



City of Peoria 8401 West Monroe Street Peoria, Arizona 85345

OFFICE OF THE CITY ATTORNEY

CIVIL	602-412-7330
PROSECUTOR	602-412-7335
FACSIMILE	602-412-7043

OPINION NO. 98-01
Office of the City Attorney

TO: Councilmember Rebekah Coty, Pine District

FROM: Steve Kemp, City Attorney

DATE: October 4, 1998

SUBJECT: Application of Ordinance 94-74

QUESTION:

You have inquired as to whether Ordinance 94-74 adopted in 1994 which enacted Parking Standards for all zoning districts in the City of Peoria may be applied retroactively to parking uses that were in place prior to the adoption of the ordinance.

OPINION:

For purposes of this Opinion, the following factual background is provided. In 1994, the City Council adopted Ordinance 94-74, which revised Article 14-23 of the Peoria Zoning Ordinance adopting comprehensive parking standards applicable to all residential districts. Based on an inquiry that you have received from a citizen, the question has arisen as to whether this ordinance applies to parking uses in place at the time the ordinance was adopted.

Analyzing this issue requires a discussion of the concepts of uses and development standards that are part of the zoning process. Peoria's zoning process is based on the grant of state authority pursuant to A.R.S. §9-461, et.seq. and Article I, Section 3 of the City Charter. Under this authority, the City may establish one or more zoning classifications. Bartolomeo v. Town of Paradise Valley, 129 Ariz. 409, 631 P.2d. 564 (App. 1981). The City additionally has the authority to regulate the matters of

property development such as aesthetics. Arizona Public Service Co. v. Town of Paradise Valley, 125 Ariz. 447, 610 P.2d 449 (1980); City of Scottsdale v. Arizona Sign Ass'n Inc., 115 Ariz. 233, 564 P.3d 922 (App. 1977).

Uses that are permitted within a zoning classification may be maintained, even if the zoning classification is changed. Rotter v. Coconino County, 169 Ariz. 269, 818 P.2d 704 (Ariz. 1991). At the same time there is a strong public policy favoring elimination of such uses. City of Glendale v. Aldabbagh, 189 Ariz. 140, 939 P.2d 418 (1997).

It is recognized that zoning classifications are not the sole authority a city may use to regulate uses, other provisions may impact legitimate businesses. Caldwell v. Pima County, 172 Ariz. 352, 837 P.2d 154 (App.1991). These regulations need only have a reasonable relationship to the impact that they attempt to address in order to be valid. Home Builder's Ass'n of Cent. Ariz v. City of Scottsdale, 187 Ariz. 479, 930 P.2d 993 (1997).

In this case, the Peoria zoning ordinance contains a number of different use classifications. Changes in the use classifications result in the existing use becoming a non-conforming one. At the same time, the Peoria zoning ordinance contains a number of property development and regulatory provisions. Changes in these provisions may be applied to all new uses of property after the date of enactment. Unlike zoning classification changes, changes in property development and regulatory provisions may even be applied retroactively to existing property should the legislation indicate an intent to do so. S&R Properties v. Maricopa County, 178 Ariz. 491, 875 P.2d. 150 (App. 1993)

For purposes of determining a statute's retroactive application, Arizona courts consider two factors. First, did the legislature specifically provide for retroactive application. Madden-Tyler v. Maricopa County, ___ Ariz. ___, 943 P.2d 822 (App. 1997). Second, does the statute impact a procedural as compared to a substantive right. Matter of Appeal in Maricopa County Juvenile Action Numbers JV—512600 and 512797, 187 Ariz. 419, 930 P.2d 496 (App. 1996).

In this case, the changes to the parking provisions of the Peoria Zoning Ordinance are clearly substantive. A review of the ordinance does not indicate any express provision indicating council intent to apply the provisions retroactively. Therefore this office concludes as follows:

1. The City Council does have the authority to make property development standards and other regulatory provisions retroactive in their application to existing property by specifically indicating an intent to do so in the ordinance enacting the changes.
2. If the Council does not indicate such an intent, then the ordinance should be applied prospectively to all subsequent uses of the property.

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As Ordinance No. 94-74 does not indicate any intent for retroactive application, it should be applied prospectively.¹ As noted above, the City Council does have the authority to provide for retroactive application for such ordinances should it choose to do so.

If you have any further questions, please contact this office.

cc: Honorable Mayor and Council
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¹ It should be recognized that with any such non-conforming use, the burden will be on the property owner to prove the existence of such use prior to the date of the ordinance.