IN THE SUPREME COURT FOR THE STATE OF ARIZONA

SEDONA GRAND, LLC.	)	Supreme Court No.
	)	CV12-0080PR
Plaintiff / Appellant /	)	
Cross Appellee,	)	Court of Appeals, Division
	)	One No.
vs.	)	1 CA-CV 10-0782
	)	
CITY OF SEDONA,	)	
	)	Yavapai County Superior
Defendant / Appellee /	)	Court No.
Cross Appellant.	)	V-1300-820080129
	)	
	)	
	)	

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN OPPOSITION TO CITY OF SEDONA'S PETITION FOR REVIEW

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INTRODUCTION

Alarmed by the vulnerable state of their property rights, in 2006 Arizona voters overwhelmingly approved the Private Property Rights Protection Act ("PPRPA"), A.R.S. § 12-1134 *et seq.*, to secure meaningful protection for their right to own and use private property. Prior to PPRPA, Arizona's Constitution contained basic eminent domain protections, but courts often allowed government to eliminate owners' rights to use their property without compensating them. *See, e.g., Ranch 57 v. Yuma*, 152 Ariz. 218, 226, 731 P.2d 113, 121 (App. 1986). PPRPA remedied this problem by creating a strong new safeguard for property owners under which the costs of public policies must be borne by the public as a whole and not solely by private property owners.

But now that they cannot deprive owners of their rights without compensation, cities across Arizona are now seeking ways to avoid making injured owners whole. One of these is Sedona ("the City"), where it is now a crime, subject to punishments of up to six months in jail and/or a $2,500 fine, to rent one's residential property for fewer than 30 days. Sedona, Ariz., Code §§ 8-4-1 to 8-4-6. The City has broadly defined "rent"[1] to encompass a wide range of

[1] "[C]onsideration or remuneration charged, whether or not received, for the occupancy of space in a short-term vacation rental, valued in money, whether to be received in money, goods, labor or otherwise, including all receipts, cash, credits, property or services of any kind," which "may include consideration or remuneration received pursuant to an option to purchase whereby a person is given

activities, including purchasing a time share, contracting for home improvements, and even hiring a babysitter. *Sedona Grand, LLC v. City of Sedona*, 229 Ariz. 37, 868 (App. 2012). Seeking to avoid liability, the City even tried to masquerade its ban on short-term rentals as a "health and safety" regulation, exempted from PPRPA.[2] The court of appeals wisely saw through that façade, holding that the City cannot evade PPRPA by the bald assertion that its ordinance protects public health and safety. If cities can exempt themselves from PPRPA by fiat, property owners would lose any meaningful protection against regulatory takings and PPRPA would become a nullity.

Pursuant to Ariz. R. Civ. App. P. 16(b) and this Court's May 11, 2012, order, the Goldwater Institute respectfully submits this amicus curiae brief in opposition to Petitioner/Appellee/Cross-Appellant City of Sedona's Petition for Review. This Court should deny the City's Petition because (1) the court of appeals properly held that the government bears the burden of demonstrating that a land use law is exempted from PPRPA, and (2) the statute of limitations and other procedural requirements of A.R.S. § 12-821 *et seq.* (general notice of claim statute)

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a right to possess the property for a term of less than 30 consecutive days." Sedona, Ariz., Code §§ 8-4-3.

[2] Even worse, the City now seeks to deny property owner Sedona Grand its day in court by claiming the lawsuit is time barred. This argument confuses the requirements of PPRPA with those of the general notice of claim statute and results in procedural absurdities. *See infra* Section II.

are inapplicable to claims under PPRPA. Accepting the City's argument would eviscerate statutory protections accorded to property owners by placing a *greater* burden on property owners – the opposite of what voters sought to achieve when enacting PPRPA.

