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ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. PAUL E. TANG

BY: R. ST. GERMAINE, DEPUTY

CASE NO. **C-20081560**

COURT REPORTER: NONE

DATE: November 2, 2009

MICHAEL GOODMAN, in his individual capacity and as beneficiary of MAG Exempt Trust Holdings,

Plaintiff,

vs.

CITY OF TUCSON,

Defendant.

RULING

IN CHAMBERS RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON MOOTNESS GROUNDS

1. Pending before the Court is the summary judgment motion filed by the City of Tucson ("City") on the claims made by the above-referenced plaintiffs (collectively "Plaintiffs" or "Goodman") pursuant to a complaint filed March 8, 2008 ("Complaint"). Initially, the City pled its request as a dismissal motion filed February 5, 2009. On February 23, 2009, Plaintiffs opposed the motion and the City replied on March 11, 2009. On April 6, 2009, the Court notified the parties that it was converting the matter into a Rule 56 motion and invited the parties to file supplemental pleadings.[1]

2. The City submitted a statement of facts and Rule 56 memorandum on April 17, 2009. Plaintiffs filed their summary judgment response on June 18, 2009, in addition to a controverting statement of facts. On July 14, 2009 the City filed its Rule 56 reply. The court conducted oral argument on August 31, 2009, at which time it invited the parties to provide supplemental briefing by September 4, 2009. Thereafter, on September 23, 2009, the Court requested additional briefing from the parties, each which provided memoranda on or by October 9, 2009, at which time this matter was taken under advisement. Having reviewed the pleadings and record, and considered the arguments of counsel, this ruling follows. Before addressing the merits, the Court will describe the uncontroverted circumstances.

3. Goodman filed his declaratory and injunctive relief Complaint, alleging the City's adoption in June 2007 of section 3303.7 of the Tucson Building Code, relating to demolition of existing structures, imposes an unwarranted and improper review process before an owner or developer may obtain a permit to tear down a

[1] *See* Ariz.R.Civ.P. 12(b); *see also Smith v. Payne*, 156 Ariz. 506, 512, 753 P.2d 1162, 1168 (1988); *Lee v. State*, 215 Ariz. 540, 542, 161 P.3d 583, 585 (App.2007); *Tire Shredders, Inc. v. Pima County*, 192 Ariz. 352, 357, 965 P.2d 86, 92 (App.1998).

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structure within the City's historic central core.[2] ("Sec. 3303.7") Goodman sued in his personal capacity and as beneficiary of MAG Exempt Trust Holdings, LLC, and as owner of Mike's Italian Foods #1, and to that end, contends he owns properties, to wit, 23 units consisting of 19 parcels, within the city limits.[3]

4. Goodman claims that by passing Sec. 3303.7, the City violated the Arizona Property Rights Protection Act, promulgated under A.R.S. Sec. 12-1131, *et seq.* ("Act") and also violated his rights to due process under the state and federal constitutions. Under the Act and particularly, A.R.S. Sec. 12-1134, Plaintiffs claim entitlement as an "owner" to "just compensation" because the "existing rights to use, divide, sell or possess private real property [have been] reduced by the enactment or applicability of any land use law ... and such action reduce[d] the fair market value of the property...." *See* Comp. ¶ 12; A.R.S. Sec. 12-1134(A). To comply with the Act, Goodman filed a claim letter with the City on September 13, 2007 seeking compensation for the reduced value of his properties. Comp. ¶10; Plaintiff's June 17, 2008 Affidavit, p. 2.

