

Why Rent Control Is *Still* a Regulatory Taking

by

R. S. Radford

Pacific Legal Foundation
Program for Judicial Awareness
Working Paper No. 05-0001

2005

A previous draft of this article was presented at
Georgetown Environmental Law & Policy Institute's 7th Annual
Conference on Litigating Takings, held at UCLA Law School, October 14-15, 2004.

ABSTRACT

The Supreme Court has repeatedly declared that land-use regulations that fail to substantially advance legitimate state interests violate the Takings Clause of the Fifth Amendment. This standard seems readily applicable to rent control, a policy that has been shown to exacerbate the problems it is intended to remedy, and to impose heavy social costs that would not otherwise exist. Nevertheless, the California Supreme Court has declared that it will not strike down rent control under the substantial advancement standard, nor will it apply a heightened level of scrutiny to such regulations.

In response to these rulings, California rental property owners have taken their constitutional claims to federal court. In a series of decisions culminating in *Cashman v. City of Cotati*, the Ninth Circuit has found rent control laws to violate the Takings Clause under a substantial advancement standard. One of these cases, *Lingle v. Chevron, USA*, was accepted for review by the United States Supreme Court in October, 2004. The outcome of this case will have major ramifications for rent control and regulatory takings law in the 21st century.

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I THE ONCE AND FUTURE TAKING

A decade ago I took part in a conference at Fordham University Law School, at which I set out the thesis that rent control, as commonly practiced in the United States, violates the Takings Clause of the Fifth Amendment.¹ The argument was straightforward, and has not changed. Its core rests on the first prong of the Supreme Court's two-part regulatory takings standard, first enunciated in *Agins v. City of Tiburon*,² that a land-use regulation violates the Takings Clause if it fails to substantially advance legitimate state interests.³ I recognize that a handful of commentators have made something of a cottage industry out of arguing that the Court really didn't mean what it said in *Agins*, or was confused, or somehow misstated the law, such that the substantial advancement test "really" isn't a takings standard at all.⁴ To them I can only say, dream

¹ See R. S. Radford, *Why Rent Control Is a Regulatory Taking*, 6 Fordham Envt'l. L.J. 755 (1995). For an even earlier exposition of the same theme, see R. S. Radford, *Regulatory Takings Law in the 1990s: The Death of Rent Control?*, 21 Southw. U. L. Rev. 1019 (1992). The Takings Clause provides, ". . . nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

² 447 U.S. 255 (1980).

³ *Id.* at 260.

⁴ See, e.g., Thomas E. Roberts, *Facial Takings Claims under Agins-Nectow*

on.⁵ This doctrine is in fact firmly established, has regularly been reiterated,⁶ and has been employed to strike down a variety of land-use regulations, both facially and as

Procedural Loose End, 24 U. Haw. L. Rev. 623, 639 (2002) (“The entry of the ‘substantially advance legitimate state interests’ language into the takings lexicon can most charitably be described as a mistake”); Douglas T. Kendall, Timothy J. Dowling & Andrew W. Schwartz, TAKINGS LITIGATION HANDBOOK 237 (2000) (“*Agins* provides no evidence that the Court desired to create an entirely new standard of takings liability.”); John D. Echeverria, *Does a Regulation That Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking?*, 29 *Envtl. L.* 853, 858 (1999) (attributing Supreme Court’s adoption of substantial advancement takings test to “an inadvertent muddling of legal doctrines”).

⁵ For a more nuanced response, see R. S. Radford, *Of Course a Land Use Regulation That Fails to Substantially Advance Legitimate State Interests Results in a Regulatory Taking*, 15 *Fordham Envt’l L. J.* 353 (2004).

⁶ See *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 334 (2002); *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 704 (1999), *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992); *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985).

applied.⁷ Indeed, the Court went far out of its way to reaffirm the substantial advancement test as a viable regulatory takings standard in the last major takings case to come before it, *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.⁸ Until the Court says or does something that can reasonably be construed as repudiating the substantial advancement takings standard, I will therefore assume that it remains in effect.

