



# Condemnation Summit XXIV

May 10, 2019 | Arizona Biltmore





# Opening Remarks: Program Introduction & Greetings

**Chris Kramer**, Jennings, Strouss & Salmon  
**Jennifer Cranston**, Gallagher & Kennedy



# ROW Best Practices

**Jennifer Cranston**, Gallagher & Kennedy  
**Laura Curry**, Jennings, Strouss & Salmon  
**Stephanie Heizer**, City of Scottsdale

# *Public Service Co. of N.M. v. Barboan, 857 F.3d 1101 (10th Cir. 2017)*

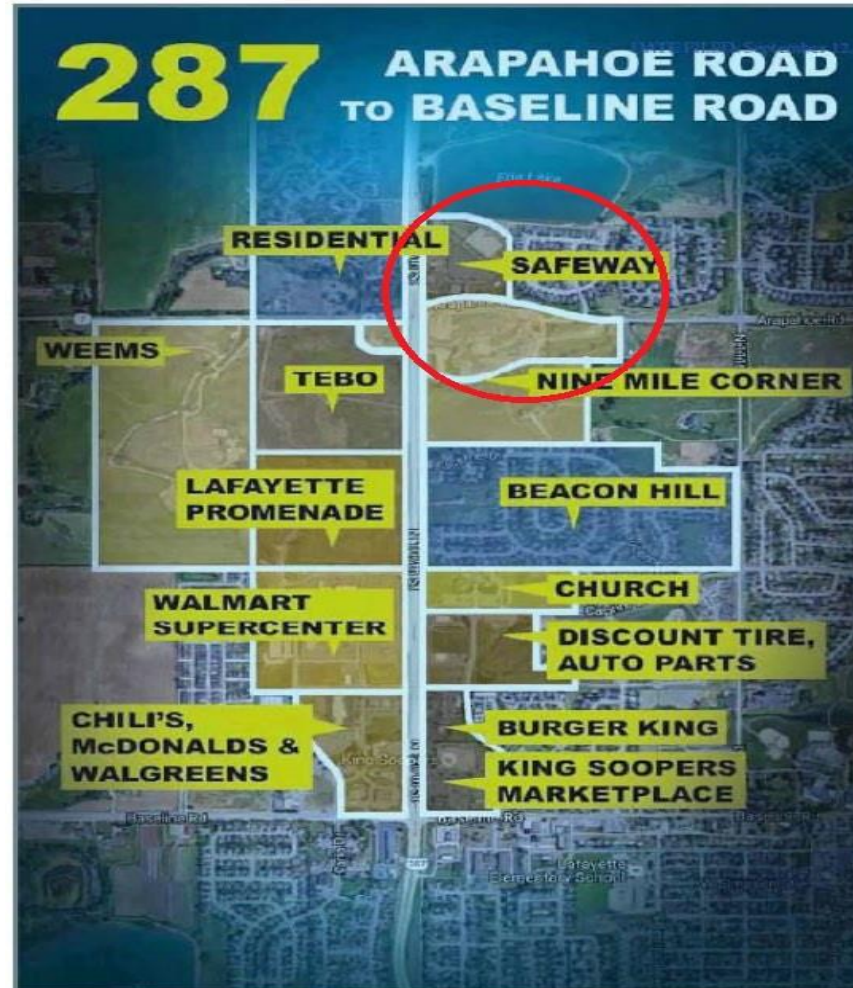
Navajo Nation

Easement for: 60 miles of transmission lines,  
crossing 57 parcels



# City of Layfayette v. Town of Erie, 434 P.3d. 746 (Colo. App. 2018)

The battle for King Soopers grocery Store



# *City of Marietta v. Summerour*, 807 S.E.2d 324, 333 (Ga.2017), reconsideration denied (Nov. 14, 2017)

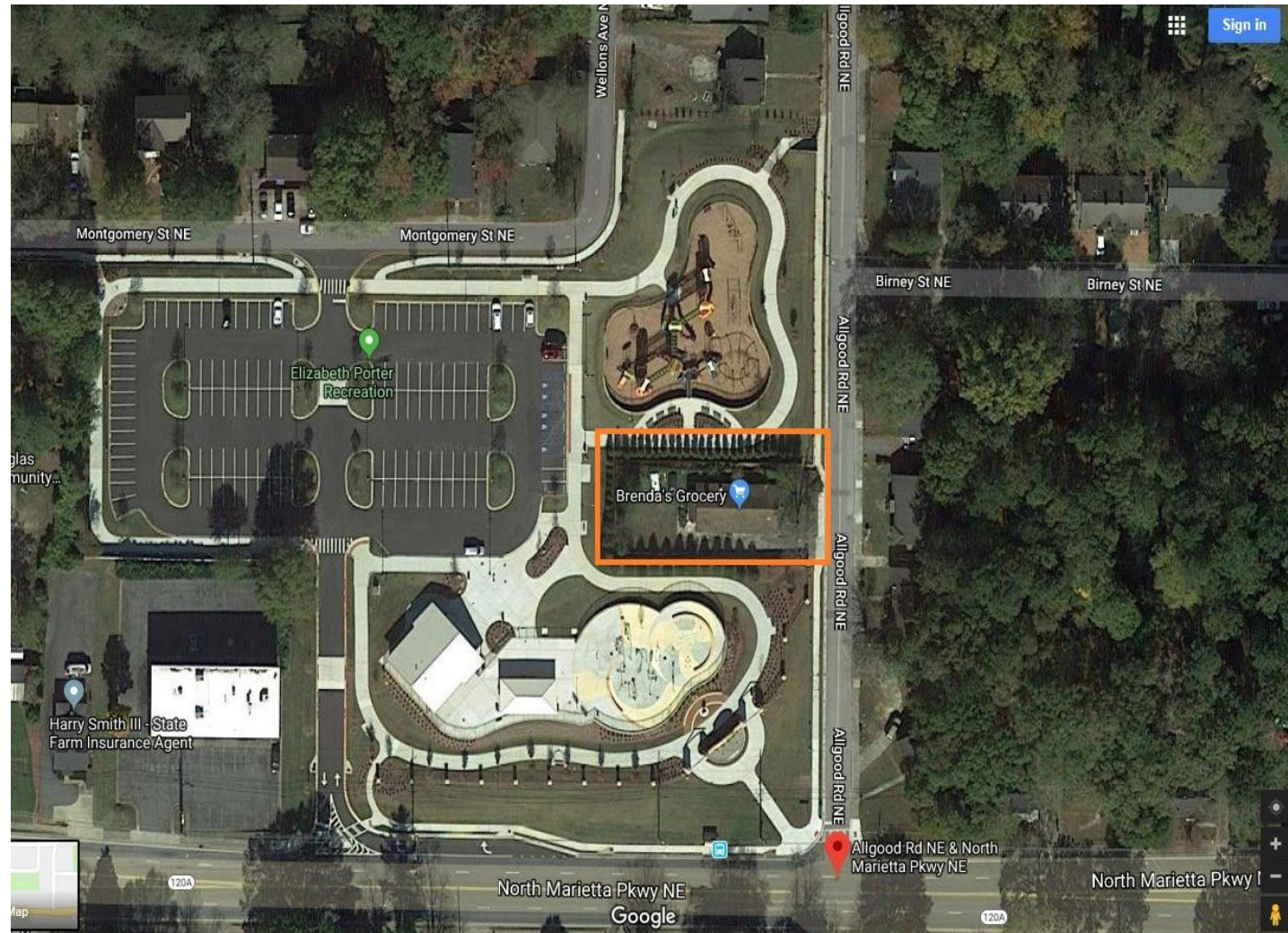
Mandatory compliance with procedural provisions / expanding the recreation center:



