

Proposition 207: A Closer Look

The Battle over Private Property Rights

Introduction

Arizona voters, along with the electorates of three other states, will cast their votes on an important property rights initiative this November. Generically referred to as Kelo-Plus, the initiatives combine restrictions on the government's ability to take private property—a reform effort prompted by the 2005 U.S. Supreme Court ruling in *Kelo v. New London*¹—with new laws requiring the government to compensate owners for land use regulations that reduce their property values. These policy issues, known as **eminent domain** and **regulatory takings**, are addressed together in four states, though several others will consider eminent domain alone. Just one state will consider regulatory takings only.²

Many Arizonans are aware of the government's ability to take private property for certain purposes due to high profile eminent domain cases like the 2003 Bailey's Brake Service case in Mesa. Perhaps less understood are the government's so-called regulatory takings, where ownership of the property does not change, but what can be done with the land is restricted in accordance with a broader municipal plan. This brief takes a closer look at the proposed statutory changes and the legal and legislative history of both policy issues to help voters better understand how Proposition 207 could affect them and their communities.³

Eminent Domain

Eminent domain is the power of the federal and state governments, through their respective constitutions, to take private property for a public use provided they justly compensate the owner. In most state constitutions, this power is

"...nor shall private property be taken for public use, without just compensation."

Fifth Amendment, U.S. Constitution

further delegated to local governments. While most of us will never have our home or business taken for the good of the community, we are all, nonetheless, subject to eminent domain authority. Roads, telephone lines, and parks are some traditional uses of property acquired with eminent domain. Other uses, broadly known among the states as redevelopment of slum and blighted areas, are more controversial and largely at issue in Proposition 207.

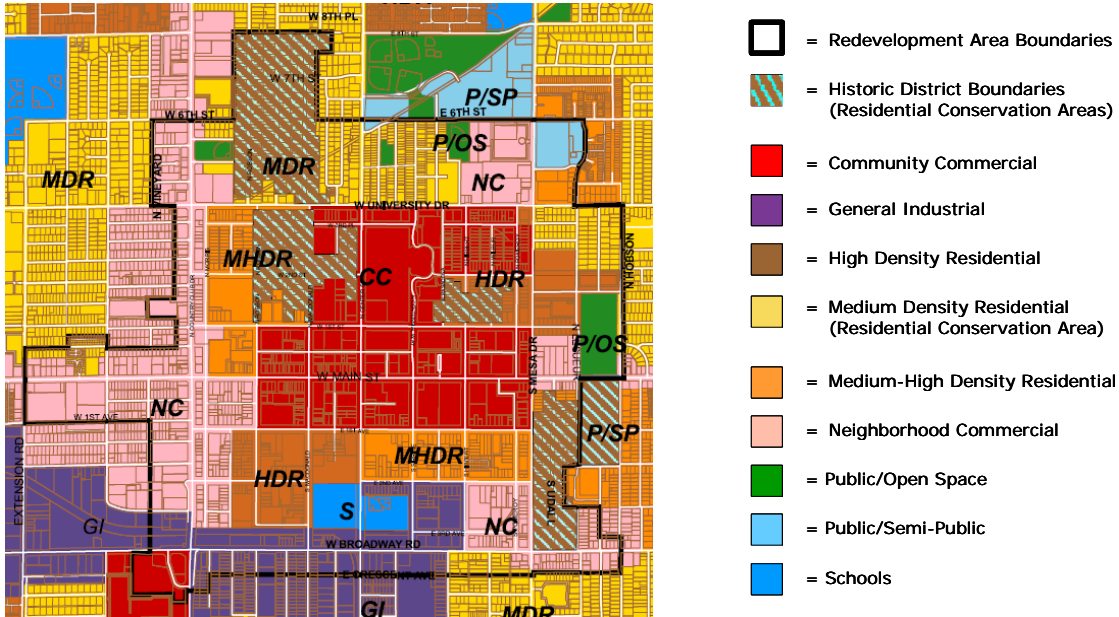
Issue—Proponents of Proposition 207 claim that local governments are abusing the power of eminent domain, most notably by taking private property for private development. They argue that new laws are necessary to prevent the Arizona or U.S. Supreme Court from interpreting the state’s constitution to allow the use of eminent domain for economic development purposes, as happened in *Kelo v. New London*. Moreover, property owners should not have to go to court to protect their constitutional rights. Advocates of the proposition say the broad slum and blight definitions and the ability to take non-slum/blighted property in a larger redevelopment project make every property owner vulnerable to an eminent domain action, while at the same time court costs prevent owners from challenging the public purpose under which their property was taken.

