

1 COOLEY GODWARD KRONISH LLP  
2 GORDON C. ATKINSON (122401)  
3 CRAIG C. DANIEL (212588)  
4 CHRISTOPHER D. JENSEN (235108)  
5 101 California St.  
6 5th Floor  
7 San Francisco, CA 94111  
8 Telephone: (415) 693-2000  
9 Facsimile: (415) 693-2222  
10 Email: gatkinson@cooley.com  
11 ccdaniel@cooley.com  
12 chris.jensen@cooley.com

13 Attorneys for Defendant  
14 Contempo Marin Homeowners Association

15 **UNITED STATES DISTRICT COURT**  
16 **NORTHERN DISTRICT OF CALIFORNIA**

17 MHC FINANCING LIMITED  
18 PARTNERSHIP, an Illinois limited  
19 partnership, and GRAPELAND VISTAS,  
20 INC., an Illinois corporation,

21 Plaintiff,

22 v.

23 CITY OF SAN RAFAEL, a municipal  
24 corporation, and CONTEMPO MARIN  
25 HOMEOWNER'S ASSOCIATION, a  
26 California corporation,

27 Defendants.  
28

Case No. C 00-03785 VRW

**CONTEMPO MARIN HOMEOWNERS  
ASSOCIATION'S RESPONSE TO  
PLAINTIFFS' OPPOSITION TO MOTION  
FOR STAY OF INJUNCTION**

Hon. Vaughn R. Walker

Hearing Date: not set

Hearing Time: not set

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Table of Contents**

	<b>Page</b>
I. INTRODUCTION .....	1
II. A STAY OF THE COURT’S INJUNCTION IS WARRANTED .....	2
A. Defendants Have Demonstrated Likelihood of Success on the Merits and/or Serious Legal Questions on Appeal .....	3
B. The Balance of Hardships Strongly Favors Granting a Stay .....	4
C. The Public Interest Favors Granting a Stay .....	6
III. A SUPERSEDEAS BOND IS NOT APPROPRIATE .....	7
IV. CONCLUSION .....	8

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Table of Authorities**

**Page**

**CASES**

*Coalition for Economic Equity v. Wilson*,  
1997 WL 70641 (N.D. Cal. 1997) ..... 2, 6

*E.E.O.C. v. Harris Farms*,  
2006 WL 1881236 (E.D. Cal. 2006) ..... 3

*Hilton v. Braunskill*,  
481 U.S. 770, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987) ..... 1

*J. Perez & Cia., Inc. v. U.S.*,  
578 F. Supp. 1318 (D.P.R. 1984) ..... 8

*Kelo v City of New London*,  
545 U.S. 469 (2005) ..... 4

*Lopez v. Heckler*,  
713 F.2d 1432 (9th Cir. 1983) ..... 2, 3, 4

*Markowitz & Co. v. Toledo Metropolitan Housing Authority*,  
74 F.R.D. 550 (D. Ohio 1977) ..... 7

*Penn Central Transp. Co. v City of New York*,  
438 U.S. 104 (1978) ..... 4

*Robinson Rubber Products Co., Inc. v. Hennepin County, Minn.*,  
927 F.Supp. 343 (D. Minn. 1996) ..... 4

*Stone v. City and County of San Francisco*,  
145 F.R.D. 553 (N.D.Cal. 1993) ..... 7

*Wilmer v. Board of County Com'rs of Leavenworth County, Kan.*,  
844 F. Supp. 1414 (D.Kan. 1993) ..... 7