ARGUMENT

I. The court of appeals properly held that government bears the burden of proving a land use law is exempt from PPRPA

PPRPA states that the *government* bears the burden of proving that a land-use law is exempt from the compensation requirement: "*This state or the political subdivision…has the burden of demonstrating* that the land use law is exempt pursuant to subsection B." A.R.S. § 12-1134(C) (emphasis added). Thus, the court of appeals properly held that governments "must establish by a preponderance of the evidence that the law was enacted for the principal purpose of protecting the public's health and safety before the exemption can apply," and there is no need for this Court's review. *Sedona Grand*, 229 Ariz. 37, __, 270 P.3d 864, 869 (App. 2012). Yet the City remarkably contends that it may simply pronounce its own land-use law exempt, and that such pronouncements "should not be disturbed by a court absent fraud, or arbitrary and capricious conduct." (City's Pet. Rev., 6.) Far from advancing a respect for "the separate branches of government" (*id.* at 5), this argument ignores the plain language of PPRPA and would insulate legislative decisions from the other branches and the people.

a. PPRPA requires meaningful judicial review of purported exemptions

Prior to PPRPA, Arizona courts did not require the government to compensate property owners for regulatory takings, except when regulations barred an owner from using land "for *any* purpose to which it is reasonably adapted." *Ranch 57*, 152 Ariz. at 226, 731 P.2d at 121 (emphasis added). That rule protected property owners only against complete wipeouts. PPRPA eliminated this extreme rule. It requires instead that government compensate a property owner for *any* land-use regulation that causes *any* reduction in property value, unless it falls under an enumerated exception. *See* § 12-1134(A)-(B). As the Arizona Supreme Court recognized, PPRPA "expand[s] the definition of regulatory takings" and "require[s] the [government] to pay just compensation to landowners for decreases in private property values caused by state land use laws." *League of Ariz. Cities & Towns v. Brewer*, 213 Ariz. 557, 558, 146 P.3d 58, 59 (2006). But the strongest property-rights protections on earth are no more than mere "parchment barriers against the encroaching spirit of power" if government can eliminate them by mere *ipse dixit*. *See* The Federalist No. 48 at 305 (James Madison) (C. Rossiter, ed. 1999). PPRPA would be rendered hollow if cities could negate it by merely asserting without foundation in fact that their restrictions on property rights are exempt.

Not only is such a reading of the exemption provision unwarranted by

PPRPA's language, but deference of *any sort* is unjustified in PPRPRA cases.[3] PPRPA declares that "property rights are fundamental rights," and that "the right to acquire, possess, control and protect property" is "inalienable." A.R.S. Title 12, Ch. 8, art. 2.1, § 2(B).[4] Of course, "[a]ny [law] that 'is aimed at limiting a fundamental right' . . . is subject to strict scrutiny." *Bertleson v. Sacks Tierney, P.A.*, 204 Ariz. 124, 126, 60 P.3d 703, 705 (App. 2002) (quoting *Ariz. Downs v. Ariz. Horsemen's Found.*, 130 Ariz. 550, 555, 637 P.2d 1053, 1058 (1981)). Deference to legislative findings is therefore unwarranted—much less the almost total deference the City seeks. It balks at being required to provide *any* evidence, and asks this Court to forgo review of its regulations whenever it merely asserts that a regulation promotes public health and safety.

The City laments the lower court's holding that "the government body must do more than incant the language of a statutory exemption to demonstrate that it is grounded in actual fact" (City's Pet. Rev. at 4 (citing *Sedona Grand*, 229 Ariz. 37

[3] The cases the City cites in advocating for a lower standard of review are inapplicable because they predate PPRPA. (*See* City's Pet. Rev. at 6-7 (citing *City of Phoenix v. Superior Court*, 137 Ariz. 409, 412-13, 671 P.2d 387, 390-91 (1983) (an *eminent domain* case predating PPRPA by over 20 years); *City of Phoenix v. Fehlner*, 90 Ariz. 13, 17, 363 P.2d 607, 609-10 (1961) (a *zoning* case predating PPRPA by over 40 years)). To the extent that those cases have any relevance, they illustrate the state of the law that prompted voters to limit the discretion of the legislature.

