

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.

SUPPLEMENTAL BRIEF

Dale S. Zeitlin (#006615)
Casandra C. Zeitlin (#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.

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INTRODUCTION

The Foothills Reserve Homeowners (the “Homeowners”), by virtue of owning their homes, owned three property rights in the community’s common areas: (1) the right to use the common areas for recreational activities; (2) the right to exclude non-Homeowners from use of the common areas; and (3) the right to keep the common areas open space and prohibit all development. Together, these appurtenant easements ensured bucolic open space common areas for the benefit of the homes. The State took all three property rights owned by the Homeowners in the common areas for the construction of an eight-lane freeway.

As framed by the Court, does [A.R.S. § 12-1122\(A\)\(2\)](#) entitle the Homeowners to the proximity damages caused by the condemnation of their appurtenant easements? The cited statute, a reflection of the protection of Article 2, Section 17 of the Arizona Constitution, permits the recovery of those damages.

Article 2, Section 17 prohibits the taking of private **property** without “just compensation.” 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). [Ariz. Rev. Stat. § 12-1122\(A\)\(2\)](#) requires that a jury “ascertain and assess,”

[i]f 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.

Once an owner establishes a taking, any factor bearing on the market value of the remaining parcel is admissible. *State ex rel. Miller v. Wells Fargo Bank of Arizona, N.A.*, 194 Ariz. 126, 129 (App. 1998, review denied). Severance damages includes damages from the proximity of the remaining property to the governmental improvement, considering factors such as increased noise, fumes, unsightliness, etc. *State ex rel. Miller v. J.R. Norton Co.*, 158 Ariz. 50, 52 (App. 1988); *Rayburn v. State*, 93 Ariz. 54, 56 (1963); *Arizona Hercules Copper Co. v. Protestant Episcopal Church Corp.*, 21 Ariz. 470, 477 (1920) (owner entitled to incidental damages to the land not taken, including diminution in value “caused by the operation of the road, taking into account danger from fire, noise, smoke and vibrations.”).¹

All the necessary requisites to claim severance damages, including proximity damages, under A.R.S. § 12-1122(A)(2) are present here: (1) the State took the Homeowners’ appurtenant easements (property) when it condemned and physically occupied the common areas; (2) the appurtenant easements constitute a part of a larger parcel (the homes or dominant estate); and (3) the homes suffered damaged because of the State’s taking and destruction of the appurtenant easements for the construction of an eight-lane freeway. The State concedes that the appurtenant

¹ The relevant Arizona jury instruction requires a jury to consider severance damages; it does not require separate findings for proximity damages. RAJI (Civil) 3d Eminent Domain 12 (July 2013).

easements are “property” and that it must pay compensation for taking those rights.

However, the State puts forward three arguments as to why it is not required to pay proximity damages mandated by A.R.S. §12-1122(A)(2) when taking appurtenant easements, none of which have merit.

The State first mischaracterizes the appurtenant easements as “nonpossessory.” This argued-for characterization is wrong and meaningless. Easement rights to use and exclude are *possessory* property interests, no lesser than a leasehold interest in property, which is a form of property the State concedes may recover severance damages. *County of Maricopa v. Shell Oil Co.*, 84 Ariz. 325, 327 (1958); *Rayburn*, 93 Ariz. at 59. Even if it is a “nonpossessory” interest, it has been long established as protected “property” under Arizona law. *Condos v. Home Dev. Co.*, 77 Ariz. 129, 136 (1954) (“A restrictive covenant which runs with the land is a property right in the nature of an easement. . . .”); *Shalimar Ass’n v. D.O.C. Enterprise*, 142 Ariz. 36, 44 (App. 1984, review denied) (“[T]he grantee of the servient tenement takes title subject to the property right to the extent that his grantor is bound thereby.”); *Phoenix v. South Bank Corp.*, 133 Ariz. 90, 93 (App. 1982). The State offers no cogent reason to abandon binding Arizona law on this point or why such a characterization now matters. “Stare decisis is ‘at its zenith’ when the precedent established ‘important settled expectations – especially those relating to property and contract rights.’” *Laurence v. Salt River Project Agric. &*

Improvement & Power District, 528 P.3d 139, 144 ¶ 19 (Ariz. 2023), quoting Bryan A. Garner et al., *The Law of Judicial Precedent* 370 (2016).