5. While the Complaint was pending, another city resident, Eric Button, filed a writ of mandamus/order to show cause against the City and the acting building official, demanding that the superior court compel respondents to issue a demolition permit, notwithstanding the provisions of Sec. 3303.7. *See* City's Motion to Dismiss, p. 2; *see* also *Button v. City of Tucson* C20086288. On the mandamus/OSC request, the Hon. John F. Kelly granted Button's relief on December 5, 2008, finding Sec. 3303.7 void. *See* City's Motion to Dismiss, Exh. A, Ruling dated October 30, 2008. Overruling the City's opposition, Judge Kelly found that the regulation had "nothing to do with public safety" and thus, "was not a reasonable exercise of the city's police power." *Id.* In addition, he determined "by creating a delay in the issuance of demolition permits," the regulation "regulate[d] the use of the land or structures" and was thus, in fact, a "zoning ordinance," the consequence of which meant the City was bound to follow "the notice and hearing requirements" of state law for its enactment. *Id.* On January 13, 2009, the City Council repealed Sec. 3303.7 via adoption of Ordinance 10625. City's Motion to Dismiss, p. 2, Exh. B. Still, the council directed its staff to take steps to amend the Land Use Code apparently to enact a similar prohibition, this time as a zoning measure as opposed to a "police powers" regulation. *Id.*; City's Statement of Facts, ¶ 1. The measure was in effect from June 12, 2007 to January 13, 2009. *Id.*; Plaintiff's Statement of Facts ¶2.

6. In the Motion, the City claims the Council's repeal of Sec. 3303.7 renders moot Plaintiffs' two-fold claims. These claims are: First, a demand to be compensated for the diminished value of Goodman's properties under the Act, such matter which is denominated as the "statutory claim" in the City's pleadings; and secondly, the developer's claim asserting a due process infirmity (the "constitutional claim"). In response, Goodman argues that the City failed to respond to his claim filed September 13, 2007 for damages with the City (the

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[2] The amended ordinance altered demolition requirements for any structure wholly or partially over 45 years old within the subject city historic area. It required that a proposed demolition be preceded by a study containing details about the structure as well any others located within 300 feet of its proximity, authorized the City to seek additional information, required the city/county historical commission to issue a finding within 30 days of the demolition study, authorized staffers to make an additional finding within 30 days, and provided that such finding could delay demolitions for up to 180 days to allow the City to arrange to purchase or buy the subject property. *See* Sec. 3303.7.

[3] Mike's Italian Foods #1 is not named in the caption of Plaintiff's Complaint. Four of the units appear to be duplexes.

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"Claim Notice"). He adds that as the City's response was untimely, then according to the time-period afforded under the Act, the City may not pursuant to the Act shield itself from liability against the developer's diminished value claims. Goodman also asserts entitlement to damages based on a due process violation, analogizing his diminution of value loss to constitutional temporary taking cases. He requests damages for, *inter alia*, lost rental income and costs. Before examining the merits of the parties' positions, it is helpful to summarize briefly the Court's obligations in reviewing a summary judgment motion. Thereafter, the Court will outline the components of the mootness doctrine on which the City bases its Rule 56(c) request, then analyzing its contentions in the context of Goodman's statutory claim and constitutional claim.

7. A Rule 56(c) motion should not be granted unless a review of the record satisfies the Court that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), Ariz.R.Civ.P.; *Wells Fargo Bank v. Arizona Laborers*, 201 Ariz. 474, 482, 38 P.3d 12, 20 (2002); *Orme School v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). In determining whether there are any factual issues to resolve, the Court must view the matters of record in the light most favorable to the party opposing summary judgment. *Espinoza v. Schulenburg*, 212 Ariz. 215, 216, 129 P.3d 937, 938 (2006); *Andrews v. Blake*, 205 Ariz. 236, 240, 69 P.3d 7, 11 (2003). If there is any genuine issue of material fact to be resolved, or any doubt as to whether such a material factual issue is present, the motion should be denied. *Gatecliff v. Great Republic Life Ins. Co.*, 170 Ariz. 34, 36, 821 P.2d 725, 727 (1991). *Wisener v. State*, 123 Ariz. 148, 149, 598 P.2d 511, 512 (1979). The motion should be granted, however, when the facts produced in support of a claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense. *See Andrews*, *supra*; *Sanchez v. City of Tucson*, 191 Ariz. 128, 130, 953 P.2d 168, 170 (1998); *Cundiff v. State Farm Mutual Auto. Ins. Co.*, 213 Ariz. 541, 548, 145 P.3d 638, 645 (App. 2006). Having outlined general notions applicable to a summary judgment request, the Court now will discuss principles involving the mootness doctrine.

