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IN REPLY REFER TO:
550

December 6, 2024

Via Electronic Mail *leo@coastnewsgroup.com*
Coast News – San Diego County newspaper

RE: Lakeview Mobile Estates comment:
(1) "To clarify position about the park's ability to change from senior park to all ages park;" and (2) "About your reference to the supreme court chevron case in the letter."

Dear Gentlepersons:

Thank you for the opportunity to comment on the ongoing dialogue between my office and the City of San Marcos.

At present, I await a response to questions about the position of the city relative to recent interpretations by the United States Supreme Court as to administrative overreach by federal agencies. I have every expectation of maintaining a positive and amicable relationship which I have enjoyed for many years.

In this further regard, I wrote an article about the "Chevron" doctrine demise for the Western Manufactured Housing Communities Association, Inc.'s "*Reporter,*" which I attach to this letter. The closing sentence bears repeating: "[D]evelopments in this area of the law may also well lead to new opportunities to work with local governments for agreement to continue to choose 55+ housing."

Marie Malone, legendary past-president of the Golden State Mobile Home Owners League (GSMOL), championed long-term leases as a panacea for solving problems between landlords and tenants. She practiced what she preached. She negotiated a 19 year long-term lease in Vista Cascade here in the county. I have always *wholeheartedly agreed* with GSMOL's former position that long-term leasing brings the hope of everlasting peace. The truth of this revelation is reflected in long-term leasing agreements adopted in cities like Vista and other areas with high quality manufactured housing. San Marcos is conspicuously out of step with compulsory market interdiction applied only to private park owners, which is unnecessarily costly to the general taxpayer. Especially when a park owner would consider a negotiated life tenancy without a further rent application.

Serving the interests of *all* parties is the stuff from which a lasting amicable coexistence can be fashioned. That interest is secured by agreement which deals with economic survival *and* residential covenants. I have made these points for decades. I hope that tenants do not, as would certainly be their prerogative, see only subsidized rent to the exclusion of secured long-term stability and peace. And *that* is within the reach of respectful meaningful dialogue.

Please feel free to contact me with any further questions or comments.

Very Truly Yours,

Terry R. Dowdall
For
DOWDALL LAW OFFICES, A.P.C.

August 2024
WMA
reporter

TAKE A WALK IN YOUR PARK
– and Discover Community

ANNOUNCING the 2024 WMA Convention & Expo

M Resort Spa Casino
Henderson, Nevada
October 14 – 17

August 2024
Volume 50 — Issue Number 8

CONTENT

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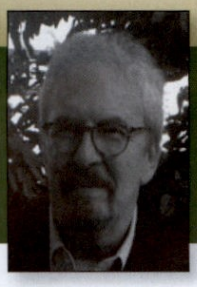
DEPARTMENTS



LEGAL LINES

Terry R. Dowdall, Esq. | Dowdall Law Offices, A.P.C.

Chevron Tanked by Supreme Court

Introduction

During WMA's 1988 Convention, a courier rushed a new HR 1158 to my hotel room. The task fell upon me to digest and outline it for Brent Swanson's (my boss) seminar, the next day. I virtually inhaled it into the night. Revelations aplenty. "Adult only" now violated civil rights law. One clause was singularly troubling: 55+ housing would require "significant services and facilities" (" ... the existence of significant facilities and services specifically designed to meet the physical or social needs of older persons ... "). *A litigation sinkhole*. I would urge "family park" status soon enough.

The Federal Fair Housing Act of 1988 ("FHAA") introduced a new protected class known as "familial status." Families with a child under 18 were given the same protection as color, race, national origin, and religion. A narrow exemption was also provided for senior housing (all occupants 62 years of age and older) and "older persons" (one person 55 or over in 80% of the total housing units), included at the last minute. The exemption reflects an intense effort by housing associations, including WMA.

HUD then passed wildly draconian regulations that confirmed our predictions for an unwieldy, unworkable law. It all but totally asphyxiated senior housing nationwide. *The result?* Congress was shocked.[1] To address the crisis, the Housing for Older Persons Act ("HOPA") was passed, which eliminated HUD's asphyxiating regulations. Essentially, HOPA made two big changes to the FHAA:

- First, it expanded availability of senior housing exemptions by deleting "significant services and facilities" requirements.
- Second, HOPA introduced legal immunity for housing providers to safeguard those who unsuccessfully try to offer "older persons housing" in good faith.

