

# Planning Zoning &

HANDBOOK

## ZONING

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# ZONING

A zoning ordinance allows a local government to regulate the height, size, and location and density of buildings, and the uses to which buildings and land may be put. Several key legal decisions (notably *Hadacheck v. Sebastian*<sup>27</sup>, and *Euclid v. Amber Realty Co*<sup>28</sup>.) upheld the legality of separating buildings and land uses, thereby validating zoning practices early in the century.

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<sup>27</sup> 239 U.S. 394 in 1915

<sup>28</sup> 272 U.S. 365 in 1926

## 8.1 PURPOSE AND OBJECTIVES OF ZONING

Zoning is intended to promote the health, safety, and general welfare of the community. Often this is achieved by grouping compatible land uses together in districts and separating or buffering incompatible uses. Historically, zoning was initiated largely to buffer nuisances related to some uses from other uses, such as industrial processes from residential uses. Zoning ordinances today may address numerous purposes, including:

- ▶ Conserving the value of neighborhoods
- ▶ Stabilizing neighborhoods
- ▶ Assuring orderly growth
- ▶ Managing densities
- ▶ Moving traffic efficiently and safely
- ▶ Protecting cultural, historical, natural, or environmentally sensitive areas
- ▶ Controlling aesthetics
- ▶ Preserving the community health, safety, or other values through the establishment of special zones and regulatory development standards

Overall, zoning seeks to preserve the planned character of a neighborhood by excluding uses and structures inappropriate to the area and eliminating non-conforming uses. Zoning ordinances also regulate development in accordance with safety considerations.

## Zoning Should Not Be Used To:

- ▶ Provide economic opportunity or advantage to one parcel of property without extending that opportunity to all property similarly situated
- ▶ Artificially increase the value of land
- ▶ Make housing more expensive in some districts than in others through the use of unreasonable and restrictive development standards
- ▶ Promote economic or racial segregation through exclusionary practices.

The objectives of zoning legislation are to establish regulations, provide for all essential uses of land and buildings, and to ensure that each use is in an appropriate place. While zoning helps to reduce blight, zoning should not be thought of solely as a means of nuisance avoidance. Legitimate business operations, which may be undesirable in one location, may be appropriate land uses in another area.

There have been critics of traditional zoning practices that separate land uses. Arguments against the strict separation of uses include increased traffic congestion, as people must commute to different areas, lack of pedestrian opportunities, and loss of character in neighborhoods and commercial or downtown areas that have become more homogeneous. In response, some communities are incorporating mixed-use zoning and overlay districts to address the negative effects of separated uses and to achieve other community goals.

## 8.2 RELATIONSHIP TO THE GENERAL OR COMPREHENSIVE PLAN

Section 3 of the Standard Zoning Enabling Act of 1922 provides that a zoning ordinance be prepared “in accordance with a general [or comprehensive] plan.” In general, the plan provides policy guidance and the zoning ordinance is a legally binding tool to implement the plan. Preparing a plan concurrently with, or prior to, the adoption of a zoning ordinance is not only good planning practice, but also is the best legal defense of a zoning ordinance.

The courts usually will not question the policies and programs contained in a general or comprehensive plan or an ordinance based on such a plan unless the particular zoning provision is clearly arbitrary or exceeds the police powers. If a community fails to adopt a plan, the courts are less likely to uphold a legally challenged zoning provision since there is no explicit policy to guide it.

In Arizona, statutes require the following for municipalities:

- ▶ All zoning and rezoning ordinances or regulations adopted under this article shall be consistent with and conform to the adopted general plan of the municipality, if any, as adopted under article 6 of this chapter. In the case of uncertainty in construing or applying the conformity of any part of a proposed rezoning ordinance to the adopted general plan of the municipality, the ordinance shall be construed in a manner that will further the implementation of, and not be contrary to, the goals, policies and applicable elements of the general plan. A rezoning ordinance conforms with the land use element of the general plan if it proposes land uses, densities or intensities within the range of identified

uses, densities and intensities of the land use element of the general plan <sup>29</sup>.

