

# **Municipal Downzoning Study Committee**

## ***Final Report***

January, 2000

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# FINAL REPORT

## Municipal Downzoning Study Committee

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# APPENDIX A

## **First Meeting Agenda, Minutes & Attachments**

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# ARIZONA STATE LEGISLATURE

## INTERIM MEETING NOTICE OPEN TO THE PUBLIC

### MUNICIPAL DOWNZONING STUDY COMMITTEE

**Date:** October 6, 1999  
**Time:** 9:00 a.m.  
**Place:** Senate Appropriations Room #109

#### AGENDA

1. Introduction and Opening Remarks
2. History of Zoning Presentation  
Ben Anderson
3. Presentation of Related Recommendations of Growing Smarter  
Commission
4. Presentation of Municipal Zoning Issues and Concerns  
Lana Marcussen, CIRCA
5. Discussion
6. Public Testimony
7. Adjourn

#### Members:

Senator Edward Cirillo, Cochair  
Senator Gus Arzberger  
Senator Ken Bennett  
Mr. Ben Anderson  
Mr. Paul Cragan  
Mr. Jay Dushoff

Representative Jean Hough-McGrath, Cochair  
Representative Bill Brotherton  
Representative Bob Burns  
Ms. Pat Loven  
Ms. Lana Marcussen  
Mr. Buzz Slavin

Persons with a disability may request a reasonable accommodation such as a sign language interpreter, by contacting the Senate Secretary's Office: (602)542-4231 (voice). Requests should be made as early as possible to allow time to arrange the accommodation.

ARIZONA STATE LEGISLATURE  
Forty-fourth Legislature – First Regular Session

**MUNICIPAL DOWNZONING STUDY COMMITTEE**

Minutes of Meeting  
Wednesday, October 6, 1999  
Senate Appropriations Room #109 – 9:00 a.m.

(Tape 1, Side A)

The meeting was called to order at 9:03 a.m. by Cochairman McGrath and attendance was noted by the secretary.

Members Present

Senator Arzberger	Representative Brotherton
Senator Bennett	Representative Burns
Ben Anderson	Lana Marcussen
Paul Cragan	Buzz Slavin
Pat Loven	Representative McGrath, Cochairman
Senator Cirillo, Cochairman	

Members Absent

Jay Dushoff

Speakers Present

Ben Anderson, representing himself, Sierra Vista  
Steve Betts, Land Use Attorney, representing Growing Smarter Commission  
Ed Wren, Lobbyist and Concerned Citizen, representing the Kishiyama and Nakagawa Families  
Mike Longstreth, Lobbyist, representing the Kishiyama and Nakagawa Families  
Nick Nakagawa, representing the Nakagawa Family  
Joy Mee, Assistant Planning Director, City of Phoenix  
Harold Vangilder, Councilman, City of Sierra Vista  
Tim Terrill, Principal, Land Development, Stantec Consulting Incorporated, Tucson  
June Willems, representing herself, Tucson  
Amy Rudibaugh, Director, Intergovernmental Relations, City of Glendale  
David Pennartz, Deputy City Attorney, City of Glendale  
Glenn Hickman, Hickman Egg Ranch, Glendale

## Introduction and Opening Remarks

Cochairman McGrath explained that a bill was passed during the 1998 Session stipulating that if a county wants to downsize property, written permission of the property owner is needed. The same type of legislation was introduced during the 1999 Session for city property owners. She explained that the purpose of this Study Committee is to "fine tune" the 1999 legislation for the upcoming Session. The Members introduced themselves.

## History of Zoning Presentation

Ben Anderson, representing himself, Sierra Vista, gave a presentation relating to the history of zoning (Attachment 1).

Mr. Brotherton surmised that the bill basically gives landowners veto power over downzoning and Mr. Anderson agreed.

Senator Cirillo brought up the fact that downzoning is often initiated by a citizen who does not like what is occurring on nearby property, not government. He noted that a meeting was held in Sun City West yesterday because 700 people do not want a Walgreen's built in a residential area. He asked if giving one property owner veto power eliminates the role of government to arbitrate arguments between two property owners.

Mr. Anderson answered that if the landowner is involved in the arbitration, that is fine, but if arbitration occurs without the landowner's participation, there is a problem:

Senator Cirillo indicated that if one property owner is given veto power, the ability to negotiate a settlement is limited.

Mr. Anderson said he believes attorneys would come into eminent domain at that point.

Ms. Marcussen related that she would not specifically characterize the downzoning consent requirement as a veto of the property owner since consent does not rise to the level of the ability to veto a state or county action; however, consent means that the property owner must be fully involved in the process. There is a huge difference between being fully involved and obtaining the cooperation of a landowner, thus preventing a takings suit from occurring. She added that if a full scale taking of someone's property occurs, eminent domain comes into play.

Mr. Slavin observed that the test for downzoning in the State is somewhat similar to the federal downzoning test, which is, if a downzoning occurs and a property owner is left with an economically viable use of the property, under common law of the State, there is no taking, and therefore, no compensation involved. He added that although inverse condemnation might be a remedy available under common law in Arizona, it might not be an adequate remedy for a

property owner whose highest and best use of the property, which may be reflected in the zoning, is removed by a downzoning.

### **Presentation of Related Recommendations of Growing Smarter Commission**

Steve Betts, Land Use Attorney, representing Growing Smarter Commission, related that the Growing Smarter process began in 1997. In 1998, the Legislature passed the Growing Smarter Act, which created the Commission composed of four Senators, four State Representatives, and seven gubernatorial appointees. At the same time, a citizens group, composed primarily of the Sierra Club and the Center for Law in the Public Interest, proposed a Citizens Growth Management Act, containing the following proposals:

- Deletion of the county downzoning provision.
- Deletion of the moratorium statute negotiated several years ago for cities and property owners.
- Provide full lot split regulatory authority for property owners.
- Increase the lot size minimum for non-subdivided lands.

He said the Commission also reviewed the property rights issue and talked to any property owners, particularly in rural areas, as well as city and town representatives. The Commission produced a report on June 17, 1999 listing four ideas for dealing with property rights in statute in Arizona:

- Ask every city, town, and county to include in the General Plan how to deal with property to make sure actions, regulations, or ordinances do not result in a taking.
- Conduct a takings impact analysis before a new ordinance or regulation is adopted.
- Grant some compensation or an exemption to property owners when a government action decreases property value substantially (the percentage was left blank for the moment).
- Require a property owner's consent before private land is designated open space or permanent agricultural.

Mr. Betts related that the four ideas were reviewed and the Commission received much input and comments. A final report was compiled on September 1, 1999, containing three provisions that may be of interest to the Committee:

- Expansion of the takings appeals statute so that if a community adopts a new ordinance, it would have the effect of a taking. In lieu of going to court, the same appeals process could be used. This statute allows for a quick expedited process where the property owner can appeal to a hearing officer. If the property owner does not like the decision of the hearing officer, there is a quick appeal to Superior Court. The case is expedited on the Court's calendar and an opportunity is provided for attorneys' fees and damages to be awarded to the property owner. He noted that this process only occurs in particularly egregious situations, and typically, just by filing an appeal, both sides are willing to negotiate a solution.

(Tape 1, Side B)

Mr. Betts acknowledged that if downzoning takes all the economic viable use of a property, it would be considered a taking, and this appeals process could be used.

- If a community, in the General Plan, designates someone's private land for future open space or permanent agricultural, an alternative use or underlying zoning that is an economically viable zoning, must be provided in the Plan. Further, if someone's land is going to be zoned as open space or any other economic viable use of the property, the property owner's consent is needed.
- A county lot split regulation provision, which gives property owners in rural Arizona the right to split property with full disclosure and preserves the right of rural people to split land to give to their children or sell.

Mr. Burns noted that Mr. Betts mentioned an opportunity to recover attorneys' fees and damages and recalled that another way of expressing that is the equal access to justice provision. He is concerned that even though the provision is in statute, recovery of attorneys' fees and damages does not often occur. He said he asked staff to obtain statistics available on the issue.

Mr. Betts answered that it depends on whether or not the judge believes the property owner was truly wronged in the process and how uneven the playing field is. Recovery of attorneys' fees and damages are discretionary decisions made by the judge.

Mr. Burns remarked that a private citizen could be forced into a confrontational situation with a governing body and has to defend himself/herself at tremendous expense, but may not be able to recover costs. In some cases, a private citizen probably would not have the resources to fight, so the governing body may go ahead with a decision to change a property designation, betting that the property owner will not challenge the decision. He suggested including some guidelines in the equal access justice statutes.

Mr. Brotherton opined that barring any evidence of systemic problems or sanctions not being awarded in appropriate circumstances, he opposes entering into the realm of the judge's discretion on such items. Judges are allowed to use discretion in a number of areas, and in his experience as an attorney, attorneys' fees or sanctions are awarded when it is appropriate. He added that he believes the courts have been willing to award fees in order to discourage behaviors using up precious court time or in situations where one party has a great deal more power than another.

Discussion followed concerning whether or not General Plans are general plans or specific commitments. Mr. Betts related that within the last 10 to 15 years, most General Plans include some flexibility; however, the Plans do place expectation in the minds of the City Council and citizens.

Senator Arzberger simply stated that any time the value of a person's property is lowered, through zoning or whatever method, a taking of private property rights occurs, and the property owner should be reimbursed.

Cochairman McGrath asked when the government decided that it has a financial interest in people's property and the ability to regulate financial use of that property.

### **Presentation of Municipal Zoning Issues and Concerns**

Lana Marcussen, Private Property Rights Attorney, indicated that the first ordinances like zoning and specific regulation of use of private property developed over slave ownership in the U.S., which is one of the reasons the issue becomes so complicated so quickly. Very different rules developed in the north and south, and the west was caught in the controversy from the very beginning, as played out in the Civil War.

(Tape 2, Side A)

Ms. Marcussen said the issue of how much interference is acceptable with private property rights was never actually resolved because the side that said there could be interference won the Civil War. She acknowledged that slavery was a horrible thing, adding that the U.S. developed some unusual laws in history regarding regulatory authority over private property.

Ms. Marcussen submitted that protection of private property rights is a State process that can probably be worked out. The downzoning law and the concept of Growing Smarter are reconcilable ideas, if interests can be balanced, which sounds possible. That means including private property owners in the discussion. Because of the confusion about the way regulation of private property developed, it is very easy to see development of very large scale separation of power issues, even on a State level, which has happened in Arizona.

She commented that she recently moved to Arizona, but lived in New Mexico for 13 years. The territorial history of the two states is shared. Elements of the Constitution and Bill of Rights are identical, including the takings provision, which has become a very developed anti-takings weapon in the State of New Mexico, but has not yet occurred in Arizona.

Ms. Marcussen pointed out that the Governor and Legislature should not quibble over who will have the most influence over counties and cities regarding the process given to private landowners and the planning process. A reconciliation is needed, or it will be done through the Arizona courts. She pointed out that when the courts become involved, the end result is usually not a good process.

Ms. Marcussen informed the Members that Pima County actually challenged the constitutionality of the legislative downzoning law in court proceedings and other players appear to be involved. She conveyed that the last Secretary of Interior in New Mexico, Manuel Lujan, entered into specific contracts between federal and county agencies, resulting in major problems, and in the last week, a Corruption Committee was set up to review the situation. She said she does not

want to imply that anything illegal is going on, but the Members need to be aware of the influence that the Secretary of Interior, Bruce Babbitt, may have on this issue. Environmentalist groups are very involved in the Growing Smarter side, and there is no reason to believe that Secretary Babbitt is not talking to those groups about specific events occurring in Arizona. In addition, she has seen actual documentation that Pima County is in the process of obtaining federal funding to fight the downzoning law and Secretary Babbitt has been talking to Pima County directly about acquiring those funds. She contended that if the process remains within Arizona, the issue can be worked out by the Legislature and Governor; however, federal influence, especially with federal dollars attached, may result in passage of legislation that may not be what everyone wants.

She clarified that the documents she saw indicate that Pima County is seeking funding to fight the downzoning legislation in order to redo a stricter plan that can be subsidized by federal funds and enforce new slope regulations.

Senator Arzberger remarked that he does not see anything wrong with the County applying for federal funds for planning, but he does not endorse utilization of federal funds to fight an Arizona law that was passed. He requested that the documents be made available to the Members.

Discussion followed concerning local control versus State/federal control. Ms. Marcussen submitted that local control is more effective from the State level. Municipalities and counties are subdivisions of the State, and it is important that changes can be made in Phoenix, not Washington, D.C. From a federalism perspective, it is necessary to make sure that there is local control and the cities and municipalities do not become involved in a difficult situation, i.e., federal funds often have strings attached, which could result in trouble, as in New Mexico. The issue is a matter of State citizenship and needs to remain that way.

Mr. Anderson commented that Cochise County is experiencing problems with outside influences. An organization from Montreal appears to be influenced by federal agencies to involve itself in the San Pedro Riparian Natural Conservation Area. Also, some time ago, the Secretary of Interior made an agreement with Mexico regarding lands in that area. He submitted that it seems unusual for the Secretary of Interior to be involved in diplomacy, which is normally the realm of the Secretary of State. Thus, unique situations are occurring with federal agencies becoming involved at lower levels when the agencies should pass through state agencies first, or at least the State Legislature.

### **Public Testimony**

Ed Wren, Lobbyist and Concerned Citizen, representing Kishiyama and Nakagawa Families, testified that he is not being paid as a lobbyist for his testimony. He is present because the City of Phoenix committed a travesty against the Kishiyama and Nakagawa families who grow flowers in the area of 40<sup>th</sup> Street and Baseline Road. Mr. Nakagawa is present, but no longer grows flowers due to the fact that it is not financially feasible. Mr. Kishiyama is planting a final crop of flowers today, so he could not attend the meeting. He related that there will no longer be

any flower farms in that area beginning this spring. He advised that both gentlemen are in their 70s.

Mr. Wren said, this year, the City of Phoenix posted a very misleading sign. The City is not required to inform property owners about general designation changes, except by posting a sign, which neither family noticed. After 12 years of recognizing the appropriate use of the property for 5-15 housing units and commercial property at the corners, the City designated the property as flower gardens, reducing the value by 80 percent.

He explained that the families planted and operated the flower farms since 1937, except during a period of time members were housed in Japanese internment camps during WWII and some fought in that war. A year ago, City lobbyists told him that the families can apply to have the designation changed, which they did in August 1999. However, a recommendation was made by the City Planner's Office that the request be denied for many reasons.

(Tape 2, Side B)

Mr. Wren submitted that the land will eventually become green space or a part of South Mountain Park since it is no longer economically feasible to grow flowers, yet the City designated the area for flower gardens. He contended that the City's decision is wrong and something needs to be done by the Committee. He offered to help draft legislation.

He clarified that the land was redesignated in the land use General Plan. It was S1 for 12 years before 1997, which is agriculture, commercial corners, with 5-15 dwelling units if the families ever want to sell the land. It has now been designated agriculture but restricted to certain uses. He acknowledged that the land has not been rezoned.

Mrs. McGrath clarified that the Committee may review all facets of zoning, overlay zoning, and General Plans.

Mike Longstreth, Lobbyist, representing Kishiyama and Nakagawa Families, indicated that he has been a friend of the families for a long time. Prior to the 12 years under the previous designation, there was no General Plan requirement in Arizona and the land was zoned as agricultural. He does not know if the land was purchased as agricultural property since the purchases took place 50 years ago.

Mr. Cragan indicated that the City of Surprise is in the process of writing a General Plan and provides many opportunities for public input, participation, and notification to the community. He asked if the families participated or testified to the City on the proposed designation.

Mr. Longstreth pointed out that in 1989, the City offered \$1 per square foot to purchase a piece of each man's property in order to widen the right-of-way at Baseline and 40<sup>th</sup> Street. The offer was not accepted, and a suggestion was made that the City check the zoning documents. Later, the City made another offer of \$8.50 per square foot, which was accepted, based upon the

General Plan designation; therefore, it does provide value by establishing a precursor for what is going to happen.

Mr. Longstreth said many people in the area (seven square miles) were noticed. Some received a postcard notification of a meeting discussion. Large posters indicated that the Baseline Area Master Plan was going to be acted upon by the Planning and Zoning Commission and the City, with no specific mention that the families were among six or seven property owners whose property would be down designated. He added that the families did not participate in the hearings for which notice was received. He clarified that the recommendation for denial applies to an application to reinstate the former designation. The application is still pending and there will be a public hearing before the Planning Commission.

He submitted that the notice the two families received was an obscure bland statement about 5,000 acres being planned with no specific reference to the fact that their property would be significantly impacted. When the families filed the application in August, they had to detail the acreage, the reason for the application, and where the property is located. It cost over \$1,000 to post one board on each site. In addition, one family had to notify 80 people and the other family had to notify 60 people through correspondence, using a letter basically designed to bring out opposition. He submitted that the City spent hundreds, if not thousands, of hours of staff time on this, but did not spend five minutes to call the families to inform them that their property would be downgraded. Yet, when the Baseline Area Plan was developed, over 5,000 acres, only 37 acres made the cover of the plan.

Mrs. McGrath remarked that the two families can no longer compete and make money because 98 percent of fresh cut flowers imported in the U.S. are from Mexico, South America, etc. She contended that it is not reasonable for the City to designate property as a flower farm when it is not economically feasible to operate such a business.

Nick Nakagawa, representing the Nakagawa Family, agreed with Mrs. McGrath. He added that their age is also a factor, as well as the fact that all his children are in different businesses. He advised Mr. Brotherton that when planning was done in 1985, he believed that the 5-15 density with commercial was a good plan and he would be able to get good value for the land; but the mixed-use designation negatively impacts the land.

(Tape 3, Side A)

He related to Mr. Brotherton that he never sought legal counsel about future value or the ability to rezone the land.

Joy Mee, Assistant Planning Director, City of Phoenix, testified that the City began developing a General Plan in 1972. In 1974, State planning enabling legislation was passed authorizing adoption of a General Plan for all cities and towns. In 1985, a General Plan was adopted for the entire City based on the urban development concept, and that plan was developed over a period of several years. In 1997, the City adopted the Baseline Area Master Plan. City Council directed staff, based on concerns raised by residents and property owners that it is time to review land in

that area. Approximately half of the land is vacant and there was concern about over-commercialization and turning Baseline Road into an apartment corridor. The City spent about a year involving property owners in meetings and talking about goals, and many different plans and alternatives were reviewed. She noted that postcards were mailed before the meetings. Mr. Nakagawa showed up at some early meetings held in the area. During those discussions, the issue came up about flower gardens and nurseries. People testified that they are aging, the economy is changing, and they may not be able to continue to grow flowers. Therefore, when the City designated three parcels for nurseries and flower gardens, an alternative land use was designated (Attachment 2).

Ms. Mee contended that the new designation allows more than the previous designation, and therefore, increases the value of the property. She clarified that the application that was filed has not gone before the City Council. It is not for rezoning, but a General Plan designation. No one has denied the application, and the first public hearing will be held at the beginning of November 1999.

She related that part of the goal of the Baseline Area Master Plan is to preserve the historic character of the area; however, historic preservation only works if the property owners are willing or someone else comes in and develops. One concept was preserving the flower gardens, i.e., if the City is able to raise funds to do so or a private land trust buys rights to grow flowers. If that does not occur, the people have a right to develop the land for some alternative land use. She said at the time the designation was made, there did not seem to be any objection to the alternative land use, although during the General Plan hearings a person claiming to be a representative of flower gardens wanted to pursue an Asian cultural complex. He was asked to talk to City representatives about the concept, but never did. She related that she does not expect the City to make historic preservation funds available in the short term, but there is a bond issue scheduled in a year. If the property owners want to do something before that time, or if it does not happen, the property owners have the right to do something with the property.

Senator Cirillo remarked that the homeowners have been placed in a very bad situation.

(Tape 3, Side B)

He submitted that there should be some time frame involved.

Ms. Mee agreed that no time frame is included.

Harold Vangilder, Councilman, City of Sierra Vista, read from prepared remarks (Attachment 2).

Ms. Mee advised that the mixed-use agricultural zoning district was created within the last few months in response to the mixed-use agricultural designation in the General Plan. Public hearings were held on the issue. No other parts of the City have the designation since it is so new, but she has heard people in other parts of the City express interest. She added that it is available to anyone else and answered questions posed by the Members.

Timothy Terrill, Principal, Land Development, Stantec Consulting Incorporated, Tucson, stated that in 1998, Pima County decided to pass some new ordinances with the express purpose of beating the state downzoning legislation. His client, Ms. Willems, has an 80-acre parcel of property zoned SR, which is suburban residential. She applied to the County with a tentative plat application for 22 residential lots on July 3, 1998. On August 11, 1999, the County enacted the hillside development zoning ordinance and the buffer overlay zoning ordinance, which directly impacted the project.

(Tape 4, Side A)

He said, in essence, the developer/owner was unable to get a final plat approved by the Board of Supervisors within a certain time frame so the County decided that two provisions in the hillside development zoning ordinance apply to the project. Those are the grading limitations, which reduces the amount of grading by 34 percent, and the slope density provision, which reduces the allowable number of units from 22 to 2. For various reasons, there were many issues raised by County staff, which boiled down to about six ordinance issues. He indicated that the owner believes the County deliberately lengthened the process so the new ordinances would apply. He noted that certain elements of the ordinances have been appealed to the Design Review Committee, and in some instances, the Board of Supervisors. In other instances, appeals were made to the Board of Adjustment.

Mr. Terrill stated that he represents other clients. When the new ordinances were enacted, many had existing platted lots that were recorded, etc., but when they started to build homes on the property, they ran into conflict with the new grading regulations. Beginning in May 1999, requests for variances were denied, so now the owners can only obtain a building permit by reducing the size of the homes by 30 to 50 percent.

June Willems, representing herself, Tucson, displayed a map of the property Mr. Terrill referred to and outlined the process she went through, beginning in 1996, to obtain approval for the subdivision, including a roads and utilities agreement. On July 3, 1998, the first draft of the subdivision was submitted. Letters from the County requested grading examples and a cul de sac variance. She said she knew meetings were being held on the new hillside development zoning ordinance and the County voted in August 1998. She was also aware that the State was passing a no downzoning law; therefore, she was comfortable about completing what needed to be done to have a subdivision approved. However, she found out that the person at the County who signed the roads and utilities agreement referred to the property at a public meeting held on November 21, 1998 as an example of how the new slope density provision would take the property, which was in the planning stage, from 22 lots to 2. She also discovered that the Pima County Board of Supervisors instructed Pima County attorneys to file suit against the State claiming that a County law takes precedence over the state downzoning law, which she does not believe is right.

Ms. Willems said on April 8, 1999, Mr. Terrill submitted a new plan that met all existing ordinances applicable on July 3, 1998. Letters from the County applied the new ordinances to the plat. The plan was resubmitted numerous times with the same response. An attorney suggested that she attempt to have the issue placed on the Board of Supervisors' agenda. Even

though she followed the County procedures manual and made numerous attempts, she was unable to obtain approval. She added that an appeal was made to the Board of Adjustment.

Mr. Terrill concurred that an appeal was made to the Board of Adjustment to have the new ordinances not apply. The Board heard from County staff and others. The staff report recommended that the Board does not have jurisdiction to hear the request; therefore, the Board voted 3 to 0 to dismiss the variances.

