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Hall v. City of Santa Barbara: The "Taking" of Property Through Rent Control

I. INTRODUCTION

Property owners have frequently challenged rent control laws as unconstitutional "takings" of private property. However, these and other constitutional challenges have generally been unsuccessful. Relying on the broad police powers accorded to the states, courts have usually found rent control statutes to be constitutionally sound.¹ In August 1986, however, the Ninth Circuit Court of Appeals, in *Hall v. City of Santa Barbara*,² questioned the constitutional validity of a Santa Barbara, California rent control statute applicable to mobile home parks. The case arose when owners of a mobile home park brought action against the City of Santa Barbara seeking compensation for an alleged "taking" of property resulting from the operation of the city's mobile home rent control ordinance. Plaintiffs argued that the ordinance gave mobile home tenants a permanent possessory interest in the land on which the mobile homes were located. The United States District Court for the Central District of California dismissed the complaint for failure to state a claim. On appeal, the Ninth Circuit held that if the disputed facts were subsequently shown to be as plaintiffs alleged, the rent control ordinance should be held to transfer a possessory interest in plaintiffs' land to the mobile home tenants.³ The Ninth Circuit held that plaintiffs' allegations constituted a valid claim and instructed the lower court to address the question whether the alleged transfer of a possessory interest amounted to an uncompensated "taking" of private property prohibited by the fifth amendment to the United States Constitution.⁴ This note explains and analyzes the Ninth Circuit's decision

1. See *Fisher v. City of Berkeley*, 106 S. Ct. 1045 (1986)(holding that the rent control statute was not per se unconstitutional and violative of the fifth amendment); *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875 (1983)(dismissing an appeal of a ruling upholding the rent control statute); *Teeval Co. v. Stern*, 301 N.Y. 346, cert. denied, 340 U.S. 876 (1950)(holding that the rent control statute involved was not a taking of property without compensation); *Woods v. Cloyd W. Miller, Co.*, 333 U.S. 138 (1948)(holding that the rent control statute involved did not violate equal protection); *Bowles v. Willingham*, 321 U.S. 503 (1944)(holding that the rent control statute involved did not violate due process); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1920)(holding that the rent control statute involved was not an impairment of contract rights).

2. 797 F.2d 1493 (9th Cir. 1986)(on appeal from a dismissal for failure to state a claim).

3. *Id.* at 1502.

4. *Id.* at 1498.

in *Hall* and demonstrates that the court's "takings" analysis was incomplete. Although the court correctly focused on one aspect of "takings" analysis, it unduly prejudiced plaintiffs' fifth amendment claim by failing to properly address other pleaded theories which might have proven dispositive of the "takings" question at trial.

II. THE *Hall* CASE

In August of 1984, the City of Santa Barbara enacted a rent control ordinance applicable to mobile home parks. The ordinance set forth certain requirements for mobile homes.⁵ Lot owners were required to give tenants unlimited duration leases: leases terminable at will by the tenants but terminable only for cause by the owners.⁶ In addition, rent increase maximums were established, both as to frequency and amount.⁷

Williams and Jean Hall, owners of a mobile home park,⁸ brought suit against the City of Santa Barbara under 42 U.S.C. § 1983⁹ claiming that the city's mobile home rent control ordinance effected a "taking" of their property without just compensation in violation of the fifth and fourteenth amendments.¹⁰ The Halls asserted that the ordinance effected a "taking" in two ways. First, they claimed that the application of the ordinance severely diminished the value and usefulness of their property. Second, they claimed that the ordinance forced a perpetual lease on their property at a below-market rental rate and alleged that this action transferred a possessory interest to the tenants, an interest with both a determinable market value and a ready market.¹¹

The Halls intended to prove at trial that mobile homes in their

5. *Id.* at 1495-96.

6. The Ninth Circuit noted that although the ordinance did not explicitly state that the lease was terminable at will by the tenants, the ordinance implicitly so stated, and it was treated terminable at will by both parties. *Hall*, 797 F.2d at 1495-96 n.1.

