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United States Court of Appeals
for the Ninth Circuit

AREK FRESSADI, an unmarried man, FRESSADI DOES I-III,
Plaintiffs - Appellants,

-vs-

ARIZONA MUNICIAPAL RISK RETENTION POOL ("AMRRP"), TOWN OF CAVE CREEK, a municipal corporation, CAVE CREEK DOES III-XX, STATE OF ARIZONA, MEMBERS OF THE JUDICIAL BRANCH OF THE STATE OF ARIZONA DOES XXXI-L, MARICOPA COUNTY, MARICOPA COUNTY DOES XXI-XXX,

Defendants - Appellees.

No. 15-15566

D.C. No. 2:14-cv-01231-DJH
U.S. District Court for Arizona
Phoenix

APPELLANT'S NOTICE OF ERRATA & MOTION TO ACCEPT REVISED OVERSIZED BRIEF

Pursuant to FRAP 27-1, 32-1 and 32-2, Appellant hereby notices the Court that Appellant's Opening Brief was 22,258 words, not 22,469 as stated in his initial filing. In his Motion to Accept Late Filing, Appellant indicated that he would revise the brief to conform to the Court's 14,000 word limit, but after two weeks of writing and editing, Appellant has been unable to comply with the Court's word limit without omitting key facts of the case and jeopardizing his argument. As such, Appellant respectfully requests that the Court accept his revised attached brief that contains multiple corrections, including references to Docket numbers and page numbers in the Table of Authorities. Appellant respectfully notices the Court that none of the Defendants objected to Appellant's initial oversize brief.

Appellant was unable to shrink his Opening Brief to the Court's word count because

this case involves fraud on the court in numerous cases by Defendants Cave Creek, AMRRP, BMO, REEL, Scott, and DeVincenzo concealing due process violations to affect a Takings. To argue all the obfuscation of misdeeds committed by each Defendant, would quadruple the size of the Brief. The clarification of issues in this revised version, such as the lack of notice to Fressadi when Cave Creek recorded exactions without his consent, AMRRP's relationship to Cave Creek's concealment of due process, and how the false promise of reimbursing Fressadi for installing the sewer that served the community resulted in the foreclosure of one of his lots, kept the word count at ~21,000+ words.

The issues of this case span over 15 years, involving multiple Defendants and injuries that interplay in a domino-effect fashion, but the underlying cause as to exactly what, why, and how the concealment occurred was only discovered in 2013.

For reasons stated, Appellant respectfully requests that the Court to accept his revised and corrected Opening Brief of 21,786 words.

RESPECTFULLY SUBMITTED this 5th day of June, 2016.

/s/ Arek R. Fressadi
Arek R. Fressadi, *pro se*

CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2016 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Arek R. Fressadi
Arek R. Fressadi, *pro se*

Docket No. 15-15566

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AREK R. FRESSADI, ET AL.,

Plaintiffs - Appellants,

vs.

ARIZONA MUNICIPAL RISK RETENTION POOL ("AMRRP"), ET AL.,

Defendants - Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF ARIZONA
DISTRICT COURT NO. CV-14-01231-PHX-DJH
THE HONORABLE DIANE J. HUMETEWA, DISTRICT JUDGE

REVISED OPENING BRIEF OF APPELLANT AREK R. FRESSADI

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DMA LOTS: How Cave Creek's Malfeasance Interacts With Defendants' Misconduct

12/22/15

KEY & RELATED ISSUES OF THE CASE: Parcels & lots referred by last 3 #'s + letter

= Driveway Maintenance Agreement (DMA) intended mutual easement for access & utilities for lots 010 A,B,C & 003 A,B,C, MCRD#2003-1472588. DMA is void *ab initio* & illusory due to 003D blocking mutual access. GV Group admits DMA is void. Fressadi is entitled to equitable contribution. *See Freeman v. Sorchych*, 226 Ariz. 242, 245 P.3d 927 (App.2011) & MCRD# 2010-0708186, 2010-1004770, 2012-0377104.

= Lot 003D blocks access to all 003 lots & the 003 easement. Cave Creek & GV Group falsely recorded the deed of gift of 003D, MCRD# 2005-0766547, in violation of A.R.S § 33-420. Cave Creek required the creation of 003D to be dedicated to the Town to approve the lot split survey of 003, but did not comply with A.R.S. §§ 9-500.12 or 9-500.13. In 2012, Fressadi discovered that Mike Golic & Building Group, Inc. sold 003D to Kremer in violation of A.R.S. § 9-463.03, MCRD# 2010-067254, because MCRD# 2003-1312578 is survey, not a final recorded plat map of a subdivision.

= Non-conforming subdivision of 003 in violation of A.R.S. §§ 9-463.01,.02,.03, 9-500.12, 9-500.13, & Sections 1.1(A), 6.1(A) & 6.3(A) of the Subdivision Ord. Permits issued to 003 lots were predicated & dependent upon valid DMA/010 access & utilities, in violation of Sections 5.1(A), 5.1(C)(1) & 5.1(C)(3) of the Zoning Ord., such that permits issued to 003 lots are void per Section 1.4(A) of the Zoning Ord., and that the use must be discontinued & vacated per Section 1.7 of the Zoning Ord. or condemned per A.R.S. §§ 9-462.02(A).

= Easements for lots 003 A,B,C. Access blocked by lot 003D. *See* MCRD# 2003-1312578.

= 003 Driveway blocked by 003D w/ no legal access in violation of Sections 5.1 & 5.11 of the Zoning Ord. REEL foreclosed on 003C, but transferred void permits based on DMA, 2008, BMO foreclosed on 003B & disavowed DMA, 2009. DMA damages & costs caused the unlawful judicial foreclosure of 010A to BMO, A.R.S. §§ 9-463.02 & 13-2314.04.

= Lot 010D. *See* MCRD #2003-0481222. Fressadi discovered in 2013 that Cave Creek concealed that it did not comply with A.R.S. §§ 9-500.12(B),(E) & 9-500.13 when it required the creation of this 25' wide strip to approve the split of 010, which converted the split into a subdivision per A.R.S. § 9-463.02(A) in violation of U.S.C. 42 §1983, A.R.S.§§ 9-463.01,.02,.03, Sections 1.1A, 6.1(A) & 6.3(A) of the Sub'd Ord. Until a final plat map is recorded, the lots are unsuitable for building, not entitled to permits, and unlawful to sell.

= Easements over 010 lots required by Cave Creek, obtained & affected by CC concealing its violation of A.R.S. § 9-500.12(B). *See* MCRD# 2002-0576103, 2002-0576104, 2002-0576105, 2002-0681164, 2004-0540428, 2004-0553551, 2002-0676240, 2006-1030985.

= Cave Creek required Fressadi to grant easement over the entirety of 010D, MCRD# 2002-0681164, in order to obtain permits to construct driveways to lots 010 A,B,C because 010D blocked access. However, the split/division of parcel 010 does not conform to the Sub'd Ord., such that any permit issued is void per Section 1.4(A) of the Zoning Ord., requiring condemnation per Section 1.7 of the Zoning Ord. or A.R.S. § 9-462.02(A). *See* MCRD# 2004-0540428, 2004-0553551.

= DMA Sewer constructed & paid for by Fressadi on permits issued to 010 A,B,C, later discovered by Fressadi to be unsuitable for building (*see 010D* ✱), such that the permits are void per Section 1.4(A) of the Zoning Ord., requiring the use of the sewer to be discontinued per Section 1.7 of the Zoning Ord. or condemned per A.R.S. §§ 9-462.02(A). Cave Creek concealed that it did not comply w/ A.R.S. §§ 9-500.12(B),(E) & 9.500.13 when it required 010D to be conveyed in MCRD# 2003-0488178 w/o Fressadi's consent, a takings. When Fressadi invoiced Cave Creek for the repair & extension of the sewer, the Town disingenuously responded by placing Fressadi under criminal investigation, voiding permits, and telling Fressadi to recombine the 010 lots, MCRD# 2004-0553551.

= Cave Creek required & installed the extension of the 010 sewer to serve lots 003 A,B,C to approve the non-conforming subdivision of 003 by concealing its failure to comply with A.R.S. §§ 9-500.12 & 9-500.13.

= Cave Creek water line extension paid for by Fressadi. Reimbursement agreement invalid due to non-conforming subdivision of parcel 010.

= DMA Natural Gas paid for by Fressadi. Reimbursement agreement invalid due to Cave Creek's creation of 010's non-conforming subdivision.

= DMA Electricity, Cable, Phone & Internet paid for by Fressadi with small contribution by Vertes. Reimbursement agreement invalid due to Town's creation of 010's non-conforming subdivision.

A = Floodway where Van Dyke dumped dirt, not Fressadi. Cave Creek required this area be gifted to the Town by Desert Edge to approve non-conforming sub'd of 006. Mark Way does not legally connect to Military Rd., see 006E. Town must condemn 010D & 010 easement for Mark Way to connect to Military Rd.

B = Waste caused by REEL's trespass on Fressadi's property to construct the 003 driveway.

C = Area where GV Group dumped dirt & rock on Fressadi's property from lots 003 B & C.

D = GV Group used rock from Fressadi's property to construct wall partially over his property line w/o a foundation on uncompacted soil that collapsed, causing damage to Fressadi's property.

E = Driveway for 010 lots partially destroyed by REEL constructing the *ultra vires* 003 retaining walls. Kremer/Van Dyke, GV Group & REEL trespassed & caused damage w/ heavy construction equipment & labor vehicles. Fressadi was arrested twice and tasered for moving rocks & trespassing on his own property, instigated by BMO.

= Intended DMA gated access. After obtaining DMA benefits, Kremer disavowed DMA, causing Fressadi to rescind DMA. No one objected, so on 10/26/05 he installed chain barricades, which GV Group destroyed on 10/27/05 to continue to trespass & damage 010 property for 003 construction access.

✱ = DeVincenzos falsely claim that they had to acquire 006F to access 010C. Access to 010C is via 010 easements *supra*, not the void DMA. The sale of 010C and/or 006F are unlawful until final plat maps are recorded per A.R.S. § 9-463.03.

JURISDICTION

LC2014-000206 was filed as a Special Action on April 24, 2014 (Dkt. 1-1 at 3-83). Defendant BMO removed LC2014-000206 to District Court (Dkt. 1 at 1-5). District Court dismissed Fressadi's §1983 claims by failing to address the concealment of Cave Creek's due process violations and fraud on the court. District Court then mooted a jurisdiction challenge[1] and remanded remaining issues back to ***Superior*** Court (Dkt. 131). District Court denied Fressadi's Motion to Reconsider (Dkt. 138) on March 16, 2015 (Dkt. 139). Notice of Appeal was timely filed per FRAP, Rule 4(a)(1)(A) on March 23, 2015 (Dkt. 140). ***Lower*** Court declined to accept special action jurisdiction on April 27, 2015. District Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, 1367, 1391. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

INTRODUCTION

The core of this controversy is an inverse condemnation takings claim caused by Cave Creek concealing its failure to provide due process as required by A.R.S. §§ 9-500.12 and 9-500.13.[2]

These statutes were enacted in 1994 to insure property and due process principles "essential to the security of individual rights."[3]

Appellant did not discover until September 17, 2013[4] that Cave Creek's

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[1] *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172 (1985) (Dkts. 115, 127, 130.)
[2] See Addendums 53 & 54, and Dkt 1-1 at 37-39; Dkt. 49; Dkt. 46; Dkt. 16; Dkt. 23 at 1-15, 31, 37, 38, 42-48); Dkt. 131 at 2:14-20.
[3] Ariz. Const. art. 2 §1; art. 2 §3 proclaims that the Constitution of the United States is the supreme law of the land. Ariz. Const. art. 2 §4 insures due process.
[4] See 2013 Affidavit, reveals engineer's interaction with Town, Dkt. 1-1 at 37-39.

failure to follow due process in A.R.S. §§ 9-500.12 and 9-500.13[5] was concealed through a series of civil conspiracies[6] to exact dedications of land, easements, and improvements. (Dkt. 1-1 at 37-39; Dkt. 63 at 2-4; see also MAP at xi).

Unbeknownst to Appellant at the time, Cave Creek concealed its failure to follow due process as they shape-shifted his lot split of 3 lots into a non-conforming subdivision in violation of the U.S. and Arizona Constitutions, State Statutes, Town Codes, and Zoning and Subdivision Ordinances.

Cave Creek routinely punishes political "opponents" through due process violations or character assassination in the Town tabloid.[7] Here, it was both.

By concealing its failure to follow A.R.S. §§ 9-500.12 & 9-500.13 with deliberate indifference, the Town[8] wiped out Fressadi's investment-backed expectations and used the Town's Official Newspaper to fabricate the große Lüge to harm his business. (Dkt. 1-1 at 41-51, 72-81)

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[5] See Addendum for statutes, ordinances, rules, and constitutional law whenever mentioned in the brief. Further citations may otherwise be omitted to save words.

[6] *See Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund,* 201 Ariz. 474, 498, ¶ 99 (2002) (quoting *Baker v. Stewart Title & Trust of Phoenix,* 197 Ariz. 535, 542, ¶ 30 (App. 2000)) ("For a civil conspiracy to occur two or more people must agree to accomplish an unlawful purpose or to accomplish a lawful object by unlawful means, causing damages.").

[7] See *Langan v. Town of Cave Creek*, Dist. Court, D. Arizona 2007, No. CV-06-0044-PHX-SMM. Langan hosted fundraisers for candidates who opposed the Junta that controlled Cave Creek. See *Freeman v. Sorchych,* 245 P. 3d 927, 226 Ariz. 242 (App. 2011), *Pingitore v. Town of Cave Creek,* 981 P. 2d 129, 194 Ariz. 261 (App.1998). See also Dkt. 1-1 at 7:footnote1, at 75-77.

[8] AMRRP, Cave Creek, Mayor Vincent Francia, former Town Manager Usama Abujbarah, Zoning Administrator Ian Cordwell, Marshal Adam Stein, Dickinson Wright, Jeffrey Murray of Sims Murray, Linda Bentley, Don Sorchych, and the Sonoran News. (Dkt. 1-1 at 4-6)

By failing to provide notice and takings impact reports per A.R.S. §§ 9-500.12(B-E) and 9-500.13, the Town avoided the accrual provisions in A.R.S. § 12-821.01(B) & (C) to block post-deprivation remedies. (Dkt. 1-1 at 7:14 to 11:16, 15:14-16). Appellant's complaint was imminently plausible: Fressadi discovered in 2013 that Cave Creek obtained rulings in numerous lawsuits by concealing its violations of due process, i.e. fraud on the court.[9] As such, Fressadi's §1983 claims are not time-barred based on equitable estoppel or equitable tolling.

ISSUES PRESENTED

1. Whether concealing due process violations equitably estopped or tolled the statute of limitations on Fressadi's §1983 claims.

2. Whether concealing due process violations was part of a pattern that harmed "the integrity of the judicial process[.]" *Stonehill*, 660 F.3d at 443-444.

3. Whether the cumulative State Court rulings obtained by concealing due process violations amount to judicial takings.

4. Whether Arizona's post-deprivation remedies are inadequate such that the State is liable for damages, in addition to Cave Creek and Maricopa County.

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[9] See Dkt. 1-1 at 6-11, 9:21-25, 15:14-16.
Because a court's power to set aside a judgment for fraud on the court arises from the long-recognized "historic power [in] equity to set aside fraudulently begotten judgments," the substance of a party's filing related to fraud on the court controls over its form. *Hazel-Atlas*, 322 U.S. at 245; Wright & Miller, 11 Fed. Prac. & Proc. § 2868 (3d ed.) ("A party is not bound by the label used in the party's papers. A motion may be treated as an independent action or vice versa as is appropriate.").

STATEMENT OF THE CASE[10]

A. THE PERFECT STORM: CAVE CREEK CONCEALED ITS DUE PROCESS VIOLATIONS TO CONVERT LOT SPLITS INTO AN UNLAWFUL SUBDIVISION

The back-story[11] begins in May 2001 with Fressadi expressing support for a contentious Town Center at a Council Meeting, pursuant to his First Amendment rights. (Dkt. 1-1 at 7:8-9) Soon after, in July 2001, under color of law, Town Manager Usama Abujbarah and Zoning Administrator / Planning Director[12] Ian Cordwell told Fressadi to down-zone the density of his intended artistic enclave of adobe homes from 14-20 lots to 8 lots. In consideration for reducing the density, the Town would approve the creation of 8 lots by a series of lot splits rather than platting a subdivision because: Cave Creek's Subdivision Ordinance was not suited to an "in-fill" property of smaller sized lots; the R1-18 residential zoning of the property was "grandfathered" from Maricopa County prior to the Town's incorporation in 1986; and the size of the Town's roadway dedications in its Subdivision Ordinance were inappropriate for a "new urbanism" development.[13] On Cordwell's order, Fressadi hired an engineer to survey the split of parcel 211-

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[10] Allegations of facts from the complaint must be taken as true, *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 900 (9th Cir. 2007).
[11] See Dkt. 1-1 at 7:4 to 15:16, and referenced in CV2006-014822, CV2012-016136, CV2010-013401, CV2010-029559, CV2009-050821, CV2010-004383, CV2009-050924, and LC2010-000109-001DT.
[12] It is a conflict of interest to be both Zoning Administrator and Planning Director.
[13] See Dkt. 131 at 2:8-11; Dkt. 1-1 at 7:10-13; Dkt. 85 at 8:3-8. Unbeknownst to Fressadi at the time, Cordwell's instructions violated State law and the Town's Subdivision Ordinance (Dkt. 49-1 at 12). Subdivision Ordinance §6.2(A)(4) defines a lot split in Cave Creek as 2 or 3 lots, (Dkt. 49-1 at 59). Cordwell's plan was to split 211-10-003 and 211-10-010 into eight lots through 4 splits.

10-010 into "Lot 1", "Lot 2" and "Lot 3." (Dkt. 49-1 at 4) The Town required the engineer to omit a strip of land (25'x440') from the easterly "Lot 1" to approve the split on 12/31/2001. "The Town required the dedication of easements to approve the split of parcel 211-10-010, and record the survey (#2002-0256784) in order to permit driveways to the subject lots in March, 2002." (Dkt. 1-1 at 37, ¶6; Dkt. 81-1 at 845) This request began Cave Creek's fraudulent scheme, a contrivance "intended to exclude suspicion and prevent inquiry;[14]" requiring land and the dedication of easements to issue permits in 2002 "***as if***" Fressadi's lots were lawfully split (Dkt. 42-3 at 8, ¶32; Dkt. 49-4 at 71).

Unbeknownst to Fressadi at the time, not yet knowing these laws existed, Cave Creek did not comply with A.R.S. §§ 9-500.12(A-E) and 9-500.13 to determine or explain exactly why the Town wanted a sliver of land omitted from the split of three lots or why the easements had to be dedicated to the Town. With deliberate indifference, Cave Creek never gave Fressadi any notice about the required exaction of land and dedication of easements, nor informed him of his right to appeal, nor provided a description of the appeal process, as required by law. Fressadi had to comply with the Town's requirements, it was not voluntary.[15] Accordingly, Fressadi detrimentally relied on the Town's instructions, and was diligent in following them, as this was his first project in Cave Creek.[16]

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[14] Dkt. 42-3 at 8, ¶32 quoting *Tovrea Land & Cattle Co. v. Linsenmeyer*, 100 Ariz. 107, 130, 412 P.2d 47, 63 (1966).
[15] The survey was recorded without Fressadi's knowledge or consent.
[16] Fressadi had never previously experienced a municipality violating its own Ordinances by concealing due process violations. He obtained his first contractor's license in 1974 and has been involved in the construction of ~2,000 dwelling units.

Next, the Town required a dedicated easement over the entirety of the sliver of land exacted from parcel 211-10-010 in order to permit the sewer extension in July, 2002. (Dkt. 1-1 at 37, ¶7) In April, 2003, Cave Creek required the dedication[17] of the sliver of land to be recorded, MCRD #2003-0488178, for final approval of the sewer installed to serve the 3 lots. (Dkt. 1-1 at 37, ¶9) The sliver of land became "Parcel A", and the survey noted that it was to be an easement, not officially part of his lot split of 3 lots – "Lot 1", "Lot 2", and "Lot 3". The survey described "Parcel A":

> THE EAST 25' OF THE FOLLOWING PARCEL ***IS CONVEYED*** TO THE TOWN OF CAVE CREEK, CAVE CREEK, ARIZONA FOR THE PURPOSES OF ROADWAY RIGHT OF WAY INCLUDING PUBLIC UTILITIES. [emphasis added] (Dkt. 49-1 at 6 – see purple area; Dkt. 1-1 at 37-39)

Unbeknownst to Fressadi, the County classified the lot split as an "undefined subdivision" by converting "Parcel A" into "211-10-010 D," and Lots 1, 2, and 3 into lots "211-10-010 A, B, & C." (Dkt. 49-5 at 95) Lot 211-10-010D was never conveyed to the Town because, as stated in the Affidavit to the Complaint, Dkt. 1-1 at 37-39, ¶5: "The Town indicated that they would handle the paperwork for the dedications of the twenty-five foot wide strips of land exacted from parcels 211-10-010 and 211-10-003." Fressadi never received any paperwork as to why the Town needed the sliver of land or any explanation for the dedications. Easements are dedicated on recording, requiring the court to correct it. (Dkt. 49-4 at 95-96)

It is mandatory for a municipality to notify a property owner of his right to

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Fressadi also consulted Guam and the Department of Defense (BRAC) regarding infrastructure and operational efficiency in addition to ENR 400 contractors.

[17] See e.g. *Dolan v. City of Tigard*, 512 U.S. 374 (1994)

appeal a town's action and for the municipality to provide a description of the appeal procedure per A.R.S. § 9-500.12(B). By concealing its failure to comply with A.R.S. § 9-500.12(B), Cave Creek engaged in conduct to prevent Fressadi from detecting a cause of action. He did not know how to appeal the Town's actions or how to timely file a Notice of Claim or complaint.[18] Cave Creek did not file a takings report with a "Hearing Officer" as required by A.R.S. § 9-500.12(C). Cave Creek did not even have a Hearing Officer.[19] Cave Creek failed to establish the nexus of proportionality as required by A.R.S. §§ 9-500.12(E) & 9-500.13. Cave Creek avoided review *de novo* by Superior Court per A.R.S. § 9-500.12 (D), (F), & (G), and blocked the accrual provisions of A.R.S. § 12-821.01(B) & (C).

By concealing its failure to follow A.R.S. § 9-500.12(B-E), the Town never established a "substantial public purpose" for requiring the 25-foot wide strip of land, which blocked access to lots 211-10-010 A, B, & C in violation of §5.1 of the Zoning Ordinance and evolved into a fourth lot, "211-10-010D."[20] (See MAP at xi)

Appellant did not realize at the time that Cave Creek had surreptitiously concealed the non-conforming subdivision status of his property by issuing permits for driveways and sewer in violation of §§ 1.1(A), 6.1(A)(7), and 6.3(A) of the Subdivision Ordinance, then approving the Work. (Dkt. 49-4 at 46-50). Permits[21]

[18] See Dkt. 1-1 at 37-39. In forty years of being in the building business, Fressadi never had to file a Notice of Claim. He had no notice or instruction on where to submit it, or what Cave Creek wanted with "Parcel A," now lot "211-10-010D."
[19] The Town did not authorize the appointment of a hearing officer per A.R.S. § 9-462.08 until July 8, 2004. Ordinance No. 2004-21.
[20] See Dkt. 49-4 at 95-96. Fressadi later discovered A.R.S. § 9-463.02(A), which defines a Subdivision as dividing land into four or more lots. (Dkt. 23 at 1:23-26)
[21] Driveway permits #02-057, #02-058 and sewer permits #02-256, #02-260, #02-

issued in violation of the Zoning[22] Ordinance are void, without any vested rights.[23]

Cave Creek has no discretion to violate these sections of its ordinances.

As such, the division of parcel 211-10-010 into four lots must be vacated, and the use of the sewer must be discontinued per §§ 1.4 & 1.7 of the Zoning Ordinance. (Dkt. 1-1 at 3-39; Dkt. 49-2 at 38-39).

By failing to comply with A.R.S. §§ 9-500.12 & 9.500.13 under color of law, Cave Creek: (1) told Fressadi to down-zone and develop the subject properties by a series of lot splits;[24] (2) required a sliver of land that converted the lot split of parcel 211-10-010 into a non-conforming subdivision without notifying Fressadi; (3) told Fressadi that the Town would reimburse him for the sewer repair and extension to serve the entire base of Black Mountain—not just Fressadi's lot split[25]; (4) issued void permits for sewer and driveways "as if" the lots were

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263, #2002-031 are public records referred to in Dkt. 1-1 at 37-39.

[22] The Subdivision Ordinance is incorporated into the Zoning Ordinance, per §1.1(B) Zoning Ordinance.

[23] See *Thomas and King, Inc. v. City of Phoenix*, 92 P. 3d 429 - Ariz: Court of Appeals, 1st Div., Dept. B 2, 2004, relying upon "*Valencia Energy v. Ariz. Dep't of Revenue,* 191 Ariz. 565, 576, ¶ 35, 959 P.2d 1256, 1267 (1998), and *Rivera v. City of Phoenix*, 925 P. 2d 741 - Ariz: Court of Appeals, 1st Div., Dept. D 1996

[24] See *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 831-32, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). "an out-and-out plan of extortion," *id.* at 837, 107 S.Ct. 3141 (internal quotation marks omitted), that effected a taking for which just compensation was required, *id.* at 842, 107 S.Ct. 3141. This has not been addressed previously due to Cave Creek concealing its failure to follow due process.

[25] Under color of law, Cave Creek made false promises of reimbursement for the sewer per Town Code §50.016. In their Motion for Summary Judgment in CV2009-050821, Cave Creek relied on Town Code §50.014, that subdividers are responsible for sewer costs to renege on its promise of reimbursement; however, this code refers to subdivisions, not lot splits. Fressadi would not have built the sewer had he been told that he would not be reimbursed its cost.

lawfully split; (5) required adjacent lots to connect to Fressadi's *ultra vires* sewer as a condition of approving their lot split; (6) converted parcel 211-10-003 into a non-conforming subdivision and then issued void permits using access and sewer from Fressadi's property, a private takings; (7) then deemed the lots split from 211-10-010 as a subdivision in order to convert the sewer to the Town's property by fraud on the court, and/or a judicial taking,[26] and/or a pattern of racketeering: (8) creating a financial hardship and foreclosure of lot 211-10-010A, which was unlawful to sell per A.R.S. § 9-463.03. (Dkt. 1-1 at 3-39)

This escalation of ultimatums for entitlements (Dkt. 1-1 at 37-39) was made possible by Cave Creek avoiding to give Fressadi notice about requiring land and concealing its incompliance with A.R.S. §§ 9-500.12 and 9-500.13. Unbeknownst to Fressadi at the time, Cave Creek used the sliver of land to convert parcel 211-10-010 into a non-conforming subdivision of four lots. Adding to the obfuscation, Zoning Administrator / Planning Director Cordwell told Fressadi a subdivision was 5 or more lots ("maybe 6") when he instructed Fressadi to make the series of lot splits; whether parcel 211-10-010 was split into 3 or 4 lots didn't matter. Cordwell's representation under color of law was a lie because 4 or more lots is a subdivision, and lots that do not comply with the Subdivision Ordinance are unsuitable for building and not entitled to permits per §6.3(A). (Dkt. 49-1 at 59). Obfuscating further, Cave Creek concealed the non-conforming subdivision status of Fressadi's property by issuing permits for driveways and sewer in 2002 ***as if*** the

[26] Dkt. 16 in toto, NB at 2:3-7 + footnote 1; Dkt. 49 at 26 ¶ 126, 27 ¶ 129; Dkt. 90 at 1-3; Dkt. 102 in toto, NB at 7:4-13; Dkt. 138 in toto, NB at 11:11-22.

parcel was lawfully split. (Dkt. 49-4 at 46-50)

Defendants and District Court claim that Fressadi "should have known" the basis of his §1983 claims when Cybernetics was denied a lot split of parcel 211-10-003 on August 5, 2002. (Dkt. 131 at 9:1-12) **Defendants and District Court confuse cause and effect.** Cave Creek concealing its failure to follow A.R.S. §§ 9-500.12 & 9.500.13 is the cause of Fressadi's §1983 claims. (Dkt. 131 at 2:14-20) Denying Cybernetics a lot split was just an effect. Cybernetics, of which Fressadi owned only 12.5%, was denied a lot split "because of concerns that a split of that parcel, combined with the previously approved lot split of the adjacent first parcel, 211-10-010, would result in the creation of a 'subdivision,' for which Plaintiff had not met the qualification." (Doc. 42-2 at 21; Dkt. 131 at 9:9-12)

To clarify the courts' confusion:

Lot Split = 2 or 3 lots, determined by "Metes and Bounds" survey.[27]

Lawful Subdivision = 4 or more lots. Subdivisions must be vetted through the Town's planning department and approved by Town Council to obtain a final recorded plat map per §1.1(A) of the Subdivision Ordinance. See A.R.S. § 9-463.02, Dkt. 49-1 at 8-98, and A.R.S. § 9-463 *et seq*.

Unlawful Subdivision = 4 or more lots that were not vetted by the Planning Commission and Town Council. They do not comply with the Subdivision Ordinance, therefore unsuitable for building and not entitled to permits per §6.3(A) of the Subdivision Ordinance (Dkt. 49-1 at 59). Permits issued in violation of the Zoning Ordinance are void per §1.4 of the Zoning Ordinance (Dkt 49-2 at 38). Per §1.7 of the Zoning Ordinance, the Town has no discretion but to order the "Metes and Bounds" split of four lots vacated,

[27] "Metes and Bounds" is a centuries old English survey system to describe boundaries of a plot of land used for lot splits in municipalities (2-3 lots).

and the use of the improvements must be discontinued because permits issued in violation of Zoning regulations do not create vested rights.[28] Unlawful to sell any portion until a final plat map is recorded per A.R.S. § 9-463.03.

Parcel 211-10-010 = 4 lots masquerading as a lot split – divided into 4 lots by Cave Creek requiring an exaction of a sliver of land to approve a "Metes and Bounds" "lot split" survey. Permits were issued "as if" a lot split, but characterized as a subdivision by Cave Creek to avoid compensating Fressadi for installing a sewer that serves the community-not just his property. A Takings per A.R.S. § 9-500.13.

Town Council "Kabuki Theater" denied the lot split by claiming that parcel 211-10-010 was "the first parcel" of a subdivision of a parent parcel that was split into parcels 211-10-010 and parcel 211-10-003. However, for as long as the County has had records, these parcels have been separate and not part of a parent parcel. Kabuki Theater was just for the Town's Tabloid because Parcel 211-10-010 was already an unlawful subdivision masquerading as a lot split. Even IF parcel 211-10-010 was a split of only three lots and Fressadi's small percentage of ownership to the adjoining parcel is included, then Fressadi's "lot split" of parcel 211-10-010, plus his interest in parcel 211-10-003 equals four lots, i.e. an unlawful subdivision. Regardless, Cave Creek **DID NOT** inform Fressadi at the Town Council meeting that his 010 lots were already unlawful due to Cave Creek's requirement for the sliver of land that became a fourth lot. Defendants arguing that Fressadi "should have known" he had a subdivision is false evidence, rising to fraud on the court.

[28] See Dkt. 49-2 at 39. See *Rivera v. City of Phoenix*, 925 P. 2d 741 - Ariz: Court of Appeals, 1st Div., Dept. D 1996. Additionally, the sliver of land blocked access to the right-of-way for the lots in violation of § 5.1(A),(C)(1),(C)(3) of the Zoning Ordinance (Dkt. 49-2 at 78). For a visual representation of the facts and argument, see MAP at xi.

From 2001 until May 2012 (CV2010-013401), Fressadi believed that his lot split was lawful and his permits vested. Fressadi initiated litigation in CV2006-014822, CV2009-050821, CV2009-050924 and LC2010-000109 based upon his understanding and belief that parcels 211-10-010 and 211-10-003 were lot splits. There is no ruling in CV2009-050821[29] as to whether parcel 211-10-010 was lot split or unlawfully subdivided. On appeal of CV2009-050821, after discovering the "undefined subdivision" status on Maricopa County's website,[30] Dkt 49-5 at 95, Fressadi argued for the first time that parcel 211-10-010 was an unlawful subdivision. The Court of Appeals did not address Fressadi's allegation of an unlawful subdivision in 1CA-CV12-0238. (Dkt. 42-3 at 9, fn 5) Fressadi did not yet know his injury to argue §1983 claims – that his lots were unbuildable and unsellable, and that all of his permits were really void; a takings. He did not realize it until 2013, when he discovered[31] that the Town concealed its violations of due process per A.R.S. §§ 9-500.12 and 9-500.13. (Dkt. 1-1 at 37-39) If he knew the true status of his lots and the cause of his claims earlier, he would have argued them.

In April 2003, Cybernetics sold parcel 211-10-003 to mitigate damages, and

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[29] See Dkt. 42-2. Fressadi filed CV2009-050821 thinking his property was lawfully split, but argued on appeal that the Town used the sliver of land to convert his lot split into a non-conforming subdivision of four lots, which was never addressed.
[30] When Fressadi questioned the County on what was an "undefined subdivision," the County removed the page and went into litigation-mode silence.
[31] *Long v. City of Glendale,* 208 Ariz. 319, ¶ 11, 93 P.3d 519, 525 (App. 2004) ("the restrictive time periods for bringing claims against public entities are not unreasonable precisely because such claims do not accrue until the claimant ***realizes*** he or she has been injured"). [emphasis added].

the buyer applied for a lot split. (Dkt. 1-1 at 17:11-14) To approve the split, Cave Creek required the dedication of a sliver of land[32] (Dkt. 49-4 at 52) and for their lots to connect to Fressadi's sewer. (Dkt. 49-5 at 2-7) To comply with Cave Creek's sewer requirement to split parcel 211-10-003, Fressadi executed a reciprocal easement / Homeowner's Association with the buyer of parcel 211-10-003, Keith Vertes, Manager of GV Group LLC, MCRD # 2003-1472588 (Dkt. 49-4 at 53-58). The HOA, a.k.a. Driveway Maintenance Agreement ("DMA"), provided reciprocal access, utilities (sewer), and allocated maintenance and improvement expenses as a covenant that ran with lots 211-10-010 A, B, & C and 211-10-003 A, B, & C. (See MAP at xi) Unbeknownst to Fressadi, the sliver of land was never dedicated to the Town such that there was no access to the 003 easement.[33] Vertes also misrepresented the status of GV Group LLC, which did not exist, and sold lot 211-10-003A the day prior to executing the HOA to Kremer, who subsequently refused to join the HOA. CV2006-014822 was filed to resolve the HOA. Fressadi was not aware at the time that Cave Creek concealed its failure to comply with A.R.S. §§ 9-500.12 (A-E) and 9-500.13 or that the "unsuitable for building" status of the lots rendered the HOA driveway and sewer *ultra vires*.[34]

Still believing the subject lots were lawful, Fressadi invoiced Cave Creek for

[32] In hindsight, the Town required the sliver of land from parcel 211-10-003 to convert its "Metes & Bounds" survey into a non-conforming subdivision.
[33] When Kremer filed bankruptcy in 2012 and offered the sliver of land to the Town, lot 211-10-003D, Cave Creek didn't want it.
[34] Cave Creek failed to file a takings impact report per A.R.S. § 9-500.12(C). See Dkt. 49-4 at 54-60, MCRD #2003-147588, including parcel 211-10-010 easements, MCRD #2003-0488178 (Dkt. 1-1 at 17:2-3; Dkt. 49-1 at 6), and parcel 211-10-003 easement, MCRD #2003-1312578 (Dkt.1-1 at 18:5-9; Dkt. 49-4 at 52).

the sewer[35] (Dkt. 49-4 at 78-81) after completion (Dkt. 49-4 at 46-50, 54-58) to accurately allocate HOA costs between the lot owners. The Town fraudulently retaliated on February 27, 2004: "It has recently come to the Town's attention that the ***subdividing*** of the above referenced parent parcels may have been initiated in an attempt to violate the Town of Cave Creek Town Code as well as applicable Arizona Revised Statutes." [emphasis added] (Dkt. 49-4 at 83-84)[36] The Town placed the "010" and "003" lots under criminal investigation by blurring the distinction between a lot split and a subdivision through confusing syntax and semantics. Parcels 211-10-010 and 211-10-003 were lot splits. Fressadi was told to lot split these parcels by Cordwell and the Town Manager Abujbarah agreed in 2002 to reimburse Fressadi for repairing and extending the sewer to serve a greater area of the Town. "In the event a building permit has been issued and it is later learned that the lot or parcel was created in violation of these regulations…"[37]

By failing to follow A.R.S. § 9-500.12(B), and by issuing permits to lots unsuitable for building, Cave Creek concealed the non-conforming subdivision status of the lots. (Dkt. 42-2 at 6) Part of Cave Creek's contrivance to exclude suspicion and prevent inquiry, was to place Fressadi under investigation for illegal subdividing—***for following the Town's requirements!***

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[35] The Town required that the sewer be designed and constructed to serve the entire neighborhood, over 100 dwelling units, not just Fressadi's lots.
[36] The letter is cryptic and does ***not*** clearly state that Fressadi has "a Subdivision", nor were there any findings, follow-up, or proposed remedies regarding this "investigation".
[37] i.e. ALL permits INCLUDING SEWER issued to lots 211-10-010 A, B, & C and lots 211-10-003 A, B, & C (Dkt. 49-4 at 84). See MAP at xi.

Per the Town's letter, Fressadi met with Town Marshal Stein, who, under color of law, told Fressadi to reassemble the 010 lots. Fressadi assembled lots 211-10-010 B, A, D.[38] MCRD # 2004-054028. Violating Rules of Professional Conduct ("ER") 3.3 & 8.4, Attorney Murray for AMRRP/Cave Creek offered false evidence in Dkt. 56-1 at 5:23-26: "Shortly thereafter, on May 14, 2004, in an attempt to 'un-convey' the 25' strip of dedicated roadway right of way, Plaintiff recorded 2004-0540428, conveying from himself to himself 'Parcel A', the same legally described property previously conveyed to the Town for roadway right of way and public utilities in 2003-0488178." Attorney Murray lied to the Court. Murray ***knew*** that "Parcel A" was never conveyed to the Town. He told Judge Fenzel in CV2009-050821 that it was only created, that it wasn't a "Takings." The Affidavit attached to Complaint as Exhibit A, clearly states that the Town was to "handle the paperwork" for the conveyance of "Parcel A." (Dkt. 1-1 at 38, ¶5) With this, Cave Creek continued to obfuscate by making arguments that suited them when they needed them, that "Parcel A" was either conveyed or not conveyed, and the Courts ignored it and/or made no conclusion on the matter.

After selling 211-10-010C, Fressadi tried to sell lot 211-10-010A. When the buyer applied for a lot split, the Town issued an inter-office memo (Dkt. 49-4 at 67): "The Engineering Department requests a formal submittal for the 25-Foot Dedication of Schoolhouse Road (Currently parcel 211-10-010D).[39] We will not

[38] Assembling the entirety of parcel 211-10-010 was not possible without Court assistance, as lot 211-10-010C was sold to the DeVincenzos, which was "subject to" the HOA in October 2003, part of the subject matter of CV2006-014822.
[39] This is an example of Cave Creek's official policy to ignore due process with

approve the lot split until the additional right-of-way is dedicated to the Town to provide adequate access to the subject parcels." However, the subject parcels ***have*** adequate access. The Town previously required Fressadi to grant easement to permit two driveways to serve all lots split from parcel 211-10-010 to comply with §154.056(C)(3) ("the route of legal and physical access shall be the same," and §154.056(C)(8) ("No non-public way or driveway shall provide access to more than three (3) residential lots.")

Cave Creek wants lot 211-10-010D to avoid the ruling in *Cook v. Town of Pinetop-Lakeside,* 232 Ariz. 173, ¶ 14, 303 P.3d 67, 70 (App.2013) ("The statute of limitations does not run against a plaintiff in possession who brings a quiet title action purely to remove a cloud on the title to his property.") Fressadi still owns lot 211-10-010D and seeks to Quiet Title in his Ninth Claim. (See Dkt. 1-1 at 29-32; Dkt. 23) A.R.S. § 9-463.03 states that:

> "It is unlawful for **any person** to offer to sell . . . any subdivision or part thereof until a final plat thereof, in full compliance with provisions of this article . . . is recorded in the office of the recorder . . . **The county recorder shall not record a plat located in a municipality having subdivision regulations enacted under this article unless the plat has been approved by the legislative body of the municipality**." [emphasis added].

The "undefined subdivision" (Dkt. 49-4 at 95-96) of the 211-10-010 lots by "Metes

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deliberate indifference. There is no mention of appeal per A.R.S. § 9-500.12(B); the Town provided no notice per A.R.S. § 9-500.12(B-E) in 2001 (Dkt. 1-1 at 37-39) or 2003 (Dkt. 49-4 at 70); there was no takings impact report per A.R.S. § 9-500.13; and no establishment of the nexus of proportionality: the lots to be created already had access (Dkt. 49-4 at 71-73). Fressadi never agreed to convey Cave Creek an 11,000 square foot lot without "just compensation."

and Bounds" survey cannot be recorded as a final plat map. As such, the lots must be reassembled according to Lisa J. Bowey, Director of Litigation for Maricopa County Assessor's Office, as said in 2014: "If the Court enters a Judgment striking the split(s), please forward a copy of the Judgment to us and we will make the necessary changes.[40]" (Dkt. 23 at 15) "When a court in equity is confronted on the merits with a continuing violation of statutory law, ***it has no discretion or authority*** to balance the equities so as to permit that violation to continue." Footnote 7, *City of Tucson v. Clear Channel Outdoor, Inc*., 181 P. 3d 219 - Ariz: Court of Appeals, 2nd Div., Dept. A 2008, quoting Zygmunt J.B. Plater, *Statutory Violations & Equitable Discretion,* 70 Cal. L.Rev. 524, 527 (1982). [emphasis added] Violations of A.R.S. §§ 9-500.12, 9-500.13, 9-463.03, and 9-463.02(A) are continuing.

AMRRP/Cave Creek failed to disclose to Fressadi or the Courts that the Town had concealed its failure to follow A.R.S. §§ 9-500.12(B-E) and 9-500.13 when the Town exacted land and easements to grant entitlements to parcels 211-10-003 and 211-10-010 in CV2006-014822, CV2009-050821, CV2009-050924, LC2010-000109, and CV2010-013401.

AMRRP/Cave Creek failed to disclose to Fressadi or the Courts that the parcels were divided into four lots by "Metes and Bounds" surveys such that they are unsuitable for building and not entitled to permits per §6.3(A) of the Subdivision Ordinance. As such, permits issued to these lots are void per §1.4 of the Zoning Ordinance. The lots must vacated and reassembled; the use of the sewer

[40] A cloud on the title still exists because parcels 211-10-010 and 211-10-003 were not split, but unlawfully subdivided.

and other improvements must be discontinued per §1.7 of the Zoning Ordinance.

Concealing Cave Creek's failure to follow A.R.S. § 9-500.12 (B-E) for 15 years caused the perfect storm. (Dkt. 1-1 at 3-39; Dkt. 49) *See Zinermon v. Burch*, 494 U.S. 113, 126 (1990), ("[T]o determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate."). *See Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) ("[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.") (quotation marks and citation omitted). In most cases, "a meaningful time" means prior to the deprivation of the liberty or property right at issue. *Zinermon*, 494 U.S. at 127; *see also Caine v. Hardy*, 943 F.2d 1406, 1411-12 (5th Cir. 1991) ("Ordinarily, government may effect a deprivation only after it has accorded due process . . . .").

Based on events over the last fifteen years, Appellant now argues that the DMA is void *ab initio* and/or illusory in CV2006-014822 because the HOA lots must be vacated, *supra* (Dkt. 23 at 15). Permits issued to lots 211-10-003 A, B, & C were based on access and utilities (sewer) from Fressadi's lots, and granted by concealing Cave Creek's failure to follow due process in A.R.S. §§ 9-500.12 (A-E) and 9-500.13. These permits must be voided, per §1.4 of the Zoning Ordinance.

Fressadi filed CV2009-050821 (Dkt. 42-2, Exh.3) and CV2009-050924 to be consolidated with CV2006-014822 to address sewer, subdivision, and zoning violation issues. Appellant argues that Cave Creek concealed its violations of due process as part of a civil conspiracy with other Defendants to obtain an unfair advantage and utilize the Courts as an instrument of injustice.

For instance, Cave Creek and REEL, acted in concert to issue a variance for excessive lot coverage on lot 211-10-003C in 2010 (Dkt. 49-5 at 21-51).[41] Lot 211-10-003C is zoned R1-18. According to §5.11, Table 12 of the Zoning Ordinance, lot 211-10-003C is entitled to 25% lot coverage. For reasons unknown, Cave Creek issued permits to lot 211-10-003C based on plans showing 56% lot coverage, a self imposed violation. The plans also showed access and utilities from Fressadi's property in violation of §§ 6.1(A)(7) and 6.3(A) of the Subdivision Ordinance.

REEL and Cave Creek concocted a fraudulent scheme that the excessive lot disturbance on lot 211-10-003C was the result of Fressadi blocking access to his driveway, but REEL has no right to use access or utilities from Fressadi's property. The excessive lot coverage on lot 003C was self-imposed and had nothing to do with accessing Fressadi's property.

According to §5.1(C)(1) of the Zoning Ordinance, no zoning clearance will be issued unless a building or lot has permanent legal access to a dedicated street, and §5.1(C)(3) requires the legal and physical access to be the same. Fressadi discovered in 2013 that Lot 211-10-003C does not have legal access to a dedicated street. The legal and physical access to lot 211-10-003C is via the 003 easement, but lot 003D was never conveyed to the Town such that it blocked access to a dedicated street (See MAP at xi). By failing to follow A.R.S. 9-500.12(B), Cave Creek committed a private taking of Fressadi's property for his neighbors' use,

[41] BMO was also granted a variance by Cave Creek for the Town's self-imposed zoning violations on lot 211-10-003B based on the variance to lot 211-10-003C. (Dkt. 49-4 at 53-66.)

then justified the excessive lot coverage by blaming Fressadi for not allowing his neighbors to use his land without just compensation.

