ARIZONA SUPREME COURT

State of Arizona, et al., Plaintiff/Appellant, v. Foothills Reserve Master Owners Association, Inc., Defendant/Appellee.	No. CV-23-0292-PR Court of Appeals No. 1 CA-CV 22-0371 Maricopa County Superior Court No. CV2017-010359

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

The State opposes the Petition ("Pet.") seeking review of the court of appeals' opinion in *State v. Foothills Reserve Master Owners Association, Inc.*, 1 CA-CV 22-0371 (Dec. 7, 2023) ("Opinion" or "Op."). The case arises from the State's condemnation of two common area parcels ("Common Areas") in a subdivision for a freeway extension. The subdivision's homeowners' association, the Foothills Reserve Master Owners Association, Inc. ("HOA"), owned the Common Areas. (I.R. 1.) The subdivision's homeowners ("Homeowners") each had easement interests in the Common Areas. (I.R. 168, ¶¶ 8, 10.) The State did not condemn Homeowners' homes or any of Homeowners' property interests other than their easement interests in the Common Areas. (I.R. 1.)

The State compensated the HOA for its complete taking of the Common Areas by paying it the areas' fair market value. (I.R. 90.) It also entered into a stipulated Judgment to compensate Homeowners for extinguishing their easement interests in the Common Areas by paying them the difference in their homes' value with the easements and without them. (I.R. 342; *see* A.R.S. § 12-1122(A)(1), (C) [governing the valuation of condemned properties and interests].) Homeowners believed, however, that they were also entitled to proximity damages, a type of severance damage, for the loss in value that their homes suffered because of their proximity to the new freeway. (I.R. 167 at 10.) Under A.R.S. § 12-1122(A)(2),

"[i]f the property sought to be condemned constitutes only a part of a larger parcel," a judge or jury in a condemnation action must determine "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 by reason of the construction of the improvement that precipitated the condemnation in the manner that the plaintiff has proposed.

The Opinion reasoned that because the word "parcel" means a parcel of land, "the property sought to be condemned" must be a smaller parcel of land for severance damages to be available under the statute. Op. ¶¶ 18-21. It held that Homeowners were not entitled to severance damages because their easement interests were not parcels of land. *Id.* ¶ 21. It also rejected Homeowners' contention that they were entitled to severance damages because the Common Areas were "a larger parcel" of land from which their homes had been severed. *Id.* ¶ 23. The Opinion explained that severance damages are available only if "the claimant owns the larger parcel from which a smaller parcel is condemned." *Id.* Since the HOA owned the Common Areas and Homeowners had no ownership or title interests but only easement interests in them, the Opinion held that they were not entitled to severance damages on that basis. *Id.* Because the Opinion comports with the statute's plain language as well as with national and Arizona eminent domain jurisprudence, this Court should deny review.

ISSUES PRESENTED FOR REVIEW

1. Did the Opinion correctly determine that severance damages are available under A.R.S. § 12-1122(A)(2) only when a physical parcel of land is taken from a larger parcel of land and only when the claimant owns the larger parcel of land from which a smaller parcel is taken?

2. Did Homeowners receive just compensation?

MATERIAL FACTS

The HOA represented the 589 Homeowners in pursuing their compensation claims in the condemnation action. (I.R. 156.) Before obtaining appraisals for trial, the parties filed motions concerning the types of damages that would be recoverable. (I.R. 162, 167.) Homeowners claimed nonexclusive positive easements to use and enjoy the Common Areas (I.R. 168, ¶ 8) and negative easements (restrictive covenants) requiring that the Common Areas would remain open space and that the HOA would own and maintain them for landscaping and maintenance purposes (*id.* ¶ 10).

After cross-motions for summary judgment (I.R. 162, 167-69, 172, 176-77, 185-88, 196-97), the trial court ruled that Homeowners were entitled to proximity damages under A.R.S. § 12-1122(A)(2) in addition to the difference in their homes' value with and without the easements to which the State had agreed they were entitled. (I.R. 202 at 9, 11.) The court subsequently entered a Judgment that

awarded Homeowners a stipulated total of six million dollars for the difference in their homes' values with and without the easements. (*See* I.R. 342 at 4-5.) The Judgment preserved the State's right to appeal the proximity damages ruling and provided that if the State was unsuccessful on appeal, it would pay Homeowners an additional twelve million dollars for proximity damages. (*Id.* at 5.)