**STATUTES**

Federal Rules of Civil Procedure

    Rule 62(c) ..... 2, 7

    Rule 62(d) ..... 7

Proposition 209 ..... 2

1 **I. INTRODUCTION**

2 In response to this Court’s request for briefing on whether its forthcoming injunction in  
3 this action (“Injunction”) against enforcement of the San Rafael Rent Control Ordinance (the  
4 “Ordinance”) should be stayed pending appeals by CMHOA and the City, Defendant Contempo  
5 Marin Homeowners Association’s (“CMHOA”) Request for Stay Of Injunction (“Request”) demonstrated that the factors set forth under *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987), favor staying the Injunction to preserve the *status quo* pending  
6 appellate review. The brief in favor of a stay filed concurrently by co-Defendant the City of San  
7 Rafael (“City”), which CMHOA joins, set forth additional reasons why a stay should be granted.  
8 Together, Defendants established that they have a substantial likelihood of success on the merits  
9 of their appeal, or that serious and difficult legal questions would be presented on appeal; that  
10 irreparable harm will result unless this court’s injunction (“Injunction”) is stayed pending appeal;  
11 that MHC will not be irreparably harmed by a stay; and that the public interest favors a stay.

12 In contrast, the brief filed concurrently by Plaintiff MHC Financing Limited Partnership  
13 (“MHC”), in opposition to Defendants’ request for a stay, fails to overcome Defendants’  
14 showing. First, MHC overstates the burden that Defendants must meet to show that a stay is  
15 appropriate and ignores a significant prong of the standard under which stay requests are  
16 evaluated in the Ninth Circuit. MHC then asserts that Defendants cannot show likelihood of  
17 success on the merits, but does not address any of the specific legal arguments raised by  
18 Defendants in their briefs and does not attempt to address the prong of the standard that it  
19 ignores—*i.e.*, whether Defendants’ appeal raises serious legal questions. MHC then argues,  
20 incredibly, that Defendants would *not* be irreparably harmed if residents of the Contempo Marin  
21 Mobilehome Park (the “Park”) are subjected to onerous rent increases that would certainly force  
22 them to relocate, but that MHC *would* be irreparably harmed by maintaining the Ordinance in  
23 place during the pendency of appeal in order to preserve the *status quo*. Finally, MHC contends  
24 that it is entitled to a \$10.5 million supersedeas bond if a stay is granted, but provides no authority  
25 to support requiring a bond as a condition of a stay here—where only injunctive relief is at issue,  
26 MHC has no vested right to monetary payment, and MHC waived any claim for past or future  
27  
28

1 damages prior to the trial. This Court should stay its Injunction to preserve the *status quo*  
 2 pending appeal, and should deny MHC’s exorbitant and unwarranted bond request.

3 **II. A STAY OF THE COURT’S INJUNCTION IS WARRANTED**

4 Under Rule 62(c) of the Federal Rules of Civil Procedure (“Rule 62(c)”), a stay of the  
 5 Court’s injunction is warranted here. MHC misstates the standard governing stays of injunction  
 6 pending appeal, by asserting that Defendants must establish a “strong likelihood” of reversal and  
 7 disregarding entirely the “continuum” under which Rule 62(c) motions are determined in the  
 8 Ninth Circuit—whereby a stay can be justified by demonstrating *either* “a probability of success  
 9 on the merits and the possibility of irreparable injury” *or* that “serious legal questions are raised  
 10 and that the balance of hardships tips sharply in [the moving party’s] favor”. *Lopez v. Heckler*,  
 11 713 F.2d 1432, 1435 (9th Cir. 1983).

12 Plaintiffs cite *Coalition for Economic Equity v. Wilson*, 1997 WL 70641 (N.D. Cal. 1997)  
 13 for the proposition that a party seeking a stay pending appeal bears a “heavy” burden. However,  
 14 the factors favoring denial of the requested stay in *Coalition for Economic Equity* illustrate  
 15 precisely why a stay is needed here. In *Coalition for Economic Equity*, the plaintiffs had won a  
 16 preliminary injunction against enforcement of a new California state constitutional amendment  
 17 (“Proposition 209”), which forbade state and local governmental entities from maintaining race-  
 18 and gender-conscious preferences. 1997 WL 70641. The defendants moved for a stay of the  
 19 injunction, which would have enabled them immediately to put Proposition 209 into effect and  
 20 eliminate all such preferences prior to the impending appellate review of the injunction. *Id.* In  
 21 denying the defendants’ requested stay, the Court noted that stays pending appeal, like  
 22 preliminary injunctions, are designed to “preserv[e] the status quo prior to a full adjudication on  
 23 the merits.” *Id.* There, enacting the requested stay before review by the Court of Appeals would  
 24 have produced exactly what a Rule 62(c) stay is supposed to prevent—“on-again, off-again”  
 25 treatment of the law in question resulting in statewide disruption and confusion, which would not  
 26 have served the public interest. *Id.* Here, by contrast, the public interest in preservation of the  
 27 *status quo* and avoiding the irreversible disruption that would result from immediate vacation of  
 28 the Ordinance (as described more fully in CMHOA’s Request at 11-12 and the declarations filed