[4] Ballot arguments are probative of the intent of voters in enacting a proposition. *See, e.g., Ariz. Early Childhood Dev. & Health Bd. v. Brewer*, 221 Ariz. 467, 469, 212 P.3d 805, 807 (2009).

at 870)), and complains that "[t]his distrust of legislative bodies is misplaced." (*Id.* at 4.) But it was this very distrust of legislative bodies, based on a history of abuse, that impelled Arizonans to enact PPRPA. *See* A.R.S. Title 12, Ch. 8, art. 2.1, § 2(A)(4) (providing examples of regulatory takings abuse in Arizona). When PPRPA was on the ballot, supporters championed the limitations it imposed on government, noting that PPRPA "limits and tightens the government's ability to effectively 'take' your property by placing unfair and unreasonable regulations on it." Arizona Secretary of State General Election Publicity Pamphlet, November 7, 2006, Ballot Propositions ("Publicity Pamphlet"), at 181, 184. Meaningful judicial review that enforces PPRPA and forbids governments from shifting regulatory costs to individual property owners furthers PPRPA's purpose by pushing legislators "to err on the side of protecting citizens' constitutional rights." *See Owen v. City of Independence, Missouri*, 445 U.S. 622, 652 (1980).

b. Even under a deferential standard of review, governments are not entitled to exercise unchecked power

What Sedona seeks is nothing less than carte blanche to impose the costs of regulations on property owners. The City complains that the court of appeals' refusal to accept its *ipse dixit* "infringes upon the legislative discretion of the City Council" (City's Pet. Rev. at 3), and "blurs the line between the separate branches of government." (*Id.* at 5.) But while it has discretion to act within its lawful authority, a city council cannot insulate itself from judicial scrutiny and PPRPA's

statutory protections.[5] Especially under the vigorous safeguards of PPRPA, "where the will of the [City], declared in its [ordinances], stands in opposition to that of the people, declared in the [PPRPA], the judges ought to be governed by the latter rather than the former." Federalist No. 78, *supra* at 466.

The court of appeals' ruling did not subject the City to demanding scrutiny, despite PPRPA's strong protections and establishment of property rights as "fundamental." A.R.S. Title 12, Ch. 8, art. 2.1, § 2(B); *see infra* § 1(A). Rather, the court applied a modest preponderance-of-evidence standard that simply requires the City to show that it banned short-term "rentals" for the principal purpose of protecting public health and safety. *Sedona Grand, LLC*, 229 Ariz. at __, 270 P.3d at 869. In fact, PPRPA explicitly requires the government to prove "by clear and convincing evidence" that an exercise of eminent domain is necessary to eliminate health and safety threats. A.R.S. § 12-1132(B).

Before PPRPA, courts invalidated land-use regulations that were "arbitrary and unreasonable" and lacked a "substantial relation to the public health, safety, morals or general welfare." *See, e.g., City of Phoenix v. Oglesby*, 112 Ariz. 64, 65,

[5] Even under the deferential rational basis test, Arizona courts do not give governments the free rein Sedona demands here. *See, e.g., State Compensation Fund v. Symington*, 174 Ariz. 188, 194, 848 P.2d 273, 279 (1993) (invalidating tax statutes); *Big D Constr. Corp. v. Ct. of Appeals*, 163 Ariz. 560, 566, 789 P.2d 1061, 1067 (1990) (striking down bid preference statute); *Tucson Elec. Power Co. v. Apache County*, 185 Ariz. 5, 12, 912 P.2d 9, 16 (App. 1995) (invalidating differential tax treatment).

537 P.2d 934, 935 (1975) (citation omitted). This was the baseline standard *before* voters enacted the PPRPA's heightened protections, so at the very least, the land-use law must be substantially related to public health and safety. *See id.* Even this lenient standard did not allow cities to exempt themselves from the duty to compensate whenever they merely *asserted* that a law served public health and safety.

