



# **Adequate Public Facilities Ordinances**

## **Best Practices Paper #1: Growing Smarter Implementation Project**

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## Introduction

The adequate public facilities ordinance was one of the top ten issues selected by MAG member agency planning directors. Planning directors who rated the adequate public facilities ordinance working paper as being of "top value" were from communities with areas of minimal development, and with active development currently or soon to come.

*Local Issues.* In the interview phase of the issues selection, many of the planners from these communities cited timely infrastructure provision as one of their biggest issues. Although exactions and development fees have alleviated this problem for many communities, timing infrastructure phasing with development has remained a persistent problem. The following are some of the negative results of this lack of timing that identified in the interviews with MAG member agency planning directors:

- Reduced service standards to existing and new residents.

- Schools and parks sited on remnant parcels after much development had occurred, rather than in early planning as a community focal point.

- A lack of ability to time public facility and service capacity with the demands created by new development.

- Increased pressures to approve development that is inconsistent with the general plan to facilitate on short-term infrastructure needs.

- The lack of explicit mechanisms under our existing statutes to time local development approvals with facilities of regional significance, such as freeways.

- The potential lost opportunity for local communities to incorporate new policies for timing infrastructure to serve new development at or before the time that it is needed in the growth areas and costs of development general plan elements added to our planning statutes as a result of the 1998 and 2000 Growing Smarter/Plus legislation.

*Local Actions.* Adequate public facilities regulations are a means of controlling the timing of development in direct relationship to a government's ability to service it. In the MAG region, three member agencies have recently adopted this innovation:

- Queen Creek adopted an adequate public facilities ordinance (APFO) as a part of their zoning ordinance in February of 1999.

- Glendale adopted an AFPO for schools in October of 1999.

- The following October, the Town of Buckeye adopted an APFO for schools.

Planners from each community report that elected officials, citizens, landowners, school districts and developers have favorably received the method. It ensures that needed facilities are in place concurrently with the development that require it, so that new development does not cause a reduction in levels of service to existing residents. It enables planners to locate and time schools, parks and other infrastructure to the best advantage to ensure the long-term quality of the community.

*Intent.* In principle, land use planning, zoning and public facility plans and ordinances should prevent development in areas that lack adequate levels of urban services. The key aspect of adequate public facilities ordinances is that local government can delay or withhold the approval of developments in areas where adequate urban services are

unavailable. APFOs typically include minimum required levels of service for water, sewer, drainage and streets. They may also specify requirements for schools, fire, police, parks, sidewalks, bicycle paths and transit.

Traditional public facilities control methods have included large lot "holding" zones at the urban fringes, which operated to manage development until service capacity was increased.<sup>1</sup> As outlying development became more adequately serviced, these zoning categories were relaxed to allow more intense development. However, in this system, the impact of each development on the existing services is not analyzed.<sup>2</sup> Instead, each new development proposal need only comply with location and density standards under the zoning ordinance, which merely incorporates an implied future service capacity.<sup>3</sup>

APFOs are based on the concept of concurrency, which means that public facilities must be provided at the same time, or concurrently, as the new development. Concurrency relies on basic regulatory controls already available to local governments: (1) the ability to withhold development permits for timing and sequencing of developments and (2) the ability to budget for anticipated capital improvements.<sup>4</sup> A community adopts a LOS standard for each type of facility and applications are denied if the service demands of a project cannot be accommodated at the adopted level of service at the time that the project is completed.<sup>5</sup>

*Regional Applications.* Although the APFO concept could be applied to facilities of regional significance, this has not yet been widely used in the United States, in the absence of integrated standards for state, county and local jurisdictions. Perhaps this is due to difficulties in programming large-scale regional facilities in a timely manner relative to a single development project. If this could not be accomplished, the result would be subject to legal challenge as a "taking" (defined as depriving a property owner of constitutionally entitled use of property). Also, it would be difficult to meet the Constitutional test of "rough proportionality" to deny a permit based on the provision of a facility with capacity that is clearly larger than the need generated by the specific development. (These and other constitutional issues are discussed in greater detail under the heading "Constitutional Issues", below.)

