

# **ROCKY MOUNTAIN LAND USE INSTITUTE**

## **RECENT LAND USE DECISIONS IN THE ROCKY MOUNTAIN WEST**

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## ARIZONA CASES

**Emmett McLoughlin Realty, Inc. v. Pima County, 212 Ariz. 351, 132 P.3d 290 (Ariz. App. 2006).**

Plaintiff sued Pima County, requesting that a rezoning decision be declared void. The rezoning was initiated during a Pima County Board of Supervisors meeting, during which a group presented a proposal to rezone Plaintiff's property. The Board did not give Plaintiff notice of this meeting. Subsequently, a formal rezoning application was filed and the County followed all the notice and hearing requirements during the rezoning process. Plaintiff argued that since the proposal affected his property, the Board's failure to give notice did not comport with Arizona and County law and violated Plaintiff's constitutional right of due process. The Superior Court granted Pima County's motion for summary judgment. Plaintiff appealed. The Arizona Court of Appeals held that Arizona and County law did not require Pima County to give Plaintiff notice because the Board had no jurisdiction to authorize the rezoning during the meeting. Further, the law only requires notice in regards to a public hearing before the Planning and Zoning Commission. Similarly, the Court held that the County did not violate Plaintiff's constitutional right of due process because the Board did not engage in actual rezoning or de facto rezoning at the meeting. The Court thus affirmed the judgment in favor of Pima County.

**Center Bay Gardens, L.L.C. v. City of Tempe City Council, 2007 WL 273513 (Ariz. App. Div. 1 Jan. 30, 2007).**

Plaintiff owned an apartment complex directly across the street from the site of a proposed development. The Tempe City Council approved three zoning applications regarding the property. Plaintiff filed a special action complaint against Tempe challenging this approval. The Trial Court dismissed the suit for lack of standing, finding that Plaintiff did not claim a particular injury other than general economic or aesthetic losses. The Arizona Court of Appeals reversed, holding that because the development project is across the street, almost triples the existing density, doubles the existing mass, and removes previously required landscape setbacks, Plaintiff alleged a particularized injury satisfying the standing requirement.

**League of Arizona Cities and Towns v. Brewer, 213 Ariz. 557, 146 P.3d 58 (Ariz. 2006).**

Proposition 207, or the Private Property Rights Protection Act, seeks to limit the use of eminent domain and to require compensation for regulatory takings. Plaintiffs sued to enjoin the Arizona Secretary of State from placing Proposition 207 on the 2006 general election ballot. Plaintiffs argued that the initiative violated the Arizona Constitution's Revenue Source Rule, which requires an initiative that proposes a mandatory expenditure of state revenues to identify an independent source of revenue that will cover the immediate and future costs of the initiative. The Superior Court dismissed Plaintiff's challenge, holding that although Proposition 207 would violate the Revenue Source Rule, such violations cannot be reviewed before a proposition is enacted into law. On appeal, the Arizona Supreme Court affirmed the Superior Court's ruling that pre-election review of the initiative by the courts is improper. However, because the Proposition does not require a "mandatory

expenditure of state revenues,” the trigger of the Revenue Source Rule, the Court vacated the Superior Court’s ruling that Proposition 207 violated the Revenue Source Rule.

Voters passed Proposition 207 in the November 2006 election. The text of the Proposition is attached.

**Mutschler v. City of Phoenix, 212 Ariz. 160, 129 P.3d 71 (Ariz. App. 2006).**

Plaintiffs, who owned a swingers club, sued the City of Phoenix after the City shut the club down pursuant to an ordinance declaring such clubs a per se public nuisance. Plaintiff claimed that the City’s action constituted a regulatory taking by denying them the economically viable use of their property. The Superior Court entered summary judgment for the City. The Arizona Court of Appeals affirmed. The Court held that the club owners were not entitled to compensation because the club included live sex acts, meaning that the club could have been abated at common law as a public health hazard by threatening the spread of sexually transmitted diseases. The club thus constituted the type of public nuisance for which compensation is not required under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

**Salib v. City of Mesa, 212 Ariz. 446, 133 P.3d 756 (Ariz. App. 2006).**

Plaintiff, who owns a Winchell’s Donut House, filed an action against the City of Mesa after a Mesa official ordered Plaintiff to remove his window signs pursuant to a City sign code. The code restricted signs in business windows to less than 30% coverage of the window. Plaintiff argued that the sign restriction violated his free speech rights under the U.S. and Arizona Constitutions. The Superior Court granted summary judgment to the City and the owner appealed. The Supreme Court of Arizona affirmed, holding that the restriction was a constitutionally permissible regulation because it advanced a significant government interest in aesthetics and was narrowly tailored to directly advance this interest.