7. *Id.* at 1496.

8. Williams and Jean Hall (Plaintiffs) are residents of the City of Santa Barbara and own the Los Amigos Mobile Home Estates which is located within the City of Santa Barbara.

9. 42 U.S.C. § 1983 (1982) states, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

10. *Hall*, 797 F.2d at 1496.

11. Although the Halls did not actually divide their complaint into these two separate "takings" theories, their brief did contain elements of both. (Appellant's Opening Brief, *Hall*, 797 F.2d at 1493.) As is pointed out later in this note, these "taking" theories are separate and distinct. The Halls would have better stated their argument had they specifically identified the two theories and made clear arguments for both.

park were selling for as much as ten times the California mobile home blue book value¹² because of the favorable regulated lot rent where the mobile homes were located.¹³ The value of the possessory interest transferred from the Halls to the mobile home tenants was alleged to be the difference between a mobile home's blue book value and its selling price.¹⁴

The Hall's two grounds for relief were in effect a single claim of inverse condemnation — a cause of action against a government agency to recover the value of property lost through agency regulation or action, though no formal exercise of the power of eminent domain has been completed.¹⁵ Because the Halls were appealing the district court's dismissal for failure to state a claim, the Ninth Circuit only addressed the question whether the trial court had properly dismissed the inverse condemnation claim.¹⁶ Overruling the district court's dismissal, the circuit court held that, on the facts alleged by the plaintiffs, application of the Santa Barbara ordinance might constitute a "taking."¹⁷

In reaching its decision to remand the case, the Ninth Circuit identified two lines of Supreme Court cases addressing inverse condemnation claims.¹⁸ In the first line of authority, the cases address regulatory actions claimed to have diminished the value or usefulness of private property but not involving any physical occupation or physical invasion. Actions by government in this area are often called "regulatory takings."¹⁹ In the second line of authority, the cases address gov-

12. The blue book spoken of is the *KELLEY BLUE BOOK FOR MANUFACTURED HOUSING* (Mobile Homes), published by the Kelley Blue Book company of Costa Mesa, California. It is a standard reference for prices of mobile homes. *Hall*, 797 F.2d at 1496 n.5.

13. Appellant's Opening Brief at 3, *Hall*, 797 F.2d at 1493.

14. *See id.* at 21.

15. *BLACK'S LAW DICTIONARY* 740 (5th ed. 1979).

16. *Hall*, 797 F.2d at 1496 nn.8, 9 (the court stated that a dismissal for failure to state a claim is a question of law; therefore, the court could have reviewed the case de novo. *Guillory v. County of Orange*, 731 F.2d 1379, 1381 (9th Cir. 1984) However, the *Hall* court did not actually perform a de novo review, choosing instead to focus on one aspect of the case.

17. *Hall*, 797 F.2d at 1504.

18. *Id.* at 1497. The Ninth Circuit did note that three questions had to be answered before it could find whether the Santa Barbara rent control ordinance amounted to an unconstitutional taking. The three questions were: 1) Did the governmental action amount to a taking of property?; 2) Did it advance a legitimate state interest?; and 3) Was there just compensation?. Although the court briefly addressed the last two questions, it devoted most of its opinion to the "taking" question.

19. *See San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981)(regulatory taking occurs if a regulation denies the owner of practically all use of his land); *Agins v. City of Tiburon*, 447 U.S. 255, 255 (1980) (no regulatory taking occurs where the property can be used profitably after the implementation of a regulation, even though the use isn't the most profitable); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)(no regulatory taking where a regulation denies the most beneficial use of the property); *United States v. Causby*, 328 U.S. 256 (1946)(regulatory taking found when planes from a neighboring airport, leased by the

ernment action which physically intrudes upon private property either directly or by authorizing others to do so. The court described this type of action as "physical occupation."²⁰

