

# Transferring Swedish City Planning Techniques to Arizona\*

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The phenomenal increase in Arizona's population in recent years<sup>1</sup> has resulted in tremendous growth in the Phoenix and Tucson metropolitan areas.<sup>2</sup> Most of the development in these areas has been in the form of low to medium density single family residences, spread in a disorderly pattern over large areas of land.<sup>3</sup> The sprawling nature of the development is intensified by the tendency of many developers to hop over vacant land near the developed areas of the cities, in favor of cheaper land in outer areas.<sup>4</sup> This leapfrog development and the resulting urban sprawl<sup>5</sup> not only frustrate orderly growth, but may also

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1. Arizona's population has grown from 499,261 in 1940 to 2,449,200 in 1978. VALLEY NAT'L BANK, ARIZONA STATISTICAL REVIEW 6 (34th ed. 1978).

2. The population of Phoenix has grown from 64,414 in 1940 to 690,100 in 1978. During the same time Tucson has grown in population from 35,752 to 309,600. *Id.*

3. PHOENIX PLANNING DEPARTMENT, THE COMPREHENSIVE PLAN 1990 15-16 (1969) [hereinafter cited as PHOENIX PLAN 1990]; COMPREHENSIVE PLAN FOR THE DEVELOPMENT OF EASTERN PIMA COUNTY, POLICIES introduction (1977) (proposed) [hereinafter cited as THE COMPREHENSIVE PLAN FOR PIMA COUNTY].

4. Interview with Wayne Moody, Director of Tucson Planning Office in Tucson (Oct. 18, 1978); telephone interview with Bob Johnson of the Phoenix Planning Office (Oct. 21, 1978). Primarily as a result of leapfrog development, vacant land constitutes 40% of the land in Phoenix, PHOENIX PLAN 1990, *supra* note 3, at 31, and 38% of the land in Tucson, GENERAL LAND USE PLANNING, A REPORT FOR COMMUNITY DISCUSSION 14 (1972).

5. The term urban sprawl describes a haphazard pattern of low density development which occurs when developers "go beyond the areas of logical development to isolated locations on the urban fringe where they can find land at reasonable prices," thus leaving undeveloped the areas closer to the urban core. F. BOSSELMAN, ALTERNATIVES TO URBAN SPRAWL: LEGAL GUIDELINES FOR GOVERNMENTAL ACTION 5 (1968). Urban sprawl not only creates an unaesthetic, inefficient pattern of development on the urban fringe, but it also adversely affects inner city areas as the affluent move to the developing suburbs and leave the lower income and minority groups behind. *Id.* at 6-7. The leapfrogging process that characterizes sprawl also has an irreversible impact on the plant and animal life in the fragile desert areas surrounding the cities. See generally Maggio, *Urbanization Upsetting Plants, Animals*, Arizona Daily Star, June 17, 1973, at 1, col. 1, *reprinted in*, TUCSON: THE SHRINKING DESERT 42-44 (1973). Sprawl also causes increased traffic congestion and longer commuting trips, as residences and places of employment are located farther apart. The increased traffic in turn produces more air pollution, which further deteriorates the quality of life in the urban areas. Kiser, *City Threatened by Auto Pollution*, Arizona Daily Star, June 10, 1973, at 1, col. 1, *reprinted in* TUCSON: THE SHRINKING DESERT, *supra*, at 40; COMPREHENSIVE PLAN FOR PIMA COUNTY, *supra* note 3, at 32.

impose greater costs on taxpayers and consumers who must often pay some portion of the expenses to extend water, electricity, and sewage facilities to areas that are far from the nearest development.<sup>6</sup>

In seeking solutions to the problems of urban sprawl, the example of Sweden, a nation renowned for its city planning,<sup>7</sup> might reasonably be considered to see which planning techniques could be borrowed from that country and adapted for use in Arizona. Like Arizona, Sweden has experienced tremendous urban development since World War II. Unlike Arizona, however, it has managed to control more efficiently the time, place, and manner of development so as to avoid excessive sprawl and the resulting destruction of open space and good agricultural lands near the urban areas.<sup>8</sup> By examining the Swedish land use planning laws and techniques, planning ideas can be discovered that may be adaptable to Arizona's cultural, economic, and political system. At the same time, Arizonans can learn from any mistakes and problems encountered in the Swedish planning experience.

This Note will examine and compare the land use laws, policies, and techniques of Arizona and Sweden, using as examples the actual planning and development of two Arizona cities, Phoenix and Tucson, and two Swedish cities of comparable size, Stockholm and Malmö. Among the techniques which will be discussed are planning, land banking, and transfer development rights. Finally, the possibility of transferring some of the positive aspects of the Swedish experience to Arizona will be discussed.

## LAND USE PLANNING IN ARIZONA AND SWEDEN

### *Arizona*

Arizona, which is the sixth largest state in the United States in

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6. As a result of leapfrogging, water and sewer lines and roads must be extended over great distances to reach from one residential neighborhood to another, resulting in higher per capita costs for these services, as well as miles of water and sewer lines adjacent to undeveloped properties. F. BOSSELMAN, *supra* note 5, at 6. Some of the additional costs generated by sprawl for schools, roads and other public improvements are imposed on the community as a whole. Note, *Public Land Banking: A New Praxis for Urban Growth*, 23 CASE W. RES. L. REV. 897, 902-03 (1972). Local governments in the Tucson and Phoenix areas now usually require developers to contribute some or all of the funding for the initial provision of roads, water lines, and other public services. Interview with Alex Garcia, Pima County Planning Director, in Tucson (Oct. 20, 1978). Although the developers pay some of the initial costs for public services, however, much of the expense of maintaining the services eventually falls on the local government. Moreover, if the services provided by the developers are not of the same standard as those normally provided by the local government, the government may have to upgrade the services, replacing substandard equipment. Telephone interview with Bob Johnson, *supra* note 4.

7. Stockholm is often cited by commentators on planning for its exemplary new communities. See, e.g., A. STRONG, *PLANNED URBAN ENVIRONMENTS* 61 (1975); Passow, *Land Reserves and Teamwork in Planning Stockholm*, 36 J. AM. INST. PLANNERS 179, 179-88 (1970); Note, *supra* note 6, at 908.

8. See text & notes 71-95 *infra*.

terms of land area,<sup>9</sup> is one of the fastest growing states in terms of population.<sup>10</sup> Far more than half of Arizona's inhabitants live in the Phoenix and Tucson greater metropolitan areas.<sup>11</sup> Phoenix, Arizona's capital and largest city,<sup>12</sup> is located in central Arizona, while Tucson is located in the southern region of the state.<sup>13</sup> Even though both areas have been populated for over 10,000 years,<sup>14</sup> they have grown into large urban centers only since World War II.<sup>15</sup>

Since most of Arizona's urban growth has occurred since the United States acquired the area, Anglo-American laws and concepts have governed urban development in Arizona. The traditional Anglo-American concept of land ownership stresses the impregnability of private ownership rights in land.<sup>16</sup> At the root of the traditional concept of private property is the belief that society is served best by giving private land owners the freedom to choose the most efficient and profitable use for their land.<sup>17</sup> In the United States, this strong tradition of private land ownership without government interference "has proved highly resistant to the imposition of public land use controls."<sup>18</sup>

Land use in Arizona is controlled primarily through planning and zoning.<sup>19</sup> Local land use policy decisions are expressed in comprehen-

9. VALLEY NAT'L BANK, *supra* note 1, at 58.

10. *See id.* at 5. *See* note 1 *supra*.

11. VALLEY NAT'L BANK, *supra* note 1, at 6, 10. Indeed, almost half of the state's population is in Maricopa County (the greater Phoenix area) alone. *Id.* at 65.

Both metropolitan areas are located in desert regions with hot summers, mild winters, and little precipitation.

12. *Id.* at 6. The 1978 population of Phoenix was 690,100; the population of the greater Phoenix area 1,346,500. *Id.* at 10. Phoenix is the 15th most populous city in the United States. *Id.* at 5.

13. Tucson now has a population of about 309,600. *Id.* at 10.

14. Archaeologists have discovered artifacts indicating that Arizona has been inhabited since 10,000 B.C., and probably even before that. Haury, *Before History*, in ARIZONA, ITS PEOPLE AND RESOURCES 18 (1972).

15. VALLEY NAT'L BANK, *supra* note 1, at 6.

16. Caldwell, *Rights of Ownership or Rights of Use?—The Need for a New Conceptual Basis for Land Use Policy*, 15 WM. & MARY L. REV. 759, 760-62 (1974).

17. Note, *supra* note 6, at 900.

18. Caldwell, *supra* note 16, at 761. Zoning, a land use control device that restricts the types of development allowed in a particular area or zone, was introduced around the 1920's to protect property values and exclude improper uses from residential areas. Note, *supra* note 6, at 901, 904. The constitutionality of zoning as a valid police power measure was upheld by the United States Supreme Court in *Euclid v. Ambler Realty*, 272 U.S. 365, 387-97 (1926).

Although zoning remains the major planning tool in this country, it has been criticized as being too inflexible, ineffective and subject to abuse. Note, *supra* note 6, at 906; Note, *Land Use Control in Metropolitan Areas: The Failure of Zoning and a Proposed Alternative*, 45 S. CAL. L. REV. 335, 338-50 (1972).

19. In Arizona, the Urban Environment Management Act [hereinafter cited as the Act], ARIZ. REV. STAT. ANN. §§ 9-461 to 9-467 (1977 & Supp. 1978-79), gives cities and towns the authority to control land development through planning, zoning, and other devices. Counties are not included in the Act, but are given the power to regulate land use by ARIZ. REV. STAT. ANN. §§ 11-801 to 11-867 (1977 & Supp. 1978-79). The planning and zoning powers of the counties are co-existent with those of the cities and towns. For a discussion of Arizona's land use legislation, see Schroeder, *Public Regulation of Private Land Use in Arizona: An Analysis of Its Scope and Potential* (pt. 1) 1973 LAW & SOC. ORD. 747, 762-69, 787-92.

sive plans<sup>20</sup> that establish the proposed distribution and location of broad categories of land uses, and the location of streets and transportation facilities.<sup>21</sup> Once adopted by the local legislative body,<sup>22</sup> the comprehensive plans may be implemented through specific plans,<sup>23</sup> zoning,<sup>24</sup> subdivision regulations,<sup>25</sup> and other appropriate devices.<sup>26</sup>

Zoning, the main tool used by city and county governments to control land development patterns and implement comprehensive plans,<sup>27</sup> is used to control the bulk, location, and use of buildings within zones, and to control signs, parking, building in flood plains, and other land uses.<sup>28</sup> Ideally, planning and zoning should be used together by local governments to provide for coherent, rational allocations of land uses in urban areas.<sup>29</sup> Planning and zoning have not been effective in the Tucson and Phoenix areas, however, in controlling ur-

20. The Act authorizes, but does not require, municipalities to engage in comprehensive planning. ARIZ. REV. STAT. ANN. § 9-461.01 (1977). If a city decides to engage in comprehensive planning, it must establish a planning agency to prepare the comprehensive plan. *Id.* § 9-461.01, .03. Counties are required to engage in comprehensive planning as a guide to county development. *Id.* §§ 11-802, -806, -821.