Opponents are largely unconcerned with Proposition 207’s changes to court cost provisions, but claim the public use definitions and property-by-property blight justification inappropriately restrict a city’s ability to deal with slum clearance and revitalization. The courts would be unable to balance such public benefits with private ones, as was done in *Bailey’s* (see Page 5). In fact, opponents say, the *Bailey’s* case proves that current law successfully protects property rights.

Opponents are also concerned that under Proposition 207 one owner could bring an entire project to a halt with his or her price demand. The increased costs of building around particular non-blighted properties, or alternately justifying each property in court, will prevent cities from realizing sustainable growth goals. For example, they will be less able to provide affordable housing by passing on the savings from the city’s role in acquiring large tracts of land. Attracting commercial development to rejuvenate blighted downtown areas, instead of building on the less expensive perimeter of the city, will also be hindered.

Current law—Under Arizona statutes, eminent domain can be used to take private property from an unwilling seller for traditional public purposes, to create affordable housing, to clear and redevelop slum or blighted areas, and “...all other public uses authorized by the legislature.”⁴ Prior to exercising eminent domain power, a municipality must obtain an appraisal and make a written offer to buy the property.⁵ Typically, a local government then files a lawsuit and requests that the superior court grant “immediate possession” of the property so that a project is not delayed during litigation over the price.⁶ It is nearly always granted for uses previously established as public (such as highways, schools, or utilities) and the owner usually has one to six months to vacate the property, depending on the land’s current use. Both state and federal laws govern the relocation benefits necessary for an owner to purchase a comparable home or business.⁷ If compensation cannot be agreed upon, a jury reviews evidence presented by both parties to decide the most probable price the property would bring if sold on the open market.⁸ The court can charge the cost of this trial to the government, the property owner, or both parties, at its discretion.⁹

Proposed Land Uses of Mesa's Downtown Redevelopment Area



Source: City of Mesa, Town Center Redevelopment Plan, created 1999, http://www.cityofmesa.org/redevlmt/pdf/REDEVPLAN_fullcopy_with_exhibits.pdf.

When eminent domain is used for slum clearance and redevelopment in Arizona, several more steps must be taken. For example, two-thirds of the governing body must agree that a slum or blighted area exists and that redevelopment is necessary in the interest of the public health, safety, morals, or welfare of the residents; two-thirds must approve a redevelopment plan and then afford all interested parties a reasonable opportunity to express their views at a public meeting; after a good faith effort to negotiate with property owners in the redevelopment area, two-thirds of the governing body must approve the use of eminent domain in a public meeting the owner has been invited to attend.¹⁰ Any property “deemed necessary for or in connection with a redevelopment project” can be acquired and transferred to “any redeveloper for residential,

recreational, commercial, industrial, or other uses or for public use in accordance with the redevelopment plan.”¹¹ The map above shows one of several elements required in any redevelopment plan.

“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.”

Article II, Section 17, Arizona Constitution

The Arizona Constitution specifically precludes the use of eminent domain for all but a few private purposes and requires that the judiciary

hear any challenge to an alleged public purpose.¹² In practice, a property owner must contest a public use quickly, before immediate possession is granted. The judge may hear the parties' arguments during the hearing for immediate possession or in a larger evidentiary hearing. If the court determines the property cannot be taken using eminent domain, the municipality must pay all court and litigation costs.¹³

Proposed language—Proposition 207 would prohibit the use of eminent domain for economic development and define public use to include only the following:

1. use by the general public or by public agencies,
2. use for the creation or functioning of utilities,
3. acquisition to eliminate a direct threat to public health or safety caused by the property, and
4. acquisition of abandoned property.

Proposition 207 prohibits government from taking private property for economic development projects.

The initiative requires the government to produce convincing evidence showing that each property taken for slum clearance and redevelopment is a direct threat to public health or safety, rather than needed “in connection with” a redevelopment project.

