EMINENT DOMAIN 2

Power of Eminent Domain

Public agencies such as [*name of condemnor*] have the right to acquire private property for public use if they pay the owner the fair market value of the property.

In this case, [*name of condemnor*] is acquiring [*name of condemnee*]'s property for [describe the project]. [*Name of condemnor*] must pay [*name of condemnee*] the fair market value of the property [*name of condemnor*] is acquiring [plus the amount of severance damages, if any, to [*name of condemnee*]'s remaining property].

You must determine the fair market value of the property [*name of condemnor*] is acquiring [plus the amount of severance damages, if any, to [*name of condemnee*]'s remaining property] as of [*date of valuation*].

SOURCE: RAJI (CIVIL) 3d Eminent Domain 1 and 2; ARIZ. CONST. ART. 2 § 17; A.R.S. §§ 12-1111 and 1122 (1997).

COMMENT: RAJI (CIVIL) 3d Eminent Domain 1 informed the jury that the owner must be paid "just compensation." RAJI (CIVIL) 3d Eminent Domain 2 then defines "just compensation" as "the fair market value of the property taken [and the amount of severance damages, if any, to the remaining portion]." The revised instruction simply shortens the equation. Instead of "money to be paid equals just compensation equals fair market value plus severance damages, if any," the new instruction simplifies the formula to "money to be paid equals fair market value plus severance damages, if any."

Using the word "acquires" instead of "take" is consistent with the definition of market value as the amount of money a willing buyer would pay a willing seller on the open market. *See Mandl v. City of Phoenix,* 41 Ariz. 351, 18 P.2d 271 (1933); *State ex rel. Ordway v. Buchanan,* 154 Ariz. 159, 162, 741 P.2d 292, 295 (1987); *City of Phoenix v. Wilson,* 200 Ariz. 2, 6, 21 P.3d 388, 392 (2001).

USE NOTE: The date of valuation is the date of the summons. A.R.S. § 12-1123(A).

Use bracketed language appropriate to the facts.

Gary L. Birnbaum (#004386)
James T. Braselton (#010788)
MARISCAL, WEEKS, McINTYRE & FRIEDLANDER, P.A.
2901 North Central Avenue, Suite 200
Phoenix, Arizona 85012-2705
Phone: (602) 285-5000

Attorneys for LeSueur Investments III, V and VI, L.L.C.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA ex rel. VICTOR M. MENDEZ, Director, Department of Transportation,

Plaintiff,

v.

LESUEUR INVESTMENTS V., L.L.C., an Arizona limited liability company; and MARICOPA COUNTY TREASURER,

Defendants.

No. CV 2003-013072 (Consolidated)

MOTION IN LIMINE TO EXCLUDE EVIDENCE OR ARGUMENT REGARDING THE PLANNING OR CONSTRUCTION OF ANY PART OF THE SANTAN FREEWAY PROJECT IN CONNECTION WITH THE VALUATION ISSUE AT TRIAL

(Assigned to Hon. Colin F. Campbell)

Lesueur Investments III, L.L.C., V, L.L.C., and VI, L.L.C. ("Landowners") respectfully request that the Court enter an Order in limine precluding introduction of any evidence or argument suggesting or assuming that any part of the Santan Freeway Project had been planned, designed or constructed as of the date of valuation applicable in this case. (July 7, 2003).

I. In an Eminent Domain Action, the Fair Market Value of the Property to be Acquired Must Be Determined as if the Project for which the Acquisition Is Required Was Never Planned, Designed or Constructed.

The instant motion is based upon a single, indisputable, controlling principle of law applicable to this case and to all other Arizona eminent domain proceedings:

> The fair market value of the property that is the subject of the eminent domain action must be determined, as of the statutory valuation date, without regard to the project for which it is to be acquired – i.e., value must be determined as if the project was never planned, designed or constructed.

This principle is supported by state and federal cases, treatises and other authorities. See, e.g., United States v. Reynolds, 397 U.S. 14, 90 S.Ct. 803 (1970); United States v. Miller, 317 U.S. 369, 63 S.Ct. 276 (1943); State v. Hollis, 93 Ariz. 200, 379 P.2d 750, 753-54 (1963); Uvodich v. Arizona Board of Regents, 9 Ariz.App. 400, 406, 453 P.2d 229, 253 (1969). See also, 4 Nichols on Eminent Domain (3rd Ed) §12B.17 [8] [a and b]; 3 Nichols on Eminent Domain (3rd Ed) § 8A.01 [3] [b].

In this case the "project" is the Santan Freeway, which when fully constructed will extend from Interstate 10 (on the west), east and then north to its intersection with the Superstition Freeway (U.S. 60). While construction of the Santan Freeway occurred in phases, reference to ADOT's own records confirms that the entirety of the Santan Freeway constitutes a single "project" as a matter of fact, logic and law.

The State, and all of the witnesses in this case, acknowledge that for purposes of determining just compensation, the plans for the portion of the Santan Freeway which directly impacts (severs) the Landowners' property may not be considered in determining the value of the condemned property. Thus, for valuation determination purposes, the condemned property is not (and is not planned to be) on, under or adjacent to a freeway. The Court might reasonably wonder why, given these acknowledgments, this motion is necessary.

The reason is that discovery has revealed that the State intends to argue (and its experts intend to testify that) as of the valuation date, a part of the Santan Freeway existed (or was planned) and extended east from Interstate 10 to a termination point at its intersection with the Price Road Freeway. This intersection of the project (Santan Freeway) with the Price Road Freeway, occurs at or near the alignment of Pecos Road, a planned (but largely non-existent) east-west arterial roadway. As a result of this unilaterally determined artificial termination point, the State then apparently intends to argue that traffic would have exited the Santan Freeway at that termination point and been dumped onto the future Pecos Road, which would then become the new major East Valley, east-west arterial roadway. Since Pecos Road is situated south of Landowners' property (which sits on Williams Field Road, the existing major

east-west arterial roadway), the State will then ask the jury to conclude that the commercial core of Gilbert would not be (as planned) on Landowners' property, but, instead, on Pecos Road to the south.

Stated differently, the State hopes to present a case based upon the assumed existence of part of the Santan Freeway (because that purportedly would diminish the value of Landowner's property), while simultaneously disregarding the next (easterly) segments of the Santan Freeway because its location, construction and consideration would increase the value of Landowners' property! Such an approach to valuation is both manifestly unjust and, as a matter of law, prohibited by what is sometimes referred to as the "project influence rule." While the Santan Freeway has been and will be constructed in phases, it is a single project and, under the rules governing the determination of just compensation, the Landowners' property must be valued as if the Santan Freeway was not planned and did not exist as of the statutory date of valuation.

In State v. Hollis, supra, the Arizona Supreme Court stated the rule in a form directly applicable here:

> It is competent to show the value of the property as it would have been if no such highway construction had been contemplated.

93 Ariz. at 206, 379 P.2d at 753. Similarly, in City of Phoenix v. Clauss, 177 Ariz. 566, 568, 869 P. 1219, 1221, the Arizona Court of Appeals articulated the rule as:

> *In determining the fair market value of the subject property before the taking, you must assume that the public project did not exist.* In other words, the condemned property cannot be charged with a lesser value at the time of the taking when the decrease in such value is caused by the taking itself or by reason of the fact that a public project has been planned which includes the subject property. On the other hand, the condemned property should not be credited with a higher value because news of the public project may have increased its value. *You should give the subject property the value that it would have had, as if the public project had never been planned.*

(emphasis added). Thus, it is clear that, for condemnation purposes, the property being condemned must be valued as if the "project" was never "contemplated" (per Hollis), planned or constructed (per Clauss). Here, the "project" is the Santan Freeway.

In this case, there can be no question that the Santan Freeway "segment" that terminates at its intersection with the Price Road Freeway is, and always has been, an integral component of the very same Santan Freeway for which Landowners' property is being taken. See Exhibits A-E, attached hereto.[1] Manifestly, the entire Santan Freeway was planned as of July 7, 2003. Under Arizona law, this fact may not be considered in valuing the subject property. The law does not allow the government to consider a segment of it in order to artificially depress the value of the property being condemned.

Conclusion

The existence/planning of the project for which Landowners' property is to be acquired may not, as a matter of law, be considered by the trier-of-fact in determining the valuation issue. It may not be considered if it enhances the value of the property; it may not be considered if it depresses the value of the property. The planning and/or construction of the entire project may not be considered; and the planning and construction of a segment or phase of the project may not be considered. The rule applies to both the condemnor and the condemnee and, in a jury trial, the jury must be instructed accordingly.

For the foregoing reasons, an order in limine is essential in this case. Specifically, the Court should enter an order precluding either party from referencing (through testimony or argument) in connection with the valuation issue, the planning, design or location of all or any part of the Santan Freeway. Any proffered evidence of Santan Freeway's planning or construction – or the impact of the freeway or any segment of that Freeway – on area traffic patterns (and thus, indirectly, upon the value of Landowners' property) must be excluded.

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[1] These exhibits, taken from ADOT's website, confirm that the Santan Freeway is a single "project" connecting I-10 on the west with the Superstition Freeway (U.S. 60) on the north and east.

DATED this 30th day of June, 2006.

MARISCAL, WEEKS, McINTYRE & FRIEDLANDER, P.A.

By: _____
Gary L. Birnbaum
James T. Braselton
2901 North Central Avenue, Suite 200
Phoenix, Arizona 85012-2705
Attorneys for LeSueur Investments III, V, and VI, L.L.C.

ORIGINAL of the foregoing mailed this 30th day of June, 2006, to:

Bryan B. Perry
Assistant Attorney General
Office of the Attorney General
Transportation Section
1275 West Washington Street
Phoenix, Arizona 85007-2997

By: _____

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ARIZONA DEPARTMENT OF

TRANSPORTATION

LOOP 202

SANTAN FREEWAY UPDATE

ADOT

FEBRUARY 2004

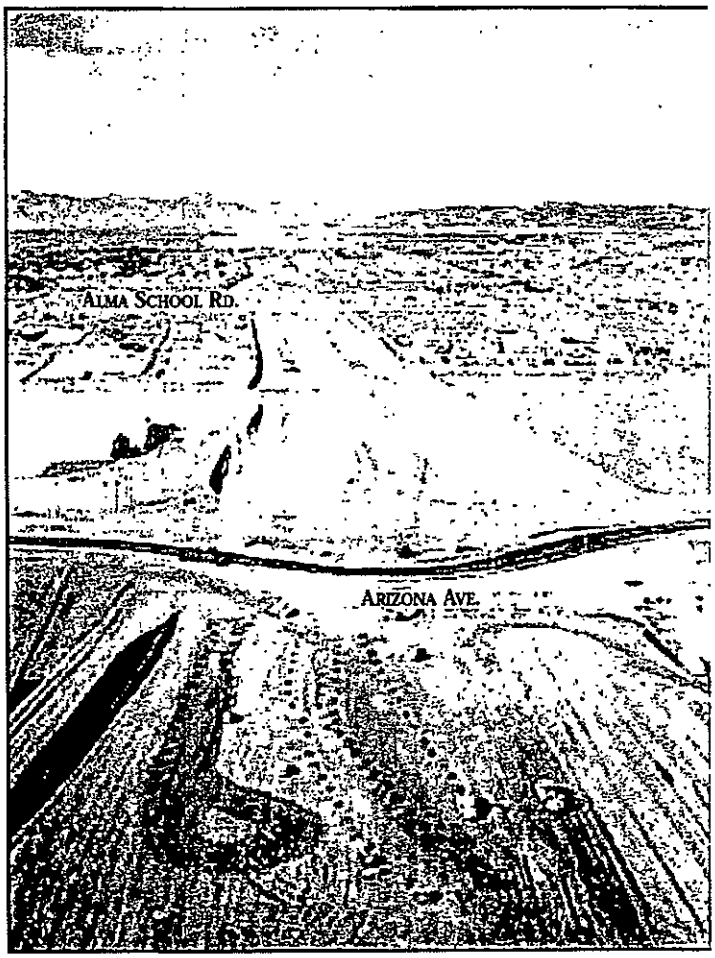
The first five-mile segment opened last fall within the 26 mile Santan corridor, providing a free-flow link from Interstate 10 to the Loop 101 Price freeway. Early next year the Santan will open to State Route 87 (Arizona Avenue) and from the U.S. 60 Superstition Freeway to Elliot Road, at the corridor's northern end. By late 2006, when the Santan is targeted for completion, 11 projects will have been completed since construction started in October 2000.

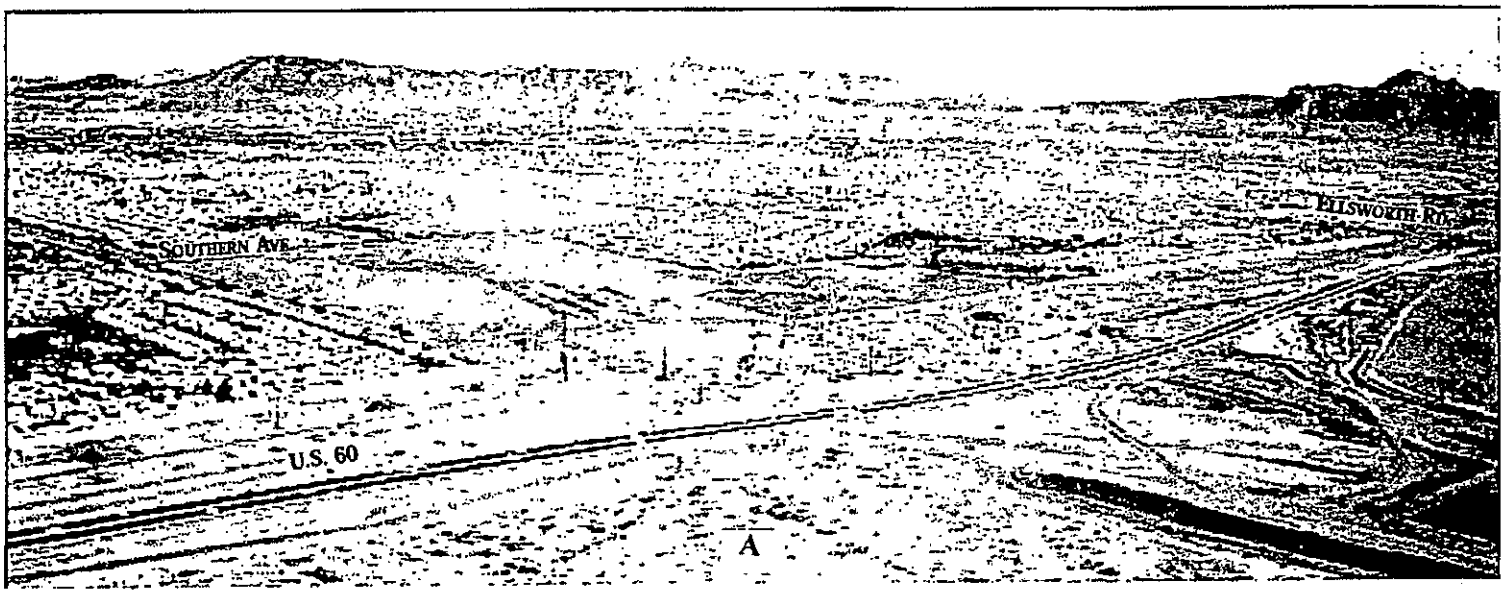
Beyond projects currently under way, work begins by summer on another six miles between SR 87 and Gilbert Road and between Power and Elliot roads. The final stretch between Gilbert and Power enters construction early next year, adding an estimated $134 million to the $260 million now under construction or set to begin. Key construction elements include sound barriers to separate adjacent neighborhoods from the freeway and rubberized asphalt pavement to provide a smooth, quiet ride.

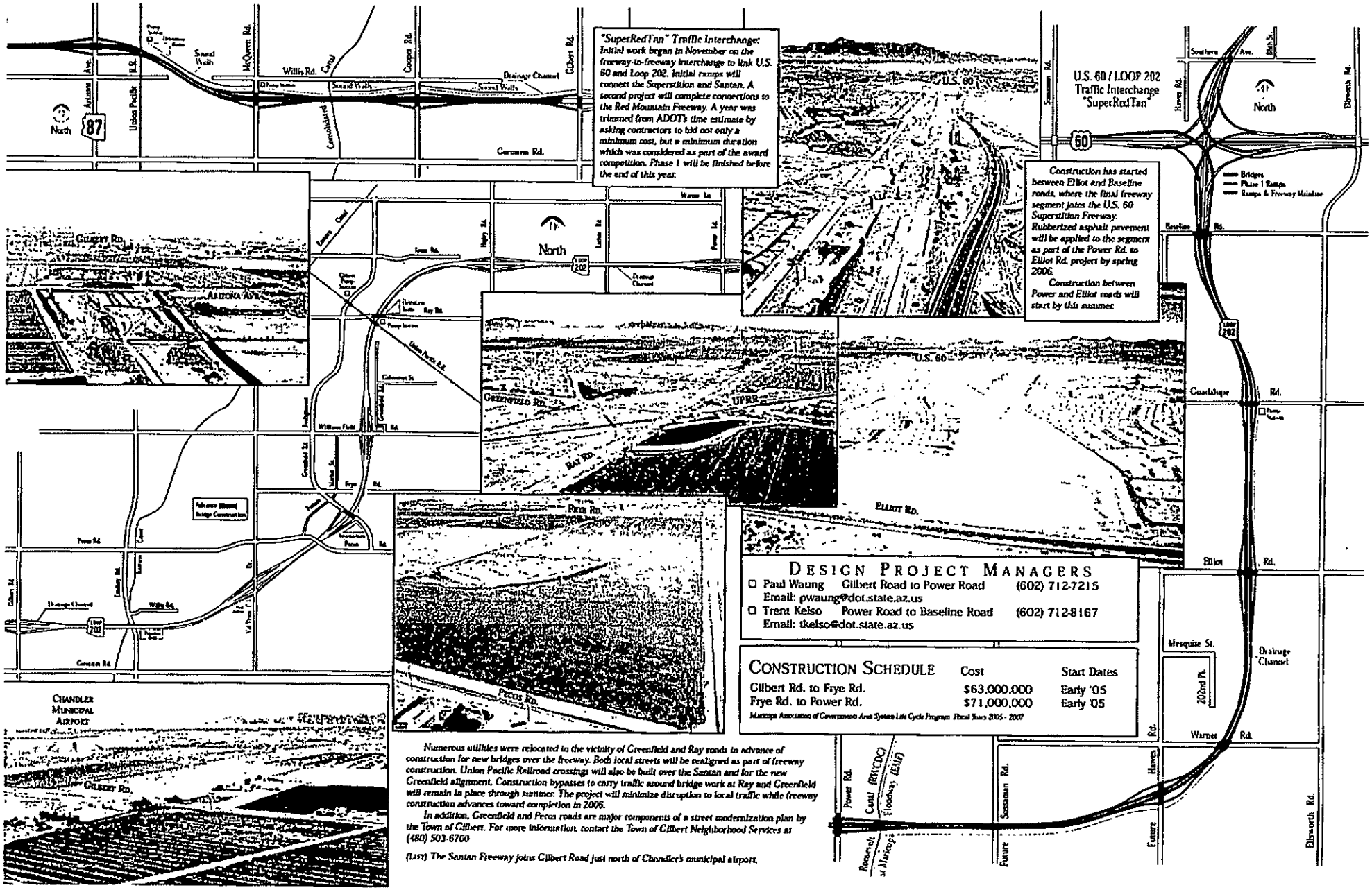
Construction is starting on the 2.6 mile segment between SR 87 and Gilbert Road, to complete traffic interchanges at Arizona Avenue, and McQueen and Cooper roads. A connection to and from the west at Gilbert will open by the end of '05, when the six-lane, divided highway is completed.

By the end of '04, Phase 1 of the "SuperRedTan" freeway-to-freeway interchange linking U.S. 60 and the Santan will be completed. It connects the Superstition Freeway to the Santan segment between Elliot and Baseline roads, providing an eastbound U.S. 60 exit to the south, and a Loop 202 exit to westbound U.S. 60.

Work to finish the massive interchange will continue when a second and final project begins by fall '05. All remaining connections will be finished, including ramps and mainline lanes to the Loop 202 Red Mountain freeway, to the north.







"SuperRedTan" Traffic Interchange: Initial work began in November on the freeway-to-freeway interchange to link U.S. 60 and Loop 202. Initial ramps will connect the Superstition and Santan. A second project will complete connections to the Red Mountain Freeway. A year was trimmed from ADOT's time estimate by asking contractors to bid not only a minimum cost, but a minimum duration which was considered as part of the award competition. Phase 1 will be finished before the end of this year.

Construction has started between Elliot and Baseline roads, where the final freeway segment joins the U.S. 60 Superstition Freeway. Rubberized asphalt pavement will be applied to the segment as part of the Power Rd. to Elliot Rd. project by spring 2006.

Construction between Power and Elliot roads will start by this summer.

