

LAND USE REGULATION IN ARIZONA AFTER THE PRIVATE PROPERTY RIGHTS PROTECTION ACT

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In November 2006, Arizona voters passed Proposition 207, the Private Property Rights Protection Act, a law that requires the state or any county, city, or town to pay compensation when a land use regulation results in any decrease in a landowner's property value. Since the law's enactment, local governments in Arizona have proved reluctant to effect new land use regulations or make changes to those already existing. But while Proposition 207 is restrictive, it also contains several exceptions for situations where value-reducing regulations do not require compensation. This Note argues that local governments should make full use of these exceptions in order to continue to regulate land use when important and necessary.

INTRODUCTION

In November 2006, Arizona voters approved Proposition 207: The Private Property Rights Protection Act ("Prop 207").¹ This state-level ballot initiative was part of a larger regulatory takings movement motivated largely in response to the U.S. Supreme Court's 2005 decision in *Kelo v. City of New London*.² In that decision, the Court held that the use of eminent domain in furtherance of an economic development plan is a constitutionally valid "public purpose."³ Private property advocates viewed *Kelo* as an attack on private property rights via an expansion of the government's power of eminent domain.⁴ Though that case dealt exclusively with eminent domain—the right of the government to take private

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1. ARIZONA SEC'Y OF STATE, STATE OF ARIZONA OFFICIAL CANVASS 16 (2006) [hereinafter CANVASS], available at <http://www.azsos.gov/election/2006/General/Canvass2006GE.pdf>.

2. 545 U.S. 469 (2005); see Hannah Jacobs, Note, *Searching for Balance in the Aftermath of the 2006 Takings Initiatives*, 116 YALE L.J. 1518, 1520, 1522–27 (2007).

3. *Kelo*, 545 U.S. at 484.

4. See Patricia E. Salkin & Amy Lavine, *Measure 37 and a Spoonful of Kelo: A Recipe for Property Rights Activists at the Ballot Box*, 38 URB. LAW. 1065, 1069–70 (2006).

property in exchange for reasonable compensation and turn it over to public use⁵—property rights advocates used public sentiment against the ruling to support laws requiring compensation for partial regulatory takings: the idea that property owners should also be compensated for any reduction in property value resulting from land use regulation.

The partial regulatory takings movement did not originate in response to *Kelo*, however.⁶ A number of states enacted partial regulatory takings measures in the 1990s in response to the Supreme Court's decisions in *Lucas v. South Carolina Coastal Commission*⁷ and *Dolan v. City of Tigard*.⁸ About ten years later, in 2004, Oregon voters passed Measure 37, one of the most restrictive partial regulatory takings laws in the country.⁹ During the 2006 elections, partial regulatory takings laws failed in California, Washington, and Idaho, succeeding only in Arizona.¹⁰ Some states' partial regulatory takings laws, such as those in Arizona and Oregon, require compensation for any reduction in property value, while others, such as in Louisiana, Texas, and Mississippi (all three enacted in the mid-1990s), require compensation only after the reduction in property value exceeds some threshold percentage.¹¹

Arizona's Prop 207 narrows the definition of what constitutes a public purpose for eminent domain actions, and requires state and local governments to compensate landowners whenever land use regulations diminish property values.¹² As an alternative to paying compensation, the new law allows the governmental entity imposing a regulation to exempt a landowner from enforcement of the

5. *Id.*; BLACK'S LAW DICTIONARY 562 (8th ed. 2004) (defining "eminent domain").

6. Jacobs, *supra* note 2, at 1522 (noting a 1988 Executive Order requiring the federal government to assess regulatory takings).

7. 505 U.S. 1003, 1004 (1992) (finding that a South Carolina law preventing the construction of habitable structures on petitioner's parcels, rendering the property "valueless," constituted a taking under the Fifth and Fourteenth Amendments of the U.S. Constitution requiring just compensation).

8. 512 U.S. 374, 391 (1994) (holding that the Fifth Amendment to the U.S. Constitution requires an individualized determination and a "rough proportionality" between a required dedication and the impact of the proposed development).

9. Julia H. Miller & Heather Amrhein, *State Legislation Addressing Eminent Domain and Regulatory Takings*, SM056 A.L.I.—A.B.A. 791, 793 (2007).

10. *Id.*

11. ARIZ. REV. STAT. ANN. § 12-1134 (2006) (requiring compensation for any reduction in property value); LA. REV. STAT. §§ 3:3608–3:3612, 3:3621–3:3624 (1995) (20% reduction in property value required for compensation); MISS. CODE ANN. §§ 49-33-1 to 49-33-19 (West 1995) (requiring a 40% property value reduction required for compensation); OR. REV. STAT. § 195.305 (2007) (with some exceptions, requiring payment of just compensation, based on reduction in fair market value, when "a public entity enacts one or more land use regulations that restrict the residential use of private real property or a farming or forest practice and that reduce the fair market value of the property"); TEX. GOV'T CODE ANN. § 2007.001–2007.045 (Vernon 1995) (requiring a 25% reduction in property value for compensation); *see also* Miller & Amrhein, *supra* note 9, at 799–801 (listing and summarizing regulatory takings measures by state).

12. *See* ARIZ. REV. STAT. ANN. §§ 12-1131 to 12-1138 (2006).

value-reducing regulation.¹³ The proposition also allows governments and landowners to come to agreements whereby a landowner agrees to waive the right to sue for compensation regarding a particular regulation.¹⁴ Finally, Prop 207 also includes exceptions for land use regulations concerning public health and safety, public nuisances, and other subjects.¹⁵

For several reasons, scholars have criticized the more restrictive partial regulatory takings measures, such as Arizona's Prop 207, that call for compensation for any reduction in value.¹⁶ First, by requiring payments of compensation that most local governments simply cannot afford, these laws interfere with the ability of governments to regulate land use for the public good.¹⁷ Second, such laws tip the balance between private property and the public good in favor of private property to the public's detriment.¹⁸ Finally, partial regulatory takings laws take an oversimplified view of the relationship between property value and land use regulation.¹⁹ Public debate concerning the measures largely ignored these criticisms and instead focused on perceived abuses of government power.²⁰

13. § 12-1134(E).

14. § 12-1134(I).

15. § 12-1134(B)(1)-(7).

16. Some laws (like those in Louisiana, Mississippi, and Texas) mandate compensation only when the reduction in property value exceeds a specific threshold percentage. Miller & Amrhein, *supra* note 9, at 800-01; *see also* sources cited *supra* note 11.

17. Keith Aoki et al., *Trading Spaces: Measure 37, MacPherson v. Department of Administrative Services, and Transferable Development Rights as a Path out of Deadlock*, 20 J. ENVTL. L. & LITIG. 273, 296 (2005) (asserting that provisions allowing governments to waive regulation in lieu of paying compensation hurts other landowners by changing neighboring land use without public proceedings and public-welfare justifications); F. Patrick Hubbard, "Takings Reform" and the Process of State Legislative Change in the Context of a "National Movement," 50 S.C. L. REV. 93, 113 (1998) ("Expanding requirements for compensation increases the wealth of property owners at the expense of society and frees owners from social responsibility in the use of their property."); Jacobs, *supra* note 2, at 1521 (arguing that restrictive partial regulatory takings regimes prevent neighborhoods from influencing their own growth and character).

18. Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 ECOLOGY L.Q. 187, 230-31 (1997) (suggesting that private property rights have traditionally been limited by the public good); Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265, 287-93 (1996).

19. William K. Jaeger, *The Effect of Land-Use Regulations on Property Values*, 36 ENVTL. L. 105, 106-07, 109 (2006) (showing that empirical data suggests land use regulation raises property values and arguing that the fact that exemption from a regulation would raise a property's value does not mean that the regulation has reduced the property's value); Lynda J. Oswald, *Property Rights and the Police Power*, 37 AM. BUS. L.J. 527, 528 (2000) (arguing that using only economic impact "to determine whether compensation should be paid is a gross oversimplification of the regulatory takings analysis").

20. *See, e.g.*, JANICE K. BREWER, ARIZ. SEC'Y OF STATE, PUBLICITY PAMPHLET: BALLOT PROPS & JUDICIAL PERFORMANCE REVIEW 180-81 (2006), available at <http://www.azsos.gov/election/2006/Info/PubPamphlet/english/Guide.pdf>.