The Proposition also contains several clauses that reduce the individual or corporate property owner's financial burden in eminent domain cases. First, regardless of the outcome, a property owner contesting an eminent domain action will never have to pay the government's

court and litigation costs. Second, in a redevelopment case, the government must pay the property owner's costs if the government has prevailed, but had originally failed to offer compensation equal to the court's final determination. Third, when a property owner's primary residence is taken in an eminent domain action, the municipality must offer to locate and purchase a comparable home for the owner, though he or she can still opt for monetary compensation instead.

Findings—Use of eminent domain for a *public purpose* is a long-held judicial interpretation of the *public use* clause in the U.S. Constitution,¹⁴ but the involvement of private development companies in redevelopment projects has complicated the issue in Arizona and elsewhere by blurring the lines between a public and private use. As a result, the U.S. Supreme Court has been asked to clarify the constitutionality of redevelopment statutes on more than one occasion.¹⁵ Historically, the Arizona courts have come to similar conclusions as the federal court. For example, they have affirmed that a private party will often benefit from a project with a public purpose and that does not make the use unconstitutional.¹⁶ They have also taken a deferential approach to a city's judgment of its redevelopment needs, which means that non-blighted properties can be taken if the municipality determines they are “necessary” for the larger redevelopment project.¹⁷

That changed in 2003 when the Arizona Court of Appeals confronted the issue of whether economic development meets the public use requirement of the Arizona Constitution. In the *Bailey's Brake Service* case, the Court stated that each property in a designated slum or blighted area is afforded the “constitutionally required judicial determination that the property is being taken for a use that is ‘really public.’”¹⁸ By using a balancing test, the Court of Appeals found that

the anticipated public benefits of economic development did not substantially outweigh the private character of the end use of private commercial ownership and operation. Unlike the Connecticut Constitution and its application to the *Kelo* taking, the Arizona Constitution prohibited the City of Mesa from taking Bailey's Brake Service for a more profitable business. At the same time, the *Bailey* ruling affirmed, for the first time, that eminent domain could be used for economic development in certain circumstances.

In 2001, the City of Mesa began an eminent domain action against Bailey's Brake Service. As part of a larger downtown redevelopment plan, the city wanted to replace the brake shop with another private business. Randy Bailey sued, claiming that use of eminent domain to transfer property from one private owner to another for increased tax revenue was a violation of the Arizona Constitution. Initially, he lost in a lower court, but in 2003, the Court of Appeals reversed that decision and the *Bailey* case set a new standard for eminent domain use in the state.

During and since the *Bailey's* decision, the legislature has tightened restrictions, nearly annually, on local governments' use of eminent domain. Current law requires:

- multiple public notices about redevelopment projects,
- several council votes to authorize its use,
- guidelines for the courts when awarding costs, and
- a second appraisal if requested by a home owner.

The balancing test established in *Bailey's* was used in 2005 to prevent the taking of several properties to construct a mall in Tempe.¹⁹ Since then, there has been no contested use of eminent

domain for a redevelopment project, which may indicate that current laws are indeed sufficient. However, the new laws have not been tested in the courts and neither *Bailey's* nor the *Tempe* case was heard by the Arizona Supreme Court. Therefore, the courts could revert to prior interpretations of the Arizona Constitution that gave deference to the legislature's determination of the necessary actions and property boundaries for redevelopment.

Since *Kelo v. New London*, 26 states have enacted at least one new eminent domain regulation.²⁰ Most new laws prohibit its use for economic development purposes and some further limit the definition of public use. Georgia, Missouri, and Wisconsin required that blight be evaluated on a property-by-property basis.²¹ Last session, the Arizona Legislature passed a bill that, like Proposition 207, had all three provisions. Additionally, it restricted the definition of slum and blight, prohibited immediate possession in redevelopment cases, and revised other related laws.²² Governor Napolitano vetoed it explaining, "[w]hile I oppose the use of eminent domain power to benefit private economic interests, this bill goes too far in restricting a city's ability to deal with slum and gangs."²³

Eleven electorates, including Arizona's, will vote on eminent domain revisions this fall. Four of the eleven plus the state of Washington will address regulatory takings.

Regulatory Takings

A regulatory taking is an uncompensated restriction on the use of private property. Zoning ordinances are the most common property restrictions. To zone, a city segregates large areas of property and applies different rules to each geographic group. Designating an area for tall skyscrapers versus homes, for open space versus new development, or for historic preservation are just a few zoning examples.