Design Project Managers

- Paul Waung — Gilbert Road to Power Road — (602) 712-7215
  Email: pwaung@dot.state.az.us
- Trent Kelso — Power Road to Baseline Road — (602) 712-8167
  Email: tkelso@dot.state.az.us

Construction Schedule

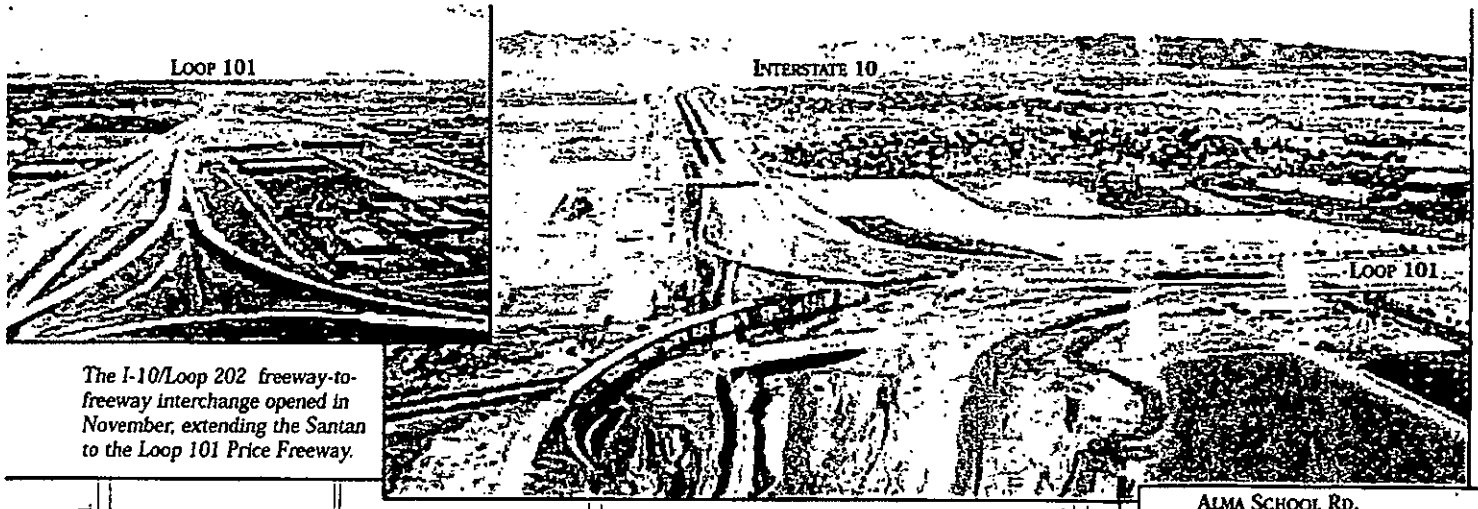
	Cost	Start Dates
Gilbert Rd. to Frye Rd.	$63,000,000	Early '05
Frye Rd. to Power Rd.	$71,000,000	Early '05

Maricopa Association of Governments Area System Life Cycle Program Fiscal Years 2005 - 2007

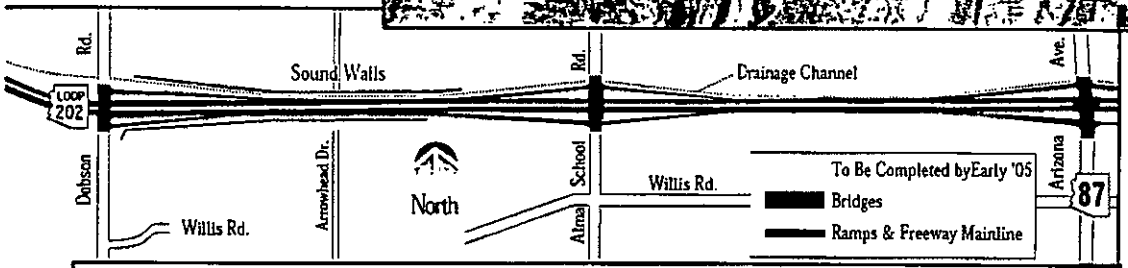
Numerous utilities were relocated in the vicinity of Greenfield and Ray roads in advance of construction for new bridges over the freeway. Both local streets will be realigned as part of freeway construction. Union Pacific Railroad crossings will also be built over the Santan and for the new Greenfield alignment. Construction bypasses to carry traffic around bridge work at Ray and Greenfield will remain in place through summer. The project will minimize disruption to local traffic while freeway construction advances toward completion in 2006.

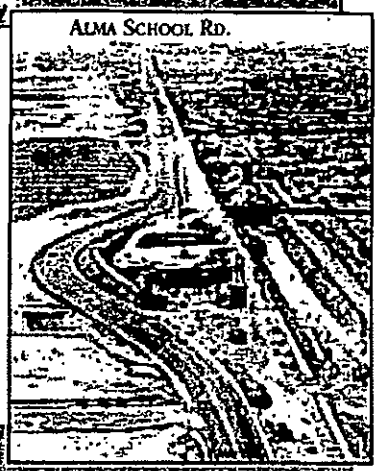
In addition, Greenfield and Pecos roads are major components of a street modernization plan by the Town of Gilbert. For more information, contact the Town of Gilbert Neighborhood Services at (480) 503-6760.

(Left) The Santan Freeway joins Gilbert Road just north of Chandler's municipal airport.



The I-10/Loop 202 freeway-to-freeway interchange opened in November, extending the Santan to the Loop 101 Price Freeway.





Dobson Rd. to Arizona Ave.: Work began last August on this 2.4 mile, six-lane, divided freeway segment. It includes a full-diamond interchange at Alma School, a half-diamond to and from the east at Dobson, and the west half of the full-diamond interchange at Arizona Avenue. The $31.9 million project, awarded to Edward Kraemer & Sons, Inc., Phoenix, in June '03, will be completed by early '05. Masonry sound barrier walls and rubberized asphalt are key project elements. Prior to completion to Gilbert Road, only two lanes will lead to Arizona Avenue (SR 87).

Loop 202 Current Project Particulars

L101 Price / Loop 202 Santan Traffic Interchange

- Scope: Freeway-to-freeway interchange including seven bridges for free-flow ramps, the Price Road / Loop 202 traffic interchange and 1.6 miles of freeway between McClintock and Dobson roads
- Cost: $48.3 million contract awarded April '02 to Edward Kraemer & Sons, Inc, Phoenix
- Time: Initial interchange ramps, South-to-West and East-to-North, opened in November '03. Remaining ramps will be finished by July and opened upon completion of Dobson to SR 87 segment.
- **More Information:** Mark Bonan, Valley Project Information at (602) 712-7176

Arizona Ave. to Gilbert Rd.

- Scope: 2.7 miles of six-lane, divided freeway with bridges to carry McQueen, Cooper and Gilbert over the freeway. Complete east half of Arizona Ave. interchange, finish full-diamond interchanges at McQueen and Cooper, plus west half of the full-diamond interchange at Gilbert. Cast-in-place concrete sound barrier walls and rubberized asphalt pavement.
- Cost: $47.7 million contract awarded December '03 to Pulice Construction, Inc., Phoenix
- Time: 400 working days (about 20 months) from February 6, '04
- **More Information:** Gordon Bleyl, Resident Engineer at (602) 712-6470, or, Mark Bonan, Valley Project Information at (602) 712-7176

Advance Bridge Construction: Greenfield and Ray Roads & UPRR Crossings

- Scope: Finish local street bridges over the Santan prior to freeway construction to minimize traffic impacts. Complete bridges to carry realigned Ray and Greenfield roads over the freeway, a Union Pacific Railroad freeway crossing, and a new UPRR crossing at realigned Greenfield Road.
- Cost: $15.7 million contract awarded September '03 to Pulice Construction, Inc., Phoenix
- Time: 360 calendar days from November 17, '03
- **More Information:** Sam Hanna, Resident Engineer at (602) 712-8110, or, Mark Bonan, Valley Project Information at (602) 712-7176

Power Road to Elliot Road

- Scope: 3.3 miles of six-lane, divided freeway with bridges to carry the freeway over Power, Sossaman, Hawes and Warner roads. Interchanges include the east half of a full-diamond at Power, a full-diamond interchange at Hawes and the south half of the full-diamond interchange at Elliot. Rubberized asphalt paving is included in the project.
- Cost: $66.8 million (estimate)
- Time: 670 calendar days, with an anticipated May '04 start date
- **More Information:** Mike Zimnick, Assistant District Engineer at (602) 712-8965 or, Mark Bonan, Valley Project Information at (602) 712-7176

Elliot Rd. to Baseline Rd.

- Scope: 2.15 miles of six-lane divided freeway with bridges to carry the freeway over Elliot and Baseline roads, and Guadalupe Rd. over the freeway. Complete full-diamond interchange at Guadalupe and north half of the full-diamond interchange at Elliot, plus a half-diamond to and from the south at Baseline. Masonry sound barrier walls at locations identified by noise studies, plus rubberized asphalt pavement to be applied as part of the Power to Elliot project.
- Cost: $39.5 million contract awarded November '03 to Pulice Construction, Inc., Phoenix
- Time: 220 working days (about 11 months) from January 8, '04
- **More Information:** Mike Harrington, Sr Resident Engineer at (602) 712-8114, or, Mark Bonan, Valley Project Information at (602) 712-7176

U.S. 60 / Loop 202 Traffic Interchange Phase 1

- Scope: Initial connections of U.S. 60 and Loop 202, to and from the south, widening of U.S. 60 (Superstition Freeway) between Sossaman and Ellsworth roads, and completion of Santan Freeway bridges and ramp bridge segments over U.S. 60. Masonry sound barrier walls along U.S. 60.
- Cost: $41 million contract awarded October '03 to FNF Construction, Inc.,Tempe
- Time: 230 calendar days beginning December 4, '03
- **More Information:** Rob Samour, Resident Engineer at (602) 712-7054, or, Mark Bonan, Valley Project Information at (602) 712-7176

Santan Freeway

The **Santan Freeway (Loop 202)** is part of the Maricopa Association of Governments Regional Freeway System that will connect Interstate 10 to the Superstition Freeway through the southeast valley. The completed Santan Freeway will serve Gilbert, Chandler, Tempe, Mesa, the Gila River Indian Community and the unincorporated portions of Maricopa County.

The project includes relocating utilities and realigning Greenfield Rd to accommodate the freeway infrastructure. The new freeway will have **rubberized asphalt** as its pavement surface. Three lanes in each direction will be separated by an open median with cable barriers.

The relocation of utilities is scheduled to begin in the summer of 2003. Greenfield Road realignment is scheduled to begin in late 2003 and be completed in early 2005.

The freeway will be constructed in three separate segments, beginning in early 2005 and completed by late 2006. The first segment will be from Gilbert Rd to Williams Field Rd. The second from Williams Field Rd to Higley Rd and the third from Higley Rd to Power Rd.

More information is available on the Arizona Department of Transportation (ADOT) website: http://redmountainfreeway.com/

Town Manager's Office
50 E Civic Center Dr
Gilbert, AZ 85296
(480) 503-6863

George Pettit
Town Manager
(480) 503-6864

Marc Skocypec
Asst Town Manager
(480) 503-6862

Tami Ryall
Deputy Town Manager
(480) 503-6765

Linda Tunney
Administrative Asst
(480) 503-6863

Diane Archer
Financial/Performance Coord
(480) 503-6758

ırizona)

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ally constructed beltway encompassing the eastern Phoenix,
d surrounds the cities of Tempe, Mesa, Chandler, and Gilbert. It
ith Interstate 10 and State Route 51, and is completed in segments
:e.

?02 to consist of three sections:

Interstate 10/Arizona 51 triple interchange to U.S. Route 60, passing through Tempe
ompleted as far as Power Road.
nterchange through Mesa, Gilbert and Chandler back to Interstate 10. Completed in June

ow.

ıction of the freeway east of Interstate 10 has been accelerated
07. Long-term plans call for the extension of the freeway west of
Mountain to meet I-10 again in West Phoenix, essentially
; route of downtown. The final planning and eventual
ıuth Mountain Freeway) will occur after the current construction
rently (as of June 2006) causing much controversy in Ahwatukee,
the demolition of up to 255 homes according to Arizona
ıd open up Ahwatukee to be more readily accessible, affecting its
ough the Gila River Reservation has not been welcomed by the
ıny to recommend not building the freeway at all. Other
cts on South Mountain Park, environmental impacts on the
ossible alignments at the west end, and escalating land acquisition costs.

Old colored Arizona Loop 202 shield that is being phased out

secting Loop 202

al plan, once at the origin with AZ51, once south of Phoenix, and once at the terminus in

with I-10
northern terminus
ear the Salt River and once in Chandler. Some planned routes for the South Mountain
ion at the western terminus, creating a triple intersection with I-10.
sa and once in Chandler

tion site on the proposed South Mountain Freeway
y.com/southmtn/index.htm)

viki/State_Route_202_%28Arizona%29"

GILBERT
ARIZONA

antan Freeway

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lore information is available on the Arizona Department of Transportation (ADOT) website:
ttp://redmountainfreeway.com/

D

SANTAN ~ LOOP 202 ~ COMPLETED

For Additional Information Contact our
Communication & Community Partnership Office at 602-712-7355

Construction Brochure - May 2005 (Adobe .pdf file)
Environmental Assessment
Link: Aerial Maps

Link: Road Closures www.az511.com

Construction Schedule

Click on a roadway section for additional information

Section (view maps)	Miles	Start Date	Completion Date	Contractor	Contract Amount
Santan/South Mountain/I-10 West Half Traffic Interchange, Phase I (Pecos Road Connection)	1.5	July 2003	Open to Traffic December 2004	DH Blattner	$26,590,000
Santan/I-10 East Half Traffic Interchange Phase II (Chandler Blvd.)	0.5	August 2001	Open to Traffic November 2003	Kraemer	$58,696,000
I-10/Wildhorse Pass Blvd. Traffic Interchange	--	June 2003	Open to Traffic April 2004	Pulice	$14,613,000
56th Street to Kyrene Road and Kyrene Road to McClintock Drive	3.3	September 2002	Open to Traffic November 2003	Pulice	$46,759,000 $4,661,000
Price/Santan Traffic Interchange	2.0	Design Stage May 2002	Open to Traffic November 2004	Kraemer Kraemer	$60,295,000
Dobson Road to Arizona Avenue	1.9	July 2003	Open to Traffic June 2005	Kraemer	$41,486,000
Arizona Avenue to Gilbert Road	3.1	December 2003	Open to Traffic December 2005	Pulice	$67,183,620
Gilbert Road to Frye Road	3.5	January 2005	Open to Traffic June 2006	FNF	$64,407,000
Frye Road to Higley Road and Higley Road to Power Road	2.6 2.0	October 2004	Open to Traffic June 2005	Pulice	$70,622,000
Power Road to Elliot Road	3.9	May 2004	Open to Traffic June 2006	Pulice	$64,275,000
Elliot Road to Baseline Road	1.9	January 2004	Open to Traffic January 2005	Pulice	$44,234,000

E

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TRN03-0211 / 969009
Attorneys for Plaintiff
TRN@azag.gov

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR MARICOPA COUNTY

STATE OF ARIZONA ex rel. VICTOR M. MENDEZ, Director, Department of Transportation,

Plaintiff,

v.

LESUEUR INVESTMENTS V., L.L.C., an Arizona limited liability company; and MARICOPA COUNTY TREASURER,

Defendants.

No. CV2003-013072 (Consolidated)

PLAINTIFF'S RESPONSE TO DEFENDANTS'S MOTION IN LIMINE RE: THE PLANNING OR CONSTRUCTION OF ANY PART OF THE SANTAN FREEWAY PROJECT IN CONNECTION WITH THE VALUATION ISSUE AT TRIAL

(Oral Argument Requested)

(Assigned to The Honorable Janet Barton)

Plaintiff State of Arizona ex rel. Victor M. Mendez, Director, Department of Transportation, by and through counsel undersigned, respectfully requests that this Court deny Defendants' motion in limine for the reasons set forth in Plaintiff's attached Memorandum of Points and Authorities which is incorporated herein by reference.

MEMORANDUM OF POINTS AND AUTHORITIES

Defendants have combined two motions in limine in one. Part of Defendants' motion is an attempt to define, as a matter of law, the "project" for which the subject property was

acquired as that portion of State Route 202 from Interstate 10 to U.S. 60. The second part of Defendants' motion is an attempt to use the "project influence rule" to prohibit any evidence that would allow Plaintiff to rebut Defendants' opinion that the subject property would have had the same highest and best use without the freeway as it does with the freeway. Defendants cite no law in support of their motion, and the second part of their motion would lead to the end of the doctrine the motion is based upon.

I. DEFENDANTS'S MOTION IN LIMINE IS UNTIMELY.

Plaintiff disclosed its traffic engineer's opinion regarding what transportation infrastructure would be built in the absence of the Santan Freeway in November, 2004. Pursuant to the Court's Scheduling Order of June 7, 2005, rebuttal disclosure statements were to be filed no later than August 2, 2005. Defendants filed such a rebuttal disclosure statement, but failed to list as an issue of law or fact this issue regarding the definition of the Project. The Court also ordered the parties to meet and discuss motions in limine prior to filing them. This meeting took place on January 30, 2006, but this issue was not raised. (*See* attached email dated February 2, 2006). Instead, Defendants first raised the issue by an email dated June 29, 2006 (copy attached). Had Defendants raised the issue in a timely fashion, the parties may have worked the issue out between them or taken it to the Court for early resolution. Instead, in a clear case of litigation by ambush, Defendants waited to raise the issue until the eve of trial.

. . . .

II. DEFENDANTS CITE NO LAW SUPPORTING THE PROPOSITION THAT THE DEFINITION OF THE PROJECT IS A MATTER OF LAW, AND THE FACTS ARE CONTRARY TO DEFENDANTS' ASSERTION.

Defendants seeks to define the project as a matter of law as the entire Santan Freeway from Interstate 10 to U.S. 60. The reason the definition of the project is of importance in this matter is that, in order to avoid any influence on the value of the subject property caused by the project, one must define the project. In Arizona, the project influence rule is set forth in A.R.S. §28-7097, which reads, in relevant part:

> "In acquiring property for transportation purposes pursuant to this Article, when determining the market value of the property to be taken and the market value of the remainder, if any, in the before condition, a decrease or increase in the market value of the real property before the date of valuation caused by the public project for which the property is to be acquired or by the likelihood that the property would be acquired for the project shall be disregarded."

Accordingly, one must determine what is "the public project" for which this property is being acquired.

Defendants claim that "fact, logic and law" dictate that the project is the Santan Freeway from Interstate 10 to U.S. 60. Defendants cite no law regarding how projects are to be defined or that the definition of the project is a matter of law for the Court. Fact and logic, however, dictate that the project would be the Santan Freeway from State Route 101 to U.S. 60. There are two traffic engineers who will be testifying in this matter--one for Plaintiff, and one for Defendants. Both traffic engineers opine that, if the entire Santan Freeway from I-10 to U.S. 60 were eliminated, good traffic engineering principles would

dictate that a high-speed connection be made between the end of the 101 Freeway (where it currently intersects with State Route 202 at Pecos Road) to Interstate 10.

It should be noted that, had Defendants timely objected to the above testimony, the State might have stipulated to the definition of the project proposed by the Defendants; Plaintiff would not have wanted to argue over this minor point. Both parties' traffic engineers expressed opinions as to what the transportation network would look like if the 202 Freeway were never to be built. The State's traffic engineer believes that Pecos Road would become a major transportation corridor across the southeast valley if the Santan Freeway were not to be built. One of several reasons for that opinion was the engineer's assumption that State Route 101 would not dead-end at Pecos Road but, in the absence of the Santan Freeway, would loop to the west and connect to Interstate 10. If the Court finds that, as a matter of law, the traffic engineers must assume that there is no connection between State Route 101 and I-10, there are still other factors supporting the State's traffic engineer's conclusion in this regard. Had Defendants disclosed this issue in August, 2005, Defendants' engineer would have so testified at his deposition.

III. THE "PROJECT INFLUENCE RULE" REQUIRES MENTION OF THE PROJECT TO DETERMINING THE IMPACT OF THE PROJECT ON PROPERTY VALUES.

The project influence rule does not prohibit any mention of the project for which the property is being acquired. Defendants cite no statutes or cases supporting such a proposition. Moreover, such an extension of the project influence rule would render the

rule meaningless and would allow parties in condemnation cases to present evidence of values that are inflated or depressed due to the project, without the possibility of rebuttal.

The case at hand is a prime example. This was a partial acquisition of the LeSueur's property. The remainder of the property is being developed with a regional mall, power center, and other high intensity uses. Defendants claim that these uses would have been possible even had the freeway not been planned. Plaintiff believes that, had the freeway not been planned, such a high intensity use would be unlikely. Defendants' appraiser bases his opinion of the highest and best use of the subject property in part on the Gilbert General Plan in existence on the date of value. That plan clearly shows the Santan Freeway. Plaintiff believes the evidence will show that, but for the freeway, the City of Gilbert General Plan would not designate the subject property as a high intensity commercial core. The proof is that the only City of Gilbert General Plan that does not include a proposed location for the Santan Freeway also did not show the subject property as a commercial core.

In sum, by prohibiting any mention of the project, the Court would in effect do away with the project influence rule by prohibiting any evidence regarding the influence of value caused by the project. Under Defendants' theory, if a government agency built a landfill on a portion of a property owner's land and valued that land by comparing it to other properties in the same neighborhood which sold after knowledge of the dump, the property owner would be prohibited from presenting any evidence that the value of those sales were adversely impacted by the announcement of the project. Likewise, if a property

owner values its property with the highest and best use which it would not have but for the project, the government would be prohibited from mentioning the project and any influence the project has on value. In order to determine, one way or the other, whether there has been an impact on value caused by the project, one must consider the project, its influence on planning and zoning in the subject neighborhood, and its influence on values in order to make sure to back those influences out of the value of the subject property.

IV. **CONCLUSION.**

Defendants' untimely motion should be denied. Defendants cite no law establishing the definition of the project as a matter of law, and present no facts in this regard. Even if Defendants were right, and the definition of "the project" is as a matter of law the Santan Freeway from Interstate 10 to U.S. 60, the remedies sought by Defendants, a prohibition on mentioning the subject project, would render the "project influence rule" inoperable because project influenced values in condemnation cases could not be rebutted. For the foregoing reasons, Defendants' motion should be denied.

RESPECTFULLY SUBMITTED this 11th day of July, 2006.

TERRY GODDARD, Attorney General

Bryan B. Perry
Jennifer M. Dorsey
Assistant Attorneys General
Attorneys for Plaintiff

Copy of the foregoing ~~mailed~~/hand-delivered
this 19th day of July, 2006, to:

The Honorable Janet Barton
Judge of the Superior Court
125 West Washington, OCH-301
Phoenix, Arizona 85003

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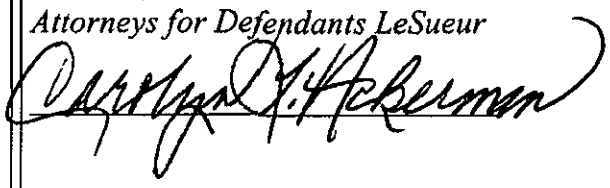

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
01/22/2008 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2003-013072 01/17/2008

JUDGE DOUGLAS L. RAYES

CLERK OF THE COURT
T. Tankersley
Deputy

ARIZONA STATE, et al. BRYAN B PERRY

v.

LESUEUR INVESTMENTS V, L L C, et al. JAMES T BRASELTON

JOHN W PAULSEN
GARY L BIRNBAUM
JENNIFER MARIE DORSEY

TRIAL MINUTE ENTRY
DAY 8

9:30 a.m. Trial to Jury continues from January 16, 2008. Plaintiffs are represented by Bryan B. Perry, James Redpath and Jennifer M. Dorsey. Defendants are represented by Gary L. Birnbaum and James T. Braselton. Defendant Wilford W. Andersen is present.

Court Reporter, Cindy Lineburg, is present.

The jury is not present.

Discussion is held regarding objections to expert witness testimony.

The Court finds that there is no evidence for the jury to find that the project is anything other than the San Tan Freeway, i.e. the 202 Freeway that runs between I-10 and U.S. 60.

The Court rules that any testimony from Mr. Lee or Mr. Zaddick that relies on or assumes the existence of any part of the San Tan Freeway is not admissible pursuant to Rules 401 and 403.

Argument is held regarding evidence issues.

IT IS ORDERED that evidence that incorporates the project plan is not admissible under Rules 401 and 403 as it would risk unfair prejudice and confusion for the jury.

10:27 a.m. Court stands at recess.

