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The Dividing Lines between Lot Splitting and Subdividing . . .

PART I – GENERAL DISCUSSION OF TOPIC

The division of property into two or more parcels for sale or ownership may require specific approvals by the State of Arizona (through the Department of Real Estate -- "D.R.E.") and/or from a Town or Municipality or the County in which the property is located under statutes that fall into 3 different titles.

A. Lot Splitting vs. Formal Subdivision:

To understand what approvals are required under all of these statutes, it is best to separate two processes, and then realize how one process is really an exception to the statutes requiring the other process to be followed:

(a.) the less-regulated "lot splitting" process where ground is divided by a single owner into 3 or fewer parcels in a city or town, or in into 5 or fewer parcels in the county;

(b.) as opposed to the heavily regulated "formal subdivision" process where a single owner divides ground that is located in a city or town is divided into 4 or more parcels, or ground that is located out in the county into 6 or more parcels.

As will be explained next, Arizona's lot split laws are really an exception to the statutes that pertain to creation of formal subdivisions, which are found under three titles in the Arizona Revised Statutes:

1. Plat Approval.

Arizona's plat approval statutes fall under two different titles:

First, for property that is located in the unincorporated areas of a county, there are specific statutes in Title 11 (A.R.S. §§ 11-806.01 & .02) which are enforced at the county level and require that a subdivider obtain county approval of his subdivision plat before recording it by obtaining both a preliminary and a final plat approval, as sequential processes, where each approval requires informal stops with the staff and Technical Advisory Committee, and then formal stops before the Planning & Zoning Commission and the County Board of Supervisors, along with collateral involvement of the fire department, flood control, county health, etc. All of this can easily take several months or more.

For property that is instead located inside a city or town, a parallel set of statutes in Title 9 (A.R.S. §§ 9-463.01 & .01) create the an almost identical plat approval process where the stops instead include staff, normally a Subdivision Committee, the Planning & Zoning Commission and the City/Town Council.

2. Public/Subdivision Report.

Next, in Title 32 there are other statutes (A.R.S. § 32-2181, *et. seq*.) which are enforced by the Arizona Department of Real Estate ("DRE") and require that the subdivider provide to DRE certain information which it then uses to produce a "public report" on the subdivision that the subdivider must then provide to every prospective purchaser as a disclosure document. The process can easily take a couple of months.

Both the county plat approval statutes and the states public report statutes are based on A.R.S. § 32-2101 (50), a statute which defines a subdivision as the creation by a party of 6 or more lots or parcels, while the municipal plat approval statutes at A.R.S. § 9-463.02 define a subdivision at the creation of 4 or more lots.

3. Lot-Splitting Exception.

However, a single party who simply creates 5 or fewer parcels in the unincorporated areas of a county, or 3 or fewer parcels in a city or town, is safely operating under an exception to the formal subdivision law that is generally called "lot splitting".[1]

Therefore, if while acting alone I buy a large parcel of county ground from a stranger operating at arm's length, and cut it into 5 smaller parcels of any shape and any size that are still larger than the minimum lot size, and then sell those 5 parcels to 5 more strangers also operating at arm's length, I do not violate the law, even if, before I sell the parcels, I add substantial amenities that you might find in a subdivision such as paved roads, fencing, wells, etc. And the same rule applies to each of my buyers; if the parcel I sell them is large enough, they too can cut it into 5 parcels without going through the formal subdivision process.

B. <u>Illegal Activity</u>:

What is illegal, in fact a felony, is described by A.R.S. 32-2181 D, which states:

> D. It is unlawful for a person or group of persons acting in concert to attempt to avoid this article by acting in concert to divide a parcel of land or sell subdivision lots by using a series of owners or conveyances or by any other method that ultimately results in the division of the lands into a subdivision or the sale of subdivided land.

In other words, what becomes illegal is when I "act in concert" with a seller, and/or with other buyers who are buying from my seller, and/or with my own buyers downstream to create 6 or more parcels. Since there is no more definition of what "acting in concert" really is, it is a fact question to be interpreted by people who divide the land and by DRE, which is the state agency charged with enforcing the subdivision statutes.