Ms. Willems informed the Members that she spent about \$700,000 over a four-year period on the project. She had to put in a road, and it took five months to obtain a permit, which generally takes five days. It took two years and \$250,000 to build the road. In March 1999, the Board of Supervisors somehow turned the beginning of the road for the platted subdivision cul-de-sac off the top of the mountain into a driveway. There is no longer a County road to the beginning of the easement, and no one can find the document showing that the Board voted or the resolution voted on.

Mr. Slavin related that some current court cases may be helpful to Ms. Willems and her attorney in resolving the issue, such as the Golf Leisure case in the Town of Paradise Valley, and vested zoning right cases. He surmised that she may be in Superior Court for a remedy as opposed to waiting much longer, opining that he believes she has a great case.

Mr. Terrill indicated that court processes have been started.

Amy Rudibaugh, Director, Intergovernmental Relations, City of Glendale, indicated that zoning is necessary for compatibility and to obtain the best use for property owners.

(Tape 4, Side B)

She related that the major difference between the county downzoning bill that passed two sessions ago and the downzoning bill for cities introduced last Session is that it would have applied to rezoning, not only downzoning. When a city annexes a piece of land, it must be placed in a holding pattern to be given more specific zoning, and upzoning cannot be done because city zoning does not specifically match county zoning. She submitted that the concept of not being able to do zoning without the property owner's consent is a veto.

Ms. Rudibaugh related to Mrs. McGrath that the City does not attempt takings, and if a taking does occur, the Constitution and other matters take care of those types of situations. She acknowledged that the City needs to have a General Plan, but there must be some flexibility in the Plan for zoning. For example, 550,000 people live in the West Valley, but only 150,000 people live and work there; therefore, much of the land is residential. In the event commercial businesses locate in the area in the future, the City would have the flexibility to be able to change the zoning to commercial.

She said the bill introduced last year would have created vested zoning for all property, and there is a difference between vested zoning and zoning. Vested zoning occurs if a person has put

money into the property and has plans in accordance to the zoning. She added that zoning for agricultural use is not a taking if agriculture is an economically viable use.

Ms. Rudibaugh indicated that land owned by the Hickman family was annexed into the City in May 1998. County zoning is applicable for six months. If some sort of zoning is not applied during those six months, the land is not zoned, which means anything could occur on the property and only criminal laws prevail. Currently, there is no land in the City of Glendale with no zoning. The City cannot zone for a higher density because city zoning never completely matches county zoning. Therefore, an attempt was made to zone as close as possible to Maricopa County zoning, but even the most equivalent zoning would have been somewhat restrictive. The City attempted to zone the land A1, which is agricultural, allowing the Hickmans to carry out current operations, and initiating a change in the ordinance for that specific operation; however, the Hickmans objected.

David Pennartz, Deputy City Attorney, City of Glendale, related that the City Council did initiate RC3 and M1 zoning, which is heavy commercial and light industrial, on the Hickman's property at their request. Under municipal statutes passed by the Legislature, the City is not allowed to grant initial zoning that has any uses, densities, or intensities more intense than what was held under the county, so the City must go with the same or less. The Council has a policy, especially when annexing agricultural areas, of granting what may be like the Phoenix S1, but is A1 zoning, as one house per 40 acres in commercial agriculture production, in a holding zone situation, which closely matches what most people hold in the County. On this particular property, at the property owner's request, there was an initiation to grant the most equivalent zoning to zoning held in the County, but an objection was raised at the Planning Commission because it did not exactly match.

He related that the Hickmans had a mixed-use zoning, an agricultural use, and a commercial or industrial use. The business is a laying operation, which, under the City's ordinance, would be an agricultural use, but also processes, sells, and transports eggs, which is more of a commercial or industrial-type use. Often, when property is annexed with a mix of use already developed, it is difficult to find an exact match in City zoning.

Mr. Pennartz indicated that when the City initially zones property, if the use is inconsistent in any respect with City zoning, the property is grandfathered in and the business operation can continue forever; however, that is not really the issue. The issue was, if the Hickmans wanted to expand by adding another laying house, for example, as a grandfathered use, a nonconforming use in a commercial industrial zone, the expansion could not occur, even if A1 zoning were granted. Therefore, the Council decided to grant A1 zoning, which is most consistent with the basic nature of the use (agricultural), and immediately start the process to amend the ordinance to provide for the mix of uses to be fully permitted so the Hickmans do not have to worry about being grandfathered. He added that before that ever came about, the annexation was challenged. The zoning was never challenged because the annexation was successfully challenged, so the property is not in the City of Glendale any longer.

Glen Hickman, Hickman Egg Ranch, Glendale, testified that the Ranch was established in 1944 at 67<sup>th</sup> Avenue & Missouri, and he is the third-generation steward of the family business. He noted that the business had to be moved to 91<sup>st</sup> Avenue once before because of urban encroachment and it took 18 years to pay off the move. His family made an investment at that time based on zoning granted in the 1980's, approval of the City Council, and reaffirmation by a General Plan adopted in the mid-1980's. His family continues to make multi-million dollar investments based on the zoning and Plan in place for the surrounding area.

He stated that in the egg-laying business, it is very difficult to finance special-purpose buildings, such as warehouses, so substitute collateral must be used. His family owns and operates one of the largest egg-laying operations in the State and is involved in commercial feed, trucking, and other operations. The family puts up collateral, including land and personal houses, to finance certain business assets. He said he does not believe the City understood the consequences of its actions by stripping the zoning, but the Hickman's bankers view it as something to bet on in case the egg ranch fails.

Mr. Cragan asked if the Ranch was annexed against the Hickman's will, thus resulting in a downzoning on an annexation.

Mr. Slavin indicated that he is Mr. Hickman's lawyer and agreed with Mr. Cragan's assessment of the situation. He explained that some land assemblers/speculators attempted to assemble a lot of land to convert from a long-time agricultural use to somewhat of a glitzy television film studio, among other uses. A major homebuilder was also involved at one point. He noted that his experience with Mr. Pennartz and the City has always been favorable. The people assembling the land in the City ultimately decided to stay out of the fray. The City attempted to find a way that the area could change uses over time, but there was no method agreed upon by landowners, the City, and the Hickmans.

(Tape 5, Side A)

### Discussion

Discussion followed concerning the feasibility of requiring that county and city zoning match or stipulating that a city cannot annex property unless the same protection provided by the county is granted. Mr. Cragan suggested giving cities the option of leaving county zoning in place when land is annexed.

Cochairman McGrath submitted that perhaps six months is not long enough for cities to adjust zoning, especially if a new zoning category must be developed. She added that the final meeting of the Committee will be held in November, but a date and time have not yet been chosen.

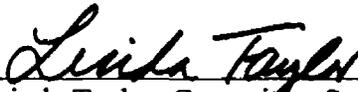
Mr. Cragan commented that he would like to make a 10-minute presentation at the beginning of the next meeting. He suggested that the Committee consider changing vesting rules in statute so that when recording with an intent to develop occurs, a reasonable time period is allowed during

which rules cannot be changed so the economic benefit in the investment made can be realized. He added that he will provide an example at the next meeting.

Mr. Burns requested that any suggestions be forwarded to staff for distribution to the Members for review before the next meeting. He also suggested that the Members think about possible motions to be voted on at the next meeting.

Cochairman McGrath asked that suggestions be submitted in writing as soon as possible in order to have a working session next meeting.

Without objection, the meeting adjourned at 12:55 p.m.

  
\_\_\_\_\_  
Linda Taylor, Committee Secretary

(Original minutes, attachments, and tapes are on file in the Office of the Chief Clerk. A copy of the minutes and attachments are filed with the Senate Secretary.)

**Municipal**

*Downgrading*

*and*

**Ben L. Anderson Jr.**

[WWW.BMFCOMSOFT.ORG](http://WWW.BMFCOMSOFT.ORG)

Municipal

Downgrading

to

**ZONING:**

**GOVERNS THE TYPE OF  
DEVELOPMENT WHICH TAKES  
PLACE ON THE LAND**

# ABBREVIATED HISTORY

1867

**EARLIEST APPLICATION OF  
LAND-USE ZONING POWER IN  
THE UNITED STATES**

# San Francisco

**Initiated to isolate obnoxious land uses to protect the environment of residences.**

*The physical separation and isolation ... of dangerous, odoriferous, or unsightly practices, such as tar boiling, soap making, fat rendering and dead carcass cremation... viewed as a reasonable governmental response to the unacceptable impositions of one otherwise legal activity upon another.*

***Both the residences and these businesses had their right to exist ... but not necessarily in close proximity to each other***

● ● ●

**LEGAL SEPARATION AND  
ISOLATION OF LAND USES  
BEGINS.**

**FOUNDATIONS FOR MANY  
CURRENT ZONING  
PRACTICES.**

**1899**

**EARLIEST SUPREME COURT  
LAND USE CONTROL CASES**

## **New Orleans**

*- residents contested the expansion of a "zone" in which houses of prostitution were permitted into a nearby "residence" zone, prostitutes being considered by some to be socially undesirable neighbors, if not threats to the public health.*

**THE COURT SUPPORTED THE  
ORDINANCE**

● ● ●

**MOST EARLY LAND USE  
ZONING LAWS:**

**DEALT WITH CLEARLY  
OBNOXIOUS OR CLEARLY  
SOCIAALLY UNACCEPTABLE  
SITUATIONS**

**1916**

**NEW YORK ZONING CODE:**

**AMERICA'S FIRST  
"COMPREHENSIVE" ZONING  
CODE**

## **PYRAMIDAL APPROACH.**

Residence zone, considered the "highest" zone classification -- nothing but residences were permitted.

Commercial zone, the next lower zone on the pyramid, commercial uses and residences were allowed.

Industrial zones, where industrial and commercial and residential uses were all permitted. In effect, industrial zones were really unzoned for all uses.

**1909**

**FIRST MAJOR AMERICAN LAND  
USE CONTROLS THAT  
INFLUENCE VAST AREAS OF  
UNDEVELOPED LAND.**

# Los Angeles

## Different types of zones

Framework for the exclusive "single-family only" residence zones

Varying types of commercial and industrial zones:

LIGHT

HEAVY

WAREHOUSING

**1920 +**  
**AUTOMOBILE IMPACT**  
**LAND USES SPREAD**  
**WIDER DISTANCES.**

*Land use based on  
municipal economics  
municipal services  
(i.e., police, fire, garbage pickup).*

# AGENDA BASED ZONING

## THE COURTS:

Single-family-only areas would lead to the promotion and protection of home ownership.

Mixed residence-type neighborhoods,  
Fine-grained zoning patterns  
Diversity oriented

# **Post-WWII**

## **EXCLUSION OF USES FROM ZONES**

### **ISOLATION BY DISTANCE**

**AMERICAN PROBLEMS, REAL, IMAGINED,  
OR SOCIO-DEMOGRAPHIC "SOLVED" BY  
PHYSICAL ISOLATION AND SEGREGATION**



● ● ●  
1950's

## **"PURITY" OF ZONES CONCEPT**

**(NIMBY "not-in-my-backyard")**

Increased exclusion of uses from zones

“American Dream” White Picket Fence - low  
development density

Spread of zones of developmental uniformity and  
life-style conformity.

# COUNTY

"Zoning regulations" means provisions governing the use of land or buildings, or both, the height and location of buildings, the size of yards, courts and open spaces, the establishment of setback lines and such other matters as may otherwise be authorized under this chapter and which the board deems suitable and proper.

# COUNTY

"Zoning ordinance" means an ordinance adopted by the board of supervisors, which shall contain zoning regulations together with a map setting forth the precise boundaries of zoning districts within which the various zoning regulations are effective.

# **MUNICIPAL**

**"Zoning ordinance" means a municipal ordinance regulating the use of the land or structures, or both, as provided in this article.**

**House Bill 2621**  
**2<sup>nd</sup> Regular Session**  
**43<sup>rd</sup> Legislature**  
**1998**

# **COUNTY ZONING: DOWNZONING**

Prohibits county-initiated downzoning without the express written consent of an affected property owner.

Downzoning: reducing the density and/or the intensity of use of a piece of property.

Downzoning would occur if a piece of property was rezoned from commercial use to low-density residential use.

Downzonings require notice and opportunity for hearing for the affected land owner who may sue a governing body for an improper downzoning.

Under county law downzonings may be initiated by either an affected property owner or by the governing body of a county.

A county initiates a rezoning usually to:

- (1) correct an obvious problem;
- (2) create rural zones to protect agricultural and rural areas;
- (3) address neighborhood concerns.

The intent is to assure private property owners that the value of their land cannot be restricted by a county without their express approval.

Opponents argue that existing zoning ordinances and case law adequately protect the rights of such owners and that the bill, among other things, eliminates the ability of a county to implement overlay zones which legitimately protect the public health and safety.

Overlays zones refer to restrictions which affect an entire area of land that includes many different classification of zoning.

For example, an airport overlay zone would restrict *all* buildings in a given area to certain height restrictions to ensure that planes could safely takeoff and land.

Overlay zones require the same implementation and approval procedures as downzonings.

F. The legislature finds that a REZONING OF LAND WHICH CHANGES THE zoning classification OF THE LAND OR which restricts the use or reduces the value of THE land is a matter of statewide concern and such a change in zoning that is initiated by the governing body OR ZONING BODY shall not be made without the express written consent of the property owner.

THE COUNTY SHALL NOT ADOPT ANY CHANGE IN A ZONING CLASSIFICATION TO CIRCUMVENT THE PURPOSE OF THIS SUBSECTION.

**FACT SHEET - CITY OF PHOENIX  
BASELINE FLOWER GARDENS OWNERS  
GENERAL PLAN AND REZONING ISSUES**

October 6, 1999

- **Three sites are designated on the Baseline Area Master Plan and General Plan for flower gardens. An alternate RESIDENTIAL OR MIXED LAND USE classification has been designated for each one.**
  - \* **Northeast corner of 36th Street and Baseline Road (approximately 15 acres)**  
The Zoning Hearing Officer approved Rezoning Application 78-99-8 with stipulations on August 16, 1999, for 12.25 acres of R-3A and 2.92 acres of C-1. The site is designated as Nursery/Flower Garden on the General Plan with an alternative use of 5-10 dwelling units per acre. This rezoning request is not consistent with the General Plan but does not require a General Plan Amendment because the multi-family request is under 20 acres and the commercial request is under 10 acres. This request proposes a 192 unit apartment complex with a commercial office building. City Council approved the rezoning request.
  - \* **Northwest corner of 40th Street and Baseline Road (approximately 36 acres)**  
No action has been taken on this site. An application for a General Plan Amendment has been filed as part of the annual cycle. There is no fee. Under the Mixed Use Agricultural designation the site could have farming, retail sales of farm products, restaurants, offices, low density housing, a bed and breakfast resort as well as other uses. It would also allow a ten acre commercial center at the northwest corner of 40 Street and Baseline Road on this site. The General Plan Amendment filed requests commercial at the corner and residential at 5-15 units per acre for the balance.
  - \* **South side of Baseline Road, east of the 36th Street (approximately 10 acres)**  
The alternative use for this site is 2-5 dwelling units per acre. It is unknown at this time what the owner wants to do with the property.
- **Some of the property owners have said that they want a different classification than what is shown on the General Plan map, and the City of Phoenix is working with them to bring their requests to public hearing. The City of Phoenix has been meeting with Baseline property owners who own land designated for flower gardens and for mixed use agriculture. Some of these property owners are already working with City staff and a consultant to determine what changes in designation they may wish to file. Property owners who want a different General Plan designation have two options:**
  - \* **They can file for free by September 1 to be considered as part of the annual**

- General Plan amendment review cycle which occurs once a year. OR
- \* They can file a special amendment with a small fee to change their General Plan designation; this request would precede the regularly scheduled General Plan amendment review.

General Plan amendments have been filed for 66 acres located on the south side of Baseline Road in the vicinity of 32nd Street. The requests is to change the General Plan designation from Mixed Use Agricultural to 2-5 dwelling units, 5-10 dwelling units and commercial. The 66 acres are part of the approximately 202 acres of Mixed Use Agricultural designated on the south side of Baseline Road or 773 acres total within the Baseline Area Master Plan. The amendments will be heard by the Planning Commission and City Council this fall and early winter as part of the annual cycle.

NOTE: Some of the mixed use agriculture designated land has underlying zoning for single-family housing, and some of the property owners intend to use their existing zoning.

- Property owners with a General Plan designation of Mixed Use Agriculture who wish to keep this designation and develop under it would have to request to be rezoned to Mixed Use Agriculture. The City of Phoenix has no intention of zoning anyone to the district who doesn't request that zoning district. Some owners have expressed an intention to file shortly for the district.

**CONCLUSION:** There was never any intention to keep anyone raising flowers or farming their property against their will. Although there was extensive public involvement in the development of the Baseline Area Master Plan, there are annual free opportunities to consider changing the General Plan Land Use Map. **EVERY PROPERTY OWNER IN THE BASELINE MASTER PLAN AREA DESIGNATED FOR NURSERIES OR FLOWER GARDENS OR MIXED USE AGRICULTURAL HAS A GENERAL PLAN DESIGNATION OR ALTERNATE DESIGNATION THAT ALLOWS RESIDENTIAL DEVELOPMENT AT MEDIUM DENSITY SINGLE FAMILY OR MULTIPLE FAMILY DENSITIES OR ALLOWS SINGLE STORY OFFICES AND RESTAURANTS COMBINED WITH LOWER DENSITY HOUSING.**

THANK YOU SENATOR CIRILLO AND REPRESENTATIVE MCGRATH—AND MEMBERS OF THE COMMITTEE—FOR THE OPPORTUNITY TO ADDRESS YOU. MY NAME IS HAROLD VANGILDER AND I HAVE THE GREAT HONOR OF BEING A CITY COUNCILMAN IN THE CITY OF SIERRA VISTA.

AS YOU ARE PAINFULLY AWARE—PROPERTY RIGHTS ISSUES ARE ON EVERYONE'S FRONT BURNERS HERE IN ARIZONA. I KNOW THEY CERTAINLY ARE IN SIERRA VISTA. HOWEVER—I THINK IT IS APPROPRIATE THAT PROPERTY RIGHTS SHOULD RECEIVE THIS LEVEL OF ATTENTION BECAUSE THE FOUNDATION OF ALL PERSONAL FREEDOMS REST ON THE RIGHTS WE HAVE TO—AND IN—PROPERTY. I DO NOT BELIEVE IT IS HYPERBOLE TO STATE THAT IF PROPERTY RIGHTS ARE LOST THAT IT IS ONLY A MATTER OF TIME UNTIL WE ARE NO LONGER FREE IN ANY OF THE HISTORICAL UNDERSTANDINGS THAT HAVE BEEN USED TO DEFINE FREEDOM FOR THE PEOPLE WE CALL AMERICANS.

I HAVE BEEN ACTIVE IN THE CIVIC AND POLITICAL LIFE OF SIERRA VISTA SINCE 1983. MY ROLES HAVE VARIED IN THAT TIME. I HAVE BEEN A CITY COMMISSIONER—GRASS ROOTS POLITICAL ACTIVIST—HAVE ESTABLISHED TWO LOCAL FOUNDATIONS—AND AM IN MY 6<sup>TH</sup> YEAR ON THE CITY COUNCIL. IN THAT TIME—SIERRA VISTA HAS PROSPERED AND I BELIEVE THE KEY TO THAT SUCCESS WAS—AND STILL IS—HINGED ON THE FACT THAT LOCAL GOVERNMENT WAS FRIENDLY TO THE RIGHTS OF THOSE WHO OWNED PROPERTY AND WERE WILLING TO TAKE RISKS WITH IT.

NO DOUBT SOME HAVE TOLD YOU THAT A PROHIBITION ON DOWNZONING WILL TAKE AWAY "LOCAL CONTROL" AND INHIBIT THE ABILITY OF LOCAL GOVERNMENT STRUCTURES TO EFFECTIVELY DO THEIR JOB. THIS IS PURE PASTURE PATTIES—AND I STRONGLY URGE YOU TO IGNORE SUCH BLATHER. SUCH STATEMENTS—I AM CONVINCED—ARE BASED ON A BELIEF THAT THE "PEOPLE OUT THERE" EXIST FOR THE BENEFIT OF CITY HALL. I CONTEND THAT MY CITY HALL EXISTS FOR THE BENEFIT OF THE "PEOPLE OUT THERE." I URGE YOU TO INSTITUTIONALIZE THIS VIEW AT THE STATE LEVEL SO THAT THE POLITICAL SUBDIVISIONS OF THE STATE OF ARIZONA WILL BE—BY DIRECTION—BEHOLDEN TO THIS VIEW.

SENATOR CIRILLO—REPRESENTATIVE MCGRATH—AND MEMBERS OF THE COMMITTEE—GOVERNMENT AT EVERY LEVEL SHOULD WORSHIP DAILY AT THE SHRINE OF PRIVATE PROPERTY RIGHTS. IF GOVERNMENT WORSHIPS AT ANY OTHER SHRINE—THEN THEY WORSHIP IDOLS. MY CITY COUNCIL DEALS FREQUENTLY WITH ZONING ISSUES. WE HAVE NEVER BEEN IMPEADED BY THE FACT THAT WE EXIST TO SERVE. IN THE COMING WEEKS—I WILL ASK FOR A SERIES OF CITY COUNCIL WORK SESSIONS TO REVIEW OUR CODES AND ORDINANCES RELATING TO ZONING ISSUES. MY INTENT IS TO INSURE THAT THE CITY OF SIERRA VISTA DOES THE FOLLOWING AS THEY RELATE TO PROPERTY RIGHTS ISSUES;

1. NO DOWN-ZONING—REZONING—OR LAND USE CHANGE WITHOUT THE CONSENT OF THE PROPERTY OWNER,
2. PRIVATE PROPERTY CAN ONLY BE CONDEMED FOR A PUBLIC PURPOSE RELATING TO CIVIC INFRASTRUCTURE, TRANSPORTATION, HEALTH, OR PUBLIC SAFETY,
3. NO CONDEMNATION OF PRIVATE PROPERTY FOR THE BENEFIT OF ANOTHER PRIVATE SECTOR ENTITY,
4. CONDEMNED PRIVATE PROPERTY SHALL BE BOUGHT AT A RATE 1 AND ½ TIMES THE APPRAISED VALUE OR THE PRICE PAID BY THE CURRENT OWNER, WHICHEVER IS GREATER.

I TRULY BELIEVE THAT THE FOUR ITEMS I STATED ABOVE WILL NOT INTERFERE WITH THE LEGITIMATE NEEDS OF MY CITY HALL TO PLAN AND PERFORM. IN FACT—I BELIEVE THAT WHAT I HAVE STATED IS IN CONCERT WITH OUR STATE CONSTITUTION MANDATING GOVERNMENT TO PROTECT INDIVIDUAL RIGHTS. WORDS MEAN THINGS—THEY'RE NOT JUST SOUNDS WE MAKE. IF WE BELIEVE AS A PEOPLE THAT GOVERNMENT SHOULD BE AS SMALL AS POSSIBLE THEN THE LAWS ENACTED BY GOVERNMENT BODIES SHOULD BE

PREPONDERANTLY AIMED AT LIMITING THE ABILITY OF THE GOVERNMENT TO INTERFERE WITH REAL PEOPLE DOING REAL THINGS. I UNDERSTAND THAT THIS IS FUNCTIONALLY DIFFICULT—BUT IT NEVER THE LESS SHOULD BE OUR PHILOSOPHICAL REASON FOR BEING.