10:37 a.m. Court reconvenes with the parties and respective counsel present.

Court Reporter, Cindy Lineburg, is present.

The jury is present.

Jerry Zaddick is sworn and testifies.

Exhibits 97 and 98 are received in evidence.

11:50 a.m. Court stands at recess.

1:10 p.m. Court reconvenes with the parties and respective counsel present.

Court Reporter, Scott Coniam, is present.

The jury is present.

Jerry Zaddick continues to testify.

2:18 p.m. Court stands at recess.

2:39 p.m. Court reconvenes with the parties and respective counsel present.

Court Reporter, Scott Coniam, is present.

The jury is present.

Plaintiffs rest.

2:42 p.m. The jury is excused.

Discussion is held regarding final jury instructions.

3:20 p.m. Court stands at recess until 8:30 a.m. on January 18, 2008.

3:45 p.m. Further discussion is held, off the record, regarding final jury instructions.

3:50 p.m. Court stands at recess.

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

CITY, a municipal corporation, Plaintiff, vs. DEFENDANT PROPERTY OWNER X, a single man; and PIMA COUNTY TREASURER, Defendants. (A.P.N. No. ___-__-____)	No. C2018____ **REQUESTS FOR ADMISSION TO DEFENDANT X** **(Eminent Domain)** (Assigned to Hon. Judge --)

TO: DEFENDANT X,

Pursuant to Rule 36, Arizona Rules of Civil Procedure, Plaintiff City hereby requests the admission of the matters set forth below.

REQUESTS FOR ADMISSION

1. Admit that the project at issue in this case is the Broadway Boulevard, Euclid to Country Club Improvement Project ("the Project") as described in Tucson City Council Resolution 22557, attached.

_____ Admit **_____** **Deny _____**

2. Admit that the Project limits are generally depicted in the map, below.

_____ Admit _____ Deny _____

3. Admit the property that is the subject of the Complaint ("Subject Property") was within the scope of the Project at the time the government first committed to the Project.

_____ **Admit** _____ **Deny** _____

4. Admit that the government first committed to the Project when the Tucson City Council passed Resolution 22557 authorizing the acquisition of the property necessary for the Project, including the Subject Property.

_____ **Admit** _____ **Deny** _____

5. Admit the use to which the Subject Property is to be applied, the Project, is a public use for which the exercise of the right of eminent domain is authorized by law.

_____ **Admit** _____ **Deny** _____

6. Admit that taking the Subject Property is necessary for the Project.

_____ **Admit** _____ **Deny** _____

7. Admit that the City Council's determination that the Subject Property is necessary for the Project is not arbitrary, capricious, fraudulent, or an abuse of discretion.

_____ **Admit** _____ **Deny** _____

8. Admit that the Project is located in the manner which is most compatible with the greatest public good and least private injury as required by ARS §12-1115(A).

Admit _____ **Deny** _____

DATED this ___ day of October, 2018.

JENNINGS, STROUSS & SALMON, P.L.C.

By: _____
Christopher W. Kramer
Danielle J.K. Constant
Laura R. Curry
Attorneys for Plaintiff

EMINENT DOMAIN 7

Project Influence (Zoning)

If you find that [the reasonable probability of] a change in [zoning] [and/or] [land use restrictions] existed before the acquisition because of [*name of project*], then you must disregard [the probability of] that change when you determine the fair market value of the property being acquired [and the remaining property].

SOURCE: *Town of Paradise Valley v. Young Financial Servs., Inc.,* 177 Ariz. 388, 391, 868 P.2d 971, 974 (Ct. App. 1993).

USE NOTE: Use bracketed language appropriate to the facts.

EMINENT DOMAIN 8

Project Influence

In determining the fair market value of the property being acquired [and the remaining property], you must disregard any decrease or increase in market value to the property before the acquisition which was caused by the [*name of project*] or by the likelihood that [part of] the property would be acquired for the [*name of project*].

SOURCE: *State v. Hollis,* 93 Ariz. 200, 379 P.2d 750, 753-54 (1963); *Uvodich v. Arizona Bd. of Regents,* 9 Ariz. App. 400, 453 P.2d 229, 234-35 (1969); A.R.S. § 28-7097 (ADOT cases).

USE NOTE: Use bracketed language appropriate to the facts.

9 Ariz.App. 400
Court of Appeals of Arizona.

Jack L. UVODICH and Edna B. Uvodich, husband and wife, and the Unknown Heirs of any Deceased Defendant, Appellants,
v.
ARIZONA BOARD OF REGENTS, a body corporate, and the City of Tucson, an Arizona municipal corporation, Appellees.

No. 2 CA-CIV 559.
|
April 10, 1969.
|
Rehearing Denied May 29, 1969.

Synopsis
Condemnation case in which property owners appealed from an adverse judgment of Superior Court, Pima County, Cause No. 101091, Robert O. Roylston, J. The Court of Appeals, Hathaway, J., held, inter alia, that where closure of one street constituted merely a deprivation of one means of access to the general system of streets, property owners still had reasonable access to street system, and only damage they sustained did not differ in kind, although it might have in degree, from that suffered by the public in general, damages suffered were merely damnum absque injuria and property owners could not recover for them.

Affirmed.

West Headnotes (11)

[1] **Eminent Domain**
Obstruction of Access
Municipal Corporations
Access to and Use of Roadway

As to streets abutting property owners' land, property owners have an easement of ingress and egress to and from the property which constituted a property right compensable by the state when destroyed or substantially impaired.

1 Cases that cite this headnote

[2] **Eminent Domain**
Questions for Jury

Question of whether closures or temporary blockage of streets in vicinity of property owners' business gave them a claim for damages was one for court's determination.

Cases that cite this headnote

[3] **Eminent Domain**
Vacation
Eminent Domain
Interference with Trade or Business

One whose property does not abut on closed street ordinarily has no right to compensation for closing or vacation of the street if he still has reasonable access to the general system of streets, and a decrease in value of his property because of diversion of traffic away from it affords no basis for compensation.

Cases that cite this headnote

[4] **Eminent Domain**
Vacation

Where closure of one street constituted merely a deprivation of one means of access to the general system of streets, property owners still had reasonable access to street system, and only damage they sustained did not differ in kind, although it might have in degree, from that suffered by the public in general, damages suffered were merely damnum absque injuria and property owners could not recover for them.

Cases that cite this headnote

1 Cases that cite this headnote

[5] **Indemnity**
Particular Cases and Issues

Where it was apparent that board of regents did not undertake to indemnify city for any damages sustained by property owners as result of vacation of subject streets, but rather agreed to indemnify city only for damages awarded by a court of competent jurisdiction, property owners could not successfully assert a third-party beneficiary claim against the board of regents by virtue of its covenant in quitclaim deed from city where court refused to award any damages to property owners.

1 Cases that cite this headnote

[6] **Conspiracy**
Object
Conspiracy
Means

Even assuming concerted action on part of board of regents and city in relation to vacation of certain streets, property owners could not successfully contend that there was a "conspiracy" where one requisite of actionable conspiracy, an unlawful purpose or an unlawful means to accomplish such purpose, was missing.

3 Cases that cite this headnote

[7] **Eminent Domain**
Injuries from Construction or Operation of Works

Damage incurred by a property owner as an incident of the construction of a public improvement is not "damage" within the purview of the Constitution. A.R.S.Const. art. 2, § 17.

1 Cases that cite this headnote

[8] **Eminent Domain**
Nature of Injury to Property Not Taken

Decrease in value caused by condemnation process is afforded no legal remedy.

1 Cases that cite this headnote

[9] **Eminent Domain**
Nature of Injury to Property Not Taken

Claims for relief by property owners on grounds of depreciation in value of their property caused by acts of condemning authority failed to state a claim, since such damages are damnum absque injuria.

1 Cases that cite this headnote

[10] **Eminent Domain**
Necessity of Just or Full Compensation or Indemnity

"Just compensation", required by State Constitution to be given for property taken by eminent domain, means valuing property in such way as not to diminish or depreciate its value because of steps taken by public authority in carrying out a plan. A.R.S.Const. art. 2, § 17.

2 Cases that cite this headnote

[11] **Eminent Domain**
Time with Reference to Which Compensation to Be Made

Time as of which evaluation of condemned

property should be made must comport with peculiar facts and circumstances of the case so as to assure the property owner compensation which is just, as contemplated by the Constitution. A.R.S.Const. art. 2, § 17; A.R.S. § 12-1123.

3 Cases that cite this headnote

Attorneys and Law Firms

***401 **230** May, Dees & Newell, by Louis W. Barassi, Willis R. Dees, Tucson, for appellants.

Gary K. Nelson, Atty. Gen., Stanley Z. Goodfarb, Special Asst. Atty. Gen., Phoenix, Dino DeConcini, City Atty., J. Dan O'Neill, Asst. City Atty., Tucson, for appellees.

Opinion

HATHAWAY, Judge.

A summary of the proceedings in the trial court which culminated in the judgment from which this appeal is taken is as follows. The Arizona Board of Regents instituted a condemnation action to acquire a parcel of realty located at the corner of Hawthorne Street and Martin Avenue in Tucson, owned by Mr. and Mrs. Uvodich. The defendants filed a counterclaim in four counts. The plaintiff moved to dismiss the counterclaim and the motion was granted with leave to amend the counterclaim and to join the City of Tucson as a party defendant. The defendants filed an amended counterclaim against the Board and a cross-claim against the City of Tucson. Both the Board and City moved to dismiss the counterclaim on the ground that it failed to state a claim for relief. After submission of memoranda and argument thereon, the trial court granted the motion to dismiss and the formal judgment duly entered thereon recited:
'At said hearing, this court, having heard argument and reviewing the file, and all pleadings and matters contained therein, ordered the granting of the motions to dismiss * * *.'[1]

The defendants now contend that their counterclaim stated a claim for relief, hence the motion to dismiss was erroneously granted. However, in view of the fact that matters outside the counterclaim were presented to and considered by the trial court, as evidenced by the recitation in the judgment set forth above, the motion was treated and disposed of as one for summary judgment. Our review therefore is predicated on the same record. We shall consider each of the counts set forth in the counterclaim seriatim.

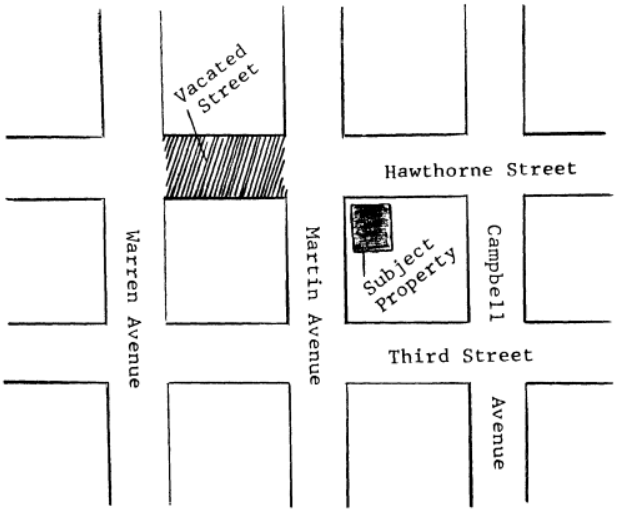
COUNT ONE

Count 1 in substance alleged that the Board, in conjunction with the City and in furtherance of the expansion of the University of Arizona, vacated and closed Hawthorne Street from Warren to Martin Avenues, and North Warren Avenue between Hawthorne and East Second Streets, which for many years prior thereto had been public thoroughfares; that these ***402 **231** streets were a 'direct and easy means of ingress and egress' to their property and the business conducted thereon; that the closing of these streets had 'materially and drastically interfered with ingress and egress' to and from their property by their customers and had destroyed the 'ease of ingress and egress and general access' to their property; and that they had been permanently deprived of substantial and essential means of ingress and egress. At the time of the hearing on the motion to dismiss, the defendants were permitted to amend the amended counterclaim to allege that the Board and the City had vacated and closed other nearby streets. The parties stipulated that, at all times material, access could be had to the defendants' property 'by a traveler on Hawthorne entering Martin or by a traveler on Third Street entering Martin.' Appended to the Board's motion to dismiss was an affidavit of counsel, which remains uncontroverted in the record, stating:
'That on or about the date of filing of the summons and complaint in the above-entitled action and presently, the only street physically closed in the immediate vicinity of the defendants' property was Hawthorne Street from the west curb line of Martin to the east curb line of Warren Avenue.

'That Warren Avenue was at that time and is presently physicially open from Fifth Street to Speedway.

'That Martin Avenue on the date of the filing of the complaint was and is presently physically open from Speedway to Sixth Street.'

[1] [2] Examination of the diagram below indicates that there was no closure of the streets on which the subject property ***403 **232** abutted. As to these streets, the defendants had an easement of ingress and egress to and from the property which constituted a property right compensable by the state when destroyed or substantially impaired. State ex rel. Morrison v. Thelberg, 87 Ariz. 318, 350 P.2d 988 (1960); State ex rel. Herman v. Jacobs, 7 Ariz.App. 396, 440 P.2d 32 (1968). There being no destruction or impairment of access to the abutting streets, the trial court ruled as a matter of law that any closures or temporary blockage of other streets or other places did not give the defendants a claim for damages. This question was one for the court's determination. City of Phoenix v. Wade, 5 Ariz.App. 505, 428 P.2d 450 (1967).



The appellant relies on language in Reese v. De Mund, 74 Ariz. 140, 245 P.2d 284 (1952) to the effect that the extent of a grantee's private right of user in streets and alleys shown on a plat, to which by reference his conveyance was made, is limited to such streets and alleys as are reasonably and materially beneficial to him and of which the deprivation would reduce the value of his lot. (74 Ariz. 142, 245 P.2d 284.) In Reese, the complaint alleged that the plaintiff had suffered special damage by reason of the vacation of an alley in that the sewer line which served their property, together with their gas and utility line, was located in the alley being abandoned and also that their property was being depreciated in value because of the closing of the alley. Although this original opinion held that a claim for relief had been stated, on rehearing it was reversed and our Supreme Court affirmed the trial court's dismissal of the complaint. Reese v. De Mund, 75 Ariz. 66, 251 P.2d 887 (1952). The court stated: 'These damages, as appear from the complant, are not different in either degree or kind from those suffered by the public, generally, and can constitute no basis for the cause of action claimed.' 75 Ariz. 67, 251 P.2d 887.

[3] [4] It may be stated as a general rule 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. See Annot., 49 A.L.R. 330; Annot., 93 A.L.R. 639. A decrease in the value of his property because of diversion of traffic away from it affords no basis for compensation. Rayburn v. State, 93 Ariz. 54, 378 P.2d 496 (1963); Rutledge v. State, 100 Ariz. 174, 412 P.2d 467 (1966); Kansas City v. Berkshire Lumber Company, 393 S.W.2d 470 (Mo.1965); Wolf v. Commonwealth, 422 Pa. 34, 220 A.2d 868 (1966); People ex rel. Department of Public Works v. Symons, 54 Cal.2d 855, 9 Cal.Rptr. 363, 357 P.2d 451 (1960). Here, the closure of Hawthorne Street between Martin and Warren Avenues constituted merely a deprivation of one means of access to the general system of streets. The defendants still had reasonable access to the street system and the only damage they sustained did not differ in kind, although it might have in degree, from that suffered by the public in general, i.e., mere circuity of travel. Under these circumstances, notwithstanding they were damaged by the closing of the street, the trial court properly ruled that such damages were merely Damnum absque injuria. Gayton v. Department of Highways, 149 Colo. 72, 367 P.2d 899 (1962); Archenhold Automobile Supply Company v. City of Waco, 396 S.W.2d 111 (Tex.1965); People v. Symons, supra.

COUNT TWO

Count 2 realleged the allegations set forth in Count 1 as to the closing of the designated streets and further alleged that:

> '* * * the City of Tucson joined with the plaintiff in furtherance of said expansion program and did close said streets and alleys in consideration of and relying upon the express promise

> and agreement of the plaintiff, through its duly authorized offices, to accept the responsibility for injury to the defendants Uvodich, from any damage or harm by ***404 **233** reason of closing of said streets and the agreed appropriation thereof.'

In opposition to the motion to dismiss, the defendants submitted a memorandum of law and appended thereto an exhibit (Exhibit 1) to support their position that 'there was a direct binding and enforceable contractual obligation on the part of the Board of Regents inuring to the benefit of the said defendants and in the other persons injured by the vacation of the streets in question.' Construing the allegations of Count 2 most favorably to the defendants, it would appear that they were attempting to assert a third party beneficiary claim against the Board of Regents by virtue of its covenant in the quitclaim deed from the City (part of Exhibit 1) which recited:
'The grantee, the Board of Regents of the universities and state college of Arizona, in consideration of the transfer of the above described portions of streets and alleys, Covenants to hold harmless the City of Tucson, a municipal corporation, From any damages awarded by a court of competent jurisdiction against the City of Tucson as the result of any action or cause of action brought by any owner or owners of real property in the City of Tucson claiming damages as a proximate result of the adoption of ordinance No. 2895 vacating the above described portions of streets and alley.' (Emphasis added)

[5] It is apparent that the Board did not undertake to indemnify the City of Tucson for Any damages sustained by property owners as a result of the vacation of the subject streets. It agreed to indemnify the City only for 'damages awarded by a court of competent jurisdiction.' As a consequence thereof, the adverse ruling on Count 1 of the counterclaim caused the claim alleged in Count 2 to fail.

COUNTS THREE AND FOUR

In their opening brief, the defendants contend that Count 3 alleges deliberate and unlawful joint and concerted acts on the part of the Board and the City, constituting civil conspiracy. They claim that Count 4 sets forth an actionable claim for relief 'sounding in tort for abuse of legal process.' The tenor of their argument in their reply brief appears to be that Counts 3 and 4 state a claim for relief because the depreciation in value of their property was caused by acts of the condemning authority.

The substance of the allegations of Counts 3 and 4 is that in 1960 the University of Arizona announced a planned expansion through some thirteen residential blocks within the next ten years according to a map released simultaneously therewith; that pursuant to this program, the Board systematically and progressively acquired property in the area either by purchase or by exercise of its power of eminent domain; that after such acquisition, the Board destroyed the residence thereon and created parking lots and sites for the University buildings; and that as a consequence of this program the defendants' property was depreciated in value.
[6] As to the defendants' 'conspiracy' argument, we need only say that even assuming concerted action on the part of the Board and the City had been alleged, one requisite of an actionable conspiracy was missing-an unlawful purpose or an unlawful means to accomplish such purpose. See 15A C.J.S. Conspiracy s 3; Riner v. Paskan, 213 Cal.App.25d 499, 28 Cal.Rptr. 846 (1963).

As to the defendants' 'depreciation in value' argument, they have cited no authority which permits recovery for same in inverse eminent domain. Art. 2, s 17, of the Arizona Constitution, A.R.S. provides that no private property shall be taken or damaged for public use without just compensation having first been made or paid into court. However, as pointed out by one treatise:
'* * * (T)he addition to the state constitution of a cause requiring payment for 'damage' as well as for 'taking' by no means opens the gate to a claim by a property owner for indemnity for all the ***405 **234** many injuries that he or his property may suffer by virtue of an act of government. 'Damages' are interpreted by the courts in a highly artificial way to mean 'damages in a constitutional sense.'

1 Orgel on Valuation under Eminent Domain (2d ed.), s 6, pp. 37-39.

[7] Here we have no physical invasion of the defendants' property. In Rutledge v. State, supra, our Supreme Court pointed out that, under such circumstances, damage incurred by a property owner as an incident of the construction of a public improvement is not 'damage' within the purview of Art. 2, s 17. This view is in accord with the general rule in this country. Jahr, Eminent Domain s 51.

The acts complained of by the defendants consisted of those in furtherance of the Board's expansion program-announcement of its plans, acquisition of neighboring properties in accordance therewith and devotion of such acquired properties to a public use. We do not dispute that such acts may result in economic loss to a property owner. A public announcement of a planned project may result in tenants moving out, see e.g., Foster v. City of Detroit, 254 F.Supp. 655 (E.D.Mich.1966), land may become unsalable, see e.g., Eckhoff v. Forest Preserve District, 377 Ill. 208, 36 N.E.2d 245 (1941), maintenance of land and buildings may cease, Foster v. City of Detroit, supra, ordinances preventing new construction may be passed. See e.g., Hunter v. Adams, 180 Cal.App.2d 511, 4 Cal.Rptr. 776 (1960) and police protection may cease, thereby encouraging vandalism, see e.g., In re Elmwood Park Project Section 1, Group B, 376 Mich. 311, 136 N.W.2d 896 (1965). Furthermore, when property is condemned in a piecemeal fashion, the condemning authority itself may help to prematurely blight the area and an owner whose lot is one of the last acquired is forced to absorb the declining market value which usually accompanies piecemeal condemnation. See, City of Cleveland v. Carcione, 118 Ohio App. 525, 190 N.E.2d 52, 5 A.L.R.3d 891 (1963).

[8] [9] In a recent law review article, 'Damages Arising Through Instituting, Litigating, or Abandoning Eminent Domain Proceedings,' 1967 Utah Law Review 548, the author points out that it is conceivable that the rationale of inverse eminent domain, through its embodiment in a 'damage' provision as in our constitution, could be used to compensate losses caused by instituting, litigating, or abandoning condemnation proceedings. The author notes that, since as much or more actual damage often arises through the process of condemnation, the situation should be no different than where compensable damage is allowed. However, the doctrine of Damnum absque injuria still is applied and decrease in value caused by the condemnation process is afforded no legal remedy. 6 Nichols, Eminent Domain (3d ed., revised 1965) s 26.45; 11 McQuillin, Municipal Corporations s 32.38. The rationale for denying compensation for such decrease in value has been that compensation is required only for the property taken and not for the owner's losses, see e.g., Monongahela Navigation Company v. United States, 148 U.S. 312, 13 S.Ct. 622, 37 L.Ed. 463 (1893) or that the damage caused by the imminence of condemnation is merely one of the costs of ownership. See Smith v. Erie Railroad Company, 134 Ohio St. 135, 16 N.E.2d 310 (1938). We hold, therefore, that Counts 3 and 4, being merely Damnum absque injuria, failed to state a claim and the trial court did not err in dismissing them.

In so holding, however, we do not suggest that the defendants are foreclosed from showing this claimed depreciation in value in the condemnation proceedings. Our Supreme Court has held that property cannot be charged with a lesser value at the time of taking when the decrease in value is occasioned by reason of the taking itself. State v. Hollis, 93 Ariz. 200, 206, 379 P.2d 750 (1963). Admission of evidence of the value the property would have had if the public improvement had not been contemplated ***406 **235** was endorsed in Hollis, supra. A.R.S. s 12-1123 provides:

> 'A. For the purpose of assessing compensation and damages, the right thereto shall be deemed to accrue at the date of the summons, and its actual value at that date shall be the measure of compensation and damages.'

