

**LEGAL AUTHORITY TO
PLAN & ZONE**

**C
H
A
P
T
E
R**

3

LEGAL AUTHORITY TO PLAN & ZONE

Arizona municipal and county governments have no inherent power to regulate land use. They are political subdivisions of the state, and whatever legislative or administrative authority they have to plan and zone is derived from the enabling legislation that is adopted by the State Legislature. In Arizona, elected and appointed officials must observe the legal requirements set forth in the Arizona Revised Statutes (abbreviated throughout the Handbook as “A.R.S.”). Officials should also be aware of recent state and federal court decisions that affect the legal interpretation of these statutes.

Although the authority of local governments to regulate land use is delegated by the state, the control of land use has historically been a function of local government. Local governments may exercise control over the development of land in a variety of ways, especially through comprehensive (or general) land use planning, zoning, ordinances and subdivision ordinances.

Because of legal implications inherent to nearly all aspects of planning, statutory and legal references have been included throughout this Handbook. State statutes may be modified by the Legislature and the courts may decide significant issues before this Handbook can be brought up to date. For this reason, local officials should always consult their jurisdiction’s attorney for the latest law on the subject. (When possible, it is also recommended to have legal counsel present at public hearings.)

3.1 BACKGROUND OF LEGAL AUTHORITY

The Tenth Amendment to the Constitution of the United States reserves to the states or to the people all powers not specifically delegated to the federal government. One of these is the “police power”. This power provides the authority to adopt laws, ordinances, and regulations to protect the public health, safety, morals, and welfare. Comprehensive land use planning, zoning and subdivision regulations fall under the umbrella of this authority.

The police power is an “elastic” power, changing form to reflect the conditions of the time. Regulations embraced under the complex conditions of today might have been condemned as arbitrary or unreasonable as little as 70 years ago, and vice versa. Over time, the courts have interpreted the legitimate use of the police power broadly to promote a variety of community benefits. These benefits can promote social, environmental, aesthetic or safety values. Planning has long been accepted as an important vehicle for a community to define and maintain its essential values and identity.

In exercising planning and land use control powers, local governments must follow several constitutional principles, including equal protection and due process. A more detailed discussion of some of the United States Supreme Court cases that established the current (at the time of this writing) interpretations of these and other constitutional principles can be found in Section 3.5 of this chapter. For a background compilation of Arizona planning and zoning case law that has evolved over time, a review of Jordan & House, *Arizona Land Use Law* (3rd Ed. and 2001 Supplement), published by the State Bar of Arizona is recommended.

3.2 ARIZONA MUNICIPAL PLANNING AUTHORITY

State planning and zoning statutes are not static. Historically, Arizona Statutes have been adjusted to fit changing times in a series of “tweaking” bills by the State Legislature. Two efforts have been more comprehensive: the 1973 Urban Environmental Management Act, and in 1998 and 2000, with the Growing Smarter and Growing Smarter Plus Acts.

In 1973, the Arizona State Legislature amended Title 9 of A.R.S. to authorize cities and towns to plan through the Urban Environmental Management Act (UEMA). Prior to 1973, cities and towns in Arizona had zoning authority but no explicit planning authority. However, the authority to plan was generally inferred to accompany the power to zone and some communities had planning power written into their charters.

The 1998 and 2000 Growing Smarter and Growing Smarter Plus Acts broadened the scope of general planning to include more specific mechanisms to manage and plan for growth. An initial update of general and comprehensive land use plans and subsequent updates every 10 years were also specified.

More information on the general plan elements and other components of planning and zoning that are defined by the statutes (current as of this writing) is included in Chapter 6 (for cities and towns) and Chapter 7 (for counties).

■ Planning Agency

A.R.S. § 9-461.01 authorizes establishment of a “Planning Agency” as the official body designated by local ordinance to carry out municipal planning. This agency may be a planning department, planning commission, hearing officer, the elected body itself, or any combination thereof. Once formed, the planning agency must:

1. Develop and maintain a general plan.

2. Develop specific plans as may be necessary to implement the general plan.

3. Periodically review the capital improvements program of the municipality.

4. Perform such other planning functions as directed by the elected body.

The agency will be limited by the powers outlined in the municipal ordinance. It may:

- ▶ Contract for, receive, and utilize any grants or other financial assistance made available by a municipality, a county, the state or federal government.
- ▶ Contract with the state or federal government and any of its agencies, or the elected body of any municipality or county.

■ **Creation of Municipal Planning Commission**

A.R.S. § 9-461.02 authorizes cities and towns to create a planning commission to advise on land use and development issues. Planning commissions in Arizona must have at least five members who are appointed by the elected body. The number of commissioners may differ depending on the degree of urbanization and development of the community. The ordinance establishing the commission must set the number of commissioners, the method of their appointment and removal, terms of office and process for selection of a chair, and duties of the planning commission. Chapter 5 provides a detailed discussion of the role of the commission.

