ARIZONA COURT OF APPEALS

DIVISION TWO

EMMETT McLOUGHLIN REALTY, INC.; QUICK-MART STORES, INC.; DOUGLAS S. HOLSCLAW JR; ANNE T. HOLSCLAW; TOOPS FAMILY LIMITED PARTNERSHIP; RIGGS FAMILY TRUST; LYNN GREER TRUST; JULIE GREER TRUST, Plaintiffs/Appellants, v. PIMA COUNTY, ARIZONA; MEMBERS OF THE PIMA COUNTY BOARD OF SUPERVISORS OF PIMA COUNTY, ARIZONA, Defendants/Appellees.	No. 2CA-CV 01-0198 Pima County Superior Court No. C2000-3514

BRIEF OF AMICI CURIAE AMERICAN PLANNING ASSOCIATION AND THE ARIZONA CHAPTER OF THE AMERICAN PLANNING ASSOCIATION

JORDEN, BISCHOFF, McGUIRE & ROSE, P.L.C.
7272 E. Indian School Road, Suite 205
Scottsdale, Arizona, 85251
Telephone: (480) 505-3900
Firm Bar No. 00404200

Douglas A. Jorden (AZ Bar No. 004729)
Michele A. Hentrich (AZ Bar No. 020489)

Attorneys for Amici Curiae
American Planning Association and the Arizona

Chapter of the American Planning Association

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STATEMENT OF THE CASE

Amici Curiae American Planning Association ("APA") and the Arizona Chapter of the American Planning Association (the "Arizona Chapter") omit any Statement of the Case because they are appearing as amici curiae pursuant to Rule 16, ARIZ. R. CIV. APP. PROC.

ISSUES PRESENTED

APA and the Arizona Chapter will not set forth a recitation of the issues before this Court because of their appearance as amici curiae and because they agree with the recitation set forth in the Appellees' Answering Brief.

STATEMENT OF FACTS

APA and the Arizona Chapter will omit a recitation of the facts because of their appearance as amici curiae and because the material facts are undisputed.

ARGUMENT

Comprehensive planning and zoning have, for the past 80 years, been important tools for local governments to maintain the quality of life for their residents. Under the broad authority of the police power, local governments have established land-use regulations to protect private property values, to prevent nuisances from conflicting land uses and to ensure that cities remain livable and safe despite the increasingly

dense concentrations of people. For over 70 years, state and federal courts have reviewed challenges to these regulations on a case-by-case basis. In response to a supposed uncertainty associated with such individualized determinations by the courts, some state legislatures have taken it upon themselves to fashion statutory schemes to address regulatory takings issues. In 1998, the Arizona Legislature enacted ARIZ. REV. STAT. § 11-829(G) as one such measure. Unfortunately, the remedy fashioned in ARIZ. REV. STAT. § 11-829(G) causes more problems than it corrects by (i) undermining the fundamentals of comprehensive planning and zoning that have evolved over the past 80 years, (ii) conflicting with the consistency and uniformity requirements that have been bedrock principles of land-use law, and (iii) improperly delegating legislative authority to individual citizens.

I. COMPREHENSIVE PLANNING AND ZONING ARE ESSENTIAL TOOLS FOR PRESERVING THE QUALITY OF LIFE.

Comprehensive planning and zoning have become indispensable tools for managing growth in the United States. From its origins, zoning has been used by municipalities to manage growth to ensure that the health, safety and welfare of its citizens are protected. This concept has been developed over 80 years of practical application based mainly on the original enabling acts adopted in the 1920's. Zoning is now such an integral part of our society that citizens have developed expectations

that their property and its value will be protected by the regulations imposed upon their neighbors and upon themselves.

A. The Foundations Of Planning And Zoning Were Established More Than 80 Years Ago.

Zoning is generally thought to have first emerged in New York City in 1916.[1] The concept gained immediate popularity as an effective tool to manage growth. Its popularity caught the attention of then Commerce Secretary Herbert Hoover, who had a particular interest in housing and the protection of residential neighborhoods from industrial encroachment.[2] Hoover shared the belief of many conservatives of the time that most governmental functions work best at a local rather than at a higher level.[3] He appointed an Advisory Committee on Zoning that eventually drafted, and subsequently published in 1924, the Standard State Zoning Enabling Act (the "Standard Act").[4] "Significantly, in a reflection of Hoover's conservatism, the choice

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[1] 1 Young, *Anderson's American Law of Zoning* § 3.01 (4th ed. 1995); D. Mandelker & J. Payne, *Planning and Control of Land Development* (5th ed. 2001), at 197.

[2] R. Tseng-yu Lai, *Law in Urban Design and Planning: The Invisible Web* (New York: Van Norstrand Reinhold, 1988), at 85.

[3] *Id*.

[4] *Id*.

of whether to zone would be left a local option."[5] By the time the United States Supreme Court decided the seminal land-use case of *Village of Euclid v. Ambler Realty Company*[6] in 1926, all but five states had adopted some form of the Standard Act,[7] and by 1930 every state had some legislation that authorized municipal zoning.[8]

B. Comprehensive Zoning Has Been Ratified By The Courts As A Legitimate Exercise Of The Police Power.

For more than 70 years the courts have uniformly approved local government's authority to zone private property.[9] However, this is not to say that the courts have been reluctant to strike down an ordinance that has exceeded constitutional limits.[10]

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[5] *Id*.

[6] 272 U.S. 365 (1926).

[7] Mandelker & Payne, *supra* note 1, at 198.

[8] Lai, *supra* note 2, at 85.

