WILLIAMS, ZINMAN & PARHAM P.C.

ATTORNEYS AT LAW

www.wzplegal.com

Scott E. Williams *
Mark B. Zinman
Michael A. Parham**
Melissa A. Parham

SCOTTSDALE OFFICE PARK
7701 EAST INDIAN SCHOOL ROAD, SUITE J
SCOTTSDALE, ARIZONA 85251
(480) 994-4732
FAX (480) 946-1211

Legal Assistants: Denise Simpson, Vanessa Johnson, Chris Francis

ALSO LICENSED TO PRACTICE IN: *COLORADO **DISTRICT OF COLUMBIA

Mike@wzplegal.com
www.MichaelParhamLaw.com

October 28, 2014

Hon. Jerry Nabours
Mayor, City of Flagstaff and all
Council Members
Flagstaff City Hall
211 West Aspen Ave.
Flagstaff, AZ 86001

Re: ORDINANCE NO. 2014-29
Our Clients--Manufactured Housing Communities of Arizona, Inc. and Arizona Multihousing Association

Ladies and Gentlemen:

Manufactured Housing Communities of Arizona (MHCA) is the statewide organization representing the interests of manufactured housing communities and recreational vehicle parks across Arizona. Arizona Multihousing Association (AMA) is a statewide association representing the interests of residential rental dwelling landlords including apartment communities throughout Arizona. This letter is written on behalf of both organizations to alert you to serious legal and constitutional problems presented by the above referenced proposed ordinance.

The proposal is the result of the recent attempted change in use of Arrowhead Mobile Home Park. The owner of that property had a sale in escrow whereby the buyer would obtain a zoning change and convert the land to student apartments following a closure of the mobile home park and relocation of its tenants in accordance with state law.

Opposition to the closure of the park by certain elements in the Flagstaff area drove the developer away resulting in the cancelation of the sale and the landlord of Arrowhead continues to operate it as a mobile home park despite its obvious desire to get out of that business.

The proposed ordinance would condition a zoning change of land occupied by a mobile home park or multi-housing community on submission of a Relocation Impact Report (RIR) Plan prepared by a "Relocation Specialist" that the park or community owner would be required to employ. The proposal states: "the City Council intends to supplement the requirements of state law for the purpose of mitigating adverse impacts due to the displacement of tenants in conjunction with a Zoning Map amendment to another use" and further "the City Council

requires information from proposed developers or property owners about the assistance a developer may provide to displaced households that have reduced relocation options."

The text of the proposal makes it clear that burdens are intended to be placed on mobile home park and multi-family landowners to mitigate the problem of the lack of affordable housing in the Flagstaff area. For the reasons set forth below we believe such action is open to legal attack on constitutional and other grounds.

BRIEF ANALYSIS OF PROPOSED FLAGSTAFF RELOCATION ORDINANCE

Highlights of Proposed Flagstaff Tenant Relocation Ordinance

The draft ordinance begins with a number of introductory clauses including:

> WHEREAS, the City Council intends to supplement the requirements of state law for the purpose of mitigating adverse impacts due to the displacement of tenants in conjunction with a Zoning Map amendment to another use.

It then sets forth many substantive provisions in Section 1 including these:

It would amend the existing ordinance to add:

> Division 10-20.50 that will result in the closure of a manufactured home park or multi-family residential property and which displaces residents will require submittal and approval of a Relocation Impact Report (RIR).

Later that same section would add the following:

> An explanation of any relocation assistance that the applicant intends to provide for the estimated cost of relocating manufactured homes to available spaces. The explanation shall include whether the applicant intends to pay for the costs of physically moving or replacing exterior improvements to the manufactured home and movable improvements such as porches, steps, accessible ramps, carports, accessory structures, skirting and tiedowns. The explanation shall identify benefits provided by the Arizona Mobile Home Parks Residential Landlord and Tenant Act and those provided directly by the applicant. The explanation of assistance shall also include proposed costs, if any, for packing, moving, and unpacking of all personal property. The schedule for providing relocation assistance benefits and the name, address and contact information of the manufactured home mover.

These and virtually the entire balance of the draft make it clear that the purpose is to require private property owners/landlords to cover most or all of the relocations expenses incurred by tenants in moving when a change in land use is made.

Note: The Ordinance would apparently not apply if a landlord were to simply close the community without requesting a zoning change. Once closed and tenants are moved off, nothing would prevent the owner from then seeking the zoning change.