MY CITY—ALONG WITH THE CITIES IN TWELVE OF ARIZONA'S FIFTEEN COUNTIES REJECTED GROWING SMARTER. THIS ISSUE FAILED IN 17 OF THE 19 VOTING PRECINCTS IN SIERRA VISTA. THE ONLY THING MORE DISPISED IN MY CIRCLE WAS THE TRULY DICTATORIAL AIMS ADVANCED IN THE RADICAL PROPOSAL BY THE SIERRA CLUB WHICH WOULD HAVE SUBSTITUTED GROUP ACTIONS OR THE POLICE POWERS OF GOVERNMENT FOR MARKET BASED SOLUTIONS PREDICATED ON INDIVIDUAL LIBERTY. IT IS MY HOPE THAT THIS COMMITTEE WILL MAKE A STRONG STATEMENT ABOUT PROPERTY RIGHTS—THAT YOU WILL INSIST THAT THEY BE RESPECTED BY ALL LEVELS OF GOVERNMENT STARTING WITH CITY COUNCILS.

FINALLY—I HAVE REMAINED AMAZED AND PERPLEXED AT THE FACT THAT THE GOVERNOR AND THE LEGISLATURE HAS FAILED TO USE THE BULLY PULPIT TO DECLARE THAT ISSUES SUCH AS GROWTH BOUNDRIES REPRESENT A DIRECT ASSAULT ON OUR WAY OF LIFE. DO NOT REMAIN SILENT BEFORE THE SIERRA CLUB'S PROPOSAL. YOU ARE THE LEGITIMATE ADVOCATES FOR THE PEOPLE—YOU SHOULD NOT FALL PROSTRATE BEFORE AN NGO THAT CONTRIBUTES NOTHING TO OUR LIFE. I WILL SUBMIT TO YOU THAT HANNIBAL IS AT THE GATE. PAY NO TRIBUTE—GIVE AWAY NOTHING.

AGAIN—I THANK YOU FOR THE OPPORTUNITY TO SPEAK.



HAROLD VANGILDER, COUNCILMAN  
CITY OF SIERRA VISTA  
OCTOBER 6, 1999

# APPENDIX B

## **Second Meeting Agenda, Minutes & Attachments**

# ARIZONA STATE LEGISLATURE

## INTERIM MEETING NOTICE OPEN TO THE PUBLIC

### MUNICIPAL DOWNZONING STUDY COMMITTEE

**DATE:** Tuesday, November 9, 1999

**TIME:** 9 A.M.

**PLACE:** Senate Hearing Room 3

#### AGENDA

1. Call to Order
2. Presentation by Paul Cragan
3. Presentation on Equal Access to Justice
4. Discuss/Adopt Recommendations of Committee Members
5. Public Testimony
6. Adjourn

#### MEMBERS:

Representative Jean Hough McGrath, CoChair  
Representative Bill Brotherton  
Representative Robert Burns  
Mr. Ben Anderson  
Mr. Paul Cragan  
Ms. Pat Loven

Senator Edward Cirillo, CoChair  
Senator Gus Arzberger  
Senator Ken Bennett  
Mr. Buzz Slavin  
Mr. Jay Dushoff  
Ms. Lana Marcussen

People with disabilities may request reasonable accommodations such as interpreters, alternative formats, or assistance with physical accessibility. If you require accommodations, please contact the Chief Clerk's Office at (602) 542-3032, (TDD) 542-6241.

**ARIZONA STATE LEGISLATURE**  
**Forty-fourth Legislature – First Regular Session**

**MUNICIPAL DOWNZONING STUDY COMMITTEE**

Minutes of Meeting  
Tuesday, November 9, 1999  
Senate Hearing Room 3 – 9:00 a.m.

(Tape 1, Side A)

The meeting was called to order at 9:02 a.m. by Co-Chairman Cirillo. The attendance was noted by the secretary.

**Members Present**

Senator Edward Cirillo, Co-Chairman  
Senator Gus Arzberger  
Senator Robert Bennett  
Ben Anderson  
Paul Cragan  
Jay Dushoff

Representative Jean McGrath, Co-Chairman  
Representative Bill Brotherton  
Representative Robert Burns  
Ms. Pat Loven  
Buzz Slavin

**Members Absent**

Lana Marcussen

**Speakers**

The Honorable Robert Myers, Judge, Arizona court system  
Greg Gemson, Research Analyst, House of Representatives

Guest list (Attachment 1).

**Presentation by Paul Cragan**

Mr. Cragan indicated that, from his perspective and that of cities, the role of those agencies that determine and implement zoning is to keep government out of peoples' lives. This is accomplished by minimizing the conflicts between neighbors and adjoining properties. He referenced his letter of October 27, 1999 (Attachment 2), which further states his understanding of the cities' perspective on zoning issues.

From the letter, Mr. Cragan mentioned a potential lawsuit that Surprise must contend with; specifically, a 15-year old zoning plan is now being enforced by a landowner. Though the land in question is located next to a dump, the landowner wishes to develop it as residential. He explained that, if the land is developed, sooner or later there will begin to be complaints about the dump, and those complaints will be directed at the City Attorney, namely himself. Mr. Cragan cited two other examples: one, regarding Loop 303 and Sun City Grand, and another

regarding Luke Air Force Base and Surprise. He iterated that all related zoning complaints will ultimately come to his office

Mr. Cragen explained that there is a continuum of zoning philosophies. On one end is the belief that the public good should yield to public property rights, except in extraordinary cases, such as airport overlays. The other end of the continuum is the belief that private property rights should yield to the public good, except in extraordinary cases, such as when the government condemns property. He explained that zoning law, as it has developed over the past 75 years, has achieved a middle ground.

Mr. Cragen asserted that the three specific land use cases that the Committee previously discussed do not warrant a re-making of zoning law as it has evolved over 75 years. Furthermore, the three cases at issue do not indicate that the system is broken. He cautioned the Committee about the potentially disastrous, unintended consequences of re-engineering the zoning laws. Instead, he offered three individual solutions/amendments as he outlined in his letter (Attachment 2).

Co-Chairman Cirillo asked if there is any way the Committee could "tighten up" the regulations on annexation, specifically when a city annexes land that conforms to county zoning, and in turn makes a recommendation to the Legislature. Mr. Cragen noted that no forcible annexes have taken place in Surprise; however, he can envision a time when a one or more people will not want to be annexed, in which case a "majority rule" would be inappropriate. He stated his willingness to work with the Committee to develop guidelines for such zoning "problems," and commented that such pre-emptive work is a good idea.

Co-Chairman McGrath requested that Mr. Slavin present his perspective and recommendations on downzoning to the Committee. Co-Chairman Cirillo requested that he do so after the next and last presentation.

### Presentation on Equal Access to Justice

The Honorable Robert Myers, Judge, Arizona court system, noted that there exists hundreds of statutes relating to legal fees that the Legislature has enacted over the years. Many of these fees are in connection with contract cases. One statute, specifically A.R.S. § 12-348, permits courts, upon application, to award legal fees against an individual who is successful in pursuing or defending a case against the State under certain circumstances. Judge Myers commented that one of the recommendations the Committee will be considering would allow a property owner, who successfully defeats a government rezoning or land use change, to collect for legal fees as part of their compensation as is the case with other citizen-government litigation.

Judge Myers noted that Commissioner Toby Maureen Gerst has compiled a book for judicial officers, *Legal fees in Arizona: A Desk Reference of Selected Statutes, Rules of Court, Cases, Ethics Opinions*. He indicated that this book has been revised three times since its first publication in 1993 as a testament to the activity on this topic. He commented that the courts have been careful not to enlarge the definition of "court costs" as set forth by the Legislature. He noted that the Arizona Supreme Court has set down seven separate criteria to consider when a Superior Court judge is asked to award legal fees.

Co-Chairman Cirillo asked if copies of Commissioner Gerst's book might be made available to the Committee. He asked Judge Myers to share his opinion about pre-litigation dispute resolution.

Judge Myers indicated that he has "no problem" with alternate dispute resolution and he noted that Arizona courts have continually and repeatedly encouraged litigants to meet with mediators and arbitrators (Attachment 3). In fact, without alternate dispute resolution, Judge Myers implied, the court system would be "paralyzed." Additionally, Judge Myers described the self-service center, which is a resource available to non-represented litigants.

Representative Burns expressed his concerns over equal access to justice at the administrative level, in addition to the court level. He speculated that citizens might forego litigation against state government because they cannot afford it. He asked if there might be a way to "fine tune" the statutes regarding compensation for legal fees and thereby achieve a more level playing field.

Representative Burns asked Judge Myers to confirm or reject his suspicion that, more often than not, legal fees are not awarded. Judge Myers could not say one way or the other; however, he suggested that when legal fees are not awarded, it is because the criteria for such awards have not been met. Judge Myers briefly explained the English Rule, in which the losing party pays the legal fees of the prevailing party, with certain exceptions. This is not the case in the United States; however, the national and state Legislatures have implemented statutes that approach and approximate the English Rule. The book written by Commissioner Gerst outlines many such Arizona statutes. Certainly, the costs of litigation give potential litigants pause before following through with a lawsuit. However, there does exist a contingency fee, or "the poor man's key to the courthouse." The contingency fee allows a litigant to retain an attorney with no out-of-pocket expense, yet allows the attorney to retain a percentage of the award.

Representative Burns asserted that the government is still in a more favorable position than individual citizens in certain litigation, such as condemnation. Judge Myers concurred, and referenced a 1996 survey conducted by the Bureau of Justice Statistics of the 75 largest counties in the United States. In this survey, Maricopa County, the fifth largest county, had an average civil litigation award of \$28,000. Furthermore, the government was involved in ten percent of all civil litigation: two percent of the time as plaintiff, and eight percent of the time as defendant. Certainly, government has substantial resources when it comes to litigation. Representative Burns contended that, again, most cases do not make it to court because the playing field is not level, and private citizens do not believe they can successfully/financially bring government to court. As a result, there is a forfeiture of their rights for lack of financing.

Mr. Dushoff noted that Superior Court judges have discretion to award legal fees to the winning parties in contract cases and that, under A.R.S. § 12-341.301, there is no limit to the dollar amount on such fees. Judge Myers agreed, as long as the standards enumerated by the Supreme Court are followed; furthermore, the award cannot exceed actual costs. Mr. Dushoff stated his understanding that there is no limitation on the per-hour fee an attorney can be paid under such awards. Judge Myers indicated that to be true, as long as the fee is ethical and within the guidelines for lawyers.

Mr. Dushoff stated his understanding that A.R.S. § 12-348 is "roughly the same as" A. R. S. § 12-341.301 and yet in the former, there is a limitation of the total award of fees of

\$10,000 in non-property tax cases and \$20,000 in property tax cases, according to subsections E(4) and E(5). Judge Myers indicated that to be so in section 27, dollars per hour. Mr. Dushoff commented on the fine job Commissioner Gerst did on her book regarding legal fees and he observed that, in Arizona, there are many different statutes that speak to legal fees that can be awarded and there are many differences, slight and substantial, between them. Judge Myers concurred that such a multitude of statutes is "mind-boggling." Mr. Dushoff asked Judge Myers if, in his view, it would be beneficial to the courts and to the public if the myriad of statutes pertaining to legal fees were revisited and simplified by the Legislature and some universal provisions reached. Judge Myers thanked Mr. Dushoff for the rhetorical line of questioning and indicated that if he could accomplish the task, then "bless you."

Representative Brotherton asked Judge Myers to confirm his understanding that zoning litigation is not always initiated by landowners with modest pieces of property, but rather by developers with large parcels of land and sufficient financial backing to be on "equal footing" with the government. Judge Myers conceded that there are some multi-national corporations that far exceed the assets of the State. Representative Brotherton noted that one of the recommendations that the Committee would be considering takes the discretion away from the judge and makes the award of legal fees to the private party automatic.

Representative Brotherton asked Judge Myers if he felt that the judicial officer, assuming s/he is impartial and understands the facts of the case, would be in a better position to decide whether or not legal fees should be awarded. Judge Myers indicated that judicial officers must work within the confines of legislative mandates and it is up to the Legislature if it wishes to grant judges discretion in awarding legal fees. He stated that such can be accomplished by changing "(a judge) shall" to "(a judge) may," which allows for judicial discretion. Judge Myers added that cases do become driven by legal fees.

Representative Brotherton asked Judge Myers, as an experienced attorney and judicial officer, if he believed justice is better served with or without judicial discretion. Judge Myers opined that it is better for the courts, and not the Legislature, to make legal determinations. Representative Brotherton commented that when a citizen brings suit against a governmental agency, such as the City of Phoenix, and they win, they will likely seek to collect for their legal fees. However, if they lose, the understanding seems to be that they can "walk away" and not be expected to reimburse the agency for its legal fees. He suggested that reciprocity be adopted so that people will think twice before bringing suit against a governmental agency. Judge Myers indicated that "a good lawyer" will prognosticate what the outcome of a lawsuit might be and disclose this degree of risk to the potential litigant.

Senator Arzberger asked if the statistics quoted earlier gave any indication what percentage of the cases Maricopa County lost, whether it was the plaintiff or defendant. Judge Myers indicated that such a breakdown was not provided in the analysis. Senator Arzberger speculated that the government likely prevailed in a majority of the cases, which might be the reason why the statistics are not broken down further. Judge Myers suggested that if a person had the inclination and resources, such information could be painstakingly researched.

Mr. Cragan noted that, from his experience as an attorney in Alaska for eleven years, the Alaskan courts adopted the English Rule with a few exceptions. Specifically, in domestic relations cases such as divorce and child custody, court costs of the losing party were not

collected. He further noted that this rule, #82 of the Rules of Civil Procedure, generated a large number of appeals and, as such, is the single-most litigated provision in the whole of Alaska law. Additionally, cases frequently are reduced to a legal battle over legal fees and not over who is "right" or "wrong." In fact, in Alaska, it was almost considered malpractice if a losing attorney did not file an appeal, given Rule 82. Mr. Cragan asked Judge Myers if such has become the case in Arizona. Judge Myers stated that he would like to believe that most Arizona lawyers do not litigate simply over fees and he opined that such is not a productive pursuit. However, Judge Myers speculated, certainly there are appeals that are based solely on legal fees, which is probably no more or less than occurs nationwide. Mr. Cragan opined that such appeals over fees prolonged the litigation process.

Co-Chairman McGrath noted that the Committee is studying three cases that speak to "the problems of heavy government." She noted that Mr. Slavin effectively defended the attempted annexation of the Hickman egg ranch by the City of Glendale; however, the ranch was unable to sue Glendale for its legal fees. She asked Judge Myers what legislative fix must be made that would have allowed the ranch to sue for such fees. Judge Myers speculated that the case failed to meet the standard set down by the Arizona Supreme Court for the award of legal fees. He explained to Co-Chairman McGrath that an attorney may appeal for legal fees only and not have to re-try the entire case.

Mr. Dushoff corrected Co-Chairman McGrath's perception that Mr. Slavin litigated an easy case and that, in fact, Hickman v. City of Glendale was a "very difficult case" and a "marvelous victory." He clarified for her that Mr. Slavin's client, by statute, was not permitted to sue for legal fees, in this case. He noted that he has prepared a specific recommendation for the Committee's consideration that speaks to this point.

Mr. Anderson also noted that, in this case, had Judge Myers been the presiding judicial officer, he would have had no discretion or jurisdiction to award legal fees if he had wanted to

(Tape 1, Side B)

Mr. Anderson explained that Mr. Slavin was not defending a case brought by the government, but rather a case brought against the government; therefore, the potential for seeking legal fees did not exist.

### Discussion of Committee Members

Mr. Slavin overviewed his memorandum (Attachment 4) for the Committee.

Senator Cirillo asked if he felt the Legislature should "tighten up" the annexation rules so that negotiations might occur before an annexation could be finalized. Mr. Slavin indicated that the "right interface" does not appear to exist between, in this case, Maricopa County and the City of Glendale. He suggested that there is an opportunity to fine tune the annexation rules legislatively. However, Mr. Slavin added that, the annexation statute is clear and appropriate, if it is properly applied and administered.

Mr. Dushoff asked Mr. Slavin to comment on the time constraints of challenging an annexation. Mr. Slavin noted that the statute provides a period of 30 days to challenge an annexation, which

can be an unrealistic deadline under certain circumstances. Mr. Slavin suggested that the period of time to file be extended to 60 or 90 days. Additionally, the process could be broken up so that one must simply file their intent to challenge the annexation within the 30-day time period.

Mr. Dushoff referred to a famous case of non-conforming use in Arizona history, namely the Graham fruit stand. In this case, though the fruit stand had been annexed by the City of Phoenix, it was allowed to retain its county land use for an additional 40 years. Mr. Dushoff stated his understanding that, in this case, the fruit stand was able to maintain its county land use indefinitely. Mr. Slavin concurred. Mr. Dushoff noted, however, that the nonconforming use provision does not allow for business/economic growth and such a provision would not have served the Hickman egg ranch. Mr. Slavin again concurred. Mr. Slavin explained that with the option of nonconforming use, the ranch would forfeit its valuable industrial and commercial zoning and become limited in its use and would experience a diminution of its land value. This devaluation would be apparent through the eyes of a bank or other lending institution.

Co-Chairman McGrath asked Mr. Slavin if he is suggesting that when a property is annexed into a city that the zoning not be altered to a lower/limited use permit, and that the city must either conform to the existing county zoning or acquire permission from the existing landowner. Mr. Slavin suggested that, in terms of equity, equivalent zoning ought to be implemented.

Representative Burns commented that landowners are typically not aware of annexation plans until it is almost too late to challenge them. He asked if there might be room for improvement, with regard to notification. Mr. Slavin commented that notice of annexation and understanding the implications of annexation are two different things. He suggested that the use of impact fees might be a viable solution for agricultural-intensive establishments, such as egg ranches, dairies, etc. In this case, the impact fee would fund the eventual relocation of such establishments once the area becomes annexed by a city, and thereby avoid contention and litigation.

Mr. Cragan commented that he does not wish to adopt a downzoning cure that proves to be worse than the original problem. Mr. Slavin explained that if, for example, there was a re-zoning on the height restriction for a piece of land, commercial or residential, there will be change in the "intensity of activity" on that site. This will impact the valuation of the land.

Mr. Cragan related that his district could not afford to purchase a ladder fire truck and therefore could not attend to fires above two stories. The city changed the text of the zoning ordinance, limiting buildings to 35 feet in height. He stated that, according to Mr. Slavin's reasoning, the city is now liable to civil litigation because it has limited the valuation of every piece of property. Mr. Cragan characterized this as a cure that is worse than the problem. Mr. Slavin indicated that this is a classic example of how under-funded governments shift the economic burden to landowners by, in this case, limiting the valuation of their land. He suggested that the city could have instead weighed the cost of the ladder fire truck, \$500,000, against the potential for lawsuit, perhaps \$2.5 million, and opted to purchase the truck.

Mr. Cragan stated that in his city, the City of Surprise, including notification with utility bills and advertising in the local newspaper qualifies as "proper notice" to inform landowners that changes will be made to a zoning district. He noted that Mr. Slavin suggests that the city be able to prove that every property owner of an affected district receive proper notice. Mr. Cragan asked how the city would feasibly and financially accomplish such a task. Mr. Slavin suggested that if a

zoning change affects a small, identifiable population, than certified mail is warranted. Mr. Cragan agreed, and he revisited the issue of receiving notice versus understanding the implications of the notice. Mr. Slavin suggested that an explanation in layman's terms go out with the notices to help landowners understand the implications. If landowners still don't read or understand the notice, Mr. Slavin explained, the worst that has happened is that the city is "guilty of engaging in due process."

Representative Brotherton stated his understanding of Mr. Slavin's viewpoint: property owners should be compensated for any infringement or lessening of their land's valuation, even if this goes against "75 years of case law." Mr. Slavin explained that if a community, through its governing bodies, chooses to lower someone's property value for the benefit of the entire taxpaying community, then that community should compensate a landowner for the diminution. He further explained that such an administrative approach would be a viable alternative to illegal exactions.

Representative Brotherton stated his understanding that there is a degree of risk involved in buying undeveloped land, and he asked Mr. Slavin if he advocates that each landowner is entitled to the highest and best use of the land. Mr. Slavin conceded that there are market forces that make land investment risky; however, when zoning changes are made from commercial to residential, such changes should be compensable. Representative Brotherton asserted that the actions of governments should be counted among the "market forces" that investors must take into account when investing. Mr. Slavin stated that citizens don't understand downzoning, or that it occurs, until it happens to them, which makes it an unforeseeable risk. Representative Brotherton noted that people invest in the stock market, though they do not understand the myriad risks involved. Mr. Slavin iterated his stand that when a community, through its governing bodies, chooses to lower someone's property value for the benefit of the entire taxpaying community, then that community should compensate the landowner for the diminution.

Representative Brotherton asked Mr. Slavin how his proposal for impact fees, for the eventual relocation of agricultural-intensive establishments, would effect one's property rights. Mr. Slavin explained that impact fees would serve landowners in at least two ways. Impact fees imposed on the land around, for example, a chicken farm, would not only subsidize the relocation of the chicken farm when it becomes necessary, but it will also preserve the marketability of the surrounding land. Furthermore, this approach would avoid the contentious nature nuisance lawsuits. Representative Brotherton argued that such a formula benefits the one agricultural establishment and shifts the financial burden on the surrounding landowners.

(Tape 2, Side A)

Mr. Slavin argued that there appears to be a propensity, in the name of the public good, to change the zoning of land. He explained that, in the traditional notion of fairness and justice, if a change in zoning and, typically, valuation can be traced to the "public benefit" then such would "scream to overturn 75 years" of case law.

Senator Bennett noted that zoning changes must conform to general plans for a city. He commented that the concept of general plans has evolved from an "intent" to a "commitment," with respect to certain zoning situations, and he asked Mr. Slavin how that trend might be

reversed. Mr. Slavin acknowledged that, originally, general plans were meant to serve as guidelines, which did not carry any force of law until the Omnibus General Plan Act was adopted. He opined that "generally, the system works pretty well."

Senator Bennett expressed his frustration as a private businessman and a former city council member over the list of "allowable uses" for commercial land. He recounted a personal anecdote, in which his family's full-service car wash had to be re-located down the street from its original location, yet the zoning of the new location did not allow for such use. He explained that he became more aware of the zoning codes and "allowable uses" from this experience and he came to understand how inadequate they can be and he wondered if the system could be improved upon. Mr. Slavin noted that "performance zones" are not tied to specific uses but rather the intensity of use. Mr. Slavin suggested that any attempt to revise the zoning and use codes would prove to be very difficult.

### Recommendations of Committee Members

Co-Chairman Cirillo noted that, at the previous meeting, Members were asked to submit their recommendations, and that staff has prepared them for discussion.

Greg Gemson, Research Analyst, House of Representatives, briefly introduced the submissions of the Members (Attachment 2), the summary of these submissions (Attachment 5), A. R. S. § 11-829 (Attachment 6), and the Member recommendations in the form of draft motions (Attachment 7).

Co-Chairman Cirillo commented on the difficulty of writing a statute that covers all possible situations. He indicated that the Committee and Legislature should seek to provide a system that clarifies the meaning of the general plan, encourages greater public involvement, and provides greater advance notification, thereby avoiding court entanglements. Additionally, it would be beneficial to provide a simple appeals process to further avoid court entanglements.

Co-Chairman McGrath clarified that government has no rights and is not vested with rights; rights are vested in individuals and their property, of which government is a steward. Co-Chairman Cirillo concurred, yet argued that individuals have banded together for collective benefits and, as such, imparted obligations ("rights") to government, which ought not to overwhelm the personal property rights of individuals. Co-Chairman Cirillo advocated a middle-ground approach.