## MONTANA CASES

**North 93 Neighbors v. Board of County Commissioners of Flathead County, 332 Mont. 327, 137 P.3d 557 (Mont. 2006).**

Plaintiff challenged the Flathead County Board of Commissioner’s decision to amend various planning documents to facilitate the development of a large shopping mall. After the District Court granted summary judgment to the County, Plaintiff appealed. The issues on appeal involved (1) whether the Board developed a sufficient factual record to support its decisions to amend the County’s growth policy and zoning regulations with independently adopted findings of fact; (2) whether the zoning amendment was consistent with the County growth policy; and (3) whether the Board’s approval of a zoning amendment was illegal spot zoning. The Supreme Court of Montana affirmed the District Court’s ruling in part and reversed in part. The Court held that the Board’s sole reliance on the Planning Office’s report regarding amendment to County growth policy was unreasonable. The Planning Office wrote the report before the Board received 4,400 public comments and the Board had an obligation to consider these comments and incorporate them into its decision making process. The

Court thus reversed and remanded the District Court's granting of summary judgment for the limited purpose of determining whether the Board satisfied this obligation by requiring the Board to determine what issues, if any, were raised through the public comment process that were not addressed by the Planning Officer's report. Regarding the second issue, the Court affirmed the District Court, holding that the zoning amendment substantially complied with the County growth policy. The Court also affirmed the District Court's ruling regarding the third issue, finding that the Board's approval of a zoning amendment facilitating the mall's development was not spot zoning because the surrounding properties were largely commercial. Further, the amendment comported with the County growth policy, for which the Court held that only substantial compliance is required.

**Citizen Advocates for a Livable Missoula, Inc. v. City Council and Mayor of the City of Missoula, 331 Mont. 269, 130 P.3d 1259 (Mont. 2006).**

Plaintiffs sued the Missoula City Council and Mayor, alleging that a rezoning ordinance, which would allow for the construction of a Safeway grocery store, violated the County growth policy and neighborhood plan. Plaintiffs argued that the ordinance does not substantially comply with the neighborhood plan because (1) it does not comport with the plan's goal to maintain a sense of history and protect key landmarks; (2) it will increase traffic congestion, creating a pedestrian unfriendly environment; and (3) the scale of the proposed "big box" style Safeway facility is inconsistent with the residential and small business character of the neighborhood. The City Council argued that the proposal fulfills a neighborhood plan to expand and enhance existing businesses. The Council further argued that the Planning Office attached seventeen conditions to the proposal specifically addressing public concerns about the project and to insure that the proposal complies with the neighborhood plan. The District Court granted summary judgment to the City. On appeal, the Supreme Court of Montana affirmed, holding that the rezoning ordinance substantially complied with the growth policy.

# PROPOSITION 207

## OFFICIAL TITLE

### AN INITIATIVE MEASURE

AMENDING TITLE 12, CHAPTER 8, ARIZONA REVISED STATUTES, BY ADDING ARTICLE 2.1;  
RELATING TO THE PRIVATE PROPERTY RIGHTS PROTECTION ACT.

### TEXT OF PROPOSED AMENDMENT

Be it enacted by the People of the State of Arizona:

#### Section 1. Short title

This act may be cited as the "Private Property Rights Protection Act".

#### Sec. 2. Findings and declarations

A. The people of Arizona find and declare:

1. Article 2, section 17 of our State Constitution declares in no uncertain terms that private property shall not be taken for private use.

2. Our Constitution further provides that no person shall be deprived of property without due process of law.

3. Finally, our Constitution does not permit property to be taken or damaged without just compensation having first been made.

