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**IN THE SUPERIOR COURT OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI**

SEDONA GRAND, LLC,

Plaintiff,

vs.

CITY OF SEDONA,

Defendant.

Case No.: CV 82008-0129

**PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT**

(Assigned to Hon. Mark M. Moore)

Pursuant to Ariz. R. Civ. P. 56, Plaintiff Sedona Grand, L.L.C. ("Sedona Grand"), moves for summary judgment on Count Two of the complaint. Pursuant to A.R.S. § 12-1832, it seeks declaratory judgment that (1) the 1995 Rental Ban did not prohibit Sedona Grand's purchase option agreements; (2) by prohibiting previously lawful option agreements, the 2008 Occupancy Ban restricts Sedona Grand's property rights; (3) the 2008 Occupancy Ban further reduces Sedona Grand's rights to use its property

for a broad range of previously permissible uses; (4) the 2008 Occupancy Ban is not exempt under Arizona's Private Property Rights Protection Act ("PPRPA") health and safety exception, A.R.S. § 12-1134(b); and therefore (5) the City is required to compensate Sedona Grand under the PPRPA for the diminution in value its property has suffered as a result of the 2008 Occupancy Ban.

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). The Motion is supported by the accompanying Statement of Facts ("SOF") and the Memorandum of Points and Authorities set forth below.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

Defendant City of Sedona ("the City") is a municipal corporation and an incorporated subdivision of the State of Arizona. (SOF 1.) Plaintiff Sedona Grand, L.L.C. ("Sedona Grand") is a limited liability company organized in and under the laws of the State of Arizona and owns 20 Jasper Court, a parcel located in Sedona and improved by a residence ("the Property"). (SOF 2-3.)

In 1995, the City enacted a Land Development Code ("1995 Rental Ban"), which restricted the rights of residentially zoned property owners, such as Sedona Grand. (SOF 4.) Specifically, the Rental Ban prohibited "[r]entals of single-family dwellings for periods of less than 30 consecutive days." (*Id.*)

On December 5th, 2006, the City notified Sedona Grand of its determination that Sedona Grand was in violation of the 1995 Rental Ban. (SOF 5.) Overwhelmed by the restrictive nature of the City's regulations, Sedona Grand felt compelled to sell the Property. (SOF 6.) In January 2007, it reluctantly listed the Property for sale with a real estate broker. (*Id.*)

As a sales tool to help sell the Property, Sedona Grand began offering a purchase option agreement to prospective buyers. (SOF 7.) By entering a purchase option agreement, a prospective property purchaser obtained the exclusive right to purchase the Property plus exclusive rights to inspect the Property for a set time period as set forth in the individual agreements. (SOF 8.)

On January 25, 2007, Sedona Grand notified the City that it had listed the Property for sale as a result of the City's restrictive zoning regulations and that it intended to use a purchase option agreement to assist in facilitating a sale. (SOF 9.) Sedona Grand entered into the first purchase option agreement in May 2007 and sold 11 purchase option agreements between May and November 2007. (SOF 10-11.) Each agreement granted the prospective property purchaser both a right to purchase the Property and the exclusive right to inspect the Property for a set time period, usually one or two weeks. (SOF 11.)

In a February 28, 2007 letter, the City claimed that using purchase option agreements to sell a home violated the 1995 Rental Ban. (SOF 12.) Several months later, on May 10, 2007, the City ordered Sedona Grand to cease and desist alleged rental activity on the Property that the City deemed in violation of the 1995 Rental Ordinance. (SOF 13.) Counsel for Sedona Grand responded on June 5, 2007 that the property owners were not renting, but rather using a purchase option agreement as a tool to sell the Property, and were in compliance with the 1995 Rental Ban. (SOF 14.) The City subsequently conducted an investigation of the use of the Property, during which it interviewed at least one person occupying the Property during the term of an option agreement who was there to examine the property for prospective purchase. (SOF 15-16.) Another prospective property purchaser, Loretta Peak, also purchased an option agreement and was using the agreement to examine the Property with interest in purchasing it. (SOF 17.)