The county enabling legislation is more ambiguous. A.R.S. § 11-821(A) requires the commission to formulate and adopt a comprehensive plan for the development of the county and says that the plan: “shall show the commission’s recommendations for the development of the area of jurisdiction together with the general zoning regulations.” Section 11-821(B) says that: “The county plan shall provide for zoning, and shall show the zoning districts designated as appropriate for various classes of ... uses ...”. Section 11-824 states that: “upon adoption [by the board of supervisors] the plan ... shall be the official guide for the development of the area of jurisdiction.”

All this clearly implies that zoning should be consistent with the county plan.

One of the most frequently quoted judicial statements on this topic is from an opinion of the New York Court of Appeals:

“ *The [general or] comprehensive plan is the essence of zoning. Without it there can be no rational allocation of land uses. It is the insurance that the public welfare is being served and that zoning does not become anything more than just a Gallup Poll.* ”

To be valid, zoning regulations (including rezoning or map amendments) must be adopted in conformance with the notice and hearing requirements prescribed by statute and the jurisdiction’s zoning ordinance (see Sections 4.1

<sup>29</sup> (A.R.S. § 9-462-01(F)).

on the Open Meeting Law and 4.2.2 on notice for zoning hearings).

## 8.3 LEGAL AUTHORITY TO ZONE

### 8.3.1 Municipal Zoning Authority

Cities, town, and counties depend on authority granted to them by their state for their powers. A.R.S. § 9-462.01 authorizes zoning regulations to conserve and promote the public health, safety and general welfare as follows:

- ▶ Regulate the use of buildings, structures, and land as between agriculture, residence, industry, business, and other purposes.
- ▶ Regulate signs and billboards.
- ▶ Regulate location, height, bulk, number of stories and size of buildings and structures, the size and use of lots, yards, courts and other open spaces, the percentage of a lot that may be occupied by a building or structure, and the intensity of land use.
- ▶ Establish requirements for off-street parking and loading.
- ▶ Establish and maintain building setback lines.
- ▶ Create civic districts around civic centers, public parks, public buildings or public grounds and establish regulations therefore.
- ▶ Require, as a condition of rezoning, public dedication of rights-of-way as streets, alleys, public ways, drainage, and public utilities as are reasonably required by or related to the effect of the rezoning.
- ▶ Establish floodplain zoning districts and regulations to protect life and property from the hazards of periodic inundation.

Regulations may include variable lot sizes, special grading or drainage requirements, or other requirements deemed necessary for the public health, safety or general welfare.

- ▶ Establish special zoning districts or regulations for certain lands characterized by adverse topography, adverse soils, subsidence of the earth, high water table, lack of water or other natural or man-made hazards to life or property. Regulations may include variable lot sizes, special grading or drainage requirements, or other requirements deemed necessary for the public health, safety or general welfare.
- ▶ Establish districts of historical significance.
- ▶ Establish age specific community zoning districts in which residency is restricted to a head of a household or spouse who must be of a specific age or older and in which minors are prohibited from living in the home. Age specific community zoning districts shall not be overlaid on property without the permission of all owners of property included as part of the district unless all property in the district has been developed, advertised, sold or rented under specific age restrictions. The establishment of age specific zoning districts is subject to all the public notice requirements and other procedures prescribed by this article. [See the Federal Fair Housing Amendments Act of 1988.]
- ▶ Establish procedures, methods, and standards for the transfer of development rights (see Section 3.2.1 on transfer and purchase of development rights).

To achieve these goals, the statutes allow the legislative body to divide a municipality, or portion thereof, into zones of the number, shape

and area it deems best suited to carry out the purpose of the statutes. In addition, the law indicates that zoning regulations shall be uniform for each class or kind of building or use of land throughout each zone. The regulations in one type of zone may differ from those in other types of zones as follows:

- ▶ Within individual zones, there may be uses permitted on a conditional basis wherein additional requirements must be met, including requiring site plan review and approval by the planning agency. Such conditional uses are generally characterized by:
  - Infrequency of use
  - High degree of traffic generation
  - Requirement of large land area.
- ▶ Within residential zones, the regulations may permit modifications to minimum yard lot area and height requirements.

To carry out the purpose of the statutory provisions, the legislative body may adopt overlay zoning districts and regulations applicable to particular buildings structures, and land within individual zones. An overlay zoning district means a special zoning district that includes regulations that modify regulations in another zoning district with which the overlay zoning district is combined. Overlay zoning districts and regulations must be adopted pursuant to rezoning hearing requirements (see Section 4.2.2).

