

FOR
RENT

PROTECTING PRIVATE PROPERTY RIGHTS

THE PROPERTY OWNERSHIP FAIRNESS ACT

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EXECUTIVE SUMMARY

IN 2005, the Supreme Court's decision in *Kelo v. City of New London* shocked the nation when it rubber-stamped a decision by state officials to seize private homes by eminent domain to make way for private redevelopment projects. In response, lawmakers on both sides of the political aisle began passing new state laws aimed at protecting property owners from government takings.

Despite these efforts at reform, governments have found plenty of loopholes allowing them to abuse property owners by condemning land or by changing the rules that govern how owners can use their property, sticking them with the mortgage, the taxes, the potential liability if someone slips and falls on the property—and often wiping out the property's market value. Ten years after *Kelo*, most federal and state courts still do little to protect landowners when government declares their property “blighted” or takes away the right to use property as one wishes.

In response to the rampant abuses that remain even in the wake of post-*Kelo* reforms, the Goldwater Institute has developed a cutting-edge initiative to limit government's power to seize land outright through eminent domain or through the more insidious method of overregulation. The Act (1) ensures that government can only condemn private property for truly public uses, not to help out developers or advance political agendas, and (2) requires government to pay owners when its regulations reduce their property values without actually ensuring public health and safety. The Act is a principled, practical solution that strikes a fair balance: it allows government to bar property uses that threaten public health or safety, but it also bars officials from sticking property owners with the bill when land-use restrictions go beyond what's necessary to protect the public.

In 2006, Arizona voters approved a version of the Act¹ by a 2:1 margin. It is by far the nation's strongest protection for property rights. In its decade of operation, the Act's success has sent a message to officials that they cannot expect to take Arizonans' property without paying for it, nor can they redesign neighborhoods to serve the interests of politically powerful developers at the expense of home and small-business owners. Now, building on this success, the Property Ownership Fairness Act can be used to protect citizens in the other 49 states.



THE TROUBLING STATE OF PRIVATE PROPERTY RIGHTS TODAY

Nearly a decade ago, the United States Supreme Court delivered one of the most controversial opinions in its history: *Kelo v. City of New London*,² upholding a decision by state officials to seize private homes through eminent domain to make way for a massive redevelopment project to benefit powerful private developers. The ruling triggered outrage across the political spectrum. In response, Americans sought to safeguard their property rights through reforms at the state level. While some of these endeavors were successful, most were hampered by loopholes or ineffective tinkering with procedural details, thus leaving property rights as vulnerable as ever.³

Arizona was different. In 2006, that state's voters overwhelmingly approved the Private Property Rights Protection Act,⁴ by far the strongest protection for property rights in the nation. Although opponents of reform warned that the Act would hamper government's ability to protect citizens and would sap taxpayer dollars to benefit wealthy landholders, the opposite has proven true. The Act has proven a marked success story—improving government efficiency and securing Arizonans' right to their possessions, with none of the chaos opponents predicted. The Act is an excellent model for states that want to provide meaningful security for one of the most essential human rights: the right of property ownership.

SEIZING PROPERTY

Eminent domain—the government's power to seize private property for a public use in exchange for payment that the government considers “just compensation”—was historically used to construct roads, canals, post offices, or military bases. Unfortunately, that power has been expanded to the point that state and local governments today regularly condemn people's property to transfer it to private companies in the name of “creating jobs” or increasing tax revenues.

That was the justification given by one Arizona city when it decided to seize Bailey's Brake Service, a family business that had served hundreds of customers in the Phoenix suburb of Mesa since the 1970s. Randy Bailey bought the shop from his father in 1995 intending to carry on the family legacy. But the city had other plans: it wanted to use eminent domain to demolish his shop and give the land—along with a \$2 million subsidy—to a private hardware store that wished to relocate to Bailey's site. Bailey challenged the condemnation in court, arguing that it violated the federal and Arizona constitutions, both of which only allow the use of eminent domain for *public* uses such as highways, not for private uses like hardware stores.

Following the ruling in the federal *Kelo* case, Mesa officials argued that the increased tax revenue that the hardware store would generate was a “public benefit” that justified the taking, and the trial court agreed. But the Arizona Court of Appeals reversed that decision. It held unanimously that under the state constitution, the “requirement of ‘public use’ is only satisfied when the public benefits and characteristics of the intended use substantially predominate over the private nature of that use.”⁵ Taking property from one private party to give to another did not fit the bill—even if doing so might result in some general “benefit” to the public. The state Supreme Court did not consider the case.

Although Randy Bailey won his battle and kept his property, a large loophole remained, as property rights were still vulnerable to unsubstantiated “blight” designations. In many states, including Arizona at that time, government can condemn un-blighted property simply because it is located next to an unsafe area or blighted property. Vague legal definitions also meant blight was the eye of the beholder.

In neighboring California, for example, the legal definition of “blight” is so broadly worded that almost any property in the state can be targeted for condemnation at any time. Community officials may declare a neighborhood blighted whenever they pass a resolution proclaiming that “physical” and “economic” blight is present. But these terms are defined by vague guidelines, including: “[f]actors that ... substantially hinder the economically viable use ... of buildings ... [including] substandard design, inadequate size given present standards and market conditions, [or] lack of parking,” “adjacent or nearby

uses that are incompatible with each other and which prevent the economic development of ... the project area," and "the existence of subdivided lots of irregular form and shape and inadequate size for proper usefulness and development that are in multiple ownership." ⁶

In Ohio, the city of Lakewood declared a tidy, middle-class neighborhood "blighted" so that it could make way for a luxury condominium development. The city's standards for determining when a neighborhood was "blighted" included such issues as whether the houses had two-car garages and central air conditioning.⁷

Such ambiguous rules empower local governments to declare virtually anything blighted. This problem is worsened by the fact that most states do not require that a property itself be blighted before it can be condemned. Most state "redevelopment" laws let local officials declare an entire area blighted, even if it includes well-maintained homes or successful businesses. What's more, a blight designation is not made through a court proceeding, where legal rules of evidence apply, but through an administrative vote by local officials. In most states, such a vote cannot be challenged later in court except under the most extreme circumstances—and property owners always bear the burden of *disproving* the existence of blight. That would be hard enough, since it's not possible to prove a negative, but some states use the so-called "substantial evidence" test, which makes that burden even more difficult. Though the name implies that the government must show a substantial amount of proof to declare property blighted, the "substantial evidence" test actually means courts must rule in favor of the government if there is any evidence whatever to support the government's declaration of blight.⁸ Such extreme deference to city officials means that virtually no blight designation is ever found to be unwarranted.

Finally, state laws are usually biased toward the government when it comes to the types of "evidence" officials can rely upon when they declare a neighborhood blighted.⁹ Some cities have used so-called windshield surveys, meaning that a consultant hired by the city drives through the neighborhood and later submits a report listing factors that support the declaration of blight.¹⁰ In one California case, officials declared a large section of Fresno blighted on the basis of a windshield survey that suggested

that some buildings in the area were constructed at a time when lead paint was widely used—but which did not even show that any actual lead paint was found on the buildings.¹¹ Still, a city's declaration of blight cannot be overturned unless a property owner proves that there is no evidence whatsoever to support it. ¹²

Eminent domain is almost entirely a matter of state law: the federal government rarely undertakes anti-blight projects on its own, and the laws of each state typically dictates the process of condemnation.¹³ After the controversy over the *Bailey* case, many Arizonans feared that the state's Supreme Court might follow in the path of the *Kelo* decision and reduce the already limited protections they enjoyed under state law. They had good reason to worry, given that that court had provided virtually no protections for property owners whose land was taken, not directly through eminent domain, but through the indirect method of "regulatory" takings.