Ga. Code Ann. § 22-1-9 (West)

(3) Before the initiation of negotiations for fee simple interest for real property, the condemning authority shall establish an amount which it believes to be just compensation and shall make a prompt offer to acquire the property for the [that amount]. **The condemning authority shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount it established as just compensation. ...**

# AFTER CONDITION



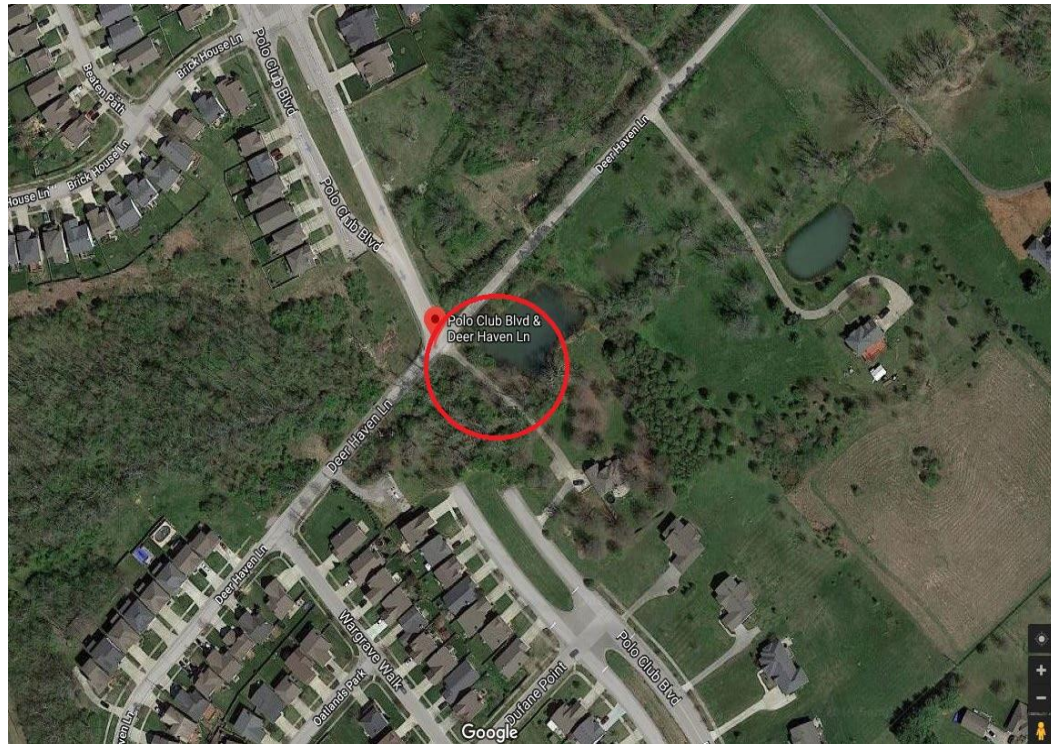
*Marietta Daily Journal*, Oct. 30, 2017 ([www.mdjonline.com](http://www.mdjonline.com))



Ray Summerour stands inside Brenda's Grocery along Allgood Road on Monday. The Georgia Supreme Court ruled in favor of Summerour Monday in an eminent domain case involving the city of Marietta's plans to build a new park on the store's property.



**Lexington-Fayette Urb. County Govt. v. Moore, 559 S.W.3d 374,  
376 (Ky. 2018)**  
(2015 views)



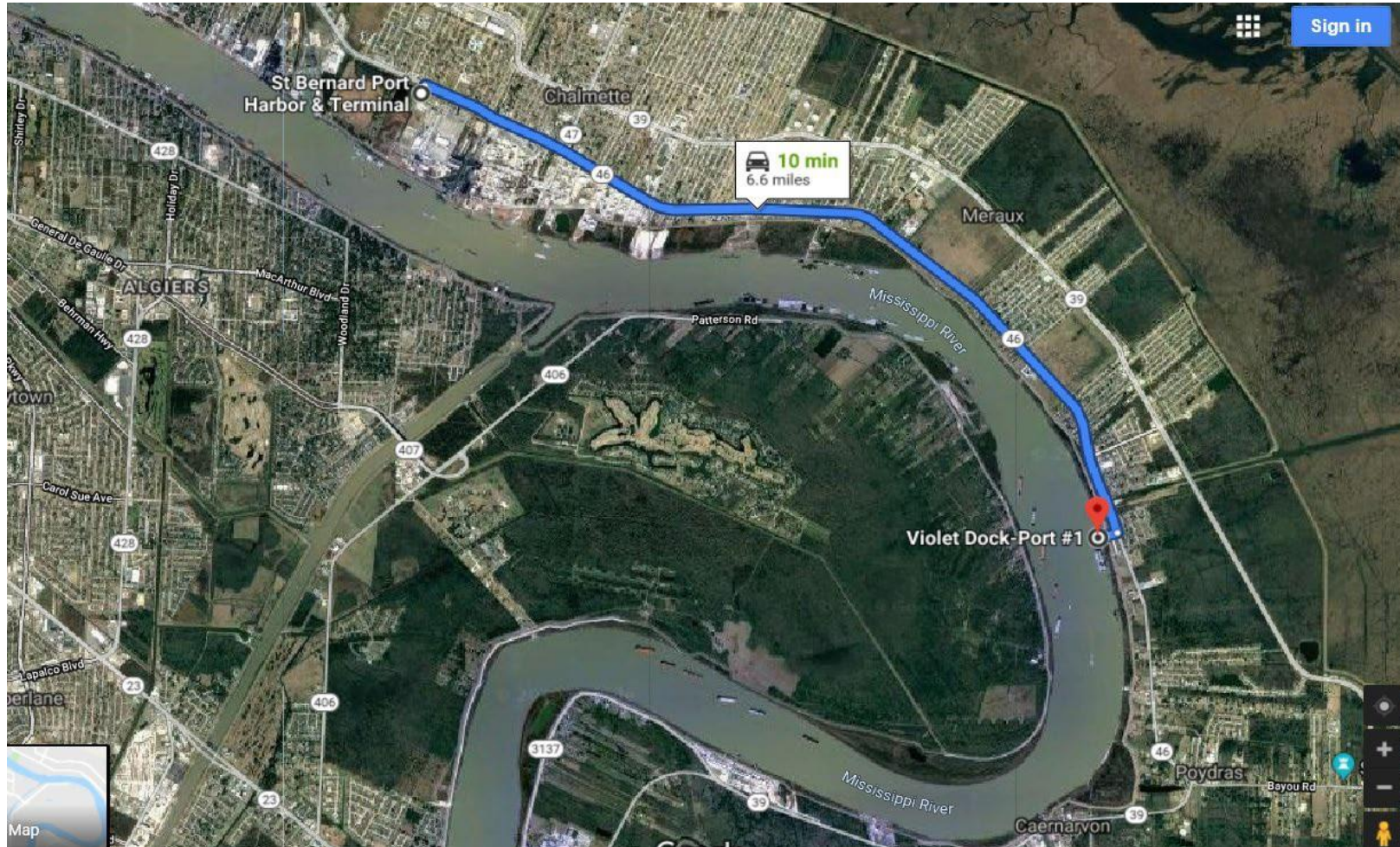
# *Padilla v. Metro. Transit Auth. of Harris County, 497 S.W.3d 78 (Tex. App. 2016)*

