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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT
Case Type: Declaratory Judgment

Court File No.: 27-CV-17-9410
The Honorable Patrick D. Robben

Fletcher Properties, Inc. et al,

Plaintiffs,

v.

City of Minneapolis,

Defendant.

AMICUS CURIAE MEMORANDUM IN SUPPORT OF DEFENDANT BY AMICI POVERTY & RACE RESEARCH ACTION COUNCIL AND HOUSING JUSTICE CENTER

INTRODUCTION

Amici Poverty & Race Research Action Council (PRRAC) and Housing Justice Center (HJC) submit this Memorandum in opposition to the Plaintiffs' motion for summary judgment on the grounds that the City's ordinance constitutes a per se taking (Section 1) or *Penn Central* regulatory taking (Section 3) or is preempted by state law (Section 2).

ARGUMENT

1. The City ordinance does not effect a per se taking.

The Plaintiffs' complaint and original motion for summary judgement relied on the decision in, and subsequent extensive precedent generated by, *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) for the argument that the ordinance constituted a taking in violation of the U.S. and Minnesota Constitutions. After remand, however, the Plaintiffs rely on the recent U.S. Supreme Court decision in *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021). There the Supreme Court found a per se taking by a California statute permitting union organizers to access farm workers on site and on a limited basis. But the Court was careful to

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distinguish such cases from those in which the plaintiffs' business relies on providing access to their property to the public:

> Unlike the growers' properties, the PruneYard was open to the public, welcoming some 25,000 patrons a day. 447 U. S., at 77-78, 100 S. Ct. 2035, 64 L. Ed. 2d 741. **Limitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public**. See Horne, 576 U. S., at 364, 135 S. Ct. 2419, 192 L. Ed. 2d 388 (distinguishing PruneYard as involving "an already publicly accessible" business); Nollan, 483 U. S., at 832, n. 1, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (same).

Id at 2076-77. (emphasis added). Plaintiffs' rental properties are "generally open to the public" and therefore, under *Cedar Point*, not subject to a per se taking claim. Directly on point as well as *PruneYard Shopping Center v. Robbins*, 447 U.S. 74 (1980), referred to in the quote above, is *Yee v. City of Escondido*, 53 U.S. 519 (1992), involving manufactured home park rentals subject to a rent control ordinance and rejecting plaintiffs' per se taking argument:

> When a landowner decides to rent his land to tenants, the government may place ceilings on the rents the landowner can charge, see, *e. g., Pennell, supra, at 12, n. 6*, or **require the landowner to accept tenants he does not like**, see, *e. g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964)*, without automatically having to pay compensation. See also *PruneYard Shopping Center v. Robins, 447 U.S. 74, 82-84, 64 L. Ed. 2d 741, 100 S. Ct. 2035 (1980)*.

Id., at 529, emphasis added.

As indicated by the broad statement of principle set out in *Cedar Point, Pruneyard,* and *Yee* regarding business generally open to the public, there is no distinction between laws protecting applicants and those protecting existing tenants as to per se takings. *Heart of Atlanta Motel,* cited above, was about exclusion of prospective tenants. The applicant/resident distinction did not even apply in *Pruneyard*, which involved a shopping center. The Court in *Yee* rejected a per se taking claim because the "tenants were invited by (the property owners), not

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forced on them by the government." Id. at 528. See also, *Federal Home Loan Mortg. Corp. v. New York State Div. of Hous. & Community Renewal*, 83 F.3d 45,47-48 (2nd Cir.1996)("where a property owner offers property for rental housing, the Supreme Court has held that government regulation of the rental relationship does not constitute a physical taking," citing *Yee*); *335-7 LLC v. City of New York*, 524 F.Supp.3d 316, 328 (S.D.N.Y. 2021) ("In accordance with *Yee*, courts in this Circuit have long upheld the RSL[Rent Stabilization Law] against facial physical taking challenges because landlords have voluntarily offered their property for rent and, by the express terms of the RSL, landlords can evict unsatisfactory tenants, reclaim or convert units, or exit the market.").

The plaintiffs' argument certainly fails to distinguish *Heart of Atlanta Motel* and that failure demonstrates the fundamental flaw in their position. In that case the Supreme Court rejected a challenge to the 1964 Civil Rights Act as a taking which required "appellant to rent available rooms to negroes against its will." 379 U.S. at 244. Had the appellants in that case succeeded, not only the 1964 Civil Rights Act, but the Federal Fair Housing Act and the Minnesota Human Rights Act would be held to constitute unconstitutional per se takings. Like the Minneapolis ordinance, these statutes all prohibit landlords from refusing to rent to certain classes of persons. A per se taking decision for the plaintiff's here is necessarily and unavoidably an assertion that the federal Fair Housing Act and Minnesota Human Rights Act impose an unconstitutional taking. And the Appellant's position in *Heart of Atlanta* indicates exactly where that leads.