Other jurisdictions which have had occasion to consider the question of depreciated value resulting from a general plan of condemnation do not permit depreciation in value caused by the condemnor to inure to its benefit. In re Elmwood Park Project Section 1, Group B, supra; Foster v. City of Detroit, supra; Lower Nueces River Water Supply District v. Collins, 357 S.W.2d 449 (Tex.Civ.App.1962) (dictum); State Through Department of Highways v. Clarke, 135 So.2d 329 (La.App.1961); Buena Park School District of Orange County v. Metrim Corporation, 176 Cal.App.2d 255, 1 Cal.Rptr. 250 (1959); City of Cincinnati v. Mandel, 9 Ohio Misc. 235, 224 N.E.2d 179 (1966); City of Cleveland v. Carcione, supra; Sayre v. United States, 282 F.Supp. 175 (N.D. Ohio 1967); State Road Department v. Chicone, Fla., 158 So.2d 753 (1963). It is stated in Lewis on Eminent Domain, Vol. 2 (3d ed.) 1329:

> '* * * if the proposed improvement had depreciated the value of the property, it would be very unjust that the condemning party should get it at its depreciated value; and the correct rule would seem to be that the value should be estimated irrespective of any effect produced by the proposed work * * *.'

[10] Art. 2, s 17 of the Arizona Constitution mandates the payment of 'just compensation.' This term has been defined:

'* * * valuing property in such a way as not to diminish

or depreciate its value because of steps taken by the public authority in carrying out a plan.' City of Cincinnati v. Mandel, 224 N.E.2d 180.

[11] State v. Hollis, supra, recognizes that arbitrary application of A.R.S. s 12-1123, supra, is not required where application of the statute would result in unjust compensation to the property owner. The logical conclusion, therefore, is that the time as of which the evaluation of the property should be made must comport with the peculiar facts and circumstances of the case so as to assure the property owner compensation which is just, as contemplated by the Arizona Constitution.

For the reasons herein stated, the judgment is affirmed.

MOLLOY, C.J., and NORMAN S. FENTON, Superior Court Judge, concur.

NOTE: Judge HERBERT F. KRUCKER having requested that he be relieved from consideration of this matter, Judge NORMAN S. FENTON was called to sit in his stead and participate in the determination of this decision.

All Citations

9 Ariz.App. 400, 453 P.2d 229

Footnotes

1 This judgment has the requisite 'finality' for appeal purposes in that the trial court, in accordance with Rule 54(b), Arizona Rules of Civil Procedure, as amended, expressly determined that there was no cause for delay and directed entry of judgment.

IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

CITY OF TUCSON, A MUNICIPAL CORPORATION,
Plaintiff/Appellee,

v.

CHERYL A. TANNO AND THE ESTATE OF PASQUALE J. TANNO,
Defendants/Appellants.

No. 2 CA-CV 2017-0143
Filed October 10, 2018

Appeal from the Superior Court in Pima County
No. C20151377
The Honorable Catherine Woods, Judge

AFFIRMED

COUNSEL

Jennings, Strouss & Salmon P.L.C., Tucson
By John J. Egbert and Danielle J.K. Constant
Counsel for Plaintiff/Appellee

Stubbs & Schubart P.C., Tucson
By Thomas M. Parsons
Counsel for Defendants/Appellants

OPINION

Judge Eppich authored the opinion of the Court, in which Presiding Judge Vásquez and Judge Espinosa concurred.

E P P I C H, Judge:

¶1 In this eminent domain case, Cheryl Tanno and the estate of Pasquale Tanno appeal from a final judgment awarding them $365,910 in compensation for real property condemned by the City of Tucson. They argue the trial court committed error in making evidentiary determinations, refusing to tender certain jury instructions, and declining to award sanctions for a purported discovery violation. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 In 2015, the City of Tucson filed an eminent domain complaint in superior court seeking to condemn a parcel of real property owned by the Tannos. The city sought to acquire the property for the development of the "Downtown Links," a proposed roadway project it asserted was for public use. In response, the Tannos requested a determination of the value of the condemned property and a jury trial.

¶3 After the conclusion of discovery, the city filed several motions in limine seeking to exclude portions of expert testimony disclosed by the Tannos, portions of Cheryl's testimony regarding the value of her property, and evidence relating to certain legal theories advanced by the Tannos. After conducting three hearings, the trial court granted the majority of the city's motions.

¶4 The case proceeded to a jury trial, where the sole issue was the value of the Tanno property. At trial, the court reaffirmed its prior evidentiary rulings, in some instances considering more evidence than was available at the time of its pretrial rulings. The jury returned a verdict in favor of the Tannos, awarding them $365,910 for the fair market value of the property. The trial court issued a final, appealable judgment based on the jury's verdict. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

Eminent Domain

¶5 In Arizona, the state, a county, city, town, village, political subdivision, or person, may exercise the right of eminent domain to acquire property for public use. *See* A.R.S. § 12-1111. Pursuant to our constitution, however, a property owner is entitled to just compensation for land taken by eminent domain. Ariz. Const. art. II, § 17. "Just compensation is the amount of money necessary to put the property owner in as good a financial position as if the property had not been taken." *City of Phoenix v. Wilson*, 200 Ariz. 2, ¶ 8 (2001). Further, "[t]he value of land taken by eminent domain in Arizona is to be determined by the market value of the property: by what a willing buyer would pay for the property and what a willing

seller would take." *State ex rel. Ordway v. Buchanan*, 154 Ariz. 159, 162 (1987). The market value of the property is set as of the day of the summons. A.R.S. § 12-1123(A).

¶6 The Tannos argue the trial court committed several errors that prevented them from receiving just compensation for their property. Their arguments largely stem from the court's decision not to admit certain evidence, which the Tannos contend would have shown the property's value. "A trial court has broad discretion in the admission of evidence, and we will not disturb its decision absent an abuse of that discretion and resulting prejudice." *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, ¶ 59 (App. 2004). "To test whether a trial court has abused its discretion, we must determine not whether we might have so acted under the circumstances, but whether the lower court exceeded the bounds of reason by performing the challenged act." *Toy v. Katz*, 192 Ariz. 73, 83 (App. 1997). "It is well established law in Arizona that appellate courts will not disturb the exercise of discretion of the trial court if it is supported by any reasonable evidence." *Peters v. M & O Constr., Inc.*, 119 Ariz. 34, 36 (App. 1978).

Evidence of Project Influence

¶7 The Tannos first argue the trial court erred in precluding evidence of the city project's influence on the value of their property. They argue they should have been permitted to present evidence of a roadway project initiated by the Arizona Department of Transportation (ADOT) in the 1980s, asserting the Downton Links is a continuation of that same project. They argue the decades-long development of the roadway resulted in a substantial decrease to the value of their property, or "condemnation blight."

¶8 Under the project influence doctrine, "property may not be charged with a lesser or greater value at the time of taking, when the change in value is caused by the taking itself or by anticipation of appreciation or depreciation arising from the planned project." *City of Phoenix v. Clauss*, 177 Ariz. 566, 569 (App. 1994); *see also* A.R.S. § 28-7097 ("[W]hen determining the market value of the property to be taken . . . a decrease or increase in the market value . . . before the date of valuation caused by the public project for which the property is to be acquired . . . shall be disregarded."). Thus, pursuant to this doctrine, a property owner in an eminent domain action is entitled to recover damages from a decrease in value caused by the government project for which the property is taken. *See Clauss*, 177 Ariz. at 569. But, "[t]he doctrine applies only to properties that were 'probably within the scope of the project from the time the government was

committed to it.'" *Id.* (quoting *City of Tucson v. Ruelas*, 19 Ariz. App. 530, 532 (1973)).

¶9 The trial court determined the ADOT project and the Downtown Links were separate and distinct projects. The court thus concluded that any decrease in value caused by the ADOT project would not have been recoverable as damages caused by development of the Downtown Links project. In doing so, the court concluded the ADOT project had been abandoned "in or about the year 2000," and further concluded "the City began planning the Downtown Links Project in approximately 2005 or 2006." As a result, the court precluded the Tannos "from seeking damages for 'Condemnation Blight' allegedly caused by the State of Arizona's plans and activities related to the [ADOT project]."

¶10 The Tannos have not established the trial court abused its discretion, as there was reasonable evidence to support the court's conclusion that the Downtown Links was distinguishable from the ADOT project. *See Peters*, 119 Ariz. at 36. While the projects are similar, perhaps even similar enough to support a determination that the Downtown Links is a continuation of the prior ADOT project, our role on review is limited to determining whether there was reasonable evidence to support the court's conclusion that the two projects were distinct. *See Toy*, 192 Ariz. at 83.

¶11 The ADOT project initially sought to construct a state route with a speed limit of fifty miles per hour, similar to a freeway. Plans for the Downtown Links also include a parkway-style roadway, but with plans to include landscaping, major infrastructure for rainwater drainage, and a speed limit of thirty miles per hour. There was evidence the city had planned to complete the last mile of the project which had been abandoned by ADOT in 1989.[1] However, the Downtown Links was not approved by a city resolution until 2009. If the Downtown Links were a mere continuation

[1] In particular, the Tannos rely on a city report outlining the background of the Downtown Links, which associates the Downtown Links with the ADOT project. According to the report, the ADOT project was largely completed in the 1980s with the exception of the final mile, which was not built due to "lack of funding and lack of community support." Responsibility for the final mile of the project was thus relinquished to the City of Tucson in 1989. Although the report supports the Tannos' argument, we are not persuaded it is sufficient to establish an abuse of the trial court's discretion.

of the ADOT project, we fail to see how a separate resolution approving it would have been necessary.

¶12 Based on the trial court's reasonable conclusion that the two projects were distinct, any decrease in value caused by the ADOT project would not have been attributable to the Downtown Links. Thus, any evidence of such would not be admissible as evidence of project influence from the Downtown Links. *See Clauss*, 177 Ariz. at 569. Accordingly, the court did not abuse its discretion in precluding the Tannos from seeking damages for project influence prior to 2005 or 2006, the timeframe in which the city had apparently committed to the Downtown Links project.

Evidence of Best Use

¶13 The Tannos next argue the trial court erred in disallowing evidence of the best use of their property. Specifically, they contend they should have been permitted to present expert testimony of the property's potential "assemblage" with other properties in the area, thereby increasing its potential value.[2]

¶14 In order to determine the value of property in a condemnation case, the highest and best use of the property must be considered. *Wilson*, 200 Ariz. 2, ¶ 8. There is no rigid formula to determine the value of a parcel of property, and each case must be viewed in light of its own facts. *Id.* ¶¶ 15-16. While the best use of a smaller tract of property may be in combination with others as part of a larger tract of property (as in an assemblage theory), such evidence of best use should be grounded in common sense and market data. *Cf. id.* ¶¶ 12, 16. "Remote and speculative damages may not be considered in eminent domain cases." *City of Tucson v. Estate of DeConcini*, 155 Ariz. 582, 583 (App. 1987).

¶15 The trial court precluded evidence of assemblage, stating it was the Tannos' "burden to show that as of the time of taking, development based on assemblage of surrounding parcels was reasonably probable at any time in the foreseeable future," and concluding the Tannos had failed to meet that burden. It also noted that even if there was some evidence to

[2]"Assemblage," also referred to as "joinder," is "a theory involving the prospect of joining separate parcels." *M & R Inv. Co. v. State ex rel. Dep't of Transp.*, 744 P.2d 531, 535 (Nev. 1987). "If the highest and best use of separate parcels would involve a prospective, integrated, unitary use, then such prospective use may be considered in fixing the value of the property condemned providing joinder of the parcels is *reasonably practicable*." *Id.*

show that assemblage was probable, the expert's opinion on the value of the property apparently did not depend on an assemblage theory. The expert assigned the same value to the Tannos' property both as a single parcel and under an assemblage theory. The court thus concluded "the theory of assemblage is of very minimal relevance and its relevance is substantially outweighed by Rule 403 considerations of wasting time and confusing the issues and misleading the jury." *See* Ariz. R. Evid. 403.

¶16 The Tannos have not established the trial court abused its discretion in concluding the possibility of assemblage was remote or speculative. *See id.* In support of their argument, the Tannos point to a city document showing their property could be joined with surrounding properties into a larger tract for development. But the document does not establish that assemblage of the properties would be supported by the market or that it was likely to occur. *See Wilson*, 200 Ariz. 2, ¶ 16. Indeed, interests in the surrounding properties were owned by the state or the city, presenting a significant obstacle to joining them with the Tanno parcel.

¶17 Furthermore, the Tannos apparently do not contest the trial court's conclusion that the expert's testimony on value was not based on assemblage. Thus, the court could have reasonably concluded that theory had minimal probative value to the expert's testimony. Accordingly, it was within the court's discretion to preclude evidence of assemblage if its probative value was substantially outweighed by the dangers of wasting time, confusing the issues, or misleading the jury, as it did here. *See* Ariz. R. Evid. 403. We see no abuse of discretion.

Owner Testimony

¶18 The Tannos also argue the trial court "improperly excluded, or improperly limited, [Cheryl] Tanno's opinion of value, as the [property] owner," asserting the court's rulings effectively precluded her from "explaining the methods she used to support her opinion of value." In Arizona, a property owner may always testify about the value of his or her property because "[a]n owner of property has, by definition, knowledge of the components of value that are useful in ascertaining value." *Town of Paradise Valley v. Laughlin*, 174 Ariz. 484, 486 (App. 1992) (alteration in *Laughlin*) (quoting *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 304 (App. 1983)). In other words, a property owner may testify to the value of his or her property because he or she has knowledge of what makes it valuable, even if he or she is not qualified as an expert. *Id.*

¶19 The Tannos argue Cheryl should have been able to testify that $250,000 from 1993 would have been worth $1,065,655 in 2015 had it been invested in companies listed in the stock market's S&P 500.[3] They point to a 1993 negotiation with the city, in which both sides purportedly agreed the property was worth $250,000. The trial court precluded evidence of the value of the hypothetical investment, concluding Cheryl "did not tie that figure to what she thinks the fair market value of her property was in 2015." It found that line of testimony would be irrelevant, and concluded even if it were relevant, it would be "substantially outweighed by Rule 403 concerns."

¶20 The Tannos have not established the trial court abused its discretion in precluding evidence of a hypothetical investment. When deposed, Cheryl could not tie the value of her hypothetical investment to the actual value of her property, or any components of value thereof. As such, her opinion of value based on an investment theory was not rooted in her experience as a land owner—the very experience which would have qualified her to give valuation testimony notwithstanding her lack of expert qualifications. *See Laughlin*, 174 Ariz. at 486. We therefore cannot conclude the trial court abused its discretion in limiting this aspect of Cheryl's testimony, even in light of the general latitude given to land owners testifying to the value of their property. *See id.*; *see also* Ariz. R. Evid. 403.

Motions in Limine

¶21 The Tannos also argue the trial court's evidentiary rulings, described above, constituted "improper[] . . . dispositive relief," contrary to Rule 56, Ariz. R. Civ. P. In order for us to reach this issue, we first consider whether the Tannos have waived any right of review for failure to present the issue below. *See Cont'l Lighting & Contracting, Inc., v. Premier Grading & Utils., LLC*, 227 Ariz. 382, ¶ 12 (App. 2011) (argument waived by failing to raise it below). The Tannos did not raise any argument premised upon Rule 56 in any of their written responses opposing the city's motions in limine. In response to the trial court's questioning at a pretrial hearing, however, the Tannos argued "[i]f [the admissibility of evidence of assemblage] were a question of law, it should have been brought up as a motion for partial summary judgment." While not particularly well-developed below, we conclude the issue as it relates to evidence of best use (or assemblage) was sufficiently preserved for our review.

[3]The S&P 500 is an index of 500 widely held common stocks that measures the general performance of the financial market.

¶22 Based on the briefs submitted on appeal, the arguments of counsel at oral argument before this court, and our own review of the record, it appears the Tannos failed to raise a Rule 56 challenge to the project influence and owner testimony regarding value rulings below. As a general rule, appellate courts "will not consider issues not raised in the trial court." *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 503 (1987). Our supreme court has explained: "The concept of waiver is based on two factors: fair notice and judicial efficiency." *Geronimo Hotel & Lodge v. Putzi*, 151 Ariz. 477, 479 (1986). But, waiver "is merely a rule of procedure, and not a matter of jurisdiction," *Town of S. Tucson v. Bd. of Supervisors*, 52 Ariz. 575, 582 (1938), and our supreme court has, in its discretion, declined to find waiver when considering "issues of statewide importance, those of constitutional dimension or situations in which the public interest is better served by having the issue considered rather than deferred," *Schoenfelder v. Ariz. Bank*, 165 Ariz. 79, 90 n.8 (1990) (quoting *Dombey v. Phx. Newspapers, Inc.*, 150 Ariz. 476, 482 (1986)); *accord Harris v. Cochise Health Sys.*, 215 Ariz. 344, ¶ 17 (App. 2007) ("[A]lthough Arizona appellate courts have the discretion to hear arguments first raised on appeal, we rarely exercise that discretion.").

¶23 This case involves the right of a property owner to receive just compensation for property condemned pursuant to eminent domain—a right of constitutional dimension. *See* Ariz. Const. art. II, § 17. The arguments presented for our review are purely legal and involve the same analysis as the Tannos' non-waived claim, making it judicially efficient for us to consider them. *See Geronimo Hotel & Lodge*, 151 Ariz. at 479. Moreover, the Tannos presented these arguments in their opening brief, and the city has been afforded the opportunity to, and did in fact, respond to them in its answering brief. *See id.* We thus conclude it is appropriate for us to address the Tannos' Rule 56 argument in its entirety. We review whether the court applied the proper legal standard in evaluating the city's motions de novo. *See Mobilisa, Inc. v. Doe*, 217 Ariz. 103, ¶ 9 (App. 2007).

¶24 The Tannos contend the city's motions in limine were essentially motions for summary judgment, and suggest the trial court's rulings did not comply with the requirements of Rule 56, effectively precluding their claim for just compensation. In support of their argument, the Tannos rely on two extra-jurisdictional cases holding a claim or defense may not be dismissed in a motion in limine. *See Meyer Intellectual Props. Ltd. v. Bodum, Inc.*, 690 F.3d 1354, 1378 (Fed. Cir. 2012) ("Because we conclude that it was procedurally improper for the court to dispose of [defendant's] inequitable conduct defense on a motion *in limine*, we reverse the court's decision and remand for further proceedings."); *Gold Cross Ems, Inc. v. Children's Hosp. of Ala.*, 309 F.R.D. 699, 700-02 (S.D. Georgia 2015) ("The

Court . . . therefore finds that Plaintiff's motion in limine is an improper and untimely motion for summary judgment.").

¶25 But the Tannos have not provided any authority to establish that their theories of calculating just compensation through evidence of project influence, best use, and owner testimony, were, in and of themselves, claims or defenses. The trial court's rulings did not preclude the Tannos from pursuing their claim, which ultimately resulted in a monetary judgment in their favor. Rather, the court's rulings limited the evidence that could be introduced in support of the claim. As such, the court's rulings involved "disputed evidentiary issue[s]" of relevance and Rule 403 considerations, which may be properly considered in a motion in limine. *See* Ariz. R. Civ. P. 7.2. We see no error.

Remaining Issues

¶26 The Tannos additionally argue the trial court erred in refusing to tender jury instructions or special interrogatories consistent with their theory of the case. But, they fail to meaningfully develop this argument. They do not cite any legal authority requiring the court to tender the instructions proposed, do not argue which instructions should have been given, and do not meaningfully establish how the instructions would have been supported by the facts in evidence. *See* Ariz. R. Civ. App. P. 13(a)(7) (argument must contain citations to legal authority and references to the record); *Clauss*, 177 Ariz. at 569 (jury instructions must be supported by facts in evidence). We therefore consider this argument waived, and decline to consider it further. *See Ritchie v. Krasner*, 221 Ariz. 288, ¶ 62 (App. 2009).

¶27 Similarly, the Tannos argue the trial court erred in declining to award sanctions for a purported discovery violation. Again, they fail to meaningfully develop this argument. Aside from providing a citation to Rule 37, Ariz. R. Civ. P., which generally affords the trial court discretion to award sanctions, their argument lacks citations to the record and argument supported by legal authority. *See* Ariz. R. Civ. App. P. 13(a)(7). This argument is waived. *See Ritchie*, 221 Ariz. 288, ¶ 62.

Disposition

¶28 The trial court's judgment is affirmed. Because the Tannos are not the prevailing party on appeal, we deny their request for attorney fees.

177 Ariz. 566
Court of Appeals of Arizona,
Division 1, Department B.

CITY OF PHOENIX, a municipal corporation, Plaintiff–Appellee,
v.
Grace M. CLAUSS, Defendant–Appellant.

No. 1 CA–CV 91–0621.
|
March 8, 1994.

Synopsis

Condemnation proceeding was brought. The Superior Court, Maricopa County, Cause No. CV 89–09647, Elizabeth Stover, J., made award and condemnee appealed. The Court of Appeals, Contreras, J., held that: (1) trial court had erred by giving "project influence doctrine" or "project enhancement" instruction that property could not be charged with lesser or greater value at time of taking when change in value was caused by taking itself or anticipation or appreciation of depreciation arising from planned project of which property would be a part, and (2) jury question was presented as to whether particular transactions which were in escrow could be counted as "comparable sales" for purposes of arriving at valuation.

Reversed and remanded.

Attorneys and Law Firms

**1220 *567 Roderick G. McDougall, Phoenix City Atty. by Sharon K. Haynes, Asst. City Atty., Phoenix, for plaintiff-appellee.

Streich Lang, P.A. by Dan M. Durrant, Phoenix, and Leonard M. Bell, P.C. by Leonard M. Bell, Scottsdale, for defendant-appellant.

OPINION

CONTRERAS, Judge.

Defendant–Appellant Grace M. Clauss ("Appellant") appeals from a judgment awarding her $1.25 million against the City of Phoenix in an eminent domain proceeding which resulted in the taking of an eighty-nine acre parcel on the northwest end of the South Mountain range. The primary issue presented is whether the trial court erred, under the fact situation presented here, by instructing the jury not to consider any decrease or increase in the condemned property's value which resulted from either the taking itself or the planned public project that included the taking. We have jurisdiction pursuant to Ariz.Rev.Stat.Ann. ("A.R.S.") section 12–2101(B). We conclude that the trial court erred in giving the instruction, and we, therefore, reverse and remand.

FACTS AND PROCEDURAL HISTORY

Appellant owned a parcel of 88.567 acres at the southwest corner of the 19th Avenue and Elliott Road alignments in Phoenix. The southern and eastern boundaries of the Appellant's property abut the original 1924 boundary of South Mountain Park, a public open space area. In the 1960's and 70's, the City of Phoenix adopted the Phoenix Mountain Preserve approach to acquiring land for its various mountain preserve properties, including additions to South Mountain Park. At all times relevant to this litigation, Appellant's property bordered on mountain preserve property to the west. There is a distinction between South Mountain Park in its relationship to Appellant's property since South Mountain Park was already in existence and may have contributed to the desirability of Appellant's property prior to the commencement of the mountain preserve acquisition program which sought to acquire Appellant's property.

