Attachment 14

CITY OF UNION CITY
AGENDA
FOR THE MEETING OF THE
RENT AND TENANT TASKFORCE
MONDAY, DECEMBER 19, 2016
7:00 P.M.
RUGGIERI SENIOR CENTER, DINING ROOM
33997 ALVARADO-NILES ROAD
UNION CITY, CALIFORNIA

I. ROLL CALL:

Duru Ahanotu, Abigail Andrade, Chris Cara, Timothy Conde, Remy Fortier, Annie He, Dorothy Jackson, Chunchi Ma, Bill Mulgrew, Anna Nunez, Ian Palavi, Marjorie Rocha, Tony Samara, Jamie Sessions, Chung Wu

II. APPROVAL OF MINUTES:

Minutes from the December 5, 2016 meeting

III. UNFINISHED BUSINESS:

None

IV. PUBLIC COMMENTS:

(This is an opportunity for the public to speak. Each speaker will be granted up to 3 minutes to speak. This allotted time cannot be aggregated or passed on to another individual. In instances where more than five members of the public wish to address the Taskforce, the three minute time limit may be abbreviated at the discretion of the Moderator in order facilitate the business of the Taskforce.)

V. PRESENTATIONS:

A. Opening Remarks by Taskforce Members *(2 minute time limit)*

VI. TASKFORCE DISCUSSION:

A. Consideration of extending the meeting time past 9 p.m.
B. Final Voting on Options B and C

VII. ADJOURNMENT:

CITY OF UNION CITY
MINUTES
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I. ROLL CALL:

Present: Duru Ahanotu, Abigail Andrade, Chris Cara, Timothy Conde, Remy Fortier, Annie He, Dorothy Jackson, Chunchi Ma, Bill Mulgrew, Anna Nunez, Ian Palavi, Marjorie Rocha, Tony Samara, Jamie Sessions, Chung Wu

Absent: None

Staff: Tony Acosta, City Manager; Joan Malloy, Economic and Community Development Director; Kris Kokotaylo, Deputy City Attorney; Alin Lancaster, Housing and Community Development Coordinator; Lorena Gonzalez, Administrative Assistant

II. APPROVAL OF MINUTES:

The regular Taskforce minutes from the December 5, 2016 meeting were approved as submitted.

III. UNFINISHED BUSINESS: None

VI. TASKFORCE DISCUSSION: (Note, item taken out of order)

A. Consideration of extending the meeting time past 9:00 p.m.

Tony Acosta, City Manager - requested to move Agenda Item VI.A, Consideration of extending the meeting time past 9:00 p.m., before Agenda Item IV., Public Comments, due to the number of public speakers and to give the Taskforce members more time for discussion. Mr. Acosta asked for a vote on whether the meeting should continue past 9:00 p.m. to conclude voting on all options that the Taskforce had been reviewing.

Meeting to Go Past the 9:00 p.m. End Time

AYES (9) – Duru Ahanotu, Abigail Andrade, Chris Cara, Timothy Conde, Remy Fortier, Anna Nunez, Ian Palavi, Marjorie Rocha, Tony Samara
NOES (6) – Dorothy Jackson, Chunchi Ma, Bill Mulgrew, Jamie Sessions, Chung Wu, Annie He
ABSENT (0)
ABSTAIN (0)

Mr. Acosta concluded there was not a supermajority vote to continue the meeting, so the meeting would end at 9:00 p.m. The meeting resumed according to the Agenda with Public Comments.

IV. PUBLIC COMMENTS:

1. Nancy George, Executive Director of Union City Kids' Zone (Fremont): stated that she was here on behalf of the families she works with, that are being pushed out of their homes. They are working families with children, who are trying to get by and having to leave the city. Ms. George is concerned with the gentrification that is happening, both cultural and age gentrification. Union City is quickly going to become a city where people with children can't afford to live here. She urges the Taskforce to think about how to keep Union City diverse and not push families out.

2. Ivan Viray Santos, 10 year teacher at James Logan High School (Union City): stated that he is a renter and educator in Union City. He also indicated his wife is a teacher in the Bay Area. Mr. Santos stated that with both of their incomes, they clear a six figure salary, but are still being negatively impacted with the increasing rent and costs to live in the Bay Area. Also being a teacher, Mr. Santos stated he has seen at least one student every other month, have to leave because their families can no longer afford to live in this area. Having grown up in Union City, he knows the importance for a student to take advantage of all Union City has to offer, especially the New Haven Unified School District. He also echoes the statements made by Nancy George. He asks the Taskforce to please consider rent control for the working class families that are affected in Union City.

3. Sam Baskar (Union City): stated that he is speaking on behalf of landlords. Landlords are not the bank or the government. This is a free market and the market should decide what needs to be done. No one can control the cost of a house. He suggests that if renters are involved in illegal activity, for example drug dealing, they should have 3 to 4 weeks to quit, not an eviction process that can take up to six months. He is against rent control that will benefit renters involved in illegal activity.

4. Adriana Carranza (Union City): stated that she has lived in Union City for the past fifteen years and is a single-mother. She is a union member and organizer. Many of the members in her union include hotel and restaurant workers that in live in Union City and who are being pushed out. She stated that there is a need for change in this city, if working families are to remain in the community. Ms. Carranza stated she is also being pushed out of her own city because it is hard for her to make ends meet. She needs the Taskforce to really think about what they are doing for Union City and standup and take a vote for the working families, students and the elderly who live in Union City.

5. Ji Song (Pleasanton): stated that at the previous Rent and Tenant Taskforce meeting he recommended the book, "Forty Centuries of Wage and Price Control." He stated that as soon as the price of the rent is controlled, the landlord is going to sell the property and no longer invest in the property. As a result, it will create a scarcity in housing and the rents will increase instead of decrease.

6. Kobe Tabing, Youth Intern for Filipino Advocates for Justice (Newark): stated that he doesn't hate landlords but believes that Rent Control and Just Cause Evictions will help the working class. He sees his parents struggle all the time, to feed them, or put something under the Christmas tree during the holidays. He asked the Taskforce to keep in mind, that renters are not only a dollar sign but they are actual people.

7. Maria Ramirez (Union City): stated that housing is needed, there is a crisis. Women make half of what men make and single-mothers are trying to live in Union City. Her home in Decoto has been generational, for her mother and her sisters. Today, her nieces and nephews who are teachers cannot afford to live here. She is in favor of rent control.

8. Roberta Ryan, Residents Insisting on Social Equity (RISE) Coalition (Fremont): stated that she is here in support of the community/tenant advocates in Union City. She would like to see Union City adopt a solution that will protect the most people in the strongest way through rent control and just cause for eviction. The RISE Coalition has seen the ineffectiveness of rent mediation in Fremont and firmly advocate for rent control and just cause.

9. Gehad Massoud, Residents Insisting on Social Equity (RISE) Coalition (Fremont): stated that she had never thought of Fremont, Union City or Newark when she thought of homelessness. She continued that she has never seen so many people on the streets and it's disheartening. Landlords have a business to run, at the same time, city staff, City Council and the residents of this city need to look at what is best for Union City residents. She urges, the Taskforce to vote for rent control and a just cause eviction ordinance.

10. Michael Chapman (Union City): stated that he does not agree with the vote to end this Taskforce meeting at 9:00 p.m. There are a lot of families struggling in the area. His aunt who is disabled was recently evicted from the city she lived in and had to move to another city. He is in favor of rent control.

11. Bill Wu (San Jose): stated that the situation of the renters has to be resolved, but the way it is being resolved is wrong. The Taskforce should have a similar goal. It should not be the renters against the landlords. The City should go against the bad landlords, tenants, and lawyers. There are other solutions similar to what they have in San Leandro and San Jose.

12. David Stark, Public Affairs Director for the Bay East Association of Realtors (Pleasanton): stated that he encourages the Taskforce to consider additional meetings because this information and topic is too important. This discussion should not be limited to two minutes. If needed, more time should be provided.

13. Malcolm Lee (Hayward): stated that he is a housing provider and has had a tenant that was caught shoplifting, and he and couldn't evict the tenant. He lost four months of rent and had to pay $1500 in lawyer fees. He is not in favor of just cause evictions and rent control.

14. Daniel Lee (Daly City): gave an example, if 100 people each had $10 dollars and one of them decides to sell apples for two dollars. If fifty people buy an apple, the one selling the apples then makes a profit of $100. Now there is wealth inequality, because the one selling the apples has $110 and the rest have $8 and $10. He does not consider the one selling the apples, to be a greedy person. No one forced the fifty people to buy an apple.

15. Adeles Fan: stated that she is a small housing provider in Union City and that it is also a struggle for small landlords. One of her tenants moved out earlier this month and the unit was returned in poor condition. Ms. Fan stated that she had to spend $8,000 to renovate the unit. She continued that once the renovation is complete, she will then need to find a tenant and during the winter it is much more difficult to find tenants.

V. PRESENTATIONS:

B. Opening Remarks by Taskforce Members

Annie He - Had no comments

Tony Samara – stated that it was the community that brought this issue to the City Council. To build a process where those who are deeply affected by the problem are given equal voice to those who benefit from the problem is inherently unfair. Essentially, to take five representatives who are speaking for those who are hurting and five for those who benefit, essentially they cancel each other out. He thinks that is reflective in the issues that keep coming up. He would like to note that he thinks there is a problem with the way the process is structured. Secondly, Legal Aid of San Mateo County released an eviction report. They looked at 3,100 cases of evictions in 3 years. Obviously, Union City is different from San Mateo County. He wanted to highlight some of the findings. First, 75% of the eviction activity in 2014 and 2015 was either based on no cause evictions or because tenants could not afford rent. African Americans comprise 2.5% of the county but 21.4% of evictions. Female head of households represent 63% percent of evictions and households with children represented 70% percent of evictions. It is important to remember this is a civil rights issue when we look at who is evicted and who is impacted. It is not a race neutral, class neutral or gender neutral issue. It is very clear who is impacted. Union City may be different from San Mateo County but there is no reason to think that it is vastly different on these measures. He would encourage City Council to look into this specifically for Union City. Finally, policies often reflect the values of the people. We need to ask what kinds of values we want our housing policies to reflect.

Abigail Andrade – stated that her purpose in participating in this Taskforce was to have her voice, and her community's voice be heard. She is here in honor of her grandparents, who settled in Decoto in the 1950's. She is also here to honor her parents and the hard work they put in to buy their first home 20 years ago in Union City. This city has made her who she is and it is a city that she loves. We are not gang members or criminals like other members have said in this Taskforce. We come from hardworking families who have come and settled in Union City for generations. Newcomers who have settled in Union City grow to love the city as much as she does. We come to make the city safe and enjoyable for everyone. Now, she has the difficult job of working with families who have been displaced due to high rent increases. She cannot begin to explain the damage caused to our youth when they undergo constant stress that is caused by unstable living conditions. The emotional trauma that a child carries when they are uprooted from their home has long term effects. This is why it is important for Union City to adopt the framework that protects its renters. It's the City Council's duty to protect its most vulnerable residents - the working poor, who continue to be displaced as we speak. She was born and raised in Union City, is a renter, and is raising her daughter. Now she has the duty to fight for her right to stay in Union City. She hopes that tonight, a decision is made for rent stabilization and just cause evictions.

Chris Cara - stated that he is a service provider and works with the youth in Union City. He has seen the youth and families he works with become displaced or priced out of Union City. Our purpose on this Taskforce should be to address the renter's struggle and housing crisis in Union City. We have a responsibility to protect tenants. Not doing anything, is not an option. He doesn't think that mediation goes far enough to protect tenants. He thinks one of the things that has been lost from the Taskforce members, is the fact that the landlords are the ones in position of power. He is not against people making a living by providing housing for the community. He thinks that a profit can be made but it doesn't have to be made on the backs of struggling families. If landlords have to exploit working families to make a profit, then clearly they are not part of the solution.

Remy Fortier – stated that she joined the Taskforce as an impartial member and felt she was uniquely suited to be impartial. She is an entrepreneur and a real estate agent, and yet she also believes in social justice. She is a product of social justice. She grew up under rent control and received help and aid from programs as a foster care child living in Berkeley. She wouldn't be sitting here today if she hadn't received some of that help. She does see rent control as help. She sees it as a way of bringing back the out of control market inequalities. She knows for a fact, after 10 years in the real estate industry, that

we can have rent control and profit. They can coexist at the same time. She doesn't want the Taskforce members to feel that they have to choose between the two. She thinks they can be fair and they can have investments that pay off and are an asset. It can be done while protecting some of the issues the landlords have brought up. Bad tenants can be a struggle for eviction, and we need to take that into account. This is a meeting to talk about what framework is needed, not to iron out the details. That is what this Taskforce is for. We ask our city leadership to take the reins from there and figure out a way to address the concerns we all expressed through this Taskforce. The reason we are here, is because there is a crisis and something does have to be done. There isn't an option of doing nothing. Mediation is not an aggressive enough stance to make a difference in the crisis in our community right now. Like one of the public speakers said, "Here in Union City we should not have a crisis of homelessness." It is our responsibility as impartial members, especially on this Taskforce, to vote in a direction that shows city leadership that we are committed to finding a solution.

Anna Nunez – stated that she is part of the impartial component of this Taskforce. It is very disheartening to hear some of the remarks. The ones she took the most offense to was when Taskforce members referred to people as "those people." She is a supervisor and has an educated staff that comes from UC Berkeley, UCLA, UC Davis, private universities yet they can't afford to live here. We heard a young teacher, who happens to be her son's teacher, say that he and his wife combined make six figures but they are struggling. She is also part of the population with a housing cost burden, yet she is responsible with her retirement, the plan for her son's college education, and to have discretionary income to go on vacation. She knows the importance of an education. She is trying to sort everything out, and yet it is difficult to hear one type of group being referred to" this" and the other as the victim. She looks at corporations like Facebook in Menlo Park that gives back to their city and donates to their schools. Chevron also, gives back to the City of Richmond. She is not saying every landlord has to give back, but there has to be some kind of compromise, a component of social justice and social responsibility. She is not in favor of either option A, B or C because it adds an extra layer of bureaucracy and costs. Landlords will then pass on the cost to their tenants. Adding cost will create a vicious cycle and we will be here meeting again, every month. The more she discusses this topic with co-workers and directors, she realizes it's a problem, and the Taskforce has a unique opportunity to come up with a creative option D that all parts of the table can agree upon.