A.R.S. § 9-461, 461-01, 461-02 have been included in Appendix B as a reference. To search the statutes in their entirety, consult your library

or the A.R.S. web site at:
www.azleg.state.az.us/ArizonaRevisedStatutes.asp.

3.2.1 Other Sources of Municipal Planning Authority

In addition to planning, zoning, and subdivision controls, municipalities may exercise other sources of authority to manage and direct land use in the interest of the public health and safety.

■ **Eminent Domain**

Municipalities have the power to acquire land for public purposes by eminent domain, providing that the property owner is compensated. The exercise of eminent domain powers can have a substantial impact on land use patterns in a community, especially when exercised as part of a municipal redevelopment plan.

■ **License and Permits Powers**

Licensing or permitting systems are frequently used to regulate activities affecting public health and safety and may affect land development in several ways. For example, the Urban Environmental Management Act provides that a permit system may be used to enforce zoning regulations.¹ These systems must be administered consistently with zoning laws and may not be used to forbid uses permitted by the zoning regulations.

Permit systems may be used to administer conditional uses, special uses, and signage. Proponents of permit regulations argue that local planning officials need discretion to administer conditional uses, as well as the power to impose conditions, supervise the continuation of the use, and restrict the life of the use. Conditional use permits and nonconforming uses are discussed in greater detail in Chapter 8.

¹ A.R.S. § 9-462.05(D)

■ Easements and Covenants

Easements and restrictive covenants are the primary tools for private land use control. Easements may be used to give local governments, public utilities, and adjacent property owners rights to access and use land owned by another; restrictive covenants may be employed to enforce a planned development scheme by limiting the purposes for which neighboring land may be used. Affirmative covenants may be used to impose obligations of maintenance and contribute to the upkeep of commonly owned property. These private control devices have been successfully used in large planned communities.

Public use of easements and covenants to control land use has been more limited. Recent suggestions for expanded public use of these devices fall into three basic categories. First, easements and covenants may be used to prevent development and to preserve open space by acquiring development rights. Second, they may be used, as is done in urban renewal projects, to control the use of land sold or otherwise disposed of by the government. Third, they may be used to obtain more detailed control over subdivisions and other forms of development than is possible under zoning regulations. Private restrictions may be more effective than general zoning regulations in many cases, also ensuring regular maintenance of the property. A city may require the filing of restrictive covenants as a condition of zoning and permit individual property owners to enforce them.²

■ Conservation Easements

A conservation easement is a legal agreement regarding the voluntary donation or sale of particular property rights to a governmental entity or nonprofit organization that agrees to monitor and enforce the terms of the agreement. Arizona's conservation easement statute³

² *Goodman v. Superior Court*, 137 Ariz. 348, 670 P. 2d 746 (App. 1983)

³ A.R.S. § 33-271 through § 33-276

specifies that conservation easements may be created, conveyed, recorded, assigned, released, modified, terminated or otherwise altered in the same manner as other easements. An easement may be created to protect or preserve:

- ▶ Historical, architectural, archeological, or cultural aspects of real property.

- ▶ Land for the outdoor recreation or education of the general public.

- ▶ Land as a natural habitat for fish, wildlife, and plants.

- ▶ Open space, including farmland and forestland, for the public's enjoyment pursuant to a clearly delineated governmental conservation policy.

The property owner (grantor) and public entity (holder or grantee) must agree on the terms of the easement. The grantor may specify how long a conservation easement will last, either in perpetuity, or for a given period of time. The grantor may also negotiate whether the public may have access to the property. The grantor, public entity, or a third party specified in the easement document may legally enforce the terms of the easement.

Once created, a conservation easement may be modified or terminated based on the agreement. The public benefits from the donation of these easements through conservation and protection of important natural and cultural resources. The property remains on the tax rolls, and private monies are used to acquire and maintain the property.

For more information on conservation easements contact...



State Historic Preservation Office
Arizona State Parks
1300 W. Washington Street
Phoenix, AZ 85007
(602) 542-4009

www.pr.state.az.us/partnerships/partners.html

■ Public Acquisition and Disposition of Land

Local governments may affect land use patterns within their boundaries by intervening directly in the development process:

- ▶ Through property acquisition by purchase or eminent domain.

- ▶ Through the development of publicly owned property for public use.

- ▶ By stimulating the redevelopment of under-utilized property through renewal and redevelopment programs.

In Arizona, municipalities may “purchase, lease, or rent land” outside, as well as within, their corporate limits.⁴ The power to acquire property gives local governments a way to directly control the development of land. Traditionally, the broadest exercise of this power has been in the area of redevelopment. Under enabling legislation for the renewal of obsolete areas, Arizona cities are given authority to acquire interests in land by eminent domain, and to dispose of that land in ways that will assure its future development in accordance with a redevelopment plan. The powers conferred to municipalities to engage in redevelopment projects contrast dramatically with the more limited powers otherwise available for municipal land acquisition.

