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IN THE SUPERIOR COURT OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

MICHAEL GOODMAN, in his individual capacity and as beneficiary of MAG Exempt Trust Holdings,	Case No.: C2008-1560
Plaintiff,	**Response to Defendant's Motion to Dismiss as Moot Pursuant to Rule 56**
vs.	
CITY OF TUCSON,	Oral argument requested.
Defendant.	*Hon. Paul Tang*

Defendant City of Tucson moved ("Mot.") to have this case dismissed as moot pursuant to Rule 56, Arizona Rules of Civil Procedure, on the basis that the law challenged in this lawsuit, which was the cause of the damages sought, was declared unconstitutional on other grounds in a different lawsuit and subsequently was repealed by the City Council. For the reasons in plaintiff's statement of facts ("SOF") and below, the lawsuit is not moot for two reasons, either of which is sufficient to sustain the action: (1) plaintiff's claims for damages remain outstanding, and (2) the City has not satisfied its burden of demonstrating that it will not re-enact the law.

Argument

The City contends that the lawsuit is moot because the Private Property Rights Protection Act specifically provides only for damages for diminution in property value and provides alternatively for

the repeal of a law; and that the appropriate remedy for plaintiff's constitutional injury is an injunction, which is unnecessary because the law was repealed. On motion for summary judgment, the evidence must be viewed in the light most favorable to the non-moving party. *Thompson v. Better-Bilt Aluminum Products Co., Inc.*, 171 Ariz. 550, 558, 832 P.2d 203, 211 (1992). "A motion which has such final and serious consequences as one to dismiss an appeal should not be presented or decided perfunctorily." *In re Henry's Estate*, 6 Ariz.App. 183, 188, 430 P.2d 937, 942 (App. 1967) (citation omitted). Yet in raising the issue here, the City overlooks the substantial damages suffered by plaintiff as a consequence of the unconstitutional ordinance, and fails to establish that it will not resurrect the law.

At the federal level, the mootness doctrine derives from the case or controversy requirement of U.S. Const. Art. III, § 1, see *N.C. v. Rice*, 404 U.S. 244, 246 (1971). Although Arizona has no such requirement, as a prudential matter, Arizona courts will not decide moot cases. "We will make an exception, however, to consider a question of great public importance or one which is likely to recur even though the question is presented in a moot case." *Fraternal Order of Police Lodge 2 v. Phx. Emp. Rel. Bd.*, 133 Ariz. 126, 127, 650 P.2d 428, 429 (1982). Under both the state's mootness doctrine and the more stringent federal standards, this case is not moot.

I. Damages

All parties acknowledge that for 18 months and one day, plaintiff and other property owners were subjected to the requirements of an unconstitutional law. The City's position is that because it finally did the right thing—prodded helpfully by a Superior Court ruling striking down the law—that the slate is wiped clean and everything is as good as new. Not quite. As attested in his declaration, plaintiff suffered substantial and ongoing damages as a consequence of the unconstitutional ordinance. "If there

is a reasonable view of the evidence that will support punitive damages the question should be left to the jury," and on motion for summary judgment, the "evidence of the non-movant is to be believed." *Thompson*, 171 Ariz. at 558, 832 P.2d at 211 (citations omitted).

The City appears to concede that the case is not moot if plaintiff has a remaining claim for damages. It is without question that "so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case." *Buckhannon Bd. & Care Home v. W. Va. Dep't of Housing & Human Res.*, 532 U.S. 598, 608-09 (2001); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 8 (1978). See generally 13C C. Wright, A. Miller & E. Cooper, *Fed. Prac. & Proc.*, § 3533.3 (2d ed. 1984).

In understanding how the issue of damages keeps the case a live controversy, it is helpful first to consider plaintiff's measure of damages. A proper determination of the measure of damages depends on the circumstances. Arizona law for damages under the regulatory takings statute implicated here is undeveloped, but the same principles apply for ordinary constitutional takings laws, as well as for the damages resulting from the enforcement of an unconstitutional law (also implicated here). In the takings context, the Arizona Supreme Court declared, "It is our intent to compensate a person for the losses he has actually suffered by virtue of the taking." *Corrigan v. City of Scottsdale*, 149 Ariz. 538, 543-44, 720 P.2d 513, 518-19 (1986). "The damages awarded and the way to measure those damages thus may be adapted to compensate the party whose land has been taken for his actual losses." *Id.*, 149 Ariz. at 544, 720 P.2d at 519.

