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SUPREME COURT
OF THE STATE OF WASHINGTON

WESTERN PLAZA,

Petitioner,

v.

NORMA TISON,

Respondent.

RESPONDENT'S RESPONSE TO BRIEF OF AMICUS
CURIAE

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 ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION	1
II. LEGAL ARGUMENT	1
1. There Is No Legislatively Crafted “Delicate Balance” as Urged by MHCW.	1
2. The Park Owner’s Constitutional Analysis is Flawed.	8
III. CONCLUSION	10

TABLE OF AUTHORITIES

TABLE OF CASES

Case	Page
<i>FCC v. Florida Power</i> , 480 U.S. 245, 252, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987)	9
<i>Kaiser Aetna v. United States</i> , 444 U.S. 164, 176 (1979)	9
<i>Laurel Park Community, LLC v. City of Tumwater</i> , 698 F.3d 1180, 1184-85 (9 th Cir. 2012)	2, 9, 10
<i>Little Mountain Estates Tenants Association v. Little Mountain Estates MHC LLC</i> , 169 Wn.2d 265, 236 P.3d 193 (2010)	1, 6, 7
<i>Manufactured Housing Communities of Washington v. State</i> , 142 Wn.2d 347, 394, 13 P.3d 183 (2000)	2, 5, 10
<i>McGahuey v. Hwang</i> , 104 Wn. App. 176, 15 P.3d 672, review denied, 144 Wn.2d 1004 (2001)	7
<i>Peyton Building, LLC v. Niko's Gourmet, Inc.</i> , 180 Wn. App. 674, 683, 323 P.3d 629 (2014)	8
<i>Pope v. Lee</i> , 152 N.H. 296, 306-07, 879 A.2d 735, 741 (2005)	5
<i>Seashore Villa Ass'n v. Hagglund Family Ltd. Partnership</i> , 163 Wn. App. 531, 545, 260 P.3d 906 (2011), review denied, 173 Wn.2d 1036 (2012)	7
<i>Yee v. City of Escondido</i> , 503 U.S. 519, 523, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992)	5, 8, 9

Statutes	Page
25 Del. C. §7007 (1953) as amended 2013	3
RCW 59.20.040	2
RCW 59.20.060(1)(g)(ii)	6, 8
RCW 59.20.073(1)	5
RCW 59.20.080	6
RCW 59.20.080(1)(e)	6, 8
RCW 59.20.090	3
RCW 59.20.090(1)	3, 5
RCW 59.20.090(2)	1, 2, 7
RCW 59.20.130	4
RCW 59.20.140	4

Court Rules	Page
RAP 13.7(b)	8

I. INTRODUCTION

Amicus Curiae Manufactured Housing Communities of Washington (“MHCW”) essentially argues that a mobile home park owner needs the flexibility to unilaterally alter *any* lease term upon automatic renewal of an annual lease, and for that reason the rent limitation clause in the lease at bar, which clause was specifically negotiated by the parties at the inception of the lease, may be unilaterally altered by the landlord. Any other rule, MHCW contends, would upset an imagined “delicate balance” embedded in the language of the MHLTA and would raise constitutional issues. These arguments are without merit.¹

II. LEGAL ARGUMENT

1. There Is No Legislatively Crafted “Delicate Balance” as Urged by MHCW.

A park owner would love to have the ability to modify any term

¹MHCW’s arguments also suffer from an analytical flaw. If the park owner’s argument is correct—that the landlord may change any term of the lease upon its annual automatic renewal—then it would be impossible for the landlord to agree in the lease *not* to change any term of the lease. Such a clause itself could be changed under the park owner’s theory, and it would be therefore impossible for the tenant to negotiate any enforceable limitation on the amount of rent charged by the park owner. The absurdity of this proposition weighs heavily in favor of rejecting it. There is no reason why the park owner cannot agree to waive or not enforce rights accorded under RCW 59.20.090(2). Such a waiver or agreement would be enforceable under the principles enunciated in *Little Mountain Estates, infra*, 169 Wn.2d 265.

of a tenant's lease.² Such power would not reflect a "delicate balance" carefully crafted during the legislative process, but absolute hegemony ceding unreasonable and unjust power over people monetarily challenged.³ The park owner may under current law raise rent upon three months' notice before the end of the term. RCW 59.20.090(2). Thus, any financial concern of the park owner can be met by simply raising rent to cover increased costs. But the ability to change *any* term in the lease upon expiration of the term would allow the park owner to change or add *non-financial* terms, e.g., the location or dimensions of a tenant's lot, restrictions on parking in the mobile home park, the burden to maintain park sidewalks and trees, the requirement to use certain colors in painting the home, etc.