1 by CMHOA in support of its Request) requires that the Injunction be stayed until appellate review  
2 is complete.

3 Plaintiffs also cite the denial of a stay in *E.E.O.C. v. Harris Farms*, 2006 WL 1881236  
4 (E.D. Cal. 2006), in support of their assertion that a party seeking a stay pending appeal faces a  
5 difficult burden. However, that case is distinguishable. First, the defendant who sought the stay  
6 in *E.E.O.C.* failed to produce any evidence showing specific irreparable harm that would have  
7 resulted from denial of a stay of the injunction at issue (which required the defendant to take  
8 measures to prevent or curtail sexual harassment). *Id.* at \*2. In contrast, CMHOA has produced  
9 multiple declarations demonstrating that denial of a stay here would result in *specific* Park  
10 residents being forced to relocate upon MHC more than doubling their rents. (Decl. of Candace  
11 Clark ¶¶ 5, 7-8; Decl. of Khadija Gallagher ¶¶ 5-6, 8-9; Decl. of Ben Ludin ¶¶ 4-6, 12-13; Decl.  
12 of Tracy Newman ¶¶ 5-8, 10; Decl. of Patricia Passiz ¶¶ 5, 8-9; Decl. of Charlean Pohl ¶¶ 5-6, 8-  
13 9; Decl. of Katty Samoun ¶¶ 6-7, 9-10; Decl. of Bette Whitt Ellett ¶¶ 5-6, 8-9; *see also* Decl. of  
14 Alex C. Sears, Exh. A.) Second, in *E.E.O.C.*, the defendant failed to demonstrate likelihood of  
15 success on appeal, instead showing “only a possibility,” which was remote. 2006 WL 1881236 at  
16 \*15. Here, there is no such issue: the City and CMHOA have demonstrated a substantial  
17 probability of success on the merits with regard to the Court’s legal conclusions. (*See* CMHOA’s  
18 Request, at 5-12; City’s Motion, at 16-19.) Further, the balance of hardships tips more strongly in  
19 CMHOA’s favor here than in *E.E.O.C.*, and therefore, on the *Lopez v. Heckler* “continuum” (*see*  
20 713 F.2d at 1435), CMHOA and the City need not even demonstrate a strong probability of  
21 success to warrant a stay, only that “serious legal questions” are raised, *id.* CMHOA and the City  
22 have met this standard as well. (*See* CMHOA’s Request, at 5-12; City’s Motion, at 16-19.)

23 **A. DEFENDANTS HAVE DEMONSTRATED LIKELIHOOD OF SUCCESS ON THE MERITS**  
24 **AND/OR SERIOUS LEGAL QUESTIONS ON APPEAL**

25 Defendants have not—as MHC contends in a brief prepared before it had even  
26 seen Defendants’ papers—merely “reiterated” arguments previously made before this Court to  
27 demonstrate a likelihood of success on the merits. Rather, Defendants have made a strong  
28 showing that at a minimum, “serious legal questions” will be raised on appeal, and further that

1 they have a probability of success on the merits. *See Lopez v. Heckler*, 713 F.2d at 1435 (setting  
 2 forth “continuum” for evaluating stay motions). (See CMHOA’s Request, at 5-12; City’s  
 3 Motion, at 16-19.)