How will local governments in Arizona regulate land use after enactment of Prop 207, given scholars' concerns about restrictive partial regulatory takings regimes and Oregon's experience with its regulatory takings law?²¹ Will cities, towns, and counties curtail their regulation of land use for fear of compensation claims? Will they continue regulating as they have and simply waive enforcement of new regulations as to landowners who make Prop 207 claims for compensation? Or will they aggressively seek to regulate within the various exceptions of the new law?

In the first year after Prop 207's enactment, regulating authorities appeared hesitant to test the new law or property owners' willingness to demand compensation.²² It seems that, at least for the immediate future, Arizona's cities, towns, and counties are proceeding cautiously, trying to regulate without provoking property owners.

This Note argues that local governments should continue regulating land use for the public good while acting within Prop 207's exceptions for public nuisances, public health and safety, and provision for waivers. In a rapidly growing state like Arizona, governments must regulate land use to promote and encourage responsible growth and development.²³ Asking property owners to sign waivers limiting their right to compensation under the proposition, a tactic currently pursued by many cities including Mesa, Phoenix, and Scottsdale, will prove a necessary measure, but will not allow governments to regulate as freely as before Prop 207's enactment.²⁴ Prop 207's exceptions for regulations concerning actions traditionally considered public nuisances, and for regulations promoting public health and safety, should provide regulating authorities some room to continue regulating in at least a few significant ways. Local governments will be more limited, however, in their ability to regulate under the new law.

Part I of this Note describes Prop 207 and summarizes Arizona's regulatory takings law before the new provision took effect. Part II argues that the new law reduces the ability of local governments to respond to changing circumstances with sensible land use regulations. Part III discusses waivers of the right to sue under Prop 207 as one possible avenue for governments to enact necessary regulations. Finally, Part IV examines other ways local governments

21. Because Oregon's measure does not provide a source of funding for compensation, waiving regulations with regard to landowners who bring claims is the only viable option for most local governments. Aoki et al., *supra* note 17, at 295.

22. The City of Flagstaff is the only municipality thus far threatened with a Prop 207 suit. Howard Fischer, *Test Case*, ARIZ. DAILY SUN, Oct. 4, 2007, available at http://www.azdailysun.com/articles/2007/10/04/news/20071004_front%20page_10.txt.

23. Press Release, U.S. Census Bureau, Nevada Once Again Fastest-Growing State; Louisiana Rebounds (Dec. 27, 2007), available at <http://www.census.gov/Press-Release/www/releases/archives/population/011109.html> (noting that Arizona, the fastest-growing state from 2005–2006, is now second to Nevada).

24. Jahna Berry, *Eminent-Domain Law Protects Owners, but Critics Wonder at What Larger Cost*, ARIZ. REPUBLIC, July 5, 2007, at A1; Jason Massad, *Mesa Waivers Aim to Skirt Prop. 207*, E. VALLEY TRIB., Apr. 13, 2007; City of Scottsdale, *Waiver of Right to Make a Claim Under Prop 207*, <http://www.scottsdaleaz.gov/Assets/documents/bldgresources/Prop207Waiver.pdf> [hereinafter Prop 207 Waiver] (last visited Jan. 8, 2009).

must work within the new legislation when regulating land use, including paying compensation, exempting landowners, and regulating within the law's exceptions.

I. PROP 207 AND REGULATORY TAKINGS

A. Prop 207

In addition to restricting the power of eminent domain, Prop 207 drastically changed Arizona's regulatory takings regime. Prior to 2006, Arizona courts applied the U.S. Supreme Court's regulatory takings analysis when hearing federal and state claims.²⁵ Under the Court's *Dolan* standard, Arizona courts balanced the various factors at play in a land use regulation, including economic impact, the type of regulation, public policies, and relevant facts and circumstances, to determine whether a taking had occurred and compensation was owed.²⁶ After the passage of Prop 207, however, any value-reducing regulation constitutes a taking and governments must compensate landowners for any land use regulations that cause a reduction in property value, except for those falling within specific exceptions.

Prop 207 requires that:

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.²⁷

The statute excludes certain categories of land use regulations from mandatory compensation for reductions in value. These exclusions include: regulations relating to the protection of public health and safety, including "fire and building codes, health and sanitation, transportation or traffic control, solid or hazardous waste, and pollution control"; public nuisances "commonly and historically" recognized under the common law; regulations required by federal law; limitations or prohibitions on the use of property for housing sex offenders, selling narcotics, liquor control, pornography, obscenity, nude or topless dancing, adult-oriented business; and regulations establishing locations for utilities.²⁸ Regulations not directly regulating the owner's land or enacted before the law took effect also fall outside its scope.²⁹ Furthermore, the state or political subdivision

25. See *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997) (stating that *Dolan v. City of Tigard*, 512 U.S. 374 (1994), controls in applying Arizona law); *Wonders v. Pima County*, 89 P.3d 810, 814 (Ariz. Ct. App. 2004) (applying U.S. Supreme Court precedent to determine whether a regulatory taking had occurred).

26. John C. Keene, *When Does a Regulation "Go Too Far?"—The Supreme Court's Analytical Framework for Drawing the Line Between an Exercise of the Police Power and an Exercise of the Power of Eminent Domain*, 14 PENN ST. ENVTL. L. REV. 397, 419–20 (2006).

27. ARIZ. REV. STAT. ANN. § 12-1134(A) (2006).

28. § 12-1134(B)(1)–(5).

29. § 12-1134(B)(6)–(7).

that enacts a value-diminishing regulation has the burden of demonstrating that one of the above exceptions applies.³⁰

Prop 207 also mandates a specific procedure for adjudicating claims. When a property owner believes a land use regulation has diminished the property's value, the owner must make a written demand to the government that enacted the regulation, citing the specific amount requested for just compensation.³¹ The regulating authority then has several potential courses of action. It may: (1) reach an agreement with the landowner on the amount of just compensation it will pay; (2) amend the regulation to avoid a diminution in value; (3) repeal the regulation entirely; or (4) grant the landowner an exemption to enforcement of the regulation on the owner's parcel.³² If ninety days after the property owner first made a written claim for compensation the government has not agreed to pay compensation or waive enforcement of the law as to that owner, the landowner has a cause of action in superior court for just compensation.³³

Additionally, the statute authorizes a government to reach agreements with property owners "to waive a claim for diminution in value regarding any proposed action by [the government] or action requested by the property owner."³⁴ This provision, allowing contracts that waive a landowner's rights to bring a claim, may provide a significant avenue for local governments to continue with land use projects otherwise prohibited by the high costs of just compensation.

Finally, Prop 207 includes significant disincentives for governments to challenge landowners' diminution in value claims in court. One of the law's provisions states that a property owner is not liable for the government's attorneys' fees or costs in any action for diminution in value, presumably even for frivolous claims.³⁵ The statute authorizes the court to award costs, expenses, and reasonable attorneys' fees to successful plaintiffs.³⁶ This potential added cost provides another incentive for regulating governments either to pay the requested compensation or to waive enforcement of new regulations and chilling the passage of regulations that might result in Prop 207 claims for fear of responsibility for costs, expenses, and attorneys' fees.

30. § 12-1134(C).

31. § 12-1134(E). The statute of limitations on claims for diminution in value expires three years from the effective date of the land use law or its application to the property, whichever occurs later. § 12-1134(G).

32. § 12-1134(E).

33. *Id.*

34. § 12-1134(I).

35. § 12-1135(A). Arizona's rules of legal ethics, however, prohibit filing frivolous claims. ARIZ. R. PROF'L CONDUCT 3.1 (2008) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a good faith basis in law and fact for doing so that is not frivolous . . .").

36. § 12-1135(D).