Despite the City's previous opinion and warning, no criminal or civil complaints for violation of

the 1995 Rental Ban were filed with the City against Sedona Grand, nor did the City file any civil or criminal enforcement actions against Sedona Grand for violation of the 1995 Rental Ban. (SOF 18.) Instead, on January 22, 2008, the City enacted Sedona City Code §§ 8-4-1 to 8-4-5 (“2008 Occupancy Ban”), which re-defined “rent” as:

[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 a right to possess the property for a term of less than 30 consecutive days.

(SOF 19-20.)

The 2008 Occupancy ban is much broader in scope than the 1995 Rental Ban, and the “terms ‘rent,’ ‘transient’ and ‘rental,’ as now defined in the [2008 Occupancy Ban], encompass more than the ‘usual and commonly understood’ meaning of the words used in the [1995 Rental Ban].” *Sedona Grand, L.L.C. v. City of Sedona*, 229 Ariz. 37, 41, 270 P.3d 864, 868 (App. 2012), *review denied* (Aug. 28, 2012); (SOF 21.) Indeed, the 2008 Occupancy Ban re-defines “rent” activities to include “numerous arrangements that would not commonly have been understood to be ‘rentals.’” *Id.*; (SOF 22.)

Specifically, the Ban subjects property owners to criminal penalties and prohibits numerous activities on residential property that were not previously unlawful, including but not limited to various purchase option, time-share, in-home nursing, nanny, babysitting, pet-sitting, house-sitting, and home improvement agreements that grant a right-of-occupancy to any portion of the property for fewer than thirty days. (SOF 23.)

As a result, the 2008 Occupancy Ban has significantly reduced Sedona Grand’s previously

existing rights to use and sell the Property. (SOF 24.) Because the Ban greatly diminished its property rights, on February 25, 2008 Sedona Grand, through counsel, served the City a Notice of Claim pursuant to the PPRPA, A.R.S. § 12-1131 *et seq.* (SOF 25.) Sedona Grand’s Notice stated that it had suffered losses as a result of the reduction in property rights and that its claim included but was not limited to “lost income from the sales of the options”; “lost opportunities to sell and lease the property”; and “loss of value.” (SOF 26.) It demanded \$1,850,000 or the ordinance’s repeal or waiver with respect to Sedona Grand. (SOF 27.) However, the City did not respond to Sedona Grand’s letter, failing to offer compensation or to alter the ordinance. (SOF 28.) Thus, this cause of action accrued and Sedona Grand filed a lawsuit in Yavapai County Superior Court on May 27, 2008. The parties filed cross motions for summary judgment on Count Two, which seeks just compensation pursuant to A.R.S. § 12-1134.¹

In an Under Advisement Ruling on May 15, 2010, the Superior Court found that the 2008 Occupancy Ban was exempt from the PPRPA under the health and safety exception, *Sedona Grand, L.L.C. v. City of Sedona*, V1300-CV-820080129, pp. 2-3 (May 15, 2010), and on July 1, 2010, the Court entered judgment for the City. The Court of Appeals reversed the decision. Seeing through the City’s façade, the Court of Appeals held that the City cannot evade the PPRPA by baldly asserting that its ordinance protects public health and safety. *Sedona Grand*, 229 Ariz. at 38, 270 P.3d at 865. It also held that Sedona Grand would be entitled to compensation for “arrangements that were not prohibited before the [new] Ordinance.” *Id.* at 41, 270 P.3d at 868. Because the 2008 Occupancy Ban “marks a material change” from the 1995 Rental Ban, *id.* at 40, 270 P.3d at 867, the Court held that the City “must

¹ Count One sought damages for interference with contractual relationships and is no longer at issue in the case.

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 [health and safety] exemption can apply." *Id.* at 42, 270 P.3d at 869. The Court remanded the case to the trial court to determine (1) the primary purpose of the City's 2008 Occupancy Ban, and (2) whether Sedona Grand has satisfied the requirements of the PPRPA and is entitled to compensation. *Id.* at 43, 270 P.2d at 870.