As examples, here are two frequent but clearly illegal actions:

[1] Both the formal subdivision process and the simpler lot split process have their good and bad sides. Formal subdivisions offer far more protections to the buyer and the community, but developers tend to offset the extra time and expense of the process by forcing more sardines in the can – i.e. developing at greater densities; so the person who buys in a subdivision is more likely to live where the desert used to be, while the party buying a lot split lot is more likely to get more ground and live <u>*in*</u> the natural desert.

(1.) Family, Friends & Friends' Friends, too. One common type of illegal subdivision is where a handful of my friends and family work together as a group to purchase 5 parcels from a seller, and, then, the 5 of us each cuts our parcels into 5 lots and sells them. Many people who do this try to be clever by using corporations and LLCs that they control instead of, or along with, friends and family. But these people are idiots because you can sit at your computer and review the county assessor's and recorder's websites to find out in a few minutes who purchased a parcel and when, and simply check the website for the Arizona Corporation Commission ("**ACC**") website to see who is behind any company. And all of this ready proof remains a part of the public record forever.

(2.) Doubling Down on Escrows. Another common type of illegal subdivision involves working as a buyer with a group of buyers who are together buying up to 5 parcels at the same time in what I will call the "upstream escrows", where some of us, in turn, has two or more buyers below us who are buying smaller parcels from us in "downstream escrows" which simultaneously close such that the money from the downstream escrows is necessary to close the upstream escrows. Note that a "double escrow" or a "simultaneous closing" or "back-to-back closing", (i.e. where the money from the downstream escrow is passed upstream and used to help close the upstream escrow), is not by itself illegal, even though the upstream and downstream buyers are obviously "acting in concert" to do this. But it obviously becomes illegal when the total number of lots that are created and sold by the buyers in both the upstream and downstream escrows is more than 5. Again, this illegal conduct can be seen and proven in minutes by simply visiting the assessor's, recorder's, and ACC websites.

B. Special Considerations in analyzing the configuration of the division of the lands:

To better understand the rules in question, we must first understand three special considerations for analyzing the configurations or geometry of the property being divided, as they impact the actual head count of the number of lots or tracts into which a property will be divided:

1. Assemblages.

Even if they were acquired at different points in time, all contiguous parcels owned by the same party, despite the fact that they have previously been known by different tax parcel numbers, are treated as a single property when counting the divisions thereof.

Rule: In evaluating various configurations, DRE consistently says it will count all parcels you purchase or create which are contiguous to one another as part of your "assemblage".

2. "Lot Line Adjustments."

The term "lot line adjustment" basically applies to a reconfiguration of the boundary line between two adjacent parcels, whether they are commonly owned or not, and whether the resulting shift of ground from one parcel to another is minor or substantial.

But when the two adjacent parcels are owned by two different parcels, the ground that is shifted from one parcel to the other, is considered by the state to come off of the assemblage of the first owner, and go onto the assemblage of the second owner. In other words, if property of any size or shape is conveyed by one property owner (the grantor) to an adjacent property owner (the grantee) it adds to that grantee's "assemblage" for the purposes of counting his total number of divisions, and is therefore deducted entirely from the assemblage of the grantor, and treated as if he had never owned it.

Rule: You are allowed to sell land to an immediate neighbor as a "lot line adjustment" without counting it as one of your allowable 5 splits (in the county) or 3 splits (in a city or town) because it comes off of your assemblage, but goes onto his. But all other lots you assemble or create are counted, and you cannot create more than 5 (in the county) or 3 (in a city or town).

3. Earlier Divisions of the Land.

It should also be noted that it is generally of no consequence that the property which is currently being divided is itself the product of one or more earlier generations of divisions or splits of larger pieces of land. As long as the current landowner has no incestuous relation to the parties who previously owned the land from which his property was carved, and has not otherwise operated in concert with them to circumvent the subdivision laws, then the state and the city or town can ignore the prior subdivision history of the property. As such, it does not generally matter if a single property is still at the size it was when it first became private ground, or if it is now a small fragment and the result of many generations of prior divisions and splits, and without direct reason for suspicion of a wrongdoing, the state and city or town need not research the history of the property.

Rule: You cannot create more than 5 lots (in the county) or 3 lots (in a city or town), and, except for "lot line adjustments", all other lots you assemble or create are counted against your total.