■ Arizona Preserve Initiative

The Arizona Preserve Initiative (API) provides a process for conserving Arizona State Trust Land as open space within or near a municipality. Adopted in 1996 and amended in 1997, the API allows for Trust Land to be sold or leased for conservation purposes.⁵ As part of this process, land is reclassified and sold or leased through auction. A matching grant program is administered through Arizona State Parks to assist

⁴ A.R.S. § 9-401

⁵ A.R.S. Title 37, Article 4.2

with funding the acquisition of Trust Land for conservation purposes. Funding for this program was approved by the voters as Proposition 303 in 1998 and totals \$20 million per year for 11 years, beginning in fiscal year 2001.

For more information on the API and
the grant program contact:

**Arizona State Land Department
Arizona Preserve Initiative
1616 West Adams
Phoenix, AZ 85007
(602) 542-2643
<http://www.land.state.az.us/>**

**Arizona State Parks
Growing Smarter Grant Programs
1300 W. Washington Street
Phoenix, AZ 85007
grants@pr.state.az.us
<http://www.pr.state.az.us/partnerships/growingsmarter/growing.html>**

■ Transfer and Purchase of Development Rights

The concept behind transfer of development rights (TDR) and purchase of development rights (PDR) is that property rights are comprised of a “bundle” of rights, which include development rights, air space rights, mining rights, etc. (see Appendix C, Land Rights Diagram). Under the PDR concept, private or government entities could negotiate with the landowner to purchase development rights on all or part of a property, and the title and other rights associated with the property remain with the original owners. This would allow the owner to benefit financially from the development potential of the property, and permit the retention of agriculture or open space in the community at lower public cost than the acquisition of the entire fee interest. A.R.S. § 9-464.01 provides that the acquisition of interests or rights in real property for the preservation of

open spaces or areas constitutes a public purpose for which public funds may be expended or advanced.

Similar benefits may occur under a TDR system, although TDR allows for “trading” of development rights among landowners rather than outright purchase. Under the TDR concept, “sending areas” and “receiving areas” are created to identify land that is suitable for limiting or accepting additional development rights, respectively. A property owner would be able to transfer development rights from one location to another. A municipality could also purchase development rights in a sending area for resale in a receiving area, or otherwise function as an intermediary as specified by its ordinance.

A.R.S. § 9-462.01(A)(12) establishes the authority and requirements associated with the TDR process. “Development rights” are defined in the statute as the maximum allowable development, with respect to the use, area, bulk, or height of improvements. A quantifiable value for development rights must be established in a TDR ordinance, which could include number of dwelling units, floor area, floor area ratio, height limitations, or traffic generation. Receiving properties must be identified based on the ability to accommodate the additional development rights without “substantial adverse environmental, economic, or social impact to the property or neighboring properties”. Sending properties are defined in law as areas with special characteristics, which may include floodplain, mountains, recreation or parkland or historic or aesthetic value.⁶

■ Development (“Impact”) Fees

A.R.S. § 9-463.05 authorizes a municipality to assess development fees to offset costs to the municipality associated with providing necessary public services to a development. A development fee must result in a beneficial use to the development, must bear a reasonable

relationship to the burden imposed upon the municipality to provide additional necessary public services to the development, and must be assessed in a nondiscriminatory manner. A development impact fee ordinance must provide a credit toward the payment of a development fee for the required dedication of public sites and improvements provided by the developer for which the development fee is assessed.

■ Development Agreements

A.R.S. § 9-500.05 authorizes a municipality to enter into development agreements. A development agreement may address any matter relating to the development of property, including land use restrictions, provisions for infrastructure, phasing schedules, timing of annexation, and duration of the agreement. A development agreement must be consistent with a municipality’s general and specific plans. This statute has not been construed by the Arizona courts in a land use context. Unresolved legal issues regarding development agreements include the relationship of such agreements to zoning regulations, notice and hearing procedures for adoption of development agreements, and whether such agreements constitute “contract zoning.”

■ Moratoriums

A.R.S. § 9-463.06 prescribes the conditions under which a city or town may enact a moratorium on development or construction activities, including notice and hearing requirements and written findings justifying the need for the moratorium. The statute provides that a moratorium may be justified by either a need based on a shortage of essential public services or a “compelling need,” which is defined as a clear and imminent danger to the health and safety of the public. The statute also provides for limitations on the duration of moratoriums and requires that procedures be established to allow landowners to seek waivers.

⁶ A.R.S. § 9-462.01(H)

3.3 COUNTY PLANNING AUTHORITY

The counties' primary tools for land use control are planning, zoning, and subdivision regulations. Although the 1998 and 2000 Growing Smarter/Plus Acts added to county planning tools, authority in these areas is not as comprehensive as that of municipalities. The authority of counties to zone is set forth in A.R.S. §§ 11-801 to 11-833. Counties may enact airport and floodplain regulations pursuant to the same enabling legislation applicable to municipalities. Counties also are authorized to adopt overlay zoning districts and regulations.⁷

A.R.S. § 11-802 provides counties with specific statutory power to engage in comprehensive planning:

“ The board of supervisors of a county, in order to conserve and promote the public health, safety, convenience and general welfare and in accordance with the provisions of this chapter, shall plan and provide for the future growth and improvement of its area of jurisdiction, and coordinate all public improvements in accordance therewith... ”

A.R.S. § 11-821 provides that a county planning commission and board of supervisors are responsible for formulating and adopting a long-term, comprehensive plan. (For more information on the county comprehensive plan and its elements, see Chapter 7.)