One measure is lost rental income. See, e.g., *Kimball Laundry Co. v. U.S.*, 338 U.S. 1, 7 (1949); *Reichs Ford Rd. Jt. Venture v. State Roads Comm'n of the State Hwy. Admin.*, 880 A.2d 307, 313 (Md.

2005). Here, plaintiff states in his declaration that the anti-demolition ordinance forced him to delay or reconfigure developments, which resulted in increased costs and permanently reduced rental income (SOF 3). The ordinance caused a reduction in the fair market value of plaintiff's property that, contrary to the City's wishful assertions, was not miraculously recovered with the belated repeal of the City's ordinance. Plaintiff should be allowed to prove those damages pursuant to both his statutory and constitutional claims.

Statutory claim. The City asserts the statutory claim (A.R.S. § 12-1131 et. seq.) no longer gives rise to damages because (1) the statute gives the City the right to revoke the offending regulation instead of paying compensation, and (2) the value of the property has been restored by revocation of the ordinance. The City is wrong on both counts. First, A.R.S. § 12-1134(E) allows a City to avoid paying just compensation by repealing the regulation *only if it acts within 90 days of the property owner's demand for compensation.*[1] Here, the City repealed the regulation 13 months after the 90-day grace period expired—and, of course, only after the Court declared it unconstitutional. The conditions set forth in the statute govern merely *when* the cause of action accrues; they do not operate to *destroy* or moot a mature claim.

It would be perverse to allow a City to avoid paying just compensation by repealing the law after it has been declared unconstitutional. In this case, counsel for the plaintiff and defendant agreed to litigate separately the issues of liability and damages. It would be a neat trick for the City to lose on liability, only to defeat a damage claim by thereafter repealing the law. The injustice is hardly

[1] The City (Mot. p. 4) concedes that the procedure allowing for repeal prior to the accrual of a claim is limited in time.

attenuated by the fact that the law here was declared invalid in a different lawsuit. Plainly the people of Arizona, in enacting the property rights statute, intended that a damages claim is perfected once the 90-day grace period for the City to repeal the regulation expires. Plaintiff alleges in his Complaint and declaration (SOF 4) that the anti-demolition ordinance significantly diminished the market value of his property, and he should be allowed to prove those damages.

Damages are appropriate even when a law has been repealed and there is only a finite time period in which plaintiff's action for damages accrued. In *Ariz. State Bd. of Directors for Jr. Colleges v. Phoenix Union High Sch. Dist. of Maricopa County*, 102 Ariz. 69, 70, 424 P.2d 819, 820 (1967), a junior college school district appealed the decision rejecting its claim for state aid under integration statutes. The following year, an integration plan for the school district was approved by legislators and voters. *Id.*, 102 Ariz. at 73-74, 424 P.2d at 823. The Arizona Supreme Court held the case was not moot because there was still a question of whether the district was entitled to aid for the 1961-1962 year. *Id.*, 102 Ariz. at 74, 424 P.2d at 824. The Court further held, "The mere existence of a cloud, the denial of a right, the assertion of an unfounded claim . . . may constitute the operative facts entitling a party to declaratory relief." *Id.*, 102 Ariz. at 73, 424 P.2d at 823 (citation omitted); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478 n.1 (1989) (holding the expiration of the challenged ordinance did not render the constitutional claims moot because damages were incurred while the ordinance was effective). Plaintiff's case is just like the school district's. His claims are not moot, despite the change in legislation, because the question remains whether he is entitled to damages for the time the ordinance was effective. Plaintiff's rights and claims are clear and well-defined far beyond the mere "cloud" required for declaratory relief.