8. The mootness doctrine addresses whether a case retains its character as a "live" controversy and focuses on whether the time for court action has expired. *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974); *see generally*, L. Tribe, American Constitutional Law § 3-11 (2nd ed. 1983) (hereinafter, "Tribe"). A case is not rendered moot if a party seeking judicial action continues to be exposed to harm or a substantial prospect of future harm. This contrasts from the situation where if the positions of the parties have been altered to such degree that the wrong complained of is no longer present, a case may be considered moot. *Id.*

9. At the federal level, courts are restricted to hearing "cases or controversies" pursuant to a "constitutional jurisdictional requirement." *North Carolina v. Rice*, 404 U.S. 244, 245-46 (1985). Arizona courts, however, are not subject to the same constitutional restriction. *Big D Construction Corp., v. Court of Appeals*, 163 Ariz. 560, 562-63, 789 P.2d 1061, 1063-64 (1990). As mootness is a matter of "prudential or judicial restraint" the doctrine may be overlooked in the circumstance where public interest compels the court to answer even mooted issues. *Id.* (unconstitutionality of bid preference provision); *Fraternal Order of Police v. Phoenix Employee Relations Board,* 133 Ariz. 126, 127, 650 P.2d 428, 429 (1982) (propriety of city rule requiring election of collective bargaining representative).

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10. Beyond the immediately preceding, federal and Arizona courts recognize an exception to the mootness doctrine. That exception deals with the occasion where the harm initially being addressed is recurring, but avoids judicial review due to the time required to adjudicate the issues presented. *Big D Construction Corp.* at 563, 789 P.2d at 1064. As a consequence, a moot question of public importance of a type that can recur may be heard by a court. *E.g., Sherrill v. Department of Transportation,* 165 Ariz. 495, 497, 799 P.2d 836, 838 (1990) (sufficiency of breath sample in implied consent DUI law case when license suspension had expired); *State v. Mathieu*, 165 Ariz. 20, 21, 795 P.2d 1303, 1304 (App.1990) (brief sentence mooted statutory issue); *Fiesta Mall Venture v. Mecham Recall Committee*, 159 Ariz. 371, 373, 767 P.2d 719, 721 (App.1988) (solicitations for recalling then-Governor at shopping center when the governor had been already removed); *cf. Contempo-Tempe Mobile Homeowners Ass'n v. Steinert*, 144 Ariz. 227, 228-29, 696 P.2d 1376, 1377-78 (App.1985) (although question likely to be repeated, it was an issue deemed in fact moot as it was not of great significance when not then decided).

11. In addition, a moot question may be heard involving an issue of great pubic importance on grounds that the detriment which might arise from ignoring the lack of a "live" controversy involving the litigating parties is outweighed by the benefits expected to accrue from resolving the legal issue at hand. *E.g., Camerena v. Department of Public Welfare*, 106 Ariz. 30, 31, 470 P.2d 111, 112 (1970). So, while the issue of the validity of threatened action by a county schools superintendent in naming a replacement school board member was deemed moot by expiration of the vacant subject term, a court proceeded to decide the moot issue to provide guidance to public officers and assist them in the future administration of the law. *Campbell v. Harris*, 131 Ariz. 109, 111, 638 P.2d 1355, 1357 (App.1981). Finally, a decision is moot if "action by the reviewing court would have no effect on the parties." *Ciulla v. Miller ex rel. Arizona Highway Department*, 169 Ariz. 540, 541, 821 P.2d 201, 202 (App.1991) (expiration of suspension of driver's license did not moot motorist's claim challenging the suspension as driving record and insurance rates remained affected).