**1221 *568 The City of Phoenix acquired the Appellant's property through its power of eminent domain, planning to include it as part of the mountain preserve. The City filed its condemnation complaint on April 7, 1989 (the valuation date).

At trial, real estate appraiser Robert L. Blake testified on Appellant's behalf. He testified that he had appraised Appellant's property by the development approach and opined that its value on the valuation date was $2,965,000.00. In connection with Blake's testimony, Appellant offered exhibit 60, consisting of five typewritten sheets showing sales of lots in the Canyon Reserve subdivision on the south side of South Mountain and twenty-three other sales on the north side of the north Phoenix mountains. Although exhibit 60 was not supplied

as part of the record on appeal, at oral argument it was presented and received by this court.

At trial on voir dire examination by the City's counsel, Blake acknowledged that seven sales listed on the first page of exhibit 60 were still in escrow. The City's counsel objected to admission of sales in escrow. The City argued that unless the witnesses were able either to demonstrate that the sales had closed escrow or give some background information explaining why they had not, then essentially they were equivalent to mere offers which are inadmissible pursuant to *State v. McDonald,* 88 Ariz. 1, 352 P.2d 343 (1960).

At the suggestion of Appellant's counsel, the first page of exhibit 60 was removed and preserved as exhibit 60, and the remaining four pages were marked and admitted as exhibit 60A. The trial court sustained the City's objection, ruling that Blake could not testify about sales of comparable properties still in escrow. Blake was permitted to testify concerning completed sales of comparable mountain lots ranging from $95,000 to $225,000.

After the close of the evidence, counsel and the court discussed whether the court should give the City's proposed "project enhancement" instruction no. 7:

> In determining the fair market value of the subject property before the taking, you must assume that the public project did not exist. In other words, the condemned property cannot be charged with a lesser value at the time of the taking when the decrease in such value is caused by the taking itself or by reason of the fact that a public project has been planned which includes the subject property. On the other hand, the condemned property should not be credited with a higher value because news of the public project may have increased its value. You should give the subject property the value that it would have had, as if the public project had never been planned.

Appellant's counsel objected to this instruction on the basis that it was not supported by the evidence and could cause confusion and be misleading. The trial court gave the proposed instruction.

After deliberating, the jury awarded Appellant $1,250,000.00. The trial court entered judgment in accordance with the verdict. Appellant timely appealed. [1]

JURY INSTRUCTIONS

[1] [2] [3] Appellant contends that the trial court's instruction to the jury regarding "project enhancement" was misleading and confusing to the jury. We agree. This court will not overturn a verdict on the basis of jury instructions unless there is substantial doubt about whether the jury was properly guided. *Durnin v. Karber Air Conditioning Co.,* 161 Ariz. 416, 419, 778 P.2d 1312, 1315 (App.1989). Erroneous jury instructions do not require reversal unless the error prejudiced the appellant's substantial rights. We will not presume prejudice; it must appear ****1222 *569** affirmatively in the record. *Walters v. First Federal Savings & Loan Association of Phoenix,* 131 Ariz. 321, 326, 641 P.2d 235, 240 (1982).

[4] When the trial court instructs the jury on a theory that is not supported by facts in evidence, however, we must reverse because the trial court has invited the jury to speculate about possible nonexistent circumstances. *Brierley v. Anaconda Co.,* 111 Ariz. 8, 12, 522 P.2d 1085, 1089 (1974); *Spur Feeding Co. v. Fernandez,* 106 Ariz. 143, 148, 472 P.2d 12, 17 (1970); *Herman v. Sedor,* 168 Ariz. 156, 158, 812 P.2d 629, 631 (App.1991).

[5] [6] [7] The "project influence doctrine" (also referred to as "project enhancement") holds that property may not be charged with a lesser or greater value at the time of taking, when the change in value is caused by the taking itself or by anticipation of appreciation or depreciation arising from the planned project. *See State v. Hollis,* 93 Ariz. 200, 206, 379 P.2d 750, 753 (1963) ("property cannot be charged with a lesser value at the time of taking when the decrease in such value is occasioned by the taking itself."); *Uvodich v. Arizona Board of Regents,* 9 Ariz.App. 400, 405, 453 P.2d 229, 234 (1969) ("[T]he damage caused by the imminence of condemnation is merely one of the costs of ownership.") The doctrine applies only to properties that were "probably within the scope of the project from the time the government was committed to it."

City of Tucson v. Ruelas, 19 Ariz.App. 530, 532, 508 P.2d 1174, 1176 (1973), (citing *Merced Irrigation District v. Woolstenhulme,* 4 Cal.3d 478, 93 Cal.Rptr. 833, 483 P.2d 1, 7 (1971)). The doctrine also excludes evidence of "comparable" sales that reflect an enhanced or reduced value due to the governmental plan or project that occasioned the taking of the property in question. *Ruelas,* 19 Ariz.App. at 532, 508 P.2d at 1176.

[8] Here, over Appellant's objection, the trial court instructed the jury that it could assign neither a higher nor a lower value to the property if the increase or decrease in value was caused by the taking itself or by the planned public project that included the taking. We agree with Appellant's contention that the trial court erred when it gave the City's proposed instruction no. 7.

It is true that witness Richard Counts testified that the Appellant's property was being acquired for the Phoenix Mountain Preserve. John Loper testified that the City acquired two-thirds of a 30 acre parcel immediately west of the Appellant's property for the mountain preserve program about two years before the instant condemnation action was filed. However, it is also true that Appellant's evidence showed her own and comparable properties were entitled to premium valuation because they were close to the guaranteed public open space represented by the long pre-existing *South Mountain Park* in both its original and expanded form. Contrary to the City's argument, however, these facts are not equivalent to a showing that the value of Appellant's property or comparable properties was enhanced either by the market influence of the Phoenix Mountain Preserve acquisition program or by that of the proposed taking of Appellant's property. Instead, these facts suggest that the Appellant is entitled to the full benefit of any enhanced value that resulted from her property's location next to *South Mountain Park.* The record contains no evidence that the Phoenix Mountain Preserve acquisition program affected the market for Appellant's property or any comparable properties.

The condemnor shoulders the burden of proving that the subject property was "probably within the scope of the project from the time the government was committed to it." *Ruelas,* 19 Ariz.App. at 532, 508 P.2d at 1176. The City provided no evidence concerning either the operation of the Phoenix Mountain Preserve acquisition program or the relationship between that program and South Mountain Park, or how that relationship may have increased the value of the subject property. Based upon the evidence presented, we conclude the challenged instruction had no legitimate function in the case. Its only likely role was to suggest incorrectly to the jury that it should disregard expert evidence from several sources that the location of Appellant's property next to public open space (South Mountain Park) enhanced its fair market value.

****1223 *570 EXCLUSION OF SALES IN ESCROW**

Appellant also contends that the trial court erred when it refused to allow appraiser Robert Blake to testify about sales of comparable property that had not closed escrow. We address this issue because we believe it is likely to arise again upon remand. [2]

[9] It is well settled that bare offers to purchase, without more, are inadmissible on the issue of market value of real property. *See State v. McDonald,* 88 Ariz. 1, 9, 352 P.2d 343, 348 (1960) (refused offer of impecunious purchaser should not have been admitted to prove value of property). Offers to purchase are suspect because they often represent the opinion of one person and are difficult to authenticate. *Id.* at 9–10, 352 P.2d at 348 (citing Orgel, *Valuation Under Eminent Domain* (2d Ed.) § 148). Our supreme court concluded:

> [W]e must distinguish offers relating to property taken from offers relating to property not taken and with respect to both types of property, we must differentiate offers by the owner to sell from offers of third parties to buy. The courts have generally held that evidence of offers to buy property other than that taken may not be admitted.

88 Ariz. at 9–10, 352 P.2d at 348.

The proposed evidence in this case transcends the mere offer proposed in *McDonald.* At the very least, the Appellant's comparable sales evidence consisted of sales that were still in escrow but had not yet closed. We often imply a bilateral enforceable agreement for sale from the presence of escrow instructions. *See Horizon Corp. v.*

Westcor, Inc., 142 Ariz. 129, 135, 688 P.2d 1021, 1027 (App.1984) ("Without the escrow instruction there would have been no contract.").

[10] Although such an agreement would be executory, executory contracts for sale are admissible as comparable sales in condemnation proceedings. *See United States v. 428.02 Acres of Land, etc.,* 687 F.2d 266, 270 (8th Cir.1982) ("[W]hen the trial judge effectively precludes all evidence of sales, or contracts for sale, of property that is comparable to the property being condemned, the ultimate goal of just compensation may be defeated."); *Wolff v. Commonw. of Puerto Rico,* 341 F.2d 945, 947 (1st Cir.1965) ("A sale conditioned on a reclassification is nonetheless a sale, ... and the fact that it was not consummated cannot be an objection."); *United States v. Certain Parcels of Land in the City of Philadelphia,* 144 F.2d 626, 629–30 (3d Cir.1944) (evidence of unconsummated contract for sale of land may be properly admitted to arrive at just compensation); *People ex rel. Department of Public Works v. Kawamoto,* 230 Cal.App.2d 18, 40 Cal.Rptr. 685, 686–87 (1964) (actual consummation of land sale not essential to admissibility of evidence of Agreement For Sale for purpose of supporting expert opinion concerning value of condemned property); *Arnold v. Maine State Highway Comm'n,* 283 A.2d 655, 659 (Me.1971) (enforceable contract for sale of property later taken in condemnation proceedings admitted as "strong and significant evidence" of fair market value at the time of the taking); *Western Michigan Univ. Bd. of Trustees v. Slavin,* 381 Mich. 23, 158 N.W.2d 884, 888 (1968) (bilateral sales agreement, binding on both parties, admissible to show value of condemned property); *City of East Orange v. Crawford,* 78 N.J.Super. 239, 188 A.2d 219, 222 (1963) (evidence admitted of price at which condemnees agreed to sell the property prior to the taking); *State v. Clevenger,* 384 S.W.2d 207, 210 (Tex.Civ.App.1964) (although contract for sale of land not consummated because purchaser forfeited earnest money placed in escrow, it was ruled admissible as a comparable sale upon which condemnees' expert could rely in valuing condemned land).

[11] **[12]** Executory agreements for sale which are conditional in nature have also been held to be admissible evidence. In *Slavin,* 158 N.W.2d at 888, the court held that a conditional executory contract for sale should have been admitted into evidence as a comparable sale when testimony revealed that the conditions had been fulfilled. Thus, ****1224** ***571** it is clear to us that the presence of escrow agreements is prima facie evidence of an underlying bilateral agreement enforceable by either party.

[13] **[14]** Objections to the validity of executory contracts affect the *weight* of the evidence rather than its *admissibility. Certain Parcels of Land in City of Philadelphia,* 144 F.2d at 630. The jury, in deciding the weight to be accorded to such evidence, may consider whether the offer was bona fide and for cash and whether or not the offeror would be able to comply with the offer if it were accepted. *McDonald,* 88 Ariz. at 10, 352 P.2d at 349, (citing *City of Chicago v. Harrison–Halsted Bldg. Corp.,* 11 Ill.2d 431, 143 N.E.2d 40, 45 (1957)). Once prima facie evidence of a comparable sale has been introduced, the burden of rebutting the validity of the agreement underlying the escrow should rest with the party opposing the admission of the comparable sales evidence.

[15] In light of the foregoing, we conclude that an unconsummated contract for sale of land, subsequently placed in escrow, is competent evidence of a comparable sale upon which the jury may rely to value the subject property at the time of taking. Even if the executory agreement is conditional, the jury should be allowed to consider whether the conditions were or could have been fulfilled. *Slavin,* 158 N.W.2d at 888.

We reverse and remand this matter for proceedings consistent with this decision. [3]

JACOBSON, P.J., and LANKFORD, J., concur.

All Citations

177 Ariz. 566, 869 P.2d 1219

Footnotes

1 Neither party's brief complies with the requirement of Rule 13(a)(6), Arizona Rules of Civil Appellate Procedure ("ARCAP"), that "[w]ith respect to each contention raised on appeal, the proper standard of review on appeal shall be identified, with citations to relevant authority, at the outset of the discussion of that contention." *See also* ARCAP 13(b)

(answering brief must comply with ARCAP 13(a) with certain exceptions). Each party tacitly assumes, incorrectly, that resolution of any issue in the party's favor on the merits will entail a favorable disposition of the appeal. Counsel's failure to comply with the rule has unnecessarily required the Court to expend valuable judicial time and resources.

2 We acknowledge that with the passage of time the particular escrows in question have probably closed. However, other evidence of similar nature may be offered at retrial.

3 Because we reverse and remand for a new trial in favor of Appellant, we find it unnecessary to address Appellant's argument that she was prejudiced by the trial court's inconsistent treatment of post-deposition testimony from Mr. Fagan and Mr. Temple.

4 Cal.3d 478
Supreme Court of California,
In Bank.

MERCED IRRIGATION DISTRICT, Plaintiff and Appellant,
v.
Mazie WOOLSTENHULME, Defendant and Respondent.

Sac. 7872.
|
March 31, 1971.

Synopsis
Action by irrigation district to condemn parcels of land. The Superior Court, Mariposa County, Thomas Coakley, J., entered judgment and district appealed. The Supreme Court, Tobriner, J., held that in determining just compensation, jury was properly permitted to consider the 'project enhanced' value which accrued to condemnee's property prior to the time that it was reasonably probable that the property would be taken for the improvement.

Cost order vacated and motion for costs and disbursements remanded and judgment otherwise affirmed.

Opinion 7 Cal.App.3d 536, 86 Cal.Rptr. 575, vacated.

West Headnotes (17)

[1] **Eminent Domain**
Time with Reference to Which Compensation to Be Made

In determining just compensation for condemned land, jury was properly permitted to consider the "project enhanced" value which accrued to condemnee's property prior to the time that it was reasonably probable that the property would be taken for the improvement: inconsistent Court of Appeal decisions disapproved. West's Ann.Evid.Code, § 816; West's Ann.Const. art. 1, § 14; West's Ann.Code Civ.Proc. § 1249.

17 Cases that cite this headnote

[2] **Eminent Domain**
Value of Land

Factors to be considered in determining market value of property are the general character of the neighborhood, the quality of the public and private services, and the availability of public facilities. West's Ann.Evid.Code, § 816.

1 Cases that cite this headnote

[3] **Eminent Domain**
Value of Land

Increase in value of property which can reasonably be expected to be condemned resulting from speculation by potential purchasers that the condemnor may be compelled to pay an artificially inflated price for the property does not affect actual market value, and such increase in value is not a proper element of fair market value for just compensation purposes. West's Ann.Const. art. 1, § 14; West's Ann.Code Civ.Proc. § 1249.

9 Cases that cite this headnote

[4] **Eminent Domain**
Value of Land

Increases in value of a condemnee's land attributable to activities paid for by government, or instituted at the behest of government, are properly includable in computations of just compensation. West's Ann.Const. art. 1, § 14; West's Ann.Code Civ.Proc. § 1249.

1 Cases that cite this headnote

[5] **Eminent Domain**
Taking Entire Tract or Piece of Property

"Just compensation" for taking of property contemplates compensation measured by what the landowner has lost rather than by what the condemnor has gained. West's Ann.Const. art. 1, § 14; West's Ann.Code Civ.Proc. § 1249.

2 Cases that cite this headnote

[6] **Eminent Domain**
Value of Land

In determining how much condemnee has lost as result of taking, state bears responsibility of meeting the reasonable market evaluations of potential sellers or purchasers. West's Ann.Const. art. 1, § 14; West's Ann.Code Civ.Proc. § 1249.

1 Cases that cite this headnote

[7] **Eminent Domain**
Value of Land

When government decides, sometime after initial completion of project, that expansion of the project is necessary, just compensation to owners of land taken in expansion project requires that condemnee, who has previously purchased property at increased price in expectation that he would be near the improvement, should be compensated for full market value, including the increment paid for "project enhancement." West's Ann.Const. art. 1, § 14; West's Ann.Code Civ.Proc. § 1249.

27 Cases that cite this headnote

[8] **Eminent Domain**
Time with Reference to Which Compensation to Be Made

Condemnee was not entitled to compensation on basis of "project enhancement" accruing after it was probable that the land to be valued would be taken for the project. West's Ann.Const. art. 1, § 14; West's Ann.Code Civ.Proc. § 1249.

1 Cases that cite this headnote

[9] **Eminent Domain**
Time with Reference to Which Compensation to Be Made

Standard of "probability of inclusion" is the appropriate one to be utilized in excluding from determination of just compensation the "project enhancement" accruing after it was probable that land to be valued would be taken for the project. West's Ann.Const. art. 1, § 14; West's Ann.Code Civ.Proc. § 1249.

1 Cases that cite this headnote

[10] **Eminent Domain**
Questions for Jury

In condemnation cases involving property enhanced in value by the project, trial court rather than jury should determine date when it became probable that land to be valued would be taken for the project. West's Ann.Const. art. 1, § 14; West's Ann.Code Civ.Proc. § 1249.

6 Cases that cite this headnote

[11] **Evidence**
Sales of Other Property in General

Evidence of sales which took place in region of

irrigation district project was admissible as "comparable sales" even though sales reflected a substantial enhancement attributable to the project. West's Ann.Evid.Code, § 816.

2 Cases that cite this headnote

[12] **Evidence**
Sales of Other Property in General

When sales of neighboring property which substantially reflect enhancement value not properly shared by the condemned property will not shed light on value of the subject property, but rather will tend to confuse the issue if admitted into evidence, sales should be excluded. West's Ann.Evid.Code, § 816.

2 Cases that cite this headnote

[13] **Evidence**
Comparable Sales or Values

Statute rendering inadmissible opinion as to the value of any property or property interest other than that being valued does not preclude an appraiser, when referring to comparable sales, from explaining any adjustments that must be made in the comparable sale price in utilizing that sale as an indicant of the value of the property to be taken. West's Ann.Evid.Code, §§ 816, 818–820, 822(d).

7 Cases that cite this headnote

[14] **Evidence**
Sales of Other Property in General

Permitting condemnee's witness to testify as to sales reflecting a substantial enhancement attributable to project for which subject property was being condemned was not an abuse of discretion in view of testimony attributing rise in land values in area to substantial number of factors other than the project and where exclusion of sales would have deprived jury of all objective market evidence. West's Ann.Evid.Code, §§ 816, 818–820, 822(d).

11 Cases that cite this headnote

[15] **Eminent Domain**
Liability for Costs and Expenses on Abandoning Proceedings

Where condemnor's original complaint sought to acquire grazing and watering rights over 199.9-acre tract and in amended complaint condemnor abandoned claim for grazing and watering rights and instead sought fee interest in 117 acres, there was a "partial abandonment" entitling condemnee to attorney's fees, but inasmuch as condemnor did carry proceeding through to conclusion with respect to 117 acres, condemnor's shift in position with respect to the 117 acres did not constitute an "abandonment." West's Ann.Code Civ.Proc. § 1255a.

2 Cases that cite this headnote

[16] **Eminent Domain**
Liability for Costs and Expenses on Abandoning Proceedings

Condemnee could be awarded attorney fee for partial abandonment where original contingent fee contract between condemnee and attorney was modified to provide for "reasonable charges" in the event of abandonment. West's Ann.Code Civ.Proc. § 1255a.

4 Cases that cite this headnote

[17] **Eminent Domain**
Liability for Costs and Expenses on Abandoning Proceedings

Statute providing that condemnee shall be

compensated for reasonable costs and disbursements incurred in preparing to defend condemnation action which is later abandoned by condemnor is designed to compensate condemnee for expenses incurred when condemnor declines to carry proceeding through to its conclusion. West's Ann.Code Civ.Proc. § 1255a.

2 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

TOBRINER, Justice.

In response to the mounting social, environmental and health crises of recent years, governmental authorities have considerably expanded the planning and construction of 'public improvements.' Because the definite commencement of a public project is almost invariably preceded by significant publicity and public interest, land values in the vicinity of the potential project often will increase in response to this foreknowledge. A recurring issue in eminent domain litigation is whether, and to what extent, such increases[1] in land values attributable to the proposed project comprise a proper element of the 'just compensation' to be paid to a land ***484** owner ****4** if his land is ultimately taken for a project. This question has not been definitely resolved by California decisions to date;[2] three cases before our court today require us to confront this issue of the proper interpretation of our constitutional 'just compensation' clause directly, and additionally require us to probe the practical problems of application attending our constitutional conclusions.

For the reasons discussed hereafter, we have concluded that the few appellate decisions *****836** which have intimated that any increase in value arising from the expectation of the coming project should be excluded from just compensation must be reexamined in light of the realities of a landowner's position. In the early stages of a desirable project's development, land which is expected to be within the vicinity of the project, but is not expected to be taken for the project, will naturally increase in value, and a landowner who chooses to sell such land at this time will gain the benefit of this incremental value; similarly, one who buys such land at this time must pay this incremental amount for his purchase. It is not until a particular piece of property is reasonably expected to be condemned for the project that this enhanced market value, attributable to the land's anticipated proximity to the improvement, disappears. We have determined that it would be unfair, in computing just compensation, to eliminate the appreciation in market value which a specific piece of property in fact enjoyed before it was designated for condemnation, since that would in effect deny to the owner the market value of his property prior to the time it was pinpointed for taking.

1. The facts of the instant case.

Mrs. Mazie Woolstenhulme, defendant-landowner in the instant eminent domain action, owns a ranch of approximately 13,150 Acres in a remote portion of Mariposa County. One end of the ranch borders Lake McClure, an artificial lake created in 1927 and owned by Merced Irrigation District, the condemnor in this proceeding. In the present action, the district condemned 189 acres of defendant's land for use in connection with a new, multipurpose water project planned for the region. The jury awarded defendant $250 per acre for this land, and the district attacks this valuation on appeal.

Prior to the commencement of the district's new water project, little domestic water and no power was available in the Lake McClure region; land in the area was largely

uninhabited and devoted primarily to cattle grazing. Lake McClure was subject to wide seasonal fluctuation, covering ***485** a maximum of 2,700 acres during the winter months, but contracting to merely 30 acres, surrounded by mudflats, in summer. The district owned a buffer strip of 200 feet around the lake, presumably adjacent to the lake's border in its high water stage. Evidence introduced at trial revealed that, during this pre-improvement stage, land in the area had not sold for higher than $125 an acre.

