



INSTITUTE FOR JUSTICE
ARIZONA

August 17, 2023

Via email: planningdivision@pinal.gov

Pinal County Board of Adjustments and Appeals
Community Development Planning Division
85 N. Florence St.
PO Box 2973
Florence, AZ 85132

Re: Tia Howard Application for an Interpretation

The Institute for Justice is a public interest, civil liberties law firm that has dedicated more than 30 years to protecting property rights across the nation. For more than 20 of those years, we have had an office here in Arizona. We represent Tia Howard in her application for an interpretation of several sections of the Pinal County Development Services Code (“PCDSC”) regarding zoning.

As explained below, Tia wants to operate a micro school in Pinal County but Senior Planners Gilbert Olgin and Patrick Roberts have informed her that some sections of the zoning code may prohibit her from doing so. It is not clear, however, that these provisions are enforceable against Tia and her micro school. We believe that the proper interpretation of these provisions will not adversely affect Tia. But if these provisions do apply to Tia and her micro school, they likely violate her constitutional rights, specifically her rights to equal protection and substantive due process, and burden the rights of parents to direct the education and upbringing of their children. A proper interpretation from this Board would, therefore, forestall any need for constitutional litigation. It is our hope that this situation can be amicably resolved via this application.

Background

“Micro school” is a term that encompasses a variety of small, “alternative” educational approaches. They have been described as “one-room schoolhouse meets blended learning and home schooling meets private schooling.”¹ These alternative approaches have been around for many years. Indeed, micro schools are just modern variations on the original one-room schoolhouse model of education in this country.

Though they have a venerable history, micro schools have experienced a massive growth since the beginning of COVID-19. The pandemic upended American education, throwing schools,

¹ Michael B. Horn, *The Rise of Micro-schools: Combinations of private, blended, and at-home schooling meet needs of individual students*, 77 (Education Next, Summer 2015), available at: https://www.educationnext.org/wp-content/uploads/2022/03/ednext_XV_3_whatnext.pdf.

students, and parents into uncertainty. First there were complete shutdowns. Then impromptu versions of distance learning. And finally delayed and erratic reopenings under ever-changing rules. This did not work for students or parents, and families across the country began to spontaneously organize themselves into a variety of alternatives in what the New York Times called “‘the largest educational innovation experiment’ in history.”² Micro schools grew “exponentially” in Arizona,³ in part because Arizona’s Empowerment Scholarship Account program allows parents to wholly customize their child’s education to fit their child’s needs because there is no one-size-fits-all learning option that is suitable for all children.⁴ In Arizona, some micro schools operate as a part of a charter (public) school while others are private, or more like home school co-ops, or something different still.⁵

Tia and Dr. Stephen Howard and their children are part of this micro school movement. When they moved to Arizona from Alaska in 2020, Tia, who has a Bachelor of Science in Early Childhood, had already been involved in the micro school movement for more than a decade. When they lived in Alaska, Tia educated her children through a variety of “alternative” approaches, including home school, a home-school co-op, and Alaska’s Family Partnership Correspondence Charter School.

When she came to Arizona, and with her oldest children now away at college, Tia began looking for the right educational community for her two youngest children. Through her new church, she learned about Prenda micro schools. She received training and was qualified as a Prenda “guide” (a teacher). During COVID, she taught a micro school of about a dozen students at a performing arts academy in Gilbert.

Though Tia enjoyed her experience, she still wanted something different for her youngest son. So, like many other educational entrepreneurs, Tia decided to start her own micro school. Her plan is to have a small number—perhaps a dozen—of children, ages 8-12, at her school with her son and to grow it as her son ages.

Tia does not want her school to be in a commercial area; she wants a small community of students in a residential setting. Tia also did not want to host the school in her own home, due to a number of factors including her HOA. She began looking for potential locations for her school and found a perfect location. Situated close to the Howard’s home is a single-family home on a 1.75-acre parcel located in an unincorporated area of Pinal County (“the property”). The parcel is zoned GR – GENERAL RURAL. The Howards entered a contract to purchase the property, made a \$5,000 earnest money deposit, and waited for the close of escrow.