21. *Id.* §§ 9-461.05(C), 11-806. Cities with populations over 50,000 must also plan for such things as the conservation of natural resources, open space needs, public buildings and improvements, and the elimination of substandard housing. *Id.* § 9-461.05(D).

22. Adoption procedures for municipal plans are set out in ARIZ. REV. STAT. ANN. § 9-461.06 (1977). Prior to the adoption of the plan, planners must seek input from the public and other planning agencies. *Id.* § 9-461.05(E) & (F). Public hearings must then be held before the planning commission, *id.* § 9-461.06(B), and the municipal legislative body. *Id.* § 9-461.06(D).

County planning and zoning commissions prepare the county comprehensive plans which may be adopted in whole or in part by the county board of supervisors after public hearings. *Id.* § 11-806. The commission must also formulate a comprehensive long term plan with recommendations for the development of the planning area. *Id.* § 11-821. The plan may be adopted by the commission after a public hearing, *id.* § 11-822, and by the county board of supervisors after another hearing. *Id.* §§ 11-823, -824.

23. *Id.* § 9-461.08. A specific plan is defined as a detailed element of the general plan. *Id.* § 9-461 (Supp. 1978-79). The definition encompasses zoning ordinances, as well as detailed area plans, such as those used by planners in Phoenix and Tucson.

24. Municipal and county zoning regulations include, among other things, provisions governing the use of land, height and location of buildings, and open spaces. *Id.* §§ 9-462.01, 11-801(8) (1977). See generally "Rezoning Subject to Conditions," 18 ARIZ. L. REV. 786, 791-97 (1976). Zoning appeals and applications for hardship variances are heard by county and municipal boards of adjustment. ARIZ. REV. STAT. ANN. §§ 9-462.06, 11-807 (1977 & Supp. 1978-79). Zoning is enforced primarily by withholding building permits for projects that do not conform to the zoning regulations. *Id.* §§ 9-462.05, 11-808(A) (1977 & Supp. 1978-79).

25. Municipalities are given specific authority under the Act to regulate the subdivision of land by setting requirements which must be met before a subdivision plat will be approved. ARIZ. REV. STAT. ANN. § 9-463.01, .03 (1977). The design and location of buildings are not within the scope of these regulations. Counties also have the express power to regulate subdivisions by approving subdivision plats. *Id.* § 11-806.01 (Supp. 1978-79).

26. The discussion in this Note will be limited to planning, zoning, and subdivision regulations. For a discussion of other devices which can be used by a local government to control land use, such as the law of nuisance, see Schroeder, *supra* note 19, at 770-84, 792-95.

27. PHOENIX PLAN 1990, *supra* note 3, at 35-36. Zoning functions by restricting the use of land in certain areas without compensation to the owners, so long as the restriction promotes the public health, safety, morals, or welfare. Zoning which is too restrictive, however, may require compensation if it constitutes a taking. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-16 (1922). For a good discussion of the takings clause and other aspects of zoning, see *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427-1708 (1978).

28. ARIZ. REV. STAT. ANN. §§ 9-462.01, 11-801(8) (1977).

29. "[Rationally] basic policy decisions should be made first on a coordinated basis (plan-

ban sprawl. The failure of these land use controls can be attributed, in part at least, to three major factors: Zoning has not always been consistent with planning;<sup>30</sup> the plans have often been ineffective;<sup>31</sup> and local governments have been unable to control development that occurs outside their boundaries.<sup>32</sup>

Zoning should be consistent with planning, but the interpretation of consistency has been less than consistent itself.<sup>33</sup> For example, Tucson was originally planned on a "neighborhood concept" in which the square mile area formed by the intersections of four major streets would be a neighborhood with homes, schools, and churches.<sup>34</sup> Commercial enterprises were to fill the corners where the streets intersected, and apartments were to line the major streets between these corner stores.<sup>35</sup> The planned neighborhood concept was never fully realized, however, because the commercial corners were gradually expanded through rezoning, with the result that strip commercial development now lines the major arteries of Tucson, instead of the planned apartments.<sup>36</sup>

Even where planning and zoning have been consistent, they have seldom been intended to control urban sprawl. Planning and zoning in Tucson and Phoenix<sup>37</sup> have generally provided for low to medium density development in the form of detached single family residences.<sup>38</sup> The plans and zoning ordinances, however, have contained few, if any, incentives for development near the urban core, or deterrents against developers hopping over vacant land to build on the urban fringe.<sup>39</sup> In

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ning); and then the appropriate tools . . . should be selected to carry out these decisions." I N. WILLIAMS, AMERICAN LAND PLANNING LAW § 1.01, at 3 (1974).

30. See text & notes 33-36 *infra*.

31. See text & notes 37-40 *infra*.

32. See text & notes 42-44 *infra*.

33. Interview with Wayne Moody, *supra* note 4; Telephone interview with Bob Johnson, *supra* note 4. This problem is not unique to Tucson or Phoenix. "There are few communities that can claim with much justification that their regulations stem directly from any comprehensive, long-range plan." Reps, *Requiem for Zoning*, in LAND USE CONTROLS: PRESENT PROBLEMS AND FUTURE REFORM 33 (D. Listokin ed. 1974).

34. Interview with Wayne Moody, *supra* note 4.

35. *Id.*

36. *Id.* To ensure that plans are not emasculated by inconsistent zoning decisions, Tucson planners are now attempting to involve citizens and citizens' groups more actively in the planning process. The underlying theory is that the citizens will not only provide valuable input into the planning process, but will also supply lobbying pressure on the council to follow the plan they helped to create. *Id.*

37. In Phoenix, land use patterns were regulated by zoning without the benefit of a plan until 1971, when the first comprehensive plan for the city, Phoenix Plan 1990, was adopted. Telephone interview with Bob Johnson, *supra* note 4. The Phoenix City Council now usually follows the comprehensive plan and the detailed area plans that supplement it in establishing zoning ordinances and other land use regulations. *Id.*

38. PHOENIX PLAN 1990, *supra* note 3, at 64; COMPREHENSIVE PLAN FOR PIMA COUNTY, *supra* note 3, at introduction. For the purposes of this Note, low density uses will be defined as one dwelling unit per acre to one unit per four acres, medium density as one to five dwelling units per acre, and high density uses as five to twenty-five dwelling units per acre.

39. Interview with Wayne Moody, *supra* note 4; telephone interview with Bob Johnson,

fact, since development was allowed on the urban fringe as well as in the core, developers had an incentive to develop the less expensive lands on the edge of existing development, rather than the lands in the urban core.<sup>40</sup> Aware of the defects in earlier land use regulations, planners in Phoenix and Tucson have enlisted new planning ideas to combat uncontrolled urban sprawl.<sup>41</sup>

The effectiveness of land use planning in Phoenix and Tucson is necessarily reduced if the other political entities in the Phoenix and Tucson metropolitan areas have lower standards for development, or conflicting ideas about what development should be allowed in the metropolitan region.<sup>42</sup> For example, Phoenix's practice of annexing existing county zoning has resulted in nonconforming uses and inadequate development controls in the annexed areas.<sup>43</sup> Because conflicts between the development plans of the local governments in a metropolitan area could frustrate orderly development in the area, the municipalities and counties in the Phoenix and Tucson regions cooperate voluntarily in planning matters.<sup>44</sup> Whether this voluntary cooperation can achieve coherent, effective planning in the Phoenix and Tucson metropolitan areas remains to be seen.

Local governments in Arizona have been granted fairly extensive powers to regulate land use by the relevant Arizona statutes.<sup>45</sup> Never-

*supra* note 4; Burton, *Urban Solution May Have Been There All Along*, Arizona Daily Star, April 15, 1973, at 1, col. 1, reprinted in TUCSON: THE SHRINKING DESERT, *supra* note 5, at 22-23.

40. Interview with Wayne Moody, *supra* note 4; telephone interview with Bob Johnson, *supra* note 4; Parham, *Planners, Developers Disagree on Urban Sprawl*, Arizona Daily Star, March 18, 1973, at 1, col. 1, reprinted in TUCSON: THE SHRINKING DESERT, *supra* note 5, at 8.

41. Tucson planners hope to encourage orderly growth by promoting development near the urban core in five year stages. The proposed comprehensive plan for Pima County provides for local governments to designate and establish "priority urbanization and growth areas in 5-year increments." COMPREHENSIVE PLAN FOR PIMA COUNTY, *supra* note 3, at 42. Development outside the five year growth area is permitted only if the proposed development would not require an expansion of public services, or impose costs on the local government during the development's first five years. *Id.* at 42. The comprehensive plan also expresses the need for incentives to encourage construction in the inner city, and provides for local governments to incorporate into their zoning ordinances density bonus provisions, which allow higher than normal densities for certain inner city development, as an incentive for development. *Id.* at 46.

Phoenix planners are seeking to promote an orderly growth pattern by developing plans based on an urban village concept, in which residences are built around a center with commercial, business, recreational, and educational facilities. The center serves as an activity nucleus for the surrounding housing, tying them into a sort of urban village, and providing inhabitants with nearby shops, work places, schools, entertainment, and perhaps a sense of community. Telephone interview with Bob Johnson, *supra* note 4.

42. For example, Tucson's attempts to encourage development in the inner city and restrict development on the urban fringe would be defeated if developers could simply develop less expensive land beyond the city limits.

43. PHOENIX PLAN 1990, *supra* note 3, at 180.

44. Interview with Wayne Moody, *supra* note 4; Telephone interview with Bob Johnson, *supra* note 4. Local plans for regional matters such as air and water quality are also coordinated by the Maricopa Association of Governments in the Phoenix area and the Pima Association of Governments in the Tucson area. *Id.* As to how these regional governments operate, see discussion at note 186 *infra*.

45. See text & notes 19-28 *supra*.

theless, land development in the Tucson and Phoenix urban areas has been characterized by low density, haphazard sprawl.<sup>46</sup> Part of the blame for this pattern of development lies in the way the local land use regulations were implemented,<sup>47</sup> but some of the problem must also be attributed to inefficiencies and defects in the regulations themselves.<sup>48</sup> Zoning, the workhorse of land use controls in Arizona, has been especially inflexible, ineffective, and subject to abuse.<sup>49</sup>

### *Sweden*

Sweden is approximately the same physical size and shape as California, but it lies on about the same northern latitude as Alaska.<sup>50</sup> As a result of the migration from rural to urban areas brought about by industrialization,<sup>51</sup> most Swedes now live in urban industrial centers in the southern half of the country.<sup>52</sup> After the industrial revolution, the tremendous growth of these southern urban areas created an enormous demand for rapid housing development.<sup>53</sup> The Swedish government responded to the demand by gradually developing legislation designed to ensure orderly urban growth while providing high quality housing.<sup>54</sup>

46. See text & notes 3-6 *supra*.

47. See text & notes 33-36, 42-44 *supra*.

48. See text & notes 37-44 *supra*.

49. See note 18 *supra*.

50. SKANDINAVISKA ENSKILDA BANKEN, SOME DATA ABOUT SWEDEN 1977-78 5 (1977). Sweden has a land area of 173,654 square miles. *Id.*; SWEDISH INSTITUTE, GENERAL FACTS ON SWEDEN 1 (1976).

