No. 12-17749

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RANCHO DE CALISTOGA,

Appellant,

vs.

CITY OF CALISTOGA, W. SCOTT SNOWDEN

Appellees.

On Appeal From The United States District Court
for the Northern District Of California
Case No. C-11-5015-JSW
Honorable Jeffrey S. White, District Judge

BRIEF OF AMICUS CURIAE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF APPELLEE CITY OF CALISTOGA

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I. IDENTITY AND INTEREST OF AMICUS

This brief is filed on behalf of the League of California Cities in support of Appellee the City of Calistoga and affirmance of the decision below. The League of California Cities is an association of 469 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The League's intent as amicus curiae is to provide the Court with assistance and background concerning the public policy issues surrounding manufactured housing and mobilehome parks that have led numerous California cities, exercising their legislative discretion, to enact mobilehome rent control ordinances. Such ordinances are a common exercise of the police power and have been repeatedly upheld by this Court as well as the California courts. The League will also address the importance and continued validity of the Williamson County doctrine requiring exhaustion of state procedures before a federal takings claim can be heard.

This brief is submitted in support of Appellee the City of Calistoga. All parties have consented to the filing of this brief, pursuant to Federal Rule of Appellate Procedure 29(a). No party's counsel authored this brief in whole or in part; no party or its counsel contributed money to fund the brief; and no person contributed money to fund the brief.

II. INTRODUCTION

The League will address two of the issues presented to the Court. First, Appellant argues that Calistoga's rent control law is unconstitutional as applied to Appellant's current request to raise rents by nearly 33% because Appellant's economist believes rent control is not necessary and Appellant believes its "market rents" are reasonable. Those questions, however, are all matters of legislative policy judgment, not factual issues to be determined by the courts.

Second, Appellant and amicus Pacific Legal Foundation ("PLF") insist that the district court erred when it enforced the prudential ripeness requirements of Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985), and its progeny. However, the remedies provided by California courts further the public policies of this State. Appellant's obligation to pursue California's state court remedies, and the adequacy of those remedies, are matters of settled Circuit law.

III. BACKGROUND

While the parties have provided the Court with a full picture of the factual and procedural background of this case, the issues presented herein arise in the larger context of cities throughout California attempting to manage the unique challenges posed by mobilehome parks. The League thus presents the Court with a more complete historical background of manufactured housing, the legal and public policy issues leading to rent control for this unique form of housing, and the relevant legal landscape, which is by now thoroughly explored.

A. THE PARTICULAR VULNERABILITY OF MANUFACTURED HOME OWNERS WITH HOMES ON RENTED PARK SPACES

A "mobilehome" or "manufactured home" is a house constructed at a factory. Mobilehomes are frequently built in sections, with each section transported and then joined at the home site. Once installed, a mobilehome can have an indefinite useful life approximating that of a traditional home. An "industry overview" of the history of manufactured housing, and the transition of these dwellings from trailers to actual homes that are pre-assembled in a factory rather than built in place, can be found in the *Field Instruction Manual* for the National Appraisal system for valuing mobilehomes. A copy of the relevant pages is attached hereto as Appendix A.

A mobilehome owner typically rents a plot of land, called a "pad," from the owner of a mobilehome park. The park owner provides roads within the park and

common facilities such as a clubhouse or swimming pool. From 1960 to 1975, the number of mobilehome pads in California increased from 150,000 to approximately 370,000. However, by the 1980s, the production of mobilehome parks in urban areas had virtually halted, and the number of pads in California currently remains near 370,000 spaces. Because the supply of pads is constricted, vacancy rates in mobilehome parks in California are extremely low.

Once a home is installed it is, for all practical purposes, permanently affixed to the pad. As the United States Supreme Court has explained:

> Mobile homes are largely immobile as a practical matter, because the cost of moving one is often a significant fraction of the value of the mobile home itself. …only about 1 in every 100 mobile homes is ever moved. … When the mobile home owner wishes to move, the mobile home is usually sold in place, and the purchaser continues to rent the pad on which the mobile home is located.

Yee v. City of Escondido, 503 U.S. 519, 523 (1992). As this Court recently explained en banc, "[b]ecause the owner of the mobile home cannot readily move it to get a lower rent, the owner of the land has the owner of the mobile home over a barrel." Guggenheim v. City of Goleta, 638 F.3d 1111, 1114 (2010); see generally K. Baar, *The Right To Sell The "Im" Mobile Manufactured Home In Its Rent Controlled Space In The "Im" Mobile Home Park: Valid Regulation Or Unconstitutional Taking?*, 24 Urban Lawyer 157 (1992).

B. NUMEROUS JURISDICTIONS IN CALIFORNIA HAVE ENACTED RENT CONTROL TO PROTECT RESIDENTS OF MOBILEHOME PARKS

In response to the shortage of spaces and immobility of homes, California enacted its Mobilehome Residency Law ("MRL") in 1978. Cal. Civ. Code § 798 et seq.; see Yee, 503 U.S. at 524. Under the MRL, mobilehome owners have the right, among others, to sell their homes in place to qualified incoming residents. Cal. Civ. Code § 798.74.

While the MRL does not itself impose price limits on pad rents, it allows cities to enact rent control ordinances. As the California Supreme Court has explained, "[t]he immobility of the mobilehome, the investment of the mobilehome owner, and restriction on mobilehome spaces, has sometimes led to what has been perceived as an economic imbalance of power in favor of mobilehome park owners that has in turn led many California cities to adopt mobilehome rent control ordinances." Galland v. City of Clovis, 24 Cal. 4th 1003, 1010 (2001). There are currently over 100 cities and counties in California that have mobilehome rent control laws similar to the one challenged in this action.

One justification for any rent control is the desire to maintain affordable housing. However, two other public policies unique to the rent control context are critically important in adopting such laws.

The most important interest unique to the mobilehome context is protecting the investment that a mobilehome owner makes in his or her home. As this Court has recognized, "[m]obile homes have the peculiar characteristic of separating ownership of homes that are, as a practical matter, affixed to the land, from the land itself." Guggenheim, 638 F.3d at 1114. This interest implicates a public policy question – when the housing market rises, should mobilehome owners see an increase in the value of their homes like all other homeowners, or should the parkowners be free to prevent any increase in value, and even to decrease the value of the home, through exorbitant rents?[1] Parkowners and their advocates see mobilehomes as akin to cars (despite the fact that they cannot be driven away) – merely personal property that should lose value over time. In the parkowners' view, when the overall housing market is climbing, the only thing that should increase are rents while an in-place mobilehome's value continues to depreciate. Indeed, the Appellant here repeatedly refers to mobilehomes as having a "depreciated value," and claims to have introduced "evidence" on that policy question. (Appellant's Opening Brief p. 23.)

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[1] The concept of a "market value" for any good represents public policy choices. See Chesapeake Western Ry. v. Forst, 938 F.2d 528, 531 (4th Cir. 1991) ("The job of determining whether a particular valuation method produces a 'true' market value involves, at its core, a policy choice. The concept of a true market value is inherently an approximation, in some sense a fiction, since there is no such thing as a perfect market."); Adamson Cos. v. City of Malibu, 854 F. Supp. 1476, 1489 (C.D. Cal. 1994) ("rent control is more properly viewed as an allocation of shared value rather than as a transfer of rights.").