In the late 1950's the district began evolving plans for a new Lake McClure project that was considerably to alter the nature of the area. The new project was to increase the size of the lake, and eliminate most of the fluctuation in its coverage and depth; it was to provide the neighboring lands with power and domestic water bot available from the old dam and lake. By 1962 the district had begun a quest for federal funds to assist in the financing of the project, and early in 1963 several newspaper articles informed the public that the completed Lake McClure project would include recreational facilities, such as camping, boating and fishing. The trial court found that about January 1, 1963 the public, while unaware of 'exactly what area, what spots were to be recreation,' did know of the general recreation plans, and that, as a result, property values in the area began to increase within a short time thereafter. The court also found that by ****5** January 1, 1965 the plans for the project had progressed to a point where it became 'reasonably probable'[3] that the present *****837** parcel of defendant's land would be taken for the project.[4] During 1965 and 1966, a flurry of land sales occurred in the area at prices ranging from $250 to $600 an acre. The district filed the amended complaint on which this action is based in August 1967.

At trial plaintiff condemnor's appraisal witness testified that, omitting ***486** consideration of the new Lake McClure project, cattle grazing was the highest and best use of the 189 acres in question, and he valued the land, on the basis of the normal market value of such land in the past, at $125 an acre. Mrs. Woolstenhulme, the defendant-landowner, stated that in her opinion the property had a value of $600 an acre; she admitted, however, that in February 1966 she had sold a similar parcel of her ranch for $250 an acre. Defendant's expert appraisal witness, Richard Leuschner, testified that when used for grazing purposes as part of defendant's ranch, the land would have a value of $200 an acre. Leuschner declared, however, that viewing the 189 acres as a separate tract, 'development,' rather than cattle grazing, was the highest and best use of the property and he stated that, on the basis of his examination of sales of comparable properties, he would evaluate defendant's land at $600 an acre after deducting $50 an acre of 'enhanced value' arising from the Lake McClure project.

In attempting to explain this surprisingly small increment of value which he attributed to the pending improvement, Leuschner testified that he believed that he new Lake McClure project was only one of a considerable number of factors resulting in the rapid increase in land value in the region, and was not an overwhelming factor at that. The appraiser described a growing statewide trend, stretching over almost a decade, of sales of agricultural foothill property to city residents seeking a country 'home away from home;' he attributed the trend, in large part, to the tremendous population increase in California's urban centers in recent years. Leuschner also testified that although Mariposa County is relatively far removed from the heavily populated areas of Los Angeles and the Bay region, newly constructed freeways had reduced the traveling time considerably and had made the region accessible for 'recreational development' purposes. The appraiser concluded that even without the new water project, the area would have been an attractive 'development' site, for he considered the old lake adequate for swimming and fishing.

In support of Leuschner's valuation, defendants offered evidence of some of the 1965 and 1966 sales of neighboring parcels as 'comparable sales' under section 816 of the Evidence Code. The district objected ****6** to the introduction of these sales on the grounds that the sale prices reflected an increase or enhancement in value attributable to benefits created by the very project for which condemnation was sought, an enhancement which the district contended was not a proper element of 'just compensation.' The condemnor strongly disputed Leuschner's analysis of the increase in land values in the area, and argued that it was the new project which had transformed *****838** land, previously useful only for grazing, into valuable lakefront sites. The trial judge, although finding that the proffered sales reflected 'substantial enhancement' due to the recreational potential ***487** of the project, nevertheless admitted the evidence, indicating that he would instruct the jury to eliminate any post-January 1, 1965 enhancement attributable to the project from the determination of just compensation. The jury was so instructed,[5] and, as stated above, awarded defendant $250 an acre.

On this appeal the district raises two principal objections to the trial court's valuation rulings. First, the district contends that the court erred in instructing the jury to exclude Only that 'enhancement value' which arose after January 1, 1965. The district asserts that the general rule in this state is that, in determining just compensation, All 'enhanced value' attributable to the condemnor's proposed improvement must be excluded and that the

court erred in permitting defendant to recover the pre-1965 increment in value which resulted from public knowledge and expectation of the Lake McClure project. Second, the district contends that, even assuming that pre-1965 enhancement was a proper element of compensation, the trial judge erred in admitting evidence of sales which were found to reflect 'substantial' post-January 1, 1965 enhancement. Plaintiff asserts that such sales are not 'comparable sales' within the meaning of section 816 of the Evidence Code, and thus are inadmissible.

As explained below, we have concluded that neither of plaintiff's objections should be sustained. We shall initially point out that, under our just compensation clause, an owner of the condemned property should be compensated for the increase in value which his land has experienced in anticipation of the benefits of a proposed improvement, so long as it is not reasonably probable that the specific piece of property being evaluated is to be taken for the improvement. Secondly, we shall explain that under Evidence Code, section 816, sales are not necessarily 'non-comparable' simply because they reflect 'substantial' project enhancement, and thus a trial court, in exercising the discretion granted by the statutory provision, may properly admit such sales in evidence.

[1] We turn first to the proper measure of just compensation in these circumstances.

***488** 2. The trial court did not err in permitting the jury, in determining just compensation, to consider the 'project enhanced' value which accrued to defendant's property prior to the time that it was reasonably probable that the property would be taken for the improvement.

(a) A legitimate element of just compensation lies in the increase in value resulting from a reasonable expectation that a particular piece of property will be outside a proposed public improvement, and thus will reap the benefits of that improvement.

Article I, section 14 of the California Constitution provides that 'Private property ****7** shall not be taken or damaged for public use without just compensation having first been made to * * * the owner * * *' and although the constitutional provision does not explicitly define the measure of 'just compensation,' it has long been established that in general 'the compensation required is to be measured by the market value of the property * * *' at the time of the taking. (*****839** Rose v. State of California (1942) 19 Cal.2d 713, 737, 123 P.2d 505, 519; see, e.g., Muller v. Southern Pacific Branch Ry. Co. (1890) 83 Cal. 240, 243, 245, 23 P. 265; Spring Valley Waterworks v. Drinkhouse (1891) 92 Cal. 528, 533, 28 P. 681. See also Code Civ.Proc. s 1249.) 'Market value,' in turn, has been defined as 'the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all of the uses and purposes to which it was adapted and for which it was capable.' (Sacramento So. R.R. v. Heilbron (1909) 156 Cal. 408, 409, 104 P. 979, 980.)

[2] The 'market value' of a given piece of property, of course, reflects a great variety of factors independent of the size, nature, or condition of the property itself. The general character of the neighborhood, the quality of the public and private services, and the availability of public facilities all play important roles in establishing market value. Thus, widespread knowledge of a proposed public improvement, planned for an indefinite location within a given region or neighborhood, will frequently cause the market value of land in the region or neighborhood to rise. Such an increase in market value results from the expectation that a given parcel of property will be outside of the project and will soon enjoy the benefits of the proposed improvement. If, for example, the planned project is a public park, land in the vicinity will be expected to gain the advantages of a nearby recreational area, and will consequently become more desirable and more valuable.

Sometimes, however, property which has increased in value, out of an initial anticipation that the land would be Outside of a public improvement, ***489** must Itself be taken for the construction or creation of that public improvement. Since the instant case presents that situation, our first issue must be to determine whether, in such a case, the owner of the land to be taken should be compensated for the loss of this increase in value—an increase that occurs prior to the time that it is known the particular piece of property will be included in the project. We note at the outset that, although this court has not spoken directly to the issue in the past, the majority rule in other jurisdictions is that such 'project enhanced' value does constitute a proper element of value for which the landowner is entitled to be compensated. (See 4 Nichols on Eminent Domain (3d ed. 1962) s 12.3151(2), pp. 209—210.) Most notably, the United States Supreme Court has consistently construed the 'just compensation' clause of the Fifth Amendment of the Federal Constitution to countenance the landowner's recovery of this 'project enhanced value' unless his property was itself 'probably within the scope of the project from the time the Government was committed to it.' (United States

v. Miller (1943) 317 U.S. 369, 377, 63 S.Ct. 276, 281, 87 L.Ed. 336; see Kerr v. South Park Comrs. (1886) 117 U.S. 379, 384—386, 6 S.Ct. 801, 29 L.Ed. 924; Shoemaker v. United States (1893) 147 U.S. 282, 303—305, 13 S.Ct. 361, 37 L.Ed. 170; United States v. Reynolds (1970) 397 U.S. 14, 16—18, 90 S.Ct. 803, 25 L.Ed.2d 12.) The courts of our sister states have generally embraced a like position. (See, e.g., Williams v. City and County of Denver (1961) 147 Colo. 195, 200, 363 P.2d 171, 174; Cole v. Boston Edison Co. (1959) 338 Mass. 661, 666, 157 N.E.2d 209, 212; Andrews v. State of New York (1961) 9 N.Y.2d 606, 217 N.Y.S.2d 9, 176 N.E.2d 42; Rowan v. Commonwealth (1918) 261 Pa. 88, 94—95, 104 A. 502, 504—505; ****8** Stafford v. City of Providence (1873) 10 R.I. 567, 571—572, 14 Am.Rep. 710, 714—715; State By and Through Road Commission v. Wood (1969) 22 Utah 2d 317, 318—320, 452 P.2d 872, 873—874.)

In our view, the widespread agreement on this point finds firm support in the principle that 'market value' is the proper measure of just compensation, and, for the reasons explained more fully below, we now join these sister states in holding that *****840** this kind of 'enhancement value' is a proper element of just compensation.

On this appeal the district, although not contesting the general validity of the market value standard of 'just compensation,' contends that California precedent has long established 'that in arriving at a determination of * * * market value * * * it is not proper to consider the increase, if any, in the value of such land by reason of the proposed improvement which is to be made on the land by the condemnor.' (***490** County of Los Angeles v. Hoe (1955) 138 Cal.App.2d 74, 78, 291 P.2d 98, 100.) The district claims that this doctrine, derived from a statement by this court in San Diego Land etc. Co. v. Neale (1888) 78 Cal. 63, 74—75, 20 P. 372, precludes a jury from including in an eminent domain award Any increase in value 'attributable to' the proposed project (or, as it is often referred to, 'project enhanced value'). In support of its position the condemnor relies on a series of Court of Appeal decisions, which contain dicta to the effect that '(a)ny rise in value before the taking * * * caused by the expectation of that event' is to be disallowed in computing just compensation. (City of Pasadena v. Union Trust Co. (1934) 138 Cal.App. 21, 26, 31 P.2d 463, 466; People ex rel. Dept. of Pub. Works v. Shasta Pipe etc. Co. (1968) 264 Cal.App.2d 520, 539, 70 Cal.Rptr. 618; People ex rel. Dept. of Water Resources v. Brown (1967) 255 Cal.App.2d 597, 599, 63 Cal.Rptr. 363; Community Redevelopment Agency of City of Los Angeles v. Henderson (1967) 251 Cal.App.2d 336, 343, 59 Cal.Rptr. 311; County of Los Angeles v. Hoe (1955) 138 Cal.App.2d 74, 78, 291 P.2d 98.) Under this line of cases, the condemnor argues, the general increase in neighborhood land values which frequently accompanies the announcement of a desirable public improvement constitutes 'project enhanced value' for which the landowner is never entitled to be compensated; in sum, the benefit conferred upon the land by the condemnor should not be charged against the benefactor.

This position, based on an expansive interpretation of the concept of 'project enhanced value,' which past decisions have indicated is to be excluded from compensation, obscures pertinent distinctions between different types of 'project enhanced value.' The value of land can be said to increase 'by reason of the proposed improvement' (County of Los Angeles v. Hoe (1955) 138 Cal.App.2d 74, 78, 291 P.2d 98, 100) for at least three distinct reasons: (1) the worth of Property known to be within the project may rise when the land is valued As part of the proposed improvement rather than as a separate tract of land; (2) the value of Property expected to be condemned may rise because of the anticipation that the condemnor will be required to pay an inflated price for the land at the time of condemnation; and (3) the value of Property expected to be outside of the proposed improvement may rise because it is anticipated that the land will reap the benefits resulting from Proximity to the coming project. Although past California decisions have not found it necessary to distinguish between these various 'increases in value,' the district's contention in the instant case brings the need for such analysis into sharp focus. We shall analyze each of these three situations in the course of this opinion.

We begin with the seminal decision of San Diego Land etc. Co. v. Neale (1888) 78 Cal. 63, 20 P. 372. In Neale, defendant's land was being condemned as a reservoir site in connection with the construction of a dam ***491** on a neighboring tract. At trial, the condemnee asked his appraiser to evaluate the land on the basis of its use as a reservoir site, taking into account the on-going construction of the dam. In holding this question improper on appeal, ****9** the Neale court declared: 'it seems monstrous to say that the benefit arising from the proposed improvement is to be taken into consideration as an element of the value of the land. * * *' In context, this statement, which gave rise to the doctrine relied on by the district in the instant case, *****841** clearly is no more than a declaration of the firmly established premise that 'compensation is based on loss imposed on the owner, rather than on benefit received by the taker. (Citations.) The beneficial purpose to be derived by the condemnor's use of the property is not to be taken into consideration in determining market values, for it is wholly irrelevant.' (People v. La Macchia (1953) 41 Cal.2d 738, 754, 264 P.2d 15, 26; see City of Stockton v. Vote (1926) 76 Cal.App. 369, 404, 244 P. 609;

Commerce v. City of Boston (1910) 217 U.S. 189, 195, 30 S.Ct. 459, 54 L.Ed. 725.) Thus, the improper 'enhancement' or 'benefit' referred to in Neale is simply the increase in value which a condemned tract gains when it is valued As part of the proposed project, i.e., the first type of 'project enhanced value' referred to in the preceding paragraph. It is clear, of course, that this incremental value is one which could never be considered in determining 'just compensation' under the established definition of 'market value' set out above.[6]

[3] We turn to the second aspect of 'project enhanced value' which we have noted in the trilogy outlined Supra. A situation in which the enhanced value of the land should not be included as compensation occurs when the increased value is due to speculation based upon the imminence of a taking. After a parcel of land has been designated for condemnation, the 'actual market value' of the parcel will frequently fluctuate as a result of the impending condemnation. An increase in the value of property which can reasonably be expected to be condemned can generally be explained only as a result of speculation by potential purchasers that the condemnor may be compelled to pay an artifically inflated price for the property. (See Palmer, Manual of Condemnation Law (1961) s 154.) Although this speculation does, in a sense, affect 'actual market value,' (see 1 Orgel on Valuation Under Eminent Domain (2d ed. 1953) s 83, pp. 355 et seq.), this is not the 'open market' value contemplated by our controlling decisions (e.g., Sacramento So. R.R. v. Heilbron (1909) 156 Cal. 408, 409, 104 P. 979; c.f. ***492** United States v. Cors (1949) 337 U.S. 325, 333, 69 S.Ct. 1086, 93 L.Ed. 1392). Almost all courts universally agree that such an increase in value, based on a purchaser's conjecture of what the condemnor may ultimately be required to pay, is not a proper element of 'fair market value' for 'just compensation' purposes. (See, e.g., United States v. Reynolds (1970) 397 U.S. 14, 16, 90 S.Ct. 803, 25 L.Ed.2d 12; United States v. Miller (1943) 317 U.S. 369, 377, 63 S.Ct. 276, 87 L.Ed. 336; Olson v. United States (1934) 292 U.S. 246, 261, 54 S.Ct. 704, 78 L.Ed. 1236.) If a tribunal were required, in setting just compensation, to consider an increase in value arising merely from the anticipation of the tribunal's final award, then logically a speculator would in effect be able to set 'just compensation' through his own purchase price. (See 1 Orgel on Valuation Under Eminent Domain (2d ed. 1953) s 83, p. 359.) In our view this type of 'enhanced' value is clearly not a legitimate element of just compensation and thus we now reiterate that such increases in value cannot properly be taken into consideration in determining the fair market value contemplated by our constitutional just compensation requirement.

The (1) 'enhanced value' arising from the condemnor's potential use of the property ****10** itself for the project, as in Neale, and (2) the 'enhanced value' resulting from speculation over the amount of an imminent condemnation award are clearly distinguishable, however, from (3) the increase in land values of property which is expected to be adjacent to or near a proposed *****842** project. This category is the third in the grouping set out above. Although the increase in value of the adjacent or nearby property is undoubtedly 'attributable' to the project, it results not from the expectation that the land will be taken for the project, as in the case of the property in Neale, which is included in the project, or of the property which enjoys the speculative gain, but instead from the expectation that the land will Not be taken for the project. It is this distinction which the argument of the condemnor in the instant case ignores, and upon which, we have concluded, plaintiff's position founders.

The difference between the project enhanced value of the adjacent property and that of the other two situations discussed above is that the rise in value of the adjacent property is a legitimate element of its 'fair open market value.'[7] Clearly, the expected proximity of a tract of land ***493** to a proposed project constitutes a factor 'which a buyer would take into consideration in arriving at a fair market value, were he contemplating a purchase of the property,' (People ex rel. Dept. of Pub. Works v. Donovan (1962) 57 Cal.2d 346, 352, 19 Cal.Rptr. 473, 476, 369 P.2d 1, 4), and as such we think the value attributable to this anticipated proximity constitutes a proper element of just compensation. 'The rule is that the owner is entitled to the market value of his land, to be determined in view of all the facts which would naturally affect its value in the minds of purchasers generally * * *. 'Any existing facts which enter into the value of the land in the public and general estimation, and tending (sic) to influence the minds of sellers and buyers, may be considered.' (citation).' (Spring Valley Water-Works v. Drinkhouse (1891) 92 Cal. 528, 533, 28 P. 681, 683; see Joint Highway Dist. No. 9 v. Ocean Shore R.R. (1933) 128 Cal.App. 743, 753—759, 18 P.2d 413; City of Stockton v. Vote (1926) 76 Cal.App. 369, 401—407, 244 P. 609.)

[4] The courts have long held that benefits of government activities, reflected in market value, compose part of just compensation for land. Thus, increases in the value of a condemnee's land 'attributable to' a wide variety of activities paid for by government, or instituted at the behest of government, are properly includable in computations of just compensation. (See, e.g., People ex rel. Dept. of Pub. Works v. Donovan (1962) 57 Cal.2d 346, 352—354, 19 Cal.Rptr. 473, 369 P.2d 1 ('reasonable probability of zoning change' a factor to be considered); ****11** County of Los Angeles v. Hoe (1955) 138

Cal.App.2d 74, 78—79, 291 P.2d 98 (increase in value from neighboring city improvements includable in determining value of tract to be taken for county project); City of San Diego v. Boggeln (1958) 164 Cal.App.2d 1, 6—7, 330 P.2d 74 ***843** (same).) Under these precedents the increase in value of lands expected to be outside a project constitutes a proper element of 'just compensation.'

The district argues, however, that even if this increased value in neighborhood property is a valid component of 'market value,' it should not be considered in determining 'just compensation.' Just compensation, the condemnor asserts, is only intended to put the landowner in the same **494** position he would have held if the project had not been built; the inclusion of this 'enhancement' element in compensable value transgresses the principle that 'just compensation' requires that compensation be 'just' to the public as well as to the condemnee. (See People ex rel. Dept. of Pub. Works v. Pera (1961) 190 Cal.App.2d 497, 499, 12 Cal.Rptr. 129.) To require a condemnor to pay for value which has arisen only because of its initiation of a project, plaintiff suggests, is to give the landowner a 'windfall' at the expense of the public fisc.

[5] [6] We believe that the condemnor's argument rests upon its assertion that the basic purpose of 'just compensation' is simply to return a landowner to the same position he would have held if the public project had never been constructed Or contemplated. In position such a purpose to our constitutional provision, however, the district has subtly assumed away the entire question at issue. Of course, as we have stated above, 'just compensation contemplates compensation measured by what the landowner has lost rather than by what the condemnor has gained (People v. La Macchia (1953) 41 Cal.2d 738, 754, 264 P.2d 15). Nevertheless, the long-established recognition of 'market value at the time of the taking' as the general measure of 'just compensation' reflects a deeply rooted judgment that, in determining just how much the landowner Has lost, the state bears the responsibility of meeting the reasonable market evaluations of potential sellers or purchasers. General adherence to the 'market value' measure insures a landowner that, in general, he will not be penalized for retaining his land after general public knowledge of the project. He should be assured that if his property is ultimately condemned, the condemnor will compensate him for its 'market value,' ideally at the price at which he could have sold the land on the open market just prior to the taking.

[7] Inclusion of 'project enhanced value' in compensation is essential if, in accordance with the above principle, the reasonable evaluations of landowners are to be met. In a situation in which the government decides, some time after the initial completion of a project, that expansion of the project is necessary, 'just compensation' would clearly require that a condemnee, who had previously purchased his property at an increased price in the expectation that he would be near the improvement, should be compensated for 'full' market value, including the increment paid for 'project enhancement.'[8] (See 4 Nichols on Eminent Domain (3d ed. 1962) s 12.3151(3), pp. 210—211.) Since these owners purchased the property at **495** the enhanced value, we could hardly justify the exclusion of this 'enhanced' value from compensation if their property is ultimately taken.

For the same reason, the increase in value of land which is initially expected to be outside the boundaries of a proposed improvement, must be recognized to constitute a proper element of just compensation. Purchasers and sellers regularly, and quite **12** reasonably, take into account the benefit that the land can be expected to reap from an imminent public project, and it would be equally unfair and incompatible with the principles underlying our constitutional ***844** just compensation provision to exclude such enhanced value. Although the district chooses to characterize compensation for this project enhanced value as a 'windfall' to the landowner, that epithet might equally be applied to the wide variety of other components of market value for which a landowner might not have directly 'paid,' factors such as zoning laws, public services and general neighborhood appearance which, as previously noted, have long been recognized to be legitimate elements of 'just compensation.'

In light of this analysis and the weight of authority, we now hold that increases in value, attributable to a project but reflecting a reasonable expectation that property will not be taken for the improvement, should properly be considered in determining 'just compensation.'

The following Court of Appeal decisions are disapproved to the extent that they contain broad statements inconsistent with this conclusion: People ex rel. Dept. of Pub. Works v. Shasta Pipe etc. Co. (1968) 264 Cal.App.2d 520, 539, 70 Cal.Rptr. 618; People ex rel. Dept. of Water Resources v. Brown (1967) 255 Cal.App.2d 597, 599, 63 Cal.Rptr. 363; Community Redev. Agency of City of Los Angeles v. Henderson (1967) 251 Cal.App.2d 336, 343, 59 Cal.Rptr. 311; City of San Diego v. Boggeln (1958); 164 Cal.App.2d 1, 5, 330 P.2d 74; County of Los Angeles v. Hoe (1955) 138 Cal.App.2d 74, 78, 291 P.2d 98; City of Pasadena v. Union Trust Co. (1934) 138 Cal.App. 21, 26, 31 P.2d 463.

(b) The trial court properly instructed the jury to exclude all 'project enhancement' accruing after it was probable that the land to be valued would be taken for the project.