[9] *See Village of Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926) (upholding the legitimacy of zoning under the police power); *Zahn v. Bd. of Public Works, et al.*, 274 U.S. 325 (1927) (upholding the validity of Los Angeles zoning ordinance)*; Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U.S. 116 (1928) (holding that otherwise valid zoning plan could not exclude a home for children or old people); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) (upholding historic preservation ordinance applied to train depot); *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (upholding zoning permitting only one home per acre); *Village of Belle Terre v. Borras*, 416 U.S. 1 (1974) (upholding a zoning ordinance requirement that only family members live together in residential district).

[10] *See Nectow v. Cambridge*, 277 U.S. 183 (1928) (inclusion of certain

Rather, the courts have endeavored to apply the *Euclid* baseline test[11] for validity of a regulation on an individualized basis as articulated by Justice Holmes in the seminal case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (setting forth the often repeated rule that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking). Justice Holmes recognized, prior to the Supreme Court's ruling in *Euclid*, that it is permissible and necessary for government to infringe upon individual property rights in order to function, noting that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal,* 260 U.S. at 413. Likewise, Justice Holmes understood that the facts of regulatory takings cases would be so individualized that a single rule of law could not be applied to determine the constitutionality of a regulation, rather ". . . this

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residential property not indispensable to the general plan and therefore zoning was arbitrary and unreasonable as applied to this property); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (ordinance requiring landlord to physically install cable television wires to each tenant's apartment held invalid); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (holding a regulation invalid which required public access across private land).

[11] "...before the ordinance can be declared unconstitutional, [it must be shown] that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Euclid,* 272 U.S. at 395.

is a question of degree - and therefore cannot be disposed of by general propositions." *Id.* at 416.

What was true in Holmes' time is even more germane today as both land uses and the scope of regulatory control have substantially increased in complexity since 1922. What has not changed, however, is the fact that property rights are unique to the individual, and that a generalized determination of regulatory takings is no more possible today than it was in Justice Holmes' time.

C. Comprehensive Planning And Zoning Are Vital Tools To Support Growth and Development Of Our Communities.

Comprehensive planning and zoning enhance a community in many different ways, including protecting property values, maintaining quality of life for its residents and generally protecting the health, safety and general welfare of its residents. Most recently, the U. S. Supreme Court confirmed the importance of planning and implementing regulations such as moratoria and zoning in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465 (2002).

It has long been presumed, and sometimes shown through economic studies, that the separation of incompatible uses into different zones would raise property value.[12] "Zoning is, after all, about community quality. And if community quality

[12] D. Elliott, "Givings and Takings," 48 *Land Use Law and Zoning Digest*

improves, then property values tend to increase."[13] Additionally, the government increases property values through land use regulations. Local governments use regulations to reduce the risks associated with "free riders"[14] and "negative externalities."[15] Land-use regulations, such as zoning, often provide benefits, as well as burdens, to property owners.

Land-use regulations, particularly limitations on adjoining land uses, improve the quality of life for residents of urban areas. "It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Village of*

(January 1996) at 3.

[13] *Id.*

[14] " 'Free riders' are those who sit back and do not participate in programs to benefit the community, or who violate community laws but enjoy the benefits of the programs and laws anyway because they cannot be excluded. One classic example is a water polluter who does not meet discharge standards but enjoys cleaner water anyway because others are obeying the law. Governments attempt to prevent free riders through the use of both their taxing powers and their police powers." D. Elliott, "Givings and Takings," 48 *Land Use Law and Zoning Digest* (January 1996) at 3.

[15] " 'Negative externalities' are those adverse impacts that one property owner can impose on another when the market is left unregulated. If your neighbor converts his house into an industrial plant, there may be a substantial decrease in the value of your house. The government properly uses land-use regulations to set limits on adjoining uses, which tends to stabilize and raise property values." D. Elliott, "Givings and Takings," 48 *Land Use Law and Zoning Digest* (January 1996) at 3.

Belle Terre v. Borras, 416 U.S. 1, 6 (1974). "I would also agree with the majority that local zoning authorities may properly act in furtherance of the objectives asserted to be served by the ordinance at issue here: restricting uncontrolled growth, solving traffic problems, keeping rental costs at a reasonable level, and making the community attractive to families." *Id.* at 13 (Justice Marshall dissenting). Both Justice Douglas (writing for the majority in *Village of Belle Terre*) and Justice Marshall keenly recognized that many factors make up the quality of life that we enjoy and that land-use regulation enhances all of these factors.

The courts have long held that zoning is a valid use of the police power to promote health and security by separating residential and industrial neighborhoods, to suppress and prevent disorder, to facilitate fire fighting and to prevent such fires from spreading from industrial uses to residential uses.[16] The validity of land-use regulation for the preservation of health, safety, and welfare is now so rooted in our everyday lives that it has become a practical reality rather than a judicial interpretation.

II. CONFORMANCE WITH ARIZ. REV. STAT. § 11-829(G) WILL RESULT IN NON-UNIFORM AND INCONSISTENT APPLICATION OF THE ZONING ORDINANCE.

[16] *Euclid v. Ambler,* 272 U.S. at 391.

Allowing an individual property owner to thwart the best interests of the community by withholding his consent to a rezoning pursuant to ARIZ. REV. STAT. § 11-829(G) defeats the thoughtful and deliberative planning process which includes both landowners and interest groups, a process underscored by the U. S. Supreme

Court in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* 122 S.Ct. 1465 (2002).