Ian Palavi - stated that he has lived in Union City since 1989 and had his first son at the age of nineteen. If it wasn't for programs like Kidango and Head Start he would have paid a lot more for his son's basic childcare. He learned that stabilization within the community also benefits the landlord. If you leave it up to the market, the market is always unpredictable. He is in favor of rent stabilization. He has an uncle in San Francisco under rent control. The owner of his uncle's unit owns an additional eight units and three or four are under rent control and he has been able to make a profit for the past thirty to forty years. This is partly due to the landlord's due diligence on interviewing tenants and having a good relationship with the tenants. It's a partnership where tenants do their part to respect the building, and the landlord respects doing the right thing. He hopes the Taskforce can come up soon with some middle ground.

Jamie Sessions - Had no comments

Bill Mulgrew – stated that in Union City, there are only 248 owners of multi-family properties of which 91% (226 owners) own just one property. Union City is largely mom and pop property owners. Looking at it from their perspective, the last duplex that sold in Union City went for about $875,000. At the average Union City Rent of $2,251, they are earning a combined rent of $4,500 per month. The mortgage payment is appx $3,200. The property taxes are over $1,100/month. So after just taxes and mortgage, the net profit is a whopping two hundred dollars per month before insurance, maintenance, garbage, water and city taxes. The owner makes money by holding onto the property through tax

deductions and by keeping the units rented. There is absolutely no incentive for vacancy. And any risk? From 2007-2010 when the real estate market tanked, nobody was convening task forces to help units from being foreclosed on. In spite of what we're told, there is an option D and E and F and so on. Let's put some heat on Sacramento to give us back the mechanism for affordable housing. Let's talk to the Silicon Valley employers who are paying the ridiculous salaries that are driving up rents. Let's lobby local government to ease restrictions on Accessory Dwelling Units (ADUs). We have been railroaded into thinking that the only solution to rising rents is reducing the property owner's ability to feed and care for their families. There is no other profession, or employment where the worker's ability to earn a living is restricted by the government. Let's not cave to expedience. Let's give this all the time it takes to look at all the options.

Duru Ahonotu - The debate on rent stabilization has cleanly divided between free market principles and pleas for social justice. It is too bad that the two principles generally fail to get along. And yet, one marvel of this country is that we get to live out the on-going process of struggle to force these two to coexist. He has heard references on putting our faith into the "invisible hand" of the market. From his vantage point, the invisible hand is quite visible. This hand wears a glove, and it is slapping around the poor and the working class like never before. The free market that this hand serves is increasingly leaving these people behind. The market is not rewarding wage earners with the kind of salary gains to thrive in this market, in this system. This system is increasingly biased toward those who control capital and assets, two precious resources that the poor and working class largely lack. For example, this free market has created an artificial tax system which advantages property ownership over renting. This free market sits under a Federal Reserve which for years pinned rates to near zero and executed a monetary policy that provided great advantage to asset owners. The free market of global capital flows means that the wealth of the planet's richest pour into asset-friendly markets, like the U.S., and further amplify the market's distortions. Finally, in a region like the Bay Area, all manner of rules, regulations, and practices distort the market away from supply-based solutions to the current housing crisis. All these market distortions leave small communities like ours in a bind. Union City has done well to-date to avoid yet one more market distortion in the form of rent control, but he thinks that time is coming to an end. However, from my perspective and from what you all have taught me, Union City needs to proceed with care. We should start with addressing the worst excesses of this distorted market with the expectation that through our efforts, the City will send a signal to the market to behave better on behalf of the economically vulnerable. To this end, he listed the actions he supports into the public record which are included as Attachment 1.

Dorothy Jackson – state that she is a resident of Union City since 1982. She does not believe that this Taskforce has completed their charge from the City Council. We have not explored all the options available to us. She wants to assist in making a recommendation to the City Council that would not unduly burden the housing providers (landlords) or constrain their private property rights; and that would at the same time provide some protection for the tenants against outrageous rent increases. It does not appear that we have come up with an option that the majority of the Taskforce can recommend. We have been presented with information that rent control is counter-productive to the economy, causes the deterioration of existing housing, suppresses new housing, and is very costly to administer. We have received information that rent control is a measure with short term benefits, benefiting only temporarily the tenants in residence now, leading to lack of mobility for present tenants and possible discrimination towards new tenants competing for rent-controlled units. Nevertheless, we only have three choices in front of us that are virtually the same as presented by staff to City Council back in July. In her opinion, none of the three choices that are offered provide the balanced and equitable solution that our community deserves. We need to explore other solutions that have worked in other areas. Areas all over the county, even outside of the county have come up with creative solutions that have worked, and rent control in her opinion will not work. If that means more meetings for the Taskforce to come up with a solution, then she believes they should have them.

Chunchi Ma - He is a landlord and stated there are a lot more options the Taskforce needs to consider. We cannot commit to only the options that have been provided. He would like to challenge the tenant advocate group, that if rent control and just cause eviction is so magical, how is it that San Francisco, Oakland, and Berkeley have the highest rent not only in the state but in the country. We have teachers that had to move to Daly City and South San Francisco to look for housing. If rent control is so successful how come they couldn't find housing in San Francisco? Basically, it is demand and supply. They use to have 100,000 available units to rent in San Francisco. The owners took one-third of the housing off circulation leaving a smaller supply for renters. That is the reason rental prices have increased. The only one that benefits from rent control is the tenant that lives in the unit. Do we really want Oakland, Berkeley and San Francisco to be the example for Union City? Secondly, he is planning on doing capital improvements in his units for 2017, which includes replacing windows and expanding the concrete parking lot. Those expenses can range from a couple thousand dollars to tens of thousands of dollars. If they cap the rent increases to CPI he won't be able to do the capital improvements. The city will then have a lot of rundown units as a result.

Chung Wu – stated that he came to this country over 3 decades ago. Times were tough when he arrived. His parents, uncle, and he had to squeeze into a tiny 400 square feet, one bedroom apartment. Some of them had to sleep in the living room. So when the struggles of the working poor are brought up, he gets it. He has been there. But the discussion here is not about him. This is about people in need, many who are the working poor. How do we help them? If rent control is the way to help all these people, he would be all for it. Remember, he has been there. He knows how tough it is. He is a researcher by training. After every task force meeting, he takes his binder and studies it. On top of that, having done his own research of 50+ years of rent control in New York, San Francisco, Oakland, Washington D.C., what does the research from impartial sources tell us? Unfortunately, rent control does not work. Yes, a small portion of people get to stay in rent controlled properties and pay lower rent but most people don't benefit. Those that stay in rent controlled properties see their housing conditions deteriorate over time. All those properties get worse and worse and become eye sores in the neighborhood, and the entire neighborhood goes down with them. Property values, including those owned by homeowners, decrease.

Tim Conde - stated that a week ago a lady walked into the Centro de Servicios offices with a complaint that her rent was being increased from $1,000 to $1,500 a month. When they sat down with her asked her where she lived and what was happening, they discovered she was paying $1,000 a month for an 8 x 8 aluminum storage shed in someone's backyard. No insulation, no heat, and no power. She was paying it because she had too. Why we asked her? She begged them not to turn in her landlord because she didn't have any other options. That was her only option as a single person; she was paying cash and is an undocumented worker. His interest, that hasn't really been talked about is supply. He would call on those that can to help increase supply, so the people who are displaced, have housing options because housing options are what keep rent costs down.

Marjorie Rocha – stated that she hopes that the Taskforce will be able to do justice to this process. She thinks this process has been forced, it has been hurried and it upsets her greatly that people are not willing to vote to go past the nine o' clock hour. She is sure that everyone wants to go home, she would like to go home, but she also wants to see justice done to this process. She doesn't know what justice looks like to everyone, but she wants to make sure everyone gets heard and every alternative gets discussed. She doesn't see that, that has happened. She is hoping if this isn't resolved by nine o' clock, that the Taskforce will be able to have more meetings. She really thinks they owe it to each other, the residents and the landlords of Union City. She wants to see justice done and see this process extended if it needs to be.

VI. TASKFORCE DISCUSSION:

B. Final Voting on Options B and C

Alin Lancaster, HCD Coordinator – reviewed Option B, Binding Tenant/Landlord Mediation. She also reminded the Taskforce that they must make a motion to vote on an option and they are allowed to make modifications to the options.

Bill Mulgrew – asked what happens if the Taskforce votes on Option B, is that the end?

Alin Lancaster, HCD Coordinator – explained that the Taskforce would vote on all options as there may be more than one option with a majority vote.

Tony Acosta, City Manager – stated that City Council understands that there may not be a single proposal that receives a majority vote and that the Taskforce should not be constrained by the presence or absence of a majority, as the Taskforce will be voting on all the options. He also noted that he did not know how much weight a majority vote would hold with the City Council.

Chunchi Ma – stated that he sent an email to Alin Lancaster regarding costs and wanted to review the costs of running a program.

Alin Lancaster, HCD Coordinator – explained that Attachment B in the meeting packet includes the annual budgets of binding tenant/landlord mediation and rent stabilization programs in other Bay Area cities. She noted that the cost estimates for Union City were in the middle compared to the other cities.

Chung Wu – cited a report by the City of Berkeley Planning and Development Department that was published in 1998. He noted that the report says that the majority of the cost of a rent control system to the City of Berkley is not the cost of operating the program. These costs are passed on to the tenants. The real cost for the City is forgone revenue from lower property values and rents. The study reported that the actual property value in the City of Berkley was 42 percent below expected value. It indicates that, 17,000 rent control units in properties with three units or more, property values in Berkeley could have increased by $425,000,000 if rent control has been eliminated in 1988. Lower property values reduce the revenue from property tax and the real property transfer tax. While, lowered rents reduces revenue from business license tax. The impact for Berkeley in terms of tax revenue back in 1991 was $1.6 million per year.

Remy Fortier – noted that Mr. Wu had stated that he had done a ton of research on rent control. She asked Mr. Wu if he had done any research on options that he felt were viable.

Chung Wu – responded that the problem with rent control is it's a blanket solution. The best way is to have targeted help. The one thing we don't want is landlords kicking out tenants in order to raise the rent. Instead of making evictions difficult, target or prevent landlords from doing that.

Remy Fortier – responded to Mr. Wu by asking isn't that what just cause evictions do?

Chung Wu – stated that normally the landlords don't want to get rid of tenants as an empty unit doesn't generate rent. The only time landlords want to get rid of tenants is to raise the rent, so we would target that specific scenario and put in place an ordinance that just addresses that.

Remy Fortier – responded that wouldn't that place the burden of proof exclusively on the tenant.

Tony Acosta, City Manager – noted that there was only 50 minutes left of the meeting and wanted to make sure that the conversations were staying on point and moving the discussion forward.

Chunchi Ma – stated that he was aware of an apartment complex in Mountain View that is selling for $1.5 million instead of $2 million due to the passing of a rent control measure. The property owner was so upset that rent control passed they are trying to get rid of the property.

Tony Acosta, City Manager – noted that the conversation that is happening is more relevant to Option C and not Option B, which is binding tenant/landlord mediation.

Tim Conde – asked if Option B was applicable to all rental units rather than just multi-family units what would happen to the estimated cost to implement Option B?

Alin Lancaster, HCD Coordinator – noted that if the Option B was expanded to all rental units, the annual budget would increase but she also noted that the number of eligible units would also increase. Due to that Ms. Lancaster did not know if the cost on per unit basis would actually increase.

Chung Wu – stated that he listened to the audio recording from the December 5, 2016 meeting and had concerns with the definition of binding mediation. Mr. Wu's understanding is that in binding mediation the mediator cannot make a decision/recommendation.

Alin Lancaster, HCD Coordinator - responded that a third party would conduct the mediation by bringing the two parties together and facilitating a conversation between the parties. If they cannot come to an agreement and the unit in question is a pre-1995 multi-family unit then the case would move to binding arbitration. She noted that the mediator and arbitrator could be the same person but just that their role would change.

Chung Wu – cited a 2012 court case, Bowers v. Raymond, regarding binding mediation the mediator conducts the mediation and if a settlement is not reached the mediator decides by reaching a settlement. Binding mediation is an oxymoron, since mediation is not supposed to be binding. They either reach an agreement or they don't. Mr. Wu also sent an email after the meeting requesting the attached documents related to the cited court case be included in the meeting record (see Attachment 2).

Alin Lancaster, HCD Coordinator – noted that the title of Option B could be changed

Kris Kokotaylo, Deputy City Attorney – noted that you could also call it binding arbitration

Alin Lancaster, HCD Coordinator – added that for the units not eligible for rent control the process would be mediation only. Ms. Lancaster further explained that the City of Alameda has a Rent Review Advisory Committee and going before this committee is their mediation process. If the tenant/landlord can't come to an agreement, it then goes to a hearing officer. The main purpose of the straw polling was to determine who the Taskforce preferred to be the mediator, a third party mediator or a board/committee.

Chung Wu – stated, so let's say under this mediation process, the parties don't come to an agreement does it automatically go to arbitration.
Alin Lancaster, HCD Coordinator – the ordinance would layout a process, but yes, it would then go to arbitration

Chung Wu – asked if both parties can request to not go to arbitration

Kris Kokotaylo, Deputy City Attorney – responded yes

Chung Wu – once they go to arbitration, it's up to the arbitrator to decide. For example, the arbitrator could limit the increase to 3%

Kris Kokotaylo, Deputy City Attorney – responded that most ordinances have a limit, so for example in San Jose you can do between 5-8%.