Congress never authorized local government to highjack family housing.[2] HOPA did not speak to zoning.[3] HOPA merely relaxed senior housing requirements of the FHAA and nullified HUD's regulatory frolic that nearly killed senior housing nationwide. Obviously, private housing providers were regulated by the FHAA and HOPA. The FHAA was a private exemption. HOPA was a remedial fix.

Recent developments in case law may lead to productive interchange with local governments in a cooperative spirit for consensual adjustments with owners who may agree to voluntarily offer 55+ housing.

Senior Zoning Guidelines for Municipalities?

In the wake of HOPA, HUD continued its regulatory overreach with new regulations, including a senior housing example: a local municipality that usurps the landlord's choice of family housing to impose senior zoning. But confiscation of choice by housing providers (including mobilehome parkowners) *was not approved by Congress*. There's no sacrifice of "familial status" choice on an altar of senior zoning.

[1] Senate Report, Calendar 231, Report 104-172, REPORT, HR 660, at page 3 ("Interpreting and implementing the 'significant facilities and services' standard has been very troublesome ... it has been unclear what the phrase 'significant facilities and services' means ... There have been so many lawsuits that the exemption Congress intended is now being revoked as a practical matter by threat of litigation.").

[2] Senate Report, Calendar 231, Report 104-172, REPORT, HR 660, at 2 ("I. Purpose. The purpose of HR 660 is to eliminate the burden of the 'significant facilities and services' requirement ... This legislation is needed to provide a clear, bright-line standard of when a seniors' housing community is in fact 'housing for older persons' for purposes of the Fair Housing Act. HR 660 is intended to clear up this problem and return to the original intent of the Fair Housing Act exemption ... HR 660 is designed to make it easier for a housing community of older persons to determine whether they qualify for the fair "Housing Act exemption.")

[3] "What this legislation says is that if you are legitimately a community that has set itself aside for older people only, you can be certified for that purpose and not worry about discrimination, because you are trying to live up to that ..." (Congressional Record — House of Representatives, Proceedings and Debates of the 104th Congress, 1st Session, December 18, 1995, *H14966 HOUSING FOR OLDER PERSONS ACT OF 1995).

HUD's senior zoning examples in the *Federal Register*[4] are not codified: just an illustrative exemption from "familial status." Senior housing by compulsory zoning represents an ultra vires departure from the FHAA's mandate, which assigns the choice-the-election-for senior housing to the housing provider as amplified by HOPA.

Senior housing requires a requisite "intent." Absent intent, a housing provider is disqualified and must revert to the FHAA's "familial status." Courts have decided that compulsory zoning trumps the choice to rent to families. HUD has been, almost comically, imbued by the courts as empowered to generate requisite "intent." Congress never said that. Moreover, municipalities have undertaken no effort whatsoever to enforce HOPA on an ongoing basis in areas where it has imposed senior zoning. Now, HUD's involuntary coercion appears doomed by the U.S. Supreme Court, which just decided *Loper Bright v. Raimondo*[5] annulled the *"Chevron doctrine."*

Chevron v. Natural Resources Defense Council[6]

In 1984, the court decided *Chevron USA v. Natural Resources Defense Council*. "Chevron deference" required courts to take a backseat to bureaucratic (agency) *say-so* interpreting federal law that was deemed ambiguous. At the time of the 1984 decision, Chevron received support as a strike in favor of deregulation. At the time, the Reagan administration's Environmental Protection Agency interpreted the Clean Air Act in favor of business.

Over the course of time, observations morphed. *Chevron* has come to be a symbol of massive bureaucratic over-regulation, with passage of imposing regulations never approved by Congress. Opponents now argued that the courts, not federal agencies, should control legal meaning of ambiguous federal statutes. In overturning Chevron, Justice Roberts noted the *Chevron doctrine* "allows agencies to change course even when Congress has given them no power to do so."

Does This Affect Mobilehome Parkowners?

YES. Many owners are satisfied with regulations for 55+ parks and desire to offer senior housing. Conversely, many owners object to zoning regulations that impose a requirement for senior housing by force. The question is whether the statute, which specifies senior housing as an election to be made by the housing provider, can be forced upon property owners by local government. HUD has allegedly imposed regulations that impermissibly add legal burdens that only legislation can impart — and which Congress never approved.