4. Notwithstanding these clear constitutional rights, the state and municipal governments of Arizona consistently encroach on the rights of private citizens to own and use their property, requiring the people of this State to seek redress in our state and federal courts which have not always adequately protected private property rights as demanded by the State and Federal Constitutions. For example:

(a) A recent United States Supreme Court ruling, *Kelo v. City of New London*, allowed a city to exercise its power of eminent domain to take a citizen's home for the purpose of transferring control of the land to a private commercial developer.

(b) The City of Mesa used eminent domain to acquire and bulldoze homes for a redevelopment project that included a hotel and water park. After the developer's financing fell through the project was abandoned and the property left vacant.

(c) The City of Mesa filed condemnation actions against Randy Bailey, to take his family-owned brake shop, and Patrick Dennis, to take his auto-body shop, so that local business owners could relocate and expand a hardware store and an appliance store.

(d) The City of Tempe instituted an eminent domain action to condemn the home of Kenneth and Mary Ann Pillow in order to transfer their property to a private developer who planned to build upscale townhomes.

(e) The City of Chandler filed a condemnation action against a fast food restaurant in order to replace the fast-food restaurant with upscale dining and retail uses.

(f) In the wake of the *Kelo* ruling, the City of Tempe recently sought to condemn property in an industrial park in order to make way for an enormous retail shopping mall.

(g) The City of Tempe told the owners of an Apache Boulevard bowling alley that the City intended to condemn their property and specifically instructed them not to make further improvements to the land. Heeding Tempe's advice, the owners made no further improvements and ultimately lost bowling league contracts and went out of business. The Arizona Court of Appeals refused the owners' request for just compensation.

(h) Courts have also allowed state and local governments to impose significant prohibitions and restrictions on the use of private property without compensating the owner for the economic loss of value to that property.

5. For home owners in designated slum or blighted areas, the compensation received when a primary residence is seized is not truly just as required by our state constitution.

6. Furthermore, even when property is taken for a valid public use, the judicial processes available to property owners to obtain just compensation are burdensome, costly and unfair.

B. Having made the above findings, the people of Arizona declare that all property rights are fundamental rights and that all people have inalienable rights including the right to acquire, possess, control and protect property. Therefore the citizens of the State of Arizona hereby adopt the Private Property Rights Protection Act to ensure that Arizona citizens do not lose their home or property or lose the value of their home or property without just compensation. Whenever state and local governments take or diminish the value of private property, it is the intent of this act that the owner will receive just compensation, either by negotiation or by an efficient and fair judicial process.

Sec. 3. Title 12, chapter 8, Arizona Revised Statutes, is amended by adding article 2.1, to read:

Article 2.1. PRIVATE PROPERTY RIGHTS PROTECTION ACT

12-1131. PROPERTY MAY BE TAKEN ONLY FOR PUBLIC USE CONSISTENT WITH THIS ARTICLE

EMINENT DOMAIN MAY BE EXERCISED ONLY IF THE USE OF EMINENT DOMAIN IS AUTHORIZED BY THIS STATE, WHETHER BY STATUTE OR OTHERWISE, AND FOR A PUBLIC USE AS DEFINED BY THIS ARTICLE.

12-1132. BURDEN OF PROOF

A. IN ALL EMINENT DOMAIN ACTIONS THE JUDICIARY SHALL COMPLY WITH THE STATE CONSTITUTION'S MANDATE THAT WHENEVER AN ATTEMPT IS MADE TO TAKE PRIVATE PROPERTY FOR A USE ALLEGED TO BE PUBLIC, THE QUESTION WHETHER THE CONTEMPLATED USE BE REALLY PUBLIC SHALL BE A JUDICIAL QUESTION, AND DETERMINED AS SUCH WITHOUT REGARD TO ANY LEGISLATIVE ASSERTION THAT THE USE IS PUBLIC.

B. IN ANY EMINENT DOMAIN ACTION FOR THE PURPOSE OF SLUM CLEARANCE AND REDEVELOPMENT, THIS STATE OR A POLITICAL SUBDIVISION OF THIS STATE SHALL ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THAT EACH PARCEL IS NECESSARY TO ELIMINATE A DIRECT THREAT TO PUBLIC HEALTH OR SAFETY CAUSED BY THE PROPERTY IN ITS CURRENT CONDITION, INCLUDING THE REMOVAL OF STRUCTURES THAT ARE BEYOND REPAIR OR UNFIT FOR HUMAN HABITATION OR USE, OR TO ACQUIRE ABANDONED PROPERTY AND THAT NO REASONABLE ALTERNATIVE TO CONDEMNATION EXISTS.