Chunchi Ma – had a question for the City Attorney regarding just cause evictions. He gave the example of the tenants he recently evicted and has discussed at previous meetings. Mr. Ma said that the police wouldn't give a written statement or evidence. Mr. Ma noted that if they continue to pay rent, he cannot evict them without evidence.

Chris Cara – asked if the Taskforce could move on and not talk about one off issues.

Kris Kokotaylo, Deputy City Attorney – stated that if you go to civil trial, you will have to prove your case and that evidence could include someone testifying for you.

Chunchi Ma – stated that the other tenants in the building won't testify in fear of retaliation

Kris Kokotaylo, Deputy City Attorney – responded that the police could testify or you could obtain a police report

Chunchi Ma – replied that the tenants are underage

Tony Samara – noted that just cause exists is in a lot of other places and that staff can go to those cities and ask specific questions once we decide on just cause as a framework. We're not going to be able to answer that question here.

Tony Acosta, City Manager – agreed with Mr. Samara and noted that the Taskforce was not here to craft a detailed process. The Taskforce is here to come up with general policy and parameters and that the Taskforce needs to focus on that. Mr. Acosta noted that staff will take all the Taskforce recommendations and present them to City Council. He also noted that the City Council can also consider other alternatives that may or may not have been considered by the Taskforce. The Taskforce is of great value to the City Council but the City Council has a record of listening to outside people/groups. So this isn't an all or nothing constraint. He also stated that the City has no interest in stopping anyone from being heard by the City Council. The Taskforce can't debate the details of an ordinance as they are not in a position to make that decision for the City Council.

Chunchi Ma – made a motion to vote on Option B with a modification that just cause eviction protections be removed

Bill Mulgrew – seconded the motion

OPTION B, Binding Mediation (modified) – just cause eviction protections removed

AYES (2) – Annie He, Chunchi Ma,
NOES (12) – Duru Ahanotu, Abigail Andrade, Chris Cara, Tim Conde, Remy Fortier,
Dorothy Jackson, Bill Mulgrew, Anna Nunez, Ian Palavi, Tony Samara, Jamie Sessions, Chung Wu
ABSENT (0)
ABSTAIN (1) –Marjorie Rocha

Tim Conde – made a motion to vote on Option B with just cause evictions included along with the modification that all rental units (including single family and condominium units) be eligible for non-binding tenant/landlord mediation.

Chung Wu – seconded the motion.

OPTION B, Binding Mediation (modified) – all rental units eligible for tenant/landlord mediation

AYES (3) – Duru Ahanotu, Tim Conde, Annie He
NOES (10) –Abigail Andrade, Chris Cara, Remy Fortier, Dorothy Jackson, Chunchi Ma, Bill Mulgrew, Ian Palavi, Tony Samara, Jamie Sessions, Chung Wu
ABSENT (0)
ABSTAIN (2) – Anna Nunez, Marjorie Rocha

Chung Wu – made a motion to vote on Option B with the following modifications: all rental units (including single family and condominium units) are eligible and increase the rent threshold from 7% to 10%.

Tony Samara – stated that the Taskforce just voted down extending Option B to all units and now Mr. Wu is making a motion to increase the rent threshold to 10%. He continued, stating that he thinks for this option and the next, we want to avoid micro-managing the details. These are both conceptual options and we should just be voting on them as concepts and leave the details to City Council. Otherwise we will be here for another year talking about details.

Alin Lancaster, HCD Coordinator – noted that staff's intention with providing more detail to the options was to see if there were any components/criteria of each option that could be modified to the point where the tenants and landlords could reach a compromise. Ms. Lancaster noted that the components of the options that were provided are typically the areas where the most points of contention arise.

Remy Fortier – expressed concern with the structure of the options and that the Taskforce hasn't had conversations about each component or voted on each component separately. She also stated that she's not in favor of mediation as a solution because at the end of the day it's not really binding. So when we talk about rent thresholds and how they affect the options it almost doesn't matter since we don't agree on the option in the first place. She feels that the Taskforce should vote on mediation, rent control and just cause as those are the three options. She feels there is frustration on both sides with how the options are structured. She asked about making a motion to just vote on the concept of binding tenant/landlord mediation

Dorothy Jackson and Chunchi Ma – noted that a motion had already been made by Mr. Wu

Remy Fortier – responded that she didn't think a change from a 7% to 10% threshold would make a difference with the voting results
Chung Wu – When you say binding mediation, in that case the mediator will make the decision. The mediator may emphasize, for example a 1% rent increase. That in fact is the same as rent control. Is that what we want?

Tony Acosta, City Manager – responded that the big difference between rent control and binding mediations is that mediation would be on a case by case basis. Mr. Acosta asked the Taskforce by a show of hands, how many taskforces members could vote for Option B (Binding Tenant/Landlord Mediation) under any circumstances that we haven't yet defined. Option B did not receive a majority vote and Mr. Acosta noted that Option B as a package was not viable. He stated that continuing on an

option that only has 2 to 3 supporters is not moving the discussion forward and proceeded to move on to Option C.

Alin Lancaster, HCD Coordinator – reviewed Option C, Rent Stabilization and Just Cause Evictions

Chung Wu – asked who would run the program and make the decisions on what costs can be passed through

Joan Malloy, ECD Director, and Alin Lancaster, ECD Coordinator – both responded that the program would be run by the City

Tony Samara - made a motion to vote on Option C on a concept only with the following provisions unspecified: rent increase threshold, allowed pass-through costs, adjustment banking, and harassment protections. The sole exception to this was just cause evictions which were specified to include: not paying rent; lease violations; damaging the dwelling unit; illegal activity; unauthorized subleasing (including Airbnb); owner/family occupancy; and substantial rehabilitation of unit.

Chris Cara – seconded the motion.

OPTION C, Rent Stabilization and Just Cause Evictions (modified) – as a concept only with nothing specified except for just cause eviction protections

AYES (8) – Duru Ahanotu, Abigail Andrade, Chris Cara, Tim Conde, Remy Fortier, Anna Nunez, Ian Palavi, Tony Samara
NOES (6) – Annie He, Dorothy Jackson, Chunchi Ma, Bill Mulgrew, Jamie Sessions, Chung Wu
ABSENT (0)
ABSTAIN (1) –Marjorie Rocha

Chung Wu – made a motion to vote on Option A (Non-binding Tenant/Landlord Mediation) as a concept only.

Dorothy Jackson – seconded the motion.

OPTION A, Non-Binding Mediation (modified) – as a concept only

AYES (7) – Duru Ahanotu, Annie He, Dorothy Jackson, Chunchi Ma, Bill Mulgrew, Jamie Sessions, Chung Wu
NOES (7) – Abigail Andrade, Chris Cara, Tim Conde, Remy Fortier, Anna Nunez, Ian Palavi, Tony Samara
ABSENT (0)
ABSTAIN (1) –Marjorie Rocha

Anna Nunez – asked with Option B, why would the City hire a 3rd party mediator rather than having city staff oversee the program?

Alin Lancaster, HCD Coordinator - responded that other cities have recommended having professional mediators. City staff would be fielding calls, conducting initial intakes, and giving cases to a mediator but the City would hire someone who is a professional mediator to conduct the actual mediation.

Tim Conde – made a motion to vote on Option B as a concept only.

Chung Wu – seconded the motion.

OPTION B, Binding Mediation (modified) – as a concept only

AYES (4) – Duru Ahanotu, Tim Conde, Annie He, Chung Wu
NOES (9) – Abigail Andrade, Chris Cara, Remy Fortier, Dorothy Jackson, Chunchi Ma, Bill Mulgrew, Ian Palavi, Tony Samara, Jamie Sessions
ABSENT (0)
ABSTAIN (2) – Anna Nunez, Marjorie Rocha

Tony Acosta, City Manager- asked if there was any interest to make a motion on Just Cause Eviction as a stand-alone concept.

Remy Fortier – made a motion to vote on just cause eviction protections as a stand-alone concept

Tim Conde – seconded the motion.

Just Cause Eviction Protections – as a concept only

AYES (3) – Abigail Andrade, Tim Conde, Tony Samara
NOES (11) – Duru Ahanotu, Chris Cara, Remy Fortier, Annie He, Dorothy Jackson, Chunchi Ma, Bill Mulgrew, Anna Nunez, Ian Palavi, Jamie Sessions, Chung Wu
ABSENT (0)
ABSTAIN (1) –Marjorie Rocha

Remy Fortier - commented that the Taskforce heard from Chung Wu and Dorothy Jackson, that there are other options that the landlords have a willingness to explore. The Taskforce has not seen of those options and she would be interested to hear what they are.

Tony Acosta, City Manager - stated that in terms of the process, there is still work to do to craft more detailed options. One motion passed tonight and next time we will need to look a little more into the details of the ordinance.

Tony Acosta, City Manager – requested the Taskforce vote on holding an additional Taskforce meeting on January 9, 2017 and that Taskforce members would be allowed to submit proposals for alternative options that would be due to City staff by January 3, 2017.

Tony Samara - stated that asking Taskforce members to draft proposals and have them on January 3rd given with the holidays may be unrealistic. He noted that the Taskforce already have had six meeting to talk about the different options and voted on three different options. He doesn't know if coming back there will be many other options.

Abigail Andrade – noted that one of the options received a majority vote and that should be presented to City Council and that the City Council should sort out specific details.

Tony Acosta, City Manager – responded that the Taskforce has an option with a majority vote that can be presented to City Council and that the Taskforce is not obligated to consider any new options. He also clarified that he was not suggesting the Taskforce dive deep into exploring new options and start the whole process over. Rather, he explained that several Taskforce members, primarily the landlord representatives, had made statements during the meeting that there are very specific proposals that have not yet been considered. He noted that since some Taskforce members have already been considering other alternates, they should be able to draft a proposal and submit it to staff within the proposed time frame.

Tony Samara – stated that the Taskforce has covered a lot of ground and that it's time for City Council consideration. He noted that the City Council may ask the Taskforce to reconvene, which is fine, but he didn't think there was anything to gain from meeting again.

Chung Wu – noted the easiest way to solve this issue is for the Taskforce to vote on holding another meeting on January 9, 2017.

Tony Acosta, City Manager – requested the Taskforce vote on adding an additional meeting on January 9, 2017.

Additional Taskforce Meeting on January 9, 2017

AYES (11) – Duru Ahanotu, Tim Conde, Remy Fortier, Annie He, Dorothy Jackson, Chunchi Ma, Bill Mulgrew, Anna Nunez, Marjorie Rocha, Jamie Sessions, Chung Wu
NOES (4) – Abigail Andrade, Chris Cara, Ian Palavi, Tony Samara
ABSENT (0)
ABSTAIN (0)

Abigail Andrade and Tony Samara – requested clarification as whether adding an additional meeting meant that Option C, as a concept, was not going to be provided as a recommendation to City Council.

Tony Acosta, City Manager – noted that motion for Option C, as a concept, has passed and there is no reconsideration of the motion but that the Taskforce has the opportunity to further refine Option C at the next meeting. He also stated that the Taskforce could also add to the January 9th agenda consideration of new, alternate proposals that may be submitted by the Taskforce members.

Chris Cara – stated that he thinks this undermines the vote that just happened.

Dorothy Jackson – made a motion for the Taskforce to consider refining Option C and to consider alternative proposals that are submitted by Taskforce members at the January 9, 2017 meeting.

Chung Wu – seconded the motion

January 9, 2017 Taskforce Meeting Agenda

AYES (10) – Duru Ahanotu, Tim Conde, Remy Fortier, Annie He, Dorothy Jackson, Chunchi Ma, Bill Mulgrew, Marjorie Rocha, Jamie Sessions, Chung Wu
NOES (5) – Abigail Andrade, Chris Cara, Anna Nunez, Ian Palavi, Tony Samara
ABSENT (0)
ABSTAIN (0)

VII. ADJOURNMENT:

The meeting was adjourned approximately at 9:10 p.m.

Alin Lancaster

From: Duru A. <iqduru@stanfordalumni.org>
Sent: Thursday, December 15, 2016 5:22 PM
To: Alin Lancaster
Cc: Joan Malloy
Subject: Re: Taskforce Meeting - Opening Remarks

Follow Up Flag: Follow up
Flag Status: Flagged

Hi Alin,

My opening remarks are pasted below. I can't quite read all of this in two minutes, but I would like my complete remarks published in the public record. If someone wants to give me their two minutes, I will happily take them. :) Otherwise, my stated remarks will be an abbreviated version of my printed remarks.

---- Duru

Hello Everyone,

As a member of the impartial component of this taskforce, I have tried to do my best to observe, listen, and learn from my fellow taskforce members and the public commentary. A big thanks to the City staff who have delivered a mountain of data to inform this process. I now want to take just a few moments to take an official position before we finalize a vote.

The debate on rent stabilization has cleanly divided between free market principles and pleas for social justice. It is too bad that the two principles generally fail to get along. And yet, one marvel of this country is that we get to live out the on-going process of struggle to force these two to co-exist.

I have heard some references on putting our faith into the invisible hand of the market. From my vantage point, the invisible hand is quite visible. This hand wears a glove, and it is slapping around the poor and the working class like never before. The free market that this hand serves is increasingly leaving these people behind. It is a strange thing that officially reported inflation rates are extremely low and yet the cost to live in places like the Bay Area, like Union City, is sky high relative to incomes. The market is not rewarding wage earners with the kind of salary gains to thrive in this market, in this system. This system is increasingly biased toward those who control capital and assets, two precious resources that the poor and working class largely lack.

