reaching consequences in many other areas of California law through this backdoor method of applying *Levin's* incorrect unconstitutional exactions - takings analysis to both the prohibitive price preemption and reasonableness standards, which apply to many other state statutes.

C. Conclusion

For the above reasons, the Bay Federal Credit Union respectfully requests the depublicaton of the *Coyne* decision in its entirety.

Sincerely,
Law Office of William J. Constantine

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