■ Creation of Planning Commission

A.R.S. § 11-802 also directs each county board of supervisors to:

“ ...form planning and zoning commissions to consult with and advise it regarding matters of planning, zoning, and subdivision platting and in the manner provided in this chapter, adopt and enforce such rules, regulations, ordinances and plans as may apply to the development of its area of jurisdiction. ”

A.R.S. § 11-803 provides the regulations for the composition and term-length of county planning and zoning commissions. The number of members is dependent upon the number of supervisors in the county.

- ▶ In counties having three supervisory districts, the commission consists of nine members. Three members are appointed from each supervisory district by the supervisor from that district, and not more than three may be a resident of an incorporated municipality.
- ▶ In counties having five districts, the commission consists of ten members, two from each district, and not more than one from each district may be a resident of an incorporated municipality.

With the exception of the first appointed planning and zoning commission, county commissioners' terms are for four years. Depending on the number of members, the initial planning and zoning commission will consist of five two-year and five four-year terms (for a ten-member commission) or four two-year and four-four year terms (for a nine-member commission). If a vacancy occurs other than by expiration of the term, it must be filled by an appointment replacing the remaining portion of the term.

The county supervisors may remove a member of the commission for cause. The county assessor, county engineer, county health officer and county

⁷ A.R.S. § 11-821(F)

attorney all serve in an advisory capacity to the planning commission and board of adjustment.

The statutes that govern county planning and zoning authority (A.R.S. § 11-801, 11-802, 11-803 and 11-804) are included in Appendix B. To search the statutes in their entirety, consult a library or the ARS website at: www.azleg.state.az.us/ArizonaRevisedStatutes.asp.

3.3.1 Other Sources of County Authority to Control Land Use

Much of Section 3.2.1 related to municipal authority also applies to county planning, including the discussions of permits and licensing, easements and covenants, the acquisition and disposition of land, and the Arizona Preserve Initiative. Specific provisions with regard to county authority are noted below. Arizona Statutes do not address TDR in counties. In several areas, counties have authority to adopt regulations affecting land use that cities do not possess, such as the power to regulate air pollution.

■ Nuisance

Only county boards of health have authority to control and abate nuisance.⁸ The board of supervisors has authority to “make and enforce all local, police, sanitary and other regulations not in conflict with general law”.⁹ The statutes authorize the county to establish boards of health, which may exercise all usual powers, including the regulation of sanitary conditions for subdivision.¹⁰

⁸ A.R.S. §§ 36-601 and 36-602

⁹ A.R.S. § 11-251(31)

¹⁰ A.R.S. § 36-182 and *Davis v. Hidden*, 124 Ariz. 546, 606 P.2d 36 (1979).

■ Licenses and Permits

Counties may require licenses and permits and building codes may be adopted and enforced through permits.¹¹ However, the activities and occupations subject to regulation may be more limited than those for cities. Before the county may regulate, the express power to do so must be delegated to it through enabling legislation.¹²

■ Acquisition and Disposition of Land

Counties may acquire land for public purposes including open space by eminent domain.¹³ Counties cannot engage in redevelopment or renewal activities, and the procedures for disposing county-owned land are restricted.

■ Pollution Control

The responsibility for controlling air pollution is shared by the Arizona Department of Environmental Quality and county boards of supervisors at the local level. Each board must designate a county department, establish an air control district or form a multi-county air quality control region to enforce air quality legislation within “non-attainment areas”.¹⁴ A board of supervisors is required to adopt such rules as it determines are necessary and feasible to control the release into the atmosphere of air contaminants originating within the county or multi-county air quality region. Standards must be at least equal to, or more restrictive than, those adopted by the State.¹⁵

■ Development (“Impact”) Fees

The Growing Smarter/Plus legislation authorized a county that has adopted a capital facilities plan to assess development fees within the covered planning area in order to offset the capital costs for water, sewer, streets, parks and public safety facilities determined by the plan to be necessary for public services provided by the county to a

¹¹ A.R.S. §§ 11-808, 11-861, and 11-863.

¹² *Davis v. Hidden*, 124 Ariz. 546, 606 P.2d 36 (1979)

¹³ A.R.S. §§ 9-464.01 and 12-1111.

¹⁴ A.R.S. § 49-473

¹⁵ A.R.S. § 49-479

development in the planning area.¹⁶ Development fees assessed by a county are subject to the same requirements imposed on municipalities, except that a county must give at least 120 days of advance notice of the intention to assess a new or increased development fee.

■ Development Agreements

A.R.S. § 11-1101 authorizes a county to enter into development agreements. The authority granted is substantially the same as that granted to municipalities, except that a county may only enter into development agreements relating to property outside the incorporated area of a city or town.