In fact, the unlawful/non-conforming subdivision status of the 003 lots renders them unlawful for sale, unsuitable for building, and permits issued to the lots must be deemed void, requiring the Zoning Administrator to order the use of the land and improvements discontinued and vacated per §1.7 of the Zoning Ordinance. Cave Creek granted REEL's variance against Federal and State law and its own Ordinances to conceal a taking of Fressadi's property. By concealing its due process violations, REEL and Cave Creek affirmed the grant of variance as part of a continuing pattern of fraud on the court in LC2010-000109.

By concealing material facts as to the status of the lots and concealing its due process violations, AMRRP/Cave Creek obtained a ruling in CV2006-014822 to deny consolidation of CV2009-050821, CV2009-050924, and LC2010-000109, as a continuation of its pattern of fraud on the court. Further rulings were issued in error in CV2006-014822 and overturned on appeal.[42]

Appellant also alleged that civil conspiracies transpired in CV2009-050924. By concealing Cave Creek's failure to follow due process as codified in A.R.S. §§ 9-500.12 and 9-500.13 and in violation of Rules of Professional Conduct ("ER") 3.3 & 8.4, attorneys for Defendants Cave Creek, Kremer, and REEL concealed that

[42] FRESSADI v. REAL ESTATE EQUITY LENDING, INC., Ariz: Court of Appeals, 1st Div., Dept. A 2012, No.1 CA-CV 11-0728; FRESSADI v. DE VINCENZO, Ariz: Court of Appeals, 1st Div., Dept. B 2013, No. 1 CA-CV 12-0435; FRESSADI v. GV GROUP, LLC, Ariz: Court of Appeals, 1st Div., Dept. D 2013, No. 1 CA-CV 12-0601. CV2006-014822 is ongoing, subject to this ruling.

the 003 lots were unsuitable for building and not entitled to permits per §6.3(A) of the Subdivision Ordinance. Instead, by making false statements about Fressadi's integrity, CV2009-050924 was dismissed with prejudice per Ariz. R. Civ. P., Rules 16(f) & 37(b)(2). The ruling was affirmed in CA-CV 11-0051 (Dkt. 42-2 at 19-25). Petition for review was denied by the Arizona Supreme Court, CV 12-0212-PR.

Cave Creek then arrested Fressadi for moving rocks on his property per A.R.S. § 13-1602(A)(1). The complaint, CR20100109, claimed that the rocks on Fressadi's property were a "retaining wall system" owned by Defendants BMO, REEL and Kremer, a private taking. (See Map at xi) After Fressadi removed the case from Cave Creek's *kangaroo* Court, the case was dismissed. The Court's Administrator filed grievances that the Town Manager used the Municipal Court for political purposes. Typical of whistleblowers, the Administrator was fired.

As the economy crashed, Defendant BMO Harris Bank, foreclosed on the homes built on lots 211-10-003 A & B. These homes, and the existence of the lots, relied on access and utilities (sewer) from Fressadi's property.

Appellant[43] had borrowed $245,000 from BMO's predecessor, M&I Bank, to pay for a portion of the HOA driveways and related utilities (sewer, water, electric, gas, TV, and telephone) that benefitted the BMO properties. Appellant suggested that BMO forgive the loan balance of ~$225,000 to offset BMO's costs of HOA improvements. Rather than equitably contribute to the costs of infrastructure upon which the existence of the BMO lots and homes depended, the bank filed CV2010-013401 for judicial foreclosure on Fressadi's lot 211-10-010A.

[43] Appellant's total investment is ~$1,000,000 (Dkt. 49-5 at 68-91)

BMO whines[44] for finality (Dkt. 40), but BMO concealed fraud on the court. BMO depicts Fressadi's due diligence as "vexatious litigation." However, Fressadi made claims upon discovery. By digging through thousands of documents with diligent determination, he found that Cave Creek concealed its failure to follow due process as codified in A.R.S. § 9-500(B). However, A.R.S. §§ 9-500.12 & 9-500.13 appear **INADEQUATE** because there is no indication when a town must notice a property owner, nor do the statutes address deprivations, ramifications, and remedies after a Town takes property ***without the property owners' knowledge and consent.*** As such, it is unclear if A.R.S. §§ 9-500.12(A)&(A)(1) provide PRE and/or POST-deprivation remedies. Regardless, Cave Creek *knew* it had a duty and burden to comply with A.R.S. §§ 9-500.12(B) in 1997 when it passed Town Code §150.02, but the Town decided not to comply with the requirements of state law with deliberate indifference.

In this instance, the concealment of Cave Creek's failure to follow these statutes shocks the conscience as the Town used the exaction or dedication to convert property into non-conforming subdivisions – the butterfly effect[45] that

[44] Although it is unlawful to sell any portion of a subdivision until a final plat map is recorded (A.R.S. § 9-463.03), Defendant Sheriff Joe Arpaio issued a deed for lot 211-10-010A to M&I Bank now BMO in consideration for $358,319.30 on May 1, 2012. BMO then sold lot 211-10-010A for $120,000 on July 13, 2012 for a loss of $238,319.30—more than Fressadi's offer of settlement two years prior. If BMO wanted finality, they should have accepted Fressadi's settlement offer.

[45] Discovered and named by Edward Lorenz, the "butterfly effect" is a Chaos Theory term of art where the *sensitive dependence on initial conditions* in a nonlinear system can result in large differences to a later state. The effect derives from the theoretical example of whether a hurricane's formation was caused by a distant butterfly flapping its wings several weeks before.

caused a hurricane of harm to Fressadi and what would have been an extremely profitable project.

State defendants[46] did not implement nor enforce A.R.S. §§ 9-500.12 & 9-500.13. All Defendants and their attorneys had an ethical duty to disclose them. Adherence would have prevented the catastrophically compounding consequences of due process violations by mitigating deprivation relief ***in a timely basis***. Under these State and Town laws, with a proper appeal process[47] and full disclosure of the facts, all underlying causes would have had to be revealed to Fressadi so that he could make proper and timely claims. (Dkt. 1-1) Instead, Defendants and District Courts completely ignored these laws, defaulting to generic and fraudulent arguments that Fressadi "failed to state a claim" and was time-barred (Dkt. 35, Dkt. 42, Dkt. 56-1, Dkt. 131).

The concealment of Cave Creek's failure to follow due process in A.R.S. §§ 9-500.12 and 9-500.13 harmed the integrity of the judicial process so that Fressadi was not paid for installing infrastructure that benefitted the public, which caused the judicial foreclosure of 211-10-010A and the filing of 4:11-bk-01161-EWH

[46] The judicial branch of the State of Arizona, and the State's political subdivisions of Maricopa County (to include its agencies) and Cave Creek. Checks and balances must apply vertically as well as horizontally if the Constitution is to be upheld as the supreme law of the land.

[47] On review of Town Council Meeting Minutes since the inception of Cave Creek, the Town's Official policy is to obtain dedications of land by Deeds of Gift with no notice or hearing as required per A.R.S. § 9-500.12. The "gifts" are accepted by the Mayor and Council without the burden of establishing the nexus of proportionality, or providing a Taking Report. The Town and AMRRP's attorneys then argue that these "gifts" were made voluntarily.

(Dkt. 42-4). In violation of A.R.S. § 9-463.03, Maricopa County Sheriff's Office sold lot 211-10-010A to BMO on October 20, 2011, MCRD #2011-0892620. On November 28, 2011, Fressadi was assaulted and then Tasered twice by a Deputy for trespassing in his own property; complaint dismissed, JC2012-065297. Fressadi filed CIV-12-876TUCFRZ / 2:13-cv-00252-SLG, precursor to this case, which was dismissed without prejudice because Appellant was not deemed indigent.

In 2013, after Kremer offered lot 211-10-003D to Cave Creek and the Town didn't want it, Kremer's attorney asked Appellant if he wanted to block access to lots 211-10-003 A, B, & C by acquiring lot 211-10-003D. It was then that Fressadi knew something was seriously amiss. Vertes and Golec sold 211-10-003D to Kremer in 2010. As such, the 211-10-003 easement has always been landlocked. It was not reciprocal as intended per the HOA. (Dkt. 49-4 at 54-58) Cave Creek, in concert with Golec & Vertes / GV Group, had recorded the gift of lot 211-10-003D to Cave Creek, MCRD #2005-0766547, but the recording was false in violation of A.R.S. § 33-420. Wondering why Cave Creek recorded a false document, Fressadi went looking for the needle in the haystack. Buried between "Escort and escort agency advertising requirements" and "Use of city or town resources or employees to influence elections"[48] in the "Miscellaneous" section of Title 9, Fressadi found A.R.S. § 9-500.13, leading to the discovery of A.R.S. § 9-500.12, and obtaining an Affidavit from his engineer exposing Cave Creek's misconduct (Dkt. 1-1 at 37-39).

[48] The Sonoran News is Cave Creek's "Official newspaper." It is paid by the Town as a Town resource but influences elections in violation of A.R.S. § 9-500.14. The Court did not comprehend the correlation between the harm caused by Cave Creek and The Sonoran News, as part of Fressadi's §1983 claims.

When Fressadi sought to address Cave Creek's concealment of its violations of due process by amending[49] CV2006-014822, his claims were dismissed. On January 7, 2014, in CV-13-0209-PR (Dkt. 42-3 at 13), the Arizona Supreme Court did not consider Cave Creek's concealment of its due process violations to deny Fressadi's petition for review of the ruling in 1CA-CV12-0238 at ¶1 that Fressadi's claims were time-barred in CV 2009-050821 (Dkt. 42-2 at 19). As such, all rulings regarding the subject matter herein were obtained or influenced by the concealment of Cave Creek's due process violations.

B. THE PLEADINGS WERE WITH SUFFICIENT PARTICULARITY

As such, the claims in LC2014-000206 were sequentially organized in a step-by-step mathematical manner according to "if-then," "either-or" logic based on the newly discovered evidence that Cave Creek concealed its failure to follow A.R.S. §§ 9-500.12 and 9-500.13 as the cause of Fressadi's §1983 claims, which equitably estopped or tolled the statute of limitations on his §1983 claims.

Cave Creek failed to adhere to "shall" provisions of its ordinances to circumvent the accrual provisions of A.R.S. §§ 12-821.01(B) & (C) in violation of A.R.S. §§ 13-2314.04, 9-500.12(H), 12-821.01(C), and 12-821.01(G).[50] Fressadi

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[49] In keeping with the delayed discovery rule, and the "Relation Back Doctrine," *e.g. Krupski v. Costa Crociere S.p.A.,* 130 S. Ct. 2485, 2490 (2010)

[50] *See Canyon Del Rio Investors, L.L.C. v. City of Flagstaff,* 227 Ariz. 336, 340, ¶1, 258 P.3d 154, 156 (App. 2011) ((1) damage claims arising out of municipal zoning decisions do not ripen -and the statute of limitations does not begin to run -until the plaintiff exhausts its administrative remedies; and (2) declaratory judgment claims may be brought before related damage claims become ripe, no statute of limitations begins to run against such claims until administrative remedies [are] exhausted. …[P]laintiff is not required to exhaust its administrative remedies before bringing

alleged that Cave Creek concealed its failure to follow due process procedures with deliberate indifference or as its official policy to obtain favorable judgments in the lawsuits named in LC2014-000206 by fraud on the court, e.g *In re Levander*, 180 F.3d 1114, 1118, 1119 (9th Cir. 1999) (quoting *Chambers*, 501 U.S. at 44), and that the State of Arizona is liable for failing to provide adequate post-deprivation remedies, (Dkt. 1-1 at 7:4 to 13:22). IF concealing Cave Creek's failure to follow Federal and State law in countless lawsuits causing Judges to violate their oaths of office was not fraud on the court, then its Judicial Takings.

Fressadi also argued other relevant and rightful claims, including breach of contract, negligence, misrepresentation, fraud, and a request to quiet title based on the newly discovered (2013) concealment of Cave Creek's due process violations, all of which were either dismissed, ignored, or even chided. (Dkts. 102, 138)

Cave Creek calls Fressadi a "serial pro per litigator" (Dkt. 56-1 at 3:2-15). So does BMO. In concert, Maricopa County called Fressadi a "serial, vexatious litigant." The State acknowledged that Fressadi plead fraud on the court (Dkt. 35 at 5:9-21), but failed to grasp that inadequate post-deprivation remedies amounted to Judicial Takings. Instead, the State claims that: "The Complaint also appears to allege a civil rights claim under 42 U.S.C. §1983 **although the statute is not explicitly referenced in the Complaint**." [emphasis added] (Dkt. 35 at 5:14-16).

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an action under 42 U.S.C. §1983, an as-applied challenge to a zoning decision must be predicated on a final decision by the relevant government body.)

Obviously, the State did not read the Complaint,[51] to disingenuously argue that Fressadi was merely using "constitutional buzz words" (Dkt. 35 at 5:9-21).

Cave Creek, Maricopa County, and the State all say that Fressadi did not argue with particularity, as if saying it makes it true (Dkt. 35 at 6:17 to 7:3; Dkt. 42 at 12:9-13; Dkt. 56 at 17-19). However, the Defendants and District Court do not argue nor address the core of Fressadi's Complaint: Concealing Cave Creek's due process violations with deliberate indifference harmed the integrity of the judicial process as fraud on the court, judicial takings, and/or as a part of a pattern of racketeering.

Others acted in concert with Cave Creek or took advantage of the Town's misconduct. Casting Fressadi in a false light and twisting the facts were part of the fraudulent scheme to conceal Cave Creek's due process violations and cause harm to Fressadi's person, property, and business. The Town's "Official Newspaper," the Sonoran News is directly mailed to every Cave Creek mailbox and stacked throughout town in key locations to perform a "public function" that would normally be the prerogative of Cave Creek. The Town "significantly encourages" the Sonoran News[52] to be its "spin doctor," and they are intertwined in a "symbiotic relationship," to rationalize and/or obfuscate the Junta's criminal conduct as part of Fressadi's §1983 claims. (Dkt. 1-1 at 41-83) *See Focus On The Family*, 344 F.3d at 1277 (citation omitted).

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[51] "Plaintiff brings this action pursuant to 42 U.S.C. §§ 1983, 1988 and Article 2, Sections 1, 2, 2.1, 3, 4, 6, 8, 9, 11, 13, 17, 32 of the State of Arizona Constitution." (Dkt. 1-1 at 14:18-20)

[52] Defendants Linda Bentley, Donald R. Sorchych, and Conestoga Merchants, Inc.

Taken as a whole, Appellant alleged civil conspiracy;[53] that concealing Cave Creek's failure to comply with A.R.S. §§ 9-500.12 & 9-500.13 was part of a pattern of unlawful activity in violation of A.R.S. § 13-2314.04. Cave Creek/AMRRP/ Murray *et al,* GV Group, REEL, and/or BMO engaged in "an unconscionable plan[s] or scheme[s]… designed to improperly influence the court[s] in its decision[s]." *England v. Doyle*, 281 F.2d 304, 309 (9th Cir. 1960) (citation omitted); *see also Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1131 (9th Cir. 1995). Concealing Cave Creek's failure to follow due process procedures harmed the integrity of the judicial process[54] as a wrong against the institutions set up to safeguard and protect the public, and circumvented A.R.S. §§ 9-463 *et seq*., 12-821.01(B) & (C), and any post-deprivation remedy. Public records and lawsuits were incorporated into the Complaint to argue with particularity.[55]

In error, District Court did not consider the concealment of Cave Creek's failure to comply with A.R.S. §§ 9-500.12(B), (E) & 9-500.13 was the cause of Fressadi's §1983 claims. In error, District Court did not grasp that, by concealing its failure to provide notice as required in A.R.S. § 9-500.12(B), Cave Creek obtained "time-barred" rulings through a pattern of fraud on the court. (Dkt. 131)

Cave Creek's failure to follow A.R.S. §§ 9-500.12(B), (E) & 9-500.13 was the §1983 claim before the Court. The evidence of Fressadi's discovery that

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[53] See Footnote 6.
[54] *United States v. Estate of Stonehill*, 660 F.3d 415, 443 (9th Cir. 2011).
[55] See Dkt. 1-1 at 7:6-7; at 9:19-20; at 16:22-24; at 17:2-3, 25; at 18:1-9, 11, 15, 21, 25; at 19:2, 19-20; at 20:13-14, 19; at 21:5, 7, 24-25; at 29:22-26, at 30:1-2, 5, 7-8, 18-19, 23, 26; at 31:3-4.

Cave Creek failed to follow these State statutes is in the lawsuits. From 2006 through 2011, Appellant argued that the splits of the subject properties were lawful and his rights had vested, especially sewer, as he believed with the information and the illusory permits he was given during that time. When the Town required easements over lots 010 A, B, C & D for the sewer, he believed there was a justifiable exchange because Cave Creek promised reimbursement for installing the sewer. However, Cave Creek later reneged on reimbursement by claiming that whatever was in the easement belonged to the Town—after the sewer was built. Cave Creek was able to affect this takings by concealing its failure to follow A.R.S. § 9-500.12(B-E). The Town avoided a takings report and the burden to establish a nexus of proportionality and, since Fressadi did not know his right to appeal or the appeal process, Arizona Courts ruled that any claim he had against the Town was time-barred, CV2009-050821 (Dkt. 42-2 at 5:13). In 1CA-CV12-0238, the Court of Appeals affirmed that his claims were time-barred (Dkt. 42, Exh. 5) because Fressadi had yet to discover and realize that Cave Creek had concealed its failure to comply with due process per A.R.S. § 9-500.12(B), (E) & 9-500.13. Arizona's Supreme Court denied Fressadi's petition for review, CV-13-0209-PR (Dkt. 42, Exh. 6), because Cave Creek's concealment of its failure to follow due process[56] was not before the Court in CV2009-050821 or 1CA-CV12-0238. In error, District Court relied upon these rulings obtained by fraud on the

[56] See Dkt. 1-1 at 37-39. The court may consider facts established by exhibits attached to the complaint. *Durning v. First Boston Corp*., 815 F.2d 1265, 1267 (9th Cir. 1987).

court to conclude: "The Court is unable to identify a single federal constitutional claim that is adequately pled with supporting facts." (Dkt. 131 at 10:8-9)

District Court did not liberally construe Fressadi's *pro se* pleadings. Fressadi reserved his right to amend and supplement his Complaint, that claims may not have accrued per A.R.S. §§ 9-500.12(B-H), 12-821.01(C)(G), and 13-2314(B-D), and for his *pro se* pleadings to be liberally construed (Dkt. 1-1 at 34:9-12).[57]

Fressadi requested an award of actual and delay damages per A.R.S. § 9-500.12(H) that Cave Creek had acted in bad faith by concealing its failure to comply with A.R.S. § 9-500.12(B) & (E) to circumvent equitable estoppel/tolling provisions of A.R.S. § 12-821.01(C) and deprive Fressadi of property without due process. (Dkt. 1-1 at 4:8-11, at 9:16-18, at 23:9 to 24:5) The Clerk of the Court filed Fressadi's Complaint as a Special Action and Lower Court declined special action jurisdiction and dismissed his claims on April 27, 2015. Even though State Courts have broad discretion to set aside rulings to accomplish justice,[58] the State failed to provide a post-deprivation remedy of procedural due process violations. Concealing due process violations perpetrated a fraud so "that the judicial

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[57] *Haines v. Kerner*, 404 U.S. 519-20, (1972). See also *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 - Supreme Court 2007 ("A document filed *pro se* is "to be liberally construed," *Estelle,* 429 U.S., at 106, 97 S.Ct. 285, and "a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers," *ibid.* (internal quotation marks omitted). Cf. Fed. Rule Civ. Proc. 8(f) ("All pleadings shall be so construed as to do substantial justice").")

[58] *Amanti Elec., Inc. v. Engineered Structures, Inc.,* 229 Ariz. 430, 432, ¶¶ 7-8, 276 P.3d 499, 501 (App. 2012); *Gendron v. Skyline Bel Air Estates,* 121 Ariz. 367, 368-69, 590 P.2d 483, 484-85 (App.1979).

machinery could not perform in the usual manner its impartial task of adjudging cases." *In re Intermagnetics Am., Inc.*, 926 F.2d 912, 916 (9th Cir. 1991).

SUMMARY OF ARGUMENT

Appellant's Complaint was timely because he did not discover that Cave Creek fraudulently concealed its failure to follow A.R.S. §§ 9-500.12 and 9-500.13 until 2013. Fressadi is entitled to Cave Creek complying with due process per the Fourteenth Amendment and Article 2, Section 4, of Arizona's Constitution.

Fressadi is entitled to Cave Creek complying with State statutes and the Town's Ordinances as part of his bundle of property rights. District Court did not address nor consider that Cave Creek's concealment of its due process violations would equitably toll or estop the Statute of Limitations on §1983 claims for procedural and substantive due process, equal protection, or inverse condemnation.

Property owners in the State of Arizona are entitled to equal protection in accordance with A.R.S. §§ 9-500.12 and 9-500.13. Fressadi is entitled to fundamental equal protection of constitutional rights to property and due process. *Kenyon v. Hammer*, 142 Ariz. 124 (1983) 688 P.2d 1016. (Dkt. 102, Dkt. 138)

Appellant alleged that the concealment of Cave Creek's failure to follow due process harmed the integrity of the judicial process in numerous subject matter related lawsuits. (Dkt. 1-1 at 9:19-25, at 13:4-6). Contrary to the District Court's opinion (Dkt. 131 at 3), the *Rooker-Feldman* doctrine does not bar subject matter jurisdiction when a federal plaintiff alleges a cause of action for extrinsic fraud on a state court and seeks to set aside a state court judgment obtained by that fraud. *See Kougasian v. TMSL, Inc.,* 359 F.3d 1136, 1140-41 (9th Cir. 2004).

In their motions to dismiss, Defendants listed a litany of lawsuits obtained in their favor to paint Fressadi in a false light as a "serial pro per litigator", but fail to address the concealment of due process violations as a condition of fraud on the court. (Dkt. 42 at 3; Dkt. 40 at 1-4) Fressadi argues that the concealment of Cave Creek's failure to follow due process and failure to provide notice either CAUSED the litany of lawsuits and/or affected the outcome. Fressadi was as diligent as possible with the information and instructions he was provided from the Town's attorneys, officials, and employees whose "remedies" made matters worse. Neither Maricopa County nor the State of Arizona provided any post-deprivation solution.

"Extrinsic fraud on a court is, by definition, not an error by that court. It is, rather, a wrongful act committed by the party or parties who engaged in the fraud. In essence, it includes conduct that prevents a party from presenting his claim in court." *Wood v. McEwen,* 644 F.2d 797, 801 (9th Cir. 1981). "The focus of such claim is not on whether a state court committed legal error, but rather on a wrongful act by the adverse party." *Reusser v. Wachovia Bank, N.A.,* 525 **F.3d** 855, 859 (9th Cir. 2008).

Appellant alleged that the extrinsic fraud committed by the Defendants *supra* damaged the "integrity of the judicial process" and is a "wrong against the institutions set up to protect and safeguard the public." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.,* 322 U.S. 238, 246 (1944), *abrogated on other grounds, Standard Oil of Cal. v. United States,* 429 U.S. 17 (1976).

Appellant argues that the official policy of Cave Creek is to conceal their failure to follow due process with deliberate indifference to cause State officers

(Judges) to act (or fail to act) under State law in a manner violative of the U.S. Constitution, such that the State court rulings named in the Complaint are void. *See*, *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 1687 (1974), *Cooper v. Aaron*, 358 U.S. 1, 78 S.Ct. 1401 (1958) (acts against the Constitution are violations of oath to support it), *In re Sawyer*, 124 U.S. 200 (1888) (when a Judge does not fully comply with the Constitution, then his orders are void). The concealment of Cave Creek's due process violations and the Courts' rulings caused a complete wipe out of Appellant's investment-backed expectation per the Fifth Amendment.

As such, the State Court rulings regarding the subject property and matters herein amount to a Judicial Takings. Appellant further argues that the Takings, caused by concealing violations of due process and the circumvention of the State's inadequate post-deprivation remedies, in combination with the castigation of Appellant in a false light by the Town's Official paper, was part of a fraudulent scheme to cause harm to Fressadi's business, property, and person.

Appellant alleged fraud on the court. (Dkt. 1-1, especially at 9:21-25, 13:4-6, 15:14-16, 26-29). In error, District Court did not accept Appellant's allegations as true. Instead, it relied upon State Court rulings obtained by fraud on the court. District Court did not liberally construe Fressadi's *pro se* Complaint; did not provide him with an opportunity to amend his Complaint, nor provide him with a statement of the Complaint's alleged deficiencies before dismissing his civil rights claims. *See Morrison v. Hall,* 261 F.3d 896, 899 n. 2 (9th Cir.2001) (citing *Karim-Panahi* 839 F.2d at 623. It was manifestly unjust for District Court not to apply the

doctrine of equitable tolling because Cave Creek concealed its violations of procedural due process to deprive Fressadi of property.

STANDARD OF REVIEW

Rule 12(b)(6) dismissals require that all findings be reviewed *de novo*. *See, e.g.*, *Compton v. Countrywide Fin. Corp.*,761 F.3d 1046, 1054 (9th Cir. 2014) (*de novo* standard applies to Rule 12(b)(6) motion). The district court's dismissal based on statute of limitations is reviewed *de novo*. *See Johnson v. Lucent Techs. Inc*., 653 F.3d 1000, 1005 (9th Cir. 2011); *Lukovsky v. City & County of San Francisco*, 535 F.3d 1044, 1047 (9th Cir. 2008). "This court will not resolve statute of limitations issues based upon disputed facts," *Logerquist v. Danforth,* 188 Ariz. 16, 22, 932 P.2d 281, 288 (App. 1996).

A district court's decision whether to apply equitable tolling is generally reviewed for abuse of discretion, but where the relevant facts are undisputed, review is *de novo*. *Santa Maria v. Pac. Bell,* 202 F.3d 1170, 1175 (9th Cir. 2000). Under the abuse of discretion standard, the appellate court must first "determine de novo whether the trial court identified the correct legal rule to apply to the relief requested." *United States v. Hinkson*, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc). If the issue requires the appellate court "to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then . . . the question should be classified as one of law and reviewed de novo." *Id.* at 1260.

Questions of statutory interpretation are reviewed *de novo*. *Hobson v. Mid-Century Ins. Co.,* 199 Ariz. 525, ¶ 6, 19 P.3d 1241, 1244 (App. 2001). Mootness

presents a question of law reviewed *de novo*. *See Sierra Forest Legacy v. Sherman,* 646 F.3d 1161, 1176 (9th Cir.2011). Whether a judgment is void is a legal issue subject to *de novo* review. *See Retail Clerks Union Joint Pension Trust v. Freedom Food Ctr., Inc.*, 938 F.2d 136, 137 (9th Cir. 1991).

The court may also consider facts which may be judicially noticed, *Mullis v. U.S. Bankr. Ct.,* 828 F.2d at 1388, and matters of public record, including pleadings, orders, and other papers filed with the court.[59] *Mack v. South Bay Beer Distribs.,* 798 F.2d 1279, 1282 (9th Cir. 1986).

"Where the question presented is one of law, we consider it in light of all relevant authority, regardless of whether such authority was properly presented in the district court." *Crown Point Dev., Inc. v. City of Sun Valley,* 506 F.3d 851, 853-54 (9th Cir. 2008) (citing *Ballaris v. Wacker Siltronic Corp*., 370 F.3d 901, 908 (9th Cir. 2004) (quoting *Elder v. Holloway*, 510 U.S. 510, 516, (1994))). *See also Alvarez v. Hill*, 518 F.3d 1152, 1157-58 (9th Cir. 2008) (viewing the complaint most favorably to the plaintiff on a motion to dismiss means that it need not identify the source of the claim, only provide notice under Fed. R. Civ. P. 8).

ARGUMENT

A. Cave Creek Concealed Appellant's §1983 Claims

"A local government entity is liable under §1983 when 'action pursuant to official municipal policy of some nature cause[s] a constitutional tort.'" *Oviatt v. Pearce,* 954 F.2d 1470, 1473-74 (9th Cir.1992) (quoting *Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)). A local

[59] Court filings and documents referenced in the lawsuit were incorporated therein.

governmental entity may also be liable if it has a "policy of inaction and such inaction amounts to a failure to protect constitutional rights." *Id.* at 1474 (citing *City of Canton v. Harris,* 489 U.S. 378, 388, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989)); *see also Monell,* 436 U.S. at 690-91, 98 S.Ct. 2018.

The core of this complaint is that Cave Creek concealed its failure to follow due process as codified in A.R.S. §§ 9-500.12 and 9-500.13 with regard to Fressadi and the subject properties. (Dkt. 1-1 at 37-39) These statutes were enacted[60] to insure that municipalities complied with the Fifth and Fourteenth Amendment. AMRRP/Cave Creek falsely claim that A.R.S. §§ 9-500.12 and 9-500.13 "are nothing more than Arizona's adoption of the *Nolan* [sic]/*Dolan* standards for public exactions. *See A.R.S. § 9-500.13*." (Dkt. 56-1 at 9:5-6)

Cave Creek admits that: "The statutory remedy for a takings violation in Arizona is A.R.S. § 9.500.12." (Dkt. 56-1 at 16:9-10) "Because Arizona law provides an adequate remedy for takings, Plaintiff must pursue that claim before asserting a taking claims under the Fifth Amendment," (citation omitted). (Dkt. 56-1 at 16:7-9) Cave Creek falsely argues that: "[Fressadi] is not entitled to bring a

[60] "We interpret statutes in accordance with the intent of the legislature, [and] `look to the plain language of the statute . . . as the best indicator' of its intent, and if the language is clear and unambiguous, `we give effect to that language.'" *State ex rel. Goddard v. Ochoa*, 224 Ariz. 214, ¶ 9, 228 P.3d 950, 953 (App. 2010), *quoting Fragoso v. Fell*, 210 Ariz. 427, ¶ 7, 111 P.3d 1027, 1030 (App. 2005) (second alteration in *Goddard*). "When the language of a statute is clear and unambiguous, a court should not look beyond [its] language" or employ rules of statutory construction to determine its meaning and the legislature's intent in enacting it. *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, ¶6, 181 P.3d 219, 225 (App. 2008); *see also State v. Barnett*, 209 Ariz. 352, ¶7, 101 P.3d 646, 648 (App. 2004).

claim for §1983 takings violation because he failed to file a claim under A.R.S. § 9.500.12." (Dkt. 56-1 at 16:7-11)

To argue against their disingenuous circular logic, Fressadi did not file a claim under A.R.S. § 9.500.12 because Cave Creek failed to notice Fressadi that the Town was engaging in a takings without his knowledge and consent; failed to notice him of his right to file a claim; failed to provide instructions for the claim process as required by A.R.S. § 9.500.12(B); failed to submit a Takings report per A.R.S. § 9.500.12(C); and failed to establish the essential nexus of proportionality between the exaction, dedication, or easement requirement and the grant or approval of entitlement as required by A.R.S. § 9.500.12(E).

Cave Creek claims Ordinance 2000-07[61] "provided notice that there was a right to appeal for ***any*** dedication." [emphasis added] (Dkt. 56-1 at 9:9-10). Cave Creek claimed that Ordinance 2000-07 is an amendment to the Zoning Ordinance (Dkt. 67-1 at 1-32), but Ordinance 2000-07 is not listed as an amendment in the Appendix of the Zoning Ordinance. Dkt. 49-3 at 106-112 lists all amendments in chronological order. 2000-07 is not found on pg. 111, which is where it would be if it was an amendment. Even if it was in the Zoning Ordinance, 2000-07 addresses only dedications for the future extension of Town streets as shown on long-range transportation corridor plans. Fressadi's land is on a dead end street that is not part

[61] See Dkt. 67-1 at 2-5. Appellant alleges that Ordinance 2000-07 is a takings, and reviewable per A.R.S. §§ 9-500.12 and 9.500.13. Appellant argues that Cave Creek's concealment of its failure to follow A.R.S. §§ 9-500.12 and 9.500.13 is a takings. As part of his bundle of property rights, Fressadi is entitled to Cave Creek's strict compliance to A.R.S. §§ 9-500.12 and 9.500.13 per *Roth*.

of the Town's long-range transportation corridor plans.

In contrast, while researching this Brief, Appellant discovered that a more ethical prior Town Council approved Ordinance 97-16 in 1997 so that property owners would be noticed per A.R.S. § 9-500.12(B) (Town Ord. § 150.02). As such, Cave Creek has known of its burden and duty to adhere to A.R.S. §§ 9-500.12 and 9-500.13 since 1997 but "consciously" does not follow Ord. 97-16 as its official policy as stated in the Exhibits in Cave Creek's Motion to Dismiss (Dkt. 67-1 at 2-5). The Town's "deliberate" course of action is to merely mention A.R.S. § 9-500.12 in Ord. 2000-07, which does not comply with the requirements for notice. (The custom or policy of inaction, however, must be the result of a "conscious,") *City of Canton,* 489 U.S. at 389, 109 S.Ct. 1197, or " 'deliberate choice to follow a course of action ... made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.' " *Oviatt,* 954 F.2d at 1477 (quoting *Pembaur v. City of Cincinnati,* 475 U.S. 469, 483-84, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) (plurality opinion)).

To prevail on §1983 claims, plaintiffs must sufficiently allege that: (1) they were deprived of their constitutional rights by defendants or their employees acting under color of state law; (2) that the defendants have customs or policies which "'amount[] to deliberate indifference'" to their constitutional rights; and (3) that these policies are the "'moving force behind the constitutional violation[s].'" *Oviatt,* 954 F.2d at 1473, 1477 (quoting *City of Canton,* 489 U.S. at 389-91, 109 S.Ct. 1197). In *Oviatt,* deliberate indifference to a person's constitutional rights occurs when the need for more or different action,

> "is so obvious, and the inadequacy [of the current procedure] so likely to result in the violation of constitutional rights, that the policymakers ... can reasonably be said to have been deliberately indifferent to the need." Whether a local government entity has displayed a policy of deliberate indifference is *generally a question for the jury.*

Id. at 1477-78 (quoting *City of Canton,* 489 U.S. at 390, 109 S.Ct. 1197, and citing *Davis v. Mason County,* 927 F.2d 1473, 1482 (9th Cir.1991)) (emphasis added). Here, the need to follow due process as codified in State statutes is so obvious and the Town's procedures are so inadequate, that Cave Creek's policymakers were deliberately indifferent to the need.[62] "When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking." *Estelle* at 853, 118 S.Ct. 1708.

Cave Creek's official policy of Ordinance 2000-07 amounts to deliberate indifference to the rights of persons whom its employees and officials will come into contact. Fressadi's constitutional "injury would have been avoided" had the governmental entity properly trained its employees. *Oviatt,* 954 F.2d at 1474 (citing *City of Canton,* 489 U.S. at 389-91, 109 S.Ct. 1197).

Pursuant to A.R.S. § 9-500.12(B), Cave Creek had to notify[63] Fressadi of his

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[62] Cave Creek has no evidence of training programs to insure that Town employees complies with A.R.S. §§ 9-500.12 and 9-500.13. A local governmental entity's failure to train its employees can also create §1983 liability where the failure to train "amounts to deliberate indifference to the rights of persons" with whom those employees are likely to come into contact. *City of Canton,* 489 U.S. at 388-89, 109 S.Ct. 1197. "[F]or liability to attach in this circumstance the identified deficiency in a [local governmental entity's] training program must be *closely related* to the ultimate injury." *Id.* at 391, 109 S.Ct. 1197 (emphasis added).

[63] See A.R.S. § 9-462.04(A)(3),(4),(5). "Notice shall be sent by first class mail to each real property owner…" It follows that the notice must contain information regarding Notice of Claim A.R.S. § 12-821.01(A), and statute of limitations per

right to appeal the Town's exactions, dedications, and easement requirements per A.R.S. § 9-500.12(A) **and explain the appeal procedure**.[64] Cave Creek never notified Fressadi of his right to appeal any exaction, dedication, or easement the Town required in order to grant entitlements to use, improve, or develop his properties.[65] By failing to notice Fressadi of his right to appeal and explain the appellate procedure, Cave Creek avoided a hearing, which would have prevented the mess of violations committed by the Town and/or remedied the status of Fressadi's lots, and they avoided submitting a takings impact report to a hearing officer[66] as required by A.R.S. § 9-500.12(C). Even before Fressadi should have had the right to appeal, Cave Creek and Maricopa County did not give notice to Fressadi that the requirements and recordation of the once "omitted" and then clandestinely converted "fourth lot" made Fressadi's property a non-conforming subdivision. In fact, they ***never*** explicitly informed him nor remedied it and, under color of law, continued to act "***as if***" Fressadi had a legal lot split to conceal their malfeasance, which made it impossible for Fressadi to make comprehensive and timely claims.

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§1983 and A.R.S. § 12-821. There is no evidence that Cave Creek ever notified Fressadi of his due process rights per A.R.S. § 9-500.12(B).

[64] A.R.S. § 9-500.12(B) precludes a Municipality from requesting that a property owner waive their right of appeal during the process. *By concealing their failure to follow A.R.S. § 9-500.12(B), Fressadi never had the right to appeal.*

[65] See Dkt. 1-1 at 37-39.

[66] **Cave Creek did NOT have a hearing officer at the time.** The Town did not authorize to appoint a hearing officer per A.R.S. § 9-462.08 until July 8, 2004. Ordinance No. 2004-21. In the interim, the Town's Council was to act as the hearing officer. A.R.S. § 9-462.04(G).

The Due Process Clause of the Fourteenth Amendment prohibits states from depriving "any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV §1. The concept of notice is a fundamental element of the right to procedural due process. *See Mullane v. Central Hanover Bank &Trust Co.*, 339 U.S. 306, 314 (1950). *See also* 16B AM.JUR. 2D *Constitutional Law §* 934 (1998). To meet the requirements of due process, the notice must be "reasonable and adequate for the purpose, [with due regard afforded] to the nature of the proceedings and the character of the rights which may be affected by it." 16B AM.JUR. 2D**,** *supra* note 17, § 934. **Notice must "be reasonably calculated, under all circumstances, to apprise interested parties of the pendency of [an] action and afford them an opportunity to present their objections."** [emphasis added] *Larry Dean Dusenbury v. United States*, 534 U.S. 161, 168 (2002) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The primary purpose of the procedural due process notice requirement is to ensure the "deprived person" a meaningful opportunity to be heard. *See Mullane,* 339 U.S. at 314 (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

Ordinance 2000-07 provides no description of the appeal process. It does not address exactions or dedications required by the Town that are not a future part of the Town's long-range transportation corridor plans. Claiming that Ordinance 2000-07 complies with due process is as egregious as publishing notice in a newspaper. The Supreme Court held in *Mullane* 339 U.S. at 306 that notice by publication in a newspaper to beneficiaries **whose interests and addresses were known** regarding judicial settlement of accounts did not satisfy the requirements of

due process because there was no meaningful opportunity to be heard. *Id.* at 319.

The Court reasoned that the fundamental right to be heard "has little reality or worth unless one is informed that the matter is pending, and can choose for himself whether to appear or default, acquiesce or contest." *Id*. at 314. Fressadi's situation is similar. Cave Creek knew Fressadi's interests and address. According to A.R.S. § 9-462.04(A)(3),(4),(5), "**Notice shall be sent by first class mail to each real property owner**…" [emphasis added]. This method should apply to the application of notice per A.R.S. § 9-500.12(B) and BEFORE a deprivation may occur through exactions, dedications, and/or easements; and that the notice must contain information sufficient to make a Notice of Claim per A.R.S. § 12-821.01(A) with stated statutes of limitations per §1983 and A.R.S. § 12-821.

The U.S. Supreme Court consistently applies the *Mullane* standard in the pre-deprivation context, namely, the requirement of notice reasonably calculated to provide interested parties with an opportunity to be heard. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Parham v. J.R.*, 442 U.S. 584, 606-07 (1979); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18 (1978). By failing to provide Fressadi notice per A.R.S. § 9-500.12(B), "the Town engaged in conduct prior to the filing of litigation that prevented Fressadi from filing the action within the limitations period." 1CA-CV12-0238 at ¶33 (Dkt. 42-3 at 8).

Cave Creek failed to notice Fressadi of his right to appeal the Town's "series of lot splits" scam in 2001 per A.R.S. §§ 9-500.12 and 9-500.13, which would have vetted Cordwell's planning instructions and requirements through a proper hearing process. "After all, if a policeman must know the Constitution, then why

not a planner?" Brennan Dissenting, *San Diego Gas and Electric Co. v. City of San Diego*, 101 S. Ct. 1287 (1981).

Had the Town complied with due process, Fressadi never would have agreed to down-zone his property so that Cave Creek could circumvent its Zoning and Subdivision Ordinances; nor would he have filed an application for a 3-lot split of parcel 211-10-003 in 2002 if he knew it would be converted (Dkt. 49-1 at 4) into a 4-lot "non-conforming subdivision" in 2003 (Dkt. 49-1 at 6).

Properly noticed, the appeal process would have revealed that there was no "legitimate government interest" to create and convey the fourth lot. Fressadi never would have granted easements for the sewer or permitted or constructed the sewer if he knew that the Town was going to steal it by rendering his lot split unlawful.

Fressadi never would have borrowed $245,000 from BMO for sewer and utilities, relying on Cave Creek and the 003 lot owners to reimburse him. Fressadi would never have sold parcel 211-10-003, and would have avoided the HOA hassle in CV2006-014822 and the Zoning violations in CV2009-050924 and LC2010-000109.

He would've avoided the incessant "bad light" in the Sonoran News tabloid (Dkt. 1-1 at 41-83). Fressadi never would have been Tasered or arrested. Fressadi would still own his home, his property, and have a comfortable amount of money.

By failing to provide Fressadi notice and a hearing per A.R.S. § 9-500.12, Fressadi was uninformed. Cave Creek deprived him of his rights and his ability to choose "whether to appear or default, acquiesce or contest." Fressadi could have appealed Cave Creek's requirements for exactions in a timely manner. ***Fressadi***

never would have been time-barred.

In bad faith, *from 2001 to 2014,* Cave Creek caused the perfect storm by violating Appellant's rights as protected by the Fifth and Fourteenth Amendments, and Ariz. Const. art 18 §6, art 2 §§ 1, 2, 2.1, 3, 4, 6, 8, 9, 11, 13, 17, 32, and art 6 §9. Cave Creek intentionally concealed its failure to follow due process procedures in A.R.S. §§ 9-500.12(A-E) and 9-500.13 as its official policy to avoid the burden of establishing the nexus of proportionality for all exactions, dedications, or easements required to grant Fressadi entitlements (Dkt. 1-1 at 37-39). In their maelstrom of malfeasance, Cave Creek failed to provide pre-deprivation notice and notice for appeal per A.R.S. § 9-500.12(B), prevented Fressadi from a hearing and filing a takings claim prior to filing litigation per A.R.S. § 9-500.12(A),(C), circumvented the accrual/tolling provisions of A.R.S. § 12-821.01(B),(C), and circumvented *de novo* review by Superior Court per A.R.S. § 9-500.12(B),(G). See 1CA-CV12-0238 at ¶ 1 (Dkt. 42-2 at 1-2). Failure to follow A.R.S. §§ 9-500.12 and 9-500.13 is negligence per se.[67] AMRRP blocked any post-deprivation process to effect a taking of Fressadi's property by obtaining favorable rulings,[68]

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[67] See *Caldwell v. Tremper,* 367 P.2d 266 Ariz.,1962 (Violation of statute or ordinance requiring particular thing to be done or not done is "negligence per se."), *Griffith v. Valley of Sun Recovery and Adjustment Bureau, Inc*., 613 P.2d 1283 Ariz. App. Div. 1, 1980 (Negligence per se applies when there has been violation of specific requirement of a law or an ordinance), *Deering v. Carter,* 376 P.2d 857 Ariz.,1962 (In establishing existence of negligence per se, jury need only find that party committed specific act prohibited, or omitted to do specific act required by statute or ordinance.)

[68] "Because corrupt intent knows no stylistic boundaries, fraud on the court can take many forms." *Aoude v. Mobil Oil Corp*., 892 F.2d 1115, 15 Fed. R. Serv. 3d 482 (1st Cir. 1989).

purporting that any claim against the Town was time-barred. Fressadi argues that he is entitled to damages per A.R.S. § 9-500.12(H) – actual, compensatory, punitive, and delay damages for each day of the 15 years that the violations have been and still are continuing.

A.R.S. §§ 9-500.12, 9-500.13, 12-821.01(B), (C) & (G) are meant to act in concert to give effect to an entire statutory system. *Backus v. State*, 203 P. 3d 499 at ¶¶10, 11- Ariz: Supreme Court 2009, quoting *Grant v. Bd. of Regents,* 133 Ariz. Fressadi has a legitimate claim of entitlement[69] for the State of Arizona to compel Cave Creek to strictly comply[70] with Federal law regarding his rights to property and due process, and with State statutes that insure citizens are afforded the

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[69] Property interests are created "by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). To have a property interest in a government benefit, "a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.*

[70] "[T]he power to zone and regulate subdivisions exists by virtue of the state enabling legislation..." *Folsom Investments, Inc. v. City of Scottsdale,* 620 F. Supp. 1372 (D.C. Ariz. 1985); *Bella Vista Ranches, Inc. v. City of Sierra Vista,* 126 Ariz. 142,613 P.2d 302 (App. 1980). Since zoning and subdivision authority comes from the state, a city must exercise their power "within the limits and in the manner prescribed in the grant and not otherwise." *City of Scottsdale v. SCOTTSDALE, ETC.*, 583 P. 2d 891 - Ariz: Supreme Court 1978, quoting *City of Scottsdale v. Superior Court*, 439 P. 2d 290 - Ariz: Supreme Court 1968. "[A] municipal corporation has no inherent police power." *City of Scottsdale, supra.,* 439 P.2d at 293; *Scottsdale Associated Merchants, Inc.,* 120 Ariz. *4,* 583 P.2d 891 at 892 (1978). Cities must strictly comply with state enabling statutes because municipalities are not sovereign powers—they are an extension of state sovereignty. *City of Scottsdale v. Superior Court,* 103 Ariz. 204,439 P.2d 290 (1968).

fundamental requirements of due process—the opportunity to be heard, in a meaningful time and manner. *See Zinermon v. Burch,* 494 U.S. 113, 126 (1990) ("The constitutional violation actionable under §1983 [for a procedural due process claim] is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process."). A.R.S. §§ 9-463 *et seq*., 9-500.12, 9-500.13, 12-821.01(C) & (G) are not constitutionally adequate if Cave Creek can ignore them and, by concealing its failure to follow these State statues, circumvent the safeguards that temper the State's statute of limitations to obtain favorable court rulings in numerous interrelated lawsuits *from 2006 to 2015*.