51. N. FRICK, PLANERA/BYGGA/BO 11-13 (1969). The enormity of the rural to urban movement can be seen from the fact that while the population of Sweden grew by 2,000,000 from 1945 to 1965, the population of the rural areas shrunk by 750,000. *Id.* at 13.

52. SWEDISH INSTITUTE, *supra* note 50, at 1. The average population density of Sweden is 52 inhabitants per square mile, but this does not reflect the actual situation, as over 90% of the population lives in the southern half of the country. *Id.*

Two of the major population centers in Sweden are Stockholm and Malmö. Stockholm is located on the mainland and on some 20 islands on the east coast of Sweden. E. ÖDMANN & G. DAHLBERG, URBANIZATION IN SWEDEN 70 (1970). It was founded as a fortress in the middle of the 13th century and was established as the nation's capital in the 1600's. Sidenbladh, *Stockholm: A Planned City*, in CITIES 75 (1970). The population of the greater Stockholm metropolitan area in 1977 was 1,364,175, or 16.6% of the Swedish population. The population of Stockholm Commune was 661,258. STOCKHOLM OFFICE OF STATISTICS, STOCKHOLM '77, DATA GUIDE 1 (1977).

Malmö was a Danish town from its beginnings in the 12th century until the middle of the 17th century. Today, the southern Swedish city is a thriving industrial and commercial center, and the third largest commune in Sweden. MALMÖ'S BUILDING COMMITTEE, MALMÖ 1862-1962 8 (1962). The population of Malmö as of 1976 was 240,000, while the population of the greater Malmö area was 453,320. SWEDISH CENTRAL BUREAU OF STATISTICS, SIFFROR OM SVERIGE 1978 3 (1978).

53. N. FRICK, *supra* note 51, at 14. The housing demand was intensified by the increased wealth of Swedes, who were no longer content to live in overcrowded conditions in low quality dwellings. *Id.* See also H. WOHLIN, FRAMEWORK FOR URBAN DEVELOPMENT IN SWEDEN 2 (1978).

54. See P. HEIMBÜRGER, THE USE OF MUNICIPAL LAND OWNERSHIP AS AN INSTRUMENT IN INFLUENCING THE STRUCTURE OF URBAN DEVELOPMENT, SWEDEN'S EXPERIENCE 18-19 (n.d.). The primary laws relevant to land regulation in Sweden are: 1947 Building and Planning Act (SFS 385/1947); 1959 Building Code (SFS 612/1959); Housing Acts (SFS 523/1947; 605/1959;

Land planning in Sweden today is regulated on the national,<sup>55</sup> regional (county),<sup>56</sup> and local levels, but the main responsibility for actual development planning rests with the local governments, or communes.<sup>57</sup> Communes are given the power to regulate urban development by the Building and Planning Act of 1947<sup>58</sup> and the Building Statutes of 1959.<sup>59</sup> The Building and Planning Act requires communes

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309/1967; 655/1962); 1967 Pre-emption Act (SFS 868/1967); and the 1972 Expropriation Act (SFS 719/1972).

Sweden's long history of public control over land make these far reaching laws possible. Land had historically belonged to the king and church, but all citizens had a collective right to enjoy it. In 1530, King Gustav I Vasa initiated a Protestant Reformation, and gave much of the land he seized from the Catholic Church to the towns, although the public retained its right to free enjoyment of the land. Swedish law and tradition have retained this ancient right of public access to land (*allemansrätten*) thus allowing Swedes to walk on all land, private or public, that is not under till, directly attached to a building, or otherwise likely to be harmed by the intrusion. Passow, *supra* note 7, at 185. When the liberal ideas of private land ownership spread to Sweden in the early 19th century, much of the public land was sold to private owners who were given absolute control over the property, and could not be forced to relinquish it without compensation. When the private owners began misusing their new lands to maximize short term profits, the public gradually began reacquiring ownership and control over the land. P. HEIMBÜRGER, *supra*, at 3-4.

55. As Sweden is a constitutional monarchy with a parliamentary system of government, political power rests primarily in the cabinet and the party or coalition of parties it represents. The administration and execution of the legislation and policy decisions are carried out by central administrative agencies, including the National Board of Urban Planning (Statens Planverk), the National Housing Board (Bostadsstyrelsen) and the county administrative boards (*länsstyrelsen*). The national government influences planning through legislation, advice, and financial, judicial, and administrative aid. A. STRONG, *supra* note 7, at 20-25. For a more complete discussion of Sweden's government, see E. ÖDMANN & G. DAHLBERG, *supra* note 52, at 98-99; SWEDISH INSTITUTE, SWEDISH GOVERNMENT IN ACTION *passim* 1976.

56. There is a regional county administrative board in each of Sweden's 24 counties. The general function of the boards, which are directly subordinated to the national government, is to supervise and coordinate national and local interests within the county. County planners normally work closely with local planners to make sure relevant national legislation is followed, and to protect public and private interests affected by the plans. E. ÖDMANN & G. DAHLBERG, *supra* note 52, at 112-13.

The county boards usually review and ratify local development plans, although they must defer to the national Ministry of Housing and Physical Planning if controversial or extremely complicated plans are involved. The decisions of a county board may be appealed to either special courts or the national government, depending on the type of case and the parties involved. Bexelius, *Town and Country Planning Law in Sweden*, in PLANNING LAW IN WESTERN EUROPE 278-79 (J. Garner ed. 1975).

The county boards also have primary responsibility for regional development planning that aims at distributing jobs, services, and other resources evenly throughout the country in order to give equal opportunities to people in all areas. See MINISTRY OF LABOUR & HOUSING & MINISTRY OF PHYSICAL PLANNING & LOCAL GOVERNMENT, PLANNING SWEDEN 19-21 (1973) [hereinafter cited as PLANNING SWEDEN].

Most counties also have an elected county council (*landsting*) to handle health care matters and certain types of education within the county. SWEDISH INSTITUTE, *supra* note 55, at 4 (1976).

57. Communes (*Kommuner*) were created by combining the preexisting towns, boroughs, and rural districts into new units of local government with minimum populations of 3,000. Further reforms have resulted in about 270 communes, each with an urban center and a minimum population of 8,000. The purpose of the boundary reforms which created the communes was to produce local units of sufficient size to effectively provide for housing, planning, education, and other social services. P. HEIMBÜRGER, *supra* note 70, at 4-6. For a detailed explanation of the development of the modern Swedish communes, see PLANNING SWEDEN, *supra* note 72, at 22-27.

58. Byggnadslag [BL] SFS 385/1947, as amended. A new Building and Planning Act is now being drafted and should be adopted by Parliament within a few years. Interview with Alfred Bexelius, co-author of the 1947 Building and Planning Act, in Stockholm (Mar. 23, 1978).

59. Byggnadsstadgen [BS] SFS 612/1959.

to undertake both overview and detailed planning.<sup>60</sup> Overview plans indicate the general locations of major land uses, such as residences, streets, highways, and industries.<sup>61</sup> There are two types of overview plans: regional plans, which coordinate the basic land use planning in two or more communes;<sup>62</sup> and master plans, which are long range plans giving the essential features of land use within a commune.<sup>63</sup> Overview plans are usually not given legal effect through approval by the commune or ratification by the county or state.<sup>64</sup> Instead, they serve as guides for drafting detailed plans and granting building permits.<sup>65</sup>

Detailed planning may be in the form of either a town plan or a building plan.<sup>66</sup> Both types of detailed plans indicate the specific location of buildings, streets, parks, and other uses in an area intended for immediate development.<sup>67</sup> Among other things, town plans also indicate the type and style of housing allowed, the maximum height, size, and number of floors of buildings, the sequence in which development

60. BL §§ 2, 3 (SFS 775/1972). Detailed plans are prerequisites for all high density development. High density development (tätbebyggelse) is defined in BL § 6 (SFS 1088-1971) as "overall development of a kind which necessitates, or can be expected to necessitate, special arrangements for the satisfaction of collective needs [e.g., sewers, streets, public utilities]." All other development is considered to be low density development (glesbebyggelse). *Id.* A detailed plan is not needed for low density development, but the feasibility of the development is tested by the commune when a building permit is requested. BL § 5, BSt § 29. For a good discussion of the Building and Planning Act, see Bexelius, *supra* note 56.

61. BL §§ 2, 3 (SFS 775/1972).

62. *Id.* §§ 3, 126-135. If communes in a region decide to make a regional plan, they form a regional planning council composed of representatives of each commune, presided over by a chairperson and a vice-chairperson chosen by the national government. *Id.* §§ 126-129. The national government can order communes to engage in regional planning, if deemed necessary. *Id.* §§ 127, 128.

The Local Federation of South-West Skåne [SSK], of which Malmö is a member commune, is an example of a regional planning council in southern Sweden. The federation drafts advisory regional plans, which are usually followed as long as they are current, since the county administrative board generally requires compliance with the regional plan as a condition for approving local plans. Interview with Philip Möding of the South Skåne Regional Planning Committee, in Malmö (June 16, 1978).

Regional planning in the Stockholm area is handled in a special manner. BL § 128. Since 1971, the Stockholm County Council has been given responsibility for all health care and mass transit services within the county. H. CALMFORS, DEN KOMMUNALA SJÄLVSTYRELSEN I STOCKHOLM 43 (1976). The county council has also taken on regional planning duties, and while the regional plans are only advisory, the county administrative board can refuse to approve plans which do not follow the regional plan. Interview with Joseph Stäck, head of the Greater Stockholm Regional Planning Office, in Stockholm (June 9, 1978).

63. BL §§ 2, 9-23 (SFS 775/1972). Master plans, which give the basic land uses for different areas within the commune, are drawn up by a commune on its own initiative (BL § 9) or upon orders from the national government. (BL § 10a). Like regional plans and detailed plans, master plans must be placed on public exhibition for a minimum period of time before they can be approved and ratified. BSt § 17 (SFS 819/1975).