4 As Defendants demonstrated in their moving papers, CMHOA does not need to show that  
 5 reversal is certain or even highly probable to meet its burden to demonstrate a substantial case on  
 6 the merits, and this Court does not need to—and should not be expected to—conclude that its  
 7 ruling was mistaken in order to grant a stay. *Robinson Rubber Products Co., Inc. v. Hennepin*  
 8 *County, Minn.*, cited by Plaintiffs, demonstrates the application of this standard: there, the district  
 9 court recognized that even though it had “previously considered and found unpersuasive” the  
 10 cases cited by the moving party, and even though the Court “believe[d] its decision to be firmly  
 11 grounded upon Supreme Court precedent,” the district court’s order was “one of first impression  
 12 within a very controversial area; a fact which suggests that it presents a novel and substantial  
 13 question sufficient to weigh in favor of granting a stay of [the] permanent injunction.” 927 F.  
 14 Supp. 343, 347 (D. Minn. 1996). Here, as demonstrated in Defendants’ moving papers, this  
 15 Court’s decision presents a number of novel legal questions in the controversial and rapidly-  
 16 evolving area of takings law as applied to rent control regulations. (See CMHOA’s Request, at 5-  
 17 12; City’s Motion, at 16-19.) Further, the City and CMHOA have demonstrated a substantial  
 18 probability of success on the merits with regard to the Court’s findings: (1) that the Ordinance  
 19 constituted a regulatory taking under *Penn Central Transp. Co. v City of New York*, 438 U.S. 104  
 20 (1978); (2) that the Ordinance effected an unconstitutional “private taking” under *Kelo v City of*  
 21 *New London*, 545 U.S. 469, 480 (2005); (3) that MHC’s claims are not barred by the statute of  
 22 limitations and/or *res judicata*; (4) that MHC’s claims are ripe; (5) that the Court applied the  
 23 correct economic analysis of harm to MHC resulting from the 1999 amendments to the  
 24 Ordinance; (6) that mobilehomes cannot gain in equity; and (6) that the Ordinance was not  
 25 severable. (*Id.*) Under either end of the *Lopez v. Heckler* “continuum,” a stay is favored here.

26 **B. THE BALANCE OF HARDSHIPS STRONGLY FAVORS GRANTING A STAY**

27 As CMHOA’s Request and its supporting declarations established, specific and  
 28 irreparable harm will result from the Ordinance being invalidated. MHC has demonstrated that it

1 intends immediately to raise monthly pad rent on residents to \$1,925 on all lots. (Decl. of  
 2 Candace Clark ¶ 6 & Exh. A; Decl. of Khadija Gallagher ¶ 7 & Exh. A; Decl. of Ben Ludin ¶ 10  
 3 & Exh. A; Decl. of Tracy Newman ¶ 9; Decl. of Patricia Passiz ¶ 7 & Exh. A; Decl. of Charlean  
 4 Pohl ¶ 7 & Exh. A; Decl. of Katty Samoun ¶ 8 & Exh. A; Decl. of Bette Whitt Ellett ¶ 7 & Exh.  
 5 A.) That rent increase will impose severe financial hardship on many, if not most, Park residents  
 6 and result in a mass relocation out of the Park. (Decl. of Candace Clark ¶¶ 5, 7-8; Decl. of  
 7 Khadija Gallagher ¶¶ 5-6, 8-9; Decl. of Ben Ludin ¶¶ 4-6, 12-13; Decl. of Tracy Newman ¶¶ 5-8,  
 8 10; Decl. of Patricia Passiz ¶¶ 5, 8-9; Decl. of Charlean Pohl ¶¶ 5-6, 8-9; Decl. of Katty Samoun  
 9 ¶¶ 6-7, 9-10; Decl. of Bette Whitt Ellett ¶¶ 5-6, 8-9; *see also* Decl. of Alex C. Sears, Exh. A.)<sup>1</sup>  
 10 MHC’s crass characterization of this impact on residents as merely “monetary consequences”  
 11 does not account for the irreversibility of forced relocation if the Ordinance is later upheld.  
 12 Neither does it account for the economically-immeasurable consequences of forced relocation on  
 13 families. As the uncontested trial evidence demonstrated, the Park’s residents are significantly  
 14 poorer than most residents of San Rafael or Marin County (*see* Trial Exhs. 1004-1017), and  
 15 nearby housing prices are much higher than those within the Park (*see* Trial Transcript,  
 16 4/24/2007, at 590:18-591:18 [Quigley]). Thus, it is clear that relocation for most residents will  
 17 not be a matter of simply moving a short distance away from their current homes. Apart from the  
 18 generally-foreseeable consequences of relocation, such as children changing schools or workers  
 19 moving farther away from their jobs, some residents have elderly or disabled relatives who live  
 20 very close by and depend on them for care (*see* Decl. of Patricia Pasisz in Supp. of Request for  
 21 Stay ¶ 6; Decl. of Tracy Newman in Supp. of Request for Stay ¶ 8); forced relocation will make  
 22 this care much more burdensome. These impacts far exceed mere “monetary consequences.”