Light rail construction / restaurant access

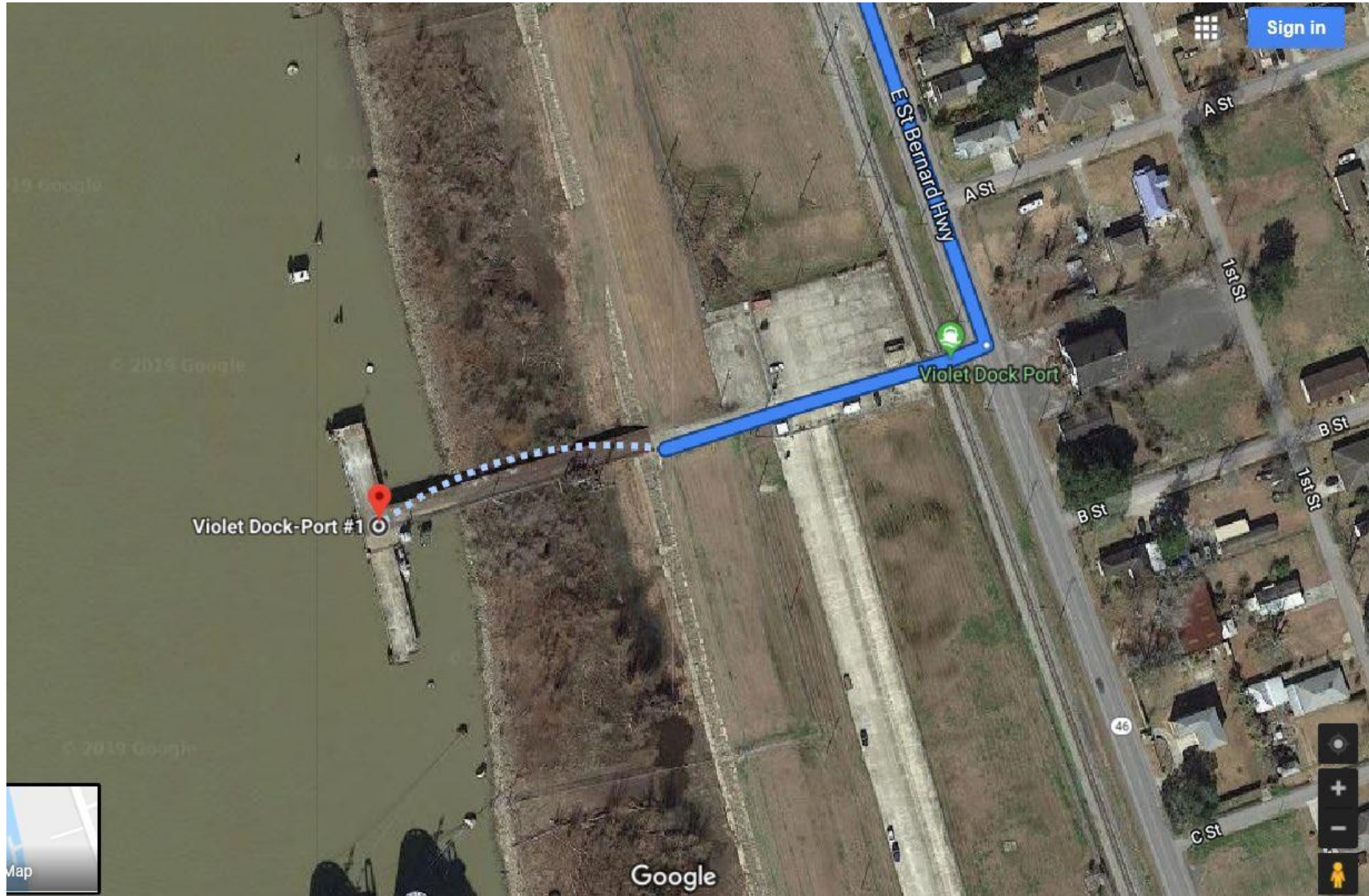




## ***St. Bernard Port v. Violet Dock Port, 255 So. 3d 57 (La. App. 2018)***

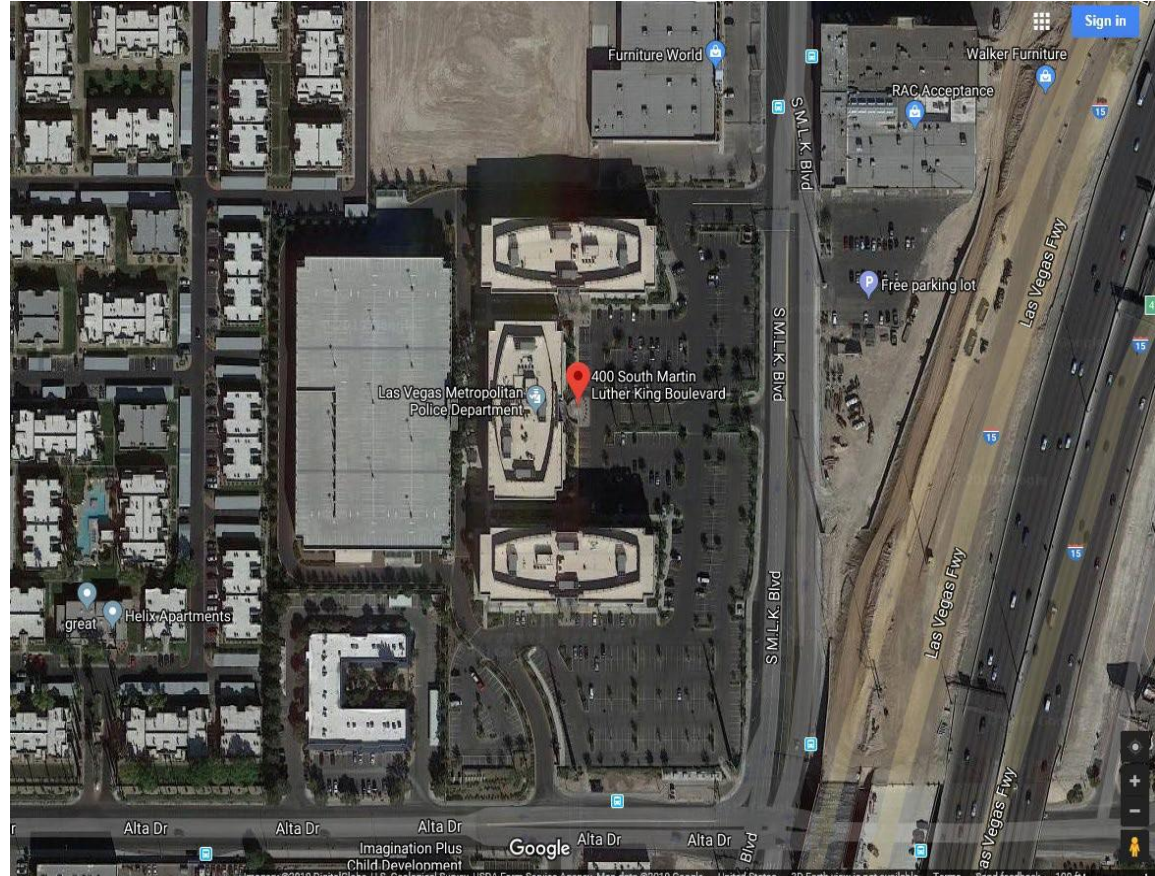






# Clark County v. H.Q. Metro LLC, 422 P.3d 1243 (Nev. 2018)

Who gets the money?



