National Consumer Law Center
Fighting Together for Economic Justice

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Dr. David R. Anderson
Executive Director
All Parks Alliance for Change
2380 Wycliff Street, Suite 200,
St. Paul, MN 55114

Dear Dr. Anderson:

You asked for my opinion about the impact, if any, of a decision from the Washington State Supreme Court, *Manufactured Housing Communities of Washington v. State*, 13 P.3d 183 (Wash. 2000) (hereinafter *MHC v. State*), on the constitutionality of Minn. H.F. 817. My opinion is that the decision has no impact on the constitutionality of that bill. The Washington State decision is irrelevant to H.F. 817 because it addresses the constitutionality of a law that created a right of first refusal, which H.F. 817 does not do; the decision interprets a provision of the Washington State Constitution that does not appear in Minnesota's Constitution; and the Washington Supreme Court repudiated that decision in 2019.

Background on NCLC

I am the Deputy Director of the National Consumer Law Center (NCLC), a non-profit organization, founded in 1969, that specializes in consumer issues, particularly those affecting low-income and elderly consumers. NCLC provides legal and technical analysis and assistance on consumer law issues to legal services, government, and private attorneys representing low-income and elderly consumers across the country.

NCLC has long had a focus on manufactured housing. Our manufactured housing webpage highlights our many reports, issue briefs, agency comments, and testimony on these issues. Of particular relevance for this bill, we have published a Policy Guide on Promoting Resident Ownership of Communities and a compendium of the full text of all state laws on the subject. I am the principal author of those materials. Along with three of my colleagues, I am also a co-author of the widely-cited AARP publication *Manufactured Housing Community Tenants: Shifting the Balance of Power* (2004), which analyzed state manufactured home community statutes in the fifty states. I am a graduate of Brown University and Yale Law School.

Summary of the Washingon State decision

In *MHC v. State,* the Washington Supreme Court held that a statute granting manufactured home community residents a right of first refusal—the right to buy a manufactured home community if they matched a third-party offer—violated the state constitution. The court held that the park owner's right to decide to whom to sell the property was absolute, and that granting the residents a right of first refusal impermissibly took this property right from the park owner. The court held that this was the case even if

the right of first refusal was granted for a public benefit, and even though the park owner would receive exactly the same price for the park as if it were sold to the third party.

The Washington State decision addresses only the constitutionality of a law granting a right of first refusal, not a law that merely grants a purchase opportunity.

The first reason that *MHC v. State* is irrelevant to Minn. H.F. 817 is that the bill *does not give residents a right of first refusal*. Unlike the statute the Washington Supreme Court struck down, Minn. H.F. 817 does not give residents the right to purchase their manufactured home community. Nor does it prevent the park owner from selling the community to the buyer the park owner chooses.

H.F. 817 merely gives the residents a 60-day period to submit an offer. It requires the park owner to treat the residents in good faith, and to assure them that the park owner will consider their offer and negotiate with them in good faith. Subdivision 4(a) of the bill explicitly allows the park owner to reject the residents' offer, requiring only a written explanation of the reasons for doing so. Thus, H.F. 817 does not create the requirements that the Washington Supreme Court found unconstitutional.

The Washington State decision interprets a provision of the Washington State Constitution that does not appear in Minnesota's Constitution.

A second reason that *MHC v. State* has no impact on the constitutionality is that it interprets a provision of the Washington State Constitution that does not appear in Minnesota's Constitution. The state constitutional provision in question, Wash. Const. Art. I, § 16, provided that "[p]rivate property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes," followed by details about procedures to be followed.

Minnnesota's Constitution has no such provision. Its closest analog is Minn. Const. Art. I, § 13, which provides: "Private property shall not be taken, destroyed or damaged for public use without just compensation therfor, first paid or secured." The Washington State decision explicitly contrasted language like that, which is common in state constitutions, with the language of the Washington Constitution. The court stressed that the differences between the two types of provisions were "significant," and its decision was based on those differences. Thus, even if H.F. 817 created a right of first refusal, which it does not, *MHC v. State* would be irrelevant to it because it interprets language that does not appear in Minnesota's Constitution.

The Washington Supreme Court has repudiated *MHC v. State*.

Even if *MHC v. State* had some relevance to Minn H.F. 817, it should be given little weight because the Washington Supreme Court itself repudiated it in *Yim v. City of Seattle*, 451 P.3d 675 (Wash. 2019). There, the court dealt with the constitutionality of a city ordinance that required landlords to publish their rental criteria, treat all rental applicants equally, and rent to the first applicant who met the published criteria. Since the issues were somewhat similar to those addressed in *MHC v. State*, in that both cases involved a law or ordinance that restricted a property owner's freedom of choice about whom to convey a property interest (*i.e.* ownership or a lease), the court reexamined *MHC v. State and* its other earlier decisions. The court held that the absolutist position taken in *MHC v. State* that interference with any attribute of ownership of property was unconstitutional was mistaken.

The Washington Supreme Court's repudiation of *MHC v. State* brings it more in line with the only other state supreme court to consider the constitutionality of a law granting manufactured home community residents a right of first refusal. In *Greenfield Country Estates Tenants Assoc., Inc. v. Deep*, 666 N.E.2d 988 (Mass. 1996), the Massachusetts Supreme Judicial Court rejected the argument that the

state's right of first refusal law amounted to a taking of property without just compensation under the U.S. Constitution. The court held:

> The statutory right of first refusal minimally limits an owner's freedom to transfer property in that the owner must offer the property to the tenants on substantially the same terms and conditions as contained in a bona fide offer of purchase. The owner is not required to sell to the tenants on terms less favorable than he or she can receive from a third party.

Accordingly, the court held '[t]he statutory right of first refusal cannot be said materially to affect the marketability of the property so as to deprive it of economic value." Citing the stability that the right of first refusal created for residents and the law's promotion of the continued existence of affordable housing, the court observed "[i]t is difficult to imagine a more appropriate and close-fitting method to further the legitimate interest of the Commonwealth." The court concluded that "mere conditioning the sale of the property to a right of first refusal does not amount to a taking."

Conclusion

The Washington Supreme Court decision addresses a state law that is fundamentally different from H.F. 817, interprets a provision that does not appear in the Minnesota Constitution, and has been repudiated by the court that issued it. H.F. 817 merely creates a purchase opportunity, not a right of first refusal, but even if it created a right of first refusal it would likely be held constitutional.

Sincerely yours,

Carolyn L. Carter

Carolyn L. Carter
Deputy Director