International Municipal Lawyers Association
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IMLA NEWS
Issue 2 – February 17, 2023

FEATURED CASE:

Housing: New York's Rent Stabilization Program is not a Taking and Satisfies Due Process

***Community Housing Improvement Program v. City of New York*, no. 20-cv-366, (2d Cir. Feb. 6, 2023).**

Affirming the court below, the Second Circuit finds that New York City's rent stabilization laws, even if causing financial pressure for landlords, are not a physical or regulatory taking and are adequately supported by a rational basis. (Congratulations to the City's Corporation Counsel in defending this important program).

Background: The New York City Rent Stabilization Law (RSL) was enacted in 1969 to address the chronic shortage of affordable housing in the City. The RSL is intended to prevent excessive rents by, among other things, capping rent increases and limiting the legal grounds for evictions. Over time, the Legislature has amended the RSL in response to changing political and economic conditions, most recently via the Housing Stability and Tenant Protection Act of 2019 (HSTPA).

Among other things, the HSTPA:

- limited landlords' capacity to charge excess rent attributed to major capital improvements and individual apartment improvements;
- repealed vacancy decontrol and high-income decontrol, which had removed units from regulation when the rent or tenant's income reached a specified level;
- repealed certain vacancy and longevity increases, which had permitted landlords to raise rents above the otherwise allowable amounts if a unit became vacant or if a tenant had remained in place for an extended period; and
- limited landlords to recovering one rent-stabilized unit per building for personal use upon a showing of necessity, with additional restrictions when the affected tenant is a senior citizen or disabled.

Various property owners and managing agent trade associations (Landlords) sued to invalidate the RSL and HSTPA on the grounds that they effect a physical and regulatory taking in violation of the Fifth Amendment and lack a rational basis, violating the Fourteenth Amendment's Substantive Due Process clause. The Eastern District of New York dismissed.

Appeal: The Second Circuit affirmed.

Not surprisingly, the two sides characterize the rent stabilization measures very differently. The Landlords contend that they are prevented from recouping costs of needed improvements, and that the programs too often enable affluent and undeserving people to game the system. The City presents statistics showing that the vast majority of stabilized units are rented by low- and middle income tenants, including the firefighters, police, teachers, EMTs, tradespeople and others who enable City life to flourish for all.

These were not new arguments. As the Circuit put it:

> Throughout its life, this regulatory regime has been the subject of continual attention in the State and City Legislatures. This is hardly surprising. Striking an appropriate balance between the sharply diverging interests of landlords and tenants involves negotiation and compromise over a very long list of complicated and difficult questions. Resolving such questions is a quintessential function of a legislature. At the end of the day, it is highly probable—indeed, virtually certain—that no interested party will be entirely satisfied by what the legislature does.

Facial challenge: To prevail on a facial challenge, the plaintiff must "establish that no set of circumstances exists under which the [challenged] Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). The Landlords sought to circumvent *Salerno* by citing *United States v. Stevens*, 559 U.S. 460 (2010), arguing that the latter required *either* "'that no set of circumstances exists under which [the statute] would be valid, *or* that the statute lacks any plainly legitimate sweep.'" But the Circuit found that *Stevens*, wherein a defendant challenged a statute criminalizing the creation, sale, or possession of depictions of animal cruelty as facially invalid under the First Amendment was distinguishable; while the Supreme Court might have introduced a subtle lessening of the facial challenge standards in the context of First Amendment cases, it had no application in the rent stabilization scenario: "Especially where, as here in the rent stabilization context, the regulatory regime at issue has both persisted and been adjusted over time, reflecting finely tuned, legislative judgments, we must exercise caution in entertaining facial challenges. Neither *Patel* nor *Stevens*, thus, lower the high bar the Landlords must satisfy to assert a facial challenge."

Takings: The Circuit cited one precedent that was particularly applicable: In *Yee v. City of Escondido*, 503 U.S. 519 (1992), the Court rejected a Takings Clause challenge to rent control laws. *Yee* involved a mobile-home rent control ordinance that set rent at below-market rates. The Court held that the ordinance—even considered in conjunction with other state laws effectively permitting tenants to remain at will—was not a physical taking. It reasoned that the statutes did not facially *require* landlords to rent their properties in perpetuity because evictions were permitted in some conditions, and because the "tenants were invited by petitioners, not forced upon them by the government."