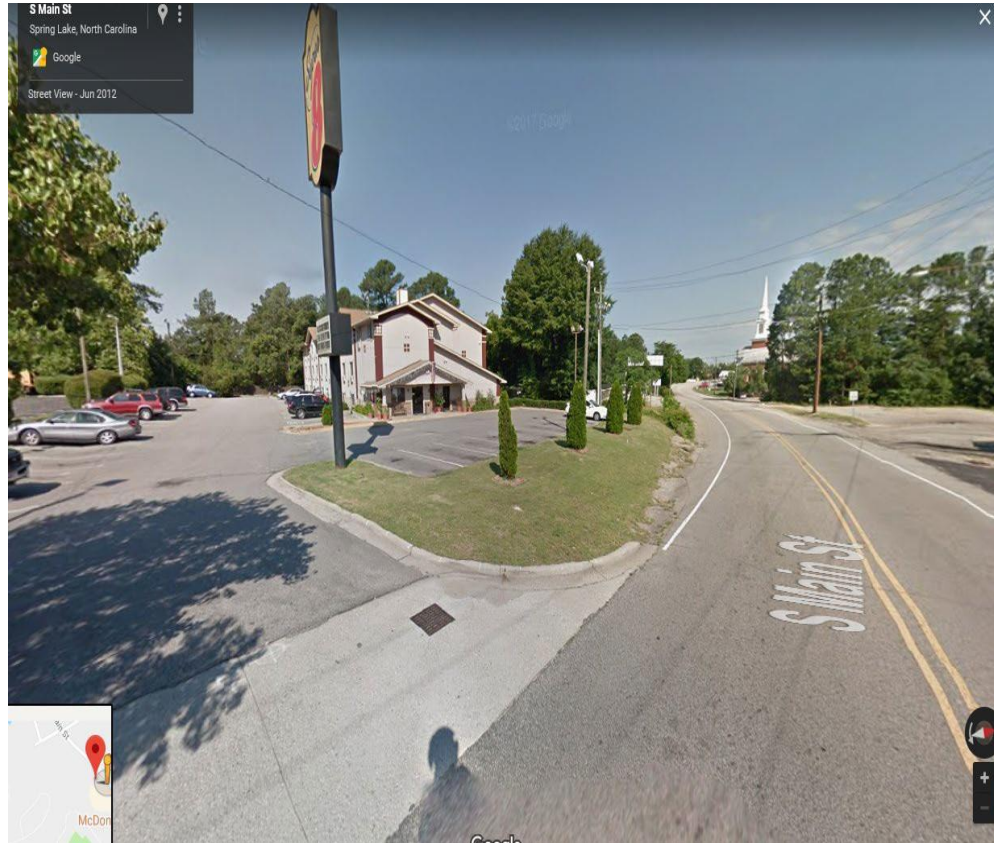






# N. Carolina Dept. of Transp. v. Laxmi Hotels, 817 S.E.2d 62 (N.C. App. 2018)

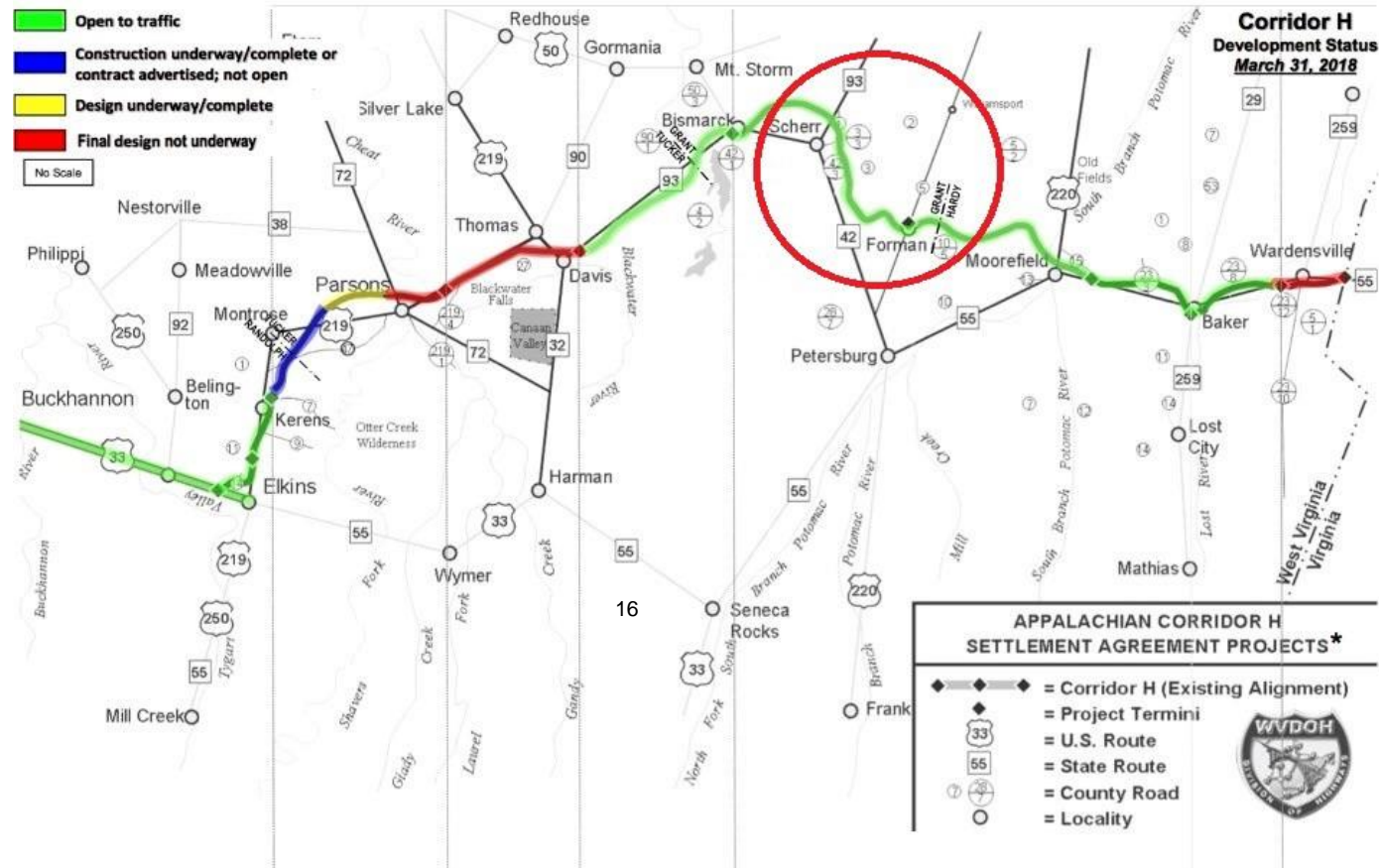
**BEFORE**



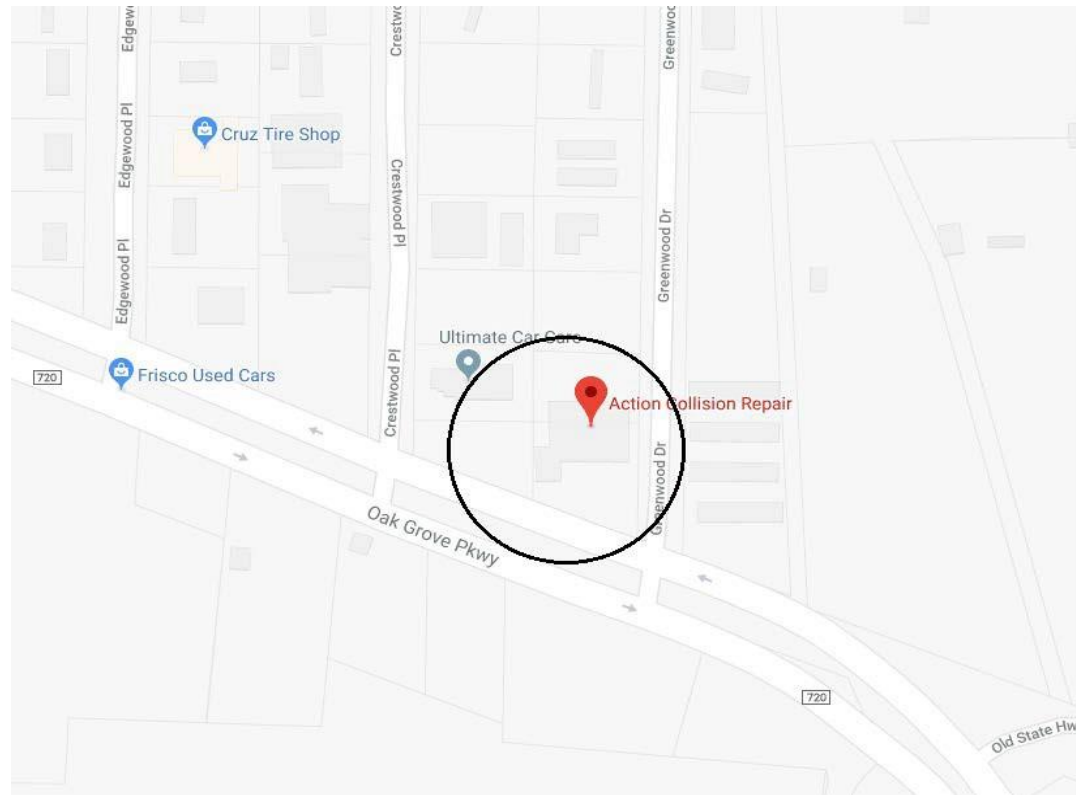
**AFTER**



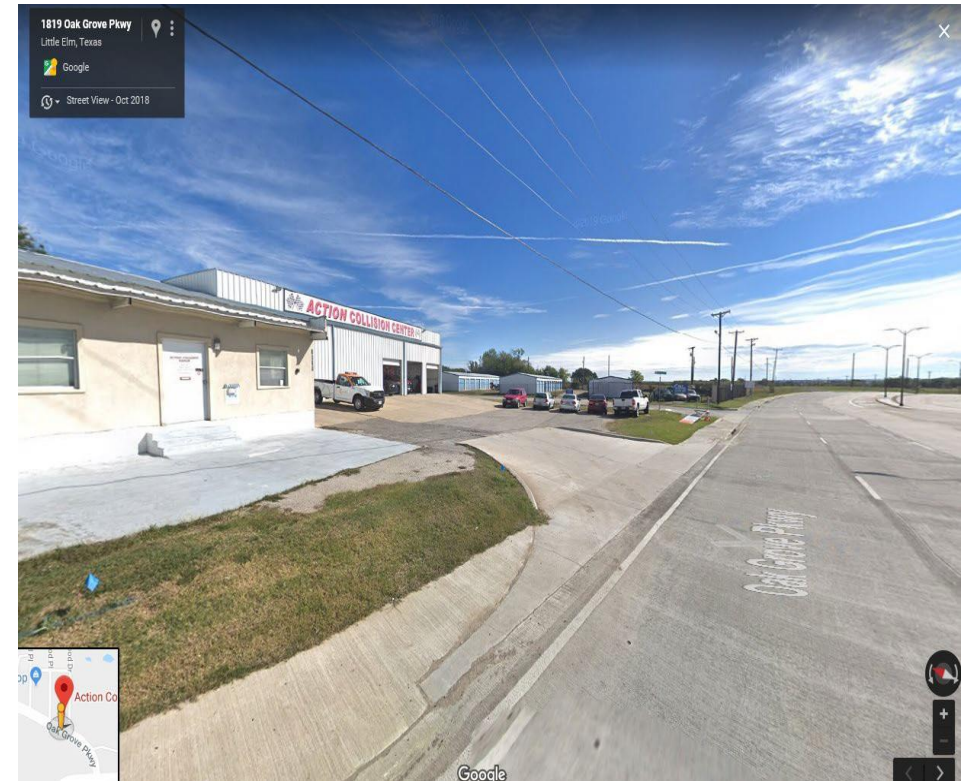
# W. Virginia Dept. of Transp., Div. of Highways v. Echols, 18-0226, 2019 WL 1590693, at \*2 (W. Va. Apr. 12, 2019)



# *Morale v. State*, 557 S.W.3d 569, 571 (Tex. 2018), reh'g denied (Oct. 19, 2018)



**AFTER**





# Condemnation Summit XXIV

Morning Networking Break





# View from the Bench – Practical Application of the Civil Rules Changes

**Misty Guille**, AAG

**Judge Brenden Griffin**, Pima County Superior Court

**Don Bivens**, Partner, Snell & Wilmer

# Discussion Outline

1. REFRESHER
2. THEORY: How did the new rules come to be? What are these rules designed to accomplish?
3. APPLICATION: How are the new rules working? Are they doing what they were intended to do? Have there been any unintended consequences?