A.R.S. §§ 12-821.01(C), 9-500.12, 9-500.13, 9-463 et seq., and §§ 1.1, 6.1(A), 6.3(A) of the Town's Subdivision Ordinance and §§ 1.4, 1.7, 5.1, and 5.11 of the Town's Zoning Ordinance "contains mandatory language" that significantly constrains the decision maker's discretion. *Jacobson v. Hannifin,* 627 F.2d 177, 180 (9th Cir. 1980). Cave Creek or its actors failed to follow mandatory provisions of its Ordinances. (Dkt. 1-1 at 7:4 to 11:16) Cave Creek's concealment of its failure to follow due process, and mandatory provisions of its Ordinances, interfered with Fressadi's property rights in an irrational or arbitrary fashion. *See Bateson v. Geisse,* 857 F.2d 1300, 1303 (9th Cir. 1988) ("A substantive due process claim does not require proof that all use of the property has been denied, but rather that the interference with property rights was irrational or arbitrary.") Requiring a sliver of land to approve a split of three lots, which converted the split into an unlawful subdivision – causing the lots to be unsuitable for building, not entitled to permits, and unlawful to sell – is irrational and arbitrary.

Procedural due process in Arizona requires fundamental fairness. *State v. Tyszkiewicz,* 209 Ariz. 457, 460, ¶ 13, 104 P.3d 188, 191 (App.2005). The right to fundamental fairness is violated when citizens are denied procedural due process. *County of Sacramento v. Lewis,* 523 U.S. 833, 845-46, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). Procedural due process ensures that a party receives adequate notice, an opportunity to be heard at a meaningful time and in a meaningful way, and an impartial judge. *Matthews v. Eldridge,* 424 U.S. 319, 333-34, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Goldberg v. Kelly,* 397 U.S. 254, 267-68, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); *Emmett McLoughlin Realty, Inc. v. Pima County,* 212 Ariz. 351, 355, ¶ 17, 132 P.3d 290, 294 (App.2006); *Comeau v. Arizona State Board of Dental Examiners*, 196 Ariz. at 107, ¶ 20, 993 P.2d at 1071.

Concealing Cave Creek's failure to follow due process as codified in A.R.S. §§ 9-500.12 (B-E) and 9.500.13 affected litigation involving the subject properties. (Dkt. 1-1 at 7:14 to 8:11, at 9:19-25, at 15:12-16) As such, Arizona failed to provide due process "where the state remedy, though adequate in theory, was not available in practice." *Monroe* v. *Pape,* 365 U. S. 167, 173-174 (1961).

B. Equitable Tolling and/or Equitable Estoppel Precludes Dismissal of Appellant's Claims

The statute of limitations for §1983 actions in Arizona is two years, A.R.S. § 12-542. (Dkt. 131 at 8:2-15) Under the common law "discovery rule," a cause of action accrues for purposes of A.R.S. § 12-542, and the limitation period begins when "the plaintiff knows or with reasonable diligence should know the facts underlying the cause." *Doe v. Roe,* 191 Ariz. 313, ¶ 29, 955 P.2d 951, 960 (1998);

see also Walk v. Ring, 202 Ariz. 310, ¶ 22, 44 P.3d 990, 996 (2002) (for limitation period to commence, "it is not enough that a plaintiff comprehends a 'what;' there must also be reason to connect the 'what' to a particular 'who' in such a way that a reasonable person would be on notice to investigate whether the injury might result from fault").

Plaintiff discovered that Cave Creek ("the Who") concealed its failure to follow A.R.S. §§ 9-500.12 (B-E) and 9-500.13 ("the what") on 9/17/2013. See Complaint (Dkt. 1-1 at 37-39). Cave Creek's failure to comply with A.R.S. §§ 9-500.12 (B-E) and 9-500.13 is core of Appellant's §1983 claims, and the cause of all his other §1983 injuries. Although AMRRP, Cave Creek, and Maricopa County argue that Appellant's claims are barred by the statute of limitations, none of them address the Butterfly Effect of Cave Creek concealing its failure to follow A.R.S. §§ 9-500.12 (B-E) and 9-500.13 as the cause of substantive due process, equal protection, and takings claims. District Court did not consider how Cave Creek concealing its failure to follow A.R.S. §§ 9-500.12 (B-E) and 9-500.13 caused a hurricane of harm—that all the issues alleged in the Complaint (Federal and other) are injuries arising from a failure to notice Fressadi in keeping with the legislative intent of A.R.S. §§ 9-500.12, 9-500.13, and *Mullane*.

Appellant argues that his Complaint is timely. It was filed within two years of when Appellant learned that: (1) Cave Creek had concealed its failure to provide Plaintiff with notice of his right to appeal and the appeal process; (2) that the Town fraudulently concealed its failure to follow due process in order to avail itself of the statute of limitations in a litany of litigation that never would have happened

had Cave Creek complied with due process in the first place.

Fressadi pleaded with particularity that Cave Creek took active steps to prevent Fressadi from suing on time by concealing its failure to follow due process as codified in State statutes (Dkt. 1-1 at 9:21-25, 13:14-16). "On a motion to dismiss, the Court must accept Plaintiffs allegations as true," *Johnson v. First American Title Insurance Co.,* Dist. Court, D. Arizona 2008 No. CV-08-01184-PHX-DGC quoting *Smith v. Jackson,* 84 F.3d 1213, 1217 (9th Cir. 1996) (Plaintiffs' allegations of concealment, and the factual nature of the equitable tolling inquiry, preclude dismissal on limitations grounds).

Given that Cave Creek had a duty and burden to notice of his right to appeal and describe the appeal process for ALL the Town's requirements per A.R.S. § 9-500.12(B), the Defendants' use of the statute of limitations is repugnant to justice.

The doctrine of equitable tolling pauses the statute of limitations when the Defendants "conceal a fraud" or "commit[] a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it." *Bailey v. Glover,* 88 U.S. (21 Wall) 342, 349, 22 L.Ed. 636, 639 (1874). **This doctrine was developed to prevent wrongdoers from concealing their actions and then perpetrating a further fraud by using the statute of limitations as a shield—like in this instance.**

As the Court remarked in *Bailey v. Glover*, 21 Wall. at 349, 88 U.S. at 349, such action would "make the law which was designed to prevent fraud the means by which it is made successful and secure." Under the doctrine of equitable tolling, "a defendant whose affirmative acts of fraud or concealment have misled a person

from either recognizing a legal wrong or seeking timely legal redress may not be entitled to assert the protection of a statute of limitations." *Porter v. Spader,* 225 Ariz. 424, 428, ¶ 11, 239 P.3d 743, 747 (App. 2010). If fraudulent concealment is established, "the statute of limitations is tolled until such concealment is discovered or reasonably should have been discovered." *Walk v. Ring,* 202 Ariz. 310, 319, ¶ 35, 44 P.3d 990, 999 (2002) (quotation and citation omitted); *see also Grimmett v. Brown,* 75 F.3d 506, 514 (9th Cir. 1996) (noting fraudulent concealment tolls statute of limitations only if plaintiff proves defendant actively misled her and she had neither actual nor constructive notice of the facts constituting her cause of action despite exercising due diligence).

Cave Creek actively misled Fressadi by telling him to develop his property by a series of lot splits. Cave Creek misled Fressadi by issuing permits "as if" his property was lawfully split when it was a non-conforming subdivision unsuitable for building and not entitled to permits. Fressadi had no actual or constructive notice, though Defendants argue that he "should have known" that something was amiss in 2002 or 2009, and District Court believed it (Dkt. 131 at 8:17 to 9:19). Defendants conspicuously omit how or what Fressadi should have done to correct what he should have known.

The solution is for the Court to Order that parcels 211-10-003 and 211-10-010 be reassembled and for the Defendants to pay for their costs and damages associated with the delay per A.R.S. §§ 9-500.12(H) and 13-2314.04(B). The cause of harm in this instance, starts with the omission of notice as required by A.R.S. § 9-500.12(B). It would seem that the legislative intent of the statute is for the

municipality to give the property owner notice of his right to appeal and the appeal process upon making the request for an exaction, dedication, or easement because, according to A.R.S. § 9-500.12(C), **the property owner must file his appeal in writing within thirty days after the final action is taken**.

According to A.R.S. § 9-500.12(B), "The city or town shall not request the property owner to waive the right of appeal or trial *de novo* at any time during the consideration of the property owner's request". Fressadi has a legitimate claim of entitlement in a government benefit—that Cave Creek strictly comply and abide by the U.S. and Arizona Constitutions, State statutes, and Town ordinances, part of Plaintiff's Bundle of Rights for which he has a legitimate claim of entitlement. See *Bd. of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

Fressadi's Bundle of Sticks[71] are important to consider in tolling the statute of limitations for Appellant's §1983 claims because Cave Creek's misconduct, capable of being prosecuted under 42 U.S.C. §1983, caused quiet title issues that have no statute of limitations due to ongoing, continuous zoning violations. *See* Footnote 7, *City of Tucson v. Clear Channel Outdoor, Inc*., 181 P. 3d 219 - Ariz: Court of Appeals, 2nd Div., Dept. A 2008, ("When a court in equity is confronted on the merits with a continuing violation of statutory law, ***it has no discretion or authority*** to balance the equities so as to permit that violation to continue.") quoting Zygmunt J.B. Plater, *Statutory Violations & Equitable Discretion,* 70 Cal. L.Rev. 524, 527 (1982). [emphasis added]. "The basic question to be answered in determining whether, under a given set of facts, a statute of limitations is to be tolled is one 'of

[71] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

legislative intent whether the right shall be enforceable . . . after the prescribed time.' " *Burnett* v. *New York Central R. Co.,* 380 U. S. 424, 426 (1965).

The legislative intent of A.R.S. § 9-500.12(B-H) must be taken into context with A.R.S. § 12-821.01(C); that any of Fressadi's claims would not accrue per A.R.S. § 12-821 until all remedies in A.R.S. § 9-500.12 were exhausted.

Had Cave Creek complied with A.R.S. § 9-500.12(B-H), Fressadi would have been noticed in timely manner of his right to appeal the Town's requirements for a sliver of land to approve a lot split that converted his property into a non-conforming subdivision. He could have appealed the Town's requirement for dedicated easements to take a sewer that serves the community. The Takings Clause is to prevent the government from forcing some people to alone to bear public burdens which, in fairness and justice, should be borne by the public as a whole. *Palazzolo v. Rhode Island,* (United States Supreme Court, June 28, 2001), *citing Armstrong v. United States,* 364 U.S. 40, 49 (1960).

He would have had the right to appeal a down-zoning of his property that has caused fifteen years of grief. He would have had the right to trial *de novo* in Superior Court and according to A.R.S. § 12-821.01(C), his claims would not accrue until all his remedies in A.R.S. § 9-500.12 were exhausted. Appellant alleges that his §1983 claims against Cave Creek for failing to follow due process in A.R.S. §§ 9-500.12 and 9-500.13 caused a cloud on the title of his property, especially for tax purposes. See *Cook v. Town of Pinetop-Lakeside ,supra.*

The doctrine of equitable tolling focused on Defendant's conduct in *Bailey,* but 100+ years later, "Equitable tolling focuses primarily on the plaintiff's

excusable ignorance of the limitations period…" *Hensley v. United States*, 531 F.3d 1052, 1057-58 (9th Cir. 2008). See also Socop-Gonzalez v. I.N.S., 272 F.3d 1176, 1193 (9th Cir. 2001) (quoting *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1207 (9th Cir. 1995)). Appellant relies upon the clear and plain language of A.R.S. § 9-500.12(B-H) and *Mullane*. Since Cave Creek concealed its failure to follow due process as codified in State law, and since the duty and burden is on Cave Creek, Plaintiff's ignorance of the limitations period is excusable.

As mentioned above, Fressadi argues that Cave Creek's intended consequence for failing to provide notice of his right to appeal and its process, and concealing the true status of his property by issuing illusory permits, is this: Fressadi would be unable to obtain vital information bearing on the existence and prosecution of his claims in a timely manner as the litigation in State Court from 2006 to 2015 affirms.

"Equitable estoppel . . . may come into play if the defendant takes active steps to prevent the plaintiff from suing in time—a situation [often referred to as] fraudulent concealment." *Johnson v. Henderson*, 314 F.3d 409, 414 (9th Cir. 2002). Arizona does not require a duty to disclose to support a claim for fraudulent concealment. *Lerner v. DMB Realty*, LLC, 322 P.3d 909, 916 (Ariz. Ct. App. 2014) ("Unlike simple nondisclosure, a party may be liable for acts taken to conceal, mislead or otherwise deceive, even in the absence of a fiduciary, statutory, or other legal duty to disclose." (quoting *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Tr. Fund*, 201 Ariz. 474, 483

(Ariz. 2002) (en banc))).

Cave Creek intentionally concealed its failure to comply with the notice provisions of A.R.S. § 9-500.12(B) to avoid administrative review of the Town's requests and actions in a timely manner per A.R.S. §§ 9-500.12(B-H), 9-500.13, 12-821.01(C) and/or (G). Cave Creek had a legal duty to disclose, notify, and describe the appellate process of each and every dedication, exaction, and requirement for taking land, easement, or development rights to Fressadi. Cave Creek not only failed to comply with due process as required by State and Federal law, Cave Creek concealed its violations to obtain favorable rulings by harming the integrity of the judicial process.

A motion to dismiss on statute of limitations grounds cannot be granted if "the complaint, liberally construed in light of our 'notice pleading' system, adequately alleges facts showing the potential applicability of the equitable tolling doctrine." *Cervantes v. City of San Diego*, 5 F.3d 1273, 1277 (9th Cir. 1993); see also *Morales v. City of Los Angeles*, 214 F.3d 1151, 1153, 1155 (9th Cir. 2000). The same holds true for equitable estoppel. Because equitable tolling turns on matters outside of the pleadings, the Supreme Court's recent decisions in *Twombly* and *Iqbal*, which concerned the requirements of Fed. R. Civ. P. 8, do not provide reason to revisit this rule. Therefore, when analyzing a complaint for failure to state a claim, "[a]ll allegations of material fact are taken as true and construed in the light most favorable to the non-moving party." *Smith v. Jackson,* 84 F.3d 1213, 1217 (9th Cir.1996); *see Miree v. DeKalb County,* 433 U.S. 25, 27 n. 2, 97 S.Ct. 2490, 53 L.Ed.2d 557 (1977). "Dismissal on statute of limitations grounds can be

granted pursuant to Fed. R. Civ. P. 12(b)(6) 'only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled.'" *TwoRivers v. Lewis,* 174 F.3d 987, 991 (9th Cir. 1999) (citing *Vaughan v. Grijalva,* 927 F.2d 476, 478 (9th Cir. 1991) (quoting *Jablon,* 614 F.2d at 682)); *see Pisciotta v. Teledyne Indus., Inc.,* 91 F.3d 1326, 1331 (9th Cir. 1996).

The statute of limitations was tolled because Cave Creek failed to provide notice as required by A.R.S.§ 9-500.12(B). It violated due process to conceal substantive due process violations and Takings, not only from Fressadi, but from the Courts to commit fraud on the court.

"In civil rights cases where the plaintiff appears *pro se*, the court must construe the pleading liberally and must afford plaintiff the benefit of any doubt." *Karim-Panahi v. L.A. Police Dep't,* 839 F.2d 621, 623 (9th Cir.1988); *see Morrison v. Hall,* 261 F.3d 896, 899 n. 2 (9th Cir.2001), *Frost v. Symington,* 197 F.3d 348, 352 (9th Cir.1999), both citing *Karim-Panahi* 839 F.2d at 623; *Haines v. Kerner,* 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). The rule of liberal construction is "particularly important in civil rights cases." *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). The Court must assume that all general allegations "embrace whatever specific facts might be necessary to support them." *Peloza v. Capistrano Unified Sch. Dist.,* 37 F.3d 517, 521 (9th Cir.1994), *cert, denied,* 515 U.S. 1173, 115 S.Ct. 2640, 132 L.Ed.2d 878 (1995) (citations omitted). Because Plaintiff is *pro se,* the Court must construe her [his] Complaint liberally, even when evaluating it under the *Iqbal* standard. *Johnson v. Lucent Technologies Inc.,* 653 F.3d 1000, 1011 (9th Cir. 2011).

Fressadi thought his Complaint was sufficiently particular, supported by incorporating public records and related cases by reference therein. Defendants and District Court claim that Fressadi "failed to make a claim" as if by merely saying it makes it true. Before the court can dismiss a *pro se* civil rights complaint for failure to state a claim, the court must give the plaintiff a "statement of the complaint's deficiencies." Karim-Panahi, 839 F.2d at 623. *See Noll v. Carlson,* 809 F.2d 1446, 1448 (9thCir. 1987). Fressadi never received a "statement of the complaint's deficiencies." If the District Court had any incomprehension of the facts or deemed the form of Fressadi's Complaint to be insufficient, then the Judge should have offered Fressadi an opportunity to restate his case to ensure a fair contest and protect Fressadi's rights to due process. Instead, the Court swept 15 years of violations under the rug by not considering equitable tolling or estoppel, and relied on rulings obtained by fraud on the court to dismiss Fressadi's Complaint.

C. Concealing Cave Creek's Due Process Violations Harmed the Integrity of the Judicial Process

Federal courts always have the "inherent equity power to vacate judgments obtained by fraud." *United States v. Estate of Stonehill*, 660 F.3d 415, 443 (9th Cir. 2011). There are no time restrictions when filing a motion for fraud upon the court under Rule 60(d)(3). *Id.* at 443-44.

A court's inherent power to vacate a judgment procured by fraud "fulfill[s] a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence" to the

rule that a final judgment is typically binding and final. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944), *overruled on other grounds by Standard Oil of Cal. v. United States*, 429 U.S. 17 (1976).

Fraud on the court exists where there is "an unconscionable plan or scheme… designed to improperly influence the court in its decision." *England v. Doyle*, 281 F.2d 304, 309 (9th Cir. 1960) (citation omitted); *see also Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1131 (9th Cir. 1995).

Fraud on the court occurs when the conduct either "defiles the court or is perpetrated by officers of the court." *Dixon v. C.I.R.*, 316 F.3d 1041, 1046 (9th Cir. 2003). When the conduct harms "the integrity of the judicial process...and the fraud rises to the level of 'an unconscionable plan or scheme which is designed to improperly influence the court in its decisions,'" the court "not only can act, [but] should." *Id.* (citations omitted).

Appellant argues that Cave Creek / AMRRP, engaged in "an unconscionable plan or scheme . . . designed to improperly influence the court in its decision," by failing to comply with A.R.S. §§ 9-500.12 & 9-500.13 and obtained favorable rulings in a litany of litigation on the subject properties. (Dkt. 1-1 at 19-21)

"[F]raud upon the court... is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *In re Intermagnetics Am., Inc.*, 926 F.2d 912, 916 (9th Cir. 1991). "[T]he relevant inquiry is not whether fraudulent conduct 'prejudiced the opposing party,' but whether it 'harm[ed] the integrity of the judicial process.'" *Stonehill*, 660 F.3d at 444 (quoting *Alexander v.*

Robertson, 882 F.2d 421, 424 (9th Cir. 1989)). "[T]o show fraud on the court, [the moving party] must demonstrate, by clear and convincing evidence, an effort by the [opposing party] to prevent the judicial process from functioning in the usual manner. They must show more than the perjury or nondisclosure of evidence, unless that perjury or nondisclosure was so fundamental that it undermined the workings of the adversary process itself." *Id.* at 445. Appellant argues that AMRRP's non-disclosure of evidence—that Cave Creek concealed its failure to follow A.R.S. §§ 9-500.12 and 9-500.13—is so fundamental that it undermined the workings of the adversary process itself. For sake of brevity, Appellant only addresses the rulings in CV2009-050821 and 1CA-CV 12-0238 that District Court used to determine that Plaintiff's §1983 claims are time-barred by the two-year statute of limitations. (Dkt. 131 at 9) Starting[72] with the sliver of land in 2001:

Cave Creek wrongfully concealed from Fressadi and the Courts that it had a duty to comply with A.R.S. §§ 9-500.12 and 9-500.13. Cave Creek had the burden to notice Fressadi of his right to appeal and Cave Creek would have had to describe the appellate procedure for Fressadi to file an appeal with a Hearing Officer per A.R.S. § 9-500.12(C). The Notice would have to describe his right to appeal Ordinance 2000-07 and Town Code § 50.016 per A.R.S. § 9-500.12(A)(2): "The adoption or amendment of a zoning regulation by a city or town that creates a taking of property in violation of section 9-500.13." Cave Creek would have the duty and burden to establish the nexus of proportionality and provide the Hearing

[72] The true point of beginning is when the Town told Fressadi to avoid the red tape of a subdivision and do a series of lot splits to down-zone the development in 2000.

Officer with a "Takings Report" for just compensation per A.R.S. § 9-500.12(C-E). If either party objected to the Hearing Officer's ruling, the matter would be adjudicated *de novo* by Superior Court.

This is "the judicial process functioning in its usual manner." The legislative intent of A.R.S. § 9-500.12(B) was instantaneous gratification—Cave Creek had to provide notice ***immediately*** upon making a request for a requirement for exactions, dedications and easements to grant an entitlement to ***prevent*** obstruction of due process by running out the clock on statutes of limitations per §1983, A.R.S. § 9-500.12, and A.R.S. §§ 12-821 & 12-821.01.

For the judicial process to function in its usual manner as intended by the legislature, Cave Creek had to provide Fressadi notice of his right to appeal the Town's requirement for a sliver of land to approve his lot split in November 2001 per A.R.S. § 9-500.12(B). Fressadi would then have thirty days to file an appeal with the Town's Hearing Officer and object to the Town's requirement for a sliver of land to approve his lot split. Cave Creek would have to file a takings report. The Hearing Officer would schedule a time for the appeal within thirty days of obtaining Fressadi's appeal. According to A.R.S. § 9-500.12(E), Cave Creek had the burden to establish nexus of proportionality; that the Town's zoning regulation did not violate A.R.S. § 9-500.13. According to A.R.S. § 12-821.01(C), Fressadi's claim would not accrue until all administrative or remedial processes in A.R.S. §§ 9-500.12 and 9-500.13 were exhausted. If the Hearing Officer modifies or affirms the requirement of the dedication, exaction, or zoning regulation (i.e. the Town's 2000-07 Ordinance), then Fressadi would have thirty days to file a complaint in

Superior Court with powers in A.R.S. § 9-500.12(G). The matter would have preference in Superior Court, and the court would have the authority to assess reasonable attorney fees and "compensate the property owner for direct and actual delay damages on a finding that the city or town acted in bad faith" per A.R.S. § 9-500.12(H).

This is how the legislature intended the judicial process to function in its usual manner and uphold the Constitutions of the United States and the State of Arizona. As such, the issue of the sliver of land to approve a lot split could have been decided through the Town's appeal process by March 2002. If the matter required adjudication in Superior Court, then the matter would be timely per A.R.S. 12-821.01(C) such that Cave Creek had no statute of limitation defense. If appealed, the matter would be timely per A.R.S. 12-821.01(C), such that Cave Creek had no statute of limitation defense.[73] The legislative intent of A.R.S. §§ 9-500.12 and 9-500.13 was to prevent this situation where Cave Creek's concealment of its failure to follow due process causes the 9th Circuit to be the "Grand Mufti[74]" of Cave Creek.

Appellant argues that AMRRP acted with an "evil hand guided by an evil mind.[75]" The legislative intent of A.R.S. §§ 9-500.12 and 9-500.13 was to place the duty and burden on the municipality to prevent situation like this, where a Town would do nothing and then avoid liability by using the statute of limitation as a

[73] Alternatively, if Appellant does nothing, he loses his right to appeal the Town's requirement for a sliver of land in thirty days.
[74] See *Hoehne v. County of San Benito,* 870 F.2d 529, 532 (9th Cir.1989).
[75] *Rawlings v. Apodaca,* 151 Ariz. 149, 162, 726 P.2d 565, 578 (Ariz. 1986).

defense. See *Bailey* supra. By concealing Cave Creek's failure to follow A.R.S. §§ 9-500.12 and 9-500.13, the burden of discovery shifted to the Property Owner. Defendants argue that the Plaintiff "***knew or should have known***" with 20/20 hindsight. It is ***NOT*** the burden of Fressadi to enforce the Town's duties or know how to monitor their performance to abide by State laws. Why bother enacting A.R.S. §§ 9-500.12 and 9-500.13 if Towns are permitted to circumvent its duties by concealing its failure to comply with its provisions for due process and then use the Courts to obtain rulings based on the statute of limitations; "the law which was designed to prevent fraud [is] the means by which it is made successful and secure." *Bailey* at 349. AMRRP's entire course of conduct across the litany of lawsuits involving this subject matter and properties has been to block the judicial process from functioning in its usual manner.

The same analysis would apply to each and every requirement by the Town for an exaction, dedication, or easement as indicated in Dkt.1-1 at 37-39.

Fraud upon the court may be found in an entire course of conduct by a party, rather than a single act of fraud directed at the court. In *Stonehill*, the Ninth Circuit analyzed seven categories of evidence cited as fraud upon the court. *See* 660 F.3d at 446-51. The Ninth Circuit first examined each category of evidence in isolation to determine if it constituted fraud upon the court, and determined that each category, on its own, did not qualify. *Id.* The Ninth Circuit then examined the allegations of fraud on the court as a whole, analyzing whether, taken together, the misrepresentations and nondisclosures "change[d] the story . . . presented to the district court." *Id.* at 452. Although the Ninth Circuit ultimately found that the

totality of conduct did not constitute fraud upon the court in *Stonehill* because the conduct was not at the core of the controversy in that particular case, ***it is here.*** *Stonehill* makes clear that a court is not limited to analyzing each alleged instance of misconduct in isolation, but can consider whether an entire course of conduct undermined the judicial process as a pattern of fraud upon the court. *Id.* at 454; see also *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1129-32 (9th Cir. 1995) (analyzing whether the defendant's course of conduct throughout the case constituted fraud on the court).

Although Fressadi was diligent with the information he was provided, Rule 60(d)(3) relief does not turn on the diligence of those uncovering the fraud. *Pumphrey*, 62 F.3d at 1133. Additionally, "[p]rejudice is not an element of fraud on the court." *Dixon v. Comm'r*, 316 F.3d 1041, 1046 (9th Cir. 2003), *as amended* (Mar. 18, 2003) (citations omitted). Rather, "[f]raud on the court occurs when the misconduct harms the integrity of the judicial process, regardless of whether the opposing party is prejudiced." *Id*. In these instances, the court "not only can act, [it] should." *Id*. See also *Cypress on Sunland Homeowners Ass'n v. Orlandini,* 227 Ariz. 288, 299, ¶ 25, 257 P.3d 1168, 1179 (App. 2011) (reconsider rulings that are manifestly erroneous or unjust to address newly discovered evidence or previously unavailable evidence). Defendants do not deny and therefore tacitly concede that Cave Creek concealing its failure to follow due process as codified in A.R.S. §§ 9-500.12 and 9-500.13 is "newly discovered or previously unavailable evidence."

> When a party obtains a judgment by concealing material facts and suppressing the truth with the intent to mislead the court, this constitutes

> a fraud upon the court, and the court has the power to set aside the judgment at any time. *Ivancovich v. Meier,* 122 Ariz. 346, 349, 595 P.2d 24, 27 (1979). A fraud upon the court is perpetrated "by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases." *In re Intermagnetics Am., Inc.,* 926 F.2d 912, 916 (9th Cir.1991) (quoting J. Moore and J. Lucas, Moore's Federal Practice ¶ 60.33, at 515 (2nd Ed. 1978)).
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> As the United States Supreme Court explained in Hazel-*Atlas Glass Co. v. Hartford-Empire Co.,* 322 U.S. 238, 246, 64 S.Ct. 997, 88 L.Ed. 1250 (1944), *overruled on other grounds, Standard Oil of Cal. v. United States,* 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976), the district court is permitted to set aside a judgment obtained by a fraud upon the court pursuant to Federal Rule 60(b) (the equivalent of Rule 60(c)), without regard to time limits because such fraud harms the "integrity of the judicial process," and is a "wrong against the institutions set up to protect and safeguard the public." There, the Court granted relief even though the complainant had waited nine years to bring the action and knew at the time that fraudulent evidence may have been introduced during the first proceeding. *See also Pumphrey v. K.W. Thompson Tool Co.,* 62 F.3d 1128, 1130, 1133 (9th Cir.1995) ("One species of fraud upon the court occurs when an 'officer of the court' perpetrates fraud affecting the ability of the court ... to impartially judge a case," and a judgment obtained by such fraud can be set aside even if the opposing party was not diligent in uncovering it). Further, under Arizona Supreme Court Rule 42, E.R. 3.3(a), a "lawyer shall not knowingly ... make a false statement of fact or law to a tribunal ... [or] fail to disclose to the tribunal legal authority ... known to the lawyer to be directly adverse to the position of the client."

Cypress at ¶ 42,43, 257 P.3d 1168, 1179 (App. 2011)

Defendants provide no evidence that they complied with A.R.S §§ 9-500.12 & 9-500.13, and Defendants and their Attorneys concealed these violations from Fressadi and the Courts.

D. Arizona is Liable for Cave Creek's & Maricopa County's Misconduct

The State argues judicial immunity but did not dispute Fressadi's factual

allegations, and the District Court did not address the State's liability for Cave Creek or Maricopa County's misconduct or Judicial Takings. Factual allegations must be accepted as true, and the pleadings must be construed in the light most favorable to Fressadi, the Plaintiff. *Outdoor Media*, 506 F.3d at 900. *See also Carvajal v. United States*, ___F.3d ___, ___, 2008 WL 1043899, at *1 (9th Cir. 2008) ("Because the District Court dismissed the relevant claims under Federal Rule of Civil Procedure 12(b)(6), we accept as true the allegations in the complaint.") (citing *Knox v. Davis*, 260 F.3d 1009, 1012 (9th Cir. 2001)). See also *Cahill v. Liberty Mut. Ins. Co.,* 80 F.3d 336, 337-38 (9th Cir.1996).

Appellant alleges that the non-disclosure of Cave Creek concealing its violations of due process is so fundamental, that it undermined the workings of the adversary process in CV2006-014822 (Blakey, Oberbilling, Rea, Willett, Flores), CV2009-050821(Hauser, Fenzel), CA-CV 12-0238 (Gould, Brill), CV 13-0209, CV2009-050924 (Budoff), CA-CV 11-0051 (Kessler, Brill), LC2010-000109-001DT (Myers), CV2010-013401 (Rea), CV2010-029559, 4:11-bk-01161-EWH, CV2011-014289 (Willett), and CV2012-016136 (Rea).[76] AMRRP/Cave Creek and

[76] Contrary to the State's sweeping generalizations (Dkt. 35), Appellant argues that the State Judges named herein violated their oath of office by failing to uphold the Constitution. Claims against the State are for failing to provide an adequate post-deprivation remedy. If the judicial branch of the State of Arizona is systemically flawed, then it is a judicial takings. It is an "either / or" equation: Either Cave Creek, BMO, REEL, Golec, Vertes, DeVincenzo, and Charlie 2 perpetrated fraud on the court, or the State's judicial branch did not uphold the Constitution; a taking of Fressadi's property without just compensation. Maricopa County pays the salaries of Maricopa County Superior Court Judges. Contrary to vitriolic attack on Fressadi by the County, the allegations against the County are: a judicial taking complicit with the State, a taking based on taxing the subject property as a lot split

others concealed due process violations to prevent "a real contest before the court[s] of the subject matter of the suit[s]," or committed "some intentional act or conduct ... [that] has prevented the unsuccessful party from having a fair submission of the controversy," *Bates v. Bates,* 1 Ariz. App. 165, 169, 400 P.2d 593, 597 (1965); *see generally In re Villar,* 317 B.R. 88, 94 (B.A.P. 9th Cir. 2004) ("an order granted without adequate notice does not satisfy the requirements of due process of law and is therefore inevitably void"); 11 Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice & Procedure* § 2862, at 331 (2d ed. 1995 & Supp. 2012) (stating that a judgment is void[77] if the court "acted in a

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when the County knew it was an unlawful subdivision, and Sheriff Arpaio for unlawfully selling Fressadi's property and assaulting him.

[77] When a judgment is void, the "court has no discretion but to vacate" the judgment. *Martin*, 182 Ariz. at 14, 893 P.2d at 14; *see also Barlage v. Valentine*, 210 Ariz. 270, 272, ¶ 4, 110 P.3d 371, 373 (App. 2005). "There is no time limit in which a motion under Rule 60(c)(4) may be brought; the court must vacate a void judgment or order 'even if the party seeking relief delayed unreasonably.'" *Martin,* 182 at 14, 893 P.2d at 14 (quoting *Brooks v. Consolidated Freightways,* 173 Ariz. 66, 71, 839 P.2d 1111, 1116 (App. 1992)).

A court which makes a void order may at any time on its own motion or the motion of party move to set aside such void order. "The void judgment creates no binding obligation upon the parties, or their privies; it is legally ineffective." 7 Moore's Federal Practice § 60.25[2] (2d ch. 1955), p. 263, footnote #29. This rule of law is succinctly stated in Moore's Federal Practice, *supra*:

"The theory underlying the concept of a void judgment is that it is legally ineffective—a legal nullity; and may be vacated by the court which rendered it at any time. Laches of a party can not cure a judgment that is so defective as to be void; laches cannot infuse the judgment with life." 7 Moore's Federal Practice § 60.25[4] (2d ed. 1955), p. 274.

The U.S. Supreme Court stated that if a court is "without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification; and all persons concerned in executing such

manner inconsistent with due process of law"). See e.g. *IN RE STATE EX REL. KINGRY*, Ariz: Court of Appeals, 1st Div., Dept. E 2012. The limitations inherent in the requirements of due process and equal protection of the law extends to judicial as well as political branches of government so that a judgment may not be rendered in violation of those constitutional limitations and guarantees. *Hanson v Denckla*, 357 US 235, 2 L Ed 2d 1283, 78 S Ct 1228.

Under the Supremacy Clause of the U.S. Constitution, State laws or actions by state actors violating federal law are invalid. U.S. Const. art. VI, cl.2. *See Shaw v. Delta Air Lines,* 463 U.S. 85, 96 n.14 (1983). As such, concealing violations of procedural due process and property rights as protected by Federal law and codified in State statutes cannot be any more basic.

The concealment of Cave Creek's failure to follow A.R.S. §§ 9-500.12 and 9-500.13 caused the perfect storm. (Dkt. 1-1) [N]or be deprived of life, liberty, or property, without due process of law;[78] nor shall private property be taken for public use, without just compensation.[79] Appellant argues that the State's process for insuring rights to property and due process are not constitutionally adequate if AMRRP / Cave Creek can conceal its failure to follow State statutes and then obtain rulings from State Courts that any claim against Cave Creek is time-barred. *See Zinermon v. Burch*,

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judgments or sentences, are considered, in law, as trespassers." *Elliot v. Piersol,* 1 Pet. 328, 340, 26 U.S. 328, 340 (1828).

[78] Article 2 §4 of the Arizona Constitution.

[79] Article 2 §17 of the Arizona Constitution, Arizona's analogue to the Takings Clause, provides in relevant part: "No private property shall be taken or damaged for public or private use without just compensation having first been made[.]" This provision is not necessarily coextensive with its federal counterpart, *see Bailey v. Myers,* 206 Ariz. 224, 229, ¶ 20, 76 P.3d 898, 903 (App.2003).

494 U.S. 113, 126 (1990), ("[T]o determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate."). *See Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) ("[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.") (quotation marks and citation omitted). In most cases, "a meaningful time" means prior to the deprivation of the liberty or property right at issue. *Zinermon*, 494 U.S. at 127; *see also Caine v. Hardy*, 943 F.2d 1406, 1411-12 (5th Cir. 1991) ("Ordinarily, government may effect a deprivation only after it has accorded due process . . . ."). Fressadi was not accorded due process.

AMRRP is a collective of Arizona municipalities operating as a self-insurance pool for the last 26 years. A.R.S. §§ 9-500.12 and 9-500.13 were enacted in 1994. A preponderance of the evidence suggests that AMRRP has concealed due process violations to obtain favorable rulings from State's Judicial Branch for 21 years; that claims against municipalities were time-barred because property owners were not aware of their right to appeal or the appellate process. Although Arizona gives lip service to the U.S. Constitution being the Supreme Law of the land, the Judicial Branch has denied the constitutional rights of many by ruling in favor of the State's political subdivisions that claims are time-barred; "the law which was designed to prevent fraud [is] the means by which it is made successful and secure,"[80] in violation of Article 18 §6 of Arizona's Constitution. (Dkt. 42-2, Dkt 42-3) This case is a matter of first impression. This is the first time anyone in the

[80] *Bailey* at 349.

State of Arizona has argued that the statute of limitations is tolled if a municipality does not provide due process as required by A.R.S. §§ 9-500.12 and 9-500.13.

Appellant argues, as a result of the damage caused by Cave Creek failing to follow procedural due process as codified A.R.S. §§ 9-500.12 and 9-500.13 – and as a result of Cave Creek failing to abide by Arizona Constitution Article 2 §§ 4 & 17, the U.S. Constitution, and U.S. Supreme Court rulings as codified in A.R.S. § 9-500.13 – that Appellant was deprived of property without just compensation, causing a wipeout of his investment-backed expectations; that his property was damaged and/or taken; that the Sheriff of Maricopa County, in obedience to the State Superior Court of Arizona, sold Appellant's property in violation of A.R.S. § 9-463.03; and that the State's political subdivision, Maricopa County, assessed and collected taxes on Appellant's property "as if" it was a lawfully split. As such, Appellant argues that the State of Arizona is financially liable for violations of Federal law committed by the State's political subdivisions, especially when they conceal their violations to commit fraud on the court.

Cave Creek derives ***all*** of its powers to regulate property from the State. *Jinks v. Richland County*, 538 U.S. 456, 3 (2003) (Municipalities are not sovereign), *City of Scottsdale v. Superior Court*, 103 Ariz. 204,439 P.2d 290 (1968) (municipalities do not have sovereignty; they are an extension of state sovereignty-with no more power than what they are granted by the state).

Neither Cave Creek nor any State Court has the discretion to circumvent the Supreme law of the land. *U.S. v. Will*, 449 U.S. 200, 216, 101 S.Ct. 471, 66 L.Ed.2d 392, 406 (1980). See *Woods v. United States,* 724 F.2d 1444 (9th Cir.

1984). The *Woods* court declared simply that the argument that the state could not be liable for the city's misuse of delegated responsibilities would, if "taken to its logical extreme," allow "all State responsibility . . . [to] be effectively abrogated." *Id*. at 1448.

Appellant argues that rulings obtained by concealing due process violations to prevent post-deprivation remedies of just compensation are judicial takings.[81] See *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot. (Stop the Beach)*, 130 S. Ct. 2592, 2602 (2010)("the Takings Clause bars the State from taking private property without paying for it, no matter which branch is the instrument of the taking"). Justice Scalia opined in *Stop the Beach*[82] that the remedy for a judicial taking is not "just compensation" but rather an invalidation of the judicial decision depriving an owner of property (see pgs. 18-19 of the slip

[81] Fressadi argued Judicial Takings throughout the case: Dkt. 16 (Response to BMO's Notice of Removal); Dkt. 49 at 26 ¶126, 27 ¶129 (Plaintiff's Affidavit); Dkt. 90 at 1-3 (Response to State Motion to Dismiss); Dkt. 102 (Response to BMO's Motion to Dismiss); Dkt. 138 (Plaintiff's Motion to Reconsider Orders), all incorporated by reference herein. The concept of government takings derived from the Magna Carta cl. 28 (1215).

[82] *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 130 S. Ct. 2592 (2010) "If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation." *Id.;* see also *Smith v. United States*, 709 F.3d 1114, 1116-17 (Fed. Cir. 2013) (characterizing the plurality opinion in *Stop the Beach* as "recogniz[ing] that a takings claim [could] be based on the action of a court" and noting that, prior to *Stop the Beach*, academic discussion recognized "that judicial action could constitute a taking of property." (citing Barton H. Thompson, Jr., Judicial Takings, 76 Va. L. Rev. 1449 (1990)).

opinion). Scalia's opinion dovetails with case law that Court decisions are void[83] (Dkt. 1-1 at 9:19-25, 14:17 to 16:10).

However, voiding judgments is woefully inadequate as a post-deprivation remedy. In Italy, litigants can sue the State for compensation for judicial takings. The focus of Italy's system is to protect judges from harassing and vexing lawsuits. Upon determination that a judge committed an act to deny justice, fraudulently or with inexcusable negligence, and committed a manifest violation of EU law or a misrepresentation of fact or evidence, compensation will be granted to the victim.[84]

To prevent Federal Courts from being the Grand Mufti of local zoning boards, Appellant argues that Federal Courts should address judicial takings and fraud on the court in a manner similar to Italy's system of the state compensating victims of judicial abuse.

See Addendum for supporting statutes, ordinances, rules, and constitutions.

VII. CONCLUSION / RELIEF SOUGHT

Every municipal property owner in the State of Arizona is entitled to the opportunity to be heard at a meaningful time and a meaningful manner according to and in compliance with A.R.S. §§ 9-500.12 and 9-500.13. However, Appellant

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[83] A void judgment is not entitled to the respect accorded a valid adjudication, but may be entirely disregarded, or declared inoperative by any tribunal in which effect is sought to be given to it. It is attended by none of the consequences of a valid adjudication. It has no legal or binding force or efficacy for any purpose or at any place. ... It is not entitled to enforcement ... All proceedings founded on the void judgment are themselves regarded as invalid. 30A Am Jur Judgments " 44, 45.

[84] Law No. 117 of April 13, 1988, Indemnification of Damages Caused in the Exercise of Judicial Functions and Civil Liability of Judges, G. U. No. 88, NORMATTIVA art. 4(1).

was denied Equal Protection and due process to affect a Takings without just compensation. For reasons stated, Appellant's §1983 claims are not time-barred. All of the facts and law argued in this Opening Brief were available to the District Court. District Court blundered by confusing cause and effect. District Court did not even consider Appellant's pleadings regarding fraud on the court or Cave Creek's violations of A.R.S. §§ 9-500.12 and 9-500.13 as a §1983 claim, even though it was the core of the Complaint. (Dkt. 1-1 at 14-16)

A. For reasons stated, Appellant respectfully requests that the District Court's rulings be reversed and remanded to address the entirety of Appellant's claims.

B. Appellant respectfully requests a ruling that Cave Creek's concealment of its due process violations per A.R.S. §§ 9-500.12 and 9-500.13 harmed the integrity of the judicial process in CV2006-014822, CV2009-050821, CA-CV 12-0238, CV 13-0209, CV2009-050924, CA-CV 11-0051, CA-12-0213- PR, LC2010-000109-001DT, CV2010-013401, CV2010-029559, 4:11-bk-01161-EWH, CV2011-014289, and CV2012-016136, and that the rulings in these cases be vacated.

C. In the alternative, Appellant respectfully requests a ruling that the rulings in the above cases are judicial takings; that the State of Arizona failed to provide adequate post-deprivation remedies after Cave Creek concealed the Town's failure to follow due process and State law, such that the State of Arizona is financially liable for the taking of Fressadi's property without just compensation; for the complete wipe out of Appellant's investment-backed expectations and for actual, compensatory, punitive, and delay damages for all violations arising from Cave Creek concealing its failure to follow Federal and State law in keeping with the

intent of A.R.S. § 9-500.12(H) and §1.7(A) of Cave Creek's Zoning Ordinance.

D. Appellant respectfully requests a ruling striking the unlawful subdivisions of parcels 211-10-010 and 211-10-003.

E. Appellant respectfully requests an evidentiary hearing to determine just compensation for all takings, and temporary takings to include all zoning violations by Cave Creek; for actual, compensatory, punitive, and delay damages from Cave Creek, its surety AMRRP, Maricopa County, and the State of Arizona pursuant to A.R.S. §§ 12-821.01(B), (C), & (G), 9-500.12(H), and §1.7(A) of Cave Creek's Zoning Ordinance.

VIII. STATEMENT OF RELATED CASES

4:11-bk-01161-EWH

2:13-cv-00252-SLG

Dated: Tucson, Arizona, May 25, 2016.

/s/ Arek Fressadi
Arek Fressadi, Plaintiff-Appellant *pro se*

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NO. 15-15566

This brief is accompanied by a motion for leave to file an oversize brief pursuant to Circuit Rule 32-2 and is 21,786 words, measured with Microsoft Word 2003, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable.

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionally spaced, has a typeface of 14 points or more.

DATED: Tucson, Arizona, June 5, 2016.

/s/ Arek Fressadi
Arek Fressadi, Plaintiff-Appellant *pro se*

Docket No. 15-15566

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Opening Brief of Appellant Arek R. Fressadi was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 5, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Arek Fressadi
Arek Fressadi, Plaintiff-Appellant *pro se*

ADDENDUM

INDEX

Constitutions, Statutes, Ordinances, Codes, Rules, and Regulations

* In 2013, Fressadi discovered A.R.S. §§ 9-500.12 and 9-500.13, located in the "Miscellaneous" section of Title 9. See pages 3 & 4 of 7.

** Cave Creek Town Code, Title V § 50.016 regarding sewer reimbursement was passed on December 8, 2003, and deleted on January 11, 2009, after Fressadi sent the Town a Notice of Claim for reimbursement on October 24, 2008.

1984—Pub. L. 98–620, title IV, §402(29)(C), Nov. 8, 1984, 98 Stat. 3359, struck out item 1296 "Precedence of cases in the United States Court of Appeals for the Federal Circuit".

1982—Pub. L. 97–164, title I, §127(b), Apr. 2, 1982, 96 Stat. 39, added items 1295 and 1296.