Various disputes now challenge the governmental overreach, compelling parkowners to operate senior parks as being invalid *ab initio*. Federal agencies, including HUD, must follow plain language when the law is clear.

Loper Bright v. Raimondo[7]

In *Loper Bright v. Raimondo*, the Supreme Court overturned Chevron, holding that federal courts are required to rely on their own interpretation of ambiguous statutes instead of deferring to bureaucratic administrators. This is a dramatic truncation of power and influence by federal agencies to interpret and expand on federal laws they implement. Commenters opine that Loper Bright will reverberate nationwide, perhaps proving to be unworkable absent further congressional remediation. Justice Kagan dissented, arguing that invalidation of Chevron has created a "jolt to the legal system."

A New World?

Justice Roberts noted that courts are legally directed to "decide legal questions by applying their own judgment" and therefore "makes clear that agency interpretations of statutes — like agency interpretations of the Constitution — are not entitled to deference." He added "... it thus remains the responsibility of the court to decide whether the law means what the agency says."

Going forward, the court will take a more active, intrusive role in declaring federal legal interpretation. The court held that judges are better able to decipher the meaning of vagueness found in federal statutes. Even when the issue is scientific or abstruse. "Congress expects courts to handle technical statutory questions." Courts also have the

[4] The Federal Register chronicles daily life in Washington: it is the official journal of the U.S. that contains government agency rules, proposed rules, and public notices every weekday. Final rules are ultimately reorganized by topic or subject matter and codified in the Code of Federal Regulations (CFR), which is updated quarterly. See *About the Code of Federal Regulations. National Archives. August 15, 2016*

[5] *Loper Bright Enterprises v. Raimondo* (2023) ___U.S. ___[143 S.Ct. 2635, 216 L.Ed.2d 1223].

[6] *Chevron U.S.A. Inc. v. Natural Resources Defense Council* (1984) 468 U.S. 1227 [105 S.Ct. 28, 105 S.Ct. 29, 82 L.Ed.2d 921].

[7] *Loper Bright Enterprises v. Raimondo* (2023) ___U.S. ___[143 S.Ct. 2635, 216 L.Ed.2d 1223].

benefit of briefing from the parties and "friends of the court."

Retroactive upheaval of previous precedent is not expected. Justice Roberts indicates that *Loper Bright* will not require reliance on *Chevron* to be reversed: "... to say a precedent relied on *Chevron* is, at best, just an argument that the precedent was wrongly decided." More will be required.

However, if a regulation is outside the scope of regulatory power and changes or adds to the meaning of the statute in a way Congress did not authorize, the case is not just wrongly decided; it is an unauthorized and unenforceable quasi-legislative action with no mooring to express direction by Congress.

Threat to Compulsory Senior Zoning

The courts may no longer abdicate judicial power to bureaucratic whim. Agencies cannot unilaterally supplement statutes by cavalier frolic. Thus, the demise of mandated senior zoning is, now, vulnerable to challenge. The Ninth Circuit's position, that senior zoning is permissible due to an illustration of senior zoning contained in uncodified examples of senior housing printed in the Federal Register, is shaky and likely to be re-examined in light of *Loper Bright*.

Ending *Chevron deference* takes away any excuse to defend senior zoning. It should not apply in the first place, because HOPA is not ambiguous (in respect to the definition of "housing provider"). It is beyond HUD's powers to create new classes of housing provider. In previous cases, management's arguments were rejected (that management is the only entity with the right to pursue an exemption for senior housing, of its own voluntary volition, and to be protected from liability for good faith noncompliance). This decision is now open to reinterpretation by the court, where consistency between the statute and promulgated regulations setting up supplementary housing provider classes can be scrutinized.

Who Is in Charge of Maintaining Compliance with HOPA?

Ongoing compliance with HOPA's "intent" requirement is necessary. Failure to budget for compliance efforts and absence of procedures proves municipalities abandon enforcement integral to senior housing. HOPA calls for demonstrable intent to operate as senior housing. Regulations requiring senior housing contradict the voluntary choice Congress gave to private property owners. HUD may not have a power to transfer that authority to local government by redefining "housing provider." Congress did not intend this. Senior zoning is nowhere discussed in the statute or its history of the FHAA. Consider one case decided against a large Southern California county.