The statutes also allow the legislative body to approve a change of zone conditioned upon a schedule for development of the specific use or uses for which rezoning is requested. If at the expiration of this period the property has not been improved for the use for which it was conditionally approved, the legislative body, after notification by certified mail to the owner and applicant who requested the rezoning, shall schedule a public hearing to take administrative

action to extend, remove or determine compliance with the schedule for development or take legislative action to cause the property to revert to its former zoning classification.

### 8.3.2 County Zoning Authority

County authority to zone unincorporated areas is contained in the general delegation of planning authority received from the State Legislature. The statute provides that the comprehensive plan shall provide zoning. However, the provisions for zoning are not extensive. County zoning authority is found in A.R.S. § 11-821(B), which states that the county plan:

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Shall provide for zoning, shall show the zoning districts designated as appropriate for various classes of residential, business and industrial uses and shall provide for the establishment of setback lines and other plans providing for adequate light, air and parking facilities and for expediting traffic within the districts.

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May establish the percentage of a lot or parcel that may be covered by buildings, and the size of yards, courts and other open spaces.

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Shall consider access to incident solar energy.

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May provide for retirement community zoning districts.

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The scope of the zoning powers under these provisions is somewhat imprecise, although zoning may be used to obtain all of the objectives outlined in the comprehensive plan. However, special provisions protect certain activities. For example, a county must establish districts where such uses as canneries, fertilizer plants, refineries,

feedlots, packing plants, and tallow works may be located.<sup>30</sup> In addition, a county cannot regulate or restrict the use of land for railroad, mining, grazing or agricultural purposes if the tract involved is five or more contiguous commercial acres [A.R.S. § 11-830(A)(2)].

As in the statutes governing municipal zoning authority, the county enabling legislation expressly exempts existing uses from regulation. The statute not only establishes the right to continued uses, repair and alteration of nonconforming property, but also provides that a nonconforming business may expand up to 100 percent of the area of the original business [A.R.S. § 11-830(B)]. The county may enforce its zoning ordinance by withholding building permits [A.R.S. § 11-808(A)]. Additionally, county officials and neighboring property owners who are “especially damaged” may bring an action to enjoin, prevent, or remove structures or uses that violate the ordinance [A.R.S. § 11-808(H)].

### 8.3.3 Adopting Zoning Ordinances

Procedures for adopting and amending county zoning parallel those for adopting municipal ordinances [A.R.S. § 11-829]. The zoning ordinance is adopted by the governing body, subject to prior review and recommendation by the planning and zoning commission. Before taking action, both the commission and the board or council are required to hold public hearings and comply with any other procedures required by the adopted citizen review process.

## 8.4 LEGAL ISSUES

Historically, local governments have had considerable flexibility in establishing zoning

<sup>30</sup> For example, the planning provision refers to parks and wildlife areas, but there is no indication that zoning may be used for these purposes or that the county may reserve land for such purposes.

classifications. The legal test is a vague one: only if the zoning classification appears to be arbitrary and unreasonable and without any substantial relation to the public health, safety, and general welfare will the regulation be declared unconstitutional.<sup>31</sup> Moreover, in determining reasonableness, the courts have deferred to local judgment because they have viewed zoning classification as a legislative rather than a judicial matter.<sup>32</sup> Even though the regulation diminishes the value of the property, the zoning will be sustained if the property “can be reasonably used for the purpose for which it is zoned...” “Reasonable use” has been interpreted to mean a use that is economically viable. [See *Ranch 57 v. City of Yuma*, 152 Ariz. 218, 731 P.2d 113 (App. 1986)].

Successful challenges to local zoning have been infrequent in Arizona because of these broad tests. The lack of successful challenges does not indicate, however, that the courts will uphold all local zoning. However, if the ordinance discriminates against a particular property owner or if it is especially tailored to regulate a particular piece of property, the ordinance may be struck down as “spot zoning.”<sup>33</sup>

In resolving questions of discrimination or spot zoning, the courts have been assisted by the existence of an overall, comprehensive land use plan. Where zoning conforms to a reasonable plan, the zoning will likely be upheld since the plan provides a rational basis for making classifications. Prior to 1973, Arizona enabling legislation did not require that zoning regulations conform to a general plan.