Complying with this criterion requires that restrictive regulations be designed to mitigate some demonstrable social costs that would otherwise be imposed by the

⁷ See *City of Monterey, id.*; *Dolan, id.*; *Nollan, id.*

⁸ 535 U.S. 302 (2002). Although the *Tahoe-Sierra* Court found that a temporary development moratorium could not effect a categorical taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, Justice Stevens' majority opinion went on to explain that such a moratorium *could* give rise to liability as a regulatory taking under any of seven alternative theories, including the following:

[A]part from the District Court's finding that TRPA's actions represented a proportional response to a serious risk of harm to the lake, *petitioners might have argued that the moratoria did not substantially advance a legitimate state interest.*

Id. at 334 (emphasis added).

unregulated use of the property in question.⁹ Already in 1995 there existed a mass of uncontroverted empirical evidence demonstrating that rent control tends to have the opposite effect – creating social costs and burdens that would not otherwise exist, and exacerbating housing problems far beyond anything that would pertain in competitive markets. Rent-controlled cities in California and Massachusetts have suffered serious declines in their stock of rental housing, despite a housing boom in comparable but uncontrolled cities in those states.¹⁰ Moreover, the incidence of these costs has been alarmingly regressive. It has long been understood that a disproportionate share of the financial benefits of rent control accrue to residents of the most well-to-do neighborhoods.¹¹ In California, this tendency has been pushed to new heights (or depths,

⁹ See *Nollan*, 483 U.S. at 838-39. See also, e.g., Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 Nw. U. L. Rev. 591, 602 (1998):

[The *Nollan*] Court described the “substantially advance” test as one that examines the proportionate relationship between the amount of public harm caused by the owner and the regulatory burden imposed: a cause-effect test.

¹⁰ See Radford, *Why Rent Control Is a Regulatory Taking*, *supra* note 1, at 770 (citing research showing that, “[w]hile the regulated cities lost 8% to 14% of their rental housing stock, comparable locales without rent control *increased* their supply of rental units, typically by 5% to 20% over the decade.”) (emphasis in original).

¹¹ See, e.g., John C. Moorhouse, *Long-Term Rent Control and Tenant Subsidies*, 27 Q.

depending on one's social perspective), as the diminishing rental housing stock has become occupied by an increasingly white, middle class, professional population of renters.¹² It is hard to imagine another policy option that could have been more effective in displacing the poor and minorities from such bastions of radical gentrification as Berkeley and Santa Monica, California.¹³

One thing that *has* changed in the course of the past ten years, however, is that the California Supreme Court has made it unmistakably clear that it just doesn't care. In *Santa Monica Beach Ltd. v. Superior Court*,¹⁴ a regulatory taking challenge to Santa Monica's rent control scheme, the state's high court proclaimed that, contrary to the United State Supreme Court's requirement of heightened scrutiny in such cases,¹⁵ it would apply the most deferential possible standard of review. If a human being can be located, anywhere on the face of the earth, who can imagine any possible rationale for

Rev. Econ. & Bus. 6, 21 (1987); Ned Levine, et al., *Who Benefits from Rent Control?*, 56 Am. Plan. Ass'n. J. 140, 144 (1990).

¹² See St. John & Associates, *Rent Control in Perspective: Impacts on Citizens and Housing in Berkeley and Santa Monica Twelve Years Later* (August, 1993).

¹³ See *id.*

¹⁴ 968 P.2d 993 (Cal. 1999).

¹⁵ See *Nollan*, 483 U.S. at 834 n.3.

adopting such a law, it will pass constitutional muster in California.¹⁶ And just to be on the safe side, the state court added (in a separate decision) that the constitutionally required remedy of just compensation would not be available, even if a violation of the Takings Clause were somehow established. Under the doctrine laid down in *Kavanau v. Santa Monica Rent Control Board*,¹⁷ the only remedy California courts can grant for being deprived of one's property by a predatory rent control board is the right to ask them to please give it back.¹⁸ Certainly, being required to return to an agency that has violated your constitutional rights and ask them to reconsider seems more like a remedy for a due process violation than for a taking. The California Supreme Court agrees but is not bothered by that fact, since it has determined that "a remedy for [a] due process violation, if available and adequate, *obviates a finding of a taking.*"¹⁹ Because every takings claimant was already required, under California's unique procedural scheme, to obtain a

¹⁶ See *Santa Monica Beach*, 968 P.2d at 1002.