A federal court adjudged a county liable for imposing age restrictions on a zoning district for senior tenants absent the 80% occupancy. The county had cavalierly ignored any procedures designed to make sure the zoned area was reserved for seniors (another case held that "... [i]t is not enough that the person claiming the exemption published a policy demonstrating its intent to provide housing for persons 55 years of age or older if the entity did not adhere to a procedure demonstrating the same intent"). The county had taken "no action to verify the ages of residents," nor had it enforced the zoning restriction.

Conclusion

Currently, a local government that does not follow the requirements for implementation of 55+ housing stated in the CFR's (as-is) may be challenged for non-compliance with HOPA. Also, if FHAA/HOPA do not allow for local government to impose "senior housing" at all, the entire illustration (and supportive precedent) is void *ab initio*. Canceling *Chevron deference* may lead to new hope for overdue curtailment of unauthorized regulations. It may mean reinstatement of free choice and family housing options.

Developments in this area of the law may also well lead to new opportunities to work with local governments for agreement to continue to choose 55+ housing. ▪

Terry Dowdall specializes in mobilehome park law and has represented parkowners for over 40 years. He is an advisor to WMA's Legislative Committee and Committee to Save Property Rights. He can be reached at 714.532.2222 phone; 714.532.3238 fax; or by email at *trd@dowdalllaw.com.*

NEWS & INFORMATION

Doug Johnson | Executive Director

Our Fight to Save Long-Term Leases

On August 31, 2020, Governor Gavin Newsom signed AB 2782 into law. This codified Civil Code Section 798.17 and spelled the beginning of the end of our industry's decades-old, long-term lease exemption from local rent control. Starting on January 1, 2025, all mobilehome park long-term leases will become subject to current and future rent control ordinances. Since 1985, parkowners have made many costly concessions to residents in order to secure these long-term leases. Something had to be done to stop this illegal action.

In late December 2022, WMA and a Petaluma parkowner agreed to sue the State of California in an effort to invalidate the law and to preserve a rent control protection granted decades ago and now taken away — unconstitutionally — by the Legislature. *Western Manufactured Housing Communities Association & Sandalwood Estates LLC v. Governor Gavin Newsom & Attorney General Rob Bonta* claims AB 2782 violates the contract clause of the U.S. Constitution and due process protections of the federal and state constitutions.

Nine months later, Sacramento County Superior Court Judge Christopher E. Krueger allowed our lawsuit against the long-term lease destroying AB 2782 to move forward to trial. The State of California attempted to have the case thrown out of court by filing a demurrer, but the judge ruled: "The court finds that the FAC (First Amended Complaint) sufficiently alleges a substantial impairment of a contractual relationship."

Paul Beard, our attorney in this case and formerly with the Pacific Legal Foundation (PLF), was quoted in the Los Angeles Daily Journal hailing the decision: "Today's ruling was an important victory for parkowners in California, as they continue to suffer under an ever-intensifying onslaught of unconstitutional attacks on their industry by the Legislature and governor. Today, the court rightly rejected the attorney general's plea to 'look the other way' and simply rubber-stamp this outrageous law, which purports to retroactively hollow out long-term leases that have benefited both parks and their residents for decades.

Now the state will have to prove — with arguments and evidence — that a significant and legitimate purpose supports this law and can override the constitutional prohibition on legislative impairments to private contracts."

We are set to go to trial next year and in the meantime, our legal team is working on a motion for preliminary injunction to stop the law from going into effect on January 1, 2025. This hearing will be held in Sacramento County Superior Court on November 9 at 9:00 a.m.

Have you made your contribution to this important property rights cause? If so, will you consider giving more? WMA's Committee to Save Property Rights (CSPR) contributed $50,000 and parkowners from all over California have also given generously. Checks should be made out to CSPR with "AB 2782 Lawsuit" written on the memo line and mailed to WMA at our new office address: 2295 Gateway Oaks Drive, Suite 240, Sacramento, CA 95833. ▪

Welcome New Members

Del Prado Mobile Home Park, Yuba City

Macs Trailer Park, Grimes

Magnolia Gardens

Mobile Home Park, Lemoore

Midstate Mobile Manor, Fresno

Ridge Wireless Inc., Cupertino

San Joaquin Estates, Fresno

Sierra Springs, Bass Lake

▪

Doug Johnson is WMA's Executive Director and can be reached at 2295 Gateway Oaks Drive, Suite 240, Sacramento, CA 95833; phone 916.448.7002, extension 4025; fax 916.448.7085; or email *doug@wma.org.*