Mobilehome owners have a different view. They see their mobilehomes as *homes*. Like any other home buyer, by purchasing a home they make an investment, and they expect an opportunity for that home to gain in value. The fact that mobilehomes, once installed on a site, can gain in value is expressly recognized by the mobilehome appraisal industry:

> **The practice of arbitrarily depreciating manufactured homes is no longer acceptable**. Today's manufactured home is a true dwelling. … At less than half the price of a conventional house of the same square footage, the manufactured home will certainly attract an ever growing share of the home buying market. **This market demands and deserves a realistic value-system. It requires a system which permits the accumulation of equity, for equity is basic to the concept of home ownership**.

(Appendix p. 107 (emphasis added)).

Courts have repeatedly recognized that cities have the power to adopt policies more consonant with the homeowners' view on this policy issue, and to protect mobilehome owners' investment in their homes. "Regardless of the wisdom of the tenants' decisions to live in the parks, the City has the power to legislate to protect the tenants' investments. Without vacancy control, the parkowner could force existing tenants to sell the coach-in-place at 'distress-sale prices.'" Adamson Cos., 854 F. Supp. at 1493. This Circuit has expressly recognized a legitimate public interest in protecting mobilehome owners' investment in their homes. Carson Harbor Village Ltd. v. City of Carson, 37 F.3d 468, 472 (9th Cir. 1994) ("prohibition of rent increases at the termination of a

tenancy would further the law's goals, at least insofar as the purpose is to protect the investments of existing tenants").[2] That interest is different than an interest in promoting affordable housing and must be separately analyzed in any takings challenge. Ventura Mobilehome Communities Owners Ass'n v. City of San Buenaventura, 371 F.3d 1046, 1054 (9th Cir. 2004).

Mobilehome rent control serves a second well recognized purpose as well. Cities have a recognized interest in protecting seniors or others on low or fixed incomes from exorbitant rent increases. See, e.g., Schnuck v. City of Santa Monica, 935 F.2d 171, 175 (1991); Adamson Cos., 854 F. Supp. at 1490; Danekas v. San Francisco Residential Rent Stabilization & Arbitration Bd., 95 Cal. App. 4th 638, 652 (2001); Casella v. City of Morgan Hill, 230 Cal. App. 3d 43, 57 (1991). This interest is also distinct from the general interest in making housing more affordable.

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[2] See also Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 690 (9th Cir. 1993) ("the stated purposes of the ordinance were . . . to protect owners' investments in their mobile homes . . . These purposes are similar to those advanced in support of other rent control ordinances; the Supreme Court has held that these goals are legitimate"); accord Montclair Parkowners Ass'n v. City of Montclair, 76 Cal. App. 4th 784, 795 (1999) ("protection of the current mobilehome owners' equity in their homes and protection of prospective mobilehome owners from excessive rents are legitimate government interests."); Sandpiper Mobile Village v. City of Carpinteria, 10 Cal. App. 4th 542, 551 (1992) ("This ordinance … seeks to protect mobilehome owners' investments, and also to provide park owners with a reasonable return on their investment.").

Rent poses a unique problem for fixed income residents. This group includes seniors who have retired, sold their homes, used the proceeds from their homes to purchase a mobilehome, and who are paying rent out of their monthly pension or social security checks. Others may be residents who have savings to invest in a home they can later re-sell, but not to pay in the form of rent. Indeed, this is a critical difference between the cost of the home and rent – homeowners can re-sell their homes.[3] Renters simply spend the rent they pay.

By regulating rents, rent control directly advances a city's interest in protecting fixed-income residents by helping to provide some degree of certainty about the amount or percentage of rent increase each home owner may be subject to over time. This is true irrespective of the price of the homes – an investment they can resell.[4]

These policies are critical in the mobilehome context because, as this Circuit has recognized, "mobile [home] parks differ from most other property in the separation of ownership of the land from the improvements affixed to the land," Guggenheim, 638 F.3d at 1123, a difference that places mobilehome owners "over

[3] Promoting home ownership and community building are also legitimate government interests. See Ewing v. City of Carmel-By-The-Sea, 234 Cal. App. 3d 1579, 1588-93 (1991).

[4] Appellant's suggestion that the constitution requires means testing of any government rent protections is baseless. "Because there are some tenants in the parks with low or fixed incomes, the City has a legitimate interest in protecting them. The incidental benefit to wealthier tenants does not invalidate that purpose." Adamson Cos., 854 F. Supp. at 1490.

a barrel." Id. at 1114. None of these policies disappear simply because a landlord believes that seeking market rent is "fair," that certain residents can afford to pay more, or for any of the other economic policy arguments Appellant makes as to why it believes rent control is unnecessary.

C. COURTS HAVE REPEATEDLY UPHELD RENT CONTROL GENERALLY, AND MOBILEHOME RENT CONTROL IN PARTICULAR

The power of cities to regulate the price charged for rental housing is well settled and beyond reasonable dispute. "This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440 (1982). The Supreme Court has repeatedly rejected economic theory-based challenges to the validity of rent controls.[5] Fisher v. City of Berkeley, 475 U.S. 260 (1986); Pennell v. City of San Jose, 485 U.S. 1 (1988); Yee, 503 U.S. 519.

[5] As this Court held in Schnuck, 935 F.2d at 175, "[t]hat rent control may unduly disadvantage others ... are matters for political argument and resolution; they do not affect the constitutionality of the Rent Control Law." See Yee v. City of Escondido, 224 Cal. App. 3d 1349, 1358 (1990) ("As we read the opinions of the U.S. Supreme Court and lower federal and state courts, the decision whether to use rent control as a tool to correct imperfections in the market system is a political issue for legislative bodies and not a question of constitutional law for the courts.").

Both the California courts and this Court have frequently confirmed the constitutionality of mobilehome rent control. The well worn nature of this inquiry was aptly expressed by this Court earlier this year: "As Yogi Berra observed, 'it's déjà vu all over again' as we are being 'called upon to consider, yet again, a takings challenge to mobile home rent control laws.'" MHC Financing Ltd. P'ship v. City of San Rafael, 714 F.3d 1118, 1122 (9th Cir. 2013) (quoting Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 683 (9th Cir. 1993)). Challenges to mobilehome rent control laws were also rejected on the merits in Guggenheim, 638 F.3d at 1118-23; Equity Lifestyle Properties, Inc. v. County of San Luis Obispo, 548 F.3d 1184, 1193-94 (9th Cir. 2008); Ventura Mobilehome Communities Owners Ass'n, 371 F.3d at 1055; and Carson Harbor Village Ltd., 37 F.3d at 472.[6]

[6] The California courts have been equally unequivocal in their support of mobilehome rent control. "Mobilehome rent control ordinances are accorded particular deference as rational curative measures to counteract the effects of mobilehome space shortages that produce systematically low vacancy rates and rapidly rising rents." Carson Harbor Village, Ltd. v. City of Carson Mobilehome Park Rental Review Bd., 70 Cal. App. 4th 281, 290 (1999); Sandpiper Mobile Village, 10 Cal. App. 4th at 550; see also Montclair Parkowners Ass'n, 76 Cal. App. 4th at 795; Westwinds Mobile Home Park v. Mobilehome Park Rental Review Bd., 30 Cal. App. 4th 84, 95 (1994); Casella, 230 Cal. App. 3d at 49-57. In addition to the persuasive value of such state decisions, it is important to remember that property rights are created by state law, Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972), and that the majority of takings cases are litigated in the state courts with review to the United States Supreme Court, not the federal district courts. San Remo Hotel, L.P. v. San Francisco, 545 U.S. 323, 346-47 (2005).