The State then argues that the appurtenant easements and the homes do not constitute the larger parcel. This argument fails basic property law that establishes appurtenant easements together with the dominant estate constitute a single economic unit (i.e., the bundle of sticks). 4 J. Sackman, *Nichols on Eminent Domain* § 12B.02, (Rev. 3d ed. 2002) (“Appurtenant easements . . . are included in the taking of the dominant estate . . . The dominant estate and the easement together constitute one entity.”); *Restatement 3d Property: Servitudes* § 1.5 (“‘Appurtenant’ means that the rights or obligations of a servitude are tied to ownership or occupancy of a particular unit or parcel of land.”). Eminent domain law has long recognized that the “larger parcel” may include different types of interests and estates, the joining of which may be established through a variety of alternative measures: dependency of value, unitary value, the “interrelationship” of the property rights, or a common purpose. *State ex rel. Morrison v. Jay Six Cattle Co.*, 88 Ariz. 97, 108 (1960) (“[I]t is well settled that just compensation must be paid not only for the property actually taken but also for the destruction of the unitary value of other property not presently taken, which may have a *special value because of its unification with the property taken.*” (emphasis in original)); *Ariz. State Land Dep’t. v. State*, 113 Ariz. 125, 128-29 (1976) (“The subject matter of the condemnation proceedings in the case is

a right-of-way, and, consequently, has no real economic value standing alone. The market value must therefore be determined on the basis of a larger tract of which the condemned lands are a part.”); *State ex rel. LaPrade v. Carrow*, 57 Ariz. 429, 433 (1941) (“[W]e think the more equitable rule is that when the ‘larger parcel’ at the time of the condemnation is held and used by one party for a common purpose, even though his title thereto varies both in quality and quantity, that it is fairly within the terms of the subdivision.”).

Finally, the State invokes a policy argument that allowing compensation for proximity damages could be abused in the future and subject the State to excessive damages. This argument has been rejected by the Arizona Supreme Court when the constitutional right to just compensation is implicated. *Corrigan v. City of Scottsdale*, 149 Ariz. 538, 542 (1986). Moreover, the Court would have to rewrite the Arizona Constitution and Arizona statutes to exclude appurtenant easements from the term “property.” This is not within the province of the judiciary but is reserved to the citizens of the State.

Lastly, and fatally, the State waived the issue of whether the Homeowners could maintain a claim for severance damages when it did not preserve this issue in the Stipulated Judgment. There is no legal or common-sense argument why proximity damages, which are a component of severance damages, would be prohibited where severance damages are recoverable. The State also waived any

evidentiary argument (a fact issue) that the homes did not suffer damage based on their proximity to the Freeway or that the damage was not special to the Homeowners.² In other words, there is no evidentiary issue before the Court as to whether the homes suffered severance damages, including proximity damages.

There is no constitutional, statutory, common law, or evidentiary support for disallowing proximity damages for the taking of the appurtenant easements.

I. The nature of the appurtenant easements.

The Foothills Reserve community sits at the foothills of South Mountain and is surrounded by open desert and mountain views. IR 79-80, Exhibits 1, 7. There was no night-time or weekend traffic prior to the new Freeway because Pecos Road, the only access to Foothills before the taking, terminated at the southeast corner of the subdivision. IR 168-169, IR 185-186, Exhibit 2 (Declaration of Galen Schliem, Foothills Homeowner). The recorded CC&Rs gave the Homeowners the right to use the common areas and to exclude non-Homeowners. IR 168-169, Exhibit 4; IR 185-186, Exhibit 2. The recorded plat established that the common areas could not be built on, and therefore, provided a permanent visual open space. *Id.*; IR 202. These vast vistas provided a sense of quiet, peace of mind, tranquility, and a feeling of repose to the Homeowners. *Id.* The whole purpose of the common areas was to protect the

² The requirement of “special damages” is only applicable where there has not been a physical taking. *4A Nichols on Eminent Domain* § 14.03[6][b]. In any event, the parties’ appraisers found that damages to the Foothills homes were special.

quiet use and enjoyment of the homes. *Id.*

In the *after* situation this changed. The State took the Foothill's desert open space land, destroyed the natural beauty of the common areas, constructed the unsightly concrete freeway with elevated 20+ foot high concrete walls, installed obtrusive elevated freeway lighting resulting in incessant night-time traffic headlights, and inundated the homes with freeway noise and noxious fumes. *Id.*

The parties cross-moved for summary judgment on whether the Homeowners could claim proximity damages. IR 162, 167-69, 172, 176-77, 185-88, 196- 97. The trial court ruled that the Homeowners could present their claim for proximity damages to a jury.