64. P. HEIMBÜRGER, *supra* note 54, at 9.

65. *Id.*

66. BL § 2. Detailed plans are limited in scope to an area which is likely to be developed in the near future. BSt § 12.

67. BL §§ 25, 107.

will occur, and anticipated costs.<sup>68</sup> Once a detailed plan is adopted by a commune and ratified by the county or state,<sup>69</sup> it becomes legally binding and any development that does not comply with the plan is illegal unless special dispensation is given.<sup>70</sup> A commune can also restrict high density development in a particular area simply by refusing to draft a detailed plan for that area, since a detailed plan is a legal prerequisite to any high density development.<sup>71</sup>

In addition to their power to regulate land development through physical planning, communes can engage in land banking to ensure desired development will occur.<sup>72</sup> Communes bank land by acquiring

68. Plans set maximum limits only, but a developer will usually build to the maximum limits allowed. Interview with Joseph Stäck, *supra* note 62.

Building plans may be less detailed than town plans. BL § 107 (SFS 1088/1971). A building plan need only give the major purposes for which the planned area may be used. *Id.* § 108. Another difference between a building plan and a town plan is that landowners within an area covered by a building plan have to carry out the plan themselves, for example by maintaining the streets on their own. BL § 114 (SFS 775/1972). Where a town plan is involved, the commune is responsible for preparing and caring for the streets and public areas created by the plan, and can automatically appropriate land needed for such uses. BL § 41.

69. Planning is initiated by the commune either on its own, or at the request of the national government or a landowner. During the initial planning stages, the communal planner must consult other authorities and interested parties affected by the plan. When a tentative draft of the plan is completed, it is put on public exhibition for at least three weeks. Property owners affected by the plan are given personal notice of the exhibition, while public notice is given through local newspapers. After the exhibition, the planners consider any comments received from the public and decide whether the plan should be changed, and a new exhibition is held. If the plan is then approved by the Communal Council, it goes to the county administrative board or the national government for ratification. Interested property owners who protested against the plan at the exhibition stage can also protest at the ratification stage, and can appeal ratification of the plan to the national government. BL §§ 2, 26, 108 (SFS 775/1975). The whole process of making a plan legally binding takes from one to three years. Interview with Alfred Bexelius, *supra* note 58.

70. BL §§ 34, 110 (SFS 775/1972, 459/1975). If a land owner's right to use the land is unduly restricted by the plan, compensation may be required. Compensation must be given when a plan reduces a landowner's ability to continue existing uses. BL §§ 22, 75 (SFS 775/1972). For example, if a farmer is hindered by a plan from using his land for agricultural purposes, he is entitled to compensation for the losses stemming from his inability to continue farming. B. BENGTSSON, PLANERING OCH FASTIGHETSBLDNING 26 (1977). Similarly, if a building permit has already been obtained but not used, a landowner can obtain compensation if the right to build is lost because of a plan. *Id.*

71. BL §§ 5, 34 (SFS 775/1972, 459/1978). The owner may continue the present use of the land, and may apply for dispensation from the planning requirement to construct a small number of buildings on the unplanned land, but the owner may not develop the land until the commune agrees to the development. BL § 5 (SFS 775/1972). Dispensations from planning requirements are often given to allow the construction of small numbers of houses. Interview with Elsa Krantz, planner with the National Board of Urban Planning, in Stockholm (Mar. 20, 1978).

Under Swedish law, a landowner cannot demand compensation because he has been prevented from developing land beyond the uses previously allowed. BL §§ 2, 22, 48, 75 (SFS 775/1972, 312/1973); B. BENGTSSON, *supra* note 70, at 25. Thus, land values for compensation purposes are determined without regard to the potential development of the land, unless development has already been approved by governmental authorities. B. BENGTSSON, *supra* note 70, at 25; P. HEIMBÜRGER, LAND POLICY IN SWEDEN 23-24 (1976). A commune may also be required to buy land if the value of the land after detailed planning is obviously out of proportion to its previous value. BL § 48 (SFS 775/1972).

72. Land banking has been defined as:

the acquisition of developed and undeveloped land, holding of land, and disposition of land for all types of land uses—public and private—without prior specification of the use for particular sites, by a public body whose deliberate purposes are control of metropoli-

and storing for future use undeveloped land.<sup>73</sup> When the communes eventually decide what use should be made of the land, they sell or lease the land back to private owners to carry out the desired use.<sup>74</sup>

Swedish communes engage in land banking in order to bolster physical planning techniques, keep land and housing costs low, and ensure that high quality housing is available to all residents.<sup>75</sup> In Stockholm, for example, public land ownership gave local planners and politicians the flexibility and control they needed to plan and build a series of high density suburban satellite communities separated from each other and the central city by greenbelts, and linked to the city by the rapid transit system.<sup>76</sup> Residents of these satellite communities enjoy spacious, high quality, low cost housing that is conveniently located within easy walking distance of parks, mass transit facilities, day care centers, schools, and commercial centers.<sup>77</sup> These planned communities were built with little tax bite to Stockholm taxpayers, since most of

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tan growth pattern and/ or regulation of metropolitan land prices and/or capturing of capital gains and/or regulation of land use.

H. FLECHNER, *LAND BANKING IN THE CONTROL OF URBAN DEVELOPMENT* 7 (1974). Public acquisition and disposition of land are often used in the United States in urban renewal projects. *Id.* Urban renewal differs from the land banking defined above in that land banking generally involves public acquisition of large amounts of undeveloped land that is held (banked) for unspecified use at undetermined future dates. The underlying reason for such land banking is usually to control growth or regulate land prices. *Id.* at 7-8. On the other hand, urban renewal projects generally involve the acquisition of small amounts of developed land for specific redevelopment to be undertaken as soon as possible. *Id.* at 6. For an interesting discussion of the role of land banking in urban renewal, see Note, *supra* note 6, at 931-35.

73. See generally, Roberts, *Land Storage—the Swedish Example*, 38 MOD. L. REV. 121, 128-29 (1975). For example, Stockholm began acquiring land in 1904, with two landmark purchases that more than doubled the city's area. D. PASS, *VÄLLINGBY AND FARSTA—FROM IDEA TO REALITY* 29 (1973); Passow, *supra* note 7, at 180. Much of the land acquired in 1904 was leased to private home owners in the 1920's when Stockholm began a build-your-own-home program to provide low cost housing to its overcrowded inhabitants. D. PASS, *supra*, at 33.

Between 1960 and 1967, Stockholm acquired 77,500 acres, or 21,500 acres more than all land bought during the preceding 55 years. Passow, *supra* note 7, at 181. The increase in land buying by the commune in the 1960's was brought on by three factors: The desire of the commune to buy land marked for development by the 1958 Regional Plan; the creation of STRADA, a communal land buying corporation; and the passage of the 1967 capital gains tax on land sales profits, which made many private land owners eager to sell to Stockholm before the new tax could go into effect. *Id.* at 182. STRADA was created in the late 1950's to compete with private buyers on the real estate market. As a private company, run by public officers, STRADA does not need to disclose its business actions to the public at all times as the Stockholm Real Estate Board does. *Id.* at 185. By 1970, Stockholm owned 50,100 hectares (about 125,000 acres) inside and outside the communal boundaries. STOCKHOLMS KOMMUN, *STOCKHOLMS STADS MARKOMRÅDEN* 1 (1970). Most of this land is leased to public corporations or private parties. Passow, *supra* note 7, at 181.

74. Roberts, *supra* note 73, at 123.

75. R. SVENSSON, *SWEDISH LAND POLICY IN PRACTICAL APPLICATION*, DOC. D5:1976 9-13 (1976). Public land ownership is also considered essential to keep land prices low. Without it, private owners would develop land at actual market prices, and land and housing would go up 10 to 20 times in value. Interview with H.P. Dahlquist, planner with Malmö's Real Estate Office, in Malmö (June 14, 1978).

76. The basic plan for the development of these suburban communities was the 1952 Master Plan for Stockholm. Implementation of the plan depended on communal land ownership, national legislation, and adequate funding from local income taxes and government loans and grants. By the end of the 1960's all of the new communities envisioned by the plan had been built. STOCKHOLM'S PLANNING OFFICE, *STOCKHOLM—URBAN ENVIRONMENT* 11 (1972).

77. *Id.* at 51-86.

the land was acquired by the commune years before, when the land was undeveloped and far outside the existing area of urban growth.<sup>78</sup>

Communes can acquire land through expropriation,<sup>79</sup> preemption,<sup>80</sup> or direct purchases on the open market.<sup>81</sup> Land acquisitions are generally made in accordance with a long range overview plan, so that areas intended for future development can be in communal hands by the time development is begun.<sup>82</sup> Land banked by the commune can be sold or leased to private parties for development<sup>83</sup> at a price covering the actual costs to the commune, excluding increases in land value due to the potential development of the land.<sup>84</sup> Although communes do not make a profit from their land banking operations, land banking does not pose a financial burden on the communes because tax receipts are largely unaffected by public land ownership.<sup>85</sup> Moreover, some return is made by leasing the land for agricultural purposes prior to sell-

78. Passow, *supra* note 7, at 179. Stockholm taps four major revenue resources to finance its land acquisitions—municipal revenues such as income taxes, national government loans, bank loans, and long term bonds. *Id.* at 185. See notes 85 & 128 *infra*.

79. The right to expropriate land is set out in the 1972 Expropriation Act (SFS 719/1972). B. BENGTTSSON, *SPECIELL FASTIGHETS RÄTT* 8 (1974). Expropriation, the exercise of the power of eminent domain, has been available to communes since 1949 as a means to "ensure that land is available on reasonable terms for urban development and otherwise to transfer to municipal ownership undeveloped land for disposal on leasehold tenure." P. HEIMBÜRGER, *supra* note 54, at 10. Communes could therefore ensure that the development called for by a plan would be carried out, even if the private land owner would not develop the land on reasonable terms. Under the 1972 Act, communes no longer need to show that the private owner is unlikely to develop the land, but may expropriate if the land is or may be needed for future high density development. EX. LAW § 2.1.

Expropriation requires the permission of the national government, which may delegate the duty to the county administrative boards. (EX. LAW 3.1). Expropriation that is in accordance with a plan is usually allowed. Compensation is determined by the courts as the market value of the property, but without considering expected development brought about by communal planning. In order to separate expected development profits from market value, the courts follow a presumption that the real value of the property is the market value 10 years before the request to expropriate was made. EX. LAW § 4.3. This rule places the burden of proof on the landowner to show that his land has increased in value because of reasons other than the expectancy of higher intensity use. For a discussion of the expropriation laws, see B. BENGTTSSON, *supra* at 7-26; P. HEIMBÜRGER, *supra* note 54, at 10-12.

80. In most private land transactions the commune has a legal right to take the purchaser's place under the same conditions agreed upon by the original parties. PREEMPTION LAW § 5. The seller receives the stipulated price, and the preempted purchaser is entitled to actual out-of-pocket expenses from the commune. (EXP. LAW § 13.1). Preemption is not allowed if the property in question has a ratable value of less than 200,000 Swedish crowns (about \$45,000), an area of less than 3,000 square meters (about 32,130 square feet), or if relatives or close friends are involved. PREEMPTION LAW § 3.

81. See generally Roberts, *supra* note 73, at 126-27. Most land acquired by communes is acquired by direct purchase using the threat of expropriation as a lever. *Id.* at 127.