The Legislature certainly did not make it clear through statutory

²The MHLTA refers to a "rental agreement." RCW 59.20.040 (the MHLTA "shall regulate and determine legal rights, remedies, and obligations arising from any rental agreement between a landlord and a tenant . . ."). The term "lease" has been used in this appeal with no difference in meaning, as in the context of this case an agreement, like a lease, implies the agreement of both parties, i.e., the landlord and the tenant.

³"Because they cost less than traditional homes (less even than rental housing in some circumstances), manufactured homes are an attractive option for lower-income and poorer residents. 'Mobile home residents are typically poorer than the average rental household, with incomes lower by one-third.'" *Laurel Park Community, LLC v. City of Tumwater*, 698 F.3d 1180, 1184-85 (9th Cir. 2012), quoting *Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 394, 13 P.3d 183 (2000) (Talmadge, J., dissenting).

language that a park owner's power to change any provision in the lease was a "delicate balance" the Legislature sought to achieve. This is especially true, since the Legislature, in enacting the MHLTA in 1977, knew how to include a specific provision allowing the park owner to change any term of the lease upon expiration of the lease, which at that time was six months in duration.⁴ The elimination of that specific language in later versions of the MHLTA is powerful evidence of the legislative intent that park owners *not* have the power to unilaterally modify leases upon lease expiration.⁵

It should be obvious that a park owner, as drafter of the lease,

⁴See RCW 59.20.090(1) as enacted in Laws of 1977, ex. Sess., ch. 279, § 9. Brief of AC MHCW fn 2.

⁵The Delaware Manufactured Homes and Manufactured Home Communities Act, 25 Del. C. § 7007, remarkably similar to what the Washington Legislature intended to say in RCW 59.20.090, provides as follows:

- (a) The term of a rental agreement for a lot in a manufactured home community must be:
 - (1) One year; or
 - (2) A shorter or longer term that is mutually agreed upon by the parties and is designated in writing within the rental agreement.
- (b) Upon the expiration of the term of a rental agreement, the rental agreement must be *automatically renewed* by the landlord for the same term and with the same provisions as the original agreement, with the exception that modified provisions relating to the amount and payment of rent are permitted, and, with the mutual agreement of all parties to the rental agreement, other modifications not prohibited by law . . .

25 Del. C. §7007 (originally enacted in 1953 and amended by Laws 2013, ch. 63, s. 4, effective 6/30/2013) [*italics added*].

would change a provision in the lease only when that change benefitted the landlord. Otherwise there would be no need to make the change. Interestingly, the lease in this case imposes essentially no obligations upon the park owner, except to deposit the security deposit into a trust account. CP 22, ¶ 7. The lease imposes numerous burdens and obligations upon the tenant, including the recitation of the statutory obligations contained in RCW 59.20.140. CP 22, ¶ 10.⁶ And even though RCW 59.20.130 imposes statutory obligations upon the park owner as landlord, the lease does not recite or refer to those obligations. CP 22-23. Given that mentality, a park owner would have no incentive to make a change in the lease that would benefit the tenant, if the change imposed any additional burden or cost upon the park owner.

Furthermore, neither Amicus nor respondent park owner provides any explanation of what the words “automatically renewed”

⁶Many of the paragraphs of the lease begin with the words “Tenant agrees . . .” or “Tenant shall . . .[.]” e.g. ¶ 3 (utilities), ¶ 5 (late charges), ¶ 8 (occupants), ¶ 9 (pets), ¶ 10 (responsibilities), ¶ 14 (improvements), ¶ 15 (fees for guests), ¶ 16 (guest parking), ¶ 18 (subletting), and ¶ 19 (liability and indemnity). Other paragraphs contain the same words within the paragraph, e.g., ¶ 1 (rent/term), ¶ 2 (additional charges), ¶ 7 (security/damage deposit), ¶ 11 (rules and regulations), ¶ 12 (termination-eviction/waiver of non-payment of rent), ¶ 13 (holding over), ¶ 20 (hazardous substances), and ¶ 25 (secured party). Many of the remaining paragraphs impose burdens on the tenant, e.g., ¶ 17 (assignment), ¶ 21 (condemnation–eminent domain), and ¶ 26 (mediation).

mean in RCW 59.20.090(1).⁷ The word “automatically” indicates that the parties need do nothing--no negotiations, no meetings, no notices, no written documents, no procedural steps; the rental agreement gets renewed without human intervention, i.e., “automatically.” See, *Pope v. Lee*, 152 N.H. 296, 306-07, 879 A.2d 735, 741 (2005) (language in commercial lease providing that lease was “automatically” renewed created perpetual lease “without volition” of either party).