Mr. Dushoff noted that he represents only private property owners and that, currently, there does not exist a level playing field. He stated that when there is a tax to be paid, government can always locate and notify landowners, yet when there is zoning change or an annexation, government agencies will complain that the task is too monumental or costly. Furthermore, he stressed the sanity in allowing a landowner more than 30 days to file a lawsuit against an annexation.

With regard to "75 years of case law," Mr. Dushoff noted that not too long ago sovereign immunity was the law of the land and now that such is not the case, he asserted, few people would choose to go back. With regard to Co-Chairman Cirillo's suggestion of staying in the middle ground, Mr. Dushoff suggested that if the playing field is already skewed or otherwise

uneven, staying in the middle will only serve to maintain the existing inequities and not be a viable solution. Additionally, Mr. Dushoff asserted that the statutes, which provide for the collection of legal fees by the prevailing party, serve to resolve litigation and not propagate it. Mr. Dushoff suggested that these statutes, specifically A. R. S. § 12-348, could benefit from revision to address its limitations.

Mr. Anderson thanked the Members, especially the attorneys, for their insights, as the meeting had been very informative for him. He asserted that litigation does seem to be driven by legal fees and not by individual property rights or what is just and right under the constitution. He supported Mr. Dushoff and Mr. Slavin's suggestion to extend the filing time for challenging an annexation beyond 30 days. Additionally, there is no reason, he contends, that a landowner cannot be given proper notice of any zoning or district changes. Furthermore, notice should spell out the implications of any change and it should be written in the language that the layman can understand. Mr. Anderson acknowledged the role of market forces in land valuation; however, he viewed contestable zoning and ordinance regulation as an imposition on the rights of individuals and landowners.

Co-Chairman Cirillo iterated his belief that a middle ground must be reached, at least among the extremes represented on the Committee, that can be supported by a majority of votes by the Legislature.

#### Motions Regarding "Restrictions on Zoning/Land Use Changes"

The Committee discussed the motions regarding restrictions on zoning and land use changes (Attachment 7).

Mr. Dushoff suggested that the third motion is an indirect and inaccurate reference to the Growing Smarter (GS) recommendation that dealt with open spaces, and yet the GS recommendation provides that the alternate use be economically viable.

Senator Arzberger expressed support for the second motion with exception, and suggested that a percentage value be included in the language. He suggested that this motion would simply validate what has been done over the years and what has been upheld by the United States Supreme Court.

Mr. Gemson confirmed that the third motion was taken from Mr. Cragan's suggestion, using GS language. He pointed out that the three motions are not exclusive of each other and do not have to be adopted or rejected as one unit. To that point, Senator Arzberger explained that the Committee could adopt the second motion by itself; however, to adopt the first motion, the second must also be adopted.

Representative Burns suggested that the Committee's recommendation include the words "recommend to the Legislature," as it is the function of the Study Committee to make recommendations to the Legislature.

**Representative Burns moved that the Committee recommend to the Legislature items one, two, and three, as listed, allowing for re-wording in the event of any disagreement.**

Senator Bennett expressed concerns over the deficiencies in item three.

**Representative McGrath made a substitute motion that the Committee recommend to the Legislature items one and two, as listed, allowing for re-wording in the event of any disagreement.**

Mr. Anderson noted that Senator Arzberger's suggestion about valuation and compensation might be open to interpretation, or rather misinterpretation. Co-Chairman Cirillo noted that the Committee can go about adopting the motions in two ways: either 1) refine them before and when they are adopted, or 2) pass them along to the Legislature to refine and/or adopt them. He suggested that the latter be observed.

Mr. Slavin noted that items one and two are alternate options. Co-Chairman McGrath suggested adding the word "or" between them.

**Representative McGrath made a substitute motion that the Committee recommend to the Legislature items one and two, as listed, separated by "or", and allowing for re-wording in the event of any disagreement. The motion was seconded by Ms. Loven. The motion carried.**

#### Motions Regarding "Equal Access to Justice"

The Committee discussed the motions regarding equal access to justice (Attachment 7).

**Mr. Dushoff moved that the Committee recommend item one to the Legislature.**

**Representative Burns moved the following amendment to Mr. Dushoff's motion: the Committee recommend to the Legislature that it investigate revising and consolidating the myriad statutes relating to attorney's fees into a uniform code.**

Senator Arzberger suggested that combining the two motions into one might hold one up at the expense of the other.

**Representative Burns withdrew his amendment.**

Representative Brotherton iterated his belief that reciprocity should exist between the government, individuals, and liability for legal fees. Specifically, if an individual brings suit against the government, whether they are an individual or a well-funded corporation, and loses, they ought to be subject to the legal fees incurred by the government.

Mr. Dushoff rejected Representative Brotherton's stance. He asserted that a property owner will suffer their own legal fees if they do not prevail against the government. Furthermore, he asserted, such is one of the burdens that the government must bear if a citizen chooses to challenge its actions. Representative Brotherton noted that the government's money is taken directly from the people, the citizenry. Mr. Slavin contested that if the government, the steward

of the public trust, chose to devalue one's property for the common good, then the government must bear any associated costs, including legal fees.

**Co-Chairman Cirillo called for the question on Mr. Dushoff's motion. The motion carried.**

**Representative Burns moved that the Committee recommend to the Legislature that it review and simplify the myriad statutes relating to attorney's fees. The motion carried.**

### **Motions Regarding "Notification"**

The Committee discussed the motions regarding notification (Attachment 7).

**Co-Chairman McGrath moved that the Committee recommend item one to the Legislature. Ms. Loven seconded the motion.**

Mr. Cragan noted that the language "by certified mail" leaves him concerned about the potential cost, especially when the change effects a very large community, if not an entire city. Senator Bennett agreed. He stated that he considered making a motion to delete the language "each meeting or event pertaining to that" and replacing it with "the proposed."

Mr. Dushoff commented that publishing notice in a newspaper "is a joke" and, in this day and age, not a proper form of notice. He suggested striking out "by certified mail" and inserting "by a fair and appropriate method." Such language would allow for more flexibility and interpretation, depending on whether proper notice must be made to 20 people or 2,000 people, and such interpretation would ultimately be decided if notice were contested and litigated. Otherwise, the Legislature might choose to spell out what a "fair and appropriate method" would be.

Representative Brotherton added that notification should include information regarding the re-designation of the land. Co-Chairman Cirillo indicated that, in his reading of the motion, such would be done. Representative Brotherton suggested that the problem is that the motion is subject to different interpretations. Ms. Loven suggested that the language would force government entities to think through the potential impact of their plans.

Senator Bennett indicated that "specific information regarding the impact" might place an undue burden on the city or municipality to provide anticipated or proposed specific impacts for each person individually. Mr. Cragan stated that such a task would be impossible. Co-Chairman Cirillo suggested that the word "specific" be deleted. Additionally, Mr. Dushoff suggested deleting the words "regarding the impact of that" and inserting the word "explaining" after "information."

**Co-Chairman Cirillo moved the above-discussed changes be implemented to Co-Chairman McGrath's motion; specifically:**

**After "owners," delete "by certified mail" insert "by a fair and appropriate method"**

After "of" delete "each meeting or event pertaining to that" insert "the proposed"

After "include" delete "specific"

After "information" delete "regarding the impact of that" insert "explaining".

Mr. Slavin clarified that if the government would be making changes to a targeted property then notice should be specific and made by certified mail or process server. He indicated that such notice could be considered fair and appropriate. Otherwise, for a greater target area, a more general method may be used.

Mr. Cragan noted that, currently, the government is required to notice landowners in the event of rezoning.

(Tape 2, Side B)

Mr. Slavin indicated that such a burden would also apply to changes in the general plan for the city.

**Co-Chairman Cirillo called for the question on his motion to amend Co-Chairman McGrath's motion. The motion carried.**

**Co-Chairman Cirillo moved that Co-Chairman McGrath's motion, as amended, be adopted. The motion carried.**

#### **Motions Regarding "New Zoning/Annexation Requirements"**

The Committee discussed the motions regarding new zoning and annexation requirements (Attachment 7).

Mr. Gemson reminded the Committee that the two items are not exclusive of each other and may be adopted singly or together.

Co-Chairman McGrath expressed support for item two to ensure that zoning is not reduced. She also suggested that this might be a good place to include Mr. Slavin's suggestion that the filing deadline to challenge an annexation ordinance be extended from 30 to 90 days.

Mr. Slavin shared Co-Chairman McGrath's sentiments, with regard to item two. Co-Chairman Cirillo asked if Mr. Slavin would like to recommend deleting "reduce the value" and insert "lower the zoning."

**Mr. Slavin moved that item two be amended as follows:**

**After "reduce" delete "the value"**

**After "use" delete "and value"**

**and he moved that the Committee recommend to the Legislature that the deadline to appeal an annexation ordinance be extended from 30 days to 90 days.**

Mr. Cragan noted that extending the deadline may have an unintended consequence. He explained that when land is purchased, for example, from a farmer by a developer, the annexation cannot be zoned until after the 30 days. Annexation confers status and obligation on the property and the city and by extending the deadline, the farmer and developer will have to wait up to two additional months before their deal can be consummated. Mr. Cragan noted that he has no preference whether the motion to extend is adopted or not.

Mr. Slavin agreed that it is a jurisdictional process. Mr. Dushoff suggested that the rezoning be conditional on the annexation ordinance. Mr. Slavin indicated that the purchaser must realize the risk involved, namely that the rezoning might be overturned when the land is annexed. Mr. Cragan noted that this will upset the parties involved, who will now have to wait up to 90 days. Mr. Slavin suggested that an alternate process can take place concurrently that would confer jurisdiction. Mr. Cragan reminded Mr. Slavin that any approval that is granted would become voided if the annexation is challenged.

Representative Brotherton suggested that stakeholders, such as homebuilders, ought to be present or represented at this discussion. Mr. Cragan explained that Mr. Slavin and Mr. Dushoff represent such stakeholders.

Senator Bennett stated his understanding of the point at issue: if the deadline to challenge an annexation can be extended to 90 days then can a landowner, who is anxious to permit an annexation, be allowed to waive his/her appeal rights and move the process forward.

Mr. Cragan noted that a landowner may wish to speed up the annexation process, however, the landowners around him/her will also have an opportunity to challenge the annexation.

**Mr. Cragan made a substitute motion that the three items be moved and voted on separately. The motion carried.**

**Co-Chairman Cirillo moved that the Committee recommend item one to the Legislature. The motion carried.**

**Co-Chairman Cirillo called for the question on Mr. Slavin's motion that item two be amended. The motion carried.**

**Co-Chairman Cirillo moved that the Committee recommend item two, as amended, to the Legislature. The motion carried.**

**Co-Chairman Cirillo moved that the Committee recommend to the Legislature that the deadline to appeal an annexation ordinance be extended from 30 days to 90 days. The motion carried.**

### Motions Regarding a Hearing Process

The Committee discussed the motions regarding a hearing process (Attachment 7).

**Mr. Dushoff moved that the Committee recommend to the Legislature item one. Mr. Cragan seconded the motion.**

Mr. Slavin asked if this motion is intended to apply to changes in land use or zoning that is initiated by the city. He asked if this process would be activated if an individual made an application for a zoning change or a land use change that was denied, or worse, their property becomes downgraded.

Mr. Cragan noted that the item does appear to cover every land use decision. Co-Chairman Cirillo asked Mr. Cragan if he would support adding "initiated by the government." He indicated that he would like to limit the item to downzoning. Co-Chairman Cirillo suggested adding the language "that results in downzoning."

**Mr. Dushoff made a substitute motion that the Committee recommend to the Legislature item one, concluding with the language "that results in a downzoning." The motion carried.**

Without objection, the meeting adjourned at 12:26 p.m.



Seth Goodman, Committee Secretary

(Original minutes, attachments, and tapes are on file in the Chief Clerk's Office.)

sg  
11/19/99



ARIZONA  
HOUSE OF REPRESENTATIVES

MEMO

**TO:** Greg Gemson  
**FROM:** Representative Brotherton  
**DATE:** October 28, 1999  
**SUBJECT:** Municipal Downzoning Study Committee

Thank you for your correspondence dated October 7, 1999. I recommend that there be no statutory or session law changes regarding municipal downzoning. I do not believe that there is a need for any changes as there are laws and procedures currently in place to adequately and equitably protect the rights of the property owners of Arizona.

ATTACHMENT 1/2



CITY ATTORNEY'S OFFICE  
12425 WEST BELL ROAD  
SUITE D-100  
SURPRISE, AZ 85  
OFFICE 583-1000 FAX 583-1000

October 27, 1999

Members, Municipal Downzoning Committee  
Arizona State Legislature  
Phoenix, Arizona

Dear Committee Members:

I was appointed to the Municipal Downzoning Committee so that I could present the cities' views on the issues brought before the Committee. The purpose of this paper is to present those views to the members of the Committee.

#### The Nature of Regulatory Takings

Governments routinely regulate the activities which may be carried out on privately owned land, frequently reducing the land's value. Thus, governments enact building codes which make the construction of improvements more expensive than they would otherwise be. They also (1) regulate the use of water, sometimes prohibiting the subdivision of land, so that home buyers are protected and groundwater is not exhausted; (2) impose expensive regulations on the storage and disposal of hazardous waste, so that groundwater is not polluted; (3) prevent the storage of explosives in residential neighborhoods, so that people are not injured by explosions; (4) regulate excavations, so that neighboring properties do not subside, (5) prohibit construction activity in residential neighborhoods during the early morning hours, so that noise does not unreasonably disturb residents; and the list could go on and on. Governments also regulate the use of land through zoning regulations. Any of these regulations may reduce the value of someone's property. These are regulatory takings.

The question is not whether these government actions take property rights away from private citizens. Clearly, they do. Rather the question is, when is the government required to pay the individual for the property rights which it has taken away?

#### The Historic Legal Basis of Zoning

Compensation is due when the government directly takes possession of private property. The classic example is the condemnation of land for a public purpose. However, compensation is not due for all such direct takings.

Through taxation, the government takes possession of money which individuals have lawfully earned, and yet no compensation must be paid to the individuals. In this situation, the law balances the public need to fund the activities of government, e.g., national defense, sewer service, etc., against the right of individuals to retain the fruits of their labors. So long as the tax is reasonable in amount and related to a legitimate public purpose, it will be sustained. However, a tax which is so large as to be confiscatory, will be stricken. Real property taxes are regularly levied and collected on this basis.

Regulatory takings are analyzed in a similar way. In this area the courts balance the public health, safety and welfare against individual liberty. A government regulation can interfere with an individual's use of his property so long as 1) the regulation is reasonably related to a legitimate public purpose, e.g. protecting the public health, safety, and welfare; 2) the regulation is reasonable in scope; and 3) the regulation does not deny the property owner all viable economic use of his property. Under these criteria, it is generally accepted that building codes and hazardous waste regulations are reasonable intrusions into individual property rights for the purpose of protecting the public health, safety and welfare. Therefore, the government is not required to pay compensation to property owners affected by such regulations. Zoning regulations are routinely upheld using the same analysis. Thus, when people accept the validity of building codes or hazardous waste regulations, but dispute the validity of zoning regulations, the argument is a question of degree only.

When do zoning regulations go too far, and thus constitute a taking for which compensation is due? The constitutionality of zoning property without compensating the land owner for changes in property value was first sustained by the United States Supreme Court in 1926 in a case called Village of Euclid, Ohio v. Ambler Realty Co. The analysis used by the Supreme Court is the same as set forth above.

First, zoning ordinances are enacted because, particularly in densely crowded urban areas, the actions of one property owner necessarily affect adjoining property owners, sometimes positively and sometimes negatively. Zoning regulations attempt to minimize conflicts between incompatible land uses, thereby enhancing property values and furthering the peaceful and orderly development of the community as a whole. This furthers the public health, safety, and welfare and is thus reasonably related to a legitimate public purpose. In the 75 year old words of the Supreme Court:

Building zone laws are of modern origin. They began in this country about 25 years ago. Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom,

necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day . . .

Since zoning regulations must be enacted in furtherance of the public health, safety, and welfare, they cannot be based solely on the interests of a particular individual. The practice of adopting a general plan for development of a community flows from this requirement. The general plan looks at the welfare of the community as a whole, and the zoning regulations must implement this general plan for the common good.

However, individual property rights cannot just be ignored for the common good. Under the traditional analysis, the ordinance must be reasonable in scope and must afford the property owner a reasonable economic return on the property under the existing conditions. However, a property owner is not entitled to the highest and most profitable use of his property, so long as he has the viable economic benefit of his investment.

A zoning regulation which meets these standards is a lawful regulation and not a taking for which compensation is due. However, a zoning regulation which violates these standards because 1) it is not reasonably related to protecting the public health, safety, and welfare; or 2) it is unreasonably restrictive; or 3) it has the effect of denying the property owner a viable economic use of the property, will constitute a regulatory taking for which compensation is due.

Since 1926, these principles have been accepted in Arizona and all over America. They are reflected in numerous decisions of the Arizona and federal courts and are imbedded in Title 9, Chapter 4, Articles 6 and 6.1 of the Arizona Revised Statutes. These statutes were derived from Arizona laws first enacted in 1925. In short, these principles have been the settled law in Arizona, and throughout America, for almost 75 years. They are the basis upon which cities all over the country have been built. To the extent that cities are "financial partners" with landowners, this body of law is the basis from which that "partnership" is derived.

### The Benefits of Zoning

The benefits of zoning are sometimes hard to comprehend, because we take them so much for granted. People living in urban areas are accustomed to residing in quiet residential neighborhoods. They live on streets without heavy traffic, and need not be concerned that their neighbor might erect a noisy, smelly industrial plant next door. They do local shopping at small commercial complexes located conveniently in the general vicinity of their homes. These shopping areas are easily reached, because they are located at the intersection of major streets.

People make major shopping excursions to large shopping centers located adjacent to regional transportation arteries, or in relatively compact business districts. Industrial facilities and other employment centers are located away from residential areas so that noise, odors, traffic congestion and other impacts of these businesses do not intrude into quiet residential neighborhoods. They are also usually located close to major transportation arteries, so that raw materials, finished products, and employees can easily move to and from the work site.

Because of these circumstances, most people live for many years without engaging in any significant conflict with a neighbor over incompatible land uses, and all of these conditions come about through the reasonable application of zoning regulations in an urban setting. While there are many responsible property owners who would assist in creating these conditions voluntarily, it is also true that zoning regulations prevent selfish and unscrupulous property owners from causing significant harm to the public at large. I will give an example of such behavior in the next section.

#### Reasons Not to Make Major Changes in 75 Years of Settled Zoning Law

1. Thousands of zoning decisions are made every year in Arizona, and the vast majority of those decisions do not produce litigation, and do not generate complaints to the Legislature. The three problem situations presented to the Committee, while obviously serious, are isolated instances which can be handled in other ways, as discussed below. They do not indicate that the overall system is broken.

2. Private property rights are very thoroughly protected under state and federal law. As discussed above, cities must pay compensation under the state and federal constitutions, if a zoning regulation goes too far. If a property owner succeeds in a federal civil rights lawsuit, the city must pay the property owner's costs and attorney fees. This is a major incentive for cities to be careful in their land use decisions.

Under state law, property owners can obtain a vested right to develop property in at least three ways: 1) by spending a significant amount of money in reliance on the existing zoning, e.g. by commencing construction; or 2) by applying for and receiving a protected development right from a city pursuant to A.R.S. § 9-1201, et seq.; or 3) by negotiating a development agreement pursuant to A.R.S. § 9-500.05. If the property owner obtains a vested right through one of these mechanisms, the city cannot subsequently defeat the vested right through a zoning change. It is reasonable to expect property owners to at least attempt to avail themselves of statutory protections which already exist before seeking additional legislation.

3. Many, many thousands of property owners, and indeed entire cities, have made huge financial investments in reliance on the current zoning system. Every family which buys a house makes that investment in reliance on the assumption that the residential character of the

neighborhood will not radically change. Residential developers buy land in reliance on the residential zoning of surrounding properties, which enhances the developer's investment. Industrial developers buy land in reliance on zoning ordinances which protect their investment by buffering the industrial use from complaints by homeowners in the area. Some cities such as Paradise Valley enhance property values by maintaining large lot sizes, while emerging communities like Surprise attract residents through the lower housing prices available with increased density. Cities invest in very expensive infrastructure, such as sewer plants, based on an expectation that the future will bring a population density which will support the investment. The legitimate expectations of all these people should not be defeated by major changes in a system of zoning which has worked for 75 years.

4. Landowners can be just as abusive as government officials. In Surprise, a developer owns land immediately adjacent to the eastern boundary of the Northwest Regional Landfill. This developer wants to build residential housing on 5,000 square foot lots on this land. Under his proposal, urban backyards would be immediately across the street from an industrial waste disposal facility. This developer has threatened the City of Surprise with litigation if we do not grant him the necessary residential zoning.

Experience teaches that families buy homes in such circumstances and then look to the government to solve the ensuing problems. People buy houses next to freeways and then complain about traffic noise. They buy houses next to an Air Force base and then complain about noise from jets flying overhead. If this development proceeds, people will buy houses next to a landfill and then demand that the City of Surprise eliminate the noise, odor, dust and traffic associated with the waste disposal facility. Thus, this residential developer's plan to maximize the profit from his land, may significantly impair the landfill owner's ability to generate maximum profit from his land, and the City will be expected to take tax dollars from its citizens to solve the problem. This is the very kind of land use conflict that the existing zoning laws are designed to avoid.

5. Conditions change over time, and cities must have the flexibility to adapt to those changes. The property owner next to the landfill is attempting to implement planning decisions which were made in the early 1980s, at a time when Surprise was a small agricultural community with virtually no housing opportunities. In the ensuing 15 years, the following changes have occurred:

- (a) Most of the property owners in the area went bankrupt and lost their land. Some people went to prison;
- (b) The federal government acquired much of the land through the Resolution Trust Corporation;
- (c) The Community Facilities District which was formed to fund infrastructure in the area was dissolved;
- (d) The RTC sold the land to large developers which were not involved in the earlier planning efforts, such as the Del Webb Corporation;

- (e) The need for housing in the community radically changed, because 55,000 residential building lots are now in the development stream in Surprise;
- (f) The 15 year old plans for water and sewer service, on which this developer is relying, are now obsolete because the pattern of growth in Surprise is very different from the pattern envisioned 15 years ago.

Yet despite these changes, Surprise is being threatened with litigation if it refuses to implement an obsolete 15 year old plan. If the Legislature changes the law so that planning and zoning decisions, once made, cannot be changed without the consent of landowners like this one, then cities will of necessity become very cautious about granting new zoning changes. This change in posture could significantly affect the value of property currently being held for future development.

6. The value of property, and the types of government action which do or do not constitute a "downzoning", are fluid concepts which can ultimately be resolved only through costly litigation. Further, the value of property, and the highest use of that property, can be greatly affected by factors such as location and market conditions. Ordinarily, commercial property is considered to be more valuable than residential property, and a change from commercial to residential zoning would constitute a "downzoning". However a few years ago in Surprise, the Del Webb Corporation owned property which was zoned commercially. The property was immediately adjacent to the main entrance of the Sun City Grand retirement community. In that circumstance, the highest use of the property was residential development and the site was rezoned accordingly. Because of the property's location, a rezone back to commercial use would constitute a "downzoning". If cities are subjected to this kind of uncertainty, they may be afraid to act on a proposed rezoning, despite its value to the property owner. It is not always clear what actions constitute a "downzoning".