2. The City ordinance is not preempted by the Minnesota Human Rights Act.

The plaintiffs have asserted, relying on *Edwards v. Hopkins Plaza L.P.*,783 N.W.2d 171 (Minn. App. 2010), that the Legislature intended that the Minnesota Human Rights Act to permit

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property owners to decline to participate in the voucher program. The argument is then that the City's ordinance is preempted by a direct conflicts with the MHRA's purported permission for landlords not to participate in the Section 8 program. The plaintiffs note that the MHRA's procedure is "exclusive," citing Minn. Stat. § 363A.04

But the plain language of the exclusivity provision, and the case law relating to it, make clear that the City ordinance is not preempted by the MHRA. What § 363A,04 provides is:

> Nothing contained in this chapter shall be deemed to repeal any of the provisions of the civil rights law or of any other law of this state relating to discrimination because of race, creed, color, religion, sex, age, disability, marital status, status with regard to public assistance, national origin, sexual orientation, or familial status; but, **as to acts declared unfair** by sections 363A.08 to 363A.19, and 363A.28, subdivision 10, the procedure herein provided shall, while pending, be exclusive. (emphasis added)

Given the bolded phrase above, the decision in *Edwards v. Hopkins Plaza Limited Partnership*, 783 N.W.2d 171 (Minn. App. 2010) has a legal effect exactly the opposite of that claimed by the plaintiffs. The *Edwards* court held that The MHRA did not apply to owner decisions to deny occupancy to voucher holders if the decision was based on administrative burdens of the program. Thus the MHRA is exclusive only to injuries that do not have that basis.

Minnesota Courts have repeatedly ruled against exclusivity and preemption by the MHFA when the plaintiff's claim is based on acts not prohibited by the MHFA In *Daniel v. City of Minneapolis*, 923, NW2d 637, 650 (Minn.. 2019), the plaintiff brought claims against the city under both the MHRA and Workers Compensation Act. The state Supreme Court had to address the fact that both statutes had exclusivity clauses. The Court concluded that because the acts "do not extend to the same types of injuries, we find no conflict" in allowing recovery under both acts, even if the underlying facts were the same for both claims. Here, the *Edwards* court held that the MHRA does not address the injury addressed by the City's ordinance and there is

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thus no conflict. Similarly the Supreme Court held in *Abel v. Northwestern Hospital*, 947 NW2d 58, 80 (Minn. 2020) that the lower courts' holding of preemption of the plaintiff's negligence claim based on the exclusivity provision of the MHA was "premature" because "no court has yet concluded" that the defendants owed the plaintiff any obligations under the MHRA. Similarly, given *Edwards*, a defendant violating the city ordinance "for legitimate business reasons" might well owe the plaintiff an obligation under the ordinance but not under the MHRA because such an act was held in *Edwards* not to be unfair under the MHRA and there would thus be no preemption by the MHRA. See also, *Hinrichs-Cady v. Hennepin County*, 943 NW2d 417, 424 (Minn.App. 2020), holding that claims under the Pregnancy and Parental Leave Act and Minnesota Whistleblower Act could not be determined preempted by the MHRA exclusivity provisions because, with respect to the PPLA and MWA claims, the plaintiff "did not allege any status identified in and protected by the MHRA". Similarly a plaintiff alleging the unique protection of the City ordinance against rejection for business reasons would not allege any status protected under the MHRA as interpreted by *Edwards*.

The *Abel* court provided a second argument for why the exclusivity provision doesn't apply to the City ordinance by noting (947 N.W.2d at 80) that "the preemption provision applies only where a Human Rights Act claim is 'pending.'" A plaintiff seeking remedy under the city ordinance would, under *Edwards*, have no MHRA claim pending against the defendant and thus there could be no preemption.

The Voucher program is governed by federal law and federal law explicitly permits local laws to prohibit discrimination against voucher holders. 24 C.F.R. § 982.53(d). The Plaintiffs fail to perceive the significance of this fact. The finding by *Edwards* that the MHFA does not prohibit discrimination based on the terms of the program is not at all the same as a finding that,

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under the MHFA, no local law could prohibit such discrimination. The plaintiffs extend E*dward's* well beyond the Court of Appeals' actual holding and attribute to the MHFA features that would, if they actually existed, be preempted by the federal regulations which clearly permit local regulation like that of the Minneapolis ordinance.