The court of appeals determined that Homeowners were not eligible for proximity damages under A.R.S. § 12-1122(A)(2) (Op. ¶¶ 18-23), and Homeowners sought review.

REASONS TO DENY REVIEW

I. The Opinion Correctly Interpreted and Applied Section 12-1122(A)(2).

A. The Opinion Correctly Interpreted the Statute's Plain Language.

Homeowners note that section 12-1122(A)(2) uses the word "property" and that their easements are property. (Pet. at 2-4, 7, 10, 14.) They erroneously maintain that by rejecting their severance damages claim for their condemned easements under that provision, the Opinion necessarily held that easements are not property and that their taking does not require just compensation. (*See* Pet. at 1-3, 6-14.) The Opinion instead explicitly recognized that easements are property and that the State therefore cannot take them under its eminent domain powers without justly compensating their owners for their loss. Op. ¶ 12.

Homeowners apparently erroneously believe that every statutory provision

that authorizes damages for the State's taking of "property" in a condemnation action must authorize damages for any and all types of property that the State could possibly take in such an action. (*See* Pet. at 6-10.) The State and Federal Constitutions require the State to provide just compensation for its takings. Ariz. Const. art. II, § 17; U.S. Const. amend. V. They do not preclude the Legislature from enacting statutory provisions authorizing damages only for the taking of particular types of property in specific situations as long as the statutory scheme as a whole ensures just compensation for all takings. As the Opinion noted, Homeowners did not raise any constitutional challenge to Arizona's eminent domain laws in the superior court or on appeal. Op. ¶ 24.

Section 12-1122(A)(2), which concerns severance damages, applies "[i]f the property sought to be condemned constitutes only a part of a larger parcel" and provides for damages accruing to "the portion not sought to be condemned by reason of its severance from the portion sought to be condemned." The Opinion reasoned that if the property sought to be condemned must be part of a larger parcel, then the property sought to be condemned must itself be a smaller parcel. Op. ¶ 19. It then looked to other Arizona eminent domain statutes and to respected dictionaries in determining that the word "parcel" means a parcel of land. *Id.* ¶¶ 19-20. Although Homeowners assert that the Opinion departed from mandatory statutory interpretation principles (Pet. at 1, 6, 10), it actually gave the word

"parcel" its ordinary meaning in accordance with long-accepted principles. *See* A.R.S. § 1-213 ("Words and phrases shall be construed according to the common and approved use of the language."); *State ex rel. Larson v. Farley*, 106 Ariz. 119, 122 (1970) (stating that statutes that relate to the same subject or have the same general purpose should be read in conjunction with other related statutes "as though they constitute[] one law"); *State ex rel. Morrison v. Nabours*, 79 Ariz. 240, 245 (1955) ("In determining what the ordinary meaning of a word is no better source and authority is to be found than reference to a recognized dictionary.").

The Opinion logically concluded that since the property sought to be condemned must be part of a larger parcel of land, it must be a smaller parcel of land. Op. ¶¶ 19-20. This was consistent with *City of Scottsdale v. Eller Outdoor Advertising Co. of Ariz.*, 119 Ariz. 86, 93 (App. 1978), in which the court of appeals had previously recognized that under section 12-1122, "severance damages are only collectible for the partial taking of a whole parcel of real property."