7. Some proposed solutions just create other problems. It has been suggested that any time a government decreases the value of property through zoning it should condemn and pay for the property. The major source of revenue for any government is taxation. This solution would require that, if a city regulates the use of one person's property, that city must take property from other citizens (tax dollars) to compensate the first property owner for the rezoning. All discussions about zoning ultimately reach the same question. What is the proper balance between an individual's private property rights and the interests of the public at large? As discussed above, that question has been answered consistently and uniformly for the last 75 years. That answer should not be changed, because the problems presented to the committee can be solved in other ways.

#### Solutions to the Problems Presented to the Committee

The system of zoning which has developed over 75 years of legal precedent and practical experience generally works quite well. However, problems and abuses do unfortunately occur.

Sometimes these difficulties point up a problem with the system which can be corrected through legislation, and sometimes they do not. My analysis of the three situations presented to the committee is as follows:

1. Hickman's Egg Ranch. The Hickman family's problem arises from a statutory requirement that the City of Glendale place city zoning on the Hickman's property within six months after annexation. Since Glendale does not have a zone which corresponds to the county zoning previously applicable to the property, the Hickmans were adversely affected by the city's zoning change against their will. This problem was created by A.R.S. § 9-462.04 D which reads as follows:

A municipality may enact an ordinance authorizing county zoning to continue in effect until municipal zoning is applied to land previously zoned by the county and annexed by the municipality, **but in no event for longer than six months after the annexation.**

The Hickman's problem could have been resolved if Glendale had been permitted to leave the county zoning in place after annexation. Unfortunately, the six month limitation in this statute prohibited Glendale from adopting that option. This problem could be solved by striking the final phrase "but in no event for longer than six months after the annexation" from this statute. I believe that the Committee should recommend this change to the Legislature.

2. The Flower Growers. The testimony given by the property owners, and that given by the representatives of the City of Phoenix, are in direct conflict with each other. Thus, it is difficult for me to determine the true state of affairs in this matter. However, it appears that the City of Phoenix designated this property for an agricultural use in its general plan, when it had been previously designated for residential and commercial uses. The property owners were understandably concerned about this action.

However, it also appears that the Phoenix general plan contained underlying commercial and residential uses which were available to the property owners. Apparently, the property owners have availed themselves of these general plan designations by requesting residential and commercial zoning. There seems to be a dispute about whether 12 acres or 17 acres of commercial zoning should be permitted. The property owners' application is currently pending, but has not been decided by the Phoenix City Council.

This dispute points up both a problem and its solution. The designation of land as open space, or some other similar land use category, in a general plan obviously could have a large impact on the value of the property. Because zoning must implement the general plan designation, it probably constitutes a compensable taking. However, Phoenix's action in providing underlying viable land use designations points up a solution which was addressed by the Growing Smarter Commission. I suggest that this Committee recommend to the Legislature that

it adopt the following recommendation from the Growing Smarter Commission's Final Report dated September 1, 1999.

[L]and cannot be designated as open space, recreation, conservation, or agriculture in a general or comprehensive plan without an alternative designation or underlying zoning that has an economically viable use.

3. The Pima County Hillside Property. Based on the testimony of the land owner alone (since Pima County was not present to defend itself), Pima County's actions appear to constitute a compensable taking. While it is unfortunate that this occurred, existing law provides the property owner a remedy. She must bear the cost of litigation in order to obtain this remedy (unless she wins a federal civil rights suit), but the Legislature cannot change that situation. If the Legislature enacts another statute which gives her increased rights, and Pima County nevertheless violates the new statute, she still must go to court to vindicate her rights.

However, the Legislature could provide a cheaper administrative mechanism for resolving such complaints. The Growing Smarter Commission recommended the establishment of such a procedure, and I suggest that this Committee recommend to the Legislature that it adopt the Growing Smarter Commission's recommendation as follows:

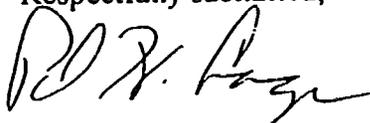
[T]he Commission recommends that the existing statutes that provide an administrative process for property owners to appeal dedication or exaction requirements on improvement or development of real property be expanded to include takings claims based on new ordinances or regulations. This would give property owners who feel that their property has been taken the following remedy:

- a quick appeal to a hearing officer of any action by a city, town or county thought to constitute a taking.
- there would be no cost to the private property owner to make the appeal.
- a hearing would be scheduled within 30 days.
- the city, town or county would be required to provide the hearing officer with a takings impact analysis.
- if the property owner is not satisfied with the hearing officer's decision, the owner could, within 30 days after the decision file a complaint in superior court, and if successful, could be awarded attorney fees.
- if the hearing officer finds that the action may create a taking of the owner's property rights, the hearing officer shall refer the decision and recommendations to the council or board for its consideration.

Members, Municipal Downsizing Committee  
October 27, 1999  
Page 9

At the next Committee meeting, I intend to offer the attached motions which would implement these recommendations. If any of the Committee Members have questions or comments concerning the information discussed above, I would appreciate hearing from you. My office's direct telephone number is (623) 583-3135, and my fax number is (623) 583-1399.

Respectfully submitted,



Paul H. Cragan  
City Attorney

Proposed Motions for Consideration by the Municipal Downzoning Committee  
submitted by  
Committee Member Paul H. Cragan

1. I move that the Committee recommend to the Legislature that A.R.S. §9-462.04 D be amended as set forth below.

**§9-462.04. Public hearing required**

D. A municipality may enact an ordinance authorizing county zoning to continue in effect until municipal zoning is applied to land previously zoned by the county and annexed by the municipality, ~~but in no event for longer than six months after the annexation.~~

2. I move that the Committee recommend to the Legislature that it adopt legislation implementing the following recommendation from the Growing Smarter Commission's Final Report dated September 1, 1999.

[L]and cannot be designated as open space, recreation, conservation, or agriculture in a general or comprehensive plan without an alternative designation or underlying zoning that has an economically viable use.

3. I move that the Committee recommend to the Legislature that it adopt legislation implementing the following recommendation from the Growing Smarter Commission's Final Report dated September 1, 1999.

[T]he Commission recommends that the existing statutes that provide an administrative process for property owners to appeal dedication or exaction requirements on improvement or development of real property be expanded to include takings claims based on new ordinances or regulations. This would give property owners who feel that their property has been taken the following remedy:

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- the city, town or county would be required to provide the hearing officer with a takings impact analysis.
- if the property owner is not satisfied with the hearing officer's decision, the owner could, within 30 days after the decision file a complaint in superior court, and if successful, could be awarded attorney fees.
- if the hearing officer finds that the action may create a taking of the owner's property rights, the hearing officer shall refer the decision and recommendations to the council or board for its consideration.

**TO: Municipal Downzoning Committee**

**Attn: Greg Gemson  
House of Representatives  
1700 W. Washington  
Phoenix, Arizona 85007**

**From: Ben L. Anderson Jr., Committee Member**



**Date: 19 October, 1999**

**Subject: Municipal Downzoning Recommendations**

**Ref: 7 October Letter requesting recommendations to Municipal Downzoning Study Committee.**

**The following is submitted for consideration:**

**In that all Citizens of the State of Arizona are equal under the U.S. Constitution, it is appropriate that Arizona Downzoning Laws, be they County or Municipal, should treat all Citizens equally.**

**It is surely inappropriate to treat Citizens differently merely on the basis of where they live any more than based on gender, age, race or religious affiliation.**

**The ONLY variances to that underlying precept would be in those most unique situations that can be clearly demonstrated to warrant a variance due to health and safety reasons such as an Airport Overlay Zone (that would for safety reasons restrict the height of buildings along flight approach paths). No other variances would seem justified.**

**AND – in those cases where a variance is clearly demonstrated and ruled justified, the impacted property owner is to be compensated in accordance with the best and highest value use of his property.**

**Municipalities must not be allowed to adopt any change in zoning ordinances, regulations, procedures or any other administrative or legalistic machinations to circumvent the intent of this concept.**

**I recommend this approach so that the final recommendations will default in favor of the property owner and not to some raft of bureaucratic special situations that favor the "public good" over individual property rights. By the same token, the U.S. Constitution defaults to individual rights and property rights over other more "general" rights.**

**I enclose a copy of HB2621 and its executing Arizona Revised Statute below. Your attention is invited to Paragraph F.**

**ARS 11-829 . Amendment of ordinance or change of zoning district boundaries; definition**

**F. The legislature finds that a rezoning of land that changes the zoning classification of the land or that restricts the use or reduces the value of the land is a matter of statewide concern and such a change in zoning that is initiated by the governing body or zoning body shall not be made without the express written consent of the property owner. The county shall not adopt any change in a zoning classification to circumvent the purpose of this subsection.**

+++++

**11-829 . Amendment of ordinance or change of zoning district boundaries; definition**

**A. A property owner or authorized agent of a property owner desiring an amendment or change in the zoning ordinance changing the zoning district boundaries within an area previously zoned shall file an application for the amendment or change. All zoning and rezoning ordinances, regulations or specific plans adopted under this article shall be consistent with and conform to the adopted county plan. In the case of uncertainty in constructing or applying the conformity of any part of a proposed rezoning ordinance to the adopted county plan, the ordinance shall be construed in a manner that will further the implementation of, and not be contrary to, the goals, policies and applicable elements of the county plan. A rezoning ordinance conforms with the county plan if it proposes land uses, densities or intensities within the range of identified uses, densities and intensities of the county plan.**

**B. Upon receipt of the application the board shall submit it to the commission for a report. Prior to reporting to the board, the commission shall hold at least one public hearing thereon after giving at least fifteen days' notice thereof by one publication in a newspaper of general circulation in the county seat and by posting of the area included in the proposed change. In case of a rezoning, the posting shall be in no less than two places with at least one notice for each quarter mile of frontage along perimeter public rights-of-way so that the notices are visible from the nearest public right-of-way. The commission shall also send notice by first class mail to each**

real property owner as shown on the last assessment of the property within three hundred feet of the proposed amendment or change and each county and municipality which is contiguous to the area of the amendment or change. The notice sent by mail shall include, at a minimum, the date, time and place of the hearing on the proposed amendment or change including a general explanation of the matter to be considered, a general description of the area of the proposed amendment or change, how the real property owners within the zoning area may file approvals or protests of the proposed rezoning, and notification that if twenty per cent of the property owners by area and number within the zoning area file protests, an affirmative vote of three-fourths of all members of the board will be required to approve the rezoning. The following specific notice provisions also apply:

1. In proceedings that are initiated by the commission involving rezoning, notice by first class mail shall be sent to each real property owner, as shown on the last assessment of the property, of the area to be rezoned and all property owners, as shown on the last assessment of the property, within three hundred feet of the property to be rezoned.

2. In proceedings involving one or more of the following proposed changes or related series of changes in the standards governing land uses, notice shall be provided in the manner prescribed by paragraph 3:

(a) A ten per cent or more increase or decrease in the number of square feet or units that may be developed.

(b) A ten per cent or more increase or reduction in the allowable height of buildings.

(c) An increase or reduction in the allowable number of stories of buildings.

(d) A ten per cent or more increase or decrease in setback or open space requirements.

(e) An increase or reduction in permitted uses.

3. In proceedings governed by paragraph 2, the county shall provide notice to real property owners pursuant to at least one of the following notification procedures:

(a) Notice shall be sent by first class mail to each real property owner, as shown on the last assessment, whose real property is directly affected by the changes.

(b) If the county issues utility bills or other mass mailings that periodically include notices or other informational or advertising materials, the county shall include notice of such changes with such utility bills or other mailings.

(c) The county shall publish such changes prior to the first hearing on such changes in a newspaper of general circulation in the county. The changes shall be published in a display advertisement covering not less than one-eighth of a full page.

4. If notice is provided pursuant to paragraph 3, subdivision (b) or (c), the county shall also send notice by first class mail to persons who register their names and addresses with the county as being interested in receiving such notice. The county may charge a fee not to exceed five dollars per year for providing this service and may adopt procedures to implement this paragraph.

5. Notwithstanding the notice requirements set forth in paragraph 2, the failure of any person or entity to receive notice shall not constitute grounds for any court to invalidate the actions of a county for which the notice was given.

C. If the planning commission or hearing officer has held a public hearing, the board may adopt the recommendations of the planning commission or hearing officer through use of a consent calendar without holding a second public hearing if there is no objection, request for public hearing or other protest. If there is an objection, a request for public hearing or a protest, the board shall hold a public hearing thereon at least fifteen days' notice of which shall be given by

one publication in a newspaper of general circulation in the county seat and by posting the area included in the proposed change. After holding the hearing the board may adopt the amendment, but if twenty per cent of the owners of property by area and number within the zoning area file a protest to the proposed change, the change shall not be made except by a three-fourths vote of all members of the board. If any members of the board are unable to vote on the question because of a conflict of interest, the required number of votes for the passage of the question is three-fourths of the remaining membership of the board, except that the required number of votes in no event shall be less than a majority of the full membership of the board. In calculating the owners by area, only that portion of a lot or parcel of record situated within three hundred feet of the property to be rezoned shall be included. In calculating the owners by number or area, county property and public rights-of-way shall not be included.

D. The planning commission may on its own motion propose an amendment to the zoning ordinance and may, after holding a public hearing as required by this chapter, transmit the proposal to the board which shall thereupon proceed as set forth in this chapter for any other amendment.

E. Notwithstanding the provisions of title 19, chapter 1, article 4, a decision by the governing body involving rezoning of land which is not owned by the county and which changes the zoning classification of such land or which changes the zoning standards of such land as set forth in subsection B, paragraph 2 may not be enacted as an emergency measure and such a change shall not be effective for at least thirty days after final approval of the change in classification by the board. Unless a resident files a written objection with the board of supervisors, the rezoning may be enacted as an emergency measure that becomes effective immediately by a four-fifths majority vote of the board for those counties with five or more supervisors or a two-thirds majority vote of the board for those counties with less than five supervisors.

**F. The legislature finds that a rezoning of land that changes the zoning classification of the land or that restricts the use or reduces the value of the land is a matter of statewide concern and such a change in zoning that is initiated by the governing body or zoning body shall not be made without the express written consent of the property owner. The county shall not adopt any change in a zoning classification to circumvent the purpose of this subsection.**

G. For the purposes of this section "zoning area" means the area within three hundred feet of the proposed amendment or change.

October 16, 1999

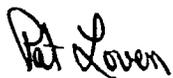
Mr. Greg Gemson  
House of Representatives  
Phoenix, AZ 85007

Dear Mr. Gemson,

After hearing how the City of Phoenix proceeded with the Baseline General Plan, I believe safeguards should be enacted. These would include the following:

1. A governmental entity should not be allowed to "redesignate" a use. I view this as circumventing zoning and rezoning procedures and requirements.
2. More specific information as to consequences of a rezoning or "redesignation" should be given to affected property owners at the time the notices are sent. Too many property owners do not understand what adopting a general plan means and many are too busy running businesses or working to attend the prolonged meetings. This is especially true if these plans are going to be treated as zoning designations.
3. Governmental entities should not be allowed to make assumptions as to values .

Sincerely,



Pat Loven  
Committeemember

# DUSHOFF & McCALL

LAWYERS  
A PROFESSIONAL CORPORATION

November 1, 1999

## HAND-DELIVERED

Senator Edward Cirillo, Co-Chair  
Representative Jean Hough-McGrath, Co-Chair  
State Legislature  
1700 West Washington Street  
Phoenix, AZ 85007

Re: **Municipal Downzoning Study Committee**

Dear Senator Cirillo and Representative McGrath:

As a member of the Downzoning Committee, I wanted to submit my recommendations for the Committee's consideration.

### Downzoning

The only current statute on downzoning is A.R.S. § 11-829(F). (For your convenience, I am attaching a copy of § 11-829.)

The scope of § 11-829(F) is ambiguous. It is located in Title 11 of Arizona Revised Statutes, which deals only with counties. Yet the first sentence of subsection F states that downzoning "is a matter of statewide concern," and then says that "the governing body or zoning body" shall not downzone without the property owner's consent. That is then followed by a sentence which says that "the county" shall not adopt a zoning change "to circumvent the purpose of this subsection."

Does that section relate only to county zoning, or does the first sentence apply to downzoning by any governing body? Does the second sentence literally mean that a county cannot circumvent the subsection, but that other governing bodies may circumvent the subsection?

THIS PAGE BY MAIL FROM J. H. McGRATH

It is my recommendation that § 11-829(F) be rewritten as follows:

1. The statute should make it clear that it applies to any governing body or zoning body which rezones land.

2. The statute should provide that a "downzoning" would be valid if it is initiated by the property owner, or if it is initiated by the governing body/zoning body with the express written consent of the property owner, or if compensation is paid to the property owner with respect to the downzoning.

3. The compensation which would be paid to the property owner (in the absence of his consent) would be the difference in market value (if any) of the land immediately before the date of the downzoning, and the market value of the land immediately after the date of the downzoning.

Comment: This would track conceptually Arizona law on severance damages in a condemnation lawsuit; the severance damages to the remainder are measured by the difference in value immediately before and immediately after the date of valuation. See, for example, the Arizona case of *State ex rel. Miller v. Filler*, 166 Ariz. 147, 812 P.2d 620 (1991).

4. If the compensation route were taken, the downzoning would be effective immediately, with the compensation to be determined by negotiation or a trial in Superior Court if necessary.

Comment: This would track conceptually the Arizona statutory procedure in a condemnation lawsuit: if the government needs the land right now, the government can obtain an order for immediate possession from the court, with the condemnation compensation to be determined at a later time. See A.R.S. § 12-1116.

Comment: One could say the "express written consent" is sufficient as a prerequisite for downzoning, for the property owner would consent if he were paid what he believed to be appropriate compensation. However, I think that approach would be unfair to the government which is downzoning a property. Assume that there is a significant difference of opinion between the property owner and the government as to the reduction in value. If "express written consent" were the only way of downzoning a property, then the property owner could refuse to grant his consent until the property owner's version of the monetary damages were paid. Under what I am suggesting, if the government decides to downzone and pay compensation, and if there is a disagreement between the government and the property owner as to the amount of compensation, then Superior Court will determine the amount of the decrease in market value.

**Cost recovery and other methods of recourse  
relating to zoning and land use actions by the  
government.**

The letter from President Burns of July 14, 1999 which appointed me to the Downzoning Study Committee mentioned that one of the purposes of the Committee is to "examine cost recovery and other methods of recourse for prevailing parties involved in municipal zoning and land use actions.

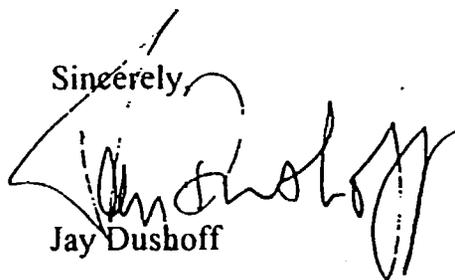
It is my recommendation that if a property owner is downzoned, and successfully defeats the downzoning in court, that the landowner should be entitled to receive from the government his reasonable attorneys' fees, expert witness fees and court costs ("litigation costs"). I believe that if he is downzoned and the issue of compensation is litigated, then the property owner should also be entitled to recover his litigation costs. In an analogous area, namely annexation, I believe that if a property owner successfully challenges an annexation in court, then the property owner should be entitled to recover his litigation costs from the government.

Senator Edward Cirillo, Co-Chair  
Representative Jean Hough-McGrath, Co-Chair  
November 1, 1999

Page 4

If you have any questions concerning the recommendations in this letter, please give me a call.

Sincerely,

A handwritten signature in black ink, appearing to read "Jay Dushoff", written over the word "Sincerely,".

Jay Dushoff

JD:srf  
Enclosure

cc: Greg Gemson  
Sue Anable

The Dispute Resolution Alternatives Office (DRAO) of the Courts in Maricopa County assists the Court, litigants and lawyers with finding appropriate dispute resolution procedures for cases filed in the Superior Court. Programs of the DRAO include:

**CIVIL DEPARTMENT** - Assisting judges, lawyers and litigants with choosing one of the procedures listed in this brochure, finding service providers, and scheduling various forms of Summary Jury Trial. The DRAO also reviews cases seeking damages above \$50,000 for possible use of mediation, binding arbitration, neutral evaluation or summary jury trial. Judges may refer cases to the DRAO for scheduling of ADR sessions.

**DOMESTIC RELATIONS DEPARTMENT** - Supervision of the Roster of Family Mediators in the Self-Service Center of the Court. The DRAO provides orientation to mediators seeking to be added to the roster.

**CRIMINAL DEPARTMENT** - The DRAO provides trained mediators to the Adult Probation Department for the facilitation of compliance with probation requirements, assisting clients who have committed technical violations with successfully completing their probation.

Lawyers and litigants may obtain assistance in learning more about Dispute Resolution Alternatives, finding a service provider, or setting up a procedure by calling 506-7884.

# SUPERIOR ALTERNATIVES

Dispute Resolution Alternatives Available in the Superior Court of Arizona Maricopa County



## BENEFITS OF USING ALTERNATIVES

- SHORTER TIME TO RESOLUTION OF DISPUTE
- COSTS LESS THAN FULL JURY TRIAL
- PRESERVES RELATIONSHIPS
- PROCESS CAN BE DESIGNED BY PARTIES
- MANY SERVICES OFFERED IN THE COMMUNITY
- MEDIATION OFFERS FULL CONTROL OVER OUTCOME TO THOSE WHO WILL BE AFFECTED
- CAN BE COMPLETELY CONFIDENTIAL



Dispute Resolution Alternatives Office

Superior Court of Arizona  
Maricopa County

ATTACHMENT 3

# SUPERIOR SETTLEMENT ALTERNATIVES

Judges are encouraging attorneys to manage their cases by planning discovery in two phases: 1) SETTLEMENT-FOCUSED and 2) TRIAL-FOCUSED. To support the attorney who uses this approach, the Court has developed a roster of professional neutrals who offer a spectrum of services. The DISPUTE RESOLUTION ALTERNATIVES OFFICE of the Court can assist attorneys in locating these individuals. The following descriptions are generally accepted definitions of the services, but attorneys can work with service providers to design procedures that best fit their cases.



**ARBITRATION** - A forum in which parties and counsel present their positions to a neutral who renders a decision and award. There are a variety of forms of arbitration, including ones in which high and low awards are established in advance, and where all parties know the figures or only the arbitrator knows what each side has set as their limit. In these cases, the arbitrator is bound by the figures and must select one or the other. Arbitration can be binding or advisory as determined by the parties in advance.

**EARLY NEUTRAL EVALUATION (ENE)** - A forum in which each side presents their case to a neutral evaluator who has expertise in the subject matter of the case. The evaluator may serve as a mediator or simply provide the parties with an evaluation of the strengths and weaknesses of their positions as well as an opinion on the value of the case if it goes to trial. The evaluator can also assist with narrowing issues and establishing discovery schedules.



**MEDIATION** - A procedure in which parties enter into settlement discussions with the assistance of a third party neutral. The focus is to promote open dialogue, foster consideration of underlying interests, and consider alternative solutions to the dispute. Mediation is confidential, and the outcome is exclusively under the control of the parties.