Appellant attempts to evade all of this well established law by insisting that, even if rent control is usually constitutional, it is unconstitutional to control the specific rent increase Appellant sought because it believes controls are not necessary and has paid experts to say so. As discussed below, such a claim is fundamentally inconsistent with the appropriate standards for review of legislation, and wholly untenable.

IV. ARGUMENT

A. APPELLANT'S NOVEL AS-APPLIED THEORY IS FUNDAMENTALLY INCONSISTENT WITH WELL ESTABLISHED PRINCIPLES OF LEGISLATIVE DEFERENCE

Appellant admits that cities have the power to enact rent control. Appellant insists, however, that enforcement of rent control in this specific instance is purportedly unconstitutional because (1) appellant believes the rent it wants to charge is "neither excessive, monopolistic, nor in violation of any other legitimate public purpose," (2) "there is no means testing", and (3) other businesses are not required to provide "subsidies." In other words, Appellant claims that, although rent control is generally constitutional, it is unconstitutional if a landlord can prove that it is not "necessary" in a specific case. Appellant attempted to "prove" its theories by using the opinions of an economist and appraiser who testified that the rent sought was not too high. Critically, Appellant is *not* claiming that it is unable to earn a reasonable rate of return under the existing regulatory scheme.

Appellant's theory, if accepted, would depart from over a century of case law recognizing that it is the *legislature's* job to determine whether rent control is "necessary." The Supreme Court has long recognized that states are "free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adopted to its purpose." Nebbia v. New York, 291 U.S. 502, 537 (1934). Local jurisdictions are entitled to "serve as a laboratory in the trial of novel social and economic experiments . . ." Conant v. Walters, 309 F.3d 629, 639 (9th Cir. 2002) (quoting United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 501 (2001) (Stevens, J., concurring)). Thus, the Supreme Court has repeatedly held that questions of economic theory are legislative policy matters:

> The doctrine that prevailed in Lochner, … has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. … Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to "subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the fourteenth amendment was intended to secure."

Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).

> Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within the prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

Reed v. Wiser, 555 F.2d 1079, 1093 n.19 (2nd Cir. 1977) (quoting Chicago, Burlington & Quincy R.R. Co. v. McGuire, 219 U.S. 549, 569 (1911)).

Appellant cannot avoid this legislative authority to determine economic policy by insisting that its claim is an "as applied" claim, and thus the Court has the power to hold a trial and determine whether there is really a need for rent control "with respect to the denial of this particular rent increase at this particular point in time."

Again, Appellant makes no claim, nor did it below, that it is making an inadequate return or that the controlled rents are otherwise confiscatory. Appellant's claim is that the "market rent" it wants to charge is "fair," that tenants could afford higher rent, and that other prices are not similarly controlled. Those are all *policy* arguments, not valid constitutional challenges. Cities are entitled to reach their own policy conclusions, in their discretion, without being subject to an expert battle whenever a regulated landlord believes the law is unnecessary. "[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." FCC v. Beach Communications, 508 U.S. 307, 314 (1993). The government "has no obligation to produce evidence to sustain the rationality" of its laws. Heller v. Doe *ex rel* Doe, 509 U.S. 312, 320 (1993). "We are a court, not a tenure committee, and are bound by precedent establishing that such laws do have a rational basis. . . . [T]he

Due Process Clause does not empower courts to impose sound economic principles on political bodies." Guggenheim, 638 F.3d at 1123.

Indeed, the case Appellant insists it had the right to present through a trial represents precisely the type of proceeding the Supreme Court has unanimously rejected as inappropriate:

> To resolve Chevron's takings claim, the District Court was required to choose between the views of two opposing economists as to whether Hawaii's rent control statute would help to prevent concentration and supracompetitive prices in the State's retail gasoline market. Finding one expert to be "more persuasive" than the other, the court concluded that the Hawaii Legislature's chosen regulatory strategy would not actually achieve its objectives. The court determined that there was no evidence that oil companies had charged, or would charge, excessive rents. …We find the proceedings below remarkable, to say the least, given that we have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation.

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 544-45 (2005) (citations omitted).

The district court correctly refused to second-guess the wisdom of Calistoga's rent control ordinance under the guise of an "as applied" takings claim. Its decision should be affirmed.

B. APPELLANT'S CLAIM WAS PROPERLY DISMISSED AS UNRIPE

The district court also properly dismissed Appellant's regulatory takings claim as unripe because Appellant had not exhausted parallel state law challenges to those claims. The League agrees with the briefing submitted by the City on this issue (Appellees' Answering Brief pp. 13-21), and provides the following

additional analysis of the well established need to seek relief from the California courts in order to ripen a federal takings claim.

The second Williamson County requirement requires a plaintiff to have "pursued compensation through state remedies unless doing so would be futile" in order to bring a federal takings claim. Ventura Mobilehome Communities Owners Ass'n, 371 F.3d at 1052. This requirement "arises from the fact that the Fifth Amendment takings clause, made applicable to the states by the Fourteenth Amendment, is 'designed not to limit the governmental interference with property rights per se, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.'" Schnuck, 935 F.2d at 173. "In order for [a land owner's] claim that the City took its property without just compensation to be ripe for federal judicial review, [the owner] was required first to seek compensation through California's inverse condemnation proceedings." Jones Intercable of San Diego, Inc. v. City of Chula Vista, 80 F.3d 320, 324 (9th Cir. 1996). This second requirement means that most takings claims should be adjudicated in the state courts. San Remo Hotel, L.P., 545 U.S. at 346.

Contrary to the arguments of Appellant and the PLF, California provides an adequate, non-futile, procedure for providing compensation for a confiscatory rent control law. In Kavanau v. Santa Monica Rent Control Bd., 16 Cal. 4th 761 (1997), the California Supreme Court established a procedure "by which a party

injured by a government taking could seek compensation." Equity Lifestyle Properties, Inc., 548 F.3d at 1190-91. Under Kavanau, if a landlord proves that the previously controlled rents were confiscatory, it can obtain higher future rents to compensate for the past losses. This remedy furthers several important public policies while fully protecting the landlord's rights. First, "this remedy, as opposed to an award of damages against the Rent Board, places the cost of compensating [the landlord] roughly on those tenants who benefited from unconstitutionally low rents." Kavanau, 16 Cal. 4th at 784. Second, "the remedy of future rent adjustments avoids putting a reviewing court in the position of declaring the appropriate regulated rent ceiling for a particular apartment in order to measure damages." Id. "Setting rent ceilings is essentially a legislative task, and agencies, not courts, choose which administrative formula to apply." Id. If, however, the Kavanau remedy is inadequate in a particular case to cure the constitutional harm, ordinary reverse condemnation damages remain available. Galland, 24 Cal. 4th at 1025, 1029; Colony Cove Properties, LLC v. City Of Carson, 640 F.3d 948, 959 (9th Cir. 2011).