Permitting government to circumvent PPRPA without evidence that a regulation is exempt would be particularly detrimental in cases where, as here, PPRPA suggests the regulation would trigger compensation. Notably, PPRPA does *not* include "general welfare" among its exemptions. § 12-1134(B). As the court of appeals recognized, "the nexus between prohibition of short-term occupancy and public health is not self-evident" and "neighborhood character and public health are entirely distinct concepts." *Sedona Grand*, 229 Ariz. 37 at 870. Indeed, when PPRPA was on the ballot, even its *opponents* agreed that a regulation maintaining a particular neighborhood character would not be exempted from the law's compensation requirements. *See* Publicity Pamphlet, at 185 ("Examples of actions that could trigger lawsuits and payments" if PPRPA became law include "enactment of neighborhood preservation codes," "historic overlay zoning" and "neighborhood preservation measures").

If having to provide evidence that a land-use regulation was actually passed

for its stated purpose means governments sometimes will have to pay for the property rights they diminish, this Court should leave that result undisturbed. It simply means PPRPA is being enforced as voters intended.

II. The requirements of A.R.S. § 12-821 *et seq.* are inapplicable to PPRPA claims

The City also attempts to evade PPRPA liability for its restrictive land-use law by contending that Sedona Grand's entire lawsuit is time-barred because it did not file its notice of claim for just compensation and subsequent lawsuit in accordance with the general notice of claim statute's respective 180-day and one-year limitations periods. (*See* City's Pet. Rev. at 12.) Even assuming *arguendo* that Sedona Grand's cause of action accrued on February 28, 2007, as the City claims (*see id.* at 13),[6] Sedona Grand's notice of claim letter and subsequent lawsuit were timely filed under PPRPA's *three-year* statute of limitations.[7] Thus, this Court should deny the City's Petition for Review on the issue of timeliness.

a. HB 2319 clarifies that A.R.S. § 12-821 does not apply to claims under PPRPA

[6] This date cannot be the correct cause of action because Sedona Grand's PPRPA claim was brought under the City's *new* January 22, 2008, ordinance. *See Sedona Grand*, 229 Ariz. at __, 270 P.3d at 866.

[7] Sedona Grand sent its PPRPA notice letter on February 25, 2008 (Cross-Pet. Rev. at 3), and subsequently filed this lawsuit on May 27, 2008 (*id.*), both well within three years of *either* the 2007 or 2008 cause of action dates.

On March 28, 2012, Governor Jan Brewer signed HB 2319[8] into law, to clarify that the state's notice of claim statute, A.R.S. § 12-821 *et seq.*, does not apply to PPRPA claims. The legislature found that "compelling a property owner to comply with both pre-suit requirements rather than just PPRPA's requirements burdens property rights and appears to contravene PPRPA's intent to secure greater protection for property rights." HB 2319, § 2.

HB 2319 applies to the present case. Changes to procedural laws are typically applied to pending lawsuits. *See State Comp. Fund v. Fink*, 224 Ariz. 611, 614, 233 P.3d 1190, 1193 (App. 2010) (a new law expanding the right to intervene in lawsuits allowed an intervention in an ongoing case filed prior to the new rule because it was a procedural statute); *State v. Warner*, 168 Ariz. 261, 264, 812 P.2d 1079, 1082 (App. 1990) (same). Although Arizona law prohibits application of retrospective laws, that prohibition applies only to laws altering *substantive* rights, not to procedural changes. *Id.*; *State v. Aguilar*, 218 Ariz. 25, 32, 178 P.3d 497, 504 (App. 2008). "Substantive law creates, defines and regulates rights while a procedural law establishes only the method of enforcing such rights or obtaining redress." *Aranda v. Industrial Comm'n*, 198 Ariz. 467, 470-471, 11 P.3d 1006, 1009-10 (2000) (citations omitted). Because HB 2319 is a procedural law that overrules a judicial misapplication of pre-suit procedures under

[8] Available at http://www.azleg.gov/legtext/50leg/2r/laws/0110.pdf (visited June 5, 2012).

PPRPA, it applies to Sedona Grand's lawsuit.

b. Requiring a property owner to comply with both statutes is illogical and antithetical to the purpose of PPRPA

Even assuming *arguendo* that this Court determines HB 2319 does not apply to this case, the pre-suit requirements of PPRPA supersede those of the general notice of claim statute, and thus the three-year statute of limitations prevails over the older statute's one-year period.