1978—Pub. L. 95–598, title II, §236(b), Nov. 6, 1978, 92 Stat. 2667, directed the addition of item 1293, "Bankruptcy appeals", which amendment did not become effective pursuant to section 402(b) of Pub. L. 95–598, as amended, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

1961—Pub. L. 87–189, §4, Aug. 30, 1961, 75 Stat. 417, struck out item 1293 "Final decisions of Puerto Rico and Hawaii Supreme Courts".

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

(June 25, 1948, ch. 646, 62 Stat. 929; Oct. 31, 1951, ch. 655, §48, 65 Stat. 726; Pub. L. 85–508, §12(e), July 7, 1958, 72 Stat. 348; Pub. L. 97–164, title I, §124, Apr. 2, 1982, 96 Stat. 36.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§225(a), 933(a)(1), and section 1356 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions, and sections 61 and 62 of title 7 of the Canal Zone Code (Mar. 3, 1911, ch. 231, §128, 36 Stat. 1133; Aug. 24, 1912, ch. 390, §9, 37 Stat. 566; Jan. 28, 1915, ch. 22, §2, 38 Stat. 804; Feb. 7, 1925, ch. 150, 43 Stat. 813; Sept. 21, 1922, ch. 370, §3, 42 Stat. 1006; Feb. 13, 1925, ch. 229, §1, 43 Stat. 936; Jan. 31, 1928, ch. 14, §1, 45 Stat. 54; May 17, 1932, ch. 190, 47 Stat. 158; Feb. 16, 1933, ch. 91, §3, 47 Stat. 817; May 31, 1935, ch. 160, 49 Stat. 313; June 20, 1938, ch. 526, 52 Stat. 779; Aug. 2, 1946, ch. 753, §412(a)(1), 60 Stat. 844).

This section rephrases and simplifies paragraphs "First", "Second", and "Third" of section 225(a) of title 28, U.S.C., 1940 ed., which referred to each Territory and Possession separately, and to sections 61 and 62 of the Canal Zone Code, section 933(a)(1) of said title relating to jurisdiction of appeals in tort claims cases, and the provisions of section 1356 of title 48, U.S.C., 1940 ed., relating to jurisdiction of appeals from final judgments of the district court for the Canal Zone.

The district courts for the districts of Hawaii and Puerto Rico are embraced in the term "district courts of the United States." (See definitive section 451 of this title.)

Paragraph "Fourth" of section 225(a) of title 28, U.S.C., 1940 ed., is incorporated in section 1293 of this title.

Words "Fifth. In the United States Court for China, in all cases" in said section 225(a) were omitted. (See reviser's note under section 411 of this title.)

Venue provisions of section 1356 of title 48, U.S.C., 1940 ed., are incorporated in section 1295 of this title.

Section 61 of title 7 of the Canal Zone Code is also incorporated in sections 1291 and 1295 of this title.

In addition to the jurisdiction conferred by this chapter, the courts of appeals also have appellate jurisdiction in proceedings under Title 11, Bankruptcy, and jurisdiction to review:

(1) Orders of the Secretary of the Treasury denying an application for, suspending, revoking, or annulling a basic permit under chapter 8 of title 27;

(2) Orders of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Board of Governors of the Federal Reserve System and the Federal Trade Commission, based on violations of the antitrust laws or unfair or deceptive acts, methods, or practices in commerce;

(3) Orders of the Secretary of the Army under sections 504, 505 and 516 of title 33, U.S.C., 1940 ed., Navigation and Navigable Waters;

(4) Orders of the Civil Aeronautics Board under chapter 9 of title 49, except orders as to foreign air carriers which are subject to the President's approval;

(5) Orders under chapter 1 of title 7, refusing to designate boards of trade as contract markets or suspending or revoking such designations, or excluding persons from trading in contract markets;

(6) Orders of the Federal Power Commission under chapter 12 of title 16;

(7) Orders of the Federal Security Administrator under section 371(e) of title 21, in a case of actual controversy as to the validity of any such order, by any person adversely affected thereby;

(8) Orders of the Federal Power Commission under chapter 15B of title 15;

(9) Final orders of the National Labor Relations Board;

(10) Cease and desist orders under section 193 of title 7;

(11) Orders of the Securities and Exchange Commission;

(12) Orders to cease and desist from violating section 1599 of title 7;

(13) Wage orders of the Administrator of the Wage and Hour Division of the Department of Labor under section 208 of title 29;

(14) Orders under sections 81r and 1641 of title 19, U.S.C., 1940 ed., Customs Duties.

The courts of appeals also have jurisdiction to enforce:

(1) Orders of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Board of Governors of the Federal Reserve System, and the Federal Trade Commission, based on violations of the antitrust laws or unfair or deceptive acts, methods, or practices in commerce;

(2) Final orders of the National Labor Relations Board;

(3) Orders to cease and desist from violating section 1599 of title 7.

The Court of Appeals for the District of Columbia also has jurisdiction to review orders of the Post Office Department under section 576 of title 39 relating to discriminations in sending second-class publications by freight; Maritime Commission orders denying transfer to foreign registry of vessels under subsidy contract; sugar allotment orders; decisions of the Federal Communications Commission granting or refusing applications for construction permits for radio stations, or for radio station licenses, or for renewal or modification of radio station licenses, or suspending any radio operator's license.

Changes were made in phraseology.

AMENDMENTS

1982—Pub. L. 97–164, §124, inserted "(other than the United States Court of Appeals for the Federal Circuit)" after "The court of appeals" and inserted provision that the jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

1958—Pub. L. 85–508 struck out provisions which gave courts of appeals jurisdiction of appeals from District Court for Territory of Alaska. See section 81A of this title which establishes a United States District Court for the State of Alaska.

1951—Act Oct. 31, 1951, inserted reference to District Court of Guam.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97–164 effective Oct. 1, 1982, see section 402 of Pub. L. 97–164, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1958 AMENDMENT

Amendment by Pub. L. 85–508 effective Jan. 3, 1959, on admission of Alaska into the Union pursuant to Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c.16 as required by sections 1 and 8(c) of Pub. L. 85–508, see notes set out under section 81A of this title and preceding section 21 of Title 48, Territories and Insular Possessions.

TERMINATION OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE CANAL ZONE

For termination of the United States District Court for the District of the Canal Zone at end of the "transition period", being the 30-month period beginning Oct. 1, 1979, and ending midnight Mar. 31, 1982, see Paragraph 5 of Article XI of the Panama Canal Treaty of 1977 and sections 2101 and 2201 to 2203 of Pub. L. 96–70, title II, Sept. 27, 1979, 93 Stat. 493, formerly classified to sections 3831 and 3841 to 3843, respectively, of Title 22, Foreign Relations and Intercourse.

§ 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under section 1631 of this title.

(B) When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in

AMENDMENTS

2002—Pub. L. 107–273, div. C, title I, §11020(b)(1)(B), Nov. 2, 2002, 116 Stat. 1827, added item 1369.

1999—Pub. L. 106–113, div. B, §1000(a)(9) [title III, §3009(2)], Nov. 29, 1999, 113 Stat. 1536, 1501A–552, substituted "trademarks" for "trade-marks" in item 1338.

1998—Pub. L. 105–304, title V, §503(b)(2)(B), Oct. 28, 1998, 112 Stat. 2917, inserted "designs," after "mask works," in item 1338.

1995—Pub. L. 104–88, title III, §305(a)(4), Dec. 29, 1995, 109 Stat. 944, substituted "Surface Transportation Board's" for "Interstate Commerce Commission's" in item 1336.

1994—Pub. L. 103–465, title III, §321(b)(3)(B), Dec. 8, 1994, 108 Stat. 4947, added item 1368.

1990—Pub. L. 101–650, title III, §310(b), Dec. 1, 1990, 104 Stat. 5114, added item 1367.

1988—Pub. L. 100–702, title X, §1020(a)(7), Nov. 19, 1988, 102 Stat. 4672, substituted "Actions" for "Action" in item 1330, inserted a period after "question" in item 1331, substituted "plant variety protection, copyrights, mask works, trade-marks," for "copyrights, and trade-marks" in item 1338, and inserted "and elective franchise" in item 1343.

1986—Pub. L. 99–336, §6(a)(1)(A), June 19, 1986, 100 Stat. 638, renumbered item 1364 "Senate actions" and item 1364 "Construction of references to laws of the United States or Acts of Congress" as items 1365 and 1366, respectively.

1984—Pub. L. 98–353, title I, §101(b), July 10, 1984, 98 Stat. 333, substituted "cases" for "matters" in item 1334.

1980—Pub. L. 96–486, §2(b), Dec. 1, 1980, 94 Stat. 2369, struck out "; amount in controversy; costs." after "question" in item 1331.

1978—Pub. L. 95–598, title II, §238(b), Nov. 6, 1978, 92 Stat. 2668, directed the substitution of "Bankruptcy appeals" for "Bankruptcy matters and proceedings" in item 1334, which amendment did not become effective pursuant to section 402(b) of Pub. L. 95–598, as amended, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

Pub. L. 95–572, §6(b)(2), Nov. 2, 1978, 92 Stat. 2457, added item 1363 and redesignated former item 1363 "Construction of references to laws of the United States or Acts of Congress", as 1364.

Pub. L. 95–521, title VII, §705(f)(2), Oct. 26, 1978, 92 Stat. 1880, added item 1364 "Senate actions".

Pub. L. 95–486, §9(c), Oct. 20, 1978, 92 Stat. 1634, substituted "Commerce and antitrust regulations; amount in controversy, costs" for "Commerce and antitrust regulations" in item 1337.

Pub. L. 95–393, §§7(b), 8(a)(2), Sept. 30, 1978, 92 Stat. 810, substituted "Consuls, vice consuls, and members of a diplomatic mission as defendant" for "Consuls and vice consuls as defendants" in item 1351 and added item 1364 "Direct actions against insurers of members of diplomatic missions and their families".

1976—Pub. L. 94–583, §2(b), Oct. 21, 1976, 90 Stat. 2891, added item 1330.

1970—Pub. L. 91–358, title I, §172(c)(2), July 29, 1970, 84 Stat. 591, added item 1363.

1966—Pub. L. 89–635, §2, Oct. 10, 1966, 80 Stat. 880, added item 1362.

1962—Pub. L. 87–748, §1(b), Oct. 5, 1962, 76 Stat. 744, added item 1361.

1958—Pub. L. 85–554, §4, July 25, 1958, 72 Stat. 415, inserted "costs" in items 1331 and 1332.

1953—Act Aug. 15, 1953, ch. 505, §3, 67 Stat. 589, added item 1360.

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605–1607 of this title.

(Added Pub. L. 94–583, §2(a), Oct. 21, 1976, 90 Stat. 2891.)

EFFECTIVE DATE

Section effective 90 days after Oct. 21, 1976, see section 8 of Pub. L. 94–583, set out as a note under section 1602 of this title.

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

(June 25, 1948, ch. 646, 62 Stat. 930; Pub. L. 85–554, §1, July 25, 1958, 72 Stat. 415; Pub. L. 94–574, §2, Oct. 21, 1976, 90 Stat. 2721; Pub. L. 96–486, §2(a), Dec. 1, 1980, 94 Stat. 2369.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §41(1) (Mar. 3, 1911, ch. 231, §24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, §1, 48 Stat. 775; Aug. 21, 1937, ch. 726, §1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

Jurisdiction of federal questions arising under other sections of this chapter is not dependent upon the amount in controversy. (See annotations under former section 41 of title 28, U.S.C.A., and 35 C.J.S., p. 833 et seq., §§30–43. See, also, reviser's note under section 1332 of this title.)

Words "wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs," were added to conform to rulings of the Supreme Court. See construction of provision relating to jurisdictional amount requirement in cases involving a Federal question in *United States v. Sayward*, 16 S.Ct. 371, 160 U.S. 493, 40 L.Ed. 508; *Fishback v. Western Union Tel. Co.*, 16 S.Ct. 506, 161 U.S. 96, 40 L.Ed. 630; and *Halt v. Indiana Manufacturing Co.*, 1900, 20 S.Ct. 272, 176 U.S. 68, 44 L.Ed. 374.

Words "all civil actions" were substituted for "all suits of a civil nature, at common law or in equity" to conform with Rule 2 of the Federal Rules of Civil Procedure.

Words "or treaties" were substituted for "or treaties made, or which shall be made under their authority," for purposes of brevity.

The remaining provisions of section 41(1) of title 28, U.S.C., 1940 ed., are incorporated in sections 1332, 1341, 1342, 1345, 1354, and 1359 of this title.

Changes were made in arrangement and phraseology.

AMENDMENTS

1980—Pub. L. 96–486 struck out "; amount in controversy; costs" in section catchline, struck out minimum amount in controversy requirement of $10,000 for original jurisdiction in federal question cases which necessitated striking the exception to such required minimum amount that authorized original jurisdiction in actions brought against the United States, any agency thereof, or any officer or employee thereof in an official capacity, struck out provision authorizing the district court except where express provision therefore was made in a federal statute to deny costs to a plaintiff and in fact impose such costs upon such plaintiff where plaintiff was adjudged to be entitled to recover less than the required amount in controversy, computed without regard to set-off or counterclaim and exclusive of interests and costs, and struck out existing subsection designations.

1976—Subsec. (a). Pub. L. 94–574 struck out $10,000 jurisdictional amount where action is brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

1958—Pub. L. 85–554 included costs in section catchline, designated existing provisions as subsec. (a), substituted "$10,000" for "$3,000", and added subsec. (b).

EFFECTIVE DATE OF 1980 AMENDMENT; APPLICABILITY

Section 4 of Pub. L. 96–486 provided: "This Act [amending this section and section 2072 of Title 15, Commerce and Trade, and enacting provisions set out as a note under section 1 of this title] shall apply to any civil action pending on the date of enactment of this Act [Dec. 1, 1980]."

EFFECTIVE DATE OF 1958 AMENDMENT

Section 3 of Pub. L. 85–554 provided that: "This Act [amending this section and sections 1332 and 1345 of this title] shall apply only in the case of actions commenced after the date of the enactment of this Act [July 25, 1958]."

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d)(1) In this subsection—

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a for-

revenue from imports or tonnage except matters within the jurisdiction of the Court of International Trade.

(June 25, 1948, ch. 646, 62 Stat. 932; Pub. L. 96–417, title V, §501(21), Oct. 10, 1980, 94 Stat. 1742.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §41(5) (Mar. 3, 1911, ch. 231, §24, par. 5, 36 Stat. 1092; Mar. 2, 1929, ch. 488, §1, 45 Stat. 1475).

Words "Customs Court" were substituted for "Court of Customs and Patent Appeals." Section 41(5) of title 28, U.S.C., 1940 ed., is based on the Judicial Code of 1911. At that time the only court, other than the district courts, having jurisdiction of customs cases, was the Court of Customs Appeals which became the Court of Customs and Patent Appeals in 1929. The Customs Court was created in 1926 as a court of original jurisdiction over customs cases. (See reviser's note preceding section 251 of this title.)

Words "any civil action" were substituted for "all cases" in view of Rule 2 of the Federal Rules of Civil Procedure.

Changes were made in phraseology.

AMENDMENTS

1980—Pub. L. 96–417 redesignated the Customs Court as the Court of International Trade.

EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by Pub. L. 96–417 effective Nov. 1, 1980, and applicable with respect to civil actions pending on or commenced on or after such date, see section 701(a) of Pub. L. 96–417, set out as a note under section 251 of this title.

§ 1341. Taxes by States

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

(June 25, 1948, ch. 646, 62 Stat. 932.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §41(1) (Mar. 3, 1911, ch. 231, §24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, §1, 48 Stat. 775; Aug. 21, 1937, ch. 726, §1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

This section restates the last sentence of section 41(1) of title 28, U.S.C., 1940 ed.

Other provisions of section 41(1) of title 28, U.S.C., 1940 ed., are incorporated in sections 1331, 1332, 1342, 1345, 1354, and 1359 of this title.

Words "at law or in equity" before "in the courts of such State" were omitted as unnecessary.

Words "civil action" were substituted for "suit" in view of Rule 2 of the Federal Rules of Civil Procedure.

Words "under State law" were substituted for "imposed by or pursuant to the laws of any State" for the same reason.

§ 1342. Rate orders of State agencies

The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,

(2) The order does not interfere with interstate commerce; and,

(3) The order has been made after reasonable notice and hearing; and,

(4) A plain, speedy and efficient remedy may be had in the courts of such State.

(June 25, 1948, ch. 646, 62 Stat. 932.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §41(1) (Mar. 3, 1911, ch. 231, §24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, §1, 48 Stat. 775; Aug. 21, 1937, ch. 726, §1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

This section rearranges and restates the fourth sentence of section 41(1) of title 28, U.S.C., 1940 ed.

Other provisions of section 41(1) of title 28, U.S.C., 1940 ed., are incorporated in sections 1331, 1332, 1341, 1345, 1354, and 1359 of this title.

Words "at law or in equity" before "in the courts of such State" were omitted as unnecessary.

Words "civil action" were substituted for "suit," in view of Rule 2 of the Federal Rules of Civil Procedure.

Word "operation" was substituted for "enforcement, operation or execution" for the same reason.

§ 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section—

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(June 25, 1948, ch. 646, 62 Stat. 932; Sept. 3, 1954, ch. 1263, §42, 68 Stat. 1241; Pub. L. 85–315, part III, §121, Sept. 9, 1957, 71 Stat. 637; Pub. L. 96–170, §2, Dec. 29, 1979, 93 Stat. 1284.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §41(12), (13), and (14) (Mar. 3, 1911, ch. 231, §24, pars. 12, 13, 14, 36 Stat. 1092).

Words "civil action" were substituted for "suits," "suits at law or in equity" in view of Rule 2 of the Federal Rules of Civil Procedure.

Numerous changes were made in arrangement and phraseology.

AMENDMENTS

1979—Pub. L. 96–170 designated existing provisions as subsec. (a) and added subsec. (b).

1957—Pub. L. 85–315 inserted "and elective franchise" in section catchline and added par. (4).

1954—Act Sept. 3, 1954, substituted "section 1985 of Title 42" for "section 47 of Title 8" wherever appearing.

EFFECTIVE DATE OF 1979 AMENDMENT

Section 3 of Pub. L. 96–170 provided that: "The amendments made by this Act [amending this section and section 1983 of Title 42, The Public Health and Welfare] shall apply with respect to any deprivation of rights, privileges, or immunities secured by the Constitution and laws occurring after the date of the enactment of this Act [Dec. 29, 1979]."

§ 1344. Election disputes

The district courts shall have original jurisdiction of any civil action to recover possession of any office, except that of elector of President or Vice President, United States Senator, Representative in or delegate to Congress, or member of a state legislature, authorized by law to be commenced, where in it appears that the sole question touching the title to office arises out of denial of the right to vote, to any citizen offering to vote, on account of race, color or previous condition of servitude.

The jurisdiction under this section shall extend only so far as to determine the rights of the parties to office by reason of the denial of the right, guaranteed by the Constitution of the United States and secured by any law, to enforce the right of citizens of the United States to vote in all the States.

(June 25, 1948, ch. 646, 62 Stat. 932.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 41(15) (Mar. 3, 1911, ch. 231, § 24, par. 15, 36 Stat. 1092).

Words "civil action" were substituted for "suits," in view of Rule 2 of the Federal Rules of Civil Procedure.

Words "United States Senator" were added, as no reason appears for including Representatives and excluding Senators. Moreover, the Seventeenth amendment, providing for the popular election of Senators, was adopted after the passage of the 1911 law on which this section is based.

Changes were made in phraseology.

§ 1345. United States as plaintiff

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

(June 25, 1948, ch. 646, 62 Stat. 933.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 41(1) (Mar. 3, 1911, ch. 231, § 24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, § 1, 48 Stat. 775; Aug. 21, 1937, ch. 726, § 1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

Other provisions of section 41(1) of title 28, U.S.C., 1940 ed., are incorporated in sections 1331, 1332, 1341, 1342, 1354, and 1359 of this title.

Words "civil actions, suits or proceedings" were substituted for "suits of a civil nature, at common law or in equity" in view of Rules 2 and 81(a)(7) of the Federal Rules of Civil Procedure.

Word "agency" was inserted in order that this section shall apply to actions by agencies of the Government and to conform with special acts authorizing such actions. (See definitive section 451 of this title.)

The phrase "Except as otherwise provided by Act of Congress," at the beginning of the section was inserted to make clear that jurisdiction exists generally in district courts in the absence of special provisions conferring it elsewhere.

Changes were made in phraseology.

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(Added Pub. L. 91–358, title I, §172(c)(1), July 29, 1970, 84 Stat. 590, §1363; renumbered §1364, Pub. L. 95–572, §6(b)(1), Nov. 2, 1978, 92 Stat. 2456; renumbered §1366, Pub. L. 99–336, §6(a)(1)(C), June 19, 1986, 100 Stat. 639.)

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(Added Pub. L. 101–650, title III, §310(a), Dec. 1, 1990, 104 Stat. 5113.)

REFERENCES IN TEXT

The Federal Rules of Civil Procedure, referred to in subsec. (b), are set out in the Appendix to this title.

EFFECTIVE DATE

Section 310(c) of Pub. L. 101–650 provided that: "The amendments made by this section [enacting this section] shall apply to civil actions commenced on or after the date of the enactment of this Act [Dec. 1, 1990]."

§ 1368. Counterclaims in unfair practices in international trade.

The district courts shall have original jurisdiction of any civil action based on a counterclaim raised pursuant to section 337(c) of the Tariff Act of 1930, to the extent that it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim in the proceeding under section 337(a) of that Act.

(Added Pub. L. 103–465, title III, §321(b)(3)(A), Dec. 8, 1994, 108 Stat. 4946.)

REFERENCES IN TEXT

Section 337 of the Tariff Act of 1930, referred to in text, is classified to section 1337 of Title 19, Customs Duties.

EFFECTIVE DATE

Section applicable with respect to complaints filed under section 1337 of Title 19, Customs Duties, on or after the date on which the World Trade Organization Agreement enters into force with respect to the United States [Jan. 1, 1995], or in cases under section 1337 of Title 19 in which no complaint is filed, with respect to investigations initiated under such section on or after such date, see section 322 of Pub. L. 103–465, set out as an Effective Date of 1994 Amendment note under section 1337 of Title 19.

§ 1369. Multiparty, multiforum jurisdiction

(a) IN GENERAL.—The district courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 natural persons have died in the accident at a discrete location, if—

(1) a defendant resides in a State and a substantial part of the accident took place in another State or other location, regardless of whether that defendant is also a resident of the State where a substantial part of the accident took place;

(2) any two defendants reside in different States, regardless of whether such defendants are also residents of the same State or States; or

(3) substantial parts of the accident took place in different States.

(b) LIMITATION OF JURISDICTION OF DISTRICT COURTS.—The district court shall abstain from hearing any civil action described in subsection (a) in which—

(1) the substantial majority of all plaintiffs are citizens of a single State of which the primary defendants are also citizens; and

(2) the claims asserted will be governed primarily by the laws of that State.

(c) SPECIAL RULES AND DEFINITIONS.—For purposes of this section—

(1) minimal diversity exists between adverse parties if any party is a citizen of a State and any adverse party is a citizen of another State, a citizen or subject of a foreign state, or a foreign state as defined in section 1603(a) of this title;

(2) a corporation is deemed to be a citizen of any State, and a citizen or subject of any foreign state, in which it is incorporated or has its principal place of business, and is deemed to be a resident of any State in which it is in-

(5) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(d) INTERVENING PARTIES.—In any action in a district court which is or could have been brought, in whole or in part, under this section, any person with a claim arising from the accident described in subsection (a) shall be permitted to intervene as a party plaintiff in the action, even if that person could not have brought an action in a district court as an original matter.

(e) NOTIFICATION OF JUDICIAL PANEL ON MULTIDISTRICT LITIGATION.—A district court in which an action under this section is pending shall promptly notify the judicial panel on multidistrict litigation of the pendency of the action.

(Added Pub. L. 107–273, div. C, title I, § 11020(b)(1)(A), Nov. 2, 2002, 116 Stat. 1826.)

EFFECTIVE DATE

Pub. L. 107–273, div. C, title I, § 11020(c), Nov. 2, 2002, 116 Stat. 1829, provided that: "The amendments made by subsection (b) [enacting this section and sections 1697 and 1785 of this title and amending sections 1391 and 1441 of this title] shall apply to a civil action if the accident giving rise to the cause of action occurred on or after the 90th day after the date of the enactment of this Act [Nov. 2, 2002]."

CHAPTER 87—DISTRICT COURTS; VENUE

AMENDMENTS

2011—Pub. L. 112–63, title II, §§ 201(b), 203, Dec. 7, 2011, 125 Stat. 763, 764, added item 1390 and struck out item 1392 "Defendants or property in different districts in same State".

1998—Pub. L. 105–304, title V, § 503(c)(3), Oct. 28, 1998, 112 Stat. 2917 inserted ", mask works, and designs" in item 1400.

1996—Pub. L. 104–331, § 3(b)(2)(B), Oct. 26, 1996, 110 Stat. 4069, which directed amendment of table of sections for chapter 37 by adding item 1413 at end, was executed by adding item 1413 at end of table of sections for chapter 87 to reflect the probable intent of Congress.

1988—Pub. L. 100–702, title X, § 1001(a), Nov. 19, 1988, 102 Stat. 4664, struck out item 1393 "Divisions; single defendant; defendants in different divisions".

1984—Pub. L. 98–353, title I, § 102(b), July 10, 1984, 98 Stat. 335, added items 1408 to 1412.

1978—Pub. L. 95–598, title II, § 240(b), Nov. 6, 1978, 92 Stat. 2668, directed the addition of item 1408, "Bankruptcy appeals", which amendment did not become effective pursuant to section 402(b) of Pub. L. 95–598, as amended, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

1968—Pub. L. 90–296, § 2, Apr. 29, 1968, 82 Stat. 110, added item 1407.

§ 1390. Scope

(a) VENUE DEFINED.—As used in this chapter, the term "venue" refers to the geographic specification of the proper court or courts for the litigation of a civil action that is within the subject-matter jurisdiction of the district courts in general, and does not refer to any grant or restriction of subject-matter jurisdiction providing for a civil action to be adjudicated only by the district court for a particular district or districts.

(b) EXCLUSION OF CERTAIN CASES.—Except as otherwise provided by law, this chapter shall not govern the venue of a civil action in which the district court exercises the jurisdiction conferred by section 1333, except that such civil actions may be transferred between district courts as provided in this chapter.

(c) CLARIFICATION REGARDING CASES REMOVED FROM STATE COURTS.—This chapter shall not determine the district court to which a civil action pending in a State court may be removed, but shall govern the transfer of an action so removed as between districts and divisions of the United States district courts.

(Added Pub. L. 112–63, title II, § 201(a), Dec. 7, 2011, 125 Stat. 762.)

EFFECTIVE DATE

Pub. L. 112–63, title II, § 205, Dec. 7, 2011, 125 Stat. 764, provided that: "The amendments made by this title [enacting this section, amending sections 1391 and 1404 of this title, and repealing section 1392 of this title]—

"(1) shall take effect upon the expiration of the 30-day period beginning on the date of the enactment of this Act [Dec. 7, 2011]; and

"(2) shall apply to—

"(A) any action that is commenced in a United States district court on or after such effective date; and

"(B) any action that is removed from a State court to a United States district court and that had been commenced, within the meaning of State law, on or after such effective date."

§ 1391. Venue generally

(a) APPLICABILITY OF SECTION.—Except as otherwise provided by law—

(1) this section shall govern the venue of all civil actions brought in district courts of the United States; and

(2) the proper venue for a civil action shall be determined without regard to whether the action is local or transitory in nature.

(b) VENUE IN GENERAL.—A civil action may be brought in—

(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;

(2) a judicial district in which a substantial part of the events or omissions giving rise to

the claim occurred, or a substantial part of property that is the subject of the action is situated; or

(3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

(c) RESIDENCY.—For all venue purposes—

(1) a natural person, including an alien lawfully admitted for permanent residence in the United States, shall be deemed to reside in the judicial district in which that person is domiciled;

(2) an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question and, if a plaintiff, only in the judicial district in which it maintains its principal place of business; and

(3) a defendant not resident in the United States may be sued in any judicial district, and the joinder of such a defendant shall be disregarded in determining where the action may be brought with respect to other defendants.

(d) RESIDENCY OF CORPORATIONS IN STATES WITH MULTIPLE DISTRICTS.—For purposes of venue under this chapter, in a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

(e) ACTIONS WHERE DEFENDANT IS OFFICER OR EMPLOYEE OF THE UNITED STATES.—

(1) IN GENERAL.—A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (C) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

(2) SERVICE.—The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

(f) CIVIL ACTIONS AGAINST A FOREIGN STATE.—A civil action against a foreign state as defined in section 1603(a) of this title may be brought—

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

(g) MULTIPARTY, MULTIFORUM LITIGATION.—A civil action in which jurisdiction of the district court is based upon section 1369 of this title may be brought in any district in which any defendant resides or in which a substantial part of the accident giving rise to the action took place.

(June 25, 1948, ch. 646, 62 Stat. 935; Pub. L. 87–748, § 2, Oct. 5, 1962, 76 Stat. 744; Pub. L. 88–234, Dec. 23, 1963, 77 Stat. 473; Pub. L. 89–714, §§ 1, 2, Nov. 2, 1966, 80 Stat. 1111; Pub. L. 94–574, § 3, Oct. 21, 1976, 90 Stat. 2721; Pub. L. 94–583, § 5, Oct. 21, 1976, 90 Stat. 2897; Pub. L. 100–702, title X, § 1013(a), Nov. 19, 1988, 102 Stat. 4669; Pub. L. 101–650, title III, § 311, Dec. 1, 1990, 104 Stat. 5114; Pub. L. 102–198, § 3, Dec. 9, 1991, 105 Stat. 1623; Pub. L. 102–572, title V, § 504, Oct. 29, 1992, 106 Stat. 4513; Pub. L. 104–34, § 1, Oct. 3, 1995, 109 Stat. 293; Pub. L. 107–273, div. C, title I, § 11020(b)(2), Nov. 2, 2002, 116 Stat. 1827; Pub. L. 112–63, title II, § 202, Dec. 7, 2011, 125 Stat. 763.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 111, 112 (Mar. 3, 1911, ch. 231, §§ 50, 51, 36 Stat. 1101; Sept. 19, 1922, ch. 345, 42 Stat. 849; Mar. 4, 1925, ch. 526, § 1, 43 Stat. 1264; Apr. 16, 1936, ch. 230, 49 Stat. 1213).

Section consolidates section 111 of title 28, U.S.C., 1940 ed., with part of section 112 of such title.

The portion of section 112 of title 28, U.S.C., 1940 ed., relating to venue generally constitutes this section and the parts relating to arrest of the defendant, venue and process in stockholders' actions constitute sections 1401, 1693, and 1695 of this title.

Provision in section 111 of title 28, U.S.C., 1940 ed., that a district court may proceed as to parties before it although one or more defendants do not reside in the district, and that its judgment shall be without prejudice to such absent defendants, was omitted as covered by rule 19(b) of the Federal Rules of Civil Procedure.

Word "action" was substituted for "suit" in view of Rule 2 of the Federal Rules of Civil Procedure.

Word "reside" was substituted for "whereof he is an inhabitant" for clarity inasmuch as "inhabitant" and "resident" are synonymous. (See *Ex parte Shaw*, 1892, 12 S.Ct. 935, 145 U.S. 444, 36 L.Ed. 768; *Standard Stoker Co., Inc. v. Lower*, D.C., 1931, 46 F.2d 678; *Edgewater Realty Co.*

v. Tennessee Coal, Iron & Railroad Co., D.C., 1943, 49 F.Supp. 807.)

Reference to "all plaintiffs" and "all defendants" were substituted for references to "the plaintiff" and "the defendant," in view of many decisions holding that the singular terms were used in a collective sense. (See *Smith v. Lyon*, 1890, 10 S.Ct. 303, 133 U.S. 315, 33 L.Ed. 635; *Hooe v. Jamieson*, 1897, 17 S.Ct. 596, 166 U.S. 395, 41 L.Ed. 1049; and *Fetzer v. Livermore*, D.C., 1926, 15 F.2d 462.)

In subsection (c), references to defendants "found" within a district or voluntarily appearing were omitted. The use of the word "found" made section 111 of title 28, U.S.C., 1940 ed., ambiguous. The argument that an action could be brought in the district where one defendant resided and a nonresident defendant was "found," was rejected in *Camp v. Gress*, 1919, 39 S.Ct. 478, 250 U.S. 308, 63 L.Ed. 997. However, this ambiguity will be obviated in the future by the omission of such reference.

Subsection (d) of this section is added to give statutory recognition to the weight of authority concerning a rule of venue as to which there has been a sharp conflict of decisions. (See *Sandusky Foundry & Machine Co. v. DeLavand*, 1918, D.C.Ohio, 251 F. 631, 632, and cases cited. See also *Keating v. Pennsylvania Co.*, 1917, D.C.Ohio, 245 F. 155 and cases cited.)

Changes were made in phraseology.

REFERENCES IN TEXT

The Federal Rules of Civil Procedure, referred to in subsec. (e), are set out in the Appendix to this title.

AMENDMENTS

2011—Subsecs. (a) to (d). Pub. L. 112–63, §202(1), added subsecs. (a) to (d) and struck out former subsecs. (a) to (d) which related to venue when jurisdiction is founded only on diversity of citizenship, when jurisdiction is not founded solely on diversity of citizenship, when a defendant is a corporation, and when an alien is sued, respectively.

Subsec. (e). Pub. L. 112–63, §202(2), inserted subsec. heading, substituted "(A)", "(B)", and "(C)" for "(1)", "(2)", and "(3)", respectively, in first par., designated first and second pars. as pars. (1) and (2), respectively, and inserted par. headings.

Subsec. (f). Pub. L. 112–63, §202(3), inserted heading.

Subsec. (g). Pub. L. 112–63, §202(4), inserted heading.

2002—Subsec. (g). Pub. L. 107–273 added subsec. (g).

1995—Subsec. (a)(3). Pub. L. 104–34 substituted "any defendant is" for "the defendants are".

1992—Subsec. (a)(3). Pub. L. 102–572 inserted before period at end ", if there is no district in which the action may otherwise be brought".

1991—Subsec. (b). Pub. L. 102–198 substituted "in (1)" for "if (1)".

1990—Subsec. (a). Pub. L. 101–650, §311(1), substituted cls. (1) to (3) for "the judicial district where all plaintiffs or all defendants reside, or in which the claim arose".

Subsec. (b). Pub. L. 101–650, §311(2), substituted "may, except as otherwise provided by law, be brought only if" and cls. (1) to (3) for "may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law".

Subsec. (e). Pub. L. 101–650, §311(3), substituted "(2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3)" for "or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4)".

1988—Subsec. (c). Pub. L. 100–702 amended subsec. (c) generally. Prior to amendment, subsec. (c) read as follows: "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

1976—Subsec. (e). Pub. L. 94–574 provided that, in actions against the United States, its agencies, or officers or employees in their official capacities, additional persons may be joined in accordance with the Federal Rules of Civil Procedure and with other venue requirements which would be applicable if the United States, its agencies, or one of its officers or employees were not a party.

Subsec. (f). Pub. L. 94–583 added subsec. (f).

1966—Subsec. (a). Pub. L. 89–714, §1, authorized a civil action to be brought in the judicial district in which the claim arose.

Subsec. (b). Pub. L. 89–714, §1, authorized a civil action to be brought in the judicial district in which the claim arose.

Subsec. (f). Pub. L. 89–714, §2, repealed subsec. (f) which permitted a civil action on a tort claim arising out of the manufacture, assembly, repair, ownership, maintenance, use, or operation of an automobile to be brought in the judicial district wherein the act or omission complained of occurred. Present provisions are now contained in subsecs. (a) and (b) of this section.

1963—Subsec. (f). Pub. L. 88–234 added subsec. (f)

1962—Subsec. (e). Pub. L. 87–748 added subsec. (e).

EFFECTIVE DATE OF 2011 AMENDMENT

Amendment by Pub. L. 112–63 effective upon the expiration of the 30-day period beginning on Dec. 7, 2011, and applicable to any action commenced in a United States district court on or after such effective date, and to any action removed from a State court to a United States district court that had been commenced, within the meaning of State law, on or after such effective date, see section 205 of Pub. L. 112–63, set out as an Effective Date note under section 1390 of this title.

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107–273 applicable to a civil action if the accident giving rise to the cause of action occurred on or after the 90th day after Nov. 2, 2002, see section 11020(c) of Pub. L. 107–273, set out as an Effective Date note under section 1369 of this title.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102–572 effective Jan. 1, 1993, see section 1101(a) of Pub. L. 102–572, set out as a note under section 905 of Title 2, The Congress.

EFFECTIVE DATE OF 1988 AMENDMENT

Section 1013(b) of title X of Pub. L. 100–702 provided that: "The amendment made by this section [amending this section] takes effect 90 days after the date of enactment of this title [Nov. 19, 1988]."

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94–583 effective 90 days after Oct. 21, 1976, see section 8 of Pub. L. 94–583, set out as an Effective Date note under section 1602 of this title.

[§ 1392. Repealed. Pub. L. 112–63, §203, Dec. 7, 2011, 125 Stat. 764]

Section, act June 25, 1948, ch. 646, 62 Stat. 935; Pub. L. 104–220, §1, Oct. 1, 1996, 110 Stat. 3023, related to defendants or property in different districts in the same State.

EFFECTIVE DATE OF REPEAL

Repeal by Pub. L. 112–63 effective upon the expiration of the 30-day period beginning on Dec. 7, 2011, and applicable to any action commenced in a United States district court on or after such effective date, and to any action removed from a State court to a United States district court that had been commenced, within the meaning of State law, on or after such effective date, see section 205 of Pub. L. 112–63, set out as an Effective Date note under section 1390 of this title.

the purposes of this order as the order applies to programs administered by it; and is directed to cooperate with the Committee, to furnish it, in accordance with law, such information and assistance as it may request in the performance of its functions, and to report to it at such intervals as the Committee may require.

SEC. 203. Each such department and agency shall, within thirty days from the date of this order, issue such rules and regulations, adopt such procedures and policies, and make such exemptions and exceptions as may be consistent with law and necessary or appropriate to effectuate the purposes of this order. Each such department and agency shall consult with the Committee in order to achieve such consistency and uniformity as may be feasible.

PART III—ENFORCEMENT

SEC. 301. The Committee, any subcommittee thereof, and any officer or employee designated by any executive department or agency subject to this order may hold such hearings, public or private, as the Committee, department, or agency may deem advisable for compliance, enforcement, or educational purposes.

SEC. 302. If any executive department or agency subject to this order concludes that any person or firm (including but not limited to any individual, partnership, association, trust, or corporation) or any State or local public agency has violated any rule, regulation, or procedure issued or adopted pursuant to this order, or any nondiscrimination provision included in any agreement or contract pursuant to any such rule, regulation, or procedure, it shall endeavor to end and remedy such violation by informal means, including conference, conciliation, and persuasion unless similar efforts made by another Federal department or agency have been unsuccessful. In conformity with rules, regulations, procedures, or policies issued or adopted by it pursuant to Section 203 hereof, a department or agency may take such action as may be appropriate under its governing laws, including, but not limited to, the following:

It may—

(a) cancel or terminate in whole or in part any agreement or contract with such person, firm, or State or local public agency providing for a loan, grant, contribution, or other Federal aid, or for the payment of a commission or fee;

(b) refrain from extending any further aid under any program administered by it and affected by this order until it is satisfied that the affected person, firm, or State or local public agency will comply with the rules, regulations, and procedures issued or adopted pursuant to this order, and any nondiscrimination provisions included in any agreement or contract;

(c) refuse to approve a lending institution or any other lender as a beneficiary under any program administered by it which is affected by this order or revoke such approval if previously given.

SEC. 303. In appropriate cases executive departments and agencies shall refer to the Attorney General violations of any rules, regulations, or procedures issued or adopted pursuant to this order, or violations of any nondiscrimination provisions included in any agreement or contract, for such civil or criminal action as he may deem appropriate. The Attorney General is authorized to furnish legal advice concerning this order to the Committee and to any department or agency requesting such advice.

SEC. 304. Any executive department or agency affected by this order may also invoke the sanctions provided in Section 302 where any person or firm, including a lender, has violated the rules, regulations, or procedures issued or adopted pursuant to this order, or the nondiscrimination provisions included in any agreement or contract, with respect to any program affected by this order administered by any other executive department or agency.

PART IV—ESTABLISHMENT OF THE PRESIDENT'S COMMITTEE ON EQUAL OPPORTUNITY IN HOUSING

[Revoked. Ex. Ord. No. 12259, Dec. 31, 1980, 46 F.R. 1253; Ex. Ord. No. 12892, §6–604, Jan. 17, 1994, 59 F.R. 2939.]

PART V—POWERS AND DUTIES OF THE PRESIDENT'S COMMITTEE ON EQUAL OPPORTUNITY IN HOUSING

SEC. 501. [Revoked. Ex. Ord. No. 12259, Dec. 31, 1980, 46 F.R. 1253; Ex. Ord. No. 12892, §6–604, Jan. 17, 1994, 59 F.R. 2939.]

SEC. 502. (a) The Committee shall take such steps as it deems necessary and appropriate to promote the coordination of the activities of departments and agencies under this order. In so doing, the Committee shall consider the overall objectives of Federal legislation relating to housing and the right of every individual to participate without discrimination because of race, color, religion (creed), sex, disability, familial status or national origin in the ultimate benefits of the Federal programs subject to this order.

(b) The Committee may confer with representatives of any department or agency, State or local public agency, civic, industry, or labor group, or any other group directly or indirectly affected by this order; examine the relevant rules, regulations, procedures, policies, and practices of any department or agency subject to this order and make such recommendations as may be necessary or desirable to achieve the purposes of this order.

(c) The Committee shall encourage educational programs by civic, educational, religious, industry, labor, and other nongovernmental groups to eliminate the basic causes of discrimination in housing and related facilities provided with Federal assistance.

SEC. 503. [Revoked. Ex. Ord. No. 12259, Dec. 31, 1980, 46 F.R. 1253; Ex. Ord. No. 12892, §6–604, Jan. 17, 1994, 59 F.R. 2939.]

PART VI—MISCELLANEOUS

SEC. 601. As used in this order, the term "departments and agencies" includes any wholly-owned or mixed-ownership Government corporation, and the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and the territories of the United States.

SEC. 602. This order shall become effective immediately.

[Functions of President's Committee on Equal Opportunity in Housing under Ex. Ord. No. 11063 delegated to Secretary of Housing and Urban Development by Ex. Ord. No. 12892, §6–604(a), Jan. 17, 1994, 59 F.R. 2939, set out as a note under section 3608 of this title.]

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. §1979; Pub. L. 96–170, §1, Dec. 29, 1979, 93 Stat. 1284; Pub. L. 104–317, title III, §309(c), Oct. 19, 1996, 110 Stat. 3853.)

CODIFICATION

R.S. §1979 derived from act Apr. 20, 1871, ch. 22, §1, 17 Stat. 13.

Section was formerly classified to section 43 of Title 8, Aliens and Nationality.

AMENDMENTS

1996—Pub. L. 104–317 inserted before period at end of first sentence ", except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable".

1979—Pub. L. 96–170 inserted "or the District of Columbia" after "Territory", and provisions relating to Acts of Congress applicable solely to the District of Columbia.

EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96–170 applicable with respect to any deprivation of rights, privileges, or immunities secured by the Constitution and laws occurring after Dec. 29, 1979, see section 3 of Pub. L. 96–170, set out as a note under section 1343 of Title 28, Judiciary and Judicial Procedure.

§ 1984. Omitted

CODIFICATION

Section, act Mar. 1, 1875, ch. 114, §5, 18 Stat. 337, which was formerly classified to section 46 of Title 8, Aliens and Nationality, related to Supreme Court review of cases arising under act Mar. 1, 1875. Sections 1 and 2 of act Mar. 1, 1875 were declared unconstitutional in *U.S. v. Singleton*, 109 U.S. 3, and sections 3 and 4 of such act were repealed by act June 25, 1948, ch. 645, §21, 62 Stat. 862.

§ 1985. Conspiracy to interfere with civil rights

(1) Preventing officer from performing duties

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

(R.S. §1980.)

CODIFICATION

R.S. §1980 derived from acts July 31, 1861, ch. 33, 12 Stat. 284; Apr. 20, 1871, ch. 22, §2, 17 Stat. 13.

Section was formerly classified to section 47 of Title 8, Aliens and Nationality.

§ 1986. Action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not

commenced within one year after the cause of action has accrued.

(R.S. § 1981.)

CODIFICATION

R.S. § 1981 derived from act Apr. 20, 1871, ch. 22, § 6, 17 Stat. 15.

Section was formerly classified to section 48 of Title 8, Aliens and Nationality.

§ 1987. Prosecution of violation of certain laws

The United States attorneys, marshals, and deputy marshals, the United States magistrate judges appointed by the district and territorial courts, with power to arrest, imprison, or bail offenders, and every other officer who is especially empowered by the President, are authorized and required, at the expense of the United States, to institute prosecutions against all persons violating any of the provisions of section 1990 of this title or of sections 5506 to 5516 and 5518 to 5532 of the Revised Statutes, and to cause such persons to be arrested, and imprisoned or bailed, for trial before the court of the United States or the territorial court having cognizance of the offense.

(R.S. § 1982; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; June 25, 1948, ch. 646, § 1, 62 Stat. 909; Pub. L. 90–578, title IV, § 402(b)(2), Oct. 17, 1968, 82 Stat. 1118; Pub. L. 101–650, title III, § 321, Dec. 1, 1990, 104 Stat. 5117.)

REFERENCES IN TEXT

Sections 5506 to 5510, 5516 to 5519 and 5524 to 5535 of the Revised Statutes, referred to in text, were repealed by act Mar. 4, 1909, ch. 321, § 341, 35 Stat. 1153; section 5506, 5511 to 5515, and 5520 to 5523, also referred to in text, were repealed by act Feb. 8, 1894, ch. 25, § 1, 28 Stat. 37. The provisions of sections 5508, 5510, 5516, 5518 and 5524 to 5532 of the Revised Statutes were reenacted by act Mar. 4, 1909, and classified to sections 51, 52, 54 to 59, 246, 428 and 443 to 445 of former Title 18, Criminal Code and Criminal Procedure. Those sections were repealed and reenacted as sections 241, 242, 372, 592, 593, 752, 1071, 1581, 1583 and 1588 of Title 18, Crimes and Criminal Procedure, in the general revision of Title 18 by act June 25, 1948, ch. 645, 62 Stat. 683.

