



OFFICE OF THE
Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

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(R75-39)
75-34
BRUCE E. BABBITT
ATTORNEY GENERAL

March 10, 1975

LAW LIBRARY
ARIZONA ATTORNEY GENERAL

Ms. Holly Wallace
Legislative Aide
House of Representatives
State Capitol
Phoenix, Arizona 85007

Re: Laws Limiting or Prohibiting People Within
Certain Age Brackets from Living Within
the Limits of a Certain City or Town

Dear Ms. Wallace:

In response to your inquiry of January 30, 1975, the following information is submitted.

To date, we have not discovered any state to have specific laws limiting or prohibiting people within certain age brackets from living within the limits of a certain city or town.

In response to your question as to whether the State Legislature could enact such legislation, and how, a somewhat involved discussion is necessary. Common council type cities (A.R.S. §§ 9-231 through 9-276) are limited to the authority delegated by the Legislature in A.R.S. § 9-240 and by the general powers established in Title 9, Chapter 4. Under zoning powers (A.R.S. § 9-461) such cities, for the purpose of promoting the health, safety, morals and general welfare, may among other things regulate and restrict the density of the population.

Charter cities (A.R.S. § 9-281) may adopt a charter which is consistent with the Constitution and the law of the state. Where it appears that the Legislature has adopted a statute which is of statewide concern, a charter city is prohibited from legislating upon the same subject matter unless the city's legislation on such subject is more restrictive or stringent than those in the state statute.

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At first blush, it might appear that a charter city could enact an ordinance restricting the age of residents, in effect restricting the "density of the population" previously mentioned. Specific legislative authority would be necessary, added to A.R.S. § 9-461, to grant such authority to common council type cities.

The imposition of such restrictions, either at state or city level, raises serious constitutional questions. The United States and Arizona Supreme Courts have not ruled on the specific question. The due process clauses of the United States and Arizona Constitutions provide that no person shall be deprived of life, liberty or property without due process of law. Article 4, Part 2, Section 19 of the Arizona Constitution provides, in part, that no special law shall be adopted affecting the estates of deceased persons and minors.

Arizona decisions have held that equal protection and due process are satisfied, not by all persons being treated alike, but by individuals in a certain class being treated equally; that there be a reasonable basis for any distinction, with a substantial difference between those to whom it applies and to whom it does not apply, and that the distinction embrace all in a like situation.

In 1971, the New Jersey Supreme Court in Molino v. Mayor and Council of Bor. of Glassboro, 116 N.J. Super. 195, 281 A.2d 401 (1971), held that a borough ordinance which had the effect of barring children violated the equal protection clause, adding that there is a right to live as a family and not to be subject to a legal limitation on the number of members of that family to reside anyplace.

In Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974), the United States Supreme Court upheld a zoning ordinance which excluded more than three unrelated persons from living together within a village. However, the dissent commented that the court has the obligation to insure that zoning ordinances, even when adopted in furtherance of legitimate aims, do not infringe upon fundamental constitutional rights, and that zoning laws cannot consider

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who the persons are, or how they choose to live, whether they are black, white, Republican, Democrat, Catholic, Jew or married or unmarried. In another United States Supreme Court case, it was stated that freedom of association encompasses the right to invite a stranger into the home, to join the household, or to visit. An ordinance which creates a classification which infringes upon personal rights cannot withstand constitutional scrutiny only upon a showing of protecting a compelling and substantial state interest. There are also federal cases indicating that laws limiting the number of children raise the question of the constitutional protection to bear a child. Other cases state that marriage is one of the basic civil rights, that there is a right to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child, that freedom of choice in matters of marriage and family life is one of the liberties protected by the due process clause of the Fourteenth Amendment.

In Riley v. Stoves, 22 Ariz.App. 223, 526 P.2d 747 (1974), a recent Arizona Court of Appeals case, the Court upheld a restrictive covenant that barred person under 21 from living in a certain subdivision. The Court found that the restriction was privately drawn and was a reasonable means of accomplishing a private objective. The court declined to find that such private act violated the defendant's right to equal protection.