Edwards is not to the contrary. The Court concluded that refusal to participate "for a legitimate business reason does not constitute discrimination under the MHRA." Even without the express language of 363A.04, that conclusion in no way dictates the conclusion that the MHRA prohibits local laws making discrimination based on program requirements a violation.. The Minnesota Supreme Court in *Graco, Inc. v. City of Minneapolis*, 937 N.W.2d 756 (Minn. 2020) recently reiterated the three grounds for finding local laws preempted by state law. The one relevant here is: "the ordinance forbids what the statute *expressly* permits." *Id*, 760 (emphasis in original). The *Graco* decision is on point here, holding that the state minimum wage law did not expressly permit payment of *only* the state minimum wage. 937 N.W. 2d at 760. Here it is clear that neither the MHRA nor any other state law *expressly* addresses in any way voucher discrimination based on business objections and certainly does not "expressly" permit owners to engage in such discrimination. Therefore the ordinance does not forbid what the statute expressly permits and there is no preemption.

3. The Plaintiffs' Expert Report demonstrates that the ordinance does not result in a regulatory taking.

Putting aside any questions regarding the conclusions or methodology of the defendants' Expert Report (and there are many, set out in the City's Expert Rebuttal), the Report on its face demonstrates that the ordinance does not constitute a regulatory taking under *Penn Central. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

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A *Penn Central* taking requires a very substantial diminution in property value. The *Penn Central* court indicated that diminutions of 75% and 87.5% had been held insufficient. 438 U.S. 104, 131 (1978). A Ninth Circuit case recently held:

> Although no litmus test determines whether [**12] a taking occurred, we start from the premise that the *Penn Central* factors seek "to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *See Lingle, 544 U.S. at 539*. Thus, we have observed that diminution in property value because of governmental regulation ranging from 75% to 92.5% does not constitute a taking. *MHC Fin., 714 F.3d at 1127-28*. The Federal Circuit has noted that it is "aware of no case in which a court has found a taking where diminution in value was less than 50 percent." *CCA Assocs. v. United States, 667 F.3d 1239, 1246 (Fed. Cir. 2011)*. Nor are we.

Colony Cove Props, LLC v. City of Carson, 888 F.3d 445,451 (Ninth Cir. 2018).

The Expert Report compares average gross income and expenses from a sample of "comparable" market rate projects that take vouchers (average shown on page 10) and that do not take vouchers (average shown on page 8). As the Expert Report points out in the formula and example on page 4, net operating income (NOI) is equal to annual Effective gross income minus annual expenses and market value is equal to NOI divided by the capitalization rate.

The difference in average NOI per unit for the samples is easy to calculate: based on the average performances on pages 8 and 10:

	Without vouchers	With vouchers
Gross Effective Income	10,706	10,721
Minus Operating Expenses	4,040	5,295
Equals Net Operating Income	6,666	5,426

The Report suggests an increases in capitalization rate of 25 to 100 basis points due to acceptance of vouchers. Accepting the maximum 100 basis point increase for purposes of the example although it, and any other increase, is highly suspect, and using the same 6%

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capitalization rate for the project without vouchers used in the Report's example, the respective market values are: Without vouchers: 6,666/.06 = 111,100 and with vouchers 5,426/.07 = 77,514

This is a reduction in market value of 33,586, or 30.2%. As indicated above, this is not nearly a sufficiently significant effect on market value to constitute a *Penn Central* regulatory taking. Thus, the plaintiffs have not only failed to present evidence of a regulatory taking, they have presented conclusive evidence that there is no such taking.

Nor does the additional language of the Minnesota Constitution help. The provision has been applied in only a handful of cases, none of which apply here. *State by Humphrey v. Strom,493 N.W.2d 554, 558 (Minn. 1992)* involved an eminent domain case so the taking question wasn't at issue. *Johnson v. City of Minneapolis*, 667 N.W.2d 109, 116 (Minn. 2003), involved bad faith related to an eminent domain case which the Court characterized as "this case represents a narrow and rare instance." The rest involve enactments which have the effect of benefitting government-owned facilities. *See*, *McShane v. City of Faribault*, 292 N.W.2d 253, 258-59 (Minn. 1980).

CONCLUSION

For these reasons, the amici urge the Court to reject the plaintiffs' motion for summary judgment on the grounds that the City's ordinance constitutes and unconstitutional taking or is preempted by state law.

Dated: August 12, 2022

/S/ John D. Cann

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