3.4 THE TAKINGS ISSUES AND PLANNING

Justice William O. Douglas of the U.S. Supreme Court, writing the majority opinion in *Village of Belle Terre v. Borass*¹⁷ upheld a zoning ordinance restricting land use to single-family dwelling units, stating:

“ A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs - the police power is not confined to elimination of filth, stench, and unhealthy places, it is ample to lay out zones where family values, youth values, and the blessing of quiet seclusion, and clean air make the area a sanctuary for people. ”

Zoning has also been defined as the process whereby a community defines its essential character. Whether driven by a concern for health and safety, or other public values, zoning

provides the mechanism by which neighboring uses of land are not mutually – or more often unilaterally – destructive.¹⁸ As Justice Sutherland observed for the United States Supreme Court in the landmark case of *Village of Euclid v. Ambler Realty Co.*,¹⁹ the power to zone closely parallels the common law of nuisance and thus finds guidance in the maxim “sic utere tuo ut alienum non laedas” (use your own property in such a manner as not to injure that of another).²⁰ Hence, a community reasonably might conclude that a factory has no place in an otherwise exclusively residential section or that an amusement park does not belong in an area devoted to quiet parks, libraries, and schools. As in nuisance law, the issue is ultimately one of whether the proposed land use is – “like a pig in the parlor instead of the barnyard” – “merely the wrong thing in the wrong place.”²¹

In the interest of the public health, safety, and welfare, government can appropriate private land for public purposes. When this occurs, compensation must be paid. The term “taking” refers to a situation in which the regulation of private property without compensation is considered so burdensome as to be unconstitutional. This is sometimes also referred to as inverse condemnation.

The police power, i.e., the power to protect the public health safety and welfare (discussed in 3.1) is the legal basis for land use regulation. The courts interpret this authority broadly. Land use regulations may include economic, aesthetic, or safety considerations – as long as local law is not in conflict with state or federal law. Typically, landowners who claim inverse condemnation must show that for a temporary or permanent period of time all the use and value of a property has been destroyed – not just the owner’s ability

¹⁸ *Brendale v. Confederated Tribes and Bands of Yakima Indian Nations*, 492 U.S. 408 (1989).

¹⁹ 272 U.S. 365(1926)

²⁰ *Id.*, at 387

²¹ *Id.*, at 388

¹⁶ A.R.S. § 11-1102

¹⁷ 416 U.S. 1(1974)

to pursue a preferred or intended use. In Arizona, case law has affirmed that, to constitute a taking, a land use regulation must deprive the landowner of all reasonable use for which the property is adapted, and destroy its economic value, or leave all but a bare residue of its value.²²

Takings are often a complex issue, and any specific questions should be directed to legal counsel. In precedent-setting court decisions, several considerations have been identified with regard to land use regulation and takings:

■ Public Benefit

Land use regulations must promote the common good. As expressed in *Agins v. City of Tiburon*,²³ part of the test to determine if a taking has occurred is if an ordinance “substantially advances legitimate state interests.” In that case, the community’s low density zoning ordinance was upheld. The court found that the preservation of open space is a legitimate use of the police power to guard a community against the effects of urbanization. In another example, in *Village of Euclid v. Ambler Realty Co.*,²⁴ the U.S. Supreme Court held that zoning classifications that separate incompatible land uses may benefit the whole community by ensuring safety and protecting property values. Zoning that protects or enhances the health and safety or welfare of a community will typically pass this test.

■ Economically Viable Land Uses

Another consideration used by courts evaluating the constitutionality of a land use regulation is whether it deprives a property of all economically viable use. Some fluctuation in property value is likely to occur in response to any government regulation. Fluctuation alone is not typically grounds for a finding of a taking. Typically, the

courts have found that a taking has occurred when a regulation restricts a property from all economically viable uses in the name of the common good.

■ Exaction

A nexus (reasonable relationship or logical connection) should exist between an exaction permit condition and the nature of the projected impacts of the proposed development. The scope of an exaction must be roughly proportional to the projected impact of the proposed development.

■ Due Process

Under the U.S. Constitution, property owners are guaranteed due process of law when the government deprives them of property. In evaluating the legitimacy of a regulation or land use decision, courts may review the process through which it was developed to ensure this guarantee. Such a review may include the assurance that fair public hearings were held or conflicts of interest avoided, among other procedural considerations.

To summarize, a municipality can minimize or avoid the potential for damages to be assessed against it by ensuring that its land use regulations:

- ▶ Do not exert disproportionate effects on individual developers or property owners.

- ▶ Establish a connection (nexus) between the condition imposed and the perceived impacts of the development.

- ▶ Allow some economically viable use of the property.