CODIFICATION

R.S. § 1982 derived from acts Apr. 9, 1866, ch. 31, § 4, 14 Stat. 28; May 31, 1870, Ch. 114, § 9, 16 Stat. 142.

Section was formerly classified to section 49 of Title 8, Aliens and Nationality.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, substituted "United States attorneys" for "district attorneys". See section 541 of Title 28, Judiciary and Judicial Procedure, and Historical and Revision Notes thereunder.

"United States magistrate judges" substituted in text for "magistrates" pursuant to section 321 of Pub. L. 101–650, set out as a note under section 631 of Title 28. Previously, "magistrates" substituted for "commissioners" pursuant to Pub. L. 90–578. See chapter 43 (§ 631 et seq.) of Title 28.

Reference to the district courts substituted for reference to the circuit courts on authority of section 291 of act Mar. 3, 1911.

§ 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

(R.S. § 722; Pub. L. 94–559, § 2, Oct. 19, 1976, 90 Stat. 2641; Pub. L. 96–481, title II, § 205(c), Oct. 21, 1980, 94 Stat. 2330; Pub. L. 102–166, title I, §§ 103, 113(a), Nov. 21, 1991, 105 Stat. 1074, 1079; Pub. L. 103–141, § 4(a), Nov. 16, 1993, 107 Stat. 1489; Pub. L. 103–322, title IV, § 40303, Sept. 13, 1994, 108 Stat. 1942; Pub. L. 104–317, title III, § 309(b), Oct. 19, 1996, 110 Stat. 3853; Pub. L. 106–274, § 4(d), Sept. 22, 2000, 114 Stat. 804.)

REFERENCES IN TEXT

Title 13 of the Revised Statutes, referred to in subsec. (a), was in the original "this Title" meaning title 13 of the Revised Statutes, consisting of R.S. §§ 530 to 1093. For complete classification of R.S. §§ 530 to 1093 to the Code, see Tables.

Title 24 of the Revised Statutes, referred to in subsec. (a), was in the original "Title 'CIVIL RIGHTS,'" meaning title 24 of the Revised Statutes, consisting of R.S. §§ 1977 to 1991, which are classified to sections 1981 to 1983, 1985 to 1987, and 1989 to 1994 of this title. For complete classification of R.S. §§ 1977 to 1991 to the Code, see Tables.

Title 70 of the Revised Statutes, referred to in subsec. (a), was in the original "Title 'CRIMES,'" meaning title 70 of the Revised Statutes, consisting of R.S. §§ 5323 to

5550. For complete classification of R.S. §§5323 to 5550, see Tables.

Title IX of Public Law 92–318, referred to in subsec. (b), is title IX of Pub. L. 92–318, June 23, 1972, 86 Stat. 373, as amended, known as the Patsy Takemoto Mink Equal Opportunity in Education Act, which is classified principally to chapter 38 (§1681 et seq.) of Title 20, Education. For complete classification of title IX to the Code, see Short Title note set out under section 1681 of Title 20 and Tables.

The Religious Freedom Restoration Act of 1993, referred to in subsec. (b), is Pub. L. 103–141, Nov. 16, 1993, 107 Stat. 1488, which is classified principally to chapter 21B (§2000bb et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2000bb of this title and Tables.

The Religious Land Use and Institutionalized Persons Act of 2000, referred to in subsec. (b), is Pub. L. 106–274, Sept. 22, 2000, 114 Stat. 803, which is classified principally to chapter 21C (§2000cc et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2000cc of this title and Tables.

The Civil Rights Act of 1964, referred to in subsec. (b), is Pub. L. 88–352, July 2, 1964, 78 Stat. 241, as amended. Title VI of the Civil Rights Act of 1964 is classified generally to subchapter V (§2000d et seq.) of this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2000a of this title and Tables.

CODIFICATION

R.S. §722 derived from acts Apr. 9, 1866, ch. 31, §3, 14 Stat. 27; May 31, 1870, ch. 114, §18, 16 Stat. 144.

Section was formerly classified to section 729 of Title 28 prior to the general revision and enactment of Title 28, Judiciary and Judicial Procedure, by act June 25, 1948, ch. 646, §1, 62 Stat. 869.

AMENDMENTS

2000—Subsec. (b). Pub. L. 106–274 inserted "the Religious Land Use and Institutionalized Persons Act of 2000," after "Religious Freedom Restoration Act of 1993," and deleted comma after "section 13981 of this title,".

1996—Subsec. (b). Pub. L. 104–317 inserted before period at end ", except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction".

1994—Subsec. (b). Pub. L. 103–322, which directed the amendment of the last sentence of this section by striking "or" after "92–318," and by inserting ", or section 13981 of this title," after "1964", was executed to subsec. (b) of this section by striking "or" after "Act of 1993," and by inserting ", or section 13981 of this title," after "1964", to reflect the probable intent of Congress and amendments by Pub. L. 102–166 and Pub. L. 103–141. See 1993 and 1991 Amendment notes below.

1993—Subsec. (b). Pub. L. 103–141 inserted "the Religious Freedom Restoration Act of 1993," before "or title VI".

1991—Subsec. (a). Pub. L. 102–166, §113(a)(1), designated first sentence of existing provisions as subsec. (a).

Subsec. (b). Pub. L. 102–166, §§103, 113(a)(1), designated second sentence of existing provisions as subsec. (b) and inserted "1981a," after "1981,".

Subsec. (c). Pub. L. 102–166, §113(a)(2), added subsec. (c).

1980—Pub. L. 96–481 struck out "or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code,".

1976—Pub. L. 94–559 authorized the court, in its discretion, to allow a reasonable attorney's fee as part of the prevailing party's costs.

EFFECTIVE DATE OF 1991 AMENDMENT

Amendment by Pub. L. 102–166 effective Nov. 21, 1991, except as otherwise provided, see section 402 of Pub. L. 102–166, set out as a note under section 1981 of this title.

EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by Pub. L. 96–481 effective Oct. 1, 1981, and applicable to adversary adjudication as defined in section 504(b)(1)(C) of Title 5, Government Organization and Employees, and to civil actions and adversary adjudications described in section 2412 of Title 28, Judiciary and Judicial Procedure, which are pending on, or commenced on or after Oct. 1, 1981, see section 208 of Pub. L. 96–481, set out as an Effective Date note under section 2412 of Title 28.

SHORT TITLE OF 1976 AMENDMENT

Pub. L. 94–559, §1, Oct. 19, 1976, 90 Stat. 2641, provided: "That this Act [amending this section] may be cited as 'The Civil Rights Attorney's Fees Awards Act of 1976'."

§1989. United States magistrate judges; appointment of persons to execute warrants

The district courts of the United States and the district courts of the Territories, from time to time, shall increase the number of United States magistrate judges, so as to afford a speedy and convenient means for the arrest and examination of persons charged with the crimes referred to in section 1987 of this title; and such magistrate judges are authorized and required to exercise all the powers and duties conferred on them herein with regard to such offenses in like manner as they are authorized by law to exercise with regard to other offenses against the laws of the United States. Said magistrate judges are empowered, within their respective counties, to appoint, in writing, under their hands, one or more suitable persons, from time to time, who shall execute all such warrants or other process as the magistrate judges may issue in the lawful performance of their duties, and the persons so appointed shall have authority to summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged; and such warrants shall run and be executed anywhere in the State or Territory within which they are issued.

(R.S. §§1983, 1984; Mar. 3, 1911, ch. 231, §291, 36 Stat. 1167; Pub. L. 90–578, title IV, §402(b)(2), Oct. 17, 1968, 82 Stat. 1118; Pub. L. 101–650, title III, §321, Dec. 1, 1990, 104 Stat. 5117.)

CODIFICATION

R.S. §§1983 and 1984 derived from acts Apr. 9, 1866, ch. 31, §§4, 5, 14 Stat. 28; May 31, 1870, ch. 114, §§9, 10, 16 Stat. 142.

Section was formerly classified to section 50 of Title 8, Aliens and Nationality.

CHANGE OF NAME

"United States magistrate judges" and "magistrate judges" substituted in text for "magistrates" wherever appearing pursuant to section 321 of Pub. L. 101–650, set out as a note under section 631 of Title 28, Judiciary and Judicial Procedure. Previously, "magistrates" substituted for "commissioners" pursuant to Pub. L. 90–578. See chapter 43 (§631 et seq.) of Title 28.

"District courts" substituted for "circuit courts" on authority of section 291 of act Mar. 3, 1911.

U.S. CONSTITUTION – Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. CONSTITUTION – Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONSTITUTION – Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONSTITUTION – Article VI

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.
This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

(3) an answer to a counterclaim designated as a counterclaim;
(4) an answer to a crossclaim;
(5) a third-party complaint;
(6) an answer to a third-party complaint; and
(7) if the court orders one, a reply to an answer.

(b) MOTIONS AND OTHER PAPERS.

(1) *In General*. A request for a court order must be made by motion. The motion must:
(A) be in writing unless made during a hearing or trial;
(B) state with particularity the grounds for seeking the order; and
(C) state the relief sought.

(2) *Form*. The rules governing captions and other matters of form in pleadings apply to motions and other papers.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Apr. 28, 1983, eff. Aug. 1, 1983; Apr. 30, 2007, eff. Dec. 1, 2007.)

Rule 7.1. Disclosure Statement

(a) WHO MUST FILE; CONTENTS. A nongovernmental corporate party must file 2 copies of a disclosure statement that:
(1) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or
(2) states that there is no such corporation.

(b) TIME TO FILE; SUPPLEMENTAL FILING. A party must:
(1) file the disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court; and
(2) promptly file a supplemental statement if any required information changes.

(As added Apr. 29, 2002, eff. Dec. 1, 2002; amended Apr. 30, 2007, eff. Dec. 1, 2007.)

Rule 8. General Rules of Pleading

(a) CLAIM FOR RELIEF. A pleading that states a claim for relief must contain:
(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(b) DEFENSES; ADMISSIONS AND DENIALS.

(1) *In General*. In responding to a pleading, a party must:
(A) state in short and plain terms its defenses to each claim asserted against it; and
(B) admit or deny the allegations asserted against it by an opposing party.

(2) *Denials—Responding to the Substance*. A denial must fairly respond to the substance of the allegation.

(3) *General and Specific Denials*. A party that intends in good faith to deny all the allegations of a pleading—including the jurisdictional grounds—may do so by a general denial. A party

that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

(4) *Denying Part of an Allegation*. A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) *Lacking Knowledge or Information*. A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

(6) *Effect of Failing to Deny*. An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) AFFIRMATIVE DEFENSES.

(1) *In General*. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

(2) *Mistaken Designation*. If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

(d) PLEADING TO BE CONCISE AND DIRECT; ALTERNATIVE STATEMENTS; INCONSISTENCY.

(1) *In General*. Each allegation must be simple, concise, and direct. No technical form is required.

(2) *Alternative Statements of a Claim or Defense*. A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) *Inconsistent Claims or Defenses*. A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) CONSTRUING PLEADINGS. Pleadings must be construed so as to do justice.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007; Apr. 28, 2010, eff. Dec. 1, 2010.)

Rule 9. Pleading Special Matters

(a) CAPACITY OR AUTHORITY TO SUE; LEGAL EXISTENCE.

(1) *In General*. Except when required to show that the court has jurisdiction, a pleading need not allege:

(A) a party's capacity to sue or be sued;

(B) a party's authority to sue or be sued in a representative capacity; or

(C) the legal existence of an organized association of persons that is made a party.

(2) *Raising Those Issues*. To raise any of those issues, a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge.

(b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

(c) CONDITIONS PRECEDENT. In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.

(d) OFFICIAL DOCUMENT OR ACT. In pleading an official document or official act, it suffices to allege that the document was legally issued or the act legally done.

(e) JUDGMENT. In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it suffices to plead the judgment or decision without showing jurisdiction to render it.

(f) TIME AND PLACE. An allegation of time or place is material when testing the sufficiency of a pleading.

(g) SPECIAL DAMAGES. If an item of special damage is claimed, it must be specifically stated.

(h) ADMIRALTY OR MARITIME CLAIM.

(1) *How Designated*. If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated.

(2) *Designation for Appeal*. A case that includes an admiralty or maritime claim within this subdivision (h) is an admiralty case within 28 U.S.C. §1292(a)(3).

(As amended Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 30, 1970, eff. July 1, 1970; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007.)

attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) *Motion for Sanctions.* A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) *On the Court's Initiative.* On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) *Nature of a Sanction.* A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) *Limitations on Monetary Sanctions.* The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) *Requirements for an Order.* An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) INAPPLICABILITY TO DISCOVERY. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

(As amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 30, 2007, eff. Dec. 1, 2007.)

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) TIME TO SERVE A RESPONSIVE PLEADING.

(1) *In General.* Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent,

or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) *United States and Its Agencies, Officers, or Employees Sued in an Official Capacity*. The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) *United States Officers or Employees Sued in an Individual Capacity*. A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) *Effect of a Motion*. Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) HOW TO PRESENT DEFENSES. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;
(2) lack of personal jurisdiction;
(3) improper venue;
(4) insufficient process;
(5) insufficient service of process;
(6) failure to state a claim upon which relief can be granted; and
(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) MOTION FOR JUDGMENT ON THE PLEADINGS. After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) RESULT OF PRESENTING MATTERS OUTSIDE THE PLEADINGS. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All

parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) MOTION FOR A MORE DEFINITE STATEMENT. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) MOTION TO STRIKE. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) JOINING MOTIONS.

(1) *Right to Join*. A motion under this rule may be joined with any other motion allowed by this rule.

(2) *Limitation on Further Motions*. Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) WAIVING AND PRESERVING CERTAIN DEFENSES.

(1) *When Some Are Waived*. A party waives any defense listed in Rule 12(b)(2)–(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) *When to Raise Others*. Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) *Lack of Subject-Matter Jurisdiction*. If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) HEARING BEFORE TRIAL. If a party so moves, any defense listed in Rule 12(b)(1)–(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)

of the preliminary matters, injustice result. Accordingly, in order to prevent any such unjust result, the committee intends the rule to be construed to provide that the accused may subject himself to cross-examination as to issues raised by his own testimony upon a preliminary matter before a jury.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—2011 AMENDMENT

The language of Rule 104 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 105. Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes

If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1930; Apr. 26, 2011, eff. Dec. 1, 2011.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

A close relationship exists between this rule and Rule 403 which requires exclusion when ''probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.'' The present rule recognizes the practice of admitting evidence for a limited purpose and instructing the jury accordingly. The availability and effectiveness of this practice must be taken into consideration in reaching a decision whether to exclude for unfair prejudice under Rule 403. In *Bruton v. United States*, 389 U.S. 818, 88 S.Ct. 126, 19 L.Ed.2d 70 (1968), the Court ruled that a limiting instruction did not effectively protect the accused against the prejudicial effect of admitting in evidence the confession of a codefendant which implicated him. The decision does not, however, bar the use of limited admissibility with an instruction where the risk of prejudice is less serious.

Similar provisions are found in Uniform Rule 6; California Evidence Code §355; Kansas Code of Civil Procedure §60–406; New Jersey Evidence Rule 6. The wording of the present rule differs, however, in repelling any implication that limiting or curative instructions are sufficient in all situations.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

Rule 106 as submitted by the Supreme Court (now Rule 105 in the bill) dealt with the subject of evidence which is admissible as to one party or for one purpose but is not admissible against another party or for another purpose. The Committee adopted this Rule without change on the understanding that it does not affect the authority of a court to order a severance in a multi-defendant case.

COMMITTEE NOTES ON RULES—2011 AMENDMENT

The language of Rule 105 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 106. Remainder of or Related Writings or Recorded Statements

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1930; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 26, 2011, eff. Dec. 1, 2011.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The rule is an expression of the rule of completeness. McCormick §56. It is manifested as to depositions in Rule 32(a)(4) of the Federal Rules of Civil Procedure, of which the proposed rule is substantially a restatement.

The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial. See McCormick §56; California Evidence Code §356. The rule does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case.

For practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—2011 AMENDMENT

The language of Rule 106 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE II. JUDICIAL NOTICE

Rule 201. Judicial Notice of Adjudicative Facts

(a) SCOPE. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) KINDS OF FACTS THAT MAY BE JUDICIALLY NOTICED. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) TAKING NOTICE. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) TIMING. The court may take judicial notice at any stage of the proceeding.

(e) OPPORTUNITY TO BE HEARD. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) INSTRUCTING THE JURY. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the

court must instruct the jury that it may or may not accept the noticed fact as conclusive.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1930; Apr. 26, 2011, eff. Dec. 1, 2011.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Subdivision (a). This is the only evidence rule on the subject of judicial notice. It deals only with judicial notice of ''adjudicative'' facts. No rule deals with judicial notice of ''legislative'' facts. Judicial notice of matters of foreign law is treated in Rule 44.1 of the Federal Rules of Civil Procedure and Rule 26.1 of the Federal Rules of Criminal Procedure.

The omission of any treatment of legislative facts results from fundamental differences between adjudicative facts and legislative facts. Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body. The terminology was coined by Professor Kenneth Davis in his article An Approach to Problems of Evidence in the Administrative Process, 55 Harv.L.Rev. 364, 404–407 (1942). The following discussion draws extensively upon his writings. In addition, see the same author's Judicial Notice, 55 Colum.L. Rev. 945 (1955); Administrative Law Treatise, ch. 15 (1958); A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69 (1964).

The usual method of establishing adjudicative facts in through the introduction of evidence, ordinarily consisting of the testimony of witnesses. If particular facts are outside of reasonable controversy, this process is dispensed with as unnecessary. A high degree of indisputability is the essential prerequisite.

Legislative facts are quite different. As Professor Davis says:

''My opinion is that judge-made law would stop growing if judges, in thinking about questions of law and policy, were forbidden to take into account the facts they believe, as distinguished from facts which are 'clearly * * * within the domain of the indisputable.' Facts most needed in thinking about difficult problems of law and policy have a way of being outside the domain of the clearly indisputable.'' A System of Judicial Notice Based on Fairness and Convenience, *supra*, at 82. An illustration is *Hawkins v. United States*, 358 U.S. 74, 79 S.Ct. 136, 3 L.Ed.2d 125 (1958), in which the Court refused to discard the common law rule that one spouse could not testify against the other, saying, ''Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage.'' This conclusion has a large intermixture of fact, but the factual aspect is scarcely ''indisputable.'' See Hutchins and Slesinger, Some Observations on the Law of Evidence—Family Relations, 13 Minn.L.Rev. 675 (1929). If the destructive effect of the giving of adverse testimony by a spouse is not indisputable, should the Court have refrained from considering it in the absence of supporting evidence?

''If the Model Code or the Uniform Rules had been applicable, the Court would have been barred from thinking about the essential factual ingredient of the problems before it, and such a result would be obviously intolerable. What the law needs as its growing points is more, not less, judicial thinking about the factual ingredients of problems of what the law ought to be, and the needed facts are seldom 'clearly' indisputable.'' Davis, *supra*, at 83.

''Professor Morgan gave the following description of the methodology of determining domestic law:

''In determining the content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present. * * * [T]he parties do no more than to assist; they control no part of the process.'' Morgan, Judicial Notice, 57 Harv.L.Rev. 269, 270–271 (1944).

This is the view which should govern judicial access to legislative facts. It renders inappropriate any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level. It should, however, leave open the possibility of introducing evidence through regular channels in appropriate situations. See *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 55 S.Ct. 187, 79 L.Ed. 281 (1934), where the cause was remanded for the taking of evidence as to the economic conditions and trade practices underlying the New York Milk Control Law.

Similar considerations govern the judicial use of nonadjudicative facts in ways other than formulating laws and rules. Thayer described them as a part of the judicial reasoning process.

''In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved; and the capacity to do this with competent judgement and efficiency, is imputed to judges and juries as part of their necessary mental outfit.'' Thayer, Preliminary Treatise on Evidence 279–280 (1898).

As Professor Davis points out, A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69, 73 (1964), every case involves the use of hundreds or thousands of non-evidence facts. When a witness in an automobile accident case says ''car,'' everyone, judge and jury included, furnishes, from non-evidence sources within himself, the supplementing information that the ''car'' is an automobile, not a railroad car, that it is self-propelled, probably by an internal combustion engine, that it may be assumed to have four wheels with pneumatic rubber tires, and so on. The judicial process cannot construct every case from scratch, like Descartes creating a world based on the postulate *Cogito, ergo sum.* These items could not possibly be introduced into evidence, and no one suggests that they be. Nor are they appropriate subjects for any formalized treatment of judicial notice of facts. See Levin and Levy, Persuading the Jury with Facts Not in Evidence: The Fiction-Science Spectrum, 105 U.Pa.L.Rev. 139 (1956).

Another aspect of what Thayer had in mind is the use of non-evidence facts to appraise or assess the adjudicative facts of the case. Pairs of cases from two jurisdictions illustrate this use and also the difference between non-evidence facts thus used and adjudicative facts. In *People v. Strook*, 347 Ill. 460, 179 N.E. 821 (1932), venue in Cook County had been held not established by testimony that the crime was committed at 7956 South Chicago Avenue, since judicial notice would not be taken that the address was in Chicago. However, the same court subsequently ruled that venue in Cook County was established by testimony that a crime occurred at 8900 South Anthony Avenue, since notice would be taken of the common practice of omitting the name of the city when speaking of local addresses, and the witness was testifying in Chicago. *People v. Pride*, 16 Ill.2d 82, 156 N.E.2d 551 (1951). And in *Hughes v. Vestal*, 264 N.C. 500, 142 S.E.2d 361 (1965), the Supreme Court of North Carolina disapproved the trial judge's admission in evidence of a state-published table of automobile stopping distances on the basis of judicial notice, though the court itself had referred to the same table in an earlier case in a ''rhetorical and illustrative'' way in determining that the defendant could not have stopped her car in time to avoid striking a child who suddenly appeared in the highway and that a non-suit was properly granted. *Ennis v. Dupree*, 262 N.C. 224, 136 S.E.2d 702 (1964). See also *Brown v. Hale*, 263 N.C. 176, 139 S.E.2d 210 (1964); *Clayton v. Rimmer*, 262 N.C. 302, 136 S.E.2d 562 (1964). It is apparent that this use of non-evidence facts in evaluating the adjudicative facts of the case is not an appro-

priate subject for a formalized judicial notice treatment.

In view of these considerations, the regulation of judicial notice of facts by the present rule extends only to adjudicative facts.

What, then, are ''adjudicative'' facts? Davis refers to them as those ''which relate to the parties,'' or more fully:

''When a court or an agency finds facts concerning the immediate parties—who did what, where, when, how, and with what motive or intent—the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts. * * *

''Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses.'' 2 Administrative Law Treatise 353.

Subdivision (b). With respect to judicial notice of adjudicative facts, the tradition has been one of caution in requiring that the matter be beyond reasonable controversy. This tradition of circumspection appears to be soundly based, and no reason to depart from it is apparent. As Professor Davis says:

''The reason we use trial-type procedure, I think, is that we make the practical judgement, on the basis of experience, that taking evidence, subject to cross-examination and rebuttal, is the best way to resolve controversies involving disputes of adjudicative facts, that is, facts pertaining to the parties. The reason we require a determination on the record is that we think fair procedure in resolving disputes of adjudicative facts calls for giving each party a chance to meet in the appropriate fashion the facts that come to the tribunal's attention, and the appropriate fashion for meeting disputed adjudicative facts includes rebuttal evidence, cross-examination, usually confrontation, and argument (either written or oral or both). The key to a fair trial is opportunity to use the appropriate weapons (rebuttal evidence, cross-examination, and argument) to meet adverse materials that come to the tribunal's attention.'' A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69, 93 (1964).

The rule proceeds upon the theory that these considerations call for dispensing with traditional methods of proof only in clear cases. Compare Professor Davis' conclusion that judicial notice should be a matter of convenience, subject to requirements of procedural fairness. *Id.*, 94.

This rule is consistent with Uniform Rule 9(1) and (2) which limit judicial notice of facts to those ''so universally known that they cannot reasonably be the subject of dispute,'' those ''so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute,'' and those ''capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy.'' The traditional textbook treatment has included these general categories (matters of common knowledge, facts capable of verification), McCormick §§324, 325, and then has passed on into detailed treatment of such specific topics as facts relating to the personnel and records of the court, *Id.* §327, and other governmental facts, *Id.* §328. The California draftsmen, with a background of detailed statutory regulation of judicial notice, followed a somewhat similar pattern. California Evidence Code §§451, 452. The Uniform Rules, however, were drafted on the theory that these particular matters are included within the general categories and need no specific mention. This approach is followed in the present rule.

The phrase ''propositions of generalized knowledge,'' found in Uniform Rule 9(1) and (2) is not included in the present rule. It was, it is believed, originally included in Model Code Rules 801 and 802 primarily in order to afford some minimum recognition to the right of the judge in his ''legislative'' capacity (not acting as the trier of fact) to take judicial notice of very limited categories of generalized knowledge. The limitations thus imposed have been discarded herein as undesirable, unworkable, and contrary to existing practice. What is left, then, to be considered, is the status of a ''proposition of generalized knowledge'' as an ''adjudicative'' fact to be noticed judicially and communicated by the judge to the jury. Thus viewed, it is considered to be lacking practical significance. While judges use judicial notice of ''propositions of generalized knowledge'' in a variety of situations: determining the validity and meaning of statutes, formulating common law rules, deciding whether evidence should be admitted, assessing the sufficiency and effect of evidence, all are essentially nonadjudicative in nature. When judicial notice is seen as a significant vehicle for progress in the law, these are the areas involved, particularly in developing fields of scientific knowledge. See McCormick 712. It is not believed that judges now instruct juries as to ''propositions of generalized knowledge'' derived from encyclopedias or other sources, or that they are likely to do so, or, indeed, that it is desirable that they do so. There is a vast difference between ruling on the basis of judicial notice that radar evidence of speed is admissible and explaining to the jury its principles and degree of accuracy, or between using a table of stopping distances of automobiles at various speeds in a judicial evaluation of testimony and telling the jury its precise application in the case. For cases raising doubt as to the propriety of the use of medical texts by lay triers of fact in passing on disability claims in administrative proceedings, see *Sayers v. Gardner*, 380 F.2d 940 (6th Cir. 1967); *Ross v. Gardner*, 365 F.2d 554 (6th Cir. 1966); *Sosna v. Celebrezze*, 234 F.Supp. 289 (E.D.Pa. 1964); *Glendenning v. Ribicoff*, 213 F.Supp. 301 (W.D.Mo. 1962).

Subdivisions (c) and (d). Under subdivision (c) the judge has a discretionary authority to take judicial notice, regardless of whether he is so requested by a party. The taking of judicial notice is mandatory, under subdivision (d), only when a party requests it and the necessary information is supplied. This scheme is believed to reflect existing practice. It is simple and workable. It avoids troublesome distinctions in the many situations in which the process of taking judicial notice is not recognized as such.

Compare Uniform Rule 9 making judicial notice of facts universally known mandatory without request, and making judicial notice of facts generally known in the jurisdiction or capable of determination by resort to accurate sources discretionary in the absence of request but mandatory if request is made and the information furnished. But see Uniform Rule 10(3), which directs the judge to decline to take judicial notice if available information fails to convince him that the matter falls clearly within Uniform Rule 9 or is insufficient to enable him to notice it judicially. Substantially the same approach is found in California Evidence Code §§451–453 and in New Jersey Evidence Rule 9. In contrast, the present rule treats alike all adjudicative facts which are subject to judicial notice.

Subdivision (e). Basic considerations of procedural fairness demand an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter noticed. The rule requires the granting of that opportunity upon request. No formal scheme of giving notice is provided. An adversely affected party may learn in advance that judicial notice is in contemplation, either by virtue of being served with a copy of a request by another party under subdivision (d) that judicial notice be taken, or through an advance indication by the judge. Or he may have no advance notice at all. The likelihood of the latter is enhanced by the frequent failure to recognize judicial notice as such. And in the absence of advance notice, a request made after the fact could not in fairness be considered untimely. See the provision for hearing on timely request in the Administrative Procedure Act, 5 U.S.C. §556(e). See also Revised Model State Administrative Procedure Act (1961), 9C U.L.A. §10(4) (Supp. 1967).

Subdivision (f). In accord with the usual view, judicial notice may be taken at any stage of the proceedings,

whether in the trial court or on appeal. Uniform Rule 12; California Evidence Code §459; Kansas Rules of Evidence §60–412; New Jersey Evidence Rule 12; McCormick §330, p. 712.

Subdivision (g). Much of the controversy about judicial notice has centered upon the question whether evidence should be admitted in disproof of facts of which judicial notice is taken.

The writers have been divided. Favoring admissibility are Thayer, Preliminary Treatise on Evidence 308 (1898); 9 Wigmore §2567; Davis, A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law, 69, 76–77 (1964). Opposing admissibility are Keeffe, Landis and Shaad, Sense and Nonsense about Judicial Notice, 2 Stan.L.Rev. 664, 668 (1950); McNaughton, Judicial Notice—Excerpts Relating to the Morgan-Whitmore Controversy, 14 Vand.L.Rev. 779 (1961); Morgan, Judicial Notice, 57 Harv.L.Rev. 269, 279 (1944); McCormick 710–711. The Model Code and the Uniform Rules are predicated upon indisputability of judicially noticed facts.

The proponents of admitting evidence in disproof have concentrated largely upon legislative facts. Since the present rule deals only with judicial notice of adjudicative facts, arguments directed to legislative facts lose their relevancy.

Within its relatively narrow area of adjudicative facts, the rule contemplates there is to be no evidence before the jury in disproof. The judge instructs the jury to take judicially noticed facts as established. This position is justified by the undesirable effects of the opposite rule in limiting the rebutting party, though not his opponent, to admissible evidence, in defeating the reasons for judicial notice, and in affecting the substantive law to an extent and in ways largely unforeseeable. Ample protection and flexibility are afforded by the broad provision for opportunity to be heard on request, set forth in subdivision (e).

Authority upon the propriety of taking judicial notice against an accused in a criminal case with respect to matters other than venue is relatively meager. Proceeding upon the theory that the right of jury trial does not extend to matters which are beyond reasonable dispute, the rule does not distinguish between criminal and civil cases. *People v. Mayes*, 113 Cal. 618, 45 P. 860 (1896); *Ross v. United States*, 374 F.2d 97 (8th Cir. 1967). Cf. *State v. Main*, 94 R.I. 338, 180 A.2d 814 (1962); *State v. Lawrence*, 120 Utah 323, 234 P.2d 600 (1951).

Note on Judicial Notice of Law. By rules effective July 1, 1966, the method of invoking the law of a foreign country is covered elsewhere. Rule 44.1 of the Federal Rules of Civil Procedure; Rule 26.1 of the Federal Rules of Criminal Procedure. These two new admirably designed rules are founded upon the assumption that the manner in which law is fed into the judicial process is never a proper concern of the rules of evidence but rather of the rules of procedure. The Advisory Committee on Evidence, believing that this assumption is entirely correct, proposes no evidence rule with respect to judicial notice of law, and suggests that those matters of law which, in addition to foreign-country law, have traditionally been treated as requiring pleading and proof and more recently as the subject of judicial notice be left to the Rules of Civil and Criminal Procedure.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

Rule 201(g) as received from the Supreme Court provided that when judicial notice of a fact is taken, the court shall instruct the jury to accept that fact as established. Being of the view that mandatory instruction to a jury in a criminal case to accept as conclusive any fact judicially noticed is inappropriate because contrary to the spirit of the Sixth Amendment right to a jury trial, the Committee adopted the 1969 Advisory Committee draft of this subsection, allowing a mandatory instruction in civil actions and proceedings and a discretionary instruction in criminal cases.

COMMITTEE NOTES ON RULES—2011 AMENDMENT

The language of Rule 201 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE III. PRESUMPTIONS IN CIVIL CASES

Rule 301. Presumptions in Civil Cases Generally

In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1931; Apr. 26, 2011, eff. Dec. 1, 2011.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

This rule governs presumptions generally. See Rule 302 for presumptions controlled by state law and Rule 303 [deleted] for those against an accused in a criminal case.

Presumptions governed by this rule are given the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption establishes the basic facts giving rise to it. The same considerations of fairness, policy, and probability which dictate the allocation of the burden of the various elements of a case as between the prima facie case of a plaintiff and affirmative defenses also underlie the creation of presumptions. These considerations are not satisfied by giving a lesser effect to presumptions. Morgan and Maguire, Looking Backward and Forward at Evidence, 50 Harv.L.Rev. 909, 913 (1937); Morgan, Instructing the Jury upon Presumptions and Burdon of Proof, 47 Harv.L.Rev. 59, 82 1933); Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stan.L.Rev. 5 (1959).

The so-called ''bursting bubble'' theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions too ''slight and evanescent'' an effect. Morgan and Maguire, *supra*, at p. 913.

In the opinion of the Advisory Committee, no constitutional infirmity attends this view of presumptions. In *Mobile, J. & K.C.R. Co. v. Turnipseed*, 219 U.S. 35, 31 S.Ct. 136, 55 L.Ed. 78 (1910), the Court upheld a Mississippi statute which provided that in actions against railroads proof of injury inflicted by the running of trains should be prima facie evidence of negligence by the railroad. The injury in the case had resulted from a derailment. The opinion made the points (1) that the only effect of the statute was to impose on the railroad the duty of producing some evidence to the contrary, (2) that an inference may be supplied by law if there is a rational connection between the fact proved and the fact presumed, as long as the opposite party is not precluded from presenting his evidence to the contrary, and (3) that considerations of public policy arising from the character of the business justified the application in question. Nineteen years later, in *Western & Atlantic R. Co. v. Henderson*, 279 U.S. 639, 49 S.Ct. 445, 73 L.Ed. 884 (1929), the Court overturned a Georgia statute making railroads liable for damages done by trains, unless the railroad made it appear that reasonable care had been used, the presumption being against the railroad. The declaration alleged the death of plaintiff's husband from a grade crossing collision, due to specified acts of negligence by defendant. The jury were instructed that

FRAP 4. APPEAL AS OF RIGHT—WHEN TAKEN

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(A) A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger.

(B) A monospaced face may not contain more than 10½ characters per inch.

(6) Type Styles. A brief must be set in a plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

(7) Length.

(A) Page limitation. A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B) and (C).

(B) Type-volume limitation.

(i) A principal brief is acceptable if:

- it contains no more than 14,000 words; or
- it uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type volume specified in Rule 32(a)(7)(B)(i).

(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation.

(C) Certificate of compliance.

(i) A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

- the number of words in the brief; or
- the number of lines of monospaced type in the brief.

(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rules 28.1(e)(3) and 32(a)(7)(C)(i).

(b) Form of an Appendix. An appendix must comply with Rule 32(a)(1), (2), (3), and (4), with the following exceptions:

(1) The cover of a separately bound appendix must be white.

(2) An appendix may include a legible photocopy of any document found in the record or of a printed judicial or agency decision.

(3) When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 8½ by 11 inches, and need not lie reasonably flat when opened.

(c) Form of Other Papers.

(1) Motion. The form of a motion is governed by Rule 27(d).

(2) Other Papers. Any other paper, including a petition for panel rehearing and a petition for hearing or rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

(A) A cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2). If a cover is used, it must be white.

(B) Rule 32(a)(7) does not apply.

(d) Signature. Every brief, motion, or other paper filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys.

(e) Local Variation. Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005.)

CIRCUIT RULE 32. FORM OF BRIEF

[Abrogated 1/1/99]

See FRAP 32. Form of Briefs, Appendices, and Other Papers on page 125, effective December 1, 1998.

CIRCUIT RULE 32-1. FORM OF BRIEFS: CERTIFICATE OF COMPLIANCE

All briefs submitted under Circuit Rule 28-4 or Circuit Rule 32-4, must include a certificate with language identical to and a format substantially similar to Form 8 in the Appendix of Forms attached to these rules. *(Rev. 12/1/02)*

CIRCUIT RULE 32-2. MOTIONS TO EXCEED THE PAGE OR TYPE-VOLUME LIMITATION

The Court looks with disfavor on motions to exceed the applicable page or type-volume limitations. Such motions will be granted only upon a showing of diligence and substantial need. A motion for permission to exceed the page or type-volume limitations set forth at FRAP 32(a)(7) (A) or (B) must be filed on or before the brief's due date and must be accompanied by a declaration stating in detail the reasons for the motion.

Any such motions shall be accompanied by a single copy of the brief the applicant proposes to file and a Form 8 certification as required by Circuit Rule 32-1 as to the line or word count. The cost of preparing and revising the brief will not be considered by the Court in ruling on the motion.

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 32-2

If the Court does not grant the requested relief or grants the relief only in part, the Court ordinarily will provide the party a reasonable interval after the entry of the order to file a brief as directed by the Court. Any order that decides a motion will make adjustments to the due date(s) for any further briefing. (Rev. 1/1/07)

CIRCUIT RULE 32-3. BRIEFS FILED PURSUANT TO COURT ORDER

All briefs filed pursuant to court order must conform to the format requirements of FRAP 32.

If an order of this Court sets forth a page limit, the affected party may comply with the limit by

(1) filing a monospaced brief of the designated number of pages, or

(2) filing a monospaced brief for which the number of lines divided by 26 does not exceed the designated page limit, or

(3) filing a monospaced or proportionally spaced brief in which the word count, divided by 280, does not exceed the designated page limit.

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1. Fundamental principles; recurrence to

Section 1. A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.

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2. Political power; purpose of government
Section 2. All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

2.1. Victims' bill of rights

Section 2.1. (A) To preserve and protect victims' rights to justice and due process, a victim of crime has a right:

1. To be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process.
2. To be informed, upon request, when the accused or convicted person is released from custody or has escaped.
3. To be present at and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present.
4. To be heard at any proceeding involving a post-arrest release decision, a negotiated plea, and sentencing.
5. To refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant.
6. To confer with the prosecution, after the crime against the victim has been charged, before trial or before any disposition of the case and to be informed of the disposition.
7. To read pre-sentence reports relating to the crime against the victim when they are available to the defendant.
8. To receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury.
9. To be heard at any proceeding when any post-conviction release from confinement is being considered.
10. To a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence.
11. To have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights and to have these rules be subject to amendment or repeal by the legislature to ensure the protection of these rights.
12. To be informed of victims' constitutional rights.

(B) A victim's exercise of any right granted by this section shall not be grounds for dismissing any criminal proceeding or setting aside any conviction or sentence.

(C) "Victim" means a person against whom the criminal offense has been committed or, if the person is killed or incapacitated, the person's spouse, parent, child or other lawful representative, except if the person is in custody for an offense or is the accused.

(D) The legislature, or the people by initiative or referendum, have the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section, including the authority to extend any of these rights to juvenile proceedings.

(E) The enumeration in the constitution of certain rights for victims shall not be construed to deny or disparage others granted by the legislature or retained by victims.

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3. Supreme law of the land; authority to exercise sovereign authority against federal action; use of government personnel and financial resources

Section 3. A. The Constitution of the United States is the supreme law of the land to which all government, state and federal, is subject.

B. To protect the people's freedom and to preserve the checks and balances of the United States Constitution, this state may exercise its sovereign authority to restrict the actions of its personnel and the use of its financial resources to purposes that are consistent with the constitution by doing any of the following:

1. Passing an initiative or referendum pursuant to article IV, part 1, section 1.
2. Passing a bill pursuant to article IV, part 2 and article V, section 7.
3. Pursuing any other available legal remedy.

C. If the people or their representatives exercise their authority pursuant to this section, this state and all political subdivisions of this state are prohibited from using any personnel or financial resources to enforce, administer or cooperate with the designated federal action or program.

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4. Due process of law

Section 4. No person shall be deprived of life, liberty, or property without due process of law.

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6. Freedom of speech and press

Section 6. Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

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8. Right to privacy

Section 8. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

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9. Irrevocable grants of privileges, franchises or immunities

Section 9. No law granting irrevocably any privilege, franchise, or immunity shall be enacted.

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11. Administration of justice

Section 11. Justice in all cases shall be administered openly, and without unnecessary delay.

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13. Equal privileges and immunities

Section 13. No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.

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17. Eminent domain; just compensation for private property taken; public use as judicial question

Section 17. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having first been made, paid into court for the owner, secured by bond as may be fixed by the court, or paid into the state treasury for the owner on such terms and conditions as the legislature may provide, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefore be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law. 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 as such without regard to any legislative assertion that the use is public.

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32. Constitutional provisions mandatory

Section 32. The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.

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9. Intermediate appellate courts

Section 9. The jurisdiction, powers, duties and composition of any intermediate appellate court shall be as provided by law.

6. Recovery of damages for injuries

Section 6. The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation, except that a crime victim is not subject to a claim for damages by a person who is harmed while the person is attempting to engage in, engaging in or fleeing after having engaged in or attempted to engage in conduct that is classified as a felony offense.

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16 A.R.S. Rules of Civil Procedure, Rule 16(f)

Rule 16(f). Trial-setting conference

Currentness

(1) If the Court has not already set a trial date in a Scheduling Order or otherwise, the court shall hold a Trial-Setting Conference, as set by the Scheduling Order, for the purpose of setting a trial date. The conference shall be attended in person or telephonically (as permitted by the court) by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(2) In addition to setting a trial date, the court may discuss at the Trial-Setting Conference:

(A) The status of discovery and any dispositive motions that have been or will be filed.

(B) A date for holding a Trial Management Conference under Rule 16(g).

(C) The imposition of time limits on trial proceedings or portions thereof.

(D) The use of juror questionnaires.

(E) The use of juror notebooks.

(F) The giving of brief pre-voir dire opening statements and preliminary jury instructions.

(G) The effective management of documents and exhibits.

(H) Such other matters as the court deems appropriate.

(3) If for any reason a trial date is not set at the Trial-Setting Conference, the court shall schedule another Trial-Setting Conference as soon as practicable for the setting of a trial date.

Credits

Added Aug. 28, 2013, revised Sept. 6, 2013, effective April 15, 2014, subject to the applicability provisions of Arizona Supreme Court Order No. R-13-0017.

16 A. R. S. Rules Civ. Proc., Rule 16(f), AZ ST RCP Rule 16(f)
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16 A.R.S. Rules of Civil Procedure, Rule 37(b)

Rule 37(b). Failure to comply with order

Currentness

(1) *Sanctions by court in county where deposition is taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the county in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by court in which action is pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35 the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Credits

Amended July 17, 1970, effective Nov. 1, 1970; Sept. 15, 1987, effective Nov. 15, 1987.

16 A. R. S. Rules Civ. Proc., Rule 37(b), AZ ST RCP Rule 37(b)
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Rule 60(c). Mistake; inadvertence; surprise; excusable neglect; newly discovered evidence; fraud, etc.

Currentness

On motion and upon such terms as are just the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(d); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be filed within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment or order was entered or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant served by publication as provided by Rule 59(j) or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Credits

Amended July 14, 1961, effective Nov. 1, 1961; July 23, 1976, effective Oct. 1, 1976; Sept. 15, 1987, effective Nov. 15, 1987.

16 A. R. S. Rules Civ. Proc., Rule 60(c), AZ ST RCP Rule 60(c)
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Rule 42. Arizona Rules of Professional Conduct

Currentness

The professional conduct of members shall be governed by the Model Rules of Professional Conduct of the American Bar Association, adopted August 2, 1983, as amended by this court and adopted as the Arizona Rules of Professional Conduct:

PREAMBLE

ER

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1.2. Scope of Representation and Allocation of Authority between Client and Lawyer.

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Rules of Professional Conduct

3. Advocate

Related Opinions (/Ethics/EthicsOpinions/RelatedOpinions?id=40)

ER 3.3. Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by ER 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See ER 1.0(m) for the definition of "tribunal." It

also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause; the lawyer must not mislead the tribunal by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare ER 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in ER 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with ER 1.2(d), see Comment [10] to that Rule. See ER 8.4(b), Comment [2].

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is

premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. Counsel first must attempt to persuade the accused to testify truthfully or not at all. If the client persists, counsel must proceed in a manner consistent with the accused's constitutional rights. See State v. Jefferson, 126 Ariz. 341, 615 P.2d 638 (1980); Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978). The obligation of the advocate under the Rules of Professional Conduct is subordinate to such constitutional requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See ER 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may

be surprised when the lawyer's client or another witness called by the lawyer offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by ER 1.6. It is for the tribunal then to determine what should be done - making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See ER 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus, the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final

judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by ER 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see ER 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by ER 1.6.

(/)

Rules of Professional Conduct

8. Maintaining the Integrity of the Profession

Related Opinions (/Ethics/EthicsOpinions/RelatedOpinions?id=61)

ER 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable Code of Judicial Conduct or other law.

(g) file a notice of change of judge under Rule 10.2, Arizona Rules of Criminal Procedure, for an improper purpose, such as obtaining a trial delay or other circumstances enumerated in Rule 10.2(b).

Comment

COMMENT [AMENDED EFFECTIVE DEC. 1, 2002]

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of

those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even one of minor significance when considered separately, can indicate indifference to legal obligation.

A lawyer who in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. This does not preclude legitimate advocacy when race, sex, religion, national original, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of ER 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

COURT COMMENT TO EXPERIMENTAL 2001 AMENDMENT TO ER 8.4(G)

Arizona is one of only a few states that allow by judicial rules a party to notice a change of judge without cause. The purpose of the rule is to allow a party to ask for a new judge when a party may perceive a bias that does not rise to disqualification under the rules allowing a challenge for actual bias or prejudice. Historically, the reasons for exercising a challenge were not inquired into. Just as peremptory challenges of jurors lead to abuses of race or gender based disqualification, however, the peremptory notice of judge has been abused by some to obtain trial delay.