82. Interview with H.P. Dahlquist, *supra* note 75.

83. Roberts, *supra* note 73, at 123.

84. *Id.* at 129.

85. *Id.* at 133. The income tax is the primary source of revenue for Swedish communes. Taxes on the income from real estate constitute only a small fraction of the local tax base. Communes therefore have little fiscal interest in raising the value of land. P. HEIMBÜRGER, *supra* note 54, at 6.

The local income tax, which is proportional and assessed at a flat rate, averaged 27% of taxable income in 1977. THE SWEDISH INSTITUTE, TAXES IN SWEDEN 2 (1977). There is also a steeply progressive national income tax ranging from 2% to 58% of taxable income. *Id.*

ing or leasing it for development.<sup>86</sup>

Land banking and the physical planning controls embodied in the Building and Planning Act have enabled Swedish communes to grow in an orderly, efficient manner without the problems of leapfrog development and urban sprawl.<sup>87</sup> Modern residential developments in Swedish urban areas have by and large been well planned, attractive, and of very high quality.<sup>88</sup> Most of these residential areas offer, among other things, low cost spacious housing,<sup>89</sup> traffic separation,<sup>90</sup> mixed multiple and single family residences, and easy access to mass transit facilities, shopping, and recreational areas.<sup>91</sup> Because of the acute housing shortage existing at the time,<sup>92</sup> most residential areas built during the 1950's and 1960's were densely developed, and some have been criticized for having lost all human scale.<sup>93</sup> Some recent developments, however, tend to be smaller, less monotonous, and more attractive, as planners have involved the public more in the planning process.<sup>94</sup>

Today, the housing shortage has been eliminated to the point where there is a glut of multi-family residences.<sup>95</sup> In addition, the

86. *Id.*

87. A. STRONG, *supra* note 7, at 45-61.

88. *Id.* For example, Vällingby, the first of the new communities built in the Stockholm area, features high rise multi-family apartment buildings near a commercial center, with lower blocks of flats beyond that, and single family dwellings filling out the edges. STOCKHOLM'S PLANNING OFFICE, *supra* note 76, at 51.

Vällingby introduced several noteworthy planning ideas, which have been followed in later developments, such as easy access to mass transportation and convenience stores, a large commercial and social center within each housing group, dwellings arranged in neighborhood units with plenty of open space nearby, and traffic separation. D. PASS, *supra* note 73, at 2-8.

89. The aim of the Swedish housing policy is to give everyone the opportunity to acquire a large and comfortable dwelling at reasonable cost. Modern Swedish dwellings are large and contain standard conveniences such as central heating, private water closets, shower or bath, stove, refrigerator, good lighting, and noise insulation. SKANDINAVISKA ENSKILDA BANKEN, *supra* note 50, at 48-49; H. WOHLIN, *supra* note 53, at 3.

90. All modern housing developments have extensive pedestrian and bicycle paths that are completely separated from motorized traffic and connect all areas of the development. H. WOHLIN, *THE PLANNING OF STOCKHOLM* 7 (1978).

91. A. STRONG, *supra* note 7, at 45-61.

92. The housing shortage of the 1950's and 1960's was a result of the rapid urbanization following World War II. To end the shortage, the Swedish Parliament passed a resolution in 1965 calling for the construction of one million new dwellings within 10 years. The target was met before the 10 year period had elapsed. G. Svensson, *Origins and Development of Housing Policy in Sweden*, in *HABITAT '76* 10-11 (1976).

93. During the period of intense building, planners "applauded every plan that crossed their desks," and paid little attention to the social aspects of planning a new development. Interview with Thorsten Egerö of Stockholm's City Planning Office in Stockholm (June 1, 1978). As a result, some of the developments have been criticized for being too densely built and too monotonous, despite their high quality and convenience. Interview with Hans Wohlin of Stockholm's Department of Planning and Building Control, in Stockholm (May 22, 1978). The problems of these unpopular developments are compounded by the tendency of social welfare bureaus to place foreigners, alcoholics, and people with social problems there. *Id.*

94. Interview with Hans Wohlin, *supra* note 93.

95. While the demand for multi-family housing has also diminished, the demand for single family dwellings has increased, partly because single family houses are advantageous from a tax viewpoint. Interview with H.P. Dahlquist, *supra* note 75. Though some low cost multi-family residences are still being built in the Stockholm area, they are generally smaller and more archi-

rapid growth of the major urban centers has stopped, principally because of a national policy of decentralization that is encouraging industries and companies to relocate in smaller urban areas.<sup>96</sup> Thus, after years of planning for rapid growth, planners in Stockholm and Malmö can now concentrate on historic preservation, urban renewal, and upgrading standards in existing housing.<sup>97</sup>

#### TRANSFERRING SWEDISH LAND PLANNING TECHNIQUES TO ARIZONA

As a result of the Swedish planning and land banking systems Swedish communes have been able to control urban development efficiently and effectively with minimum environmental and financial costs.<sup>98</sup> Three of the most important tools used by Swedish planners are: Land banking, the separation of development rights from other rights of land ownership, and regional review of local planning. If these three techniques for regulating urban development could be adapted for use in Arizona, they would be potent weapons in the arsenal of Arizona planners.

#### *Land Banking*

Under the Swedish land banking system, the communes buy land and store it for future uses.<sup>99</sup> When development is desired, a commune sells or leases the land to private owners, at a price not exceeding the actual costs to the commune.<sup>100</sup> A commune can also elect to keep the land undeveloped for recreational or other low intensity uses.

Land banking has been proposed by many American planning experts as a means of controlling urban growth patterns and regulating land prices in the United States.<sup>101</sup> Land banking is cited by one of its

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tecturally varied than previous developments, to increase appeal. Interview with Thorsten Egerö, *supra* note 93.

96. The national policy of decentralization seeks to limit growth in the Stockholm, Malmö, and Göteborg (Gothenburg) metropolitan areas by giving incentives to businesses to locate elsewhere. See L.S. BOURNE, *URBAN SYSTEMS: STRATEGIES FOR REGULATION* 101 (1975).

97. Renewal in Stockholm's inner city area has taken two approaches. In the medieval Old Town, the emphasis is on historic preservation, no new buildings may be erected and existing ones must be preserved, according to the town plan. In the central business district, the approach has been one of modernization, and many old buildings have been razed to make way for the subways, new commercial centers, and wide streets capable of serving 20th century needs. An effort is also being made to upgrade standards in old apartment buildings in and around the inner city. Loans and subsidies are available to encourage renovation, and property owners who do not bring substandard apartments up to proper standards can be deprived of their right to manage the property, as a last resort. H. WOHLIN, *supra* note 90, at 5.

98. See text & notes 55-97 *supra*.

99. See text & notes 72-75 *supra*.

100. Roberts, *supra* note 73, at 123.

101. See, e.g., Haar, *Wanted: Two Federal Levers for Urban Land Use—Land Banks and Urbank* in *LAND USE CONTROLS: PRESENT PROBLEMS AND FUTURE REFORMS* 370-74 (D. Listokin, ed. 1974); NATIONAL COMMISSION ON URBAN PROBLEMS, *BUILDING THE AMERICAN CITY* 251 (1968); Comment, *Land Banking: New Solutions for Old Problems*, 39 ALB. L. REV. 771, 771-73 (1975); Note, *supra* note 6, at 898-99.

proponents as a means to "solve at one stroke many of the most difficult problems in our present system of land use controls."<sup>102</sup> According to its supporters, land banking could be used to provide a supply of prepared sites ready for development,<sup>103</sup> to facilitate controls over the sequence and timing of development,<sup>104</sup> to minimize or end the problems of sprawl,<sup>105</sup> and to reduce spiraling land and housing costs.<sup>106</sup> The Swedish land banking experience indicates that many of these goals could be achieved. Some difficulties must be resolved, however, before land banking can be implemented efficiently in Arizona.

The difficulties that would confront attempts to implement a system of land banking in Arizona include questions about its constitutionality, administrative format, and political feasibility. There are also related problems of financing and managing large scale public land acquisitions and storage.

Since a land banking agency must have the power of eminent domain in order to be effective,<sup>107</sup> the implementation of land banking in the United States raises the issue of whether the condemnation of land for inclusion in a land bank is constitutionally permissible. The basic constitutional limitation on the power of eminent domain is that when private property is taken for a public use, the owner must be compensated.<sup>108</sup> The question that arises in land banking is whether land is being taken for a public use when it is condemned for an unknown future use.<sup>109</sup> Prior to the turn of the century, condemnation was prohibited unless the property taken would be available for actual, immediate use by the public at large.<sup>110</sup> The concept of public use has expanded, however, and the emphasis has gradually shifted to the reasonableness of the project for which the land was condemned, rather than the specific use to which the property would be put.<sup>111</sup> Thus, the

102. 5 N. WILLIAMS, *supra* note 29, § 163.31, at 484.

103. *Id.*

104. Note, *supra* note 6, at 929-30.

105. *Id.* at 899, 929-30. A land bank can control the sequence of development and prevent sprawl by parcelling out land near the urban core for development, and reserving from development land on the urban fringe. *Id.*; Comment, *Land Banking: Development Control through Public Acquisition and Marketing*, 6 ENVTL L. 191, 193 (1975).

106. A land bank could reduce the costs of land and housing by capturing the land at low predevelopment prices and passing the savings along to the ultimate consumers. Note, *supra* note 6, at 930-31.

107. As in Sweden, most land would probably be obtained by the land banking agency through negotiated purchases, but the power to take property by condemnation is needed as a lever to encourage private owners to sell at reasonable costs. Roberts, *supra* note 73, at 127; Note, *supra* note 6, at 948.

108. The fifth and fourteenth amendments to the Constitution limit eminent domain by requiring that the government pay just compensation for private property taken for a public use.