## History

*Rampano.* The idea of using a systematic approach to "time" growth by tying development approvals to the adequacy of facilities was pioneered by the city of Ramapo, New York.<sup>6</sup> The Ramapo system used a point scale system imposed by ordinance to

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<sup>1</sup> White, S. Mark. 1996. *Adequate Public Facilities Ordinances and Transformation Management*. Chicago: Planning Advisory Service, 6.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> White, S. Mark. 1996. *Adequate Public Facilities Ordinances and Transformation Management*. Chicago: Planning Advisory Service, 1.

<sup>5</sup> Nelson, Arthur C. and James B. Duncan. No date. *Growth Management Principles and Practices*; Planners Press, 95.

<sup>6</sup> White, *supra* note 1 at 7.

evaluate development proposals. The system required that all residential developments obtain a special use permit. The availability of the permit was based on the adequacy of sewers, drainage facilities, parks and recreation, roads and firehouses. The system was upheld in the New York Court of Appeals in *Golden v. Planning Board of the Town of Ramapo*.<sup>7</sup> By combining the police powers with planning efforts and capital budgeting, Ramapo was the first systematic attempt to employ direct controls relating to the adequacy of public facilities to development approvals.<sup>8</sup>

*Tiered Systems.* The Ramapo concept has since been refined for metropolitan areas through use of "tier" systems that adopt increasingly stringent development controls from the urban core to outlying, exurban areas.<sup>9</sup> In these tiered systems, growth is actively encouraged in urbanizing areas, which generally includes the downtown and the central city. Development in planned urbanizing areas is staged through the use of capital improvements planning, special use permits, official mapping, and other innovative land use controls.<sup>10</sup>

*LOS Standards.* Other systems, such as that of Broward County Maryland, have built on the Ramapo model by tying development approvals to LOS standards. These standards measure the ratio of public facility capacity to the need for the facility by population. This model takes into account all demand for facilities, present and future. It establishes "staging ceilings" for "transportation policy areas" that are based on area-wide LOS standards. As a part of a comprehensive amendment to state planning statutes in 1998, the state of Maryland now designates priority-funding areas and state funding is directed to those areas. To qualify as a PFI, an area must meet minimum density requirements, have adequate water and sewer capacity and demonstrate that they have an APFO for schools, based on minimum state requirements<sup>11</sup>.

*Concurrency.* Concurrency is defined as having the facilities to serve new development in place either before or at the time that the development is constructed. Other states have concurrency legislation for regional facilities. In Florida, a concurrency system was adopted as a part of a comprehensive rewrite of state planning statutes in 1985. The Florida system is integrated through the state, county and jurisdictional level as well as between jurisdictions. Local governments are required to prepare a comprehensive plan that includes "standards to ensure the availability of public facilities and the adequacy of those facilities, including acceptable levels of service". Local governments set local standards for roads, sanitary sewer, solid waste, drainage, parks and recreation and mass transit, if applicable. The State Department of Transportation sets regional transportation facilities standards, which must be met by local governments. The Florida legislation also requires a comprehensive planning element dealing with the coordination of local comprehensive plans with special purpose governments providing services but not having regulatory authority.

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<sup>7</sup> 30 N.Y.2d 350, 285 N.E.2d 291 (Ct. App. 1972).

<sup>8</sup> White, *supra* note 1, at 7

<sup>9</sup> White, *supra* note 1, at 7 (citations omitted)

<sup>10</sup> *Id.*

<sup>11</sup> Cox, *Corey Recent Progress in Reforming Planning Legislation*, Land Use Law and Zoning Digest, vol.51 No.10 October 1999

After some experience with implementation, the Florida APFO legislation was modified to take a softer approach in 1993. After finding that concurrency requirements could discourage urban infill and redevelopment, the legislation was changed to authorize exceptions when a project is otherwise consistent with the comprehensive plan. Also, to relieve some burdens on the development community, an approval can no longer be denied if it generates an infrastructure need of 110 percent of capacity, although the local government may charge a fee for the additional required infrastructure. However, an excess of 115 percent will still result in denial of approval for a project.

### **Constitutional Issues**

Usually, an APFO is subject to attack only as a regulatory taking.<sup>12</sup> Under adequate public facilities ordinances, landowners are temporarily denied the use of their land under the police power until utilities can be provided.