The Second Circuit also found useful guidance in *Cedar Point*. There, the Supreme Court held that because the regulation granted a right to invade the grower's property it amounted to a *per se* physical taking. But *Cedar Point* also emphasized that "[l]imitations on how a business generally open to the public may treat individuals … are readily distinguishable from regulations granting a right to invade property closed to the public."

The Circuit also disagreed that the RSL compelled Landlords to refrain in perpetuity from terminating a tenancy: The statute set forth several grounds on which a landlord may terminate a lease, including failure to pay rent, creating a nuisance, violating provisions of the lease, or using the property for illegal purposes. "It is well settled that limitations on the termination of a tenancy do not effect a taking so long as there is a possible route to an eviction." (citing *Yee*).

The Landlords also asserted that the *Penn Central* factors "(1) the economic impact of the regulation on the claimant,"(2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3)"the character of the governmental action," supported their Takings claim. They contended that the RSL has a direct and substantial negative economic impact on rent-stabilized properties in the City; because stabilized rents are on average 25% lower than market rents and permissible rent increases are outpaced by increases in operating costs, property owners must choose between making losing investments or letting their properties deteriorate. The Circuit recognized that possibility, but found that the Landlords had not demonstrated that the RSL could never be applied constitutionally:

> The RSL may well have an appreciable economic impact on the profitability of some buildings subject to its provisions. When permissible rent increases are outpaced by operating cost increases, the result may be a reduction or, in some cases, the elimination of net operating income. We acknowledge that some property owners may be legitimately aggrieved by the diminished value of their rent-stabilized properties as compared with their market-rate units. . . . But while legislative judgments may take into account these varying policy perspectives, we are bound to follow the standard set forth for a facial regulatory taking under *Penn Central*. Appellants have simply not plausibly alleged that every owner of a rent-stabilized property has suffered an adverse economic impact that would support their facial regulatory takings claims. . . . Instead of alleging that every landlord has suffered an adverse economic impact, the Landlords principally rely on data purporting to show the average economic effects of the RSL. But these effects do not establish that the RSL can never be applied constitutionally, which is the requirement for a facial challenge.

The same flaw undermined the Landlord's investment-backed expectations argument: "Once again, we can assume *arguendo* that some property owners may have had their investment-backed expectations thwarted by the current iteration of the RSL. . . . However, the Landlords have failed to establish that the RSL interferes with *every* property owner's investment-backed expectations, which is required on a facial challenge, because such expectations can be assessed only on a case-by-case basis.

The character of the governmental action also weighed against the Landlords. They argued that the RSL constituted a physical invasion because it burdened property owners with non-removable tenants and, in so doing, eliminates landlords' rights to determine the use of their property or to use it themselves. But the Circuit disagreed: "Like the broad public interests at issue in *Penn Central*, here, the legislature has determined that the RSL is necessary to prevent 'serious threats to the public health, safety and general welfare.' N.Y.C. Admin. Code § 26-501. No one can seriously contend that these are not important public interests and courts are not in the business of second-guessing legislative determinations such as this one."

Due Process: The Landlords' Due Process arguments failed. They asserted that the RSL is not "rationally related" to alleviating the housing shortage, securing housing for low-income residents, addressing rent profiteering, or promoting neighborhood stability; to the contrary, they said, the law reduces the housing supply, secures housing for the wealthy, increases rent for uncontrolled units, and discriminates in favor of tenants over owners. They pointed to various economists who argued that the RSL causes more harm than good in some respects.

But they could not use a Due Process argument to make a takings claim:

> [A]s the Supreme Court has noted, the Due Process Clause cannot "do the work of the Takings Clause" because "where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." . . . . In any event, as the Court has noted, the liberties protected by due process "do not include economic liberties."

And even if a Due Process challenge were available, the Landlords' rationale would fail a rational basis review, which "is not a mechanism for judges to second guess legislative judgment even when, as here, they may conflict in part with the opinions of some experts." As the Circuit concluded, "It is beyond dispute that neighborhood continuity and stability are valid bases for enacting a law."

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SHORT SUMMARIES:

3rd Circuit – FLSA – Work Release

I'll just mention this case to you as I may mess up the facts in my haste to get it out. The gist as best I can tell is that some folks who are deadbeat parents are arrested and the state uses the opportunity of their incarceration and work release to get them on track to support their kids. Apparently, in Lackawana County, the deadbeats must first work at the solid waste facility sorting through waste for half of their sentences at $.65 an hour before they can start back at or get a job. OUCH. The 3rd Circuit didn't think this violated the 13th Amendment but did find violations of other acronymical laws.