109. Comment, *supra* note 105, at 211-12.

110. Note, *supra* note 6, at 950.

111. *Id.* at 952-53. See *Berman v. Parker*, 348 U.S. 26, 33-34 (1954). The specific constitutionality of acquiring land for storage and later development at an unknown time for an unspecified use, however, has only been tested once. See text & notes 113-117 *infra*.

condemnation of land for a government project that purports to serve the public welfare will generally meet the public use test if the taking is a reasonable means of achieving the legitimate objectives of the project.<sup>112</sup>

The use of eminent domain in a land banking project was upheld in *Commonwealth v. Rosso*,<sup>113</sup> the only American case specifically testing the constitutionality of land banking. In *Rosso*, the Puerto Rican Supreme Court determined the legality of legislation that provided for land acquisition and storage for undetermined future uses.<sup>114</sup> Citing the social, economic, and moral justifications for land banking, the court found that the land banking served a public purpose,<sup>115</sup> and refused to consider the specific use to which the property in question might be put.<sup>116</sup>

If courts follow the precedent set in *Rosso* and scrutinize individual instances of condemnation only within the framework of an entire land banking scheme, the problems of taking land for an unspecified use can be avoided.<sup>117</sup> Courts generally defer to legislative definitions of public use and the reasonable means of achieving it. Therefore statutes establishing land banks will probably be upheld if they clearly spell out the public benefits of land banking and the reasonableness of using condemnation to achieve those benefits.<sup>118</sup> Many of the objectives of land banking legislation, such as the prevention of urban sprawl, have already been found by various courts to justify the use of eminent domain in other cases.<sup>119</sup>

In addition to clearly defining the objectives of land banking so as to overcome constitutional challenge, the legislation establishing a land bank must resolve the questions of what type of land banking agency to establish, how to operate and fund it, and how to eventually use the banked land. The ALI Model Land Development Code provides model enabling legislation dealing with all of these issues.<sup>120</sup> The

112. Comment, *Judicial Review of Land Bank Dispositions*, 41 U. CHI. L. REV. 377, 384 (1974).

113. 95 P.R.R. 488 (1967), *appeal dismissed*, 393 U.S. 14 (1968). For discussions of the case and the Puerto Rican land banking act, see Callies, *Commonwealth of Puerto Rico v. Rosso: Land Banking and the Expanded Concept of Public Use*, 2 PROSPECTUS 199 (1968); Note, *supra* note 6, at 916-23, 959-62. Excerpts from the case are translated into English in Callies, *supra*.

114. Callies, *supra* note 113, at 208; Note, *supra* note 6, at 960.

115. Callies, *supra* note 113, at 208.

116. 95 P.R.R. at 525-26.

117. The *Rosso* court avoided the issue of whether the Rosso's land was taken for an unspecified use by looking to the overall objectives of the land banking legislation to find the necessary public purpose for the taking. *Id.* at 525-26.

118. Comment, *supra* note 105, at 211-12; Comment, *supra* note 112, at 384.

119. The prevention of urban sprawl and control of new development have justified the use of eminent domain in many urban renewal cases. F. BOSSELMAN, *supra* note 5, at 44-49. For example, in *Berman v. Parker*, 348 U.S. 26 (1954), the Supreme Court held that planning for a more attractive community constituted a valid public purpose for the exercise of the power of eminent domain. *Id.* at 33.

120. ALI MODEL LAND DEV. CODE (1975) [hereinafter cited as ALI MODEL CODE]. Article 6

model code vests land banking powers in a state agency that is a corporation<sup>121</sup> with the authority to apply for state and federal grants, to enter contracts with local governments, to receive funds through state and local appropriations, to issue bonds,<sup>122</sup> and to borrow money.<sup>123</sup> Local governments can participate in the land reserve system by appropriating money to finance the acquisition of land by the state agency on behalf of the local government,<sup>124</sup> and by contracting with the state agency to have it acquire, store, and maintain land for the local government.<sup>125</sup> The state agency can acquire land by purchase, gift, exchange, or condemnation,<sup>126</sup> and dispose of it through sale or lease.<sup>127</sup> The decision whether the property holdings of the land bank should be subject to local property taxes is left to the adopting state.<sup>128</sup>

The system established by the model code provides a workable format for implementing land banking in Arizona. Other practical problems must be resolved, however, before Arizona should attempt to engage in land banking. The primary obstacles to the implementation

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of the ALI MODEL CODE deals with land banking. For a discussion of the code, see Comment, *supra* note 101, at 789-95.

121. ALI MODEL CODE, *supra* note 120, §§ 6-102, 6-201. Like a corporation, the state agency has the capacity to contract, sue and be sued in its own name, and secure its obligations by pledges of its own revenue and property. *Id.* § 6-201. The main advantage of a public corporation over a more typical public agency is its greater freedom from political pressures and government red tape. See Note, *supra* note 6, at 943. The corporation's political autonomy could, however, make it less responsive to the public wishes than a state agency. Comment, *supra* note 105, at 206. The ALI MODEL CODE solves this problem by creating a state agency with the powers of a public corporation. Comment, *supra* note 105, at 206-07; ALI MODEL CODE, *supra* note 120, § 6-201.

A state agency can probably operate more efficiently than a local agency could. To be effective land banking agents, local governments would have to be able to acquire and dispose of land lying outside their boundaries, yet most metropolitan areas are splintered into several local government units. See Note, *supra* note 6, at 938-39. Furthermore, local governments are often incompetent, and even corrupt. 5 N. WILLIAMS, *supra* note 29, § 161.08, at 428-29; Comment, *supra* note 105, at 194 n.15.

122. The Internal Revenue Code exempts the interest on the obligations of a political subdivision from income taxation. I.R.C. § 103. A state land banking agency would fit within the definition of a political subdivision. See Note, *supra* note 6, at 944 n.210.

123. ALI MODEL CODE, *supra* note 120, § 6-201(6). The financial resources available to the state land reserve agency, including tax revenues, government loans, and money borrowed on the open market or by floating bonds, are similar to the revenue sources used by Swedish communes to finance their land banking activities. Passow, *supra* note 7, at 185. See note 129 *infra*.

Federal funds are already available for land banking purposes under the Housing and Community Development Act of 1974. 42 U.S.C. 5305(a)(1) (1976); see note 156 *infra*.

124. ALI MODEL CODE, *supra* note 120, § 6-501(1).

125. *Id.* §§ 6-101, 6-501(2), (3).

126. *Id.* § 6-302.

127. *Id.* §§ 6-401, 6-409. The disposition should be intimately connected with local planning policies. See *id.*

128. *Id.* § 6-203. Most local governments in the United States rely heavily on the property tax as a source of local revenue. Mandelker, *The Role of Zoning in Housing & Metropolitan Development in LAND USE CONTROLS: PRESENT PROBLEMS & FUTURE REFORM* 44 (D. Listokin, ed. 1974). If these funds are denied to local governments while the property is in the possession of a land bank, friction may develop between the local government and the land bank. Comment, *supra* note 105, at 208. The model code suggests three possibilities for resolving this problem: full property tax payments; complete exemption; or payments of certain sums of money according to a formula, in lieu of property taxes. ALI MODEL CODE, *supra* note 120, § 6-203(1).

of land banking are financial costs and the prevalent American philosophy of private ownership and control over land.

The fundamental problem facing a successful land bank is funding the initial land acquisitions.<sup>129</sup> Although the land bank will eventually recapture all or most of its expenses when the banked sites are developed and sold,<sup>130</sup> the initial land purchase will require a substantial investment with little immediate return.<sup>131</sup> To meet preliminary expenses land banks will probably have to rely on federal funding,<sup>132</sup> supplemented by money obtained through loans on the open market or by the issuance of bonds.<sup>133</sup>

Once a land bank has acquired enough land to have an effect on urban development,<sup>134</sup> it can prepare the land nearest the urban center for sale or lease to private developers,<sup>135</sup> and simultaneously begin acquiring more land on the outskirts of the bank to forestall premature development there.<sup>136</sup> During the period between acquisition and disposition, banked land can be leased on a temporary basis for agriculture or other low density uses, in order to defray operating costs.<sup>137</sup>

129. Comment, *supra* note 105, at 210; Note, *supra* note 6, at 962-63. A 1970 estimate of the investment costs of establishing a land bank for an area of 2.5 million people would be \$250 million, although an investment of half that amount would still make a considerable impact on development. Note, *supra* note 6, at 962.

Swedish communes finance their land acquisitions through local income taxes and loans acquired either on the open market or from the national government. The two principle forms of government loans are land acquisition loans and leasehold loans. Land acquisition loans, which may be used to acquire land intended for housing, require no security and may be paid back over a 10-year period. P. HEIMBÜRGER, *supra* note 54, at 13; Roberts, *supra* note 73, at 126. Leasehold loans, which are used by communes to acquire land for leasing to private parties, are exempted from repayment for the first 10 years, and are repayable over a 30 year period. P. HEIMBÜRGER, *supra* note 54, at 14; R. SVENSSON, *supra* note 75, at 25-26. Another type of government loan that affects communal land acquisitions is the housing loan, which is made at low rates to private developers in order to provide capital not covered by primary loans on the open market or the buyer's cash reserves. Housing loans are available only if the development occurs on land leased or purchased from a commune, and if the total costs of the land and housing are kept below certain maximum limits set by the government. *Id.* at 31.

130. See Note, *supra* note 6, at 962-64; Comment, *supra* note 105, at 210.

131. Comment, *supra* note 105, at 210-11.

132. Note, *supra* note 6, at 965-68. Federal funds which could be used for land banking purposes are already available to local governments under a revenue sharing program for community development grants. 42 U.S.C. § 5305(a)(1) (1976).

133. Note, *supra* note 6, at 968-72. If a land bank has obtained capital by debt financing, however, it may be tempted to sell land for development based on maximum returns rather than orderly growth objectives. *Id.* at 972.

134. The amount of land required for effective land banking depends on the physical characteristics of the area and the objectives of the land bank. *Id.* at 962.

135. Since a land banking agency can make centralized decisions about when and where to install public services, the economies of scale should reduce the cost of installing these services. Comment, *supra* note 112, at 379.

136. By continually purchasing land on the periphery of the bank and allotting land near the urban core for development, a land bank can control the timing and location of development, and prevent or at least curtail sprawl. Comment, *supra* note 105, at 193.

137. Note, *supra* note 6, at 964 n.293. A program of leasing city land to defray the costs of land ownership is already in effect in Tucson. Although Tucson has not undertaken land banking operations, it has purchased large quantities of irrigated farm land in areas near the city in order to ensure a continued supply of water to the city's residents. After purchasing the land, the city

Upon disposition, the costs of acquiring, storing, and preparing the land for development can be recouped by the land bank.<sup>138</sup> Whether a profit will be made depends largely on the objectives that the land bank is seeking to achieve. If one of the purposes of the bank is to subsidize low income housing or inhibit land price inflation,<sup>139</sup> the agency may wish to dispose of the land at below the fair market value, despite the loss of profits.

In evaluating whether the high initial costs of land banking should defeat its implementation, the tangible and intangible benefits of land banking must be weighed against its actual costs. One of the greatest benefits of land banking is the elimination, or at least minimization of urban sprawl.<sup>140</sup> Besides improving the quality of the living environment in the urban area,<sup>141</sup> the land bank would reduce the costs of providing roads, schools, and other public services, since the costly practice of extending these services past vacant land to leapfrog development on the urban fringe would be eliminated.<sup>142</sup> Land banking can also reduce land and housing costs if the banking agency acquires land at predevelopment prices and passes the savings along to the ultimate consumers.<sup>143</sup> In addition, land banking allows governments to preserve landmarks, open spaces and scenic areas at little cost, since the land is purchased before approaching development can drive up the fair market value of land in the area.<sup>144</sup>

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leases the land to private users for a variety of low water consuming uses. COMPREHENSIVE PLAN FOR PIMA COUNTY, *supra* note 3, at 16.