Many communities face the problem of nonconformance: when structures and uses

<sup>31</sup> *City of Tucson v. Arizona Mortuary*, 34 Ariz. 495, 272 P.923 (1928).

<sup>32</sup> See, e.g., *City of Phoenix v. Fehlner*, 90 Ariz. 13, 363 P.2d 607 (1965).

<sup>33</sup> See *Klensin v. City of Tucson*, 10 Ariz. App. 399, 459 P.2d 316 (1969) and *City of Phoenix v. Felner*, 90 Ariz. 13, 363 P.2d 607 (1961).

conflict with current regulations, but were legally established before the regulations became effective. In Arizona, the typical case involves existing uses previously outside the boundaries of a regulating municipality and subsequently annexed.

The Arizona Statutes provides that zoning regulations shall not “affect existing property or [the] right to its continued use for the purpose used at the time...regulation takes effect, [or] to any reasonable repairs or alternation...” [A.R.S. § 9-462.02]. But until the property is put to some lawful use, there is no right to a continuation of the former zoning or to the absence of zoning.<sup>34</sup> A property owner can acquire a “vested right” to develop his or her property based upon the expenditure of substantial amounts of money in good faith reliance on a building permit or a conditional use permit.<sup>35</sup> The current Arizona zoning enabling act prohibits the elimination of nonconforming uses by amortization and protects existing uses, reasonable repairs or alterations made to them.

In the case of annexation, a municipality may enact an ordinance authorizing county zoning to continue in effect for up to six months, until municipal zoning is applied to the land previously zoned by the county, and annexed by the municipality. However, the municipality annexing an area must initially adopt zoning classifications which permit densities and uses no greater than those permitted by the county immediately before annexation and which can be changed later [A.R.S. § 9-471(L)].

Once zoning regulations are established, only two methods exist for making changes to them:

1. Amendment of the zoning ordinance or rezoning

<sup>34</sup> See *City of Tucson v. Arizona Mortuary*, 34 Ariz. 495, 272 P.923 (1928).

<sup>35</sup> See *Town of Paradise Valley v. Gulf Leisure Corp.* 557 P.2d 532 (1976).

2. Granting of a variance

**Amendments** ■ In 1988, the Arizona Legislature amended sections 9-462.04 and 11-829 of the Arizona Revised Statutes to require more stringent public notice provisions of municipalities and counties. The legal notice requirements should be consulted when advertising applications for amendment to the municipal or county zoning code. (See Chapters 3 and 4 for discussions on public notice and Open Meeting Law requirements).

A zoning amendment is subject to the same procedural limitations as the original ordinance. Unfortunately, no reported cases in Arizona indicate when a rezoning might be appropriate. Some jurisdictions elsewhere in the country require the showing of substantial change in circumstances before a rezoning is granted but this question of “change in circumstance” or the “Maryland rule” has been specifically rejected in Arizona. (See *Dye v. City of Phoenix*, 542 P.2d 31 [1975]).

**Variations** ■ In Arizona, variances from the terms of the zoning ordinance are heard and granted by a board of adjustment. Variances are to be granted only if special circumstances exist relative to the property’s size, shape, topography, location or if the strict application of the zoning ordinance would deprive the property owner of privileges enjoyed by other property of the same classification in the same zoning district.

Statutes require that any variance granted is subject to such conditions as will ensure that the adjustment authorized shall not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which such property is located. Variances may be granted when the property owner demonstrates that the application of the zoning ordinance to the property will create a special property hardship. Both Arizona case law (*Nicola v. Board of Adjustment*, 101 P.2d 199 [1940]), and the present statute, A.R.S. § 9-

462.06(H)(1), prohibit the granting of “use variances” because they are, in effect, rezonings. (See Chapter 5 for a discussion on the role and responsibility of the board of adjustment).

The book, *Arizona Land Use Law*, concludes that the statutory and case law in Arizona have established these standards:

- 1 A variance may be granted only where there are special circumstances applicable to the property.
- 2 Any hardship that would justify the granting of a variance must relate to the use of the land as opposed to the owner. A personal hardship does not justify a variance.
- 3 A hardship which as been ... intentionally created does not justify a variance.
- 4 Need for an “adequate financial return” is not a legitimate basis for a variance.