Local governments often use these regulations to enhance public safety, conserve the natural environment, and maintain a uniform neighborhood character as the size and location of its population changes over time. If you own a business or home, your property is likely subject to several zoning restrictions. A new zoning or a rezoning can increase or decrease the value of land. Proposition 207 addresses “downzoning,” when a law reduces a property’s value.

Issue—Advocates of Proposition 207 claim that it is unfair and unconstitutional to make one property owner pay for a benefit that all enjoy, such as open spaces for conservation or minimum lot sizes for neighborhood aesthetics. They argue that when a person or business invests in land, with certain expectations of its use that have garnered a particular property value, government should not be allowed to change the rules for some alleged public purpose without paying. Supporters note that purposes in the true best interest of the community, like health and safety, are excluded from the compensation requirement so that government can still function in its appropriate capacities.

Opponents claim that Proposition 207 will either freeze land use at its 2006 purpose, or cost taxpayers countless dollars in compensation claims. Freezing land uses would harm the environment by stopping new animal, plant, and hillside protections. It would prevent residents from stopping new, nonconforming uses that hurt the character and often property values of the whole neighborhood. Another concern is that it would limit Arizonans’ ability to stop irresponsible development when new practices or new information about current practices prove unsustainable or costly to taxpayers in the long-run. Opponents are particularly concerned about development that risks water supplies, like subdivisions outside

Active Management Areas (AMAs) and wildcat developments.ⁱ

If local governments, instead, continue to enact new land use ordinances, opponents argue that the financial benefits of compensation claims would largely accrue to private business due to the various restrictions imposed on new development (described below). Further, opponents claim the Proposition makes frivolous lawsuits likely because the government bears the burden of proof and claims are allowed for land uses the owner never intended, but is nonetheless restricted from undertaking.

Current law—Arizona law does not require the state or any local government to compensate a property owner when a newly imposed land use law reduces the value of his or her property. It does require that the city or county post public notices in an area under consideration for a zoning change and allow those affected to express any concerns in a public hearing overseen by the city planning commission.²⁴ If the proposed change would increase or decrease the area that can be developed on the property (through height restrictions, setback distances, or open space requirements) by 10 percent or more, a notice of the hearing must be sent by mail to all property owners directly affected.²⁵ After the hearing, the planning commission will make a recommendation to the governing body that can then adopt the zoning amendment.²⁶ However, if the owners of 20 percent or more of the affected properties file a protest against the proposed amendment, three-fourths of the

ⁱ As part of the Groundwater Management Act, five areas in the central part of the state have been designated AMAs. Subdivisions in AMAs must have an assured water supply of 100 years before any homes are sold. Homes in subdivisions outside AMAs can be sold as long as the initial buyer is informed of “inadequate” water supplies. Water rules for AMAs and other land use laws also do not apply when a developer subdivides land into fewer than six parcels, known as wildcat development.

governing body must approve it with a vote to become law.²⁷

When a new zoning designation is approved, existing development is allowed to remain a legal, nonconforming property.²⁸ A land owner who wants to begin new construction and believes adhering to the zoning creates an undue hardship can request a variance (usually a temporary exemption) for the property²⁹ or a rezoning that would go through the process described above.³⁰ If it is not granted, the owner can sue the government for just compensation under the Fifth Amendment of the U.S. Constitution or Article 2, Section 17 of the Arizona Constitution.

Several regulatory takings lawsuits have been heard by the Arizona and federal courts and guidelines for takings compensation established. The most specific ruling declared that any land use regulation that deprives an owner of the whole economic value of his or her property must be justly compensated.³¹ When a regulation has not gone as far as to eliminate the land's full economic value, the Arizona courts have used the U.S. Supreme Court's system of weighing three factors to determine whether the taking is a compensable one:³²

- the economic impact of the government action,
- the extent to which the government action interfered with reasonable investment-based expectations, and
- the "character" of the government action.

Like most trials, court and litigation costs are awarded at the discretion of the court or agreed upon by the parties if the lawsuit is settled out of court.