**MED/ARB** - A hybrid of mediation and arbitration in which the dispute is first mediated. A decision is then made by the neutral on any issues left unresolved. The arbitrator's decision may be binding or advisory as determined in advance by the parties.

**SUMMARY JURY TRIAL** - A trial which is conducted in a manner designed to be completed in no more than two days. Each side has limited time for presentation of the case, and the jury consists of 4 - 8 members. Attorneys meet in advance with the judge who will preside over the trial to determine the exact procedures to be used. Decisions by the jury on cases under \$300,000 shall be binding while those over \$300,000 shall be advisory unless otherwise decided by the parties.

**SHORT TRIAL** - One form of summary jury trial designed to be completed in one day. The Shorttrial is a binding procedure employing a 4-member jury and having about 2 hours for presentation of the case by each side. Most of the information is taken from depositions rather than using live witnesses in order to stay within the time limitations. No official record is kept of the Shorttrial, and appeals are only granted upon showing of fraud. A Shorttrial is frequently used as an alternative to arbitration. Judges Pro Tempore preside over the trial.

**SETTLEMENT CONFERENCE** - An evaluative mediation performed by a judicial officer, which is generally held as a last resort, settlement-focused procedure before a standard trial.

**MEMORANDUM**  
**FRANCIS J. SLAVIN, P.C.**

**TO:** The Honorable Ed Cirillo - Co Chair  
The Honorable Jean McGrath - Co Chair  
Municipal Downzoning Study Committee

**FROM:** FJS

**DATE:** November 4, 1999

**RE:** Potential Downzoning Scenarios

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The following are potential downzoning scenarios which the Committee might consider addressing in any proposed new legislation. The term "downzoning" would refer to any action by a city or town which would restrict allowed uses (e.g., change from commercial to residential) or impose more restrictive zoning regulations (setbacks, heights, lot coverage, etc.). The term "downzoning" would not apply to change of zoning from a less restricted to a more restricted classification which is applied for or consented to by the landowner.

**Scenario 1.** Landowner's land is changed from a less restrictive to more restrictive zoning district under one of the two following alternatives:

- a. Land included in a rezoning application made by an adjoining landowner.
- b. City or town itself initiates an application to rezone.

**Scenario 2.** City or town or area landowners initiate an amendment to the general plan (as defined in A.R.S. §9-461.05) which changes the land use designation to a more restricted type of land use, e.g. change from high density residential to medium or low density residential.

**Note:** Under A.R.S. §9-462.01.F, zoning classifications and zoning ordinance and regulations shall be consistent with and conform to the adopted general plan of the city or town. Consequently, the change in the general plan indirectly changes the allowable zoning.

- Scenario 3.** The city or town or area landowner initiates a regulatory specific plan (as defined in A.R.S. §9-461.0) which limits the uses and/or exacts more restrictive regulations, e.g. floor area ratio, height, setbacks.
- Scenario 4.** After an annexation, the city or town initiates a rezoning to a classification which is more restrictive than the county zoning classification enjoyed by the landowner prior to annexation, e.g. change from industrial to agricultural.
- Note 1.** Certain land uses such as general agricultural are exempt by statute (A.R.S. §11-830.A.2) from zoning regulation by counties if the land involved is 5 acres or more. There is no such exemption for such uses located within the corporate limits of the city or town. Consequently, upon annexation of agricultural land, it becomes subject to zoning regulation by the annexing city or town.
- Note 2.** Under A.R.S. §9-471.L, a city or town annexing an area is required to adopt zoning classifications which permit uses no greater than those permitted by the county immediately prior to the annexation. Some cities or towns will grant the nearest equivalent zoning classification while others argue that they may grant more restrictive zoning, e.g. rezoned from a county industrial to a city agricultural classification.
- Note 3.** Under A.R.S. §9-462.04.D, a city or town may enact an ordinance which authorizes county zoning to remain in effect up to 6 months after the annexation. This may be done without holding public hearings as required for normal rezoning of property.
- Scenario 5.** City or town, on its own initiative or upon application by a citizen, amends the zoning ordinance text which (a) eliminates or restricts uses previously allowed under a zoning classification, e.g., city or town restricts used car sales which were previously allowed in the C-1 zoning classification or (b) imposes more restrictive regulations, e.g., limits height or developable area.

Cities or towns who engage in downzoning are quick to point out that the uses being conducted by the landowner on the effective date of the downzoning may be continued as

legal non-conforming uses. This "grandfathered land use" is provided for in A.R.S §9-462.02A which states as follows:

Nothing in an ordinance or regulation authorized by this article shall affect existing property or the right to its continued use for the purpose used at the time the ordinance or regulation takes effect, nor to any reasonable repairs or alterations in buildings or property used for such existing purpose.

Cities or towns who engage in downzoning rationalize the justification for their actions by arguing that the landowner is still allowed to continue using the property as it was being used at the time of the effective date of the downzoning. This ignores the many uses that are allowed in the particular zoning classification applicable to the property prior to the downzoning. This thinking ignores the fact that many landowners have used their land and improvements as collateral for repayment of loans. These loans are supported by appraisals which take into account the variety of uses allowed within the zoning classification applicable to the property. Some landowners do not utilize the maximum zoning allowed in the zoning classification applicable to their property. This does not mean, however, that they or their successors waive the right to those uses in the future. Most zoning ordinances restrict the owner of a downzoned parcel from expanding the use and the buildings containing the use. In most cases, the value of a downzoned parcel will be diminished by such downzoning action notwithstanding the continuation of the existing use being made of the property.

Depending upon whether a landowner files a lawsuit in federal or state court, there are 2 slightly different but similar doctrines that have been announced by the federal and state courts with regard to inverse condemnation resulting from downzoning actions. In the state of Arizona, the test is whether or not the landowner is left with an economically viable use of the property. Under the federal doctrine, the test is whether or not the downzoning interferes with the landowner's reasonable investment-backed expectations. Neither of these court tests however addresses the diminution in value that would result from the downzoning. Rather, it measures as a matter of common law the extent which courts will allow cities or towns to downzone properties without violating the inverse condemnation provisions of the respective federal and state constitutions.

There are basic societal reasons why cities and towns should retain the right to downzone property based upon public health, safety and general welfare reasons. However, the process of downzoning should involve rigorous due process and ultimately result in some form of compensation being paid to the property owner who has suffered a quantifiable diminution in property value. The committee might wish to consider imposing the follow due process requirements:

1. Consider following the procedure used by the cities in determining whether or not a proposed exaction, e.g. dedication of right-of-way, constitutes a taking or is a permissible requirement reasonably related to the effect of a change of use of the property. A city or town could be required to conduct a hearing receiving input from the affected landowner and its consultants before proceeding with the proposed downzoning. There would be findings and conclusions (a) as to whether or not the proposed downzoning was in the best interest of the safety, health or general welfare and (b) as to the impact on value of the affected property.
2. The aggrieved landowner could then appeal the findings and recommendations of the hearing officer to the Mayor and Council. Additional evidence would be taken from the affected landowner and area landowners with regard to the proposed downzoning and the measure of the impact on value of the affected land. The Council would then be required to reverse, modify or accept the findings and conclusions made by the city hearing officer.
3. The city should be obligated to employ an outside appraiser to measure or quantify the impact on value the landowner would also be given the opportunity to employ its own appraiser, if necessary, to contest the conclusions of the city's appraiser.
4. After this process has been concluded, the city or town may then proceed with the proposed downzoning.
5. The aggrieved landowner would retain the right to file a lawsuit in Superior Court to challenge the findings and conclusions of the city or town which has downzoned the affected land.
6. The scope of the review by the Superior Court would be confined to the record made during the city hearings.
7. In the event that the court disagreed with the city's conclusion and determined that the land use diminution was greater than that concluded by the city, the city would be obligated to pay all of the appraisal fees, legal fees, and court costs and other consulting fees of the aggrieved landowner.

In the event that the landowner agreed with the city's conclusion as to value impact or in the event the landowner is successful in its appeal of the city's determination of value,

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then the city would be obligated within 30 days of the downzoning action to compensate the landowner for the amount of the diminished value. An official action of the city would either be a change of zoning classification, change in zoning regulations or a change in the general or specific plan.

I would suggest that there be a work study session of the Committee members in order to discuss the advantages and disadvantage of any proposed form of remedial legislation.

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**INTEROFFICE MEMORANDUM**

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**TO:** MEMBERS OF THE MUNICIPAL DOWNZONING STUDY  
COMMITTEE

**FROM:** GREG GEMSON, HOUSE RESEARCH STAFF 

**SUBJECT:** MEETING MATERIALS – MEMBER RECOMMENDATIONS

**DATE:** 11/04/99

**CC:** SUSAN ANABLE, VICTOR RICHES

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Attached please find a document summarizing the recommendations of the various members of the Municipal Downzoning Study Committee. Also included is a copy of all the source materials associated with those recommendations as they were submitted to me over the course of the last few weeks. These recommendations will be discussed at the next committee meeting, which will be held on Tuesday, November 9, at 9 AM in Senate Hearing Room 3.

If you have any questions, please feel free to contact me at (602) 542-0619.

MEMBER NAME	RECOMMENDATIONS
Rep. McGrath	<ol style="list-style-type: none"> <li>1. If government takes an action that devalues a privately-owned property, a property owner needs three (3) appraisals from certified appraisers as proof of loss. There is no need to go to court to collect.</li> <li>2. If government is going to change general plans or enact overlay zoning, they must notify property owners who will be affected by certified mail of each meeting or event. Signage is not adequate notification.</li> <li>3. Compensation for reasonable attorney fees is automatic, not at the judges discretion, if a private citizen prevails in court against a government.</li> <li>4. Take steps to improve "Equal Access to Justice."</li> <li>5. Make statutory changes similar to either those made for the counties in ARS 11-829, paragraph F, by Laws 1998, Chapter 55, or make changes similar to those proposed by HB 2549/SB 1364 within ARS 9-462.01:  "The legislature finds that a reduction of a zoning classification that restricts the use or reduces the value of land is a matter of statewide concern and such a change in zoning that is initiated by the governing body shall not be made without the express written consent of the property owner. The municipality shall not adopt any change in a zoning classification to circumvent the purposes of this section."</li> </ol>
Rep. Burns	<ol style="list-style-type: none"> <li>1. Amend the requirements for notification so that affected property owners are made fully aware of pending zoning changes.</li> <li>2. Take steps to improve "Equal Access to Justice".</li> </ol>
Rep. Brotherton	<ol style="list-style-type: none"> <li>1. Recommends no changes.</li> </ol>
Sen. Cirillo	<ol style="list-style-type: none"> <li>1. Require that a city or town perform a thorough review of current zoning of a property and then resolve those zoning issues prior to annexation if the zoning is going to change for the land subject to the annexation.</li> <li>2. Eliminate the requirement that a city or town establish zoning for land annexed within 6 months of the annexation.</li> <li>3. Move towards uniform zoning standards to be used by all cities, towns and counties.</li> </ol>

Paul Cragan

1. That the Committee recommend to the Legislature that ARS 9-462.04 D be amended as follows:
  - “D. A municipality may enact an ordinance authorizing county zoning to continue in effect until municipal zoning is applied to land previously zoned by the county and annexed by the municipality., ~~but in no event for longer than six months after the annexation.~~”
2. That the Committee recommend to the Legislature that it adopt legislation implementing the following recommendation from the Growing Smarter Commission’s Final Report dated Sept. 1, 1999:
  - “Land cannot be designated as open space, recreation, conservation, or agriculture in a general or comprehensive plan without an alternative designation or underlying zoning that has an economically viable use.”
3. That the Committee recommend to the Legislature that it adopt legislation implementing the following recommendation from the Growing Smarter Commission’s Final Report:
  - “The Commission recommends that the existing statutes that provide an administrative process for property owners to appeal dedication or exaction requirements on improvement or development or real property be expanded to include takings claims based on new ordinances or regulations. This would give property owners who feel that their property has been taken the following remedy:
    - a. A quick appeal to a hearing officer of any action by a city, town or county thought to constitute a taking.
    - b. There would be no cost to the private property owner to make the appeal.
    - c. A hearing would be scheduled within 30 days.
    - d. The city, town or county would be required to provide the hearing officer with a takings impact analysis.
    - e. If the property owner is not satisfied with the hearing officer’s decision, the owner could, within 30 days after the decision, file a complaint in Superior Court, and if successful, could be awarded attorney fees.
    - f. If the hearing officer finds that the action may create a taking of the owner’s property rights, the hearing officer shall refer the decision and recommendations to the council or board for its consideration.”

<p>Ben Anderson</p>	<p>Recommends that all Arizona Downzoning laws, be they county or municipal, treat all citizens equally.</p> <p>The only variances to that underlying concept would be in the most unique situations that can be clearly demonstrated to warrant a variance due to health and safety reasons such as an Airport Overlay Zones (that would for safety reasons restrict the height if buildings along flight approach paths).</p> <p>In those cases where a variance is clearly demonstrated and ruled justified, the impacted property owner is to be compensated in accordance with the best and highest value use of the property.</p> <p>Municipalities must not be allowed to adopt any change in zoning ordinances, regulations or procedures or any other administrative or legalistic means to circumvent this intent.</p> <p>Each situation should default to individual rights and property rights over more "general rights" or the "public good".</p> <p>Specifically, recommends that language similar to ARS 11-829, paragraph F be amended into other places in statute relating to zoning:</p> <p style="padding-left: 40px;">"The legislature finds that a rezoning of land that changes the zoning classification of the land or that restricts the use or reduces the value of the land is a matter of statewide concern and such a change in zoning that is initiated by the governing body or zoning body shall not be made without the express written consent of the property owner. The governing body or zoning body shall not adopt any change in a zoning classification to circumvent the purpose of this subsection."</p>
<p>Pat Loven</p>	<ol style="list-style-type: none"> <li>1. That a governmental entity should not be allowed to "redesignate" a use. I view this as circumventing zoning and rezoning procedures and requirements.</li> <li>2. That more specific information as to the consequences of a rezoning or "redesignation" should be given to affected property owners at the time the notices are sent. Too many property owners do not understand what adopting a general plan means and many are too busy running businesses or working to attend the prolonged meetings. This is especially true if these plans are going to be treated as zoning designations.</li> <li>3. Governmental entities should not be allowed to make assumptions as to values.</li> </ol>

Jay Dushoff

Recommends that ARS 11-829, paragraph F, be re-written as follows:

1. The statute should make it clear that it applies to any governing body or zoning body which rezones land.
2. The statute should provide that a "downzoning" would be valid if it is initiated by the property owner, or if it is initiated by the governing body/zoning body with the express written consent of the property owner, or if compensation is paid to the property owner with respect to downzoning.
3. The compensation which would be paid to the property owner (in the absence of his consent) would be the difference in market value (if any) of the land immediately before the date of the downzoning, and the market value of the land immediately after the date of the downzoning.
4. If the compensation route is taken, the downzoning would be effective immediately, with the compensation to be determined by negotiation or a trial in Superior Court if necessary.
5. If a property owner is downzoned, and successfully defeats the zoning in court, then the landowner should be entitled to receive from the government his reasonable attorney's fees, expert witness fees and court costs (litigation cost). Furthermore, if the property is downzoned and the issue of compensation is litigated, then the property owner should also be entitled to recover his litigation costs. Similarly, if a property owner challenges an annexation in court, then the property owner should be entitled to recover his litigation costs from the government.

B. A specific zoning plan may be adopted or amended after notice and hearing before the commission and board as provided in § 11-829. If the board adopts a specific zoning plan, it shall establish administrative rules and procedures for the application and enforcement of the plan and may assign or delegate administrative functions, powers and duties for the plan to county officers and officials.

C. A specific zoning plan shall include text, maps and illustrations specifying all of the following:

1. The distribution, location and extent of land uses, including open space.
2. The distribution, location, extent and intensity of major components of public and private transportation, sewage and solid waste disposal, drainage and other facilities necessary to provide for the land uses described in the specific plan.
3. Standards by which development shall proceed and, if applicable, requirements for conservation, development and utilization of natural resources.
4. A statement of whether the specific zoning plan is consistent with the comprehensive plan required by § 11-806.
5. Any other matters necessary or desirable for implementation of the specific zoning plan.

Amended by Laws 1990, Ch. 97, § 1.

#### Historical and Statutory Notes

The 1990 amendment deleted "more than five hundred thousand but" preceding "less than one million persons" in the first sentence of subsec. A.

### § 11-829. Amendment of ordinance or change of zoning district boundaries; definition

A. A property owner or authorized agent of a property owner desiring an amendment or change in the zoning ordinance changing the zoning district boundaries within an area previously zoned shall file an application for the amendment or change. All zoning and rezoning ordinances, regulations or specific plans adopted under this article shall be consistent with and conform to the adopted county plan. In the case of uncertainty in constructing or applying the conformity of any part of a proposed rezoning ordinance to the adopted county plan, the ordinance shall be construed in a manner that will further the implementation of, and not be contrary to, the goals, policies and applicable elements of the county plan. A rezoning ordinance conforms with the county plan if it proposes land uses, densities or intensities within the range of identified uses, densities and intensities of the county plan.

B. Upon receipt of the application the board shall submit it to the commission for a report. Prior to reporting to the board, the commission shall hold at least one public hearing thereon after giving at least fifteen days' notice thereof by one publication in a newspaper of general circulation in the county seat and by posting of the area included in the proposed change. In case of a rezoning, the posting shall be in no less than two places with at least one notice for each quarter-mile of frontage along perimeter public rights-of-way so that the notices are visible from the nearest public right-of-way. The commission shall also send notice by first class mail to each real property owner as shown on the last assessment of the property within three hundred feet of the proposed amendment or change and each county and municipality which is contiguous to the area of the amendment or change. The notice sent by mail shall include, at a minimum, the date, time and place of the hearing on the proposed amendment or change including a general explanation of the matter to be considered, a general description of the area of the proposed amendment or change, how the real property owners within the zoning area may file approvals or protests of the proposed rezoning, and notification that if twenty per cent of the property owners by area and number within the zoning area file protests, an affirmative vote of three-fourths of all members of the board will be required to approve the rezoning. The following specific notice provisions also apply:

adopted pursuant to this subsection and becomes effective. On or before the tenth anniversary of the plan's most recent adoption, the board shall either readopt the existing plan for an additional term of up to ten years or shall adopt a new county plan as provided by this article.

C. The adoption or readoption of, or a major amendment to, the county comprehensive plan shall be approved by the affirmative vote of at least two-thirds of the members of the board. The adoption or readoption of a county plan, and any amendment to a county plan, shall not be enacted as an emergency measure and is subject to referendum as provided by article IV, part 1, § 1, subsection (8), Constitution of Arizona, and title 19, chapter 1, article 4. For purposes of this subsection, "major amendment" means any of the following:

1. A change of land use designation on the plan that:
  - (a) Increases the intensity of use on the property.
  - (b) Decreases the intensity of use on the property at the initiative of the board of supervisors.
2. Deletion of a requirement for the reservation or dedication of land for public purposes, except for minor boundary adjustments or street alignments.
3. Establishment of a new, or deletion of a planned, freeway, expressway, parkway or limited access arterial street shown on the general plan.
- D. Upon adoption or readoption, the plan, or any part thereof, shall be the official guide for the development of the area of jurisdiction.
- E. Any change, amendment, extension or addition of the county plan may be made only in accordance with the provisions of this chapter.

Amended by Laws 1998, Ch. 204, § 9.

Section 19-141 et seq.

#### Historical and Statutory Notes

The 1998 amendment by Ch. 204 rewrote the section, which prior thereto read:

"The board may adopt the county plan as a whole, or by successive actions adopt separate parts of the plan. Upon adoption, the plan, or any part thereof, shall be the official guide for the development of the area of jurisdiction. Any change, amendment, extension or addition of the county plan may be made only in accordance with the provisions of this chapter."

Laws 1998, Ch. 204, § 21, provides:

"Sec. 21. Readoption and amendment of municipal and county general plans

"A. Each city and town that is subject to the provisions of title 9, chapter 4, article 6, Arizona Revised Statutes, and each county that is subject to title 11, chapter 6, article 2, Arizona Revised Statutes, and whose general or comprehensive plan is adopted, amended, extended or readopted or most recent readoption or rewrite or amendment to the general or comprehensive plan was adopted:

### § 11-825. Specific zoning plans; adoption; administration; contents

A. The board or commission of a county with a population of less than one million persons may prepare specific zoning plans for designated parcels of land which shall include a text and maps of a land use plan and specific zoning, sign, street and other regulations for implementation of the county master plans. All property owners within the boundaries of the specific zoning plan shall give written consent before the plan may be established. A specific zoning plan shall not be adopted if it creates an area that is not within the plan but is completely surrounded by the plan boundaries.

1. In proceedings that are initiated by the commission involving rezoning, notice by first class mail shall be sent to each real property owner, as shown on the last assessment of the property, of the area to be rezoned and all property owners, as shown on the last assessment of the property, within three hundred feet of the property to be rezoned.
2. In proceedings involving one or more of the following proposed changes or related series of changes in the standards governing land uses, notice shall be provided in the manner prescribed by paragraph 3:
  - (a) A ten per cent or more increase or decrease in the number of square feet or units that may be developed.
  - (b) A ten per cent or more increase or reduction in the allowable height of buildings.
  - (c) An increase or reduction in the allowable number of stories of buildings.
  - (d) A ten per cent or more increase or decrease in setback or open space requirements.
  - (e) An increase or reduction in permitted uses.
3. In proceedings governed by paragraph 2, the county shall provide notice to real property owners pursuant to at least one of the following notification procedures:
  - (a) Notice shall be sent by first class mail to each real property owner, as shown on the last assessment, whose real property is directly affected by the changes.
  - (b) If the county issues utility bills or other mass mailings that periodically include notices or other informational or advertising materials, the county shall include notice of such changes with such utility bills or other mailings.
  - (c) The county shall publish such changes prior to the first hearing on such changes in a newspaper of general circulation in the county. The changes shall be published in a display advertisement covering not less than one-eighth of a full page.
  4. If notice is provided pursuant to paragraph 3, subdivision (b) or (c), the county shall also send notice by first class mail to persons who register their names and addresses with the county as being interested in receiving such notice. The county may charge a fee not to exceed five dollars per year for providing this service and may adopt procedures to implement this paragraph.
  5. Notwithstanding the notice requirements set forth in paragraph 2, the failure of any person or entity to receive notice shall not constitute grounds for any court to invalidate the actions of a county for which the notice was given.
    - C. If the planning commission or hearing officer has held a public hearing, the board may adopt the recommendations of the planning commission or hearing officer through use of a consent calendar without holding a second public hearing if there is no objection, request for public hearing or other protest. If there is an objection, a request for public hearing or a protest, the board shall hold a public hearing thereon at least fifteen days' notice of which shall be given by one publication in a newspaper of general circulation in the county and by posting the area included in the proposed change. After holding the hearing the board may adopt the amendment, but if twenty per cent of the owners of property by area and number within the zoning area file a protest to the proposed change, the change shall not be made except by a three-fourths vote of all members of the board. If any members of the board are unable to vote on the question because of a conflict of interest, the required number of votes for the passage of the question is three-fourths of the remaining membership of the board, except that the required number of votes in no event shall be less than a majority of the full membership of the board. In calculating the owners by area, only that portion of a lot or parcel of record situated within three hundred feet of the property to be rezoned shall be included. In calculating the owners by number or area, county property and public right-of-way shall not be included.
    - D. The planning commission may on its own motion propose an amendment to the zoning ordinance and may, after holding a public hearing as required by this chapter, transmit the proposal to the board which shall thereupon proceed as set forth in this chapter for any other amendment.

