

STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL November 15, 2006	No. I06-005 (R06-009) Re: County Fire Code Authority
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To: Kirk Rowdabaugh
State Forester

Questions Presented

You have requested a formal opinion answering the following questions regarding counties' enforcement of adopted fire codes and their interaction with Declarations of Covenants, Conditions, and Restrictions ("CC&Rs"):

1. Do counties have the authority to enforce wildland-urban interface fire codes?
2. Do State or county fire codes supersede CC&Rs?
3. Are county fire codes automatically incorporated into CC&Rs?
4. Regardless of whether it has a conflicting fire code, does a county ever have authority to enforce a CC&R?

Summary Answers

1. Counties have the authority to enforce wildland-urban interface fire codes.
2. State or county fire codes supersede CC&Rs when fire code provisions directly conflict with CC&R provisions. When a fire code provision and a CC&R provision are not in

direct conflict, but rather, are both restrictive, the provision that contains the more stringent restriction will control and will establish the permitted use.

3. Existing law at the time of enactment of CC&Rs, including fire codes, is incorporated into such agreements. However, newly-enacted fire codes are not retroactively incorporated into existing CC&Rs.

4. In general, counties do not have the authority to enforce CC&Rs.

Background

In 1970, the Arizona Legislature enacted A.R.S. § 11-861(A), which states in part: “In any county which has adopted zoning pursuant to this chapter, the board of supervisors *may adopt and enforce*, for the unincorporated areas of the county so zoned, a building code” A.R.S. § 11-861(A) (emphasis added); 1970 Ariz. Sess. Laws ch. 177, § 2. In 1996, the Legislature added that the “board of supervisors *may adopt* a fire prevention code in the unincorporated areas of the county in which a fire district has not adopted the uniform fire code pursuant to section 48-805. . . .” A.R.S. § 11-861(B) (emphasis added); 1996 Ariz. Sess. Laws ch. 113, § 1. In 2004, the Legislature added further that the “board of supervisors *may adopt* a current wildland-urban interface code. . . .” A.R.S. § 11-861(D) (emphasis added); 2004 Ariz. Sess. Laws ch. 326, § 3.

CC&Rs are private, restrictive covenants or servitudes running with the land. *See Powell v. Washburn*, 211 Ariz. 553, 555, ¶ 8, 125 P.3d 373, 375 (2006). CC&Rs govern and restrict the use of land within a given community and constitute “a contract between the subdivision’s property owners as a whole and the individual lot owners.” *Ariz. Biltmore Estates Ass’n v. Tezak*, 177 Ariz. 447, 448, 868 P.2d 1030, 1031 (App. 1993).

Analysis

A. Counties Have Authority to Enforce Wildland-Urban Interface Codes.

Although A.R.S. § 11-861(D) itself does not specifically state that a county may enforce an adopted wildland-urban interface fire code, A.R.S. § 11-863(B) establishes that a county may do so: “The board may adopt necessary rules and regulations for the enforcement of any code adopted under this article [A.R.S. §§ 11-861 to 11-866]” Furthermore, the “penalty provisions of § 11-808 may be applied by the county in enforcing the provisions of this article.” A.R.S. § 11-866. Thus, counties have authority to enforce wildland-urban interface codes through the imposition of statutory penalties.

B. State/County Fire Codes Supersede CC&R Provisions.

In general, when a contract is incompatible with a statute, the statute will control. *Higginbottom v. State*, 203 Ariz. 139, 142, ¶ 11, 51 P.3d 972, 975 (App. 2002). The exercise of police power to protect the public welfare, such as the enactment of fire codes, may supersede provisions in private contracts like CC&Rs if the government’s actions are reasonable and appropriate to the public purpose. *See Phelps Dodge Corp. v. Arizona Elec. Power Co-op., Inc.*, 207 Ariz. 95, 119, ¶ 101, 83 P.3d 573, 597 (App. 2004) (noting that state can impair contract obligations in exercise of its police power in order to protect important public interests). Accordingly, a fire code will render unenforceable a CC&R provision that permits a use or activity prohibited by the code or forbids a use or activity required by the code. *See* Restatement (Third) of Property: Servitudes § 3.1 cmt. c (2000) (“Although zoning regulations and servitudes are usually compatible in the sense that the more restrictive prevails, a servitude that authorizes a use prohibited by zoning is illegal or unenforceable to that extent.”);¹ *Dillon-Malik, Inc. v.*

¹ “In the absence of contrary precedent, Arizona courts look to the Restatement.” *Paxson v. Glovitz*, 203 Ariz. 63, 67, ¶ 21 & n.3, 50 P.3d 420, 424 & n.3 (App. 2002) (applying Restatement (Third) of Property: Servitudes).