A. Zoning Regulations Must Be Uniform Throughout Each Zoning District.

Regulations must be uniform throughout each zoning district such that all similarly situated persons are treated equally. "This is important, not so much for legal reasons as because it gives notice to property owners that there shall be no improper discrimination, but that all in the same class shall be treated alike."[17] Unequal treatment of similarly situated persons may result in the legislative act being declared unconstitutional as violating the equal protection clause, as some jurisdictions have held.[18]

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[17] 1 Young, *Anderson's American Law of Zoning* § 5.25 (4th ed. 1995).

[18] *See Moerder v. City of Moscow*, 78 Idaho 246, 300 P.2d 808 (1956)(ordinance requiring building to be set back a distance equal to average of other buildings on that street is not uniform and therefore invalid); *Carleton Tennis Associates, Inc. v. Town of Clay*, 131 Misc.2d 522, 500 N.Y.S.2d 908 (1985)(ordinance prohibiting food sales near park when such sales were allowed in same zones not near park is invalid); *N.T. Hegeman Co. v. Mayor and Council of Borough of River Edge*, 6 N.J. Super. 495, 69 A.2d 767 (1949)(ordinance which required set-back of 67 ft. for one block where same zone elsewhere required only 25 ft. held invalid); *Ronda Realty Corp. v. Lawton*, 414 Ill. 313, 111 N.E.2d 310 (1953)(ordinance requiring apartments to provide off street parking while no other types of structures in same class were required to do so held invalid); *Richmark Realty v. Whittlif*, 226 Md. 273, 173 A.2d 196 (1961)(ordinance void where it waived separation requirement for filling stations and public parks); *Great Atlantic & Pacific*

Under Arizona law, uniformity is required between regulations affecting property similarly situated. The leading Arizona case, while applying specifically to the statutory provisions governing zoning in cities and towns, is instructive. *See Jachimek v. Superior Court*, 169 Ariz. 317, 819 P.2d 487 (1991)(striking down the city's "inebriate" overlay zone which prohibited pawn shops in areas of a C-2 zone which otherwise would have allowed such use). *Jachimek* specifically addressed ARIZ. REV. STAT. § 9-462.01(C) which sets forth the generally accepted rule that zoning regulations must be uniform for each class or kind of building or use within the same zoning district. *Jachimek v. Superior Court,* 169 Ariz. at 319 (*citing* 1 N. Williams & J. Taylor, *American Planning Law: Land Use and the Police Power* § 31.01 (1988 Rev.)(statutory uniformity requirements represent "a re-enactment in statutory form of the general principle underlying the equal protection clause - that all land in similar circumstances should be zoned alike, and that differential treatment must be justified by a showing of different circumstances justifying such treatment")).

Tea Company, Inc. v. Town of East Hampton, 997 F. Supp. 340 (E.D.N.Y. 1998)(prohibition of commercial buildings in excess of 10,000 square feet not permissible if industrial buildings of same size permitted).

Although there is not an identical provision in the Arizona statutes for county planning and zoning,[19] the principle still applies.

The language of ARIZ. REV. STAT. § 11-829(G)[20] would seemingly allow a single property owner to prevent the county from enacting uniform changes to an entire zoning category if such changes would affect the value of his property. Even if the zoning amendment was proffered for the most important health, safety, or general welfare reasons, that single owner could place his personal property interests before those of the community as a whole. The net result is that the county would be forced to apply zoning amendments only to specific pieces of property for which no protest has been filed, resulting in non-uniform application of the zoning ordinance. Because equality and fairness are implicit in our constitution and our case law, ARIZ. REV. STAT. § 11-829(G) must be invalidated because its application can only result in inequality and unfairness.

B. Zoning Regulations Must Be Consistent With The Adopted

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[19] *See* ARIZ. REV. STAT. §§ 11-801 to 11-877.

[20] "The legislature finds that a rezoning of land that **changes the zoning classification of the land or that restricts the use or reduces the value of the land** is a matter of statewide concern. Such a change in zoning that is initiated by the governing body or zoning body shall not be made without the express written consent of the property owner. . . . **The county shall not adopt any change in a zoning classification to circumvent the purpose of this subsection.**" ARIZ. REV. STAT. § 11-829(G) (emphasis added).

Comprehensive Plan Of The Counties.

All rezoning must be consistent with the comprehensive plan of the county. For an exhaustive review of the "consistency" requirement, see D. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 Mich. L. Rev. 899 (1976). Although the consistency requirement has received little judicial attention in Arizona,[21] its importance has recently been reinforced by Arizona's Growing Smarter Act (adopted 1998 ARIZ. SESS. LAWS CHAPTER 204); the specific relevant provision is codified at ARIZ. REV. STAT. § 11-829(A), which now requires that all rezonings be "consistent with and conform to" a county's comprehensive plan. The Growing Smarter Act makes clear the important interdependence between the county zoning ordinance and the comprehensive plan. While the act specifically states that it does not require a county to immediately rezone all property within its jurisdiction to be in compliance with the comprehensive plan, it clearly directs that any future rezoning must comply. ARIZ. REV. STAT. § 11-829(A).

Counties are required to enact and maintain a comprehensive plan. This power, and duty, to adopt a comprehensive plan is fundamental to the counties' ability to rationally plan for the future land uses within their jurisdictions. Comprehensive

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[21] *See, e.g., Haines v. City of Phoenix,* 151 Ariz. 286, 727 P.2d 339

planning, however, is essentially useless without the power to zone the underlying land in conformance with the comprehensive plan. Specifically, the relevant statute states:

> B. In addition to the other matters that are required or authorized under this section and article 1 of this chapter, the county plan:
>
> 1. Shall provide for zoning, ***shall show the zoning districts designated as appropriate for various classes of residential, business and industrial uses*** and shall provide for the establishment of setback lines and other plans providing for adequate light, air and parking facilities and for expediting traffic within the districts.
>
> . . .