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. [IR 202, Order, p. 7.]

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 on 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. [IR 202, Order, p. 10] [Petition APP40-50]

Both the State’s and Homeowners’ expert appraisers found that the homes suffered severance damages, including proximity damages, caused by the State’s taking of the appurtenant easements. IR 295-299, Exhibit 1, APP32-77; IR 295-299, Exhibit 1, APP47.

Rather than proceed to trial, the parties entered into a “high-low” settlement: the Homeowners were guaranteed six million dollars as the minimum amount of just compensation and eighteen million dollars payable if proximity damages were recoverable as a matter of law.³ IR 342.

II. Appurtenant easements are valued as a part of the dominant estate.

Appurtenant easements by their very nature have no independent market value as they cannot be sold separately from the dominant estate. Their value is dependent on the dominant estate. Thus, the value of appurtenant easements are measured by comparing the value of the dominant estate with the appurtenant easement sticks, and all the rights and benefits that flow from those property rights, to the value without those sticks.⁴ This is the severance damage analysis under [A.R.S. § 12-1122](#)

³ The court of appeals misinterpreted the high-low settlement when it said the homeowners were paid the value of their appurtenant easements. That is incorrect. The payment under the settlement agreement was only for severance damages, including proximity damages.

⁴ The typical method of valuing land or buildings through market sales does not apply to appurtenant easements.

(A)(2) (“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. . . .”). *See also, e.g., City of Phoenix v. Wilson*, 200 Ariz. 2, 8 ¶ 18 (2001) (“In Arizona, severance damages are calculated by comparing the worth of the remaining property before and after the taking.”); *see also United States v. Welch*, 217 U.S. 333, 339 (1910) (“[T]he value of the easement cannot be ascertained without reference to the dominant estate to which it was attached.”). This severance damage analysis is the only valuation method used by the parties’ respective appraisers in this case.

III. The Constitution and Statutes protect all “property” equally.

The Arizona Constitution and A.R.S. §12-1122 do not contain different protections for different types of property. All property is protected equally. “Property” encompasses real, personal, tangible, intangible, possessory, and nonpossessory rights. *See, e.g., Lynch v. United States*, 292 U.S. 571, 578 (1934); *South Bank Corp.*, 133 Ariz. at 93; *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); *McMurrin 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.”).

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 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.

In re Forsstrom, 44 Ariz. 472, 481 (1934) (overruled on other grounds *State ex rel. Morrison v. Thelberg*, 87 Ariz. 318 (1960)).

Appurtenant easements run with the land and are considered real property. *Condos*, 77 Ariz. at 136; *see also Welch*, 217 U.S. at 339 (“A private right of way is an easement and is land.”). Appurtenant easements extend benefits to a dominant estate and the right to injunctive relief to enforce the uses and restrictions against the servient estate. *Condos*, 77 Ariz. at 135-36; *Shalimar*, 142 Ariz. 36; Restatement 3d of Property, *Servitudes* §§ 1.1, 4.1. Thus, the Arizona Constitution mandates full payment of just compensation for the taking of an appurtenant easement, the same as every other form of “property”:

Since easements are treated as property rights, American law gives easements status and protection similar to that accorded to the 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) (David A Thomas ed., 1994), p. 392 (emphasis added).

IV. Severance damages including proximity damages are recoverable where the government takes appurtenant easements.

“Appurtenant easements . . . are included in the taking of the dominant estate . . . The dominant estate and the easement together constitute one entity.” 4 *Nichols on Eminent Domain* § 12B.02; Restatement 3d Property: *Servitudes* § 1.5. Here, the dominant estate (the homes) plus their property rights in the servient estate (the common areas) constitute the larger parcel. Because the State took the servient estate and appropriated it to a use inconsistent with the appurtenant easements, the Homeowners are entitled to damages.