II. ARGUMENT

A. **The 2008 Occupancy Ban is not exempt under the PPRPA's health and safety exception because the City cannot demonstrate that the principal purpose of the Occupancy Ban was the protection of public health and safety.**

Unable to deprive property owners of their rights without providing just compensation, the City attempts to recast its imposition of neighborhood aesthetics as an exempt health and safety regulation. But while the PPRPA does not *forbid* cities from restricting the use of private property, it ensures that the costs of public policies and community desires must be borne by the public as a whole and not solely by private property owners. Indeed, the PPRPA would be toothless if cities could evade it by merely asserting without foundation in fact that their regulations are exempt.

As a threshold matter, the City "must establish by a preponderance of the evidence that the [2008 Occupancy Ban] was enacted for the principal purpose of protecting the public's health and safety before the [health and safety] exemption can apply." *Id.* at 42, 270 P.3d at 869. In other words, the PPRPA requires government to show a true nexus between the land-use law and a public health and safety concern. The City cannot meet this burden.

In cases where the nexus between the prohibition and the health and safety issue is self-evident, less evidence is required to meet this threshold. *Id.* at 43, 270 P.3d at 870. Thus, an ordinance

prohibiting accumulation of garbage, debris, and visual blight had a direct and obvious connection to health and safety because the resulting harms – including “insects, rodents, snakes and fire” – fell squarely within the core meaning of public health. *Id.* at 42-3, 270 P.3d at 869-70 (*citing State v. Watson*, 198 Ariz. 48, 6 P.3d 752 (App. 2000)). Likewise, a floodplain ordinance to mitigate “uncontrolled flood waters or improperly blocked waterways” had a “commonsense, self-evident nexus” to “death and destruction of property, and . . . disease and ill-health. *Id.* at 43, 270 P.3d at 870 (*citing Smith v. Beesley*, 226 Ariz. 313, 247 P.3d 548 (App. 2011)).

But in cases where, as here, “the nexus between prohibition of short-term occupancy and public health is not self-evident,” the City must meet a higher threshold. Such evidence is absent from the record in this case. *Id.* All the City is able to offer are vague notions of community standards, but “neighborhood character and public health are entirely distinct concepts.” *Id.* In fact, when voters were presented with the PPRPA, even its opponents conceded that a regulation preserving or advancing a particular neighborhood character would not be exempted from the law’s compensation requirements. See Arizona Secretary of State General Election Publicity Pamphlet, November 7, 2006, Ballot Propositions at 185, 188² (“Examples of actions that could trigger lawsuits and payments” if the PPRPA became law include “enactment of neighborhood preservation codes,” “historic overlay zoning” and “neighborhood preservation measures”). The 2008 Occupancy Ban fits squarely within this category and is subject to the PPRPA.

² Available at <http://www.azsos.gov/election/2006/Info/PubPamphlet/english/Guide.pdf>. “To determine the intent of the electorate, courts . . . look to the publicity pamphlet.” *Heath v. Kiger*, 217 Ariz. 492, 496, 176 P.3d 690, 694 (2008). It is permissible for a court to take judicial notice of publicity pamphlets. *Pedersen v. Bennett*, 230 Ariz. 556, 559, 288 P.3d 760, 763 (2012).

B. The 2008 Occupancy Ban reduced Sedona Grand's rights to use its property

To be eligible for just compensation under the PPRPA, A.R.S. § 12-1131 *et seq.*, a property owner must show that (1) his existing rights to use, divide, sell or possess property were reduced (2) by a land-use law (3) and the action reduced the property's fair market value. A.R.S. § 12-1134(A). The fair market value is not before the Court in this partial motion, and the Court of Appeals already determined that the Occupancy Ban is a land-use law subject to the PPRPA. *Sedona Grand*, 229 Ariz. at 40, 270 P.3d at 867. Thus, the only showing Sedona Grand must make in order to be entitled to summary judgment is that its property rights have been diminished by the 2008 Occupancy Ban.³

i. By prohibiting previously lawful option agreements, the 2008 Occupancy Ban restricts Sedona Grand's property rights.

a. On its face, the 1995 Rental Ban did not prohibit option agreements.