This free market has created an artificial tax system which advantages property ownership over renting. This free market sits under a Federal Reserve which for years pinned rates to near zero and executed a monetary policy that provided great advantage to asset owners, particularly in property, stocks, and even bonds. The free market of global capital flows means that the wealth of the planet's richest pour into asset-friendly markets, like the U.S., and further amplify the market's distortions. (As an aside - for anyone interested in a stark example of how these global capital flows drive down affordability, see the rising call for rent control in Australia's major urban areas, Sydney in particular. Australia currently has no rent control and current analysis suggests that additional supply cannot even begin to address the affordability problem that now even impacts middle class families). This free market relegates educational opportunity mostly to institutions in the immediate neighborhood. If that neighborhood is poor, then access to educational resources and opportunity will also tend to be poor. Finally, in a region like the Bay Area, all manner of rules, regulations, and practices distort the market away from supply-based solutions to the current housing crisis.

All these market distortions leave small communities like ours in a bind. Union City has done well to-date to avoid yet one more market distortion in the form of rent control, but I think that time is coming to an end. Our otherwise distorted free market is increasingly failing the most economically vulnerable among us. Based on what I have seen and heard, the failure is more than an inconvenience or even tough luck. It has become intolerable.

I have learned a lot about the ins and outs of rent control on this taskforce. From my perspective and from what you all have taught me, Union City needs to proceed with care. We should start with addressing the worst excesses of this distorted market with the expectation that through our efforts the City will send a signal to the market to behave better on behalf of the economically vulnerable. To this end, I prefer to support the following set of actions:

- Encourage landlords and renters to discuss rent increases that go above a certain, but high, annualized threshold NOT tied to CPI.
- Implement procedures to address attempts to subvert the spirit and the letter of the ordinance.
- Allow landlords pricing flexibility through banking rent increases including credit for years when they have to drop rents.
- Actively monitor the marketplace with the expressed intent to reconsider the ordinance if affordability gaps reach new extremes.

I fully understand and appreciate that this exact set of preferences will not likely become the task force's recommendation to the City Council. However, I *will* still vote to support action and not inaction...assuming the action represents as reasonable a compromise as is possible under these difficult circumstances. What is at stake is the kind of city we want to live in.

Thank you for your attention.

N. Duru Ahanotu, PhD

On Thu, Dec 15, 2016 at 4:23 PM, Alin Lancaster <AlinL@unioncity.org> wrote:

Good Afternoon Taskforce,

As you may have seen on agenda, we are allowing the Taskforce to give opening remarks before we start the final voting. Each Taskforce member will only have **two minutes** to speak, so please plan accordingly. If you plan to write a statement ahead of time, please share this with staff as it will help us with preparing the meeting minutes. Finally, please note that you're not required to speak or make any statements.

Kind Regards,

Alin

ALIN LANCASTER

Housing & Community Development Coordinator
City of Union City

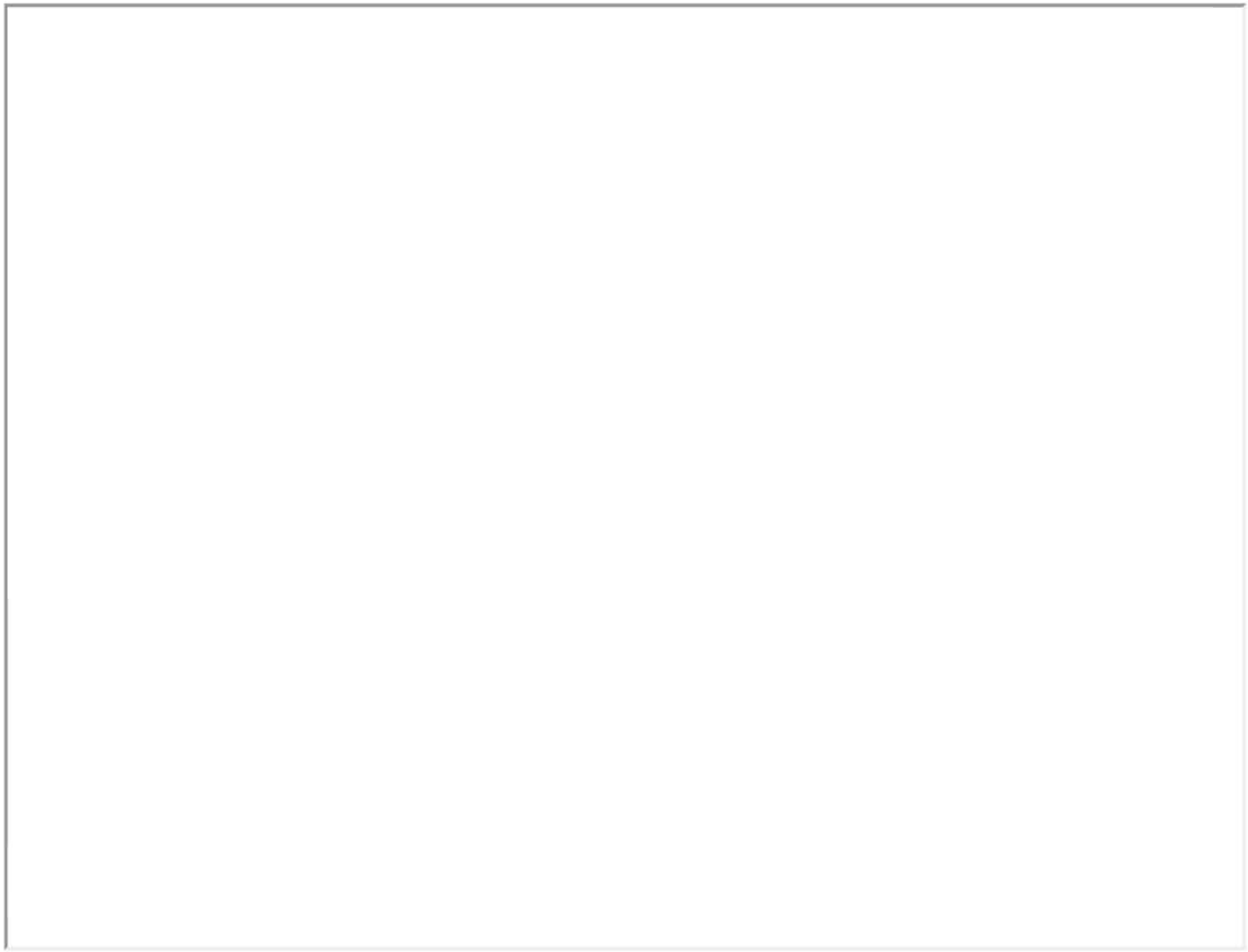
The Sydney Morning Herald

The government says it has a plan to fix the housing affordability crisis. This chart suggests it doesn't

Inga Ting
Published: September 5, 2016 - 10:16AM

This is the chart economists say demonstrates that the government's plan to halt rocketing house prices is doomed.

It shows house prices in Greater Sydney have continued to climb skyward despite a five-year boom in housing supply.

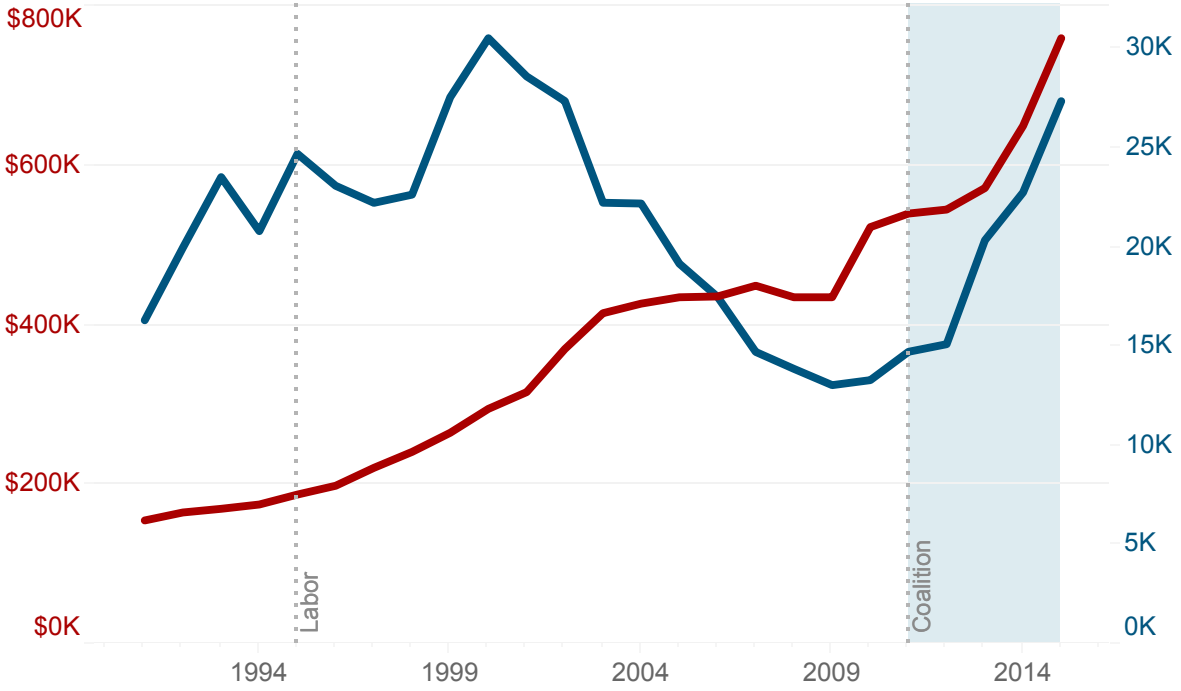


The NSW government insists change is on the horizon. Housing completions are only now recovering from a seven-year slump and we will see results in the next few years, according to the latest NSW Intergenerational Report.

But economists, urban planners and community groups disagree, and this week wrote an open letter urging the government to go beyond supply as its sole strategy for moderating house prices. It is the first time property developers, non-profit organisations, the finance sector and universities have united to call for action on affordable housing.

House prices have continued to rise despite a boom in housing supply.

Median sale price vs **dwelling completions** in Greater Sydney, 1991-2015



Graphic: Inga Ting | Source: NSW Department of Planning, NSW Department of Housing

Boosting supply

Since winning government in 2011, the Coalition's housing affordability policy has rested on a seductively simple strategy: build more houses.

"The most effective way we can tackle housing affordability is to increase supply," NSW Treasurer Gladys Berejiklian has said on numerous occasions, including in a statement to Fairfax Media this week.

Prime Minister Malcolm Turnbull has backed the strategy, saying in May: "Now this is how you address housing affordability. Housing affordability is the result of there being insufficient supply of housing. You need to have more supply of housing."

The economics seems basic enough: when supply goes up, price comes down. Yet house prices have risen by 40 per cent since 2011 while dwelling completions have ballooned by 85 per cent.

Building more houses won't fix housing affordability, experts say. *Photo: Paul Rovere*

Houses are not bananas

"If they understood how housing markets actually worked, this would come as no surprise at all," said Bill Randolph, director of UNSW's City Futures Research Centre.

"The problem is you can't apply year 10 economic theory to a metropolitan housing market."

The housing market doesn't behave like the market for bananas or cans of beans, experts say. For example, when the price of bananas rise, people buy fewer bananas and more alternative fruits, like apples or oranges, said economist and geographer Peter Phibbs. Professor Phibbs is chair of urban and regional planning and policy at the University of Sydney, and director of the university's town planning innovation centre, the Henry Halloran Trust.

"But with housing, because it's an asset market, as the price goes up it encourages buyers to get into the market because they can see the potential gain of holding an asset that's going up in value," Professor Phibbs said.

This is particularly true in Australia because we have tax incentives (namely, negative gearing and the capital gains tax discount) that actively encourage investment in the private housing market, he said.

We just can't build that many houses

"Supply is incredibly important and it's very good it's been going up - the population is growing; we need more houses," Professor Phibbs said.

But boosting supply alone won't put home ownership within reach of low and moderate income earners, he says.

The link between new supply and house prices is weak, economists argue. It's not like the banana market, for example, where the entire supply is produced each year and new supply has a strong link to price. In the housing market new homes are a tiny fraction of the entire housing supply.

"Nobody has ever shown … that you can supply enough housing into a market to effectively make prices fall," Professor Randolph said.

"New supply is 2 per cent of the housing market. Even if that doubled, what impact would that have? Most of us buy second-hand housing."

Making matters worse in Australia is a finance model that essentially ties supply to demand by requiring developers to sell a certain proportion of new housing off-the-plan, Professor Phibbs said.

"It's unlikely that additional supply will lead to sharp reductions in price because the stock has already been sold … Supply never gets very far in front of demand," he said.

The price of money

But there is a more fundamental reason the relationship between house prices and supply is not simple or straightforward, according to planning expert and Committee for Sydney CEO Tim Williams.

In the housing market, 'demand' is not driven by housing 'need' but by access to housing finance, he says. Virtually everyone needs to borrow money to buy a home, which means the major determinant of house prices is the price of money itself.

"Homes are unaffordable not because we are building too few but because the market is flooded with cheap credit," he said.

"Increasingly access to this is being channelled to existing homeowners over first-time buyers, leading to many Sydneysiders owning two and three properties while the average 30-year-old cannot get into home ownership.

"We cannot build our way to affordability in such a market."

What should we do?

Asked whether the government should consider strategies other than boosting supply, Ms Berejiklian said again that increasing supply was "the most effective way of tackling housing affordability".

"When we came to office in 2011, NSW annual residential construction spending was just $12.4 billion and building approvals were below 35,000," she told Fairfax Media.

"NSW building approvals have more than doubled to over 70,000 and real residential construction over the past year has reached $19.4 billion – the highest level on record."

Professor Phibbs advocates inclusionary zoning, which would require new developments to include a certain number of homes for moderate- and low-income earners.

"It's been used in a lot of American cities," he said. "You can't use it everywhere but in high-value areas it's really a no-brainer."

