IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

APARTMENT OWNERS ASSOCIATION OF CALIFORNIA, MICHAEL WALLIN, AND JONATHAN H. BORNSTEIN,	*	
Petitioners and Appellants	*	**No. A131253**
v.	*	Trial Court
CITY OF OAKLAND, HOUSING RESIDENTIAL RENT AND RELOCATION BOARD	*	No. RG09 481765
Respondents	*	

Appeal from Judgment of Superior Court of Alameda County
Honorable Frank Roesch, Judge

RESPONDENT'S BRIEF

Myron Moskovitz (SBN #36476)
90 Crocker Ave.
Piedmont, Calif. 94611
(510) 384-0354
Special Counsel for Respondent

Barbara J. Parker, City Attorney, City of Oakland (SBN #69722)
Doryanna Moreno, Chief Assistant City Attorney, City of Oakland (SBN #140976)
Richard F. Illgen, Deputy City Attorney, City of Oakland (SBN #126803)
One Frank Ogawa Plaza, 6th Floor
Oakland, Calif. 94612
(510) 238-6517

ATTORNEYS FOR RESPONDENTS

SUMMARY OF THIS BRIEF

This case is about notice. Appellants insist that Oakland landlords should be able to continue their practice of evicting tenants with only a *three*-day notice to vacate, based on their claim that occupancy is "illegal" because *the landlord* has violated zoning, housing, or building code requirements by renting out illegal in-law units, renting out apartments infested by rodents or with leaking roofs, and the like. The Oakland Rent Board determined that, in this situation, giving the innocent tenant only three days to uproot her family, find a new home, and move to it is unfair and contrary to the purposes of Measure EE, and that Regulation 10b was needed to give the tenant *30 or 60 days* to move.

Appellants claim that the Board lacked authority to enact Regulation 10b. California law, however, gives administrative agencies broad discretion to enact regulations to carry out the purposes of the statutes or ordinances they administer.

Appellants also contend that the language of Measure EE *requiring* the Board to adopt certain regulations somehow deprives the Board of its general authority *permitting* the Board to adopt other regulations. This contention makes no sense.

Appellants then argue that Regulation 10b deprives them of Due Process of law, by requiring a landlord to re-rent to an evicted tenant where the landlord intends to take the unit off the market. But this Regulation imposes no such requirement; Appellants have simply misread the Regulations.

Finally, it is not clear that Appellants' claims are even justiciable. Their showing of standing and ripeness is shaky at best.

STATEMENT OF THE CASE

On October 28, 2009, Appellants filed a petition for writ of mandate, declaratory relief, and injunctive relief against Respondents City of Oakland and its Housing Residential Rent and Relocation Board (hereafter "the Board"). AA 1. The petition challenged the validity of the Board's Regulation 8.22.360.A.10b (hereafter "Regulation 10b") on a variety of grounds, including contentions that the Regulation was inconsistent the ordinance it implements: Measure EE.[1]

Appellants moved for a writ of mandate (JA 342), and filed a memorandum of points & authorities in support of their petition. JA 218. Respondents filed an opposition. JA 351. Appellants filed a reply brief. JA 625.

The court denied the petition. JA 964. Judgment in favor of Respondents was entered on December 8, 2010. JA 968. Notice of entry of judgment was filed on December 21, 2010. JA 972.

Appellants filed notice of appeal on February 18, 2011. JA 976. The parties stipulated to the use of a Joint Appendix (JA) in this appeal. JA 983.

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[1] Regulation 10b appears at JA 336 and 403. Measure EE appears at JA 12, 185, and 251. For the convenience of the Court, we have attached Measure EE and Regulation 10b as Exhibits 1 and 2 to this brief.

STATEMENT OF FACTS

Measure EE – Oakland's "Just Cause for Eviction" ordinance – was enacted by the voters in 2002, to supplement its rent control ordinance. Landlords challenged the validity of Measure EE, and this Court upheld almost all of the Measure, in *Rental Housing Ass'n of Northern Alameda County v. City of Oakland* (2009) 171 Cal.App.4th 741.

Section 6 of Measure EE allows landlords to evict for several reasons, including failure to pay rent (subsection 1), breach of covenant (subsection 2), owner move-ins (subsection 9), and other grounds.