Catalina Foothills Sch. Dist. No. 16 v. La Paloma Prop. Homeowners Ass’n, 238 Ariz. 510 (App. 2015), provides an excellent analysis of the valuation concepts and applicable legal principles when appurtenant easements are taken. In *Catalina*, a school district condemned a private roadway and converted it to a public roadway. The court recognized the homeowners’ right to present severance damages as a factual issue for the jury for losing their private easement rights. “Severance damages compensate an owner whose property has been taken *for any reduction* in the fair market value.” 238 Ariz. at 516, ¶ 21. “Severance damages” encompasses proximity damages. The homeowners’ appraiser opined that the homes would suffer severance damages in the amount of \$1,428,631 caused by converting the road from private to public. 238 Ariz. at 515, n. 4. The jury rejected the appraiser’s opinion of severance damages.

Catalina demonstrates two important principles: (1) when appurtenant easements are taken, the dominant estate is entitled to claim all damages for a reduction in fair market value under A.R.S. §12-1122(A)(2) and the Arizona Constitution; and (2) trust in a jury to decide the fact issue as to whether there are in fact damages from the taking of an appurtenant easement.

The majority of cases from other jurisdictions, many of which have the identical constitutional language as the Arizona Constitution, support the rule that the taking of appurtenant easements allows the owner of the dominant estate to claim severance damages, including proximity damages.

The leading case from the California Supreme Court found that an owner, whose right to enforce restrictions on a servient estate that had been extinguished, may claim damages caused by the proximity to the government improvement. *Southern California Edison Co. v. Bourgerie*, 507 P.2d 964, 967 (Cal. 1973). “Because the Arizona legislature adopted A.R.S. § 12-1122 from California, this court has held that California law is very persuasive when interpreting our condemnation statute.” *State ex rel. Miller v. Filler*, 168 Ariz. 147, 150 (1991). In allowing proximity damages, the California Supreme Court recognized the pernicious effect on the value of property in proximity to public improvements.

The California Supreme Court had to first consider an earlier case that held negative restrictions were not protected property and not subject to the constitutional

protection of just compensation. The California Supreme Court overruled the earlier case and held that negative restrictions constitute property: “To establish a substantive distinction by merely labeling one property interest for which compensation must be made and the other a mere contractual right which may be appropriated without any compensation is inequitable and rationally indefensible.” 507 P.2d at 967. The California Supreme Court rejected the argument (argued by the State here) that recognizing a right to compensation would substantially increase the cost of public projects as an unjustifiable reason to undermine the constitutional requirement of just compensation:

We find these reasons for denying compensation to be unpersuasive. Conceding the possibility that the cost of condemning property might be increased somewhat by awarding compensation for the violation of building restrictions, we cannot conclude that such increases will significantly burden exercise of the power of eminent domain. As a practical matter some takings would result in negligible damage to the owners of the restriction (e.g., public works such as parks or access roads); if the character of the improvement were such that damage to some landowners would result (e.g., schools or fire stations), it is likely that only those immediately adjoining or in close proximity to the improvement would suffer substantial injury, even in highly restricted areas.

507 P.2d at 968. *See also Meredith v. Washoe County Sch. Dist.*, 435 P.2d 750, 752-53 (Nev. 1968) (“We cannot see how compensation, required by constitutional commands, can be said to interfere with any governmental taking.”); *Adaman Mut. Water Co., v. United States*, 278 F.2d 842, 849 (9th Cir. 1960) (“The argument that an impermissible burden is put upon the power of eminent domain by a restrictive

covenant is untenable.”). Indeed, in many if not most cases, the valuation evidence will limit the recoverable damage to the dominant estate, which may likely be slight. This may occur in the context of the widening of streets, the conversion of a private street to a public street, or other types of governmental projects such as for water tanks, libraries, parks, or underground gas lines. Also, the further away from the government improvement the less impact on value.⁵ These are issues of fact for the jury; not questions of entitlement. In this case, the valuation evidence and the parties’ stipulated judgment found the homes suffered severance damages, including proximity damages, as a matter of fact.

The Court also rejected the potential-for-abuse argument made by the State here): “If bad faith or sharp practices were established, a court could properly refuse to allow compensation.” *Edison*, 507 P.2d at 968.⁶

The recovery of severance damages, including proximity damages, for the taking of appurtenant easements has also been established in the following cases:

⁵ See, e.g., *Horst v. Housing Authority of County of Scotts Bluff*, 166 N.W. 2d 119, 121 (Neb. 1969) (“Even where substantial damages might be warranted to some homeowners, it would seem that the amount of damages would rapidly diminish as the distance of a claimant’s lot from the condemned tract increased”); *Washoe*, 435 P.2d 750, 752 (Nev. 1968) (same).