While zoning is a constitutional power of local governments affirmed by the courts,³³ Arizona law limits a county's review of developments

smaller than a subdivision, during the initial division of land. These "wildcat" developments have fewer than six lots and must meet only minimum acreage and dimension requirements and provide legal access. They must reserve land for utilities, for example, but do not have to prove that there is a long-term water supply; they must provide street access to the properties, but those roads do not have to be wide enough to be traversed by an emergency vehicle.³⁴

Proposed language—Proposition 207 requires the government to compensate an individual or corporation when a land use law it enacts reduces the actual or potential value of the owner's property. The provision applies to any new or revised land regulation that "directly regulate[s]" an owner's land, like a new zoning ordinance or a modification of a government agency's rules. It excludes land use laws enacted for the following five purposes:

1. to protect the public's health and safety,
2. to reduce public nuisances historically recognized under common law,
3. to limit pornography, liquor sales, and other adult business and to prohibit illegal drug sales,
4. to establish locations for utility facilities, and
5. to fulfill a federal requirement.

After the property owner submits a written claim with the amount owed, the government or agency can contest the claim in court by demonstrating that the land use law is exempt from the compensation requirement. If the government prevails, the court decides which party pays the property owner's attorney and court fees. As with eminent domain, win or lose, the owner would not be responsible for the government's costs. Rather than paying compensation, the municipality or government

agency can waive the restriction for that property, an exemption that would be passed down to subsequent owners.

Proposition 207 limits the government's ability to change an area's current zoning.

Findings—Land use laws have evolved with urban planning theories, and in most cities, today's system is considerably more complex than the three zoning districts, five height districts, and three area classes of the original New York ordinances.³⁵ Still, there has been little legislation addressing regulatory takings in Arizona, which makes the potential impact of Proposition 207 difficult to estimate. Most recently, legislation adopted in 1998 required counties to obtain the written consent of all affected property owners before downzoning an area.³⁶ That law was challenged in 2000 when Pima County rezoned an area from commercial to residential use without the consent of two business owners, and it was eventually repealed by the courts because it was unconstitutional to delegate such legislative authority to private individuals.³⁷ A 1992 law would have required state agencies to analyze the potential costs of, and alternatives to, any proposed regulation that would affect private property use, and submit the review to the governor and the legislature, but it was repealed by Arizona voters in a referendum.³⁸

In Oregon, the only state to have adopted a takings measure like Proposition 207, the impact is still being assessed. The measure was implemented nearly two years ago, but the claims process was put on hold for almost five months as its constitutionality was challenged in court. As of September 8th, 2006, more than 2,000 claims totaling over \$5 billion in compensation requests have been filed with the state.³⁹ Thus far, local governments have

avored waiving regulations and have allowed farmland to be developed, for example, instead of paying the compensation.⁴⁰ But no empirical data exists to explain the measure's impact on local government's current planning decisions. The comparison is complicated by the fact that Oregon's compensation requirement applies to new *and* old land use laws.

At the heart of the uncertainty around Proposition 207's impacts are questions about which government planning activities will truly be affected given the exemptions stated in the proposal. For example, a new water supply rule may be found by the courts to go beyond what is necessary to protect residents, or it may fall under the health and safety exemption. Zoning ordinances are technically meant to "conserve and promote the public health, safety, and general welfare," yet few think a traditional rezoning is likely to be exempt.⁴¹ Historic preservation should be exempt because that designation tends to increase, not decrease the value of property, but anomalies are hard to anticipate. For instance, could restrictions on adding a porch to a historic home decrease its resale value? Oregon landowners have prevailed in the vast majority (91 percent) of cases that have reached a final decision.⁴² However, several specific land use laws were listed in that state's initiative, whereas in Proposition 207, a land use law is "any statute, rule, ordinance, resolution, or law."

Due to the initiative's cost allocation clause, we do know that local governments would be mostly responsible for the court costs of determining which actions are compensable. In large, older cities like Phoenix where over one hundred zoning changes could be requested in a year, the potential liability – whether in payouts or incompatible and archaic land uses – is formidable.⁴³ Urbanizing areas like Pinal County could also face considerable liability as laws are revised to manage unprecedented

growth. In the end, the effects of the initiative may depend on each municipality's tolerance for risk and the discretion of the courts.

Conclusion

Proposition 207 is important to understand because it proposes significant changes to current law that, like all legislation passed by the voters, cannot be repealed by the legislature or vetoed by the governor.⁴⁴ This brief illustrates the court and legislature's ongoing

struggle to establish eminent domain laws that balance individual rights and Arizona's long-term community needs. The regulatory takings issue is part of a similar struggle for balance. But the brief shows the state's relative inexperience with regulatory takings legislation and its reliance on adaptable land use rules to revitalize mature areas and preserve resources in areas of new growth. These factors make the response by local policymakers, and hence the Proposition's ultimate impact, hard to predict.