By its own plain, unambiguous language, the 1995 Rental Ban did not apply to option agreements. The Rental Ban prohibited only "rentals" of dwellings for fewer than 30 days. (SOF 4.) It did not restrict the use of option agreements by which a prospective purchaser could occupy a property for fewer than thirty days; that prohibition was first introduced by the 2008 Occupancy Ban. *Sedona Grand*, 229 Ariz. at 41, 270 P.3d at 868 (SOF 20-23).

The primary goal of statutory construction is to determine legislative intent. *Mail Boxes v.*

³ Pursuant to A.R.S. § 12-1832, Sedona Grand seeks a declaration that the 2008 Occupancy Ban diminished its pre-existing property rights. Resolution of this issue requires construing the scope of the relevant ordinances and determining the extent of Sedona Grand's property rights prior to the 2008 Occupancy Ban. However, recovery is not contingent upon Sedona Grand's actual use of the property, as the PPRPA only requires that a property owner show that his existing rights are reduced in a way that reduces the property's fair market value. A.R.S. § 12-1134(a).

Industrial Comm'n, 181 Ariz. 119, 121, 888 P.2d 777, 779 (1995). The best source of a statute's meaning is its plain language, and when the language is unambiguous, it is determinative of the statute's construction absent clear legislative intent to the contrary. *Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991); *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 592, 667 P.2d 1304, 1307 (1983). The 1995 Rental Ban states, "[r]entals of single-family dwellings for periods of less than 30 consecutive days" is prohibited. (SOF 4.) Sedona Grand's purchase option agreement differs significantly from rentals. While both convey interests in real property, they convey different interests. A lease conveys only a term interest in the estate, conditioned upon the payment of rent. But a purchase option agreement such as Sedona Grand's is a covenant to convey the estate, unconditionally, upon exercise of its terms. (See SOF 8 ("By entering a purchase option agreement, a prospective property purchaser obtained the exclusive right to purchase the Property plus exclusive rights to inspect the Property for a set time period.")) A tenant's lease does not provide him with a right to purchase the underlying property. In contrast to options, leases attach specific rights and obligations to both the lessor and lessee. See *Tucson Med. Ctr. v. Zoslow*, 147 Ariz. 612, 712 P.2d 459 (App. 1985). Breach of a lease may not, under identical circumstances, constitute breach of an option or vice versa, and the bases for relief can be different. Compare *Andrews v. Blake*, 205 Ariz. 236, 69 P.3d 7 (2003) (distinguishing between exercise of an option and acceptance of an offer in determining availability of equitable remedies), with *Foundation Dev. Corp. v. Loehmann's, Inc.*, 163 Ariz. 438, 788 P.2d 1189 (1990) (preserving equitable remedies in the event of a trivial breach of an unambiguous lease). The 1995 Rental Ban is unambiguously limited to "rentals" and does not include option agreements. Accordingly, in prohibiting option agreements for the first time, the 2008 Occupancy Ban diminished Sedona Grand's

previously existing property rights.

b. The legislative history of the 2008 Occupancy Ban demonstrates that the 1995 Rental Ban did not prohibit option agreements.