² Eilene Zimmerman, *In Pandemic’s Wake, Learning Pods and Microschools Take Root* (Oct. 14, 2020), <https://www.nytimes.com/2020/10/14/education/learning/pods-microschools-pandemic.html>.

³ Trisha Hendricks, *Microschools grow exponentially amid pandemic in Arizona* (December 21, 2021), <https://www.12news.com/article/news/education/microschools-grow-exponentially-amid-covid-pandemic-in-arizona/75-f505e468-0575-4b2b-9dbb-d755e15c46f6>.

⁴ Kiera Riley, *ESA expansion sparks wave of microschools* (Arizona Capitol Times, May 26, 2023), <https://azcapitoltimes.com/news/2023/05/26/esa-expansion-sparks-wave-of-microschools/>.

⁵ *Id.* See also *Microschool Enrollment in Arizona: Charter School-Funded vs ESA-Funded*, <https://help.prenda.com/knowledge/microschool-enrollment-in-arizona>.

But after the Howards entered the contract and made their deposit, they learned it might not be legal to use the property for Tia's micro school because of three provisions of the Pinal County zoning code. Tia conferred with Senior Planners Gilbert Olgin and Patrick Roberts about these issues on June 9, 2023. They told Tia that, based on their interpretation of the zoning code, she could not use the property for her micro school as she intended. Because of what Olgin and Roberts told Tia, the Howards could not afford the risk of buying the property, had to withdraw from the contract, and lost their \$5,000.

As explained below, however, a proper interpretation of the three relevant provisions would allow the property to be used for Tia's micro school. The property remains on the market and the Howards remain committed to finding a location just like it for Tia's school. Tia now seeks an interpretation of those three provisions from the Board of Adjustments and Appeals to determine whether they really prevent her intended use of the property or similarly-zoned properties. Each provision is discussed in turn below.

PCDSC § 2.04.010(C), public and quasi-public uses: school.

As noted, the property is zoned GR – GENERAL RURAL. In relevant part, PCDSC § 2.40.010(C) permits as a use in the GR Zone:

Public and quasi-public uses: church, club, museum, library, community service agency, clinic, public park, school, college, playground, athletic field, public or private utility and facilities, governmental structure; athletic, sport or recreation club; and hospital or sanatorium; such buildings shall be located at least 50 feet from any boundary line of the site.

We believe that "school" as used here includes Tia's micro school. However, Senior Planners Olgin and Roberts informed Tia that "school" here includes only "government funded" schools. Tia's micro school is not government funded, it is a private school, and therefore Olgin and Roberts told her that her micro school is not permitted in the GR Zone. This is an incorrect reading of PCDSC § 2.40.010(C) for at least four reasons.

First, it is inconsistent with the applicable definitions. "School" should be "interpreted according to [its] common, plain, natural and accepted usage" unless "otherwise defined" in the code. PCDSC § 2.05.030(B). The zoning code does not include a definition for "school." See PCDSC § 2.10.010. It does, however, include the following definitions:

School, private, means any building or group of buildings, the use of which meets state requirements for education and which does not secure any major part of its funding from a governmental agency.

School, public, means an institution of learning belonging to the public and established and conducted under public authority; and pursuant to A.R.S. § 15-189.01, also includes charter schools for purposes of zoning.

School, nursery, means an institution intended primarily for the daytime care of children of preschool age. Even though some instruction may be offered in

connection with such care, the institution shall not be considered a school within the meaning of this title.

By specifically exempting “school, nursery” from consideration as “a school within the meaning of this title” and not exempting “school, private” from such consideration, PCDDSC § 2.10.010 demonstrates that “school, private” is “a school within the meaning of this title.” This comports with the “common, plain, natural and accepted usage” of the word as well. Accordingly, Tia’s private micro school should qualify as a “school” for purposes of PCDDSC § 2.40.010(C).