The Debate

Vote Yes on Proposition 207

By Carol Springer

The Town of New London, CT decided to take the homes of a number of people, including that of the Kelos, to turn the properties over to a developer who would provide the town with more in tax revenues. The Kelos objected. In June, 2005, in *Kelo v. New London*, the U.S. Supreme Court, in a 5-4 decision, determined that the taking of private property by eminent domain to turn it over to a private developer in the name of economic development qualifies as a "public use." In her dissenting opinion, Justice Sandra Day O'Connor wrote, "Today the Court abandons this long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner..." Also in a dissenting opinion, Justice Thomas wrote of the decision, "I cannot agree. If such 'economic development' takings are for a 'public use' then any taking is, and the Court has erased the public use clause from the Constitution."

Vote No on Proposition 207

By Grady Gammage, Jr.

Proposition 207 is a red herring designed to fool Arizona's voters into passing a dangerous measure that will undo zoning laws, freeze water management statutes, and stop all manner of normal and beneficial government regulation under the guise of "protecting homeowners."

In the wake of a controversial U.S. Supreme Court decision allowing the use of eminent domain by a town in Connecticut to take private property away from an owner for the purpose of generating economic benefit to the town, an eastern real estate developer named Howie Rich has funded initiatives all over the U.S. purporting to limit such actions. But the Arizona Supreme Court has already established far more restrictive rules for Arizona in the city of Mesa versus Bailey [*Bailey v. Myers*]. Mr. Bailey won that case, and Mesa was not allowed to take his business. The provisions of 207 dealing with eminent domain are largely meaningless.

Vote Yes – continued

The Court did, however, allow states to enact more stringent laws. The result of the *Kelo* case has been a national grassroots effort to overturn the *Kelo* decision. In only one year, twenty-six states enacted eminent domain legislation and eleven states prepared ballot propositions that qualified for a vote this year, including the Proposition 207 initiative in Arizona.

Proposition 207 addresses two “takings” issues. First, it prohibits governments from taking private property for private use. Second, it addresses the issue of regulatory takings by prohibiting governments from enacting any land use law that would reduce the value of a property without just compensation. Because governments must, on occasion, regulate land, there are a number of exemptions to the regulatory takings clause in Proposition 207. Among these are the protection of the public’s health and safety, transportation and utilities, anything required by Federal law, and the control of sex-orientated businesses or liquor and illegal drugs. Furthermore, this shall not apply to anyone not directly regulated by the land use law.

Unfortunately, governments have increasingly abused the mighty power of eminent domain. Individual property owners, as a rule, do not have the financial resources to fight the “deep pockets” power of government. Most, normally acquiesce to the government and simply “sell on demand.” Proposition 207 will put governments on notice that actions in eminent domain cases and in the enactment of land use laws must be justifiable and defensible.

Opponents of Proposition 207 claim it will “tie the hands” of government and create unnecessary lawsuits. The primary role of government, according to the constitutions of

Vote No – continued

Buried deep in 207 is the real goal—to require payments to property owners for all effects of land use regulations. This would radically alter rules in effect since before Arizona became a state. Under existing law, planning, zoning, city ordinances, and state statutes sometimes limit, or burden, property rights (like prohibiting you from starting a restaurant in your house) and sometimes benefit them (like restricting your neighbor from putting in a convenience market and devaluing your home). Proposition 207 would end that practice—new statutes and ordinances could never add to existing regulations on property unless the government pays. The recently enacted Growing Smarter legislation would be largely undone; zoning regulations could never be changed; the Groundwater Management Act could not be amended; no regulation of wildcat subdivisions would ever be allowed.

If you think cities should use zoning powers to protect military airbases, limit density, control “big box” retail, or make development conform to a general plan, then you should vote NO on 207, for it will undermine all those efforts. Should we try to limit development on hillsides, in washes or other sensitive areas? Most Arizonans think so, but if 207 passes, those efforts will end.

A similar initiative, called Measure 37, was passed in Oregon, and nearly \$5,500,000,000 in claims have been filed against the state. Proposition 207 has some exceptions Oregon’s measure didn’t have, but make no mistake—it will cost us hundreds of millions of dollars, lead to endless litigation, and stop dozens of potentially important pieces of local regulation. Maybe the negative impact is only one billion, but that money will come from new taxes. Arizona isn’t Oregon, a state where growth

Vote Yes – continued

the United States and the State of Arizona, is the protection of the lives and property of its citizens. Therefore, it should never be construed as a burden to require governments to protect the property rights of every individual home or business owner.