12-1133. JUST COMPENSATION: SLUM CLEARANCE AND REDEVELOPMENT

IN ANY EMINENT DOMAIN ACTION FOR THE PURPOSE OF SLUM CLEARANCE AND REDEVELOPMENT, IF PRIVATE PROPERTY CONSISTING OF AN INDIVIDUAL'S PRINCIPAL RESIDENCE IS TAKEN, THE OCCUPANTS SHALL BE PROVIDED A COMPARABLE REPLACEMENT DWELLING THAT IS DECENT, SAFE, AND SANITARY AS DEFINED IN THE STATE AND FEDERAL RELOCATION LAWS, SECTION 11-961 ET SEQ. AND 42 USC 4601 ET SEQ., AND THE REGULATIONS PROMULGATED THEREUNDER. AT THE OWNER'S ELECTION, IF MONETARY COMPENSATION IS DESIRED IN LIEU OF A REPLACEMENT DWELLING, THE AMOUNT OF JUST COMPENSATION THAT IS MADE AND DETERMINED FOR THAT TAKING SHALL NOT BE LESS THAN THE SUM OF MONEY THAT WOULD BE NECESSARY TO PURCHASE A COMPARABLE REPLACEMENT DWELLING THAT IS DECENT, SAFE, AND SANITARY AS DEFINED IN THE STATE AND FEDERAL RELOCATION LAWS AND REGULATIONS.

12-1134. DIMINUTION IN VALUE: JUST COMPENSATION

A. IF THE EXISTING RIGHTS TO USE, DIVIDE, SELL OR POSSESS PRIVATE REAL PROPERTY ARE REDUCED BY THE ENACTMENT OR APPLICABILITY OF ANY LAND USE LAW ENACTED AFTER THE DATE THE PROPERTY IS TRANSFERRED TO THE OWNER AND SUCH ACTION REDUCES THE FAIR MARKET VALUE OF THE PROPERTY THE OWNER IS ENTITLED TO JUST COMPENSATION FROM THIS STATE OR THE POLITICAL SUBDIVISION OF THIS STATE THAT ENACTED THE LAND USE LAW.

B. THIS SECTION DOES NOT APPLY TO LAND USE LAWS THAT:

1. LIMIT OR PROHIBIT A USE OR DIVISION OF REAL PROPERTY FOR THE PROTECTION OF THE PUBLIC'S HEALTH AND SAFETY, INCLUDING RULES AND REGULATIONS RELATING TO FIRE AND BUILDING CODES, HEALTH AND SANITATION, TRANSPORTATION OR TRAFFIC CONTROL, SOLID OR HAZARDOUS WASTE, AND POLLUTION CONTROL;
2. LIMIT OR PROHIBIT THE USE OR DIVISION OF REAL PROPERTY COMMONLY AND HISTORICALLY RECOGNIZED AS A PUBLIC NUISANCE UNDER COMMON LAW;
3. ARE REQUIRED BY FEDERAL LAW;
4. LIMIT OR PROHIBIT THE USE OR DIVISION OF A PROPERTY FOR THE PURPOSE OF HOUSING SEX OFFENDERS, SELLING ILLEGAL DRUGS, LIQUOR CONTROL, OR PORNOGRAPHY, OBSCENITY, NUDE OR TOPLESS DANCING, AND OTHER ADULT ORIENTED BUSINESSES IF THE LAND USE LAWS ARE CONSISTENT WITH THE CONSTITUTIONS OF THIS STATE AND THE UNITED STATES;
5. ESTABLISH LOCATIONS FOR UTILITY FACILITIES;
6. DO NOT DIRECTLY REGULATE AN OWNER'S LAND; OR
7. WERE ENACTED BEFORE THE EFFECTIVE DATE OF THIS SECTION.

C. THIS STATE OR THE POLITICAL SUBDIVISION OF THIS STATE THAT ENACTED THE LAND USE LAW HAS THE BURDEN OF DEMONSTRATING THAT THE LAND USE LAW IS EXEMPT PURSUANT TO SUBSECTION B.