In *First English Evangelical Lutheran Church v. County of Los Angeles*,<sup>13</sup> the United States Supreme Court ruled those regulatory takings, even if effective for only a temporary period of time constituted a taking under the Fifth Amendment. In *First English*, the County of Los Angeles adopted an interim ordinance that prohibited any new construction for twelve years on property bordering a creek in response to a flood which had destroyed a church retreat at that location. The County determined that the ordinance was necessary for the preservation of public health and safety. The church sued, seeking compensation for an uncompensated taking of all use of property. On remand, however, the California Courts found that the outright prohibition of construction on the property was not a regulatory taking subject to compensation.<sup>14</sup> Fundamental to the court opinion was the balance between public necessity and private deprivation.<sup>15</sup> The court stated that the preservation of life and health under the ordinance would support the deprivation of all use of a landowner property where aesthetic purposes would not.<sup>16</sup>

This ruling is particularly relevant to adequate public facilities ordinances. For example, aesthetic considerations such as premature urbanization relating to urban form are not the primary justification for adequate public facilities concerns.<sup>17</sup> The purposes behind APFOs have been described as

*[T]he ability of communities to provide public facilities and services essential to individual health, safety, and welfare, and to maintain a balance between*

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<sup>12</sup> White, *supra* note 1. at 12.

<sup>13</sup> *First English Evangelical Lutheran Church v. County of Los Angeles*, 210 Cal. App.3d 1353, 258 Cal. Rptr. 893 (Cal. App. 1989), *cert. Denied*, 493 U.S. 1056 (1990)

<sup>14</sup> White, *supra* note 1. at 10.

<sup>14</sup> White, *supra* note 1. at 10.

<sup>14</sup> *First English*, 210 Cal.App.3d 1353,258 Cal. Rptr. 893 (Cal. App. 1989).

<sup>15</sup> Id.

<sup>16</sup> Id.

*development and infrastructure that ensures the overall economic, environmental and psychological well being of a community.*<sup>18</sup>

APFOs serve a number of purposes related to public health and safety, e.g., delaying development because there is a lack of sewer service protects groundwater from contamination from septic tanks; delaying development because there is a lack of adequate roads prevents accidents resulting from dangerous levels of congestion; delaying development because there is a lack of fire fighting facilities reduces the chances of death and property damage from fire.<sup>19</sup> Accordingly, cases decided in other states since the Supreme Courts takings trilogy<sup>20</sup> indicate that the denial of all use for a reasonable, temporary period of time does not result in a taking under *First English*.

## **Implementation**

Before a local government can implement adequate facilities ordinances, there must be some authority upon which they can be based.

*Because local governments are creatures of the state, the authority to adopt land-use regulations must be granted by the state, which is usually accomplished through enabling legislation. Because explicit enabling legislation for APFOs is rare, authority is implied under more traditional zoning or subdivision enabling legislation. The authority to deny development approval based on inadequate facilities is often found under subdivision or zoning enabling legislation or home rule powers. The decision in Golden v. Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, appeal diss'd, 409 U.S. 1003 (1972), found the requisite authority under the Standard Zoning Enabling Act.*<sup>21</sup>

In Arizona, the 1998 and 2000 Growing Smarter/Plus amendments to state planning statutes provide additional opportunities to include the adequate public facilities ordinance in the growth area element and cost of development element in the general plan:

*A growth area element, specifically identifying those areas, if any, that are particularly suited for planned multi-modal transportation and infrastructure expansion. This element shall include policies and implementation strategies that are designed:*

*(a) Make automobile, transit and other multi-modal circulation more efficient, make infrastructure expansion more economical and provide for a rational pattern of land development.*

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<sup>19</sup> White, *supra* note 1, at 10

<sup>20</sup> *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Lucas v. South Carolina Coastal Council*, \_\_\_ U.S. \_\_\_, 112 S.Ct. 2886, 120 L.Ed.2d 798. (1992); *Dolan v. City of Tigard*, \_\_\_, U.S. \_\_\_, 129 L.Ed.2d 304 (1994).

