ARIZONA SUPREME COURT

STATE OF ARIZONA, *et al.,* Plaintiff/Appellant, v. FOOTHILLS RESERVE MASTER OWNERS ASSOCIATION, INC., Defendant/Appellee.	Supreme Court No. CV-23-0292-PR Court of Appeals Division One Case No: 1 CA-CV 22-0371 Maricopa County Superior Court Case No. CV2017-010359
DIETMAR HANKE, *et al.*, Intervenors/Appellees.	

PETITION FOR REVIEW OF DEFENDANT/APPELLEE FOOTHILLS RESERVE MASTER OWNERS ASSOCIATION, INC.

Dale S. Zeitlin (#006615)
Casandra C. Markoff (#033990)
ZEITLIN & ZEITLIN, P.C.
5050 North 40th Street, Suite 380
Phoenix, Arizona 85018
602-648-5222
dale@zeitlinlaw.com
casandra@zeitlinlaw.com
Attorneys for Defendant/Appellee Foothills Reserve Master Owners Association, Inc.

TABLE OF CONTENTS

Document Contains Internal Links and Bookmarks

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

Constitutional Provisions

INTRODUCTION

The Court should accept review because the COA's decision undermines property rights, offends the Constitution, upsets a century of takings jurisprudence in Arizona (and everywhere), and departs from mandatory principles of statutory interpretation. The COA deprived homeowners of their right to just compensation for the loss of value caused to their homes by the taking of their property and the construction of the State's freeway.

The State condemned appurtenant easements that preserved adjacent open space area and their use by homeowners. The parties agreed that the State took compensable property rights from the homeowners (the easements) and that their homes suffered severance damages as a result. The parties only disagreed over whether the homes and easements constituted a larger parcel, entitling the homeowners to recover proximity damages. The trial court found in favor of the homeowners, IR 202, and the State appealed.

The COA reversed and held that *only* the taking of a physical "parcel of land" entitles property owners to severance damages: "Because an easement is not a parcel of land, the homeowners were not entitled to severance damages."

The seismic consequence: every taking of an easement (utility, conservation, access, air, etc.) or lease now no longer receives the constitutional guarantee of just compensation (which requires payment of severance damages).

The COA couched its opinion in a deeply flawed interpretation of A.R.S. § 12-1122(A)(2), which codifies the constitutional mandate of severance damages:

> If the **property** sought to be condemned constitutes only a part of a larger parcel, the damages that will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff.

(emphasis added). The COA defined the term "larger parcel" as a physical parcel of land which, it somehow deduced, must limit "property" to physical "smaller parcels of land." This overlooks a century of precedent recognizing that many intangible property rights form tangible property rights. *See, e.g.*, *In re Forsstrom*, 44 Ariz. 472, 481 (1934).

The COA ignored the Constitution and decades of established precedent protecting and defining easements as "property." Nowhere in the Constitution or Arizona jurisprudence are easements provided less protection than other types of property. The COA had a duty to adhere to these long-established understandings. The COA's decision cannot stand.

The COA made the exact opposite determination in the **same** case as it related to an intervenor homeowner who represented himself: "Applying this [severance damage] law, the superior court properly concluded the Hankes [] were entitled to severance damages. . . ." *State of Arizona v. Foothills Reserve*, No. 1 CA-CV 22-0216, at *9 ¶ 20 (review denied); APP16-24. These conflicting decisions extend a

claim for severance damages to one homeowner but deny the same claim to his identically situated neighbors.

In an unrelated case pending review, this same COA panel narrowly interpreted the types of "property" protected by the U.S. and Arizona Constitutions to exclude contracts. *City of Surprise v. Circle City*, et al., No. 1 CA-CV 22-0532 (CV-23-0261-PR); APP25-39. The COA mistakenly advances a limited concept of property: if you cannot touch it, the Constitution should not protect it.

ISSUES PRESENTED FOR REVIEW

I. Our Constitution protects property from being taken or damaged without just compensation. Ariz. Const. art. II, § 17. The constitutional mandate of just compensation requires payment of severance damages in a partial taking of property. *See, e.g.*, *State ex rel. Miller v. Wells Fargo Bank, N.A.*, 194 Ariz. 126 (App. 1998). Easements are property. Did the COA err in holding that A.R.S. § 12-1122(A)(2) foreclosed homeowners from recovering severance damages caused to their homes by the taking of their appurtenant easements?

II. An issue that the COA did not decide but that this Court may need to reach is whether appurtenant easements and the homes for which they run in favor of constitute a "larger parcel" for severance damage purposes.

MATERIAL FACTS

Foothills Reserve is a master-planned community of 590 homes located at South Mountain. IR 79-80, Exhibits 1, 7. The State took the HOA's common areas. The homeowners owned two appurtenant easements which guaranteed that the condemned common areas remained scenic open space and open to use by the homeowners. IR 168-69, Exhibit 4; IR 185-86, Exhibit 2; IR 202. The State and HOA settled the value of the common areas. The homeowners reserved their right to claim severance damages caused by the taking without having to file a counterclaim. IR 90. In a representative capacity, the HOA pursued the claims of 589 homeowners.

Because the State replaced the natural beauty of the restricted open space common areas with an unsightly freeway, elevated concrete walls, obtrusive lighting, noise, and noxious fumes, the homes suffered damages. *Id*. The State conceded that the easements are "property" and that it owed just compensation to the homeowners measured by the value of the homes (the dominant estate) with and without the easements. IR 178-79. This is referred to as the "before and after" rule, which is used to determine severance damages to property remaining after a taking. Yet, the State disagreed that the homeowners could recover the proximity damages caused to their homes. The parties filed cross-motions for summary judgment on this issue. IR 162, 167-69, 172, 176-77, 185-88, 196-97.

In a well-reasoned decision, the trial court ruled that the homeowners had a

claim for severance (and proximity) damages:

> [T]he State agreed . . . that the measure of damages "is the difference in the value of the dominant property before and after the taking." As such, the State specifically stated that the subject valuation "means valuing the property before, with the covenant, and after, without the covenant." As such, the State admitted that we are dealing with damages which accrue to the portion not sought to be condemned, the fee ownership in the lots, by reason of their severance from the portion sought to be condemned, the easement and restrictive covenant rights in the common area. This is the essence of severance damages. . . .

IR 202; APP40-50. Because appurtenant easements lack independent value, it is the value provided to the dominant estate that appraisers consider in measuring damages. The superior court recognized that the Constitution requires the homeowners to receive the full loss in value to their homes.

The parties only dispute the homeowners' entitlement to recover proximity damages. The State concedes that the homes did suffer proximity damages from the taking of the easements. State's Appeal Reply Brief at p. 10. Both parties' appraisers opined that the replacement of the open space with a noisy, unsightly, and polluting freeway damaged the homes. IR 295-299, Exhibit 1, APP51-72; APP73-86.

Prior to trial, the parties settled the severance damage claim: $18 million if severance damages included proximity damages and $6 million for severance damages without proximity damages.[1] Because the parties, and their appraisers,

[1] The COA's statement that homeowners have received the value of the easement is incorrect and irrelevant. The homeowners settled for a partial payment of $6 million

agreed that the homes suffered severance damages, including proximity damages, the settlement avoided a lengthy jury trial on the amount of damages but permitted the State to appeal whether the homeowners are entitled to proximity damages as a matter of law. IR 342, Judgment ¶ 5(g).[2]

REASONS TO GRANT REVIEW

The Court should accept review because the COA's decision stands to deprive countless property owners of their constitutional guarantee to just compensation. APS recently cited the decision by the COA to stand for the proposition that it need not pay severance damages for the taking of a transmission easement. APP87-88.

There are three major legal errors with the COA's holding: (1) it directly violates the constitutional guarantee of just compensation; (2) it fails to adhere to fundamental and mandatory principles of statutory interpretation; and (3) it upsets decades of unquestioned precedent (both in Arizona and throughout the country).

I. The COA ignored the Constitution and mandatory principles of statutory interpretation that require "property" to include easements.

Every statute must be read in the light of the Constitution. *Goodyear Aircraft Corp. v. Indus. Comm'n*, 62 Ariz. 398, 407-08 (1945), and must avoid an

for the loss in value of their homes, with $12 million unpaid pending final adjudication of the issue of proximity damages.

[2] The COA enlarged the issue before it as one of severance damages generally; the State waived that larger issue and only preserved proximity damages for appeal. *Baker v. Emmerson*, 153 Ariz. 4, 8-9 (App. 1986).

interpretation that renders the statute unconstitutional, *Brenda D. v. Dep't of Child Safety, Z.D.*, 243 Ariz. 437, 444 ¶ 23 (2018). "Thus, words or phrases used in the statute are presumed to have been used in the same sense as in the constitutional provision on the subject . . . . courts are not to give terms appearing in the statute a meaning different from that in which they are used in the constitution." *Goodyear*, 62 Ariz. at 407-08. A state "may not sidestep the Takings Clause by disavowing traditional property interests." *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 167 (1998); *Tyler v. Hennepin County*, 143 S. Ct. 1369, 1375 (2023) ("The Takings Clause would be a dead letter if a state could simply exclude from its definition of property any interest that the state wished to take.").

Statutes must be interpreted in harmony with the Constitution and presumed to be constitutional and any doubt will be resolved in favor of constitutionality. *Escamilla v. Cuello*, 230 Ariz. 202, 205 ¶¶ 15-16 (2012); *State v. Arnett*, 119 Ariz. 38, 48 (1978). The COA's interpretation failed this duty by stating that it was not prepared to "tackle" constitutional problems presented by its own analysis.

"If a statute's language is clear and unambiguous, we apply it without resorting to other methods of statutory interpretation. Ambiguity exists if there is uncertainty about the meaning or interpretation of a statute's terms." *Hayes v. Continental Ins. Co.*, 178 Ariz. 264, 268 (1994). The COA agrees easements are "property" for the purposes of A.R.S. § 12-1122(A)(1) – there is no justification for

altering its meaning in the next subsection.

The Constitution protects "property" from being taken or damaged without just compensation. It does not discriminate among types of property. Ariz. Const. art II, § 17. Easements existed as property rights long before the Arizona Constitution; if the framers thought easements should not receive the full protection of the Constitution, they would have said so. Thus, the taking of easements must receive the same constitutional guarantee of just compensation as all other property.

"Just compensation" means "[t]he equivalent in money which places the owner in as good a position financially as he would have been if his property had not been taken. . . ." *Defnet Land & Inv. Co. v. State*, 103 Ariz. 388, 389-90 (1968). "Severance damages compensate an owner whose property has been taken for any reduction in the fair market value of remaining property not taken." *Catalina Foothills Unified Sch. Dist. No. 16 v. La Paloma Prop. Owners Ass'n*, 238 Ariz. 510, 516 ¶ 21 (App. 2015). Thus, severance damages are a necessary component of the constitutional guarantee of just compensation when any property is partially taken.

The COA departed from the long-held and widely-accepted meaning of "property," which has been rigorously protected since statehood. *De Hansen v. District Court of Second Judicial District*, 11 Ariz. 379 (1908); *City of Phoenix v. Mori*, 182 Ariz. 612 (1995) (territorial courts protected landowners); *Bailey v. Myers*, 206 Ariz. 224, 227 ¶ 11 (App. 2013) ("The framers of our Constitution understood

that one of the basic responsibilities of government is to protect private property interests."). "Property" encompasses real, personal, tangible, intangible, possessory, and nonpossessory rights. *See, e.g.*, *Lynch v. United States*, 292 U.S. 571, 578 (1934); *City of Phoenix v. South Bank Corp.*, 133 Ariz. 90, 93 (App. 1982); *Solana Land Co. v. Murphey*, 69 Ariz. 117, 122 (1949); *Deer Valley Indus. Park Dev. & Lease Co. v. State*, 424 P.2d 192, 198 (Ariz. App. 1967); *McMurran v. Durran*, 17 Ariz. 552, 555 (1916) ("property" includes real and personal property and "exhausts the class of property; it includes the whole class genus.").

> Nearly 90 years ago, the Arizona Supreme Court explained:
>
> > When real property is considered, a man has not only right of use, of possession and disposition in a particular area of land, but he has at times other rights over contiguous and surrounding area affecting the use of the particular area, and these are as much his property as the right to the use of the area he possesses . . . . to the extent they are secured by law, they are truly property as much as the right to use the land to which they appertain. It would follow from these definitions and explanations of the meaning of the term "property" that since it consists, not in tangible things themselves, but in certain right in and appurtenant to them, it would logically follow that when a person is deprived of any of these rights, he is to that extent deprived of his property, and that it is taken in the true sense, although his title and possession of the physical object remains undisturbed.

Forsstrom, 44 Ariz. at 481 (overruled on other grounds by *Thelberg*, which defined "property" even more broadly to include rights to abutting street grade). Appurtenant easements and restrictive covenants extend benefits to a dominant estate and the right to injunctive relief to enforce the uses and restrictions to maintain that benefit

to the dominant estate. *Condos v. Home Dev. Co.*, 77 Ariz. 129, 135-36 (1954). Thus, the owner cannot reach "as good a position financially as he would have been if his property had not been taken" without recovering the damages to the dominant estate.

The COA's holding does not adhere to the Constitution's meaning of the term "property," which includes easements. The Constitution dictates the definition of "property" as used in A.R.S. § 12-1122(A)(2).

The COA cites Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012), for the negative-implication canon that "[t]he expression of one thing implies the exclusion of others." The treatise stresses that the doctrine "must be applied with great caution" and is only applicable with a list of items. For example, a sign "no dogs allowed" implies that other creatures, such as monkeys or elephants, are also excluded or the sign "no shoes, no shirt, no service" obviously implies that service will be denied for those without pants. This doctrine has no application here and cannot alone justify departing from the Constitutional meaning of the term "property."

II. The COA decision conflicts with decades of established precedent and widely-consulted treatises in eminent domain that require severance damages for the taking of easements.

The COA's ruling violates *stare decisis*, which is at its "'zenith' when the precedent establishes 'important' settled expectations—especially those relating to property and contract rights.'" *Laurence v. Salt River Project Agric. & Improvement*

& Power Dist., 528 P.3d 139, 144 ¶ 18 (Ariz. 2023) (quoting Bryan A. Garner et al., *The Law of Judicial Precedent* 370 (2016)).

Arizona has recognized that severing an appurtenant easement from a dominant estate requires payment of severance damages:

> When public authority through its power of eminent domain severs from the dominant tenement of the landowner the appurtenant easement over the servient real estate . . . and if the servient estate by reason of its particular location is used and is going to be used in the foreseeable future as an interstate highway, it seems clear that the property owner has been damaged by such extinguishment substantially more than if the servient estate was an untraveled dirt road. The additional damage caused by reason of the fact that the servient estate is a well-traveled highway cannot be relegated to the classification of damnum absque injuria. . . .

State ex rel. Herman v. Wilson, 4 Ariz. App. 420, 428 (1966).

In *Catalina Foothills*, 238 Ariz. 510, 516 ¶ 21 (App. 2015), the taking of private roadway easements in adjoining common area land entitled homeowners to prove severance damages to their homes:

> As applied, this provision requires the District to pay the fair market value of the condemned property, plus severance damages. *See* A.R.S. §12-1122(A)(1-2). Severance damages compensate an owner whose property has been taken for any reduction in the fair market value of remaining property not taken.

In *State of Arizona v. Thelberg*, 87 Ariz. 318, 324-26 (1960), the court held when the government changes the grade of an abutting street, thereby damaging an access easement, a property owner may recover severance damages.

In *City of Phoenix v. Garretson*, 234 Ariz. 332, 337-37, ¶¶ 17-22 (2014), the

court held that a property owner had a claim for severance damages from a loss of access caused by a segment of the light rail. No land was taken and the property owner retained access from other streets.

In *City of Yuma v. Lattie*, 117 Ariz. 280, 285 (App. 1977), the court held that a property owner was entitled to claim severance damages for the loss in value to his property caused by the change in grade of an abutting street.

In *Selective Resources v. Superior Court*, 145 Ariz. 151, 153-54 (App. 1984), the court held it an error not to permit evidence of severance damages caused by the taking of a transmission line easement.

None of the cases cited by the COA support the interpretation that the severance damage statute only applies to the taking of a "parcel of land" rather than the taking of "property." To the contrary, the cases stand for the proposition that once a taking of property occurs, an owner may prove any damages caused to remaining property. *Wells Fargo Bank*, 194 Ariz. at 128-30 ¶¶ 10-18 ("Once a condemnee establishes a taking, any factor bearing on the market value of the remaining parcel is admissible."); *State ex rel. Miller v. Filler*, 168 Ariz. 147, 149-53 (1991) (same); *State ex rel. Miller v. Norton*, 158 Ariz. 50, 52 (App. 1988) (same).

The COA's decision is also contrary to *State ex rel. Ordway v. Buchanan*, 154 Ariz. 159 (1987), where the Arizona Supreme Court stressed "the measure of severance damages is the difference between the market value of the remainder

before and after the taking." *Id.* at 164; *see also Filler*, 168 Ariz. at 150.

The right to recover severance damages caused to a dominant estate by the taking of an easement or restrictive covenant has been recognized throughout the country. Many of those jurisdictions share an identically worded Takings Clause and severance damage statutes. California, which Arizona considers highly persuasive in condemnation, recognizes a claim for severance damages when restrictive easements are taken:

> [I]t is difficult to justify affording compensation for the appropriation of an easement, which is unquestionable compensable "property," while denying payment for violation of a restriction.
>
> . . .
>
> [I]t is likely that only those immediately adjoining or in close proximity to the improvement would suffer substantial injury. . . .

Southern California Edison Co. v. Bourgerie, 507 P.2d 964, 966-68 (Cal. 1973); *Redevelopment Agency v. Tobriner*, 200 Cal. Rptr. 364, 367 (Cal. App. 1984). S*ee also Creegan v. State*, 391 P.3d 36, 38 (Kan. 2017); *Horst v. Housing Authority of County of Scotts Bluff*, 166 N.W.2d 119, 121 (Neb. 1969); *Johnstone v. Detroit, G.H. & M.R. Co.*, 222 N.W. 325, 331 (Mich. 1928); *Flynn v. New York., W. & B. R. Co.*, 112 N.E. 913 (Ct. App. N.Y. 1916); *Pierce v. Northeast Lake Wash. Sewer & Water Dist.*, 870 P.2d 305, 313 (Wash. 1994); *Burnquist v. Cook*, 19 N.W.2d 394, 398 (Minn. 1945); *Leigh v. Village of Los Lunas*, 108 P.3d 525, 530-31 (N.M. App. 2004); *United States v. Welch*, 217 U.S. 333, 339 (1910); *Adaman Mut. Water Co. v. United States*, 278 F.2d 842, 846 (9th Cir. 1960); *United States v. Certain Land*

in Augusta, 220 F. Supp 696, 701 (S.D. Me. 1963); *United States v. 57.09 Acres of Land*, 706 F.2d 280, 281 (9th Cir. 1983).

Similarly, the COA's decision conflicts with leading treatises on property and eminent domain:

> Because easements are treated as property rights, American law gives them the status and protection similar to that accorded the outright ownership of land. Easements cannot, for example, be taken by the government except with the same eminent domain protections and processes given to other property rights.

7 Thompson on Real Property § 60.02 (b), p. 392. "[W]here an easement appurtenant to land is taken, the measure of damages is the depreciation in the market value of the dominant estate." 26 Am. Jur. 2d *Eminent Domain* § 385; *see also* 4 *Nichols on Eminent Domain* §12.3[1] (rev. 3d ed. 1981).