Municipal attorneys and planners may evaluate procedures to minimize exposure to regulatory taking claims and to avoid liability for damages in the following ways:

²² *Ranch 57 v. City of Yuma*, 152 Ariz. 218, 731 P.2d 113 (Ariz. App. 1986)

²³ 447 U.S. 255 (1979),

²⁴ 272 U.S. 365

- ▶ Determine the adequacy of land uses in the general plan and zoning categories to ensure a reasonable array of uses that may apply to property in each district.
- ▶ Evaluate existing procedures for obtaining relief. It may be advisable to enable an aggrieved landowner to appeal to the city or town council to alleviate the effect of potentially confiscatory regulations. It should be noted that Arizona law already requires a process for appealing administrative exactions in municipalities [A.R.S. § 9-500.12] and counties [A.R.S. § 11-810].
- ▶ Establish the necessity for justifying development fees and exactions with studies that link the public purpose to be achieved with the nature and extent of the conditions imposed. Traditional dedication requirements may be more suspect than fee exactions because they are seldom preceded by capital facilities studies that typically accompany fee ordinances.

In addition to constitutional principles that protect property owners from arbitrary and confiscatory land use regulations, “protected development rights” statutes have been adopted in Arizona that permit land to be developed in accordance with certain approved development plans, notwithstanding changes in land use regulations for specified periods of time. These statutes are set forth in A.R.S. § 9-1201 et seq. (cities and towns) and A.R.S. § 11-1201 et seq. (counties).

3.5 CASE LAW REGARDING LAND USE REGULATION

The United States Supreme Court has handed down several significant rulings that relate to planning and land use regulations. Brief

descriptions of the background and holding for each case are provided below. Please note that court decisions can shift, be defined more precisely, or otherwise reinterpreted over time, as new cases are heard and new justices are appointed. When in doubt on the legal aspects of a specific situation, it is recommended that legal counsel be consulted.

3.5.1

Penn Central Transportation Company v. City of New York, 438 U.S. 104, 98 S.Ct. 2646 (1978)

Background ■ Owners of Penn Central wished to develop a multi-story tower above its station in New York City. This desire was in conflict with the New York City Landmark Preservation Ordinance, which had been adopted to preserve the character of existing designated historic buildings. Penn Central challenged the ordinance and sued to build the office tower and recover compensatory damages for the temporary “taking” of holding up the development of the tower.

Supreme Court Holding ■ The Supreme Court held that the property right to maximize the economic potential by developing the skyscraper was only one of many property rights held by the owners. The ordinance was applied to like properties and therefore did not single out Penn Central. All owners of like properties were both restricted in their development potential and enjoyed the benefits of the Landmark Preservation Ordinance. Penn Central was not prevented from carrying out their existing lucrative business in the terminal so the court determined that the prevention of a skyscraper was not a taking.

3.5.2

Agins v. The City of Tiburon, 447 U.S. 255 (1980)

Background ■ Agins acquired 5 acres of unimproved land in Tiburon, California for residential development. The City of Tiburon rezoned the land to allow between one and five single-family residences and open space uses. Agins sued the city, alleging that the restrictions on the use of their property due to zoning amounted to a taking without just compensation. The California Supreme Courts ruled for Tiburon, holding that the zoning ordinance had deprived Agins of his property. The case was appealed to the Supreme Court.

Supreme Court Holding ■ The Court upheld the zoning designation, and established a “two-part test” for determining whether regulation has resulted in a taking. The test indicates that a taking has occurred: 1) if it can be shown that the regulation deprives an owner economically viable use of his land, or 2) if the regulation does not advance a legitimate government interest. This is frequently referred to as the “disjunctive test”. In this case, the appellants were not prevented from using their property or denied other fundamental attributes of ownership by the zoning ordinance. In addition, the Court determined that the ordinance did substantially advance the legitimate government goal of discouraging premature and unnecessary conversion of open space to urban land uses.

3.5.3

First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 107 S.Ct. 2378 (1987)

Background ■ The church owned land along a creek where flooding had destroyed all the buildings on the property. In response to the flooding, Los Angeles County adopted an interim

ordinance prohibiting construction or reconstruction of buildings or other structures within an interim flood protection area, which included land owned by the church. As a result, the church sued the county to recover damages, alleging that the ordinance denied it all use of its property.

The California courts held that a landowner need not be compensated for the reason that compensation is not required unless an ordinance is first declared unconstitutional and the government decides to let it remain in effect. Otherwise, invalidation of the ordinance is a sufficient remedy. The case was appealed to the Supreme Court.

Supreme Court Holding ■ The U.S. Supreme Court reversed the California Court of Appeals and held that even though a taking may be temporary in nature, invalidation of a regulation is not an adequate remedy and that under the Just Compensation Clause of the Fifth Amendment, compensation must be paid for the period of time an unconstitutional regulation is in effect.

The *First English* decision had less impact in Arizona than in some other states because the Arizona Supreme Court had already ruled that landowners may seek compensation for damages that result from confiscatory land use regulations and temporary takings *Corrigan v. City of Scottsdale*.²⁵

3.5.4

Nollan v. California Coastal Commission, 107 S.Ct. 3141 (1987)

Background ■ Nollan had applied for a permit to build a larger house on his beachfront lot. The California Coastal Commission included a permit

²⁵ 149 Ariz. 538, 720 P.2d 513 (1985), *cert. denied*, 479 U.S. 986

condition that required Nollan provide a public easement across his property, to allow access from one public beach to another public beach. Nollan sued, alleging a taking. The county court struck down the permit condition, but on appeal the California Court of Appeals ruled that the condition did not violate the takings clause of the constitution. The case was appealed to the Supreme Court.

