TAKINGS TALK

Takings decision should be published

By Michael M. Berger

A decision relating to takings law in California was recently filed by the Court of Appeal in San Francisco. *San Francisco SRO Hotel Coalition v. City and County of San Francisco*, A151847 (Oct. 15, 2018). There are two strange things about the opinion. First, the court ruled in the property owners' favor. Second, the appellate opinion was not certified for publication.

Why are those things strange? The reasons are related. California's courts have long had a national reputation for being very hard on property owners in takings litigation. Indeed, a number of years ago, two nationally reputed land use experts joked that practitioners in other parts of the country wondered why California property owners bothered to sue municipalities when it

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would save both time and money if they simply slit their throats. Honest. You can't make that stuff up. Check it for yourself, if you like. Take a look at Richard Babcock and Charles Siemon, "The Zoning Game Revisited" 293 (1985). Others have reached the same conclusion.

So the first strangeness about the *San Francisco SRO Hotel* decision is that the property owners won. In itself, that is noteworthy. The second strangeness is that, notwithstanding the opinion's noteworthy nature the Court of Appeal did not certify it to see the light of day. In other words, given the opportunity to show that California courts can dispense even-handed justice, this court decided to hide its light. Too bad. California can use a little positive press now and again.

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So, what happened in this case? It was another in a series of San Francisco rent control cases. San Francisco is well known for its rent control ordinances. More than that, it has a twist that is not seen uniformly in other jurisdictions. Given the shortage of low income housing, San Francisco tends to treat anything that looks like housing as part of the city's housing stock. In this case, the subject was single room occupancy (SRO) hotel rooms. An SRO is a small hotel room that typically lacks either a kitchen or bathroom. Pretty basic housing. The term of occupancy can vary, but under the law in effect when San Francisco amended its ordinance, SRO operators could rent their rooms for periods of seven to 31 days without being subject to the city's rent control laws. And that is where the rub came in this case.

Remember, this tale takes place in San Francisco. The owners of SRO hotels periodically gazed longingly at the tourist oriented hotels operated by others, and the generally good turnover at higher rates than SROs were able to charge. Some of them longed to make a change. The city really did not want that to happen. It viewed it as a loss of low income housing stock. So the city amended its SRO ordinance to require an initial rental term of at least 32 days. In addition to setting a longer occupancy term, the newly amended ordinance made the SROs subject to the city's rather stringent rent control laws. In the court's words, the city "was effectively forcing them out of the hotel business and into the landlord/tenant business."

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The property owns (consisting of individuals and associations) sued. Among other things, they claimed that the new ordinance utterly eliminated their business of renting residential units for periods of seven to 31 days. They further charged that the 32 day rentals they would be allowed to make would subject them to the stringent rent control ordinance, "chang[ing] the nature of their business in significant and detrimental ways." The Court of Appeal replied simply, "We agree."

Thus, the court was able to analyze the case outside the traditional rent control context. That was useful, as rent control in general has been upheld as constitutional as long as they are reasonably calculated to eliminate excessive rents and at the same time provide landlords with a just and reasonable return on their investment. Nothing in the plaintiffs' presentations showed denial of a reasonable return.

But that did not eliminate the takings issue. Overriding theoretical and jurisprudential differences between the parties is the city's general power to eliminate a land use that it finds no longer suitable for the location. The problem is merely one of compensation. The city could eliminate any of the hotel uses it no longer desired by simply providing compensation to the owner. It could do that either through direct payment of compensation for the value of the property or by eliminating the use and accompanying it with establishment of a reasonable "amortization" period to allow the owner an opportunity to recoup its investment. I am not always convinced that the amortization approach actually provides appropriate compensation, but the courts have at least theoretically accepted it.

But this case did not fit within any traditional mold. As the court put it, "But the issue here is not the application of rent control to an existing landlord-tenant business; it is a forced change in the nature of the business without compensation or a reasonable amortization period." Just so. The case was remanded to the trial court to reconsider the plaintiffs' request for a preliminary injunction after considering "the balance of the hardships."

That leaves only the publication issue at large. Given the California judiciary's long history of showing little or no consideration to the rights of property owners when their interests conflict with those of the government, one feels justified in asking whether it might not have been a good idea to take this opportunity to show that our appellate courts are capable of showing serious understanding to the serious problems faced by property owners. For it is clear that this court understood. We, of course, have no idea what will happen on remand, or whether cooler heads might prevail at city hall and the case could settle before more litigation occurs. But for now, at least one California appellate court has been willing to put its marker on the side of the balance that favors property owners. If nothing else, that would have been worth letting the rest of the bar know.

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