CONCLUSION

The COA deprived the homeowners of just compensation. This petition should be granted, the COA reversed, and the superior court affirmed.

DATED this 5th day of February 2024.

ZEITLIN & ZEITLIN, P.C.

By: */s/ Dale S. Zeitlin*
Dale S. Zeitlin
Casandra C. Zeitlin
5050 North 40th Street, Suite 380
Phoenix, Arizona 85018
Attorneys for Defendant/Appellee Foothills Reserve Master Owners Association, Inc.

APPENDIX

Table of Contents

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, et al., *Plaintiffs/Appellees*,

v.

FOOTHILLS RESERVE MASTER OWNERS ASSOCIATION, INC.,
Defendant/Appellee.

DIETMAR HANKE, et al., *Intervenors/Appellants*

No. 1 CA-CV 22-0216
FILED 3-7-2023

Appeal from the Superior Court in Maricopa County
No. CV2017-010359
The Honorable Timothy J. Thomason, Judge

AFFIRMED

COUNSEL

Dietmar and Linda Hanke, Phoenix
Intervenors/Appellants

Arizona Attorney General's Office, Phoenix
By Michelle Burton, Joe Acosta, Jr.
Counsel for Plaintiffs/Appellees

Zeitlin & Zeitlin, P.C., Phoenix
By Dale S. Zeitlin, Casandra C. Markoff
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Presiding Judge Samuel A. Thumma delivered the decision of the Court, in which Judge Cynthia J. Bailey and Vice Chief Judge David B. Gass joined.

T H U M M A, Judge:

¶1 Appellants Dietmar and Linda Hanke appeal from the grant of the State of Arizona's motion for summary judgment on their claim for severance damages involving the State's condemnation of neighboring land. Because the Hankes have shown no error, the judgment is affirmed.

FACTS AND PROCEDURAL HISTORY

¶2 In 2017, the Arizona Department of Transportation (ADOT) filed this action to condemn land to extend the 202 freeway. ADOT sought to condemn land owned by the Foothills Reserve Master Owners' Association, Inc. (HOA). Under the HOA's Covenants, Conditions, and Restrictions (CC&Rs), the HOA board represented HOA members in condemnation proceedings. The Hankes, who are HOA members and own one of the nearly 600 units in the Foothills Reserve, later intervened as defendants. The Hankes argued that the condemnation was not for a public need or use and was improper, and that the HOA could not represent their interests.

¶3 By mid-2018, the HOA stipulated that the State could obtain immediate possession of the land being taken and that the taking was necessary and for a proper public use. The Hankes were not a party to this stipulation. Over the Hankes' objection, the court entered the stipulated order for immediate possession in July 2018.

¶4 In 2019, the superior court determined that the CC&Rs authorized the HOA to represent all homeowners for their damages claims in the condemnation. When the Hankes objected, the court allowed the Hankes to represent themselves, meaning the HOA no longer represented their interests.

¶5 Although stating severance damages totaled $204,000, the Hankes sought "substitute facilities" damages totaling nearly $1.5 million and punitive damages. On motion, the court ruled that "substitute facilities" damages were not recoverable and that, at most, the Hankes were

entitled to severance damages, representing "the difference between the market value of the remainder before and after the taking." *See State ex rel. Ordway v. Buchanan*, 154 Ariz. 159, 164 (1987). Given statutory immunity, *see* A.R.S. § 12-820.04 (2023),[1] the court also rejected the Hankes' punitive damage claims.

¶6 The State and the HOA, on behalf of all unit owners other than the Hankes, reached a settlement that the court approved over the Hankes' objection. The State moved for summary judgment against the Hankes, seeking a determination they were owed $5,000 in severance damages and arguing the Hankes failed to dispute the $5,000 amount with admissible controverting evidence. The Hankes opposed the motion, arguing existing eminent domain law was unjust. The Hankes stated that the proper valuation date was in 2005, when ADOT made the "unofficial announcement" of the project, resulting in a claim for $204,000 in severance damages. In doing so, the Hankes stated the $204,000 severance claim was "insufficient to make" them whole. The Hankes' damages opinion largely focused on their "substitute facilities" claim for nearly $1.5 million that the court previously rejected.

¶7 The State's reply argued the Hankes did not dispute genuine issues of material fact sufficient to defeat the motion for summary judgment. The State argued the Hankes admitted in their response that they will not "comply with Arizona law regarding the computation of damages," that their damages claim did not comply with Arizona law regarding severance damages and that, instead, they disagreed with eminent domain law. Accordingly, the State repeated its request that the court grant summary judgment requiring it to pay the Hankes $5,000 in severance damages plus interest.

¶8 The court granted summary judgment for the State and against the Hankes, with the resulting partial final judgment directing the State to pay the Hankes $5,000 plus interest. The State timely paid that amount and the Hankes timely appealed. This court has jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) and -2101(A)(1).

DISCUSSION

[1] Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

¶9 The Hankes argue three general issues on appeal: (1) the State's taking of the land for the freeway was improper; (2) the State and the HOA could not properly stipulate to the taking; and (3) the superior court erred in granting the State's motion for summary judgment. The court addresses these issues in turn.

I. The Hankes Have Not Shown the State's Taking of the Land for the Freeway Was Improper.

¶10 The State has the power of eminent domain to take private property for a necessary public use upon paying just compensation. *See, e.g.,* Ariz. Const. art. 2, § 17; A.R.S. §§ 12-1112; 12-1131; *Bailey v. Myers*, 206 Ariz. 224, 228 ¶ 14 n.1 (App. 2003). Whether a taking is for a public use is "a judicial question." Ariz. Const. art. 2, § 17; A.R.S. § 12-1132(A). The issue of necessity, by contrast, is deferential, giving "great weight" to assertions of necessity. *Bailey*, 206 Ariz. at 228 ¶ 14 n.1. To defeat a necessity claim, the party opposing the taking must show by clear and convincing evidence it is "unnecessarily injurious." *See Queen Creek Summit, LLC v. Davis*, 219 Ariz. 576, 580 ¶ 16 (App. 2008) (citation omitted).

A. Public Use.

¶11 Public use includes "[t]he possession, occupation, and enjoyment of the land by the general public, or by public agencies." A.R.S. § 12-1136(5)(a)(i). Although agreeing "the freeway is a public use," the Hankes argue the freeway was built for the purpose of "general economic health," which is expressly excluded from the statutory definition of "public use." *See* A.R.S. § 12-1136(5)(b). Contrary to that assertion, freeways have long been understood to serve a public use under eminent domain law. *See, e.g.*, *Calmat of Ariz. v. State ex rel. Miller*, 176 Ariz. 190, 191 (1993); *State ex rel. Herman v. Schaffer*, 105 Ariz. 478, 479 (1970); *State ex rel. Morrison v. Thelberg*, 87 Ariz. 318, 324 (1960). The Hankes have cited no authority for the proposition that a public freeway is not a public use and have not shown the superior court erred in considering the public use issue.

B. Public Need and Necessity.

¶12 The Hankes argue there was "no public need" for the freeway. The State may exercise eminent domain for roads so long as it benefits the county, city or inhabitants and is authorized by statute. A.R.S. § 12-1111. The Legislature has delegated to ADOT the power to acquire real property by condemnation that it "considers necessary for transportation purposes." A.R.S. § 28-7092(A). Land for "transportation purposes" includes land needed to build highways. *See* A.R.S. § 28-7092(B). The

Hankes have not shown how the taking here failed to comply with these requirements or was undertaken for any improper purpose.

¶13 The Hankes argue other land could have been taken to build the freeway instead of the HOA common area. Although perhaps true, the Hankes cite no authority for the proposition that the availability of alternatives defeats the taking of specific land. Moreover, the availability of alternative land does not mean the taking was unnecessary. *See, e.g.*, *Chambers v. State ex rel. Morrison*, 82 Ariz. 278, 280–83 (1957) (rejecting argument that the taking was not necessary because the State could have condemned other land). The Hankes have failed to show there was not a public need for the taking or that it was not necessary.

II. The State and the HOA Properly Could Settle Their Dispute.

¶14 The Hankes argue the HOA was not the proper party to represent the homeowners, and, as a result, the settlement between the State and the HOA was improper because it did not properly include the Hankes. The Hankes also argue the superior court "force[d]" the settlement between the State and the HOA on the Hankes and that they should have been able to object to the settlement.

A. The HOA Properly Could Represent the Homeowners.

¶15 The HOA's CC&Rs expressly provide the unit owners appoint the Board [of the HOA] to represent the owners "in connection with the taking" of any common area, adding that "[t]he Board shall act in its sole discretion" in that representation. The CC&Rs designate the HOA to represent unit owners in a condemnation action. *See also Catalina Foothills Unified Sch. Dist. v. La Paloma Prop. Owners Ass'n, Inc.*, 238 Ariz. 510, 517–18 ¶ 28–30 (App. 2015) (holding the HOA may represent the homeowners in a condemnation action of a subdivision's common areas when authorized by the CC&Rs). The court correctly determined the HOA was the proper party to represent the homeowners.

B. The State and the HOA Could Settle Their Disputes Without Participation or Approval by the Hankes.

¶16 The Hankes were allowed to intervene as parties to represent their separate interests. The Hankes then moved to sever their case before the State and the HOA reached a settlement, asserting they "are pursuing an entirely different remedy than the HOA." The superior court granted the Hankes' motion to sever. Additionally, the court made clear the HOA was not representing the Hankes, the Hankes were not bound by any settlement

or resolution of the dispute between the State and the HOA and, similarly, could not object to any such settlement or resolution. The Hankes, however, seek to challenge the settlement between the HOA and the State.

¶17 The Hankes were not bound by, or parties to, the settlement agreement between the State and the HOA. Accordingly, the Hankes have not shown how they have standing to object to or appeal from that settlement agreement. *Dowling v. Stapley*, 221 Ariz. 251, 273-74 ¶¶ 72-76 (App. 2009). The superior court made clear the Hankes were representing themselves in their claim for damages from the State. Because they were not parties to the settlement agreement, the court could not "force" a settlement on the Hankes. For these reasons, the State and the HOA could settle their disputes without participation by the Hankes.

III. Summary Judgment was Proper Because the Hankes Did Not Show a Genuine Dispute of Material Fact.

¶18 The Hankes argue summary judgment was improper because the superior court erred in limiting their recovery to severance damages, not using 2005 for the "before" date for severance damages, and not allowing them to recover substitute facilities and punitive damages.

¶19 "The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). When the movant shows that no genuine issue of material fact exists, the opposing party has the burden to produce sufficient competent evidence to show such an issue exists. *E.g.*, *Kelly v. NationsBanc Mortg. Corp.*, 199 Ariz. 284, 287 ¶ 14 (App. 2000). "If the opposing party does not so respond, summary judgment, if appropriate, shall be entered against that party." Ariz. R. Civ. P. 56(e). This court reviews de novo a grant of summary judgment. *Andrews v. Blake*, 205 Ariz. 236, 240 ¶ 12 (2003).

¶20 Here, the State condemned a common area of land owned by the HOA. The Hankes, however, had a claim for severance damages for any diminution of value of their unit. *See State ex rel. Ordway v. Buchanan*. 154 Ariz. 159, 164 (1987) ("Severance damages are proper when the land condemned is part of a larger parcel."); *accord* A.R.S. § 12–1122(A). Severance damages are measured by "comparing the worth of the remaining property before and after the taking." *City of Phoenix v. Wilson*, 200 Ariz. 2, 9 ¶ 18 (2001). Applying this law, the superior court properly concluded the Hankes both were entitled to severance damages and had the burden to prove their severance damages. *Buchanan*, 154 Ariz. at 164.

¶21 Although typically the date of the summons is used to determine severance damages, at times, the date may be the order of immediate possession, particularly when the value of the property has increased. *See City of Scottsdale v. CGP-Aberdeen, L.L.C.*, 217 Ariz. 626, 634 ¶ 36 (App. 2008). Here, the order for immediate possession was issued in July 2018. The State's expert used July 2018 to determine the "before" and "after" market value to calculate severance damages to the Hanke's unit. Looking at the difference between those values, the State's expert opined that the Hankes incurred $5,000 in severance damages. The State relied on this value in seeking summary judgment. In opposing the State's motion, the Hankes did not dispute, as a factual matter, the $5,000 in damages. Instead, the Hankes claimed far higher damages based on different legal concepts.

¶22 First, the Hankes used November 2005 as the "before" date, claiming ADOT first informally announced the freeway project then. Although conceding the State did "nothing" on the project for at least a decade after November 2005, the Hankes claim their unit decreased in value "well over $100k" during that decade. But planning is not a taking for purposes of determining severance damages. *City of Scottsdale*, 217 Ariz. at 634 ¶ 34; *see also Weintraub v. Flood Control Dist. of Maricopa Cnty.*, 104 Ariz. 566, 571 (1969) ("[N]otice of preliminary proceedings of proposed actions which may result in taking land for public use is not a damaging of a property which would entitle the owner to compensation therefor."); *State ex rel. Herman v. Larriva's Ace Elec. Co.*, 11 Ariz. App. 452, 454 (1970) ("The fact that a resolution has been passed does not necessarily mean that the property will ever be condemned."). Accordingly, the Hankes have not shown the court erred in using the July 2018 order of immediate possession as the proper date for severance damages.

¶23 Second, the Hankes used "the current date" as the "after" date when they calculated damages in 2020, adding "Proximity Damages are likely to continue to accrue." But the "before" and "after" dates used to determine severance damages refer to the value of Hankes' unit before and after the July 2018 immediate possession order, seeking to place them in the position they "would have occupied had no taking occurred." *See State ex rel. Miller v. Filler*, 168 Ariz. 147, 149, 150 (1991). As a result, the Hankes failed to disclose or show the court facts to dispute the severance damages calculation, looking at the "before" and "after" condition when the State took possession of the property in July 2018. Thus, the Hankes failed to show a genuine dispute as to any material fact as to severance damages.

¶24 The Hankes argue they should have been able to recover "general, special, indirect, consequential, incidental, and hedonic damages" as well as punitive and substitute facilities damages, as they argued in opposing the State's motion for summary judgment. The superior court properly concluded the Hankes cannot recover punitive damages from the State. *See* A.R.S. §§ 12-820.04 (establishing immunity for public entity and public employee acting with the scope of employment) & 28-7092(A) (authorizing ADOT to use condemnation to acquire real property "necessary for transportation purposes"). Other than severance damages, the Hankes have not shown a legal right to these other types of damages claimed, and the superior court properly concluded the Hankes failed to do so. *See Maricopa Cnty. v. Shell Oil Co.*, 84 Ariz. 325, 327 (1958) (explaining the property owner bears the burden to establish recoverable damages).

¶25 Finally, the Hankes have shown no entitlement to compensation for the State to pay them the costs of buying a different unit or house, what they call replacement cost or substitute facilities damages. They cite no authority on appeal supporting such a claim and no Arizona opinion has recognized the concept as a requirement for eminent domain. To the extent the Hankes rely on dicta in *Brown v. United States*, 263 U.S. 78 (1923), the United States Supreme Court later made clear that the concept is not constitutionally required. *See United States v. 50 Acres of Land*, 469 U.S. 24, 33 (1984); *see also id.* at 35 (noting the concept "diverges from the principle that just compensation must be measured by an objective standard that disregards subjective values which are only of significance to an individual owner."). Nor have the Hankes shown that Arizona law fails to provide constitutionally required just compensation here. *See Catalina Foothills Unified Sch. Dist.*, 238 Ariz. at 516 ¶ 21. For these reasons, the Hankes have shown no error in the superior court granting the State's motion for summary judgment and awarding them $5,000 in severance damages.

IV. The Hanke's Failure to Serve the HOA as Required by This Court's Orders and Rules Entitles the HOA to Sanctions.

¶26 The Hankes served their notice of appeal on both the State and the HOA, and the Hankes' briefs on appeal criticize actions by both the State and the HOA. The Hankes, however, failed to serve the HOA with their opening brief on appeal when they filed it. *But see* ARCAP 4(f) (requiring such service). This court then ordered the Hankes to serve the HOA by September 6, 2022, and to file a certificate of service. *See* ARCAP 4(f) & (g). That order added the court "will consider imposing sanctions if appellants fail to serve Foothills [with] any additional documents filed in

this appeal." The Hankes failed to serve their opening brief on the HOA by September 6, 2022. The HOA now seeks attorneys' fees as a sanction, citing A.R.S. § 12-349.

¶27 Reasonable attorneys' fees and expenses may be assessed against a party who unreasonably expands or delays the proceeding. A.R.S. § 12-349(A)(3). The Hankes claim they did not serve their opening brief on the HOA as ordered by the court because they were "[l]acking support staff and having suffered several cyberattacks." However, the Hankes filed numerous motions between the time the court first ordered them to serve the HOA with the opening brief and when the Hankes finally did so. This conduct belies the claim that they were not able to serve the HOA. Because the Hankes unreasonably expanded and delayed the proceedings, the HOA is awarded its reasonable attorneys' fees incurred on appeal that were caused by that sanctionable conduct.

CONCLUSION

¶28 The judgment is affirmed. Along with the award of sanctions for the HOA under A.R.S. § 12-349, the arguments asserted by the Hankes against the HOA arise out of contract. Accordingly, as the successful party on appeal, the HOA is awarded its reasonable attorneys' fees and costs incurred on appeal under A.R.S. §§ 12-341 and 341.01, contingent upon its compliance with ARCAP 21.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

CITY OF SURPRISE, *Plaintiff/Appellee*,

v.

CIRCLE CITY WATER COMPANY, LLC, *Defendant/Appellee*.

CIRCLE CITY WATER COMPANY, LLC, *Cross-Claimant/Appellee*,

v.

LAKE PLEASANT 5000, LLC, et al., *Cross-Defendants/Appellants*.

LAKE PLEASANT 5000, LLC, et al., *Counter-Claimants/Appellants*,

v.

CITY OF SURPRISE, et al., *Counter-Defendants/Appellees*.

No. 1 CA-CV 22-0532
FILED 9-21-2023

Appeal from the Superior Court in Maricopa County
No. CV2018-011038
The Honorable Connie Contes, Judge (Retired)
The Honorable Joseph P. Mikitish, Judge

AFFIRMED

COUNSEL

Zeitlin & Zeitlin PC, Phoenix
By Dale S. Zeitlin, Casandra C. Markoff
Counsel for Defendants/Appellants, Lake Pleasant 5000

Snell & Wilmer, Phoenix
By Robert A. Henry
Co-Counsel for Plaintiff/Appellee, City of Surprise

City of Surprise, Surprise
By Robert W. Wingo
Co-Counsel for Plaintiff/Appellee, City of Surprise

Osborn Maledon, PA, Phoenix
By Meghan Grabel, Phillip W. Londen, Elias J. Ancharski
Counsel for *Defendant/Appellee, Circle City*

MEMORANDUM DECISION

Judge Jennifer B. Campbell delivered the decision of the Court, in which Presiding Judge Cynthia J. Bailey and Judge David D. Weinzweig joined.

C A M P B E L L, Judge:

¶1 Lake Pleasant 5000, L.L.C., Harvard Investments, Inc., Rex G. Maughan and Ruth G. Maughan as Trustees for the Maughan Revocable Trust of 2007, Dated August 24, 2007, Rex G. Maughan, and Ruth G. Maughan (collectively, the Landowners) challenge the superior court's rulings in favor of the City of Surprise (Surprise) and Circle City Water Company, LLC (Circle City) in this condemnation action. For the following reasons, we affirm.