ARIZ. REV. STAT. § 11-821(B)(1)(emphasis added). The comprehensive plan merely sets forth the range of zoning categories permissible (i.e., R1-35, R1-43) within a specified use category (i.e., low density residential). Therefore, without the power to carry out the rezoning contemplated by a change in the comprehensive plan, such comprehensive plan is of little effect.

ARIZ. REV. STAT. § 11-829(G) directly interferes with a county's ability to follow the legislative mandate that zoning be consistent with the comprehensive plan, as it would allow a single property owner to force a county to maintain zoning clearly inconsistent with the comprehensive plan. The ability of a single property owner to

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(App.1986).

foil a comprehensive planning scheme flies in the face of 80 years of planning and zoning.

III. THE COURTS THAT HAVE CONSIDERED STATUTES SIMILAR TO ARIZ. REV. STAT. § 11-829(G) HAVE FOUND THEM INVALID AS IMPROPER DELEGATIONS OF LEGISLATIVE AUTHORITY.

APA concurs with Appellees that the statute in question is an unlawful delegation of legislative authority.[22] The statutory scheme of ARIZ. REV. STAT. § 11-829(G) is typically characterized as a "consent" requirement, which requires approval of certain property owners before a zoning ordinance may be amended.

A consent requirement should not be confused with a "protest" provision. Protest provisions allow specified parties to either (i) protest a rezoning prior to enactment, which sometimes triggers a super majority requirement for the legislative body to adopt the rezoning,[23] or (ii) protest a rezoning after enactment, causing the legislative act to be reversed.[24] Consent requirements differ from the constitutionally

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[22] *See* Appellees' Answering Brief, at 16-19.

[23] *See, e.g.,* ARIZ. REV. STAT. § 11-829(C).

[24] Protest provisions which trigger super majority requirements are constitutional because the legislature is still allowed to make the final decision, while protest provisions which act to reverse a legislative act are unconstitutional. *See Cary v. City of Rapid City*, 559 N.W.2d 891 (S.D. 1997)(protest provision which allowed certain property owners to prevent a validly adopted ordinance from becoming effective deemed unconstitutional because no standards were prescribed limiting its use).

permissible protest provisions in that the power of final decision in protest cases always rests with the legislative body to override the protest if sufficient affirmative votes are cast, whereas the final decision in consent cases cannot be affected by the legislative body.[25] Consent requirements have been attacked on the grounds that they constitute an illegal delegation of power to property owners whose consent is required, and that the delegation is without standards to guide the use of the power.[26]

A. The Legislative Authority Relating To Zoning May Not Be Delegated To Private Citizens.

It is unquestioned in Arizona that the power to zone or rezone property is legislative,[27] a power which may not be delegated unless such delegation is authorized by the Constitution. *Southern Pacific Company v. Cochise County*, 92 Ariz. 395, 404, 377 P.2d 770 (1963)(statute which gives unlimited regulatory power to agency with no prescribed restraint offends Article IV, Section 1 of the Arizona Constitution); *see also Hernandez v. Frohmiller*, 68 Ariz. 242, 204 P.2d 854 (1949)(legislative act which vests in a person free of any standard independent of his own judgment the power to

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[25] 1 Young, *Anderson's American Law of Zoning* § 4.37 (4th ed. 1995).

[26] *Id*.

[27] *See Wait v. City of Scottsdale*, 127 Ariz. 107, 618 P.2d 601 (1980); *Queen Creek Land & Cattle Corp. v. Yavapai County Bd. of Supervisors*, 108 Ariz. 449, 501 P.2d 391 (1972); *Pioneer Trust Co. of Arizona v. Pima County*, 168 Ariz. 61, 811 P.2d

supply, give force to or suspend such act is unconstitutional). "It is a well established theory that a legislature may not delegate its authority to private persons over whom the legislature has no supervision or control." *Industrial Commission v. C&D Pipeline, Inc.*, 125 Ariz. 64, 66, 607 P.2d 383 (1980). ARIZ. REV. STAT. § 11-829(G) delegates to a property owner the legislative authority to determine the proper zoning for that particular lot property. This delegation is unaccompanied by any standards under which the authority is to be executed, leaving the exercise of that power to the discretion of individual property owners. Such standardless delegations are unconstitutional.

B. The United States Supreme Court Determined Long Ago That "Consent" Statutes Are Generally An Unconstitutional Delegation Of Legislative Authority.

The United States Supreme Court, in a trio of cases, decided more than 70 years ago that consent requirements are generally unconstitutional. In the first of these cases, the Supreme Court struck down an ordinance that required the City of Richmond, Virginia's committee on streets to establish a building line[28] upon receipt of a petition of two-thirds of the residents abutting that street. *Eubank v. City of*

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22 (1991).

[28] As used in this case, "building line" refers to what is commonly known today as the front yard setback line.

Richmond, 226 U.S. 137, 141 (1912)(lack of discretion in the streets committee to determine whether a building line should be established when neighbors along the street could make such determination held unconstitutional delegation of legislative authority). "The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised." *Id.* at 143-44.

Several years later, the Supreme Court upheld a City of Chicago ordinance which prohibited the erection of a billboard in certain areas except upon the affirmative consent of owners of a majority of the property on both sides of the block where the billboard was to be located. *Thomas Cusack Company v. City of Chicago, et al.*, 242 U.S. 526 (1916). The Supreme Court in *Cusack* distinguished its holding from *Eubank* by focusing on the ability of the property owners to waive the existing prohibition on billboards. *Id.* at 531. Thus, the Supreme Court, without naming it such, created the "waiver" rule.