There is a great distinction between the enforcement of a private restrictive covenant and a statute or ordinance that infringes upon such basic constitutional rights as are involved here.

We would consider the proposed legislation to be so fraught with constitutional problems as to recommend unfavorable consideration of same, and recommend that you rely upon the private restrictive covenants already upheld by the Arizona courts.

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As to how these restrictions would pertain to criminal laws, I would refer you to the discussion contained in the attached opinion of the Arizona Court of Appeals.

If we can be of further help to you in this matter, please let us know.

Sincerely,

BRUCE E. BABBITT
Attorney General

JAMES W. WOODCOCK
Assistant Attorney General

JWW:lf

Enclosure



DEPARTMENT OF LAW
OFFICE OF THE
Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

attach to
75-34

BRUCE E. BABBITT
ATTORNEY GENERAL

December 6, 1976

Honorable Anne Lindeman
6542 West Earll Drive
Phoenix, Arizona 85033

Dear Representative Lindeman:

You have asked this office, on behalf of various senior citizen groups, for a review of the status of deed restriction enforcement as it relates to age restrictions.

As you know, the Legislature in 1975 passed two statutes designed to deal with the question. They first amended the Consumer Protection Act, A.R.S. § 44-1521.7, to include within the definition of "sale" "any real estate subject to any form of deed restrictions imposed as part of a previous sale."

The second statute, A.R.S. § 33-1317.B. is a penal provision which provides as follows:

No person shall rent or lease his property to another in violation of a valid restrictive covenant against the sale of such property to persons who have a child or children living with them nor shall a person rent or lease his property to persons who have a child or children living with them when his property lies within a subdivision which subdivision is presently designed, advertised and used as an exclusive adult subdivision. A person who rents or leases his property in violation of the provisions of this section shall be punished for the first offense by a fine of not less than one hundred nor more than five hundred dollars, and for a subsequent conviction by a fine of five hundred dollars, by imprisonment in the county jail, or both.

The amendment to the Consumer Protection Act has been of little value because the basic requirement for any action under that statute is a showing of fraud or misrepresentation. Normally,



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a person with minor children, knowingly purchasing in violation of a restrictive covenant cannot be characterized as a victim-- if anything he is more of a perpetrator of the violation. The injured parties are the other residents of the subdivision; however, their rights are more in the nature of contractual rights. It would be difficult to bring an action under the Consumer Fraud Act unless it could be shown that the developer, at the time the restrictions were recorded, intended to sell in violation of the restrictions. In many cases, that would be virtually impossible to prove.

An alternative method of enforcement is by enacting a criminal statute, as has been done with § 33-1317.B. Since that statute does not confer any enforcement jurisdiction upon the Attorney General, it can be enforced only by County Attorneys. However, I expect that, in appropriate cases, we could readily cooperate with the County Attorney who has direct jurisdiction.

The first part of 1317.B., making it a misdemeanor to rent to families with children in subdivisions with recorded deed restrictions, is clearly valid. I have communicated that view to representatives of Adult Action and other groups. They have not brought forth any specific examples of violations of this provision; presumably this underlines the effectiveness of the law as a deterrent.

Section 1317.B., however, makes no provision against the sale to persons with children who reside in a subdivision with recorded deed restrictions. Whether it was deliberate policy or an oversight that rentals and not sales were included, I do not know. However, the statute could readily be broadened to include sales in addition to rentals if you deem it desirable to do so.

The second half of 1317.B., making it a misdemeanor to rent to persons with children in subdivisions "designed, advertised and used as an exclusive adult subdivision" is presumably designed to cover those adult communities which do not have recorded deed restrictions. At the outset, there is a serious constitutional problem with any penal statute as vague and overbroad as this. More importantly, even if constitutional, it places on the prosecutor a tremendous burden of investigating and proving all the facts relating to the history and promotion of the subdivision. In the absence of the most compelling circumstances, I would certainly understand the reluctance of any County Attorney to file under this provision.

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Please let me know if we can be of further assistance.

Sincerely,



Bruce E. Babbitt
Attorney General

BEB:cl

cc: Honorable Stan Turley
Honorable John Rhodes