Plaintiff's statutory claim for damages is analogous to the law for damages in cases involving temporary takings of property. In *Corrigan*, 149 Ariz. at 541, 720 P.2d at 516, the Arizona Supreme Court held that "once a court establishes that there was a regulatory 'taking,' the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation." The Court observed that providing damages for temporary takings should encourage government officials "to stay well on the constitutional side of the line." *Id.*, 149 Ariz. at 542, 720 P.2d at 517. In accordance with this policy, plaintiff deserves the opportunity for this Court to establish that he suffered a temporary diminution in value under A.R.S. § 12-1134, and to prove just compensation for the resulting damages.

The City (Mot. p. 5) cites for mootness *Way v. State*, 205 Ariz. 149, 155-56, 67 P.3d 1232, 1238 (App. 2003). There, the finding of mootness is more limited than the City lets on, and in fact, the court considered evidence in the record on damages. In *Way*, a motorist alleged prejudice for having his driver's license improperly suspended for six weeks. The motorist continued to drive during that period and was never arrested for driving with a suspended license, but he nevertheless claimed damages on the basis that he "would have been subject to arrest." *Id.* The court found the question "hypothetical" and therefore moot. *Id.* However, the court looked for support in the record for a finding that the motorist had been prejudiced. *Id.*

While the court did not find the evidence there, it did in *Ciulla v. Miller*, 169 Ariz. 540, 541, 821 P.2d 201, 202 (App. 1991), where the record showed that the driver's license suspension impacted the motorist's driving record and insurance rates. In both cases, the court looked to the evidence to

determine whether a viable claim for damages existed. The dividing line is simple and clear: if there is a viable claim for damages, the case is not moot. Plaintiff's damages in this case find abundant support in the record (SOF 3), and such evidence must be taken as true in deciding the question of mootness raised in the City's motion.

The City (Mot. pp. 5-6) also cites for mootness *Webber v. Smith*, 129 Ariz. 495, 498-99, 632 P.2d 998, 1001-02 (App. 1981). The City erroneously conflates two different holdings in that case. First, the court affirmed the holding of the trial court that there was "no evidence [ ] of any actual losses incurred" from a wrongful attachment of property when the defendant did not list the property for sale. *Id.*, 129 Ariz. at 499, 632 P.29 at 1002. Again, the court considered the evidence at trial and did *not*, as the City asserts, dismiss the case as moot. The court in that case found a separate damages claim moot where damages were requested for a wrongfully taken truck and motorcycle that were subsequently returned to the owner. *Id.*, 129 Ariz. at 498, 632 P.2d 1001. The court noted that the owner "did not seek damages for loss of use during the period the items were held" wrongfully. *Id.* Here, plaintiff similarly requests damages for a property right he subsequently recovered; but in contrast to *Webber*, plaintiff does seek damages for his losses during the interim. Thus, his claim is not moot.

Constitutional claim. The City crucially overlooks the fact that the damages sustained by the plaintiff arise not only from the statutory claim, but from the constitutional claim as well. It is true that injunctive relief pertains only to the constitutional claim; but it does not follow that damages relief pertains only to the statutory claim. Plaintiff suffered injury both on account of a regulation that diminished the value of his property and from the application of an unconstitutional law.

The City contends that although the request for damages in the Complaint was not linked solely

to either the statutory or constitutional causes of action, that the claim is tied to solely the statutory claim. First, the Complaint served its purpose to put the City on notice that plaintiff seeks damages. This is all that is required in a notice pleading state such as Arizona. See *Rosenburg v. Rosenburg*, 123 Ariz. 589, 593, 601 P.2d 589, 593 (1979) ("We feel that plaintiff's complaint sufficiently placed defendant on notice of the relief sought"). Second, "[a] person cannot be forced to elect before the conclusion of trial the theory he will advance or the remedy he will seek." *Vinson v. Marton & Assoc.*, 159 Ariz. 1, 4, 764 P.2d 736, 739 (App. 1998). In *Vinson*, the court refused to dismiss as moot a complaint that requested only specific performance, even though specific performance became impossible. The court noted that if the plaintiff prevailed on the merits, he could simply amend his complaint to request damages in lieu of specific performance. *Id.*, 159 Ariz. at 4, 764 P.2d at 739 (citing Rule 15(b), Ariz. R. Civ. P., which mandates that pleadings be automatically conformed or amended to reflect evidence at trial). Likewise, if necessary, plaintiff here could move to amend the complaint to specifically request damages with respect to *both* statutory and constitutional claims following a presentation of evidence.