Homeowners contend that the court of appeals reached the opposite result in *State v. Foothills Reserve Master Homeowners Association, Inc.*, No. I CA-CV 22-0216 (March 7, 2023) ("*Foothills*"). (Pet. at 2-3.) That case involved the Hankes, who owned a home in the subdivision at issue here, but who wanted to represent themselves in the condemnation action. *Foothills* at 2, ¶ 4. After the trial court ruled that severance damages were proper, the State moved for summary judgment

asking that the Hankes be awarded severance damages of $5,000. *Id.* at 2-3, ¶¶ 5-6. The State's appraiser followed the trial judge's ruling allowing severance damages in reaching the $5,000 amount (I.R. 202 at 10-11; I.R. 296 [Ex. 1, ¶ 10]), and the State argued that the Hankes had presented no damages evidence (I.R. 300). The State did not argue that they were not entitled to severance damages in seeking summary judgment because their damages were de minimis. (*See id.*)

The trial court granted the State summary judgment. *Foothills* at 3, ¶ 8. The Hankes appealed, and the State did not cross-appeal. *Id.* The Hankes argued on appeal that the trial court had erred in limiting their damages to severance damages. *Id.* at 6, ¶ 18. The State did not raise on appeal in the Hankes' case the argument that severance damages in the form of proximity damages were improper that it had made in the trial court and had preserved for appeal with respect to Homeowners. *See id.* at 4-9, ¶¶ 10-25. Because the proximity damages issue was not before the court, the decision in that case does not conflict with the Opinion on that issue. Moreover, the decision is a memorandum decision, which under Supreme Court Rule 111(c)(1)(C) lacks precedential value and should not be cited even for persuasive value on the propriety of awarding severance damages in the circumstances here because the Opinion adequately addresses that issue. The *Foothills* decision therefore does not create a conflict between court of appeals' opinions that this Court needs to resolve.

B. The Opinion Correctly Held that Homeowners Were Not Entitled to Proximity Damages.

Homeowners erroneously maintain that the State conceded that their homes suffered proximity damages, which are a form of severance damages. (Pet. at 1, 5-6.) They also erroneously maintain that the Opinion impermissibly enlarged the issue before it to one of severance damages generally, which it contends that the State waived, instead of limiting it to proximity damages. (Pet. at 6 n.1.) The State has consistently taken the position throughout the proceedings that Homeowners were not entitled to any severance damages, including proximity damages. (*See* I.R. 162, 172, 176, 197.)

Homeowners also claim that the State's appraiser agreed that their homes had suffered severance damages. (Pet. at 5-6.) The appraiser complied with the trial court's ruling allowing severance damages and considered proximity to the freeway as a potential source of damages (I.R. 202 at 10-11; I.R. 296 [Ex. 1, ¶ 10]), but that was not a concession by the State that Homeowners were legally entitled to proximity damages. The stipulated Judgment (I.R. 342 at 5) preserved the State's right to appeal the proximity damages issue. Moreover, claimants are entitled to severance damages of any type only if section 12-1122(A)(2)'s requirements are met. Since the State argued and the Opinion held that Homeowners did not meet those requirements (Op. ¶¶ 15-23), any distinction between proximity damages and severance damages generally is irrelevant.

The Opinion correctly determined that Homeowners were not entitled to severance damages because although their easements were property, they were not parcels of land. (Op. ¶¶ 12, 21.) In rejecting Homeowners' assertion that they were entitled to severance damages because the Common Areas were "a larger parcel" of land from which their homes had been severed, the Opinion correctly noted that severance damages are available only when the claimant owns the larger parcel of land, which Homeowners did not. (Op. ¶ 23 [citing *State ex rel. Miller v. Wells Fargo Bank of Ariz., N.A.*, 194 Ariz. 126, 129-30, ¶¶ 16-17 (App. 1998)].)

The Opinion is also correct because as Homeowners acknowledge (Pet. at 3, 8), section 12-1122(A)(2)'s plain language establishes that it applies only where a partial taking has occurred. As a result of the total taking of the Common Areas from the HOA, Homeowners' easement interests were extinguished. Although Homeowners apparently believe that they are entitled to severance damages because their separate and distinct home lots (which the State did not condemn) are somehow remnants of the easements that were taken, they are mistaken. *Eller Outdoor Advert. Co.*, 119 Ariz. at 93 ("[S]everance damages are only collectible for the partial taking of a whole parcel of real property.").

II. Homeowners Received Just Compensation.

Homeowners mistakenly assert that the Opinion denied them just compensation for their condemned easement interests. (Pet. at 1, 5 n.1, 6, 14.)