The plaintiff landowners' "takings" argument in *Hall* was one of first impression for the Ninth Circuit.²¹ For the first time, a rent control statute was said to have not only *regulated* the use of an owner's land but also to have effected a *physical occupation* of the land.²² The Halls argued that they were forced to give possession of their land to the tenants and that this governmentally mandated transfer of a possessory interest constituted a "taking" without "just compensation."²³ The City of Santa Barbara responded that the ordinance was a mere land use regulation imposing a statutory lease which protected mobile home lot tenants. The City argued that the ordinance did not transfer a possessory interest to the tenant and was not an unconstitutional "taking."²⁴

Rejecting the City's argument, the Ninth Circuit noted that if the facts alleged by the Halls were proven true, enforcement of the Santa Barbara ordinance would in fact result in a permanent physical occupation of the property by the mobile home tenants.²⁵ The court reasoned that since the rent control ordinance required leases of unlimited duration and terminable at will only by tenants, property owners were left with only a narrow right to repossess their property.²⁶ If tenants honored their contracts with the property owner and continued paying

military on a temporary basis, passed over private property so low that they destroyed a chicken farm); *Northern Transportation Co. v. Chicago*, 99 U.S. 635 (1879)(a "taking" was found when a city constructed a temporary dam in a river which flooded land prohibiting entry onto private property).

20. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)(permanent physical occupation was found when a city authorized a cable television company to install cable boxes on privately owned apartment buildings); *Kaiser Aetna v. U.S.*, 444 U.S. 164 (1979) (a "taking" was found when the government created a public right of access to a private marina); *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1872)(a "taking" was found when a state has authorized a dam to be built that floods privately owned land).

21. *Hall*, 797 F.2d at 1496.

22. *Id.*

23. *Id.*

24. *See id.* at 1499-1501.

25. *Id.* at 1502.

26. *See id.* at 1495-96 n.2. The rent control ordinance allowed a landlord to terminate a lease for the following causes: "(1) failure to comply with a local or state mobile home regulation; (2) conduct that constitutes substantial annoyance to other resident; (3) failure to comply with lease provisions or reasonable park rules; (4) non-payment of rent, utility charges, or reasonable service charges; (5) condemnation of the park; (6) change in the park in accordance with California Civil Code Section 798.56(f); and (7) cessation of occupancy by the tenant." *Id.* Each one of the seven causes for termination were largely out of the property owner's control.

rent, the property owner had little possibility to terminate the lease.²⁷ Additionally, tenants could transfer their mobile homes without interrupting the unlimited duration lease term.²⁸ Thus, the Santa Barbara ordinance gave old tenants the exclusive right to choose new tenants, denying the landowners this traditional right of fee ownership. The only right the property owners retained was the right to collect forcibly reduced rents.²⁹

The Ninth Circuit also noted that, according to plaintiffs' allegations, enforcement of the statute permitted tenants to derive an economic benefit from the leases by causing mobile home prices to rise above blue book values. Buyers were willing to pay more for the mobile homes because of the desirability to live in a rent control area.³⁰ In effect, the tenant received a possessory interest *and* an economic interest in the land at the property owner's expense. The interest could be transferred, had a market value, and could be sold at a profit. The court described the ability to sell the possessory interest at a profit as a "monetization" of the interest.³¹ This ability to monetize the possessory interest, the court emphasized, would be determinative of the takings question should the plaintiffs' factual allegations be established at trial.³² The court used this monetization factor to distinguish the *Hall* case from earlier rent control cases which had held that rent control statutes were valid exercises of police power.³³

27. *Hall*, 797 F.2d at 1500.

28. Tenants could sell their mobile homes at a higher price than the blue book value because of the favorable lot lease involved. The lot lease, with its reduced rents, would be assigned to the new tenant when the mobile home was purchased. This situation is what the Ninth Circuit refers to as reaping a monetary windfall, or "monetizing" of the possessory interest. *Hall*, 797 F.2d at 1501-02.

29. *Hall*, 797 F.2d at 1502.

