McCrory, Arkansas Trailer-Banishment Ordinance: Lessons Learned?

Walter Wright[1]
Mitchell Williams Law Firm

I. Introduction

The past 20 years have arguably seen a significant improvement in local governmental acceptance in Arkansas of manufactured housing. This is due in no small part to the efforts of the Arkansas Manufactured Housing Association ("AMHA") and its individual members. Educational efforts have helped address manufactured housing myths.

Equally important, the AMHA has not hesitated to oppose discriminatory municipal laws (zoning or otherwise). A key tool has been the use of applicable Arkansas or federal legislation that prevents local discrimination against manufactured housing. Despite these efforts, some Arkansas municipalities still search for ways to reduce or eliminate the ability of their residents to choose manufactured housing.

The most recent example is a Trailer-Banishment Ordinance ("Ordinance") enacted by the McCrory, Arkansas City Council ("McCrory"). The Ordinance proposed to ban mobile homes failing to meet a dollar value test. The AMHA carefully tracked both the enactment of the McCrory Ordinance and was supportive of a subsequent legal challenge by a nonprofit national organization.

As will be discussed, the McCrory Ordinance was subsequently withdrawn in the face of serious questions about its constitutionality. Nevertheless, the McCrory Ordinance clearly illustrates the importance of proactively identifying and opposing such measures in whatever form. Further, there is a continuing need to educate local Arkansas government about manufactured housing and the protections provided by federal and Arkansas law.

As a result, this article addresses both the elements of the McCrory Ordinance and the judicial challenge that resulted in its withdrawal. Also briefly reviewed are two other sets of laws (one federal/one Arkansas) that were put in place a number of years ago to prevent discrimination against manufactured housing.

---

[1] Walter G. Wright is a member of the Mitchell Williams Law Firm in Little Rock. He has served for almost a decade as General Counsel to the Arkansas Manufactured Housing Association. Walter has also been an Adjunct Professor at the University of Arkansas at Little Rock School of Law for the past 25 years. He can be reached at wwright@mwlaw.com

II. Relevant Federal/Arkansas Laws

Manufactured homes are sometimes unfairly perceived as inferior or less aesthetically pleasing than site-built housing. As a result of such perceptions, local governments on occasion utilize their zoning or other authorities to attempt to eliminate, isolate or minimize manufactured housing. The ability of an Arkansas municipality to undertake such discriminatory measures is limited to a great extent by both federal and Arkansas laws. These are very briefly described below.

A. Relevant Federal Law on Manufactured Housing Production

Congress enacted in 1974 the National Manufactured Housing Construction and Safety Standards Act ("Federal Act"). The Federal Act required the United States Department of Housing and Urban Development ("HUD") to promulgate and periodically revise regulations addressing various aspects of the production of manufactured houses.

The federal regulation promulgated pursuant to the Federal Act is known as the HUD Code. This code has a unique status as the only federal residential building code. It applies uniform construction and safety standards to both single or multi-section "manufactured houses." These building standards have been subjected to federal regulation, in part, to establish practical, uniform, and to the extent possible, performance based federal construction standards for these structures.

The State of Arkansas addresses the regulation of manufactured housing through the Arkansas Manufactured Housing Commission ("AMHC"). The Arkansas Manufactured Homes Standards Act requires that the AMHC do what is necessary to comply with the federal act. This includes enforcement of the federal HUD Code.

1. Local Government Preemption

The HUD Code sometimes conflicts with local government's regulation of manufactured housing. Municipalities' oversight activities have usually included the construction and/or siting of both site-built and manufactured housing through building standards or zoning codes.

(a.) HUD Code Preemption

The HUD Code expressly prohibits state and local governments from enacting construction or safety standards that differ from its provisions. This statutory provision's purpose is to promote the uniformity and comprehensiveness of the HUD Code. State and local governments do retain the right to establish standards for both stabilizing and support systems of manufactured homes and the foundations on which those manufactured homes are installed.