Vote No – continued

management has often run over private property owners. Nor is it Connecticut, where the Town of New London condemned a house to make way for a factory. Arizona has done a good job of balancing private property rights with the need to protect the environment and regulate development. Proposition 207 is an effort by outsiders to undo that balance. Arizonans shouldn't be fooled. Arizonans should vote NO.

Rebuttals

Rebuttal to Vote No

Examine carefully each of the opposition's arguments and you will find one common theme, the belief that government should be able to take some or all of the value of your property WITHOUT PAYING FOR IT.

Government's most powerful tool is the power of zoning. Governments zone property based on the "highest and best use" of a given property. Once granted, zoning becomes a property right with the owner's ability to develop the property under the applicable zoning ordinance. One practical effect of zoning is to create differing monetary land values. An example is that commercial zoning generally creates more property value than does residential zoning. At the heart of the debate about the regulatory takings clause in Proposition 207 is if governments, after granting a particular zoning, can change that zoning in a way that decreases the value of the property without paying the property owner just compensation. When government enacts land use laws to the detriment of the property value, the question becomes, is this a "taking"? Unquestionably, the answer should be yes!

Rebuttal to Vote Yes

Supervisor Springer and I agree that eminent domain—the power of government to actually dispossess an owner of his property—can be, and has been, abused. We also agree that Justice O'Connor, in her *Kelo* dissent, got it right. But Proposition 207 goes far beyond eminent domain.

In 1922, another great Supreme Court Justice, Oliver Wendell Holmes, observed: "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Holmes was restating the essence of the social compact. In an orderly society, each individual must surrender some measure of rights – he is *burdened* by those limits, but *benefited* by limitations on others. It all works out, Holmes said, because an *average reciprocity of advantage* exists in the incidence of burdens and benefits. *I don't get to do whatever I want with my land, but neither do you.* Proposition 207 represents a sweeping repudiation of this principle, and says that if government adopts regulations that *to any degree* diminish the value of private property, it must

Rebuttal to Vote No – continued


If so, should that devaluation be compensable? Again, the answer must be yes! Proposition 207 is prospective only and therefore does not apply at all to any current land use law, contrary to the opposition’s allegations. Governments derive their powers from those being governed. When governments abuse those powers, it is up to the people to correct the abuse. Proposition 207 gives voters the opportunity to protect property rights with a **YES** vote on Proposition 207.

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Rebuttal to Vote Yes – continued

compensate. Never mind that other regulations may increase the value of the same property, or that regulations on other property benefit this one. Holmes’ famous standard is repealed; the average reciprocity of advantage matters no longer; as to property rights, the social compact doesn’t apply – payment is required to anyone who is burdened. Pass 207 and we may arrive at a place where “government can hardly go on.”

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Endnotes:

- ¹ *Kelo v. City of New London*, 125 U.S. 2655 (2005).
- ² American Planning Association. Eminent Domain Legislation Across America <http://www.planning.org/legislation/eminentdomain> and Regulatory Takings Ballot Measures Across America <http://www.planning.org/legislation/measure37/>, (accessed September 12, 2006). Note that in late September, the Nevada courts rejected the regulatory takings portion of that state’s initiative.
- ³ The full text of Proposition 207 can be found at <http://www.hopeforarizona.com>.
- ⁴ A.R.S. § (Arizona Revised Statutes Section) 12-1111, §36-1407, and §36-1478 respectively.
- ⁵ A.R.S. §12-1116(A).
- ⁶ A.R.S. §12-1116(E).
- ⁷ A.R.S. §11-963 to §11-965 and Code of Federal Regulations, Title 49, Part 24.
- ⁸ A.R.S. §12-1122(C).
- ⁹ A.R.S. §12-1128(A).
- ¹⁰ A.R.S. §36-1473, §36-1479, and §36-1478 respectively.
- ¹¹ A.R.S. §36-1480.
- ¹² Exceptions to private uses of private property are, “private ways of necessity and for drains, flumes or ditches, on or across lands of others for mining, agricultural, domestic, or sanitary purposes.” The Arizona Constitution, Article 2, Section 17.
- ¹³ A.R.S. §12-1129.