Finally, in 1928 the Supreme Court attempted to reconcile the holdings of *Eubank* and *Cusack* when it found unconstitutional an ordinance which allowed otherwise prohibited uses, in this case a philanthropic home for children or the elderly, in residential areas upon the written consent of two-thirds of the owners within 400 feet of the proposed use. *Washington ex rel. Seattle Title Trust Company, Trustee, etc.*

v. Roberge, Superintendent of Building of Seattle, 278 U.S. 116 (1928)(standardless delegation allowing neighbors to withhold consent for any or no reason is repugnant to the due process clause of the Fourteenth Amendment because it subjects one property owner to the whim and caprice of another). Based upon the nature of the use, the *Roberge* Court came to a seemingly opposite conclusion on an ordinance that was strikingly similar to the one upheld in *Cusack*. The Supreme Court reasoned that the facts of *Cusack* "were sufficient to warrant the conclusion that such billboards would or were liable to endanger the safety and decency of such districts. It is not suggested that the new home for the aged poor would be a nuisance." *Id.* at 122. Thus, the *Roberge* Court limited the permissible waiver cases to those involving nuisances. Since the Supreme Court decided this trio of cases, the distinction between unconstitutional "consent" regulations and constitutional "waiver" regulations has been recognized by several of the country's leading land use scholars.[29]

Appellants, in their Opening Brief, pp. 20-21, and their Reply Brief, pp. 2-3, suggest that ARIZ. REV. STAT. § 11-829(G) is a permissible "waiver" statute. But, a close examination of the text of the statute shows that it is in fact an impermissible

[29] *See* 1 Young, *Anderson's American Law of Zoning §* 4.37 (4th ed. 1995); D. Mandelker, J. Gerard & E. Sullivan, *Federal Land Use Law* § 2.05 [2] (2002); 3 Ziegler, *Rathkopf's The Law of Zoning and Planning* § 24.49(2002).

and unconstitutional "consent" statute. The Supreme Court's fundamental basis for upholding the waiver provisions in *Cusack* was that the requirement simply allowed a majority of property owners to waive ordinance provisions prohibiting a specific use.[30] Despite Appellants' characterization to the contrary, this basis is not present in ARIZ. REV. STAT. § 11-829(G). Rather, the statute states that counties may not engage in the legislative act of rezoning without consent by the individual property owner. The relevant portion of the statute states: ". . .such a change in zoning that is initiated by the governing body or zoning body shall not be made without the express written consent of the property owner." ARIZ. REV. STAT. § 11-829(G). Therefore, by the very text of the statute itself, a complaining property owner cannot waive a previously enacted regulation because such rezoning could not be accomplished without his consent.

[30] In connection with its "waiver" argument, Appellants appear to suggest that ARIZ. REV. STAT. § 11-829(G) merely allows a property owner to waive the benefits of legislatively granted property rights in the existing zoning. It is well settled law in Arizona that a property owner has no right to either the continuing existence of zoning or to a future change in zoning. *Fidelity National Title Insurance Company v. Pima County*, 171 Ariz. 427, 429, 831 P.2d 426, 430 (App. 1992); *cf, City of Tempe v. Rasor*, 24 Ariz. App. 118, 536 P.2d 239 (1975); *City of Phoenix v. Beall*, 22 Ariz. App. 141, 524 P.2d 1314 (1974); *see, also, Phoenix City Council v. Canyon Ford, Inc.*, 12 Ariz. App. 595, 473 P.2d 797 (1970); *Lakeview Development Corporation v. City of South Lake Tahoe*, 915 F.2d 1290 (9th Cir. 1990); *Marblehead Land Company v. City of Los Angeles*, 47 F.2d 528 (9th Cir. 1931).

The Supreme Court's rulings in *Eubank, Roberge,* and *Cusack* were also influenced by the existence or lack of "standards" to guide delegated action. The facts of *Cusack*, relied upon heavily by Appellants, are similar to *Eubank* and *Roberge* with respect to the power conferred upon neighbors to control the use of nearby land, but they differ in the standards that regulated that power. The Court in *Eubank* notes the difference that truly distinguishes the unconstitutional "consent" ordinance from the constitutional "waiver" ordinance in *Cusack*:

> [t]he statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, ***creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously. Taste (for even so arbitrary a thing as taste may control) or judgment may vary in localities, indeed in the same locality.***

Eubank, 226 U.S. at 143-144 (emphasis added). Similarly, the pivotal language in *Roberge* reads "[t]he section purports to give the owners of less than one-half the land within 400 feet of the proposed building authority - ***uncontrolled by any standard or rule prescribed by legislative action*** - to prevent the Trustee from using its land for the proposed home." *Roberge,* 278 U.S. at 121-122. *Cusack*, on the other hand, involved adjoining property owners' ability to waive a prohibited use according to the standards (the prohibition in the zoning ordinance) set forth by the legislature. Like *Eubank* and *Roberge*, the Arizona statute in question includes no standards to guide

property owners in deciding when to exercise the power to stop a rezoning. Like the statute in *Eubank* and *Roberge*, the Arizona statute is unconstitutional.

C. Other States Have Found Consent Statutes To Be Invalid.

As with the United States Supreme Court cases, the state court cases involving approval by a third party can be categorized as either consent or waiver cases. As would be expected, those cases involving waiver requirements were held constitutional and those involving consent requirements were uniformly held unconstitutional.

