

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

TOWN OF FLORENCE, a political
subdivision of the State of Arizona,

Plaintiff/ Appellant,

vs.

FLORENCE COPPER, INC.,

Defendant/ Appellee.

No. 1 CA-CV 19-0504

Maricopa County Superior Court
No. CV2015-000325

**BRIEF OF AMICUS CURIAE THE LEAGUE OF
ARIZONA CITIES AND TOWNS
(FILED WITH WRITTEN CONSENT)**

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INTEREST OF AMICUS CURIAE

The League is a voluntary association of 91 incorporated cities and towns in the State of Arizona that comprise approximately 78% of Arizona's total population. The League's members range from cities like Phoenix with 1.6 million residents to towns like Tusayan comprised of a few hundred full time residents. The League provides collective advocacy, education, training, technical assistance, and information-sharing for, and among, the cities and towns of Arizona.

The League's members share the Town of Florence's grave concern regarding its ability to enact zoning ordinances that promote the safety, health and well-being of its populace, and to take steps to enforce those zoning ordinances without fear of being bankrupted for it. Left standing, the trial court's ruling will paralyze small public entities from fulfilling their public duties to step forward to act in the best interests of the many. The League therefore submits this amicus curiae brief in support of the Town of Florence's appeal.

No person or entity other than the Amici identified herein provided financial resources for the preparation of this Brief.

LEGAL ARGUMENT

The League reminds the Court of the general precepts applicable to town zoning enactments, and the effect this case could have on many small cities and towns in Arizona.

I. TOWNS NEED TO BE ABLE TO ZONE FOR THE GOOD OF THE MANY

The purpose of zoning laws is to protect and promote public health, safety, morals and general welfare. [A.R.S. § 9-462.01](#) (the legislative body of any municipality by ordinance may establish zoning regulations in order to conserve and promote the public health, safety and general welfare). Zoning laws, an exercise of the municipality's police power, serve the public welfare by providing for the orderly development of the community. [Bartolomeo v. Paradise Valley](#), 129 Ariz. 409, 412-13 (Ct. App. 1981); [Klensin v. City of Tucson](#), 10 Ariz.App. 399, 402 (1969). A town's mission to serve the public welfare is the very reason it must hold public hearings on any zoning ordinance: to give interested persons an opportunity to be heard, and thus ensure that the proposed zoning is in the interest of the greater good. [A.R.S. § 9-462.04](#); [Hart v. Bayless Inv. & Trading Co.](#), 86 Ariz. 379, 389 (1959).

Given the foregoing, zoning ordinances enacted in response to the stated desires of not only the affected landowner, but also the Town's citizenry (as manifested in the public hearings), must be respected. This precept applies to the Town of Florence's 2007 zoning ordinance, which was supported by the landowner, the Town, and the citizenry, and which has been in effect without mining for over a decade.

In addition, municipalities cannot contract away their police power. *See, e.g., P.C.B. P'ship v. City of Largo*, 549 So. 2d 738, 741 (Fla. Dist. Ct. App. 1989) (voiding development agreement that purported to restrict the City's ability to decide whether to build a road, install a traffic device and permit the development of a parking lot and a storm drain connection). Ruling as the trial court has that the Town, landowner, and citizens alike cannot all agree upon a zoning ordinance that ensures their homes and neighborhoods will maintain their residential qualities essentially means that the Town in 2003 contracted away its police power to act for the common good. This is a result that should not occur. Police power "is not confined within the narrow circumspection of precedents, resting upon past conditions which do not cover and control present-day conditions obviously calling for revised regulations to promote the health, safety,

morals, or general welfare of the public.” *Miller v. Bd. of Pub. Works of City of Los Angeles*, 195 Cal. 477, 488, 234 P. 381, 385 (1925) (Where the interest of the individual conflicts with the interest of society, such individual interest is subordinated to the general welfare).

Cities and towns across Arizona need to be secure in knowing that when the municipality, affected landowner, and citizens all agree on the qualities and benefits they want in their neighborhoods, their collaborative efforts to effectuate those desires will not be undermined. The citizens of the Town of Florence have enjoyed their residential neighborhoods for decades. They deserve to enjoy them for the future—without the fear that a foreclosure purchaser coming in decades later can upend their dreams based on a contract that purportedly prevents the Town from exercising its police power to act in the best interests of the citizens.

II. LEFT STANDING, THE FEE AWARD AGAINST THE TOWN WILL DISCOURAGE SMALL ENTITIES FROM ENFORCING ZONING DECISIONS

A fee award under [A.R.S. § 12-341.01](#) is discretionary, not mandatory. Nor did the fee provision in the 2003 Pre-Annexation Development Agreement (“PADA”) mandate an award of fees to Florence Copper. The

PADA provided only that a party bringing an action to enforce the PADA “may apply for attorney fees pursuant to [A.R.S. § 12-341.01](#).”

The Town, which filed a declaratory action to preserve its zoning ordinance, has put forth its legal arguments why the trial court abused its discretion in awarding Florence Copper \$1.7 million in attorneys’ fees. Just as importantly, a substantial award of attorney's fees like the one the trial court authorized here will in all likelihood illegitimately deter small local governmental units from exercising their rightful zoning authority and/or taking steps to enforce that authority. Indeed, it would be the understatement of the century to say that this award will chill future small towns from attempting to assert and enforce what they deem to be their legitimate police powers. The trial court authorized an award that was 4% of the Town’s total annual budget, when the Town was simply seeking to enforce its 2007 zoning ordinance. Municipalities will be faced with an incomprehensible choice: take steps they believe are necessary to enforce their zoning authority at the risk of subjecting themselves to contract attorney’s fees that could literally incapacitate their budgets, or forego enforcement and abdicate their duties to their citizenry. To prevent this Hobson’s choice, the Legislature has specifically limited the amount of fees

awardable against a town under the applicable statute authorizing fees against a city or town. *See* [A.R.S. § 12-348\(E\)\(2\) and \(4\)](#). The fact that a contract existed in this case should not detract from—or eliminate consideration of—the very significant public policy reasons for limiting fee awards against small towns like Florence and similar municipalities that will face the repercussions of this decision.

CONCLUSION

For the foregoing reasons, The League of Arizona Cities and Towns supports the Town of Florence’s appeal and respectfully requests the Court to grant the Town’s requested relief.

RESPECTFULLY SUBMITTED this 16th day of April, 2020.

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CERTIFICATE OF COMPLIANCE

1. This Certificate of Compliance concerns:

A brief, and is submitted under Rule 14(a)(5)

An accelerated brief, and is submitted under Rule 29(a)

A motion for reconsideration, or a response to a motion for reconsideration, and is submitted under Rule 22(e)

A petition or cross-petition for review, a response to a petition or cross-petition for review, or a combined response and cross-petition, and is submitted under Rule 23(h)

An amicus curiae brief, and is submitted under Rule 16(b)(4)

2. The undersigned certifies that the attached brief, motion or petition uses type of at least 14 points, is double-spaced, and contains 1,098 words.

3. The document to which this Certificate is attached [X] does not, or [] does exceed the word limit that is set by Rule 14, Rule 22, Rule 23, or Rule 29, as applicable.

/s/ Eileen Dennis GilBride

CERTIFICATE OF SERVICE

Eileen Dennis GilBride, being first duly sworn, upon oath states that on the 16th day of April, 2020, she caused the original of the foregoing BRIEF OF AMICUS CURIAE THE LEAGUE OF ARIZONA CITIES AND TOWNS to be electronically filed through AZTurboCourt and that she caused a copy of the foregoing brief to be electronically served to the following parties:

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