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- ¹⁴ In U.S. Supreme Court's *Kelo v. New London* decision, Justice Stevens refers to this long held interpretation, citing *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896), and explains that "[n]ot only was the 'use by the public' test difficult to administer,....it proved to be impractical given the diverse and always evolving needs of society."
- ¹⁵ See *Burman v. Parker*, 348 U.S. 26 (1954), *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), and *Kelo v. City of New London*, 125 U.S. 2655 (2005).
- ¹⁶ *City of Phoenix v. Superior Court*, 137 Ariz. 409 (1983).
- ¹⁷ In *City of Phoenix v. Superior Court*, as in federal cases, the Court reasoned that while the question of a legitimate public purpose is a judiciary one, determining which properties are needed to eliminate the problem is a public policy decision, involving knowledge of social and economic conditions gained from talking to citizens, viewing the area, and other processes unavailable to the courts.
- ¹⁸ *Bailey v. Myers*, 206 Ariz. 224 (2003).
- ¹⁹ *City of Tempe v. Valentine et al.*, (2005).
- ²⁰ National Conference of State Legislators. 2006 State Legislation <http://www.ncsl.org/programs/natres/emindomainleg06.htm> and 2005 State Legislation <http://www.ncsl.org/programs/natres/post-keloleg.htm>, (accessed September 12, 2006).
- ²¹ American Planning Association. Eminent Domain Legislation across America. <http://www.planning.org/legislation/eminentdomain>, (accessed September 12, 2006).
- ²² House Bill 2675, Forty-seventh Legislature, Second Regular Session. (Ariz. 2006).
- ²³ Arizona State Legislature. Governor's Letters. <http://www.azleg.state.az.us/govlettr/47leg/2R/HB2675.pdf>, (accessed September 12, 2006).
- ²⁴ A.R.S. §9-462.01-04 and §11-829.
- ²⁵ A.R.S. §9-462.04(A).
- ²⁶ A.R.S. §9-462.04(C). Subsection G also states that the governing body of the municipality shall perform the hearing duties in jurisdictions that do not have a planning commission or hearing officer.
- ²⁷ A.R.S. §9-462.04(H).
- ²⁸ A.R.S. §9-462.02(A).
- ²⁹ A.R.S. §9-462.06 and §11-807.
- ³⁰ A.R.S. §9-462.04 and §11-829. Conversely, these statutes also allow a property owner to request that their neighborhood be downzoned. Dedications and exactions imposed by the county can also be appealed through a process described in §11-810.
- ³¹ *Ranch 57 v. City of Yuma*, 152 Ariz. 218 (1986) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).
- ³² *Circle K Corp. v. City of Mesa*, 166 Ariz. 464 (1990) and *Penn Central Transportation Co. v. City of New York* 438 U.S. 104 (1978).
- ³³ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) and *Transamerica Title Ins. Co. v. City of Tucson*, 157 Ariz. 346 (1988).
- ³⁴ Wildcat development requirements are found in A.R.S. §11-809. Subdivision regulations are found in §11-806.01.
- ³⁵ Toll, Seymour I. (1969). *Zoned American*. New York: Grossman Publishers.
- ³⁶ A.R.S. §11-829(G).
- ³⁷ *Emmett McLoughlin Realty, Inc. v. Pima County*, 132 Ariz. P.3d 290 (2006).
- ³⁸ Arizona Secretary of State. 1994 Election Information, Proposition 300. <http://www.azsos.gov/election/1994/Info/ElectionInformation.htm>, (accessed September 12, 2006).
- ³⁹ Oregon Department of Land Conservation and Development. Measure 37. http://www.oregon.gov/LCD/MEASURE37/summaries_of_claims.shtml, (accessed September 12, 2006).
- ⁴⁰ Egan, Timothy. 2006. Oregon's Property Rights Law Kicks In, Easing Rigid Rules. *The New York Times*, July 25.
- ⁴¹ A.R.S. §9-462.01.
- ⁴² The Institute of Portland Metropolitan Studies, Portland State University. Measure 37: Database Development and Analysis Project. http://www.pdx.edu/media/i/m/ims_m37pptAug06.pdf, (accessed September 12, 2006).
- ⁴³ As of September 2006, 144 rezoning requests were submitted to the City of Phoenix Planning Department this year.
- ⁴⁴ Arizona Constitution, Article IV, Part 1, Section 1.