¹⁷ 941 P.2d 851 (Cal. 1997).

¹⁸ The *Kavanau* court established that the only recourse for property owners who have been subjected to confiscatory rent regulations is to seek to have the rent board's actions invalidated via mandamus, followed by a return to the offending agency for further proceedings. See *id.* at 865.

¹⁹ *Id.* at 865 (emphasis added).

due process remedy as a *prerequisite* to pursuing inverse condemnation,²⁰ and under *Kavanau* a due process remedy obviates the finding of a taking (and therefore moots any inverse condemnation claim), the California Supreme Court has effectively foreclosed inverse condemnation as a remedy in all cases alleging a regulatory taking by operation of a rent control law.²¹

It remains true today, as it was a decade ago, that the United States Supreme Court has never upheld a peacetime rent control law challenged as a regulatory taking,²² and in fact struck down one such measure in the formative years of its regulatory takings jurisprudence.²³ Elsewhere at the state level, New York's highest tribunal has found a rent control law to be unconstitutional under the substantial advancement inquiry.²⁴ In California, however, rental property owners have learned that they will have to look elsewhere than to the state court system to pursue legal claims stemming from violations

²⁰ See *Hensler v. City of Glendale*, 876 P.2d 1043, 1056-60 (Cal. 1994) (holding that all regulatory takings claims in California courts must proceed by way of administrative mandamus or declaratory relief).

²¹ See, e.g., *Galland v. City of Clovis*, 16 P.3d 130, 134 (Cal. 2001) (*Kavanau* “precluded a claim for inverse condemnation”).

²² See Radford, *Why Rent Control Is a Regulatory Taking*, *supra* note 1, at 762-64.

²³ See *Chastleton Corporation v. Sinclair*, 264 U.S. 543, 547-48 (1924).

²⁴ See *Manocherian v. Lenox Hill Hospital*, 643 N.E. 2d 479, 483-84 (N.Y. 1994).

of their Fifth Amendment rights.

II CALIFORNIA RENTAL PROPERTY OWNERS TURN TO THE FEDERAL COURTS

Following the *Kavanau* and *Santa Monica Beach* decisions, California property owners began turning to the federal judiciary, which might reasonably be presumed to offer a more stalwart defense of rights guaranteed under the federal Constitution. Indeed, a takings challenge to a mobile home park rent control law had already met with success in the Ninth Circuit,²⁵ albeit under a somewhat strained legal theory.²⁶ Nevertheless, the shift from state to federal court as the preferred locus of rent control litigation has not been a seamless transition. A host of procedural pitfalls have presented themselves, many of which are still being litigated at this time.²⁷

In the Ninth Circuit, regulatory takings claims must be brought under 42 U.S.C. §

²⁵ See *Hall v. City of Santa Barbara*, 797 F.2d 1493, amended on denial of rehearing and rehearing en banc, 833 F.2 1270 (9th Cir. 1986).

²⁶ See *infra*, text at notes 74-83.

²⁷ See, e.g., *Carson Harbor Village, Ltd., v. City of Carson*, 353 F.3d 824 (9th Cir. 2004) (petition for certiorari pending); *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651 (9th Cir. 2003) (same); *San Remo Hotel v. City and County of San Francisco*, 364 F.3d 1088 (9th Cir. 2004) (same).

1983,²⁸ and the Supreme Court has tied the statute of limitations for § 1983 actions to the applicable state’s statute for personal injury claims.²⁹ At the time of *Kavanau* and *Santa Monica Beach*, this set a one-year limitation period for bringing takings claims in federal court.³⁰ No new apartment rent control ordinances have been adopted in California since the 1980s, so facial takings challenges to these measures cannot be brought in federal court unless they are significantly amended. On the other hand, scores of California jurisdictions have imposed rent control on mobile home parks over the past decade, and these laws continue to be adopted throughout the state. For this reason, all facial takings challenges to rent control laws filed in the federal courts of California since *Kavanau* and *Santa Monica Beach* have been brought by the owners of mobile home parks.

