Arizona House of Representatives

Phoenix, Arizona 85007

February 10, 2023

Via Email and Regular Mail
Hon. Kris Mayes
Arizona Attorney General
2005 North Central Avenue
Phoenix, Arizona 85004

Re: S.B. 1487 Investigation No. 22-002

Dear Attorney General Mayes:

Thank you for your letter dated January 19, 2023. I respectfully disagree with your determination that the Legislature has given you implicit authority under A.R.S. § 41-194.01(B) to reconsider a final investigative report. As explained in my initial letter, § 41-194.01 does not contain any provision that would allow modification or reconsideration of a final report concluding that a city's Ordinance violates state law. In circumstances where the proper disposition of a challenged municipal ordinance is unclear, the Attorney General is authorized to issue a report stating that the local ordinance "may" violate state law, which then triggers a mandatory special action petition in the Arizona Supreme Court. *See* A.R.S. § 41-194.01(B)(2).

The attempt to forge an implied power of reconsideration by analogy to the Attorney General's advisory opinion process is both textually and conceptually untenable. An advisory opinion is—as its name suggests—a nonbinding assessment furnished for the informational benefit of a legislator or certain other public officers. *See* A.R.S. § 41-193(A)(7). By contrast, a final investigative report issued pursuant to A.R.S. § 41-194.01 is a formal adjudication and final disposition (subject, of course, to judicial review) of specific parties' legal rights and obligations. When acting under A.R.S. § 41-194.01, the Attorney General's Office effectively functions as an administrative agency; absent an express statutory mechanism for doing so, it cannot "reconsider" or repudiate its own binding determinations. *See generally Ayala v. Hill*, 136 Ariz. 88, 90 (App. 1983) ("disagree[ing]" with the argument that "the power to redecide is inherent in the administrative agency's initial power to decide the issue"). In short, the authority granted to you under A.R.S. § 41-194.01 is fundamentally distinct from the authority that governs the issuance of routine Attorney General Opinions under A.R.S. § 41-193(A)(7), and does not afford any discretion to "reconsider" what your own office has denominated a "final" investigative report.

In any event, should you embark on an unprecedented deviation from the statutory process outlined in A.R.S. § 41-194.01, I will take this opportunity to respond briefly to the City of Tucson's misguided and belated arguments in defense of its preempted Ordinance No. 11959 (the "Ordinance"). As a preliminary matter, the City launches its February 6th letter

with an extended disquisition on the "substantial equivalence" concept embedded in the federal Fair Housing Act and their relationship to the Ordinance. But the Ordinance's putative compatibility with federal law does not establish its validity. Rather, this dispute pivots on whether the Ordinance is preempted by, or otherwise inconsistent with, **state** law. Whatever the applicable federal statutes may or may not permit, even the City appears to concede that, because housing issues are a matter of statewide concern, the Legislature can validly preempt municipal enactments in this domain. *See State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 602, ¶ 56 (2017) (noting that the court has recognized only two policy areas—namely, the conduct of local elections and the disposition of municipal property—as matters of purely local concern). And the Legislature has done so explicitly.

A. The Legislature Has Expressly Preempted All Municipal "Fair Housing" Ordinances Adopted After January 1, 1995

As your office concluded in its final report, the Ordinance cannot be reconciled with A.R.S. §§ 9-500.09, 41-1491.06(C) or 41-1491.13(B), which prohibit any municipality from adopting a so-called "fair housing" ordinance after January 1, 1995. The City's strained exertions to cast these statutes as somehow ***authorizing*** the Ordinance can be sustained only by disregarding the operative statutory language. Specifically, while the preemptive statutes do countenance supplementary enactments by large cities, this authority must have been exercised "no later than January 1, 1995." The City "completely ignores the temporal requirement," Final Investigative Report at 13—and continues to do so. Indeed, the legislative history confirms that the bill enacting these preemption clauses, 1992 Ariz. Laws ch. 207 (H.B. 2546), reflected a "finely crafted agreement" that received the support of property owners only because it largely ensured "uniformity" in state housing laws. *See* Minutes of Meeting of Comm. on Commerce of Ariz. House of Representatives, Feb. 24, 1992 at 10-11. A basic fidelity to the statutory text and its underlying legislative objective extinguishes the City's defense of the Ordinance.[1]

B. The City's Belated "Special Law" Defense Is Unavailing

The City purports to discover, and alleges for the first time in their recent letter, that H.B. 2546 is a "special law" that contravenes Article IV, Part 2, Section 19 of the Arizona Constitution. This untimely defense, however, is not viable for at least four reasons.

First, your office lacks jurisdiction to adjudicate the constitutionality of state laws. The inquiry authorized by A.R.S. § 41-194.01 is linear and discrete; the Attorney General must determine whether a challenged county or municipal enactment or policy "[v]iolates any provision of state law or the Constitution of Arizona." When (as here), it does, the inquiry is at an end. The question of whether or to what extent a predicate "state law" is consistent

[1] The City insists that a "clear statement of preemption"—by which it apparently means an express invocation of the Legislature's preemptive prerogative—is required, but the case law belies that novel contrivance. *See, e.g., Fleischman v. Protect Our City*, 214 Ariz. 406 (2007) (holding that ordinance allowing supplemental ballot measure petition filings was preempted by inconsistent state law prohibiting such submissions).

with controlling federal or state constitutional provisions remains reserved exclusively to the judicial branch.