Subsection 10 of Section 6 allows the landlord to evict the tenant "to undertake substantial repairs that cannot be completed while the unit is occupied, and that are necessary either to bring the property into compliance with applicable codes and laws affecting the health and safety of tenants of the building, or under an outstanding notice of code violations affecting the health and safety of tenants of the building." To invoke this subsection, the landlord must give a specific notice at least 30 or 60 days before the tenant must vacate. See Measure EE, Section 6, Subsection B3, which provides that the notice requirements of Code of Civil Procedure §1946 and §1946.1 (a "successor provision" of §1946) apply. In addition, Subsection 10 limits the dispossession to 3 months, and requires the landlord to offer the tenant the right to return after the repairs are completed. Subsection C of Section 6 imposes additional restrictions on landlords who utilize Subsection 10.

And Section 11 allows landlords to remove *all* their units from the rental market if they meet the requirements of the Ellis Act. Both the Ellis Act (Govt. Code §7060.4, subsection (b)) and Oakland require 120 days notice for such evictions, unless the tenant is elderly or disabled, in which case one year's notice is required.

However, in 2010, the Board found that many landlords who had rented illegal units had schemed to *evade* the requirements of Section 10 and the Ellis Act. JA 400. These landlords were giving their tenants a *3-day* notice under Code of Civil Procedure §1161, subsection 4, which allows a 3-day notice to evict on a tenant "using the premises for an unlawful purpose." These landlords asserted that by living in a home that the landlord had rented out in violation of zoning or housing codes, the tenant was "using the premises for an unlawful purpose." [2]

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2. It is questionable whether the words "unlawful purpose", as used in Code of Civil Procedure §1161(4), include occupancy of a unit whose "unlawfulness" was caused by the landlord, not the tenant. We found no reported case so holding, and such a holding would be inconsistent with language in that subsection allowing its use when the tenant uses the premises to sell illegal drugs. It would also be inconsistent with Health & Safety Code §§17975 et.seq., which requires a landlord who evicts a tenant from an illegal unit to pay the tenant relocation benefits within 20 days – not much help to a tenant if she had to leave within 3 days. And it would be inconsistent with cases imposing a duty on the landlord to maintain the premises – and giving the tenant remedies for the landlord's breach of that duty. See, e.g., *Green v. Superior Court* (1974) 10 Cal.3d 616. See also 7 Miller-Starr, Cal. Real Estate §19.124: "A lease of resident premises imposes both a statutory and common-law duty to maintain the premises in a duty on the landlord to maintain the premises in a habitable condition, and this duty cannot be waived or assumed by the tenant." Several statutes impose duties on the landlord to provide habitable premises. See e.g. Civil Code §§1941, 1941.1, 1941.3, 1942, 1942.1, 1942.3, 1942.4, and 1942.5.

These landlords also claimed that they were not violating Measure EE, because Subsection 6 of Measure EE allows the landlord to evict where "the tenant has used the rental unit or the common areas of the premises for an illegal purpose including the manufacture, sale, or use of illegal drugs." The Board found that

> [L]andlords often evict tenants citing California Civil Code 1161(4) which applies to circumstances where a tenant has "committed an illegal act on the premises," such as selling controlled substances; in those cases, while the purpose of the eviction was through no fault of their own, tenants were only given three days notice to vacate, and the evictions were often reported to credit reporting agencies as being related to illegal uses of the premises. . . . [JA 400.]

Therefore, the Board adopted Regulation 10b, declaring its purpose:

> Before this Regulation 8.22.360A(10)(b) was enacted, landlords would often evict tenants citing Regulation 8.22.360A(6) herein, which applies to circumstances where a tenant has committed an illegal act on the premises, such as selling controlled substances. In those cases, while the eviction was through no fault of their own, tenants were given only three days notice to vacate, and the evictions were often reported to credit reporting agencies as being related to illegal uses of the premises. This Regulation 8.22.360A(10(b) is intended to provide landlords with an appropriate mechanism for evicting a tenant where the unit is taken off the residential rental market due to a code violation. [JA 403.]