The California courts thus provide an avenue for landlords to challenge rent control as confiscatory, and an adequate remedy in the event a confiscatory taking is found. Consistent application of these requirements promotes public policy by creating clear paths for litigation to follow, by preventing the type of needless

parallel track litigation attempted in this case, and by focusing rent control litigation in state courts with greater knowledge and experience with local concerns. This Court has repeatedly confirmed that California's remedies are adequate, and that the required resort to them is not futile. See Colony Cove Properties, LLC, 640 F.3d at 958-59; Equity Lifestyle Properties, Inc., 548 F.3d at 1191-92; Ventura Mobilehome Communities Owners Ass'n, 371 F.3d at 1053; Carson Harbor Village, Ltd. v. City of Carson, 353 F.3d 824, 827-30 (9th Cir. 2004); Hacienda Valley Mobile Estates v. City of Morgan Hill, 353 F.3d 651, 658-61 (9th Cir. 2003). The district court's consistent application of this clearly established law should be affirmed.

V. CONCLUSION

Cities have the authority, through their police power, to adopt local mobilehome rent control ordinances. Whether or not such ordinances are necessary at a given place and time, as well as the precise parameters of the price controls, are matters of legislative policy and discretion. Cities may exercise that discretion whether based on proven facts or just rational speculation and experimentation. The remedy for a policy disagreement is the ballot box, not the courthouse.

Moreover, cities have the right to full application of California's well established procedures for challenging the application of local rent controls. This

Court has repeatedly rejected attempts by landlords to avoid such procedures or to argue, without even trying, that use of such procedures is futile.

The district court's opinion faithfully adhered to each of these well settled rules of law, clearly respecting the delineation in our democratic society between the role of local and state governments and that of the federal courts. That decision should be affirmed.

Dated: June 26, 2013

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CERTIFICATION OF WORD COUNT

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), I certify that this amicus curiae brief contains 4,622 words, not counting the tables, and this attachment, as determined by the word count function of Microsoft Word 2003.

Dated: June 26, 2013

KERR & WAGSTAFFE LLP

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APPENDIX A

It is a Question of Value

NATIONAL APPRAISAL SYSTEM

A Division of National Appraisal Guides

Field Instruction Manual

Fifth Revision
Reprinted 1999

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The National Appraisal System was designed from the point of view that mobile homes are dwellings, not vehicles. This starting point creates an entirely different perspective on their evaluation from what has been customary and familiar in the manufactured home industry. It requires a new understanding of terms like "depreciation" and "economic life" as they relate to this type of housing. The manufactured home is no longer a vehicle. It evolved from a type of vehicle, and some homes are still relatively easy to relocate. In the 1960's and early 1970's, it was conventional to assume that mobile homes would steadily decline in value, so that they are worth about 50% of their original price after only 5 years. This assumption was contrary to actual experience, but it did not produce any great harm or concern as long as new manufactured homes were retailed for around $6,000 or less. A 50% depreciation over 5 years represented a depreciation loss of $3,000, and owners usually shrugged it off Where else could you live for fifty bucks a month? Besides, with a 7 or 8 year installment contract, the owner usually had some equity after 4 or 5 years. The problem of value has always been with us. But its impact was absorbed by the manufactured home owner without much fuss because he expected his property to depreciate. "The Book" said the manufactured home depreciated. The owner went along, both because he could afford to and because the bank went along too. To a large extent, the owner-attitude of readily accepting the concept that manufactured home value endured for so long. If Authority says it's so, then it must be so.

The various value guide books did not publish figures that reflected used manufactured home market activity. They merely prophesied that since manufactured homes have always depreciated in the past, they will continue to do so in the future. And of course, as long as everyone believed the prophecy, it did come true. And why have manufactured homes always depreciated? Because they have been likened to wheeled vehicles. Remember, manufactured homes had their origins in wheeled, temporary shelter, covered wagons, towed trailers. They were true vehicles, and vehicles depreciate rapidly because they wear out rapidly to the point where the cost of maintenance is uneconomical, so their usefulness diminishes quickly. In this introduction, we present a brief history of the manufactured home to show how it has evolved over the past 80-odd years from a vehicle with sleeping and storage facilities, to today's 1,500 and more square foot permanent dwellings, built to last for 50 plus years, and for which the term "mobile" really isn't correct or descriptive anymore.

The practice of arbitrarily depreciating manufactured homes is no longer acceptable. Today's manufactured home is a true dwelling. Indeed, in the history of many it is probably the best housing yet devised in terms of cost, energy efficiency, human comfort and quality of construction. It is the only form of housing which is built to a uniform, national building code with rigid requirements for systems-engineering, safety and quality in materials and workmanship. The manufactured home fits today's middle income families and it suits today's modern American life style. Alone, among all the housing alternatives in this country, the manufactured home offers home ownership to a majority of American families. Relatively few Americans can afford to buy the traditional site-built home with an average price tag now over $176,000 (including land). In fact, a recent study shows that 80% of present home owners could not now afford to buy the house they are currently living in. At less than half the price of a conventional house of the same square footage, the manufactured home will certainly attract an ever growing share of the home buying market. This market demands and deserves a realistic value-system. It requires a system which permits the accumulation of equity, for equity is basic to the concept of home ownership. Consider what would happen to the residential real estate market without equity generation made possible by a sound valuation method: the appraisal process which has been developed and refined over a long period of time.

The National Appraisal System was developed in 1976 to answer the need for equity accumulation. The techniques and types of information it employs are similar to those of professional real estate appraisers, but specifically adapted to the manufactured home environment. In use, the system enables the appraiser to calculate the most accurate, market reflective, supportable value judgements now possible.

The forerunner of today's modern manufactured home was never expected or intended by its inventors to become permanent housing. Homemade trailers began showing up almost as soon as the first motor car appeared. Before 1920, manufactured trailers were available, and there were plenty of customers. In the early 1920's the American instinct to form clubs resulted in the Tin Can Tourist of America, chartered to "unite fraternally all auto campers" and to encourage friendship among trailer owners, foster good relations with local residents, encourage "clean and wholesome" entertainment in "trailer camps", promote cleanliness in their surroundings and put out campfires.