Yet such an amendment is not necessary where plaintiff's Complaint requests "other and further relief as justice and equity require and the Court deems appropriate." This relief includes damages resulting from an ordinance subsequently declared unconstitutional. In the ordinary course of litigation, circumstances often change in unanticipated ways following the filing of the Complaint, and the request for such "other and further relief" precisely encompasses the events here. The case is not moot where plaintiff's damages claims remain outstanding for the constitutional claims.

Damages are appropriate where an unconstitutional law, as here, causes actual injury. See, e.g.,

Thompson v. Carter, 284 F.3d 411, 418 (2d Cir. 2002); *Wheeler v. City of Pleasant Grove*, 896 F.2d 1347, 1349-50 (11th Cir. 1990); *City of Watseka v. Ill. Pub. Act. Council*, 796 F.2d 1547, 1559 (7th Cir. 1986). As the Arizona Supreme Court admonished in *Corrigan*, 149 Ariz. at 542-43, 720 P.2d at 517-18 (citation omitted), "Neither does invalidation [of an unconstitutional law] provide any deterrent impact; instead the city can and often does enact another similarly restrictive regulation and force the landowner to undergo another costly litigation battle. Without a damages remedy, invalidation alone is a toothless tiger 'capable of great roars about constitutional property rights but ineffectual in guarding against even obvious excesses resulting from multiple regulation'."

The City will almost certainly disagree over plaintiff's entitlement to damages, and to the appropriate measure or extent of damages. If it does, it only serves to underscore plaintiff's point that the damages issue presents a live controversy.

This Court need not determine the amount or even the proper measure of damages at this stage. It need only reject the City's effort to evade meaningful accountability for its unconstitutional actions. The fact that the City belatedly repealed the ordinance does not extinguish plaintiff's well-established claim for damages.[2]

II. Possibility of Recurrence

The *Corrigan* Court hinted at a separate, independent reason to deny a motion to dismiss on mootness grounds: the possibility that once the judicial angel disappears from the City's shoulder, the temptation to resume unconstitutional conduct may prove difficult to resist. In that event, forcing the plaintiff to start his case anew would not only unfairly tax his resources, but the City's and this Court's

[2] In addition to actual damages, the Complaint also seeks attorney fees.

resources as well. In such circumstances, the Court should resolve the legal challenge.

Here, the possibility that the City will resume the challenged activity is far from hypothetical. The *Button* decision that struck down the anti-demolition ordinance was based largely on procedural grounds, i.e. that the ordinance was adopted as part of the City's Building Code rather than as a zoning law. (SOF 5) In contrast to the *Button* lawsuit, the legal challenge here goes to the substance of the ordinance, not to the manner in which it was adopted or in which code it was adopted. In response to the *Button* decision, City officials might well determine that a procedural "fix" is all that is necessary to exhume the ordinance. If so, it would leave plaintiff's constitutional and statutory claims here intact.[3]

Indeed, as the *Tucson Citizen* reported, "In the same breath that it repealed a rule about demolitions in the city's oldest neighborhoods, the Tucson City Council pledged to put a revised version of the rule back on the books." (SOF 7). The City admits in its motion (Mot. p. 6) that "the Mayor and Council have directed staff to prepare a new zoning ordinance that covers the same subject matter." The Court can search the City's motion in vain for any assurance that it will not re-adopt the same ordinance. Without such assurance, the case is not moot.