The *operative* parts of Regulation 10b provide that, where the City has cited the building for code violations, the landlord may either (1) remove *all* the units from the rental market by invoking the Ellis Act, or (2) remove *less than all* units by giving a giving a 30- or 60-day notice pursuant to Code of Civil

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Even if Code of Civil Procedure §1161(4) *did* permit an eviction of an innocent tenant, Oakland may disallow such a ground. "[A] local rent control ordinance may permissibly eliminate a ground for eviction specified in Code of Civil Procedure section 1161 without creating a conflict with the unlawful detainer statutes." *Rental Housing Ass'n of Northern Alameda County v. City of Oakland*, *supra*, 171 Cal.App.4th at 764-765.

Procedure §§1946 and 1946.1, which notice must include specified information. JA 403. Regulation 10b notes that where the City has "red-tagged" a unit because it poses an imminent hazard, "the provisions of the Just Cause Ordinance do not apply as this [72 hour] order to vacate is brought by the City or governmental entity and not the landlord." JA 403-404.

The trial court held that Regulation 10b is valid, reasoning:

> The Rent Board "may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as may be fairly implied from the statute granting the powers." (*CalFarm Ins. v. Deukmajian* (1989) 48 Cal.3d 805, 824.) So long as the regulation is within the scope of the authority granted, the agency is permitted to fill in the details of Measure EE. (See *Association of California Ins. Companies v. Poizner* (2009) 180 Cal. App.4th 1029, 1047 [citing cases].) Here, Measure EE expressly gives the Rent Board authority to establish procedures for a good cause eviction due to code violations in the rental unit where repairs need to be undertaken by the landlord, and the unit will need to be vacant for more than three months to complete them. It is well within this authority that the Rent Board established a process for good cause eviction due to code violations in the rental unit where repairs or corrections are needed, but can never, or will never, be completed. [JA 966.]

ARGUMENT

I. THE STANDARD OF REVIEW IS *DE NOVO*.

At page 1 of Appellants' Opening Brief (AOB), Appellants assert that the standard of review is *de novo*, because the issues are the meaning of an ordinance and the facial validity of an administrative regulation. We agree.

II. THE BOARD WAS AUTHORIZED TO ADOPT REGULATION 10b.

Because we found the organization of Appellants' arguments to be somewhat confusing and repetitive, we will respond to them in a different order.

A. California Law Authorizes Administrative Agencies to Enact Regulations Implementing Ordinances They Are To Enforce.

Appellants concede that "administrative powers are not limited to those expressly conferred by statute or ordinance." AOB 14. Quite so. An administrative agency's powers "are not limited to those expressly conferred by statute; rather, 'it is well settled in this state that officials may exercise such additional powers as are necessary for the due and efficient administration of the powers expressly granted by statute, *or as may be fairly implied from the statute granting the powers*." *CalFarm Ins. v. Deukmajian* (1989) 48 Cal.3d 805, 825 (emphasis added). See also *Association of California Insurance Companies v. Poizner* (2009) 180 Cal.App.4th 1029, 1047-48: "An administrative agency is not limited to the exact provisions of a statute in adopting regulations to enforce its mandate."

Thus, the Board *did not need* specific authorization from Measure EE in order to enact the regulation that Appellants challenge.

Any doubts about the agency's authority to adopt regulations should be resolved in favor of the agency, because "An administrative agency's view of its governing legal authority is entitled to great weight and will be followed unless it is clearly erroneous or unauthorized." *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 109.

The agency has broad discretion in deciding to adopt regulations. The court "will defer to the agency's expertise and will not 'superimpose its own policy judgment upon the agency in the absence of an arbitrary and capricious decision.'" *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 411.

At AOB 15, Appellants argue that the Court should be guided by "the purpose of the Board." The purpose of any board is to carry out the purpose of the law it is assigned to enforce. A board is empowered to "fill up the details" of the law. *Danekas v. San Francisco Residential Rent & Arbitration Board* (2001) 95 Cal.App.4th 638, 644. Appellants seek that purpose in Oakland's rent control law - overlooking the purposes set out in Measure EE itself. In its "Whereas's" preamble, Measure EE says that state laws that impose "vacancy decontrol" give landlords an economic incentive to evict (see also Section 2, Finding 6), that residential tenants suffer serious hardship when forced to move, and that "basic fairness" requires that landlords not evict for arbitrary reasons. All three of these purposes are served by Regulation 10b, which does *not bar* evictions, but merely

requires landlords to give *reasonable notice* before compelling tenants to move because of occupancy problems brought on by the landlords themselves.