BACKGROUND

¶2 The United States Congress enacted the Colorado River Basin Project Act (the Act) in 1968, providing for the construction, operation, and maintenance of the Central Arizona Project (CAP). 43 U.S.C. § 1521 ("For the purposes of furnishing irrigation water and municipal water supplies to the water-deficient areas of Arizona . . . the Secretary [of the Interior]

shall construct, operate, and maintain the Central Arizona Project[.]"). The Act appropriated federal dollars to build CAP infrastructure, 43 U.S.C. § 1528, which the federal government may recover by entering water-distribution "master contracts" with state political subdivisions. 43 U.S.C. § 1524(b)(1); *see also Maricopa-Stanfield Irrigation & Drainage Dist. v. Robertson*, 211 Ariz. 485, 488-89, ¶¶ 16-18 (2005). State political subdivisions, in turn, may then "make CAP water available to 'users' within [their] boundaries through subcontracts." *Maricopa-Stanfield*, 211 Ariz. at 488, ¶ 16 (citing 43 U.S.C. § 1524(b)(1)).

¶3 That is what happened here. In 1972, the federal government entered a master contract with the Central Arizona Water Conservation District (the conservation district) to facilitate the delivery of CAP water. A.R.S. §§ 48-3701(12), -3702, and–3703. The conservation district is a multi-county, special-purpose taxing district. A.R.S. § 48-3702. Under the master contract, the federal government "agreed to construct and operate the CAP water delivery system in exchange for repayment of the attendant costs," *Maricopa-Stanfield*, 211 Ariz. at 489, ¶ 17, but the contract (1) requires that the United States "be a party to [any] subcontracts," (2) prohibits the assignment or transfer of contract rights without written approval from the Secretary of the Interior, and (3) disclaims any guarantee of water availability.

¶4 In 1999, the federal government and the conservation district entered a subcontract with Circle City, which entitled Circle City to purchase as much as 3,932 acre-feet of CAP water each year, subject to availability. Like the master contract, the subcontract precludes Circle City from assigning or transferring its water rights under the subcontract without written approval from the Secretary of the Interior.

¶5 The Landowners contacted Circle City in 2004, requesting water service for an undeveloped "master planned residential community" comprised of thousands of residential units, a hotel, and commercial space (the planned community). In March 2005, Circle City and the Landowners entered a water facilities agreement, which required:

- Circle City to apply with the Arizona Corporation Commission for an extension of its Certificate of Convenience and Necessity (CC&N) service area to include the planned community.[1]

- the Landowners to reimburse Circle City for any accounting, engineering, or legal expenses related to the expansion of the CC&N area;

- the Landowners to construct "both on-site distribution and off-site water infrastructure utility facilities necessary for Circle City to serve the [planned community]"; and

- Circle City "to provide potable domestic water service" to the planned community.

¶6 The facilities agreement did not specify the source of the potable water to be supplied, but a Water Master Plan, attached as an exhibit to the facilities agreement, added that the water supply "is anticipated to come from a combination of groundwater wells and (CAP) surface water supply."

¶7 As required under the facilities agreement, Circle City successfully petitioned to extend its CC&N area to include the planned community, and the Landowners reimbursed Circle City for its legal and engineering expenses ($67,782.61). From there, the Landowners did nothing. They took no action to either construct the requisite water infrastructure or develop the planned community. And in 2013, the Landowners notified Circle City that the planned community was "currently non-viable."

¶8 A few years later, Surprise entered a settlement agreement with Circle City for Surprise to condemn all of Circle City's assets, including the subcontract and the CC&N. While negotiating that settlement, Circle City reached out to the Landowners and offered to return the reimbursement monies for legal and engineering expenses that the

---

[1] Ariz. Admin. Code R14-2-602(B)(2) ("Any utility that desires to extend its CC&N service area shall file with the Commission an application for a CC&N extension."). "Once granted, [a] certificate [of convenience and necessity] confers upon its holder an exclusive right to provide the relevant service for as long as the grantee can provide adequate service at a reasonable rate." *James P. Paul Water Co. v. Ariz. Corp. Comm'n*, 137 Ariz. 426, 429 (1983).

Landowners had previously remitted. The Landowners declined, and Surprise filed a condemnation complaint against Circle City and the Landowners. Surprise sought to acquire Circle City's real and personal property, as well as the CC&N and the subcontract, but disclaimed any interest in Circle City's obligations or liabilities, expressly excluding the facilities agreement from the condemnation. Surprise also sought a declaration that the facilities agreement granted the Landowners "no water or other property rights" in the condemned assets.

¶9 The Landowners asserted four counterclaims: (1) interference with contract (alleging Surprise agreed to pay Circle City "millions of dollars for assets that are basically worthless" to acquire Circle City's CAP water rights and thwart Circle City's fulfillment of its obligations to the Landowners under the facilities agreement); (2) inverse condemnation (alleging Surprise inversely condemned the Landowners' "valuable property right" by condemning Circle City's CAP water rights); (3) unconstitutional impairment of contract (alleging Surprise's taking of Circle City's assets, except for the facilities agreement, "unconstitutionally impairs" the Landowners' contract with Circle City); and (4) violation of 42 U.S.C. § 1983 (alleging Surprise's condemnation of Circle City's assets, except for the facilities agreement, violates the Landowners' substantive due process rights).

¶10 Circle City, in turn, crossclaimed for a declaratory judgment against the Landowners that Circle City's performance under the facilities agreement "w[ould] be rendered impossible" by Surprise's condemnation action, excusing its nonperformance on that basis. Circle City also requested an award of attorneys' fees. To that, the Landowners added a breach of contract crossclaim against Circle City.

¶11 In separate motions, Surprise and Circle City moved to dismiss the Landowners' crossclaims, arguing the Landowners had no compensable property rights under the subcontract. Circle City also reasserted that its nonperformance under the facilities agreement "would be excused under the doctrine of impossibility." Citing the same reasons, Surprise and Circle City also separately moved for judgment on the pleadings.

¶12 After briefing and oral argument, the superior court granted judgment on the pleadings in favor of Surprise and dismissed the Landowners' counterclaims against it. The court held that the Landowners had "no property right to the assets being condemned," including "any CAP water," reasoning that the facilities agreement neither conveyed "any

of Circle City's rights to water" to the Landowners nor required Circle City to provide the planned development with water from a specific source. The court also noted that the federal government's approval would have been required if the facilities agreement had guaranteed CAP water. Because the Landowners had no property interest in the condemned assets, the superior court also found they lacked "standing to challenge the determination of public use and necessity required for the condemnation."

¶13 Concerning the Landowners' claims against Circle City, the court found that Circle City's performance under the facilities agreement was "impracticable" and "excused" once Surprise condemned Circle City's assets. But the superior court denied Circle City's motions for dismissal and judgment on the pleadings, reasoning that the Landowners "may be entitled to restitution for amounts expended in part performance of the [facilities] agreement."

¶14 Following those rulings, Circle City moved for summary judgment on restitution, acknowledging that it "should repay" the Landowners the monies for costs incurred ($67,782.61) to expand its CC&N service area. But Circle City denied the Landowners' claim for $15 million in restitution—the negotiated amount due Circle City under the condemnation settlement agreement. In response to Circle City's motion for summary judgment, the Landowners requested "time and opportunity to conduct discovery" to determine "the appropriate measure of restitution" under Arizona Rule of Civil Procedure (Rule) 56(d). The superior court denied the Landowners' request for Rule 56(d) relief; instead, ordering Circle City to "file a new motion for summary judgment on the issue of the method and scope of restitution as a matter of law."

¶15 Consistent with the superior court's order, Circle City filed a supplemental motion for summary judgment, arguing that the proper scope of restitution when a party's "duty to perform is excused under the doctrine of impracticability" is the measure of benefits already "conferred" on the nonperforming party "by way of part performance or reliance." In response, the Landowners challenged Circle City's proposed measure of restitution, alleging "that Circle City actively solicited the condemnation to avoid its obligations to [the Landowners] under the [facilities agreement]," and therefore, under theories of breach of contract and unjust enrichment, the Landowners are entitled to the full amount ($15 million) Surprise agreed to pay Circle City under the condemnation settlement agreement. Agreeing with Circle City that the measure of restitution "does not include expectation damages," the superior court granted Circle City's summary judgment motion concerning the scope of restitution.

¶16 Upon the superior court's adoption of its *measure* of restitution, Circle City moved for summary judgment on the *amount* of restitution, arguing the only benefit conferred by the Landowners in part performance or reliance on the facilities agreement was the $67,782.61 the Landowners paid Circle City to reimburse the engineering and legal costs it expended to secure the expanded CC&N area. The Landowners cross-moved for summary judgment on the amount of restitution, relying on an expert's valuation to support their contention that the expansion of the CC&N area to include the planned community represented a $15 million benefit *conferred by the facilities agreement* to Circle City.

¶17 After full briefing and oral argument, the superior court granted Circle City's motion for summary judgment and denied the Landowners' cross-motion for summary judgment. The superior court found that the Landowners "present[ed] no evidence that [they] undertook any action to expand the CC&N area." In fact, to the contrary, the superior court found that Circle City took *all* action related to the expansion of its CC&N area. Noting the Landowners' failure to construct water infrastructure or otherwise develop the planned community, the superior court found "that whatever benefit [] flowed from an expanded CC&N resulted from Circle City's actions and the [Arizona Corporation Commission's] approval, not [the Landowners'] actions." Accordingly, the superior court concluded that the CC&N expansion "[wa]s not a benefit conferred by [the Landowners] on Circle City."

¶18 Having prevailed on summary judgment, Circle City requested an award of its attorneys' fees ($519,002.50) and costs under A.R.S. §§ 12-341, -341.01, and -329. The superior court awarded Circle City $150,000 in attorneys' fees under both A.R.S. §§ 12-341.01 and -349, plus costs, finding the Landowners' claims arose out of contract—the facilities agreement—and the Landowners made several "claims for restitution that were inconsistent with . . . prior rulings." Upon entry of final judgment, the Landowners timely appealed.

DISCUSSION

I. Judgment on the Pleadings in Favor of Surprise and Dismissal of the Landowners' Counterclaims Against Surprise

¶19 The Landowners first challenge the superior court's entry of judgment on the pleadings in favor of Surprise and its dismissal of their counterclaims against Surprise. They contend that Surprise's condemnation

of Circle City's assets stripped the planned community of all value—effectuating a taking of their property.

¶20 "A motion for judgment on the pleadings pursuant to [Arizona Rule of Civil Procedure 12(c)] tests the sufficiency of the complaint, and judgment should be entered for the defendant if the complaint fails to state a claim for relief." *Giles v. Hill Lewis Marce*, 195 Ariz. 358, 359, ¶ 2 (App. 1999). We review the granting of a motion for judgment on the pleadings de novo. *Id.*

¶21 We likewise review de novo whether issues of fact or law preclude the dismissal of a counterclaim. *Save Our Valley Ass'n v. Ariz. Corp. Comm'n*, 216 Ariz. 216, 218-19, ¶ 6 (App. 2007); *Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶ 7 (2012). A counterclaim is subject to dismissal if the claimant "[would not be] entitled to relief under any interpretation of the facts susceptible to proof." *Vortex Corp. v. Denkewicz*, 235 Ariz. 551, 556, ¶ 17 (App. 2014) (quoting *Coleman*, 230 Ariz. at 355-56, ¶¶ 7-8 (internal citation omitted)).

¶22 In reviewing a judgment on the pleadings or the dismissal of a counterclaim, we assume the truth of all well-pled, material allegations in the complaint, but "do not accept as true allegations consisting of conclusions of law, inferences or deductions that are not necessarily implied by well-pleaded facts, unreasonable inferences or unsupported conclusions from such facts, or legal conclusions alleged as facts." *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 389, ¶ 4 (App. 2005).

¶23 Both the state and federal constitutions prohibit the government from taking private property without just compensation. *State ex rel. Miller v. Gannett Outdoor Co. of Ariz. Inc.*, 164 Ariz. 578, 579 (App. 1990) (citing U.S. Const. amend. V; Ariz. Const. art. 2, § 17). But the government cannot effect a taking of a property interest from a party that "had no property right to begin with." *State v. Mabery Ranch, Co.*, 216 Ariz. 233, 243, ¶ 39 (App. 2007). In other words, "the state is obligated to pay compensation for the taking of legally cognizable property interests" only, and "[a]ny other interests affected are non-compensable under the United States Constitution and Arizona law." *Gannett Outdoor Co. of Ariz. Inc.*, 164 Ariz. at 584. Accordingly, to prevail on a claim that the government unlawfully appropriated private property for public use without just compensation, a claimant must demonstrate a "diminution in (or elimination of) value" in "a *protected* property interest." *Mutschler v. City of Phoenix*, 212 Ariz. 160, 165, ¶ 16 (App. 2006) (emphasis added).

¶24 Under this framework, we must determine, as a threshold matter, whether a claimant has identified "a cognizable property interest" before considering whether the government action amounted to a taking. *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1212-13 (Fed. Cir. 2005). To be clear, if a claimant fails to establish a legally recognized property interest, we need not examine the nature of the government's action. *Mutschler*, 212 Ariz. at 165.

¶25 Here, under the facilities agreement, the Landowners possessed the right to have Circle City provide water service to the undeveloped planned community from a combination of groundwater and surface water. That is not a protected property interest.

¶26 First, the facilities agreement did not convey vested water rights for either CAP water or groundwater. The agreement could not convey a right to CAP water without written approval of the Secretary of the Interior. *See City of Phoenix v. South Bank Corp.*, 133 Ariz. 90, 94 (App. 1982); *Maricopa-Stanfield*, 211 Ariz. at 488, ¶ 16 ("The terms and conditions of the [CAP] subcontracts were to be subject to the Secretary's approval . . . ."). And the agreement could not convey a right to groundwater because any such right would be prospective. *See Town of Chino Valley v. City of Prescott,* 131 Ariz. 78, 82 (1981) ("[T]here is no right of ownership of groundwater in Arizona prior to its capture and withdrawal from the common supply . . . ."); *see also Davis v. Agua Sierra Res., L.L.C.*, 220 Ariz. 108, 112 (2009) (describing a landowner's right to potential future groundwater as "an unvested expectancy").

¶27 Second, the facilities agreement provided the Landowners with the right to a *service*—Circle City's future delivery of potable water to the planned community—not a *property* right in Circle City's assets, and contract expectancies are not compensable property interests.[2] *See Gannett Outdoor Co. of Ariz. Inc.*, 164 Ariz. at 580 (noting expectant interests, those that depend upon the occurrence of a future event, are not compensable);

---

[2] Notably, the Landowners have not constructed any of the infrastructure necessary to enable water delivery service to the planned community. *Cf. Gannett Outdoor Co. of Ariz. Inc.*, 164 Ariz. at 579-84 (recognizing "that a lease term containing an unconditional right to renew in favor of the lessee may constitute a legally compensable interest" when evidence demonstrates the lessee would likely exercise that right, but concluding a lessee's "mere expectancy of continued lease renewals" based on previous conduct was insufficient to require compensation).

Steinfeld v. Nielsen, 15 Ariz. 424, 465 (1913) (explaining contract rights "are expectant[] when they depend upon the continued existence of the present condition of things until the happening of some future event").

¶28 Analogizing their contractual relationship with Circle City to the contractual relationships at issue in *International Paper Co. v. United States*, 282 U.S. 399 (1931), and *City of Phoenix v. South Bank Corp.*, 133 Ariz. 90 (App. 1982), the Landowners nonetheless assert that their rights to potable water service under the facilities agreement "are compensable property interests." But the Landowners' reliance on these cases is misplaced.

¶29 In *International Paper*, the claimant paper company petitioned for compensation after the federal government requisitioned all waters diverted through a river's power canal—waters that the paper company "was entitled, by conveyance and lease [with the power company], to draw" on for a specified supply—a property right under the governing state (New York) law. 282 U.S. at 405. Rejecting the government's "quibbling distinctions," the United States Supreme Court found that the government "took the property that [International Paper] *owned as fully as*" the power company. *Id.* at 407-08 (emphasis added).

¶30 In *South Bank*, a city condemned certain private property for a landfill site. 133 Ariz. at 91. "Just prior" to the condemnation, the landowner "entered into a 'material sales contract'" granting a mining company "the right to purchase sand and gravel" from a "massive . . . deposit" on the property. *Id.* Noting the contract authorized the mining company to physically enter the landowner's property and use its machinery and equipment to remove "portions of the real estate," this court characterized the agreement as "a classic profit a prendre arrangement." *Id.* at 93. Because "profits a prendre *are interests in real property*," this court held that the mining company had "a legally cognizable interest in the property for which compensation was payable upon taking." *Id.* (emphasis added).

¶31 Both cases are readily distinguishable from the circumstances here. Unlike the lease in *International Paper*, which gave the paper company the legal right to draw a specified volume of the power company's canal water, and the profit a prendre agreement in *South Bank*, which gave the mining company the right to remove certain deposits of sand and gravel from the landowner's real property, the facilities agreement gives the Landowners no tangible property rights to Circle City's condemned assets. In fact, rather than authorizing the Landowners to directly make use of Circle City's property (draw from its water assets), the facilities agreement

merely obligates Circle City to provide the Landowners with a service—the delivery of potable water.

¶32 Like the superior court, we are persuaded by *Maricopa-Stanfield Irrigation & Drainage District v. Robertson*, 211 Ariz. 485 (2005). In *Maricopa-Stanfield*, the United States and the conservation district entered into subcontracts with two irrigation districts. *Id.* at 489, ¶¶ 18-19. "[T]he subcontracts contemplated that CAP water would be delivered by the districts to agricultural landowners for irrigation," and each irrigation district entered into separate water service agreements with its respective landowners. *Id.* at ¶ 19. "[T]he water service agreements did not guarantee the landowners access to CAP water; they instead allowed the [irrigation] districts to deliver irrigation water without specifying its source." *Id.* at ¶ 20. But the parties "expected that the [irrigation] districts would deliver, and the landowners would pay for, CAP water under the water service agreements." *Id.* "After the CAP [infrastructure] was completed, the [irrigation] districts were unable to meet their financial obligations" to repay the costs of constructing the irrigation distribution systems under the subcontracts. *Id.* at ¶¶ 18, 21. "Facing financial collapse," the irrigation districts and the conservation district negotiated a comprehensive water settlement. *Id.* at ¶¶ 21-23. Although most landowners in each district approved the settlement agreement, the dissenting landowners pursued litigation, "alleging that they had vested rights to CAP water that could not be abrogated without their consent." *Id.* at 487, 489, ¶¶ 5, 23. Because only a contract with the Secretary of the Interior can "establish a right" to CAP water, the supreme court found that the landowners' water service agreements with the irrigation districts did not "create a vested right to CAP water." *Id.* at 490-91, ¶¶ 27, 32. In concluding that entry of judgment in favor of the irrigation districts was warranted, the supreme court emphasized that the water service agreements obligated the irrigation districts to deliver water only. *Id.* at 494, ¶ 54.

¶33 Applying *Maricopa-Stanfield* here, the Landowners have no legally cognizable property right to CAP water, the subcontract, or any other Circle City asset. Like the water service agreements at issue in *Maricopa-Stanfield*, the facilities agreement here failed to specify the source of the potable water to be delivered, and it did not convey any right to CAP water (nor could it without written approval of the Secretary of the Interior), any other water source, or any other Circle City asset to the Landowners.