We have recognized above that under certain circumstances an increase in the value of land which is 'attributable' to the proposed project may appropriately be included as just compensation. We also recognize that, in practice, the segregation of those cases in which 'enhancement' should be compensable from those in which it should not will often entail a difficult task. To that problem we now turn.

***496** [8] In some instances the public may know from the time of the first announcement of the improvement that certain land will be included in the project. In such cases, since the public knows that the land will not receive the benefits of proximity to the project, the market value of the property will experience no such enhancement; thus, when such property is condemned, the landowner should not receive any 'project enhanced value.' 'If it is known from the very beginning exactly where the improvement will be located if it is constructed at all, the property that will be required for its site will not participate in the rise or fall in values, for, since such property is bound to be taken if the improvement is constructed, it can never by any possibility either suffer from or enjoy the effects of the maintenance of the public work in its neighborhood; and consequently, it is well settled that in such a case in valuing the land the effect of the proposed improvement upon the neighborhood must be ignored.' (4 Nichols on Eminent Domain (3d ed. 1962) s 12.3151(1), pp. 205—206; see Note, Recovery for Enhancement and Blight in California (1969) 20 Hastings L.J. 622, 629.)

[9] Even when public information does not disclose Definitely that a given piece of property will be used for the project, however, the landowner may not be properly entitled to 'project enhanced' value. Governmental bureaucratic action is notoriously slow, and in many instances the public in general, and, in particular, interested landowners and potential buyers, will be able to determine accurately, well in advance of the formal acceptance of condemnation plans, that a given tract of property will probably be taken for the improvement. In such a case the market value of the land facing imminent condemnation will not rise because, as in the instance of ****13** 'definite inclusion,' potential purchasers and sellers can reasonably foresee that the *****845** property will not enjoy the advantages of the coming improvement. As our earlier analysis demonstrates, the inclusion of 'enhancement value' in compensation serves only to preserve the reasonable market value of the property. We see no reason to require the state to pay an incremental value if an informed individual could not reasonably expect that the property would be outside of the project.[9] As the United States Supreme Court has stated in United States v. Miller (1943) 317 U.S. 369, 377, 63 S.Ct. 276, 281, 87 L.Ed. 336, ***497** enhancement value should not be includable in 'just compensation' whenever the condemned lands 'were probably within the scope of the project from the time the Government was committed to it.'[10]

If, on the other hand, when plans for the proposed project first became public and when the consequent enhancement of land values began, the probability was that the land in question would not be taken for the public improvement, the landowner would be entitled to compensation for some 'project enhancement.' During that period when it was not likely that his land would be condemned, the fair market value of the property may have appreciated because of anticipation that the land would partake in the advantages of the proposed project. The owner would be entitled to such increase in value. On the other hand, once it becomes reasonably foreseeable that the ****14** land is likely to be condemned for the improvement, 'project enhancement,' for all *****846** practical purposes, ceases.[11] ***498** Thus, in computing 'just compensation' in such a case, a jury should only consider the increase in value attributable to the project up until the time when it became probable that the land would be needed for the improvement. (See United States v. 2,353.28 Acres etc. (5th Cir. 1969) 414 F.2d 965, 971; United States v. 172.80 Acres etc. (3d Cir. 1965) 350 F.2d 957, 959.)

[10] The approach prescribed by the trial judge in the instant case appears to accord with these standards. At the request of the parties, the trial judge conducted preliminary proceedings, prior to the empanelment of the jury, at which both parties presented evidence relating to the timetable of the Lake McClure project and to the inclusion of defendant's land within that project. The trial judge concluded, first, that general public knowledge of the proposed recreational aspect of the project commenced in January 1963; then, applying the Miller standard of 'probable' inclusion at defendant's urging, the court set January 1, 1965 as the date when it became probable that the Woolstenhulme property would be taken. (See fn. 4 supra.)[12]

Because defendant's property lay immediately adjacent to the proposed lake, the trial judge might reasonably have found that this land was probably within the scope of the project from as early as the time in 1963 when the public first learned that some additional property would be needed for recreational facilities (cf. United States v.

Crance (8th Cir. 1965) 341 F.2d 161, 165). The record makes clear, however, that during these early stages it was not known just how much of the property around the lake would be needed for public recreation, and, under these circumstances, the trial court could properly find that the probability of inclusion did not ***499** occur until the plans for the recreation sites became somewhat more definite around January 1, 1965. (Cf. United States v. 2,353.28 Acres etc. (5th Cir. 1969) 414 F.2d 965, 970—971; Calvo v. United States (9th Cir. 1962) 303 F.2d 902, 907—909.)

Thereafter, in instructing the jury as to the proper determination of compensation, the trial judge directed the jury that it was not to 'consider any enhancement that came about by virtue of public knowledge of this project for recreation purposes after ***847 **15** (January) 1, 1965.'[13] We conclude that this instruction did not permit the jury to award compensation for an increase in value to which defendant was not entitled.

3. The trial court did not err in admitting evidence of sales which took place in the Lake McClure region in 1965 and 1966 as 'comparable sales' under Evidence Code section 816.

[11] The district contends that the trial judge erred in permitting defendant's appraisal witness to support his opinion of the proper valuation of the land by presenting evidence of sales of nearby lands which occurred in 1965 and 1966. The trial court did find that these 1965 and 1966 sales reflected a 'substantial enhancement' attributable to the recreational aspects of the Lake McClure project, but admitted them into evidence nonetheless, indicating that he would instruct the jury to eliminate improper enhancement. The district claims that sales which are found to reflect 'substantial project enhancement' not properly shared by the condemned land,[14] can never constitute 'comparable sales' within the meaning of section 816 of the Evidence Code, and are thus inadmissible.

Section 816 of the Evidence Code provides in pertinent part that '(w)hen relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the price and other terms and circumstances of any sale * * * (of) comparable property if the sale * * * was freely made in good faith within a reasonable time before or after the date of the valuation. In order to be considered comparable, the sale or contract must have been made sufficiently near in time to the date of the valuation, and the property sold must be located sufficiently near the ***500** property being valued, and must be sufficiently alike in respect to character, size, situation, usability, and improvements, to make it clear that the property sold and the property being valued are comparable in value and that the price realized for the property sold may fairly be considered as shedding light on the value of the property being valued.'

Given the inherent vagueness of this standard of 'comparability,' appellate courts have recognized that "the trial judge * * * must be granted a wide discretion" (County of Los Angeles v. Faus (1957) 48 Cal.2d 672, 678, 312 P.2d 680, 684) in determining the admissibility of sales sought to be relied upon as 'comparable.' '(N)o general rule can be laid down regarding the degree of similarity that must exist to make such evidence admissible. It must necessarily vary with the circumstances of each particular case. Whether the properties are sufficiently similar to have some bearing on the value under consideration, and to be of any aid to the jury, must necessarily rest largely in the sound discretion of the trial court, which will not be interfered with unless abused.' (Wassenich v. Denver (1919) 67 Colo. 456, 464, 186 P. 533, 536; see San Bernardino County Flood Control Dist. v. Sweet (1967) 255 Cal.App.2d 889, 905, 63 Cal.Rptr. 640; People ex rel. State Park Com. v. Johnson (1962) 203 Cal.App.2d 712, 719, 22 Cal.Rptr. 149.)

Although the district does not deny that this broad discretion resides in the trial court, it does maintain that sales which are 'substantially enhanced' can never properly be found to be 'comparable sales,' because, assertedly by definition, such sales ***848 **16** are not 'sufficiently alike (the property to be valued) in respect to character, size, situation (or), usability * * *.' Section 816, however, does not establish criteria of 'substantial' or 'insubstantial' comparability, but rather requires the trial court to measure whether or not 'the property sold' is 'sufficiently alike' the property to be valued, by determining whether 'the price realized for the property sold May fairly be considered as shedding light on the value of the property being valued.' (Emphasis added.)

[12] We recognize, of course, that in many, perhaps most, cases, a trial judge may find that sales of neighboring property which 'substantially' reflect an enhancement value not properly shared by the condemned property, will not 'shed light' on the value of the subject property, but rather will tend to confuse the issue if admitted into evidence. In such cases the sales should properly be excluded. We can conceive of a variety of situations, however, in which a trial court may reasonably find that such sales will 'shed light' on the value of condemned land even though the sales reflect 'substantial enhancement.'

In some cases, for example, a project will remain in the planning and ***501** construction stage for a great many years before a tract of land, originally designated for condemnation, is actually taken by the condemnor. Although all sales in the neighborhood over that period may reflect 'substantial project enhancement,' such sales may also reflect recent increases in land values attributable to other factors, such as other new public or private improvements or zoning changes, which the owner of the condemned land is entitled to have included in a consideration of the market value of his land at the time of the taking. (See United States v. Miller (1943) 317 U.S. 369, 373 and fn. 6, 63 S.Ct. 276, 87 L.Ed. 336; Urban Renewal Agency of Wichita Metropolitan Area v. Spines (1968) 202 kan. 262, 265—267, 447 P.2d 829, 831—833.)

Under these circumstances a trial court might reasonably conclude that the 'substantially enhanced' sales could 'fairly be considered as shedding light' on the value of the condemned property, since without the admission of such sales a landowner could not support his appraiser's opinion of the increase in value attributable to these non-project factors. The conclusion is particularly viable if an expert appraisal witness can fairly estimate the amount of each of the enhanced sales prices which is attributable to 'project enhancement.' In such a case, the trier of fact could subtract the amount of value which it finds to be due to project enhancement, and could then test the witness's valuation of the condemned land against this 'adjusted' sales price.[15] Indeed, the trial court followed the latter procedure in the instant case: the defendant's appraisal witness introduced evidence of other sales in the neighborhood and estimated the extent of 'project enhanced value' at $50 an acre; the plaintiff contended, on the other hand, that in each of these sales, any amount over $125 an acre was attributable to project enhancement.

The district now argues, however, that in permitting defendant's appraiser to isolate this 'enhancement factor' in other, allegedly 'comparable' sales, the trial court violated Evidence Code, section 822, subdivision (d) which renders inadmissible '(a)n opinion as to the value of any property or property interest other than that being valued.' The district apparently reads section 822, subdivision (d) as precluding an appraiser, when referring to *****849 **17** 'comparable sales,' from explaining any adjustments that must be made in the 'comparable sale' price in utilizing that sale as an indicant of the value of the property to be taken.

***502** [13] Such an interpretation of section 822, subdivision (d), however, goes considerably beyond the main purposes of that section and inevitably conflicts with the practical application of the entire 'comparable sale' approach of section 816. Under the comprehensive statutory scheme relating to the evidentiary procedure for eminent domain proceedings enacted in 1961 (see, generally, Cal.Law Revision Com. Recommendations Relating to Evidence in Eminent Domain Proceedings (1960) (hereinafter cited as Law Rev.Com.Report)), appraisers, in relating their 'opinion' as to the value of the property, are permitted to utilize a wide variety of valuation techniques, including 'income capitalization' (Evid.Code, s 819), 'reproduction' costs (Evid.Code, s 820) and comparative sale data (Evid.Code, ss 816, 818). As the drafters of section 822, subdivision (d) indicated, in excluding 'opinion' evidence as to the value of property other than the condemned property, the section simply attempts to avoid the host of collateral issues, and the consequent prolongation of eminent domain trials, that would arise if appraisers were permitted to testify, under these liberalized evidentiary rules, as to their 'opinion' of the value of other property. (See Law Rev.Com.Report, p. A—8.) An appraiser's testimony relating to adjustments to be made in 'comparable sales,' however, does not normally raise collateral issues of great magnitude.

Moreover, the procedure of which the district complains is a most natural and, indeed, necessary component of the entire (comparable sales' approach sanctioned by section 816. It is a familiar statement that no two parcels of land are precisely equivalent; the property which is the subject of a 'comparable sale' will always differ in some particulars from the property being valued. Commonly a 'comparable sales price' will vary in some tespect from an appraiser's opinion of the condemned land's 'value;' when this happens, the appraiser will most naturally wany to explain the distinguishing features between the property sold and the property to be valued, which he had taken into account in inferring the value of the land under consideration from the 'comparable sale.' Moreover, even if the appraiser does not so testify on direct examination, he will frequently be questioned on cross-examination as to the relevant differences between the assertedly 'comparable' parcel and the subject land. In response he will be compelled to disclose how he took these relevant differences into account in deriving his valuation figure. (See, e.g., City of Los Angeles v. Cole (1946) 28 Cal.2d 509, 518, 170 P.2d 928, overruled on other grounds in County of Los Angeles v. Faus (1957) 48 Cal.2d 672, 680, 312 P.2d 680.) Such inquiries are essential if the jury is intelligently to determine the weight that should be given to such 'comparable sales' evidence. (See Law Rev.Com. Report, pp. A—50—A—51.)

Our courts have accepted this 'adjustment' process as an integral element ***503** of the 'comparable sale' approach. In San Bernardino County Flood Control Dist. v. Sweet (1967) 255 Cal.App.2d 889, 63 Cal.Rptr. 640, for

example, the court, in affirming the trial judge's admission of 'comparable sales' of property three to five miles distant from the subject property, stated: 'The admissibility of testimony relating to comparable sales rests largely in the discretion of the trial court. (Citations.) In the present case the court carefully considered the question of comparability and required the witness to adjust the sales prices to the date of value of the subject property. We find no abuse of discretion in the court's ruling.' (255 Cal.App.2d at p. 905, 63 Cal.Rptr. at p. 650.) Likewise, in City of San Diego v. Boggeln (1958) 164 Cal.App.2d 1, 7—8, 330 P.2d 74, the procedure utilized by the court in the instant case was endorsed in the context of project 'enhanced' comparable sales. (See ****18 ***850** County of Los Angeles v. Hoe (1955) 138 Cal.App.2d 74, 79—80, 291 P.2d 98; cf. City of Gilroy v. Filice (1963) 221 Cal.App.2d 259, 271, 34 Cal.Rptr. 368. See also United States v. Miller (1943) 317 U.S. 369, 380, 63 S.Ct. 276, 87 L.Ed. 336; State By and Through Road Commission v. Wood (1969) 22 Utah 2d 317, 320—321, 452 P.2d 872, 874.)

[14] The district also contends that even if 'substantially enhanced' sales may be admitted under certain circumstances, such circumstances did not exist in the instant case; in other words, the district claims that the 1965 and 1966 sales were 'noncomparable' as a matter of law and thus that the trial court's admission of these sales constituted an abuse of discretion. Considerable testimony, however, attributed the rise in land values in the area to a substantial number of factors other than the Lake McClure project; the district's appraisal witness, for example, conceded that the inflation of the mid-1960's had affected the value of land around the state, and, as recounted earlier, the landowner's witness cited a number of factors, including population growth and construction of freeways, as contributing to the increase in value. The trial judge could reasonably conclude that the 1965 and 1966 land sales might 'shed light' on the effect of these factors on the property to be valued, particularly since, without the introduction of such sales, the jury would have been deprived of all 'objective' market evidence on these matters. Under the circumstances, we conclude that the court did not abuse its discretion in permitting the witness to testify as to the challenged sales.

4. The trial court did not err in awarding defendant attorney's fees in connection with a partial abandonment of the condemnation; it did err, however, in determining the scope of the abandonment.

Plaintiff raises one final issue on this appeal. The district contends that the trial court erred in awarding the landowner, Mrs. Woolstenhulme, ***504** $3,500 for attorney's fees based upon a partial abandonment by the condemnor. The award was made pursuant to section 1255a of the Code of Civil Procedure which provides that a condemnee shall be compensated for 'reasonable costs and disbursements,' including attorney's fees, which he incurs in preparing to defend a condemnation action which is later abandoned by the condemnor.

[15] In the initial complaint filed by the irrigation district in February 1966, the district sought to condemn (1) a fee interest in areas designated parcels 1, 2, 4 and 5 and (2) the cattle grazing and watering rights to 199.9 acres designated as parcel 3. Defendant and a predecessor had earlier sold parcel 3 to the district but had reserved the grazing and watering rights and, thus, the district's intention in the initial complaint was to acquire the remainder of the complete fee interest in the tract. After this initial complaint was filed, defendant, through litigation, succeeded in rescinding her prior sale of parcel 3 to the district. The district, thereafter, in August 1967, filed an amended complaint, seeking condemnation of the fee interest of parcels 1 and 2 and 117 acres of parcel 3; this amended complaint dropped the demand for grazing and watering rights, and excluded parcels 4 and 5 completely. The trial court held that the amendment of the complaint constituted a partial abandonment, and awarded defendant an attorney's fee of $3,500 based on money expended to defend parcels 4 and 5, and the grazing and watering rights of parcel 3.

The district does not, and could not properly, contend that the amended complaint did not constitute a 'partial abandonment' entitling the landowner to attorney's fees with respect to property and property rights omitted from the subsequent complaint. (County of Kern v. Galatas (1962) 200 Cal.App.2d 353, 356—357, 19 Cal.Rptr. 348.)[16] The district, however, does raise two other objections to the $3,500 award.

*****851 **19** First, the district, relying on the rule of Franklin-McKinley School Dist. of Santa Clara County v. Lester (1963) 223 Cal.App.2d 347, 348—349, 35 Cal.Rptr. 727; City of Los Angeles v. Welsh (1935) 10 Cal.App.2d 441, 443, 52 P.2d 296; and City of Long Beach v. O'Donnell (1928) 91 Cal.App. 760, 761, 267 P. 585, contends that defendant was entitled to no award of attorney's fees at all since, it is asserted, she had only a contingent fee contract with her attorney. Assuming, without deciding, that these cases correctly interpret section 1255a as precluding an award of attorney's fees when those fees are purely contingent, we still cannot agree with the condemnor that such fees should not have been awarded in the instant case.

***505** [16] Although the original contract between defendant and heer lawyer provided only for a purely contingent fee arrangement, the attorney subsequently wrote his client stating that in the event of abandonment, the fee would be based on 'reasonable charges,' (see Cal.Condemnation Practice (Cont.Ed.Bar) pp. 18—19), and the trial court found that this second letter constituted a modification of the attorneyclient fee agreement. The record contains substantial evidence to support a finding that defendant agreed to this modification of the fee contract, and therefore the trial court could properly find that the arrangement was no longer a purely contingent one. (Cf. Franklin-McKinley School Dist. of Santa Clara County v. Lester (1963) 223 Cal.App.2d 347, 349, 35 Cal.Rptr. 727.) Thus, even under the authorities relied on by the district, the court could properly make an award under 1255a.

Second, the district maintains that the trial court erred in characterizing the amended complaint as 'abandoning' its instant demand for grazing and satering rights of parcel 3, and in awarding attorney's fees related to the defense of those rights. We conclude that this contention has merit.
[17] Section 1255a is designed to compensate a defendant for expenses incurred in anticipation of an eminent domain proceeding, when the condemnor declines to carry the proceeding through to its conclusion. (Oak Grove School Dist. of Santa Clara County v. City Title Ins. Co. (1963) 217 Cal.App.2d 678, 698, 32 Cal.Rptr. 228.) By amending its complaint to seek a fee interest in 117 acres of parcel 3, while dropping its request for grazing and watering rights over the entire 199.9-acre tract, the district did abandon its efforts with respect to the 82.9 acres of parcel 3 omitted from the amended complaint. With respect to the 117-acre portion of parcel 3, however, the amendment did not constitute an Abandonment of the initial claim for grazing and watering rights, but instead represented an Enlargement of the original demand, seeking, in addition to the watering and grazing rights, all the other interests in the land which make up the fee simple estate. Thus, with respect to these 117 acres, the district did not fail to carry the proceeding through to conclusion; the services performed by the attorney with respect to that acreage were completely untilizable in the instant action. The court erred in viewing the district's shift in position with respect to these 117 acres as an abandonment.

The abandonment was thus less extensive than understood by the trial court at the time it entered its cost award. The trial court is in the best position to determine how the reduced compass of the abandonment should affect the amount of the fee award and we believe that the proper disposition ***506** is to set aside the present cost order and remand this matter to the trial judge for recomputation.

We vacate the cost order and remand defendant's motion for costs and disbursements to the trial court for recomputation in accordance with the conclusions expressed herein. In all other respects the judgment is affirmed. Plaintiff shall bear the costs of appeal.

WRIGHT, C.J., and McCOMB, PETERS, MOSK, BURKE and SULLIVAN, JJ., concur.

All Citations

4 Cal.3d 478, 483 P.2d 1, 93 Cal.Rptr. 833

Footnotes

1 Several of the amici curiae in this matter have urged the court to address the issue of whether the Depreciation of land values, resulting from the announcement of a public improvement, is to be taken into consideration in computing just compensation. Although, of course, that issue and the enhancement issue presented by the facts of the three cases before us do show some correlations, we do not believe we should attempt to resolve the question of 'project depreciation' ('project blight') in the abstract.
Most jurisdictions which have probed the problem do not follow identical rules with respect to project enhancement and project blight (4 Michols on Eminent Domain (3d ed. 1962) s 12.3151 (2), pp. 209—210), and several commentators have suggested that differential treatment may be the proper approach (see, e.g., Anderson, Consequences of Anticipated Eminent Domain Proceedings—Is Loss of Value a Factor? (1964) 5 Santa Clara Law. 35; Note, Recovery for Enhancement and Blight in California (1969) 20 Hastings L.J. 622, 643—648). A major reason for a distinction between the two is that in the case of project blight, unlike enhancement, there is a danger that the government will announce the project in order to drive down neighborhood land values, and then attempt to take advantage of the depressed values when paying compensation for property it condemns. (See Uvodich v. Arizona Bd. of Regents (1969) 9 Ariz.App. 400, 453 P.2d 229, 234—235; c.f. United States v. Virginia Elec. & Power Co. (1961) 365 U.S. 624, 635—636, 81 S.Ct. 784, 5 L.Ed.2d 838.)
In view of the additional complexities involved in the 'blight' situation, we have concluded that before attempting to

devise a general rule we should await a case presenting that matter directly.

2 See generally, Note, Recovery for Enhancement and Blight in California (1969) 20 Hastings L.J. 622.

3 Some dispute has arisen over whether January 1, 1965 was the date at which the inclusion of defendant's land became 'definite' or just 'reasonably probable.' At one point in the record the trial judge stated that 'I am not going to apply a rule of certainty. I am going to use probability, apply the rule of probability.' Thereafter, when the judge set the date as January 1, 1965, he stated: '(T)his was a very fluid thing, but somewhere between the 29th of November, '63 and December of 1965, this became pretty definite, that the Barrett Cove area and this property, or much of it, was going to be taken. And of necessity I must be a little bit arbitrary and I will make it January 1, 1965.' We believe the most reasonable interpretation of the record is that the January 1, 1965 date was reached by application of the 'probability' standard.