138. Comment, *supra* note 105, at 210.

139. See generally Note, *supra* note 6, at 934-38.

140. Comment, *supra* note 105, at 193. See note 136 *supra*.

141. The control over urban development that could be achieved through land banking would allow planners to improve the quality of urban areas by providing for mixed residential development with nearby parks, schools, open space, shopping, and employment opportunities. Transportation could also be planned and improved to facilitate traffic movement and provide mass transit alternatives, thereby reducing traffic congestion and air pollution. See F. BOSSELMAN, *supra* note 5, at 7; Note, *supra* note 6, at 929. Land banking would also allow planners to preserve natural environments and provide a more aesthetically pleasing living environment through the elimination of urban sprawl. See Comment, *supra* note 101, at 771.

142. Instead, the timing and sequence of installing these public services would be controlled by the bank, which would result in higher quality and lower costs. See Comment, *supra* note 112, at 379.

143. A land bank can sell at prices below those of a private speculator without loss because of its lower holding costs, due largely to its exemption from income taxation, and the economies of scale involved in buying large amounts of undeveloped land. Note, *supra* note 6, at 936 n.184, 963 n.292. Any profits accrued at the time it is released for development by the bank would go into the public coffers, rather than into the hands of private speculators, and could be used to meet the costs of new services in the area. *Id.* at 930.

144. Under the current system of land development, local governments ordinarily seek to capture and preserve open space at the last minute, when land has soared in price because of the surrounding development. F. BOSSELMAN, *supra* note 5, at 6; Passow, *supra* note 7, at 179. Municipalities in Arizona can require subdividers to reserve land for public uses, as a condition for approval of the subdivisions plat. ARIZ. REV. STAT. ANN. § 9-463.01(D) (1977). Municipalities, however, must generally purchase the reserved land within one year at the fair market value of the land at the time the plat was filed, plus taxes and the costs incurred by the subdivider. *Id.* § 9-463.01(E). Rapidly growing municipalities often have difficulty in obtaining funds to purchase

In weighing the costs and benefits of land banking, the high initial expense should be considered an investment that will be recouped when the land bank goes into full operation and begins selling, as well as storing, land.<sup>145</sup> In the meantime, the costs of land banking are lessened by the interim leasing of the land, the savings from the elimination of sprawl, and the intangible benefits of better planning for a higher quality urban environment.

The strongest objection to land banking may be philosophical, not financial.<sup>146</sup> The American tradition of private property ownership with little government involvement generally allows the free market and private parties to determine when, where, and how land will be developed.<sup>147</sup> On the other hand, land banking is based on the notion that the government, rather than private individuals, should determine how land is to be used.<sup>148</sup> Despite the traditional respect for private parties, public land ownership is not uncommon in the United States,<sup>149</sup> and Congress has even authorized the use of federal funds for land banking.<sup>150</sup> While a full scale land banking operation would increase direct governmental involvement in the private market, the market would not be completely destroyed because the land eventually will be returned to the private arena for development.<sup>151</sup>

### *Separation of Development Rights From Other Rights of Land Ownership*

In Sweden, when a commune acquires land by condemnation, the amount of compensation paid to the landowner excludes payment for potential future development.<sup>152</sup> The Swedish government has determined that a private landowner should not be able to benefit from the increased value of his land due to the past actions of a commune in building roads or schools, extending public utilities, or otherwise making the land more suitable for development.<sup>153</sup> In refusing to compensate a landowner for speculative gains from potential development, the

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reserved lands within the one year time limit. Telephone interview with Bob Johnson, *supra* note 4.

145. See Comment, *supra* note 105, at 210.

146. *Id.* at 216. Unlike Swedish communes, local governments in the United States lack a tradition of extensive government ownership of land. In fact, the American tradition of private property ownership with little government involvement is opposed to the concept of public control and ownership of land. See Comment, *supra* note 101, at 781.

147. See text & notes 16-18 *supra*.

148. See Note, *supra* note 6, at 928.

149. *Id.* at 913-25. In Arizona alone, the federal government owns 59.1% of the land in the state, while the state government owns 12.8%. Only 18% of the land is in private hands. VALLEY NAT'L BANK, *supra* note 1, at 54.

150. 42 U.S.C. § 5305(a)(1) (1976). See note 132 *supra*.

151. See Comment, *supra* note 105, at 216.

152. See note 79 *supra*.

153. P. HEIMBÜRGER, *supra* note 54, at 11.

Swedish law is in effect separating the right to develop land from the right to own land and continue its existing uses.

The developmental rights thus separated were transferred to the communes by the Building and Planning Act.<sup>154</sup> According to that act, no development may occur unless governmental authorization is granted, either in the form of a detailed plan or a building permit.<sup>155</sup> A land owner, however, has no legal right to compensation if a plan or building permit is denied, even though he is not allowed to build on his own land.<sup>156</sup> A landowner's right to develop land has thus been withdrawn and transferred to the commune, which may return the development right to the owner when and if it sees fit.<sup>157</sup>

The Swedish communes benefit in several ways from the separation of private development rights from other land ownership rights. The fact that no development is allowed without prior government authorization gives the communes extensive control over land development at little cost to the taxpayers.<sup>158</sup> Communal land banking is also aided by the laws separating development rights from land. The fear that a commune will refuse to draft a plan for an area probably dissuades many private investors from purchasing land for speculation,<sup>159</sup> and encourages landowners to sell to the commune at a reasonable price.<sup>160</sup> In addition, the costs of expropriating land for land banking purposes have been reduced now that owners are no longer compensated for increments in land value due to anticipated changes in the permitted uses of the land.<sup>161</sup>

In the United States zoning and other land use regulations that restrict an owner's right to freely and fully develop his land also curtail certain development rights.<sup>162</sup> Since these regulations are usually based on the police power,<sup>163</sup> the private landowner receives no compensation for the loss of his development rights as long as the regulation is reasonably related to a valid public purpose.<sup>164</sup> If the regulation

154. SFS 385/1947; P. HEIMBÜRGER, *supra* note 54, at 10. See text & notes 66-71 *supra*.

155. BL § 5 (SFS 77/1972). See text & notes 66-71 *supra*. There is a minor exception from this requirement for certain types of building for agricultural and forestry purposes. BL § 87 (SFS 1088/1971, 459/1975). See also P. HEIMBÜRGER, *supra* note 54, at 10.

156. See text & notes 70-71 *supra*. The owner does have a right to compensation if a plan is drafted which interferes with his existing use of the land. See note 70 *supra*.

157. P. HEIMBÜRGER, *supra* note 54, at 9-10.

158. *Id.* at 10.

159. *Id.* at 12; Roberts, *supra* note 73, at 132.

160. Roberts, *supra* note 73, at 127.

161. *Id.* at 128. See note 79 *supra*.

162. Carmichael, *Transferable Development Rights as a Basis for Land Use Control*, 2 FLA. ST. L. REV. 35, 48 (1974).

163. Land may be regulated under the police power, as long as the regulation is reasonably related to a valid public purpose, that is, as long as it serves the public health, safety, or general welfare. See *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-95 (1962).

164. Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision*, 91 HARV. L. REV. 402, 403 (1977); *Developments in the Law—Zoning*, *supra* note 27, at 1463.

goes so far as to constitute a taking of the property, however, just compensation is constitutionally required.<sup>165</sup> Most land use regulations that are overturned as takings are measures that overstep the permissible boundaries of the police power, rather than literal, physical takings of property.<sup>166</sup> Assuming these regulations are reasonably related to a valid public purpose, they should be upheld if compensation is given to bring the value of the regulated property up to a level of reasonable beneficial return.<sup>167</sup>

One way to compensate an owner without imposing an undue financial burden on the local government is through a system of transferable development rights [TDR].<sup>168</sup> Under a TDR system, the development rights of a parcel of land could be transferred or sold by the owner of the land to augment the development potential of other parcels of land.<sup>169</sup> Thus, when a police power regulation would restrict the development potential of land to preclude a reasonable rate of return, the owner of the regulated land could transfer the unused development rights to his other land holdings or sell the rights to other landowners interested in increasing the development potential of their land.<sup>170</sup> If

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165. The fifth amendment provides in part, that "private property [shall not] be taken for public use, without just compensation." The takings clause requires the government to compensate landowners when land is taken by condemnation. See text & notes 132-36 *supra*. Furthermore, the clause has been held to protect land owners from regulations that fall short of actual physical acquisitions of land, but that go so far as to "be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). For a thorough discussion of the takings clause and land use restrictions, see F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* 1 *passim* (1973) [hereinafter cited as *THE TAKING ISSUE*].

The extent of value diminution that the courts will allow before a taking is found depends upon such factors as the objectives of the regulation, the number of uses left to the owner, and a balancing of the private loss against the public benefit. Carmichael, *supra* note 162, at 37-38. Generally, a noncompensatory police power regulation will be upheld if it does not reduce the fair market value of the private land below that accruing from a reasonable beneficial use. Costonis, *supra* note 164, at 411. The factors that courts consider in determining whether regulations go so far as to constitute takings are discussed in depth in *Developments in the Law—Zoning*, *supra* note 27, at 1466-97.

166. See Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021, 1027, 1034-35 (1975) [hereinafter cited as the *Taking Impasse*]. For an interesting discussion of why the taking clause should not extend to police power regulations, see *THE TAKING ISSUE*, *supra* note 165, at 238-55.

167. See Costonis, *supra* note 164, at 412; *Developments in the Law—Zoning*, *supra* note 27, at 1498-1500.

168. See generally *The Taking Impasse*, *supra* note 166, at 1061-70. TDR involves the separation of the right to development land from the other rights of land ownership, and the subsequent transfer of those rights to other parcels of land. *Id.* at 1061-62.

169. The program setting up TDR in an area must determine to which parcels of land the development rights can be transferred, ensuring that the owners of those parcels will be interested in purchasing the rights at a price that will constitute fair compensation to the owner of the restricted land. See generally, *id.*, at 1062-65; *Developments in the Law—Zoning*, *supra* note 27, at 1501.

170. See *Developments in the Law—Zoning*, *supra* note 27, at 1501. Thus, in exchange for giving up his right to develop land A, the owner of A would be given the right to develop land X, Y, or Z at a density greater than that allowed by the current zoning regulations. A's owner could develop the other lands himself, or sell the development rights to another developer. The value of the development rights should be enough to provide fair compensation to the owner of A. See *id.* at 1501.

the TDR program is operating effectively, the increased value of the development rights should be sufficient to fairly compensate the owner for the restrictions imposed by the regulation.<sup>171</sup>

The appeal of TDR lies in its fairness to both public needs and private economic motives. TDR provides a narrow passage between the Scylla of upholding a regulation with no compensation to the landowner, and the Charybdis of invalidating the regulation as a taking and forcing the local government into paying just compensation. A TDR program not only allows local governments to plan and regulate the rational allocation of land uses at no direct costs,<sup>172</sup> it also attempts to guarantee property owners fair compensation based on the reasonable use of their land.<sup>173</sup> The TDR system proposed by American planners,<sup>174</sup> therefore, seems more equitable than the Swedish system of transferring development rights to the communes without compensation to the landowners.<sup>175</sup>

Although TDR has been heralded as one of the most innovative and effective techniques of land use control ever proposed,<sup>176</sup> the very originality of the concept may interfere with its acceptance.<sup>177</sup> For instance, TDR cannot be easily categorized as an exercise of either the police or the eminent domain power.<sup>178</sup> Instead, TDR seems to be in a class by itself, with its boundaries and limitations as yet undefined.<sup>179</sup> A more serious question is how the TDR system can be administered

171. See Rose, *Psychological, Legal and Administrative Problems of the Proposal to Use the Transfer of Development Rights (TDR) as a Technique to Preserve Open Space*, 6 URB. LAW. 919, 925 (1974).