30. See *supra* note 12. An argument may be made that any mobile home price increase was merely a reflection of some external factor (e.g. inflation, appreciation of the mobile home, or the unique housing situation in Santa Barbara) that caused a general real estate price increase in the area. However, this theory's value is diminished because at least one instance exists where mobile home prices in another community with a similar mobile home rent control ordinance rose substantially above blue book value when the ordinance was passed. Amicus Curiae Brief of Oak Forest Mobile Home Estates, Ltd. at 4; *Hall*, 797 F.2d at 1493.

31. The Halls were willing to prove at trial that, for example, when Tenant #1 sold her mobile home for \$50,000.00 in excess of its blue book value, she effectively added an additional \$500.00 per month to Tenant #2's total cost of occupying the mobile home. This \$500.00 was in addition to the \$200.00 monthly rent for a mobile home park lot. Tenant #2, in turn, would recapture this additional cost per month when he later sold the mobile home to Tenant #3. Therefore, Tenant #1 would be the only person that actually was unjustly enriched. Tenant #1 freely received a possessory interest at the expense of the Halls, and she was able to sell that interest to Tenant #2 by raising the price of the mobile home. This results in the "monetization" of the possessory interest.

32. See *Hall*, 797 F.2d at 1501.

33. *Id.*

III. ANALYSIS

As noted, the Ninth Circuit distinguished *Hall* from other rent control cases based on the allegation that the mobile home tenants in *Hall* could “monetize” the possessory interest they had received from the property owner. It was largely on the strength of this argument that the appellate court instructed the lower court to try the merits of the plaintiffs’ “takings” claim.³⁴ However, the monetization argument was not the only theory which plaintiffs used to challenge the rent control ordinance. The appellate court failed to consider two other theories which were implicit in the Halls’ complaint.³⁵ These two theories can be stated as follows: 1) a governmentally mandated “perpetual lease” can itself constitute a physical occupation of property, even in the absence of a finding of “monetization”; and 2) the facts alleged by the Halls’ supported a “takings” claim even under pure regulatory taking analysis. By failing to properly address these alternative theories, the circuit court prejudiced the plaintiffs’ chances for a complete review of their claim at trial.

A. The “Perpetual Lease”

At one point in its opinion, the Ninth Circuit noted that “if the Halls’ allegations were proven true, it would be difficult to say that the [rent control] ordinance [did] not transfer an interest in their land to others.”³⁶ This transfer, the court went on to say, would be the equivalent of a permanent physical occupation of property, an action which the Supreme Court has held to be a per se “taking” of private property by government.³⁷ In reaching this conclusion, the court focused heavily on the plaintiffs’ claim that the mobile home tenants could sell their governmentally created property interests to third parties. This fact, the court noted, “drastically affects the economic realities of the landlord/tenant relationship.”³⁸ The court felt that the tenants’ ability to “monetize” their interests in the property marked a “crucial” distinction between the Santa Barbara ordinance and other rent control ordinances which denied tenants the right to “cash out.”³⁹

While the court is not to be faulted for making this distinction, it unduly limited its analysis by focusing solely on the saleability of the tenants’ interests. Even had the mobile home tenants in *Hall* not been

34. *Id.*

35. *Supra* note 11.

36. *Hall*, 797 F.2d at 1499.

37. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426-27, 433 (1982).

38. *Hall*, 797 F.2d at 1501.