Private Property Rights Protection Act

This Ordinance would likely violate this law that provides in pertinent part as follows:

> 12-1136. Definitions
>
> 3. "Land use law" means any statute, rule, ordinance, resolution or law enacted by this state or a political subdivision of this state that regulates the use or division of land or any interest in land or that regulates accepted farming or forestry practices.
>
> 12-1134. Diminution in value; just compensation
>
> A. If the existing rights to use, divide, sell or possess private real property are reduced by the enactment or applicability of any land use law enacted after the date the property is transferred to the owner and such action reduces the fair market value of the property the owner is entitled to just compensation from this state or the political subdivision of this state that enacted the land use law.
>
> . . .
>
> D. The owner shall not be required to first submit a land use application to remove, modify, vary or otherwise alter the application of the land use law to the owner's property as a prerequisite to demanding or receiving just compensation pursuant to this section.
>
> E. If a land use law continues to apply to private real property more than ninety days after the owner of the property makes a written demand in a specific amount for just compensation to this state or the political subdivision of this state that enacted the land use law, the owner has a cause of action for just compensation in a court in the county in which the property is located, unless this state or political subdivision of this state and the owner reach an agreement on the amount of just compensation to be paid, or unless this state or political subdivision of this state amends, repeals, or issues to the landowner a binding waiver of enforcement of the land use law on the owner's specific parcel.

It would be hard to argue with a straight face that a City imposing on a private landlord the very costly burden of paying relocation expenses of tenants for exercising its right of changing the use of its property would not diminish the value of the landlord's property. Under this law the landlord and all landlords similarly situated would be entitled to just compensation under the act for this diminution in value.

Constitutionality

A number of cases over the years have challenged similar ordinances on constitutional grounds. Landlords have met with great success in making these challenges. Two stand out:

1. ***Guimont v. Clarke,*** *121 Wn.2d 586 854 P.2d 1 (1993).* This is perhaps the seminal case in this area. Washington mobile home park operators challenged the constitutionality of a state relocation fund similar in many respects to the Arizona mobile home relocation fund (the Arizona fund has never been challenged). The Washington Supreme Court unanimously struck the fund statutes down on constitutional grounds. Here are some excerpts from its opinion that are relevant to the proposed Flagstaff ordinance.

> The issue in this case is the constitutionality of the Mobile Home Relocation Assistance Act, RCW 59.21, as amended in 1990. *See* Laws of 1989, ch. 201; Laws of 1990, ch. 171. When a mobile home park is closed, this law requires the park owner to contribute money toward the tenants' relocation costs. The Thurston County Superior Court struck down the law as unconstitutional under a number of different theories. We affirm on the grounds that the law violates the park owners' substantive due process rights.
>
> . . .
>
> The Fourteenth Amendment prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law...." U.S. Const. amend. 14, § 1. To determine whether a regulation violates due process, the court uses the classic 3-prong due process test. *(citation omitted).* We must determine "(1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the landowner."
>
> In this case, we must first decide whether the Act is aimed at achieving a legitimate public purpose. The purpose of the Act is to aid mobile home owners with relocation expenses when a mobile home park is closed. The State has a legitimate interest in addressing the statewide problem of relocation expenses associated with mobile home park closings. Making funds available to mobile home owners who are forced to relocate substantially advances that interest. Thus the Act passes the test of the first due process question.
>
> Under the second due process question, we must determine whether the means used are reasonably necessary to achieve that purpose. Whether the means employed are reasonably necessary to achieving the Act's purpose is debatable. Certainly, providing mobile home owners with relocation assistance would be a reasonably necessary step in achieving the Act's purpose. The more difficult issue here is whether it is reasonably necessary to require the assistance to be paid by the closing park owner. To assist in determining whether these means used by the Act are reasonably necessary in all regards, we must turn to the third due process question, that of undue oppression.
>
> In *Robinson v. Seattle, supra,* we recently struck down a city ordinance as unduly oppressive where the ordinance required, among other things, relocation assistance to tenants displaced when landowners demolished low income housing on the owners' property. *(citation omitted).* We stated:

> The problems of homelessness and a lack of low income housing in Seattle are in part a function of how all Seattle landowners are using their property.... This court has already said of the [housing ordinance] that solving the problem of the decrease in affordable rental housing in the city of Seattle is a *burden to be shouldered commonly and not imposed on individual property owners.*

(Italics ours.) *(citations omitted)*. Likewise, in this case, the costs of relocating mobile home owners, like the related and more general problems of maintaining an adequate supply of low income housing, are more properly the burden of society as a whole than of individual property owners. While the closing of a mobile home park is the immediate cause of the need for relocation assistance, it is the general unavailability of low income housing and the low income status of many of the mobile home owners that is the more fundamental reason why the relocation assistance is necessary. An individual park owner who desires to close a park is not significantly more responsible for these general society-wide problems than is the rest of the population. Requiring society as a whole to shoulder the costs of relocation assistance represents a far less oppressive solution to the problem.

In this regard, we deem it important that the increased costs imposed by the Act attach to the activity of leaving a business rather than of entering or conducting the business. The Department has cited a number of different cases in which this court has upheld the constitutionality of legislation requiring businesses to pay money to others, yet each of these cases involved costs incident either to entering or conducting the business. *(citations omitted)*. Owners of businesses in these earlier cases had the option of avoiding these costs by closing down and using their property for other purposes. The imposition of costs on closing a business cannot be avoided in this manner.

We conclude the Act is unduly oppressive and violates substantive due process. In light of this holding, we need not address the other challenges to the trial court's summary judgment order raised by the Department.