The term "house trailer " was used by the Covered Wagon Company to promote its product in 1930. You could buy one of these units for about $400 to $500, depending on equipment. The Covered Wagon was an immediate success and competitors rushed to get into this new growth business. It looked like everyone who owned a car was a likely prospect for a house trailer and the trailer business took a lot less capital that the car business. By 1937 there were hundreds of manufacturers and a number of them got together and organized the Trailer Coach Manufacturers Association (TCMA). With an eye to the future sales, TCMA sought to protect the trailer's tax status by urging states to formally declare the house trailer a vehicle rather than a home (establishing arbitrary depreciation schedules).

During World War II, the house trailer became widely used as a year-round dwelling as it fit the sudden need for housing in large quantities near the nation's defense production centers. By 1943, the National Housing Agency had purchased some 35,000 units for defense workers and their families.

With the end of the war came new demand for housing as servicemen returned home, and the rate of new family formation increased. A combination of rapidly rising costs and the building industry's inability to build conventional houses fast enough attracted many people to trailers. Manufacturers sold as many units as limited material availability allowed them to build.

In 1946, Mid-States Corporation was a leading producer of trailers, and its president, came up with

the idea of calling his company's products "mobile homes." Even then, there was something about the word "trailer" that bothered some people. But it was another ten years before TCMA officially changed the name from "trailers" to "mobile homes," and became the Mobile Home Manufacturers Association, (MHMA).

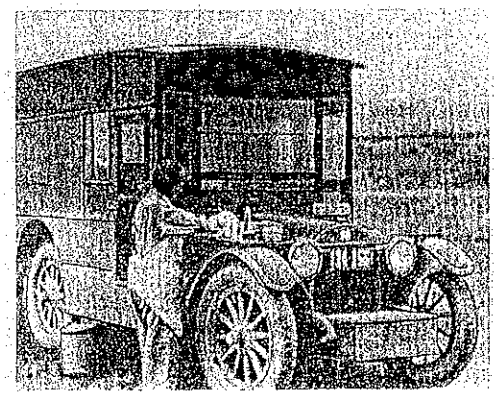
Without heavy promotion or even conscious marketing effort, the trailer was becoming accepted by rapidly growing numbers of Americans as housing. To be sure, it was still a vehicle... registered, licensed and taxed as personal property in every state... but suddenly, it had blossomed into something more. People were actually living in trailers and loving it. And for good reason. The benefits were many and strong. The cost was so low that most owners paid for their trailers in three to five years. The cost of owning was low too. Heating was easy and economical. Park rents were reasonable. Upkeep was practically nothing. The mobility was attractive too, especially to the large numbers of people whose jobs kept them moving frequently. Trailer owners also enjoyed the unique community spirit of the trailer park environment.

The concept of the trailer as a dwelling was firmly established. The nineteen-forties and early fifties were years of steady growth for the industry. In 1952, 83,000 units were sold. In 1955, the 10-wide was introduced and mobile homes accounted for over 6% of total new housing starts. Before the end of the decade, nearly 2 million people were living in mobile homes. The 10-wide had made the mobile home enormously more popular. Units were being built up to 50-feet in length and were selling as fast as park spaces became available.

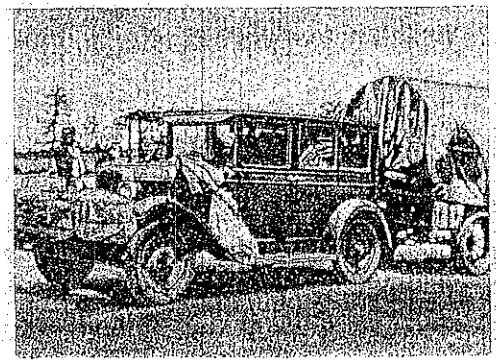
The 10-wide also effectively ended the manufactured home's function as a vehicle, for it could no longer be towed behind the owner's car. While it continued to be defined as a vehicle, it had become a true dwelling, a building. Attitudes changed slowly however, and mobile homes are still under the jurisdiction of the motor vehicle department in most states.

Manufactured homes have constantly grown in size. In the six years from 1955 to 1961, the size of the average manufactured home increased from 320 square feet to 550 square feet. And with larger floor plans, the more consumers it attracted. Sales increased every year. Then came the 12-wide and the boom was on. By 1965, the 12-wide (700 plus square feet) represented 50% of all manufactured home sales. This was also the introduction of the "double wide" (1,200 to 1,400 square feet). Manufactured homes accounted for 14% of total housing starts...DOUBLE its share of four years earlier. The manufactured home had emerged as full-fledged housing. In fact, even then, it dominated the low-cost housing market with sales of 216,000 units. By the end of 1965, 247 banks and finance companies reported $1.5 billion in manufactured home outstanding, a 90% gain over the previous year. (By the end of 1998, over 500 lenders reported outstandings of over $47.7 billion.)

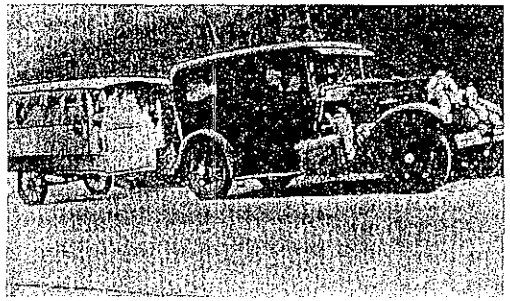
The trailer had come a long way. But the industry's growth period was just getting started. During the next few years sales soared. The average size of a new manufactured home was now over 700 square feet and 1,000 square foot homes were not uncommon. The rooms of a double wide were as spacious as those of houses costing 2 and 3 times as much. Financing was readily available on terms that made manufactured homes easy to buy and pay for. By 1969, this affordability and the tremendous allure of the



An early motorhome. The kitchen was outdoors.



Tent trailers like this were popular in the 20's.



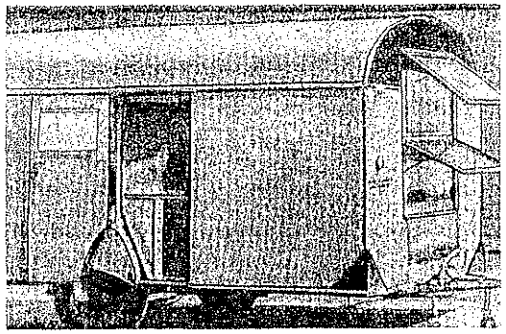
The house trailer was a substantial improvement with hard sides and rood, windows and even a coal burning stove.

The early 1930's saw production models like this, and a new industry was born.

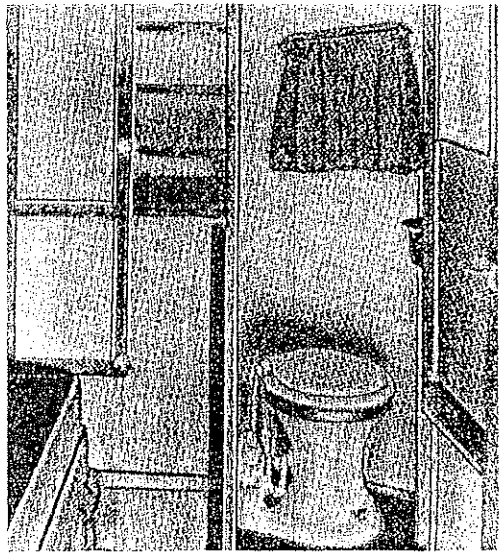
manufactured home life style enabled the industry to capture a 40% share of the total housing market. More than 400,000 manufactured homes were shipped in 1969. The following year, one of every two single family homes built was a manufactured home. The average price of a conventionally built single-family house was $22,300. The average price of fully equipped manufactured homes was less than $6,000.