39. *Id.*

able to profit from the sale of their possessory interests, the fact remains that they had received permanent occupancy of the mobile home lot at the property owners' expense. The ordinance, by leaving property owners with very limited rights to exclude tenants from occupancy of the property, granted tenants a perpetual lease on the property.⁴⁰ The right to exclude is one of the fundamental rights associated with ownership of property.⁴¹

In *Kaiser Aetna v. United States*,⁴² the Supreme Court addressed the question whether the conversion of a private marina into a public aquatic park constituted a "taking." The Court noted that "the right to exclude, so universally held to be a fundamental element of the property right, falls within this category of interests that the government cannot take without compensation."⁴³ The Court went on to hold that the denial of the right to exclude results in an actual physical invasion of the privately owned property.⁴⁴

In *Rivera v. R. Cobian China*,⁴⁵ a case similar to *Hall*, the First Circuit Court of Appeals also dealt with the concept of a property owner's right to exclude. In *Rivera*, a rent control statute covering business, commercial and industrial property gave the tenant a perpetual lease which the property owner could terminate for only very limited reasons.⁴⁶ *Rivera* wanted to terminate the lease on a building he owned so that he could use the building space for his own purposes.⁴⁷ The trial court held that the statute was constitutional and dismissed *Rivera's* action of unlawful detainer noting that terminating a lease to return property for personal use was not one of the statutorily allowed reasons for termination.⁴⁸ On appeal, the First Circuit held the statute unconstitutional saying, "for the legislature to compel [*Rivera*] against his will to keep his property in the rental market and to prevent him from using it in his own personal business . . . would appear to be a 'taking' of the property for which just compensation has not been provided."⁴⁹

40. The *Halls* argued that the transferred possessory interest should be termed a life estate. However, the potential impact of the Santa Barbara ordinance was not limited to lifetime leases. Nothing prevented tenants from assigning their leases to later tenants, who might live longer than the original tenants. This does not constitute a life estate but is analogous to a perpetual lease.

41. *Kaiser Aetna v. U.S.*, 444 U.S. 164, 179-80 (1979).

42. 444 U.S. 164 (1979).

43. *Id.* at 179-80.

44. *See id.* at 180.

45. 181 F.2d 974 (1st Cir. 1950).

46. *Id.* at 976.

47. *See id.* at 975.

48. *Id.* at 975-76.

49. *Id.* at 978.

Like the building owner in *Rivera*, the Halls could not exclude tenants in occupation except for very limited causes over which they had little or no control.⁵⁰ The Halls were virtually forced to keep their property in the rental market,⁵¹ and this condition gave the tenants of the mobile home park the equivalent of a perpetual lease. Recognizing this dilemma, the Ninth Circuit stated:

[C]ertain features of the Santa Barbara ordinance, and the way it is alleged to operate, make it peculiarly susceptible to the claim presented by the Halls. Thus, the ordinance directs the landlord to give tenants a lease, a recognized estate in land, lasting indefinitely. Moreover, the landlord's residual rights in the property are largely at the mercy of his tenants, he loses practically all right to decide who occupies the property, and on what terms.⁵²

The court failed to extend this analysis, however, to determine whether a governmentally mandated perpetual lease, which denies property owners the right to exclude, is a compensable "taking" of private property. By focusing solely on the mobile home tenants' right to monetize their possessory interest, the court overlooked a less burdensome and equally viable theory of recovery implicit in the original complaint.

B. Regulatory Taking Analysis

The terms "physical occupation" and "regulatory taking" represent distinct categories of governmental action. Claims challenging each type of action are addressed by different lines of authority.⁵³ While early in its opinion the Ninth Circuit was careful to separate the two types of claims, it later uses analysis reserved for regulatory taking inquiry to describe a physical occupation. Near the end of its takings analysis, the court observed that, as alleged, the Santa Barbara ordinance gave practically all property rights to the tenants, leaving the

50. *Supra* note 26.

51. The Halls were virtually forced to keep their property in the rental market because of the considerable obstacles one must overcome before going out of the mobile home park business. The Ninth Circuit stated, "State law allows the mobile park owner to evict tenants in order to put the park to a different use only upon giving six months' notice; such notice may only be given after all necessary local permits have been obtained. Cal. Civil Code §798.56(f). Santa Barbara in turn requires that a mobile home park owner obtain a permit to convert a park to another use. Santa Barbara, Cal. Municipal Code ch. 28.78.010 (1984). An applicant for such a permit must file a plan outlining the use to which the property is to be put, describing the impact of the removal on displaced residents, and disclosing the relocation assistance to be provided. *Id.* ch. 28.78.040. Any such plan must be approved by the city's Community Development Department. *Id.* ch. 28.78.050." *Hall*, 797 F.2d at 1500 n.18.