TAKING PROPERTY RIGHTS THROUGH REGULATION

While in an eminent domain case, the government takes outright ownership of a person's property, the government can also take away property through regulations that prohibit owners from using, selling, or building on their land. Such restrictions block people from pursuing the purpose for which they bought the property—thus taking away their property rights just as much as an eminent domain condemnation does—but because the government does not technically take the *title* to the land, judges often hold that owners are not entitled to any "just compensation." People are therefore forbidden from using their property, but they are stuck with the purchase price, the taxes, the loan payments, and the possible liability if someone is injured on the land. Yet such regulations often destroy the property's value, meaning the owner also cannot sell it. In the 1870s, the U.S. Supreme Court warned that allowing the government to evade the just compensation requirement through the trick of leaving the owner in technical possession while taking away his rights to use the land "would pervert the constitutional provision . . . and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws."¹⁴ Sadly, state and federal court rulings since then have allowed government to do just that.

Arizona courts were as culpable as any state's

when it came to these regulatory takings. Before the Private Property Rights Protection Act, citizens could rarely obtain the just compensation their constitution promises them unless the property restriction completely destroyed the market value of their land. When Kent and Judith Wonders sought permission to develop their property in Pima County, the local board of adjustment demanded that they set aside 45 acres as habitat to preserve native plants. Because this open-space dedication destroyed “only” 30 percent of their property value, and they had “not been deprived of *all* economically beneficial use of [their] land,” the court ruled that the Wonders had not suffered any taking, and were entitled to nothing.¹⁵ Following federal and state precedents that since the 1970s had essentially eliminated constitutional protections against regulatory takings, the court held that almost any government restriction on property use that fell short of a total wipeout was exempt from the compensation requirement. Only when a property owner could show that the government regulated his property so extremely as to “preclude its use for any purpose to which it is reasonably adapted” was the government required to pay for what it took away.¹⁶

SHUTTING DOWN THE SHARING ECONOMY

Consider just one of the many ways land-use regulations stifle economic opportunity by interfering with the rights of homeowners: restrictions on short-term rentals. The advent of the so-called Sharing Economy has opened new opportunities for property owners to make money and improve their local economies—and to benefit consumers with more choice and lower prices. Airbnb and VRBO.com in particular have opened a new era for vacationers and others who are looking for places to spend the night, the weekend, or longer. To get a sense of how profound this revolution is, consider that Airbnb



The state of Glenn Odegard’s Jerome property when he bought it.

alone offers more rooms than major international hotel chains such as Hilton and Marriott¹⁷ and makes up about 8 percent to 17 percent of the short-term rental supply in New York City alone.¹⁸ With expensive hotels no longer the only option, short-term rentals bring people to new destinations and encourage them to patronize the local economy and experience the local atmosphere. In 2013, visitors to Coachella Valley, California, booked over a quarter-million nights at short-term rental homes, pouring more than \$272 million into the local economy and creating 2,500 jobs.¹⁹

Unfortunately, regulators have responded not by welcoming these innovations with open arms, but by driving them out of business. Powerful hotels and vocal neighbors are successfully urging cities to ban property owners from offering their homes to travelers, despite the fact that these restrictions have no connection to the government’s legitimate functions of protecting people’s health and safety. From New York City²⁰ to Santa Monica,²¹ places with bustling tourism economies are rushing to restrict homeowners from offering rooms in their homes to travelers. Honolulu, which already prohibits rentals of fewer than 30 days, is considering raising fines to \$10,000 per day for homeowners who offer short-



Glenn Odegard's home after its historic restoration.

term rentals.²² Other cities are imposing burdensome restrictions though not complete bans. Rancho Mirage, California, requires at least one occupant to be 30 years old, thus discriminating against legal adults who are younger.²³ Nashville, Tennessee, limits the number of properties that may be "non-owner-occupied short-term rentals" to 3 percent, meaning that property owners like P.J. and Rachel Anderson—a young couple who are often on the road for P.J.'s job and who rent their home while they are away to supplement their income—are out of luck, as is Lindsey Vaughn, who bought a property with the hope the rental income would help fund her children's college education.²⁴

These restrictions reveal a growing belief that an individual's private property should be micromanaged by regulators, despite the fact that they are often more interested in serving vocal special interests, such as the hotel industry, than in respecting the rights of property owners. Such efforts do not just hurt tourism, they also reduce property values, drive up the costs of travel and lodging, and put entrepreneurs out of business. Unfortunately, most states fail to protect unsuspecting property owners and entrepreneurs from these extreme regulations.

In 2008, the city of Sedona, a popular Arizona

tourist destination, made renting residential property for fewer than 30 days a *crime*, punishable by up to six months in jail and a \$2,500 fine. Astonishingly, the ordinance defined "rent" so broadly that the term could apply to purchasing a time-share, contracting for home improvements, and even hiring a babysitter.²⁵ Other Arizona cities are following in Sedona's footsteps.

In 2012, Glenn Odegard bought a century-old home in historic Jerome, an old Arizona mining town known as "America's Most Vertical City" because of its steep streets and 5,200-foot elevation. Founded in 1876, Jerome was a copper boomtown with a peak population of 15,000 in the 1920s, but since the mine's

closing in 1953, the population has dwindled to about 450. The remaining residents have sustained the town by transforming it into a tourist destination with ghost tours, art galleries, bed-and-breakfasts, restaurants, bars, and shops.

Glenn tried to contribute to that restoration by resuscitating a home that had been abandoned and left vacant for 60 years after a landslide filled it with rocks and mud. Intending to offer it as a vacation rental, Glenn lovingly restored the dilapidated house to its original historic condition. His successful efforts earned the home a feature in *Arizona Highways* magazine and a spot on the Jerome Historic Home and Building Tour. Yet despite issuing the relevant permits and initially embracing Glenn's home renovation, town officials decreed he could no longer use the home as a vacation rental. Under the town's newly announced ban, Glenn and other homeowners face fines of \$300 and up to 90 days in jail for each day they allow paying guests to stay. His "reward" for the investment of his time, money, and labor was to be considered an outlaw.

Sadly, state courts routinely uphold vacation rental bans, on the theory that "preserving the character and integrity of residential neighborhoods" and "securing affordable housing for permanent

residents” (by forcibly keeping housing values *down*) are legitimate goals the government may pursue by restricting private property rights. Because owners can still rent their property *long-term* and live in the homes themselves, short-term vacation rental bans generally do not destroy the *entire* economic value of a home, meaning that under the laws of most states, owners are not entitled to any compensation, no matter how much the restriction costs them.²⁶

While it is understandable that neighbors don’t want loud renters next door or excessive traffic on their streets, those concerns are already addressed by existing city ordinances that forbid noise or other nuisances. Diverting valuable resources to policing short-term rental bans and negotiating petty arguments between neighbors, instead of enforcing the anti-nuisance laws already on the books, does nothing to improve neighborhoods.²⁷ Anti-short-term rental laws are more effective at creating “Not In My Back Yard”-style barriers that punish residents for letting guests use their homes, than they are at ensuring the fair treatment of all homeowners. Meaningful protections for property rights—like the Property Ownership Fairness Act—encourage cities to focus on enforcing legitimate rules against noise and traffic congestion, instead of imposing new restrictions that only drive up the cost of living, hurt local businesses, and violate the rights of property owners.

THE PROPERTY OWNERSHIP FAIRNESS ACT

In response to the rampant property rights violations that remain even after the wave of post-*Kelo* reforms, the Goldwater Institute has developed a cutting-edge initiative that limits government’s power to seize land outright through eminent domain or through the technical loophole of overregulation. The Act (1) ensures that government can only take private property for truly public uses, not to help out developers or advance political agendas, and (2) requires government to compensate owners when regulations that do not serve public health and safety goals reduce the value of their property. Based on the Arizona experience



but incorporating the lessons learned in the decade since its enactment, Goldwater’s model Property Ownership Fairness Act provides a principled, practical solution that respects property rights while respecting the need for rules that protect the public.