Imposing the costs of dealing with the lack of affordable low income housing in the Flagstaff area is every bit as much an oppressive burden on Flagstaff mobile home park and multi-family community operators as the same practice was in Washington. If conditions in the City of Flagstaff have created this situation, it is oppressive and profoundly unfair to impose the costs of dealing with them on a landowner wishing to exercise its right to change use of its land.

2. ***Levin, et. al., v. City and County of San Francisco,*** *No. 3:14-cv-03352-CRB USDC, ND CA (2014).* The U.S. District Court in San Francisco decided this case on October 21, 2014. Under a San Francisco ordinance, rental property owners who wanted to reclaim use of their own property were required to pay large sums to their tenants — money that the tenants didn't even have to use for relocation purposes. The Court struck the ordinance down as unconstitutional. Here are some excerpts from that memorandum decision:

> San Francisco's housing shortage and the high market rates that result are significant problems of public concern, and the City legislature's attempts to ameliorate them are laudable. "[B]ut there are outer limits to how this may be done. A strong public desire to

> improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *(citation omitted).* The Constitution prohibits the City from taking the policy shortcut it has taken here, in which the City seeks to "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *(citation omitted).* The Ordinance apparently is unprecedented in requiring a massive lump-sum payout from one private party to another in exchange for regaining possession of property. But that trail had not been blazed before for good reason. In so doing, the City has crossed the constitutional line between permissible government regulation of land and an impermissible monetary exaction that lacks an essential nexus and rough proportionality to the impact of an Ellis Act withdrawal.

Both of these (and many more) decisions essentially prohibit government from imposing on private landowners the expense of dealing with societal problems which present themselves when the landowners try to exercise their right to change the use of their land.

The State Has Preempted the Field

The mobile home parks relocation fund statutes were first enacted in 1987 (Laws 1987, Ch. 232). The statement of legislative intent that constituted section 1 of H.B.2243 declared, in part:

> The legislature recognizes that the relationship between the owner of a mobile home ... and the owner of a space which is rented to the owner of a mobile home is unique in terms of property rights and management ... This act applies when mobile homes are placed on rented spaces.

ARS §33-1406 provides that the Act applies to all such relationships in the State of Arizona.

Shaffer v. Alt, 25 Ariz. App. 565, 545 P.2d 76 (1976) held that a charter city may exercise powers only insofar as they are consistent with the State Constitution and do not conflict with State legislative enactments which have appropriated the field in an area of general statewide concern. *Flagstaff Vending Co., v. City of Flagstaff*, 118 Ariz. 556, 578 P.2d 985 (1978) declared that where the subject is of statewide concern and the Legislature has appropriated the field by enacting a statute pertaining thereto, that statute governs throughout the State, and local ordinances contrary thereto are invalid.

A number of recent cases touch on this subject. *City of Tucson v. Pima County*, 199 Ariz. 509, 19 P.3d 650 (App., 2001) held that municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as entrusted to them. Ultimate control over them resides with the State. *Kimple v. City of Page*, 199 Ariz. 562, 20 P.3d 605 (App., 2001) held that if State law directs a city's legislative body to do a particular duty in a certain manner, the duty must be done in that manner. *City of Casa Grande v. Arizona Water Co.*, 199 Ariz. 547, 550, 20 P.3d 590, 593 (App., 2001) put it succinctly:

> Article 13, §2 of the Arizona Constitution clarifies the relationship between charter cities and the State by declaring that a city charter "must be consistent with and subject to, the Constitution and the laws of the State".

Or, as the Court put it in *City of Tucson v. Grezaffi*, 200 Ariz. 130, 135, 23 P.3d 675, 680 (App., 2001):

> When the subject is also of statewide concern and the Legislature clearly has appropriated the field by enacting a pertinent, governing statute, however, that statute controls and renders any contrary local ordinances invalid.

See also, *City of Tucson v. Arizona Alpha of Sigma Alpha Epsilon*, 67 Ariz. 330, 195 P.2d 562 (1948) which held that where the Legislature enacts a statute of statewide concern, and it is apparent that the Legislature has appropriated the field and declared the rule, its declarations are binding throughout the State and all municipalities are precluded from legislating on the same subject matter.

Conclusion

Placing the burden of financially subsidizing tenants in finding replacement housing when a mobile home park or multi-family community wants to change the use of its land is fundamentally unfair. The landlord had nothing to do with the societal problems in the Flagstaff area that has made housing unaffordable to persons of limited means. In fact, as was the case with Arrowhead Mobile Home Park, the landlord in the past has mitigated the effect of those circumstances by providing affordable housing.

As the two cases involving relocation benefit obligations imposed on landlords cited above make clear, such actions are also unconstitutional. That alone, aside from the fact that the legislature has pre-empted the field insofar as mobile home tenant relocations are concerned and the fact that protected private property rights would be violated, is ample reason for the Council to reject this well intentioned but poorly thought out proposal.

Sincerely

Michael A. Parham

cc. Flagstaff City Attorney