23 Further, the serious legal questions raised on appeal and the possibility of reversal create  
 24 the very likely scenario of an “on-again, off-again” treatment of the Ordinance (*Coalition for*

25 <sup>1</sup> While MHC asserts that it has offered to “discuss a transition plan” with Park residents, it offers  
 26 no description or evidence of the terms of its purported “transition plan,” and the terms of this  
 27 “plan” remain a mystery to CMHOA. Neither CMHOA nor this Court can determine, based on  
 28 the information presented by MHC to date, whether its purported “plan” would in any way  
 protect residents from being forced out of their homes upon vacation of the Ordinance due to their  
 inability to pay MHC’s raised rents.

1 *Economic Equity*, 1997 WL 70641), which will cause confusion in the Park and in other mobile  
 2 home parks statewide that are subject to similar rent control ordinances, and will cause residents  
 3 to relocate even though the Ordinance may ultimately be restored.

4 On the other hand, *MHC* is the party that will suffer “only monetary consequences” if a  
 5 stay is put in place and this Court’s ruling is ultimately upheld by the Court of Appeals:  
 6 specifically, *MHC* will be denied the opportunity to more than double rents if the Ordinance  
 7 remains in place during the pendency of appeal. *MHC* has not demonstrated that this would  
 8 constitute irreparable harm. If the Ordinance has in fact diminished the value of *MHC*’s property  
 9 by \$97 million, as *MHC* contends, then *MHC* stands to gain approximately that amount of value  
 10 in its property if this Court’s order is ultimately upheld on appeal. Given that this huge property  
 11 value increase would result from vacating *even the portions of the Ordinance that were in place*  
 12 *when MHC purchased the Park* and were previously found to be permissible (*see* Order ¶¶ 26-  
 13 32), *MHC* would thus enjoy a financial gain far beyond its reasonable initial expectations at the  
 14 time of purchase (*id.* ¶ 30).<sup>2</sup> Thus, *MHC*’s contention that it stands to suffer uncompensable  
 15 harm if the Ordinance is stayed pending appeal is without merit, because if *MHC* is ultimately  
 16 successful on appeal, a stay will only have delayed *MHC*’s windfall a relatively short time.

17 Finally, *MHC*’s assertion that Defendants are “equitably precluded” from a stay is  
 18 unsupported by citation to any authority or equitable principle, and as such it merits no  
 19 consideration. The Court should disregard *MHC*’s “equitable preclusion” contention for the  
 20 additional reason that the jury found that the City did not breach the Settlement Agreement by  
 21 ultimately declining to amend the Ordinance (*see* Order at 2).

### 22 C. THE PUBLIC INTEREST FAVORS GRANTING A STAY

23 *CMHOA*’s Request demonstrated that a stay will benefit the public interest  
 24 through preservation of the *status quo* in order to prevent disruption both within the Park and  
 25 elsewhere in California. *See also Coalition for Economic Equity*, 1997 WL 70641 (public interest  
 26 favors stay to preserve status quo and prevent disruption prior to appellate review). *MHC* fails to

27 \_\_\_\_\_  
 28 <sup>2</sup> The enormous property value increase *MHC* stands to realize if it prevails on appeal is an  
 additional reason why its request for a \$10.5 million bond is unwarranted. (*See* Part II.C below.)