EMINENT DOMAIN REFORM

To ensure against *Kelo* or *Bailey*-style takings, the Act declares outright that the phrase “public use” “[d]oes not include the public benefits of economic development, including an increase in tax base, tax revenues, employment or general economic health.” This means that local officials may declare property to be blighted—and thus a target for condemnation—only when that property



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is unsafe or abandoned, not when they hope to replace existing homes or businesses with shopping malls that will increase tax revenue.

But the Act offers additional protections. First, rather than placing the burden of proof on the citizen trying to keep his property, the Act holds responsible the government trying to take it. This means officials must prove that the condemnation is necessary to eliminate the public danger. Also, the government must prove this fact by “clear and convincing” evidence, rather than the far lower standard of “substantial” evidence. This is critical, because it reverses the biased rule of “deference” that in many cases—including *Kelo*—requires judges to look the other way when government abuses its eminent

domain powers.

The Act also requires the government to prove that it must condemn *each* piece of property before taking action—rather than condemning whole neighborhoods on the basis of some properties’ poor condition, as is the current practice in most states. As an additional protection against the confiscation of homes to make way for high-end shopping malls, if government takes a person’s principal residence, it must pay the owner enough to buy a comparable home.

Finally, to prevent the government from low-balling property owners or intimidating them with the prospect of having to hire expensive lawyers, the Act requires the government to pay property owners’ attorney fees if the court finds that the taking was not

for a legitimate public use or that the government offered less than truly just compensation. It also forbids the court from forcing property owners to pay the government's attorney fees.

REGULATORY TAKINGS REFORM

In addition to eminent domain reform, the Property Ownership Fairness Act requires state and local governments to compensate owners when their regulations reduce the value of property in ways not justified by public safety needs. The Act provides that if government limits "the existing rights to use, divide, sell, or possess private real property," and that restriction reduces the property's fair market value, government must pay the owner just compensation, except in cases where the restriction is an exercise of government's proper authority to protect the general public. In other words, while owners can be barred from engaging in pollution, maintaining dangerous conditions on their property, or using their land in ways that violate the rights of their neighbors, they cannot be prohibited from building or renovating homes or operating legitimate businesses—nor can they be forced to use their land in ways they don't want to—unless the government pays them for depriving them of their property rights.

One early effort to protect people from regulatory takings was Oregon's Measure 37 in 2004. Although initially popular with voters, it proved unsuccessful and was largely repealed only three years later, in part because it was retroactive. Aggrieved property owners were allowed to file claims for regulatory takings that had occurred before the law was put in place. That resulted in more than 6,800 claims totaling over \$19 billion in just the three years after the measure's adoption.²⁸ Of course, the reason for this high volume of claims was that government officials had been taking too much from too many people. But the flood of claims—and the complicated network of lawsuits it unleashed—understandably frightened taxpayers.

The Property Ownership Fairness Act is carefully designed to avoid that retroactivity problem: it applies only to restrictions on *existing* rights to use, and only to laws passed *after* the property owner acquires the land. Also, a property owner is not entitled to compensation for land-use restrictions unless they *directly* regulate the land—something Measure 37 left unclear. Further, the Act places no limitation on the state's legitimate police powers: it

need not compensate owners for regulations that pertain to public health and safety, or that abate public nuisances, or that lawfully limit drug- or adult-oriented businesses, or that establish such public utility facilities as a waterworks. But while these exemptions allow government to perform its proper functions as the defender of the public safety, they are carefully designed to prevent bureaucrats from exploiting them as loopholes. Of course, if none of these exceptions applies, the government *can* still restrict a property owner's rights—nothing in the Act bars the government from regulating property in any way—just so long as it pays for the costs it imposes on owners.

Pro-regulation forces sometimes argue against compensating for regulatory takings on the grounds that the government often restricts how people use property, therefore it makes no sense to require payment for such restrictions.²⁹ Justice Oliver Wendell Holmes put this argument succinctly when he wrote that "government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change."³⁰ But this confuses two fundamentally different kinds of laws: those that protect individual rights, such as laws against theft or fraud, and those that provide society with public benefits. Laws that secure individual rights are enacted under the government's police power. They may in some sense reduce the value of a piece of property, but the government need not pay for these reductions because the activities restricted were wrong to begin with. Government is not required to compensate a robber when the policeman takes his gun away, or to pay people when it bars them from polluting their neighbors' property, because these things do not deprive the owner of anything he had the right to do in the first place. But laws that go beyond that limit and restrict legitimate property uses—such as laws that forbid people from renting rooms in their homes, or that force property owners to provide the public with things such as parks or wildlife habitats that would otherwise be paid for by tax dollars—are a different matter. Those laws *do* deprive owners of what is justly theirs, in order to benefit society. They are therefore similar to eminent domain condemnations, and the same just compensation requirement should apply.

Some have argued against compensating property owners for regulatory takings on the grounds that such compensation is simply too

expensive. Indeed, the U.S. Supreme Court declared in a 2002 case that requiring compensation for the many different ways government takes away people's property "would transform government regulation into a luxury few governments could afford."³¹ But the fact that a person—or the government—cannot afford to pay for what it takes is not a good reason for excusing it from its constitutional duty to justly compensate. On the contrary, that is good reason for government to show more restraint. After all, the costs of regulation are always eventually borne by *somebody*. If the government pays owners for taking their property, then the taxpayers pay the burden. If it does not, then that burden is borne by the owners who lose their property.³² But as the Supreme Court has also acknowledged, the reason just compensation is required is because it is neither fair nor just to force individual property owners to pay the full cost of public burdens that "should be borne by the public as a whole."³³ When the costs of providing public goods—whether they be a wildlife habitat or a neighborhood without vacation rentals—fall on a single person or a small group, then the public should compensate the owners for their losses.³⁴

FILING A CLAIM FOR JUST COMPENSATION

The Property Ownership Fairness Act includes a simple process to file a claim for compensation, designed to allow government and property owners to negotiate a settlement without having to go to court. Within three years of the time the restriction on use is first applied to property, the owner must send a simple letter to the government requesting just compensation. No clumsy, time-consuming administrative review process is involved. Instead, the government has 90 days to decide whether to restore the property rights by waiving the land-use restriction or to pay the owner for taking those rights away. If the government chooses not to apply the restriction, that waiver can be passed down to later owners of the property. If the government either rejects the claim letter or takes no action within three months, the owner can ask a court to order compensation. And because the government must pay a successful property owner's legal bills, bureaucrats have an incentive to cooperate and resolve disputes before going to court.

The Act was designed to enable private citizens to file a claim without having to hire an attorney.

Lowering the costs and burdens of establishing a claim increases the likelihood of settlement without lengthy and expensive lawsuits, and helps discourage governments from exploiting property owners who do not know the law. The Act is therefore a substantial improvement over the efforts by some states to protect people from regulatory takings, because most states have not done much to reduce the difficult process of filing claims. Florida's Harris Act, for example, includes what that state's courts have called "complex presuit requirements."³⁵ And the Harris Act authorizes compensation only for as-applied challenges to governmental action,³⁶ meaning that property owners cannot recover for reductions in property rights that result from across-the-board regulations that diminish the property values of all owners equally.³⁷

RECOVERY FOR PARTIAL TAKINGS

The Property Ownership Fairness Act also addresses the issue of partial takings—known as the "relevant parcel problem"—which has long bedeviled property owners. The problem arises when a land-use restriction deprives an owner of a portion of the property's value—for example, 10 percent. Here is the question: should the court treat this as a complete taking of the 10 percent, which under federal law would mean compensation is owed, or as only a small reduction in the value of the whole, in which case the owner is entitled to nothing? Many state and federal courts have taken the latter route. In some egregious cases, courts have interpreted "the property" not only in terms of physical dimensions, but also in terms of *time*, meaning that a "temporary" prohibition on the right to use property—even if it lasted for decades—would not entitle the owner to any compensation, because the owner would be allowed to use it in some way if the prohibition were ever lifted.³⁸

This Act prevents such an unjust outcome by defining "just compensation" as "the sum of money that is equal to the reduction in fair market value." Thus if a regulation deprives an owner of 10 percent of the property's value, the owner must be paid for that 10 percent loss. The Act makes no exception in terms of time, and because it provides the government with an opportunity to waive the restriction, the possibility that owners might lose their property to "temporary" prohibitions is reduced.