1. Cases From Several States Have Found Consent Statutes Impermissible.

A number of states have held that statutory provisions that require consent are unconstitutional. *See Bashant v. Walter,* 355 N.Y.S.2d 39 (1974)(requiring consent of neighboring property owners for placement of mobile home is an unlawful delegation of legislative and governmental authority to individuals); *People ex rel. Chicago Dryer Company, et al. v. City of Chicago*, 413 Ill. 315, 109 N.E.2d 201 (1952)(ordinance invalid where council forced to take action to change street name upon petition of sixty percent of property owners thereon); *La Salle Nat'l Trust v. Village of Westmont*, 264 Ill. App.3d 43, 636 N.E.2d 1157 (1994)(court denied as improper the right of consent sought by adjacent land owner); *Marta v. Sullivan*, 248 A.2d 608 (Del. 1968)(rezoning requiring consent of 50% of neighbors held invalid);

Minton v. City of Ft. Worth Planning Commission, 768 S.W.2d 563 (Tex. 1990)(requiring consent of 2/3 of property owners held unconstitutional); *New York, New Haven & Hartford Railroad Company v. Sulla*, 198 N.Y.S.2d 353 (1960)(consent of 33 1/3% of all surrounding property owners required prior to any rezoning held invalid); *Town of Gardiner v. Stanley Orchards, Inc.*, 105 Misc.2d 460, 432 N.Y.S.2d 335 (1980)(improper to require consent of adjoining landowners within 500 feet for siting of a single mobile home); *Schulz v. Milne*, 849 F. Supp. 708 (N.D. Cal., 1994) (reversed in part, affirmed in part) (requirement that neighborhood review board approve project prior to Council acting on the application held invalid). All of these cases fall squarely within the rule of law set down 90 years ago in *Eubank*; consent requirements are unconstitutional delegations of legislative authority.

2. Permissible "Waiver" Cases Are Distinguishable From Unconstitutional "Consent" Cases.

In contrast to the consent cases, there are a number of waiver cases in which an ordinance or statute waiving an existing requirement – as opposed to obtaining consent prior to the legislative action – have been upheld. *See Cady v. City of Detroit*, 289 Mich. 499, 286 N.W. 805 (1939) (prior approval of 65% of neighbors within 600 ft. required to waive existing prohibition against licensing trailer park); *Robwood Adv. Assn. v. Nashua*, 102 N.H. 215, 153 A.2d 787 (1959)(approval of 60% of neighbors

within 200 feet required before hearing allowed by board of adjustment to consider variance from existing regulation); *Cross v. Billett*, 122 Colo. 278, 221 P.2d 923 (1950)(permission of 80% of all landowners required before the board of adjustment could grant exceptions to existing ordinance); *City of East Lansing v. Smith*, 277 Mich. 495, 269 N.W. 573 (1936)(assent required of 60% of property owners within 400 ft. before a gas station could be erected contrary to existing ordinance); *State ex rel. Dickason v. Harris*, 158 La. 974, 105 So. 33 (1925)(waiver of existing prohibition of gas stations in residential area allowed if 50% of property owners on street where gas station is to be located authorized location); *City of Muskogee v. Morton*, 128 Okla. 17, 261 P. 183 (1927)(prior approval required from 2/3 of owners within 300 feet for siting of a gas station otherwise not allowed under existing regulation); *Building Inspector of Lowell v. Stoklosa*, 250 Mass. 52, 145 N.E. 262 (1924)(assent of 3/4 of neighbors on same street whose land is used for other than business or industrial required prior to rezoning to the otherwise prohibited zoning classifications of business or industrial); *Huff v. City of Des Moines, et al.*, 244 Iowa 89, 56 N.W.2d 54 (1952)(existing separation requirement between mobile homes and other residential structures could be waived by 60% of owners within 200 feet);[31] *Martin v. City of*

[31] *City of Des Moines v. Manhattan Oil Co.,* 193 Iowa 1096, 184 N.W. 823 (1921) might be read to stand for the proposition that true consent provisions are

Danville, 148 Va. 247, 138 S.E. 629 (1927)(prohibition on gas stations could be waived by certain percentage of nearby property owners); *City of Stockton v. Frisbie and Latte,* 93 Cal. App. 277, 270 P. 270 (1928)(regulation allowing waiver of prohibition on business buildings in residence district upheld).

The common thread throughout the waiver cases is the prior existence of an ordinance or statute, from which a specific group may waive some requirement.[32] This is quite different from the typical consent statute that requires consent of a specified group prior to the legislative enactment.[33]

Somewhat anomalous among the consent/waiver cases are two cases from Minnesota that, on the surface, appear to uphold consent statutes. *See Beck v. City of*

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valid. However, *Manhattan* was decided before the U.S. Supreme Court decision in *Roberge*. Further the subsequent Iowa case of *Huff v. City of Des Moines* discusses with approval the "consent/waiver" distinction, thus effectively negating any contrary implication that might be gleaned from *Manhattan.*

[32] The Supreme Court of Illinois has even rejected the distinction between "creating" and "waiving" a legislative restriction. *See, Drovers Trust & Savings Bank v. City of Chicago*, 18 Ill.2d 476, 478-79, 165 N.E.2d 314, 315 (1960)(the subtle distinction between "creating" and "waiving" a restriction cannot be justified; each is an invalid delegation of legislative authority where a final determination regarding public welfare is in the discretion of individuals). *See also, Lakin v. City of Peoria,* 129 Ill. App.3d 651, 472 N.E.2d 1233 (1984) (*citing Drovers* with approval).