The rule was amended in 2001 on an experimental basis to make clear that filing a notice of change of judge for an improper purpose, such as trial delay or other circumstances enumerated in Rule 10.2(b), is unprofessional conduct. The Court adopted this amendment and the amendments to Rule 10.2. Rules of Criminal Procedure, in an effort to address abuse of Rule 10.2. If such abuse is not substantially reduced as a result of the amendments at the conclusion of the one-year experiment on June 30, 2002, the Court at that time will abolish the peremptory change of judge in most criminal cases as recommended in a proposal by the Arizona Judicial Council. See R-00-0025.

COMMENT [EFFECTIVE DEC. 1, 2003]

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client of action the client is lawfully entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. This does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, gender identity or socioeconomic status, or other similar factors, are issues in the proceeding. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of ER 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

COURT COMMENT TO 2004 AMENDMENT

Arizona is one of a minority of states that allow a party to file a notice of

change of judge without cause. The purpose of the rule is to allow a party to ask for a new judge when a party may perceive a bias that does not rise to disqualification under the rules allowing a challenge for actual bias or prejudice.

Arizona's rule permitting peremptory change of judge has historically been viewed as "salutary" on the grounds that "it is not necessary to embarrass the judge by setting forth in detail the facts of bias, prejudice or interests which may disqualify him nor is it necessary for judge, litigant and attorney to involve themselves in an imbroglio which might result in everlasting bitterness on the part of the judge and the lawyer." Anonymous v. Superior Court, 14 Ariz. App. 502, 504, 484 P. 2d 655 (1971).

However, just as peremptory challenges of jurors led to abuses of race or gender-based disqualification, the peremptory notice of judge has been subject to abuse, including attempts through "blanket" challenges to bring pressure upon judges and thereby undermine judicial independence. State v. City Court of City of Tucson, 150 Ariz. 99, 722 P. 2d 267.

The rule was amended in 2004 to make clear that filing a notice of change of judge for an improper purpose, such as trial delay or other circumstances enumerated in Rule 10.2(b), is unprofessional conduct. The Court adopted this amendment and the amendments to Rule 10.2, Rules of Criminal Procedure, in an effort to address abuse of Rule 10.2 while preserving the traditional benefits of the right to peremptory change of judge.

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9-462.02. Nonconformance to regulations; outdoor advertising change; enforcement

A. The municipality may acquire by purchase or condemnation private property for the removal of nonconforming uses and structures. The elimination of such nonconforming uses and structures in a zoned district is for a public purpose. Nothing in an ordinance or regulation authorized by this article shall affect existing property or the right to its continued use for the purpose used at the time the ordinance or regulation takes effect, nor to any reasonable repairs or alterations in buildings or property used for such existing purpose.

B. A municipality shall not require as a condition for a permit or for any approval, or otherwise cause, an owner or possessor of property to waive the right to continue an existing nonconforming outdoor advertising use or structure without acquiring the use or structure by purchase or condemnation and paying just compensation unless the municipality, at its option, allows the use or structure to be relocated to a comparable site in the municipality with the same or a similar zoning classification, or to another site in the municipality acceptable to both the municipality and the owner of the use or structure, and the use or structure is relocated to the other site. The municipality shall pay for relocating the outdoor advertising use or structure including the cost of removing and constructing the new use or structure that is at least the same size and height. This subsection does not apply to municipal rezoning of property at the request of the property owner.

C. A municipality must issue a citation and file an action involving an outdoor advertising use or structure zoning or sign code violation within two years after discovering the violation. Such an action shall initially be filed with a court having jurisdiction to impose all penalties sought by the action and that jurisdiction is necessary for effective filing. Only the superior court has jurisdiction to order removal, abatement, reconfiguration or relocation of an outdoor advertising use or structure. Notwithstanding any other law, a municipality shall not consider each day that an outdoor advertising use or structure is illegally erected, constructed, reconstructed, altered or maintained as a separate offense unless the violation constitutes an immediate threat to the health and safety of the general public.

9-462.04. Public hearing required

A. If the municipality has a planning commission or a hearing officer, the planning commission or hearing officer shall hold a public hearing on any zoning ordinance. Notice of the time and place of the hearing including a general explanation of the matter to be considered and including a general description of the area affected shall be given at least fifteen days before the hearing in the following manner:

1. The notice shall be published at least once in a newspaper of general circulation published or circulated in the municipality, or if there is none, it shall be posted on the affected property in such a manner as to be legible from the public right-of-way and in at least ten public places in the municipality. A posted notice shall be printed so that the following are visible from a distance of one hundred feet: the word "zoning", the present zoning district classification, the proposed zoning district classification and the date and time of the hearing.

2. In proceedings involving rezoning of land which abuts other municipalities or unincorporated areas of the county or a combination thereof, copies of the notice of public hearing shall be transmitted to the planning agency of such governmental unit abutting such land. In proceedings involving rezoning of land that is located within the territory in the vicinity of a military airport or ancillary military facility as defined in section 28-8461, the municipality shall send copies of the notice of public hearing by first class mail to the military airport. In addition to notice by publication, a municipality may give notice of the hearing in such other manner as it may deem necessary or desirable.

3. In proceedings that are not initiated by the property owner involving rezoning of land which may change the zoning classification, notice by first class mail shall be sent to each real property owner, as shown on the last assessment of the property, of the area to be rezoned and all property owners, as shown on the last assessment of the property, within three hundred feet of the property to be rezoned.

4. In proceedings involving one or more of the following proposed changes or related series of changes in the standards governing land uses, notice shall be provided in the manner prescribed by paragraph 5:

(a) A ten per cent or more increase or decrease in the number of square feet or units that may be developed.

(b) A ten per cent or more increase or reduction in the allowable height of buildings.

(c) An increase or reduction in the allowable number of stories of buildings.

(d) A ten per cent or more increase or decrease in setback or open space requirements.

(e) An increase or reduction in permitted uses.

5. In proceedings governed by paragraph 4, the municipality shall provide notice to real property owners pursuant to at least one of the following notification procedures:

(a) Notice shall be sent by first class mail to each real property owner, as shown on the last assessment, whose real property is directly governed by the changes.

(b) If the municipality issues utility bills or other mass mailings that periodically include notices or other informational or advertising materials, the municipality shall include notice of such changes with such utility bills or other mailings.

(c) The municipality shall publish such changes prior to the first hearing on such changes in a newspaper of general circulation in the municipality. The changes shall be published in a "display ad" covering not less than one-eighth of a full page.

6. If notice is provided pursuant to paragraph 5, subdivision (b) or (c), the municipality shall also send notice by first class mail to persons who register their names and addresses with the municipality as being interested in receiving such notice. The municipality may charge a fee not to exceed five dollars per year for providing this service and may adopt procedures to implement this paragraph.

7. Notwithstanding the notice requirements set forth in paragraph 4, the failure of any person or entity to receive notice shall not constitute grounds for any court to invalidate the actions of a municipality for which the notice was given.
B. If the matter to be considered applies to territory in a high noise or accident potential zone as defined in section 28-8461, the notice prescribed in subsection A of this section shall include a general statement that the matter applies to property located in the high noise or accident potential zone.
C. After the hearing, the planning commission or hearing officer shall render a decision in the form of a written recommendation to the governing body. The recommendation shall include the reasons for the recommendation and be transmitted to the governing body in such form and manner as may be specified by the governing body.
D. If the planning commission or hearing officer has held a public hearing, the governing body may adopt the recommendations of the planning commission or hearing officer without holding a second public hearing if there is no objection, request for public hearing or other protest. The governing body shall hold a public hearing if requested by the party aggrieved or any member of the public or of the governing body, or, in any case, if no public hearing has been held by the planning commission or hearing officer. In municipalities with territory in the vicinity of a military airport or ancillary military facility as defined in section 28-8461, the governing body shall hold a public hearing if, after notice is transmitted to the military airport pursuant to subsection A of this section and before the public hearing, the military airport provides comments or analysis concerning the compatibility of the proposed rezoning with the high noise or accident potential generated by military airport or ancillary military facility operations that may have an adverse impact on public health and safety, and the governing body shall consider and analyze the comments or analysis before making a final determination. Notice of the time and place of the hearing shall be given in the time and manner provided for the giving of notice of the hearing by the planning commission as specified in subsection A of this section. In addition a municipality may give notice of the hearing in such other manner as it may deem necessary or desirable.
E. A municipality may enact an ordinance authorizing county zoning to continue in effect until municipal zoning is applied to land previously zoned by the county and annexed by the municipality, but in no event for longer than six months after the annexation.
F. A municipality is not required to adopt a general plan prior to the adoption of a zoning ordinance.
G. If there is no planning commission or hearing officer, the governing body of the municipality shall perform the functions assigned to the planning commission or hearing officer.
H. If the owners of twenty per cent or more either of the area of the lots included in a proposed change, or of those immediately adjacent in the rear or any side thereof extending one hundred fifty feet therefrom, or of those directly opposite thereto extending one hundred fifty feet from the street frontage of the opposite lots, file a protest in writing against a proposed amendment, it shall not become effective except by the favorable vote of three-fourths of all members of the governing body of the municipality. If any members of the governing body are unable to vote on such a question because of a conflict of interest, then the required number of votes for passage of the question shall be three-fourths of the remaining membership of the governing body, provided that such required number of votes shall in no event be less than a majority of the full membership of the legally established governing body.
I. In applying an open space element or a growth element of a general plan, a parcel of land shall not be rezoned for open space, recreation, conservation or agriculture unless the owner of the land consents to the rezoning in writing.
J. Notwithstanding the provisions of section 19-142, subsection B, a decision by the governing body involving rezoning of land which is not owned by the municipality and which changes the zoning classification of such land may not be enacted as an emergency measure and such change shall not be effective for at least thirty days after final approval of the change in classification by the governing body.

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9-462.05. Enforcement

A. The legislative body of a municipality has authority to enforce any zoning ordinance enacted pursuant to this article in the same manner as other municipal ordinances are enforced.

B. If any building structure is erected, constructed, reconstructed, altered, repaired, converted or maintained or any building, structure or land is used in violation of the provisions of this article or of any ordinance adopted pursuant to the provisions of this article, the legislative body of the municipality may institute any appropriate action to:

1. Prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance or use.
2. Restrain, correct or abate the violation.
3. Prevent the occupancy of such building, structure or land.
4. Prevent any illegal act, conduct, business or use in or about such premises.

C. By ordinance, the legislative body shall establish the office of zoning administrator. The zoning administrator is charged with responsibility for enforcement of the zoning ordinance.

D. By ordinance, the legislative body shall establish all necessary and appropriate rules and procedures governing application for zoning amendment, review and approval of plans, issuance of any necessary permits or compliance certificates, inspection of buildings, structures and lands and any other actions which may be considered necessary or desirable for enforcement of the zoning ordinance.

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9-462.08. Hearing officer

A. The legislative body of any municipality may establish the position of hearing officer and delegate to a hearing officer the authority to conduct hearings required by section 9-462.04 and on other matters as the legislative body may provide by ordinance.

B. Hearing officers shall be appointed on the basis of training and experience which qualifies them to conduct hearings and make findings and conclusions on the matters heard.

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9-463. Definitions

In this article, unless the context otherwise requires:

1. "Design" means street alignment, grades and widths, alignment and widths of easements and rights-of-way for drainage and sanitary sewers and the arrangement and orientation of lots.
2. "Improvement" means required installations, pursuant to this article and subdivision regulations, including grading, sewer and water utilities, streets, easements, traffic control devices as a condition to the approval and acceptance of the final plat thereof.
3. "Land splits" as used in this article means the division of improved or unimproved land whose area is two and one-half acres or less into two or three tracts or parcels of land for the purpose of sale or lease.
4. "Municipal" or "municipality" means an incorporated city or town.
5. "Planning agency" means the official body designated by local ordinance to carry out the purposes of this article and may be a planning department, a planning commission, the legislative body itself, or any combination thereof.
6. "Plat" means a map of a subdivision:
(a) "Preliminary plat" means a preliminary map, including supporting data, indicating a proposed subdivision design prepared in accordance with the provisions of this article and those of any local applicable ordinance.
(b) "Final plat" means a map of all or part of a subdivision essentially conforming to an approved preliminary plat, prepared in accordance with the provision of this article, those of any local applicable ordinance and other state statute.
(c) "Recorded plat" means a final plat bearing all of the certificates of approval required by this article, any local applicable ordinance and other state statute.
7. "Right-of-way" means any public or private right-of-way and includes any area required for public use pursuant to any general or specific plan as provided for in article 6 of this chapter.
8. "Street" means any existing or proposed street, avenue, boulevard, road, lane, parkway, place, bridge, viaduct or easement for public vehicular access or a street shown in a plat heretofore approved pursuant to law or a street in a plat duly filed and recorded in the county recorder's office. A street includes all land within the street right-of-way whether improved or unimproved, and includes such improvements as pavement, shoulders, curbs, gutters, sidewalks, parking space, bridges and viaducts.
9. "Subdivider" means a person, firm, corporation, partnership, association, syndicate, trust or other legal entity that files application and initiates proceedings for the subdivision of land in accordance with the provisions of this article, any local applicable ordinance and other state statute, except that an individual serving as agent for such legal entity is not a subdivider.
10. "Subdivision" means any land or portion thereof subject to the provisions of this article as provided in section 9-463.02.
11. "Subdivision regulations" means a municipal ordinance regulating the design and improvement of subdivisions enacted under the provisions of this article or any prior statute regulating the design and improvement of subdivisions.

9-463.01. Authority

A. Pursuant to this article, the legislative body of every municipality shall regulate the subdivision of all lands within its corporate limits.

B. The legislative body of a municipality shall exercise the authority granted in subsection A of this section by ordinance prescribing:

1. Procedures to be followed in the preparation, submission, review and approval or rejection of all final plats.

2. Standards governing the design of subdivision plats.

3. Minimum requirements and standards for the installation of subdivision streets, sewer and water utilities and improvements as a condition of final plat approval.

C. By ordinance, the legislative body of any municipality shall:

1. Require the preparation, submission and approval of a preliminary plat as a condition precedent to submission of a final plat.

2. Establish the procedures to be followed in the preparation, submission, review and approval of preliminary plats.

3. Make requirements as to the form and content of preliminary plats.

4. Either determine that certain lands may not be subdivided, by reason of adverse topography, periodic inundation, adverse soils, subsidence of the earth's surface, high water table, lack of water or other natural or man-made hazard to life or property, or control the lot size, establish special grading and drainage requirements and impose other regulations deemed reasonable and necessary for the public health, safety or general welfare on any lands to be subdivided affected by such characteristics.

5. Require payment of a proper and reasonable fee by the subdivider based upon the number of lots or parcels on the surface of the land to defray municipal costs of plat review and site inspection.

6. Require the dedication of public streets, sewer and water utility easements or rights-of-way, within the proposed subdivision.

7. Require the preparation and submission of acceptable engineering plans and specifications for the installation of required street, sewer, electric and water utilities, drainage, flood control, adequacy of water and improvements as a condition precedent to recordation of an approved final plat.

8. Require the posting of performance bonds, assurances or such other security as may be appropriate and necessary to assure the installation of required street, sewer, electric and water utilities, drainage, flood control and improvements meeting established minimum standards of design and construction.

D. The legislative body of any municipality may require by ordinance that land areas within a subdivision be reserved for parks, recreational facilities, school sites and fire stations subject to the following conditions:

1. The requirement may only be made upon preliminary plats filed at least thirty days after the adoption of a general or specific plan affecting the land area to be reserved.

2. The required reservations are in accordance with definite principles and standards adopted by the legislative body.

3. The land area reserved shall be of such a size and shape as to permit the remainder of the land area of the subdivision within which the reservation is located to develop in an orderly and efficient manner.

4. The land area reserved shall be in such multiples of streets and parcels as to permit an efficient division of the reserved area in the event that it is not acquired within the prescribed period.

E. The public agency for whose benefit an area has been reserved shall have a period of one year after recording the final subdivision plat to enter into an agreement to acquire such reserved land area. The purchase price shall be the fair market value of the reserved land area at the time of the filing of the preliminary subdivision plat plus

the taxes against such reserved area from the date of the reservation and any other costs incurred by the subdivider in the maintenance of such reserved area, including the interest cost incurred on any loan covering such reserved area.
F. If the public agency for whose benefit an area has been reserved does not exercise the reservation agreement set forth in subsection E of this section within such one year period or such extended period as may be mutually agreed upon by such public agency and the subdivider, the reservation of such area shall terminate.
G. The legislative body of every municipality shall comply with this article and applicable state statutes pertaining to the hearing, approval or rejection, and recordation of:
1. Final subdivision plats.
2. Plats filed for the purpose of reverting to acreage of land previously subdivided.
3. Plats filed for the purpose of vacating streets or easements previously dedicated to the public.
4. Plats filed for the purpose of vacating or redescribing lot or parcel boundaries previously recorded.
H. Approval of every preliminary and final plat by a legislative body is conditioned upon compliance by the subdivider with:
1. Rules as may be established by the department of transportation relating to provisions for the safety of entrance upon and departure from abutting state primary highways.
2. Rules as may be established by a county flood control district relating to the construction or prevention of construction of streets in land established as being subject to periodic inundation.
3. Rules as may be established by the department of health services or a county health department relating to the provision of domestic water supply and sanitary sewage disposal.
I. If the subdivision is comprised of subdivided lands, as defined in section 32-2101, and is within an active management area, as defined in section 45-402, the final plat shall not be approved unless it is accompanied by a certificate of assured water supply issued by the director of water resources, or unless the subdivider has obtained a written commitment of water service for the subdivision from a city, town or private water company designated as having an assured water supply by the director of water resources pursuant to section 45-576 or is exempt from the requirement pursuant to section 45-576. The legislative body of the municipality shall note on the face of the final plat that a certificate of assured water supply has been submitted with the plat or that the subdivider has obtained a written commitment of water service for the proposed subdivision from a city, town or private water company designated as having an assured water supply, pursuant to section 45-576, or is exempt from the requirement pursuant to section 45-576.
J. Except as provided in subsections K and P of this section, if the subdivision is composed of subdivided lands as defined in section 32-2101 outside of an active management area and the director of water resources has given written notice to the municipality pursuant to section 45-108, subsection H, the final plat shall not be approved unless one of the following applies:
1. The director of water resources has determined that there is an adequate water supply for the subdivision pursuant to section 45-108 and the subdivider has included the report with the plat.
2. The subdivider has obtained a written commitment of water service for the subdivision from a city, town or private water company designated as having an adequate water supply by the director of water resources pursuant to section 45-108.
K. The legislative body of a municipality that has received written notice from the director of water resources pursuant to section 45-108, subsection H or that has adopted an ordinance pursuant to subsection O of this section may provide by ordinance an exemption from the requirement in subsection J or O of this section for a subdivision that the director of water resources has determined will have an inadequate water supply because the water supply will be transported to the subdivision by motor vehicle or train if all of the following apply:
1. The legislative body determines that there is no feasible alternative water supply for the subdivision and that the transportation of water to the subdivision will not constitute a significant risk to the health and safety of the residents of the subdivision.
2. If the water to be transported to the subdivision will be withdrawn or diverted in the service area of a municipal provider as defined in section 45-561, the municipal provider has consented to the withdrawal or diversion.
3. If the water to be transported is groundwater, the transportation complies with the provisions governing the transportation of groundwater in title 45, chapter 2, article 8.
4. The transportation of water to the subdivision meets any additional conditions imposed by the legislative body.
L. A municipality that adopts the exemption authorized by subsection K of this section shall give written notice of the adoption of the exemption, including a certified copy of

the ordinance containing the exemption, to the director of water resources, the director of environmental quality and the state real estate commissioner. If the municipality later rescinds the exemption, the municipality shall give written notice of the rescission to the director of water resources, the director of environmental quality and the state real estate commissioner. A municipality that rescinds an exemption adopted pursuant to subsection K of this section shall not readopt the exemption for at least five years after the rescission becomes effective.

M. If the legislative body of a municipality approves a subdivision plat pursuant to subsection J, paragraph 1 or 2 or subsection O of this section, the legislative body shall note on the face of the plat that the director of water resources has reported that the subdivision has an adequate water supply or that the subdivider has obtained a commitment of water service for the proposed subdivision from a city, town or private water company designated as having an adequate water supply pursuant to section 45-108.

N. If the legislative body of a municipality approves a subdivision plat pursuant to an exemption authorized by subsection K of this section or granted by the director of water resources pursuant to section 45-108.02 or 45-108.03:

1. The legislative body shall give written notice of the approval to the director of water resources and the director of environmental quality.

2. The legislative body shall include on the face of the plat a statement that the director of water resources has determined that the water supply for the subdivision is inadequate and a statement describing the exemption under which the plat was approved, including a statement that the legislative body or the director of water resources, whichever applies, has determined that the specific conditions of the exemption were met. If the director subsequently informs the legislative body that the subdivision is being served by a water provider that has been designated by the director as having an adequate water supply pursuant to section 45-108, the legislative body shall record in the county recorder's office a statement disclosing that fact.

O. If a municipality has not been given written notice by the director of water resources pursuant to section 45-108, subsection H, the legislative body of the municipality, to protect the public health and safety, may provide by ordinance that, except as provided in subsections K and P of this section, the final plat of a subdivision located in the municipality and outside of an active management area will not be approved by the legislative body unless the director of water resources has determined that there is an adequate water supply for the subdivision pursuant to section 45-108 or the subdivider has obtained a written commitment of water service for the subdivision from a city, town or private water company designated as having an adequate water supply by the director of water resources pursuant to section 45-108. Before holding a public hearing to consider whether to enact an ordinance pursuant to this subsection, a municipality shall provide written notice of the hearing to the board of supervisors of the county in which the municipality is located. A municipality that enacts an ordinance pursuant to this subsection shall give written notice of the enactment of the ordinance, including a certified copy of the ordinance, to the director of water resources, the director of environmental quality, the state real estate commissioner and the board of supervisors of the county in which the municipality is located. If a municipality enacts an ordinance pursuant to this subsection, water providers may be eligible to receive monies in a water supply development fund, as otherwise provided by law.

P. Subsections J and O of this section do not apply to:

1. A proposed subdivision that the director of water resources has determined will have an inadequate water supply pursuant to section 45-108 if the director grants an exemption for the subdivision pursuant to section 45-108.02 and the exemption has not expired or if the director grants an exemption pursuant to section 45-108.03.

2. A proposed subdivision that received final plat approval from the municipality before the requirement for an adequate water supply became effective in the municipality if the plat has not been materially changed since it received the final plat approval. If changes were made to the plat after the plat received the final plat approval, the director of water resources shall determine whether the changes are material pursuant to the rules adopted by the director to implement section 45-108. If the municipality approves a plat pursuant to this paragraph and the director of water resources has determined that there is an inadequate water supply for the subdivision pursuant to section 45-108, the municipality shall note this on the face of the plat.

Q. If the subdivision is composed of subdivided lands as defined in section 32-2101 outside of an active management area and the municipality has not received written notice pursuant to section 45-108, subsection H and has not adopted an ordinance pursuant to subsection O of this section:

1. If the director of water resources has determined that there is an adequate water supply for the subdivision pursuant to section 45-108 or if the subdivider has obtained a written commitment of water service for the subdivision from a city, town or private water company designated as having an adequate water supply by the director of water resources pursuant to section 45-108, the municipality shall note this on the

face of the plat if the plat is approved.
2. If the director of water resources has determined that there is an inadequate water supply for the subdivision pursuant to section 45-108, the municipality shall note this on the face of the plat if the plat is approved.
R. Every municipality is responsible for the recordation of all final plats approved by the legislative body and shall receive from the subdivider and transmit to the county recorder the recordation fee established by the county recorder.
S. Pursuant to provisions of applicable state statutes, the legislative body of any municipality may itself prepare or have prepared a plat for the subdivision of land under municipal ownership.
T. The legislative bodies of cities and towns may regulate by ordinance land splits within their corporate limits. Authority granted under this section refers to the determination of division lines, area and shape of the tracts or parcels and does not include authority to regulate the terms or condition of the sale or lease nor does it include the authority to regulate the sale or lease of tracts or parcels that are not the result of land splits as defined in section 9-463.
U. For any subdivision that consists of ten or fewer lots, tracts or parcels, each of which is of a size as prescribed by the legislative body, the legislative body of each municipality may expedite the processing of or waive the requirement to prepare, submit and receive approval of a preliminary plat as a condition precedent to submitting a final plat and may waive or reduce infrastructure standards or requirements proportional to the impact of the subdivision. Requirements for dust-controlled access and drainage improvements shall not be waived.

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9-463.02. Subdivision defined; applicability

A. "Subdivision" means improved or unimproved land or lands divided for the purpose of financing, sale or lease, whether immediate or future, into four or more lots, tracts or parcels of land, or, if a new street is involved, any such property which is divided into two or more lots, tracts or parcels of land, or, any such property, the boundaries of which have been fixed by a recorded plat, which is divided into more than two parts. "Subdivision" also includes any condominium, cooperative, community apartment, townhouse or similar project containing four or more parcels, in which an undivided interest in the land is coupled with the right of exclusive occupancy of any unit located thereon, but plats of such projects need not show the buildings or the manner in which the buildings or airspace above the property shown on the plat are to be divided.

B. The legislative body of a municipality shall not refuse approval of a final plat of a project included in subsection A under provisions of an adopted subdivision regulation because of location of buildings on the property shown on the plat not in violation of such subdivision regulations or on account of the manner in which airspace is to be divided in conveying the condominium. Fees and lot design requirements shall be computed and imposed with respect to such plats on the basis of parcels or lots on the surface of the land shown thereon as included in the project. This subsection does not limit the power of such legislative body to regulate the location of buildings in such a project by or pursuant to a zoning ordinance.

C. "Subdivision" does not include the following:

1. The sale or exchange of parcels of land to or between adjoining property owners if such sale or exchange does not create additional lots.
2. The partitioning of land in accordance with other statutes regulating the partitioning of land held in common ownership.
3. The leasing of apartments, offices, stores or similar space within a building or trailer park, nor to mineral, oil or gas leases.

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9-463.03. Violations

It is unlawful for any person to offer to sell or lease, to contract to sell or lease or to sell or lease any subdivision or part thereof until a final plat thereof, in full compliance with provisions of this article and of any subdivision regulations which have been duly recorded in the office of recorder of the county in which the subdivision or any portion thereof is located, is recorded in the office of the recorder, except that this shall not apply to any parcel or parcels of a subdivision offered for sale or lease, contracted for sale or lease, or sold or leased in compliance with any law or subdivision regulation regulating the subdivision plat design and improvement of subdivisions in effect at the time the subdivision was established. The county recorder shall not record a plat located in a municipality having subdivision regulations enacted under this article unless the plat has been approved by the legislative body of the municipality.

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9-463.04. Extraterritorial jurisdiction

A. In any county not having county subdivision regulations applicable to the unincorporated territory, the legislative body of any municipality may exercise the subdivision regulation powers granted in this article both to territory within its corporate limits and to that which extends a distance of three contiguous miles in all directions of its corporate limits and not located in a municipality. Any ordinance intended to have application beyond the corporate limits of the municipality shall expressly state the intention of such application. Such ordinance shall be adopted in accordance with the provisions set forth therein.

B. The extraterritorial jurisdiction of two or more municipalities whose territorial boundaries are less than six miles apart terminates at a boundary line equidistant from the respective corporate limits of such municipalities, or at such line as is agreed to by the legislative bodies of the respective municipalities.

C. As a prerequisite to the exercise of extraterritorial jurisdiction, the membership of the planning agency charged with the preparation or administration of proposed subdivision regulations for the area of extraterritorial jurisdiction shall be increased to include two additional members to represent the unincorporated area. Any additional member shall be a resident of the three mile area outside the corporate limits and be appointed by the legislative body of the county in which the unincorporated area is situated. Any such member shall have equal rights, privileges and duties with the other members of the planning agency in all matters pertaining to the plans and regulations of the unincorporated area in which they reside, both in preparation of the original plans and regulations and in consideration of any proposed amendments to such plans and regulations.

D. Any municipal legislative body exercising the powers granted by this section may provide for the enforcement of its regulations for the area of extraterritorial jurisdiction in the same manner as the regulations for the area within the municipality are enforced.

9-463.05. Development fees; imposition by cities and towns; infrastructure improvements plan; annual report; advisory committee; limitation on actions; definitions

A. A municipality may assess development fees to offset costs to the municipality associated with providing necessary public services to a development, including the costs of infrastructure, improvements, real property, engineering and architectural services, financing and professional services required for the preparation or revision of a development fee pursuant to this section, including the relevant portion of the infrastructure improvements plan.

B. Development fees assessed by a municipality under this section are subject to the following requirements:

1. Development fees shall result in a beneficial use to the development.

2. The municipality shall calculate the development fee based on the infrastructure improvements plan adopted pursuant to this section.

3. The development fee shall not exceed a proportionate share of the cost of necessary public services, based on service units, needed to provide necessary public services to the development.

4. Costs for necessary public services made necessary by new development shall be based on the same level of service provided to existing development in the service area.

5. Development fees may not be used for any of the following:

(a) Construction, acquisition or expansion of public facilities or assets other than necessary public services or facility expansions identified in the infrastructure improvements plan.

(b) Repair, operation or maintenance of existing or new necessary public services or facility expansions.

(c) Upgrading, updating, expanding, correcting or replacing existing necessary public services to serve existing development in order to meet stricter safety, efficiency, environmental or regulatory standards.

(d) Upgrading, updating, expanding, correcting or replacing existing necessary public services to provide a higher level of service to existing development.

(e) Administrative, maintenance or operating costs of the municipality.

6. Any development for which a development fee has been paid is entitled to the use and benefit of the services for which the fee was imposed and is entitled to receive immediate service from any existing facility with available capacity to serve the new service units if the available capacity has not been reserved or pledged in connection with the construction or financing of the facility.

7. Development fees may be collected if any of the following occurs:

(a) The collection is made to pay for a necessary public service or facility expansion that is identified in the infrastructure improvements plan and the municipality plans to complete construction and to have the service available within the time period established in the infrastructure improvement plan, but in no event longer than the time period provided in subsection H, paragraph 3 of this section.

(b) The municipality reserves in the infrastructure improvements plan adopted pursuant to this section or otherwise agrees to reserve capacity to serve future development.

(c) The municipality requires or agrees to allow the owner of a development to construct or finance the necessary public service or facility expansion and any of the following apply:

(i) The costs incurred or money advanced are credited against or reimbursed from the development fees otherwise due from a development.

(ii) The municipality reimburses the owner for those costs from the development fees

paid from all developments that will use those necessary public services or facility expansions.
(iii) For those costs incurred the municipality allows the owner to assign the credits or reimbursement rights from the development fees otherwise due from a development to other developments for the same category of necessary public services in the same service area.
8. Projected interest charges and other finance costs may be included in determining the amount of development fees only if the monies are used for the payment of principal and interest on the portion of the bonds, notes or other obligations issued to finance construction of necessary public services or facility expansions identified in the infrastructure improvements plan.
9. Monies received from development fees assessed pursuant to this section shall be placed in a separate fund and accounted for separately and may only be used for the purposes authorized by this section. Monies received from a development fee identified in an infrastructure improvements plan adopted or updated pursuant to subsection D of this section shall be used to provide the same category of necessary public services or facility expansions for which the development fee was assessed and for the benefit of the same service area, as defined in the infrastructure improvements plan, in which the development fee was assessed. Interest earned on monies in the separate fund shall be credited to the fund.
10. The schedule for payment of fees shall be provided by the municipality. Based on the cost identified in the infrastructure improvements plan, the municipality shall provide a credit toward the payment of a development fee for the required or agreed to dedication of public sites, improvements and other necessary public services or facility expansions included in the infrastructure improvements plan and for which a development fee is assessed, to the extent the public sites, improvements and necessary public services or facility expansions are provided by the developer. The developer of residential dwelling units shall be required to pay development fees when construction permits for the dwelling units are issued, or at a later time if specified in a development agreement pursuant to section 9-500.05. If a development agreement provides for fees to be paid at a time later than the issuance of construction permits, the deferred fees shall be paid no later than fifteen days after the issuance of a certificate of occupancy. The development agreement shall provide for the value of any deferred fees to be supported by appropriate security, including a surety bond, letter of credit or cash bond.
11. If a municipality requires as a condition of development approval the construction or improvement of, contributions to or dedication of any facilities that were not included in a previously adopted infrastructure improvements plan, the municipality shall cause the infrastructure improvements plan to be amended to include the facilities and shall provide a credit toward the payment of a development fee for the construction, improvement, contribution or dedication of the facilities to the extent that the facilities will substitute for or otherwise reduce the need for other similar facilities in the infrastructure improvements plan for which development fees were assessed.
12. The municipality shall forecast the contribution to be made in the future in cash or by taxes, fees, assessments or other sources of revenue derived from the property owner towards the capital costs of the necessary public service covered by the development fee and shall include these contributions in determining the extent of the burden imposed by the development. Beginning August 1, 2014, for purposes of calculating the required offset to development fees pursuant to this subsection, if a municipality imposes a construction contracting or similar excise tax rate in excess of the percentage amount of the transaction privilege tax rate imposed on the majority of other transaction privilege tax classifications, the entire excess portion of the construction contracting or similar excise tax shall be treated as a contribution to the capital costs of necessary public services provided to development for which development fees are assessed, unless the excess portion was already taken into account for such purpose pursuant to this subsection.
13. If development fees are assessed by a municipality, the fees shall be assessed against commercial, residential and industrial development, except that the municipality may distinguish between different categories of residential, commercial and industrial development in assessing the costs to the municipality of providing necessary public services to new development and in determining the amount of the development fee applicable to the category of development. If a municipality agrees to waive any of the development fees assessed on a development, the municipality shall reimburse the appropriate development fee accounts for the amount that was waived. The municipality shall provide notice of any such waiver to the advisory committee established pursuant to subsection G of this section within thirty days.
14. In determining and assessing a development fee applying to land in a community facilities district established under title 48, chapter 4, article 6, the municipality shall take into account all public infrastructure provided by the district and capital costs paid by the district for necessary public services and shall not assess a portion of the development fee based on the infrastructure or costs.

C. A municipality shall give at least thirty days' advance notice of intention to assess a development fee and shall release to the public and post on its website or the website of an association of cities and towns if a municipality does not have a website a written report of the land use assumptions and infrastructure improvements plan adopted pursuant to subsection D of this section. The municipality shall conduct a public hearing on the proposed development fee at any time after the expiration of the thirty day notice of intention to assess a development fee and at least thirty days before the scheduled date of adoption of the fee by the governing body. Within sixty days after the date of the public hearing on the proposed development fee, a municipality shall approve or disapprove the imposition of the development fee. A municipality shall not adopt an ordinance, order or resolution approving a development fee as an emergency measure. A development fee assessed pursuant to this section shall not be effective until seventy-five days after its formal adoption by the governing body of the municipality. Nothing in this subsection shall affect any development fee adopted before July 24, 1982.
D. Before the adoption or amendment of a development fee, the governing body of the municipality shall adopt or update the land use assumptions and infrastructure improvements plan for the designated service area. The municipality shall conduct a public hearing on the land use assumptions and infrastructure improvements plan at least thirty days before the adoption or update of the plan. The municipality shall release the plan to the public, post the plan on its website or the website of an association of cities and towns if the municipality does not have a website, including in the posting its land use assumptions, the time period of the projections, a description of the necessary public services included in the infrastructure improvements plan and a map of the service area to which the land use assumptions apply, make available to the public the documents used to prepare the assumptions and plan and provide public notice at least sixty days before the public hearing, subject to the following:
1. The land use assumptions and infrastructure improvements plan shall be approved or disapproved within sixty days after the public hearing on the land use assumptions and infrastructure improvements plan and at least thirty days before the public hearing on the report required by subsection C of this section. A municipality shall not adopt an ordinance, order or resolution approving the land use assumptions or infrastructure improvements plan as an emergency measure.
2. An infrastructure improvements plan shall be developed by qualified professionals using generally accepted engineering and planning practices pursuant to subsection E of this section.
3. A municipality shall update the land use assumptions and infrastructure improvements plan at least every five years. The initial five year period begins on the day the infrastructure improvements plan is adopted. The municipality shall review and evaluate its current land use assumptions and shall cause an update of the infrastructure improvements plan to be prepared pursuant to this section.
4. Within sixty days after completion of the updated land use assumptions and infrastructure improvements plan, the municipality shall schedule and provide notice of a public hearing to discuss and review the update and shall determine whether to amend the assumptions and plan.
5. A municipality shall hold a public hearing to discuss the proposed amendments to the land use assumptions, the infrastructure improvements plan or the development fee. The land use assumptions and the infrastructure improvements plan, including the amount of any proposed changes to the development fee per service unit, shall be made available to the public on or before the date of the first publication of the notice of the hearing on the amendments.
6. The notice and hearing procedures prescribed in paragraph 1 of this subsection apply to a hearing on the amendment of land use assumptions, an infrastructure improvements plan or a development fee. Within sixty days after the date of the public hearing on the amendments, a municipality shall approve or disapprove the amendments to the land use assumptions, infrastructure improvements plan or development fee. A municipality shall not adopt an ordinance, order or resolution approving the amended land use assumptions, infrastructure improvements plan or development fee as an emergency measure.
7. The advisory committee established under subsection G of this section shall file its written comments on any proposed or updated land use assumptions, infrastructure improvements plan and development fees before the fifth business day before the date of the public hearing on the proposed or updated assumptions, plan and fees.
8. If, at the time an update as prescribed in paragraph 3 of this subsection is required, the municipality determines that no changes to the land use assumptions, infrastructure improvements plan or development fees are needed, the municipality may as an alternative to the updating requirements of this subsection publish notice of its determination on its website and include the following:
(a) A statement that the municipality has determined that no change to the land use assumptions, infrastructure improvements plan or development fee is necessary.
(b) A description and map of the service area in which an update has been

determined to be unnecessary.
(c) A statement that by a specified date, which shall be at least sixty days after the date of publication of the first notice, a person may make a written request to the municipality requesting that the land use assumptions, infrastructure improvements plan or development fee be updated.
(d) A statement identifying the person or entity to whom the written request for an update should be sent.
9. If, by the date specified pursuant to paragraph 8 of this subsection, a person requests in writing that the land use assumptions, infrastructure improvements plan or development fee be updated, the municipality shall cause, accept or reject an update of the assumptions and plan to be prepared pursuant to this subsection.
10. Notwithstanding the notice and hearing requirements for adoption of an infrastructure improvements plan, a municipality may amend an infrastructure improvements plan adopted pursuant to this section without a public hearing if the amendment addresses only elements of necessary public services in the existing infrastructure improvements plan and the changes to the plan will not, individually or cumulatively with other amendments adopted pursuant to this subsection, increase the level of service in the service area or cause a development fee increase of greater than five per cent when a new or modified development fee is assessed pursuant to this section. The municipality shall provide notice of any such amendment at least thirty days before adoption, shall post the amendment on its website or on the website of an association of cities and towns if the municipality does not have a website and shall provide notice to the advisory committee established pursuant to subsection G of this section that the amendment complies with this subsection.
E. For each necessary public service that is the subject of a development fee, the infrastructure improvements plan shall include:
1. A description of the existing necessary public services in the service area and the costs to upgrade, update, improve, expand, correct or replace those necessary public services to meet existing needs and usage and stricter safety, efficiency, environmental or regulatory standards, which shall be prepared by qualified professionals licensed in this state, as applicable.
2. An analysis of the total capacity, the level of current usage and commitments for usage of capacity of the existing necessary public services, which shall be prepared by qualified professionals licensed in this state, as applicable.
3. A description of all or the parts of the necessary public services or facility expansions and their costs necessitated by and attributable to development in the service area based on the approved land use assumptions, including a forecast of the costs of infrastructure, improvements, real property, financing, engineering and architectural services, which shall be prepared by qualified professionals licensed in this state, as applicable.
4. A table establishing the specific level or quantity of use, consumption, generation or discharge of a service unit for each category of necessary public services or facility expansions and an equivalency or conversion table establishing the ratio of a service unit to various types of land uses, including residential, commercial and industrial.
5. The total number of projected service units necessitated by and attributable to new development in the service area based on the approved land use assumptions and calculated pursuant to generally accepted engineering and planning criteria.
6. The projected demand for necessary public services or facility expansions required by new service units for a period not to exceed ten years.
7. A forecast of revenues generated by new service units other than development fees, which shall include estimated state-shared revenue, highway users revenue, federal revenue, ad valorem property taxes, construction contracting or similar excise taxes and the capital recovery portion of utility fees attributable to development based on the approved land use assumptions, and a plan to include these contributions in determining the extent of the burden imposed by the development as required in subsection B, paragraph 12 of this section.
F. A municipality's development fee ordinance shall provide that a new development fee or an increased portion of a modified development fee shall not be assessed against a development for twenty-four months after the date that the municipality issues the final approval for a commercial, industrial or multifamily development or the date that the first building permit is issued for a residential development pursuant to an approved site plan or subdivision plat, provided that no subsequent changes are made to the approved site plan or subdivision plat that would increase the number of service units. If the number of service units increases, the new or increased portion of a modified development fee shall be limited to the amount attributable to the additional service units. The twenty-four month period shall not be extended by a renewal or amendment of the site plan or the final subdivision plat that was the subject of the final approval. The municipality shall issue, on request, a written statement of the development fee schedule applicable to the development. If, after the date of the municipality's final approval of a development, the municipality reduces the development fee assessed on development, the reduced fee shall apply to the development.

G. A municipality shall do one of the following:
1. Before the adoption of proposed or updated land use assumptions, infrastructure improvements plan and development fees as prescribed in subsection D of this section, the municipality shall appoint an infrastructure improvements advisory committee, subject to the following requirements:
(a) The advisory committee shall be composed of at least five members who are appointed by the governing body of the municipality. At least fifty per cent of the members of the advisory committee must be representatives of the real estate, development or building industries, of which at least one member of the committee must be from the home building industry. Members shall not be employees or officials of the municipality.
(b) The advisory committee shall serve in an advisory capacity and shall:
(i) Advise the municipality in adopting land use assumptions and in determining whether the assumptions are in conformance with the general plan of the municipality.
(ii) Review the infrastructure improvements plan and file written comments.
(iii) Monitor and evaluate implementation of the infrastructure improvements plan.
(iv) Every year file reports with respect to the progress of the infrastructure improvements plan and the collection and expenditures of development fees and report to the municipality any perceived inequities in implementing the plan or imposing the development fee.
(v) Advise the municipality of the need to update or revise the land use assumptions, infrastructure improvements plan and development fee.
(c) The municipality shall make available to the advisory committee any professional reports with respect to developing and implementing the infrastructure improvements plan.
(d) The municipality shall adopt procedural rules for the advisory committee to follow in carrying out the committee's duties.
2. In lieu of creating an advisory committee pursuant to paragraph 1 of this subsection, provide for a biennial certified audit of the municipality's land use assumptions, infrastructure improvements plan and development fees. An audit pursuant to this paragraph shall be conducted by one or more qualified professionals who are not employees or officials of the municipality and who did not prepare the infrastructure improvements plan. The audit shall review the progress of the infrastructure improvements plan, including the collection and expenditures of development fees for each project in the plan, and evaluate any inequities in implementing the plan or imposing the development fee. The municipality shall post the findings of the audit on the municipality's website or the website of an association of cities and towns if the municipality does not have a website and shall conduct a public hearing on the audit within sixty days of the release of the audit to the public.
H. On written request, an owner of real property for which a development fee has been paid after July 31, 2014 is entitled to a refund of a development fee or any part of a development fee if:
1. Pursuant to subsection B, paragraph 6 of this section, existing facilities are available and service is not provided.
2. The municipality has, after collecting the fee to construct a facility when service is not available, failed to complete construction within the time period identified in the infrastructure improvements plan, but in no event later than the time period specified in paragraph 3 of this subsection.
3. For a development fee other than a development fee for water or wastewater facilities, any part of the development fee is not spent as authorized by this section within ten years after the fee has been paid or, for a development fee for water or wastewater facilities, any part of the development fee is not spent as authorized by this section within fifteen years after the fee has been paid.
I. If the development fee was collected for the construction of all or a portion of a specific item of infrastructure, and on completion of the infrastructure the municipality determines that the actual cost of construction was less than the forecasted cost of construction on which the development fee was based and the difference between the actual and estimated cost is greater than ten per cent, the current owner may receive a refund of the portion of the development fee equal to the difference between the development fee paid and the development fee that would have been due if the development fee had been calculated at the actual construction cost.
J. A refund shall include any interest earned by the municipality from the date of collection to the date of refund on the amount of the refunded fee. All refunds shall be made to the record owner of the property at the time the refund is paid. If the development fee is paid by a governmental entity, the refund shall be paid to the governmental entity.
K. A development fee that was adopted before January 1, 2012 may continue to be assessed only to the extent that it will be used to provide a necessary public service for which development fees can be assessed pursuant to this section and shall be replaced by a development fee imposed under this section on or before August 1, 2014. Any municipality having a development fee that has not been replaced under

this section on or before August 1, 2014 shall not collect development fees until the development fee has been replaced with a fee that complies with this section. Any development fee monies collected before January 1, 2012 remaining in a development fee account:
1. Shall be used towards the same category of necessary public services as authorized by this section.
2. If development fees were collected for a purpose not authorized by this section, shall be used for the purpose for which they were collected on or before January 1, 2020, and after which, if not spent, shall be distributed equally among the categories of necessary public services authorized by this section.
L. A moratorium shall not be placed on development for the sole purpose of awaiting completion of all or any part of the process necessary to develop, adopt or update development fees.
M. In any judicial action interpreting this section, all powers conferred on municipal governments in this section shall be narrowly construed to ensure that development fees are not used to impose on new residents a burden all taxpayers of a municipality should bear equally.
N. Each municipality that assesses development fees shall submit an annual report accounting for the collection and use of the fees for each service area. The annual report shall include the following:
1. The amount assessed by the municipality for each type of development fee.
2. The balance of each fund maintained for each type of development fee assessed as of the beginning and end of the fiscal year.
3. The amount of interest or other earnings on the monies in each fund as of the end of the fiscal year.
4. The amount of development fee monies used to repay:
(a) Bonds issued by the municipality to pay the cost of a capital improvement project that is the subject of a development fee assessment, including the amount needed to repay the debt service obligations on each facility for which development fees have been identified as the source of funding and the time frames in which the debt service will be repaid.
(b) Monies advanced by the municipality from funds other than the funds established for development fees in order to pay the cost of a capital improvement project that is the subject of a development fee assessment, the total amount advanced by the municipality for each facility, the source of the monies advanced and the terms under which the monies will be repaid to the municipality.
5. The amount of development fee monies spent on each capital improvement project that is the subject of a development fee assessment and the physical location of each capital improvement project.
6. The amount of development fee monies spent for each purpose other than a capital improvement project that is the subject of a development fee assessment.
O. Within ninety days following the end of each fiscal year, each municipality shall submit a copy of the annual report to the city clerk and post the report on the municipality's website or the website of an association of cities and towns if the municipality does not have a website. Copies shall be made available to the public on request. The annual report may contain financial information that has not been audited.
P. A municipality that fails to file the report and post the report on the municipality's website or the website of an association of cities and towns if the municipality does not have a website as required by this section shall not collect development fees until the report is filed and posted.
Q. Any action to collect a development fee shall be commenced within two years after the obligation to pay the fee accrues.
R. A municipality may continue to assess a development fee adopted before January 1, 2012 for any facility that was financed before June 1, 2011 if:
1. Development fees were pledged to repay debt service obligations related to the construction of the facility.
2. After August 1, 2014, any development fees collected under this subsection are used solely for the payment of principal and interest on the portion of the bonds, notes or other debt service obligations issued before June 1, 2011 to finance construction of the facility.
S. Through August 1, 2014, a development fee adopted before January 1, 2012 may be used to finance construction of a facility and may be pledged to repay debt service obligations if:
1. The facility that is being financed is a facility that is described under subsection T, paragraph 7, subdivisions (a) through (g) of this section.
2. The facility was included in an infrastructure improvements plan adopted before June 1, 2011.
3. The development fees are used for the payment of principal and interest on the portion of the bonds, notes or other debt service obligations issued to finance construction of the necessary public services or facility expansions identified in the infrastructure improvement plan.