1 address any of those public concerns, citing instead a vague interest in “enforcement of the  
 2 United States Constitution.” However, this argument merits little weight, in light of the  
 3 significant possibility that the Court of Appeals may ultimately determine that no Constitutional  
 4 violation has taken place here.

### 5 **III. A SUPERSEDEAS BOND IS NOT APPROPRIATE**

6 Even though MHC waived all damages on its Constitutional claims before trial, MHC  
 7 now argues that it is entitled to a “supersedeas bond” in the event a stay is granted, in the  
 8 astounding amount of \$10.5 million—purportedly representing the difference between residents’  
 9 current rents and the rents that MHC wishes to collect during the pendency of appeal in the  
 10 absence of the Ordinance. MHC’s baseless request for a bond should be denied.

11 Rule 62(c) “authorizes, *but does not require*, the posting of a bond” in an injunction case.  
 12 *Stone v. City and County of San Francisco*, 145 F.R.D. 553, 560 (N.D.Cal. 1993) (emphasis  
 13 added). The only two cases cited by MHC in favor of its argument have no bearing on whether a  
 14 bond requirement would be an appropriate condition to a Rule 62(c) stay of injunction in a takings  
 15 case: those cases concerned the automatic stay of execution of a *money judgment* on posting of a  
 16 supersedeas bond, pursuant to Rule 62(d). *Wilmer v. Board of County Com'rs of Leavenworth*  
 17 *County, Kan.*, 844 F. Supp. 1414, 1417 (D.Kan. 1993); *Markowitz & Co. v. Toledo Metropolitan*  
 18 *Housing Authority*, 74 F.R.D. 550, 550 (D. Ohio 1977). *See also Stone*, 145 F.R.D. at 553  
 19 (distinguishing a supersedeas bond for stay of a monetary judgment under Rule 62(d) from the  
 20 discretionary bond available in injunction cases under Rule 62(c)). MHC cites *no* authority  
 21 finding a bond under Rule 62(c) appropriate where the order appealed from was one finding a  
 22 rent control statute unconstitutional under the Takings Clause, and CMHOA is aware of none.  
 23 There is no money judgment or other vested right to payment pending against Defendants here—  
 24 in fact, MHC *waived past and future constitutional damages* in this case prior to trial. (*See Order*  
 25 *(granting in part City of San Rafael’s motion for summary judgment and granting motion to*  
 26 *dismiss)*, Case 3:04-CV-03325, Dec. 5, 2006, at p. 32.) Therefore a bond would neither be  
 27 equitable here in light of MHC’s damages waiver, nor would it serve the purpose of protecting  
 28 plaintiffs from a loss “resulting from stay of execution.” *See J. Perez & Cia., Inc. v. U.S.*, 578 F.

1 Supp. 1318, 1320 (D.P.R. 1984) (explaining that “[t]raditionally, the supersedeas bond has been  
2 confined to money judgments from which a writ of execution can issue.”) Finally, it was  
3 undisputed at trial that the Park's residents are significantly poorer and more likely to live on  
4 fixed incomes than most residents of San Rafael or Marin County. (Trial Exhs. 1004-1017.)  
5 Against that fact, imposition of a bond—particularly one as high as MHC seeks—could be  
6 tantamount to denying the Park residents the opportunity to appeal their case. This Court should  
7 deny MHC’s request for a supersedeas bond as a condition to the requested stay.

8 **IV. CONCLUSION**

9 For the foregoing reasons, CMHOA requests that this Court issue a stay pending appeal,  
10 and that no supersedeas bond condition be imposed.

11  
12 Respectfully submitted,

13  
14 Dated: March 31, 2008

COOLEY GODWARD KRONISH LLP

15  
16 /s/Alex C. Sears

Alex C. Sears (232491)

17 Attorneys for Defendant  
18 CONTEMPO MARIN HOMEOWNER’S ASSOCIATION