A far more serious stumbling block has been the “ripeness” doctrine of *Richardson* limited land-rent increases and specifically provided that the below-market

²⁸ See *Azul-Pacifico, Inc., v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992).

²⁹ See *Wilson v. Garcia*, 471 U.S. 261 (1985).

³⁰ The California statute of limitations was increased to two years in 2002. See Calif. Code Civ. Proc. § 335.1.

³¹ 473 U.S. 172 (1985).

³² *Id.* at 194.

³³ 473 U.S. at 194.

³⁴ See, e.g., *Carson Harbor Village*, 353 F.3d at 829-30; *Hacienda Valley Mobile Estates*, 353 F.3d at 659-60.

³⁵ *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 406 (9th Cir. 1996), quoting *Yee v. City of Escondido*, 503 U.S. at 534. See also *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1102 (9th Cir. 1998) (stating that a facial takings claim based solely on the allegation that an ordinance did not substantially advance legitimate interests is immediately ripe for federal adjudication).

³⁶ See, e.g., *Montclair Parkowners Association v. City of Montclair*, 264 F.3d 829 (9th Cir. 2001) (district court invoked *Younger* abstention to avoid exercising jurisdiction over mobile home rent control takings claim); *San Remo Hotel v. City and county of San Francisco*, 364 F.3d 1088 (district court invoked claim and issue preclusion after state claims had been litigated in state court in compliance with *Williamson County*).

³⁷ See, e.g., ARMEN ALCHIAN & WILLIAM R. ALLEN, *EXCHANGE AND PRODUCTION* 93-96 (2d ed. 1977); ANTHONY DOWNS, *RESIDENTIAL RENT CONTROLS: AN EVALUATION* 55-60 (1988).

³⁸ See generally, e.g., MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965); Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 *Amer. Econ. Rev.* 291 (1974).

³⁹ See THE FEDERALIST No. 10, at 778 (James Madison) (Clinton Rossiter ed., 1961) (cautioning against the influence of “factions,” i.e., “a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community”).

⁴⁰ John O. McGinnis, *Public Choice and the Structural Constitution: the Original Constitution and its Decline: a Public Choice Perspective*, 21 Harv. J.L. & Pub. Pol’y 195, 197 (1997).

⁴¹ See, e.g. Richard A. Epstein, *Yee v. City of Escondido: The Supreme Court Strikes Out Again*, 26 Loyola of Los Angeles Law Review 3, 10 (1992) (Mobile home park rent control “ increases the returns to local renters from the passage of the rent control statute by allowing them to capture the full stream of future periodic expropriations from the landlord. That larger rate of return gives the renters a greater inducement for the passage of the rent control statute in the first place, and thus increases the likelihood that such a statute will be passed.”).

⁴² It should go without saying that this is a market process that will occur even if coach owners themselves are incapable of estimating the variables.

⁴³ See, e.g., Werner Z. Hirsch & Joel C. Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. Rev. 399, 423-24 (1988).

⁴⁴ Despite a superficial similarity, rent control's inverse impact on the prices of coaches and pads does not imply that these are complementary goods (like popcorn and popcorn poppers, in the colorful but economically uninformed analysis of the California Court of Appeal in *Yee v. City of Escondido*, 224 Cal.App.3d 1349 (1990).

⁴⁵ This is the Golden State Mobilehome Owners League (GSMOL). For an account of GSMOL's leading role in California rent control politics, see William A. Fischel, *Exploring the Kozinski Paradox: Why Is More Efficient Regulation a Taking of Property?*, 67 Chi.-Kent. L. Rev. 865, 895-97 (1991). In recent years a second, smaller lobbying group has split off from GSMOL and conducts parallel lobbying activities.

⁴⁶ Cal. Gov. Code §§ 798 *et seq.*

⁴⁷ See *id.*, §§ 798.70 - 798.73.

⁴⁸ See Hirsch & Hirsch, *supra* note 43, at 420-22.