# REFRESHER

## Tiered Discovery

Tier 1	Tier 2	Tier 3
Simple cases <ul style="list-style-type: none"> <li>• few documents</li> <li>• few witnesses</li> </ul>	Intermediate cases <ul style="list-style-type: none"> <li>• more documents</li> <li>• more witnesses</li> <li>• maybe expert witnesses</li> </ul>	Complex cases <ul style="list-style-type: none"> <li>• many pretrial motions</li> <li>• many witnesses</li> <li>• voluminous docs</li> <li>• related actions in other courts</li> </ul>
\$50,000 or less in damages sought	\$50,001- \$299,999 in damages <b>and/or nonmonetary relief</b> sought	\$300,000+ in damages sought
ARCP 26.2(c)(3)(A)	ARCP 26.2(c)(3)(B), (D)	ARCP 26.2(c)(3)(C)



# REFRESHER

## Tiered Discovery

	Tier 1	Tier 2	Tier 3
Cumulative depo time (fact WTs)	5 hours	15 hours	30 hours
Rule 33 ROGS/side	5	10	20
Rule 34 RFPs/side	5	10	10
Rule 36 RFAs/side	10	10	20
Discovery Period	120 days	180 days	240 days
Written expert witness report required	No	No	Yes

# REFRESHER

## Expert Disclosure

Tier 1 & Tier 2 Disclosure statement (or expert's report) must contain:	Tier 3 Expert's report must contain:
<ul style="list-style-type: none"><li>• Expert's name, address, &amp; qualifications</li><li>• Subject matter of testimony</li><li>• Substance of facts/opinions</li><li>• Summary of grounds for each opinion</li><li>• Statement of compensation for expert's work &amp; testimony in the case</li><li>• 4-year list of cases in which witness testified as an expert at hearing or trial</li></ul>	<ul style="list-style-type: none"><li>• Expert's name, address, &amp; qualifications, including list of all publications authored in previous 10 years</li><li>• Complete statement of all opinions &amp; basis/reasons for them</li><li>• Facts/data considered in forming them</li><li>• Exhibits to be used to summarize/support them</li><li>• Identify any publication on which expert intends to rely (ROE 803(18))</li><li>• Statement of compensation for expert's work &amp; testimony in the case</li><li>• 4-year list of cases in which witness testified as an expert at hearing or trial</li></ul>

# REFRESHER

## Expert Communications – Rule 26(b)(4)

- Protects drafts of any expert report or disclosure
- Protects communications between party's attorney and expert witness
  - Except:
    - (i) relates to compensation for expert's study/testimony;
    - (ii) identifies facts/data that party's attorney provided & that expert considered in forming opinions; or
    - (iii) identifies assumptions that party's attorney provided & that expert relied on in forming the opinions.

Discoverable: Dates on which expert received facts/data from party's attorney that expert considered in forming opinions, & any portions of communications between party's attorney & expert evidencing those dates.

# REFRESHER

## Discovery: Subpoenas Duces Tecum

1. Ask if other parties can provide the materials.
2. If not, give 2-day advance notice & copy of subpoena to other parties.
3. Serve SDT on individual/entity.
4. Provide copy of SDT & any proof of service to other parties.

# REFRESHER

## Discovery Disputes

- Expedited Process to Resolve Discovery Disputes
- Before any party files a formal discovery motion:
  - Parties must first submit to court a short, written description of dispute, to be followed by informal discussion with the court.
  - Court files a minute order resolving the dispute or, if needed, authorizing formal discovery motions.

# REFRESHER

## Pima County FASTAR

- Administrative Order No. 2017-116 creates Fast Trial and Alternative Resolution Program (“FASTAR”)
- Pilot Program 11/1/17 to 10/31/2020
- “The new court rules and lower jurisdictional limit establish the framework necessary to experiment with using short trials and an alternative resolution program instead of compulsory arbitration in cases in which the amount of money sought does not exceed \$50,000.”

# THEORY

How did the new rules come to be?

What are these rules designed to accomplish?

- To strengthen mandatory initial disclosure.
- To keep discovery proportional based on the understanding that proportional discovery follows up on robust initial disclosure under Rule 26.1.

# APPLICATION

Arizona Superior Court in Pima County

July 1, 2018 through March 11, 2019

Civil Case Filings Detailed by Tier and Total Filings

CASE TYPE	Tier 1	Tier 2	Tier 3	Filings with Tier indicated	Filings without Tier indicated	Total Filings
Contract	1,224	108	29	1,361 53%	453 21%	1,814 38%
Tort – Motor Vehicle	403	192	45	640 25%	292 14%	932 20%
Unclassified Civil	266	44	18	328 13%	1,060 50%	1,388 29%
Tort Non Motor Vehicle	46	76	45	167 6%	181 8%	348 7%
Medical Malpractice	1	3	44	48 2%	37 2%	85 2%
Quiet Title	23	3	0	26 1%	18 1%	44 1%
Eminent Domain	1	4	1	6 --	17 1%	23 1%
Forcible Detainer	4	0	0	4 --	77 3%	81 2%
Election Challenge	1	0	0	1 --	5 --	6 --
<b>GRAND TOTALS</b>	1,969	430	182	2,581 55%	2,140 45%	4,721 100%
	76%	17%	7%	100%		



# APPLICATION

- Tiers: How have the tiers been working? Have cases been processed faster?
  - Judge's perspective
  - Practitioners' perspectives
    - Has tier assignment been an issue for anyone?
    - Has opposing counsel cooperated to change default tier?

# APPLICATION

- Discovery limitations: shorter period to complete discovery, new limits on discovery.
  - Judge's perspective
    - Have parties been asking for discovery over the newly prescribed limits?
  - Practitioners' perspectives
    - Has anyone had problems with the new limitations?

# APPLICATION

- Discovery cooperation.
  - Judge's perspective
    - Have parties brought more, less, or about the same amount of discovery disputes to the Court?
    - How do you feel about a party refusing to participate in a joint statement?
  - Practitioners' perspectives
    - What do you do when opposing counsel refuses to participate in a "joint" statement?

# APPLICATION

- More questions for practitioners:
  - Have the additional notice requirements for subpoenas duces tecum been burdensome or relatively simple to incorporate into practice?
  - Has anyone had problems with Tier 3 expert disclosures?
  - How has your practice changed with the protection of some expert communications?
  - Has anyone dealt with the nonparty duty to preserve ESI under Rule 45.2?

# APPLICATION

- Audience questions and comments?



# Condemnation Summit XXIV

Lunch





# Appeals – Useful Tips for Condemnation Practitioners

**Judge Kent Cattani**, Arizona Court of Appeals  
**John Egbert**, Jennings, Strouss & Salmon

# Structure of Arizona Appellate Courts

- Arizona Supreme Court
- Arizona Court of Appeals
  - Division One
  - Division Two





# Preserving issues for appeal



# Who handles the appeal? (Trial counsel vs. Appellate counsel)



# Record on Appeal



# Standards of Review



# Appeal v. Special Action

# Briefing

- Strategy
- Common errors

# Oral Argument

- Structure
- Draft decisions in Division Two
- Importance/effect
- Common errors (“jury arguments”)



# Published Opinions vs. Unpublished Memorandum Decisions





# Petitions for Review – Discretionary



# Relocation Refresher & Case Law Update

**Charles Grombacher**, Overland Program Manager  
**William Fischbach**, Tiffany & Bosco, P.A.



# RELOCATION ASSISTANCE FROM 30,000 FEET

Charles A Grombacher  
Regional Manager  
Overland, Pacific & Cutler, LLC  
[cgrombacher@opcservices.com](mailto:cgrombacher@opcservices.com)  
480.510.6007