For cities and towns, these standards are either in the statutes or have been established by judicial interpretations. The county enabling laws are not as detailed and there is little or no case law in Arizona to amplify them. But, the four standards listed above have been solidly established across the country and it is likely that the actions of county boards of adjustment would be subject to them if taken to court. Requests for variances that do not meet all these standards should be denied.

## 8.5 PREPARING THE ZONING ORDINANCE

The zoning ordinance should designate the zoning districts to be established and enumerate the particular regulations within each one. The ordinance should require that zoning boundaries be delineated on an official zoning map and that no building or structure shall be erected, altered, or used for a purpose other than that permitted in the zone as indicated on the map. Since the application of zoning is prospective rather than reactive, policies addressing the adjudication of nonconforming uses should be included in the ordinance.

How many districts should the zoning ordinance include? This is a question often asked, but to which there is no fixed answer. The number may range from two districts to forty, depending on the size and complexity of the jurisdiction. Enough districts should be established to adequately serve the community’s development goals, and no district should be established for trivial reasons. The traditional basic categories of districts are residential, commercial, and industrial.

Zoning ordinances should specify clearly the functions of those individuals and agencies responsible for carrying out policy. For example, the role of the planning commission in the development of the ordinance and amendments should be distinguished from the functions of the board of adjustment in granting variances and hearing administrative appeals.

Zoning deals with both what exists and, when applied to vacant land or land to be redeveloped, with desired future uses of land. Since the zoning ordinance implements a general or comprehensive plan, development policies established in the plan must be examined to ensure that the zoning ordinance will incorporate community land use goals. The following studies and information should be used along with the

general or comprehensive plan to prepare the zoning ordinance:

- ▶ Existing land use maps
- ▶ Soil and topography maps
- ▶ Floodplain maps
- ▶ Studies identifying geological hazards
- ▶ Population studies
- ▶ Economic base studies
- ▶ Housing inventories and construction projections
- ▶ Studies of the capacities of public facilities and utilities
- ▶ Assessed valuation of properties
- ▶ Location and characteristics of vacant land
- ▶ Size of lots, width of front lot lines, and the dimensions of existing front, side, and rear yards for residential developments.

Use the knowledge and skills of planners and zoning enforcement officials as much as you can when drafting the zoning ordinance. The ordinances should be drafted under the direction of the planning commission and legislative body. Before sending the draft ordinance to the commission for their review and recommendation, your attorney should review the document with special attention to the enabling statutes and legal form.

If the attorney approves the ordinance, it should be given to the planning commission with a letter so stating for their review and public hearing. The ordinance is then sent on with the commission's recommendations to the council or the board of supervisors for their public hearing and action.

**Describing and Locating the Districts** ■ Great care should be taken in describing the boundaries

of zoning districts on the official zoning map. Generally, district boundaries follow property lines, centerlines of streets, the perimeter of large bodies of water, railroad rights-of-way, or other clearly definable physical features. Ideally, the pattern of land use created by the districts should provide buffers to mitigate potential adverse impacts. In order to separate zones generating undesirable impacts such as noise, glare, odor, etc. natural buffers such as parks, lakes, rivers, cemeteries, educational institutions, government buildings and churches may be used as transitional areas.

The inclusion of statements of intent for the zoning ordinance as a prelude to each zoning district provides explanations of the purpose and function of districts, the reason for their establishment, and their characteristics. Statements of intent relate regulations to defensible public purposes, i.e. reducing traffic congestion and noise, limiting density, protecting the public health and safety, providing open space, and conserving property values. They also serve as a guide to the courts, elected officials, planning commissions, boards of adjustment, and developers.

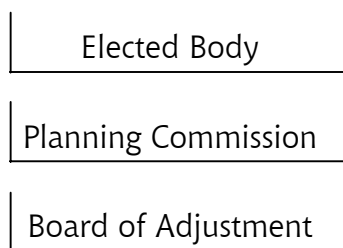
**Zoning Overlays** ■ Zoning ordinances usually establish sub classifications for agriculture, residential, commercial, office, industrial, open space, and other districts. Zones may be cumulative or exclusive as to the number of permissible uses, and include conditional, accessory (incidental to the primary permitted use), or special uses requiring additional restrictions or performance standards. Overlay regulations restrict particular uses to special areas with boundaries different from those in regular zoning districts. Overlay zones may be superimposed on districts to establish additional regulations, or to reduce or extend existing uses. One example is a historic overlay district, which may be superimposed over portions of a residential and neighborhood commercial area to preserve the character of the area. Revised in

1992, A.R.S. § 462.01(D), clearly gives municipalities the authority to use overlay zones.