¶34 In sum, because the Landowners have no cognizable property interest in Circle City's CAP water rights or any other condemned asset,

Surprise's condemnation of those assets did not effect a compensable taking of the Landowners' property under the Arizona and United States Constitutions. Therefore, we affirm the superior court's judgment on the pleadings in favor of Surprise and its dismissal of the Landowners' counterclaims against Surprise.[3]

II. Summary Judgment on Restitution and Award of Attorneys' Fees

¶35 The Landowners next challenge the superior court's summary judgment rulings on restitution in favor of Circle City. In reviewing a grant of summary judgment, we view the facts and the reasonable inferences drawn from those facts in the light most favorable to the non-moving party and affirm "if the evidence produced in support of the defense or claim has so little probative value that no reasonable person could find for its proponent." *State Comp. Fund v. Yellow Cab Co. of Phoenix*, 197 Ariz. 120, 122, ¶ 5 (App. 1999). We review de novo the superior court's application of the law. *Id.*; *see also* Ariz. R. Civ. P. 56(a) ("The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law."). We also review de novo contract interpretation. *Dreamland Villa Cmty. Club, Inc. v. Raimey*, 224 Ariz. 42, 46, ¶ 17 (App. 2010).

¶36 The Landowners contend the superior court improperly limited their restitution relief to the monies they expended under the facilities agreement, "denying [them] the right to collect the present value

---

[3] The Landowners also argue that the superior court improperly found they lacked standing to challenge the public use and necessity of the condemnation action. By statute, any person "having or claiming an interest in any of the property described in the [condemnation] complaint, or in the damages for the taking thereof, . . . may appear, plead and defend in respect to his property or interest, or that claimed by him." A.R.S. § 12-1120. In this case, the Landowners had the opportunity to appear in the condemnation action and assert their claim of a property interest. But once the superior court determined that they had no property interest in the condemned assets, the Landowners had no standing to challenge the public use and necessity of the condemnation action. For the same reason, to the extent the Landowners challenge the legality of Surprise's taking of the condemned assets absent evidence of written authorization from the federal government and conservation district, they similarly lack standing.

of [Circle City's] enlarged CC&N." According to the Landowners, the facilities agreement conferred a substantial benefit on Circle City by providing the predicate for its expanded CC&N service area.[4]

¶37 A party seeking restitution for damages under a contract discharged for impracticability is entitled to compensation for the benefit that his contractual performance or reliance has conferred on the other party. *See* Restatement (Second) of Contracts § 377 (1981) ("A party whose duty of performance does not arise or is discharged as a result of impracticability of performance . . . is entitled to restitution for any benefit that *he has conferred* on the other party *by way of part performance or reliance*.") (emphasis added). Thus, properly framed, the question here is what benefit, if any, the Landowners conferred upon Circle City through their part performance or reliance on the facilities agreement, not, as the Landowners argue, whether Circle City derived any benefit from the facilities agreement.

¶38 Examining the parties' respective performances, Circle City applied for and received an expanded CC&N service area and the Landowners reimbursed Circle City for the expenses associated with that application. But the Landowners never constructed the necessary infrastructure for water delivery service, effectively preventing Circle City from fulfilling its obligation to deliver potable water to the planned community. In fact, it is undisputed that the Landowners never developed the planned community to any degree.

¶39 On this uncontroverted record, any benefit accorded to Circle City from its expanded CC&N service area was the result of *its* performance under the facilities agreement, *not the Landowners' performance*. Indeed, consistent with the superior court's findings, the record neither reflects that the Landowners "undertook any action to expand the CC&N area" nor that they otherwise conferred any benefit to Circle City. Because the Landowners are not entitled to compensation, as a matter of law, for any benefit conferred to Circle City by the expanded CC&N service area, we

---

[4] The Landowners also assert that Circle City "is a conscious wrongdoer," having "actively solicit[ed] the condemnation" to avoid its water service obligations under the facilities agreement. Citing principles of unjust enrichment, the Landowners argue that Circle City should be divested of any "benefits" it received under the facilities agreement. But as Circle City points out, the Landowners only pled a crossclaim for breach of contract, so disgorgement based on an allegation of unjust enrichment "is not an available remedy here."

need not determine the CC&N's increased value, if any.[5] *See* A.R.S. § 40-287 ("Any portion of the certificated area of a private water company which does not contain an operating distribution system . . . is presumed to have de minimis value for the purposes of condemnation.").

¶40 In sum, given the Landowners' minimal performance under the facilities agreement, the superior court properly limited restitution to the amount they reimbursed Circle City for engineering and legal expenses associated with the expanded CC&N. Therefore, the superior court did not err by entering summary judgment on restitution in favor of Circle City and denying the Landowners' cross-motion for summary judgment.[6]

¶41 Finally, the Landowners challenge the superior court's award of attorneys' fees to Circle City under A.R.S. § 12-349, arguing they disagreed that the evidence was not substantially justifiable. But the Landowners neither challenge the amount nor the other statutory basis for the fee award. Because the Landowners do not contest the superior court's award of attorneys' fees under A.R.S. § 12-341.01—arising out of a contract—we uphold the attorneys' fees award on that basis. *Cf. White Mountain Health Ctr., Inc. v. Maricopa Cnty.*, 241 Ariz. 230, 252, ¶ 80 (App. 2016) (uphold fee award on statutory bases not challenged).

---

[5] Having found, as a matter of law, that the Landowners did not confer upon Circle City the benefit of an expanded CC&N service area, we need not address the Landowners' contention that the superior court improperly excluded their expert's valuation opinion.

[6] Although the Landowners contend that they have "rel[ied] on the [facilities agreement] for more than fifteen years," the record reflects no evidence of their reliance apart from their reimbursement of engineering and legal fees incurred by Circle City to expand its CC&N service area. More importantly, the Landowners fail to identify any benefit their purported reliance conferred on Circle City sufficient to justify restitution on that basis.

CONCLUSION

¶42 For the foregoing reasons, we affirm. Both the Landowners and Circle City request an award of their attorneys' fees on appeal. This dispute arises out of the facilities agreement and Circle City is the successful party on appeal. *See* A.R.S. § 12-341.01. Accordingly, Circle City may recover its reasonable attorneys' fees and taxable costs incurred in this appeal upon compliance with ARCAP 21.[7]

AMY M. WOOD • Clerk of the Court
FILED: AA

[7] We deny the Landowners' request to impose sanctions on Surprise.

Clerk of the Superior Court
*** Electronically Filed ***
07/02/2019 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-010359 06/28/2019

HONORABLE TIMOTHY J. THOMASON

CLERK OF THE COURT
N. Johnson
Deputy

STATE OF ARIZONA, et al.

MICHELLE BURTON

v.

FOOTHILLS RESERVE MASTER OWNERS ASSOCIATION INC, et al.

DALE S ZEITLIN

DAVINA DANA BRESSLER
DIETMAR HANKE
2729 W REDWOOD LN
PHOENIX AZ 85045
JOE ACOSTA JR.
JUDGE THOMASON

MINUTE ENTRY

East Court Building – Courtroom 713

10:59 a.m. This is the time set for Oral Argument on the State's Motions for Allowable Damages and Changes in Traffic flow and the Homeowners' Motions for Summary Judgment on Severance Damages and Taking of Private Easement. Plaintiffs, State of Arizona and John Halikowski, are represented by counsel, Michelle Burton and Joe Acosta, Jr. Defendants, Foothills Reserve Master Owners' Association, Inc., Corey E. Churchill, Abigail C. Churchill, Timothy Raymond Eull, and Jill Barnard, are represented by counsel, Dale S. Zeitlin. Intervenor, Dietmar Hanke, appears on his own behalf.

A record of the proceedings is made digitally in lieu of a court reporter.

Oral argument is presented on the motions.

For the reasons stated on the record,

IT IS ORDERED taking the motions under advisement.

Discussion is held regarding the scheduling order.

11:59 a.m. Matter concludes.

LATER:

Foothills Reserve Traffic Flow

The State of Arizona has filed a Motion for Pretrial Order Re: Changes in Traffic Flow. The Court has considered the Motion and the Response. Related thereto, the Foothills Reserve Master Owners Association, Inc. (the "Association") has moved for summary judgment on the issue of severance damages for the taking of the private easement of access to the intersection of Chandler Boulevard and Pecos Road. The State has cross moved for summary judgment. The Court has considered those Motions, Responses and Replies. The Court has also considered the brief filed by the Intervenor on May 24, 2019. The Court has also considered the arguments of counsel and Intervenor.

The State claims that the homeowners here should not be allowed to claim damages for changes in traffic flow resulting from the freeway in question. The homeowners, on the other hand, claim they are entitled to "severance damages for the taking of the private easement of access to the intersection of Chandler Boulevard and Pecos Road." Those claimed damages could include compensation for changes in "traffic flow."

The homeowners all own homes with driveways that are located on internal streets. It is undisputed that none of those streets are removed, changed or blocked as a result of the subject freeway project. Rather, as part of the freeway project, the intersection of Pecos Road and Chandler Boulevard was eliminated and is no longer available as an access route for the Foothills Reserve subdivision.

According to the homeowners, after that interchange was eliminated, the Foothills subdivision was landlocked and could not access the general system of streets. As a "mitigation" measure, the City constructed a new segment of Chandler Boulevard, which provided access to the Foothills subdivision.

As a result, homeowners in the Foothills Reserve subdivision going to and from the freeway have to use a different route than they used before the taking. Of course, the subdivision can still be accessed; it just may be a bit more inconvenient to do so. The State contends that any "inconvenience" resulting from homeowners having to use a different route to access the neighborhood is not compensable. The homeowners disagree.

The State cites *Garretson* as controlling. *City of Phoenix v. Garretson*, 234 Ariz. 332 (2014). The property in *Garretson* was immediately west of the Talking Stick Resort Arena. It was bounded by three streets, one of which was Jefferson. When the City constructed the light rail along the south side of Jefferson, it blocked two existing driveways on Jefferson. Access to the subject parcel, meaning ingress and egress to and from the abutting road, was completely eliminated with respect to the Jefferson side of the parcel. In its decision, the Arizona Supreme Court accepted the definition of "right of access", as being the "common law right of access from the landowner's property to abutting public roads," as stated in *City of Wichita v. McDonald's Corp.*, 971 P.2d 1189, 1197 (Kan. 1999). *Garretson* noted that the *McDonald's* court distinguished the right of access, which may be compensable, from the regulation or reduction of traffic flow, which is not compensable, even if it causes a reduction in value of the parcel. 234 Ariz. at 337. *Garretson* held that the City's action in blocking the driveways and preventing access to and from Jefferson was a destruction of Garretson's preexisting access to Jefferson, which was compensable.

The State argues here that access here has not been destroyed, as it was in *Garrestson*. Rather, there has just been a change in traffic flow. The homeowners' right to access their properties still exists. According to the State, any inconvenience resulting from the freeway, and the resultant change in traffic flow, is not compensable, even if it results in some decrease in value.

The homeowners frame the issue differently. They contend that they are entitled to compensation for damages arising from the taking of the private easement of access to the intersection of Chandler Boulevard and Pecos Road. The final plat of record included the Chandler-Pecos intersection. The homeowners contend that they had private easement rights in Chandler Boulevard and Pecos Road. They argue that the taking destroyed those easement rights and the attendant right of access, which is compensable, whether or not the homeowners' properties are on streets that abut the street to be closed, relying on *Thorpe v. Clanton*, 10 Ariz. 94, 100 (1906).[1] While the homeowners acknowledge that the general rule is that one whose property does not abut the closed street is ordinarily not entitled to compensation for the closing of a street, if he or she still has reasonable access to the general system of streets, *Uvodich v.*

[1] The homeowners also contend that the subdivision itself abuts the subject intersection, even if individual homes do not. This argument is rejected. The subject valuation here involves severance damages to each individual parcel, not damages to the "subdivision." The individual lots do not abut the subject interchange.

Arizona Bd. of Regents, 9 Ariz. App. 400 (1969), they contend that they have, in fact, lost general access to the system of streets.

Thorpe, a case decided when Arizona was still a territory, found that the general rule is that the owner of a lot has a right "to have all the streets and alleys, designated upon the map, kept open and unobstructed, and to enforce that right…" 10 Ariz. at 101 The property owner "acquires an easement in the street or way upon which his lot is situate, and in such other streets or ways as are necessary or convenient to enable him to reach a highway." *Id*. When this easement right is interfered with, the property owner must show special damage. In other words, there must be proof that the claimant was injured in a way not suffered by the general public. *Id.* at 102.

Another decision, *Drane v. Avery*, held that plaintiff had standing to sue when a dedicated street was obstructed. The plaintiff in *Drane* suffered special damage because that street was the only means of access to his property. *Drane v. Avery*, 172 Ariz. 100 (1951).

The homeowners contend that *City of Phoenix v. Garretson*, 234 Ariz. 332 (2014), discussed above, is distinguishable because that case did not involve homes or lots subject to a recorded plat. Moreover, according to the homeowners, *Garretson* still had access to the general system of streets, but was still provided compensation. The homeowners argue that *Garretson* actually stands for the proposition that a preexisting right of access can be a property right, the destruction of which gives rise to a right of compensation.

The homeowners here have clearly not lost permanent access to the general system of streets. South Chandler Boulevard closed permanently south of Cotton Lane in 2017. The City opened the Chandler Boulevard extension, referred to in a recent Stipulation as the "connection segment," to provide access to the Foothills Reserve community in July of 2017. Obviously, the residents have been accessing their neighborhood over the last two years. As such, it is evident that the homeowners have not lost general access to the system of streets.

In reality, *Garretson*, and the various cases discussed in the *Garretson* decision, are not that helpful here. *Garretson* addressed a situation where the owner's access to an "abutting" road was completely eliminated or substantially impaired. Indeed, the court held "that a property owner is entitled to compensation if the government either completely eliminates or substantially impairs the owner's access to an abutting road and thereby causes the property's fair market value to decrease." *Id.* at para. 28. This rule applies even if there are other reasonable alternative means of access.

Here, the homeowners did not lose access to an abutting road. Rather, the only possible claim is that the homeowners lost access to the Chandler Blvd. and Pecos Road intersection. The homeowners' parcels do not abut that intersection. As such, the situation in *Garretson* is clearly not applicable here.

The general rule is that "one whose property does not abut on the closed street ordinarily has no right to compensation for the closing or vacation of the street if he still has reasonable access to the general system of streets." *Uvodich v. Arizona Board of Regents*, 9 Ariz. App. 400, 403 (1969). "A decrease in the value of his property because of diversion of traffic away from it affords no basis for compensation." *Id.* Put another way, closing one means of access to the general system of streets, while still providing access to the street system, is not compensable.

Of course, the homeowners did not have private easement rights in Chandler Boulevard and Pecos Road. Rather, they were dedicated to the public. As such, the homeowners here had easement rights no greater than those of the public in general. As such, the issue really comes down to whether the homeowners suffered special injuries.

Even when streets are dedicated by a plat, special injury must be shown to be eligible for compensation. *Thorpe, supra*. Interference with a party's only access constitutes special injury. *Drane v. Avery*, 72 Ariz. 100 (1951). Property owners may not, however, recover for a deprivation of one means of access to the general system of streets, as long as they have not lost total access. *Uvodich v. Arizona Bd. Of Regents*, 9 Ariz. App. 400 (1969). No such total loss of access is presented here.

Even though a property owner may have an easement right in a roadway by virtue of having purchased property subject to a recorded plat containing the roadway, the owner is not entitled to damages as a result of a closure of the roadway, unless the property abuts directly upon the portion of the roadway being vacated. *State v. Wineberg*, 444 P.2d 787 (Wash. 1968). This was the situation in *Garretson,* where the city eliminated direct driveway access to a roadway abutting the subject property. No such situation is presented here.

In their Reply brief, the homeowners essentially acknowledge that, in order to be able to recover, they will have to show that they lost access to the general system of streets. They contend, however, that they did lose such access. The homeowners argue that the subdivision was landlocked. The extension of Chandler Blvd., which did provide them access, was allegedly a "mitigation" measure. The Intergovernmental Agreement, which was the contractual basis for the Chandler Road extension, provided that the extension was a "mitigation measure" which was "for the proposed State Route 202…" In other words, according to the homeowners, the extension was part of the "project." As such, the homeowners contend that they are not prevented from receiving damages for the closure of the Chandler Blvd -- Pecos Road intersection. Rather, the fact that the

homeowners now have access to the system of streets, so the homeowners contend, goes only to the measure or amount of damages.

The homeowners' position is wrong. They act as if they no longer have access to the system of streets. That is clearly not the case. While they lost one means of access, they were provided another means of access. The authorities cited above clearly stand for the proposition that losing one means of access, while being provided another means, is not a special, compensable injury. Referring to the "new" access as a "mitigation" measure done as part of the relevant "project" does not change the reality that the homeowners have access after the taking. In fact, referring to the "mitigation" measure as part of the "project" makes it clear that the project here did not result in loss of general access to the system of streets.

During argument, counsel championed *State ex rel. Morrison v. Thelberg*, 87 Ariz. 318, 325 (1960), which was only discussed in passing in the briefs. *Thelberg*, however, dealt with the elimination of access to an abutting property owner. The Arizona Supreme Court found "that the State can neither take nor damage said easement of ingress or egress of an abutting proper owner without just compensation." 87 Ariz. at 324. As such, the *Thelberg* case is limited to abutting property owners and is consistent with *Garretson,* discussed above. It is not applicable here.

The homeowners here have no special injury. The prior interchange did not abut the homeowners' properties. The homeowners still have access to the system of streets. Accordingly, the homeowners are not entitled to compensation due to the loss of access to the Chandler Boulevard and Pecos Road intersection. The State's Motion for Summary is granted and the homeowners' Motion for Summary Judgment is denied.

Foothills – "Severance" Damages

The Court has considered the State's Motion Re: Allowable Damages, the Response and Reply. The Court has also considered the homeowners' Cross Motion for Summary Judgment on Severance Damages, the Response and Reply and the State's Cross Motion, Response and Reply. The Court has also read the Response filed by the Intervenor on February 17, 2019. The Court has also considered the arguments of counsel and Intervenor.

The State has condemned a common area fee simple owned by the Foothills Reserve Master Owners Association (the "Association"). In addition, individual homeowners, who are members of the Association, have asserted claims for compensation for the loss of their interest in the common area, including severance damages to their lots.

Under the applicable Covenants, Conditions, Restrictions and Easements ("CC&Rs"), the homeowners' interest in the condemned common area was an easement interest. An easement is "a right that one person has to use the land of another for a specific purpose." *Ammer v. Arizona Wa*ter Co., 169 Ariz. 205, 208 (1991). An easement appurtenant involves two interests; the dominant tenement, to which the right of use belongs, and the servient tenement, which is subject to the use. 169 Ariz. at 209.

The easement right here is not exclusive to any homeowner. Obviously, owners do not have the right to exclude other owners. The easement rights provided to the homeowners in the CC&Rs, however, are private rights of easement. They are not given to the public in general. In other words, the easement rights to the use and enjoyment of the common area are owned only by the homeowners, as they are appurtenant to the lots.

The State relies on a cryptic statement in the plat dedication to an easement of "pedestrian access," in support of its contention that the easement rights are "public" in nature. It is not at all clear if that provision was intended to provide pedestrian access to just the homeowners or the public. Nonetheless, it is clear to the Court that the homeowners are the only persons granted the easement rights in the common area. Therefore, the easement rights are "private" in nature.[2]

Severance damages are those "which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by plaintiff." A.R.S §12-1122(A)(2). Severance damages are awarded only when the land remaining is part of a "larger parcel." *City of San Diego v. Neumann*, 863 P. 2d 725, 729 (Cal. 1993).[3]

The homeowners contend that the "larger" parcel consists of, not just the fee interests in the lots, but also each homeowner's interests in the common area. Therefore, according to the homeowners, the taking of the servient estate entitles the homeowners to compensation. The State, on the other hand, contends that there is no "larger parcel" from which the easement rights were taken, because the common area was owned by the Association. Indeed, during argument the State contended that the damages sought here are not really "severance' damages at all. Rather, the State argued that homeowners should be compensated only for the "lost" easement and restrictive rights.