(b.) Conflict with Local Government Standards

Municipal standards or codes have sometimes conflicted with the HUD Code. As a result, the federal courts have periodically adjudicated whether some aspect of a local ordinance or code has been preempted by the federal program. For example, one federal court held that the HUD Code preempted a local municipality's ban of manufactured homes from a zoning district based on the safety standards. Another federal court held that a local ordinance was prohibited because it attempted to impose greater safety requirements for manufactured homes than those mandated by the HUD Code.

(c.) Limited Applicability to Local Zoning

Not all local requirements affecting manufactured housing are preempted by the HUD Code. The most relevant examples in Arkansas are zoning codes. The federal courts have held that the HUD Code preempts only construction and safety standards and does not apply to local zoning ordinances that regulate the placement of dwellings in a community. Therefore, the HUD Code does not limit the authority of local government to establish zoning classifications specifying acceptable locations for manufactured housing as long the requirement is not

based on compliance with the construction, safety, and energy standards stricter than the HUD Code.

A number of municipalities (including some in Arkansas) recognized the federal preemption provisions were only triggered if the zoning ordinance included building and construction standards. They therefore carefully drafted zoning codes in regards to manufactured housing in a manner that avoided such preemption triggers. A community's decision as expressed in its zoning code to "restrict" manufactured housing from a locational standpoint was therefore often unaffected by the HUD Code.

B. Arkansas Affordable Housing Accessibility Act

The previously described limitations on the ability of the HUD Code to ensure that areas in a community were provided for manufactured housing led to the enactment of the Arkansas Affordable Housing Accessibility Act ("Accessibility Act"). The AMHA recognized that a state mandate to provide for similar treatment of manufactured housing from a zoning standpoint was critical.

By way of background, an Arkansas municipality's power to establish zoning and related requirements is derived from certain state statutes. A municipality's statutory authority is limited or enhanced based on the classification of the municipality, but generally includes the ability to regulate certain aspects of building construction.

Many Arkansas communities had in the past attempted to restrict the placement of manufactured housing through the use of zoning ordinances or codes. A recognition by some states such as Arkansas of the potential role of manufactured housing in addressing housing needs led to legislative initiatives to reduce discriminating local governmental treatment of such structures. Arkansas is one of those states.

In March 2003, the Arkansas General Assembly enacted the Accessibility Act to better ensure the availability of affordable housing in Arkansas communities. The Accessibility Act provides that Arkansas communities must treat manufactured homes and any other form of residential housing equally.

The Federal HUD Code plays a key role in the implementation of the Accessibility Act. This is due to the fact that the Arkansas statute prohibits municipalities from establishing ordinances or regulations incorporating standards for manufactured home construction for safety not identical to the HUD Code. Further, Arkansas municipalities are prohibited from establishing an ordinance or code that includes standards for manufactured home installation inconsistent with the state standards for installation set forth under § 20-25-106 and the design of the manufacturer.

The Accessibility Act also requires that local zoning ordinances permit the placement of manufactured homes on individually owned lots in at least one or more residential districts or zones within the municipality. The local codes are not allowed to impose regulations or conditions on manufactured homes that prohibit placement of manufactured homes or that are inconsistent with the regulations or conditions imposed on other single-family dwellings permitted in the same residential district or zone. They cannot establish or continue in effect any ordinance or regulation that restricts the placement of manufactured homes to mobile home parks, subdivisions, or land-leased communities. Regional regulations or conditions for the placement of manufactured homes within their jurisdiction as to issues such as perimeter foundation enclosures; connection to the utilities; building setbacks, etc. can be established.

III. McCrory, Arkansas Trailer-Banishment Ordinance

Despite the previously referenced federal and Arkansas statutory provisions, communities in Arkansas and elsewhere still occasionally seek ways to ban or make difficult the siting of manufactured housing within their borders. A recent example is McCrory's Trailer-Banishment Ordinance which disallowed the presence of any mobile home worth less than $7,500 to remain within the City limits.