## 8.6 ZONING ADMINISTRATION AND UPDATES

How fair is the zoning process? Zoning is a unique administrative process allowing applicants the opportunity to petition for relief or to request amendments to the zoning ordinance. Within the broad limits established in the Arizona enabling acts, each municipality or county fashions its own standards. Decisions are made (or influenced by) many sources including the planning commission, the board of adjustment, the city council or board of supervisors, the planning staff, developers, and the public.

Historically, the responsibility for considering requests for changes in zoning regulations was divided among three groups:



**City Council/Board of Supervisors** ■ The city council or board of supervisors are the elected bodies responsible for adopting amendments to the zoning ordinance or approving changes to the official zoning map.

**Planning Commission** ■ Generally, the planning commission holds the required public hearings on text amendments and rezoning of land, and makes a recommendation to the legislative body. The legislative body is not obliged to follow the planning commission's recommendations.

**Board of Adjustment** ■ The board of adjustment has two basic functions: to grant variances from the zoning regulations in cases of hardship, and to hear appeals from interpretations of the ordinance in cases where application for a permit has been denied. The board may also hear and decide requests for conditional use permits.

**Zoning Administrator** ■ According to State Statutes, a city or town council shall establish by ordinance the office of zoning administrator to enforce the zoning ordinance. The municipal zoning administrator may process building permits, serve as staff to the board of adjustment, and publish and post the required notices. The county zoning inspector position is established to enforce the code. [A.R.S. § 11-808]

**Hearing Officer** ■ According to A.R.S. § 9-462.08, city councils may establish the position of hearing officer, and may delegate to that position the authority to conduct hearings and make findings as required by A.R.S. § 9-462.04. Hearing officers shall be appointed on the basis of training and experience, which qualify them to hear cases, conduct public meetings, and make decisions.

**Neighborhood Zoning Authority** ■ Over the past decades, neighborhood action groups have grown in stature and influence. The establishment of a neighborhood group often begins with a zoning dispute. Changes to the statutes in 1998 added the requirement for municipalities to adopt ordinances that clearly define local processes for citizen involvement.

A.R.S. § 9-462.03 requires that the governing body of the municipality shall adopt, by ordinance, a citizen review process that applies to all rezoning and specific plan applications that require a public hearing. At a minimum, the ordinance must include procedures that will be used to achieve the following:

- ✓ Notify adjacent landowners and other potentially affected citizens of the application
- ✓ Inform adjacent landowners and other potentially affected citizens of the substance of the proposed rezoning.
- ✓ Provide an opportunity for adjacent landowners and other potential to express any issues or concerns that they may have with are opposed rezoning before the public hearing.

### **Changes to Zoning**

Possible changes to the zoning ordinance include text amendments, rezonings (changes in the zoning district boundaries), variances, and conditional uses, all of which are discussed below.

**Text Amendments** ■ These are changes in the provisions of the ordinance itself. There are many reasons for such amendments being proposed. Some of them are: changes in case law or statutory law, the need to deal with new land uses or types of development, problems in administering or enforcing some parts of the current ordinance, and the wishes or special interests of developers or other citizens. No text amendment should be approved unless the commission and legislative body are convinced that it is in the best interest of the municipality or county as a whole.

**Variances** ■ The creators of traditional zoning were concerned about the difficulty of developing general rules for land uses and recognized the need for a mechanism to allow deviation in particular cases. A variance is a permit to vary from the terms of the zoning ordinance because the property has unusual characteristics and cannot be developed in a productive way if zoning regulations are strictly applied. Variances are a way of providing relief in hardship cases.

(See the discussion under “Legal Issues” earlier in this chapter).

**Conditional Use Permits** ■ A conditional use permit is a discretionary permit for a particular use that is not automatically allowed within the zoning district. The purpose of the use permit is to allow specific land uses that may be acceptable but because of their nature and impact (i.e., noise, traffic) are not suitable for every location within a zone. The conditional use permit protects neighborhoods and prevents negative impacts on the community as a whole. Requirements of street dedication and improvement, landscaping and screening walls, special architectural features, and restrictions on hours of operation are common. Schools, churches, group homes, utility stations, and daycare centers are examples of conditional uses. It is common for some uses to be permitted in some zones but to need a use permit in other zones.