Professor Randolph suggests encouraging investment in properties for long-term rent. This would divert demand from the housing market and provide "a real alternative to the nightmare of current private rental," he said.

And there's always tax reform, although he acknowledges the lack of political appetite.

Ultimately, we need to reset some entrenched ideas about how we provide housing, Professor Randolph said.

"It is a wicked problem," he said. "That's why most of our governments just rub their heads and walk away."

This story was found at: ***http://www.smh.com.au/business/the-economy/the-government-says-it-has-a-plan-to-fix-the-housing-affordability-crisis-this-chart-suggests-it-doesnt-20160904-gr7sbz.html***

Open letter to the NSW Premier and Planning Minister

Dear Mr Baird and Mr Stokes,

At the recent 2016 Affordable Housing Conference there was consensus from the not for profit sector, property developers and the finance industry that further innovation is required from Government to help increase the supply of affordable housing in Sydney. This problem is, as we know, no longer confined to one group. Housing stress is now being felt now not just by the very needy but also increasingly by those higher up the income scale.

We emphasise that the Government is to be commended for creating an environment in which housing starts have more or less doubled in Sydney since 2011. However, it also has to be recognised that prices have still gone up significantly in this period. We believe that while increasing supply is a vital part of the strategy, relying solely on greater supply to moderate house prices and rents is clearly not working. Current approaches will not deliver for the growing numbers of aspiring first home buyers locked out of the market and lower income renters struggling to find affordable stock.

Something new needs to be tried not least to meet the housing needs of low paid but essential workers which are not being met currently by social housing provision or the current market. The Government has a real opportunity to make a difference both to the number and mix of homes in Sydney and community wellbeing if it uses its resources and powers in partnership with community housing providers and the private sector.

We recognise and welcome recent Government initiatives in relation to increasing social housing and private for sale supply through FACS led projects in the new Communities Plus program. The fact that income from housing land sales has been ring-fenced to invest in new social housing is also welcomed, as is the formation of a Social and Affordable Housing Fund. We also understand there are moves towards an inclusionary zoning policy in the planning system which would apply only to certain precincts in those LGAS which want it – which we strongly support but which we would like to see more generally applied.

We recognise and endorse these shifts in Government approaches but believe that there is a need for further innovation in relation to four key initiatives:

1. **Inclusionary zoning and affordable housing targets for privately owned development sites**. Many in the private sector will support inclusionary zoning if they are involved in drawing up the rules and if there is up-front certainty about planning requirements so that these can be factored into the land purchase price.

2. **Use of government land destined for housing development -** rather than seeking to maximise the return to the Treasury, the Government should set an example by mandating ambitious affordable housing targets on its major land holdings slated for disposal (e.g. regeneration sites) and accepting a slightly less-than-projected gain from the escalation in land values seen over recent years.

3. **Government incentives to trigger private and not for profit investment into affordable housing**. This would include expanding the Social and Affordable Housing Fund through, for example, designating a fraction of stamp duty receipts again inflated by the dramatic rise in property transaction values seen since 2011.

4. **Using its role on the Commonwealth's Affordable Housing Working Group to support the creation of an Affordable Housing Financial Intermediary.** This would enable community housing providers to access well-priced long-term funds from institutional investors bringing down their costs and stretching the benefit of a fixed amount of government financial support.

For Sydney to continue to be a Smart City that's vibrant, exciting and liveable for everyone no matter how much they earn, we need a long term plan for housing affordability that provides policy certainty and a development pipeline. This is the key to unlocking the not for profit and private sectors' expertise and entrepreneurship and attracting the large scale private investment we need to help solve this problem.

We all want a city where families, nurses, childcare workers and people on ordinary incomes can live, work, eat out and shop and continue to help Sydney thrive.

For the sake of those NSW households struggling to find somewhere affordable to live we need to act now.

Wendy Hayhurst (CEO, NSW Federation of Housing Associations)

Katherine McKernan (CEO, Homelessness NSW)

Professor Peter Phibbs (Faculty of Architecture, Design and Planning)

Professor Bill Randolph (Director, City Futures, UNSW)

Dr Tim Williams (CEO, Committee for Sydney)

Filed 5/31/06

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BETSY LINDSAY et al.,	
Plaintiffs and Appellants,	G033173
v.	(Super. Ct. No. 795353)
PIOTR LEWANDOWSKI et al.,	O P I N I O N
Defendants and Respondents.	

Appeal from a judgment of the Superior Court of Orange County, Dennis S. Choate, Judge. Reversed.

Christopher L Blank for Plaintiffs and Appellants Betsy A. Lindsay and Ultrasystems Environmental, Inc.

McQueen & Ashman and James A. McQueen for Plaintiff and Appellant Mike Lindsay.

Dunn, Lee & Keary and Stephen W. Dunn for Defendants and Respondents.

Betsy Lindsay, Michael Lindsay, and Ultrasystems Environmental, Inc. (collectively, Lindsay) appeal from a judgment on a stipulated settlement agreement in favor of Piotr Lewandowski, Joan Lewandowski, and the Hydro Company (collectively, Lewandowski). Lindsay argues the settlement agreement is unenforceable. We agree and reverse.

* * *

In December 2000, the parties signed a stipulation for settlement following private mediation. One version, signed by most of the parties, states "in the event of a dispute as to the terms of the settlement the parties agree to return to the mediator for final resolution by binding arbitration." The words "by binding arbitration" are a typed addition to form language that precedes it. Another version, signed by Michael Lindsay and Mary Bennett, does not have this addition.

Two provisions are at issue. One stated the parties agreed to "binding arbitration" of Ultrasystems Environmental Systems, Inc.'s (Ultrasystems) claims against The Hydro Company (Hydro). The word "arbitration" is typed in above the line, directly above the word "mediation," through which a line is drawn. It was further agreed that any arbitration award for Ultrasystems was to be set off against the amount Lindsay owed Lewandowski.

The other disputed provision is section 3: "Lindsay pays to Lewandowski the sum of $190,000 with cash, payment terms, security arrangements and stipulations regarding non-dischargeability in bankruptcy 'reasonably' agreeable to both parties but to be submitted to "binding" mediation by Judge R. J. Polis (ret.) if no satisfactory agreement on terms in entered within five days of commencement of negotiations between the parties on this issue." Shortly after the parties signed the stipulation for settlement, Lindsay retained new counsel and took the position it was unenforceable.

In April 2001, Lewandowski moved for judgment on the stipulated settlement. (Code Civ. Proc., § 664.6)[1]. He sought an order compelling arbitration of the Ultrasystems/Hydro claim, binding mediation to resolve the payment terms, and judgment enforcing the settlement. Retired Judge Polis submitted a declaration in support of the motion. It described his retention as mediator, an initial mediation proposal, and his subsequent preparation of the stipulation for settlement. He said "binding mediation" was a procedure he regularly used: "[T]he parties have agreed in advance that in the event the parties fail to agree, I then decide these terms and conditions, typically by asking the parties to each submit to me their final offers, accompanied by their oral argument as to why I should select their version over all others. I then select as the final binding provision the term or terms of either one party or the other." Retired Judge Polis said he described this process to both sides before they signed the stipulation for settlement.

Eventually, the parties agreed to arbitrate the Ultrasystems/Hydo dispute on the understanding Lindsay did not waive her position that the stipulation for settlement was unenforceable. On September 10, 2001, retired Judge Polis, acting as arbitrator, issued an award for Hydro on all issues.

On December 13, 2001, the trial court granted Lewandowski's motion to compel arbitration of the payment terms dispute. The court found "the parties have agreed to an alternate dispute resolution clause," and it ordered them "to return to Judge Robert Polis to resolve their dispute as to the terms of the Stipulation to Settlement, including . . . the meaning of the term "'binding' mediation"' . . . ."

Lindsay responded by attempting to disqualify Judge Polis. On December 17, 2001, she sent Lewandowski a "notice of disqualification of Judge Polis to serve as arbitrator" in the matter. The purported disqualification was based on a rule that "a party

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[1] All subsequent statutory references are to the Code of Civil Procedure unless otherwise indicated.

shall have the right to disqualify one court appointed arbitrator without cause in any one arbitration . . . ." (Former § 1281.9 subd. (c)(2), eliminated in a 2001 revision which rewrote section 1281.9 and added § 1281.91 by Stats. 2001, ch. 362.l; the same provision now appears in § 1281.91, subd. (b)(2).) Lewandowski moved to compel adherence with the order to arbitrate. On February 27, 2002, the trial court found the notice of disqualification invalid and ordered the parties to proceed before retired Judge Polis.

On April 4, 2002, retired Judge Polis issued a "binding mediation ruling." He concluded "Lindsay shall pay . . . $190,000 in cash forthwith, without any security agreement and without any stipulation regarding an attempt to make that amount dischargeable in bankruptcy since neither are needed with a cash payment." The ruling described the procedure used as follows: "'[B]inding mediation' is simply a normal mediation process . . . within the frame work of an agreement in advance by the parties that any impasse reached shall be resolved by the mediator who will select and propose a compromise figure circumscribed by the last two bargaining positions conveyed before the impasse." At another point, retired Judge Polis said "[b]inding mediation has only one accepted meaning, that is, that the parties who enter intend that there shall be an agreement at the end of it, even if the mediator must make the final call. That was the intent expressed here and that was the result." In a May 16, 2002 response to an inquiry from Lewandowski, retired Judge Polis said the reference to Lindsay in the ruling meant Betsy Lindsay, Michael Lindsay, and Ultrasytems.

Subsequently, the trial court granted Lewandowski's motions to confirm the arbitration award and the binding mediation award, and to enforce the stipulation for settlement. On September 18, 2003, judgment was entered awarding Lewandowski $190,000 against Besty Lindsay, Michael Lindsay, and Ultrasystems, along with other relief in favor of the various parties.

Lindsay argues the stipulation for settlement is unenforceable for several reasons. We conclude one is right – the parties never agreed on a procedure to resolve the payment dispute – and therefore reverse.

Section 664.6 provides that where parties to pending litigation stipulate to settle the case orally in court, or in a writing signed outside of court, judgment may be entered "pursuant to the terms of the settlement" upon motion of one of the parties. (§ 664.6.) "A section 664.6 motion is appropriate . . . even when issues relating to the binding nature or terms of the settlement are in dispute, because, in ruling on the motion, the trial court is empowered to resolve these disputed issues and ultimately determine whether the parties reached a binding mutual accord as to the material terms." (*In re Marriage of Assemi* (1994) 7 Cal.4th 896, 905.)

A settlement agreement, like any other contract, is unenforceable if the parties fail to agree on a material term or if a material term is not reasonably certain. (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811; Civ. Code, § 1580 ["Consent is not mutual, unless the parties all agree upon the same thing in the same sense"]; Civ. Code, § 3390, subd. 5 [contract not specifically enforceable where terms are "not sufficiently certain" to make act to be done "clearly ascertainable"].) Leaving an unresolved term for future agreement is not invariably fatal, since a settlement may be enforceable if the parties agree the remaining issue will be decided by arbitration. (See *Weddington Productions, Inc. v. Flick, supra*, 60 Cal.App.4th at p. 801 ["parties theoretically could confer wide-ranging arbitration authority on an arbitrator, even to the extent of allowing an arbitrator to write a licensing agreement for them."].) But that did not take place here.

We cannot tell what the parties meant when they provided for "binding mediation" of the payment dispute. The settlement began as a mediation. It produced a stipulation for settlement that provides for resolution of "a dispute as to the term of the settlement" by "return[ing] to the mediator for final resolution" (the version signed by

Michael Lindsay and Mary Bennett) or "by return[ing] to the mediator for final resolution by binding arbitration" (the version signed by the remaining parties). It goes on to provide for resolution of the Ultrasystems/Hydro dispute by "binding arbitration," and resolution of the payment term dispute by "binding mediation." As to the latter, the reference to binding mediation is at odds with the general proviso for settling a dispute over the settlement terms by returning "to the mediator for final resolution by binding arbitration" (one version).

About the only thing that *is* clear is that the parties did not regard binding mediation as the equivalent of arbitration. The stipulation for settlement originally provided for resolution of the Hydro dispute by "binding mediation," but "mediation" is crossed out and "arbitration" inserted in its place. That indicates the parties *did not* consider binding mediation the equivalent of arbitration. Since there was no agreement on a recognized procedure to resolve the payment term dispute, the stipulation for settlement is unenforceable.

Lewandowski argues the inconsistent references to different alternate dispute resolution procedures in the stipulation for settlement are "irrelevant" because section three refers only to binding mediation. But that does not answer the question of what the parties *meant* by binding mediation, and we are left with a contract that is uncertain regarding a material term. Such a contract cannot be enforced.

This resolution precludes any meaningful determination of the viability of the concept of "binding mediation." There is a school of thought – a not altogether unappealing one – that recognizes binding mediation as a perfectly acceptable means of dispute resolution. After all, why can't parties to a mediation provide that if they come to loggerheads on an issue, they agree to a binding resolution by the mediator acting as a arbitrator, under whatever decision-making process he/she chooses? A leading commentator has observed that where parties authorize a mediator to render a binding decision upon an impasse in settlement negotiations, "the dispute resolution procedure

then becomes, in effect, an arbitration." (Knight et al., Cal. Practice Guide: Alternate Dispute Resolution (The Rutter Group 2004) ¶ 3:12.2, pp. 3-4.)[2] The same conclusion is reached by the only reported decision on the issue of which we are aware. There, a Michigan court concluded "binding mediation is functionally the same as arbitration," and it held a trial court has the same authority to review decisions following binding mediation as arbitration. (*Frain v. Frain* (1995) 213 Mich.App. 509, 511-512.)