⁴⁹ See, e.g., Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 Colum. L. Rev. 473 (1991). As Fischel observes, "[e]xit' has a hollow meaning for people with immovable assets." Fischel, *supra* note 45, at 898.

⁵⁰ See, e.g., DOWNS, *supra* note 37, at 17-28; Richard W. Ault, *et al*, *The Effect of Long-term Rent Control on Tenant Mobility*, 35 J. Urb. Econ. 140 (1994); Steven B. Caudill, *et al.*, *Efficient Estimation of the Costs of Rent Controls*, 71 Rev. Econ. & Stat. 154 (1989);

Donald F. Vitaliano, *Measuring the Efficiency Cost of Rent Control*, 14 Am. Real Est. & Urb. Econ. Ass'n J. 61 (1986).

⁵¹ A professor of economics and consultant to the RAND Corporation, Dr. Hirsch is the author of college textbooks in, *inter alia*, statistics and economic analysis of law. See "Vitae: Werner Z. Hirsch," dated October, 1999, on file with author.

⁵² Werner Z. Hirsch, *An Inquiry into Effects of Mobile Home Park Rent Control*, 24 J. Urb. Econ. 212 (1988). This same study formed the basis for a second article appearing in 1988, this one co-authored with attorney Joel C. Hirsch and published in the *UCLA Law Review*. See Hirsch & Hirsch, *supra*, note 43.

⁵³ See Werner Z. Hirsch, *An Inquiry into Effects of Mobile Home Park Rent Control*, *id.*, at 223.

⁵⁴ See *id.* at 220.

⁵⁵ See *id.*

⁵⁶ *Id.* at 223-24.

⁵⁷ *Id.* at 224.

⁵⁸ See Werner Z. Hirsch & Anthony M. Rufolo, *The Regulation of Immobile Housing Assets under Divided Ownership*, 19 Int'l Rev. L. & Econ. 383, 395 (1999).

⁵⁹ See *id.*

⁶⁰ *Id.* at 396.

⁶¹ See John M. Quigley, *Economic Analysis of Mobile Home Rent Control: The Example of San Rafael, California* (September 12, 2002) (unpublished report on file with author).

⁶² See *id.* at 15-16.

⁶³ See *id.*

⁶⁴ See *id.* at 17.

⁶⁵ See *id.*

⁶⁶ See *id.*

⁶⁷ See *id.* at 23.

⁶⁸ *Id.* at 2.

⁶⁹ See David Dale-Johnson, *et al*, *An Examination of the Impact of Rent Control on Mobile Home Prices in California* (draft final report dated October 11, 2004, on file with author).

⁷⁰ See *id.* at 15.

⁷¹ 458 U.S. 419 (1982). In *Loretto*, the Court established that “a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.” *Id.* at 426.

⁷² 833 F.2d 1270 (9th Cir. 1986).

⁷³ *Id.* at 1273.

⁷⁴ *Id.* at 1273-74.

⁷⁵ *See id.* at 1275-76.

⁷⁶ *Id.* at 1276.

⁷⁷ *See id.* at 1280-81.

⁷⁸ *Id.* at 1281.

⁷⁹ *Id.* at 1280-81.

⁸⁰ *See id.*

⁸¹ *Id.* at 1283.

⁸² *Id.* (citation omitted).

⁸³ *Id.*

⁸⁴ *See, e.g.,* DeAnza Properties X, Ltd., v. County of Santa Cruz, 936 F.2d 1084 (9th Cir. 1992); Azul-Pacifico, Inc., v. City of Los Angeles, 973 F.2d 704.

⁸⁵ At the time *Hall* was filed, the California Supreme Court expressly foreclosed just compensation as a remedy for regulatory takings. In 1987, the United States Supreme

Court repudiated this doctrine in *First English*, and the federal judiciary has since then adhered to the somewhat naive belief that California would follow the High Court's mandate. As noted above, it has not. *See supra*, text at notes 14-24.

⁸⁶ 503 U.S. 519.

⁸⁷ For a critique of some of the flaws in Justice Wiener's opinion for the Fourth District Court of Appeal, *see* Fischel, *supra* note 45, at 903-906.