**Conditional Zoning** ■ Conditional zoning occurs when an applicant receives a rezoning for a specific use from among the uses permitted in the district. However, as there may be many other permitted uses in that district, the community has no assurance of the proposed project occurring. A similar situation occurs when applicants state that they will provide specific amenities on the site upon rezoning. Administrative difficulties may arise unless the zoning map identifies special restrictions or requirements placed on the parcel as a condition of rezoning. The developer’s “contract” may be unenforceable unless stipulated by ordinance or by a development agreement (development agreements between developers and municipalities were authorized by the Arizona Legislature in 1988 [A.R.S. § 9-500.05] and are discussed in Chapter 3).

Arizona’s municipal zoning statute authorizes the granting of a rezoning subject to the fulfillment of specific conditions. The conditions authorized are as follows:

- ▶ Dedication of rights-of-way related to the effects of the rezoning
- ▶ Site plan or use permit approval
- ▶ Approval subject to a schedule of development of the requested use

**Nonconforming Uses** ■ The early proponents of zoning were troubled by one inevitable consequence of adopting zoning in a substantially developed community: What happens to nonconforming but pre-existing uses? Municipalities in Arizona are allowed by statute to “acquire by purchase or condemnation private property for the removal of nonconforming uses and structures.”

However, as stated previously in this chapter, the municipality cannot: “affect existing property or the right to its continued use of the purpose used at the time the [zoning] ordinance or regulation takes effect, nor to any reasonable repairs or alterations in buildings or property used for such existing purpose.” [A.R.S. § 9-462.02]

Allowing the continuance of nonconforming uses as “grandfathered” uses is an option. However, expansion of the use or an increase in its intensity might harm the neighborhood that the ordinance was designed to protect. A compromise allows nonconforming uses to remain but provides restrictions on expansion, prohibits change to another nonconforming use and, upon abandonment, prevents their re-opening, reconstruction or re-use except in a manner and for a purpose permitted in the district in which they were located. The theory was that the nonconforming use, with all the restrictions placed on it, would eventually disappear. There is little data to demonstrate that this approach has been effective in solving the nonconforming use problem.

A.R.S. § 11-830 limits the power of counties to regulate nonconforming uses.

They ***CANNOT***...

1. Affect existing uses of property or the right to its continued use or the reasonable repair or alteration thereof...
2. Prevent, restrict or otherwise regulate the use or occupation of land or improvements for railroad, mining, metallurgical, grazing or general agricultural purposes, if the tract concerned is of five or more contiguous acres.

#### ***AND FURTHER MORE...***

“ A nonconforming business use within a district may expand if such expansion does not exceed one hundred percent of the area of the original business. ”

A district containing more nonconforming than allowable uses may create a legal quandary. If, for example, 50 percent of the dwellings in a single-family residential district are duplexes, a property owner wishing to convert their house into a duplex may successfully challenge the single-family classification. Any time an amendment is made to the zoning ordinance involving a substantial revision and delineation of new district boundaries, nonconforming uses may be created. Substantial pressures will be exerted on the city council and board of supervisors to leave the official zoning map intact and legal challenges may follow.

The failure of nonconforming uses to disappear has led communities in other states to take action requiring, by ordinance, the gradual amortization of nonconforming uses without compensation to the property owner. Amortization in a zoning context describes a procedure by which the discontinuance of certain nonconforming uses, usually nuisance uses or signs, is required within a specified time period. The amount of time allotted is often tied to the value of the nonconforming use.

For example, all nonconforming signs in a jurisdiction must be removed in two or three years, all nonconforming junk yards or gas stations must be dismantled in four or five years. If the nonconforming use is located in an otherwise conforming building the time span may be short. Arizona law does not authorize communities to amortize nonconforming uses. In the case, *Scottsdale v. Scottsdale Associated Merchants*,<sup>36</sup> the Arizona Supreme Court held that the City's powers to regulate signs derived from the states' zoning enabling law, and the only method available to discontinue signs, even for charter cities, was payment.