Because the language of the 1995 Rental Ban unambiguously shows that the 1995 Rental Ban does not prohibit option agreements, it is unnecessary to examine additional factors. However, legislative history further evinces that the 2008 Occupancy Ban proscribed option agreements for the first time. A cardinal principal of statutory interpretation is that a legislative body is presumed to be aware of – and take into account – the existing laws when it enacts or modifies a statute. *Daou v. Harris*, 139 Ariz. 353, 357, 678 P.2d 934, 938 (1984). Further, it is presumed that by amending a statute, the legislative body intends to change the existing law. *McCleod v. Chilton*, 132 Ariz. 9, 16, 643 P.2d 712, 719 (App.1981); *State v. Garza Rodriguez*, 164 Ariz. 107, 111, 791 P.2d 633, 637 (1990) (citing to *McCleod*, 132 Ariz. at 16, 643 P.2d at 719). The 1995 Rental Ban did not expressly prohibit option agreements. (SOF 4.) Indeed, the City did not file any civil or criminal enforcement actions against Sedona Grand for violation of the 1995 Rental Ban. (SOF 18.) Instead, the City enacted the 2008 Occupancy Ban, which was much broader in scope than the 1995 Rental Ban, encompassing purchase option agreements and “numerous arrangements that would not commonly have been understood to be ‘rentals.’” (SOF 19-22.) To conclude that the City enacted the 2008 Occupancy Ban merely to sustain the status quo and achieve a regulatory scheme that already existed under the 1995 Rental Ban would render the expansive language in the 2008 Occupancy Ban mere surplusage. But courts give meaning to “each word, phrase, clause and sentence . . . so that no part of the statute will be . . . redundant.” *Herman v. City of Tucson*, 197 Ariz. 430, 434, ¶ 14, 4 P.3d 973, 977 (App. 1999) (quotations and citations

omitted). When viewed in light of these principles of statutory construction and in the context of the facts of this case, the expansive amendments to the Sedona City Code illustrate that the 2008 Occupancy Ban outlawed purchase option agreements that were not previously prohibited, resulting in a diminution in Sedona Grand's property rights.

c. Strict construction of the 1995 Rental Ban leads to the conclusion that it did not apply to Option Agreements.

Finally, even before voters enacted the PPRPA, Arizona courts construed zoning restrictions in favor of private property rights. The 1995 Rental Ban would have to be construed broadly to be read as banning the use of purchase option agreements. Yet Arizona courts, rooted in the common-law esteem for property rights, have long held that zoning restrictions are to be strictly construed to favor the property owner, *Kubby v. Hammond*, 68 Ariz. 17, 22, 198 P.2d 134, 138 (1948), as are the ordinances granting the right to enact zoning regulations. *Robinson v. Lintz*, 101 Ariz. 448, 451, 420 P.2d 923, 926 (1966). Restrictions on sales of interests in property constrain a property owner's right and ability to sell his property. Strictly construing the 1995 Rental Ban in favor of property rights, the Ban must be read as prohibiting only *rentals* of fewer than thirty days, not purchase option agreements like those used by Sedona Grand.

ii. The 2008 Occupancy Ban further reduced Sedona Grand's rights to use its property for a broad range of previously permissible uses.

Beyond banning purchase option agreements, the 2008 Occupancy Ban unquestionably reduced Sedona Grand's rights to use its property in a variety of other ways. The Court of Appeals acknowledged that the 2008 Occupancy Ban prohibits a broad range of uses that were lawful under the 1995 Rental Ban including, but not limited to, "nanny services, in-home nursing, babysitting, pet-sitting, house-sitting,

assistance with home improvements.” *Sedona Grand*, 229 Ariz. at 41, 270 P.3d at 868.

The PPRPA requires a municipality to pay an owner “just compensation” whenever it enacts a land use law that reduces the existing owners right to use his property. A.R.S. § 12-1134. As such, Sedona Grand is entitled to be compensated for this sweeping reduction of its rights to use its property. (SOF 24.)

III. CONCLUSION

The City of Sedona’s 2008 Occupancy Ban deprives residential property owners of their rights to use their homes. Although the City of Sedona’s 1995 Rental Ban prohibited rentals of residential property for fewer than 30 days, the 2008 Occupancy Ban prohibits a broad range of uses that were lawful before its enactment. The PPRPA requires municipalities to compensate owners when they enact ordinances restricting property owners’ right to use of their property. The 2008 Occupancy Ban diminished Sedona Grand’s property rights, and the City cannot demonstrate that the primary purpose of that ordinance was to promote public health or safety.

Accordingly, Sedona Grand respectfully requests that its Partial Motion for Summary Judgment be GRANTED and that the City be required to compensate Sedona Grand for the diminution in value its property has suffered as a result of the 2008 Occupancy Ban.

DATED: September 5, 2014

Respectfully submitted,

/s/

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