⁸⁸ 503 U.S. at 527.

⁸⁹ *Id.* at 530.

⁹⁰ *Id.*

⁹¹ *Id.* at 526-30.

⁹² *Id.* at 530, citing to *Nollan*, 483 U.S. at 834-35.

⁹³ *See Hall*, 833 F.2 at 1280-81.

⁹⁴ *See Yee v. City of Escondido*, No. 90-1947, Brief for Petitioners, Nov. 27, 1991, at 25-30 (arguing that Escondido's mobile home rent control ordinance failed to substantially advance legitimate state interests under *Agins*).

⁹⁵ *See Yee v. City of Escondido*, No. 90-1947, Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioners.

rents were transferable, thereby facilitating capitalization of the financial benefits of rent control by condominium residents.¹⁰¹ As in the analogous case of mobile home parks, the Ninth Circuit recognized that “[i]ncumbent owner occupants who sell to those who

⁹⁶ 503 U.S. at 533.

⁹⁷ Judge Alex Kozinski, *Who Gives a Hoot about Legal Scholarship?*, 37 Hous. L. Rev. 295, 303 (2000).

⁹⁸ See, e.g., Kari Anne Gallagher, Comment, *Will Mobile Homes Provide an Open Road for the Nollan Analysis?*, 67 Notre Dame L. Rev. 821, 848 (1992) (“Evaluated according to the [*Agins*] analysis, the Escondido ordinance works a taking of private property without just compensation. The Escondido ordinance does not substantially advance legitimate state interests, and it requires mobile home park owners to bear the burden of curing a social problem that they did not create. Therefore, the ordinance, evaluated under [*Agins*], violates the Fifth Amendment.”); Dwight C. Hirsh IV, Casenote, *Yee v. City of Escondido--A Rejection of the Ninth Circuit’s Unique Physical Takings Theory Opens the Gates for Mobile Home Park Owners’ Regulatory Takings Claims*, 24 Pac. L.J. 1681, 1725 (1993).

⁹⁹ 124 F.3d 1150 (9th Cir. 1997).

¹⁰⁰ See *id.* at 1163.

¹⁰¹ *Id.* at 1163-64.

intend to occupy the apartment will charge a premium for the benefit of living in a rent controlled condominium”¹⁰² Drawing on *Yee*, the court of appeals went on to note that this feature of the ordinance prevented it from substantially advancing legitimate governmental interests:

The conveyance provision, as explained above [facilitating the capitalization and capture of the monetary benefits of rent control], vitiates the cause-and-effect relationship between the property use restricted (rent

¹⁰² *Id.* In striking down the Honolulu ordinance on summary judgment, the Federal District Court in *Richardson* made the resemblance to mobile home park rent control even more explicit:

Like mobile home park tenants, owner-occupants of leasehold condominiums own their housing unit . . . but lease the underlying land. Moreover, the below-market rate lease rent which applies to the mobile home tenants and leasehold condominium owner-occupants is transferable to a subsequent purchaser of the mobile home pad or condominium. *With respect to both mobile homes and condominiums, the availability of a below-market rate lease rent necessarily increases the value of the subject housing unit, thereby allowing a seller to command a premium upon the sale of the housing unit.*

Richardson v. City and County of Honolulu, 802 F. Supp. 326, 338 (D. Haw. 1992) (emphasis added).

rates) and the social evil the Ordinance seeks to remedy (lack of affordable housing).¹⁰³

The same analysis was subsequently applied in *Chevron U.S.A. Inc. v. Cayetano* (*Chevron I*),¹⁰⁴ a case in which Chevron alleged that restrictions on the rent it could charge lessee dealers of retail service stations violated the Takings Clause. The District Court agreed with Chevron that the regulations enabled incumbent dealers to capitalize the monetary value of reduced rents by selling their dealerships.¹⁰⁵ The court explained:

[t]he existence of the rent cap makes an independent dealer's leasehold interest in a service station more valuable, and this added value becomes especially significant when an incumbent dealer undertakes to sell his interest. . . . Since the Act does not prohibit an incumbent dealer from selling his or her service station lease, the rent cap provision enables these dealers to sell their stations at a premium.¹⁰⁶

On appeal, the Ninth Circuit found that summary judgment had been improperly granted because of the existence of conflicting expert testimony on whether the premium created by the regulations could be capitalized and captured by the dealers, or whether Chevron could offset this effect by adjusting the wholesale price of its gasoline.¹⁰⁷ At this point the factual dispute in *Chevron* diverges from the mobile home park paradigm,

¹⁰³ *Id.* at 1165.