Second, it is inconsistent with how schools are treated in other zoning provisions. Section 2.150.280, for example, regulates “schools” and contains different regulations for various kinds of schools: public, private, and charter. As discussed below, this differentiation presents a likely constitutional problem, but, at a minimum, this section demonstrates (1) that “schools” includes private schools, and (2) that where the PCDDSC wants to distinguish between public and private (and charter) schools, it does so expressly. Because PCDDSC § 2.40.010(C) does not expressly distinguish between public and private schools, it includes both public and private schools.

Third, it is inconsistent with PCDDSC § 2.40.010(C)’s inclusion of other “private” institutions as “public and quasi-public uses.” This section includes uses that can be either government or privately funded, including: clubs; museums; libraries; clinics; playgrounds; colleges; athletic, sport or recreation clubs; and hospitals or sanatoriums. It includes expressly privately-funded uses, including private utilities and facilities. And it includes a use that constitutionally *cannot* be government funded: churches. In short, “government funding” has nothing to do with being a public or quasi-public use, and Tia’s private micro school is a permitted school for purposes of PCDDSC § 2.40.010(C).

Fourth and finally, if PCDDSC § 2.40.010(C) means what Tia has been told it means, then it is arbitrary, discriminatory, and unconstitutional. Zoning laws cannot be “arbitrary and unreasonable” and must have a “substantial relation to the public health, safety, morals or general welfare” in their application. *Tucson v. Ariz. Mortuary*, 34 Ariz. 495, 507 (1928). Under PCDDSC § 2.40.010(C) as interpreted by Senior Planners Olgin and Roberts, Tia can start a charter micro school on the property because a charter school is a public school but cannot start a private micro school because it is not government funded. Such a distinction lacks any substantial relation to a legitimate use of zoning. The source of a school’s funding has nothing to do with the effect that a school will have on the surrounding area. Private or charter, a micro school is still a micro school as far as zoning laws should be concerned.

A proper interpretation of PCDDSC § 2.40.010(C), however, presents no such constitutional concerns because it allows both public and private schools as a permitted use in the GR Zone. We therefore ask that the Board interpret PCDDSC § 2.40.010(C) in this same way.

PCDDSC §§ 2.10.010 and 2.150.260, home occupation.

Because Senior Planners Olgin and Roberts told Tia she could not have a private micro school on the property, they discussed an alternative: Tia could have a “homeschool” (which, by definition, would also be a “private school” because it is not government funded) as a “home occupation” if she as the proprietor was “financially compensated.” Whether or not this is true—

and if it is true the negative implications for micro schools are significant—we believe a proper interpretation of PCDSC § 2.40.010(C), as discussed above, and the home occupation definition, PCDSC § 2.10.010, and ordinance, PCDSC § 2.150.260, means that Tia’s planned micro school would not be a home occupation.

A “home occupation” is “a business activity carried on by the occupant of a dwelling unit as a secondary use.” PCDSC § 2.10.010. A home occupation is a permitted use in a GR Zone. PCDSC § 2.40.010(H). But because a home occupation is “a secondary use,” a permitted primary use of a property should not be regulated as a home occupation. And because, as set forth above, Tia’s micro school should be considered a permitted primary use in a GR Zone, her school should not be subject to the restrictions on home occupations.