**Down-zoning** ■ "Down-zoning" may be defined as a change in a zoning classification that results in a real or perceived reduction in the value of the property. It is used by municipalities to correct inappropriate zoning of tracts of vacant land. There is no vested right in the continued enjoyment of a zoning classification unless the developer has made a start in substantial site improvements or other construction after receiving a building permit. (A vested right is a right given to an individual that cannot be changed or withdrawn).

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<sup>36</sup> [583 P.2d 891 (1978)]

### **Hints for Better Zoning**

The following is basic information that will help a city, town, or county administrator in its zoning regulations.

#### **Periodically Review and Update the Zoning Ordinance**

■ For example, many communities have commercial zone requirements that were designed for the old downtown or strip commercial developments. When mixed use project (offices, stores, and residences integrated on one large site) and regional shopping malls arrived, local ordinances were entirely inadequate for handling the parking, design, sign control, height, and land use problems presented. The same situation occurred in many jurisdictions with the boom in mobile home parks and condominium conversions. As the traditional family structure changes and our population ages, the community evolves and development regulations must adapt to social change as well. Group living arrangements, amenities for the disabled, daycare facilities, and ancillary housing are becoming important features of urban design.

#### **Control Negative Land Use Impacts with Buffer Zones Between Residential Districts and Other Uses**

■ A buffer zone allows for "transitional" uses such as professional offices, churches, and mortuaries which are more compatible with residential areas because of minimal noise, odor, light, or traffic impacts. Building standards: heights, bulk, design, and screening within buffer zones should be compatible with the neighborhood. Some communities are moving towards "performance" zoning, evaluating the impacts of the use on surrounding property, in addition to considering the uses identified as compatible in that zone classification.

**Increase Hillside Lot Sizes** ■ As development creeps onto hillsides, minimum lot sizes should be increased on a scale proportional to the steepness of the slope. Building coverage of the lot and height should be carefully controlled to minimize

disruption of natural features and to mitigate adverse visual impacts.

**Control the Use of Signs** ■ The purpose of a sign code is to:

- ▶ Preserve the public safety
- ▶ Promote the effectiveness of signs by preventing their concentration, improper placement, and excessive size
- ▶ Enhance the flow of traffic and protect travelers from injury as a result of distraction or obstruction of signs
- ▶ Encourage the development of private property in harmony with the character of the community
- ▶ Improve the appearance of the community

**Hearing Officers** ■ A.R.S. § 9-462.08 allows municipalities to establish a zoning hearing officer who can hold the first public hearings on any zoning ordinance and make a recommendation to the city or town council. A hearing officer can relieve the planning commission of much of the burden of public hearings so that they could devote more time to planning and policy matters.

**Establish Design or Architectural Review Boards** ■ One purpose of development control is the protection and improvement of community appearance and amenities. Architectural and site plan review may consume a great deal of the commission's time and in many cases the commission cannot provide the necessary guidance to the applicant so the project can be improved. A design review board comprised of professionals can review development projects and provide the applicant with direction. A well-rounded board should include an architect, landscape architect, building contractor, and attorney, planner – or any combination of these. This is particularly important in communities where the professional staff has no design training or where there is no professional staff.

<sup>27</sup> 239 U.S. 394 in 1915

<sup>28</sup> 272 U.S. 365 in 1926

<sup>29</sup> [A.R.S. § 9-462-01(F)].

<sup>30</sup> For example, the planning provision refers to parks and wildlife areas, but there is no indication that zoning may be used for these purposes or that the county may reserve land for such purposes.

<sup>31</sup> *City of Tucson v. Arizona Mortuary*, 34 Ariz. 495, 272 P.923 (1928).

<sup>32</sup> See, e.g., *City of Phoenix v. Fehlner*, 90 Ariz. 13, 363 P.2d 607 (1965).

<sup>33</sup> See *Klensin v. City of Tucson*, 10 Ariz. App. 399, 459 P.2d 316 (1969) and *City of Phoenix v. Felner*, 90 Ariz. 13, 363 P.2d 607 (1961).

<sup>34</sup> See *City of Tucson v. Arizona Mortuary*, 34 Ariz. 495, 272 P.923 (1928).

<sup>35</sup> See *Town of Paradise Valley v. Gulf Leisure Corp.* 557 P.2d 532 (1976).

<sup>36</sup> [583 P.2d 891 (1978)]