Supreme Court Holding ■ The Court determined that the Coastal Commission's imposition of a requirement of a public easement across the plaintiff's property as a condition of development approval constituted a taking without just compensation under the Fifth Amendment. Although the government has the power to impose conditions on permits to further public purposes, the Court determined that the Coastal Commission's goal of public access was not sufficiently related to the permit sought by Nollan. The rationale for the permit condition was that the new development would block the view of the beach, discouraging access, and that the impact of the development, together with other development in the area, would cumulatively burden the public's right to traverse the beach. Although the public goal of continuous beach access is valid, the government must pursue that goal through means other than disproportionately burdening coastal landowners. In other words, there was no rational connection ("nexus") between the permit to build a larger house and the need for public access across Nollan's property. The fact that the house might block view of the beach from the road had nothing to do with the need of people already on a public beach to traverse Nollan's property to get to another public beach on the other side.

This decision warns jurisdictions that they must thoroughly consider and document the nexus between public goals and the exactions intended to achieve them.

3.5.5

***Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 120 L.Ed. 798 (1992)**

Background ■ Lucas bought two residential lots on a South Carolina barrier island, intending to build single-family homes such as those on the immediately adjacent parcels. At the time of purchase, Lucas's lots were not subject to the state's coastal zone building permit requirements. Subsequently, the state legislature enacted the Beachfront Management Act, which barred Lucas from erecting any permanent habitable structures on his lots. Lucas filed suit against the state agency, contending that the ban on construction deprived him of all economically viable use of his property and therefore effected a taking under the Fifth and Fourteenth Amendments that required the payment of just compensation. He did not dispute the validity of the regulation as a lawful exercise of the police power. A state court agreed with Lucas, then the South Carolina Supreme Court reversed this decision, ruling that no compensation was required since the regulation in question – the Beachfront Management Act – was designed to prevent "harmful or noxious" uses of property. The case was appealed to the U.S. Supreme Court.

Supreme Court Holding ■ The U.S. Supreme Court reversed the South Carolina Supreme Court ruling and remanded the case to the state courts to give the state an opportunity to prove that, under state common-law principles of nuisance and property law, Lucas' proposed uses of the lots could be prohibited. If state common law principles would have prevented the erection of habitable structures (although the Court deemed this unlikely), then the state could reasonably argue that it is not responsible for compensation since the Beachfront Management Act does not deprive the landowner of private property, as the "proscribed use interests were not part of his title to begin with." Otherwise, the Court decision affirmed that the government would be required

to provide compensation, since all economically viable use of Lucas' property was lost. A key outcome of this case is the affirmation that government regulation can affect a taking (as opposed to a physical taking, in which the government would actually take possession of a property).

Although the validity of the use of the police power to enact the Beachfront Management Act was not questioned in this case, the Supreme Court listed in its decision the considerations for a typical inquiry into whether a taking has occurred, which included: 1) the degree of harm to public resources or adjacent private property posed by the landowner's proposed activities; 2) the social value of the landowner's activities and their suitability to the locality in question; and 3) the relative ease with which the alleged harm can be avoided through measures taken by both the landowner and the government (or adjacent private landowners). In addition, the fact that a particular use has long been engaged in by nearby owners (or that that other nearby landowners are permitted to continue the use denied to the aggrieved landowner) is typically irrelevant to common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so).

3.5.6

Dolan v. City of Tigard, 114 S.CE. 2309 (1994)

Background ■ Dolan applied for a permit to expand her store and pave her parking lot. Approval of the permit was conditioned on the dedication of land for two purposes: a public greenway along a creek on the property to minimize flooding that would be exacerbated by the increase in impervious surface on the property, and a pedestrian/bike pathway to ease traffic congestion in the central business district. Through the City of Tigard Board of Appeals,

Dolan alleged an uncompensated taking occurred since the land dedications were not related to the proposed development. The Board of Appeals (and later the state courts) rejected this assertion, finding a reasonable relationship between the permit conditions and the proposed development. The case was appealed to the U.S. Supreme Court.

Supreme Court Holding ■ The Court reversed the decision, stating that the dedication requirements constituted an uncompensated taking of property. The Court found that preventing flooding and reducing traffic congestion were public purposes, and that a nexus did exist between the public purposes and the general strategies of limiting development and providing for alternative means of transportation. However, the Court used an individualized measure of "rough proportionality" to determine whether the nature and extent of the land dedication requirements fit the nature of the proposed development, and found that they did not. This finding was based on the fact that: 1) Dolan had already dedicated 15% of her property in the floodplain to open space under the city code, and the city did not specify why a public (as opposed to a private) easement was necessary for flood control; and 2) the city did not demonstrate that the vehicle and bike trips generated by Dolan's development would reasonably relate to the pathway easement.