A significant consideration is that a mobile home park tenant cannot without great expense move his or her home out of the park and relocate it. Many tenants cannot afford this expense. So when a tenant wants to move out of the park, he or she sells the home in place to a buyer.⁸ The MHLTA specifically allows such a sale. RCW 59.20.073(1). The park owner can raise the rent upon appropriate notice each year.

⁷“Unless otherwise agreed rental agreements shall be for a term of one year. Any rental agreement of whatever duration shall be *automatically renewed* for the term of the original rental agreement, unless a different specified term is agreed upon” [italics added]. RCW 59.20.090(1).

⁸“Mobile homes are largely immobile as a practical matter, because the cost of moving one is often a significant fraction of the value of the mobile home itself. They are generally placed permanently in parks; once in place, only about 1 in every 100 mobile homes is ever moved.” *Yee v. City of Escondido*, 503 U.S. 519, 523, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992); see also *Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 392-93, 13 P.3d 183 (2000) (Talmadge, J., dissenting) (“Mobile homes are not mobile. The term is a vestige of earlier times when mobile homes were more like today’s recreational vehicles. Today mobile homes are designed to be placed permanently on a pad and maintained there for life.” (internal quotation marks omitted)).

RCW 59.20.090(2). This is the “delicate balance” the Legislature approved in structuring the MHLTA. Park tenants do not lose their equity in their homes when they move, and park owners can maintain the financial viability of their commercial enterprise by raising rents each year to market levels. MHCW has not established any need on the part of park owners to unilaterally alter any terms of the lease to obtain this result.

In addition, the park owner has mechanisms for removing problem tenants from the park. See, RCW 59.20.080. As long as the park owner has his park filled with tenants paying rent and not causing problems, the park owner typically does not care who the specific tenant is living in the space. And if the land comprising the park becomes valuable for further development, the park owner can give a one-year notice and close the park. RCW 59.20.080(1)(e); RCW 59.20.060(1)(g)(ii). When this happens, the park owner typically profits handsomely, and the park tenants typically lose all or most of the investment in their homes, as the homes are typically unsaleable once notice is given to close the park.

Moreover, MHCW’s interpretation of relevant case law is incorrect. In *Little Mountain Estates Tenants Association v. Little Mountain Estates MHC LLC*, 169 Wn.2d 265, 268, 271, 236 P.3d 193 (2010) the court emphasized the parties’ freedom to contract and

negotiate lease terms not prohibited by the MHLTA, and the court enforced the agreement made by the parties as set forth in the lease, since the agreement did not violate the MHLTA or public policy.⁹ *Little Mountain Estates* does not authorize park owners to change the terms of a duly signed rental agreement.

In *McGahuey v. Hwang*, 104 Wn. App. 176, 15 P.3d 672, *review denied*, 144 Wn.2d 1004 (2001), the court approved the charging of new fees upon automatic renewal of tenant leases, as there is no limitation on fees in RCW 59.20.090(2). *McGahuey* did provide a caveat that additional fees had to protect the tenant and had to be equitable. 104 Wn. App. at 182-183. *McGahuey* did not address the landlord's ability to unilaterally change non-financial terms of the lease, so therefore does not support the park owner's abrogation of a specifically negotiated clause limiting rent increases, in effect a waiver of RCW 59.20.090(2).

In *Seashore Villa Ass'n v. Hagglund Family Ltd. Partnership*, 163 Wn. App. 531, 545, 260 P.3d 906 (2011), *review denied*, 173 Wn.2d 1036 (2012) the court held that the tenants' association failed to prove the existence of an implied contract, where leases were renewed over the

⁹This Court also noted that the MHLTA "does not prohibit landlords from offering special terms to the tenants who first move into a new mobile or manufactured home park [footnote omitted]." 169 Wn.2d at 271. That is essentially what happened here: the park owner offered Ms. Tison special terms, i.e., a promise of a limitation on rent increases during her tenancy, in order to induce her to purchase the home and move into the park.

years. The court did not hold that any term in the lease could be modified by the park owner upon annual renewal, much less a term—such as a rent limitation clause—which was specifically negotiated by the parties.