<sup>21</sup> White, *Supra* note 1, at 9

- (b) *Conserve significant natural resources and open space areas in the growth area and coordinate their location to similar areas outside the growth area boundaries.*
- (c) *Promote the public and private construction of timely and financially sound infrastructure expansion through the use of infrastructure funding and financing planning that is coordinated with development activity.*<sup>22</sup>

*A cost of development element that identifies policies and strategies that the municipality will use to require development to pay its fair share toward the cost of additional public service needs generated by new development, with appropriate exceptions when in the public interest. This element shall include:*

- (a) *A component that identifies various mechanisms that are allowed by law and that can be used to fund and finance additional public services necessary to serve the development, including bonding special taxing districts, development fees, in lieu fees, facility construction, dedications and service privatization.*
- (b) *A component that identifies policies to ensure that any mechanisms that are adopted by the municipality under this element result in a beneficial use to the development, bear a reasonable relationship to the burden imposed on the municipality to provide additional necessary public services to the development and otherwise are imposed according to law.*<sup>23</sup>

Indications are that this opportunity to include the APFO in the list of financing mechanisms will be pursued by other communities. Peoria has included the APFO in its Cost of Development Element that was recently adopted by Council and Gilbert planners have considered it in an early draft.

Clearly, in implementing an APFO, a public need that ties the rate of growth to infrastructure capacity must be established. Studies should be prepared which address the following three issues:

1. A causal relationship between new growth and the need for additional facilities or capacity to support that growth;
2. The relationship of adequate public infrastructure to basic health, safety and welfare; and
3. The steps being taken by the municipality to ensure that those needs are accommodated, usually through the CIP.<sup>24</sup>

### **Local APFOs**

*Queen Creek.* Queen Creek adopted a growth area element as a component of the General Plan in May of 1999. The four-tiered system is unique in that it incorporates both

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<sup>22</sup> Arizona Revised Statutes 9-461.05 D2

<sup>23</sup> Arizona Revised Statutes 9-461.05 D4

<sup>24</sup> White, *supra* note 1, at 14

character and long-term public facilities phasing elements based on different policies for town center, urban corridor, suburban transition and rural preservation areas. This provides the basis for consistent policy through general plan, rezoning and subdivision processes.

The Queen Creek APFO (attached as Appendix "A") was adopted in February of 1999. The impetus of the ordinance was a desire to meet the following community objectives:

To link the provision of key public facilities and services with the type, amount, location, density and rate of timing of new development.

To properly manage new growth and development so that it does not outpace the ability of service providers to accommodate development at the established LOS standards.

To coordinate public facility and service capacity with the demands created by new development.

To encourage development at densities consistent with the adopted Queen Creek General Plan.

To ensure that the provision of public facilities and services to new development does not cause a reduction in the levels of service provided to existing residents.

To guarantee that new residents receive all necessary public facilities and services.<sup>25</sup>

The Queen Creek APFO is the result of an extensive public process. Early in the ordinance development process, a stakeholder group (comprised of landowners, citizens, developers and representatives of the business community) was convened to establish the following criteria:

The reservation of facility capacity

Current and projected public facilities capacities

The effect of failure to meet one or more of the APFO standards.

The areas, and subareas of the Town in which the APFO will apply.

The public facilities and services that will be included in the APFO.

The LOS standard for each public facility or service to be included in the APFO.

The types of development approvals/permits to which the APFO requirements will apply.

The point in the development approval process when adequate public facilities will be determined.

The conditions and mitigation requirements that may be attached to APFO approval.

The conditions and mitigation requirements that may be attached to APFO approval.<sup>26</sup>

LOS standards are based on both national and community-specific data. Public facility elements of the Queen Creek ordinance are water, central sewer, streets, parks/open space

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<sup>25</sup> White, Mark S., Freilich, Leitner & Carlisle, Decision Points and Policy Alternatives for the Preparation of an Adequate Public Facilities Ordinance, September, 1997

<sup>26</sup> White, Mark S., Freilich, Leitner & Carlisle, Decision points and Policy Alternatives for the Preparation of an Adequate Public Facilities Ordinance, September, 1997



and trails, schools and drainage. The schools component required participation and consensus from six different agencies, the town and five school districts. The Town contains five school districts, and a national LOS was adopted to standardize the measure of adequacy. It is likely that the school districts and developers will refine these standards in the future, so that they are community-specific.