PROPERTY OWNERSHIP FAIRNESS ACT: AN OVERVIEW

- ★ Restricts government's use of eminent domain to instances where (1) the use of eminent domain is authorized by state law, (2) the condemnation is necessary to that use, and (3) the use is truly public (as defined by the Act).
- ★ Puts burden on government to prove blight by real evidence, and requires courts to make a genuine decision on that question instead of deferring to the government.
- ★ Requires government to buy the owner a comparable home if it takes a home for slum clearance or redevelopment.
- ★ Requires government to pay owners when regulations that do not genuinely protect public health and safety take away property rights and reduce the value of their land.
- ★ Institutes a swift, simple claim process that allows regulatory takings claims to be resolved without the need for attorneys or lawsuits.
- ★ Requires government to pay owners' attorney fees and court costs when they successfully challenge the misuse of eminent domain or regulation.
- ★ Prohibits government from assessing attorney fees and costs against property owners.





A DECADE OF SUCCESS

IN the short time that Arizona's version of the Act has been on the books, the state's property owners have enjoyed greater protections for their rights. Below are some examples of the law's successes.

MIKE GOODMAN'S TUCSON RENOVATIONS

Mike Goodman was on a mission to revitalize downtown Tucson and the area near the University of Arizona. He bought run-down structures to replace them with upscale modern housing that could accommodate more people. His renovations were built to standards that exceeded the city's zoning requirements, and his work increased local property values and helped meet the demand for housing caused by the university.

But the antidevelopment city council had other plans. After Goodman bought the land, acquired the necessary permits, and began construction, the

council passed an anti-demolition ordinance that forced all property owners wishing to remove old structures from their property to navigate a sea of red tape. Owners were required to conduct "historical impact studies" and satisfy a long checklist of vague, subjective criteria before they could obtain a permit. The city even asserted that it could order the property sold to another buyer. This byzantine process applied to all "historic" properties, which the city defined to include any structure over 45 years old. In the name of "historic preservation," the city restricted property rights, slashed property values, and ruined plans to improve Tucson's decrepit neighborhoods. Arizona's newly enacted property protection Act was about to be put to the test.

When the case went to trial, the judge rebuked Tucson for trying to evade the law's requirements by hiding its restrictions in the city's building code instead of openly admitting that a new restriction had been imposed. Unfazed, the city reenacted the

ordinance, this time embedding the law in zoning rules and calling it a health-and-safety enactment, so as to claim exemption from the Act's compensation requirement. But another judge refused to go along with that, too. Declaring that Tucson could not ignore "the public's interest in laws requiring compensation for partial regulatory takings," the court ruled that owners like Goodman were entitled to compensation for the city's deprivation of their property rights.³⁹ Were the city allowed to get away with evading the Act's requirements, the protections that voters approved—"part of a greater effort and movement in favor of individual rights"—would be rendered "superfluous and obsolete."

Government officials often lament the costs of compensating property owners for the regulatory costs they impose. But regulation always comes at a cost to someone. Before Arizona's Act was adopted, those costs were borne by individual property owners who—lacking legal tools with which to defend themselves—were simply deprived of their property value without compensation whenever government officials came up with a "better" idea for how a person's property should be used. For example, "historic preservation" ordinances forced property owners to maintain old buildings that they would have preferred to replace or renovate, in order to provide the public with a "scenic" neighborhood, with the expenses paid, not by the public, but out of the property owners' own pockets. The Act shifts those costs back where they belong—onto the government that imposes them in the first place. Although payment is not required when regulations protect public health and safety, any restriction that goes further must be paid for by the government. This gives lawmakers a choice: if they think an historic preservation ordinance or wildlife habitat requirement is important enough, they will agree to compensate owners for those impositions. If not, that's all the more reason why individual owners should not be forced to pay those public expenses themselves. Requiring lawmakers to weigh the costs and benefits of the regulatory burdens they impose helps discourage excessive regulation and abuse.

MORE BALANCED GOVERNMENT

DECISION-MAKING

By ensuring that elected officials sensibly weigh the real costs and benefits of their land-use regulations instead of merely pretending that restrictions on property are costless, the Arizona Act has helped ensure more efficient government decision-making. Consider two cases in which the risk of liability helped protect the interests of both property owners and taxpayers against government overreaching.

Only two years after the Act was passed, Maricopa County, acting pursuant to a state law that restricted development near Luke Air Force Base, issued a moratorium on building permits for properties in the area. The moratorium had a devastating effect on property values: the value of newly zoned vacant residential lots dropped 95 percent, while existing home values were halved.⁴⁰



Property owners suddenly found themselves barred from renovating their properties, forbidden to install pools in their yards, mount solar panels on their roofs, or undertake urgent electrical and plumbing repairs. Building new homes was out of the question. Air Force veteran Robert Landers was told he could not install the therapeutic spa his doctor had prescribed to him to help recover from surgery. As a result of the moratorium, more than 175 property owners filed nearly \$20 million in claims for compensation. The county, faced with the true costs that its regulation had imposed, rescinded its freeze on permits.⁴¹

On the other hand, when there is sufficient community interest in historic preservation, the Property Ownership Fairness Act can ensure that public aesthetic values are served most efficiently. Arizona is justly proud of the many architectural masterpieces constructed by Frank Lloyd Wright,



who made Phoenix his winter home during the last two decades of his life. In 1952, he built a home for his son and daughter-in-law—the 2,500-square-foot David and Gladys Wright House, tucked away in the heart of the city’s Arcadia neighborhood. The house bears the signature spiral look of the architect’s famous Guggenheim Museum in New York City. Because the Wrights treated the home as their primary residence until the ends of their lives, it was well used and relatively unknown.

All that changed when Gladys passed away in 2008, and her grandchildren sold the house. It sat vacant for several years before a real estate developer purchased the property for \$1.8 million, with plans to demolish the house and subdivide the lot. Before closing the deal, the developer sought and obtained the government’s permission, but when Wright enthusiasts demanded that the city preserve the house, officials rescinded the demolition permit. Neighbors urged them to designate the property a landmark, thereby freezing development for at least three years.⁴²

Changing the rules in the middle of the game unfairly prevents property owners from pursuing the purpose for which they bought the property, and sticks them with the mortgage, the taxes, and often with plummeting property values. The Arizona Private Property Rights Protection Act guaranteed the developer payment for the value lost as a consequence of the moratorium. But as the fight over the Wright house intensified, the matter caught the attention of the Frank Lloyd Wright Building Conservancy, which established a nonprofit to purchase, restore, and maintain the home for educational purposes.⁴³ Instead of forcing the property owner to pay the cost of foregoing his investment plans or maintaining a property he was unable to use—and rather than forcing taxpayers to bankroll the preservationists’ desires—the Arizona law created an incentive that enabled Wright fans who wanted to save the house, and thought it was worth the price, to pick up the tab themselves. The developer walked away unharmed, and the house is undergoing restoration today.