# SOURCE OF LAW

## CONSTITUTIONAL – JUST COMPENSATION

- United States, Amendments V and XIV
- Arizona, Article II, §17

## RELOCATION LAW

- 42 USCA, §4601 et. seq. (Uniform Act)
- ARS 11-961 et. seq. (State Law, ex. ADOT)
- ARS 28-7141 et. seq. (ADOT)

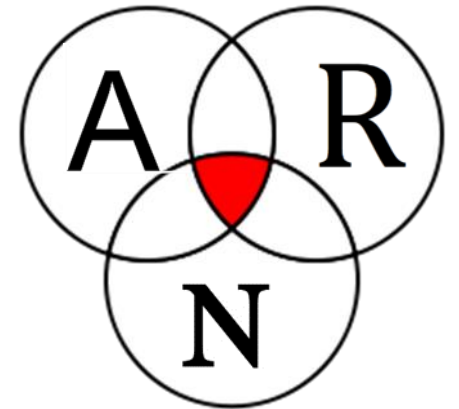
## RELOCATION REGULATIONS

- 49 CFR Part 24 (Cite as §24.302, etc.)
- ADOT Right of Way Procedure Manual



# General Rules

1. **Acquisition** – Constitutional Right (5th Amendment)  
**Relocation** – Matter of Legislative Grace
2. **Residential Relocation** – Make whole  
**Business Relocation** – Not so much
3. To be compensable, an expense must be provided for by law and be:
  - Actual
  - Reasonable
  - Necessary



# Residential Benefits

- Few changes since 2005
- **Replacement Housing Payment (RHP)**
- Owner-Occupant: Price Differential, Closing Costs and
- Tenant: Rental Assistance Payment (RAP)
- **Moving Benefit**
- Actual Cost to Move with Professional Movers or Receipts, or
- Scheduled Move Payment



# Business Benefits

## No Replacement Business Payment!

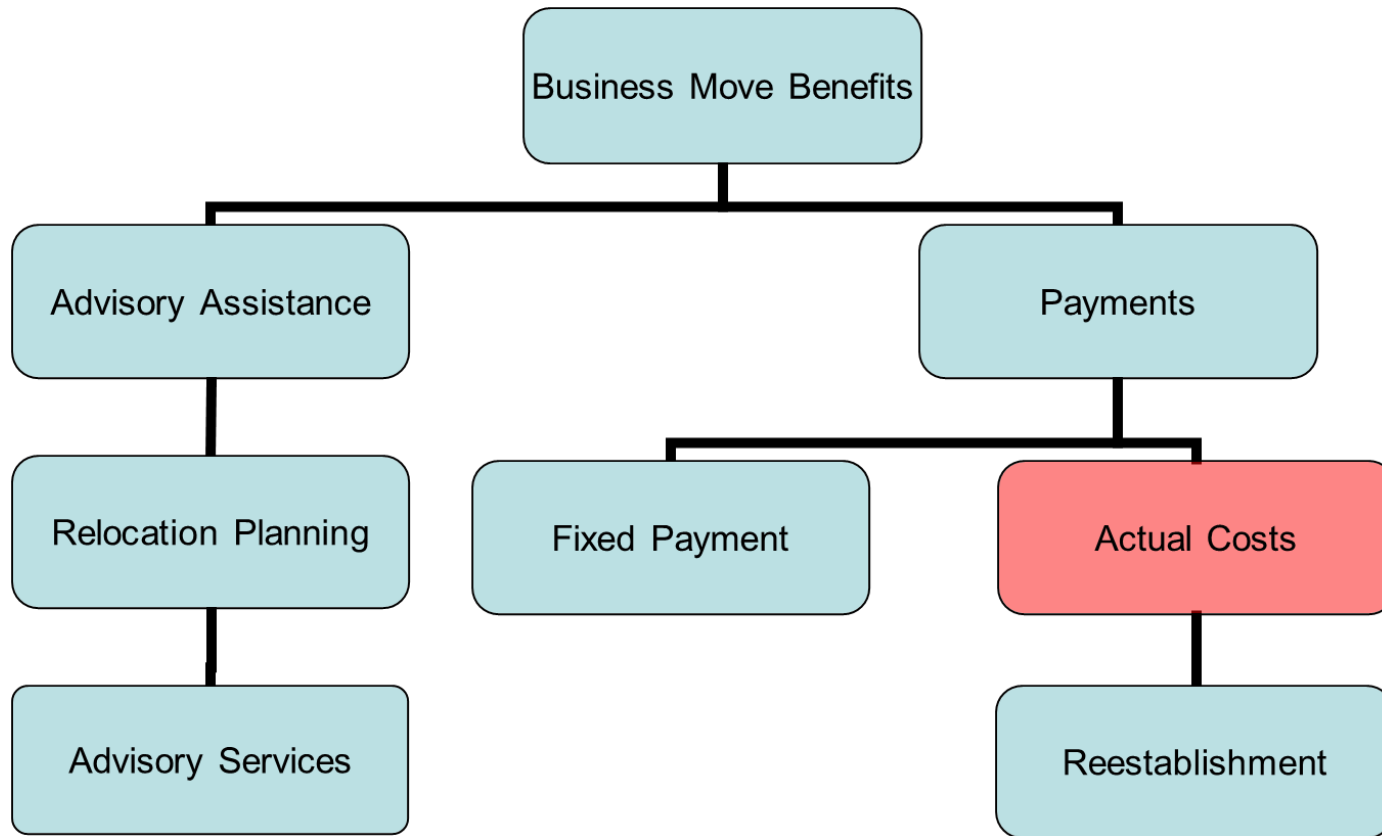
- Moving and Related and Reestablishment Expenses



OR

- Fixed Payment in Lieu of Moving and Related Expenses  
(\$1,000 - \$40,000)