Should a development proposal not demonstrate the concurrent availability of required facilities, the ordinance specifies three alternatives; 1) Either the order of development can be deferred until concurrent adequate facilities exist, or 2) the density and/or intensity can be reduced so that existing facilities provide adequate service, or 3) the applicant can agree to provide the required facilities. When the third option is chosen, a legally enforceable development agreement that includes a performance security bond for the facility must accompany the application.

Queen Creek Community Development Director John Kross reports that the ordinance has been well received. Developers like the certainty that is provided to the public facilities component of the development approval process. Design and aesthetic considerations preserve the spirit of negotiation that has traditionally been a hallmark of local government approval processes.

*Glendale.* The impetus for the Glendale schools APFO was a specific development project. Under state statutes a school district can reserve a site in a new development project for one year. If the district does not have the funds programmed to buy the site during that period, the school loses their reservation authority and the site reverts back to the developer. It is often difficult for a school district to program funds in a 12-month time frame. This can result in schools that are later sited on remnant parcels in locations that are less than ideal.

The Glendale City Council became frustrated when a developer built homes on a site the Deer Valley School District had reserved. In exploring options for better school site timing and location planning, the adequate public facilities was written and adopted in October of 1999. Zoning Administrator Ray Jacobs reports that the Ordinance has been effective and that, to date, Glendale planners have encountered few problems in its administration. The Ordinance (attached in Appendix B) requires that as a part of a rezoning request to increase density the school district must indicate that there is existing capacity to serve the development or that the developer will make provisions to provide adequate capacity. The specifics determined in negotiations between the developer and the district. The approval can proceed without the statement only if the school district fails to respond. Jacobs cites the Glendale Council commitment to good community planning as a key to the success of the ordinance.

*Buckeye.* The Town of Buckeye planning area is more than 400 square miles, largely undeveloped. The Council wanted to ensure that potential rapid development did not outpace capacity in the five school districts that are within incorporated town boundaries. Buckeye planner Donna Stevens reports that there has been overall satisfaction with the ordinance.

Buckeye's APFO (attached as a part of Appendix "B") is exclusively for concurrent school facilities. It was adopted in October of 2000. The town does not become involved in the means of determining adequacy, but instead relies on the districts and developers to reach agreement on how concurrency will be achieved.

There will likely be an upcoming amendment to the ordinance based on work currently being done by these stakeholders without direct town involvement. The Buckeye APFO is implemented through a requirement that the school district submits a letter stating either existing or planned concurrency before rezoning approval is granted by the Town Council. So far, the requirement has typically resulted in school-site dedications by developers. The school district must actively involved in the process. The rezoning can proceed without the letter of adequacy if the school district fails to respond during the stated time period. Developers have stated a desire for school facilities to be concurrent with development, recognizing that a school is a desirable focal point for a neighborhood, and the building block of a quality community. Developer Greg Hancock demonstrated this commitment when he proposed meeting the standards for a retirement community that would not be generating new students.

## **Findings**

Metropolitan Phoenix is projected to double in population during the next 25 years. To preserve the desirable characteristics that draw people and economic opportunities to this region, it will be important that this growth and development be planned to maximize long-term sustainability. This applies at both the regional and local planning scale.

The adequate public facilities ordinance is one mechanism that can be used to ensure that growth does not erode existing community facility and service standards and undermine long-term community quality. This mechanism should be used to ensure that facility service standards are not compromised during early stages of community maturity. Long-term, facility siting and timing can promote quality neighborhoods and communities that include well-sited parks and schools as focal points.