But there are significant problems with the concept of binding mediation. While there are recognized rules governing contractual arbitration (§ 1280 et seq.), contractual mediation (Evid. Code, § 1115 et seq.), and court-connected mediation programs (Cal. Rules of Court, rule 1620 et. seq.), there are none for binding mediation. The extant rules settle various issues, among them appointment of arbitrators and mediators, disclosure, disqualification, the powers of arbitrators and mediators, procedure, fees, confidentiality, and enforcement. There are also specific rules that deal with mixed alternate dispute resolution, where traditional mediation is followed by binding mediation. (Cal. Rules of Court, rule 1620.7 (g).)

If binding mediation is to be recognized, what rules apply? The arbitration rules, the court-ordered mediation rules, the mediation confidentiality rules, or some mix? If only some rules, how is one to chose? Should the trial court take evidence on the parties' intent or understanding in each case? A case-by-case determination that authorizes a "create your own alternate dispute resolution" regime would impose a significant burden on appellate courts to create a body of law on what can and cannot be done, injecting *more* complexity and litigation into a process aimed at less.

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[2] Arbitration has been defined as "'[a] process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard. . . . [Citation.]" (*Cheng-Canindin v. Renaissance Hotel Associates* (1996) 50 Cal.App.4th 676, 684.) The characteristics of an arbitration agreement are: "(1) a third party decision maker; (2) a mechanism for ensuring neutrality with respect to the rendering of the decision; (3) a decision maker who is chosen by the parties; (4) an opportunity for both parties to be heard, and (5) a binding decision." (*Ibid;* accord, *Sy First Family Ltd. Partnership v. Cheung* (1999) 70 Cal.App.4th 1334, 1341-1342.)

We do not suggest that parties are prohibited from agreeing that, if the mediation fails, they will proceed to arbitration. And, should they so desire, they may agree that the same person may first act as mediator and, if he or she fails in this task, act as the arbitrator. Whether or not this arbitrator (nee mediator) may consider facts presented to him or her during the mediation would also have to be specified in any such agreement. All of which serves to underscore how uncertain the terms of the instant "agreement" were.

It will come as no surprise that the members of this panel have strong feelings about the efficacy *vel non* of binding mediation. But their expression here, where we are simply unable to find any meeting of the minds, would be an inappropriate excursion into issues unnecessary to resolution of the case before us.

In light of our conclusion the stipulation for settlement is unenforceable for lack of agreement on a procedure to resolve the payment term dispute, we also do not reach Lindsay's other arguments against enforcement, or her argument that retired Judge Polis was properly disqualified.

The judgment is reversed. Appellants are entitled to costs on appeal.[3]

BEDSWORTH, J.

WE CONCUR:

SILLS, P. J.
RYLAARSDAM, J.

[3] Two motions to augment the record are denied. On August 8, 2004, Lewandowski moved to augment the record with four exhibits, labeled A through D. The motion was granted save for exhibit D, a lost stock certificate affidavit and assignment of Lewandowski's stock in Ultrasystems to Betsy Lindsay, which was left for decision in connection with decision of this appeal. Exhibit D is has no bearing on the appeal, and the motion to augment the record to include it is denied.

On November 24, 2004, Lindsay also moved to augment the record, proffering eight exhibits. The motion was granted with the exception of exhibit 8, an acknowledgment of satisfaction of the judgment by Lindsay, which was left for resolution in connection with decision of the appeal. Exhibit 8 likewise has no bearing on the appeal, so the motion to augment by adding it is likewise denied.

SILLS, P.J., Concurring.

I fully concur in the lead opinion but write separately because the term "binding mediation" is relatively new in the legal lexicon and because it is a deceptive and misleading term. Given that numerous court rules empower the judiciary to require attendance and good faith participation in a settlement conference[1] -- the old fashioned term for mediation -- lawyers may easily think that the term "binding mediation" simply means they are compelled to attend and participate; that's all. They may not realize the term might be interpreted to mean that if a settlement is not reached, then, puff, the mediation becomes an arbitration.

I also write separately to more clearly register the oxymoronic character of the concept of "binding mediation." As lawyers we should use precise language -- that is our tradition. A fuzz PR phrase like "binding mediation" is not worthy of us.

As all of us on this panel noted in *Vedanta Society of So. California v. California Quartet, Ltd.* (2000) 84 Cal.App.4th 517, the authors of text (whether legislation, novels or settlement agreements) "generally do not want to contradict themselves -- and when they do, their whimsy should be relatively obvious from the text (e.g., 'The sun was shining on the sea/Shining with all his might . . . And this was odd, because it was/The middle of the night.'" (*Id*. at p. 527, fn. 11.) I can think of nothing more self-contradictory than "binding mediation." Mediation is by definition a voluntary process which achieves a voluntary result, and is meaningful in distinction to "arbitration" in its very voluntariness. Or, to put it with more bite -- mediation is distinctive from arbitration in its inherent lack of consequences. You go to mediation, you like it, you don't, you settle, you don't, no big deal.

[1] E.g., California Rules of Court, rules 212 and 222. All further references to any court rule are to the California Rules of Court.

Now, granted, persons can voluntarily agree to a process which yields a result out of their control -- the roulette table comes to mind. But when the result of some sort of *adjudication* is "binding," it is "binding" precisely because it is the product of a public (court) or private (arbitration) decision-maker ultimately backed up by the government. A private *decision maker* with "binding" power is called an arbitrator. A private decision maker who simply tries to have parties come to some voluntary agreement is a mediator. A mediator with binding power is an arbitrator, not a mediator. (See Knight, et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 2005) [¶] 3:12.1, p. 3-4 ["Parties sometimes authorize the mediator to render a binding decision in the event an impasse is declared with respect to settlement negotiations. The dispute resolution procedure then becomes, in effect, an arbitration."].)

Unfortunately, the term "binding mediation" has come into existence because the Madison Avenue and MBA types have taken over what we once called "private judging." Now we call it "alternative dispute resolution" because that is a softer and gentler term and implies that the parties will have their disputes resolved in a way that is mutually satisfactory; not that they will receive a decision from a judge which one of the parties will not like. "Private judging" implies a quasi trial process with all of the tension of a courtroom and the acrimony of litigation. Although, "alternative dispute resolution" is virtually the same thing, it sounds softer. Likewise, "settlement conference" is also a forbidden term. The public relations people like "mediation" because mediation implies that your matter or dispute will be resolved to your satisfaction. The term "settlement conference" sounds like a committee meeting where people get together and talk about a settlement, but nothing might happen. That of course is unacceptable after the parties have spent a lot of money to schedule the meeting. Another term that the public relations people don't like is "arbitration," because arbitration implies that a decision will be made and not necessarily a decision one or both of the parties may like. Hence, "binding mediation" has come into existence because it is kinder and gentler. But as this case demonstrates, it is half-baked arbitration.

The California Rules of Court *define* mediation as a process in which a mediator assists the parties in "reaching a mutually acceptable agreement." And the voluntary aspect of mediation is further underscored in rule 1620.3: "A mediator must conduct the mediation in a manner that supports the principles of voluntary participation and self-determination by the parties." The rule goes on to prohibit mediators from "coercing any party to make a decision or continue to participate in the mediation." (Rule 1620.3(c).)

Besides the self-contradictory nature of the phrase, the "hybrid"[2] concept of a "mediation" which fails to reach a mutually acceptable settlement and then turns into an arbitration where the mediator is also the arbitrator can have unexpected consequences. One of these consequences is that the use of "binding mediation" may actually retard settlement. Judges and lawyers with extensive experience in conducting settlement conferences know that the person conducting the conference frequently hears things from the lawyers that he would be never hear were he the trial judge or arbitrator. For example, a lawyer might tell a mediator that his client doesn't recognize his exposure and cannot get him to understand the downside of his case. The lawyer will ask, "You can help, I think he will listen to you." Another lawyer might tell a mediator that he can possibly get another $50,000 if the other party will only come down another $100,000 on their demand. Or, both lawyers might tell a mediator what they candidly think their case is worth but ask the mediator to explain to each party the exposures they face so as to get movement toward settlement. But no lawyer in his right mind would ever tell such things to a mediator if he thought it was possible the mediator might become the arbitrator.[3] For that very reason, rule 1620.7(g) requires a mediator to exercise "caution" when combining mediation with other alternative resolution processes and to do so only with the "informed consent of the parties." And, if the mediation can become an arbitration,

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[2] One Rutter Practice Guide describes "binding mediation" as a "'hybrid'" but doesn't elaborate. (See Friedman et al, Cal. Practice Guide: Landlord-Tenant (The Rutter Group 2006) [¶] 1:333 ["Mediation is typically nonbinding (although the parties might agree to a 'hybrid' binding mediation). This form of dispute resolution is particularly suitable to landlord-tenant disputes . . . ."].)

[3] We thus may be doing to mediation what Justice Kennard warned stipulated reversals would do to the process of settlement on appeal, see *Neary v. Regents of University of California* (1992) 3 Cal.4th 273, 288-291 (dis. opn. of Kennard, J.).

each party *must* be given opportunity to select "another neutral" to conduct the ensuing proceedings.

Another, perhaps more ominous consequence of the hybridization of mediation and arbitration may be damage to the very quality of justice yielded by the process, in effect having the worst of both worlds -- hence rule 1620.7(g)'s admonition to mediators to "exercise caution in combining mediation with other alternative dispute resolution (ADR) processes."

As rule 1620.3 emphasizes, mediations are supposed to reflect a truly voluntary process. They have the advantage that, by definition, they reflect the consent of the parties.

And for their part, arbitrations have the epistemological advantages of a truly adversarial process. Each side has an incentive to present its best case, and the result will not necessarily give either side everything it wants.

But contrast those two ideals with the process contemplated in the very case before us: Parties submit "bids" in the form of settlement offers (and some written argument), and the mediator/arbitrator then selects one. Talk about roulette wheels. What was contemplated here was not "mediation" but simply a low-quality arbitration.

The stipulation we have before us obviously did not comply with the requirement of rule 1620.7(g) that parties have the right to pick a "select another neutral" when mediation is "combine[d]" with "other alternative dispute resolution (ADR) processes." Whether rule 1620.7 governs this case, however, is an issue which we have spared ourselves because we decide it on contract grounds: By using the term "binding mediation" the language of this contract is unenforceably vague.

Thus, in my view, regardless of whether this dispute is governed by the California Rules of Court, only a *clearly* written agreement *signed by the parties* can set forth a process whereby an unsuccessful settlement conference (or mediation) morphs into a de facto arbitration. The key to approval of such agreement is clarity of language and informed consent. We have neither here.

SILLS, P. J.

BOWERS v. RAYMOND LUCIA COMPANIES INC

Ryan N. BOWERS et al., Plaintiffs and Respondents, v. RAYMOND J. LUCIA COMPANIES, INC., Defendant and Appellant.

No. D059333.

Decided: May 30, 2012

Higgs, Fletcher & Mack, James M. Peterson, Victoria E. Fuller and Loren G. Freestone for Defendant and Appellant. Thorsnes Bartolotta McGuire, Vincent J. Bartolotta, Jr., Renee N. Galente, Karen R. Frostrom; McKenna Long & Aldridge, Charles A. Bird and Aaron T. Winn for Plaintiffs and Respondents.

INTRODUCTION

Raymond J. Lucia Companies, Inc. (defendant) appeals from a judgment enforcing a settlement agreement resulting in a binding mediation award in favor of Ryan Bowers, Marc Seward, and Jeffrey LaBerge (plaintiffs). Defendant contends we must reverse the judgment as the underlying settlement agreement is unenforceable because: (1) defendant never agreed to resolve the parties' dispute through binding mediation; (2) a contract term providing for binding mediation is necessarily too uncertain to be enforceable; and (3) binding mediation is not among the constitutionally and statutorily permissible means of waiving jury trial rights. We conclude there is substantial evidence to support the trial court's determination defendant agreed to the binding mediation procedure utilized in this case. We further conclude that the binding mediation provisions in the parties'

settlement agreement were not too uncertain to be enforceable. Finally, we conclude binding mediation is not a constitutionally or statutorily prohibited means of waiving jury trial rights where, as here, the parties have agreed to settle their dispute in a nonjudicial forum. We, therefore, affirm the judgment.

BACKGROUND

Plaintiffs sued Raymond J. Lucia, Sr. (Lucia), defendant, and other entities for defamation and related business torts. Lucia filed an arbitration proceeding against plaintiffs asserting similar claims.[1]

The trial court subsequently determined plaintiffs were compelled to arbitrate their claims against Lucia. Plaintiffs dismissed Lucia from their lawsuit, allowing their arbitration with him to proceed separately from their lawsuit against defendant. The arbitration proceeding commenced a few months before the scheduled trial in this case. After several days of arbitration, the parties agreed to settle their dispute before the arbitration panel reached a decision. In informing the arbitration panel of the settlement, the following exchanges occurred:

"[DEFENDANT'S COUNSEL]: Through the efforts of the parties today and also the panel being patient, we've been able to resolve this arbitration to the parties' satisfaction. As a consequence, [Lucia] is dismissing all claims against the [plaintiffs], with prejudice. And, as a result, we are also encompassing the state court matter, which is set for trial in October, and we are agreeing to bring that case to binding mediation with a component which, if it's not resolved at mediation, rolls over to arbitration. I guess it's—it's mediation with a binding arbitration component following.

"[CHAIRMAN]: Med/Arb.

"[PLAINTIFFS' COUNSEL]: The mediator has the ability to decide the case at the end of the day.

"[DEFENDANT'S COUNSEL]: Correct.

"[PLAINTIFFS' COUNSEL]:—if the parties don't resolve it.

"[DEFENDANT'S COUNSEL]: So we're resolving this matter here with respect to each other. We are taking the state court case and taking the parties in that matter, agreeing to go mediate with a jointly-a mutually-acceptable mediator. And to the extent we don't resolve it that day, it becomes a mediat[ion]—an arbitration with a range of between $100,000 and $5 million as the range that he will then have the freedom to choose after we present our cases to him or her during mediation.

"[CHAIRMAN]: Understood."