12. Having considered the preceding authorities, the Court finds several considerations weigh against the City's contention that the Council's repeal of Sec. 3303.7 renders moot Goodman's claims. Concededly, Goodman faces no present exposure to the regulation given its repeal. Arguably, then, Goodman is no longer exposed to harm or a substantial prospect of future harm. *See* Tribe Sec. 3-11. Still, the Court believes first of all that the public's interest compels it to address a perhaps arguably moot issue. *Big D Construction Corp., supra.*

13. In November 2006, voters passed a state level ballot initiative, Proposition 207, The Private Property Rights Protection Act ("Prop 207"). Arizona Secretary of State, State of Arizona Official Canvass 16 (2006). Commentators view the voter-approved initiative as part of a larger movement promoting individual rights against the ability of state and local governments to conduct regulatory takings pursuant to recent U.S. Supreme Court decisions, like *Kelo v. New London*, 545 U.S. 469 (2005), *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003, 1004 (1992) and *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). *See e.g.*, Jeffrey Sparks, Note, Land Use Regulation in Arizona After the Private Property Rights Protection Act, 51 Ariz.L.Rev. 211, 211-12 (2009) (hereinafter, "Sparks"); Hannah Jacobs, Note, Searching for Balance in the Aftermath of the 2006 Takings Initiatives, 116 Yale L.J. 1518, 1520, 1522-27 (2007).

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14. In *Kelo*, the high court held that use of eminent domain to further an economic development plan was a constitutionally valid "public purpose." 545 U.S. at 484. Although *Kelo* addressed exclusively eminent domain, that is, the right of government to take private property and use it for public purposes in exchange for reasonable compensation, property rights supporters viewed the decision as an expansion of the government's power of eminent domain and accordingly, an attack on private property rights. *See* Sparks, *supra*; *see also* Patricia E. Salkin & Amy Levine, Measure 37 and a Spoonful of *Kelo*: A Receipt for Property Rights Activists at the Ballot Box, 38 Urb.Law. 1065, 1089-70 (2006) (hereinafter, Salkin & Lavine). Rights advocates used public sentiment against *Kelo* – even though it dealt only with eminent domain – to support laws requiring compensation for *partial regulatory takings* – that is, the notion that a private owner should be compensated for *any* reduction in property value resulting from a regulation involving land use. Sparks, *supra*.[4] Given this development leading to passage of Prop 207, the Court believes that the public's interest in laws requiring compensation for partial regulatory takings is significant and arguably compelling.

15. Beyond the issue of the public's perhaps compelling interest, however, is the notion that a moot question of public importance is a type that can recur, and assuming such issue may recur, then it may be heard by a court. *Sherrill, supra.* Here, although arguably the Council's action renders moot the regulation, the City does not dispute the report that the City Council directed staff to work on enacting a similar measure pursuant to state zoning laws. *Cf. Sherrill, supra.* Moreover, a moot question may be heard involving an issue of great pubic importance on grounds that the detriment that might arise from ignoring the lack of a "live" controversy involving the litigating parties is outweighed by the benefits expected to accrue from resolving the legal issue or issues at hand. *See e.g., Camerena, supra.*

16. At this point, the Court has discussed factors supporting the notion that the City's decision rescinding Sec. 3303.7 does not render moot Goodman's claims, particularly in light of the public's interest in the issue. Yet, there are still other reasons supporting the position that the City's repeal of the regulation does not moot Goodman's claim. Such issues, however, require analysis of the circumstances underlying the Act. In embarking on this analysis, it is helpful first to discuss briefly what the Act does. The Act requires the state, and its political subdivisions, to pay or compensate private owners whenever land use measures diminish the owners' property values. *See* A.R.S. Secs. 12-1131 to 12-1138. To avoid having to make compensation, the law allows a governmental body imposing a regulation to exempt an owner of land from enforcement of the property-diminishing measure. A.R.S. Sec. 12-1134(E). Among other things, the Act also allows governments and owners to arrive at agreements in which the private owner waives the right to sue for compensation regarding a given regulatory measure. A.R.S. Sec. 12-1134(I). Finally, the Act offers an exception from its reach any land use regulation dealing with governmental activities concerning public health and safety, public nuisances, and related activities. A.R.S. Sec. 12-1134(B)(1)-(7).