Several of the home occupation regulations would, if they applied, prevent Tia from running her micro school.⁶ First, she would have to live on the property full-time, PCDSC § 2.150.260(A)(1), even though she already has her own home, lives there, and plans to use the property only for her micro school. Second, she would be limited to operating in an accessory building of not more than 400 square feet or not more than ¼ of the floor area of the main dwelling. PCDSC § 2.150.260(B). And third, she could “serve no more than five clients (here, paying students) in one day and no more than two clients (paying students) at any one time.” PCDSC § 2.150.260(J). If applicable, these regulations would be arbitrary, discriminatory, and unconstitutional given that Tia can operate a “public” micro school on the property free from any of these regulations.⁷

But, as above, a proper interpretation of PCDSC § 2.40.010(C) allows Tia to have her private micro school as a primary use on the property, which should mean that she does not need to operate as a home occupation under PCHSC §§ 2.10.010 and 2.150.260 because her school would not be “a business activity carried on by the *occupant* of a dwelling unit as a *secondary* use.” (emphasis added). We therefore ask that the Board interpret PCDSC §§ 2.10.010 and 2.150.260 in this same way.

PCDSC § 2.150.280(B) minimum site areas for private schools.

Finally, there is a further provision of the zoning code that, if applied, would prevent Tia’s micro school from being practically anywhere in Pinal County. Section § 2.150.280 of the PCDSC governing “schools” provides:

- A. Public schools are permitted in all zoning districts.
- B. Private schools for K-12 are subject to the following requirements:
 - 1. The minimum site area shall be five acres in all zones.

⁶ It is not clear whether teaching children constitutes “business activity” as used in PCDSC § 2.10.010, and the code does not otherwise define the term.

⁷ Much like with micro schools, the COVID-19 pandemic also led to substantial growth in home-based businesses. <https://ij.org/report/entrepreneur-from-home-how-home-based-businesses-provide-flexibility-and-opportunity-and-how-cities-can-get-out-of-their-way/>. But as Tia’s situation demonstrates, restrictions on home-based businesses are very limiting when they apply. To help people help themselves through entrepreneurship, Pinal County can and should ease outdated regulatory burdens that get in the way of home-based entrepreneurs by focusing on directly regulating negative externalities of land use, rather than trying to micromanage home-based businesses.

.....
C. Charter schools are prohibited from operating in an existing single-family residence that is located on property of less than an acre.

As noted above, if a private school is any school—including a micro school—that is not government funded, then the plain text of this provision would require all private micro schools to be on a lot of a minimum five acres, assuming a private school was allowed at all. Not only would this make no sense, it is again the case that a charter school is allowed to operate on the property because it is a single-family home on more than one acre of land. Given this, PCDSC § 2.150.280(B) would again be arbitrary, discriminatory, and unconstitutional as applied to Tia’s micro school.

However, it appears that state law has preempted PCDSC § 2.150.280(B). As of 2018, A.R.S. § 11-820.01 prohibits any county from “adopt[ing] or enforc[ing] a land use regulation that requires the property on which a nongovernmental primary or secondary school operates to be larger than one acre.” Accordingly, PCDSC § 2.150.280(B) should be deemed unenforceable and therefore not prohibit Tia from having her private micro school on the property. We therefore ask that the Board interpret PCDSC § 2.150.280(B) as having been preempted and made unenforceable by A.R.S. § 11-820.01.

Conclusion

As set forth above, we believe that a proper interpretation of PCDSC §§ 2.10.010, 2.40.010, 2.150.260, and 2.150.280, present no obstacles to Tia’s use of the property to for her private micro school. We understand that most zoning regulations were written without regard to the existence of micro schools. But micro schools are here now, and they are here to stay.

In the long run, Pinal County would greatly benefit from a modernization of its Development Services Code to make more clear where educational entrepreneurs can have their micro schools and to remove unnecessary burdens affecting other entrepreneurs who have home occupations. But for now, it is our hope that this Board’s interpretations will clarify that Tia is free to legally operate her private micro school on the property. Barring this, however, we are prepared to challenge the interpretation and constitutionality of these provisions in court.

Please contact me directly if I can assist your consideration of this matter.

Sincerely,



Paul Avelar

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CC: Pinal County Board of Supervisors (via email)
Kent Volkmer, Pinal County Attorney (via email)