ABUSING ZONING POWERS TO CONTROL PERSONAL CHOICES

The Property Ownership Fairness Act can even protect the public from the government’s efforts to

impose its preferred social values on the general public. For example, Arizona's Pima County was one of 44 municipalities that received federal "stimulus" money to address obesity within its borders. Pima County lobbied for its share by pledging to use \$15.8 million to implement a comprehensive scheme of restrictions on restaurants, workplaces, and schools all aimed at shrinking residents' waistlines. Perhaps the plan's most egregious goal was something called "obesity zoning," an attempt to micromanage what people eat by restricting the number of fast-food restaurants allowed in a given area.

Such restrictions have proven popular with some city planners who seek to use regulatory power not to protect people from dangerous or fraudulent business practices, but to impose health and lifestyle choices on the public. Los Angeles, for instance, has prohibited the development of new fast-food restaurants in certain low-income areas, even though taking away affordable food does not help low-income families eat better. Detroit forbade certain carryout and drive-in restaurants from operating within 500 feet of a school. The federal Centers for Disease Control has even published recommendations for local officials to use when fashioning zoning restrictions that "support healthy eating and active living" by, among other things, "changing the locations where unhealthy competitive foods are sold," "limit[ing] advertisements of less healthy foods," or employing "traffic calming approaches (e.g., speed humps and traffic circles)" to encourage people to walk instead of drive.⁴⁴

Perhaps most perplexing about the Pima County example is that the obesity plan was to be funded by federal stimulus money, in the name of "creating jobs." But such zoning changes would shut down locally owned businesses, restrict consumer choice, and effect a considerable decline in the value of property zoned for business uses. Destroying businesses and eviscerating property rights does not boost an economy. Instead, "obesity zoning" merely redistributes taxpayer resources to impose dietary decisions that bureaucrats consider preferable, with all the costs borne by citizens and businesses in the form of higher food prices and less freedom of choice. But thanks to Arizona's Private Property Rights Protection Act, Pima's obesity zoning plan would have required the county to compensate owners of restaurants and other businesses harmed by such limitations. After the plan was exposed and

legal action was threatened, the county decided it was not worth compensating affected property owners, and ditched its obesity zoning schemes.⁴⁵

LESSONS LEARNED

Now that Arizona officials are barred from passing the costs of their regulations on to individual property owners, some have sought ways to evade the Act. Below are a few lessons learned that policymakers in other states can use when drafting meaningful reforms to provide robust protection for private property rights. The model bill language provided in the Appendix incorporates all of these lessons, but policymakers should take care to review the language for consistency with the laws and practices of their own states.

THE PUBLIC SAFETY EXCEPTION

Because the Act does not require compensation for land-use rules that protect public safety and health, some cities have tried to shoehorn their restrictions on property rights into this exemption. For example, when officials in Sedona tried to ban short-term vacation rentals, they sought to avoid their duty to compensate by asserting that the ban protected public safety. Called upon in a lawsuit to explain how, they offered no evidence, but instead claimed that they needed none because their declaration that the ban protected public safety should have sufficed. Such declarations, they said, are "not subject to second-guessing by the courts."⁴⁶

Fortunately, the Arizona Court of Appeals rejected this argument. When the government diminishes property rights, and claims that doing so is necessary to protect the public, it bears the burden of "establish[ing] by a preponderance of the evidence" that the public safety exemption applies.⁴⁷ This ruling was significant because in many other states, as well as in federal court, it is typically property owners who must bear the burden of proving that restrictions on their rights are unconstitutional. This is often impossible, given that the government can usually rely on mere speculation to suggest that maybe, if it did not restrict the right to use property, the public might somehow be harmed. This approach, called the "rational basis test," is usually successful in fending

off efforts by property owners to defend their rights in court.

In the Sedona case, the Arizona judges rejected this deferential theory. If the government's mere assertion were enough to invoke the "public safety" exception, government could simply "incant the language of a statutory exception to demonstrate that it is grounded in actual fact," and nullify the initiative's protections for property rights.⁴⁸ Although the state's courts have not yet specified how closely a property regulation must serve a public health problem before being exempt, it is clear that the Act requires realistic judicial review when officials assert the public safety exception, in order to ensure that this is not merely a pretext. It is typically easy for the government to prove that a land-use law clearly and directly protects public health and safety, when that is true. In the Sedona case, the court used the example of laws that prevent people from accumulating waste in their yards, which obviously relate to health and safety because they prevent "insects, rodents, snakes and fire."⁴⁹ Likewise, floodplain ordinances have a "commonsense, self-evident nexus" to preventing emergencies and protecting lives and property.⁵⁰ On the other hand, the court observed, "the nexus between prohibition of short-term occupancy and public health" was "not self-evident."⁵¹ If officials didn't want to pay property owners for restricting their rights, they had the obligation of demonstrating—by real evidence—that restricting those rights protected the public's health and safety in some meaningful way.

They could not do so. Despite vague references to "the peace, safety and general welfare of the residents," city records showed that officials adopted the rental ban in order to protect the city's "small-town character" and "scenic beauty," not to prevent any public dangers.⁵² The complaints officials received from residents all related to general grievances about roadside parking or traffic, or neighbors expressing a desire to live in a "small town" where "you know most everyone." These residents urged the city to ban short-term rentals in order to maintain "a quiet, friendly, family" neighborhood—not to protect public safety.⁵³

Regulatory takings reform is an issue of fundamental fairness—the cost of community desires should not be imposed on property owners alone, but must be paid for by the community.

Thus the court refused to blindly accept the city's claim that the rental ban was exempt from the compensation requirement.⁵⁴

Even more outlandish were the efforts of Jerome officials to fit their ban on short-term rentals into the "public safety" exemption. They claimed, with apparent seriousness, that banning short-term rentals would protect the safety of pedestrians from out of town, who might not be aware of potholes in the streets, and would maintain sanitation because nonresidents might not know when garbage day is. They even claimed the prohibition would provide enough long-term housing to encourage citizens to run for offices in city government.⁵⁵

These issues are currently the subject of litigation in the Goldwater Institute's lawsuit, *McDonald v.*

Jerome.⁵⁶ Although Arizona courts have declared that cities must actually prove they are advancing health and safety if they claim exemption from their obligation to pay for reducing property values, courts must still decide how much proof is needed to show that a real public-health problem exists, and whether a given regulation actually resolves that problem. Policymakers in other states looking to pass reforms to protect private property rights should take care to include language that ensures that courts examine government actions that restrict property rights—and do so independently, with a

skeptical eye, instead of deferring to government's assertions of public motives. Otherwise, protections for private property rights could be rendered toothless.

PROCEDURAL OBSTACLES

Even when armed with robust property-rights protections like the Property Ownership Fairness Act, owners can find the process of seeking compensation cumbersome. Sometimes the legal procedures can be so complex that they effectively deprive property owners of protection. When Flagstaff businessman Paul Turner bought his property to operate a small engineering business, he intended to supplement his income by building a small apartment structure on the property. After he had obtained the necessary permits and laid the foundation for the new building, however, the city passed an ordinance making it illegal to develop his property as planned.

The ordinance slashed his property's value, so Turner filed a claim for compensation and completed all the necessary pre-suit requirements including notifying the city in writing that its new regulations reduced his property value. Arizona's Act requires this step to allow government and property owners a chance to work together to avoid going to court. Upon receiving a claim letter, the government can restore the citizen's property rights, agree to pay compensation, or deny the claim as unjustified. But in Turner's case, the city simply ignored the claim. This meant that after 90 days, the claim was automatically deemed denied. But when Turner hired a lawyer and filed a lawsuit, the city went after him on technicality after technicality, convincing the courts to erect new procedural hurdles along the way. The delays worked to the city's advantage because Turner had filed his claim within the last 90 days of the three-year statute of limitations provided in the Act. Thus by the time the 90-day period had expired, the city had waited long enough that Turner was denied his day in court. Sadly, the loophole the city created remains on the books today, effectively shortening the statute of limitations on Arizona's Act by three whole months.⁵⁷ States considering enacting the Property Ownership Fairness Act should take care to address this potential for government to make an end-run around the compensation requirement at the outset.