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[4] The partial regulatory takings movement perhaps originated before *Kelo*, with states passing partial regulatory takings regulations in response to decisions like *Lucas* and *Dolan*. *Lucas* held that a South Carolina law preventing construction of habitable structures on a private owner's land, rendering such property valueless, amounted to an unconstitutional taking under the Fifth and Fourteenth Amendments, requiring just compensation. 505 U.S. at 1004. *Dolan* determined that the Fifth Amendment requires an individualized analysis and a "rough proportionality" between a required dedication and the impact of the proposed development. 512 U.S. at 391. *See* Salkin & Lavine, *supra*.

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17. A preliminary question to ask is whether the City is a "political subdivision" of the State. A.R.S. Secs. 12-1134(A), (E), and (I). Courts view issues of statutory interpretation de novo. *State v. Peek*, 219 Ariz. 182, 183, ¶ 6, 195 P.3d 641, 642 (2008). When interpreting statutes, the goal of a court is to give effect to the intent of the Legislature. *Id.* at 184, ¶ 11, 195, P.3d at 643. Courts examine first the language of the statute as it is the "best indication of the Legislature's intent." *State ex rel. Thomas v. Duncan,* 222 Ariz. 448, ¶7, 216 P.3d 1194, 1196 (App.2009); *Peek, supra.* If "the language is clear and unequivocal, it is determinative of the statute's construction." *State v. Hansen*, 215 Ariz. 287, 289 ¶ 7, 160 P,3d 166, 168 (2007), (*quoting Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 296 ¶ 8, 152 P.2d 490, 493 (2007)).

18. The Act fails to define specifically "political subdivision of the State" as including a "municipality" like the City. Still, cities and towns of this state are municipal corporations created by the state, and "possessory of no greater powers than those delegated to them by the constitutions and the general laws of the state...." *City of Scottsdale v. Superior Court*, 103 Ariz. 204, 205, 439 P.2d 290, 291 (1968) *citing* Ariz. Const. Art. XIII. (City of Scottsdale could not voluntarily refer matters before it to electors, and thus initiative process was not available to citizens as a mode for amending a municipal comprehensive zoning plan). Indeed, the "general rule is that cities are political subdivisions of the state." *City of Tucson v. Fleischman*, 152 Ariz. 269, 272, 731 P.2d 634, 637 (App.1986)[5], *citing City of Phoenix v. Collar Williams & White Engineering, Inc.*, 12 Ariz.App. 510, 514, 472 P.2d 479, 483 (1970); *see also Hernandez v. Frohmiller,* 68 Ariz. 242, 249, 204 P.2d 854, 850 (1949). Given the preceding decisions, the common interpretation of the plain language of the statutory phrase, "political subdivision of the State," includes a municipality like the City of Tucson. *City of Tucson, supra; City of Phoenix, supra.* Having determined the City falls with the parameters of the term, "political subdivision of the state," the next issue to examine is the scope of the Act.

19. As mentioned, the Act requires the state and its political subdivisions to compensate a private owner whenever a land use regulation diminishes property values. *See* A.R.S. Secs. 12-1131 to 12-1138. To avoid having to pay an owner, however, a governmental body can exempt an owner from enforcement of the property-diminishing measure. A.R.S. Sec. 12-1134(E). The law also allows the applicable governmental entity to avoid compensating a landowner when it "amends, repeals or issues to the landowner a binding waiver of enforcement of the land use law on the owner's specific parcel." *Id.* As Goodman notes, however, "If a land use law continues to apply to private real property more than ninety days after the owner of the property makes a written demand in a specific amount for just compensation to this state or political subdivision of this state that enacted the land use law, the owner has a cause of action for just compensation in a court in the county in which the property is located...." A.R.S. Sec. 12-1134(E). Further, Goodman contends the City failed to exempt him from enforcement of Sec. 3303.7. He points out that the City's regulation was in effect for eighteen months and one day, and argues the Act would be rendered a nullity if the City could avoid the Act's compensation requirement by repealing its regulation *following* the expiration of the applicable ninety-day limitation creating the cause of action as specifically accorded under the Act. A.R.S. Sec. 12-1134(E).