PPRPA and the general notice of claim statute are incongruent in several ways. First, they establish different time limits for submitting claim prerequisites. Section 12-821.01(A) requires a plaintiff to send a notice of claim letter within *180 days* from the time the cause of action accrues. But PPRPA's § 12-1134(G) contains no such deadline for sending a demand letter – only a *three-year* statute of limitation for bringing an action for just compensation. Second, the statutes establish different time periods for the denial of a claim or demand letter. Under § 12-821.01(E), a notice of claim letter is deemed denied by the public entity after *60 days*. But under § 12-1134(E), the demand letter is deemed denied if a land use law continues to apply after *90 days*. Finally, the statutes set different deadlines for filing. Section 12-821 establishes a *one-year* statute of limitations, while Section 12-1134(G) provides for *three-years*. PPRPA's expanded statute of limitations period, lack of a separate time limit for sending a demand letter, and expanded negotiation period for settling claims all reflect its unique structure and

its incompatibility with the previous, more general law.

It is a commonplace of statutory construction that reading statutes together in such contorted ways is unacceptable. *Williams v. Thude*, 188 Ariz. 257, 259, 934 P.2d 1349, 1351 (1997). Generally, "[i]f two statutes appear to conflict, and one is more recent and specific, it usually will override the more general statute." *Minjares v. State*, 223 Ariz. 54, 63, 219 P.3d 264, 273 (App. 2009) (citations omitted). Because the notice of claim statute is the older and more general statute, *see* § 12-821.01, *added by* Laws 1994, Ch. 162, § 2 (preceding PPRPA by over a decade), the notice of claim requirements in PPRPA must prevail. Since PPRPA and the notice of claim statute conflict, applying the two together would require cherry-picking from one statute over the other.

Even if the statutes could be read together, applying both would result in absurd requirements. Together they would require property owners to send both a demand letter and a notice of claim, which is at best futile and tedious if one letter can fulfill both requirements, but at worst extends the time period one must wait before filing a lawsuit, if the letters must be sent separately.[9] Either way, the government derives no benefit from receiving notice under both statutes, and the property owner is burdened more than he would have been had PPRPA never been

[9] A property owner would first have to send a demand letter, wait 90 days for it to be deemed denied, then send a notice of claim letter and wait another 60 days for *that* to be denied.

enacted. [10]

Likewise, the PPRPA demand process is informal, which allows property owners to submit claims without legal counsel. It would defeat the purpose of the remedial legislation to create a trap for the unwary, which even an attorney, much less a layperson, would not discover when reading its instructions. The only "notice" that compliance with both statutes is required would come from a judicial opinion, which an attorney or layperson would have no reason to look for, given PPRPA's clear language. A judicially-created duplicative and redundant claim requirement presses the boundaries of due process.

This Court should deny the City's Petition for Review on the question of timeliness. Alternatively, it should hold that the general notice of claim statute's one-year statute of limitation does not apply to claims for just compensation under PPRPA.

CONCLUSION

The language of and purpose behind PPRPA establish solid protections for

[10] Such was a Florida appellate court's reasoning in determining the applicable statute of limitations in a case brought under the Harris Private Property Protection Act ("HPPPA"), Fla. Stat. § 70.001 (1995), similar to Arizona's PPRPA. In *Russo Associates, Inc. v. City of Dania Beach Code Enforcement Bd.*, 920 So.2d 716 (Fla. Dist. Ct. App. 2006), the government argued that the property owner's lawsuit was barred by the statute's one-year deadline for presenting a claim. *Id.* at 717. The court held that the property owner was entitled to her day in court: because HPPPA's purpose was to provide additional relief for property owners, it made little sense that the Act would impose a *shorter* statute of limitations on those lawsuits. *Id.*

Arizona property owners and strengthen their ability to challenge regulations that diminish their property values. Giving officials power to evade the compensation requirement by fiat and compelling property owners to comply with an extra pre-suit requirement would burden property owners and contravene the intent of Arizona voters.

DATED: JUNE 8, 2012

RESPECTFULLY SUBMITTED,

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