Burrell v. Staff

4th Circuit – Police – Livestreaming police action – First Amendment

In a somewhat split decision, the 4th Circuit agreed that Qualified Immunity protected an officer from suit where the officer had stopped a person from livestreaming a traffic stop. The officer advised that the person could record the events but could not livestream them due to officer safety. The full court agreed that the law was unsettled and QI applied. The majority remanded the case for further analysis of the compelling governmental interest associated with officer safety as they felt that common sense was insufficient a basis to support the policy. I'm guessing the majority don't use common sense for much else since it seems pretty plain that a police interaction that is livestreamed can induce a crowd of folks to show up to interfere whether to they want to harm the suspect or the officers. Just saying. Judge Niemeyer in a concurrence disagreed on the issue as framed by the majority of the panel and suggested that because the traffic stop involved the Fourth Amendment prohibitions on seizures, the analysis should not have been tied to the First Amendment but regulated by the reasonableness requirement of the Fourth Amendment.

Sharpe v. Winterville Police Dept.

4th Circuit – First Amendment – Defamation (sort of)

"A 90-year-old North Carolina law makes it a crime to publish a "derogatory report[]" about candidates for public office where the speaker "know[s] such report to be false or" acts "in reckless disregard of its truth or falsity." N.C. Gen. Stat. § 163-274(a)(9)." Candidates for the office of Attorney General got into a spat and one campaign asserted that the other had violated this act. The Court concluded that the Act likely violates the First Amendment reversing the lower court. The lower court had concluded that the Plaintiff was unlikely to prevail, whereas the Circuit Court saw little chance of them losing –".Not only have plaintiffs shown a likelihood of success, "it is difficult to imagine them losing.""

Grimmett v. Freeman

4th Circuit – RLUIPA – First Amendment – Land Use

A church bought property in an Agricultural District with strict regulations that attempt to protect the agricultural nature of the district and limiting uses to agricultural purposes absent some approvals. The Church received an approval called a Special Use Permit but was unable to raise sufficient funds to comply immediately. Thus, the Church sought to find ways around the limitations. One idea for it to use the property for religious purposes and construct a house of worship was to claim it was operating a winery, but the county told the Church it would need an ABC permit authorizing that purpose. The Church sued claiming RLUIPA violations and First Amendment violations. The District Court had little faith in the complaint, so dismissed it. The 4th Circuit affirmed. One key to the decision seemed to be the legislative purpose of the District which did not discriminate against religion in its purpose to promote the retention of agricultural uses within the District. If you're involved in a RLUIPA matter, this seems like a great case for the government and one that offers some really good analysis of the various aspects of RLUIPA complaints.

Alive Church of the Nazarene, Inc. v. Prince William County

7th Circuit – Takings – Riparian Rights

So, if the government shoots down a Chinese balloon having the size of a supermarket and the debris lands on your property, do you have a takings claim? Well, who knows, but things seem to be getting interesting on that score and we do know that in the 7th Circuit if the government removes a dam and a property owner gets ticked off that what was once a pretty nice waterfront and is now more land and less waterfront, doesn't have a takings claim. The gist is this – dam created a lake of sorts that covered some 15 feet of the property owner's land and now rather than water, the land is exposed. So, the property owner sues for a taking. I've got to admit that I've seen the reverse and courts seem to hold that the increased water coverage is a taking, but now we know that once the fluid has been removed – no taking.

Kreuziger v. Milwaukee County

WA SCT – Gig Economy – COVID – Hazard Pay – Takings

When Covid hit a new delivery economy arose and the Seattle City Council acted to protect deliverers and the consumers by imposing a hazard pay requirement and restricting the employer/contractor from recovering the hazard pay from the consumer. Companies engaged in the delivery business believing their rights were affected sued and at the pleadings stage some of their claims collapsed while others did not. The WA SCT determined that more claims should collapse while others might continue. Among those continuing were takings claims and impairment of contracts claims supported by a Section 1983 claim for damages. The takings claim analysis concludes that the business had a property interest in contracts with deliverers that was effectively "taken" if the pleadings can be substantiated. The WA SCT writes some pretty strange decisions and often uses visceral law rather than jurisprudence to reach conclusions they seek (not saying that's the case here), but if you represent a local government that has a progressive council, you may want to look at the decision and see what you think.

Washington Food Industry Association vs. City of Seattle