Finally, it could be applied to regional transportation systems. However, this would require new state legislation, and the design of a system that would not be challenged as a "taking". Local governments in Arizona are creatures of the state, and there is a strong history of local control in the Metropolitan Phoenix area. One mechanism that could be used to adopt regional adequate facilities ordinances would be a regional intergovernmental agreement specifying concurrency requirements for developments above a certain threshold. The concept of the development of regional impact has been used to trigger an added level of review in Vermont, Oregon, Washington and other states. A problem becomes the provision of infrastructure in a timely manner, should concurrency not be met. If this cannot be achieved a "taking" finding would be the result and the requirement would not be legally defensible. States that have set standards for the timing and location regional infrastructure in relation to local government development approvals have horizontally and vertically integrated

systems. Typically, they have a state planning office with statewide planning goals. It is questionable whether regional APFO's could be implemented in the absence of this kind of a system

Although the adequate public facilities ordinance is relatively new to Arizona, this technique has been used in other parts of the country for over 30 years. During that time it has been supported by an established history of case law. In Arizona, the 1998 and 2000 Growing Smarter/Plus amendments to our state planning law have provided even greater implicit authority at the general plan level to support the use of APFOs.

The 1998 and 2000 amendments to our state planning comprehensive planning requirements have provided a new opportunity to local communities to phase future development and infrastructure patterns and quality in the growth area and costs of development elements of the general plan. These can be used to develop the rationale and principles for concurrency. The adequate public facilities ordinance can then be adopted to implement these elements.

APFOs streamline the development approval process regarding public facilities. Design and aesthetic considerations maintain the spirit of negotiation that is the hallmark of these approval processes.

Although there seems to be a general consensus among the Planners Stakeholders Group that the APFO is a legally defensible mechanism for ensuring concurrency for most public facilities, several members cited the recent history of Arizona court cases regarding efforts by local government to establish concurrency for schools<sup>27</sup>. Legislative changes that might correct this problem might explicitly state a dedication requirement of proportionately scaled schools and park sites with explicit language for the inclusion of adequate public facilities ordinances for schools.

Other methods for to improve planning for schools should also be explored. Lengthening the time that a school site could be reserved by a district to longer than the one year period defined by existing statute would not promote concurrency, although it would promote more desirable sites for schools to be integrated with the community fabric. An additional mechanism to support this integration can be modeled after the compact that was established between developers and school districts in the southwest portion of metropolitan Phoenix, which will be discussed in greater detail in the next working paper on development fees.

The adequate public facilities ordinance should be used as a tool to ensure that a local development approval does not exceed the capacity of regional facilities (such as freeways) that serve it. There are several models for this in other states. Alternatives include regional compacts and state concurrency requirements.

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<sup>27</sup> Homebuilders Association of Central Arizona, 332 Ariz. App. 2000

The Queen Creek, Glendale and Buckeye ordinances are models that can be used by other local communities to develop their own ordinances. These differ in approach: The Queen Creek Ordinance covers a comprehensive array of facilities. The Glendale and Buckeye ordinances were developed specifically for schools. Both were developed to facilitate growth while maintaining specific community needs and values.

### **Recommendations**

The MAG Region contains many communities that have areas that are minimally developed, newly developing or actively developing. It is recommended that these communities enhance their planning efforts by taking advantage of new opportunities presented by recent amendments to our State comprehensive plan requirements. To support the land use element of the general plan, the new growth area and cost of development elements of the general plan establish a sound rationale and principles for concurrent development and infrastructure phasing. Further, it is recommended that, where appropriate, an adequate public facilities ordinance be adopted to implement these elements.

Further, it is recommended that new legislation be drafted to explicitly state that developers provide school and park sites in relation to the need generated by their development projects. This could be accomplished by the assessment of school development fees, which could be offset by developer dedications. To ensure that development does not compromise the ability of local government to serve it at the time that facilities are needed, our state statutes should be amended to specifically include the adequate public facilities ordinance as a tool for concurrency.

Options to ensure concurrency of local development approvals and the carrying capacity of freeways and other facilities that are of regional significance should be explored. Alternatives might be a regional compact by intergovernmental agreement or explicit enabling legislation that requires local plans to be concurrent with a minimum level of service standards for state facilities. To meet the tests of the constitution, these would need to be cognizant of constitutionally protected private property rights.

It is recommended that these mechanisms be used to ensure that we do not compromise our long-term economic potential and quality of life in pursuit of short-term objectives.

**Appendix A**  
**The Queen Creek Adequate Public Facilities Ordinance**

**Appendix B**  
**Glendale and Buckeye School Ordinances**