52. *Hall*, 797 F.2d at 1498-99.

53. *Supra* note 18.

landowners with only the minimal right to collect reduced rents. This situation, the court concluded, "oversteps the boundaries of mere regulation and shades into permanent occupation of the property for which compensation is due."⁵⁴

This statement sends a subtle message that the Santa Barbara rent control ordinance could not, as pure regulation, constitute a taking of private property. The court's statement obscures the fact that a compensable taking would likely be found even if pure regulatory taking analysis were applied.⁵⁵

The leading case followed by courts to determine whether an ordinance constitutes a regulatory taking is *Penn Central Transportation v. New York City*.⁵⁶ In that case, the Supreme Court stated that regulatory takings analysis was "essentially an ad hoc, factual inquiry. . . ."⁵⁷ However, the Court identified several factors which are significant to this inquiry, two of which have proven particularly important. These two factors are: 1) the economic impact of the regulation; and 2) the character of the governmental action at issue.⁵⁸

1. Economic impact

Assessing economic impact requires scrutiny of two conditions. Courts must look at any interference which governmental regulation causes to the distinct investment-backed expectations of the property owner.⁵⁹ In addition, courts must look at the extent to which government action has caused private property to decrease in value.⁶⁰

a. Interference with investment-backed expectations

A review of the cases which address the question whether a land use regulation has interfered with a landlord's investment-backed expectations does not yield any clear definition of the term "investment-backed expectations." Nor do the cases reveal how much interference is required.⁶¹ The only clear rule is that the answer to the question

54. *Hall*, 797 F.2d at 1502 (emphasis added).

55. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

56. 438 U.S. 104 (1978).

57. *Id.* at 124.

58. *Id.*

59. *Id.*

60. *Pennsylvania Coal*, 260 U.S. at 413.

61. See *Keystone Bituminous Coal Association v. DeBenedicts*, 55 U.S.L.W. 4326 (U.S. Mar. 9, 1987)(No. 85-1092); *MacDonald, Sommer & Frates v. County of Yolo*, 107 S. Ct. 22, (1986); *Connolly v. Pension Benefit Guaranty Corp.*, 106 S. Ct. 1018, (1986); *United States v. Riverside Bayview Homes, Inc.*, 106 S. Ct. 455 (1985); *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *United States v. Locke*, 471 U.S. 84 (1985); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Kirby Forest Industries, Inc. v. United*

whether a regulation has effected a "taking" "depends largely upon the particular circumstances of [the] case."⁶²

Notwithstanding the absence of any clear-cut definition of the phrase "investment-backed expectations" or of any defined levels of interference, it is clear from the facts alleged in *Hall* that the Santa Barbara ordinance had a serious impact on the landowners' property ownership. The Halls were prohibited from occupying their land for personal use and were virtually forced to keep it in the rental market at greatly depressed rental rates.⁶³ Additionally, the Halls had no control over who would live on their property; the tenants alone decided who would be their successors in interest.⁶⁴ Essentially, the only rights the Halls retained were the rights to collect reduced rents and to sell their property.⁶⁵ Because the Santa Barbara ordinance left the Halls with few alternatives and few property rights, it most certainly interfered with expectations for the profitable use and development of their land.

b. Diminution in value

The ordinance also adversely impacted the value of the Halls' property interest. Critical to the determination of how much a property has decreased in value is the question of allowable use, i.e., the question of what use remains in the property after a particular land use regulation has been applied. Knowing the use permitted by an ordinance helps courts determine what value remains in the property. This in turn permits a comparison of "the value that has been taken from the property with the value that remains,"⁶⁶ a comparison which is essential to the question whether government has taken private property.