[33] *See also, Howard Township Board of Trustees v. Waldo,* 168 Mich. App. 565, 425 N.W.2d 180 (1988)(ordinance requiring waiver as first step in an administrative procedure upheld in general, but declared unconstitutional because

St. Paul, 304 Min. 438, 231 N.W.2d 919 (1975)(approval of 2/3 of adjacent property owners required to rezone from residential to commercial); *O'Brien, et al. v. City of Saint Paul*, 285 Minn. 378, 173 N.W.2d 462 (1969)(2/3 of property owners within 100 feet must assent to apartments). Upon closer inspection, however, the distinction is quite clear between *Beck* and *O'Brien* and all of the cases holding consent statutes invalid. The Minnesota statute under consideration in those cases[34] actually is more akin to the commonly found "protest" statutes, as discussed on page 14, *supra*, than to a waiver statute. The Minnesota statute provides for a legislative override by the municipality of the consent requirement if such consents cannot be practically

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waiver required by 100% of surrounding neighbors).

[34] "The provisions of this subdivision apply to cities of the first class. In such cities amendments to a zoning ordinance shall be made in conformance with this section but only after there shall have been filed in the office of the city clerk a written consent of the owners of two-thirds of the several descriptions of real estate situate within 100 feet of the real estate affected, and after the affirmative vote in favor thereof by a majority of the members of the governing body of any such city. **The governing body of such city may, by a two-thirds vote of its members, after hearing, adopt a new zoning ordinance without such written consent whenever the planning commission or planning board of such city shall have made a survey of the whole area of the city or of an area of not less than 40 acres, within which the new ordinance or the amendments or alterations of the existing ordinance would take effect when adopted, and shall have considered whether the number of descriptions of real estate affected by such changes and alterations renders the obtaining of such written consent impractical** . . ." (Emphasis added). *O'Brien,* 285 Minn. at 380, *citing* MINN. STAT. § 462.357(5)(1969).

obtained. The ability of the legislative body to make the final decision on the authority delegated is the key feature that makes the *Beck* and *O'Brien* statute valid, unlike ARIZ. REV. STAT. § 11-829(G) which provides for absolutely no legislative oversight.

3. The Annexation and Rent Control Cases Cited by Appellants Do Not Support ARIZ. REV. STAT. § 11-829(G).

Appellants cite two cases in their Reply Brief, suggesting that these cases support ARIZ. REV. STAT. §11-829(G). On closer examination, it is evident that the cases provide little support for Appellants. First, Appellants cite *Roberts v. City of Mesa*, 158 Ariz. 42, 760 P.2d 1091 (1988). *Roberts* involves an Arizona statute that required the owners of 50% or more of the value of real and personal property to sign annexation petitions as a prerequisite to a city annexing property. Residents opposed to annexation challenged annexation decisions by the City of Phoenix and the City of Mesa, claiming that the annexation statute violated due process because of a standardless delegation of legislative power. The opponents argued that allowing property owners to sign - or not sign - annexation petitions was an impermissible delegation of legislative authority. Upholding summary judgments in favor of Phoenix and Mesa, Division One was quick to note that annexation petitioners are "mere supplicants" and that the "municipality has complete discretion to grant or

reject an annexation." 158 Ariz. at 44, 760 P.2d at 1093. The reason that this case does little to help Appellants is simple – the final annexation decision rests with the legislative body. In reality, the annexation statute in question in *Roberts* is more akin to the "protest" statutes mentioned at page 14 of this brief or the two Minnesota cases discussed at page 24. In both instances, the statutory provisions have been upheld because - as in *Roberts* - the final legislative decision rests with the legislative body.

The second case relied on by Appellants is *Hornstein v. Barry*, 560 A.2d 530 (D.C. App. 1989). *Hornstein* upheld a statute that prohibited an owner of rental housing from converting it to condominium use unless fifty per cent of the eligible tenants waived the prohibition on conversion. 560 A.2d at 531. *Hornstein* does not help Appellants for several reasons. First, the subject matter in *Hornstein* was rent control. The *Hornstein* statute was adopted in response to the "continuing housing crises in the city," *Id*. at 532-33, to "permit tenants to dispense with the protection provided by the general ban on conversions" if "the owners would sweeten the pie by buying them out at an attractive price." *Id*. at 534-35.

Second, the *Hornstein* case can be grouped with all of the other "waiver" cases previously cited. After citing *Thomas Cusack Company v. City of Chicago*, 242 U.S. 526, the court states:

> Where, as here, the City Council has made an appropriate

> finding that conversion to condominium use should be proscribed, it may constitutionally allow the primary beneficiaries of such a proscription to **waive** its benefits. . .

520 A.2d 535 (emphasis added). Unlike *Hornstein*, ARIZ. REV. STAT. § 11-829(G) was not adopted to allow landowners to "waive" a general ban on downzoning, because such a ban was not contemplated by the legislature.[35]

Third, the majority opinion in *Hornstein* was deeply criticized by the dissenters because the opinion failed to fully consider the holdings in the *Eubank-Cusack-Roberge* trilogy.

4. Of The Three Cases Requiring Consent By The Owner Of The Property That Is The Subject Of The Legislative Action, All Three Have Held The Consent Provisions Invalid.

Of all of the consent and waiver cases cited by Appellants, Appellees or in this brief, all but three involve **neighboring** property owners or **renters**; however, ARIZ. REV. STAT. § 11-829(G) does not require consent of neighboring property owners or renters. Rather, the Arizona statute requires consent of the **very owner whose property is the subject of the legislative action**. The three cases[36] that involved

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[35] *See* legislative history of ARIZ. REV. STAT. § 11-829(G) cited in Appellees' Brief at 44-46.

[36] *FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868 (Tex. 2000); *Brodner v. City of Elgin,* 96 Ill. App.3d 224, 420 N.E.2d 1176 (1981); *County of Fairfax v. Fleet,* 242 Va. 426, 410 S.E.2d 669 (1991).

consent by the actual property owner squarely support the position advanced by Appellees.