Following a brief discussion about ancillary matters, the chairman summarized, "So your agreement encompasses dismissal with and of the arbitration and the Superior Court case based upon the terms that you've agreed to, to mediate in a Med/Arb, baseball high-low atmosphere with a mediator of your choosing, to be chosen within the next several weeks."

After a brief discussion about allocating forum fees, the Chairman asked, "Anything else you want to put on the record . [?]" Defendant's counsel responded, "I think that encompasses the essential terms of our agreement." Plaintiffs' counsel agreed, stating, "I believe that's correct. Yes."

Within a week after the arbitration, the parties signed a "Settlement Agreement and Release" (settlement agreement). Paragraph II.2 of the settlement agreement provided this case "shall be placed on the Superior Court dismissal calendar. The Parties shall then proceed to a mediation/binding baseball arbitration with a mutually agreed-upon neutral within sixty days of the execution of this agreement. To wit, the Parties shall participate in a full day mediation. If, at the end of that mediation, the Parties have failed to reach an agreement, the mediator shall be empowered to set the amount of the judgment in favor of Plaintiffs against Raymond J. Lucia Companies, Inc. at some amount between $100,000 and $5,000,000, such binding mediator judgment to then be entered as a legally enforceable judgment in San Diego Superior Court without objection of any Party."

Paragraph II.3 of the settlement agreement provided, "Immediately upon execution of this agreement, the Parties shall advise the Court to place the case on the dismissal track. Should the Parties agree upon a voluntary compromise of the San Diego Superior Court case, the case shall be dismissed with prejudice. Should the matter proceed to binding baseball arbitration, the Parties shall enter the arbitrated amount as an enforceable stipulated judgment in the case."

At the mediator's request, the parties later modified the portion of paragraph II.2 of the settlement agreement beginning with "To wit" to provide "To wit, the Parties shall participate in a full day mediation. If, at the end of that mediation, the Parties have failed to reach an agreement, the Plaintiffs (Bowers, Seward, and LaBerge) shall provide to the mediator their last and final demand, which demand shall be some amount between $100,000 and $5,000,000, and the Defendants (Companies, Wealth Management, and Enterprises) shall provide to the mediator their last and final offer which offer shall be some amount between $100,000 and $5,000,000. The mediator shall then be empowered to set the amount of the judgment in favor of Plaintiffs against Raymond J. Lucia Companies, Inc. by choosing either Plaintiffs' demand or Defendants' offer, such binding mediator judgment to then be entered as a legally enforceable judgment in San Diego Superior Court without objection of any Party." The amendment further provided, "This amendment shall not impact any section of the Settlement Agreement not referenced above."

The parties participated in a full-day mediation with the mediator. At the end of the day, the parties had not reached an agreement. The mediator asked the plaintiffs for their final demand and the defendant for its final offer. Plaintiffs demanded $5million and the defendant offered $100,000. The mediator did not reach an immediate decision, but allowed the parties to continue to submit information for his consideration. He also met with defendant and defendant's counsel. The mediator ultimately selected the $5 million number.

Defendant obtained new counsel, who wrote the mediator a letter requesting that the mediator either reopen the proceeding to allow for further information exchanges and interaction, or reconsider his decision. Nothing in the record indicates defendant or defendant's counsel ever requested the mediator conduct a traditional arbitration proceeding or objected to the mediator's failure to move from the mediation into a traditional arbitration proceeding.

Plaintiffs petitioned to confirm the mediator's award. Defendant opposed the petition, arguing the trial court could not confirm the award because it was a mediation award, rather than an arbitration award. The trial court agreed and declined to confirm the award as an arbitration award. Instead, the trial court enforced the settlement agreement and subsequent mediator's award under Code of Civil Procedure 2 section 664.6.[3]

The trial court explained, "Despite their use of undefined legal terms such as 'mediation with a binding arbitration component' and 'mediation/binding baseball arbitration', the parties clearly agreed in writing that the mediator would decide the amount of the judgment with the 'binding mediator judgment to then be entered as a legally enforceable judgment in San Diego Superior Court without objection of any Party.' The parties agreed to a day long mediation whereby if they did not resolve the case, the mediator would determine the amount of the judgment. Nowhere in the settlement agreement does it contain any procedure for a formal arbitration where each side would present witnesses and evidence as defendant now maintains. It appears the use of the term 'binding baseball arbitration' was meant to allow the mediator to pick the amount. Further, any ambiguity in that term was resolved by the amendment requiring the mediator to pick either plaintiffs' demand or defendant's offer.

"This interpretation is further bolstered by the representations made in a transcript dated July 20, 2010 prior to the formalized settlement agreement. There clearly is some confusion about what to call the procedure they would use. Nonetheless, counsel for defendant agreed that the mediator had the ability to decide the case at the end of the day if the parties did not resolve it. Counsel for defendant further stated that the mediator would have the freedom to choose between a range of $100,000 and $5 million 'after we present our cases to him or her during mediation .' There is no reference to an arbitrator choosing the number after a presentation of evidence apart from the mediation. The court notes that this case involves sophisticated parties and knowledgeable

counsel who could have explicitly provided for a separate arbitration had that been what they intended." Consistent with its ruling, the trial court subsequently entered a $5 million judgment for plaintiffs.

Defendant moved for reconsideration, to vacate the judgment, and for a new trial. The trial court denied the motion, finding once again that the parties' settlement agreement was enforceable and the parties had agreed to binding mediation, rather than a two-step mediation and binding arbitration process.

DISCUSSION

IOverview of Section 664.6

"If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court ., for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement." (§ 664.6.) "Section 664.6 was enacted to provide a summary procedure for specifically enforcing a settlement contract without the need for a new lawsuit." (Weddington Productions, Inc. v. Flick (1998) 60 Cal.App.4th 793, 809 (Weddington).) A trial court "hearing a section 664.6 motion may receive evidence, determine disputed facts, and enter the terms of a settlement agreement as a judgment." (Id. at p. 810.) The trial court may not "create the material terms of a settlement, as opposed to deciding what terms the parties themselves have previously agreed upon." (Ibid., italics omitted.) Thus, a trial court cannot enforce a settlement under section 664.6 unless the trial court finds the parties expressly consented, in this case in writing, to the material terms of the settlement. (Ibid.)

II

Mutual Consent

Defendant contends we must reverse the trial court's judgment because the settlement agreement is unenforceable due to lack of mutual consent. More particularly, defendant contends it did not agree to settle the parties' dispute through binding mediation. Rather, it agreed to settle the dispute with a mediation proceeding which, if unsuccessful, would be followed by a binding arbitration proceeding that included an evidentiary hearing.

"A settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement contracts." (Weddington, supra, 60 Cal.App.4th at p. 810.) One of the essential elements of an enforceable contract is mutual consent. (Id. at p. 811.) For consent to be mutual, the parties must all agree on the same thing in the same sense. (Ibid., Civ.Code, §§ 1580 & 1636.) " 'The existence of mutual consent is determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe.' " (Weddington, supra, at p. 811.) "If there is no evidence establishing a manifestation of assent to the 'same thing' by both parties, then there is no mutual consent to contract and no contract formation." (Ibid.)

Here, the trial court found that, notwithstanding any labeling, the parties mutually agreed to a full-day mediation and, if there was no resolution at the end of the day, the mediator could make a binding award by selecting from either the plaintiffs' final demand or the defendant's final offer. We review the trial court's finding for substantial evidence. (In re Marriage of Assemi (1994) 7 Cal .4th 896, 911.)

The transcript of the arbitration proceeding at which the parties described the terms of their settlement agreement for the record indicates the parties agreed to a full-day mediation, at the end of which the mediator could make a binding award between $100,000 and $5 million if the mediation was not successful. Nothing in the transcript indicates the parties ever contemplated a failed mediation would be followed by an arbitration that included an evidentiary hearing. Moreover, such an agreement would be inconsistent with the fact the parties were in the midst of a lengthy arbitration proceeding when they made the agreement. It would also be inconsistent with plaintiffs' unwavering desire for a jury to decide their claims against the defendant and the existence of a trial date just a few months away.

The parties' settlement agreement mirrors their remarks at the arbitration proceeding and also indicates the parties agreed to a full-day mediation, at the end of which the mediator could make a binding award between $100,000 and $5 million if the mediation was not successful. The amendment to the settlement agreement allowing the mediator to choose between the plaintiffs' final demand and the defendant's final offer bolsters this conclusion. The reference to binding baseball arbitration in paragraph II.3 of the agreement does not undermine this conclusion as this terminology is reasonably interpreted as a description of the type of binding mediation to which the parties agreed. (See Beck, Is 'binding mediation' a new solution? (Feb. 2, 2009) Virginia Lawyers Weekly [as of May 17, 2012] [Binding mediation or mediated arbitration is a hybrid of mediation and arbitration. Essentially, the parties attempt to resolve their dispute with the assistance of a mediator as they would in a standard mediation. If they are unable to resolve their dispute, the mediator issues a final, binding decision at the end, just as an arbitrator would. Baseball-style arbitration, in which an arbitrator decides a monetary dispute by selecting from the parties' final proposals, is an example of binding mediation]; see also Calkins, Mediation: The Radical Change from Courtroom to Conference Table (2010) 58 Drake L.Rev. 357, 380, 390 (Calkins article) [In baseball arbitration, the plaintiff makes a demand, the defendant makes an offer, and after a full hearing, the arbitrator selects one of the figures as the award. In binding mediation, the mediator conducts a mediation and, if a settlement is not reached, the mediator decides the matter by reaching a fair settlement figure.].)

Perhaps most supportive of the trial court's finding is the absence of any indication the defendant or its counsel ever requested an arbitration hearing after the full-day mediation ended or objected because the mediator failed to commence an arbitration hearing after the mediation ended. (Okun v. Morton (1988) 203 Cal.App.3d 805, 819 [parties' postagreement conduct is persuasive evidence of their intent].) If the parties had agreed to conduct a postmediation arbitration hearing, or if defendant thought they had such an agreement, we cannot fathom any reason why defendant would not have raised the issue at the time or in any of its postmediation correspondence with the mediator. Accordingly, we conclude substantial evidence supports the trial court's finding the parties mutually agreed to allow the mediator to select between the plaintiffs' final demand and the defendant's final offer after the end of their unsuccessful mediation without first conducting a separate arbitration proceeding that included an evidentiary hearing.

III

Uncertainty

Defendant next contends the settlement agreement is unenforceable because binding mediation is an inherently uncertain term. "In order for acceptance of a proposal to result in the formation of a contract, the proposal 'must be sufficiently definite, or must call for such definite terms in the acceptance, that the performance promised is reasonably certain.' [Citation.] A proposal ' "cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain. [¶] . The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy." ' [Citations.] If, by contrast, a supposed 'contract' does not provide a basis for determining what obligations the parties have agreed to, and hence does not make possible a determination of whether those agreed obligations have been breached, there is no contract." (Weddington, supra, 60 Cal.App .4th at pp. 811–812.) "Whether a contract is certain enough to be enforced is a question of law for the court." (Patel v. Liebermensch (2008) 45 Cal.4th 344, 348, fn. 1.)

Defendant relies on Lindsay v. Lewandowski (2006) 139 Cal.App .4th 1618 (Lindsay) to support its contention. In Lindsay, the parties signed a stipulated settlement agreement following private mediation. (Lindsay, supra, 139 Cal.App.4th at p. 1620.) Most of the parties signed a version stating they agreed to resolve any disputes regarding the terms of the agreement by binding arbitration. (Ibid.) However, some of the parties signed a version requiring a return to the mediator to resolve such disputes. (Id. at pp. 1620, 1623.)

To further complicate matters, one of the provisions of the agreement initially provided for some of the parties to resolve their dispute by binding mediation, but the word "mediation" had a line drawn through it and the word "arbitration" was typed directly above it. (Lindsay, supra, 139 Cal.App.4th at p. 1620.) Yet another provision

required appellants to pay respondents a specific amount of money, subject to terms to be mutually agreed upon, or determined by binding mediation if they could not be mutually agreed upon. (Ibid.)

Over their objection, appellants participated in a binding mediation proceeding to determine the terms of their payment to respondents. The mediator issued an award in favor of respondents, which the trial court subsequently confirmed. (Lindsay, supra, 139 Cal.App.4th at p. 1622.)

On appeal, appellants argued the stipulated settlement agreement was unenforceable because, among other reasons, the parties never agreed on a specific procedure to resolve their payment terms dispute. The appellate court concurred. (Lindsay, supra, 139 Cal.App.4th at p. 1622.)

The appellate court concluded from the provision in the contract striking out mediation and replacing it with arbitration that the parties regarded binding mediation as something different from arbitration. (Lindsay, supra, 139 Cal.App.4th at p. 1623.) The appellate court also concluded the provision requiring binding mediation of payment terms conflicted with the provision in the version of the agreement some of the parties signed requiring binding arbitration of any disputes over settlement terms. (Ibid) Because the various discrepancies prevented the appellate court from ascertaining what the parties actually meant when they used the term "binding mediation," the appellate court concluded the parties' agreement was too uncertain to be enforceable .[4] (Ibid.)

The Lindsay case is distinguishable from the instant case in two key respects. First, unlike the appellants in Lindsay who demonstrated the absence of a meeting of the minds by objecting to binding mediation at the outset, the defendant in this case never objected to binding mediation or insisted it was entitled to a post-mediation arbitration hearing until after the mediator made an award in plaintiffs' favor. Second, unlike the parties in Lindsay, the parties in this case elaborated on what they meant by the alternative dispute resolution method they chose. As discussed in part II, ante, they agreed to a full-day of mediation at of the end of which, if the mediation was unsuccessful, the mediator would award plaintiffs an amount equal to either their last demand or the defendant's last offer. Thus, unlike the agreement in Lindsay, the agreement in this case is sufficiently certain to be specifically enforceable. (Civ.Code, § 3390, subd. 5; Blackburn v. Charnley (2004) 117 Cal.App.4th 758, 766 [modern trend disfavors holding contracts unenforceable because of uncertainty and defense of uncertainty applies only when the uncertainty prevents the court from knowing what to enforce]; accord, Patel v. Liebermensch, supra, 45 Cal.4th at p. 349.)