Wactor, 151 Ariz. 452, 454, 728 P.2d 671, 673 (App. 1986) (lessee's obligation to comply with zoning ordinance does not violate lessor's obligations under implied covenant of quiet enjoyment); *Verna v. Links at Valleybrook Neighborhood Ass'n, Inc.*, 852 A.2d 202, 209 (N.J. Super. Ct. App. Div. 2004) (restrictive covenants cannot avoid obligations imposed by parking ordinance); *Fanning v. Grosfent*, 58 A.2d 366, 368 (App. Div. 1977) (municipal ordinance imposing fence requirements supersedes restrictive covenant). If both the fire code and the CC&R restrict a given use or activity, both provisions are enforceable; the more restrictive provision will ultimately establish the permitted use. *See, e.g., McDonald v. Emporia-Lyon County Joint Bd. of Zoning Appeals*, 697 P.2d 69, 71-72 (Kan. App. 1985) (setback requirement in CC&R required removal of garage otherwise permitted under zoning variance obtained by property owner).

C. Fire Codes Existing at the Time of Enactment of the CC&R Are Incorporated Into its Provisions.

CC&Rs are construed to incorporate fire code provisions in effect prior to the enactment of the CC&R. "It has long been the rule in Arizona that a valid statute is automatically part of any contract affected by it, even if the statute is not specifically mentioned in the contract." *Higginbottom*, 203 Ariz. at 142, ¶ 11, 51 P.3d at 975 (citations omitted); *see also Friedman v. LeNoir*, 73 Ariz. 333, 337, 241 P.2d 779, 781 (1952) (terms of municipal building ordinance incorporated into lease agreement). However, a contract is only "to be construed in the light of the statute, of the law then in force." *Higginbottom*, 203 Ariz. at 142, ¶ 11, 51 P.3d at 975 (quoting *McCullough v. Commonwealth of Virginia*, 172 U.S. 102, 112 (1898)). Thus, while existing fire codes are incorporated into CC&Rs when those agreements are executed, newly-enacted fire codes are not retroactively incorporated into existing CC&Rs.

D. Counties Generally Cannot Enforce CC&Rs.

Only parties intended to benefit from an agreement have the right to enforce the agreement. *See Lacer v. Navajo County*, 141 Ariz. 396, 403, 687 P.2d 404, 411 (App. 1983) (citing Restatement (First) of Property § 542 (1944)); *see also* Restatement (Third) of Property: Servitudes § 8.1 (2000) (“A person who holds the benefit of a servitude ... has a legal right to enforce the servitude.”); *Singleterry v. City of Albuquerque*, 632 P.2d 345, 347-48 (N.M. 1981) (in contrast to zoning laws, restrictive covenants enforceable only by private parties—the grantors). Generally, counties are not parties or beneficiaries to CC&Rs.² The one generally accepted exception to the rule is where developers adopt restrictive covenants as a condition of subdivision or other zoning approval. Only then may a county enforce the covenants as part of its general zoning authority. *See Village of Los Ranchos de Albuquerque v. Shiveley*, 791 P.2d 466, 470-71 (N.M. Ct. App. 1990).

Conclusion

Counties have the authority to enforce adopted wildland-urban interface fire codes. The provisions of these and other fire codes supersede conflicting provisions in CC&Rs. CC&Rs incorporate the provisions of only those fire codes in effect when the CC&Rs were adopted. Counties generally cannot enforce the terms of CC&Rs.

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² A few jurisdictions outside Arizona have enacted statutes granting municipalities the power to enforce private restrictive covenants. *See, e.g.*, Tex. Local Gov’t Code Ann. §§ 212.131 to 212.136.