B. Measure EE Did Not Prevent the Board From Adopting Regulation 10b.

At AOB 8-14, Appellants argue that by including three *mandatory* provisions, the voters intended to bar any other *permissive* regulations. This makes no sense.[3]

At three places, Measure EE contains mandatory language directing the Board to enact regulations:

1. Section 9 allows a landlord to recover possession for the use of the landlord or designated relatives – unless the tenant has resided in the unit for at least 5 years and is over 60 years of age or disabled. The Board is directed to resolve disputes about whether the tenant qualifies, and "The Rent Board shall adopt rules and regulations to implement the hearing procedure."

2. Section 9, subsection h, provides that when the landlord evicts to move in, all future owner-move-ins may be invoked only as to that unit, and "The

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[3] The Board has enacted many other regulations implementing Measure EE that are not mandated by Measure EE. See JA 141-157. Some of these have already been cited approvingly by this Court, in *Rental Housing Ass'n of Northern Alameda County v. City of Oakland*, *supra* 171 Cal.App.4th at 763 (citing regulation governing warning notices) and 765, fn. 20 (citing regulation allowing eviction where tenant violates lease). Acceptance of Appellants' argument presumably would invalidate all of those regulations too.

Rent Board shall adopt rules and regulations to implement the application procedure."

3. Subsection 10 provides where the landlords seeks to recover possession to repair code violations, the tenant shall not be required to vacate for more than 3 months, unless the landlord applies for and obtains an extension from the Board, and that "The Rent Board shall adopt rules and regulations to implement the application procedure."

Appellants argue that these provisions bar the Board from adopting regulations in any other situation. But these *mandatory* provisions cannot reasonably be construed to bar *permissive* regulations that help ensure that the purposes of Measure EE are carried out.

Appellant argues that Measure EE contains no express provision authorizing the Board to adopt regulations in addition to the three mandatory regulations. But Appellants cite no authority holding that such an express provision is necessary. As discussed above, case law empowers administrative agencies to adopt regulations implementing their enabling statutes (see *CalFarm Ins. v. Deukmajian*, *supra*, and *Association of California Insurance Companies v. Poizner*, *supra*). Perhaps the voters might *expressly deprive* a particular agency of this authority, but that did not happen here. No part of Measure EE expresses an intent by the voters to strip the Board of its general authority to adopt regulations.

Appellants contend at AOB 11 that the Board "enlarged its scope" by adopting Regulation 10b. But the Board did no more than implement the purposes

spelled out by the voters in Measure EE itself, which provides that state laws imposing "vacancy decontrol" give landlords an economic incentive to evict, that residential tenants suffer serious hardship when forced to evict, and that "basic fairness" requires that landlords not evict for arbitrary reasons. Each of these three purposes is furthered by Regulation 10b, which merely requires landlords to give reasonable notice before compelling tenants to move because of violations of the law committed by landlords, not by tenants.

At AOB 11-12, Appellants state that "Measure EE simply doesn't allow the Board to determine the appropriate just causes for eviction." If Appellants mean to say that Regulation 10b adopts a *new* just cause for eviction (see also AOB 19), this is simply incorrect. Regulation 10b is meant to stop landlords from misusing Section 6, which allows the landlord to evict on a 3-day notice where "the tenant has used the rental unit or the common areas of the premises for an illegal purpose including the manufacture, sale, or use of illegal drugs." A fair reading of Section 6 would allow the landlord to evict only where the "illegal purpose" involves *tenant* misbehavior, not *landlord* misbehavior. The single example given in Section 6 – using the premises for illegal drugs – confirms this reading. And one of the main goals of Measure EE – to provide "basic fairness" by requiring that landlords not evict for arbitrary reasons - also confirms this reading. By adopting Regulations 10b, the Board properly interpreted Section 6 as *not* allowing an eviction on a 3-day notice where the landlord – not the tenant – had engaged in the "illegal purpose." For this reason, Appellants' argument at AOB 20 that

“Regulation 10b conflicts with that part of the Ordinance that permits a landlord to recover possession where the premises is being used for an illegal purpose” is without merit.