WAIVERS

No longer able to lay the cost of regulation on the shoulders of individuals and families, governments at first responded to the Act by seeking ways to circumvent the law and avoid paying just compensation. One of the most common tactics was to demand that property owners seeking development or use permits surrender their property rights in exchange for such permits. The message: Want to convert your carport to a more secure garage? Want to build an extra bedroom to accommodate your growing family? Permission granted—so long as you waive your right to seek compensation, and allow government to impose devaluing restrictions at will. Sometimes these waivers even claim to “run with the land,” depriving future owners of the right to bring such claims.

Waivers may be valid where government seeks to bar a property owner from requesting a rezoning and later claiming that the reclassification diminished his property rights. And in some limited

circumstances, government can demand that a property owner give up something in exchange for a land-use permit.⁵⁸ But the broader the waiver, the more likely it violates the Constitution. Government cannot impose unreasonable conditions on the receipt of a development permit, or force people to waive their constitutional rights in exchange for permission to use property that belongs to them.⁵⁹ Yet some Arizona cities have tried to do just this, requiring property owners seeking zoning approval to waive all present or *future* claims for compensation resulting from any *subsequent* land use law that “relat[es] to or [is] consistent with” the request.⁶⁰ Again, policymakers considering passing a Property Ownership Fairness Act should specify that the government cannot condition an owner's ability to use his or her property on the willingness to relinquish the right to just compensation.

CONCLUSION

Property takings reform is an issue of fundamental fairness—the cost of community desires should not be imposed on property owners alone, but must be paid for by the community. When the government takes a citizen's property away, it should pay just compensation—whether the taking is explicit, through eminent domain, or indirect, through regulatory takings. The Property Ownership Fairness Act strikes a fair balance, allowing cities and communities to do the job they are supposed to do—protecting public safety—and even to go further and regulate property for aesthetic or public benefit reasons, so long as they don't stick property owners with the bill. It prevents the abuse of eminent domain and provides a fair and efficient process for people whose property is taken for legitimate public uses. It protects the fundamental human right of private property while respecting the need for rules that protect everyone.

Following on its decade of success (and lessons learned) in Arizona, the Model Property Ownership Fairness Act can protect homeowners in the other 49 states as well. Today, a decade after Arizona enacted its own version, we can inaugurate a new era of nationwide protections for property rights, fairness, and the rule of law. ■

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APPENDIX

PROPERTY OWNERSHIP FAIRNESS ACT MODEL LEGISLATION

§ 1: Property may be taken only for public use consistent with this article

Eminent domain may be exercised only if the use of eminent domain is both

(A) Authorized by this state, whether by statute or otherwise; and

(B) For a public use as defined by this article.

§ 2: Just compensation; slum clearance and redevelopment

In any eminent domain action for the purpose of slum clearance and redevelopment, if private property consisting of an individual's principal residence is taken, the occupants shall be provided a comparable replacement dwelling that is decent, safe, and sanitary as defined in federal relocation laws, 42 USC 4601 et seq., and the regulations promulgated thereunder. At the owner's election, if monetary compensation is desired in lieu of a replacement dwelling, the amount of just compensation that is made and determined for that taking shall not be less than the sum of money that would be necessary to purchase a comparable replacement dwelling that is decent, safe, and sanitary as defined in the state and federal relocation laws and regulations.

§ 3: Diminution in value; just compensation

(A) If the existing rights to use, divide, sell, or possess private real property are reduced by the enactment or applicability of any land use law enacted after the date the property is transferred to the owner and such action reduces the fair market value of the property the owner is entitled to just compensation from this state or the political subdivision of this state that enacted the land use law.

(B) This section does not apply to a land use law that:

- (1) Limits or prohibits a use or division of real property if it is narrowly tailored to protect the public health and safety, including rules and regulations relating to fire and building codes, health and sanitation, transportation or traffic control, solid or hazardous waste, and pollution control;
- (2) Limits or prohibits the use or division of real property commonly and historically recognized as a public nuisance under common law;
- (3) Is required by federal law;
- (4) Limits or prohibits the use or division of a property

for the purpose of housing sex offenders, selling illegal drugs, liquor control, or pornography, obscenity, nude or topless dancing, and other adult oriented businesses if the land use laws are consistent with the constitutions of this state and the United States;

(5) Establishes locations for utility facilities;

(6) Does not directly regulate an owner's land; or

(7) Was enacted before the effective date of this section.

(C) The owner shall not be required to submit a land use application to remove, modify, vary or otherwise alter the application of the land use law to the owner's property as a prerequisite to demanding or receiving just compensation pursuant to this section.

(D) 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 the political subdivision of this state that enacted the land use law, the owner may file suit for just compensation in a court in the county in which the property is located, unless this state or political subdivision of this state and the owner reach an agreement on the amount of just compensation to be paid, or unless this state or political subdivision of this state amends, repeals, or issues to the landowner a binding waiver of enforcement of the land use law on the owner's specific parcel. This written demand for just compensation supersedes any other statutory notice or demand requirements.

(E) Any demand for landowner relief or any waiver that is granted in lieu of compensation runs with the land.

(F) An action for just compensation based on diminution in value must be made or forever barred within three years of the effective date of the land use law, or of the first date the reduction of the existing rights to use, divide, sell, or possess property applies to the owner's parcel, whichever is later. A written demand for just compensation made by the owner of the property pursuant to subsection E of this section is an exhaustion requirement that tolls the three-year time period for 90 days or the length of time that it takes of this state or the political subdivision of the state that enacted the land use law to deny the written demand, whichever is less.

(G) The remedy created by this section is in addition to any other remedy that is provided by the laws and constitution of this state or the United States and is not intended to modify or replace any other remedy.

(H) Nothing in this section prohibits this state or any political

subdivision of this state from reaching an agreement with a private property owner to waive the owner's claim for diminution in value only if such claim directly results from a government action requested by the property owner.

§ 4: Burden of proof; eminent domain and diminution in value

(A) In all eminent domain actions, whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined without regard to any legislative assertion that the use is public.

(B) In any eminent domain action for the purpose of slum clearance and redevelopment, this state or a political subdivision of this state shall establish by clear and convincing evidence that the condemnation of each parcel is necessary to eliminate a direct threat to public health or safety caused by the property in its current condition, including the removal of structures that are beyond repair or unfit for human habitation or use, or to acquire abandoned property, and that no reasonable alternative to condemnation exists.

(C) In any action for just compensation or a diminution in value, the question whether a land use law shall be exempted under Section 3(B) shall be a judicial question, and determined without regard to any legislative assertion that the land use law is exempted. The state or political subdivision of this state that enacted the land use law shall establish by clear and convincing evidence that the land use law is exempt pursuant to Section 3(B).

§ 5: Attorney fees and costs

(A) A property owner is not liable to this state or any political subdivision of this state for attorney fees or costs in any eminent domain action or in any action for diminution in value.

(B) A property owner shall be awarded reasonable attorney fees, costs, and expenses in every eminent domain action in which the taking is found to be not for a public use.

(C) In any eminent domain action for the purpose of slum clearance and redevelopment, a property owner shall be awarded reasonable attorney fees in every case in which the final amount offered by the municipality was less than the amount ascertained by a jury or the court if a jury is waived by the property owner.