IV

Constitutionality

Lastly, Defendant contends the settlement agreement is unenforceable because binding mediation is not among the constitutionally and statutorily permissible means of waiving jury trial rights. We review claims concerning the construction and application of statutes de novo. (Critzer v. Enos (2010) 187 Cal.App.4th 1242, 1253.)

Under the California constitution, trial by jury is an inviolate right secured to all. Nonetheless, the parties to a civil case may consent to waive a jury trial as prescribed by statute. (Cal. Const., art. I, § 16.) The statutory means of waiving the right to a jury trial in a civil case are by: (1) failing to appear at the trial; (2) written consent filed with the clerk or judge; (3) oral consent, in open court, entered in the minutes; (4) failing to announce, at the appropriate time, that a jury trial is required; or (5) failing to deposit jury fees. (§ 631, subd. (a) & (d).)

Although binding mediation such as provided in parties' settlement agreement is not among the methods listed in section 631 for waiving a jury trial, this does not preclude enforcement of the settlement agreement. As the Supreme Court explained, "Section 631 . relates only to the manner in which a party to [a pending court] action can waive his right to demand a jury trial instead of a court trial. It does not purport to prevent parties from avoiding jury trial by not submitting their controversy to a court of law in the first instance. Indeed it has always been understood without question that parties could eschew jury trial either by settling the underlying

controversy, or by agreeing to a method of resolving that controversy, such as arbitration, which does not invoke a judicial forum." (Madden v. Kaiser Foundation Hospitals (1976) 17 Cal .3d 699, 713 (Madden), italics added.)

In this case, the parties agreed to settle their dispute through binding mediation in a nonjudicial forum. Thus, section 631 does not apply and any failure to comply with it does not render their agreement unconstitutional and unenforceable.

Grafton Partners v. Superior Court (2005) 36 Cal.4th 944 (Grafton), upon which the defendant relies, does not alter our conclusion. Grafton is readily distinguishable as it involved the validity of a predispute jury trial waiver in a judicial forum, to which section 631 indisputably applies. (Grafton, supra, at pp. 950–951.) It did not involve, as here, the validity of a postdispute jury trial waiver arising from a settlement and agreement to resolve the plaintiffs' claims against defendant in a nonjudicial forum, to which section 631 does not apply. (Madden, supra, 17 Cal.3d at p. 713.) As Grafton specifically recognized this distinction (Grafton, at p. 955), Grafton undermines rather than supports the defendant's position.

The absence of a statute expressly authorizing the type of dispute resolution process to which the parties agreed also does not alter our conclusion. Nothing in Madden or Grafton requires the existence of such a statute to avoid the application of section 631. Instead, whether a jury trial waiver must comport with section 631 depends on whether the parties have selected a judicial or a nonjudicial forum. (Grafton, supra, 36 Cal.4th at p. 955; Madden, supra, 17 Cal.3d at p. 713.) As the parties in this case selected a nonjudicial forum, section 631 has no bearing on the enforceability of their agreement.

DISPOSITION

The stay issued May 5, 2011, is vacated. The judgment is affirmed. Respondents are awarded their costs on appeal.

FOOTNOTES

1. Because it is not necessary for our resolution of the issues raised on appeal, we omit a summary of the alleged facts underlying the parties' claims.

FN2. Further statutory references are also to the Code of Civil Procedure unless otherwise stated.. FN2. Further statutory references are also to the Code of Civil Procedure unless otherwise stated.

3. Plaintiffs argue the trial court was mistaken and could have confirmed the award as an arbitration award. However, as plaintiffs did not file a cross-appeal, the propriety of this aspect of the trial court's decision is not before us. Similarly, as neither party disputes a motion under section 664.6 is a permissible mechanism for enforcing the parties' settlement agreement, we have no occasion to address this aspect of the trial court's decision.

4. The appellate court went on to criticize the concept of binding mediation. It did not, however, as defendant suggests, conclude an agreement for binding mediation is categorically unenforceable. (Lindsay, supra, 139 Cal.App.4th at p. 1624.) While we agree with our colleagues that the concept of binding mediation seems paradoxical, we also note it is a recognized dispute resolution method, at least in certain contexts. (See, e.g., Lab.Code, § 1164 [collective bargaining]; Frain v. Frain (1995) 213 Mich.App. 509, 510 [540 N.W.2d 741,742] [marital dissolution].) In addition, one commentator has described binding mediation as more flexible than arbitration because the mediator can request more information, documentation, or discussion and the parties and their counsel can more actively participate in the process. (Calkins article, supra, 58 Drake L.Rev. at p. 390.)

McCONNELL, P.J.

WE CONCUR: BENKE and HUFFMAN, JJ.

Binding Mediation

Previous Next

Late last month, the Court of Appeal for the Fourth Appellate District in California took up the issue of "binding mediation." Unlike an earlier case on the same topic that it took up in 2006 (*Lindsay v. Lewandowski* (2006) 43 Cal. Rptr. 3d. 846, 139 Cal. App. 4th 1618), this time this court determined that such an ADR procedure can exist.

In *Bowers v. Raymond J. Lucia Companies, Inc*., Case no. D059333 (May 30, 2012)(Bowers v. Raymond J. Lucia Companies), the appellate court found that the "binding mediation" agreement was certain enough in its terms to be enforceable and that the concept of "binding mediation" did not run afoul either of the California constitution or statutory law. (As the Court explained, "… in binding mediation, the mediator conducts a mediation, and, if a settlement is not reached, the mediator decides the matter by reaching a settlement figure."(*Id. at 11*.))

Plaintiff sued Raymond J. Lucia and others for defamation and related business torts. Lucia filed an arbitration proceeding against plaintiffs raising similar claims. Because the trial court ruled that the arbitration against plaintiffs should proceed, plaintiffs dismissed Lucia from their lawsuit so that the arbitration would proceed separately from the lawsuit. The arbitration hearing occurred before the trial. (*Id. at 2-3.)*

After several days of the arbitration hearing, the parties agreed to settle their dispute before the arbitration panel rendered a decision. But, the terms of the settlement agreement were odd; they, in essence, described a med-arb procedure:

Within a week after the arbitration, the parties signed a "Settlement Agreement and Release" (settlement agreement). Paragraph II.2 of the settlement agreement provided this case "shall be placed on the Superior Court dismissal calendar. The Parties shall then proceed to a mediation/binding baseball

arbitration with a mutually agreed-upon neutral within sixty days of the execution of this agreement. To wit, the Parties shall participate in a full day mediation. If, at the end of that mediation, the Parties have failed to reach an agreement, the mediator shall be empowered to set the amount of the judgment in favor of Plaintiffs against Raymond J. Lucia Companies, Inc. at some amount between $100,000 and $5,000,000, such binding mediator judgment to then be entered as a legally enforceable judgment in San Diego Superior Court without objection of any Party." (Id. at p. 4)

At the request of mediator, the parties modified the above agreement to read as follows:

At the mediator's request, the parties later modified the portion of paragraph II.2 of the settlement agreement beginning with "To wit" to provide "To wit, the Parties shall participate in a full day mediation. If, at the end of that mediation, the Parties have failed to reach an agreement, the Plaintiffs (Bowers, Seward, and LaBerge) shall provide to the mediator their last and final demand, which demand shall be some amount between $100,000 and $5,000,000, and the Defendants (Companies, Wealth Management, and Enterprises) shall provide to the mediator their last and final offer which offer shall be some amount between $100,000 and $5,000,000. The mediator shall then be empowered to set the amount of the judgment in favor of Plaintiffs against Raymond J. Lucia Companies, Inc. by choosing either Plaintiffs' demand or Defendants' offer, such binding mediator judgment to then be entered as a legally enforceable judgment in San Diego Superior Court without objection of any Party." The amendment further provided, "This amendment shall not impact any section of the Settlement Agreement not referenced above." (Id. at p. 5)

As one might guess, at the end of a full day of mediation, the parties were at an impasse. Plaintiff demanded $5 million while the defendant offered $100,000. After allowing the parties to submit further information for his consideration and meeting with defendant and his counsel, the mediator selected the $5 million figure as the settlement amount.

Plaintiff petitioned the court to confirm the mediator's award. Defendant, who had obtained new counsel, opposed the petition, arguing that the award was unenforceable as it was a "mediation" award, not an "arbitration" award. The trial court agreed and using California Code of Civil Procedure Section 664.6 providing for the enforcement of settlement agreements,

enforced the decision of the mediator as the settlement, concluding from the language of the agreement that the parties, in essence, agreed to a "binding baseball arbitration" or a procedure by which the mediator would pick the final number if the parties could not agree.

The appellate court affirmed finding that the settlement agreement was enforceable. Under California law, one element of enforceability is "mutual consent": the parties must all agree on the same thing in the same sense. (Civil Code Sections 1580 and 1636.). The appellate court found substantial evidence to support the trial court's finding of mutual consent:

*Here, the trial court found that, notwithstanding any labeling, the parties mutually agreed to a full-day mediation and, if there was no resolution at the end of the day, the mediator could make*a binding award by selecting from either the plaintiffs' final demand *or the defendant's final offer…. (Id. at 9-10.)*

Disagreeing with the defendant, the appellate court next determined that "binding mediation" is NOT an inherently uncertain term. Unlike the situation in *Lindsay v. Lewandowski, supra,* the terms of this settlement agreement were reasonably certain and so enforceable. In contrast, in *Lindsay v. Lewandowski, supra*, different versions signed by different parties existed, and certain of the provisions themselves were contradictory as some required "mediation" while others required "arbitration". Thus, it was impossible for that appellate panel to figure out the exact procedure intended by the parties. Here, the exact procedure was clearly spelled out. (*Id. at 12-15*).

Finally, the appellate court held that the procedure used was constitutional; it did not run afoul of a party's constitutional right to a jury trial. As the appellate court noted, while there is no statute expressly authorizing "binding mediation", this procedure IS extrajudicial, or outside of the judicial system; the parties have every right to select a non-judicial forum to settle their dispute. It thus, affirmed the judgment.

While I understand this appellate decision and its recognition of "binding mediation", to me it is still an oxymoron. As Presiding Justice Sill in his concurring opinion in *Lindsay v. Lewandowski, supra*, so succinctly stated:

I can think of nothing more self-contradictory than "binding mediation." Mediation is by definition a voluntary process which achieves a voluntary result, and is meaningful in distinction to "arbitration" in its very voluntariness. Or, to put it with more bite – mediation is distinctive from arbitration in its inherent lack of consequences. You go to mediation, you like it, you don't, you settle, you don't, no big deal. (*Id. at 851*.)

… Just something to think about!

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About the Author: Phyllis Pollack

Phyllis G. Pollack, Esq. the principal of PGP Mediation (www.pgpmediation.com), has been a mediator in Los Angeles, California since 2000. She has conducted over 1300 mediations. As an attorney with more than 35 years experience, she utilizes her diverse background to resolve business, commercial,

international trade, real estate, employment and lemon law disputes at both the state and federal trial and state appellate court levels. Currently, she is the incoming chair of State Bar of California's ADR Committee. She has served on the board of the California Dispute Resolution Council (CDRC) (2012-2013), is a past president and past treasurer of the SCMA Education Foundation (20112013) and a past president (2010) of the Southern California Mediation Association (SCMA). Ms. Pollack received her BA degree in sociology in 1973 from Newcomb College of Tulane University and her JD degree from Tulane University School of Law in 1977. She is an active member of both the Louisiana and California bars. Pollack believes that it is never too late to mediate a dispute and recommends mediation over litigation as it allows the parties to decide their own solutions.

Rent and Tenant Taskforce Meeting 6

DECEMBER 19, 2016

1

MEETING AGENDA

I. Roll Call
II. Approval of 12/5/16 Minutes
III. Unfinished Business - None
IV. Public Comments
V. Presentations
   A. Opening Remarks by Taskforce Members *(2 minute time limit)*
VI. Taskforce Discussion
   A. Consideration of extending the meeting time past 9 p.m.
   B. Final Voting on Options B and C
VII. Adjournment

2

Item IV.
Public Comments

3

Item V.A.
Opening Remarks

4

Item VI.A.
Extend Meeting Time

5

Item VI.B.
Final Voting on Options B and C

6

VOTING ON OPTIONS

Option B
- Tenant/Landlord Mediation – Binding

Option C
- Rent Stabilization and Just Cause Evictions

7

Tenant/Landlord Mediation (Binding)

OPTION B

- Oversight: 3rd Party Mediator
- Eligible Units: 2+ units
- Rent Increase Threshold: 7% or more
  (i.e. tenant/landlord can only request mediation if the rent increase is 7% or more)
- Landlord participation is mandatory
  (i.e. rent increase is null and void if landlord does not participate in the process)
- Recommendations are binding for pre-1995 multi-family units and non-binding for all other units
- Just cause eviction protections
- Harassment protections

8

Rent Stabilization & Just Cause Evictions

OPTION C

- Eligible Units: Pre-1995 multi-family units
- Rent Increase Threshold: % Change in CPI
- Allowed Pass Through Costs
  - Taxes
  - Fees
  - Capital improvements
  - Utilities
- Adjustment Banking – 3 years
  - If landlord doesn't raise the rent in a given year, they can bank or save their rent increase(s) for up to 3 years
- Just Cause Evictions
  - Not paying rent
  - Lease violations
  - Damaging the unit
  - Illegal activity
  - Unauthorized sublease (including Airbnb)
  - Owner/family occupancy
  - Substantial Rehabilitation (need to define)
- Harassment Protections

9