This Court has recognized that section 12-1122 provides for two separate elements of just compensation damages in condemnation cases—valuation damages under section 12-1122(A)(1) and severance damages under section 12-1122(A)(2). *Suffield v. State ex rel. Morrison*, 92 Ariz. 152, 155 (1962). Section 12-1122(A)(1) authorizes damages for the "[t]he value of the property sought to be condemned." Although Homeowners characterize the compensation to which they stipulated as severance damages (Pet. at 5), it was actually compensation based on the valuation of their easement property interests that were taken (*see* Op. ¶¶ 13-14, 17).

Homeowners' easements were appurtenant easements, which are easements that are incidental to the ownership of particular land that pass with the land as opposed to easements belonging to particular individuals. (I.R. 168, ¶¶ 8, 10; *see also Solana Land Co. v. Murphey*, 69 Ariz. 117, 122 (1949).) Valuing such an easement requires analyzing the dominant tenement's diminution in value resulting from the easement's taking, and compensation is measured by the difference in the dominant tenement's market value with and without the easement. *See Restatement* (*First*) *of Property* § 508 cmt. c; *Hemmerling v. Tomlev, Inc.*, 432 P.2d 697, 699 (Cal. 1967). Homeowners' homes were the dominant tenements here. Although Homeowners contend that they received compensation for their homes' diminution in value and not for the value of their lost easements (Pet at 5 n.1), the easements' values were measured by the difference in their homes' values

with and without the easements, and the stipulated Judgment awarded them that amount. (Op. ¶¶ 7-8, 17.) Since the Opinion correctly held that Homeowners were not entitled to severance damages in addition to valuation damages, they received just compensation for their easements.

The trial court and Homeowners may have believed otherwise because they confused valuing condemned appurtenant easements under section 12-1122(A)(1) with determining severance damages. (*See* I.R. 202 at 7-10; Pet. at 4-5, 11-14.) Both analyses may use "before-and-after" terminology. But as the Ninth Circuit has explained, the fact that an easement's value "is measured by reference to the dominant estate does not render the value analysis a severance inquiry." *United States v. 10.0 Acres*, 533 F.2d 1092, 1095 n.1 (9th Cir. 1976).

Homeowners attempt to use access easement cases to show why they should be compensated not only for their easements' value, but also for damages to other property. (Pet. at 11-12.[1]) Although access easements are also appurtenant easements, the damage when those easements are lost reflects the access easement's value to the dominant property, that is, the value of the property taken. A.R.S. § 12-1122(A)(1). In *State ex rel. Morrison v. Thelberg*, this Court explained that

[1] Homeowners improperly cite *State ex rel. Herman v. Wilson*, 4 Ariz. App. 420 (1966), *vacated*, 103 Ariz. 194, 195 (1968). (Pet. at 11.) Vacated opinions are not authority. *Stroud v. Dorr-Oliver, Inc.*, 112 Ariz. 403, 411 n.2 (1975).

> [t]he measure of damages for the destruction or impairment of access to the highway upon which the property of an owner abuts is the difference between the market value of the abutting property immediately before and immediately after the destruction or impairment thereof. The damages awarded the abutting landowner for destruction or impairment of access therefore is based, not upon the value of the right of access to the highway, but rather upon the difference in the value of the remaining property before and after the access thereto has been destroyed or impaired.

87 Ariz. 318, 325 (1960).

Although the lost access easement's value is measured by the diminution in value of the property from which the easement is taken, this is valuation of the property taken, not severance damages. The State's condemnation of a fee interest in the HOA's Common Areas in this case extinguished Homeowners' easements in those areas that ran with the land. Homeowners are trying to recover damages to their separate home lots (which were not condemned) in addition to the value of their easements, which is not consistent with eminent domain law.

The State paid Homeowners just compensation for the value of their easements in the Common Areas. The State took no land from Homeowners. None of the cases that Homeowners cite provide authority for awarding severance damages to claimants from whom no land was taken.

The Opinion correctly interpreted and applied section 12-1122(A)(2). Contrary to Homeowners' assertions, review is not warranted on the ground that an important issue of law has been wrongly decided.

CONCLUSION

For the foregoing reasons, this Court should deny review.

Respectfully submitted this 5th day of April, 2024.

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