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[5] *Fleischman* analyzed the state's notice of elaims statute and coneluded that the statutory phrase, "public entity" within it by definition includes the "state and any political subdivision of this state...." and accordingly, a "political subdivision of this state" includes "cities." 152 Ariz. at 272, 731 P.2d at 637. Indeed, "...where the legislature has enacted specific statutes addressing a subject of statewide concern, those statutes are binding upon municipalities." *Id.*

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20. In interpreting a statute, courts give effect to each word or phrase and apply the "usual and commonly understood meaning unless the legislature clearly intended a different meaning." *Bilke v. State*, 206 Ariz. 462, 464-65, ¶ 11, 80 P.3d 269, 271-72 (2003), (*quoting State v. Korzep*, 165 Ariz. 490, 493, 799 P.2d 831, 834 (1990)). Courts thus "must read the statute as a whole, and give meaningful operation to all of its provisions." *Wyatt v. Wehmueller*, 167 Ariz. 281, 284, 806 P.2d 870, 873 (1991). Different sections of a single statute should be interpreted consistently. *Id.* If there is need to look further to determine legislative intent, courts may also look to "the context of the statute, the language used, the subject matter, its historical background, its effects and consequences, and its spirit and purpose." *Id.; see also State ex rel. Thomas v. Duncan, supra* at p. 5, ¶ 8. Furthermore, "[s]tatutes must be given a sensible construction that accomplishes the legislative intent and which avoids absurd results." *Arizona Dept. of Admin. v. Cox,* 222 Ariz. 270, ¶9, 213 P.3d 707, 710 (App.2009), *quoting Ariz. Health Care Cost Containment Sys. v. Bentley,* 187 Ariz. 229, 233, 928 P.2d 653, 657 (App.1996); *see also City of Tucson v. Clear Channel Outdoor, Inc.,* 218 Ariz. 172, ¶ 33, 181 P.3d 219, 230 (App.2008) (when interpreting particular term, " 'we apply a practical and commonsensical construction' "), *quoting Douglass v. Gendron,* 199 Ariz. 593, ¶ 10, 20 P.3d 1174, 1177 (App.2001).

21. In this provision, a landowner has a "cause of action for compensation in a court in the county in which the property is located," when a regulation or ordinance "continues to apply to private real property more than ninety days after the owner...makes a written demand in a specific amount for just compensation...." A.R.S. Sec. 12-1134(E). Applying the usual and commonly understood meaning of these words, *Bilke, supra*, and giving "meaningful operation to all of its provisions," *Wyatt, supra*, the language clearly affords a landowner a cause of action for diminution of value arising out of a land use law such as Sec. 3303.7. The Act provides clearly that following passage of more than 90 days of the making of a written demand for just compensation, a landowner has a cause of action unless the governmental entity has repealed the subject land use ordinance. A.R.S. Sec. 12-1134(E). Here, the ordinance enacted June 12, 2007, was repealed January 13, 2009, but not before Plaintiff filed a claim letter September 13, 2007 and then filed suit March 8, 2008. To adopt the City's view that the offending regulation may be rescinded *whenever* – thus rendering moot the landowner's compensation claim -- would render superfluous and obsolete the very words of the statute that *create* the compensation remedy and describe specifically the manner in which such cause of action accrues -- namely after passage of more than ninety days following a Claim Notice filing. *Id.* This interpretation thus gives a sensible construction to the provisions and accomplishes legislative intent, and avoids an absurd result. *Arizona Dept. of Admin., supra.*