D. THE OWNER SHALL NOT BE REQUIRED TO FIRST SUBMIT A LAND USE APPLICATION TO REMOVE, MODIFY, VARY OR OTHERWISE ALTER THE APPLICATION OF THE LAND USE LAW TO THE OWNER'S PROPERTY AS A PREREQUISITE TO DEMANDING OR RECEIVING JUST COMPENSATION PURSUANT TO THIS SECTION.

E. IF A LAND USE LAW CONTINUES TO APPLY TO PRIVATE REAL PROPERTY MORE THAN NINETY DAYS AFTER THE OWNER OF THE PROPERTY MAKES A WRITTEN DEMAND IN A SPECIFIC AMOUNT FOR JUST COMPENSATION TO THIS STATE OR THE POLITICAL SUBDIVISION OF THIS STATE THAT ENACTED THE LAND USE LAW, THE OWNER HAS A CAUSE OF ACTION FOR JUST COMPENSATION IN A COURT IN THE COUNTY IN WHICH THE PROPERTY IS LOCATED, UNLESS THIS STATE OR POLITICAL SUBDIVISION OF THIS STATE AND THE OWNER REACH AN AGREEMENT ON THE AMOUNT OF JUST COMPENSATION TO BE PAID, OR UNLESS THIS STATE OR POLITICAL SUBDIVISION OF THIS STATE AMENDS, REPEALS, OR ISSUES TO THE LANDOWNER A BINDING WAIVER OF ENFORCEMENT OF THE LAND USE LAW ON THE OWNER'S SPECIFIC PARCEL.

F. ANY DEMAND FOR LANDOWNER RELIEF OR ANY WAIVER THAT IS GRANTED IN LIEU OF COMPENSATION RUNS WITH THE LAND.

G. AN ACTION FOR JUST COMPENSATION BASED ON DIMINUTION IN VALUE MUST BE MADE OR FOREVER BARRED WITHIN THREE YEARS OF THE EFFECTIVE DATE OF THE LAND USE LAW, OR OF THE FIRST DATE THE REDUCTION OF THE EXISTING RIGHTS TO USE, DIVIDE, SELL OR POSSESS PROPERTY APPLIES TO THE OWNER'S PARCEL, WHICHEVER IS LATER.

H. THE REMEDY CREATED BY THIS SECTION IS IN ADDITION TO ANY OTHER REMEDY THAT IS PROVIDED BY THE LAWS AND CONSTITUTION OF THIS STATE OR THE UNITED STATES AND IS NOT INTENDED TO MODIFY OR REPLACE ANY OTHER REMEDY.

I. NOTHING IN THIS SECTION PROHIBITS THIS STATE OR ANY POLITICAL SUBDIVISION OF THIS STATE FROM REACHING AN AGREEMENT WITH A PRIVATE PROPERTY OWNER TO WAIVE A CLAIM FOR DIMINUTION IN VALUE REGARDING ANY PROPOSED ACTION BY THIS STATE OR A POLITICAL SUBDIVISION OF THIS STATE OR ACTION REQUESTED BY THE PROPERTY OWNER.

#### 12-1135. ATTORNEY FEES AND COSTS

A. A PROPERTY OWNER IS NOT LIABLE TO THIS STATE OR ANY POLITICAL SUBDIVISION OF THIS STATE FOR ATTORNEY FEES OR COSTS IN ANY EMINENT DOMAIN ACTION OR IN ANY ACTION FOR DIMINUTION IN VALUE.

B. A PROPERTY OWNER SHALL BE AWARDED REASONABLE ATTORNEY FEES, COSTS AND EXPENSES IN EVERY EMINENT DOMAIN ACTION IN WHICH THE TAKING IS FOUND TO BE NOT FOR A PUBLIC USE.

C. IN ANY EMINENT DOMAIN ACTION FOR THE PURPOSE OF SLUM CLEARANCE AND REDEVELOPMENT, A PROPERTY OWNER SHALL BE AWARDED REASONABLE ATTORNEY FEES IN EVERY CASE IN WHICH THE FINAL AMOUNT OFFERED BY THE MUNICIPALITY WAS LESS THAN THE AMOUNT ASCERTAINED BY A JURY OR THE COURT IF A JURY IS WAIVED BY THE PROPERTY OWNER.