B. Passing Prop 207 into Law

Prop 207 became law after receiving 955,533 votes in favor and 519,161 votes against on November 7, 2006.³⁷ That same year, voters in three other states considered partial regulatory takings referendums, but only Arizona's initiative won approval—voters in California, Idaho, and Washington rejected similar laws.³⁸

Though the law affects both eminent domain and regulatory takings, supporters mainly touted the bill as a remedy for alleged eminent domain “abuse” by local governments, focusing little attention on its regulatory takings aspect.³⁹ According to the proposition's text, Arizona's state and municipal governments “consistently” intrude on private property rights, forcing citizens to seek redress in state and federal courts, presumably by bringing takings claims.⁴⁰ The text further alleged that courts do not always protect private property rights to the extent required by the state and federal constitutions and included six specific instances of questionable eminent domain actions in Arizona.⁴¹ Regarding regulatory takings, however, the amendment said only that courts had allowed the state and local governments to “impose significant prohibitions and restrictions on private property” without compensation—the text offered no specific examples of such an action.⁴²

Proponents of Prop 207 focused their rhetoric on the effect the new law would have on eminent domain, exploiting anti-*Kelo* sentiment. At the same time, supporters downplayed sections of the law affecting regulatory takings by characterizing the legislation as protection for individual homeowners from out-of-control local governments. For example, one argument in favor of Prop 207 warned that, without it, everyone's home was at risk from government seizure.⁴³ Others claimed *Kelo* had “bulldozed” private property rights.⁴⁴

Those proponents who did address Prop 207's regulatory takings provisions tended to oversimplify issues surrounding land use regulation and

37. CANVASS, *supra* note 1. Voter initiatives like Prop 207 become law when approved by a majority of votes. ARIZ. CONST. art. IV, pt. 1, § 1(5). The governor cannot veto an approved initiative, nor can the legislature repeal it. *Id.* at § 1(6)(A)–(B).

38. Jacobs, *supra* note 2, at 1523–24.

39. BREWER, *supra* note 20, at 180–81.

40. Private Property Rights Protection Act, § 2(A)(4) (codified as amended at ARIZ. REV. STAT. ANN. §§ 12-1134 to 12-1138 (2006)).

41. *Id.* These instances included: the City of Mesa's use of eminent domain to obtain and bulldoze homes for a later-abandoned redevelopment project; Mesa's failed condemnation action to take a family-owned brake shop in order to allow a hardware store to expand; the City of Tempe's attempted condemnation action against a homeowner in order to give the land to a developer to construct townhomes; the City of Chandler's attempted condemnation action against a fast food restaurant in order to replace it with more upscale restaurants; the City of Tempe's use of eminent domain to turn an industrial park into a shopping mall; and the City of Tempe's failure to condemn a property used as a bowling alley as it said it would, resulting in failure of the business. *Id.*

42. *Id.*

43. BREWER, *supra* note 20, at 180.

44. *Id.* at 181.

regulatory takings jurisprudence. For example, one supporter argued that under existing regulatory takings law, a bureaucrat's signature could erase a landowner's property value with no compensation required.⁴⁵ Although Prop 207's supporters had clear examples of eminent domain "abuse" that enraged or agitated many voters, the regulatory takings aspect of the proposition was not promoted as a remedy for any clearly defined problem.⁴⁶

II. PROP 207'S EFFECT ON LAND USE REGULATION

Prop 207 unduly hinders the ability of local governments to regulate land use for a number of reasons. Oregon saw numerous land use problems arise after passing a similar measure in 2004,⁴⁷ and the Arizona law has already caused difficulty for Phoenix, Flagstaff, and Glendale, among others. The choice between paying compensation or foregoing regulation makes it difficult, if not impossible, for local governments to respond to changing circumstances with new land use regulations. Furthermore, many scholars have criticized such extreme measures that require compensation for any diminution in property value for their lack of understanding of the relationship between land use regulation and property value, and for their unfair shifting of the burdens and benefits of land use regulation.⁴⁸ This Section explores Oregon's experience with its similar regulatory takings law, looks at some of Prop 207's tangible effects, and summarizes criticisms leveled at laws like Arizona's Prop 207.

A. The Oregon Example

Similar to Prop 207, Oregon's Measure 37 gives property owners whose property values are diminished by land use regulation either the right to compensation for the difference in value or a waiver of enforcement of the relevant regulation.⁴⁹ Because the law provides no source of funding for compensation claims, most governments have no choice but to offer a waiver of enforcement from any land use regulation a landowner claims reduces their property's value.⁵⁰ To avoid costly compensation payments and litigation costs, some local governments in Oregon have even considered blanket waivers of land use regulations for all claimants under Measure 37.⁵¹

45. *Id.* at 180. This claim is mostly inaccurate, because courts almost always consider a total loss of property value resulting from regulation to be a "regulatory taking" requiring just compensation. Keene, *supra* note 26, at 425 (stating that when a regulation permanently deprives the owner of all economically beneficial use of land, it is a per se regulatory taking unless state property or nuisance law invalidated the owner's use).

46. In contrast, many Prop 207 opponents pointed out that the law, if enacted, would affect regulatory takings as well as eminent domain actions. *See* BREWER, *supra* note 20, at 185-91.

47. *E.g.*, SHEILA A. MARTIN & KATIE SHRIVER, DOCUMENTING THE IMPACT OF MEASURE 37: SELECTED CASE STUDIES 5-7 (2006), available at http://www.pdx.edu/media/i/m/ims_M37brainerdreport.pdf.

48. *See* sources cited *supra* notes 17-19.

49. Aoki et al., *supra* note 17, at 286.

50. *Id.* at 295.

51. *Id.* at 296.

A study of Measure 37's effects found that the law has resulted in numerous adverse consequences.⁵² These effects include an increase in the development of open space, development without concern for air, water, and land resources, a reduction in the availability of affordable housing, and harm to the land value of properties neighboring Measure 37 claimants, because governments are waiving regulations rather than paying compensation.⁵³ The law has also led to a reduction in the amount of protected state forest land.⁵⁴ The same study found the law allowed claimants to use land in ways inconsistent with community-adopted land use plans, forced decisions on development without consideration of potential alternatives, and reduced the ability of local governments to use new information to create land use plans consistent with changing circumstances.⁵⁵ Because local governments lack the resources to pay just compensation to claimants, waiving regulations as to claimant property owners provides the only real option: in fact, between Measure 37's enactment in January 2004 and January 2006, not a single claim had been paid.⁵⁶

The similarities between Measure 37 and Prop 207—both require compensation for reductions in property value caused by land use regulations or, in lieu of compensation, a waiver of enforcement from the regulation—suggest that Arizona may see some of the same effects as Oregon. Additionally, neither law provides a funding source for compensation, meaning that Arizona's local governments, like Oregon's, are more likely to waive enforcement than pay compensation. However, Measure 37 (unlike Prop 207) applied retroactively to land use regulations enacted before a landowner took ownership of the subject property.⁵⁷ Thus, Arizona should at least see fewer claims than Oregon.

B. Prop 207 Has Already Chilled Land Use Regulation in Arizona

Prop 207 has already reduced the ability of local governments to proceed with land use projects and to enact new regulations that adapt to changing community conditions. For example, some critics and policymakers are concerned that the law hinders the regulation of water resources, especially in developing areas.⁵⁸ Also, numerous cities fear it prevents them from changing or adding to zoning codes when necessary.⁵⁹ For example, due to an absence of development pressure seen in larger cities, small towns' zoning ordinances often lack hillside regulations or provisions for aesthetic design review of new development.⁶⁰ Yet, with population growth and resulting increased development these cities may be unable to adopt such measures without incurring significant liability under the new

52. MARTIN & SHRIVER, *supra* note 47, at 4–7.

53. *Id.* at 5–7.

54. *Id.*

55. *Id.* at 4.

56. *Id.* at 4, 7.

57. *E.g.*, Grady Gammage, Jr., *Arizona's Prop 207*, SN015 ALI–ABA 517, 526 (2008).

58. Shaun McKinnon, *Prop. 207 May Stall Water Regulation*, ARIZ. REPUBLIC, Nov. 4, 2006, at B4.

59. Gammage, *supra* note 57, at 524.

60. *Id.*

law.⁶¹ Four examples, which follow, demonstrate the effect of the law during its first two years.