22. The City counters its rescission of Sec. 3303.7 under Sec. 12-1134(E) of the Act means Goodman sustained no damages as it contends there cannot be any depreciation based upon a repealed act. *See* 22 Am. Jur. 2d Damages, § 6 (hereinafter, "Am Jur") ; *Schmitt v. Jenkins Truck Lines, Inc.*, 260 Iowa 556, 149 N.W.2d 789 (Iowa 1967). Once it repealed the regulation, the City contends "Plaintiff is in exactly the same position as he was before it was adopted. He suffered no damages by having the regulation in place and his property is worth exactly what it would have been worth had there never been a regulation." City's Motion, p. 5. These precedents are inapplicable, however.

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23. First, Sec. 6 of Am.Jur. states, "The legislature cannot, by mere fiat, authorize the recovery of damages that the plaintiff has never sustained." Am. Jur. 2d's reliance for this proposition is *Schmitt, supra*, a case that held that an amendment to a statute regarding measure of damages for the wrongful death of a man or woman applied both prospectively and retroactively as the legislature's modification altered substantive rights. In the steps of the analysis as to whether the amendment applied prospectively or retroactively, the court reasoned that the measure was amended through an act that equalized the measure of damages for wrongful or negligent injury or death. The court added, "A permissible remedy was thus provided for a recognized wrong. This must logically follow since no legislature can by mere fiat provide a remedy where no wrong has been done and no damage in fact has been sustained. Am.Jur., §2, p.14." 149 N.W.2d at 792. This Court has no quarrel with any of these Am Jur. propositions of law, except they fail to support directly the City's contention that there cannot be any diminution in value claim based upon a repealed act, so that Plaintiffs sustained no damage. Secondly, in citing this section the City has perhaps overlooked a more applicable provision, section 5 of Am. Jur., "Inference of damage arising from injury": "As a general principle, whenever there is a breach of an agreement or the invasion of one's right, the law infers some damage, and for every actionable injury there is a corresponding right to damages." 22 Am. Jur.2d § 5. Next, through legislative enactment, the Act itself describes the invasion of one's right, infers damage, and establishes a remedy in the form of diminution of value, in addition to exemptions thereunder. Lastly, so long as a "plaintiff has a cause of action for damages a defendant's change in conduct will not moot the case." *Buckhannon Bd. & Care Home v. W. Va. Dep't. of Housing & Human Resources*, 532 U.S. 598, 608-09 (2001); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 8 (1978). As a result, the Court is not persuaded by the City's legal citations.

24. In short, the thrust of the City's position appears to be that the Act is ambiguous and in fact allows the City to avoid compensating a landowner for enacting a regulation that diminishes the value of land by merely repealing the measure – whether after ninety days or not. An ambiguity exists in a statute if there is uncertainty about the meaning or interpretation of a statute's terms. *Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 268, 872 P.2d 668, 672 (1994). As stated, to accept the City's theory, however, would render the ninety-day limitation under § 12-1134(E) of the Act meaningless. Courts "are required to read the statute as a whole and give meaningful operation to all of its provisions and ensure an interpretation that does not render meaningless other parts of the statute." *Hanson Aggregates Arizona, Inc. v. Rissling Constr. Group, Inc.*, 212 Ariz. 92, 94, ¶ 6, 127 P.3d 910, 912 (App.2006), *citing Welch-Doden v. Roberts,* 202 Ariz. 201, 206, ¶ 22, 42 P.3d 1156, 1171 (App.2002). And, courts "will not read into a statute something that is not within the manifest intent of the legislature as indicated by the statute itself, nor will the courts inflate, expand, stretch or extend a statute to matters not falling within its express provisions. *Cicoria v. Cole*, 222 Ariz. 428, ¶15, 215 P.3d 402, 405 (App.2009), *citing City of Tempe v. Fleming,* 168 Ariz. 454, 457, 815 P.2d 1, 4 (App.1991).