Arizona courts recognize an exception to the mootness doctrine for questions of public importance and for matters that are capable of repetition yet evading review. See, e.g., *Fraternal Order of Police Lodge 2*, 133 Ariz. at 127, 650 P.2d at 429; *Camerena v. Dep't of Pub. Welfare*, 106 Ariz. 30, 31, 470 P.2d 111, 112 (1970); *State v. Superior Ct. of Pima County*, 104 Ariz. 440, 441, 454 P.2d 982, 984 (1969); *Wise v. First Nat'l Bank of Nogales*, 49 Ariz. 146, 149, 65 P.2d 1154, 1156 (1937). For

[3] Plaintiff is prepared to file a motion for summary judgment shortly after this Court's ruling on the pending motion.

example, in *Stop Exploiting Taxpayers v. Jones*, 211 Ariz. 576, 577, 125 P.3d 396, 397 (App. 2005), the City adopted an ordinance adjusting utility rates, and a taxpayer group petitioned for referendum. *Id.*, 211 Ariz. at 578, 125 P.3d at 398. The petition was refused on the ground that the ordinance was not subject to referendum. *Id.* The taxpayer group sued for an order that its petition be accepted, and the City subsequently adopted ordinances readjusting the challenged rates. *Id.* The City argued that because the challenged rates were no longer in effect, the question of whether the referendum petition should be accepted was moot. *Id.* The court rejected the City's argument, holding the case satisfied both of the grounds justifying an exception to the mootness rule. *Id.* The exception applies for the same reasons here.

Other jurisdictions also recognize the mootness exception. A "defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. . . . [I]f it did, the courts would be compelled to leave '[t]he defendant free to return to his old ways'." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 & n.10 (1982) (citation omitted). The City has "the 'heavy burden of persuad[ing]' the court that the challenged conduct cannot reasonably be expected to start up again." *Young v. Hayes*, 218 F.3d 850, 852 (8th Cir. 2000) (citation omitted).

Citing *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994), the City (Mot. p. 6) suggests the repeal of a law is enough to render a case moot despite the City's power to reenact it after plaintiff's claim is dismissed. Yet in *Native Village*, the legislature repealed the law *before* it was challenged in court. "Thus," the court reasoned, "the state's motivations for ceasing the allegedly illegal behavior could not have originated from a desire to terminate [the legal] action. This is not a case where

a defendant voluntarily ceases challenged action in response to a lawsuit. Therefore, it is unlikely that the challenged statute and regulations will be reenacted if we [dismiss.]" *Id.*, 38 F.3d at 1511. Likewise in *Smith v. Univ. of Washington, Law Sch.*, 233 F.3d 1188, 1194 (9th Cir. 2000), also cited by the City (Mot. p. 6), the court dismissed for mootness only after finding that the "real reason" for the school's change in its unconstitutional admissions policy was not the litigation.

Here, the opposite is true. Litigation—or more precisely, the court order issued at the conclusion of litigation—is the sole reason the City repealed the unconstitutional ordinance. The case is analogous to *ASW v. Oregon*, 424 F.3d 970, 974 (9th Cir. 2005), where the court refused to dismiss for mootness, explaining, "The posture of this case therefore contrasts sharply with *Native Village*. . . . [Because] it is probable that when faced with a similar budgetary crisis, Oregon would again consider [taking the same action]. . . . Oregon has not met its 'heavy burden of persuading' the court that 'subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur'." Likewise, the City here fails to meet the "heavy" burden required to justify dismissal on grounds of mootness.

Given the thousands of property owners potentially affected by the ordinance, the legal contours should be established in this case to avoid the need to relitigate plaintiff's action and to preclude the City from escaping liability simply by repealing and reenacting the law. The case asserts substantive constitutional challenges to an ordinance that has been repealed only after a court ruling on procedural grounds. The City has given no assurance whatsoever that it will not reenact the ordinance, and in fact suggests it affirmatively will. A legal decision on the merits is an equitable use of the resources of the Court, the City, and plaintiff, and will ensure that the City's unconstitutional conduct will not recur.

Plaintiff should be allowed to proceed to demonstrate that the City cannot exhume this law even if it desires to do so.

Conclusion

Either the continuing issue of damages or the possibility that the Council will reenact the law independently provides a sufficient basis for the Court to deny the City's motion to dismiss pursuant to Rule 56. Plaintiff requests the Court find that the case is not moot and either allow the plaintiff to file a motion for summary judgment on the merits or proceed directly to a determination of damages.

RESPECTFULLY SUBMITTED this 17th day of June, 2009 by:

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