⁶ The State’s argument that recognizing proximity damages here could have a potential for future misuse should be rejected because the State did not present evidence that the Homeowners acted in bad faith. The Homeowners acted in good faith. Courts do not speculate as to what may occur in the future. *Brush & Nib Studios, LC v. City of Phoenix*, 247 Ariz. 269, 280 ¶ 37 (2019).

Creegan v. State, 391 P.3d 36, 47 (Kan. 2017); *Horst*, 166 N.W.2d at 121 (Neb. 1969) (permitted recovery of damages caused by public improvement and stated: “[w]here the taking of land by eminent domain permits a use violative of the restrictions and extinguishes such interest, there is a taking of the property of the owners of the land for whose benefit the restriction were imposed, and such an owner is entitled to compensation for damage, if any, to his property.”); *Washoe*, 435 P.2d at 753 (Nev. 1968) (“We must look to the market value of the dominant tenement before and after the taking.”); *Johnstone v. Detroit, G.H. & M.R. Co.*, 222 N.W. 325, 331 (Mich. 1928) (“compensation is measured by the actual diminution in value of the premises of such owner as a result of the use to which the property taken is put.”).

Flynn v. New York, W. & B. R. Co., 112 N.E. 913 (Ct. App. N.Y. 1916), held:

The right of the property owner is measured by the depreciation in value which his land sustains, including such depreciation as will be sustained by reason of the use to which the railroad puts its property, the difference in value between his land with and without the railroad in operation. The railroad and its use in violation of the restrictive covenants may not be separated in considering the effect upon the owner. The rule for assessing damages applied herein seems to have been correct and the amount of the award presents no question of law.”

These restrictive covenants create a property right and make direct and compensational damages which otherwise would be consequential and non-compensational . . . But something in the nature of an easement of privacy over another’s land may be acquired by covenant in order that one may live apart from the disagreeable sights and sounds of business if one desires, and if that right has a value and the railroad subtracts a portion thereof by building on the restricted land, it is difficult to

conceive why compensation should not follow.

Id. at 914-15; *Burnquist v. Cook*, 19 N.W.2d 394, 398 (Minn. 1945) (“devoting a highway to uses destructive of easements to which it is servient, such as access, light, and air constitutes a taking of property for which compensation must be paid.”); *Adaman*, 278 F.2d at 847 (a property owner is entitled to compensation for the taking of both affirmative easements and restrictive covenants, applying Arizona law); *United States v. Certain Land in Augusta*, 220 F. Supp 696, 701 (S.D. Me. 1963) (restrictive covenants create enforceable property rights under the Fifth Amendment and holders of the dominant estate are entitled to be compensated for the diminution in the value of their lots as a result of the extinguishment of an equitable servitude).

The few courts that have denied severance damages for the taking of restrictive covenants have premised their decision on the erroneous belief that such restrictions are not property. *See, e.g., Arkansas State Highway Commission v. McNeill*, 381 S.W.2d 425 (Ark. 1964).⁷ Because settled law in Arizona is that appurtenant easements are property, these cases offer no insight. They are also inapposite here because the State took the Homeowner’s possessory rights in the

⁷ Ultimately, *McNeill* refused to adopt the “dubious reasons that have been given for the denial of compensation” and instead held that there was no causation between the restriction and damages because the taking was from property outside of the homeowners’ subdivision. *Id.* at 427. The trenchant dissent better reflects Arizona law, determining that the taking of a restrictive covenant is compensable.

common areas: the right of use and to exclude others.

United States v. 10.0 Acres, 533 F.2d 1092, 1095 (9th Cir. 1976), referenced by the State in its appeal brief, supports the majority view that proximity damages may be recovered for the taking of appurtenant easements.

The offer of proof is, in effect, that real estate appraisers are prepared to describe in monetary terms the loss of value suffered by secluded forest ‘retreats’ when nearby public improvement open the neighborhood to some of the negative aspects of civilization and progress. Once a taking ‘nexus’ is established, argue the appellants, the resulting loss, if any, is a question for the jury to decide. We agree.

...

Here, witnesses having knowledge of the market offered to testify that, in fact, the market value of the dominant land drops when a private road leading to that land is converted into a public road. The loss of the exclusivity of the easement is a direct loss that is reflected in the marketplace, and, because the loss results from a taking of an interest in land, it is compensable.