C. This Court Has Held That Measure EE Authorizes The Board To Adopt Permissive Regulations.

In *Rental Housing Ass'n of Northern Alameda County v. City of Oakland* *supra*, 171 Cal.App.4th at 764, fn. 18, this Court rejected landlords' argument that the Board was not authorized to adopt regulations implementing Measure EE:

> We are not persuaded by appellants' argument that the Rent Board lacks the authority to adopt regulations to aid in the efficient administration of Measure EE. The Rent Board has authority in its originating ordinance to "develop rules and procedures to implement [that ordinance], which shall be approved by the City Council." (See *Danekas v. San Francisco Residential Rent Stabilization & Arbitration Bd.* (2001) 95 Cal.App.4th 638, 644, 115 Cal.Rptr.2d 694 [regulations are generally presumed to be reasonable and lawful, and power to promulgate regulations to achieve goals of rent ordinance included those necessary to effect subsequent amendments to ordinance].) Moreover, the Oakland City Council specifically approved the amended regulations. In doing so, the city council stated that "the Just Cause Ordinance authorizes the Rent Board to adopt regulations implementing the Just Cause Ordinance, without approval by the City Council."

Appellants have characterized this ruling as a "mere dictum", but it is not. As the first line states, the Court was "not persuaded *by appellants' argument*. . . ." Emphasis added. A rejection of an argument expressly made by a party is a holding, not a dictum.

III. APPELLANTS HAVE FAILED TO SUSTAIN THEIR BURDEN OF SHOWING THAT REGULATION 10b. FACIALLY VIOLATES THEIR RIGHTS TO DUE PROCESS OF LAW.

At AOB 27, Appellants argue that Regulation 10b, on its face, deprives them of their property without substantive due process. This claim was not included in their Petition, and Appellants fail to show that a right to evict an innocent tenant on a 3-day notice instead of a 30- or 60-day notice is a "property" interest protected by the Due Process Clause of the Fourteenth Amendment.

In any event, to succeed with their substantive argument, Appellants must surmount a very high bar.

In *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 156, our Supreme Court noted that the old restrictive "economic due process" approach to regulatory legislation was overthrown by the United States Supreme Court in a series of decisions beginning with *Nebbia v. New York* (1934) 291 U.S. 502. *Birkenfeld* also cited *West Coast Hotels v. Parrish* (1937) 300 U.S. 379, 393, where the Court held that "the inequality in the footing of the parties" can justify government protection of persons with lesser bargaining power. Residential tenants usually face such inequality. *Green v. Superior Court* ((1974) 10 Cal.3d 616, 625 (noting that "the severe shortage of low and moderate cost housing has left tenants with little bargaining power").

Rejecting landlords' substantive due process challenge to Berkeley's ordinance adopting rent control and just-cause-to-evict, *Birkenfeld* held that "It is now settled California law that legislation regulating prices or otherwise restricting

contractual or property rights is within the police power if its operative provisions are reasonably related to the accomplishment of a legitimate governmental purpose". 17 Cal.3d at 158. The Court also noted that "Among the foremost examples of proper exercises of the police power are restrictions on the use of real property." *Id*. at 159.

Appellants' contention is not easy to discern. It appears, apparently, at AOB 30, where Appellants assert that Regulation 10b is "fundamentally unfair" in allowing a landlord to cease renting out a unit but requiring the landlord to offer the unit back to the evicted tenant after repairs are made. But Appellants overlook the word "if". Regulation 10b provides at subsection (v)(b)(4) that the landlord must tell the tenant that the offer to return "*only* applies [*sic*] *if* your landlord restores your unit to the residential rental market." Emphasis added. [4]

At pages 30-31, Appellants seem to build on this argument by claiming that landlords who evict to take their illegal units off the rental market but do not offer to re-rent to the evicted tenant will be subject to a treble damage award. But Regulation 10b provides no such thing. As the above-quoted language ("if") indicates, such a landlord has no obligation to re-rent to the evicted tenant.