3.5.7

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 216 f.3d 764 (2002)

Background ■ Between 1981 and 1984, the Tahoe Regional Planning Agency issued a moratorium on development on certain sensitive lands along the Lake Tahoe coastline. The agency was concerned about water quality degradation due to runoff from shoreline development, and the moratorium was imposed as a way to avoid

further damage while the problem was studied and a land use plan developed. Hundreds of landowners who had bought undeveloped lots along the lake sued, arguing that the moratorium constituted a taking since it deprived them of all economically viable use of their properties. The case reached the U.S. Supreme Court and was decided in April 2002.

Supreme Court Holding ■ The Court held that the moratorium did not automatically amount to a taking. The plaintiffs had argued that the *Lucas* case (described above) indicated that regulation would affect a taking if all viable economic uses were prohibited by it, and raised the prospect that even temporary restrictions would be subject to this rule. The merit of the water degradation considerations was not at issue. The decision stated that “land use regulations are ubiquitous and most of them impact property values in some tangential way”, but that compensation for all such regulations would “render government processes prohibitively expensive or encourage hasty decision-making.” Each moratorium must be weighed on its merits, including consideration of the public purpose, duration, and impact on the property owners’ expectations. In essence, the Court upheld the moratorium as a legitimate aspect of planning efforts to address community issues.

3.5.8

***Palazzolo v. Rhode Island*, 121 S.Ct. 2448 (2001)**

Background ■ Palazzolo’s predecessor in interest purchased an 18-acre waterfront parcel in 1959. Most of the parcel was a salt marsh subject to tidal flooding. Some applications to develop the parcel were rejected by various governmental agencies in the early 1960s. In 1971, the state designated salt marshes as protected coastal wetlands on which development is greatly limited. The effect of the regulation was to limited development on Palazzolo’s land to one

single-family residence. In the early 1980s, Palazzolo applied to fill part of the parcel and build a private beach club. After his application was denied, he filed an inverse condemnation action in state court asserting, among other things, that the wetlands regulations had taken his property without just compensation by depriving him of all economically beneficial use and seeking damages. The trial court ruled against Palazzolo and the Rhode Island Supreme Court affirmed, holding, among other things, that he could not assert a takings claim based on the denial of all economically viable use in light of undisputed evidence that he had \$200,000 in development value remaining on an upland parcel of the property.

Supreme Court Holding ■ The U.S. Supreme Court held that the Rhode Island Supreme Court did not err in finding that Palazzolo failed to establish a deprivation of all economic use, for it was undisputed that his parcel retained significant development value. The Court noted that a state may not evade the duty to compensate on the premise that the landowner is left with a token interest, but that was not the situation in this case. A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property “economically idle.” Although deprivation of all economic use was not shown, the case was remanded to the state courts to consider whether a taking had occurred under the ad hoc factual analysis of all circumstances approach set forth in the *Penn Central* case (see Section 3.5.1 of this chapter).

3.6 ADDITIONAL REFERENCES

For specific cases or detailed questions, please consult with your jurisdiction’s attorney.

Web site for the Arizona State Legislature:
<http://www.azleg.state.az.us>

Web site for the U.S. Supreme Court:
<http://www.supremecourtus.gov/index.html>

Web site for the Legal Information Institute:
http://www.law.cornell.edu/topics/land_use.html

¹ A.R.S. § 9-462.05(D)

² *Goodman v. Superior Court*, 137 Ariz. 348, 670 P. 2d 746 (App. 1983)

³ A.R.S. § 33-271 through § 33-276

⁴ A.R.S. § 9-401

⁵ A.R.S. Title 37, Article 4.2

⁶ A.R.S. § 9-462.01(H)

⁷ A.R.S. § 11-821(F)

⁸ A.R.S. §§ 36-601 and 36-602

⁹ A.R.S. § 11-251(31)

¹⁰ A.R.S. § 36-182 and *Davis v. Hidden*, 124 Ariz. 546, 606 P.2d 36 (1979).

¹¹ A.R.S. §§ 11-808, 11-861, and 11-863.

¹² *Davis v. Hidden*, 124 Ariz. 546, 606 P.2d 36 (1979)

¹³ A.R.S. §§ 9-464.01 and 12-1111.

¹⁴ A.R.S. § 49-473

¹⁵ A.R.S. § 49-479

¹⁶ A.R.S. § 11-1102

¹⁷ 416 U.S. 1(1974)

¹⁸ *Brendale v. Confederated Tribes and Bands of Yakima Indian Nations*, 492 U.S. 408 (1989).

¹⁹ 272 U.S. 365(1926)

²⁰ *Id.*, at 387

²¹ *Id.*, at 388

²² *Ranch 57 v. City of Yuma*, 152 Ariz. 218, 731 P.2d 113 (Ariz. App. 1986)

²³ 447 U.S. 255 (1979),

²⁴ 272 U.S. 365

²⁵ 149 Ariz. 538, 720 P.2d 513 (1985), *cert. denied*, 479 U.S. 986