1. Test Case in Flagstaff

The first test case for the new law arose out of the City of Flagstaff's designation of a fifteen-square-block historic overlay zoning district in June 2007.⁶² The zoning change imposed height limitations on new construction, despite several homeowners' threats to sue under Prop 207 if the rezoning affected their property.⁶³ Proponents of the zoning measure wanted the height restriction because it would block construction of two-story "accessory buildings" (generally second-floor apartments built on top of existing garages) that they argued encroached on neighbors' privacy.⁶⁴ Local residents also argued that the new two-story structures diminished the historical character of the neighborhood.⁶⁵ The measure's opponents wanted to retain the option to construct apartments on top of their garages as part of a plan to create affordable housing.⁶⁶

Four plaintiffs filed Prop 207 claims against the City in October 2007, arguing the historic overlay and height restrictions diminished their property values, entitling them to compensation or exemption.⁶⁷ According to the City, the plaintiffs could not prove the zoning district actually diminished their property values.⁶⁸ City Attorney Patricia J. Boomsma argued historical designation raises, rather than lowers, property values.⁶⁹ This suit is the first court action between an affected property owner and a regulating government under Prop 207.⁷⁰

2. Postponed Plans in Phoenix

Fear of Prop 207 suits has forced the City of Phoenix to temporarily shelve at least two downtown revitalization projects: the Urban Form Project,

61. *Id.*

62. Fischer, *supra* note 22.

63. *Id.*; J. Ferguson, *Flagstaff's West Side Embroiled in Building Fight*, ARIZ. DAILY SUN, Feb. 9, 2007, available at http://www.azdailysun.com/articles/2007/02/09/news/20070209_news_19.txt.

64. Ferguson, *supra* note 63.

65. *Id.*

66. J. Ferguson, *West Downtown Height Limits Passed*, ARIZ. DAILY SUN, Feb. 21, 2007, available at http://www.azdailysun.com/articles/2007/02/21/news/20070221_news_27.txt.

67. Fischer, *supra* note 22.

68. *Id.*

69. Paul Davenport (Associated Press), *Lawsuit Seen as Test Case of AZ Property Rights Law*, Oct. 3, 2007, available at <http://www.fox11az.com/news/topstories/stories/KMSB-20071003-appb-propertyrights.1362d8d5c.html>.

70. In April 2008, the trial court dismissed the suit because of plaintiffs' failure to provide a demand letter to all required parties. J. Ferguson, *Technicality Tosses Lawsuit on Townsite Backyard Apartments*, ARIZ. DAILY SUN, Apr. 29, 2008, available at http://news.azdailysun.com/non_sec/nav_includes/story.cfm?storyID=172626&syr=2008. On February 3, 2009, the Arizona Court of Appeals remanded the case for a new hearing on that issue. *Regner v. Flagstaff*, No. CV 2007-0678 (Ariz. Ct. App. Feb. 3, 2009), available at <http://www.cofad1.state.az.us/memod/CV/CV080415.pdf>.

which includes creating shade, sidewalk cafes, and parks in downtown areas; and plans to create an “Arts, Culture, and Small Business” district.⁷¹ Each project would affect more than 1,000 property owners, and, as of February 2009, the City was attempting to acquire liability waivers from all affected property owners before moving forward—an overwhelming, if not impossible, task.⁷² Thus, the City elected to delay both projects and move forward in a patchwork fashion as property owners agree to sign the waivers.⁷³

3. *Inability to Respond to Community Concerns in Glendale*

In Glendale, neighborhood and community groups expressed concern about investors buying homes to rent to vacationers for stays of a few days or weeks.⁷⁴ The practice became more prevalent with the city’s hosting of several college football bowl games and the NFL Super Bowl in January 2008.⁷⁵ Residents complained that using residential homes as vacation rentals disrupts neighborhoods, especially when large groups stay in one house.⁷⁶ The city’s zoning code does not prohibit such use, and short-term rentals were uncommon in Glendale at the time of the code’s enactment.⁷⁷ Now, Prop 207 may make the city liable for diminution in value claims if it addresses community concerns by limiting such uses.⁷⁸ Glendale’s attorneys noted that homeowners’ associations can likely regulate the short-term rentals through neighborhoods’ covenants, codes, and restrictions, but the new law will most likely prevent the city from taking action on the issue.⁷⁹

4. *Difficulties in Tucson*

When Prop 207 took effect, several Tucson neighborhoods near the University of Arizona wanted to limit construction of “mini-dorms,” two-story dwellings with multiple entries that occupy all legally usable space on their lots and are typically rented out to university students.⁸⁰ Neighbors objected to parking and noise problems associated with these structures.⁸¹ Due to concerns about Prop 207 liability, however, the City Council backed away from passing a zoning overlay ordinance to address residents’ concerns.⁸²

71. Berry, *supra* note 24, at A1; Michele Laudig, *Leveled?*, PHOENIX NEW TIMES, Feb. 8, 2007, at 1.

72. Berry, *supra* note 24, at A1.

73. *Id.*; Laudig, *supra* note 71, at 1.

74. Carrie Watters, *Renting Homes to Vacationers Riles Neighbors*, ARIZ. REPUBLIC, Jan. 17, 2007, at Glendale Republic East 3.

75. *See id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *E.g.*, Tom Beal, *Pilot Plans Disappoint Midtown Neighbors*, ARIZ. DAILY STAR (Tucson), Jan. 27, 2008, at B1.

81. *Id.*

82. Tom Beal, *UA-Area Neighborhood Eyes Rules for Infill Development*, ARIZ. DAILY STAR, Feb. 14, 2008, at B3.

Tucson also faces a Prop 207 lawsuit filed in March 2008, based on a new city ordinance affecting the demolition of potentially historic buildings.⁸³ The regulation, passed in June 2007, requires a study of the property in question and others in the area, along with the approval of the Tucson/Pima County Historical Commission, before any building more than forty-five years old and that sat within the city limits as of 1953 may be demolished.⁸⁴ The developer who brought the claim asked for \$12.5 million in compensation for the regulation's alleged diminution of his property value, or, in lieu of compensation, a waiver of enforcement resulting in permission to tear down more than twelve buildings.⁸⁵

C. Criticism of the Private Property Rights Protection Act

Critics of partial regulatory takings laws, such as Arizona's Prop 207, argue that these laws shift the benefits of land use regulation in favor of individuals, while unduly burdening government and public interests, and that they rely on a fundamental misunderstanding of the relationship between land use regulation and property values. This section considers these criticisms as they apply to Prop 207.

1. Prop 207 Unfairly Benefits Individuals at the Public's Expense

The basic assumption underlying Prop 207—that land use regulations deprive property owners of pre-existing property rights—is faulty.⁸⁶ American property law has long recognized that private property rights are subject to limitation for the public interest, and that the public interest changes over time.⁸⁷ Thus, *some* limits on the “bundle” of property rights inhere in the balance between private and public interests.⁸⁸ This is not to say that property rights regulation never requires just compensation, but as Justice Oliver Wendell Holmes famously noted in 1922, “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”⁸⁹ By creating a right to compensation for *any* regulatory diminution in land value, Prop 207 allows a single landowner to effectively halt enactment of a regulation in the public interest by demanding compensation.

Neither of the options for addressing these claims—paying compensation or waiving enforcement—leads to desirable results. Paying compensation transfers wealth from the public coffers to individual property owners, while giving exemptions defeats the public or societal goals of the regulations altogether.⁹⁰ For example, the use of private property often involves the use of common resources, such as air and water.⁹¹ No problem results from this practice until use of common

83. Andrea Kelly, *Developer Sues City, Targeting '07 Property-Use Law*, ARIZ. DAILY STAR, Mar. 13, 2008, at B3.

84. *Id.*

85. *Id.*

86. Cordes, *supra* note 18, at 233.

87. *Id.* at 230–31.

88. *Id.* at 232.

89. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

90. *See* Hubbard, *supra* note 17, at 113.