T. For the purposes of this section:
1. "Dedication" means the actual conveyance date or the date an improvement, facility or real or personal property is placed into service, whichever occurs first.
2. "Development" means:
(a) The subdivision of land.
(b) The construction, reconstruction, conversion, structural alteration, relocation or enlargement of any structure that adds or increases the number of service units.
(c) Any use or extension of the use of land that increases the number of service units.
3. "Facility expansion" means the expansion of the capacity of an existing facility that serves the same function as an otherwise new necessary public service in order that the existing facility may serve new development. Facility expansion does not include the repair, maintenance, modernization or expansion of an existing facility to better serve existing development.
4. "Final approval" means:
(a) For a nonresidential or multifamily development, the approval of a site plan or, if no site plan is submitted for the development, the approval of a final subdivision plat.
(b) For a single family residential development, the approval of a final subdivision plat.
5. "Infrastructure improvements plan" means a written plan that identifies each necessary public service or facility expansion that is proposed to be the subject of a development fee and otherwise complies with the requirements of this section, and may be the municipality's capital improvements plan.
6. "Land use assumptions" means projections of changes in land uses, densities, intensities and population for a specified service area over a period of at least ten years and pursuant to the general plan of the municipality.
7. "Necessary public service" means any of the following facilities that have a life expectancy of three or more years and that are owned and operated by or on behalf of the municipality:
(a) Water facilities, including the supply, transportation, treatment, purification and distribution of water, and any appurtenances for those facilities.
(b) Wastewater facilities, including collection, interception, transportation, treatment and disposal of wastewater, and any appurtenances for those facilities.
(c) Storm water, drainage and flood control facilities, including any appurtenances for those facilities.
(d) Library facilities of up to ten thousand square feet that provide a direct benefit to development, not including equipment, vehicles or appurtenances.
(e) Street facilities located in the service area, including arterial or collector streets or roads that have been designated on an officially adopted plan of the municipality, traffic signals and rights-of-way and improvements thereon.
(f) Fire and police facilities, including all appurtenances, equipment and vehicles. Fire and police facilities do not include a facility or portion of a facility that is used to replace services that were once provided elsewhere in the municipality, vehicles and equipment used to provide administrative services, helicopters or airplanes or a facility that is used for training firefighters or officers from more than one station or substation.
(g) Neighborhood parks and recreational facilities on real property up to thirty acres in area, or parks and recreational facilities larger than thirty acres if the facilities provide a direct benefit to the development. Park and recreational facilities do not include vehicles, equipment or that portion of any facility that is used for amusement parks, aquariums, aquatic centers, auditoriums, arenas, arts and cultural facilities, bandstand and orchestra facilities, bathhouses, boathouses, clubhouses, community centers greater than three thousand square feet in floor area, environmental education centers, equestrian facilities, golf course facilities, greenhouses, lakes, museums, theme parks, water reclamation or riparian areas, wetlands, zoo facilities or similar recreational facilities, but may include swimming pools.
(h) Any facility that was financed and that meets all of the requirements prescribed in subsection R of this section.
8. "Qualified professional" means a professional engineer, surveyor, financial analyst or planner providing services within the scope of the person's license, education or experience.
9. "Service area" means any specified area within the boundaries of a municipality in which development will be served by necessary public services or facility expansions and within which a substantial nexus exists between the necessary public services or facility expansions and the development being served as prescribed in the infrastructure improvements plan.
10. "Service unit" means a standardized measure of consumption, use, generation or discharge attributable to an individual unit of development calculated pursuant to generally accepted engineering or planning standards for a particular category of necessary public services or facility expansions.

9-463.06. Standards for enactment of moratorium; land development; limitations; definitions

A. A city or town shall not adopt a moratorium on construction or land development unless it first:

1. Provides notice to the public published once in a newspaper of general circulation in the community at least thirty days before a final public hearing to be held to consider the adoption of the moratorium.

2. Makes written findings justifying the need for the moratorium in the manner provided for in this section.

3. Holds a public hearing on the adoption of the moratorium and the findings that support the moratorium.

B. For urban or urbanizable land, a moratorium may be justified by demonstration of a need to prevent a shortage of essential public facilities that would otherwise occur during the effective period of the moratorium. This demonstration shall be based on reasonably available information and shall include at least the following findings:

1. A showing of the extent of need beyond the estimated capacity of existing essential public facilities expected to result from new land development, including identification of any essential public facilities currently operating beyond capacity and the portion of this capacity already committed to development, or in the case of water resources, a showing that, in an active management area, an assured water supply cannot be provided or, outside an active management area, a sufficient water supply cannot be provided, to the new land development, including identification of current water resources and the portion already committed to development.

2. That the moratorium is reasonably limited to those areas of the city or town where a shortage of essential public facilities would otherwise occur and on property that has not received development approvals based upon the sufficiency of existing essential public facilities.

3. That the housing and economic development needs of the area affected have been accommodated as much as possible in any program for allocating any remaining essential public facility capacity.

C. A moratorium not based on a shortage of essential public facilities under subsection B of this section may be justified only by a demonstration of compelling need for other public facilities, including police and fire facilities. This demonstration shall be based on reasonably available information and shall include at least the following findings:

1. For urban or urbanizable land:

(a) That application of existing development ordinances or regulations and other applicable law is inadequate to prevent irrevocable public harm from development in affected geographical areas.

(b) That the moratorium is sufficiently limited to ensure that a needed supply of affected housing types and the supply of commercial and industrial facilities within or in proximity to the city or town are not unreasonably restricted by the adoption of the moratorium.

(c) Stating the reasons that alternative methods of achieving the objectives of the moratorium are unsatisfactory.

(d) That the city or town has determined that the public harm that would be caused by failure to impose a moratorium outweighs the adverse effects on other affected local governments, including shifts in demand for housing or economic development, public facilities and services and buildable lands and the overall impact of the moratorium on population distribution.

(e) That the city or town proposing the moratorium has developed a work plan and time schedule for achieving the objectives of the moratorium.

2. For rural land:
(a) That application of existing development ordinances or regulations and other applicable law is inadequate to prevent irrevocable public harm from development in affected geographical areas.
(b) Stating the reasons that alternative methods of achieving the objectives of the moratorium are unsatisfactory.
(c) That the moratorium is sufficiently limited to ensure that lots or parcels outside the affected geographical areas are not unreasonably restricted by the adoption of the moratorium.
(d) That the city or town proposing the moratorium has developed a work plan and time schedule for achieving the objectives of the moratorium.
D. Any moratorium adopted pursuant to this section does not affect any express provision in a development agreement entered into pursuant to section 9-500.05 or as defined in section 11-1101 governing the rate, timing and sequencing of development, nor does it affect rights acquired pursuant to a protected development right granted according to chapter 11 of this title or title 11, chapter 9. Any moratorium adopted pursuant to this section shall provide a procedure pursuant to which an individual landowner may apply for a waiver of the moratorium's applicability to its property by claiming rights obtained pursuant to a development agreement, a protected development right or any vested right or by providing the public facilities that are the subject of the moratorium at the landowner's cost.
E. A moratorium adopted under subsection C, paragraph 1 of this section shall not remain in effect for more than one hundred twenty days, but such a moratorium may be extended for additional periods of time of up to one hundred twenty days if the city or town adopting the moratorium holds a public hearing on the proposed extension and adopts written findings that:
1. Verify the problem requiring the need for the moratorium to be extended.
2. Demonstrate that reasonable progress is being made to alleviate the problem resulting in the moratorium.
3. Set a specific duration for the renewal of the moratorium.
F. A city or town considering an extension of a moratorium shall provide notice to the general public published once in a newspaper of general circulation in the community at least thirty days before a final hearing is held to consider an extension of a moratorium.
G. Nothing in this section shall prevent a city or town from complying with any state or federal law, regulation or order issued in writing by a legally authorized governmental entity.
H. A landowner aggrieved by a municipality's adoption of a moratorium pursuant to this section may file, at any time within thirty days after the moratorium has been adopted, a complaint for a trial de novo in the superior court on the facts and the law regarding the moratorium. All matters presented to the superior court pursuant to this section have preference on the court calendar on the same basis as condemnation matters and the court shall further have the authority to award reasonable attorney fees incurred in the appeal and trial pursuant to this section to the prevailing party.
I. In this section:
1. "Compelling need" means a clear and imminent danger to the health and safety of the public.
2. "Essential public facilities" means water, sewer and street improvements to the extent that these improvements and water resources are provided by the city, town or private utility.
3. "Moratorium on construction or land development" means engaging in a pattern or practice of delaying or stopping issuance of permits, authorizations or approvals necessary for the subdivision and partitioning of, or construction on, any land. It does not include denial or delay of permits or authorizations because they are inconsistent with applicable statutes, rules, zoning or other ordinances.
4. "Rural land" means all property in the unincorporated area of a county or in the incorporated area of the city or town with a population of two thousand nine hundred or less persons according to the most recent United States decennial census.
5. "Urban or urbanizable land" means all property in the incorporated area of a city or town with a population of more than two thousand nine hundred persons according to the most recent United States decennial census.
6. "Vested right" means a right to develop property established by the expenditure of substantial sums of money pursuant to a permit or approval granted by the city, town or county.

9-500.12. Appeals of municipal actions; dedication or exaction; excessive reduction in property value; burden of proof; attorney fees

A. Notwithstanding any other provision of this chapter, a property owner may appeal the following actions relating to the owner's property by a city or town, or an administrative agency or official of a city or town, in the manner prescribed by this section:

1. The requirement by a city or town of a dedication or exaction as a condition of granting approval for the use, improvement or development of real property. This section does not apply to a dedication or exaction required in a legislative act by the governing body of a city or town that does not give discretion to the administrative agency or official to determine the nature or extent of the dedication or exaction.

2. The adoption or amendment of a zoning regulation by a city or town that creates a taking of property in violation of section 9-500.13.

B. The city or town shall notify the property owner that the property owner has the right to appeal the city's or town's action pursuant to this section and shall provide a description of the appeal procedure. The city or town shall not request the property owner to waive the right of appeal or trial de novo at any time during the consideration of the property owner's request.

C. The appeal shall be in writing and filed with or mailed to a hearing officer designated by the city or town within thirty days after the final action is taken. The municipality shall submit a takings impact report to the hearing officer. No fee shall be charged for filing the appeal.

D. After receipt of an appeal, the hearing officer shall schedule a time for the appeal to be heard not later than thirty days after receipt. The property owner shall be given at least ten days' notice of the time when the appeal will be heard unless the property owner agrees to a shorter time period.

E. In all proceedings under this section the city or town has the burden to establish that there is an essential nexus between the dedication or exaction and a legitimate governmental interest and that the proposed dedication, exaction or zoning regulation is roughly proportional to the impact of the proposed use, improvement or development or, in the case of a zoning regulation, that the zoning regulation does not create a taking of property in violation of section 9-500.13. If more than a single parcel is involved this requirement applies to the entire property.

F. The hearing officer shall decide the appeal within five working days after the appeal is heard. If the city or town does not meet its burden under subsection E of this section, the hearing officer shall:

1. Modify or delete the requirement of the dedication or exaction appealed under subsection A, paragraph 1 of this section.

2. In the case of a zoning regulation appealed under subsection A, paragraph 2 of this section, the hearing officer shall transmit a recommendation to the governing body of the city or town.

G. If the hearing officer modifies or affirms the requirement of the dedication, exaction or zoning regulation, a property owner aggrieved by a decision of the hearing officer may file, at any time within thirty days after the hearing officer has rendered a decision, a complaint for a trial de novo in the superior court on the facts and the law regarding the issues of the condition or requirement of the dedication, exaction or zoning regulation. In accordance with the standards for granting preliminary injunctions, the court may exercise any legal or equitable interim remedies that will permit the property owner to proceed with the use, enjoyment and development of the real property but that will not render moot any decision upholding the dedication, exaction or zoning regulation.

H. All matters presented to the superior court pursuant to this section have

preference on the court calendar on the same basis as condemnation matters, and the court shall further have the authority to award reasonable attorney fees incurred in the appeal and trial pursuant to this section to the prevailing party. The court may further award damages that are deemed appropriate to compensate the property owner for direct and actual delay damages on a finding that the city or town acted in bad faith.

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9-500.13. Compliance with court decisions

A city or town or an agency or instrumentality of a city or town shall comply with the United States supreme court cases of Dolan v. City of Tigard, _____ U.S. _____ (1994), Nollan v. California Coastal Commission, 483 U.S. 825 (1987), Lucas v. South Carolina Coastal Council, _____ U.S. _____ (1992), and First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987), and Arizona and federal appellate court decisions that are binding on Arizona cities and towns interpreting or applying those cases.

9-500.14. Use of city or town resources or employees to influence elections; prohibition; civil penalty; definitions

A. A city or town shall not spend or use its resources, including the use or expenditure of monies, accounts, credit, facilities, vehicles, postage, telecommunications, computer hardware and software, web pages, personnel, equipment, materials, buildings or any other thing of value of the city or town, for the purpose of influencing the outcomes of elections. Notwithstanding this section, a city or town may distribute informational pamphlets on a proposed bond election as provided in section 35-454 if those informational pamphlets present factual information in a neutral manner. Nothing in this section precludes a city or town from reporting on official actions of the governing body.

B. The prohibition on the use of public resources to influence the outcome of bond, budget override and other tax-related elections includes the use of city-focused or town-focused promotional expenditures that occur after an election is called and through election day. This prohibition does not include routine city or town communications.

C. This section does not prohibit the use of city or town resources, including facilities and equipment, for government-sponsored forums or debates if the government sponsor remains impartial and the events are purely informational and provide an equal opportunity to all viewpoints. The rental and use of a public facility by a private person or entity that may lawfully attempt to influence the outcome of an election is permitted if it does not occur at the same time and place as a government-sponsored forum or debate.

D. Employees of a city or town shall not use the authority of their positions to influence the vote or political activities of any subordinate employee.

E. The attorney general or the county attorney of the county in which an alleged violation of this section occurred may initiate a suit in the superior court in the county in which the city or town is located for the purpose of complying with this section.

F. For each violation of this section, the court may impose a civil penalty not to exceed five thousand dollars plus any amount of misused funds subtracted from the city or town budget against a person who knowingly violates or aids another person in violating this section. The person determined to be out of compliance with this section is responsible for the payment of all penalties and misused funds. City or town funds or insurance payments shall not be used to pay these penalties or misused funds. All misused funds collected pursuant to this section shall be returned to the city or town whose funds were misused.

G. Nothing contained in this section shall be construed as denying the civil and political liberties of any employee as guaranteed by the United States and Arizona Constitutions.

H. For the purposes of this section:

1. "Government-sponsored forum or debate" means any event, or part of an event or meeting, in which the government is an official sponsor, which is open to the public or to invited members of the public, and whose purpose is to inform the public about an issue or proposition that is before the voters.

2. "Influencing the outcomes of elections" means supporting or opposing a candidate for nomination or election to public office or the recall of a public officer or supporting or opposing a ballot measure, question or proposition, including any bond, budget or override election and supporting or opposing the circulation of a petition for the recall of a public officer or a petition for a ballot measure, question or proposition in any manner that is not impartial or neutral.

3. "Misused funds" means city or town monies or resources used unlawfully as proscribed by this section.

4. "Routine city or town communications" means messages or advertisements that are germane to the functions of the city or town and that maintain the frequency, scope and distribution consistent with past practices or are necessary for public safety.

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12-349. Unjustified actions; attorney fees, expenses and double damages; exceptions; definition

A. Except as otherwise provided by and not inconsistent with another statute, in any civil action commenced or appealed in a court of record in this state, the court shall assess reasonable attorney fees, expenses and, at the court's discretion, double damages of not to exceed five thousand dollars against an attorney or party, including this state and political subdivisions of this state, if the attorney or party does any of the following:

1. Brings or defends a claim without substantial justification.
2. Brings or defends a claim solely or primarily for delay or harassment.
3. Unreasonably expands or delays the proceeding.
4. Engages in abuse of discovery.

B. The court may allocate the payment of attorney fees among the offending attorneys and parties, jointly or severally, and may assess separate amounts against an offending attorney or party.

C. Attorney fees shall not be assessed if after filing an action a voluntary dismissal is filed for any claim or defense within a reasonable time after the attorney or party filing the dismissal knew or reasonably should have known that the claim or defense was without substantial justification.

D. This section does not apply to the adjudication of civil traffic violations or to any proceedings brought by this state pursuant to title 13.

E. Notwithstanding any other law, this state and political subdivisions of this state may be awarded attorney fees pursuant to this section.

F. For the purposes of this section, "without substantial justification" means that the claim or defense is groundless and is not made in good faith.

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12-542. Injury to person; injury when death ensues; injury to property; conversion of property; forcible entry and forcible detainer; two year limitation

Except as provided in section 12-551 there shall be commenced and prosecuted within two years after the cause of action accrues, and not afterward, the following actions:

1. For injuries done to the person of another including causes of action for medical malpractice as defined in section 12-561.
2. For injuries done to the person of another when death ensues from such injuries, which action shall be considered as accruing at the death of the party injured.
3. For trespass for injury done to the estate or the property of another.
4. For taking or carrying away the goods and chattels of another.
5. For detaining the personal property of another and for converting such property to one's own use.
6. For forcible entry or forcible detainer, which action shall be considered as accruing at the commencement of the forcible entry or detainer.

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12-821. General limitation; public employee

All actions against any public entity or public employee shall be brought within one year after the cause of action accrues and not afterward.

12-821.01. Authorization of claim against public entity, public school or public employee

A. Persons who have claims against a public entity, public school or a public employee shall file claims with the person or persons authorized to accept service for the public entity, public school or public employee as set forth in the Arizona rules of civil procedure within one hundred eighty days after the cause of action accrues. The claim shall contain facts sufficient to permit the public entity, public school or public employee to understand the basis on which liability is claimed. The claim shall also contain a specific amount for which the claim can be settled and the facts supporting that amount. Any claim that is not filed within one hundred eighty days after the cause of action accrues is barred and no action may be maintained thereon.

B. For the purposes of this section, a cause of action accrues when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition that caused or contributed to the damage.

C. Notwithstanding subsection A, any claim that must be submitted to a binding or nonbinding dispute resolution process or an administrative claims process or review process pursuant to a statute, ordinance, resolution, administrative or governmental rule or regulation, or contractual term shall not accrue for the purposes of this section until all such procedures, processes or remedies have been exhausted. The time in which to give notice of a potential claim and to sue on the claim shall run from the date on which a final decision or notice of disposition is issued in an alternative dispute resolution procedure, administrative claim process or review process. This subsection does not prevent the parties to any contract from agreeing to extend the time for filing such notice of claim.

D. Notwithstanding subsection A, a minor or an insane or incompetent person may file a claim within one hundred eighty days after the disability ceases.

E. A claim against a public entity or public employee filed pursuant to this section is deemed denied sixty days after the filing of the claim unless the claimant is advised of the denial in writing before the expiration of sixty days.

F. This section applies to all causes of action that accrue on or after July 17, 1994.

G. If a genuine issue of material fact exists as to whether the requirements of this section have been complied with, the issue shall be resolved before a trial on the merits and at the earliest possible time.

H. This section does not apply to any claim for just compensation pursuant to chapter 8, article 2.1 of this title.

13-1602. Criminal damage; classification

A. A person commits criminal damage by:

1. Recklessly defacing or damaging property of another person.

2. Recklessly tampering with property of another person so as substantially to impair its function or value.

3. Recklessly damaging property of a utility.

4. Recklessly parking any vehicle in such a manner as to deprive livestock of access to the only reasonably available water.

5. Recklessly drawing or inscribing a message, slogan, sign or symbol that is made on any public or private building, structure or surface, except the ground, and that is made without permission of the owner.

6. Intentionally tampering with utility property.

B. Criminal damage is punished as follows:

1. Criminal damage is a class 4 felony if the person recklessly damages property of another in an amount of ten thousand dollars or more.

2. Criminal damage is a class 4 felony if the person recklessly damages the property of a utility in an amount of five thousand dollars or more or if the person intentionally tampers with utility property and the damage causes an imminent safety hazard to any person.

3. Criminal damage is a class 5 felony if the person recklessly damages property of another in an amount of two thousand dollars or more but less than ten thousand dollars or if the damage is inflicted to promote, further or assist any criminal street gang or criminal syndicate with the intent to intimidate and the person is not subject to paragraph 1 or 2 of this subsection.

4. Criminal damage is a class 6 felony if the person recklessly damages property of another in an amount of one thousand dollars or more but less than two thousand dollars.

5. Criminal damage is a class 1 misdemeanor if the person recklessly damages property of another in an amount of more than two hundred fifty dollars but less than one thousand dollars.

6. In all other cases criminal damage is a class 2 misdemeanor.

C. For a violation of subsection A, paragraph 5 of this section, in determining the amount of damage to property, damages include reasonable labor costs of any kind, reasonable material costs of any kind and any reasonable costs that are attributed to equipment that is used to abate or repair the damage to the property.

13-1802. Theft; classification; definitions

A. A person commits theft if, without lawful authority, the person knowingly:
1. Controls property of another with the intent to deprive the other person of such property; or
2. Converts for an unauthorized term or use services or property of another entrusted to the defendant or placed in the defendant's possession for a limited, authorized term or use; or
3. Obtains services or property of another by means of any material misrepresentation with intent to deprive the other person of such property or services; or
4. Comes into control of lost, mislaid or misdelivered property of another under circumstances providing means of inquiry as to the true owner and appropriates such property to the person's own or another's use without reasonable efforts to notify the true owner; or
5. Controls property of another knowing or having reason to know that the property was stolen; or
6. Obtains services known to the defendant to be available only for compensation without paying or an agreement to pay the compensation or diverts another's services to the person's own or another's benefit without authority to do so; or
7. Controls the ferrous metal or nonferrous metal of another with the intent to deprive the other person of the metal; or
8. Controls the ferrous metal or nonferrous metal of another knowing or having reason to know that the metal was stolen; or
9. Purchases within the scope of the ordinary course of business the ferrous metal or nonferrous metal of another person knowing that the metal was stolen.

B. A person commits theft if, without lawful authority, the person knowingly takes control, title, use or management of a vulnerable adult's property while acting in a position of trust and confidence and with the intent to deprive the vulnerable adult of the property. Proof that a person took control, title, use or management of a vulnerable adult's property without adequate consideration to the vulnerable adult may give rise to an inference that the person intended to deprive the vulnerable adult of the property.

C. It is an affirmative defense to any prosecution under subsection B of this section that either:
1. The property was given as a gift consistent with a pattern of gift giving to the person that existed before the adult became vulnerable.
2. The property was given as a gift consistent with a pattern of gift giving to a class of individuals that existed before the adult became vulnerable.
3. The superior court approved the transaction before the transaction occurred.

D. The inferences set forth in section 13-2305 apply to any prosecution under subsection A, paragraph 5 of this section.

E. At the conclusion of any grand jury proceeding, hearing or trial, the court shall preserve any trade secret that is admitted in evidence or any portion of a transcript that contains information relating to the trade secret pursuant to section 44-405.

F. Subsection B of this section does not apply to an agent who is acting within the scope of the agent's duties as or on behalf of a health care institution that is licensed pursuant to title 36, chapter 4 and that provides services to the vulnerable adult.

G. Theft of property or services with a value of twenty-five thousand dollars or more is a class 2 felony. Theft of property or services with a value of four thousand dollars or more but less than twenty-five thousand dollars is a class 3 felony. Theft of property or services with a value of three thousand dollars or more but less than four thousand dollars is a class 4 felony, except that theft of any vehicle engine or

transmission is a class 4 felony regardless of value. Theft of property or services with a value of two thousand dollars or more but less than three thousand dollars is a class 5 felony. Theft of property or services with a value of one thousand dollars or more but less than two thousand dollars is a class 6 felony. Theft of any property or services valued at less than one thousand dollars is a class 1 misdemeanor, unless the property is taken from the person of another, is a firearm or is an animal taken for the purpose of animal fighting in violation of section 13-2910.01, in which case the theft is a class 6 felony.

H. A person who is convicted of a violation of subsection A, paragraph 1 or 3 of this section that involved property with a value of one hundred thousand dollars or more is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except pursuant to section 31-233, subsection A or B until the sentence imposed by the court has been served, the person is eligible for release pursuant to section 41-1604.07 or the sentence is commuted.

I. For the purposes of this section, the value of ferrous metal or nonferrous metal includes the amount of any damage to the property of another caused as a result of the theft of the metal.

J. In an action for theft of ferrous metal or nonferrous metal:

1. Unless satisfactorily explained or acquired in the ordinary course of business by an automotive recycler as defined and licensed pursuant to title 28, chapter 10 or by a scrap metal dealer as defined in section 44-1641, proof of possession of scrap metal that was recently stolen may give rise to an inference that the person in possession of the scrap metal was aware of the risk that it had been stolen or in some way participated in its theft.

2. Unless satisfactorily explained or sold in the ordinary course of business by an automotive recycler as defined and licensed pursuant to title 28, chapter 10 or by a scrap metal dealer as defined in section 44-1641, proof of the sale of stolen scrap metal at a price substantially below its fair market value may give rise to an inference that the person selling the scrap metal was aware of the risk that it had been stolen.

K. For the purposes of this section:

1. "Adequate consideration" means the property was given to the person as payment for bona fide goods or services provided by the person and the payment was at a rate that was customary for similar goods or services in the community that the vulnerable adult resided in at the time of the transaction.

2. "Ferrous metal" and "nonferrous metal" have the same meanings prescribed in section 44-1641.

3. "Pattern of gift giving" means two or more gifts that are the same or similar in type and monetary value.

4. "Position of trust and confidence" has the same meaning prescribed in section 46-456.

5. "Property" includes all forms of real property and personal property.

6. "Vulnerable adult" has the same meaning prescribed in section 46-451.

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13-2311. Fraudulent schemes and practices; wilful concealment; classification

A. Notwithstanding any provision of the law to the contrary, in any matter related to the business conducted by any department or agency of this state or any political subdivision thereof, any person who, pursuant to a scheme or artifice to defraud or deceive, knowingly falsifies, conceals or covers up a material fact by any trick, scheme or device or makes or uses any false writing or document knowing such writing or document contains any false, fictitious or fraudulent statement or entry is guilty of a class 5 felony.

B. For the purposes of this section, "agency" includes a public agency as defined by section 38-502, paragraph 6.

13-2314. Racketeering; civil remedies by this state; definitions

A. The attorney general or a county attorney may file an action in superior court on behalf of a person who sustains injury to his person, business or property by racketeering as defined by section 13-2301, subsection D, paragraph 4 or by a violation of section 13-2312 for the recovery of treble damages and the costs of the suit, including reasonable attorney fees, or to prevent, restrain, or remedy racketeering as defined by section 13-2301, subsection D, paragraph 4 or a violation of section 13-2312. If the person against whom a racketeering claim has been asserted, including a forfeiture action or lien, prevails on that claim, the person may be awarded costs and reasonable attorney fees incurred in defense of that claim. In actions filed by the state or a county, awards of costs and reasonable attorney fees are to be assessed against and paid from monies acquired pursuant to sections 13-2314.01 and 13-2314.03.

B. The superior court has jurisdiction to prevent, restrain, and remedy racketeering as defined by section 13-2301, subsection D, paragraph 4 or a violation of section 13-2312 after making provision for the rights of any person who sustained injury to his person, business or property by the racketeering conduct and after a hearing or trial, as appropriate, by issuing appropriate orders.

C. Prior to a determination of liability such orders may include, but are not limited to, issuing seizure warrants, entering findings of probable cause for in personam or in rem forfeiture, entering restraining orders or prohibitions or taking such other actions, including the acceptance of satisfactory performance bonds, the creation of receiverships and the enforcement of constructive trusts, in connection with any property or other interest subject to forfeiture, damages or other remedies or restraints pursuant to this section as the court deems proper.

D. Following a determination of liability such orders may include, but are not limited to:

1. Ordering any person to divest himself of any interest, direct or indirect, in any enterprise.
2. Imposing reasonable restrictions on the future activities or investments of any person, including prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect the laws of this state, to the extent the constitutions of the United States and this state permit.
3. Ordering dissolution or reorganization of any enterprise.
4. Ordering the payment of treble damages to those persons injured by racketeering as defined by section 13-2301, subsection D, paragraph 4 or a violation of section 13-2312.
5. Ordering the payment of all costs and expenses of the prosecution and investigation of any offense included in the definition of racketeering in section 13-2301, subsection D, paragraph 4 or a violation of section 13-2312, civil and criminal, including reasonable attorney fees, to be paid to the general fund of the state or the county which brings the action.
6. In personam forfeiture pursuant to chapter 39 of this title to the general fund of the state or county as appropriate, to the extent that forfeiture is not inconsistent with protecting the rights of any person who sustained injury to his person, business or property by the racketeering conduct, of the interest of a person in:

(a) Any property or interest in property acquired or maintained by the person in violation of section 13-2312.

(b) Any interest in, security of, claims against or property, office, title, license or contractual right of any kind affording a source of influence over any enterprise or other property which the person has acquired or maintained an interest in or control of, conducted or participated in the conduct of in violation of section 13-2312.

(c) All proceeds traceable to an offense included in the definition of racketeering in section 13-2301, subsection D, paragraph 4 and held by the person and all monies, negotiable instruments, securities and other property used or intended to be used by the person in any manner or part to facilitate commission of the offense and that the person either owned or controlled for the purpose of that use.
(d) Any other property up to the value of the subject property described in subdivision (a), (b) or (c) of this paragraph.
7. Payment to the general fund of the state or county as appropriate of an amount equal to the gain that was acquired or maintained through an offense included in the definition of racketeering in section 13-2301, subsection D, paragraph 4 or a violation of section 13-2312 or that any person is liable for under this section.
E. A person who is liable for conduct described in subsection D, paragraph 6, subdivision (a), (b) or (c) of this section is liable for the total value of all interests in property described in those subdivisions. The court shall enter an order of forfeiture against the person in the amount of the total value of all those interests less the value of any interests that are forfeited before or at the time of the entry of the final judgment.
F. A person or enterprise that acquires any property through an offense included in the definition of racketeering in section 13-2301, subsection D, paragraph 4 or through a violation of section 13-2312 is an involuntary trustee. The involuntary trustee and any other person or enterprise, except a bona fide purchaser for value who is reasonably without notice of the unlawful conduct and who is not knowingly taking part in an illegal transaction, hold the property, its proceeds and its fruits in constructive trust for the benefit of persons entitled to remedies under this section.
G. In addition to or in lieu of an action under this section the attorney general or a county attorney may file an in rem action pursuant to chapter 39 of this title for forfeiture, to the extent that forfeiture is not inconsistent with protecting the rights of any person who sustained injury to his person, business or property by the racketeering conduct, of:
1. Any property or interest in property acquired or maintained by a person in violation of section 13-2312.
2. Any interest in, security of, claims against or property, office, title, license or contractual right of any kind affording a source of influence over any enterprise or other property which a person has acquired or maintained an interest in or control of, conducted or participated in the conduct of in violation of section 13-2312.
3. All proceeds traceable to an offense included in the definition of racketeering in section 13-2301, subsection D, paragraph 4 and all monies, negotiable instruments, securities and other property used or intended to be used in any manner or part to facilitate the commission of the offense.
H. A defendant convicted in any criminal proceeding shall be precluded from subsequently denying the essential allegations of the criminal offense of which he was convicted in any civil proceeding. For the purposes of this subsection, a conviction may result from a verdict or plea including a no contest plea.
I. Notwithstanding any law creating a lesser period, the initiation of civil proceedings related to violations of any offense included in the definition of racketeering in section 13-2301, subsection D, paragraph 4 or a violation of section 13-2312, including procedures pursuant to chapter 39 of this title, shall be commenced within seven years after actual discovery of the violation.
J. In any civil action brought pursuant to this section, the attorney general or a county attorney may file with the clerk of the superior court a certificate stating that the case is of special public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or presiding chief judge of the superior court in the county in which such action is pending, and, upon receipt of such copy, the judge shall immediately designate a judge to hear and determine the action. The judge so designated shall promptly assign such action for hearing, participate in the hearings and determination and cause the action to be expedited.
K. The standard of proof in actions brought pursuant to this section is the preponderance of the evidence test.
L. A civil action authorized by this section, including proceedings pursuant to chapter 39 of this title, is remedial and not punitive and does not limit and is not limited by any other previous or subsequent civil or criminal action under this title or any other provision of law. Civil remedies provided under this title are supplemental and not mutually exclusive.
M. The attorney general may appear as amicus curiae in any proceeding in which a claim under this section has been asserted, including proceedings pursuant to chapter 39 of this title, or in which the court is interpreting this chapter or chapter 39 of this title. A party who files a notice of appeal from a civil action brought under this chapter or chapter 39 of this title shall serve the notice and one copy of the appellant's brief on the attorney general at the time the person files the appellant's brief with the court. This requirement is jurisdictional.
N. In this section and section 13-2312:
1. "Acquire" means for a person to do any of the following:

(a) Possess.
(b) Act so as to exclude other persons from using their property except on his own terms.
(c) Bring about or receive the transfer of any interest in property, whether to himself or to another person, or to secure performance of a service.
2. "Gain" means any benefit, interest or property of any kind without reduction for expenses of acquiring or maintaining it or incurred for any other reason.
3. "Proceeds" includes any interest in property of any kind acquired through or caused by an act or omission, or derived from the act or omission, directly or indirectly, and any fruits of this interest, in whatever form.

13-2314.04. Racketeering; unlawful activity; civil remedies by private cause of action; definitions

A. A person who sustains reasonably foreseeable injury to his person, business or property by a pattern of racketeering activity, or by a violation of section 13-2312 involving a pattern of racketeering activity, may file an action in superior court for the recovery of up to treble damages and the costs of the suit, including reasonable attorney fees for trial and appellate representation. If the person against whom a racketeering claim has been asserted, including a lien, prevails on that claim, the person may be awarded costs and reasonable attorney fees incurred in defense of that claim. No person may rely on any conduct that would have been actionable as fraud in the purchase or sale of securities to establish an action under this section except an action against a person who is convicted of a crime in connection with the fraud, in which case the period to initiate a civil action starts to run on the date on which the conviction becomes final.

B. The superior court has jurisdiction to prevent, restrain and remedy a pattern of racketeering activity or a violation of section 13-2312 involving a pattern of racketeering activity, after making provision for the rights of all innocent persons affected by the violation and after a hearing or trial, as appropriate, by issuing appropriate orders.

C. Before a determination of liability these orders may include, but are not limited to, entering restraining orders or prohibitions or taking such other actions, including the acceptance of satisfactory performance bonds, the creation of receiverships and the enforcement of constructive trusts, in connection with any property or other interest subject to damage or other remedies or restraints pursuant to this section as the court deems proper.

D. After a determination of liability these orders may include, but are not limited to:

1. Ordering any person to divest himself of any interest, direct or indirect, in any enterprise.

2. Imposing reasonable restrictions on the future activities or investments of any person, including prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect the laws of this state, to the extent the constitutions of the United States and this state permit.

3. Ordering dissolution or reorganization of any enterprise.

4. Ordering the payment of up to treble damages to those persons injured by a pattern of racketeering activity or a violation of section 13-2312 involving a pattern of racketeering activity.

5. Prejudgment interest on damages, except that prejudgment interest may not be awarded on any increase in the damages authorized under paragraph 4 of this subsection.

6. A person or enterprise that acquires any property through an offense included in the definition of racketeering in section 13-2301, subsection D or a violation of section 13-2312 is an involuntary trustee. The involuntary trustee and any other person or enterprise, except a bona fide purchaser for value who is reasonably without notice of the unlawful conduct and who is not knowingly taking part in an illegal transaction, hold the property, its proceeds and its fruits in constructive trust for the benefit of persons entitled to remedies under this section.

E. A defendant convicted in any criminal proceeding is precluded from subsequently denying the essential allegations of the criminal offense of which the defendant was convicted in any civil proceedings. For the purpose of this subsection, a conviction may result from a verdict or plea including a no contest plea.

F. Notwithstanding any law prescribing a lesser period but subject to subsection A of this section, the initiation of civil proceedings pursuant to this section shall be

commenced within three years from the date the violation was discovered, or should have been discovered with reasonable diligence, and ten years after the events giving rise to the cause of action, whichever comes first.
G. The standard of proof in actions brought pursuant to this section is the preponderance of evidence test.
H. A person who files an action under this section shall serve notice and one copy of the pleading on the attorney general within thirty days after the action is filed with the superior court. This requirement is jurisdictional. The notice shall identify the action, the person and the person's attorney. Service of the notice does not limit or otherwise affect the right of the state to maintain an action under section 13-2314 or to intervene in a pending action nor does it authorize the person to name this state or the attorney general as a party to the action.
I. On timely application, the attorney general may intervene in any civil action or proceeding brought under this section if the attorney general certifies that in the attorney general's opinion the action is of special public importance. On intervention, the attorney general may assert any available claim and is entitled to the same relief as if the attorney general has instituted a separate action.
J. In addition to the state's right to intervene as a party in any action under this section, the attorney general may appear as amicus curiae in any proceeding in which a claim under this section has been asserted or in which a court is interpreting section 13-2301, 13-2312, 13-2313, 13-2314.01, 13-2314.02 or 13-2315 or this section.
K. A civil action authorized by this section is remedial and not punitive and does not limit and is not limited by any other previous or subsequent civil or criminal action under this title or any other provision of law. Civil remedies provided under this title are supplemental and not mutually exclusive, except that a person may not recover, for an action brought pursuant to this section, punitive damages or emotional injury damages in the absence of bodily injury.
L. A natural person shall not be held liable in damages or for other relief pursuant to this section based on the conduct of another unless the fact finder finds by a preponderance of the evidence that the natural person authorized, requested, commanded, ratified or recklessly tolerated the unlawful conduct of the other. An enterprise shall not be held liable in damages or for other relief pursuant to this section based on the conduct of an agent, unless the fact finder finds by a preponderance of the evidence that a director or high managerial agent performed, authorized, requested, commanded, ratified or recklessly tolerated the unlawful conduct of the agent. A bank or savings and loan association insured by the federal deposit insurance corporation or a credit union insured by the national credit union administration shall not be held liable in damages or for other relief pursuant to this section for conduct proscribed by section 13-2317, subsection B, paragraph 1, based on acquiring or maintaining an interest in or transporting, transacting, transferring or receiving funds belonging to a person other than the person presenting the funds, unless the fact finder finds by a preponderance of the evidence that the person or agent acquiring or maintaining an interest in or transporting, transacting, transferring or receiving the funds on behalf of the defendant did so knowing that the funds were the proceeds of an offense and that a director or high managerial agent performed, authorized, requested, commanded, ratified or recklessly tolerated the unlawful conduct of the person or agent. A person or enterprise shall not be held liable in damages or for other relief pursuant to this section unless the fact finder makes particularized findings sufficient to permit full and complete review of the record, if any, of the conduct of the person. A natural person or enterprise shall not be held liable in damages for recklessly tolerating the unlawful conduct of another person or agent if the other person or agent engaged in unlawful conduct proscribed by section 13-2301, subsection D, paragraph 4, subdivision (b), item (xvi), (xviii), (xix) or (xx) and the unlawful conduct involved the purchase or sale of securities.
M. Notwithstanding subsection A of this section, a court shall not award costs, including attorney fees, if the award would be unjust because of special circumstances, including the relevant disparate economic position of the parties or the disproportionate amount of the costs, including attorney fees, to the nature of the damage or other relief obtained.
N. If the court determines that the filing of any pleading, motion or other paper under this section was frivolous or that any civil action or proceeding was brought or continued under this section in bad faith, vexatiously, wantonly or for an improper or oppressive reason, it shall award a proper sanction to deter this conduct in the future that may include the costs of the civil action or proceeding, including the costs of investigation and reasonable attorney fees in the trial and appellate courts.
O. Notwithstanding any other law, a complaint, counterclaim, answer or response filed by a person in connection with a civil action or proceeding under this section shall be verified by at least one party or the party's attorney. If the person is represented by an attorney, at least one attorney of record shall sign any pleading, motion or other paper in the attorney's individual name and shall state the attorney's address.
P. The verification by a person or the person's attorney and the signature by an attorney required by subsection O of this section constitute a certification by the

person or the person's attorney that the person or the person's attorney has carefully read the pleading, motion or other paper and, based on a reasonable inquiry, believes all of the following:
1. It is well grounded in fact.
2. It is warranted by existing law or there is a good faith argument for the extension, modification or reversal of existing law.
3. It is not made for any bad faith, vexatious, wanton, improper or oppressive reason, including to harass, to cause unnecessary delay, to impose a needless increase in the cost of litigation or to force an unjust settlement through the serious character of the averment.
Q. If any pleading, motion or other paper is signed in violation of the certification provisions of subsection P of this section, the court, on its own motion or on the motion of the other party and after a hearing and appropriate findings of fact, shall impose on the person who verified it or the attorney who signed it, or both, a proper sanction to deter this conduct in the future, including the costs of the proceeding under subsection N of this section.
R. If any pleading, motion or other paper includes an averment of fraud or coercion, it shall state these circumstances with particularity with respect to each defendant.
S. In any civil action or proceeding under this section in which the pleading, motion or other paper does not allege a crime of violence as a racketeering act:
1. The term "racketeer" shall not be used in referring to any person.
2. The terms used to refer to acts of racketeering or a pattern of racketeering activity shall be "unlawful acts" or "a pattern of unlawful activity".
T. In this section, unless the context otherwise requires:
1. "Acquire" means for a person to do any of the following:
(a) Possess.
(b) Act so as to exclude another person from using the person's property except on the person's own terms.
(c) Bring about or receive the transfer of any interest in property, whether to himself or to another person, or to secure performance of a service.
2. "Gain" means any benefit, interest or property of any kind without reduction for expenses of acquiring or maintaining it or incurred for any other reason.
3. "Pattern of racketeering activity" means either:
(a) At least two acts of racketeering as defined in section 13-2301, subsection D, paragraph 4, subdivision (b), item (iv), (v), (vi), (vii), (viii), (ix), (x), (xiii), (xv), (xvi), (xvii), (xviii), (xix), (xx), (xxiv) or (xxvi) that meet the following requirements:
(i) The last act of racketeering activity that is alleged as the basis of the claim occurred within five years of a prior act of racketeering.
(ii) The acts of racketeering that are alleged as the basis of the claim were related to each other or to a common external organizing principle, including the affairs of an enterprise. Acts of racketeering are related if they have the same or similar purposes, results, participants, victims or methods of commission or are otherwise interrelated by distinguishing characteristics.
(iii) The acts of racketeering that are alleged as the basis of the claim were continuous or exhibited the threat of being continuous.
(b) A single act of racketeering as defined in section 13-2301, subsection D, paragraph 4, subdivision (b), item (i), (ii), (iii), (xi), (xii), (xiv), (xxi), (xxii), (xxiii), (xxv), (xxvii) or (xxviii).
4. "Proceeds" means any interest in property of any kind acquired through or caused by an act or omission, or derived from the act or omission, directly or indirectly, and any fruits of this interest, in whatever form.

Arizona State Legislature

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33-420. False documents; liability; special action; damages; violation; classification

A. A person purporting to claim an interest in, or a lien or encumbrance against, real property, who causes a document asserting such claim to be recorded in the office of the county recorder, knowing or having reason to know that the document is forged, groundless, contains a material misstatement or false claim or is otherwise invalid is liable to the owner or beneficial title holder of the real property for the sum of not less than five thousand dollars, or for treble the actual damages caused by the recording, whichever is greater, and reasonable attorney fees and costs of the action.

B. The owner or beneficial title holder of the real property may bring an action pursuant to this section in the superior court in the county in which the real property is located for such relief as is required to immediately clear title to the real property as provided for in the rules of procedure for special actions. This special action may be brought based on the ground that the lien is forged, groundless, contains a material misstatement or false claim or is otherwise invalid. The owner or beneficial title holder may bring a separate special action to clear title to the real property or join such action with an action for damages as described in this section. In either case, the owner or beneficial title holder may recover reasonable attorney fees and costs of the action if he prevails.

C. A person who is named in a document which purports to create an interest in, or a lien or encumbrance against, real property and who knows that the document is forged, groundless, contains a material misstatement or false claim or is otherwise invalid shall be liable to the owner or title holder for the sum of not less than one thousand dollars, or for treble actual damages, whichever is greater, and reasonable attorney fees and costs as provided in this section, if he wilfully refuses to release or correct such document of record within twenty days from the date of a written request from the owner or beneficial title holder of the real property.