E. Notwithstanding the provisions of title 19, chapter 1, article 4, a decision by the governing body involving rezoning of land which is not owned by the county and which changes the zoning classification of such land or which changes the zoning standards of such land as set forth in subsection B, paragraph 2 may not be enacted as an emergency measure and such a change shall not be effective for at least thirty days after final approval of the board of supervisors, the rezoning may be enacted as an emergency measure that becomes effective immediately by a four-fifths majority vote of the board for those counties with five or more supervisors or a two-thirds majority vote of the board for those counties with less than five supervisors.

F. The legislature finds that a rezoning of land that changes the zoning classification of the land or that restricts the use or reduces the value of THE land is a matter of statewide concern and such a change in zoning that is initiated by the governing body or zoning body shall not be made without the express written consent of the property owner. The county shall not adopt any change in a zoning classification to circumvent the purpose of this subsection.

G. For the purposes of this section "zoning area" means the area within three hundred feet of the proposed amendment or change.

Amended by Laws 1993, Ch. 171, § 1; Laws 1996, Ch. 48, § 3; Laws 1996, Ch. 160, § 1; Laws 1998, Ch. 55, § 1; Laws 1998, Ch. 204, § 10.

Section 19-141 et seq.

### Historical and Statutory Notes

The 1993 amendment rewrote the section.  
 The 1996 amendment by Ch. 48, in par. 3(c) of subsec. B, substituted "advertisement" for "ad" and, in subsec. C, added a new first sentence and rewrote the second (formerly first) sentence.

The 1996 amendment by Ch. 180 inserted the last sentence of subsec. E, allowing the rezoning to be enacted as an emergency measure.

The 1998 amendment by Ch. 55 inserted a new subsec. F, redesignating former subsec. F as subsec. G.

The 1998 amendment by Ch. 204 rewrote subsec. A, which had read:

"A. A property owner or authorized agent of a property owner desiring an amendment or change in the zoning ordinance changing the zoning district boundaries within an area previously zoned shall file an application for the amendment or change."  
 Chapter 204 also rewrote subsecs. F and G, which had read:

"F. The legislature finds that a reduction of a zoning classification that restricts the use or reduces the value of land is a matter of statewide concern and such a change in zoning that is initiated by the governing body or zoning body shall not be made without the express written consent of the property owner."  
 The 1998 amendment by Ch. 204 explicitly amended this section by Ch. 204 subsec. F, redesignating former subsec. F as subsec. G.

Reviser's Notes:  
 1993 Note Pursuant to authority of § 41-1304.02, in the section heading, "definition" was added.

1996 Note. Prior to the 1998 amendments, this section contained the amendments made by Laws 1996, Ch. 48, sec. 3, and Ch. 180, sec. 1, that were blended together pursuant to authority of § 41-1304.03.

1998 Note. Pursuant to authority of § 41-1304.02, the subsection designation "G." was substituted for "F.G." to correct a manifest clerical error.

Unanimous vote. 9

9. Unanimous vote Under subsec. C in this section requiring unanimous vote of all members of county board of supervisors to change zoning ordinance if 20% of owners of property by area and number within the zoning area file a protest to the proposed change.

Notes of Decisions phrase "zoning area" refers to area within 300 feet of proposed change from which proponent must secure written consent; "included properties" to these purposes are those not already in the classification sought, any part of which lies within 300-foot perimeter, and total areas of these properties designated as "included acreage" and all owners of these properties are designated "included owners" Rotar v. Coconino County (App. Div. 1 1990) 16 Ariz. 210, 805 P.2d 1031, review denied.

Note 47  
public; interference with adjoining landowner's use and enjoyment of his land similar may suffice. Buckelew v. Town of Parker (App. Div.1 1996) 188 Ariz. 446, 937 P.2d 368, review denied.

Adjoining landowner may suffer "damage peculiar to himself" and, thus, may have standing to complain about zoning decision on adjacent property, even if his immediate neighbors suffer the same damage as he from alleged zoning violation. Buckelew v. Town of Parker (App. Div.1 1996) 188 Ariz. 446, 937 P.2d 368, review denied.

Adjoining landowner had standing to maintain special action to challenge alleged zoning violation.

§ 9-462.02. Nonconformance to regulations; outdoor advertising change

Cross References

Eminent domain, see Const. Art. 2, § 17; § 12-1111 et seq.

Notes of Decisions

Abandonment of use 4.5  
Due process 7

1. Nonconforming uses--In general  
To qualify as nonconforming use that has "ceased" to be carried on for a period exceeding one year, and is lost under city ordinance, period of nonuse must be attributable, at least in part, to the property owner, and intent to abandon is not required. City of Glendale v. Aldabbagh (1997) 189 Ariz. 140, 939 P.2d 418.

Where business owner was properly restrained in business that was preexisting nonconforming use for period in excess of one year based on allegations of misconduct, nonconforming use could be declared invalid if city showed that owner engaged in wrongdoing that led to closure of business, and owner's declaration of intent not abandon use would not save use as long as city showed that period of nonuse was attributable to owner's unlawful conduct. City of Glendale v. Aldabbagh (1997) 189 Ariz. 140, 939 P.2d 418.

Policy of eliminating nonconforming uses may only be accomplished within statutory scheme and within limits of fairness and justice. City of Glendale v. Aldabbagh (App. Div.1 1996) 187 Ariz. 235, 928 P.2d 659, review granted, vacated 189 Ariz. 140, 939 P.2d 418.

Zoning statutes and ordinances regulating nonconforming uses are construed to further state's policy of eliminating nonconforming uses and should be construed against nonconforming use. City of Glendale v. Aldabbagh (App. Div.1 1996) 187 Ariz. 235, 928 P.2d 659, review granted, vacated 189 Ariz. 140, 939 P.2d 418.

4. Extinguishing use  
Process of eliminating nonconforming uses must not unduly burden property owner's right to continue existing use. City of Glendale v. Aldabbagh

187 Ariz. 235, 928 P.2d 659, review granted, vacated 189 Ariz. 140, 939 P.2d 418.

Under city zoning ordinance creating rebuttable presumption of intent to abandon nonconforming use, where city lacks significant evidence of property owner's subjective intent, city can make prima facie case of intent to abandon by merely establishing that use has been unused for over one year, and burden then shifts to owner to rebut presumption; if owner does not come forward with evidence of intent not to abandon, use is terminated, but if owner appears and establishes that use was not abandoned presumption is extinguished. City of Glendale v. Aldabbagh (App. Div.1 1996) 187 Ariz. 235, 928 P.2d 659, review granted, vacated 189 Ariz. 140, 939 P.2d 418.

3. Rezoning

Municipality cannot enact zoning ordinance without provisions for continuance of preexisting, non-

§ 9-462.04: Public hearing required

A. If the municipality has a planning commission or a hearing officer, the planning commission or hearing officer shall hold a public hearing on any zoning ordinance. Notice of the time and place of the hearing including a general explanation of the matter to be considered and including a general description of the area affected shall be given at least fifteen days before the hearing in the following manner:

1. The notice shall be published at least once in a newspaper of general circulation published or circulated in the municipality, or if there is none, it shall be posted on the affected property in such a manner as to be legible from the public right-of-way and in at least ten public places in the municipality. A posted notice shall be printed so that the following are visible from a distance of one hundred feet: the word "zoning," the present zoning district classification, the proposed zoning district classification and the date and time of the hearing.

2. In proceedings involving rezoning of land which abuts other municipalities or unincorporated areas of the county or a combination thereof, copies of the notice of public hearing shall be transmitted to the planning agency of such governmental unit abutting such land. In addition to notice by publication, a municipality may give notice of the hearing in such other manner as it may deem necessary or desirable.

3. In proceedings that are not initiated by the property owner involving rezoning of land which may change the zoning classification, notice by first class mail shall be sent to each real property owner, as shown on the last assessment of the property, of the area to be rezoned and all property owners, as shown on the last assessment of the property, within three hundred feet of the property, to be rezoned.

4. In proceedings involving one or more of the following proposed changes or related series of changes in the standards governing land uses, notice shall be provided in the manner prescribed by paragraph 6:

- (a) A ten per cent or more increase or decrease in the number of square feet or units that may be developed.
- (b) A ten per cent or more increase or reduction in the allowable height of buildings.
- (c) An increase or reduction in the allowable number of stories of buildings.
- (d) A ten per cent or more increase or decrease in setback or open space requirements.
- (e) An increase or reduction in permitted uses.

5. In proceedings governed by paragraph 4, the municipality shall provide notice to real property owners pursuant to at least one of the following notification procedures:

(a) Notice shall be sent by first class mail to each real property owner, as shown on the last assessment, whose real property is directly governed by the changes.

(b) If the municipality issues utility bills or other mass mailings that periodically include notices or other informational or advertising materials, the municipality shall include notice of such changes with such utility bills or other mailings.

(c) The municipality shall publish such changes prior to the first hearing on such changes in a newspaper of general circulation in the municipality. The changes shall be published in a "display ad" covering not less than one-eighth of a full page.

6. If notice is provided pursuant to paragraph 5, subdivisions (b) or (c) the municipality shall also send notice by first class mail to persons who register their names and addresses with the municipality as being interested in receiving such notice. The municipality may charge a fee not to exceed five dollars per year for providing this service, and may adopt procedures to implement this paragraph.

7. Notwithstanding the notice requirements set forth in paragraph 4, the failure of any person or entity to receive notice shall not constitute grounds for any court to invalidate the actions of a municipality for which the notice was given.

B. After the hearing, the planning commission or hearing officer shall render a decision in the form of a written recommendation to the legislative body. The recommendation shall include the reasons for the recommendation and be transmitted to the legislative body in such form and manner as may be specified by the legislative body.

C. If the planning commission or hearing officer has held a public hearing, the governing body may adopt the recommendations of the planning commission or hearing officer without holding a second public hearing if there is no objection, request for public hearing, or other protest. The governing body shall hold a public hearing if requested by the party aggrieved or any member of the public or of the governing body, or, in any case, if no public hearing has been held by the planning commission or hearing officer. Notice of the time and place of the hearing shall be given in the time and manner provided for the giving of notice of the hearing by the planning commission as specified in subsection A. In addition a municipality may give notice of the hearing in such other manner as it may deem necessary or desirable.

D. A municipality may enact an ordinance authorizing county zoning to continue in effect until municipal zoning is applied to land previously zoned by the county and annexed by the municipality, but in no event for longer than six months after the annexation.

E. A municipality is not required to adopt a general plan prior to the adoption of a zoning ordinance.

F. If there is no planning commission or hearing officer, the legislative body of the municipality shall perform the functions assigned to the planning commission or hearing officer.

G. If the owners of twenty per cent or more either of the area of the lots included in a proposed change, or of those immediately adjacent in the rear or any side thereof extending one hundred fifty feet therefrom, or of those directly opposite thereto extending one hundred fifty feet from the street frontage of the opposite lots, file a protest in writing against a proposed amendment, it shall not become effective except by the favorable vote of three-fourths of all members of the governing body of the municipality. If any members of the governing body are unable to vote on such a question because of a conflict of interest, then the required number of votes for passage of the question shall be three-fourths of the remaining membership of the governing body, provided that such required number of votes shall in no event be less than a majority of the full membership of the legally established governing body.

H. Notwithstanding the provisions of § 19-142, subsection B, a decision by the governing body involving rezoning of land which is not owned by the municipality and which changes the zoning classification of such land may not be enacted as an emergency measure and such change shall not be effective for at least thirty days after final approval of the change in classification by the governing body.

Historical and Statutory Notes

The 1998 amendment by Ch. 204 made nonsubstantive changes to the section.

Cross References

Proof of publication and posting, see §§ 39-205, 48-536, 48-612.

Publication or posting, see §§ 9-812, 39-201 et seq., 48-536, 48-612, 48-633, 48-655.

Notes of Decisions

3. **Vote**  
Hospital applying for zoning change of its office property could avoid requirements of statute requiring a super-majority vote of city council to approve change when 20% or more of property owners within 150 feet of property included in proposed rezoning protest by creating 160-foot wide buffer zone between office property and adjacent residential property. *Schwarz v. City of Glendale* (App. Div.1 1997) 190 Ariz. 508, 950 P.2d 167.

of neighboring residents, and buffer zone could be used in a manner consistent with permitted uses of its residential zoning classification as a park or playground. *Schwarz v. City of Glendale* (App. Div.1 1997) 190 Ariz. 508, 950 P.2d 167.

Statute requiring super-majority vote to approve proposed rezoning does not apply when changes to a city's general plan are being proposed. *Schwarz v. City of Glendale* (App. Div.1 1997) 190 Ariz. 508, 950 P.2d 167.

Hospital's creation of a buffer zone between neighboring residents and office property to defeat statutory requirements of super-majority approval of proposed zoning change, even when done solely for that purpose, was not an illegal subterfuge; use of office property was not dependent on any use of buffer zone, since landscaping and public easement through buffer zone were created solely for benefit

Supulations regarding buffer zone proposed by city council prior to approval of rezoning of adjoining office property did not trigger statute requiring super-majority approval of proposed zoning changes; no zoning change took place on buffer zone property, but only office property's zoning was changed. *Schwarz v. City of Glendale* (App. Div.1 1997) 190 Ariz. 508, 950 P.2d 167.

§ 9-462.06. Board of adjustment.

Cross References

Proof of publication and posting, see §§ 39-205, 48-536, 48-612.

Notes of Decisions

Person aggrieved 13

age and, as result, he was aggrieved. *Bucklew v. Town of Parker* (App. Div.1 1996) 188 Ariz. 446, 937 P.2d 368, review denied.

6. Nonconforming uses

Although mere increase in volume or intensity of prior nonconforming use is not necessarily "change in use," change in basic nature or character of use may result in loss of property's protected status as nonconforming use. *Bucklew v. Town of Parker* (App. Div.1 1996) 188 Ariz. 446, 937 P.2d 368, review denied.

Even if owner of mobile home park removed park-owned rental units and mobile homes from premises, which may have abated zoning violation that allegedly occurred when recreational vehicle park housing temporary residents to unauthorized use as mobile home park with permanent residents, adjoining landowner was not necessarily deprived of standing to challenge violation; even if park-owned rental units and mobile homes had been removed, occupancy by owners of private units on year-round basis could have resulted in change of park's prior nonconforming use. *Bucklew v. Town of Parker* (App. Div.1 1996) 188 Ariz. 446, 937 P.2d 368, review denied.

13. Person aggrieved

Adjoining landowner was "person aggrieved" and, thus, had standing to appeal zoning decision to town's board of adjustment after town refused to cure zoning violation of use of property as mobile home park with permanent residents; adjoining landowner sufficiently alleged special dam-

ARTICLE 6.2. MUNICIPAL SUBDIVISION REGULATIONS

§ 9-463.01. Authority

Pursuant to the provisions of this article, the legislative body of every municipality regulate the subdivision of all lands within its corporate limits.

**Motions regarding "Restrictions on Zoning/Land Use Changes"**

1. Enact statutory changes as it relates to municipal zoning or land use changes that require a governing or zoning body to receive the express written consent of a property owner before enacting zoning changes which restricts the use or reduces the value of the property owner's land.
2. Enact statutory changes which require the compensation of property owners in the event that their land is devalued as a result of a municipal zoning or land use change.
3. Enact statutory changes which require municipalities to provide alternative designations if a zoning or land use change is made.

**Motions regarding "Equal Access to Justice"**

1. If a property's value is reduced as a result of a zoning or land use change, and the property owner successfully defeats that change in court, then the landowner is entitled to reimbursement from the government for reasonable attorney's fees, expert witness fees and court costs (litigation costs). Furthermore, if the issue of compensation is itself litigated, then the property owner should also be entitled to recover those litigation costs.

### **Motions Regarding "Notification"**

1. Enact statutory changes requiring a municipality that plans to rezone or redesignate land to notify all affected property owners, by certified mail, of each meeting or event pertaining to that zoning or land use change. This notification must include specific information regarding the impact of that rezoning or redesignation of the land.

**Motions regarding "New Zoning/Annexation Requirements"**

1. Amend ARS 9-462.04, paragraph D, as follows:

"D. A municipality may enact an ordinance authorizing county zoning to continue in effect until municipal zoning is applied to land previously zoned by the county and annexed by the municipality., ~~but in no event for longer than six months after the annexation.~~"

2. Further amend ARS 9-462.04, paragraph D, to state that when an annexation does occur and the municipality chooses not to maintain the prior (county) zoning, then the new zoning or land use imposed upon the annexed property shall not reduce the value or restrict the use of that land as compared to its use and value under the previous land use designation.

**Motions regarding a Hearing Process**

1. Establish a independent, expedited administrative process for property owners to appeal municipal zoning or land use changes.

# APPENDIX C

## **Introduced Legislation**

REFERENCE TITLE: municipal zoning; property value

State of Arizona  
House of Representatives  
Forty-fourth Legislature  
Second Regular Session  
2000

## HB 2597

Introduced by  
Representatives McGrath, Horne, Burns R, Groscost, McGibbon, Griffin: Cooley, Gardner W, Overton,  
Senator Cirillo

AN ACT

AMENDING TITLE 9, CHAPTER 4, ARTICLE 6, ARIZONA REVISED STATUTES, BY ADDING SECTION 9-461.13; AMENDING SECTIONS 9-462.04, 9-462.06 AND 9-471, ARIZONA REVISED STATUTES; RELATING TO MUNICIPAL ZONING.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Title 9, chapter 4, article 6, Arizona Revised Statutes,  
3 is amended by adding section 9-461.13, to read:

4 9-461.13. Taking of property by reduction in value due to  
5 planning or zoning regulation; remedies;  
6 reduction in assessed valuation for tax purposes;  
7 exception

8 A. IF ANY ACTION BY A CITY OR TOWN UNDER THIS ARTICLE OR ARTICLE  
9 6.1 OF THIS CHAPTER CAUSES A REDUCTION OR RESTRICTION IN THE USE OR  
10 EXCHANGE VALUE OF REAL PROPERTY AND CONSENT IS NOT RECEIVED FROM THE  
11 PROPERTY OWNER PURSUANT TO SECTION 9-462.04, SUBSECTION I, THE PROPERTY IS  
12 CONSIDERED TO HAVE BEEN DAMAGED OR TAKEN FOR THE USE OF THE PUBLIC. A  
13 REDUCTION OR RESTRICTION IN THE USE OR EXCHANGE VALUE OF THE REAL PROPERTY  
14 IS CONSIDERED TO HAVE BEEN CAUSED BY THE ACTIONS OF A CITY OR TOWN IF IT  
15 IS SO DETERMINED BY A CERTIFIED APPRAISAL OF THE PROPERTY. THE PROPERTY  
16 OWNER IS RESPONSIBLE FOR INITIATING AND PAYING FOR THE CERTIFIED APPRAISAL  
17 AND BRINGING THE APPRAISAL BEFORE THE APPROPRIATE ZONING OR LAND USE  
18 PLANNING BODY WITHIN THIRTY DAYS AFTER THE NOTICE OF THE PENDING ZONING OR  
19 LAND USE CHANGE.

20 B. THE OWNER OF PROPERTY THAT IS DAMAGED OR TAKEN UNDER SUBSECTION  
21 A OF THIS SECTION HAS A RIGHT TO A HEARING BY THE BOARD OF ADJUSTMENT  
22 PURSUANT TO SECTION 9-462.06 WITHIN SIXTY DAYS AFTER NOTICE OF A DECISION  
23 BY THE CITY OR TOWN OF THE INTENT TO CHANGE THE ZONING OF THE PROPERTY:

24 1. TO EITHER:

25 (a) REQUIRE CONDEMNATION BY AND JUST COMPENSATION FROM THE CITY OR  
26 TOWN.

27 (b) RECEIVE COMPENSATION FROM THE CITY OR TOWN FOR THE REDUCTION IN  
28 VALUE CAUSED BY THE CITY'S OR TOWN'S ACTION.

29 2. IN EITHER CASE, TO APPEAL THE AWARD OF COMPENSATION FROM THE  
30 CITY OR TOWN TO AN INDEPENDENT ARBITRATION PROCESS ESTABLISHED BY THE CITY  
31 OR TOWN WITHIN THIRTY DAYS AFTER THE AWARD, AND THE PROPERTY OWNER MAY  
32 APPEAL THAT DECISION TO SUPERIOR COURT WITHIN THIRTY DAYS.

33 C. IF THE PROPERTY OWNER PREVAILS IN THE INDEPENDENT ARBITRATION  
34 PROCESS OR IN SUPERIOR COURT, THE CITY OR TOWN IS LIABLE TO THE PROPERTY  
35 OWNER FOR THE REASONABLE AND NECESSARY ATTORNEY FEES AND COSTS OF ANY  
36 ACTIONS BROUGHT UNDER THIS SECTION INCLUDING THE COST OF THE APPRAISAL AND  
37 COSTS RELATING TO ANY ACTION TO RECOVER LITIGATION COSTS, PLUS ANY ACTUAL  
38 AND DEMONSTRABLE ECONOMIC LOSSES SUFFERED BY THE PROPERTY OWNER DUE TO THE  
39 CITY'S OR TOWN'S REGULATION DURING THE PERIOD IN WHICH IT WAS IN EFFECT.

40 D. IF THE CITY OR TOWN IS UNWILLING OR UNABLE TO PAY THE  
41 COMPENSATION AWARDED UNDER THIS SECTION, THE CITY OR TOWN SHALL REINSTATE  
42 THE LEVEL OF PLANNING, ZONING OR OTHER REGULATION THAT WAS IN EFFECT AT  
43 THE TIME THE CITY OR TOWN TOOK THE ACTION THAT RESULTED IN THE RIGHT  
44 CLAIMED PURSUANT TO THIS SECTION. THE CITY OR TOWN IS LIABLE TO THE  
45 PROPERTY OWNER FOR THE REASONABLE ATTORNEY FEES AND COSTS ASSOCIATED WITH

1 A CHALLENGE TO THE PROPOSED CHANGE THAT LED TO THE SUBSEQUENT  
2 REINSTATEMENT OF THE PRIOR CLASSIFICATION.

3 E. IF ANY ACTION BY A CITY OR TOWN UNDER THIS ARTICLE OR ARTICLE  
4 6.1 OF THIS CHAPTER CAUSES A REDUCTION IN THE FULL CASH VALUE OF REAL  
5 PROPERTY, THE COUNTY ASSESSOR OR, IF APPROPRIATE, THE DEPARTMENT OF  
6 REVENUE SHALL REFLECT THE REDUCTION IN VALUATION BY REDUCING THE ASSESSED  
7 VALUATION OF THE PROPERTY ON THE TAX ROLL AS OF THE NEXT VALUATION DATE,  
8 AS DEFINED IN SECTION 42-11001, ACCORDING TO THE ASSESSMENT PERCENTAGES  
9 PRESCRIBED FOR THE RESPECTIVE CLASS OF PROPERTY BY TITLE 42, CHAPTER 15,  
10 ARTICLE 1.

11 F. THIS SECTION SHALL NOT BE CONSTRUED AS AN EXCLUSIVE REMEDY OR TO  
12 DIMINISH OTHER RIGHTS OF PROPERTY OWNERS UNDER EXISTING CONSTITUTIONAL,  
13 STATUTORY OR COMMON LAW.