172. *Id.* at 191.

173. See generally *The Taking Impasse*, *supra* note 166, at 1061-67.

174. For a discussion of how variants of TDR have been proposed and used in the United States, see generally J. ROSE, *THE TRANSFER OF DEVELOPMENT RIGHTS: A NEW TECHNIQUE OF LAND USE REGULATION* (1975).

175. See text & notes 66-71, 79 *supra*.

176. Rose, *supra* note 171, at 919.

177. *Id.* at 921.

178. *Id.* at 922. One author has suggested that TDR, and the idea of giving fair compensation to validate overrestrictive land use regulations, should fall within a new category of power, the accommodation power. See *The Taking Impasse*, *supra* note 166, at 1022.

179. For example, although the concept of TDR was upheld in two New York cases, the specific application of TDR was overruled in one case and upheld in the other. In *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, *appeal dismissed*, 429 U.S. 990 (1976), the New York Court of Appeals struck down the TDR program to preserve two parks because the development rights were too contingency ridden unless some property could be found to which to attach them. *Id.* at 597-98, 350 N.E.2d at 388, 385 N.Y.S.2d at 11-12. In *Pennsylvania Cent. Transp. Co. v. City of New York*, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd*, 438 U.S. 104 (1978), the same court, however, upheld a TDR program because the rights could be transferred to neighboring sites, some of which Penn. Central already owned. *Id.* at 334-35; 366 N.E.2d at 1277-1278, 397 N.Y.S.2d at 920.

In affirming the New York court's decision, the Supreme Court said that while the rights provided under the TDR program "may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants, and for that reason, are to be taken into account in considering the impact of regulation." 438 U.S. 104, 137 (1978). For a discussion of the *Penn. Central* case, see Constonis, *supra* note 164, at 402.

so as to ensure its constitutionality, fairness, and viability.<sup>180</sup> A TDR program imposes a heavy burden on planners to anticipate market demands so as to ensure fair compensation.<sup>181</sup> The fairness of the TDR concept and the flexibility it gives planners, however, justifies the administrative burden it places on politicians and planners to create a system of development rights and provide a viable market for them.

### *Regional Planning Agencies*

Although Swedish communes have the primary responsibility for planning local development, the rapid urbanization of the large metropolitan areas has necessitated the formation of regional planning agencies to handle area-wide problems in Sweden. These regional planning agencies are only advisory, but their recommendations are generally followed because a commune's failure to follow a regional plan could result in a veto of the local plan upon review by the county administrative board.<sup>182</sup> The county review of communal planning decisions thus serves not only to protect the interests of the public and the national government, but also to compel communes to abide by their own regional planning decisions.<sup>183</sup>

In Arizona, as in other American states, zoning regulations and other land use controls are generally parochial, with little regard for regional problems.<sup>184</sup> The absence of effective regional planning, or state review of local regulations to ensure that regional needs are considered, prevents balanced metropolitan development and frustrates attempts to provide for orderly growth in a metropolitan area.<sup>185</sup>

To solve the regional problems caused by the fragmented control over land use in metropolitan areas, Arizona's municipalities and counties are attempting to work with each other in an effort to achieve coherent patterns of development in urban areas.<sup>186</sup> While these attempts

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180. See Rose, *supra* note 171, at 925-26.

181. *Id.* at 925.

182. See note 62 *supra*.

183. See text & notes 57-58 *supra*.

184. See 5 N. WILLIAMS, *supra* note 29, § 161.08, at 428; Mandelker, *supra* note 128, at 43-44; Comment, *Needed in Arizona: A State Land Planning Agency*, 1972 LAW & SOC. ORD. 605, 609-10.

185. Mandelker, *supra* note 128, at 43-44.

186. Arizona is divided into six regional planning districts by the executive order of the governor. Exec. Order No. 70-2 (Ariz. 1970). Maricopa and Pima Counties each constitute a district. The other districts are made up of two or more counties. Each district has a council composed of representatives of the city, town, and county governments within the district. These councils study problems that affect several local governments, and recommend action by the local governments. The recommendations or any plans drafted by the councils, however, are not binding on the local governments. For a discussion of the regional councils, see Schroeder, *supra* note 19, at 805-08.

The proposed COMPREHENSIVE PLAN FOR PIMA COUNTY, *supra* note 3, is another example of voluntary cooperation among the local governments in a metropolitan area. The cities of Tucson and South Tucson, the town of Oro Valley, Pima County, and the Pima Association of Govern-

at regional planning are encouraging, their effectiveness is hampered by the lack of any legal compulsion to enforce regional plans.<sup>187</sup> In order for regional planning to be effective, regional planning powers must be vested in a public body with adequate funding and the legal power to enforce its own planning decisions.<sup>188</sup> Presently, such a planning agency does not exist at the regional or state level in Arizona,<sup>189</sup> although the idea of a state land planning agency has been seriously considered in recent years.<sup>190</sup>

The *ALI Model Land Development Code* provides for a state land planning agency with policy making<sup>191</sup> and planning powers.<sup>192</sup> The State Land Planning Agency [SLPA] that would be established by the model code would have the authority to draft state and regional plans,<sup>193</sup> to formulate policies to guide local development that affects state or regional interests,<sup>194</sup> and to review local plans and regulations to ensure compliance with the SLPA's plans and policies.<sup>195</sup> Matters of primarily local concern would remain within the control of the local planning boards,<sup>196</sup> subject to appeal to a State Land Adjudicatory Board.<sup>197</sup> In deciding whether to allow development, however, the lo-

ments (the regional council) were all involved in the planning effort. Interview with Wayne Moody, *supra* note 4.

187. Comment, *supra* note 184, at 616.

188. *Id.* at 617.

189. The state has delegated most of its power to plan and regulate land use to the local governments, but state agencies still influence by regulating activities which affect land development, such as through its air pollution controls. See Schroeder, *Public Regulation of Private Land Use in Arizona: An Analysis of Its Scope and Potential* (pt. 2) 1974 LAW & SOC. ORD. 163, 166-90. There is no overall state planning system, however. Comment, *supra* note 184, at 609.

190. In 1973, the Arizona legislature directed the governor to establish a comprehensive statewide land use planning program. ARIZ. REV. STAT. ANN. §§ 37-161 to -163 (1974). An office of Environmental Planning was created to coordinate state and local planning. *Id.* § 37-163. A planning commission was also established to prepare a statewide land use plan. *Id.* § 37-162. See generally ARIZONA ENVIRONMENTAL PLANNING COMMISSION, A LAND USE PROGRAM FOR ARIZONA (1975) (final report to the governor and the legislature). The 1973 legislation automatically expired on June 30, 1975.

Other states, including Hawaii, Vermont, and Wisconsin, have substantially reacquired their power to regulate land development from local governments. ALI MODEL CODE, *supra* note 120, at 249-52. (commentary to art. VII).

191. ALI Model Code, *supra* note 120, § 8-101, provides for the State Land Planning Agency [SLPA]. The policy making powers of the SLPA are set out in article seven of the proposed code.

192. The planning powers of the SLPA are provided for in article eight of the model code. While state and regional planning should ideally guide the SLPA in its policy making, planning is not made a prerequisite to policy making. ALI MODEL CODE, *supra* note 120, at 254. (commentary to art. VII).

193. *Id.* § 8-401. The SLPA would also have the authority to designate regional planning divisions to promulgate regional plans. *Id.* § 8-102.

194. *Id.* § 7-101. The SLPA would only interfere directly with local regulation where matters of state or regional interest were involved. The code provides two methods of identifying whether state involvement would be necessary: If geographical areas of state or regional interest were involved, *id.* §§ 7-201 to -208, or if the proposed development were of a type affecting state or regional interests. *Id.* §§ 7-301 to -305.

195. *Id.* § 8-502.

196. *Id.* § 7-101 and note following.

197. *Id.* §§ 7-501 to -504. Under the system proposed by the model code, local regulation would remain the basic mechanism for controlling land use within a state. The local governments

cal government would have to apply the policies and standards formulated by the SLPA.<sup>198</sup>

The state planning system proposed by the model code would ensure the consideration of state and regional planning concerns while preserving local autonomy over local land use decisions.<sup>199</sup> Since the local governments would retain control over matters of primarily local interest, the SLPA could focus on planning and policy making in areas of major state and regional concern, rather than wasting time and money on minor local matters.<sup>200</sup> The code would also set up a special state adjudicatory agency to review local land use decisions, in order to safeguard the interests of developers, the state, and other interested parties.<sup>201</sup>

### Conclusion

Despite rapid urbanization following World War II, urban growth in Swedish metropolitan areas has been orderly and, for the most part, well planned. Like their American counterparts, Swedish planners drafted physical plans to guide urban development. Swedish planners, however, are also aided in their planning tasks by land banking and tight legal controls over the rights of private individuals to develop land. In addition, the formation of regional planning agencies and the review of local plans by a county board ensure that regional needs are considered in local planning.

The successes of the Swedish planning experience should not be ignored by Arizona. The techniques of land banking, the separation of development rights, and regional planning, which have proved so useful in promoting orderly growth in Sweden, should be borrowed and adapted in the manner discussed for use in this state. Arizona planners should also learn from Swedish mistakes as well, and involve the public in the planning process from the start.

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would hold public hearings concerning proposed developments and make initial land use decisions, that could be appealed to a State Land Adjudicatory Board established under § 7-501. (commentary on article VII).

198. *Id.* § 7-101.

199. The regulation of matters of primarily local concern would be left with local planners, while matters of state and regional concern would be guided by the SLPA. *Id.* § 7-101; see Fox, *A Tentative Guide to the American Law Institute's Proposed Model Land Development Code*, 6 URB. LAW. 928, 948 (1974); Comment, *supra* note 184, at 624.

In order to further preserve local autonomy and prevent conflicts between state and local planning, the SLPA would also be required to consider local plans in formulating the state development plans. ALI MODEL CODE, *supra* note 120, § 8-404.

200. ALI MODEL CODE, *supra* note 120, at 252-53 (commentary to art. vii).

201. *Id.* § 7-501. As in Sweden, review by a state board could help protect state interest from the effects of adverse local planning. Fox, *supra* note 199, at 941. See also discussion at note 56 *supra*.