2. The Park Owner’s Constitutional Analysis is Flawed.

Neither the park owner nor MHCW raised any constitutional arguments in their petition for review and supporting brief, nor in the trial court. MHCW raises for the first time a potential constitutional issue on the eve of oral argument. Such argument should be rejected, as “the Supreme court will review only the questions raised in . . . the petition for review and the answer . . .” RAP 13.7(b).¹⁰

Park owners are not stuck with perpetual leases. As noted above, they can close the park at any time with a one-year notice. RCW 59.20.080(1)(e); RCW 59.20.060(1)(g)(ii); *Yee v. City of Escondido*, 503 U.S. 519, 527-28, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992). In that case the U.S. Supreme Court, in considering a challenge to a municipal ordinance establishing rent controls on mobile home park owners,

¹⁰Amicus MHCW also does not seem to join in the park owner’s argument that the interlineated rent limitation clause does not run with the land, hence is not enforceable. It is clear, however, that a covenant regarding rent does run with the land. *Peyton Building, LLC v. Niko’s Gourmet, Inc.*, 180 Wn. App. 674, 683, 323 P.3d 629 (2014) (“It is well settled that the benefit of [the tenant’s] promise to pay rent is incidental to, and therefore touches and concerns the reversion [following the landlord’s sale of the property] . . .”

observed:

Petitioners [park owners] voluntarily rented their land to mobile home owners. At least on the face of the regulatory scheme, neither the City nor the State compels petitioners, once they have rented their property to tenants, to continue doing so. To the contrary, the Mobilehome Residency Law provides that a park owner who wishes to change the use of his land may evict his tenants, albeit with six or twelve months notice. Cal.Civ.Code Ann. § 798.56(g). Put bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by the government. See *Florida Power, supra*, 480 U.S. at 252-253. While the "right to exclude" is doubtless, as petitioners assert, "one of the most essential sticks in the bundle of rights that are commonly characterized as property," *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979), we do not find that right to have been taken from petitioners on the mere face of the Escondido ordinance.

503 U.S. at 527-28.¹¹ The Supreme Court concluded that "[o]n their face, the state and local laws at issue here merely regulate petitioners' use of their land by regulating the relationship between landlord and tenant." 503 U.S. at 528. That is essentially what the MHLTA does in the present context.

Further, under the taking analysis in *Laurel Park Community, supra*, 698 F.3d 1180, 1189-91 (9th Cir. 2012), cited by Amicus MHCW, there has been no taking, as MHCW has presented no claim that there

¹¹"[S]tatutes regulating the economic relations of landlords and tenants are not, per se, takings[.]" citing *FCC v. Florida Power*, 480 U.S. 245, 252, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987).

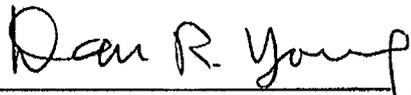
is any negative economic effect from leases that automatically renew, or that park owners' investment-backed expectations have been diminished, or that the automatic-renewal provision amounts to a physical invasion. *Laurel Park*, 698 F.3d at 1189-1191. Thus the requirements of a regulatory taking set forth in *Laurel Park* are not met here.¹²

III. CONCLUSION

This Court should reject the arguments of MHCW and affirm the decision of the Court of Appeals in this case.

RESPECTFULLY SUBMITTED this 7th day of January, 2015.

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Norma Tison

¹²Also, a park owner has not been deprived of any of the rights constituting the "bundle of sticks" of property ownership as identified in *Manufactured Housing*, 142 Wn.2d 347, 367. See also, *Laurel Park*, 698 F.3d at 1191-92. "The right of property includes four particulars: (1) right of occupation; (2) right of excluding others; (3) right of disposition, or the right of transfer in the integral right to other persons; (4) right of transmission . . ." *Manufactured Housing* at 367. As long as the park owner desires to rent out the pads to tenants and obtain rental income, none of the above rights has been diminished. If the park owner no longer desires to operate a mobile home park, the owner can close the park upon giving proper notice and use the real estate for any legitimate purpose. Thus MHCW can establish no diminution of any constitutional right.

DECLARATION OF SERVICE

I, Dan R. Young, declare to be true under penalty of perjury under the laws of the State of Washington as follows:

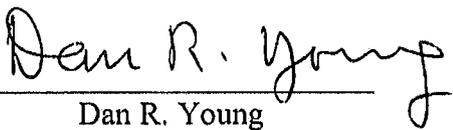
1. I am an attorney representing the respondent Norma Tison in this action.
2. On January 7, 2015, I sent by the USPS, first class mail with pre-paid postage affixed, a copy of the foregoing Respondent's Response to Brief of Amicus Curiae to the following:

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Sir/Madam Clerk,
Attached is a copy of Respondent's Response to Brief of Amicus Curiae for filing.

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