(D) A prevailing plaintiff in an action for just compensation that is based on diminution in value pursuant to Section 3 may be awarded costs, expenses, and reasonable attorney fees.

§ 6: Definitions

In this article, unless the context otherwise requires:

(A) "Fair market value" means the most likely price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all the uses and purposes to which it is adapted and for which it is capable.

(B) "Just compensation" for purposes of an action for diminution in value means the sum of money that is equal to the reduction in fair market value of the property resulting from the enactment of the land use law as of the date of enactment of the land use law.

(C) "Land use law" means any statute, rule, ordinance, resolution, or law enacted by this state or a political subdivision of this state that regulates the use or division of land or any interest in land or that regulates accepted farming or forestry practices.

(D) "Owner" means the holder of fee title to the subject real property.

(E) "Public use":

(1) Means any of the following:

(a) The possession, occupation, and enjoyment of the land by the general public or by public agencies;

(b) The use of land for the creation or functioning of public utilities;

(c) The acquisition of property to eliminate a direct threat to public health or safety caused by the property in its current condition, including the removal of a structure that is beyond repair or unfit for human habitation or use; or

(d) The acquisition of abandoned property.

(2) Does not include the public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health.

(F) "Taken" and "taking" mean the transfer of ownership or use from a private property owner to this state or a political subdivision of this state or to any person other than this state or a political subdivision of this state.

§ 7: Applicability

If a conflict between this article and any other law arises, this article controls.

§ 8: Severability

If any provision of this act or its application to any person or circumstance is held invalid that invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable. ■

ENDNOTES

¹ Arizona's Private Property Rights Protection Act, A.R.S. 12-1134 et seq.

² 545 U.S. 469 (2005).

³ Most of the state laws passed in the wake of *Kelo* amounted to little more than window dressing, or provided only minor improvements in the procedural details of eminent domain. For a critique, see Timothy and Christina Sandefur, *Cornerstone of Liberty: Property Rights in 21st Century America* (Washington, D.C.: Cato Institute, 2016), 135-39; Ilya Somin, *The Grasping Hand: Kelo v. City of New London and The Limits of Eminent Domain* (Chicago: University of Chicago Press, 2015), ch. 5.

⁴ A.R.S. § 12-1131 et seq.

⁵ *Bailey v. Myers*, 76 P.3d 898, 904 (Ariz. App. 2003).

⁶ Cal. Health & Saf. Code § 33031.

⁷ Steven Greenhut, *Abuse of Power: How the Government Misuses Eminent Domain* (Santa Ana, CA: Seven Locks Press, 2004), 242-43.

⁸ Courts in California, which has some of the most abusive property rules in the country, are somewhat schizophrenic on this point. Some have declared that blight findings, like most administrative determinations, are subject to the substantial evidence test, see, e.g., *Beach-Courchesne v. City of Diamond Bar*, 80 Cal. App. 4th 388, 400 (2000), but others have said that the standard is even lower. In *Meaney v. Sacramento Hous. & Redevelopment Agency*, 13 Cal. App. 4th 566, 578 (1993), for instance, the court held that “the evidentiary basis for [blight] findings is beyond the reach of judicial scrutiny; the courts may not inquire whether the findings are supported by substantial evidence or by any evidence at all in the administrative record.” (emphasis added.) Some California courts have held that the substantial evidence test does not mean “anything goes,” see, e.g., *Roddenberry v. Roddenberry*, 44 Cal. App. 4th 634, 651 (1996), but most of the time, they say the opposite. See, e.g., *LeVesque v. Workmen's Comp. App. Bd.*, 1 Cal. 3d 627, 635-37 (1970) (“the function of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which supports the conclusion reached, disregarding any evidence in the record contrary to the [conclusion].” (emphasis added.))

⁹ Sandefur & Sandefur, *Cornerstone of Liberty*, 113-14.

¹⁰ *Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency*, 82 Cal. App. 4th 511, 540 n. 8 (2004).

¹¹ *Vagim v. Fresno Redevelopment Agency*, et al., (Fresno Co. Super. Ct. No. 06CECG01795).

¹² See, e.g., *Evans v. City of San Jose*, 128 Cal. App. 4th 1123, 1145-46 (2005).

¹³ The federal government does often subsidize redevelopment or anti-blight projects, for example, and has done so since at least the 1950s. See Martin Anderson, *The Federal Bulldozer* (New York: McGraw-Hill, 1967); Nick Sibilla, “It’s Time for Congress to Actively Condemn Eminent Domain Abuses,” *Forbes*, June 28, 2013, <http://www.forbes.com/sites/realspin/2013/06/28/its-time-for-congress-to-actively-condemn-eminent-domain-abuses>.

¹⁴ *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 178 (1871).

¹⁵ *Wonders v. Pima Cnty.*, 207 Ariz. 576, 581 (App. 2004) (emphasis added).

¹⁶ *Ranch 57 v. Yuma*, 152 Ariz. 218, 226 (App. 1986) (emphasis added).

¹⁷ Weed, Julie, “Airbnb Grows to a Million Rooms, and Hotel Rivals Are Quiet, for Now,” *New York Times*, May 11, 2015, http://www.nytimes.com/2015/05/12/business/airbnb-grows-to-a-million-rooms-and-hotel-rivals-are-quiet-for-now.html?_r=0.

¹⁸ Ariel Stulberg, “How Much Does Airbnb Impact Rents in NYC?,” *The Real Deal*, October 14, 2015, <http://therealdeal.com/blog/2015/10/14/how-much-does-airbnb-impact-nyc-rents/>.

¹⁹ Xochitl Peña, “Vacation Rentals Boost Coachella Valley Economy by \$7M,” *Palm Springs (CA) Desert Sun*, November 2, 2014, <http://www.desertsun.com/story/money/business/tourism/2014/11/02/coachella-valley-vacation-rental/18362665>.

²⁰ Since 2011, New York has banned short-term rentals that last fewer than 30 days. S. Johanna Robledo, “Hey Wanna Rent My Couch?,” *New York Magazine*, November 27, 2011, <http://nymag.com/realestate/realestatecolumn/short-term-rentals-2011-12>. Property owners may not offer their non-primary residences as short-term rentals, even if they do so free of charge. *Bd. of Managers of S. Star v. Grishanova*, 969 N.Y.S.2d 801 (Sup. Ct. 2013), app. dismissed, 985 N.Y.S.2d 72 (2014).

²¹ In Santa Monica, it is illegal to rent a home for fewer than 30 days when the owner is not on-site. Tim Logan, “Santa Monica Comes Down Hard on Airbnb; Will Crackdown Spread?,” *L.A. Times*, May 13, 2015, <http://www.latimes.com/business/realestate/la-fi-santa-monica-council-oks-tough-rental-regs-20150512-story.html>.

²² Marina Riker, “State, City Looking to Crack Down on Illegal Vacation Rentals,” *Honolulu Civil Beat*, March 10,

2015, <http://www.civilbeat.com/2015/03/state-city-looking-to-crack-down-on-illegal-vacation-rentals>.

²³ Xochitl Peña, “Lawsuit Challenges Rancho Mirage Vacation Rental Law,” *Desert Sun*, September 26, 2014, <http://www.desertsun.com/story/news/local/2014/09/26/rent-rancho-mirage/16296603>.

²⁴ *Beacon Center of Tennessee, Anderson v. Metro Nashville*, <http://www.beacontn.org/andersons>; Bobby Allyn, “Airbnb Regs for Nashville Would Limit Guest Numbers, Tax Hosts Like Hotels,” Nashville Public Radio WPLN News Archive (blog), November 13, 2014, <http://nashvillepublicmedia.org/blog/2014/11/13/nashville-decides-start-regulating-airbnb>.