...

If in fact the evidence supports the appellants’ claim, the dominant tenement suffered a decrease in value when the government opened up the exclusive road, removed the locked gates, and made the once remote property easily accessible to trespassers. This is a matter for proof. The Court below denied the easement the opportunity to put on that proof.

V. The dominant estate (the homes) together with the appurtenant easements constitutes the larger parcel.

The State incorrectly argues that the homes together with their appurtenant easements do not comprise the larger parcel under A.R.S. §12-1122(A)(2). Basic property law defines an appurtenant easement together with the dominant estate as a single unit. *4 Nichols On Eminent Domain* at § 12B.02; Restatement 3d Property:

Servitudes §§ 1.5, 4.9. The State’s argument is contrary to Arizona Law. The larger parcel concept, a flexible inquiry, considers a “dependency of value” between the condemned land and the remaining land to be enough. *Jay Six Cattle Co.*, 88 Ariz. at 107. See also *Ariz. State Land Dep’t*, 113 Ariz. at 128 (“Severance damage may be awarded where title to the property varies both in quality and quantity”).

On title, the Arizona Supreme Court has clearly determined the rule:

[W]e think the more equitable rule is that when the ‘larger parcel’ at the time of the condemnation is held and used by one party for a common purpose, even though his title thereto varies both in quality and quantity, that it is fairly within the terms of [Ariz. Code § 27-915(2) (that has identical language to A.R.S. § 12-1122(A)(2))].

LaPrade, 57 Ariz. at 433 (emphasis added). It also is consistently held that noncontiguous parcels may constitute a larger parcel:

[W]hat constitutes a single tract... does not depend upon artificial things like boundaries between tracts as established in deeds in the owner’s chain of title, nor does it depend necessarily upon whether the owner acquired his land in one transaction or even at one time. Neither does it wholly depend upon whether holdings are physically contiguous. Contiguous tracts may be “separate” ones if used separately and tracts physically separated from one another may constitute a “single” tract if put to an integrated unitary use or even if the possibility of their being so combined in use in the reasonably near future is reasonably sufficient to affect market value. Integrated use, not physical contiguity, therefore, is the test.

See, e.g., *Baetjer v. United States*, 143 F.2d 391, 394-95 (1st Cir. 1944). In *United States v. 57.09 Acres of Land*, 706 F.2d 280 (9th Cir. 1983), the court held that a leasehold interest in the dominant estate and easement in a servient estate constitutes the larger

parcel. The Ninth Circuit rejected “contiguity.” *Id.* at 282. (“[C]ontiguity is not a prerequisite to the granting of severance damages”).

In recognition that the dominant estate together with appurtenant easements constitute the larger parcel, the court in *Catalina Foothills*, allowed a claim for severance damages, including proximity damages, to homes to be presented to a jury when their private road easement was taken. *Catalina Foothills*, 238 Ariz. at 510.

In the case at bar, the purpose of the appurtenant easements in the common areas was for the benefit of the homes (dominant estates). In establishing a unity of use, “[t]here must be such a connection or relation of adaptation, convenience and actual and permanent use as to make the enjoyment of one reasonably necessary to the enjoyment of the other, in the most advantageous manner in the business for which it is used.” 4A *Nichols* § 14B.03[1]. The burdened servient estate and benefitted dominant estate clearly meet the test of an integrated use and must be considered together as a single parcel for severance damages.

VI. Arizona has rejected the State’s public policy argument in eminent domain.

“Policy reasons in favor of denying damages are not persuasive. Governmental entities should be mindful of a person’s constitutional rights as anyone else.” *Corrigan*, 149 Ariz. at 543. The State cannot escape constitutional guarantees simply by speculating—without any evidence—that it may be “too expensive” or “too burdensome.” *Brush*, 247 Ariz. 269; *Creegan*, 391 P.3d at 48

(Kan. 2017); *Edison*, 507 P.2d at 968 (Cal. 1973); *Horst*, 166 N.W. 2d 119 (Neb. 1969); *Adaman*, 278 F.2d 842 (9th Cir. 1960); *Washoe*, 435 P.2d at 752 (Nev. 1968).

RELIEF REQUESTED

The Homeowners respectfully request that the Court reverse the court of appeals and vacate its opinion, affirm the trial court and hold that the Homeowners are entitled to claim severance damages, including proximity damages, as a matter of law.