C. Special Concerns for Realtors & Brokers:

Since DRE also licenses and trains Realtors (both brokers and salespersons) it shows little patience when they violate the subdivision laws or help others to do so. For all of these reasons, but particularly as a result of this "contiguity-assemblage" rule, Realtors are trained by DRE to be wary of any party who appears to have created 6 or more lots in any given area, and not to assist such a party in violating the law. So to be sure about this, Realtors will sometimes do research by going back up the chain of title for each lot in a given area that looks suspicious.

But, two clarifications of the contiguity rule are important: (1.) First, there is no law that prevents an individual from splitting a single parcel into as many as 5 lots some distance away, and even quite close to, ground that he is splitting, or has previously split, into as many as 5 lots. (2.) In fact, while DRE frowns on those who would walk so close to the line, there is really no specific law prohibiting a party from going back later to develop another 5 lot split which is contiguous to ground he previously divided into split into as many as 5 lots.

And, when you are simply a single party buying a single parcel that appears to be nothing more than a 5 lot split by a single seller, the law does not require you to research the chain of title to every parcel in the neighborhood, or conduct some extensive research into the possibility of illegal subdivision activity.

PART II – MORE DETAILED REVIEW OF APPLICABLE STATUTES

A. State Subdivision Statutes (enforced by D.R.E.):

The statutes which are enforced by D.R.E. are best thought of as disclosure statutes that require detailed disclosure, by way of the required subdivision report, to the potential buyers of the lots of the subdivision of a number of important items. Since the subdivision report must be approved by D.R.E., it also gives the state a chance to verify that the subdivider has taken care of a number of critical items, for example, legal access to a dedicated road and the ability to release any lot from all upstream debt.

1. Subdivision Report.

A.R.S. § 32-2101 (48) defines "subdivided lands" as property broken into 6 or more parcels. (This statute used to say 4 or more parcels, but was revised by the Arizona legislature in 1994.)

A.R.S. § 32-2181 A describes the content of the required Subdivision Report. It includes a detailed list of the types of information required, such as parties involved in the ownership and sale, all encumbrances and special assessments, terms and conditions of the sales contracts, provisions for access, sewage disposal, utilities, nearest schools, land uses, deed restrictions, etc.

A.R.S. § 32-2181 C provides that, in active groundwater management areas, the developer must also obtain a certificate of assured water supply from the Department of Water Resources. If he cannot hookup to an existing water company ready to serve the development, this certificate can require extensive studies by groundwater experts and will be extremely expensive and time consuming all by itself.

Until the developer has obtained D.R.E.'s approval of the subdivision report, he cannot offer any lots for sale or take any reservations from prospective buyers.

Despite its value to the state and the consumer, this is an expensive and time-consuming process which the developer must offset by charging more for his product and/or increasing the density of his development.

2. "Unsubdivision" Report.

A.R.S. § 32-2101 (52) defines "Unsubdivided Lands" as property broken into parcels of 36 acres or more, but less than 160 acres each. In the fashion of an "uncola," these resulting jumbo parcels are jokingly called an "unsubdivision."

A.R.S. § 32-2195 B describes the content of the required report for unsubdivided lands. The items required are not as numerous or stringent as those required for a normal subdivision with smaller lots. In the same vein, A.R.S. § 32-2195 H says that any existing water studies must be disclosed, but a certificate of assured water supply is not required.

B. Municipal Plat and Lot Split Approval Statutes (enforced by Town):

The statutes governing subdivisions and lot splits within a city or town are best thought of as plat approval statutes as they operate to require the approval by the city or town of either the final subdivision plat or the lot split map. This gives the city or town the chance to review and control certain aspects of the subdivision or lot split which are of importance to its zoning code. The specific aspects they review in this process will depend on whether the division of the property is a subdivision or a lot split:

1. Subdivision Plat Approval:

A.R.S. § 9-463.02 defines a subdivision as property broken into 4 or more lots or parcels. Unlike the equivalent definition for the D.R.E. statutes, this number was not raised to 6 by the 1994 legislature. This means that the division of property within a city or town into 4 or 5 parcels will not require the approval of a subdivision report by D.R.E. or a certificate of assured water supply from D.W.R., but will still be treated by the city or town as a subdivision.

A.R.S. § 9-463.01 C requires that a city or town review a preliminary plat of a subdivision. In so doing, they evaluate or require a number of important items, including flood potential, slopes, and other soil and topography problems, grading and drainage requirements, fees for site inspection, dedication of public streets, sewer, water and utility easements, engineering plans and payment assurances for the required infrastructure, etc.