91. Rose, *supra* note 18, at 294.

resources becomes more congested.⁹² Whereas American property law, and specifically, regulatory takings jurisprudence, traditionally allowed for the redefinition of public and private rights to deal with increasing congestion to avoid waste of common resources, laws like Prop 207 tip the balance in favor of private rights at the expense of the legislature's ability to protect common resources.⁹³

2. *Prop 207 Rests on a Misunderstanding of the Relationship Between Land Use Regulation and Property Value*

The theory underlying Prop 207 assumes that land has a given market value, and that government regulation of that land's use may diminish its value. This assumption fails to recognize that the market value of the land before the alleged value-diminishing regulation takes effect may be higher than normal because of other regulations.⁹⁴ For example, land use regulations can increase property values by artificially limiting the supply of land available for particular uses.⁹⁵ The result of such regulation is likely to be a higher supply of land available for the "allowed use" and a lower supply of land available for the "disallowed use," or vice versa, causing a price differential between allowed- and disallowed-use lands.⁹⁶

Land use regulations can also increase property values by minimizing potential harm caused by neighboring landowners, a phenomenon known as "amenity benefits."⁹⁷ Such an increase in value will occur when the benefits obtained from the community's compliance with the regulation outweighs the cost to individuals of compliance.⁹⁸ For example, a regulation that requires a certain amount of trees or open space on individual parcels might make homes in that neighborhood more attractive to buyers, and thus more valuable.⁹⁹ But because any particular owner would profit more by developing her entire parcel, regulation is needed to create the positive externalities provided by the trees and open space.¹⁰⁰ Thus if an individual owner receives an exemption from the trees and open space regulation, such as with a waiver of enforcement under Prop 207, that owner benefits by avoiding the costs of compliance while continuing to receive the amenities provided by others' compliance, as long as they continue to comply with

92. *Id.* at 272.

93. *See id.* at 273, 293–94.

94. *See Cordes, supra* note 18, at 234–38 (discussing "givings and reciprocity" positively affecting property values); *see also* John D. Echeverria, *From a Darkling Plain to What?: The Regulatory Takings Issue in U.S. Law and Policy*, 30 VT. L. REV. 969, 983 (2006) ("In many instances, stronger regulations mean higher, not lower, property values."); Gammage, *supra* note 57, at 523 (noting that benefits and burdens result in a "reciprocity of advantage").

95. Cordes, *supra* note 18, at 235.

96. Jaeger, *supra* note 19, at 108–10.

97. *Id.* at 113; *see also* Gammage, *supra* note 57, at 527 (noting that empirical evidence shows that historic district designations, which may give rise to Prop 207 claims, actually raise, instead of lower, property values). *See generally* Jaeger, *supra* note 19 (providing empirical evidence of such an effect).

98. Jaeger, *supra* note 19, at 113.

99. *Id.* at 114.

100. *Id.*

the regulation.¹⁰¹ And, neighboring landowners may see their property values diminished as a direct result of the exempted landowner's noncompliance with the regulation.

III. WAIVERS AS A POTENTIAL SOLUTION

Several Arizona cities, including Tucson, Mesa, and Phoenix, have sought waivers of Prop 207 claims from landowners in an effort to avoid costly compensation liabilities.¹⁰² In practice, these waivers range in scope from narrow and regulation-specific to broad and all-encompassing. Narrow waivers, like those used by Mesa, Phoenix, and Scottsdale, are specifically provided for in the law and cover forfeiture of claims only for diminution in value resulting from a specific land use regulation change requested by the landowner.¹⁰³ The narrow waivers will prove necessary, especially to protect local governments from landowners making diminution in value claims based on land use changes requested by the landowner.¹⁰⁴ Broader waivers cover the landowners' right to sue for any future regulation of the property, essentially waiving all present and future rights under Prop 207.¹⁰⁵ These broad waivers face sharp criticism, however, and might not withstand legal challenges.

A. Narrow Waivers

Phoenix, Mesa, and Scottsdale have all used narrow waivers to protect against Prop 207 liability for specific regulatory actions.¹⁰⁶ Prop 207 allows cities to ask landowners to sign a waiver, regardless of whether the government proposed the new regulation or the landowner requested it.¹⁰⁷ The Arizona League of Cities of Towns, for example, recommends use of waivers when property owners apply for re-zoning or other legislative land use actions.¹⁰⁸ Some Arizona

101. *Id.*

102. Massad, *supra* note 24; Erica Meltzer, *Property Rights Law Brings Call for Waivers*, ARIZ. DAILY STAR, Feb. 12, 2007, at A1. Prop 207 itself specifically authorizes use of such waivers. ARIZ. REV. STAT. ANN. § 12-1134(I) (2006).

103. § 12-1134(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."); Massad, *supra* note 24; Prop 207 Waiver, *supra* note 24.

104. It seems likely that Prop 207's sponsors included the provision specifically allowing waivers of the right to sue to give governments a means of protecting themselves from such claims.

105. Meltzer, *supra* note 102, at A1. Nothing indicates that any local Arizona governments have yet attempted to use broad waivers.

106. Berry, *supra* note 24, at A1 (Phoenix); Massad, *supra* note 24 (Mesa); Prop 207 Waiver, *supra* note 24 (Scottsdale).

107. § 12-1134(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.").

108. Arizona League of Cities and Towns, Recommendations Regarding Prop 207 Waiver Form, http://www.azleague.org/doc/resources/prop207_rec_reg_waiver.doc (last visited Jan. 8, 2009). The League is a voluntary organization made up of incorporated cities

cities request these narrow waivers from development project applicants.¹⁰⁹ Scottsdale, for example, asks property owners to sign a Prop 207 waiver along with any request for a use permit, abandonment, land division, or development review.¹¹⁰ In contrast, Phoenix has sought waivers in advance of city-initiated land use changes, including its currently postponed downtown redevelopment projects.¹¹¹ In all of these situations, waivers are purely voluntary; however, in the case of owner-initiated land use changes, an owner who refuses to waive his Prop 207 claims will likely receive a negative recommendation to the city council from the planning department.¹¹² Thus, though the waivers for landowner-initiated regulatory changes are voluntary in theory, they become closer to compulsory in practice.

Although such waivers will help protect municipalities from liability for diminution in value claims in some instances, this method relies on property owner cooperation.¹¹³ For example, a town considering a project that would affect many landowners would most likely face difficulty in obtaining waivers from all those affected. The city would either have to cancel the project or remain open to suit under Prop 207 from those property owners who refused to sign. In a case such as this, a single holdout could kill a popular project; or, if the government decided to move forward and pay the holdout compensation, that single landowner would receive compensation that all other affected owners voluntarily forewent. Thus, narrow waivers will probably be more successful for owner-requested land use actions than larger projects affecting numerous landowners.

The practice of requiring waivers as a condition for approval of a property owner's development plans has met with significant criticism.¹¹⁴ Unhappy landowners might challenge the waiver requirement under the doctrine of unconstitutional conditions, which holds that governments may not condition the receipt of a discretionary benefit on the surrender of a federal constitutional right.¹¹⁵ Most Arizona cities using waivers call them voluntary, but if cities or

and towns in Arizona. Arizona League of Cities and Towns, <http://www.azleague.org/index.cfm?fuseaction=about.main> (last visited Apr. 9, 2008).

109. Gammage, *supra* note 57, at 526; Casey Newton, *Landowners Balk at City Waiver*, ARIZ. REPUBLIC, Feb. 7, 2007, at Scottsdale Republic North 1.

110. Prop 207 Waiver, *supra* note 24. Similarly, Mesa, Chandler, Gilbert, and Apache Junction ask for waivers before approving most land use changes. Massad, *supra* note 24.

111. Berry, *supra* note 24, at A1; *see also* discussion *supra* Part II.B.2.

112. Newton, *supra* note 109, at Scottsdale Republic North 1.

113. *See, e.g.*, Berry, *supra* note 24, at A1 (noting that the City of Phoenix decided not to move forward with a zoning and land use project until obtaining waivers from the more than 1000 affected property owners).

114. Clint Bolick, *Sneaky AZ Cities Dodge New Property-Rights Law*, ARIZ. DAILY STAR, Feb. 8, 2007, available at <http://www.goldwaterinstitute.org/AboutUs/ArticleView.aspx?id=1477>; Gammage, *supra* note 57, at 526 (noting a "backlash from newspaper commentators and the development community").

115. Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) ("Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government

municipalities routinely deny land use actions where property owners refuse to waive Prop 207 claims, landowners could assert that the waivers are compulsory.¹¹⁶

The argument that Prop 207 waivers, at least those seen thus far in Arizona, violate the doctrine of unconstitutional conditions is flawed in several ways. First, the right landowners waive is not constitutional, but statutory: the right to sue for diminution in value under Prop 207 is codified in the Arizona Revised Statutes, not the state or federal constitution.¹¹⁷ Second, even if a landowner did waive his Prop 207 rights, he would retain the right to sue for a regulatory taking under the Fifth Amendment of the U.S. Constitution and article 2, section 17 of the Arizona Constitution.¹¹⁸ Thus, a landowner who waives his Prop 207 rights retains the same constitutional guarantees as a landowner who has not signed a waiver.

Property owners, therefore, are unlikely to succeed in challenging the validity of narrow waivers because they are statutorily sanctioned and do not violate the doctrine of unconstitutional conditions. Thus, narrow waivers should prove a successful means for Arizona's local governments to avoid Prop 207 liability for landowner-requested land use changes and for specific government-initiated projects requiring land use changes. These narrow waivers become less practical, however, for projects requiring regulations that affect large numbers of property owners. In such situations, persuading all affected landowners to sign the agreements will likely prove difficult.¹¹⁹

B. Broad Waivers

Some critics of Prop 207 allege that landowners have been asked or forced to sign waivers of all rights to sue under the law for *any* future land use regulation.¹²⁰ Although there is no evidence to support the claim that such waivers

where the benefit sought has little or no relationship to the property.”). At least one litigant has asserted such a claim regarding a Prop 207 waiver. In a suit alleging that a petition leading to the Town of Marana authorizing a referendum on whether to allow a residential development project to go forward, the plaintiff-developer also argued that the requirement that it sign a Prop 207 waiver pursuant to the project constituted an improper condition and unlawful exaction. Brian J. Pedersen, *Suit Would Halt De Anza Project Vote*, ARIZ. DAILY STAR, May 29, 2008, available at <http://www.azstarnet.com/metro/240981>; see also Bolick, *supra* note 114 (arguing that “the waivers are blatantly unconstitutional”).

116. *E.g.*, Newton, *supra* note 109, at Scottsdale Republic North 1.

117. ARIZ. REV. STAT. ANN. § 12-1134(A) (2006).

118. U.S. CONST. amend. V (stating “nor shall private property be taken for public use, without just compensation”); ARIZ. CONST. art. II, § 17 (“No private property shall be taken or damaged for public or private use without just compensation having first been made.”).

119. See Berry, *supra* note 24, at A1 (noting two Phoenix redevelopment projects stalled at least partly due to the difficulty of getting more than 1000 property owners to sign Prop 207 waivers).

120. Bolick, *supra* note 114.

have been used, broad waivers are likely unconstitutional and thus would not withstand judicial scrutiny.¹²¹

1. Constitutional Challenges to Broad Waivers

Waiver critics argue that broad waivers of the right to sue under Prop 207 constitute Fifth Amendment takings requiring payment of just compensation.¹²² Specifically, such waivers fail the U.S. Supreme Court's "essential nexus" test, as expressed in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*.¹²³ In *Nollan*, the Coastal Commission granted the Nollans a building permit to construct a new residence on their beachfront lot only on the condition that they created a public easement across their beachfront property.¹²⁴ The Commission's stated reason for the condition was that the new dwelling would block the public's view of the ocean.¹²⁵ The Court held that the Commission could not condition the grant of the permit on the transfer of an easement without paying the Nollans just compensation for the easement under the Fifth Amendment Takings Clause.¹²⁶ The Court reasoned that, because the condition of a public easement was unrelated to the benefit of granting of a building permit, there was no "essential nexus" between the condition and benefit, making the condition a Fifth Amendment taking.¹²⁷ If the condition instead was somehow related to the construction of a new home, such as a height restriction, no taking would have occurred.¹²⁸

In *Dolan*, the Court more fully described the "essential nexus" test.¹²⁹ First, a court must determine whether there exists an "essential nexus" between the permit condition and the "legitimate state interest."¹³⁰ If the nexus exists, the court must next decide "the required degree of connection between the exactions [condition] and the projected impact of the proposed development."¹³¹ There, the city conditioned granting the petitioner's building permit on the requirement that she dedicate a portion of her property to storm drainage improvement and a pedestrian/bicycle walkway.¹³² First, the Court found a nexus between the city's interests in preventing flooding and limiting development within a floodplain (on

121. See, e.g., Art Martori, *Cities Bypass Property Rights*, E. VALLEY TRIB., Feb. 1, 2007, available at <http://www.eastvalleytribune.com/story/83295> (noting that many Phoenix-area cities and towns ask for waivers whenever landowners request a land use change but suggesting that these waivers would apply only to the requested action and not to all future actions).

122. See, e.g., Bolick, *supra* note 114.

123. *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987); see Bolick, *supra* note 114.

124. *Nollan*, 483 U.S. at 828. The easement would allow public access to two nearby public beaches. *Id.* at 827–28.

125. *Id.* at 828–29.

126. *Id.* at 841–42.

127. *Id.* at 836–37.

128. *Id.* at 836.

129. *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994).

130. *Id.* (citing *Nollan*, 483 U.S. at 837).

131. *Id.*

132. *Id.* at 379–80.

which the petitioner's parcel sat) and between reducing traffic congestion and limiting development.¹³³ Second, the Court held that the Fifth Amendment requires a "rough proportionality" between the condition and impact of the proposed development.¹³⁴ This standard, though requiring less than mathematical precision, requires an individualized determination that the condition "is related both in nature and extent" to the proposed development's impact.¹³⁵

Broad Prop 207 waivers almost surely fail the "essential nexus" and "rough proportionality" requirements. Consider a hypothetical situation where a property owner in Tucson applies to the City for rezoning. As part of the application, the City asks the landowner to sign a Prop 207 waiver not only for the proposed rezoning but for any future land use actions that may diminish the value of the property. Without the waiver, the planning department will not recommend the rezoning to the city council. The landowner then challenges the waiver in court under the "essential nexus" test.

Here, the waiver constitutes the condition or exaction, while the City's liability for diminution in value for land use changes is the projected impact or state interest. In the first part of the analysis, there does appear to be a nexus between the City's request for the waiver and the rezoning application. If the property owner refuses to sign the waiver and the City grants the rezoning request, the owner could sue for diminution in value under Prop 207 if the rezoning reduced the property's value. Thus the City has an interest in protecting itself from Prop 207 liability when it grants the landowner's request. The broad waiver will achieve the City's goal in this regard.

In the next stage of the analysis, however, the broad waiver would almost surely fail the "rough proportionality" requirement.¹³⁶ Surrender of all potential Prop 207 rights is hardly proportional to the City's potential liability for the single rezoning, especially considering that the City could ask for a narrower waiver.¹³⁷ Because the broad waiver goes far beyond the risk of the proposed rezoning, it does not bear a "rough proportionality" to the City's potential liability and necessarily fails to meet the *Dolan* standard.

2. Other Challenges to Broad Waivers

Criticism of broad waivers is not limited to constitutional challenges; broad waivers may fail also a statutory challenge. The language of Prop 207 could invalidate broad waivers, because it allows only waivers "regarding any proposed action" by the local government or "action requested by the property owner."¹³⁸ The use of the singular noun "action" in the statutory language suggests that it refers to waivers that cede the right to sue for a single land use action, not for

133. *Id.* at 387–88.

134. *Id.* at 391.

135. *Id.*

136. *Id.*

137. In contrast, a narrow waiver of the right to sue only for the rezoning at issue would be directly proportional to the impact of the proposed rezoning action and would likely meet the "rough proportionality" requirement.

138. ARIZ. REV. STAT. ANN. § 12-1134(I) (2006).

future actions. Additionally, Arizona law provides that a governmental entity may not insist on waiver of statutory or constitutional rights from private parties as a matter of public policy.¹³⁹ Broad Prop 207 waivers seemingly violate these principles.

Precisely because Prop 207 allows for narrow waivers of the right to compensation, broader waivers of the right to sue for any future land use action are mostly likely prohibited.¹⁴⁰ Furthermore, Arizona governmental entities may not insist on a private party's waiver of statutory or constitutional rights.¹⁴¹ Broad waivers do precisely that—they waive the entirety of a property owner's statutory rights under Prop 207. Thus, broad waivers would almost surely be invalidated by the courts.