In 1970, the Skyline Corp. that championed the 10-wide and later the 12-wide, predicted at a meeting of manufactured home dealers that within 3 years the 14-wide would be approved for movement on the roads of a majority of states. By 1972, 32 states were allowing 14-wides on the road (this allowed for large double wides with over 1,600 square feet) and the 14 wide accounted for 15% of all manufactured home sales. As of 1999, 48 states allow transport of 14' to 16' wide homes (some western states allow 18'). Over 500,000 units of all sizes were shipped that year and manufactured homes were selling faster than ever. The average manufactured home had reached 1,000 square feet in area and sold for $8.75 per square foot, compared with $20 per square foot for site-built housing. Nearly 400 manufacturers were able to sell manufactured homes as fast as they could produce them. In 1973, shipments rose to 585,000 units.

Then in 1974, a depression hit the housing industry, including manufactured homes. Financing



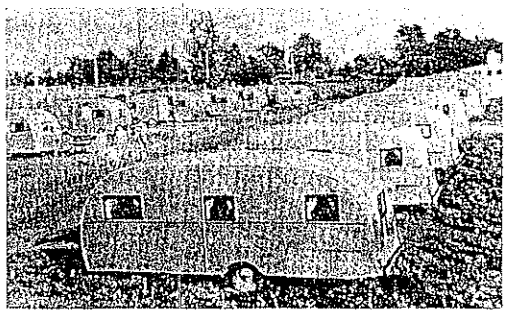
By 1936, trailer manufacturing was reported to be the fastest growing industry in the United States. The Covered Wagon Company had grown from 117 units sold in 1931 to 6,000 in 1936.



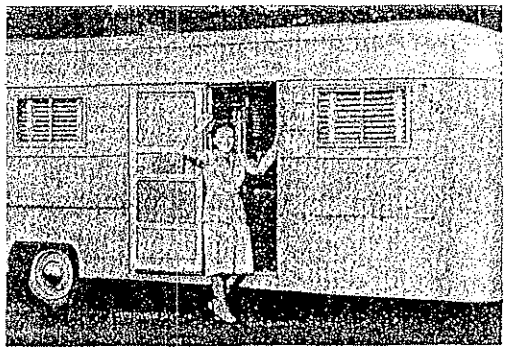
Bathrooms first appeared as luxury options in the late 1930's.

dried up, and with it sales. At the same time, inflation sent prices climbing at a staggering rate. Interest rates rose sharply, and suddenly the manufactured home had lost its great affordability edge. Industry shipments plummeted from the previous year's record high to less than 200,000 units. Large numbers of dealers went bankrupt. Some estimates of dealer closings ranged as high as 60%. Repossession rates had been rising for more than a year and now many lenders and insurers were reporting huge loss ratios, as thousands of owners, unable, or, as was often the case, unwilling to continue making payments, defaulted on their loans.

There are, of course, many reasons why the manufactured home industry took such a tumble. But it is now widely recognized that the exclusive reliance on the book value method of determining the worth of used manufactured homes (along with state tax depreciation schedules) played an extremely significant role. By 1974, there were 4.5 million



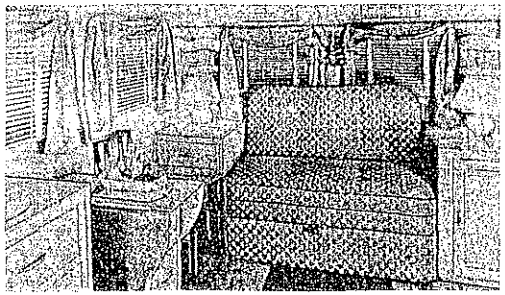
Trailers became temporary housing during the war years. In 1943, more than 60% of the nation's 200,000 trailers were providing the basic shelter needs of defense workers.



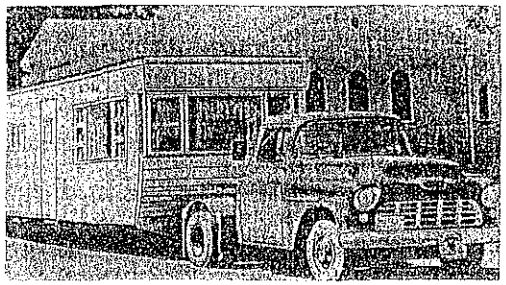
After the war, the trailer grew in both size and importance, alleviating the serious shortage of low cost housing.

manufactured homes in use as primary residences, and by definition, everyone had lost a big chunk of value. On the average, the difference between the original selling price of a manufactured home and its retail book value was in excess of $2,800. This differential was even greater for the most recent model years. This high depreciation was a cost of ownership not anticipated by most manufactured home owners.

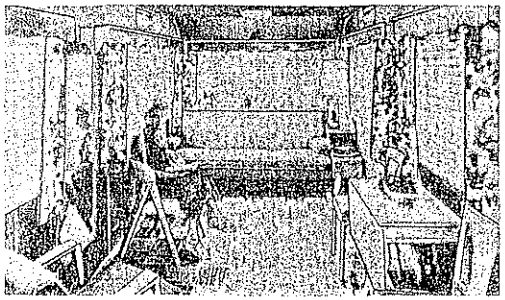
It is not inherent in the nature of manufactured



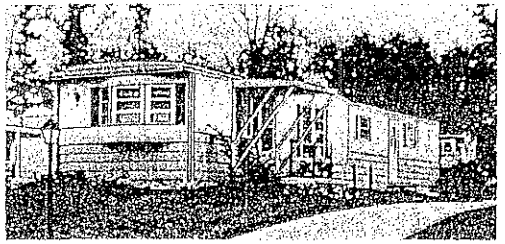
Interiors were small, but homey and convenient. By 1950 only 1% of trailer sales were to the vacation market, 45% were sold to what was defined as the temporary housing market. 15% were bought by migratory workers.



The 10-wide made mobile homes more livable and less portable. Used 10-wides are still in great demand.

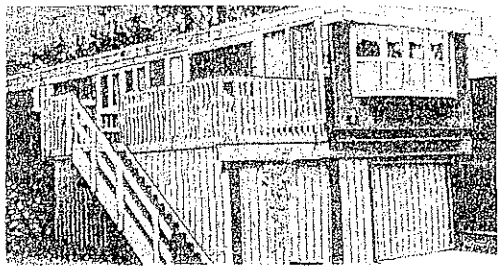


Inside, the 10-wide was much more specious. Its appeal as low cost housing and already-made life style brought many new customers.