A.R.S. § 9-463.01 D allows the city or town to require that the subdivider provide land for parks, schools, etc., but A.R.S. § 9-463.01 E says the city or town must agree to pay fair market value for this land within a year after the subdivision plat is recorded.

A.R.S. § 9-463.01 G requires the city or town to approve the final subdivision plat.

A.R.S. § 9-463.01 H incorporates the pertinent requirements from other departments or agencies (e.g. transportation, health, flood control, etc.).

A.R.S. § 9-463.01 I adopts the same criteria as the D.R.E. statutes, and requires a certificate of assured water supply if the property is in an active groundwater management area and there are 6 or more lots being created.

Like the subdivision report process at the state level, this plat approval process provides additional protections for the city or town, but is an expensive and time-consuming process which the developer must offset by charging more for his product and/or increasing the density of his development

2. Lot Split Approval:

A.R.S. § 9-463 (3) defines a "land split" as the division of a property of 2.5 acres or less into 2 or 3 smaller parcels.

A.R.S. § 9-463.01 L then provides that a city or town may adopt ordinances governing the approval of these land splits, and further describes the criteria for their approval as "the determination of division lines, area and shape of the tracts or parcels." However, this statute does not provide the city or town the authority to evaluate any of the many other items (described at part C1 above) involved in the review and approval of a preliminary or final subdivision plat. For a parcel that was never formally subdivided, the city or town must look to its building permit process to incorporate any of these concerns, such as legal access or septic tank capability.

Also, because the definition of the term "land split" (described above) does not include the splitting of a property of over 2.5 acres, this limited authority to deal with the geometry of a land split is limited to properties of 2.5 acres or less, a situation that rarely occurs in smaller towns with low density zoning. In fact, even though a city or town may pass such an ordinance, there is no statute providing a city or town with the authority to regulate the splitting of land into only 2 or 3 parcels when the original parcel is larger than 2.5 acres.

C. County Plat and Lot Split Approval Statutes (enforced by County):

There are plat approval statutes governing subdivisions and lot splits within a county that are similar/parallel to those enforced by a city or town, and require the approval by the county of either the final subdivision plat or the lot split map. They give the county the chance to review and control certain aspects of the subdivision or lot split which are of importance to its zoning code. The specific aspects they review in this process will depend on whether the division of the property is a subdivision or a lot split:

1. Subdivision Plat Approval:

While not as comprehensive as the municipal plat approval statutes, the county plat approval statutes, A.R.S. §§ 11-806.01 & 11-806.02, still cover items such as:

certificates of assured water supply for land in an AMA,
arrangement of streets, highways, bicycle facilities, and orderly development of the lots,
open spaces for traffic, drainage, utilities, fire protection, recreation, light and air,
hiking and equestrian trails,
schools, parks, fire stations, etc.

For a subdivision of 10 parcels or less, the presentation of a preliminary plat to the P&Z and the Board of Supervisors, so that they only entertain a final plat.

2. Lot Split Approval:

A.R.S. 11-809 allows a county to adopt ordinance requiring lot split approval for the splitting of properties into 5 or less parcels. If such ordinances are adopted, the approval process will deal with: the county zoning requirements for the lots (e.g. minimum lot size, width, etc.), legal access proven by a standard title report, and a statement from a surveyor or engineer addressing whether the lots are accessible to a standard 2 wheel vehicle.

a. Affidavit of Disclosure.

A.R.S. § 806.03 requires the seller of five or fewer parcels of land (a land split) to furnish an "affidavit of disclosure" to the buyer at least 7 days before close of escrow, and the buyer must acknowledge receipt of the affidavit by signing it, and the seller must then record it.

The items covered include whether or not there is: (a.) legal access, (b.) physical access, (c.) matching legal and physical access, (d.) public or private maintenance of the roads, (e.) flood plain on the property, (f.) prior flooding of the property, (g.) water, sewer, electric, natural gas, single party telephone or cable television to the property, (h.) private or shared well or a public water system, (i.) septic tank or need for one, (j.) prior percolation testing of the property, (k.) emergency access to the property, (l.) compliance with A.R.S. 11-809.

The buyer as a 5 day right of rescission beginning with the affidavit being furnished to him.

Sincerely,

Noel J. Hebets
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