The State's position on this point is a little difficult to figure out and appears to be inconsistent. Indeed, the State agreed in its Response and Cross Motion that the measure of damages "is the difference in the value of the dominant property before and after the taking." As

[2] While the easement rights are "private," the homeowners do not have the right to exclude others. Homeowners certainly cannot exclude other owners. Further, the "pedestrian access" reference in the plat at least arguably prevents the homeowners from excluding "pedestrians" from the public in general.

[3] *City of San Diego* did not address a situation where easement rights were "severed" from the fee.

such, the State conceded that the focus of damage analysis is the diminution of value of the remaining lots. The State specifically stated that the subject valuation "means valuing the property before, with the covenant, and after, without the covenant." As such, the State admitted that we are dealing with damages which accrue to the portion not sought to be condemned, the fee ownership in the lots, by reason of their severance from the portion sought to be condemned, the easement and restrictive covenant rights in the common area. This is the essence of severance damages.

The parties clearly agreed in their briefs that a before and after analysis of what each homeowner "owned," including fee and easement interests, is appropriate. Indeed, after completion of all of the briefing it did not appear as if the parties really disagree that a before and after analysis is the appropriate methodology, irrespective of whether that analysis is called "severance" damages or some related methodology. As the State stated in its Response and Cross Motion, the "disagreement lies in what factors may be considered in the after condition."

The homeowners further allege that they have had three property rights taken away. The first right is the easement in the common area. There is no question that the homeowners are entitled to compensation for the taking of their interest in the common area. The second right is the right to restrict the common areas to open space and landscaping. The parcel maps state that the common area will not be improved with dwelling units. No dwelling units, however, are being constructed on the common area. As such, this restriction is irrelevant. However, the homeowners unquestionably had a general right to restrict the use of the common areas to natural open space. As such, the loss of this right, whether referred to as a restrictive covenant or otherwise, is a proper consideration in the before and after valuation analysis. Finally, the homeowners contend that they enjoy an enforceable restrictive covenant that restricts the subdivision to residential uses. This covenant, however, applies to "lots" and the State is not acquiring lots. Therefore, this alleged property interest is irrelevant.

A restrictive covenant imposed by the owner of a tract of land in pursuance of a general plan and development of property is a property right that runs with the land. *Colonia Verde Homeowners' Ass'n v. Kaufman*, 122 Ariz. 574 (App. 1979). Accordingly, the CC&Rs grant property interests that run with the land. The homeowners are entitled to be compensated for the loss of property rights. As noted above, they have lost their easement interests in the common area. That is a compensable loss. They have also lost their right to restrict use of the common area to open space and the like. That is also a proper consideration in the valuation analysis.

The critical question here is whether the analysis of the "after" condition may properly take the proximity of the lots to the freeway project into account. The homeowners have cited various cases providing that the owner of the dominant estate is entitled to compensation measured by the value of the dominant estate before and after the taking of the easement rights. *E.g., Redevelopment*

Agency v. Tobriner, 200 Ca. Rptr. 364, 367 (Cal. App. 1984). Accordingly, the homeowners contend that, under the Arizona Constitution and A.R.S. §12-1122, the homeowners are entitled to have their homes valued in a before and after condition, taking into account the proximity of the lots to the freeway.

As noted above, the State does not claim that it should not compensate the homeowners for the loss of easement rights in the common area, plus any applicable restrictive covenants that may have been taken. The State also does not dispute that the general manner to value the loss here is looking at the difference in value of each homeowners' property, with and without the property interests being taken.

Accordingly, and as referred to above, there does not appear to be a general dispute that there should be a before and after methodology used here. The damages consist of the difference in value of the subject parcels before and after the taking of the easement and restrictive covenant rights. That means the lots are valued before, with the subject easement rights and any restrictive covenants, and after, without the easement and restrictive covenant rights.

That leaves the issue of the "proximity" to the freeway. The Court has carefully considered the State's argument that the "proximity" to the freeway should not be considered. The State argues that the freeway project is not related to the taking. Rather, the freeway arose out of the project itself. As such, proximity damages are, according to the State, not part of the before and after analysis. *People ex re. Dept. of Pub. Wks. v. Symons*, 357 P.2d 451 (Cal. 1960); *see also Arkansas State Highway Commission v. McNeill*, 301 S.W.2d 425, 426-67 (Ark. 1964).

The Association distinguishes *Symons* because that case dealt with damages caused by a taking of property not owned by the property owner. Here, the easement rights in the common area being taken are owned by the homeowners. While *Symons* is distinguishable based on the facts, there is very relevant language from the *Symons* case.

The *Symons* decision noted that "(i)t has long been recognized that there is no right to recover for all elements of damage caused by the construction of a public improvement." Referring to *Eachus v. Los Angeles etc. Ry. Co.,* 103 Cal. 614, 617, the *Symons* court noted that the constitution does not "authorize a remedy for every diminution in the value of property that is caused by a public improvement. The damage for which compensation is to be made is damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated by the constitution; but the property itself must suffer some diminution in substance, or be rendered intrinsically less valuable by the reason of the public use. The erection of a county jail or a county hospital may impair the comfort or pleasure of the residents in that vicinity, and to that extent

render the property less desirable, and even less salable, but this is not any injury to the property itself so much as an influence affecting its use for certain purposes." 357 P.2d at 455. Citing *People v. Ricciardi*, 23 Ca. 2d 390, 144 P.2d 799, the *Symons* court continued---"Not every depreciation in value of the property not taken can be made the basis of an award of damages…damages may not be allowed for diminution of property value resulting from highway changes causing diversion of traffic, circuity of travel beyond an intersecting street, or other non-compensable items." *Id.* at 455. However, items that may be compensable are things such as impairment of light and air and impairment of view. *Id.* at 456.

As such, one could certainly argue, as the State does, that the proximity to the freeway is the type of depreciation in value that should not be considered as part of the damage analysis. The Court, however, rejects that premise for a few reasons. First, under a severance damage analysis, it is proper to consider the improvement building built. A.R.S. §12-1122(A)(2). Accordingly, proximity to a freeway is a proper consideration. *State ex rel. Miller v. Wells Fargo Bank*, 194 Ariz. 126, 129 (1998).

Even if this valuation did not involve a "pure" severance analysis, the Court still believes that the proximity to the freeway is a relevant consideration. There is no dispute that the loss of the right to a common area with open views and vistas is a compensable loss. Therefore, the loss of the open views and vistas is an appropriate valuation consideration. It does not appear to the Court to be practical to consider the loss of the right to have open views and vistas, yet ignore the freeway that ended up being placed on or near the common area.

Finally, this case does not, in the Court's judgment, involve an incidental infringement of the owner's pleasure or enjoyment. Rather, the homeowners here bought their lots along with valuable easement rights in a common area. As noted above, the easement rights were "appurtenant" to the lots. These homeowners had the right to expect that they would be able to enjoy the common area, with the concomitant open spaces and vistas. This is not a situation like having a hospital built nearby, with some resulting minor impact to value. Rather, this freeway resulted in real and direct damage to the homeowners' real property rights. As noted in the discussion of *Eachus* and *Ricciardi* above, impairment of light, air and view are compensable losses. The proximity to the freeway, and the loss of open space and views, are, therefore, proper considerations. In evaluating the decrease in value of the remaining lots, it is simply unrealistic to "ignore" the proximity to the freeway. *See Redevelopment Agency v. Tobriner, Supra.*

Accordingly, damages will be computed based on a before and after analysis. The damage analysis is to focus on the "lost" easement rights and restrictive covenants. As noted above, the easement rights consisted of the right to access and use the common area. The homeowners are also entitled to compensation for loss of any right to limit use of the common area to open space.

However, the right to restrict the lots to residential uses is irrelevant. Damages due to proximity to the freeway may also be considered.

Integra Realty Resources
Phoenix

Foothills Reserve Residential Community - Surrebuttal Report
589 Single Family Homes
North and South of Shaughnessy Road, Between 27th and 30th Avenues
Phoenix, Maricopa County, Arizona 85045
Client Reference: Case No. CV2017-101359

Prepared For:
Zeitlin & Zeitlin, P.C.

Effective Date of the Surrebuttal Report:
July 3, 2018

IRR - Phoenix
File Number: 132-20-085

2. **The IRR report includes quotes from residents who complained about proximity to the freeway who are not residents of either the Foothills Reserve North or Foothills Reserve South subdivision.**

Zaddack states on page 5 of the Zaddack Rebuttal, "of the 15 residents who were quoted in the IRR report, only three (3) residents live within Foothills Reserve and none of the residents are named defendants in CV2017-101359." I don't disagree. I referenced these homeowner letters of complaint to ADOT especially BECAUSE they were not parties to the condemnation lawsuit, presuming they would be unbiased.

The complaints I quoted also showed the Ahwatukee residents' vocal and public opposition to the Freeway. Much of this was expressed in newspapers and social media. The long period of pre-condemnation vacillation by ADOT with respect to the location of the Freeway and even whether it would be constructed and the public opposition to it, contributed to blighting the Foothills Reserve homes values before ADOT actually took the common areas.

Before I completed the appraisal, I had attended an HOA open meeting where I listened to a number of residents voice their concerns that the Freeway had depressed their home values. The HOA board members were very concerned that the assessor values had baked in these lower depressed values and were not representative of the homes' market value had the Freeway not been planned. They complained that their homes were unfairly undervalued.

I heard nearly unanimous complaints of freeway noise. This was expressed from residents who lived in all areas of Foothills, both north and south. The complaints from the residents in the south part of the community were not unexpected since they are in close proximity to the Freeway. Those to the north expressed concerns regarding how the noise would get trapped against the mountain and have an echo-like effect. All expressed concerns of the noise particularly in the early morning hours. I heard complaints that windows could no longer be kept open in the spring-time and at night and in the early morning hours, and the noise made sitting in the residents' backyards or balconies unpleasant. The use and enjoyment of their homes had been diminished. I also heard complaints regarding pollution from the Freeway. Those nearby the wall erected by ADOT, complained that the wall was not only unsightly—an industrial feel—but it destroyed the residential neighborhood that had existed pre-wall and Freeway construction. They also complained that the bright lights from the Freeway also made the area feel industrial rather than residential. Many residents complained of the loss of the use of the nature trails and walk-ways that were enjoyed, but have now been replaced by a Freeway. I heard about loss of views to the south that have been replaced with the Freeway and traffic.

More recent complaints have addressed not only the unsightliness of the retention basins as it appears ADOT does little if anything to maintain them, but also of the standing water in the ponds. Some people are now complaining of that their homes shake and vibrate from the heavy traffic on the Freeway, and others now complain that the Freeway has brought crime into the area.

Since completing the IRR Appraisal, I have received 44 lawsuits (arbitrations) served on Taylor Morrison, home builder of the Promontory subdivision to the west of Foothills, that complains Taylor Morrison misled them regarding the amount of noise they would be saddled with from the Freeway.

I have also received about 110 written complaints from residents of Foothills Preserve regarding their opinions of the effect that the Freeway has had on their lives since completion of construction.

Overwhelmingly, the responses were negative and hostile. A sampling of the homeowner's complaints are as follows (grammatical mistakes left intact):

Paula Shippy – 2747 W Cottonwood Lane: I live at 2747 W Cottonwood Lane, Phoenix, AZ 85045 in the Foothills Reserve, Mountainview subdivision. I am the original homeowner, and the reason I built here was due to several factors. The area is incredibly beautiful with mountain vistas and open land to the south and west. It was a very quiet location because there was only traffic from those that lived in the neighborhood, and it was not brightly lit so you could actually sit out and see the stars at night. We enjoyed the peaceful serenity of walking on the paths with the beautiful views.

Since the construction of the Freeway, I have been disturbed by many things - first and foremost, the noise from the traffic. My home is a 2-story and the main bedroom is upstairs, and the sound of trucks and cars bounces over the wall and often wakes me up early in the morning as well as late at night. The sound can be heard even with the television on. There are also the tall streetlights that I can see from my kitchen at night, the placement sits just so that it shines bright between the houses and is quite annoying. We are also not able to take walks on the pathway that ran east/west (now parallel to the freeway) with the same peace and quiet and views due to the freeway. Driving down Pecos road used to be a beautiful drive with the mountains, now it (freeway) is a loud road with many, many, many trucks and a wall that blocks the views of the mountains.

Lorraine Samuel – 16815 S. 27th Avenue: I am a homeowner that has been living in this home for the last 15 years. In fact I had my home built. I have been happy and enjoy my peaceful living without noise and pollution. I am now staring at a wall and unable to socialize in a cul-de-sac with good neighbors during the holiday season. I am now staring at a wall listening to big rigs going down the freeway tooting their horns at a time from my bedroom and in my backyard. I don't feel the sound wall came down far enough. I am also suffering from pollution, and developed allergies that keeps me from enjoying my patio.

Vanessa Mccarthy – 3031 W Cottonwood Lane: My home is one of the closer homes to the freeway and I can hear the freeway at all hours of the day. The wall to block the sound only went to so far, and the noise just comes in where the wall stops. I have been woken up at 2 or 3 in the morning from the noise. The wall to the south, although intended to block the noise really just blocks the views we use to have. It may help with noise in other areas of the neighborhood, but not where my home is. One of the biggest loses is the view of the stars at night. The bright freeway lights actually shine into my home (problems enough for a light sleeper like me) and steal all the beauty from the night sky. All the things I loved about living here have been reduced or taken away by the freeway. The convenience is nice, but it's too high of a price. I have thought about moving, but im too concerned that the damage to my home will prohibit me from being able to sell it.

Nigel and Sandra Cardalico – 16009 S. 27th Drive: We purchased our property over 6 years ago based upon the view and serenity. Our property is elevated with a SE vista view to the preserve. Our property was private, quiet and lacking light pollution providing a perfect relaxing outdoor experience.

Coyotes and other wildlife were frequently near by and our property was truly a peaceful sanctuary. Our master bedroom and living room are located in the back of the house with views from both. Pre-construction, we were able to open our windows during the cool months to enjoy the fresh air.

During construction:

* Dust and noise
* Reduction in wildlife
* Unable to open windows due to dust/noise
* unsightly view

Post construction:

* Noise/pollution - Unable to open windows due to exhaust pollution/noise
* Mornings and evenings the freeway noise carries into our back yard.
* Significant reduction in Coyote population and evening howling which we enjoyed.

* Light pollution significantly reducing view of stars at night.
* Unsightly view of freeway traffic.
* Pecos traffic was routed to Chandler BLVD causing more noise and light pollution. Nightly vehicle headlights from incoming traffic enters our master bedroom.

Jennifer Matthews – 16654 S. 27th Drive: I am writing in regards to my home that resides at the Mountain View neighborhood in the Foothills Reserve Master Community. We purchased our forever home in May of 2010 shortly after the birth of our daughter. The desire of the area mainly was how secluded we were. Thinking of the future of raising our daughter, we liked being away from the city and near wildlife. We felt the streets would be safer, the community less traveled by commuters and less crime. We rarely heard planes overhead and saw stars almost every night of the year in the sky. That all soon changed.

When construction started on the 202, my daughter was no longer able to play in our backyard on her swing set or jump on her trampoline as she developed asthma. Her pediatrician stated it was highly the cause of excavation and spores in the air. She then had to regularly use Albuterol and a nebulizer. Windows could not be open in the cool winter months as the air was sickening our daughter.

Now, 18 months into an operating freeway in our backyard, we have to watch our daughter closely as she bikes to a friends or plays outdoors. The direct access to our neighborhood off the 17th Avenue freeway exit has spiked crime and theft. Ring doorbell users and neighbors on Nextdoor constantly share footage and pictures of thief's rifling thru vehicles, access side gates to back yards and stealing packages off front porches. Our once dream home has now caused us to install security cameras and padlocks. A home 3 houses down found bullet casings after many neighbors heard gunshots and my other neighbor had a criminal drive thru their home with a car.

Enjoying our patio is not an option as freeway semis and big rigs power thru the blasted mountain range echoing thru our neighborhood. The freeway lights glare through the community as a sore reminder. Bike rides are limited to a small loop as the state took half our paths away. Windows remain closed as the air smells and is no longer fresh. The noise is too unbearable. The dust is never-ending.

Had we the opportunity to do it all over again, we would not have moved into this once remote and beautifully serine community. The negative simply outweigh the positives and our quality of life for ourselves and especially our daughter are at risk every single day.

Louie Nasta - 16849 S. 30th Avenue: My home backs the nature path and one of the main reasons i purchased this home and have spent quite a bit of noney updating it was because of the view , the peacefulness and how it was off the path of main roads. Now i sit in ny backyard that i remodeled and can see the giant barrier wall for the freeway and rather than the peace and quiet i can hear the trucks and traffic going by. Even the beautiful nature trail has lost its appeal as my family and i take our nightly walks.

Richard Chen - 16009 S. 29th Avenue: We have experienced increased level of noise, pollution, and unsightliness of the Freeway, particularly noise. Since our house is at a higher elevation than average, noise from the freeway traffic reaches us easier because there is no sound wall being built between 27th Ave to 29th Ave along the 202 freeway. Our house's backyard and master bedroom are facing that portion of the freeway with no sound walls. And noise transmission to our house is huge, especially at night time. We enjoyed beautiful scenery from the backyard and deck of the 2nd floor before the freeway was built, but not anymore. We now only see the unsightly busy freeway and hear loud traffic.

Fred Erickson – 17001 S. 30th Avenue: Up until a few weeks ago, I owned the property at 17001 S 30th Ave, 85045. My home backed up to the preserve which now holds the freeway wall. I was one of those "handful of homes closest to the freeway". Originally, my home was to be taken as part of the SM202 right of way when it was planned as 10 lanes. When it narrowed to 8 lanes, my home was spared but I had a huge wall in my "back yard". We used to have a quiet, serene back yard experience with great views to the south. Once the freeway and well were constructed, my view was gone and lots of noise from semi-trucks and motorcycles replaced the serenity. Although I recently sold the property, I do believe my value was significantly reduced due to the freeway construction.

Albert Morales – 16650 S. 27th Drive: There is constant noise from the freeway. It does not matter if it is day or night. I used to keep my windows open in the fall/winter. I can't do it anymore due to the noise. The huge wall is also an eyesore. And there is constant bright light at night coming from the freeway. Finally, fumes from the vehicles is irritating my eyes & throat.

When I built my home in 2004, I chose my lot specifically for its position as the quietest, most private picturesque lot in the Vistas. Backed up to the reservation to the south and with nothing but the beautiful desert landscape and majestic mountain views to the west, it was quite literally the best lot in the Vistas for quiet, privacy, and desert mountain views.

A day after construction started behind my home, the desert landscape disappeared, knocked down, and plowed under by earth movers and construction workers. For two years, I endured constant construction noise, endless dust, the ground shaking from dynamite blasts, and massive pumps inches from my driveway running day and night.

With the freeway complete, my once beautiful views have been replaced with a hideous 20' elevated wall and a barren retention area filled with trash. My quiet lot is now loud with freeway noise 24/7/365 that can wake me up at night; freeway lights that are as bright as stadium lights spill over the wall onto the back of my home, shining in my windows at night.

After each rainfall, the retention area between my home and freeway fills up with water and trash flushed down the drains from the highway. When the water recedes, the garbage remains and is visible everywhere.

The freeway has transformed my home into the exact opposite of the reason I bought it.