This recent development is important to the AMHA and its members for several reasons. First, it is an example of a municipality's use of an atypical provision to attempt to discriminate against manufactured housing. Further, the successful implementation of such an Ordinance would be a precedent that other Arkansas municipalities would likely copy or even attempt to expand. This is not a hypothetical concern. The AMHA was aware of other municipalities in the same part of the state that were considering similar ordinances.

As a result, the AMHA tracked with great interest the McCrory Ordinance and the effort to challenge it. The AMHA viewed as critical the need to support, if necessary, a successful challenge to this Ordinance. A successful challenge would hopefully help the AMHA dissuade other municipalities from copying or expanding it. Fortunately, this was not necessary.

A. Components of the McCrory Ordinance

As previously noted, the McCrory Ordinance would have forbidden any mobile home worth less than $7,500 to remain within the City limits. It also proposed to levy a fine of up to $500 per day for noncompliance. A resident was required to establish by a certified appraiser or a bill of sale a value of $7,500 or more for the structure.

B. McCrory Ordinance Judicial Challenge

Subsequent to the enactment of the McCrory Ordinance, a Class Action Complaint ("Complaint") was filed in the United States District Court of the Eastern District of Arkansas by David Watlington and others on constitutional grounds. Mr. Watlington and another named Plaintiff, Lindsey Hollaway, were described in the Complaint as an "engaged couple living in McCrory below the federal poverty line in a trailer worth approximately $1,500." They were further described as being unable to afford a more expensive home. As a result, the McCrory Police Chief was stated to have ordered Ms. Hollaway to leave McCrory because of the value of their home.

A national nonprofit organization named Equal Justice Under Law ("Equal Justice") based in Washington, D.C. and John D. Coulter of the Little Rock law firm of McMath Woods P.A. filed the Class Action Complaint on behalf of the previously referenced plaintiffs. They argued that the McCrory Ordinance was unconstitutional.

The Complaint stated that McCrory's wealth-based banishment ordinance:

(1.) Violates substantive due process by infringing on Plaintiffs' fundamental right not to be forcibly expelled from their place of residence

(2.) Discriminates on the basis of wealth status without any rational connection to a legitimate government interest in violation of the Equal Protection Clause

(3.) Criminalizes property and thus violates the constitution's proscription against criminalization of status

(4.) Imposes excessive fines in violation of the Eighth Amendment for violators of the Ordinance whose only offense is being poor

(5.) Violates procedural due process by imposing punishment without any process whatsoever

The attorneys' 22-page Complaint asked that the Federal Court declare that the McCrory Ordinance violated Plaintiffs' constitutional rights and that the City be preliminarily and permanently enjoined from enforcing it against Plaintiffs and anyone else. They also asked for a judgment compensating the Plaintiffs for the damages they suffered as a result of the unconstitutional and unlawful conduct and reasonable attorney fees and costs.

The McCrory City Council scheduled an emergency meeting shortly after the Complaint was filed to revoke the Ordinance. The Ordinance was rescinded and is no longer in place. I understand McCrory has filed a Motion to Dismiss arguing the lawsuit is moot. Equal Justice Under Law disagrees that the lawsuit is moot and is requesting a judgment that would prohibit McCrory from resuming this activity. Both the resulting legal action and associated expenses have likely drawn the attention of other Arkansas municipalities and their representatives.

IV. Conclusion

This article, hopefully, provides a reminder that there is federal and Arkansas legislation in place that attempts to address discriminatory actions against manufactured housing. However, it further illustrates the reality that some municipalities will look for other means of isolating or banning manufactured housing. As a result, it is important to track such efforts and ensure that they are identified for appropriate challenge either through attendance at Council meetings or after enactment through redress in the courts. The expense and potential liabilities associated with the McCrory litigation will hopefully lead to municipalities carefully considering the legality of such measures prior to enacting them.