The ordinance in the first case, *Brodner v. City of Elgin*, 96 Ill. App.3d 224, 420 N.E.2d 1176 (1981), is nearly on all fours with ARIZ. REV. STAT. § 11-829(G). The statute at issue in *Brodner* read as follows:

> The City's zoning ordinances provide that applications for amendment of the zoned classification may be initiated by the city council, designated municipal agencies, the owner, contract purchasers, or others with "a substantial proprietary interest in the property." This section further states: "**The written consent of the owner, or his authorized representative, shall accompany all applications.**"

Brodner, 96 Ill. App.3d at 226 (emphasis added)(*citing* Elgin, Ill. Ordinances, ch. 19.52, sec. 19.52.030A). As Appellees note, ARIZ. REV. STAT. § 11-829(G) is virtually identical to the provisions struck down in *Brodner.* The *Brodner* court held that such consent requirements were an unconstitutional delegation of legislative authority:

> We accept the City's argument that the consent requirement constitutes an unlawful delegation of the City's rezoning power. Its effect is to confer upon the owner of the property the absolute discretion to decide that no rezoning shall ever occur. And this is true despite the fact that the City may be effecting a comprehensive zoning plan in pursuit of the common good, which the owner may selfishly and arbitrarily frustrate.

Brodner, 96 Ill. App.3d at 227. The Illinois statute struck down as an unconstitutional

delegation of legislative authority in *Brodner* is virtually identical to the requirements of ARIZ. REV. STAT. § 11-829(G).

The second case regarding property owner consent is *County of Fairfax v. Fleet Industrial Park Limited Partnership, et al.*, 242 Va. 426, 410 S.E.2d 669 (1991). In that case, the Virginia Supreme Court struck down a provision that required the Fairfax County Board of Supervisors to obtain the consent of all affected private landowners of a road district prior to rezoning and the unanimous consent of the district advisory board if such rezoning involved a change which would affect commercial or industrial properties in that district. *County of Fairfax v. Fleet,* 242 Va. at 428. That Court correctly understood that the consent language gave private property owners very broad powers to affect local comprehensive planning and zoning as follows:

> In the case before us, the amendment effectively grants private landowners or the advisory board a veto power over any elimination, reduction, or restriction in zoning classification, as well as ordinance text and regulations, affecting property within the district. Thus, by its terms, the amendment allows private individuals and a non-legislative body to prevent the County from legislating on zoning matters within the district; they, not the County, are given the final authority to determine which changes are appropriate and necessary, and which are not.

County of Fairfax v. Fleet, 242 Va. at 432. Again, the statute at question in *County of Fairfax v. Fleet* is very similar to ARIZ. REV. STAT. § 11-829(G).

The third case regarding property owner consent is *FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868 (Tex. 2000). In *FM Properties*, the Texas Supreme Court held unconstitutional a portion of the Texas Water Code that allowed certain private landowners to create "water quality protection zones." The water quality protection zones were exempt from municipal enforcement of any ordinances, land use ordinances, rules or requirements that were inconsistent with the property's land use and water quality plan. The Court relied on Virginia's and Illinois' decisions in *County of Fairfax* and *Brodner,* respectively, in concluding that the provision unconstitutionally delegated legislative power to private landowners. *Id*. at 877.

CONCLUSION

ARIZ. REV. STAT. § 11-829(G) threatens to undermine the 80-year foundation of comprehensive zoning and planning, and makes it difficult, if not impossible, to uniformly apply land-use regulations to properties similarly situated within its jurisdiction. Further, the statute at issue would make it virtually impossible for counties to give purpose and effect to their comprehensive plans as required by the Growing Smarter Act. Finally, the statute in question is an improper delegation of legislative authority because it confers legislative power upon an individual and it does so without any articulable standards for exercising such power. APA and the Arizona Chapter respectfully request that the Court grant the relief requested by

Appellees and declare ARIZ. REV. STAT. § 11-829(G) unconstitutional.

DATED: August 19, 2002.

JORDEN, BISCHOFF, McGUIRE & ROSE, P.L.C.

By: _____
Douglas A. Jorden (004729)
Michele A. Hentrich (020489)
Attorneys for Amici Curiae
American Planning Association and the
Arizona Chapter of the American Planning
Association

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14, ARIZ. R. CIV. APP. PROC., the undersigned certifies that the foregoing Brief of Amici Curiae is double-spaced and has been prepared using a 14 point proportionately spaced typeface, and that the word count calculated by the word processing program (Microsoft Word 2000) is 5,913.

_____
Douglas A. Jorden
Michele A. Hentrich

CERTIFICATE OF SERVICE

The undersigned certifies that an original and six copies of the foregoing Brief of Amici Curiae were sent by Federal Express to the Clerk of the Arizona Court of Appeals, Division Two, on August 19, 2002, and that two copies were mailed on August 19, 2002 to:

Amelia Cramer
Chris Straub
Pima County Attorney's Office
32 N. Stone, Suite 2100
Tucson, Arizona 85701
Attorneys for Appellees

Ethan Steele, Esq.
Jeffrey M. Neff, Esq.
1830 E. Broadway, Suite 124
Tucson, Arizona 85719
Attorneys for Appellants

Gregory T. Torok
Office of the Yuma County Attorney
198 S Main Street, Third Floor
Yuma, Arizona 85364
Attorney for Amicus Curiae Yuma County

DATED: August 19, 2002.

_____
Douglas A. Jorden
Michele A. Hentrich

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