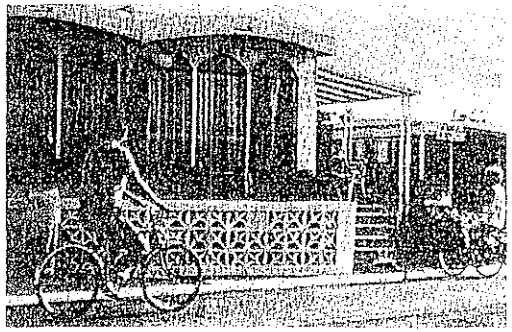


With the 12-wide, mobile homes and mobile home parks began to take on a more residential look. Once considered substandard and temporary, the mobile was taking its place as an adequate, dignified housing form for millions of Americans.

The luxury and spaciousness of the 12-wide spurred the industry's major growth years. Rooms like this were as appealing as those of most houses, and much more affordable to an ever growing market.



This permanent installation of a 14' wide home on fee land underlines the need for a professional field appraisal.

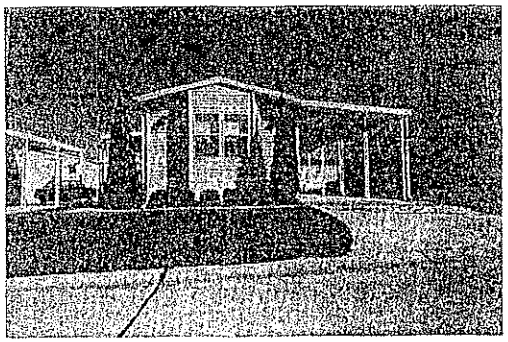


First introduced in the early sixties, the multi-wide manufactured home continues to capture a larger share of the housing market.

homes to depreciate so rapidly. Real functional obsolescence from the mid nineteen seventies, due in part to the implementation of the HUD construction code, was minor. Demand for used manufactured homes was great enough to maintain resale values considerably higher than those assumed by the books. Experience proved that a well built manufactured home, given reasonable maintenance, would retain its usefulness indefinitely. Its genuine desirability, and hence its true worth to a large extent, simply went unrecognized by the book-value method.

As owners' circumstances and housing preferences changed, the impact of the book-value method began to be felt. Owners discovered that through a combination of book-value-depreciation and loan interest cost, they could be in a position of negative equity. Many owners owed so much more on their loans than their homes were "worth" that they became discouraged. It would be years before they could realize any equity.

In effect, the exclusive use of the book-value method in determining the worth of manufactured homes had slowed the natural flow of the market and it had to back up somewhere. Used manufactured homes could not be absorbed by their natural market because an owner could not afford to pay the difference between the loan ceiling set by the book-value and his own loan payoff. The prospective buyer would not pay this difference because fewer dollars were required as a down payment on a brand new



Single section home with house type exterior and bay window.

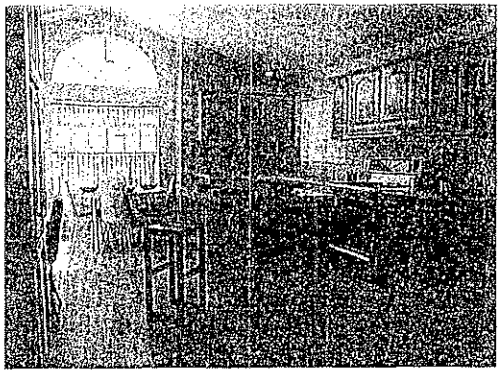
manufactured home. The trade-off between newness and lower price was effectively cancelled. The only choices open to the owner then were to force industry to buy back his home as a repossession, or to continue to pay for a home that no longer suited him. By the end of 1974 there were, according to some industry reports 200,000 plus repossessed units in inventory nationwide.

The resulting chain-reaction was devastating. Lenders, shaken by the huge increase in loss ratios, concluded that manufactured home financing had become too risky. Dealers suddenly found that their wholesale floor plan financing was sharply curtailed, or even cut off completely, and that retail financing was all but unavailable, even for the strongest applicants. It put thousands of dealers out of business, leaving the industry to reabsorb their inventories. Manufacturers' orders slowed to a trickle, increasing unit production costs, and cutting off cash flow. According to one industry estimate, 50% of the manufacturers in operation in 1973 were out of business by the end of 1975. The market, already diminished by recession, was even further restricted because of its dependence on the availability of installment financing.

During 1976, the industry staged a small comeback. Total shipments were approximately 263,987 compared with 220,824 in 1975. 1977 shipments exceeded 265,000 units. The previous thirteen years were a time of consolidation; a period of re-examination of strengths, weaknesses, opportunities and goals. The National Appraisal System grew out of the decision by industry leaders that the industry could not allow the value problem to rob it of its bright future, and from the recognition that a naturally functioning, stable resale market is necessary for the health of the entire industry.

Far from spelling doom, the difficult years of 1974 and 1975 really proved the basic strength of the manufactured home as a desirable and accepted housing alternative. The manufactured home is here to stay.

In the 1980's, one perplexing difficulty of the U.S.



Modern island kitchen with appliances.

housing crisis is cost - the housing that people wanted costs more than they could afford. As costs of housing continued to mount, the median price of a new single-family site built home exceeded the buying power of an even larger segment of the population. (The manufactured housing industry still built and sold 2 1/2 million homes.)

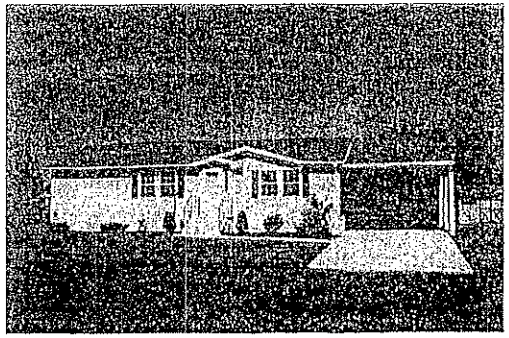
Manufactured homes represent a real housing alternative to meet housing needs of the 80's and 90's.

In the 1990's the industry produced an additional 3 1/2 million homes. It's estimated that 1 1/2 to 2 million manufactured homes will be resold annually. The industry desperately needs trained appraisers. The opportunity is NOW!

As we have seen, the dynamic evolution of the manufactured home as housing has led to critical value problems. The industry has learned that it cannot allow value to be defined away without serious consequences. Artificially imposed depreciation is a cost that the industry's customers have ultimately refused to bear.

The book value method did not work because it couldn't adequately reflect what actually happens in the used manufactured home market place, and because of fallacies in the book user's assumption that all units of a given year, make and model will be worth about the same money. Unwittingly, this approach fostered the notion that manufactured homes had very short useful life spans. There were no allowances for a home's condition or location, which strongly affects its desirability, and therefore, the price it will command, both today and in the future. Value has always been inherent in the manufactured home. What has been lacking is a reliable method of measuring, recording and certifying that value.