25. Even assuming *arguendo* this provision is facially ambiguous, any arguable ambiguity dissipates once the court applies ordinary rules of statutory construction. In ascertaining legislative intent, courts will consider the statute's context, its language, subject matter and historical background, its effects and consequences and its spirit and purpose. *Cicoria, supra* at ¶ 16, 215 P.3d at 405-406, citing *Hayes, supra*. Courts are obliged to interpret statutes in a manner that "furthers the perceived goals of the relevant body of legislation." *Cicoria, supra*. As alluded to earlier, commentators view the voter-approved Act as part of a greater effort and

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movement in favor of individual rights *vis-a-vis* the ability of state and local governments to pass regulatory takings in accordance with recent Supreme Court cases. Assuming the views of such commentators are accurate, then this effort is inconsistent with the City's interpretation of Sec. 12-1134(E) which essentially vitiates the Act's ninety-day limit and its concomitant cause of action remedy of diminution of value. A.R.S. Sec. 1134(E); *cf. Cicoria, supra* ¶ 17 (Arizona's legislative trend to tough DUI laws and impose harsher sanctions on those convicted of drunk-driving is not consistent "with Cicoria's proposed reversion to the long-discarded requirement that the State present relation back evidence in DUI cases – especially absent a clear legislative statement to that effect."). Accordingly, the City has failed to persuade the Court that Goodman's statutory claim is moot.[6]

26. Having overruled the City's mootness challenge to Goodman's statutory claim, the Court will address briefly the City's contention that the developer's due process constitutional claim is also moot. It is axiomatic that courts avoid addressing constitutional issues once there exists a legal remedy. *Petolicchio v. Santa Cruz County Fair and Rodeo Ass'n, Inc.*, 177 Ariz. 256, 259, 866 P.2d 1342, 1345 (1994) (Arizona's courts do not reach constitutional issues if proper construction of a statute makes it unnecessary in determining the merits of the action); *Fragoso v. Fell*, 210 Ariz. 427, 430, 111 P.3d 1027, 1030 (App.2005) (courts should decide cases on nonconstitutional grounds if possible, avoiding resolution of constitutional issues, when other principles of law are controlling and the case can be decided without ruling on the constitutional questions), *citing In re United States Currency of $315,900.00,* 183 Ariz. 208, 211, 902 P.2d 351, 354 (App.1995).

27. Such is the case here. As the Court has determined that Goodman's statutory claim is not moot, it therefore takes no position as to whether the developer possesses a constitutional claim emanating from the Due Process Clause of the state or federal constitution, in the manner of diminution of value, a claim he likens to hallmark constitutional temporary taking cases. *See e.g., Corrigan City of Scottsdale*, 149 Ariz. 553, 565, 720 P.2d 528, 540 (App.1986), *rev'd on other grounds*, *Corrigan v. City of Scottsdale*, 149 Ariz. 538, 720 P.2d 513 (1986).

28. For the preceding reasons, the Court **DENIES** the City's Motion for Summary Judgment on mootness grounds.[7]

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[6]The Court believes that, at this point in the proceedings, the issue of whether Plaintiff has suffered damages from the City's actions is properly addressed in the context of mootness, despite the parties' arguing it as a constitutional issue.

[7] The issue of damages was brought up at oral argument; however, the Court believes it to be premature, and declines to address the appropriate form or quantity of damages at this time. This Ruling is solely on the issues presented in the City of Tucson's Motion to Dismiss on Mootness as converted to a motion for summary judgment pursuant to Rule 12(b) and on agreement by the parties. Indeed, given Plaintiff's affidavit that he could not develop his properties during the pendency of the subject regulation, there is a question of fact as what, if any, damages Goodman may have sustained. *Orme School, supra*; *Espinoza, supra*; *Wells Fargo, supra. See also* A.R.S. Secs. 12-1136 (1), (2).

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