



INSTITUTE FOR JUSTICE

June 6, 2011

Via Overnight Mail

Planning Commission
City of Ventura
501 Poli Street
Ventura, CA 93001

To Whom It May Concern:

I understand that tomorrow, June 6, 2011, the Planning Commission will be reviewing a proposed ordinance for the City of San Buenaventura (commonly called the City of Ventura) “establishing a second dwelling unit amnesty and legalization program.” I write to inform you that the ordinance, as drafted, presents serious constitutional problems.

I am a staff attorney with the Institute for Justice (IJ), a nationwide public-interest law firm that litigates on behalf of individuals whose rights are being trampled by overreaching government. While our work is nationwide, we have been particularly active in California in recent years—most recently, we successfully sued National City, California, proving (among other things) that the city had violated our clients due-process rights under the Fourteenth Amendment.

We are deeply concerned about the City of San Buenaventura’s proposed “amnesty” ordinance because it appears that it will deprive a large number of their private property without providing them with due process. Since both the California and United States Constitutions prohibit this sort of deprivation, we urge you to reconsider the statute as drafted.

The ordinance seeks to “make it easier for owners of undocumented second dwelling units to bring [the units] into compliance with building and zoning codes.” It seeks to accomplish this by providing “amnesty” for anyone who can establish that their second dwelling unit’s “in-service date” was in 1987 or before. But it places the burden of proving the unit’s occupancy on the owners themselves, and then strictly circumscribes the types of evidence the City is willing to accept as proof of occupancy. *See* Public Review Draft of Ordinance No. 2011-_____, § 2.

This process guarantees that perfectly valid second dwelling units will be unnecessarily destroyed. A number of second dwelling units within the city pre-date the current zoning code, which means their owners have a protected property interest in maintaining their nonconforming

use. *See Traverso v. Dep't of Transp.*, 6 Cal. 4th 1152, 1160-61 (1993). Even though these owners are legally entitled to keep their second dwelling units, the procedures adopted by the statute will make it impossible for many or most of them to *prove* they are entitled to keep them. The statute disregards sworn testimony in favor of a narrowly described set of documentary evidence—and it does so for no apparent reason. As federal courts have recognized, restricting a property owner to certain kinds of documentary evidence deprives them of their constitutional right to a meaningful opportunity to be heard. *See S. Lyme Property Owners Assoc., Inc. v. Town of Old Lyme*, 121 F. Supp. 2d 195, 207 (D. Conn. 2008) (“For owners who have not kept historical records on the use of their property, [a hearing based solely on documentary evidence] is meaningless.”).

To make matters worse, I understand that the City has lost or mislaid most (or all) of its permitting records prior to the year 2000. For obvious reasons, these records would have been ideal forms of evidence for property owners seeking to establish the occupancy date for their second dwelling units. It offends the very notion of due process for the City to allow the destruction of the most relevant evidence and then place the burden of finding alternative evidence on individuals who simply want to keep what they already own.

Simple changes to the statute, however, can substantially ease the glaring constitutional problems it poses. As an initial matter, the City should eliminate the requirement that a unit’s “in-service date” be proved through a narrow set of documentary evidence. If the City’s true goal is to avoid erroneously depriving people of their property, then it has no business refusing to examine any kind of reliable evidence people bring forward.

Moreover, there is no good reason to set the “amnesty” cutoff at 1987 (when the City has no records of permitted uses) instead of at 2000 (when the City *does* have complete records). I understand that the 1987 date was chosen to match the effective date of a California law that requires sellers of real estate to disclose modifications made without necessary permits. *See Cal. Civ. Code* § 1102. But, as a practical matter, this law made little difference to many homeowners in California—it excepts any number of ordinary types of property transfers, like foreclosure sales or transfers within families. *See Cal. Civ. Code* § 1102.2. Simply put, any number of property owners in Buenaventura did not benefit from this disclosure law, and setting the effective date of this law as the cut-off for the City’s amnesty program is arbitrary—particularly in light of the fact that the City has lost the relevant records from that year.

Both of these changes—removing the restrictions on the types of permissible evidence and moving the “amnesty” cutoff to 2000 match the City’s reliable records—would impose little if any costs on the City, but would remove much of the risk of unconstitutionally depriving individuals of their private property.

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The stated purpose of the proposed ordinance—to make it easier for property owners to comply with building and zoning codes—is a good one. But the procedures it uses guarantee that a large number of people will be deprived of their property without due process of law. This violates the California Constitution. This violates the United States Constitution. And it violates basic ideas of fairness. The ordinance, as drafted, cannot be adopted.

I am happy to discuss this matter further at your convenience. Please feel free to contact me at 703-682-9320 or via email at rmcnamara@ij.org with any questions.

Regards,

A handwritten signature in black ink, appearing to read 'R. McNamara', with a long horizontal flourish extending to the right.

Robert McNamara
Staff Attorney