C. *The Continuing Use of Waivers*

It appears that waivers will function as important but somewhat limited tools for Arizona governments to enact land use regulation under Prop 207's regulatory takings regime. Narrow waivers of the right to sue for a particular land use action, whether requested by the property owner or proposed by the government, comprise a key aspect of the new law.¹⁴² These agreements allow governments to protect themselves from liability when pursuing land use changes. These waivers are limited, however, in that they rely on property owner cooperation, especially in the case of government-proposed actions.

Unlike narrow waivers, broad waivers likely will not be a useful tool because they are susceptible to invalidation on constitutional and statutory grounds. Furthermore, they are likely to face significant political criticism if the public views them as attempts to circumvent the law.¹⁴³ So, although waivers are indispensable tools for local governments to avoid liability in limited but common situations, Arizona's cities and towns should also explore alternative means of enacting necessary land use regulations that will not expose them to Prop 207 claims.

IV. ALTERNATIVES TO WAIVERS

Local governments pursuing continued land use regulation without the use of waivers have three distinct alternatives: paying compensation, exempting property owners who threaten Prop 207 suits from the regulation at issue, and confining regulations within the law's exceptions. Compensation is the least realistic of these options, because most governmental budgets simply cannot

139. *Havasu Heights Ranch & Dev. Corp. v. State Land Dept. of State of Ariz.*, 764 P.2d 37, 43 (Ariz. Ct. App. 1988) (citing *City of Glendale v. Coquat*, 52 P.2d 1178, 1179 (1935)).

140. 28 AM. JUR. 2D *Estoppel and Waiver* § 214 (2008) ("Where a legislature permits a particular, limited waiver of right upon satisfaction of set of conditions, it intends that no other related waivers be permitted.").

141. *Havasu Heights*, 764 P.2d at 43.

142. *Id.*

143. See Bolick, *supra* note 114; Meltzer, *supra* note 102, at A1; Newton, *supra* note 109, at Scottsdale Republic North 1.

accommodate the cost.¹⁴⁴ Exempting landowners who threaten to sue from a value-reducing regulation avoids the problem of costly payments, but has other drawbacks, such as granting landowners the ability to circumvent regulation.¹⁴⁵ Tailoring land-use regulations to fall within Prop 207's exceptions may prove to be a more workable option.¹⁴⁶

A. Compensation

Simply paying compensation to landowners who file Prop 207 claims is the least desirable alternative to waivers for Arizona's political subdivisions. Prop 207 did not provide a source of revenue to pay such claims; as a result, compensation would have to come from the city, county, or state general fund.¹⁴⁷ As an example of just how unwilling local governments are to pay compensation, of the thousands of Oregon Measure 37 claims filed between the law's enactment in 2004 and January 2006, not a single claim was paid: local governments simply lacked the resources to pay compensation and chose instead to waive enforcement of the regulations.¹⁴⁸ A study of ten Measure 37 claims found that the requested compensation ranged from \$100,000 to more than \$14 million.¹⁴⁹ Not only does the high cost of paying claims make this option prohibitive, but the overwhelming number of claims that Oregon faced (and Arizona could potentially face) makes anything but exempting affected landowners from regulation impractical.¹⁵⁰

There may be occasions, however, when a local government decides that a particular regulation is important enough to expend public funds to compensate potential claimants. The use of eminent domain to create public parks and preserves supplies an analogy. For example, the City of Scottsdale desired to purchase land to set aside as a mountain preserve, and in 1995, Scottsdale voters approved a sales tax increase to fund land purchases.¹⁵¹ It is possible that voters could approve a similar revenue source to pay Prop 207 claims arising out of a desirable land use regulation. The dearth of any paid claims during Oregon's tenure with Measure 37, however, suggests that this scenario is unlikely.¹⁵²

B. Exemption from Regulation

A second method by which local governments may avoid liability under Prop 207 is to continue enacting land use regulations and, when a landowner files a claim, to issue a waiver of enforcement (essentially, an exemption)¹⁵³ of the

144. See Aoki et al., *supra* note 17, at 295.

145. *Id.* at 296.

146. See ARIZ. REV. STAT. ANN. § 12-1134(B) (2006).

147. Aoki et al., *supra* note 17, at 295.

148. MARTIN & SHRIVER, *supra* note 47, at 4.

149. *Id.* at 3.

150. See Jacobs, *supra* note 2, at 1532.

151. City of Scottsdale, McDowell Sonoran Preserve: History, <http://www.scottsdaleaz.gov/preserve/history.asp> (last visited Jan. 8, 2009).

152. MARTIN & SHRIVER, *supra* note 47, at 4.

153. Prop 207 refers to such an action as a "waiver of enforcement." In order to avoid confusion with property owners' waivers of their right to sue, I will refer to such action as "exemptions."

regulation as to the owner's parcel.¹⁵⁴ This method of dealing with landowner claims has proven the most common response in Oregon.¹⁵⁵ Such exemptions avoid the prohibitive costs of compensation, but exempting certain landowners from land use regulations involves other, nonmonetary costs. Allowing landowners to avoid compliance with land use regulations can result in piecemeal regulation, undermine the purpose of land use regulation by harming neighboring property owners,¹⁵⁶ and hinder the ability of governments to provide infrastructure and services to areas of new development.¹⁵⁷

Piecemeal regulation can also cancel out any reciprocity of advantage gained by even application of land use regulations.¹⁵⁸ Reciprocity of advantage means that although regulations limit landowners' use of their property, those landowners benefit from their neighbors being limited by the same regulations.¹⁵⁹ Often, such regulations raise, rather than lower, property values.¹⁶⁰ If a regulatory scheme raises property values by minimizing harms arising from incompatible land uses, then exempting certain landowners from regulation may negatively affect the value of neighboring properties.¹⁶¹ Prop 207 neither accounts for nor provides any remedy for landowners injured by a neighbor's exemption from a land use regulation.¹⁶²

Granting exemptions to regulation also makes it difficult for local governments to control new development by deciding when and where development will occur, limiting density, and allocating land use.¹⁶³ This difficulty would affect previously un- or lightly zoned areas experiencing rapid growth.¹⁶⁴ For example, a land development company might own a large parcel in an undeveloped, lightly zoned area. As development approaches the parcel, the county could enact stricter zoning regulations to limit density and allow for the efficient provision of infrastructure and necessary services. Because the new zoning prevents the developer from developing the parcel as densely as it previously could have, the developer could bring a Prop 207 claim. In response, the county might exempt the developer's parcel from the new regulations, allowing the developer to build to a density beyond that which the existing infrastructure can accommodate. Roads, utilities, police, and fire services may be inadequate. Thus, granting exemptions would essentially lock-in land use regulation at the point at which it existed when Prop 207 was enacted.

154. ARIZ. REV. STAT. ANN. § 12-1134(E) (2006).

155. See Jacobs, *supra* note 2, at 1542.

156. Jaeger, *supra* note 19, at 114.

157. Aoki et al., *supra* note 17, at 293–94.

158. See Echeverria, *supra* note 94, at 983.

159. *Id.*

160. *Id.*

161. See Cordes, *supra* note 18, at 234–35.

162. See ARIZ. REV. STAT. ANN. § 12-1134 (2006) (requiring compensation only for diminution in property value resulting from “the enactment or applicability of any land use law”).