All manufactured homes built since June 15, 1976 must conform to the National Manufactured Home Construction and Safety Standards (the HUD Code) established under a law passed by the U.S. Congress. The U.S. Department of Housing and Urban Development administer the standards. Every manufactured home has a red and silver seal certifying that it was built in compliance with the federal construction code. This building code regulates manufactured home design and construction, strength



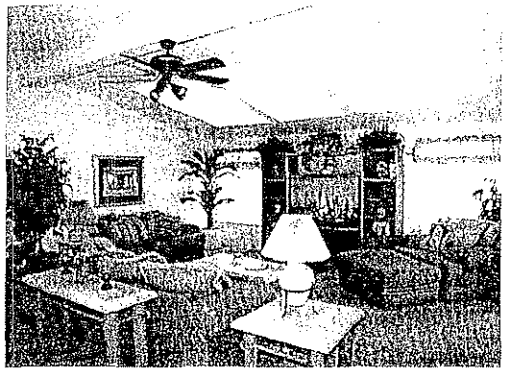
Multi-section home with attached garage.

and durability, fire resistance and energy efficiency, as well as the installation and performance of heating, plumbing, air conditioning, thermal and electrical systems. The federal program also regulates factory certification.

The adoption of the HUD code over two decades ago (with updates), set in motion a trend that has brought the modern manufactured home into the occasional mainstream of the shelter industry. Today, manufactured home builders produce a larger percentage of affordable homes costing under $50,000.

The HUD code is unique in that it is the only national building code in existence. How does this national code benefit consumers and the residential construction industry? This code, combined with growing consumer acceptance and industry improvements, has transformed the mobile home yesteryear into the permanent housing choice for millions of families annually.

This national preemptive code allows manufacturers to build to one code, rather than a patchwork of local codes. The HUD code allows production processes to be standardized, materials to be ordered in advance and in great volume, and manufacturers to be freed from unnecessary, parochial building standards that increase costs without corresponding improvements to the health, safety, and durability of the residence.



Modern living room with cathedral ceiling, skylight windows and gypsum walls.

It fosters innovation in construction processes. In many instances, the HUD code has been testing ground for innovation in local and state building codes. For example, a decade ago many building code officials scorned the idea of using PVC plumbing in residential construction. Today, site builders readily recognize and use this material.

Today's manufactured homes set the standard for value at an affordable price. They compete in appearance and performance with many typical site-built, ranch-style or two story homes. This competition forces the shelter industry to perform at the affordable housing level, thus opening more opportunities for home ownership among moderate-income citizens.

Whatever technology exists for getting more homes to more people should be encouraged, so long as those technologies meet publicly adopted standards relating to health, safety, and durability. Further, we believe that today's manufactured homes blend the best in style and amenities at a price that the average wage earner can afford.

Improvements in technology are being translated into growing acceptance not only by consumers but also local governments who regulate the use of manufactured homes. A recent survey conducted by the American Planning Association concludes that many state and local agencies have updated anachronistic land use policies because public attitudes toward manufactured housing are improving. And, the survey suggests that public attitudes are changing because the industry is producing an affordable home of improved appearance and better quality. Many communities are beginning to realize that, in the face of decreasing federal assistance in housing, manufactured homes help provide affordable housing.

In recent years, manufactured housing has represented nearly 25 to 30 percent of all new single family homes sold in America. Affordability continues to play a major role in the growth of the manufactured housing industry. For example, in 1995 the average cost of a 1,400 square foot site built home was approximately $47.00 per square foot, as compared to $27.00 per square foot for a manufactured home (including carpet, drapes and appliances).

In 1997, there were approximately 1.8 million new housing starts in the U.S., of this approximately 27% were HUD code manufactured homes. Retail sales of manufactured homes reached over $14 billion.

In 1998, this industry produced from 323 manufacturing facilities approximately 28% of all new single family homes sold in the U.S.

These statistics are only part of the increasing trend toward residential factory production. The fact is that most homes constructed today – even site built homes – are composed of factory built components. Builders are moving to these factory components to control costs and reduce housing prices to consumers.

In 1999, the average cost of a site built home (without land) was approximately $62.00 per square foot, for a tract quality home; as compared to the average quality manufactured (factory built) home of approximately $30.00 per square foot. This affordability of structural cost is the reason more site built tract developers nationally are using HUD code manufactured homes, attached to land with approved HUD foundation systems, in their housing developments.

While the HUD Title VI Construction Code has been successful in providing affordable housing for millions of consumers, there is a need for enhancements to this 25 year old code.

As the industry enters the new millennium, they have introduced to Congress legislation to help keep pace with the rapid evolution occurring in this industry called the Manufactured Housing Improvement Act. It is hoped that this act will be approved in the year 2000.

With this, other exciting changes and further acceptance by the homeowner, lending institutions, etc. it is forecasted this industry can capture 1/4 of all housing starts in the early years of the new millennium.

In Conclusion

The prognosis for the manufactured housing industry is excellent. The manufactured home will continue to evolve, as new design ideas and new materials are constantly being developed and tried. In the new millennium it is estimated that more people will live in manufactured houses than any other type of dwelling. As a single-section manufactured home, it offers many unique benefits. Its great cost advantage and high energy efficiency are two of the important ones. In its multiple-section and two story configurations it has the space and architectural styling of conventionally site built houses at far lower cost, and will continue to capture a growing share of the total housing market. (Many states have placed manufactured homes on their property tax rolls and as such, are eligible for financing under Fannie Mae/Freddie Mac criteria.)

The manufactured housing industry presents to you, the appraiser, a special opportunity. While manufactured home appraising is a relatively new field, its necessity is now widely recognized among industry leaders. The National Appraisal System has been solidly endorsed by leading manufacturers, lenders and insurers. Major savings and loans, banks, mortgage bankers, and the wall street secondary Fannie Mae, Freddie Mac money markets require appraisals before approving loans on used (over 300,000 plus resales occur annually) and new manufactured homes. So, there is already demand for the services of trained manufactured home appraisers.

You will find clients in your area among lenders (over 3,000 companies nationally lending on manufactured housing), insurers, dealers and even manufactured home owners. Call on your local lenders and HUD/VA offices, as they need qualified fee panel members for their VA and FHA Title I and II Manufactured Housing loan Programs. You'll find that most of them are already aware of the National Appraisal System and many are subscribers to the system as well as to the various N.A.D.A. Appraisal Guides. Pay a call on each of the dealers in the area. Find out what insurance companies they do business with and get in touch with them. Most dealers will be glad to give you a name to contact. Become acquainted with the MHC operators in the area. Most of them will be most happy to cooperate with anyone who is working to establish accurate and realistic manufactured home values. We also recommend that you place a listing in the Yellow Pages under Appraising. In summary, you are in a position to offer a service which is much needed by all segments of the manufactured home industry. In the National Appraisal System, you have the finest and most widely endorsed set of tools for performing that service. Beyond its direct value to your clients, your professional activity as a manufactured home appraiser will contribute greatly to the economic well-being of the manufactured home industry in your community.

Modern T-House with HUD approved foundation system attached to land.

9th Circuit Case Number(s) 12-17749

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

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CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) 6/26/2013 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) /s Michael von Loewenfeldt

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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