²⁵ Sedona, Ariz., Code §§ 8-4-1 to 8-4-6.

²⁶ See, e.g., *Cope v. City of Cannon Beach*, 855 P.2d 1083, 1086 (Or. 1993).

²⁷ For example, the city of Santa Monica estimates it will spend \$410,000 in the first year of enforcing its short-term rentals ban. Kristen Lepore, “How Santa Monica Will Enforce Its Airbnb Ban,” 89.3 KPCC Southern California Public Radio, <http://www.scpr.org/news/2015/05/18/51728/how-santa-monica-will-enforce-its-airbnb-ban>.

²⁸ State of Oregon, “Summaries of Measure 37 Claims,” December 5, 2007, http://www.oregon.gov/LCD/MEA-SURE49/pages/summaries_of_m37_claims.aspx.

²⁹ See, e.g., J. Peter Byrne, “Ten Arguments for the Abolition of the Regulatory Takings Doctrine,” *Ecology Law Quarterly* 22, no. 1 (1995): 89-142; F. Patrick Hubbard, “Palazzolo, Lucas, and Penn Central: The Need for Pragmatism, Symbolism, and *Ad Hoc* Balancing,” *Nebraska Law Review* 80, no. 3 (2001): 465, 473-74.

³⁰ *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 413 (1922).

³¹ *Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 324 (2002).

³² See *Fred F. French Investing Co., Inc. v. City of New York*, 39 N.Y. 2d 587, 596-97 (1976).

³³ *Armstrong v. United States*, 364 U.S. 40, 49 (1960); See also *VanHorne’s Lessee v. Dorrance*, 2 U.S. 304, 310 (C.C.D. Pa. 1795) (“Every person ought to contribute his proportion for public purposes and public exigencies; but no one can be called upon to surrender or sacrifice his whole property . . . for the good of the community, without receiving a recompence . . . This would be laying a burden upon an individual, which ought to be sustained by the society at large.”).

³⁴ Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard University Press, 1984), 195-215.

³⁵ *P.I.E., LLC v. DeSoto Cty.*, 133 So. 3d 577, 578 (Fla. Dist. Ct. App. 2014).

³⁶ *M & H Profit, Inc. v. City of Panama City*, 28 So. 3d 71, 76 (Fla. Dist. Ct. App. 2009).

³⁷ *City of Jacksonville v. Smith*, 159 So. 3d 888, 892-93

(Fla. Dist. Ct. App.), reh’g denied (March 18, 2015), rev. granted, 173 So. 3d 965 (Fla. 2015).

³⁸ J. David Breemer, “Temporary Insanity: The Long Tale of *Tahoe-Sierra Preservation Council* and Its Quiet Ending in the United States Supreme Court,” *Fordham Law Review* 71 (2002), 17-18.

³⁹ *Goodman v. Tucson*, C-20081560, *7 (Pima Cty. Sup. Ct. November 2, 2009).

⁴⁰ “Goldwater Institute Wins Victory on Behalf of Property Owners,” <http://goldwaterinstitute.org/en/work/topics/constitutional-rights/property-rights/goldwater-institute-wins-victory-on-behalf-of-prop/>.

⁴¹ Goldwater Institute, “Goldwater Institute Files \$20 Million in Prop 207

Claims against Maricopa County,” <http://goldwaterinstitute.org/en/work/topics/constitutional-rights/property-rights/goldwater-institute-files-20-million-in-prop-207-c/>; “Goldwater Institute Wins Victory on Behalf of Property Owners,” <http://goldwaterinstitute.org/en/work/topics/constitutional-rights/property-rights/goldwater-institute-wins-victory-on-behalf-of-prop/>

⁴² Michael Kimmelman, “Wright Masterwork Is Seen in a New Light: A Fight for Its Life,” *New York Times*, October 2, 2012, <http://www.nytimes.com/2012/10/03/arts/design/frank-lloyd-wright-house-in-phoenix-faces-bulldozers.html>.

⁴³ Fernanda Santos & Michael Kimmelman, “Sale of Wright House Assures Its Preservation,” *New York Times*, December 20, 2012, <http://www.nytimes.com/2012/12/21/us/wright-house-in-phoenix-is-sold-after-fight-for-preservation.html>.

⁴⁴ Laura Kettel Khan et al., “Recommended Community Strategies and Measurements to Prevent Obesity in the United States,” *Morbidity and Mortality Weekly Report* 58 (RR07): 1-26 (July 24, 2009), <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5807a1.htm>.

⁴⁵ Christina Kohn (Sandefur), “Pima County Has Super-sized Plan for Starving Private Property Rights,” *Tucson Sentinel*, February 8, 2011, http://www.tucson-sentinel.com/opinion/report/020811_pima_obese_op/pima-county-has-super-sized-plan-starving-private-property-rights. Supporters argued that Proposition 207 exempts land regulations that protect public health and safety, but that exception is meant to address issues such as sanitation and traffic control, not broad, general ideas about what the government thinks people should eat.

⁴⁶ Defendants’ Motion for Partial Summary Judgment, *Sedona Grand, LLC v. City of Sedona*, No. 1 CA-CV 10-0782, p. 4 (on file with the Goldwater Institute).

⁴⁷ *Sedona Grand*, 229 Ariz. 37, 42 (Ct. App. 2012).

⁴⁸ *Id.* at 43.

⁴⁹ *Id.* at 42-43.

⁵⁰ *Id.* at 43.

⁵¹ *Id.*

⁵² Sedona, Ariz., Code § 8-4-2 (2008).

⁵³ Defendants Statement of Facts, par. 5, exh. B, *Sedona Grand*, No. 1 CA-CV 10-0782, 4 (on file with the Goldwater Institute).

⁵⁴ *Sedona Grand*, No. V1300CV820080129, 5-6. (February 24, 2014).

⁵⁵ Town of Jerome, Ordinance No. 405 and attachments (2013), on file with authors.

⁵⁶ The Goldwater Institute, Jerome Vacation Rentals Case, <http://goldwaterinstitute.org/en/work/topics/constitutional-rights/property-rights/case/jerome-vacation-rentals/>.

⁵⁷ To be precise, the Arizona Court of Appeals interpreted the demand letter as imposing a “notice of claim” requirement, rather than an “administrative exhaustion” requirement. For a good explanation of the difference, see *Moreno v. City of El Paso*, 71 S.W.3d 898, 902-03 (Tex. App. 2002). This technical distinction matters because a statute of limitations is postponed for an exhaustion requirement but not for a notice requirement. Because the court in Turner’s case interpreted the demand letter rule as a notice requirement, the precedent allows officials to ignore any demand letter that arrives during the last three months of the statute of limitations period. A property owner must wait 90 days after the letter is sent before suing—but any property owner who sends such a letter within the last 3 months of the limitations period will find that by the time he or she can sue, the statute of limitations will have expired. *Aspen 528, LLC v. City of Flagstaff*, No. 1 CA-CV 11-0512, 2012 WL 6601389 (Ariz. Ct. App. December 18, 2012), rev. denied. The proposed Model Act closes this loophole by providing that the written demand is an exhaustion requirement, and that the statute of limitations does not begin to run until a demand is rejected or 90 days have passed. The Act also closes another similar loophole by declaring that a demand letter supersedes any other notice of claim requirement, thus ensuring that owners need not send multiple notice requirements, as Arizona courts initially required. See *Turner v. City of Flagstaff*, 226 Ariz. 341, 343 (Ct. App. 2011).

⁵⁸ See *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Koontz v. St. Johns River Water Management Dist.*, 133 S. Ct. 2586 (2013).

⁵⁹ *Koontz*, 133 S. Ct. at 2595. See also *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2430-31 (2015).

⁶⁰ Sandefur & Sandefur, *Cornerstone of Liberty*, 110.