¹⁰⁴ 224 F.3d 1030 (9th Cir. 2000).

¹⁰⁵ *See Chevron v. Cayetano*, 57 F. Supp. 2d 1003, 1010 (D. Haw. 1998).

¹⁰⁶ *Id.*

¹⁰⁷ *See* 224 F.3d at 1037-1040.

since in the latter case there is no possibility of a secondary, offsetting revenue flow between owners and tenants. Nevertheless, *Chevron I* is important because of its strong reaffirmation of the appropriateness of the substantial advancement standard in takings claims of this kind,¹⁰⁸ and its acknowledgment that reviewing courts must examine the actual effects of such laws under a heightened level of scrutiny, rather than deferring to statements of legitimate legislative intent.¹⁰⁹

On remand, the District Court again found that Hawaii's service station rent control scheme violated the Takings Clause.¹¹⁰ Twelve years to the day after *Yee* was decided, the Ninth Circuit affirmed in *Chevron v. Lingle (Chevron II)*,¹¹¹ once again applying the substantial advancement standard to find the rent statute unconstitutional on

¹⁰⁸ *See id.* at 1034-37. "In sum, we disagree with the concurrence's position that we should apply the 'reasonableness' test to evaluate Chevron's regulatory takings claim. The correct test is 'whether the legislation substantially advances a legitimate state interest,' as discussed above, as suggested by the Supreme Court in *Yee*, as used by the district court in this case, and as established by this court in *Richardson*." *Id.* at 1037.

¹⁰⁹ *See id.* at 1033-34 (rejecting the State of Hawaii's argument that "courts should look only to whether 'the Legislature rationally could have believed the Act would substantially advance a legitimate government purpose.'").

¹¹⁰ *See Chevron v. Cayetano*. 198 F. Supp.2d 1182 (D. Haw. 2002).

¹¹¹ 363 F.3d 846 (9th Cir. 2004).

its face.¹¹² Covering much the same ground it had in *Chevron I*, the court of appeals again drew on *Yee* and *Richardson* as teaching

“that application of the ‘substantially advances’ test is appropriate where a rent control ordinance creates the possibility that an incumbent lessee will be able to capture the value of the decreased rent in the form of a premium.”¹¹³

The panel carefully considered and rejected a panoply of new arguments the state leveled against the use of this analysis,¹¹⁴ and rebuffed the government’s plea for deferential review by noting that this option had been “specifically reject[ed]” by the Supreme Court in *Nollan*.¹¹⁵

Together, the two *Chevron* decisions and *Richardson* firmly established that rent control ordinances that enable tenants to capitalize the cash value of the regulations into the resale price of an asset will be closely evaluated under the substantial advancement standard in the Ninth Circuit. This set the stage for the first regulatory takings challenge to mobile home park rent control to be decided on the merits in federal court.

In 1997, the California Court of Appeal had reversed the dismissal of a takings claim against the City of Cotati’s general rent control law, setting the stage for a trial on

¹¹² *See id.* at 857-58.

¹¹³ *Id.* at 849.

¹¹⁴ *Id.* at 850-53.

¹¹⁵ *Id.* at 854 (*citing Nollan*, 483 U.S. at 825 n.3).

the merits.¹¹⁶ Instead of proceeding to trial, the city agreed to settle the lawsuit contingent upon an unqualified repeal of the ordinance by the city's voters. But no sooner had the electorate voted to remove rent control from the books, than the city council adopted a new measure that applied rent control exclusively to mobile home parks. The city's three park owners,¹¹⁷ feeling that they had unfairly been singled out by the new law, filed suit under a *Richardson*-style substantial advancement takings theory. This case, *Cashman v. City of Cotati*,¹¹⁸ reached the Ninth Circuit in 2004.