D. A document purporting to create an interest in, or a lien or encumbrance against, real property not authorized by statute, judgment or other specific legal authority is presumed to be groundless and invalid.

E. A person purporting to claim an interest in, or a lien or encumbrance against, real property, who causes a document asserting such claim to be recorded in the office of the county recorder, knowing or having reason to know that the document is forged, groundless, contains a material misstatement or false claim or is otherwise invalid is guilty of a class 1 misdemeanor.

§ 50.014 EXTENSION OF SERVICE.

(A) *Outside town limits.* Use of the town wastewater works will not be granted to persons outside the limits of the town without the approval of the Town Council.

(B) *Approval required.* No public sewer extensions shall be made until the plans and specifications are approved by the authorized officers of the town.

(C) *In subdivisions.* In new subdivisions where public sewer extensions are authorized by the town and constructed at the subdivider's expense, the town may authorize the subdivider or his or her agent, if he or she so desires, to install building connections with wyes and connect the building sewers to the building connection under the following provisions:

(1) The construction of the public sewer, building connections, and connections of the building sewers to the building connection shall be in compliance with Maricopa Association of Governments (MAG) Standards and Specifications under the supervision of a registered civil engineer holding a currently active registration in the state, who shall submit "as built plans" bearing the registered civil engineer's registration seal and number to the Manager. It shall be the duty of the registered civil engineer employed by the subdivider to require that all building connections serving lots in the subdivision upon which no buildings are constructed be sealed. Such sealed connections shall be inspected and approved by the authorized officer of the town before being backfilled and shall be marked in the field, located, and designated on the "as built plans." The effective seal shall consist of a vitrified clay, or equal stopper, inserted in the bell of the sewer extending to the property line in the alley or to the curb line in the street from the public sewer. Such stopper shall be jointed according to the specifications and standard details used by the MAG or subsequent revision thereof. The stopper shall be permanently flagged by attaching one end of a length of copper wire to the stopper and the other end to a broken piece of clay pipe, which shall be placed under the soil surface directly over the end of sewer pipe.

(2) Before any sewer construction is commenced, the necessary approvals and permits must be obtained by the subdivider or his or her agent from the properly authorized officer of the town.

(3) When the "as built plans" are submitted to the town, the Engineer will make a record of the building connections. The Engineer shall notify the properly authorized officer of the connections to ascertain that all requirements of the town have been fulfilled.

(4) A deposit in cash, certified check, or bond in the amount of 100% of the Engineer's estimated cost of the public sewer extension and building connections shall be paid by the subdivider or his or her agent to the Town Manager before commencing any construction to ascertain that the provisions of this section are fulfilled. Upon acceptance of the "as built plans" by the Engineer and a satisfactory report by the authorized inspector, the deposit will be promptly refunded to the subdivider or his or her agent without interest. Should the subdivider or his agent fail to comply with the foregoing provisions, the deposit shall be forfeited by the subdivider or his or her agent and used by the town to complete the approved construction.

(5) (a) Except for single-family residential units, no privately owned sewer systems and/or treatment plants or facilities of any sort for the treatment of wastewater shall be allowed in any new subdivision within the town.

(b) In addition, no more than one single-family residential unit shall be allowed to introduce wastewater into any type of privately owned wastewater treatment facility that is permitted within a new subdivision by this chapter.

(`87 Code, Art. 17-6) (Ord. 94-06, passed 3-7-94) Penalty, see § 50.999

ORDINANCE NO. O2009-16

AN ORDINANCE OF THE MAYOR AND TOWN COUNCIL OF THE TOWN OF CAVE CREEK, MARICOPA COUNTY, ARIZONA, AMENDING THE TOWN CODE OF THE TOWN OF CAVE CREEK, BY DELETING CHAPTER 50.016 WASTEWATER; REPAYMENT PROVISIONS; DEVELOPMENT AGREEMENT IN ITS ENTIRETY.

WHEREAS, the Town of Cave Creek Town Council has adopted Ordinance O2009-16 establishing the deletion of Chapter 50.016 of the Town of Cave Creek Town Code.

NOW, THEREFORE, be it ordained by the Mayor and Town Council of the Town of Cave Creek, Maricopa County, Arizona, as follows:

Section 1. That Chapter 50.016 – Wastewater; Repayment Provisions; Development Agreement (attached hereto as **Exhibit 'A'**) shall be deleted in its entirety.

PASSED AND ADOPTED by the Mayor and Town Council of the Town of Cave Creek, Arizona this 11th day of January, 2009.

Vincent Francia, Mayor

ATTEST:

Carrie A. Dyrek
Town Clerk

APPROVED AS TO FORM:

Marie A. Pontelli for
Clifford L. Mattice
Town Attorney

EXHIBIT 'A'

~~CHAPTER 50.016 – Wastewater; Repayment Provisions; Development Agreement~~

~~As a condition of imposing connection charges on owners benefitted by the extensions, the town and the owner shall enter into a repayment agreement which shall provide:~~

~~(A) Upon entry into a repayment agreement with the town, the owner shall have the right to connect into existing town trunk lines in consideration for their entry into the repayment agreement.~~

~~(B) The main sewer line is to be constructed by the owner in accordance with this chapter.~~

~~(C) In the event that the area to be serviced by the owner is smaller than the maximum area to be serviced by the proposed main sewer line and its ultimate branches and laterals, the town agrees to enter into an agreement with any party desirous of obtaining a connection to such main sewer line.~~

~~(D) Such an agreement will establish a reasonable charge to permit a connection. The connection charge will be based on a cost of the flow of the area to be served, using the agreed main sewer line construction costs based on competitive bidding and maximum service area acreage to determine the cost of flow. The connection charge may also take into account the content of waste and any additional expenses the town may incur to meet industrial pretreatment requirements.~~

~~(E) The amount of the connection charge will be paid to the town, which agrees to repay such amounts to the owner. Repayments shall be made by the town within 60 days of receipt. The total of such repayments shall not exceed that portion of the agreed construction costs of the main sewer line allotted to acreage outside the service area of the developer. The repayment agreement shall terminate in ten years or when the total amount provided for by this chapter is repaid, whichever is sooner. The town shall have the option to provide for repayment to the owner by allowing a credit against wastewater expansion fees due from the owner to the town. The connection charge shall be paid into the wastewater expansion fee account.~~

~~(F) Any connection charge under this chapter shall be in addition to all other taxes, wastewater expansion fees, sewerage rental and other~~

~~charges applicable to owners of property within the repayment agreement owner's area. The connection charge required under this chapter shall be paid prior to the acceptance of off-site improvements by the town.~~

~~(G) Repayment agreements under this chapter shall allocate a specified amount of capacity in the extension main to the owner. The allocation of additional connections shall be subject to this allocation to the owner. The agreement shall additionally provide that the owner acknowledge that the minimum allocation of capacity may reduce3 the amount of reimbursement from subsequent connections.~~

~~(H) Repayment agreements under this chapter shall not include any branch or lateral sewer within the service area.~~

~~(I) An annual charge in an amount provided by the Town Council will be assessed by the town for the administration of each repayment agreement.~~

~~(J) Repayment agreements under this chapter shall designate the area subject to connection charges pursuant to a line extension approved by the Engineering Division.~~

~~(K) The Town Manager shall be authorized to enter into repayment agreements under this chapter. Such agreements shall be recorded in the office of the Maricopa County Recorder.~~

~~(L) Repayment agreements under this chapter may be assigned to subsequent owners of property who purchase or acquire the entire interest of the owner who entered into the repayment agreement and in accordance with the specific terms of the repayment agreement.~~

~~(Ord. O-2003-16, passed 12-8-03)~~

CHAPTER 150: PLANNING AND DEVELOPMENT

Section

§ 150.01 FEES FOR DEVELOPMENT OF LAND.

(A) The Town Council shall have the authority after public hearing to determine a schedule of building development fees as it deems necessary and appropriate.

(B) Such fees shall be set by a formal Town Council resolution and shall impose fees on the division of land, the development of single-family residences, multi-family units, commercial and industrial facilities, as well as all improvements and additions thereto, including the infrastructure thereto, including but not limited to water, sewer, electrical and cable television lines and systems, as well as roads, streets, parking lots, curbs, gutters, any accessory buildings or any other improvements thereto.

(C) The fees shall be used to offset the cost and burden to the town of providing necessary services to such new or additional facilities. Such development fees are due and payable prior to the issuance of any building permit.

(`87 Code, Art. 18-2) (Ord. 94-09, passed 3-21-94)

Statutory reference:

Development fees authorized, procedures, see A.R.S. § 9-463.05

§ 150.02 DEDICATION AND EXACTION APPEALS.

(A) *Notice to property owners regarding appeals of dedications or exactions.* The Town Manager and Town Attorney shall approve forms which the town shall use to notify persons of the procedures for appealing a dedication or exaction by the town. The town shall distribute the notification forms to property owners who have been granted an approval for the use, improvement, or development of real property subject to the requirement of a dedication or exaction by the town. The initial notification form shall be as set forth in division (C) of this section. The Town Manager and the Town Attorney may hereafter amend the notification form from time to time without Town Council approval.

(B) *Appointment of hearing officers to hear appeals of dedication or exaction requirements.* The Town Manager and Town Attorney shall appoint an independent hearing officer or officers to decide appeals of dedication or exaction requirements.

(C) *Notice of appeal from dedication and exaction determinations.*

NOTICE OF APPEAL FROM DEDICATION AND EXACTION DETERMINATIONS

STATE OF ARIZONA

TOWN OF CAVE CREEK

NOTICE OF APPEAL

Appeal Pursuant of A.R.S. §§ 9-500.12 and 9-500.13 Relating to Appeals of Dedications and Exactions

APPLICANT: _____ CASE # _____

ADDRESS: _____ PARCEL #: _____

LOCATION: _____ ZONING: _____

QUARTER SECTION:

Please take notice that _____ appeals the determination by the Cave Creek Zoning Administrator to require the following:

Signature _____ Date _____

(Ord. 97-16, passed 6-16-97)

Statutory reference:

Appeals from dedications and exactions, see A.R.S. § 9-500.12

ORDINANCE NO. 97-16

AN ORDINANCE OF THE MAYOR AND COMMON COUNCIL OF THE TOWN OF CAVE CREEK, MARICOPA COUNTY, ARIZONA, AMENDING THE CODE OF THE TOWN OF CAVE CREEK, BY AMENDING CHAPTER 3 PROVIDING THAT PROPERTY OWNERS MAY APPEAL ADMINISTRATIVE APPROVALS WHICH INVOLVE DEDICATION OR EXACTION REQUIREMENTS

WHEREAS, A.R.S. §§ 9-500.12 and 9-500.13 prescribe a procedure whereby property owners may appeal any dedication or exaction arising out of the Town's administrative approval of the use, improvement or development of real property;

WHEREAS, by Laws 1995 (1st Reg. Sess.) Ch. 166, § 3, the Legislature has required the Town to enact ordinances to effect the purposes expressed in A.R.S. §§ 9-500.12 and 9-500.13; and

WHEREAS, this Council has determined that the general welfare and well-being of the Town of Cave Creek and its citizens would be promoted and enhanced by enacting the following ordinance to ensure that property owners within the Town limits shall be entitled to the rights set forth in A.R.S. §§ 9-500.12 and 9-500.13,

NOW, THEREFORE, be it ordained by the Mayor and Common Council of the Town of Cave Creek, Arizona, as follows:

Section 1. That pursuant to Section 2-5-3 of the Town Code all amendments to the Town Code are by ordinance.

Section 2. Chapter 3 of the Town Code, entitled "Administration," is hereby amended by adding a new Article 3-5, entitled "Real Property-Dedication or Exaction Procedures" as follows:

Article 3-5 *Real Property-Dedication or Exaction Requirements*

Section 3-5-1 Notice to Property Owners Regarding Appeals of Dedication or Exaction Requirements

The Town Manager and Town Attorney shall approve forms which the Town shall use to notify persons of the procedures for appealing a dedication or exaction by the Town. The Town shall distribute the notification forms to property owners who have been granted an approval for the use, improvement or development of real property subject to the requirement of a dedication or exaction by the Town. The initial notification form shall be as set forth in the attached Exhibit "A." The Town Manager

and the Town Attorney may hereafter amend the notification form from time to time without Council approval.

Section 3-5-2 Appointment of Hearing Officers to Hear Appeals of Dedication or Exaction Requirements

The Town Manager and the Town Attorney shall appoint an independent hearing officer or officers to decide appeals of dedication or exaction requirements.

Section 3. If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions thereof.

PASSED AND ADOPTED by the Mayor and Common Council of the Town of Cave Creek, this 16th day of June, 1997.

TOM AUGHERTON, Mayor

ATTEST:

CHERYLE L. WITT, Town Clerk

APPROVED AS TO FORM

THOMAS K. IRVINE, Town Attorney

ORDINANCE NO. O2000-07
ADOPTED 12-04-00 - EFFECTIVE 01-04-01

AN ORDINANCE OF THE MAYOR AND COMMON COUNCIL OF THE TOWN OF CAVE CREEK, MARICOPA COUNTY, ARIZONA, AMENDING THE ZONING ORDINANCE OF THE TOWN OF CAVE CREEK, BY AMENDING ORDINANCE 94-13, TITLE XV LAND USAGE, CHAPTER 154.056 ZONING ACCESS, AND CHAPTER 154.057ACCESSORY BUILDINGS AND USES, SUBSECTION A: General.

NOW, THEREFORE, be it ordained by the Mayor and Common Council of the Town of Cave Creek, Arizona, as follows:

Section 1. That Chapter 154.056 Zoning - Access shall be amended as follows and shall apply to building permit or zoning clearance applications filed thirty (30) days after the effective date of this Ordinance.

§ 154.056

A. Purpose: The purpose of this Article is to require environmentally sensitive planning of access to properties. The instrument (e.g., deed of dedication or easement) creating the physical access, to which a legal description is attached, shall be reviewed by the town staff and recorded, prior to issuance of the building permit.

B. Definitions:

1. Legal access is defined as a continuous easement and/or dedicated right-of-way (adjoining the subject property) with a minimum width of twenty (20) feet throughout the length of the access to public right-of-way.

2. Physical access is defined as the path of travel from public right-of-way to the subject property that would least disturb the natural environment, as determined through engineering analysis.

C. Implementation:

1. No zoning clearance will be issued for any building or structure on any lot or parcel unless that lot or parcel has permanent legal access to a dedicated street. Said access shall not be less than twenty (20) feet in width throughout its entire length and shall adjoin the lot for a minimum distance of twenty (20) feet.

2. For properties accessed through Bureau of Land Management (BLM) patent reservation easements, a dedication to the Town of the (BLM) easement will be required prior to the issuance of a zoning clearance.

3. The route of legal and physical access shall be the same and shall be approved by the Town and the local fire service agency as part of the building permit application.

4. No Zoning Clearance will be issued for a property, which is not accessible for fire protection, police protection and ambulance service.

5. Prior to issuance of any zoning clearance, right-of-way dedication may be required if the property for which the clearance is requested contains areas that will be needed for the future extension of Town streets as shown on long-range transportation corridor plans as adopted by the Town from time to time. A dedication requirement pursuant to this Section may be appealed as provided in ARS § 9-500.12.

6. Any private access easement road or driveway shall be considered an accessory use to a principal building or use.

7. A performance bond shall be posted before a building permit is issued for any private access easement road or driveway. The bond shall provide that if the building permit expires or the road/driveway is not constructed in conformance with the approved design, the performance bond will be used for the restoration to original condition, or re-vegetation of, the improved road/driveway.

8. No non-public way or driveway shall provide access to more than three (3) residential lots.

Section 2. That Chapter 154.057 Zoning - Accessory Buildings and Uses, Subsection A: General, shall be amended as follows:

§ 154.057

A. General:

1. Construction of private access easement roads or driveways shall not be commenced on a lot until a building permit or zoning clearance for the principal use has been issued.

2. Construction of accessory buildings, accessory quarters or uses, excluding private access roads or driveways, shall not be commenced on a lot until construction on the principal building has been substantially commenced. "Substantially commenced" for purposes of this article shall mean that the building has been sealed from the elements.

3. Accessory buildings, accessory living quarters, accessory uses, satellite dishes five (5) feet and greater in diameter, tennis courts, shall require zoning clearance.

4. Desert Rural accessory buildings or uses may include accessory living quarters, corrals, barns, horse shades, swimming pools, garages, satellite dishes, tennis courts, or other uses incidental to the principal residential use.

5. Residential accessory buildings or uses may include swimming pools, garages, satellite dishes, tennis courts, or other uses incidental to the principal residential use.

6. All accessory buildings or uses, except for wells and related well equipment shall have the same electrical meter as the principal building or use.

Section 3. If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions thereof.

PASSED AND ADOPTED by the Mayor and Common Council of the Town of Cave Creek, this 4th day of December, 2000.

Vincent Francia, Mayor

ATTEST:

Carrie Dyrek, Town Clerk

APPROVED AS TO FORM

Fredda Bisman
Interim Town Attorney

ORDINANCE NO. O2004-21

AN ORDINANCE OF THE MAYOR AND TOWN COUNCIL OF THE TOWN OF CAVE CREEK, ARIZONA AMENDING THE CAVE CREEK TOWN CODE PURSUANT TO TOWN CODE SECTION 10.18 BY ADDING TO TITLE I GENERAL PROVISIONS, CHAPTER 10 GENERAL PROVISIONS, SECTION 10.99, PENALTIES, A NEW PARAGRAPH (C) AND AMENDING TOWN CODE TITLE III, ADMINISTRATION, CHAPTER 31, TOWN OFFICERS BY ADDING A NEW SECTION 31.27, HEARING OFFICER, PROVIDING FOR SEVERABILITY AND REPEAL.

NOW, THEREFORE, BE IT ORDAINED by the Mayor and Council of the Town of Cave Creek, Arizona as follows:

SECTION 1: THE TOWN CODE, TITLE I GENERAL PROVISIONS, CHAPTER 10 GENERAL PROVISIONS; SECTION 10.99 PENALTIES IS HEREBY AMENDED TO READ AS FOLLOWS:

C. **ANY PERSON OR PERSONS WHO COMMITS A *CIVIL CODE INFRACTION* OR WHO CAUSES, PERMITS, FACILITATES, OR AIDS AND ABETS ANY *CIVIL CODE INFRACTION* IS SUBJECT TO A *CIVIL* SANCTION OF NOT LESS THAN TWENTY-FIVE DOLLARS ($25.00 NOR MORE THAN THREE HUNDRED DOLLARS ($300.00) AND, IN ADDITION TO ANY MONETARY *CIVIL* SANCTION, THE *CIVIL HEARING OFFICER* SHALL ORDER THE DEFENDANT TO ABATE THE *CIVIL CODE INFRACTION*, UNLESS IT HAS BEEN ABATED BY THE DATE OF THE HEARING. THE *CIVIL HEARING OFFICER* SHALL HAVE THE POWER TO SUSPEND THE PAYMENT OF ANY *CIVIL SANCTION*. A *CIVIL SANCTION* SHALL RUN WITH THE LAND. THE TOWN, IN ITS SOLE OPTION, MAY RECORD A NOTICE OF *CIVIL SANCTION* AND ABATEMENT ORDER WITH THE MARICOPA COUNTY RECORDER AND THEREBY CAUSE COMPLIANCE BY ANY PERSON(S) OR ENTITY THEREAFTER ACQUIRING SUCH PROPERTY. WHEN THE PROPERTY IS BROUGHT INTO COMPLIANCE BY THE OWNER OR RESPONSIBLE PARTY, A SATISFACTION OF NOTICE OF *CIVIL* SANCTION AND ABATEMENT ORDER SHALL BE FILED AT THE REQUEST AND EXPENSE OF THE OWNER OR RESPONSIBLE PARTY. IT IS THE PROPERTY OWNER'S RESPONSIBILITY TO SECURE THE SATISFACTION OF NOTICE OF *CIVIL* SANCTION AND ABATEMENT ORDER FROM THE TOWN.**

SECTION 2. THE TOWN CODE, TITLE III ADMINISTRATION, CHAPTER 31 TOWN OFFICERS IS HEREBY AMENDED BY ADDING A NEW SECTION 31.27 CIVIL HEARING OFFICER; TO READ AS FOLLOWS:

31.27 CIVIL HEARING OFFICER.

A CIVIL HEARING OFFICER, SHALL BE APPOINTED BY THE TOWN MANAGER AND MAY HEAR *CIVIL CODE* INFRACTIONS AND MAKE SUCH ORDERS AS MAY BE PROPER AND NECESSARY TO DISPOSE OF SUCH CASES. SUCH CASES SHALL BE HEARD WITHOUT A JURY. THE CIVIL HEARING OFFICER SHALL ADOPT SUCH LOCAL RULES OF PROCEDURE AS MAY BE NECESSARY TO IMPLEMENT THE HEARING OF *CIVIL CODE INFRACTION CASES*.

SECTION 3. This Ordinance shall become operable and in full force and effect as of 12:01 a.m. on the 8th day of the July, 2004.

SECTION 4. SEVERABILITY.

If any section, subsection, sentence, clause, phrase or portion of this Ordinance is, for any reason, held to be invalid or unconstitutional by the decisions of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions thereof.

PASSED AND ADOPTED by the Mayor and Common Council of the Town of Cave Creek, Arizona this 7 day of June 2004.

FOR THE TOWN OF CAVE CREEK

Vincent Francia, Mayor

ATTESTED TO:

Carrie A. Dyrek, Town Clerk

APPROVED AS TO FORM:

William E. Farrell, Town Attorney

CHAPTER 1. PRINCIPLES, POLICIES AND PROCEDURES

SEC. 1.1 APPLICABILITY, ENFORCEMENT, INTENT, PURPOSE AND SEVERABILITY

A. APPLICABILITY

1. Pursuant to Arizona Revised Statutes, Title 9, Chapter 4, Article 6.3 entitled "Municipal Subdivision Regulations," this Subdivision Ordinance shall apply to all land in the corporate limits of the Town of Cave Creek.

2. No person, firm, corporation or other legal entity shall sell, offer to sell, or divide any lot, piece or parcel of land which constitutes a subdivision or part thereof, as defined herein without first having recorded a plat thereof in accordance with this Ordinance.

3. Provisions of this Ordinance are supplemental to those of the Arizona Revised Statutes, Title 9, Chapter 4, Article 6.2 Section 9-463.01 and 9-463.04. Any land in the incorporated area of the Town of Cave Creek which may be classified under the definition of a subdivision shall be subject to all of the provisions of this Subdivision Ordinance.

4. No person or agent of a person shall subdivide any parcel of land into four (4) or more parcels, or, if a new street is involved, two (2) or more lots, or, complete Lot Splits, Lot Line Adjustments or other minor subdivisions, except in compliance with this Ordinance. No person subsequent to the adoption of this Ordinance shall offer for recording, in the office of the County Recorder, any deed conveying a parcel of land, or interest therein, unless such a parcel of land has been subdivided, or otherwise created, in compliance with the rules set forth in this Ordinance.

5. No lot within a subdivision created prior to the effective date of this Ordinance or approved by the Town Council under the provision of this Ordinance shall be further divided, rearranged, or reduced in area, nor shall the perimeter boundaries of any subdivision, or any lot within a subdivision, be altered in any manner without the approval of Town Council as provided for in this Ordinance.

6. If this Ordinance is in conflict with any other ordinance, or parts conflict, the more restrictive shall apply.

B. ENFORCEMENT

1. The Zoning Administrator for the Town shall enforce this Ordinance.

2. All officials and employees of the Town of Cave Creek who are vested with the authority to issue permits, shall only issue permits, record documents, conduct inspections or otherwise perform any duties or administrative actions that are in conformance with the provisions of this Ordinance.

C. INTENT

1. In their interpretation and application, these regulations are expressly tailored to the unique physical geography of Cave Creek so that its development will coincide with its natural conditions. Further, the administration of these provisions is intended to protect the reasonable use and enjoyment by landowners of their property, rights in conformance with the standards contained herein as necessary to preserve the established community character.

D. PURPOSE

1. The purpose of these regulations is to provide for the orderly growth and harmonious development of the Town of Cave Creek in keeping with its diverse lifestyles, rural character and sensitive environment; to foster preservation of the natural environment and habitat; to ensure adequate traffic circulation through coordinated street systems with relation to major thoroughfares, adjoining subdivisions, and public facilities; to secure adequate provisions for water supply, drainage, sanitary sewerage, and other health requirements; to consider reservation of adequate sites for schools, recreation areas, and/or trail systems and other public facilities; to promote the conveyance of land by accurate legal description; and to provide procedures for the achievement of these purposes.

E. SEVERABILITY

1. If any section, subsection, sentence, clause or phrase of this Ordinance is held to be invalid by a court of competent jurisdiction, such holding shall not affect the validity of the remaining portions of this Ordinance.

SEC. 1.2 AMENDMENT, APPEALS, EXCEPTIONS, RESUBSIVISION

A. AMENDMENT

1. Amendments to this Ordinance may be requested by any person or agent of any person by filing an application with the Planning Department. Amendments to this Ordinance may also be initiated by the Town Council or the Planning & Zoning Commission.

B. APPEALS

1. Zoning Administrator decisions may be appealed within ten (10) days to the Board of Adjustment for review, modification or reversal.

2. A request for an appeal shall be made in writing to the Zoning Administrator who shall schedule a public hearing for the Board of Adjustment to consider the request.

C. EXCEPTIONS

1. A request for an exception from one or more of the requirements of this Ordinance shall be made in writing to the Zoning Administrator who shall schedule a public hearing by the Planning Commission to consider the request. The Planning Commission shall make its recommendation to the Town Council. The Town Council, after holding a public hearing, shall make the final decision.

   a. Where, in the opinion of the Council after consideration by the Planning Department and the Planning Commission, there exist extraordinary conditions of topography, land ownership or adjacent development, or other circumstances not provided for in these regulations, the Council may modify these provisions in such manner and to such extent, as it deems appropriate.

CHAPTER 6. LOT SPLITS, LOT LINE ADJUSTMENTS and COMBINATIONS

SEC. 6.1 PURPOSE AND INTENT

A. The purpose of these regulations is intended to implement procedures whereby property owners may split parcels of land in compliance with the following objectives:

1. To protect and promote the public health, safety, convenience and welfare.

2. To implement the Town of Cave Creek General Plan and its elements.

3. To provide building sites of sufficient size and appropriate design for the purpose for which they are to be used.

4. To provide for the partitioning or division of land into lots, tracts or parcels of land into two or three parts through a process that is more expeditious than the subdivision process.

5. To maintain accurate records of surveys created to divide existing lots, tracts or parcels of land.

6. To assure that the proposed division of land is in conformance with the standards established by the Town of Cave Creek.

7. To assure adequate legal and physical access to lots, parcels and tracts.

SEC. 6.2 APPLICABILITY OF LOT SPLITS, LOT LINE ADJUSTMENTS AND COMBINATIONS

A. For the purpose of this Chapter, a Lot Split shall include any of the following acts and shall be subject to the provisions of this Chapter:

1. All divisions of land made within the corporate limits of the Town of Cave Creek since July 8, 1986, the Town's incorporation date, or upon the date of annexation to the Town.

2. The allowable divisions of a property are based on the configuration of the "original parcel." An "original parcel" is considered to be a property created prior to that particular property's annexation to the Town. Lot splits shall be based on the property and not ownership.

3. It shall be unlawful for any person, partnership, or other legal entity to sell or offer a contract to sell any parcel that is subject to the requirements of this regulation until an approved Land Split Map complying with the provisions of this regulation has been filed with the Planning Department and approval given by the Zoning Administrator.

4. The division of land into two (2) or three (3) parts when the boundaries of such land have been fixed by a recorded plat, except the division of land into lots, tracts, or parcels each of which results in thirty-six (36) acres or more in area.

B. For the purpose of this Chapter, a Lot Line Adjustment/Combination is where land taken from one (1) parcel is added to an adjacent parcel. A Lot Line Adjustment shall not be considered a Lot Split under the terms of this Section provided that the proposed adjustment does not:

1. Create any new lots;

2. Render any existing lot substandard in size or shape;

3. Render substandard the setbacks to existing development on the affected property;

or

4. Impair any existing access, easement, or public improvement.

SEC. 6.3 CONFORMANCE

A. All Lot Splits shall be approved by the Zoning Administrator and shall comply with this Ordinance. Failure to comply with this Ordinance shall render the property unsuitable for building and not entitled to a building permit.

CHAPTER 1 - TITLE, PURPOSE AND SCOPE

SEC. 1.0 SHORT TITLE. These regulations shall be known as the "Cave Creek Zoning Ordinance", may be cited as such and will be referred to herein as "this code", or "this Ordinance". All appendices, exhibits and/or maps attached to this Ordinance are hereby adopted and shall be incorporated herein as a part of this ordinance.

SEC. 1.1 PURPOSE and SCOPE.

A. The purpose of this Ordinance is to provide the minimum requirements for the implementation of the General Plan, to promote the public health, safety, and general welfare of the citizens of the Town of Cave Creek by guiding, controlling, and regulating the future growth and development of the Town in a manner that protects the character and the stability of the Town and is compatible with the low density, desert environment of the community. This Ordinance shall provide for the preservation of open space, protection of natural habitats, scenic vistas, riparian areas, and hillsides, while providing for adequate light and air, avoidance of overcrowding of land and excessive concentration of population by establishing land use classifications and by imposing regulations on the use of land, on the location, height and bulk of buildings and structures and by establishing standards for design and development.

B. This Ordinance shall incorporate all Town adopted codes and ordinances as they relate to the development, construction, alteration, moving, repair and use of any building, parcel of land or sign within the town, public and private utility towers and poles, and public utilities, except work located primarily in a public way, unless specifically mentioned in this ordinance.

C. Where, in any specific case, different sections of this Ordinance or any other town ordinance or code specify different requirements, the more restrictive shall govern. Where there is conflict between a general requirement and a specific requirement, the specific requirement shall apply. This Ordinance is intended to benefit the public as a whole and not any specific person or class of persons. Any benefits and detriments to specific individuals or properties resulting from the implementation, administration and enforcement of this Ordinance are incidental to the overall benefit to the whole community. Therefore, unintentional breaches of the obligations of administration and enforcement imposed on the Town of Cave Creek shall not be enforceable in tort.

D. This Zoning Ordinance establishes procedures, offices, boards, and commissions for the enforcement, interpretation, and processing of amendments, variances, conditional use permits, and appeals and for violations and penalties for infractions of these zoning regulations.

E. All changes to distinguishing traits or primary features or the use of a building or land, as evidenced by increased parking requirements, change of occupancy, change of outside storage, or other features, occurring to existing properties after the effective date of this Ordinance shall be subject to all provisions of this Ordinance. The use of a building or land shall refer to the primary or specific purpose for which the building or land is occupied, designed, intended, or maintained.

SEC. 1.2 FILING FEES.

A. Fees for services shall be charged. All fees shall be set by Resolution of the Town Council and schedules shall be available at the Town Hall. The developer/applicant shall, at the time of filing, pay to the Town those established fees. These fees shall be non-refundable unless otherwise specifically provided herein.

SEC. 1.3 INTERPRETATION.

A. The standards and restrictions established by this Ordinance shall be held to be the minimum requirements for the promotion of the General Plan, and for the interpretation and administration of the zoning regulations, standards, restrictions, uses, procedures, enforcement, fees, administration, and all other areas addressed herein.

B. This Ordinance is not intended to interfere with, abrogate, or annul any existing provisions of other laws or ordinances, except those zoning and building ordinances specifically repealed by this Ordinance, and providing that they are not in conflict with this Ordinance. In the event of a conflict, the provisions of this Ordinance shall govern. This Ordinance is not intended to interfere with, abrogate, or annul any private agreements between persons, such as easements, deeds, covenants, except that if this Ordinance imposes higher standards or a greater restriction on land, buildings or structures than an otherwise applicable provision of a law, ordinance, or a private agreement, the provisions of this Ordinance shall prevail.

C. This Ordinance amends the text of all other Zoning Ordinances previously adopted by the Town of Cave Creek, Arizona.

SEC. 1.4 APPLICABILITY.

A. This Ordinance shall govern the development and or the use of land and structures within the corporate limits of the Town of Cave Creek. All departments, officials and employees charged with the duty or authority to issue permits or licenses shall refuse to issue permits or licenses for uses or purposes where the same would conflict with any applicable provision of this ordinance. Any permit issued in conflict with the terms or provisions of this Ordinance shall be void.

B. All special uses which have been approved by the Town Council shall be permitted to proceed under such approvals provided that a complete application for building permit is submitted to the Town within six (6) months after the effective date of this Ordinance and provided further that all construction is completed within twelve (12) months after the Town Council approval or by such time specified by the Council at the time of approval.

C. No building permit or other permit required by this Ordinance shall be issued unless a site plan and zoning clearance have been submitted and approved by the Town. Except as specifically provided to the contrary in this Ordinance, each review and approval required by this Ordinance shall be independent of every other review and approval, and no review or approval shall be deemed to waive or satisfy any other requirement set forth herein.

SEC. 1.5 ENFORCEMENT.

A. The Zoning Administrator shall interpret, apply and enforce the provisions of this Ordinance to further the promotion of the public health, safety, and general welfare.

B. The Zoning Administrator shall in no case grant permission for the issuance of any permit for the construction, reconstruction, alteration, demolition, movement or use of any building, structure, lot, or parcel if the Zoning Administrator determines that the building, structure, lot or parcel as proposed to be constructed, reconstructed, altered, used, or moved, would be in violation of any of the provisions of this Ordinance, unless directed to issue such permit by the Board of Adjustment after interpretation of the Ordinance or the granting of a variance.

SEC. 1.6 LIABILITY.

A. This Ordinance shall not be construed to relieve from liability or lessen the responsibility of any person owning, operating or controlling any building or parcel of land for any damages to persons or property caused by defects or other conditions on or arising from said building or parcel of land, nor does the Town of Cave Creek assume any such liability by virtue of the reviews or permits issued under this Ordinance.

SEC. 1.7 VIOLATIONS and PENALTIES.

A. Any person who violates any provision of this Ordinance, and any amendments thereto, shall be guilty of a Class One misdemeanor punishable as provided in the Cave Creek Town Code and state law; and each day of continued violation shall be a separate offense, punishable as described.

B. It shall be unlawful for any person to erect, construct, enlarge, alter, repair, move, improve, remove, convert or demolish, equip, use, occupy or maintain any building or land or cause or permit the same to be done in violation of this Ordinance. It shall also be unlawful for any person to violate any provision designated as a condition of approval either by the plan review process or through an amendment, conditional use permit, temporary use permit, variance, site plan, or appeal by an office, board, commission, or the Town Council as established by this Ordinance.

C. When any building or parcel of land regulated by this Ordinance is being used contrary to this Ordinance, the Zoning Administrator shall order such use discontinued and the structure, parcel of land, or portion thereof vacated by notice served on any person causing such use to be continued. Such person shall discontinue the use within the time prescribed by the Zoning Administrator after receipt of such notice. The use or occupation of said structure, parcel of land, or portion thereof, shall conform to the requirements of this Ordinance.

CHAPTER 5 - DEVELOPMENT STANDARDS

SEC. 5.0 GENERAL DEVELOPMENT REGULATIONS

A. Purpose: The regulations in this Section qualify or supplement the zoning district regulations appearing elsewhere in this ordinance.

SEC. 5.1 ACCESS

A. Purpose: The purpose of this Chapter is to require environmentally sensitive planning of access to properties. The instrument (e.g., deed of dedication or easement) creating the physical access, to which a legal description is attached, shall be reviewed by the town staff and recorded, prior to issuance of the building permit.

B. Definitions:

1. Legal access is defined as a continuous easement and/or dedicated right-of-way (adjoining the subject property) with a minimum width of twenty (20) feet throughout the length of the access to public right-of-way.

2. Physical access is defined as the path of travel from public right-of-way to the subject property that would least disturb the natural environment, as determined through engineering analysis.

C. Implementation:

1. No zoning clearance will be issued for any building or structure on any lot or parcel unless that lot or parcel has permanent legal access to a dedicated street. Said access shall not be less than twenty (20) feet in width throughout its entire length and shall adjoin the lot for a minimum distance of twenty (20) feet.

2. For properties accessed through Bureau of Land Management (BLM) patent reservation easements, a dedication to the Town of the (BLM) easement will be required prior to the issuance of a zoning clearance.

3. The route of legal and physical access shall be the same and shall be approved by the Town and the local fire service agency as part of the building permit application.

4. No Zoning Clearance will be issued for a property, which is not accessible for fire protection, police protection and ambulance service.

5. Prior to issuance of any zoning clearance, right-of-way dedication may be required if the property for which the clearance is requested contains areas that will be needed for the future extension of Town streets as shown on long-range transportation corridor plans as adopted by the Town from time to time. A dedication requirement pursuant to this Section may be appealed as provided in ARS § 9-500.12.

6. Any private access easement road or driveway shall be considered an accessory use to a principal building or use.

7. A performance bond shall be posted before a building permit is issued for any private access easement road or driveway. The bond shall provide that if the building permit expires or the road/driveway is not constructed in conformance with the approved design, the performance bond will be used for the restoration to original condition, or re-vegetation of, the improved road/driveway.

8. No non-public way or driveway shall provide access to more than three (3) residential lots.

SEC. 5.2 ACCESSORY BUILDINGS AND USES

A. General:

1. Construction of private access easement roads or driveways shall not be commenced on a lot until a building permit or zoning clearance for the principal use has been issued.

2. Construction of accessory buildings, accessory quarters or uses, excluding private access roads or driveways, shall not be commenced on a lot until construction on the principal building has been substantially commenced. "Substantially commenced" for purposes of this Chapter shall mean that the building has been sealed from the elements.

9. Revegetation: The loss of trees, ground cover, and topsoil shall be minimized on any grading project. In addition to mechanical methods of erosion control, graded areas shall be protected from damage by erosion by application of ground-cover plants and/or trees. Such planting shall provide for rapid, short-term coverage of the slopes as well as long-term permanent coverage. A plan by a landscape architect may be required.

C. Design standards: The grading design standards contained in the Uniform Building Code shall apply to all grading projects.

SEC. 5.10 HEIGHT LIMITS

A. Chimneys, church steeples, ornamental towers or spires, outdoor light stanchions, wireless or amateur towers and mechanical appurtenances necessary to operate and maintain the building, may be erected to a height not exceeding thirty (30) feet, if such structure is set back from each lot line a minimum of five (5) feet for each foot of additional height above twenty-five (25) feet. The above setbacks are measured from the lot line to the closest point (including overhangs or other projections) on the structures.

SEC. 5.11 HILLSIDE

A. Purpose: To allow the reasonable use and development of hillside areas while promoting the public health, safety, convenience and general welfare of the citizens of the Town of Cave Creek, and maintaining the character, identity, and image of hillside areas. The primary objectives of the Hillside Regulations are:

1. To minimize the possible loss of life and property through the careful regulation of development;

2. To protect watershed, natural waterways, and to minimize soil erosion;

3. To ensure that all new development is free from adverse drainage conditions;

4. To encourage the preservation of the existing landscape by maximum retention of natural topographic features;

5. To minimize the visual scarring effects of hillside construction.

B. General Provisions:

1. All portions of a lot or parcel having a natural slope of fifteen (15) percent or greater shall be subject to the regulations set forth in this Section.

2. Provisions for adequate fire flow or a draftable water source shall be assured prior to issuance of any building permit for a building accessed by a hillside driveway.

3. Prior to the issuance of any building or grading permit, site plan approval shall be obtained from the Zoning Administrator.

4. Any building permit for a structure on a site having a natural slope of fifteen (15) percent or greater will limit the maximum permitted disturbed area of the entire property involved to an amount not to exceed the permitted maximum indicated as follows:

ZONE	MAXIMUM LOT COVERAGE	MAX. DISTURBED AREA	ZONE	MAXIMUM LOT COVERAGE	MAX. DISTURBED AREA
D-5A	5%	5%	MR (14/21/43)	40%	10%
D-2.5A	10%	10%	CB	40%	10%
D-1.75A	10%	10%	CB	40%	10%
D-1A	15%	15%	CC	40%	10%
R-35	20%	30%	GC	40%	10%
R-18	25%	25%	GC	40%	10%
MP	10%	10%			

TABLE 12

C. Height Regulations: The height of all structures on portions of property having a natural slope of fifteen (15) percent or greater shall not exceed twenty-five (25) feet from original natural grade through any building cross section, measured vertically at any point along that cross section from original natural grade. This Section shall not apply to transmission towers higher than twenty-five (25) feet for which special permits have been issued.

D. Other Regulations: The use, yard, intensity of use, parking, loading and unloading, and additional regulations which apply to property in any zoning district which requires Hillside Regulations shall remain as specified in the primary zoning district unless otherwise specified herein.

E. Grading and Drainage Requirements: There shall be no grading on or to any site, other than percolation and test boring (one hundred (100) square feet maximum in size), prior to the issuance of a zoning clearance.

1. Raw spill slopes are prohibited.

2. Rock veneered spill slopes may be allowed provided that:

(a) The vertical height of the spill slope does not exceed the vertical height of the exposed cut;

(b) The spill slope does not exceed a one-to-one slope;

(c) Retaining walls used to limit the height of the spill slope are color treated or veneered to blend in with the surrounding natural colors;

(d) The maximum depth of fill must not exceed eight (8) feet except beneath the footprint of the main residence.

3. All exposed disturbed area fill shall be contained behind retaining walls or covered with a natural rock veneer and treated with an aging agent and landscaped with indigenous plant material.

4. When a grading permit is required under this ordinance, developers shall provide the Town with a bond or other acceptable security which places the town in an assured position to do or to contract to do the necessary work to cover, restore and landscape exposed fills and cuts to blend with the surrounding natural terrain. The minimum acceptable bond shall be in a dollar amount equal to the number of total cubic yards of cut and fill multiplied by fifteen (15), or in such greater amount as deemed appropriate by the Town. The bond shall be in such form as deemed appropriate by the Town. In the event that construction has not commenced within six (6) months from the date of issuance of the grading permit or restoration is not complete

within twenty-four (24) months from the date of issuance of the grading permit, such bond shall be forfeited to the Town in such amount necessary for restoring the construction site to its original condition and all authorized permits shall be revoked and become void.

5. Sewage Disposal System: Grading or disturbance of natural terrain and vegetation for the purpose of installing a sewage disposal system shall be confined to within seven (7) feet of the outside edge of the elements of that system such as the leaching bed or pits, tank and distribution box, and connecting lines as required by Maricopa County Health regulations and will be considered part of the disturbed area.

6. Utility lines shall be located underground within the driveway graded area whenever possible. If this location is not possible, then disturbance of natural terrain for these lines shall be confined to within four (4) feet of either side of the lines.

7. Drainage: The entrance and exit points and continuity of all natural drainage channels on hillside sites shall be preserved.

8. All cut and fill slopes shall be completely contained by retaining walls or by substitute materials acceptable under the provisions of the Uniform Building Code (including rip-rap materials) except for:

   (a) The minimum amount of swale grading necessary for drainage purposes; or

   (b) The minimum required to establish a driveway with associated parking and turn around areas (see "Driveway Requirements"); or

   (c) Pursuant to other requirements of this Section.

F. Retaining Wall Requirements:

1. The height of a retaining wall is measured from low side natural grade to the top of the wall whether the top is retaining earth or not. Open railings on top of retaining walls are not included in height measurements. The height of a retaining wall shall be counted as part of the building height

if the face of the building is within fifteen (15) feet of the retaining wall.

2. The average height of a retaining wall shall be computed by taking the total vertical surface area of the wall above grade and dividing it by its length.

3. The finished surfaces of any retaining wall shall be stucco or other material to match building finish or blend into the natural setting.

4. The maximum height and average height of a retaining wall shall not exceed the following:

AVERAGE SLOPE AT BUILDING*	15%-25%	25%-30%	30%-35%	35% & over
Maximum Height** (feet)	10'	13'	13	18'
Average Height** (feet)	6'	8'	9'	11'

TABLE 13

(a) * Average slope at building is determined by averaging percentage of slopes shown on sections through building on site plan submittal.

(b) ** Height shall not exceed eight (8) feet without a minimum four (4) foot wide planter break.

G. Driveway Requirements:

1. Driveways exceeding fifteen (15) percent slope shall be no more than sixteen (16) feet wide and shall be paved with asphalt tinted to blend with the surrounding terrain. The paved width of such driveways shall be constructed to anticipate a maximum weight load of twenty (20) tons.

2. The height of cut and fill slopes shall be limited to an average of four (4) feet but may not exceed eight (8) feet, provided the combination does not exceed twelve (12) feet. A maximum of one-third of the cross sectional width of the driveway at any point may be on fill materials and a minimum of two-thirds (2/3) of the cross sectional width shall be on cut material or natural grade.

H. Slope Stabilization and Restoration: Vegetation shall be re-established on all exposed fill slopes, cut slopes, and graded areas with a mixture of grasses, shrubs, trees or cacti to provide a basic ground cover which will prevent erosion and permit natural re-vegetation. In lieu of the re-establishment of vegetation, all exposed cut slopes shall be rip-rapped with stone or chemically stain treated with materials which blend with the natural setting.

I. Special Procedures:

1. Prior to the issuance of a zoning clearance, proposed developments regulated by this Section must be presented to the Zoning Administrator in the form of a site plan. Site plans for single-family residential uses and their accessories may be approved by the Zoning Administrator. All other hillside development site plans must be reviewed and approved by the Town Council after a Planning Commission recommendation.

2. In relation to its approval of any site plan, the Town Council may include reasonable additional requirements as to grading, cut and fill, slope restoration, signs, vehicular ingress and egress, parking, lighting, setbacks, etc., to the extent that the noted purpose and objectives of this Section are maintained and ensured.

SEC. 5.12 HOME OCCUPATIONS

A. General: Home occupations may be approved by the Zoning Administrator for any property, provided the home occupation is conducted by a resident thereof, and is clearly subordinate and incidental to the residential use.

B. The following and similar home occupations are permitted subject to the provisions of this section:

1. Office, professional or trades business.
2. Service business.
3. Instructional service.
4. Home production or repair service.
5. Day Care involving part-time care and/or instruction, whether or not for compensation, of six (6) or fewer individuals at any time within a dwelling, not including members of the family residing on the premises.