4 Actually 117 of the 189 acres involved in this action were known to be included in the project long before 1965, because those acres were to be actually flooded by the expansion of the lake; the recreation aspect concerned only 72 acres of the present parcel. Recognizing the difficulty the jury would have in understanding an extremely complex instruction submitted by defendant which drew this distinction, the district's counsel agreed that the instruction could be modified to relate to the entire 189 acres. On this appeal both parties have treated the trial court's finding as going to the inclusion of all of defendant's property and, consequently, we adopt the same approach.

5 The judge instructed the jury that: 'You are not to take, to consider any increase in value after January 1, 1965—that is, related solely to the recreation. You may take enhancement into consideration—for example, what the experts have talked about, the natural increase in value in farm land, six or seven percent; any other factor of enhancement that may be in this case that you believe is applicable. * * * But you can't consider any enhancement that came about by virtue of public knowledge of this project for recreational purposes after (January) 1, 1965. * * *'

6 All of the early cases applying the Neale rule, did so to bar the inclusion of this type of 'enhancement value.' (Sacramento So. R.R. v. Heilbron (1909) 156 Cal. 408, 412, 104 P. 979; City of Stockton v. Vote (1926) 76 Cal.App. 369, 404, 244 P. 609; City of Pasadena v. Union Trust Co. (1934) 138 Cal.App. 21, 25—26, 31 P.2d 463.)

7 In one passage in Neale the court did aver to this distinction between different kinds of 'project enhancement.' After declaring that 'benefit arising from the improvement' would be 'inadmissible as a direct element of value,' the court observed: 'It is possible that (the landowner) might get some benefit from (the project) indirectly; that is to say, the public knowledge of a proposed improvement might cause an actual demand in the market, and a subsequent advance in the current rate of price. In such case it would be impracticable for a court to analyze the price, and determine the proportion in which any particular element contributed thereto. The scales of justice do not balance quite so delicately as that. But aside from this indirect benefit * * * it seems monstrous to say that the benefit arising from the proposed improvement is to be taken into consideration as an element of the value of the land.' (78 Cal. at pp. 74—75, 20 P. at 377.)
Although defendant reads this passage as firmly holding that 'indirect enhancement' is a proper element of just compensation, we do not believe the decision can properly be interpreted as going that far. The quoted dictum does not declare that a londowner is Entitled to this 'indirect' benefit, but only that he might obtain this benefit because it would be 'impracticable' for a court to analyze the price to eliminate this factor. In our view the discussion in Neale cannot be fairly said to have resolved the issue now before us one way or the other.

8 This analysis is also applicable to landowers who acquired the land prior to the public improvement. Although such owners have not paid out money in reliance on the project, they effectively have made an equivalent investment by retaining the land rather than selling it at the 'enhanced price.' (See 1 Orgel on Valuation Under Eminent Domain (2d ed. 1953) s 98, p. 425.)

9 Furthermore, if we were to ignore realities and were to require compensation up until the date of Definite inclusion instead of the date of Probable inclusion, we might effectively encourage the condemning authority to establish definite project boundaries quite hastily; we would thus discourage the government's use of procedures, such as public hearings, which afford the public some direct participation in the planning and placement of such projects. Procedures permitting public participation inevitably delay the official pronouncement of the definite boundaries of a public project; these procedures might prove prohibitively costly if the government were required to pay for a rise in land values, not shared by the property likely to be condemned, that might occur during the course of public hearings.

10 Courts have utilized a variety of linguistic tests in describing the requisite 'certainty of inclusion' that is required before 'project enhanced value' should be excluded. In the Miller case itself, the court, after initially declaring that the crucial

question was whether the lands were 'probably' within the project (317 U.S. at p. 377, 63 S.Ct. 276), later states that no 'project enhanced value' should be considered if the lands were 'within the area where they were Likely to be taken for the project, but might not be * * *' (317 U.S. at p. 379, 63 S.Ct. at p. 282) (emphasis added) (see also United States v. Crance (8th Cir. 1965) 341 F.2d 161, 163 ('might likely be acquired'); United States v. 172.80 Acres etc. (3d Cir. 1965) 350 F.2d 957, 959 ('probability of future inclusion'); Cole v. Boston Edison Co. (1959) 338 Mass. 661, 666, 157 N.E.2d 209, 212 ('if it was contemplated * * * that * * * land in question would sooner or later be taken') (original emphasis).)

Despite this lack of uniformity or precision in terminology, however, most of the cases appear to exclude project enhancement whenever the court concludes that an informed owner could reasonably anticipate that the property might well be taken for the project. (See, e.g., United States v. Miller (1943) 317 U.S. 369, 377, 63 S.Ct. 276, 87 L.Ed. 336 (enhancement excluded when 'one probable (site)' for the project was marked out over defendant's land); Shoemaker v. United States (1893) 147 U.S. 282, 13 S.Ct. 361, 37 L.Ed. 170 (congressional act authorized acquisition of fixed acreage for park within larger area but did not fix boundaries of park; enhancement value excluded for All property within larger area).

In our view the 'probability of inclusion' standard, utilized by the federal courts, expresses this concept adequately and in a readily comprehensible formula; the latter quality is certainly a most important one in this area, where the factual inquiries are invariably quite complex and frequently not susceptible to precise resolution. Accordingly, we believe that this standard is the appropriate one to be utilized in future cases. (See People ex rel. Dept. of Pub. Works v. Arthofer (1966) 245 Cal.App.2d 454, 465, 54 Cal.Rptr. 878.)

11 Technically, it is possible that there may be some project enhancement of value even after this time, for some potential purchasers may conceivably be will to pay more for such property in the hope, however remote, that ultimately the property will not be taken for the improvement. As we have explained earlier. however, any rise in value after this date is far more likely to be attributable to speculation upon the amount that the condemning authority will be compelled to pay. Because, as a practical matter, it would be impossible to determine the precise source of an increase in actual market value, and since those who purchase property after the date of probable inclusion voluntarily assume the risk of condemnation. We believe that the date of 'probable inclusion' constitutes the most appropriate 'cut—off' date for project enhancement.

12 As stated in the text, the trial court conducted an inquiry into the date of 'probable inclusion' and rendered a finding on that matter upon the agreement of both parties. We believe that, whether or not the parties so agree, such procedure should be followed in future cases. If the trial judge is precluded from making an early determination on this issue, he cannot properly determine which sales are sufficiently 'comparable' to the condemned property to be admitted into evidence; furthermore, unless the trial judge is permitted to determine the appropriate 'cutoff date,' we believe that, as a practical matter, it may be impossible to devise comprehensible instructions which explain to the jury which 'enhanced value' is to be included in just compensation and which is to be excluded. We therefore conclude that the trial court, rather than the jury, should determine the issue of 'probable inclusion.' The United States Supreme Court recently reached the same conclusion with respect to federal eminent domain proceedings. (United States v. Reynolds (1970) 397 U.S. 14, 20, 90 S.Ct. 803, 25 L.Ed.2d 12.)

13 Initially, the trial judge inadvertently stated the date as October 1, 1965, but he immediately corrected the date to January 1, 1965, when counsel advised him of his slip.

14 To the extent that 'project enhanced' value is a proper element of the condemned land itself, other sales reflecting similar project enhancement may. of course, be considered comparable. Since we have concluded in the prior section that defendant was entitled to 'project enhancement' until January 1, 1965, the condemnor's present objection is properly directed only at that element of the 'comparable' sale prices reflecting project enhancement subsequent to January 1, 1965.

15 Of course a trial court is not required to admit a proffered sale simply because an appraiser declares that he can isolate and eliminate all improper 'enhancement' value. In every case it remains for the trial court, rather than the witness, to decide, from all the circumstances before it, whether a sale offered into evidence 'may fairly be considered as shedding light on the value of the (property being valued).' (See Los Angeles, etc., School District of Los Angeles County v. Swensen (1964) 226 Cal.App.2d 574, 583, 38 Cal.Rptr. 214, 220.)

16 In 1938, after the trial in this case, section 1255a was amended to codify the rule of the Kern case.

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EMINENT DOMAIN 11

Burden of Proof

[*Name of condemnee*] has the burden of proving the fair market value of the property [*name of condemnor*] is acquiring [and the amount of severance damages, if any, to the remainder].

[[*Name of condemnor*] has the burden of proving the amount of special benefits, if any].

SOURCE: RAJI (CIVIL) 3d Eminent Domain 7; *State ex rel. Ordway v. Buchanan,* 154 Ariz. 159, 741 P.2d 292 (1987); *Pima County v. Palos Companies Unlimited,* 140 Ariz. 481, 682 P.2d 1148 (1984); *Choisser v. State ex rel. Herman,* 12 Ariz. App. 259, 469 P.2d 493 (1970); *State ex rel. Herman v. S. Pac. Co.,* 8 Ariz. App. 238, 445 P.2d 186 (1968); *Town of Williams v. Perrin,* 70 Ariz. 157, 217 P.2d 918 (1950); *Maricopa County v. Shell Oil Co.,* 84 Ariz. 325, 327 P.2d 1005 (1958).

Taylor v. State ex rel. Herman, 12 Ariz. App. 27, 467 P.2d 251 (1970) (regarding special benefits).

USE NOTE: Use bracketed language appropriate to the facts.

EMINENT DOMAIN 12

Severance Damages

[You must decide whether] [T]he property taken is part of a larger parcel. The [*name of condemnee*] is entitled to recover the fair market value of the part acquired by [*name of condemnor*]. [*Name of condemnee*] also is entitled to severance damages if the fair market value of the remaining property is reduced by the acquisition or by the proposed improvement.

The measure of severance damages is the difference between the fair market value of the remaining property before the acquisition and the fair market value of the remaining property after the acquisition.

SOURCE: RAJI (CIVIL) 3d Eminent Domain 4; A.R.S. § 12-1122 (1956); *Pima County v. DeConcini,* 79 Ariz. 154, 285 P.2d 609 (1955); *County of Maricopa v. Paysnoe,* 83 Ariz. 236, 319 P.2d 995 (1957); *State ex rel. Ordway v. Buchanan,* 154 Ariz. 159, 163, 741 P.2d 292, 296 (1987).

USE NOTE: Use bracketed language appropriate to the facts.

EMINENT DOMAIN 17

Cost of Cure

Severance damages may be reduced or eliminated by curing the condition causing the severance damages if the cost of cure is less than the amount of severance damages avoided by the cure.

[If you find the severance damages will be wholly cured, you must award [*name of condemnee*] the lesser of (1) the cost to cure or (2) the full amount of severance damages, but not both.]

[or]

[If you find that the severance damages are not wholly cured, you must award [*name of condemnee*] the lesser of (1) the cost to cure, plus remaining severance damages, or (2) the full amount of severance damages, but not both.]

SOURCE: *Pima County v. DeConcini,* 79 Ariz. 154, 157, 285 P.2d 609, 611 (1955); *County of Maricopa v. Shell Oil,* 84 Ariz. 325, 327 P.2d 1005 (1958); *Pima County v. Palos Companies Unlimited,* 140 Ariz. 481, 484, 682 P.2d 1148, 1151 (Ct. App. 1984).

USE NOTE: Use bracketed language appropriate to the facts.

140 Ariz. 481
Court of Appeals of Arizona,
Division 2.

PIMA COUNTY, a body politic and corporate,
Plaintiff/Appellant,
and
Estes Homes, Plaintiff-Intervenor/Appellant,
v.
PALOS COMPANIES UNLIMITED, a California corporation; Joan Choi, et vir.; and Kwan Kih Minn and Young Soo Minn, husband and wife,
Defendants/Appellees.

No. 2 CA–CIV 4987.
|
April 10, 1984.
|
Review Denied June 26, 1984.

Synopsis
In eminent domain case, jury in the Superior Court, Pima County, Cause No. 193492, J. Richard Hannah, J., returned verdict awarding value for land taken plus **severance damages**, and appeal was taken. The Court of Appeals, Howard, J., held that: (1) evidence concerning **cost** of construction of bridge across drainage channel which would cut across private road was not a competent method of proving **severance damages** in case in which the property had the same type of access in the before situation as it did in the after situation, and there was no evidence that the property in the "after" situation was so unusual that it had no market, and (2) absent any probative evidence to the value of the property in the "after" situation, issue of **severance damages** should not have been submitted to the jury.

Award of severage **damages** vacated and judgment otherwise affirmed.

West Headnotes (5)

[1] **Eminent Domain**
Depreciation of Value

Evidence concerning **cost** of construction of bridge across drainage channel which would cut across private road was not a competent method of proving **severance damages** in case in which the property had the same type of access in the before situation as it did in the after situation, and there was no evidence that the property in the "after" situation was so unusual that it had no market.

2 Cases that cite this headnote

[2] **Eminent Domain**
Injuries to Part Not Taken

Severance damages are determined by the difference between the fair market value of the remaining property before and after the taking.

2 Cases that cite this headnote

[3] **Eminent Domain**
Injuries to Part Not Taken

Evidence of **cost** to restore the property to a condition before the taking **may** be admissible **on** the issue of **damages**, but is not a separate measure of **severance damages**.

2 Cases that cite this headnote

[4] **Eminent Domain**
Presumptions and Burden of Proof

Condemnee has burden of proving **severance damages**.

Cases that cite this headnote

[5] **Eminent Domain**
Questions for Jury

Issue of **severance** **damages** should not have been submitted to jury where landowner failed to offer any evidence of the value of the property in the "after" situation.

Cases that cite this headnote

Attorneys and Law Firms

***482 **1149** Stephen D. Neely, Pima County Atty. by John R. Neubauer, Tucson, for plaintiff/appellant Pima County.

Miller & Pitt, P.C. by Gerald Maltz and Linda A. Drake, Tucson, for plaintiff-intervenor/appellant Estes Homes.

J. Emery Barker, Tucson, for defendants/appellees.

OPINION

HOWARD, Judge.

This is an eminent domain case involving the construction of a drainage ditch. The determinative issue is whether appellees proved **severance** **damages**. We hold that they did not.

The subject property is flat, undeveloped desert land consisting of 78 acres (parcel 6G) and a private road (parcel 8A) which led south from the property to the Irvington Road alignment. The property was zoned for a trailer park but its location in the 100-year flood plain inhibited its full development since it was subject to flooding at depths of up to two feet during heavy rains.

The Irvington Road alignment was nothing more than that, an alignment, in other words, the location of Irvington Road if it were extended in a westerly direction. Although the alignment was dedicated, the right-of-way was not open to public travel. Furthermore, the county had no intention of opening the road for public use. In fact, one of the members of the board of directors of the landowner testified that they were aware when the property was purchased in 1980 that the Irvington Road alignment might never be opened for public use.

There was a conflict in the testimony as to whether there was access from Mission Road, a major north-south road in the area, to the northwest portion of parcel 6G by means of a road in an existing mobile home subdivision located along the northern boundary of parcel 6G. The county's expert witnesses testified that the road was opened to the public for public use but the landowner testified that the owner of the mobile home subdivision said the road was private and could not be used by the owners of parcel 6G.

***483 **1150** The public purpose for which defendants' property was condemned was the construction of a major drainage channel to divert flood waters of the west branch of the Santa Cruz River and the realignment of Valley Road. The drainage channel cuts across the southeast corner of parcel 6G and proceeds through parcel 8A. The total amount of land taken by the county consists of 1.53 acres. After the construction of the project, Valley Road will be realigned so that it travels along the northern border of the west branch channel as it goes by parcel 6G, giving access from parcel 6G to Valley Road. Valley Road then will tie into a relocated Irvington Road southwest of the subject property. The portion of Valley Road to which parcel 6G will have access will not be open for public travel until the development in the area warrants it.

It was the testimony of the landowners' own engineering witness that the access to the subject property after the completion of the construction will be as good as or better than it was before.

The landowners' testimony on **damages** came from the president of the corporation, Joan Choi, and from a hydrologist, James H. Nelson. Although the landowner had hired an appraiser to determine its **damages**, the appraiser did not testify at trial. Instead, Mrs. Choi testified that the before value of the property was "substantially more" than the $490,000 Palos Companies paid for it. There was no evidence of the value of the property in the "after" situation, Choi being of the opinion that the property in the after situation was "landlocked". The **damage** testimony on **severance** **damages** came from Nelson who testified that it would **cost** approximately $114,000 to put a bridge across the west bank channel in order to secure access to the Irvington alignment. There was also evidence of other **cost**-to-**cure** **damages**.

The county put on expert appraisal evidence of the value of the property before and after the taking. Its expert testified that there were no **severance** **damages** and the value of the part taken was $14,546.40. The jury returned a verdict in favor of the landowner awarding it $14,546.40 for the 1.53 acres taken plus $73,000 **severance** **damages**.

The county contends the trial court erred in denying plaintiffs' motion for a directed verdict and in refusing to instruct the jury that there were no **severance** **damages** and that it should return a verdict in the amount testified to by Mr. Klafter, $14,546.40. We agree.

[1] [2] [3] Relying on *Pima County v. DeConcini*, 79 Ariz. 154, 285 P.2d 609 (1955) and *State ex rel. Herman v. Southern Pacific Company*, 8 Ariz.App. 238, 445 P.2d 186 (1968), it is the landowners' contention that their evidence concerning the construction of a bridge across the drainage channel is a competent method of proving its **severance** **damages**. We do not agree. **Severance** **damages** are determined by the difference between the fair market value of the remaining property before and after the taking. *Pima County v. Bilby*, 87 Ariz. 366, 351 P.2d 647 (1960); *Pima County v. DeConcini*, supra; *American Savings Life Insurance Company v. State*, 13 Ariz.App. 336, 476 P.2d 680 (1970). While evidence of the **cost** to restore the property to a condition before the taking **may** be admissible **on** the issue of **damages**, it is not a separate measure of **damages**. In the case of *Sacramento and San Joaquin Drainage District v. Goehring*, 91 Cal.Rptr. 375, 13 Cal.App.3d 58 (1970), the property owners had introduced into evidence the estimated additional **cost** of a pumping and draining facility in the "after" condition of the property as contrasted with the "before" condition. In holding that this evidence had no independent probative value the court stated:

> "The items noted above are classified as '**cost** to **cure**' items and are compensable. (5 Nichols on Eminent Domain (3d ed.), § 23.2.) Nevertheless, the measure of **damages** is the decrease in market value of the property. (*People ex rel. Dept. of Public Works v. Hayward Bldg. Materials Co.*, supra [1963], 213 Cal.App.2d [457] at p. 465, 28 Cal.Rptr. 782; ***484 **1151** *Dunbar v. Humboldt Bay Mun. Wat. Dist.* (1967) 254 Cal.App.2d 480, 489, 62 Cal.Rptr. 358; 1 Orgel on Valuation Under Eminent Domain, § 46, p. 222.) While **cost** of replacement or restoration of improvements ('**cost** to **cure**') may be relevant evidence on the issue of **damages** (*People ex rel. Dept. of Public Works, v. Hayward Bldg. Materials Co.*, supra 213 Cal.App.2d at p. 465, 28 Cal.Rptr. 782), it is not a measure of **damages** to be separately assessed without reference to the loss in fair market value of the property taken or **damaged**. (*Id.* at pp. 465–467, 28 Cal.Rptr. 782; *Dunbar v. Humboldt Bay Mun. Wat. Dist.*, supra, 254 Cal.App.2d at p. 489, 62 Cal.Rptr. 358; *Steiger v. City of San Diego* (1958) 163 Cal.App.2d 110, 117–118, 329 P.2d 94.) The rule is succinctly set forth in the *Hayward* case (213 Cal.App.2d at p. 469, 28 Cal.Rptr. at p. 789): 'The rule of **severance** **damages** is clear; it is the net loss in the market value of the remainder. **Costs** of reconstruction constitute merely evidence bearing on such loss.' " 91 Cal.Rptr. at 379.[1]

The cases cited by the landowners in support of their independent use of the **cost** to **cure** approach are not on point. In *State v. Southern Pacific Company*, supra, the state fenced a portion of highway which ran along the railroads. Because there is no market for railroad right-of-way, the railroad was unable to offer evidence of decrease in value to its land as a result of the fencing. The railroad claimed loss of access and evidence of the **damages** was in the form of economic hardship to the railroad in its increased operating **cost**. The court ruled that where there is no evidence of loss of market value, there still may be compensable economic loss. This theory is based upon art. 2, § 17 of the Arizona Constitution and the Fifth Amendment to the United States Constitution which states that a property owner whose property is taken must be compensated. The court concluded that economic loss is an allowable substitute for market value, *if evidence of market value is unavailable:*

> "If the character of the property *absolutely* precludes any ascertainment of the market value, then we hold that consideration may be given to the value peculiar to the owner, the ***cost** of **cure***, replacement **cost** minus depreciation, capitalized **cost** of inconvenience, or any other manner which would be a fair method of compensating a landowner for the **damages** to his property from eminent domain." (Emphasis added) 8 Ariz.App. at 241, 445 P.2d 186.

In the case of *Pima County v. DeConcini*, supra, the county widened the highway and by construction of a drainage ditch destroyed access to the remainder of the land. The landowners' expert witnesses testified that with the drainage ditch destroying the access, the remaining land was not adaptable to any commercial use and had little value if any. The court held that evidence as to the **cost** of restoring access by the construction of bridges was admissible stating:

> "The rule also is that in arriving at the market value of land which has been **damaged** by the exercise of the

right of eminent domain the court has a right to admit evidence of possible expenditures which, if expended, would diminish the **damages**. While the measure of **severance** **damages** is the difference between the market value before and after the taking, evidence of expenditures which, if made, would cause a change in market value are admissible and should be considered by the court in arriving at such value. The limitation of the rule is that the expenditures must be in such an amount as will not exceed the difference between the market value before and after taking which would have existed without the expenditure. In other words, this class of evidence cannot operate to increase the **damages** above what they would be without the expenditure. [citations omitted]" 79 Ariz. at 157–158, 285 P.2d 609.

***485 **1152** As can be seen, the *DeConcini* case does not stand for the proposition that the **cost** to **cure** approach is an independently probative method of proving **severance** **damages**.

[4] [5] Here, there was no evidence that this property in the "after" situation was so unusual that it had no market. Choi's opinion that the property was landlocked is without any support in the record. The property had the same type of access in the before situation as it did in the after situation. The condemnee has the burden of proving **severance** **damages**. *American Savings and Life Insurance Company v. State ex rel. Herman,* supra. The landowner failed to offer any evidence of the value of the property in the "after" situation. The issue of **severance** **damages** should never have been submitted to the jury.

The award of **severance** **damages** is vacated and set aside, the judgment is affirmed in all other respects except those portions of the judgment which are affected by the vacating of the award of **severance** **damages**.

BIRDSALL, C.J., and HATHAWAY, J., concur.

All Citations

140 Ariz. 481, 682 P.2d 1148

Footnotes

1 See also *State of Louisiana, Through the Department of Highways v. Alexandria Volkswagen, Inc.,* 348 So.2d 176 (La.App.1977) and see also *Tunison v. Multnomah County,* 251 Or. 602, 445 P.2d 498 (1968).