Second, the City is equitably estopped from challenging the constitutional validity of H.B. 2546. *See generally City of Tucson v. Whiteco Metrocom, Inc.*, 194 Ariz. 390, 396 (App. 1999) (acknowledging the principle that municipal governments may be estopped). If anything, the City was a beneficiary of the Legislature's partial and temporary suspension of its preemptive powers; the legislative history indicates that the City's representative attended committee hearings in support of the bill, and presumably was listening when representatives of property owners explained to the House Committee on Commerce that they had endorsed the bill only because it embodied a narrow compromise that largely secured "uniformity" in state housing laws. *See* Minutes of Meeting of Comm. on Commerce of Ariz. House of Representatives, Feb. 24, 1992 at 10-11, Attachment 1. Having extracted precisely the legislative bargain it advocated, the City cannot decades later declare the bill it championed void *ab initio*.

Third, H.B. 2546 is not a "special law." The City contends that it transgresses the constitutional limitation on statutes that "[g]rant to any corporation, association, or individual, any special or exclusive privileges, immunities or franchise." Ariz. Const. art. IV, pt. 2, § 19(13). But the text and structure of Section 19 impart that this subsection prohibits the selective dispensation of governmental favors on ***private persons***. *See generally Prescott Courier, Inc. v. Moore*, 35 Ariz. 26, 33 (1929) (explaining that Section 19(13) prevents the state government from granting a privilege to a private company "which is not extended on the same terms to other citizens").[2] Further, H.B. 2546 did not bestow any cognizable gratuity on anyone; a legislative decision simply to refrain from preempting a subset of municipal ordinances is not tantamount to a "privilege," "immunity" or "franchise" under any conventional definition of those terms.

Fourth, even assuming *arguendo* that H.B. 2546 does violate Section 19(13), the appropriate remedy would be to sever the clause that purportedly renders it unconstitutional—namely, the requirement that municipalities must have attained the requisite 350,000 population threshold by 1990. The City's "special law" theory posits that the retrospective 1990 temporal limitation creates inelasticity because no other municipality could have ever joined or departed the statutory class.[3] It is (or should be) undisputed, however, that the Legislature can both (i) employ prospective population thresholds in calibrating a preemption clause and (ii) impose a deadline for municipalities to exercise any residual non-preempted authority. Such legislation could be a special law only if the specified

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[2] By contrast, when the Framers intended to extend the special law proscription to certain matters relating to municipalities or other political subdivisions, they did so expressly. *See* Ariz. Const. art. IV, pt. 2, § 19(2), (17).

[3] Although not ultimately dispositive, the City's assertion that courts must "consider the actual probability that others will come under the act's operation when the population changes," Feb. 3 letter at 6 (quoting *Republic Inv. Fund I v. Town of Surprise*, 166 Ariz. 143 (1990), relies on an outdated understanding of elasticity that the Supreme Court has since repudiated, *see Gallardo v. State*, 236 Ariz. 84, 93, ¶ 33 (2014).

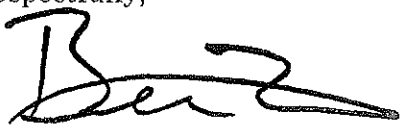
population "eligibility window had already closed" at the time the bill was passed. *Gallardo v. State*, 236 Ariz. 84, 92, ¶ 31 (2014). Because a severability analysis involves a question of legislative intent, the remedy that most fully effectuates the manifest objective underlying H.B. 2546 would be to sever the clause requiring municipalities to have retrospectively attained the population threshold by 1990. Under this construction, the Ordinance would remain preempted because any city that attained a population of at least 350,000 even after 1990 still would have been required to enact any supplementary fair housing ordinances no later than January 1, 1995.

C. The Ordinance Violates State Law on Additional Grounds

Finally, please note that, as outlined in my initial complaint, the Ordinance violates state law for reasons unrelated to H.B. 2546. To date, your office has had no occasion to evaluate those arguments. *See* Final Investigate Report at 21 n.4. If you were to erroneously assert an extra-statutory power to "reconsider" your final report, however, the arguments advanced in my initial complaint are entitled to full and fair consideration.

In this vein, it bears repeating that the Legislature's comprehensive fair housing regime impliedly preempts this regulatory field, even if one were to disregard A.R.S. §§ 9-500.09, 41-1491.06(C) and 41-1491.13(B). Notably, the City has seemingly (if inadvertently) endorsed the proposition that, but for H.B. 2456's partial exemption, municipal housing ordinances would be wholly preempted. As the City argues—and as the legislative history attests—H.B. 2546 was impelled by a belief that the legislation was necessary "to enable certain cities the ability to enact and enforce their own fair housing codes," Feb. 6 Letter at 4; *see also* Minutes of Meeting of Arizona State Senate Comm. on Gov't. and Public Safety, Mar. 19, 1992 at 6-7 (testimony of City of Phoenix representative that the bill was necessary to enable city to enforce its own fair housing ordinances, and testimony of Arizona Multihousing Association representative that the bill "continues th[e] agreement" codified in prior law to allow cities with pre-existing fair housing ordinances to enforce them). The corollary of this origin of H.B. 2546 is that—subject to the narrow exemptions codified in that bill (none of which can salvage the City's Ordinance here)—fair housing laws in Arizona are the sole and exclusive province of the Legislature.

Respectfully,



Ben Toma
Speaker of the Arizona House of Representatives

cc: Mike Rankin, Tucson City Attorney
Julie Kriegh, Phoenix City Attorney