So do I think the freeway has negatively affected the value of my home and its livability? Yeah, you could say that.

Corey & Abbey Churchill - 2702 W Amberwood Drive (previously 2752 W Cedarwood Lane): We witnessed the destruction of 20+ homes across the street from our home on Cedarwood Lane to result in a large, unattractive wall blocking the view we once had of the desert and mountains. With the freeway just in front of the home, we experienced an increase in noise of street racing at late hours in the evening on many nights (not just the weekends), large semi-trucks blowing their horns and pulling their loud breaks coming down the mountain when headed east/south, as well as light pollution from the freeway lights right in front of our home. What was once a dark, quiet evening where we could view all the stars is now a well-lit football field style lighting on our front porch and all down the street. We've also experienced vibrations of the home due to the proximity of the freeway to our home.

Galen Schliem – 2822 W. Windsong Drive: We've been damaged monetarily. The intrinsic value of owning our home has plummeted as well. What was once our neighborhood's greatest feature, our walking paths in the desert, is now mowed over by the freeway. Our wonderful and quite evenings enjoyed out back are now noisey, unenjoyable, and we really rarely still enjoy outdoor living. Working in my office, I can hear the drone of cars and rigs all day long. Sometimes the noise is more powerful from the east, sometimes the west. In both diretions there are very large sections of missing sound wall that we warned ADOT would be an unbearable noise issue. They ignored us. Walks in the evening on what's left of our path system are now filled with light polution from the 202 poles and the terrible constant roar of the freeway. In other words, walks are almost more pain than they're worth, but we have a dog and he needs exersize so we continue to endure.

Gary & Jeanine Quinones – 17009 S. 30th Avenue: Even with windows closed it is very loud all the time and often scares our dog. Large trucks on the freeway cause our house to shake. We bought this house for the quiet, dark star-lit skies and endless desert views, especially from the 2nd floor – all that is gone now.

Juan Gonzalez & Waleska Soto - 2757 W Redwood Lane: We moved in 2004 and loved the tranquility and openness of the area. It was enjoyable to end the day on the deck, watching the sunset, looking at the mountains and just "being". At night we could hear the coyotes howling.

As the freeway started construction, the peace and quiet of the area went away. From the demolition of the houses, the early start of the drilling and construction, to the route adjustments to get home after a long day. The noise barrier (wall) was built and blocked most of our open view to the mountains. Once the freeway opened, the discomfort went up another

level - the car noises and the lights coming into our master bedroom at night. Ending the night in the backyard or the deck was no longer a default option.

We also had to change the windows to make the house more soundproof so that the inside of the house didn't feel like being in the backyard. There was an unfortunate predictability of cars revving up and racing between 10 - 11pm every night.

We also enjoyed our family walks along the path since the kids were little. They had to be rerouted during the freeway construction as the path was closed near our house. Once it reopened, the path didn't have the same feel as before as the view was blocked and it had extra noise and dirt as well asmthe mountain views were blocks.

Karen & John Willson – 16821 S. 30th Avenue: In 2013, we purchased our home with the intent of living in a big city with a little bit of country living. When the highway came in it was a different way of living. The peacefulness that we had was no longer. It became a raceway of noise. We have an open wall which allows the freeway noise to be intense. We used to be able to open our windows to enjoy fresh air which is now impossible. Not only can you not open to windows to enjoy fresh air you sometimes can even sit in our home to enjoy life because it sounds as though you are on the freeway. Not only is the sound overwhelming but the pollution can not be healthy for anyone. We used to be able to enjoy the beautiful common areas, quite & full of nature and now we are left with a highway with a large whole in the wall that is loud, puts a lot of pollution in the air and truly not the country living that we once enjoyed when we purchased our home in the Foothills Reserve.

Ken Lapierre – 16637 S. 27th Lane: Freeway Light poles need to be lowered all along the freeway so as not to make the lose of views worse than they are. Can someone even try a little to help us after loosing all this land use in old common areas. Home owners need a fix. In addition I have clocked yesterday 2 semi trucks doing 78 MPH on the Pecos 202 loop section and a cars doing 85-89. Why cant there be speed enforcement or warning systems installed to reduce the speed and reduce the noise that home owners are experiencing. Excessive speeds cause louder decibels into foothills master. Also drag racing can be heard in the early morning hours too. Someone will get killed. No one from the city response to our calls.

Lastly as far as damages my noise is so bad I am left to either move or install triple pane windows. I have 40 plus windows in my home and excessive noise inside and out of the front door, side and back yards. this impact or cost will run me about $31000-46000 to remediate and is a direct result of the lack of sound mitigation on bridges and 202 walls. Typically freeway studies prior to build yield help to impacted owners.

Randall Neis – 17005 S. 30th Avenue: The new culture of the environment has changed to a high sound wall from the freeway, and another wall to divide former HOA common ground to new common ground property line for HOA, affecting views. Also, windows and doors need to be closed due to traffic air pollution and smells of fuel exhaust from vehicles when wind comes from the south. Noise can be heard in the middle of night/early morning, awaking a light sleeper like me. At night, our blinds need to be drawn to keep out light pollution from freeway lighting into our windows. Finally, w/loss of 10 acre common grounds, walking paths were lost (up to ¼ mile or less) behind my backyard, forcing our household to find other routes to walk our dogs that doesn't provide as much peace, space and tranquility from nature before freeway was built.

Steve & Julie Hales – 2764 W. Redwood Lane: Even with the wall, highway noise is heard indoors even with our windows closed. That's my main complaint, then the added air pollution. We bought this house to hear the sounds of the desert at night – owls, coyotes, crickets and now we rarely hear them. It is not a quiet home anymore.

Tracy Rao – 2720 W. Cedarwood Lane: Unable to sleep due to freeway noise. There is black soot inside the home and all exterior dirt between community wall & freeway wall is constantly blowing fine dust at our home. View is gone, including trees and landscaping. Some walking paths are gone. The value of the neighborhood has gone down. Lights from freeway now obscure the night skies. Breathing issues from vehicle emissions.

Tracy & Debi Cobb - 2724 W Cedarwood Lane: We are one of the original homeowners in the subdivision. The freeway is across the street from our home.

- Increase noise – we can hear the noise within our home and in our backyard.
- Increased pollution – Some mornings when I go for a run I can taste the fumes in the air outside my front door

- Unsightly – come on. Of course. A forty foot wall is across from our home.
- Impairment of view – we can no longer look across the desert to Estella mountains.
- Unwanted freeway lights - The freeway lights at night have turned our star filled skies into light.

A map showing the location of the 110 responses is provided below.

Updated Severance Damages Analysis

Based on the data and analysis presented in the IRR Appraisal and this Surrebuttal Report, I believe that the adjustment applied to the Before Condition home values for Foothills Reserve North in the Zaddack Appraisal should be increased, to reverse the effects of project influence, as supported by actual sale transactions via a paired sales analysis within Foothills Reserve North. Thus; I conclude that a 13.3% adjustment (versus 8.3% applied in the IRR Appraisal) is appropriate for those homes in Foothills Reserve North. No change is made to the Before Condition FMVs for Foothills Reserve South.

Also, I have eliminated many of the "specific location" adjustments applied to various homes in Foothills Reserve North and reduced the adjustments for all other homes that were given a "specific location" adjustment.

Finally, I have combined the discounts due to Freeway Proximity and Loss of Common Area into one category; "Discount Due to Freeway Impact." For Foothills Reserve North, the combined discount is 12% of the Before Condition FMV (10% for Freeway Proximity and 2% for Loss of Common Area). For Foothills Reserve South, I have concluded that the Discount Due to Freeway Impact is 25% of the Before Condition FMVs.

The following tables provide the individual fair market values for each of the 589 homes applying the revised adjustments for Project Depression in the Before Condition, followed by the individual fair market values for each of the 589 homes in the After Condition, and then by the Severance Damage Analysis summary table. I have replaced many of the calculated After Condition FMVs with the actual sales prices shown in the Zaddack Rebuttal on pages 45 and 46, which are presented in red within the tables. These tables are meant to replace the same ones included in the IRR Appraisal.

In total, severance damages for the Remainder Parcels are opined to be $16,830,394 for those homes in Foothills Reserve North and $51,444,261 for those homes in Foothills Reserve South. Thus, it is now my opinion that Severance Damage due to the Freeway is $68,274,656 in total, as summarized in the table below.

Severance Damage Summary

	Before Condition Market Value	Average Per Home	After Condition Market Value	Average Per Home	Total Severance Damages	Average Per Home
Foothills Reserve South	$185,539,283	$481,920	$134,095,022	$348,299	$51,444,261	$133,621
Foothills Reserve North	$131,885,813	$649,684	$115,055,419	$566,775	$16,830,394	$82,908
Total Subject Property	$317,425,096	$538,922	$249,150,440	$423,006	$68,274,656	$115,916

William M. Dominick
Certified General Real Estate Appraiser
Arizona Certificate # 30129

3. Judge Thomason's ruling regarding consideration of freeway proximity in the After Condition.

Judge Thomason's ruling was "Damages due to proximity to the freeway may be considered." When I appraised the property, I analyzed the data and found severance damages. Although my appraisal mentioned the Court's ruling by way of background, my opinion of damages is based on my analysis of data and not the Court's ruling.

Judge Thomason also made other legal rulings, such as "impairment of light, air and view are compensable losses" and "the loss of open space and views, are, therefore, proper considerations." Further, Judge Thomason ruled, "In evaluating the decrease in value of the remaining lots, it is simply unrealistic to "ignore" the proximity to the freeway."

Judge Thomason's rulings allowed me to conduct the severance damage analysis contained in the IRR Appraisal. His rulings, however, had no bearing on the amount of severance damages.

Integra Realty Resources
Phoenix

Appraisal of Real Property

Foothills Reserve Residential Community
590 Single Family Homes
North and South of Shaughnessy Road, Between 27th and 30th Avenues
Phoenix, Maricopa County, Arizona 85045
Client Reference: Case No. CV2017-101359

Prepared For:
Zeitlin & Zeitlin, P.C.

Effective Date of the Appraisal:
July 3, 2018

Report Format:
Appraisal Report – Concise Summary Format

IRR - Phoenix
File Number: 132-20-085

and enjoyment of the common area are owned only by the homeowners, as they are appurtenant to the lots."

ADOT's taking of a portion of the common areas, took property rights owned by the 590 remaining homes within the Foothills Reserve subdivision. These rights are set forth in the Declaration of Covenants, Conditions, and Restrictions and Easements (the "CC&Rs").

Consequently, the Court has ruled that the Larger Parcel consists of not just the fee interests in the lots, but also each homeowner's property interest in the common area. Therefore, the taking of the servient estate entitles the homeowners' to compensation.

Based on this ruling, the Larger Parcel consists of 590 separate lots within Foothills Reserve. As each lot is improved with a single-family residence and owned separately, each lot is viewed as a Larger Parcel and will be valued separately. However, for reference purposes throughout this report, the term "Larger Parcel" may be used interchangeably to refer to each lot/home individually or all 590 lots/homes collectively. In either case, the Larger Parcel includes the rights appurtenant to the Common Areas within Foothills Reserve.

The definition of "Remainder Parcel," in eminent domain is:

> *In condemnation, that portion of a larger parcel remaining in the ownership of the property owner after a partial taking.*[5]

Similar to the discussion of the Larger Parcel, for reference purposes throughout this report, the term "Remainder Parcel" may be used interchangeably to refer to each lot/home individually or all 590 lots/homes collectively. In either case, the Remainder Parcel includes the rights appurtenant to the Common Areas within Foothills Reserve.

Property Identification	
Property Name	Foothills Reserve Residential Community
Address	North and South of Shaughnessy Road, Between 27th and 30th Avenues Phoenix, Arizona 85045
Tax ID	300-05-008 thru 093; 104 thru 220; 228 thru 495; 501 thru 596; 618 thru 640
Owner of Record	Various

Purpose of the Appraisal

The purpose of the appraisal is to develop an opinion of the severance damages accruing to the 590 homes. According to the Court, "damages will be computed based on a before and after analysis. The damage analysis is to focus on the "lost" easement rights and restrictive covenants. As noted above, the easement rights consisted of the right to access and use the common area. The homeowners are also entitled to compensation for loss of any right to limit use of the common area to open space...Damages due to proximity to the freeway may also be considered."

[5] The Dictionary of Real Estate Appraisal, 6th Edition, The Appraisal Institute, Chicago, Illinois, 2015, p.195.

Property Description

The Zaddack Appraisal has a detailed description of the Foothills Reserve community, including photographs, aerial exhibits, maps and charts. I have reviewed this presentation and I find it to be an accurate depiction of the subject Larger Parcels and Common Areas in the Before Condition. Thus, there is no need to duplicate that information in this report, so I have incorporated pages 21 through 31, inclusive, of the Zaddack Appraisal herein by reference.

For reference purposes later in this report, the Foothills Reserve Residential Community is essentially divided into 2 separate segments, or neighborhoods, though they share common areas. The subdivision contains a prevalence of two-story homes, that enjoyed wonderful mountain views to the north and open desert vistas to the south.

The segment that lies south of Shaughnessy Road ("Foothills Reserve South") contains 387 subject homes mostly built between 2002 and 2005. Lot sizes are mostly under 10,000 square feet, with homes ranging in size between 1,628 and 3,730 square feet. Some homes have views of South Mountain and some have sweeping views of native desert to the south. Many homes have rear yards that front along natural desert open spaces that are owned by the Association; this is generally perceived as a premium feature by the market. This segment is depicted in the aerial below.

The segment that lies north of Shaughnessy Road ("Foothills Reserve North") generally consists of larger homes (2,237 to 4,220 square feet) on larger lots (most are larger than 10,000 square feet) and most have elevated views of the Sierra Estrella Mountains to the west and southwest, South Mountain to the north and northeast, and sweeping desert views to the south. Foothills Reserve North is mechanically gated for privacy. Home values for the 203 subject homes in this portion of the community are generally much higher than Foothills Reserve South. This segment is depicted in the aerial below.

Valuation Methodology

Before Condition Valuation

The first step in the valuation process is to estimate the value of the 590 single family residences in the Before Condition, as of the effective date of the appraisal, July 3, 2018.

As noted before, the Foothills Reserve Residential Community is essentially divided into 2 separate segments, or neighborhoods, though they share common areas.

The segment that lies south of Shaughnessy Road, or Foothills Reserve South, contains 387 subject homes mostly built between 2002 and 2005. Lot sizes are mostly under 10,000 square feet, with homes ranging in size between 1,628 and 3,730 square feet. Some homes have views of South Mountain and some have sweeping views of native desert to the south. Many homes have rear yards that front along natural desert open spaces that are owned by the Master Association; this is generally perceived as a premium feature by the market. The homes are predominantly two-story homes.

The northern segment, or Foothills Reserve North, lies north of Shaughnessy Road, between 27th and 30th Avenues. The community generally consists of larger homes (2,237 to 4,220 square feet) on larger lots (most are larger than 10,000 square feet) and most have elevated views of the Sierra Estrella Mountains to the west and southwest, South Mountain to the north and northeast, and sweeping desert views to the south. Foothills Reserve North is mechanically gated for privacy. Home values for the 203 subject homes in this portion of the community are generally much higher than Foothills Reserve South.

As set forth earlier, the 590 homes enjoyed certain property rights in the common areas that were taken by ADOT. The common areas provided a beautiful natural desert riparian area, with an architectural paved pathway that the 590 homes enjoyed. The Foothills Reserve subdivision abutted South Mountain to the north and the sparsely developed Gila River Indian Reservation to the south. Pecos Road, which was a four- lane divided road provided access to I-10. But Pecos Road dead-ended at the subject property. These factors contributed to unique vistas to the south that were basically unimpaired by night lights. Also, the lack of traffic gave the subdivision a tranquil and quiet ambience.

Because of the large number of homes, it is impractical to perform an interior inspection of each home; this would be extremely time consuming, highly inconvenient for homeowners, and monetarily unreasonable. In the Zaddack Appraisal, in valuing the Larger Parcel, Zaddack considered the Full Cash Value ("FCV") assessments formulated by the Maricopa County Assessor's Office for 2019, which are predominantly based on mass appraisal computer models relying on actual market sales activity during 2017. Appropriately, Zaddack adjusted these FCVs to better reflect fair market value as of the effective date of value.

However, though formulized in an appropriate manner, the Assessor's FCVs do not consider the condemnation principle that a property's before value must exclude any lesser value caused by the pre-condemnation announcement of the South Mountain Freeway ("condemnation blight").

After Condition Valuation

The next step in the appraisal is to estimate the value of the 590 homes in the After Condition, which is based on the hypothetical condition that the Loop 202 South Mountain Freeway Project is completed as of July 3, 2018. In reality, however, construction of the freeway in the Common Areas did not begin until after July 3, 2018. The freeway did not open until December 21, 2019, and operated for only a few months before the Covid 19 pandemic reduced traffic by as much as 44% according to MS2, a Michigan-based company that provides software development and transportation data management services to transportation agencies throughout North America. Also, shortly after the freeway opened, ADOT reported that it had poorly signed I-10, directing traffic away from the South Mountain Freeway further reducing the traffic flow. Despite these very low traffic volumes, residents in the area have filed numerous complaints, as discussed earlier.

Nevertheless, because the homeowners are limited to this single action to receive damages, I have considered the full utilization of the South Mountain Freeway in calculating damages. At full utilization, ADOT projects heavy vehicular traffic, with substantial truck traffic, including very substantial heavy truck traffic due to the fact that the new freeway will function as a truck by-pass road to take the large semi-truck traffic away from central Phoenix.

According to ADOT, the Loop 202 South Mountain Freeway is forecast to carry about 117,000 vehicles per day within its first year and as many as 190,000 vehicles per day by 2035. This traffic volume is equal to the 2018 level of traffic experienced along Interstate 10 between 51st and 59th Avenues (200,000 vpd) and along Interstate 17 between McDowell & Thomas Roads (188,556 vpd).[11]

This valuation must consider the loss of the easement rights to access and use of the former common areas and the loss of the power of the restrictive covenants to limit use of the common area to open space (part of the common area is now presumed to be a freeway). Further, this valuation is to consider damages due to proximity to the freeway and the loss of the right to have open views and vistas, noise pollution, visual pollution (lights from the freeway and traffic), health issues (from automobile and traffic air pollution) such as asthma and watery eyes.

According to the recorded plats, the parcels within ADOT's acquisition were restricted for Landscape, Drainage & Pedestrian Easement. The areas acquired by ADOT had desert vegetation and a walking path, but no vertical improvements other than a block wall (near the southeast corner of the subdivision). Under the Covenants, Conditions, Restrictions and Easements ("CC&Rs") for Foothills

[11] The Project is planned for only 6 lanes of highway traffic. In the Draft Environmental Impact Statement prepared for the Project, the following statement is made on page 1-11: "Freeways are intentionally designed to handle much higher ADT volumes than arterial streets. Based on lane capacities used in the MAG travel demand model, a typical six-lane arterial street could carry 51,000 vehicles per day (vpd), while a typical six-lane freeway could carry 165,000 vpd." This statement implies that the Project, as currently designed, will not be able to accommodate the 190,000 vpd that is projected by ADOT by 2035, just 15 years after the Project is completed. Thus, it is reasonable to expect that additional freeway lanes will be added and the existing sound wall barriers will be moved further north and closer to the subject homes. In fact, this situation is already occurring in north Phoenix with regard to Loop 101 between Cave Creek Road and 7th Avenue. While it appears that the Project may change in the foreseeable future to accommodate the anticipated demand/usage, this valuation does not consider this possibility; it is mentioned here for informational purposes only.