After passage of the rent control statute, the Halls enjoyed little control over their land. They were basically left with the right to collect reduced rents and the right to sell the property.⁶⁷ Although the circuit court did not speculate on the value of the Halls' interest in the property in light of these remaining rights, one can readily conclude that any value left to the Halls would be minimal when compared to the

States, 467 U.S. 1 (1984); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264 (1981); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Kaiser Aetna v. U.S.*, 444 U.S. 164 (1979); *Andrus v. Allard*, 444 U.S. 51 (1979); and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

62. *Penn Central*, 438 U.S. at 104.

63. *Supra* notes 49-50.

64. *Supra* note 28.

65. *Supra* note 29.

66. *Keystone Bituminous Coal Association v. DeBenedicts*, 55 U.S.L.W. 4326 (U.S. Mar. 9, 1987)(No. 85-1092).

67. *Supra* note 29.

value of the interests transferred to the mobile home tenants. Additionally, because the Halls lost the right to occupy their land for personal use and to determine who would succeed existing tenants, their interest in the property was clearly much less attractive to prospective buyers. This disincentive to purchasers (a detriment to remaining use) was certain to have had a negative effect on the Halls' remaining value in the property.

2. *Character of the governmental action*

In *Penn Central* it was noted that the character of the governmental action alleged to have taken private property is significant.⁶⁸ The Court stated that “[a] ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”⁶⁹ In other words, a regulatory taking is more readily found when government has physically invaded private property.

Although courts, including the Ninth Circuit in *Hall*, often use the terms “physical occupation” and “physical invasion” interchangeably, the Supreme Court has described the term “physical invasion” as something “short of” a permanent physical occupation.⁷⁰ In fact, the Court has held that any permanent physical occupation is a “taking” while a physical invasion is subject to a balancing process.⁷¹ Nevertheless, the Court has also stated that “a physical invasion is a government intrusion of unusually serious character.”⁷²

In *Hall*, the Ninth Circuit completely focused its opinion on a determination of permanent physical occupation.⁷³ However, the impact of the Santa Barbara ordinance could have been characterized as a physical invasion if on remand the trial court had not found the more intrusive condition of permanent physical occupation. Although the state itself had not invaded the property, its action nonetheless allowed tenants to remain on the land indefinitely.⁷⁴ This certainly was “an

68. *Penn Central*, 438 U.S. at 124.

69. *Id.*

70. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 428-30 (1982).

71. *Id.* at 432.

72. *Id.* at 433.

73. *Supra* note 17.

74. The Supreme Court has held that there is no difference between a physical invasion by government and a physical invasion by a party authorized by government. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432-33 n.9 (1982).

intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it."⁷⁵

Had the Ninth Circuit engaged in even a cursory regulatory taking analysis it would have discovered that the Santa Barbara ordinance had the potential to interfere with the Halls' investment-backed expectations, to diminish the value of their property and to cause physical invasion of their land. The circuit court should have coupled its remand to the lower court with instructions to apply the *Penn Central* factors to the facts of *Hall*.

IV. CONCLUSION

The Ninth Circuit in *Hall* unnecessarily limited its analysis of the inverse condemnation claim by focusing solely on the "monetization" of the possessory interest granted to tenants by the Santa Barbara rent control ordinance. By failing to properly address the perpetual lease and regulatory taking theories, the circuit court unduly prejudiced the Halls' fifth amendment "taking" claim.

Application of these additional "taking" theories shows that the Santa Barbara rent control ordinance granted tenants a perpetual lease constituting a transfer of a possessory interest regardless of whether the tenants could "monetize" that interest. In addition, the ordinance interfered with distinct investment-backed expectations and diminished the value of the Halls' property to such an extent that it amounted to a regulatory taking requiring just compensation. The Ninth Circuit should have addressed these theories in order to fully consider the Halls' fifth amendment "taking" claim.

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75. *United States v. Causby*, 328 U.S. 256, 264-65 (1946).