163. Aoki et al., *supra* note 17, at 293–94.

164. See Jacobs, *supra* note 2, at 1528.

C. Regulating Within Prop 207's Exceptions

A key feature of Prop 207 is that it does not apply to all land use regulations. It specifically excludes laws concerning public health and safety, public nuisances, housing of sex offenders, liquor control, adult-oriented businesses, locations for utility facilities, or other regulations required by federal law.¹⁶⁵ As discussed below, the first two exceptions, for regulations addressing public health and safety as well as public nuisance, appear sufficiently broad to encompass a relatively wide variety of land use regulation, giving local governments an opportunity to continue regulating land use without fear of Prop 207 claims. A government enacting an excepted regulation, however, has the burden of demonstrating that the land use law is exempt, which may make Arizona's political subdivisions hesitant to test the exceptions' boundaries. Nevertheless, these exceptions provide an important avenue for local governments to continue regulating land use under Prop 207.¹⁶⁶

1. The Public Health and Safety Exception

Prop 207's text provides some insight into what may constitute regulations related to public health and safety. It states that land use laws protecting public health and safety include regulations concerning fire and building codes, health and sanitation, transportation, waste, and pollution.¹⁶⁷ These specific areas of regulation may provide significant regulatory leeway for local governments. For example, zoning in previously undeveloped areas may relate directly to several of these categories in some instances. A county may enact new zoning regulations to control development in a particular area by limiting density. In response to a diminution in value claim from a developer owning a parcel within the affected area, the county can show that the regulation falls within Prop 207's public health and safety exception. Zoning that limits density may relate to transportation and traffic control by ensuring that development does not exceed the existing road system's capacity.¹⁶⁸ The regulations may also relate to health and sanitation by guaranteeing that the development does not occur at a pace that exceeds the local government's ability to provide sewer, water, and garbage pickup services, which fall within Prop 207's provision for health and sanitation, waste, and pollution-related regulation.¹⁶⁹

Arizona's constitutional standard for land use regulations and zoning laws requires that they cannot be "clearly arbitrary and unreasonable" and must have a "substantial relation to the public health, safety, morals or general welfare."¹⁷⁰ Because the traditional analysis of land use laws' constitutionality includes public

165. § 12-1134(B). Prop 207 also does not apply to laws that do not directly regulate an owner's land or that were enacted before the statute took effect. *Id.*

166. *See* § 12-1134(C).

167. § 12-1134(B)(1).

168. *See id.* Thus, the regulation would likely fall within the proposition's mention of transportation as a specific example of a public health and safety-related regulation. *Id.*

169. *See id.*

170. *E.g.*, *City of Phoenix v. Oglesby*, 537 P.2d 934, 935 (Ariz. 1975).

health, safety, and welfare, it may be difficult to determine which land use regulations pertain to health and safety as opposed to welfare. But making this distinction is necessary for local governments desiring to mold regulations that fit into Prop 207's public health and safety exception.

Prop 207's listed examples of regulations relating to health and safety provide a starting point for determining what falls within the exception.¹⁷¹ But the question remains: what types of regulation relate merely to public welfare? Arizona courts have held that land use regulation serves public welfare "by providing for the orderly development of the community."¹⁷² Thus a regulation more closely related to "orderly development" than to health or safety concerns could safely be said to fall outside the Prop 207 exception and could trigger claims. A look at Arizona court decisions assessing the validity of zoning and other land use regulations, however, shows that health and safety concerns are often present.¹⁷³ For example, an ordinance prohibiting the accumulation of debris on property relates to public safety by preventing fire hazards and to public health by reducing environments conducive to insects, rodents, snakes, or other harmful pests.¹⁷⁴ Similarly, zoning a strip of land along a major roadway with fast-moving traffic as industrial rather than commercial land promotes public safety by preventing a potentially dangerous vehicle-pedestrian collision.¹⁷⁵

2. The Public Nuisance Exception

State law grants cities limited authority to declare and abate common law public nuisances.¹⁷⁶ Prop 207's exception for public nuisances coincides with state law definitions of nuisances and allows local governments to enact land use regulations proscribing public nuisances without incurring liability.¹⁷⁷ Because the exception is limited to public nuisances historically recognized by common law,

171. See § 12-1134(B)(1).

172. *Oglesby*, 537 P.2d at 935.

173. See *State v. Watson*, 6 P.3d 752, 757 (Ariz. Ct. App. 2000) (stating that a city ordinance prohibiting the accumulation of garbage and debris on one's property promotes health and safety); *City of Tempe v. Rasor*, 536 P.2d 239, 244 (Ariz. Ct. App. 1975) (stating that zoning regulation promoted traffic and pedestrian safety).

174. *Watson*, 6 P.3d at 757.

175. *Rasor*, 536 P.2d at 244.

176. § 9-276(A)(16). A public nuisance, as opposed to a private nuisance, affects a significant amount of people or an entire community or neighborhood. *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700, 705 (Ariz. 1972).

177. § 12-1134(B)(2) (excepting from Prop 207's application laws that limit or prohibit activities "commonly and historically recognized as a public nuisance under common law"). There is a precedent for exempting public nuisance regulation from takings claims, even in traditional regulatory takings jurisprudence. The U.S. Supreme Court has stated that a land use regulation cannot be a Fifth Amendment taking requiring compensation if the regulation bans conduct constituting a public nuisance. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (1992) (stating that the state "must identify background principles of nuisance and property law that prohibit the uses [the landowner] now intends in the circumstances in which the property is presently found"). The reasoning behind this principle is that property owners have no right to engage in actions that are a nuisance or, in other words, are unlawful. *Id.* at 1029-30.

however, this exception cannot function as a loophole whereby cities and towns can simply declare an action a public nuisance, enact a land use regulation prohibiting it, and escape Prop 207 liability. As a result, Prop 207's public nuisances exception will have little effect beyond allowing local governments to continue regulating public nuisances as they always have; it neither limits the scope of government authority nor enlarges it.

3. The Burden of Demonstrating that a Regulation is Exempted

Although many common land use regulations likely fall within Prop 207's exception for laws relating to public safety and welfare, the government enacting the regulation bears the burden of showing that the regulation falls under an exempted purpose.¹⁷⁸ This burden, combined with the possibility of large awards including attorneys' fees, encourages governments to proceed carefully when regulating within the exceptions and discourages testing the exceptions' outer limits.¹⁷⁹ As a result, Prop 207's exceptions will do little more than allow municipalities to continue to enact the most necessary and common types of land use laws, or else risk exposure to significant liability.

CONCLUSION

Prop 207 has severely limited the ability of local governments to regulate land use by attaching significant costs to doing so. Regardless of the relative merits of the law, cities, towns, counties, and the state must continue to regulate land use within Prop 207's constraints. None of the regulatory options this Note discusses constitutes a "loophole" or a return to the state of the law before Arizona voters enacted the proposition. These options, allowed by Prop 207 itself, do, however, provide the state's political subdivisions avenues to enact land use laws within the parameters of the proposition, without subjecting themselves to prohibitively costly diminution in value claims.

Although waivers of the right to sue under Prop 207 will not save all land use regulation, they do serve an important function under Arizona's new regulatory takings regime. Waivers not only protect political subdivisions from liability for reductions in property value caused by regulations requested by the property owner, but they also allow cities and towns to ask landowners to waive their right to sue under Prop 207 for specific, government-initiated land use changes. The largest difficulty with waivers is that they require property owner cooperation. The more landowners a regulation affects, the more difficult it is to obtain waivers from all affected landowners. Thus, waivers should prove somewhat useful in the context of government-initiated projects and almost essential when involving landowner-requested land use actions.

In addition to waivers, local governments retain the ability to regulate for public health and safety, as well as public nuisances, without exposure to Prop 207 liability. Although these exceptions are somewhat limited, many important types

178. § 12-1134(C).

179. § 12-1135(D) ("A prevailing plaintiff in an action for just compensation that is based on diminution in value pursuant to § 12-1134 may be awarded costs, expenses, and reasonable attorney fees.").

of land use regulation fall into these categories. Local governments must regulate within these important areas, but they carry the burden of demonstrating that a given regulation falls within a Prop 207 exception.¹⁸⁰ Thus, rather than test the outer limits of the exceptions and risk liability for diminution in value and attorneys' fees, Arizona cities, towns, and counties are more likely to regulate safely within known boundaries.

So, what is the state of land use regulation in Arizona after Prop 207? Without a doubt, local governments are more limited in their ability to regulate land use than before passage of the law. Specific instances demonstrate that, for the most part, cities and towns are reluctant to challenge, or even to expose themselves to, Prop 207 claims. This Note highlights several limited but important ways in which local governments can regulate without risking potential liability. Many land use regulations, however, will necessarily fall outside those means. Prop 207's application to numerous regulations will likely result in reduction of new land use regulation throughout the state. What problems this reduction in regulation will cause, and whether Arizona's new regulatory takings regime will bear out scholars' criticisms, remain to be seen. In the meantime, local governments can and should use the tools available to them to continue to enact necessary land use regulations.

180. § 12-1134(C).