Reserve, each homeowner within the Foothills Reserve subdivision owned certain rights, including an easement interest in all common areas and the right to restrict that lots within Foothills Reserve be used only for the construction and occupancy of single-family detached dwelling units and typical residential activities incidental thereto (such as private swimming pools, together with common recreational facilities or other areas or amenities, if any).

The subject community is very unique by its nature. First, the community sits at the slopes of South Mountain, with many lots having elevated and sweeping views of the native desert and surrounding mountains. Second, the area was relatively secluded prior to the Project, benefitting from privacy, lack of air, noise and light pollution, and relatively devoid of congestion. Third, a large majority of homes within the community have direct access to the common areas, either through adjacency or a nearby walking path. Fourth, the common areas are relatively wide, much like a golf course fairway, providing privacy (no backyard neighbors) and scenic view corridors. Fifth, the common areas within Foothills Reserve South also serve as a community walking path and gathering spot, in addition to a riparian habitat and natural water drainage course.

Moreover, as noted earlier, the subject homes in the before condition enjoyed wonderful mountain and desert views. And could enjoy the desert's flora and fauna up close, with a stroll through the common areas. Night-time views of the sky, with very little light disturbance, were equally pleasant. These attributes contribute to the before value of the 590 homes.

Valuation literature has discussed the value to residential homes for attractive views and landscaping, some articles stating that home values can be increased by 30% or so. See e.g., Bourassa, Steven C., Martin Hoeshiand Jiam Sun, "What's in a View?" (2004); Sander, Heather and Stephen Polasky, "The Value of Views and Open Space." (proximity to nature increases home values); Damigos, Dimitrius and Fotis Anyfantis (2011) "The Value of View Through the Eyes of Real Estate Experts" (all experts considered views to be a substantial influence on home prices).

In my 35+ years of appraisal experience, I have found that the highest premium paid for residential properties is for elevated views. These value enhancing traits have been substantially diminished by the South Mountain Freeway being located within the Common Areas.

Proximity to the Freeway

There have been numerous articles and studies done with respect to the effects of traffic noise, pollution, and other negative factors on housing prices. Even more studies have been prepared to correlate the effects of mitigation efforts such as sound walls and light deflectors on house values. While some of these studies rely on interviews and opinions, the majority use industry standard applications of regression analysis and statistical sampling. Thus, these studies are considered reliable as to the general impacts that freeways have on residential house values, but only in a general sense since they are predominantly in areas unrelated to the subject's unique location. For brevity, the most relevant of these studies are presented next, with a brief abstract summarizing the results.

> The Effects of Traffic Sound and It Reduction on House Prices (Dana B. Kamerud a Cavin R. von Buseck), 1985 - Sales histories of two residential neighborhoods bordering on an Interstate highway were examined to determine the effect of traffic sound reduction on house prices. Sound levels were reduced in one of the neighborhoods by building a barrier along the highway. The second

neighborhood, which remained unshielded, served as a comparison area. Before the barrier was built in the first neighborhood, sound levels in both neighborhoods were determined primarily by proximity to the highway. Analysis of house prices showed that, in the absence of shielding, houses nearest the highway sold for less than equivalent houses farther away. The magnitude of this highway-proximity effect, measured in percent of house value per decibel of sound gradient, was consistent with similar estimates previously reported in the literature. The proximity effect on prices appears to have persisted long after the barrier was built. Hence, although the barrier reduced the level of traffic sound and annoyance in the shielded neighborhood, there was no evidence that these benefits were capitalized into higher house prices. The results of this study therefore suggest that hedonic price regressions (which are not based on true treatment-control data) may overestimate the potential economic benefits of traffic sound reduction.

The Effect of Noise Barriers on the Market Value of Adjacent Residential Properties (Benoit Julien and Paul Lanoie), 2007 - It is well established that an increase in noise levels leads to a decrease in the price of houses (for a recent survey, see Boardman, et al., 2005), so a reduction in noise should have the converse effect. However, some people have argued that the aesthetic impact of walls, or their impact on luminosity, could lead to reduced property values, especially for houses located very close to the shielded dwelling (Kamerud and von Buseck, 1985). Therefore, altogether, the net effect of a noise barrier on the price of adjacent houses is theoretically ambiguous, and has to be resolved empirically. The positive coefficient of CONSTRUCTION suggested that buyers anticipated an improvement in the situation following the erection of a noise barrier, but the negative coefficient of BARRIER suggested that their expectations were not fulfilled, and the negative aesthetic impact was greater than anticipated. When we consider the net impact of these two variables, we can conclude that there was a decrease of around 6% in the price of adjacent houses in the short run, and 11% in the long run. It seems clear in the territory affected by the wall, and in a recent survey published by the U.S. Department of Transportation (2006b), that the negative effects of noise barriers are not negligible.

The Impact of Traffc Noise on the Values of Single-family Houses (Mats Wilhelmsson), 2000 - Noise pollution was found to have a substantial negative effect on housing values. The existence of noise is a disturbance that is not very well recognized in planning, although a number of surveys in different countries support the notion that the non-existence of silence is one of the highest ranked environmental problems in society. The empirical analysis suggests an average noise discount of 0.6% of the house price per decibel or a total discount of 30% of the price for a house in a noisy location compared with a house in a quiet one.

Valuing Localized Externalities (R.B. Palmquist), 1992 - Examined a relatively small and homogeneous area and concluded that traffic noise is an externality that is very much local. A follow-up study showed an 11% decrease in value for houses on high traffic streets, compared with low traffic streets (Hughes and Sirmans, 1993). They also showed an average reduction of 0.8% in property values per 1,000 annual average daily traffic (AADT). For a typical collector street with 5,000 to 10,000 more trip counts per day than a purely residential street, this would equate to a 5% to 10% reduction in property values, holding all else constant.

Monetary valuation of road noise (Piotrowska, Sylwia & Damian, Łowicki), 2015 - Residential property prices as an indicator of the acoustic climate quality. This study showed that plots in zones with excess noise were 57% cheaper than those in quiet areas.

Highways are a source of air pollution. Pollution comes from emissions from combustion engines, but the bulk of localized pollutants is from particles released from tires on the road ("Particulate Matter,

Aerial View in 2015

Aerial View in 2019

Sound Wall & Buffer Area

Sound Wall & Buffer Area

View From 17012 S 27th Avenue Balcony

Cedarwood Lane (Houses Replaced With Walls)

View of Freeway Lighting From Foothills Reserve South

Freeway Light as Viewed From Interior Street in Foothills Reserve South

View of Freeway Lighting near 27th Avenue & Cedarwood Lane

Freeway Lighting Viewed along Cedarwood Lane

Freeway Lighting Viewed in front of 17012 S 27th Avenue

Based on the published studies and my own research, it is my opinion that ALL of the homes within Foothills Reserve are negatively affected by noise, light and air pollution and by the loss of long-range views to the south and the use and enjoyment of the Common Areas by varying degree. The homes closest to the Project are damaged the most, but even homes in Foothills Reserve North that have direct views to the Project are impacted by light and noise nuisance that were not present in the Before Condition. In fact, when atmospheric conditions are just right (cold temperatures, cloud cover, wind direction, fog, etc.), residents have complained that the freeway noise can be just as loud in the North as it is in the South. In my opinion, at a minimum, home values have been negatively affected on the order of magnitude of 10% to 25% as a result of the project in the After Condition.

In addition, I believe some homes are impacted to a greater degree than others because of their specific location and their level (i.e. single story versus two story). Homes closest to the freeway that are 2-story have bedroom windows facing the freeway and many have 2nd-story porches/balconies that now view the freeway wall that used to view the open desert and Sierra Estrella Mountains. These homes are most affected by noise and light pollution.

These homes are segmented as follows:

For 1-story homes in Foothills Reserve North that have direct visual impact from freeway lighting and vehicle/truck lighting, a 5% additional downward adjustment is applied.

For 2-story homes in Foothills Reserve North that have direct visual impact from freeway lighting and vehicle/truck lighting, a 10% additional downward adjustment is applied.

For 1-story homes in Foothills Reserve South located along the west side of Chandler Boulevard, a 10% additional downward adjustment is applied.

For 2-story homes in Foothills Reserve South located along the west side of Chandler Boulevard, a 15% additional downward adjustment is applied.

For 1-story homes in Foothills Reserve South that have direct visual blight with either the sound wall barrier or freeway lighting (visual blight) and are located within 1,000 feet of the Project (area of greater noise nuisance), a 15% additional downward adjustment is applied.

For 2-story homes in Foothills Reserve South that have direct visual blight with either the sound wall barrier or freeway lighting (visual blight) and/or are located within 1,000 feet of the Project (area of greater noise nuisance), a 20% additional downward adjustment is applied.

For the home located at 17012 S 27th Avenue, an additional downward adjustment of 25% is applied due to its extreme visual blight, noise and air pollution issues; this home is located closest to the freeway. In the Before Condition, this home was very desirable because it was adjacent to the riparian habitat portion of the common area that was taken by ADOT. In the After Condition, the home may be the least desirable within all of Foothills Reserve.

The final adjustment consideration in the After Condition is for the loss of common area and control. During my inspections, I visually observed many individuals and couples walking through the common areas along the walking paths. This is a quality amenity for the entire community. The walking path was disrupted by ADOT due to the partial taking, but has since been reconnected by the Association. Still, the loss of about 6 acres of riparian habitat where residents could find shade and enjoy the trees and wildlife has logically minimized the value of this amenity. Although the entire subdivision suffers from the loss of the Common Areas, it is my opinion that the loss impacts those homes closest to the freeway the most. Thus, it is my opinion that 2% and 4% downward adjustments to the Before Condition market values for each home in Foothills Reserve North and Foothills Reserve South, respectively, are appropriate to recognize this final severance damage item.

The following table summarizes the adjustments applied to each of the 590 Remainder Parcels, concluding to an After Condition market value opinion.

Severance Damages Conclusion

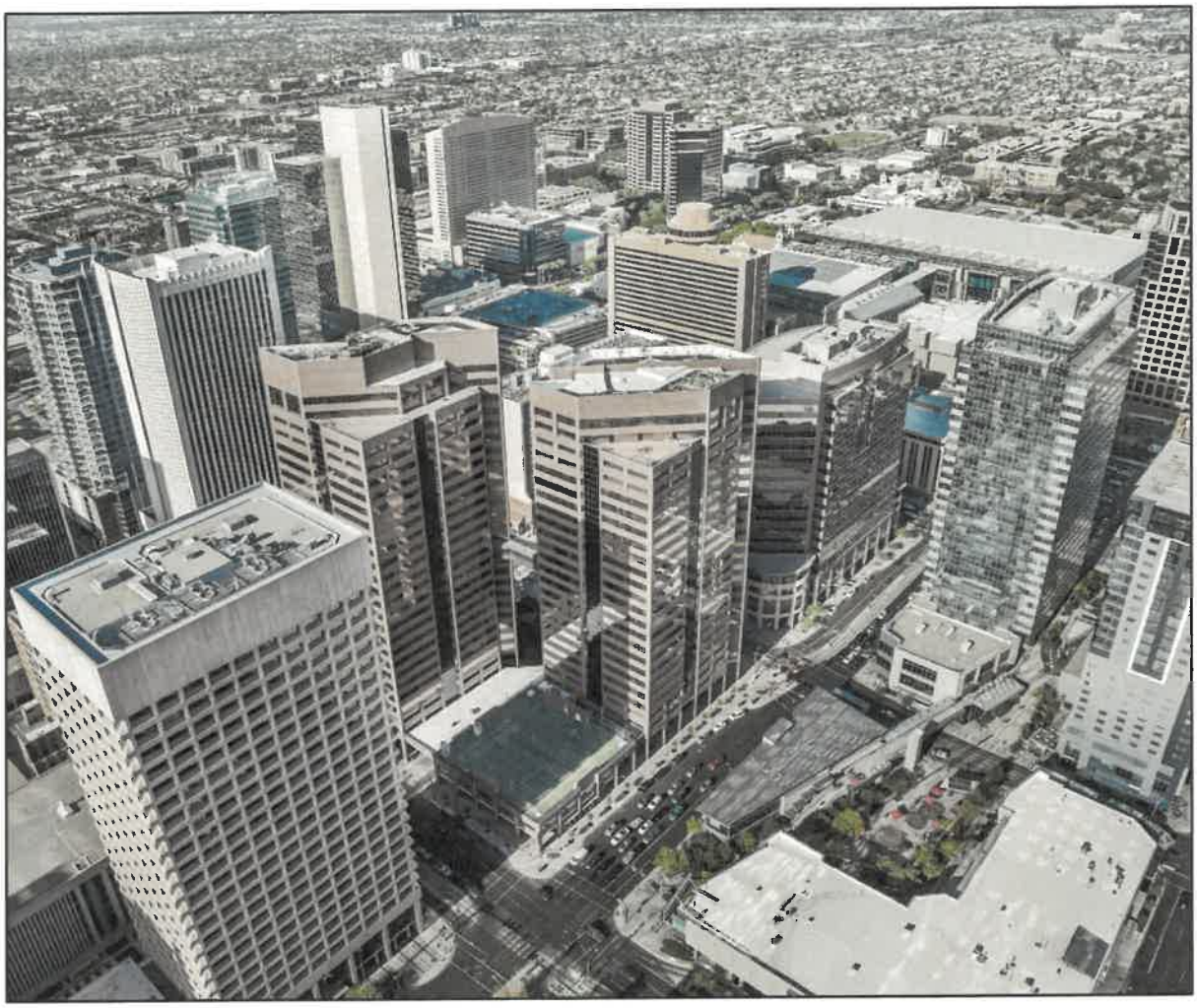
As just discussed, the date of taking (effective date of value) in this case is July 3, 2018. We presented our opinion that the 590 homes had suffered substantial value depression prior to the date of taking in anticipation of the construction of the new freeway. Now that the freeway has been constructed, the situation is quite a bit worse than had been imagined. Particularly, the light pollution is remarkably bad both from vehicles travelling on the freeway, but also from the freeway lighting system that has the effect of stadium lights shining into the subdivision every night. The ponds adjacent to the freeway constructed within the Common Areas are unsightly as well. And ADOT elected not to build sound walls either to the west or east of the subdivision, which makes for noise tunnels into the subdivision. The homeowners have complained that the noise is particularly bad in the early morning hours, which prevents them from opening their windows when the weather is nice. Sitting in the backyard has become unpleasant in many of the homes. And the views went from beautiful in the before condition to very poor in the after condition. The homeowners have also complained that they and their children have suffered from watery eyes and more respiratory issues they believed caused by the increase in vehicular pollution.

Severance damages, in this case as instructed by the Court, is the difference between the market value of the Larger Parcel in the Before Condition (total of $310,706,886 for all 590 homes) and the market value of the Remainder Parcel in the After Condition (total of $232,997,649 for all 590 homes). The specific analysis and amount for each home is summarized on the following table. In total, severance damages for the Remainder Parcels are $77,709,237 .

As a test of reasonableness for my analysis, I compare the total Before Condition values in the Zaddack appraisal, which in my opinion are project influenced and reflective of significant project depression in anticipation of the construction of the Project, to the After Condition values in this analysis. In total, the Before Condition values in the Zaddack appraisal are $245,669,634 as compared to the After Condition values of $232,997,649 in this analysis. The difference is roughly 5.2%, which represents the additional discount for the negative influences of the Project since completion of construction.

In fact, the average discount from the Before Condition values for the Foothills Reserve North homes is 13.6% while the average discount from the Before Condition values for the Foothills Reserve South homes is 32.5%. This is compared to the previously discussed measured DECREASE in Assessor FCVs for Foothills Reserve North of 8.3% and 29.4% for Foothills Reserve South between 2008 and 2019. This implies that a significantly large portion of the damages were already being reflected in the market as of the effective date of value and prior to the completion of the Project.

ZADDACK VALUATION ADVISORS, INC.



1 W Deer Valley Rd, Suite 104, Phoenix, AZ 85027 | 602-317-5648 | www.zvaonline.com

Appraisal Report:	Prepared for:
TOTAL COMPENSATION Foothills Reserve Homeowners Chandler Blvd (27th Ave) - 30th Ln, North of Pecos Rd Phoenix, Arizona Case No.: CV2017-010359	Michelle Burton Assistant Attorney General Office of the Attorney General 15 S 15th Ave Phoenix, Arizona 85007

ZADDACK VALUATION ADVISORS, INC.

In keeping with Judge Thomason's instructions, I have completed an appraisal of the 590 individual homeowner's properties assuming The South Mountain SR 202 Extension did not exist (i.e. the Before Condition) and with the South Mountain SR 202 Extension open (i.e. the After Condition).

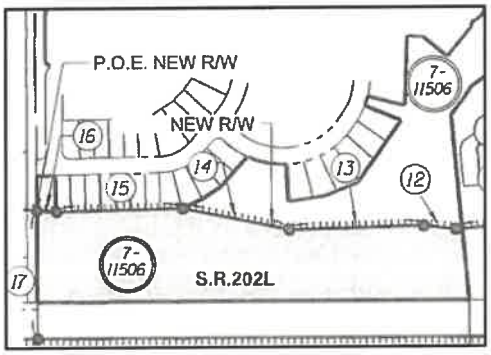
The opinions of value stated herein, as well as every other element of this appraisal, are qualified in their entirety by the Contingent and Limiting Conditions set forth in the addenda, as well as the Hypothetical Condition & Extraordinary Assumptions detailed on pages 11 – 12 of the report, which are an integral part of the appraisal.

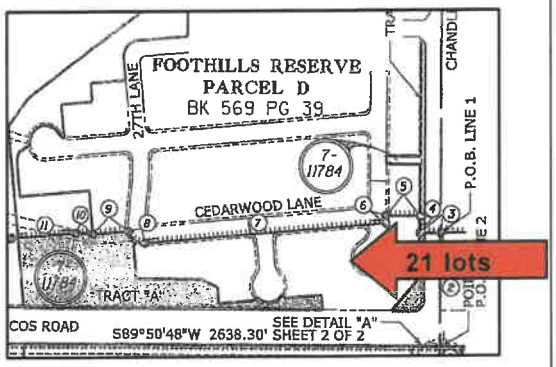
INTENDED USERS

The client is the Arizona Department of Transportation (ADOT). As such, the intended users are ADOT and its agents. I also understand that a copy of this appraisal will be provided to the property owner(s) and their agents. My work product is intended for the client's use only. Any reproduction, distribution, or reference to our conclusions beyond the scope of your intended use should be approved in advance by Zaddack Valuation Advisors, Inc.

A certification starts on the next page.

The approximate location of the common area and the 21 parcels (lots) improved with single-family residences acquired by ADOT are depicted below:





Common Area Acquired by ADOT – Looking North
Photo Date Mar-2015 Prior to start of Freeway Construction

Finally, at my request, the State of Arizona Attorney General's Office contracted with Belfiore Real Estate Consulting (Jim Belfiore) to assist me in identifying the homeowners within the Foothills Reserve who may have suffered a loss of value due to freeway noise, change in view, freeway light, loss of common area space/ views/ amenities, and to assist me in quantifying the loss of value. I have incorporated Mr. Sola's observations & conclusions and Mr. Belfiore's observations & conclusions in arriving at my opinion of the market value of the Remainder Parcels in the After Condition.

SPECIAL APPRAISAL INSTRUCTIONS

The 590 individual homeowners, who are members of the Association, have asserted claims for compensation for the loss of their interest in the common area, including severance damages to their lots as a result of ADOTs Acquisitions.