14 G. THIS SECTION DOES NOT APPLY IN THE CASE OF AN EXERCISE OF THE  
15 POLICE POWER TO PREVENT A CLEAR AND IMMEDIATE THREAT TO THE HEALTH OR  
16 SAFETY OF THE PUBLIC.

17 Sec. 2. Section 9-462.04, Arizona Revised Statutes, is amended to  
18 read:

19 9-462.04. Public hearing required

20 A. If the municipality has a planning commission or a hearing  
21 officer, the planning commission or hearing officer shall hold a public  
22 hearing on any zoning ordinance. Notice of the time and place of the  
23 hearing including a general explanation of the matter to be considered and  
24 including a general description of the area affected shall be given at  
25 least fifteen days before the hearing in the following manner:

26 1. The notice shall be published at least once in a newspaper of  
27 general circulation published or circulated in the municipality, or if  
28 there is none, it shall be posted on the affected property in such a  
29 manner as to be legible from the public right-of-way and in at least ten  
30 public places in the municipality. A posted notice shall be printed so  
31 that the following are visible from a distance of one hundred feet: the  
32 word "zoning," the present zoning district classification, the proposed  
33 zoning district classification and the date and time of the hearing.

34 2. In proceedings involving rezoning of land which abuts other  
35 municipalities or unincorporated areas of the county or a combination  
36 thereof, copies of the notice of public hearing shall be transmitted to  
37 the planning agency of such governmental unit abutting such land. In  
38 addition to notice by publication, a municipality may give notice of the  
39 hearing in such other manner as it may deem necessary or desirable.

40 3. In proceedings that are not initiated by the property owner  
41 involving rezoning of land which may change the zoning classification,  
42 notice by first class mail shall be sent to each real property owner, as  
43 shown on the last assessment of the property, of the area to be rezoned  
44 and all property owners, as shown on the last assessment of the property,  
45 within three hundred feet of the property, to be rezoned. THE NOTICE

1 SHALL CONTAIN SPECIFIC EXPLANATIONS OF THE CHANGES AND LAND USE  
2 REQUIREMENTS RESULTING FROM THE REZONING OR REDESIGNATION.

3 4. In proceedings involving one or more of the following proposed  
4 changes or related series of changes in the standards governing land uses,  
5 notice shall be provided in the manner prescribed by paragraph 5:

6 (a) A ten per cent or more increase or decrease in the number of  
7 square feet or units that may be developed.

8 (b) A ten per cent or more increase or reduction in the allowable  
9 height of buildings.

10 (c) An increase or reduction in the allowable number of stories of  
11 buildings.

12 (d) A ten per cent or more increase or decrease in setback or open  
13 space requirements.

14 (e) An increase or reduction in permitted uses.

15 5. In proceedings governed by paragraph 4, the municipality shall  
16 provide notice to real property owners pursuant to at least one of the  
17 following notification procedures:

18 (a) Notice shall be sent by ~~first class~~ CERTIFIED mail to each real  
19 property owner, as shown on the last assessment, whose real property is  
20 directly governed by the changes.

21 (b) If the municipality issues utility bills or other mass mailings  
22 that periodically include notices or other informational or advertising  
23 materials, the municipality shall include notice of such changes with such  
24 utility bills or other mailings.

25 (c) The municipality shall publish such changes prior to the first  
26 hearing on such changes in a newspaper of general circulation in the  
27 municipality. The changes shall be published in a "display ad" covering  
28 not less than one-eighth of a full page.

29 6. If notice is provided pursuant to paragraph 5, subdivisions  
30 SUBDIVISION (b) or (c) the municipality shall also send notice by first  
31 class mail to persons who register their names and addresses with the  
32 municipality as being interested in receiving such notice. The  
33 municipality may charge a fee not to exceed five dollars per year for  
34 providing this service and may adopt procedures to implement this  
35 paragraph.

36 7. Notwithstanding the notice requirements ~~set forth~~ in paragraph  
37 4, the failure of any person or entity to receive notice shall not  
38 constitute grounds for any court to invalidate the actions of a  
39 municipality for which the notice was given.

40 B. After the hearing, the planning commission or hearing officer  
41 shall render a decision in the form of a written recommendation to the  
42 legislative body. The recommendation shall include the reasons for the  
43 recommendation and be transmitted to the legislative body in such form and  
44 manner as may be specified by the legislative body.

1 C. If the planning commission or hearing officer has held a public  
2 hearing, the governing body may adopt the recommendations of the planning  
3 commission or hearing officer without holding a second public hearing if  
4 there is no objection, request for public hearing, or other protest. The  
5 governing body shall hold a public hearing if requested by the party  
6 aggrieved or any member of the public or of the governing body, or, in any  
7 case, if no public hearing has been held by the planning commission or  
8 hearing officer. Notice of the time and place of the hearing shall be  
9 given in the time and manner provided for the giving of notice of the  
10 hearing by the planning commission as specified in subsection A OF THIS  
11 SECTION. In addition a municipality may give notice of the hearing in  
12 such other manner as it may deem necessary or desirable.

13 D. A municipality may enact an ordinance authorizing county zoning  
14 to continue in effect until municipal zoning is applied to land previously  
15 zoned by the county and annexed by the municipality, ~~but in no event for~~  
16 ~~longer than six months after the annexation.~~ ANY NEW MUNICIPAL ZONING OR  
17 LAND USE APPLICABLE TO THE ANNEXED TERRITORY SHALL NOT RESULT IN A  
18 REDUCTION OR RESTRICTION OF THE USE OF THE PROPERTY AS COMPARED TO ITS  
19 PREVIOUS COUNTY LAND USE DESIGNATION INCLUDING USES THAT WERE EXEMPT FROM  
20 COUNTY ZONING ORDINANCES.

21 E. A municipality is not required to adopt a general plan prior to  
22 the adoption of a zoning ordinance.

23 F. If there is no planning commission or hearing officer, the  
24 legislative body of the municipality shall perform the functions assigned  
25 to the planning commission or hearing officer.

26 G. If the owners of twenty per cent or more either of the area of  
27 the lots included in a proposed change, or of those immediately adjacent  
28 in the rear or any side thereof extending one hundred fifty feet  
29 therefrom, or of those directly opposite thereto extending one hundred  
30 fifty feet from the street frontage of the opposite lots, file a protest  
31 in writing against a proposed amendment, it shall not become effective  
32 except by the favorable vote of three-fourths of all members of the  
33 governing body of the municipality. If any members of the governing body  
34 are unable to vote on such a question because of a conflict of interest,  
35 then the required number of votes for passage of the question shall be  
36 three-fourths of the remaining membership of the governing body, provided  
37 that such required number of votes shall in no event be less than a  
38 majority of the full membership of the legally established governing body.

39 H. Notwithstanding ~~the provisions of section 19-142, subsection B,~~  
40 a decision by the governing body involving rezoning of land which is not  
41 owned by the municipality and which changes the zoning classification of  
42 such land may not be enacted as an emergency measure and such change shall  
43 not be effective for at least thirty days after final approval of the  
44 change in classification by the governing body.

1 I. THE LEGISLATURE FINDS THAT A REZONING OF LAND THAT CHANGES THE  
2 ZONING CLASSIFICATION OF THE LAND OR THAT RESTRICTS THE USE OR REDUCES THE  
3 VALUE OF THE LAND IS A MATTER OF STATEWIDE CONCERN AND SUCH A CHANGE IN  
4 ZONING THAT IS INITIATED BY THE GOVERNING BODY OR ZONING BODY SHALL NOT BE  
5 MADE WITHOUT THE EXPRESS WRITTEN CONSENT OF THE PROPERTY OWNER. THE  
6 GOVERNING BODY OR ZONING BODY SHALL NOT ADOPT ANY CHANGE IN A ZONING  
7 CLASSIFICATION TO CIRCUMVENT THE PURPOSE OF THIS SUBSECTION. A PROPERTY  
8 OWNER MAY BRING AN ACTION PURSUANT TO SECTION 9-461.13 FOR ANY REDUCTION  
9 IN LAND VALUE RESULTING FROM A REZONING OR USE RESTRICTION.

10 Sec. 3. Section 9-462.06, Arizona Revised Statutes, is amended to  
11 read:

12 9-462.06. Board of adjustment

13 A. The legislative body shall, by ordinance, establish a board of  
14 adjustment, which shall consist of not less than five nor more than seven  
15 members appointed by the legislative body in accordance with provisions of  
16 the ordinance, except that the ordinance may establish the legislative  
17 body as the board of adjustment. The legislative body may, by ordinance,  
18 delegate to a hearing officer the authority to hear and decide on matters  
19 within the jurisdiction of the board of adjustment as provided by this  
20 section, except that the right of appeal from the decision of a hearing  
21 officer to the board of adjustment shall be preserved.

22 B. The ordinance shall provide for public meetings of the board,  
23 for a chairperson with the power to administer oaths and take evidence,  
24 and that minutes of its proceedings showing the vote of each member and  
25 records of its examinations and other official actions be filed in the  
26 office of the board as a public record.

27 C. A board of adjustment shall:

28 1. Hear and decide appeals from the decisions of the zoning  
29 administrator. ~~shall~~

30 2. HEAR AND DECIDE APPEALS OF PROPERTY OWNERS PURSUANT TO SECTION  
31 9-461.13, SUBSECTION B. APPEALS BY PROPERTY OWNERS PURSUANT TO SECTION  
32 9-461.13, SUBSECTION B SHALL BE EXPEDITED TO COMPLY WITH THE PROCEDURES  
33 PROVIDED FOR IN SECTION 9-461.13 IN A MANNER DETERMINED BY THE BOARD OF  
34 ADJUSTMENT AND WITHOUT REGARD TO ANY CONTRARY PROCEDURES PROVIDED FOR IN  
35 THIS SECTION.

36 3. Exercise such other powers as may be granted by the ordinance.  
37 and

38 4. Adopt all rules and procedures necessary or convenient for the  
39 conduct of its business.

40 D. Appeals to the board of adjustment may be taken by persons  
41 aggrieved or by any officer, department, board or bureau of the  
42 municipality affected by a decision of the zoning administrator, within a  
43 reasonable time, by filing with the zoning administrator and with the  
44 board a notice of appeal specifying the grounds thereof. The zoning

1 administrator shall immediately transmit all records pertaining to the  
2 action appealed from to the board.

3 E. An appeal to the board stays all proceedings in the matter  
4 appealed from, unless the zoning administrator certifies to the board  
5 that, in the zoning administrator's opinion by the facts stated in the  
6 certificate, a stay would cause imminent peril to life or property. Upon  
7 such certification, proceedings shall not be stayed, except by restraining  
8 order granted by the board or by a court of record on application and  
9 notice to the zoning administrator. Proceedings shall not be stayed if  
10 the appeal requests relief which has previously been denied by the board  
11 except pursuant to a special action in superior court as provided in  
12 subsection K of this section.

13 F. The board shall fix a reasonable time for hearing the appeal,  
14 and shall give notice of THE hearing by both publication in a newspaper of  
15 general circulation in accordance with section 9-462.04 and posting the  
16 notice in conspicuous places close to the property affected.

17 G. A board of adjustment shall:

18 1. Hear and decide appeals in which it is alleged there is an error  
19 in an order, requirement or decision made by the zoning administrator in  
20 the enforcement of a zoning ordinance adopted pursuant to this article.

21 2. Hear and decide appeals for variances from the terms of the  
22 zoning ordinance only if, because of special circumstances applicable to  
23 the property, including its size, shape, topography, location, or  
24 surroundings, the strict application of the zoning ordinance will deprive  
25 such property of privileges enjoyed by other property of the same  
26 classification in the same zoning district. Any variance granted is  
27 subject to such conditions as will assure that the adjustment authorized  
28 shall not constitute a grant of special privileges inconsistent with the  
29 limitations upon other properties in the vicinity and zone in which such  
30 property is located.

31 3. Reverse or affirm, wholly or partly, or modify the order,  
32 requirement or decision of the zoning administrator appealed from, and  
33 make such order, requirement, decision or determination as necessary.

34 H. A board of adjustment may not:

35 1. Make any changes in the uses permitted in any zoning  
36 classification or zoning district, or make any changes in the terms of the  
37 zoning ordinance provided the restriction in this paragraph shall not  
38 affect the authority to grant variances pursuant to this article.

39 2. Grant a variance if the special circumstances applicable to the  
40 property are self-imposed by the property owner.

41 I. If the legislative body is established as the board of  
42 adjustment, it shall exercise all of the functions and duties of the board  
43 of adjustment in the same manner and to the same effect as provided in  
44 this section.

1 J. In a municipality with a population of more than one hundred  
2 thousand persons according to the latest United States decennial census,  
3 the legislative body, by ordinance, may provide that a person aggrieved by  
4 a decision of the board or a taxpayer, officer or department of the  
5 municipality affected by a decision of the board may file, at any time  
6 within fifteen days after the board has rendered its decision, an appeal  
7 with the clerk of the legislative body. The legislative body shall hear  
8 the appeal in accordance with procedures adopted by the legislative body  
9 and may affirm or reverse, in whole or in part, or modify the board's  
10 decision.

11 K. A person aggrieved by a decision of the legislative body or  
12 board or a taxpayer, officer or department of the municipality affected by  
13 a decision of the legislative body or board may, at any time within thirty  
14 days after the board, or the legislative body, if the board decision was  
15 appealed pursuant to subsection J of this section, has rendered its  
16 decision, file a complaint for special action in the superior court to  
17 review the legislative body or board decision. Filing the complaint does  
18 not stay proceedings on the decision sought to be reviewed, but the court  
19 may, on application, grant a stay and on final hearing may affirm or  
20 reverse, in whole or in part, or modify the decision reviewed.

21 Sec. 4. Section 9-471, Arizona Revised Statutes, is amended to  
22 read:

23 9-471. Annexation of territory; procedures; notice;  
24 petitions; access to information; restrictions

25 A. The following procedures are required to extend and increase the  
26 corporate limits of a city or town by annexation:

27 1. A city or town shall file in the office of the county recorder  
28 of the county in which the annexation is proposed a blank petition  
29 required by paragraph 4 of this subsection setting forth a description and  
30 an accurate map of all the exterior boundaries of the territory contiguous  
31 to the city or town proposed to be annexed. Notice and a copy of the  
32 filing shall be given to the clerk of the board of supervisors and to the  
33 county assessor. The accurate map shall include all county rights-of-way  
34 and roadways with no taxable value that are within or contiguous to the  
35 exterior boundaries of the area of the proposed annexation. If state land,  
36 other than state land utilized as state rights-of-way or land held by the  
37 state by tax deed, is included in the territory, written approval of the  
38 state land commissioner and the selection board established by section  
39 37-202 shall also be filed.

40 2. Signatures on petitions filed for annexation shall not be  
41 obtained for a waiting period of thirty days after filing the blank  
42 petition.

43 3. After filing the blank petition pursuant to paragraph 1 of this  
44 subsection, the governing body of the city or town shall hold a public  
45 hearing within the last ten days of the thirty day waiting period to

1 discuss the annexation proposal. The public hearing shall be held in  
 2 accordance with the provisions of title 38, chapter 3, article 3.1, except  
 3 that, notwithstanding the provisions of section 38-431.02, subsections C  
 4 and D, the following notices of the public hearing to discuss the  
 5 annexation proposal shall be given at least six days before the hearing:

6 (a) Publication at least once in a newspaper of general  
 7 circulation, which is published or circulated in the city or town and the  
 8 territory proposed to be annexed, at least fifteen days before the end of  
 9 the waiting period.

10 (b) Posting in at least three conspicuous public places in the  
 11 territory proposed to be annexed.

12 (c) Notice by first class mail sent to the chairman of the board of  
 13 supervisors of the county in which the territory proposed to be annexed is  
 14 located.

15 (d) Notice by first class mail with an accurate map of the  
 16 territory proposed to be annexed sent to each owner of the real and  
 17 personal property as shown on the list furnished pursuant to subsection G  
 18 of this section that would be subject to taxation by the city or town in  
 19 the event of annexation in the territory proposed to be annexed. For  
 20 purposes of this subdivision, real and personal property includes mobile,  
 21 modular and manufactured homes and trailers only if the owner also owns  
 22 the underlying real property.

23 4. Within one year after the last day of the thirty day waiting  
 24 period a petition in writing signed by the owners of one-half or more in  
 25 value of the real and personal property and more than one-half of the  
 26 persons owning real and personal property that would be subject to  
 27 taxation by the city or town in the event of annexation, as shown by the  
 28 last assessment of the property, may be circulated and filed in the office  
 29 of the county recorder. For purposes of this paragraph, real and personal  
 30 property includes mobile, modular and manufactured homes and trailers only  
 31 if the owner also owns the underlying real property.

32 5. No alterations increasing or reducing the territory sought to be  
 33 annexed shall be made after a petition has been signed by a property  
 34 owner.

35 6. The petitioner shall determine and submit a sworn affidavit  
 36 verifying that no part of the territory for which the filing is made is  
 37 already subject to an earlier filing for annexation. The county recorder  
 38 shall not accept a filing for annexation without the sworn affidavit.

39 B. All information contained in the filings, the notices, the  
 40 petition, tax and property rolls and other matters regarding a proposed or  
 41 final annexation shall be made available by the appropriate official for  
 42 public inspection during regular office hours.

43 C. Any city or town, the attorney general, the county attorney, or  
 44 any other interested party may upon verified petition move to question the  
 45 validity of the annexation for failure to comply with the provisions of

1 this section. The petition shall set forth the manner in which it is  
 2 alleged the annexation procedure was not in compliance with the provisions  
 3 of this section and shall be filed within thirty days after adoption of  
 4 the ordinance annexing the territory by the governing body of the city or  
 5 town and not otherwise. The burden of proof shall be upon the petitioner  
 6 to prove the material allegations of his verified petition. No action  
 7 shall be brought to question the validity of an annexation ordinance  
 8 unless brought within the time and for the reasons provided in this  
 9 subsection. All hearings provided by this section and all appeals  
 10 therefrom shall be preferred and heard and determined in preference to all  
 11 other civil matters, except election actions. In the event more than one  
 12 petition questioning the validity of an annexation ordinance is filed, all  
 13 such petitions shall be consolidated for hearing. If two or more cities  
 14 or towns show the court that they have demonstrated an active interest in  
 15 annexing any or all of the area proposed for annexation, the court shall  
 16 consider any oral or written agreements or understandings between or among  
 17 the cities and towns in making its determination pursuant to this  
 18 subsection.

19 D. The annexation shall become final after the expiration of thirty  
 20 NINETY days from the adoption of the ordinance annexing the territory by  
 21 the city or town governing body, provided the annexation ordinance has  
 22 been finally adopted in accordance with procedures established by statute,  
 23 charter provisions, or local ordinances, whichever ~~ts~~ ARE applicable,  
 24 subject to the review of the court to determine the validity thereof if  
 25 petitions in objection have been filed.

26 E. For the purpose of determining the sufficiency of the percentage  
 27 of the value of property under this section, such values of property shall  
 28 be determined as follows:

29 1. In the case of property assessed by the county assessor, values  
 30 shall be the same as shown by the last assessment of the property.

31 2. In the case of property valued by the department of revenue,  
 32 values shall be appraised by the department in the manner provided by law  
 33 for municipal assessment purposes.

34 F. For the purpose of determining the sufficiency of the percentage  
 35 of persons owning property under this section, the number of persons  
 36 owning property shall be determined as follows:

37 1. In the case of property assessed by the county assessor, the  
 38 number of persons owning property shall be as shown on the last assessment  
 39 of the property.

40 2. In the case of property valued by the department of revenue, the  
 41 number of persons owning property shall be as shown on the last valuation  
 42 of the property.

43 3. If an undivided parcel of property is owned by multiple owners,  
 44 such owners shall be deemed as one owner for the purposes of this section.

1           4. If a person owns multiple parcels of property, such owner shall  
2 be deemed as one owner for the purposes of this section.

3           G. The county assessor and the department of revenue, respectively,  
4 shall furnish to the city or town proposing an annexation within thirty  
5 days after a request therefor a statement in writing showing the owner,  
6 the address of each owner and the appraisal and assessment of all such  
7 property.

8           H. Territory is not contiguous for the purposes of subsection A,  
9 paragraph 1 of this section unless:

10           1. It adjoins the exterior boundary of the annexing city or town  
11 for at least three hundred feet.

12           2. It is, at all points, at least two hundred feet in width,  
13 excluding rights-of-way and roadways.

14           3. The distance from the existing boundary of the annexing city or  
15 town where it adjoins the annexed territory to the furthest point of the  
16 annexed territory from such boundary is no more than twice the maximum  
17 width of the annexed territory.

18           I. A city or town shall not annex territory if as a result of such  
19 annexation unincorporated territory is completely surrounded by the  
20 annexing city or town.

21           J. Notwithstanding any provisions of this article to the contrary,  
22 any town THAT WAS incorporated prior to 1950 which, THAT had a population  
23 of less than two thousand persons by the 1970 census and which THAT is  
24 bordered on at least three sides by Indian lands may annex by ordinance  
25 territory owned by the state within the same county for a new townsite  
26 which is not contiguous to the existing boundaries of the town.

27           K. ~~The provisions of~~ Subsections H and I of this section shall not  
28 apply to territory which is surrounded by the same city or town or which  
29 is bordered by the same city or town on at least three sides.

30           L. A city or town annexing an area shall adopt zoning  
31 classifications which permit densities and uses no ~~greater~~ LESS than those  
32 permitted by the county immediately before annexation. Subsequent changes  
33 in zoning of the annexed territory shall be made according to existing  
34 procedures established by the city or town for the rezoning of land.

35           M. The annexation of territory within six miles of territory  
36 included in a pending incorporation petition filed with the county  
37 recorder pursuant to section 9-101.01, subsection C shall not cause an  
38 urbanized area to exist pursuant to section 9-101.01 which did not exist  
39 prior to the annexation.

40           N. As an alternative to the procedures established in this section,  
41 a county right-of-way or roadway with no taxable real property may be  
42 annexed to an adjacent city or town by mutual consent of the governing  
43 bodies of the county and city or town if the property annexed is adjacent  
44 to the annexing city or town for the entire length of the annexation and  
45 if the city or town and county each approve the proposed annexation as a

1 published agenda item at a regular public meeting of their governing  
2 bodies.

3       Sec. 5. Joint legislative study committee on reimbursement of  
4               court costs and attorney fees

5       A. The joint legislative study committee on the reimbursement of  
6 court costs and attorney fees is established consisting of the following  
7 members:

8       1. Three members of the house of representatives who are appointed  
9 by the speaker of the hosue of representatives and not more than two of  
10 whom represent the same political party. The speaker shall designate one  
11 of the members to cochair the committee.

12       2. Three members of the senate who are appointed by the president  
13 of the senate and not more more than two of whom represent the same  
14 political party. The president shall designate one of the members to  
15 chochair the committee.

16       3. One member of the judiciary who is appointed by the chief  
17 justice of the supreme court.

18       B. The committee shall:

19       1. Study the consolidation and simplification of all state statutes  
20 relating to the reimbursement of parties for attorney fees and other costs  
21 associated with a court action, including the reimbursements allowed in  
22 this act.

23       2. By December 1, 2001, recommend statutory changes regarding the  
24 expansion of citizens' rights to recover costs, including attorney fees,  
25 incurred as a result of a court action.

26       Sec. 6. Delayed repeal

27       Section 5 of this act, relating to the joint legislative study  
28 committee on reimbursement of court costs and attorney fees, is repealed  
29 from and after December 31, 2001.

30