D. A PREVAILING PLAINTIFF IN AN ACTION FOR JUST COMPENSATION THAT IS BASED ON DIMINUTION IN VALUE PURSUANT TO SECTION 12-1134 MAY BE AWARDED COSTS, EXPENSES AND REASONABLE ATTORNEY FEES.

#### 12-1136. DEFINITIONS

IN THIS ARTICLE, UNLESS THE CONTEXT OTHERWISE REQUIRES:

1. "FAIR MARKET VALUE" MEANS THE MOST LIKELY PRICE ESTIMATED IN TERMS OF MONEY WHICH THE LAND WOULD BRING IF EXPOSED FOR SALE IN THE OPEN MARKET, WITH REASONABLE TIME ALLOWED IN WHICH TO FIND A PURCHASER, BUYING WITH KNOWLEDGE OF ALL THE USES AND PURPOSES TO WHICH IT IS ADAPTED AND FOR WHICH IT IS CAPABLE.

2. "JUST COMPENSATION" FOR PURPOSES OF AN ACTION FOR DIMINUTION IN VALUE MEANS THE SUM OF MONEY THAT IS EQUAL TO THE REDUCTION IN FAIR MARKET VALUE OF THE PROPERTY RESULTING FROM THE ENACTMENT OF THE LAND USE LAW AS OF THE DATE OF ENACTMENT OF THE LAND USE LAW.

3. "LAND USE LAW" MEANS ANY STATUTE, RULE, ORDINANCE, RESOLUTION OR LAW ENACTED BY THIS STATE OR A POLITICAL SUBDIVISION OF THIS STATE THAT REGULATES THE USE OR DIVISION OF LAND OR ANY INTEREST IN LAND OR THAT REGULATES ACCEPTED FARMING OR FORESTRY PRACTICES.

4. "OWNER" MEANS THE HOLDER OF FEE TITLE TO THE SUBJECT REAL PROPERTY.

5. "PUBLIC USE":

(a) MEANS ANY OF THE FOLLOWING:

(i) THE POSSESSION, OCCUPATION, AND ENJOYMENT OF THE LAND BY THE GENERAL PUBLIC, OR BY PUBLIC AGENCIES;

(ii) THE USE OF LAND FOR THE CREATION OR FUNCTIONING OF UTILITIES;

(iii) THE ACQUISITION OF PROPERTY TO ELIMINATE A DIRECT THREAT TO PUBLIC HEALTH OR SAFETY CAUSED BY THE PROPERTY IN ITS CURRENT CONDITION, INCLUDING THE REMOVAL OF A STRUCTURE THAT IS BEYOND REPAIR OR UNFIT FOR HUMAN HABITATION OR USE; OR

(iv) THE ACQUISITION OF ABANDONED PROPERTY.

(b) DOES NOT INCLUDE THE PUBLIC BENEFITS OF ECONOMIC DEVELOPMENT, INCLUDING AN INCREASE IN TAX BASE, TAX REVENUES, EMPLOYMENT OR GENERAL ECONOMIC HEALTH.

6. "TAKEN" AND "TAKING" MEAN THE TRANSFER OF OWNERSHIP OR USE FROM A PRIVATE PROPERTY OWNER TO THIS STATE OR A POLITICAL SUBDIVISION OF THIS STATE OR TO ANY PERSON OTHER THAN THIS STATE OR A POLITICAL SUBDIVISION OF THIS STATE.

12-1137. APPLICABILITY

IF A CONFLICT BETWEEN THIS ARTICLE AND ANY OTHER LAW ARISES, THIS ARTICLE CONTROLS.

12-1138. SEVERABILITY

IF ANY PROVISION OF THIS ACT OR ITS APPLICATION TO ANY PERSON OR CIRCUMSTANCE IS HELD INVALID THAT INVALIDITY DOES NOT AFFECT OTHER PROVISIONS OR APPLICATIONS OF THE ACT THAT CAN BE GIVEN EFFECT WITHOUT THE INVALID PROVISION OR APPLICATION, AND TO THIS END THE PROVISIONS OF THIS ACT ARE SEVERABLE.