In *Birkenfeld*, the Court held the following regarding a city's police power: "It has long been settled that the power extends to objectives in furtherance of the

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[4] This regulation does no more than repeat what is already in Section 6(A)(10)(b) of Measure EE, and also in Oakland Municipal Code §15.60.100 (which predates Measure EE).

public peace, safety, morals, health and welfare and "is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life." *Id*. at 160. This is exactly what happened in the present case. Once the Board learned that landlords were evading the purpose of Measure EE, it adapted to this new situation by adopting Regulation 10b, to prevent landlords from taking advantage of their own wrongs by evicting their tenants with an unfairly short notice.

IV. APPELLANTS HAVE FAILED TO SHOW THAT THE ISSUE IS JUSTICIABLE.

While the City of Oakland would prefer a ruling from this Court affirming the City's power to enact the challenged regulations, we feel obliged to inform the Court that Appellants' Petition raises a serious question of justiciability.[5]

Appellants are the following three plaintiffs:

* Apartment Owners Association of California: a trade association of California (not just Oakland) apartment house owners (AA 2);

* Michael Wallin: "a tenant and registered voter" (AA 2)

* Jonathan H. Bornstein: "an attorney who practices mainly in the area of landlord and tenant law in the City of Oakland" (AA 3). The Complaint alleges that "the Regulations affect his ability to advise and effectively represent residential rental property owners in the City of Oakland" (AA 3);

* Bornstein also "has an ownership interest in residential property in the City of Oakland" (AA 3).

The Complaint includes no allegation that any of these parties owns illegal units in Oakland. Nor does the Complaint include an allegation that any of these parties desires or seeks to evict a tenant who occupies an illegal unit in Oakland.

In *Sherwyn & Handel v. Department of Social Services* (1985) 173 Cal.App.3d 52, the court held that a case is not ripe for decision until "a

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[5] Respondent raised this issue in its Motion for Judgment on the Pleadings (JA 39-43), which the trial court summarily denied without opinion (JA 205).

controversy "has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made." Its purpose is to prevent courts from issuing purely advisory opinions." *Id.* at 57; internal citations omitted. For that reason, the court held that a challenge by adoption lawyers to laws that require a biological father in a surrogate parenting contract to adopt his own child was not ripe:

> [I]t does not appear that a justiciable controversy is presented. Plaintiffs, as individuals, have not alleged that they or either of them are now, or plan to be, a party to a surrogate parenting arrangement, which will be affected by the subject statutes or the adoption policy contained in the all-county letter No. 83-131. Plaintiffs have merely alleged that they, as attorneys, presently represent over 100 couples who are parties to such arrangements. Hence, it appears the complaint states a cause of action in someone, but not in the plaintiffs. [*Id.* at 58. See also *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170 ("the ripeness doctrine is primarily bottomed on the recognition that judicial decisionmaking is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy.")]

Here too in the present case, if Appellants stated a cause of action, it was not for any of the Appellants. To present a *ripe* case, at least one of the Appellants would have to allege that he is presently violating Oakland housing or zoning codes on rental property he owns in Oakland, and that he needs to evict the tenant occupying the unit in order to cure his violations. The Petition contains no such allegation.

Nor do any of the Appellants have *standing*, because "The complaint does not specify any actual or threatened action which would injure the [plaintiff] or violate its rights." *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 60.

That the complaint might present a matter of public importance does not matter. "[N]either we nor the trial court can give advisory opinions or resolve disputes over matters which involve parties not before us even if the parties are united in their desire to have the court resolve unripe issues or claims which the parties have no standing to assert." *Id*. at 70.

The Petition impermissibly seeks only an advisory opinion from this Court. That alone is sufficient to justify an affirmance of the judgment below – if the Court prefers not to deal with the merits of the appeal.

CONCLUSION

At AOB 16, Appellants assert that Regulation 10b "was completely unnecessary for the due and efficient administration of the Board's power." The record shows quite the opposite. The Board found that some landlords were evading the purpose of Measure EE by evicting innocent tenants on a very short notice, where the landlord was in violation of City zoning and housing laws. The Board adopted Regulation 10b simply to ensure that these tenants had a reasonable time to find another home and move to it – without preventing the landlord from evicting. This was well within the Board's general authority and discretion to adopt regulations carrying out the intent of the voters.

Date:

Respectfully submitted,

Myron Moskovitz
Richard Illgen
Counsel for Respondents

by: _____
Myron Moskovitz