In a decision that closely tracks the legal analysis of *Richardson* and the two *Chevron* decisions, the *Cashman* panel reversed a trial court's ruling that Cotati's new rent ordinance passed constitutional muster, and held that an earlier order granting summary judgment to the park owners should be reinstated.¹¹⁹ The panel noted the case's factual similarity to *Richardson*, which was also decided on summary judgment:

Like in *Richardson*, there is no dispute that Ordinance No. 680 does not on its face prevent mobilehome tenants from capturing a premium. There is separate

¹¹⁶ See *152 Valparaiso Associates v. City of Cotati*, 56 Cal.App.4th 378 (1997).

¹¹⁷ One of the original three plaintiffs, Elizabeth White, sold her park and withdrew as a party to the litigation after the city filed a retaliatory lawsuit against the plaintiffs in state court. See *City of Cotati v. Cashman*, 52 P.3d 695 (Cal. 2002) (carving out an exception from California's anti-SLAPP statute for municipalities filing such retaliatory litigation).

¹¹⁸ 374 F.3d 887 (9th Cir. 2004).

¹¹⁹ See *id.* at 899.

ownership of the mobilehome coaches and the underlying land, controlled rent, and the ability of incumbent tenants to sell their mobilehomes subject to this controlled rent. This creates the possibility of a premium, which undermines the City's interest in creating or maintaining affordable housing.¹²⁰

In contrast, the *Cashman* court pointed to the absence of extraneous variables such as had been present in *Chevron*, that could potentially prevent Cotati's tenants from capitalizing and capturing the rent control premium.¹²¹ It is perhaps noteworthy that the relatively brief majority opinion in *Cashman* did not find it necessary to present a detailed rationale for its application of the substantial advancement standard and heightened scrutiny. Presumably, after *Chevron II*, the propriety of that approach in such cases can be considered settled law of the circuit.

On August 3, 2004, the City of Cotati filed a petition with the Ninth Circuit seeking rehearing or rehearing en banc, once again urging rejection of the substantial advancement standard and heightened scrutiny of regulatory takings claims.¹²² Although the city's petition remains pending at this writing, it seems unlikely that a majority of Ninth Circuit judges would be eager to reverse an unambiguous line of circuit precedent stretching back to *Richardson* – especially given the absence of any inter-circuit conflict, and the firm grounding of *Richardson*, *Chevron I*, *Chevron II*, and *Cashman* in a quarter

¹²⁰ *Id.*

¹²¹ *Id.* at 898-99.

¹²² *See Cashman v. City of Cotati*, No. 03-15066, Petition for Panel Rehearing and Rehearing En Banc, dated August 3, 2004.

century of Supreme Court precedent.

The simple reality of the matter may be the Ninth Circuit has finally arrived at a state I thought had been reached ten years ago:¹²³ the understanding that, under a proper application of *Agins*' substantial advancement standard and heightened scrutiny, rent control *is* a regulatory taking.

VIII WILL THE SUPREME COURT FINALLY DECIDE?

After denying petitions in a long series of rent control cases dating back to its decision in *Yee*, the Supreme Court in October, 2004, granted certiorari in *Chevron II* (now denominated *Lingle v. Chevron*).¹²⁴ The State of Hawaii's petition focused on the Ninth Circuit's application of the substantial advancement test and heightened scrutiny, in effect asking the High Court to revisit an entire line of its regulatory takings jurisprudence, stretching back a quarter century through *Nollan*, to *Agins*. Finally, by the summer of 2005, the Supreme Court may clarify the nature of the invitation it held out in *Yee*: Does the Takings Clause still function as a bulwark of individual sovereignty against majoritarian rent-seeking? Or will the Court follow California in adopting an "anything goes" standard of review? In the realm of judicial review of land-use regulation, *Lingle v. Chevron* may well set the direction for the 21st century.

¹²³ See Radford, *Why Rent Control Is a Regulatory Taking*, *supra* note 1.

¹²⁴ Case No. 04-163, October 12, 2004.