Under the Covenants, Conditions, Restrictions and Easements ("CC&Rs) for Foothills Reserve, each homeowner with the Foothills Reserve subdivision. On June 28, 2019 the Honorable Timothy J. Thomason issued a Minute Entry following Oral Argument on State's Motions for Allowable Damages and Changes in Traffic flow and the Homeowner's Motions for Summary Judgement on Severance Damages and Taking of Private Easement. Based on my reading of the Minute Entry, Judge Thomason has ruled the damages owed to the homeowners should be computed based on a before and after analysis. The appraisal is to evaluate the reduction in value, if any, caused by three (3) differences in the Before and After Condition:

1. Twenty-one (21) homes replaced by a freeway;
2. Common area replaced by a freeway; and,
3. A 10.18± acre reduction in the overall amount of common area.

In keeping with Judge Thomason's instructions, I have completed an appraisal of the homeowner's properties assuming the South Mountain SR 202 Extension did not exist (i.e. the Before Condition) and with the South Mountain SR 202 Extension open (i.e. the After Condition).

REMAINDER PARCEL VALUATION

The next step in the appraisal is to estimate the values of the Subject Remainder Parcel in the After Condition. Per Judge Thomason's instructions, the damage analysis is to focus on the two (2) "lost"' easement rights and restrictive covenants; specifically, 1) the right to access and use the common area; and, 2) the right to limit use of the common area to open space.

Additionally, the proximity to the freeway has also be considered in estimating the market value of the Remainder Parcels in the After Condition. The following table summarizes the common area within Foothills Reserve in the Before Condition and the portions of the common area acquired by ADOT:

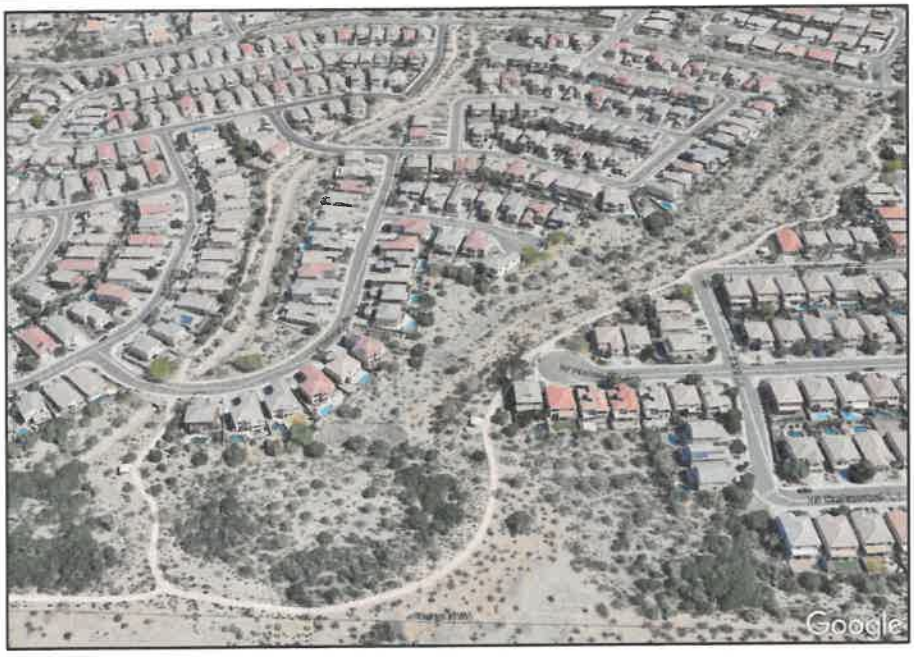
BEFORE CONDITION COMMON AREA - NORTH OF PECOS RD ALIGNMENT

Parcel/Tract	Description (Per Plat)	Size (AC)	Within ADOT Acquisition
A-1 (NW) - MCR 549-48			
Tract A	Drainage/Open Space	0.900	No
Tract B	Drainage/Open Space	1.890	No
Tract C	Drainage/Open Space	4.180	No
Tract D	Drainage/Open Space	0.002	No
Tract E	Drainage/Open Space	0.910	No
Tract F	Drainage/Open Space	0.340	No
Tract G	Drainage/Open Space	0.410	No
Tract H	Drainage/Open Space	2.790	No
Tract J	Undevelopable/Open Space	80.170	No
		91.592	
A-2 (NE) - MCR 549-49			
Tract A	Drainage/Open Space	4.010	No
Tract B	Drainage/Open Space	4.700	No
Tract D	Drainage/Open Space	1.350	No
Tract E	Drainage/Open Space	3.400	No
Tract G	Undevelopable/Open Space	23.590	No
		37.050	No
C (SW) - MCR 552-38			
Tract A	All Tracts Designated as Landscape, Drainage & Pedestrian Access Easement	1.685	No
Tract B		2.224	No
Tract C		2.679	No
Tract D		3.314	No
Tract E		16.412	Yes - 7.35 Acres
		26.314	
D (SE) - MCR 569-39			
Tract A	All Tracts Designated as Landscape, Drainage & Pedestrian Access Easement	7.8620	Yes - 2.83 Acres
Tract B		0.4380	No
Tract C		0.6410	No
		8.9410	
Total Common Area		163.897	ADOT Aquisition = 10.2 AC (6.2%)

As discussed in the Part Taken section of this report, the areas acquired by ADOT had unmanaged desert vegetation and a walking path, but no vertical improvements other than a block wall (near the southeast corner of the subdivision). Collectively, only 6.2% of the common area within Foothills Reserve was acquired by ADOT.

The following aerial photographs depict the common area within the portions of Foothills Reserve improved with residences prior to ADOT's acquisition for which the 590 remaining homeowners owned an easement right.

Before Condition - Common Area within Parcels A-1 & A-2 (North of Shaughnessey Rd)
Note – No Walking Paths



Before Condition - Common Area within Parcels C & D (South of Shaughnessey Rd)
Note – Walking Paths Connect Two (2) washes

No portion of the common area situated within Parcels A-1 & A-2 (north of Shaughnessey Rd) was acquired by ADOT. As such, no rights were lost to access and use the common area nor were any rights lost to limit use of the common area situated within Parcels A-1 or A-2 as the result of ADOT's acquisition or the building of the freeway.

The following aerial photograph depicts the common area situated within Parcels C & D (south of Shaughnessey Rd) following ADOT's acquisition of common area:

After Condition - Common Area within Parcels C & D (South of Shaughnessey Rd)
Note – Connection of Walking Paths is within ADOT Acquisition Area

As shown, ADOT's acquisition area included the portion of the walking path that connected the walking paths within the two (2) washes. It is my understanding the contractors are constructing a new section of walking path on the Remainder Parcel which will reconnect the walking path between the two (2) washes on the Remainder Parcel.

All 590 remaining homeowners lost the right to use the common area as well as the right to restrict the 21 lots that were part of the ADOT Acquisition to a single-family residence. As a practical matter, the common area within the ADOT Acquisition was unmanaged desert vegetation.

However, the homeowners whose lots abutted to the common area acquired by ADOT have also lost their view of open space and now have a view of the sound wall that was built along the north side of the freeway. Photographs of the sound wall follow on the next page.

Looking South along 29th Dr
from within Parcel A-1

Looking South along 29th Dr
from within Parcel A-2

Looking Southeast along Coleman St
from within Parcel C

Looking West along Cedarwood Ln
From within Parcel D

At my request, the State of Arizona Attorney General's office contracted with Belfiore Real Estate Consulting ("Belfiore") to assist me in identifying the homes within the Foothills Reserve subdivision who potentially suffered a loss of value and measuring the loss in value due to:

- Loss of common area space / views / amenities;
- Change in view;
- Freeway noise; and,
- Freeway light

Mr. Belfiore and I walked the entire subdivision on November 19, 2019 during which time we took photographs of views toward Loop 202 from various points within the subdivision. Following our inspection, we identified other subdivisions abutting freeways throughout Metropolitan Phoenix. The Covenants (i.e. the covenants, conditions, restrictions, assessments, charges, servitudes, liens, reservations and easements set forth in the CCRs) run with the land. As such, while the loss of any rights associated with the CCRs due to the ADOT Acquisition will be reflected in the sale price of the residence, the value loss is really a loss in land (lot) value irrespective of the type or size of single-family residence constructed on the lot.

Theoretically, since the 590 individual Remainder Parcels are improved with single-family residences that were approximately 9 – 16 years old on the effective date of the appraisal the measurement of any potential loss in value associated with freeway proximity will be apparent in the analysis of house prices for resale homes near freeways compared with house prices for resale homes farther from freeways. However, resale home transactions are limited in quantity and are typically scattered throughout subdivisions. Furthermore, many factors other than freeway proximity affect resale prices within a subdivision; most notably, age, overall condition, date of the most recent remodel/upgrade and seller motivation.

For these reasons, I requested that Mr. Belfiore focus on new home subdivisions near freeways in throughout Metropolitan Phoenix. As Mr. Belfiore noted in his report, new homebuilders are sophisticated in pricing positive and negative uses near the lots on which the homebuilder intends to build and sell homes. Homebuilders assign specific premiums for positive attributes such as lot depth, corner lot, adjacency to open space and mountain or city light views. Similarly, homebuilders take into consideration freeway proximity when pricing lots. Any negative effect on value due to freeway proximity is typically limited to the first row or two rows of homes adjacent to the freeway. For example, Fulton Homes President Norm Nichols, reported Fulton Homes has developed several subdivisions adjacent to a freeway as well as adjacent to high voltage power lines. He stated other than reducing the price of the first row of homes that back-up to the freeway, adjacency to a freeway had no measurable effect on pricing or absorption.

At my request, Mr. Belfiore collected lot discount / premium data from communities adjacent to freeways including Promontory at Foothills West, Lofts at Haven and Tavera Vista. Promontory at Foothills West is a subdivision Taylor Morrison is developing located less than ¾ mile west of Foothills Reserve and which, like Foothills Reserve, is adjacent to the South Mountain SR 202 Extension. I also inspected the houses being built within Promontory at Foothills West.

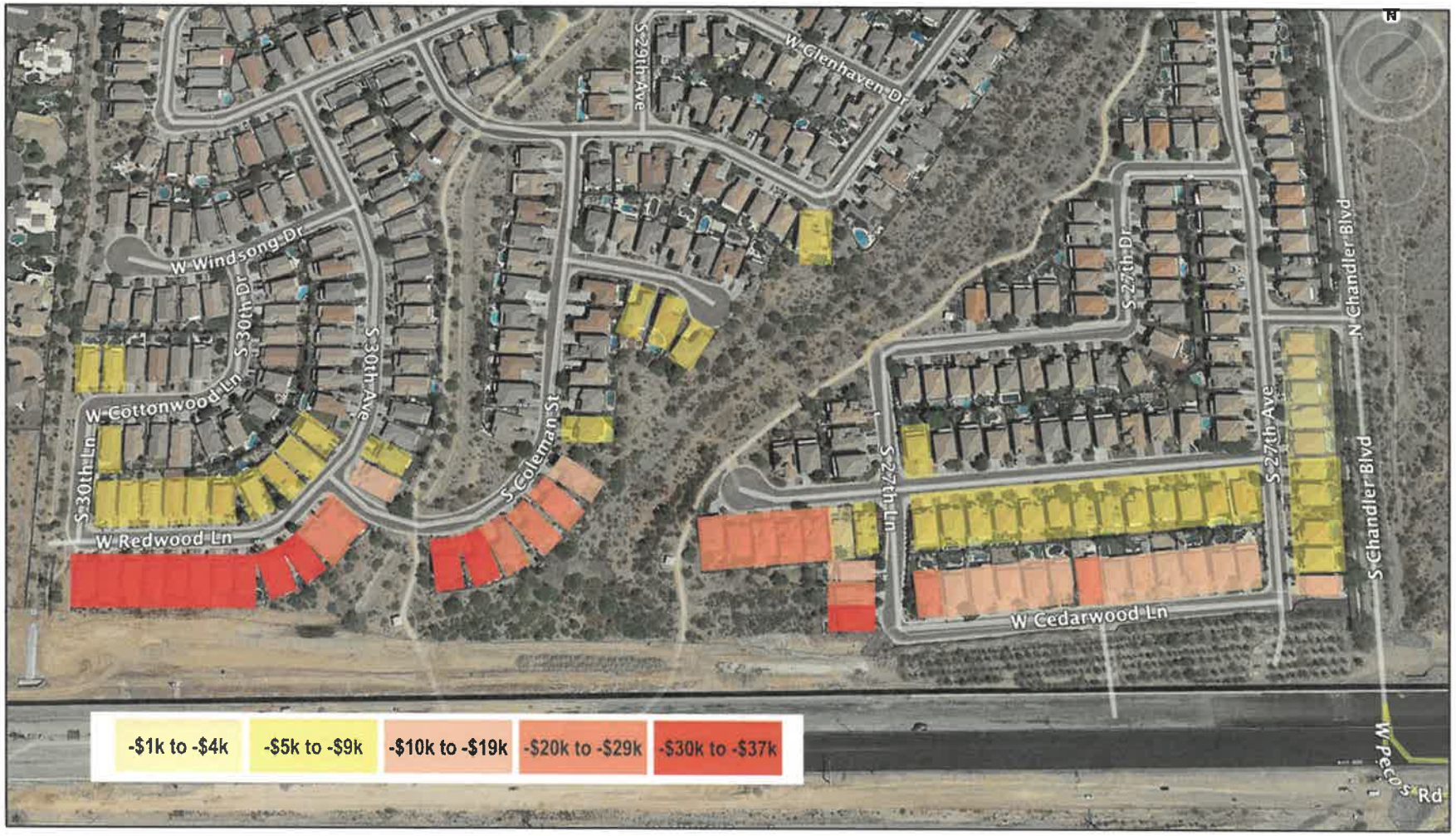
The freeway is elevated and visible from many of the lots within this subdivision due to the elevation of the freeway and due to rising west to east elevation of lots within the subdivision. Taylor Morrison marketed the lots closest to the freeway sound wall with no lot premium or discount but did attempt to mitigate the effect of the freeway with deeper than normal lots, providing homebuyers with slightly larger backyards than typical lots.

Lofts at Haven and Tavera Vista are subdivisions adjacent to the loop 202/San Tan Freeway in Chandler and Mesa being developed by Mattamy Homes. No discounts were offered for lots adjacent to the freeway sound wall. Rather, at Lofts at Haven, Mattamy Homes designed these lots to have an additional 20 - 25 feet of backyard depth and marketed these lots with average lot premiums of $3,500. At Tavera Vista, rather than increase the lot depth, Mattamy Homes installed a narrow common area landscape buffer between backyards of the eight (8) lots closest to the freeway and the freeway sound wall and marketed these lots with average premium of $1,500.

As to freeway noise, the Final Noise Report (Pecos Segment) prepared for ADOT by Connect 202 Partners concluded the sound wall constructed along the north side of the South Mountain SR 202 Extension will provide noise attenuation with at least 5 dBA noise reduction for 96 developed properties and could reduce projected unmitigated noise levels by at least 7 dBA for majority of the first row properties. Tony Sola, Acoustical Consulting Service, reviewed the Connect 202 Partners Final Noise Report and concluded, with the sound wall in place, all 590 single-family lots in the Foothills Reserve subdivision comply with both the ADOT/FHWA and HUD noise standards. Generally, home values near freeways built with rubberized asphalt and sound walls are not negatively affected by freeway noise. As such, freeway noise at the levels anticipated within the Foothills Reserve subdivision is not a factor that should negatively affect home values within the subdivision.

Based on my inspection of the 590 remaining lots, the lots (and the single-family residences constructed on each lot) situated closest to the freeway improvements have experienced a loss in value as a result of loss of open space, change in view and increased backyard light caused by the freeway. Rather than looking at desert landscaping or a home across the street, homeowners closest to the freeway now look at a 20± foot tall sound wall and some homeowners will have dimly illuminated backyards at night rather than near darkness. This loss is limited to the first couple of rows of houses which have direct and close-up views of the sound wall. Additionally, a few houses farther from the freeway with backyards that face the freeway also have experienced a decrease in value. The exhibits on the following pages depict the lots I believe have experienced a loss in value in the After Condition.

AFTER ANALYSIS – VALUE LOSS



TOTAL COMPENSATION

The tables on the following pages summarize my opinion of the Total Compensation to each of the 85 property owners who have suffered a loss in value as a result of the ADOT acquisition. The other 505 property owners within Foothills Reserve have lost certain ownership rights defined in the CCRs but, in my opinion, their residence is worth the same in the After Condition as it was in the Before Condition.

FOOTHILLS RESERVE VALUE CONCLUSION COMPARISON			
NORTH			
Appraiser	**Before**	**After**	**Damages**
Zaddack	$114,345,000	$114,345,000	$0
Dominick	$124,694,656	$107,643,731	$17,050,926
SOUTH			
Appraiser	**Before**	**After**	**Damages**
Zaddack	$131,710,446	$130,501,446	$1,209,000
Dominick	$186,012,229	$125,353,918	$60,658,311
TOTAL			
Appraiser	**Before**	**After**	**Damages**
Zaddack	$246,055,446	$244,846,446	$1,209,000
Dominick	$310,706,886	$232,997,649	$77,709,237

From: Jeff Gross
To: Dale Zeitlin
Subject: Honsberger Holdings Rule 408 Communication
Date: Friday, January 5, 2024 12:45:28 PM
Attachments: image001.png

Dale, thank you for your counteroffer. APS is willing to make one more attempt to settle this matter short of going forward with the litigation. First, let me address some of your comments.

Date of the comps. We disagree with your assertion that the date of the comps is irrelevant because we don't have a date of value. Although appraisals may or may not have to be updated if this case goes to trial, APS is offering fair market value today, so dates of the comps are relevant. And most of the comps used by ATI were 2022 and 2023 sales, which may still be relevant at the time of trial.

Location. While areas of the west valley may be "red hot" for certain types of properties, such as industrial, we disagree that this type of retail/office use in Goodyear falls within one of those categories. In any case, five of the six comparable sales ATI used were on or just off Van Buren within a short distance from the subject property, and the sixth was still very close, so if this area is red hot it is reflected in those sales.

Damages. The article I referenced presents empirical evidence that power lines have no impact on the value of commercial property. The article is relevant because, as you know, an expert witness may rely on it. I'm sure your appraiser will find severance damages, but you haven't provided any evidence for them, and one anecdotal case is not persuasive. Bob Kerrick and I tried a case against Scottsdale where the city took the position that the value of the residential property being condemned (a total take) should be reduced due to adjacent 500kV power lines. The jury verdict was heavily in our favor. We talked to the jury afterwards and they found that the power lines had no impact on value. Commercial property is not in any better position to claim severance damages. I'd also add, as you know, that the Court of Appeals in *State v. Foothills Reserve Master Owners Assoc., Inc*. recently interpreted the severance damages statute, ARS 12-1122(A)(2), to apply only when a "parcel" of land is condemned, not an easement. So severance damages may not be available here as a matter of law.

Pole/Wires. I don't understand your argument that the 230kV poles and lines will block visibility. There already are poles and lines along Van Buren. Honsberger will have a pole at the boundary of the property, but it will hardly block visibility any more than the pole and lines that already exist:

As for the size of the easement, it will not have any effect on the use of the property regardless of its size. There are no severance damages.

To settle this case now, APS will pay Honsberger $171,706. This offer will remain open until January 12, 2024. This is the last offer APS will make without further litigation. If you do not accept this settlement offer, please file your Answer by January 19, 2024. Jeff.

Jeffrey D. Gross
Berry Riddell LLC
6750 E. Camelback Rd. #100
Scottsdale, AZ 85251
(480) 682-3921