# THE BIG PICTURE





# Actual Cost Elements

## §24.301

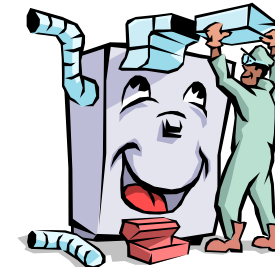
- Transportation



- Packing

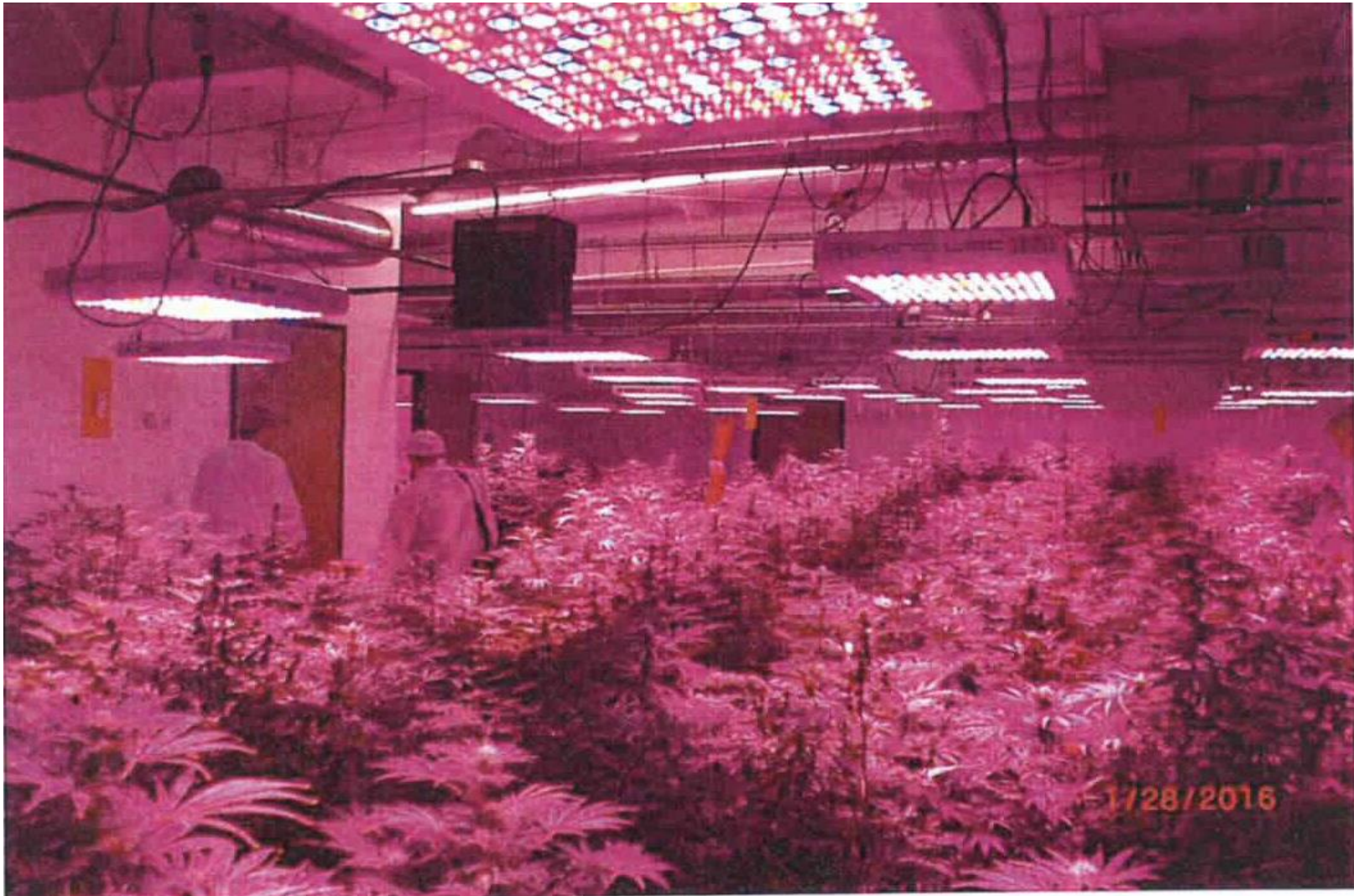


- Disconnect / Reinstallation











# What happens in Vegas stays in Vegas











# Actual Cost Elements

## §24.301

- Storage



- Insurance



- Replacement Value  
of Personal Property



# Actual Cost Elements

## §24.301

- Licenses, Fees, Permits
- Professional Services
- Signs and Stationery

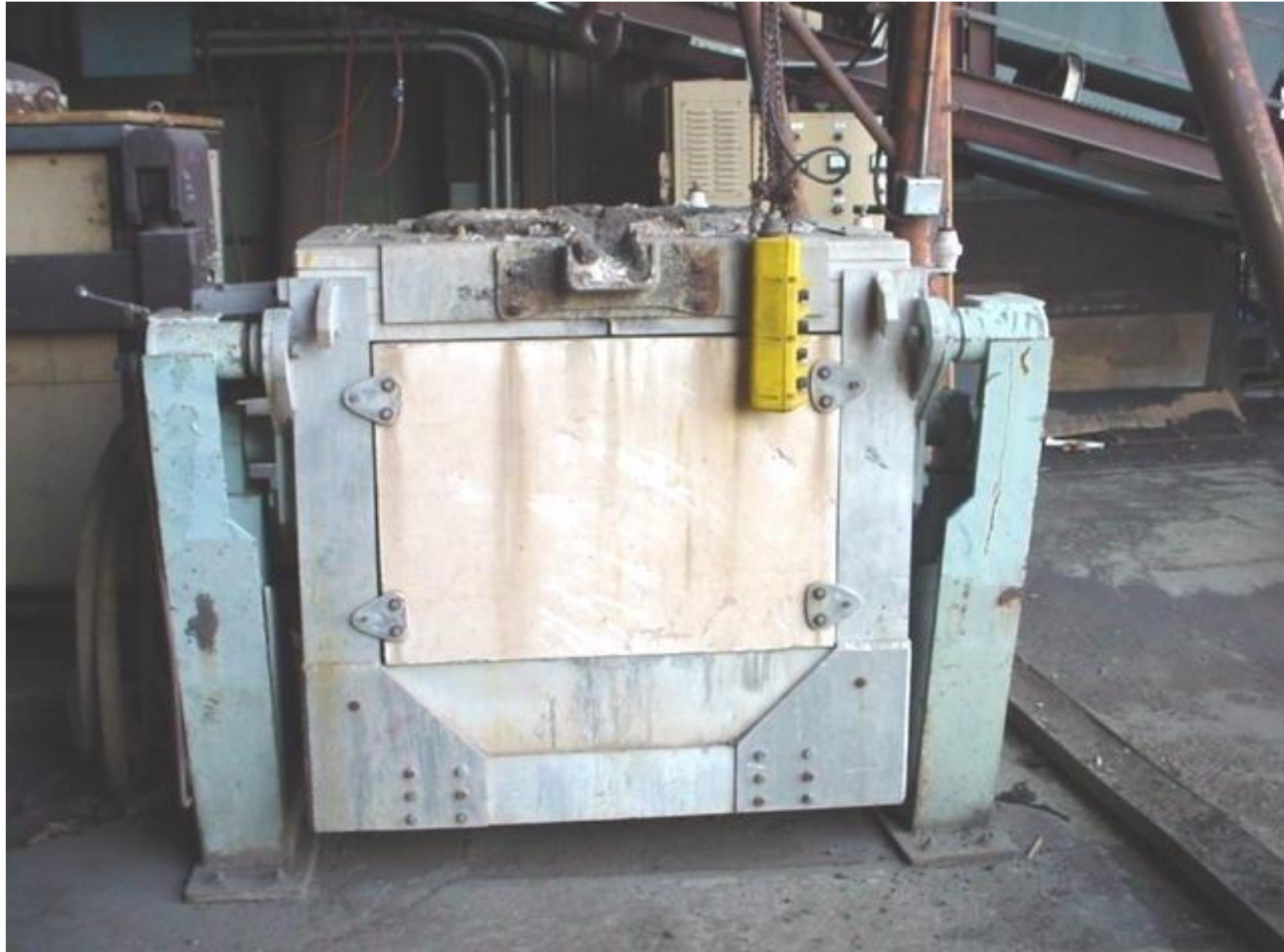


# Actual Cost Elements

## §24.301

- Actual Direct Loss
- Cost of Selling
- Substitute Property



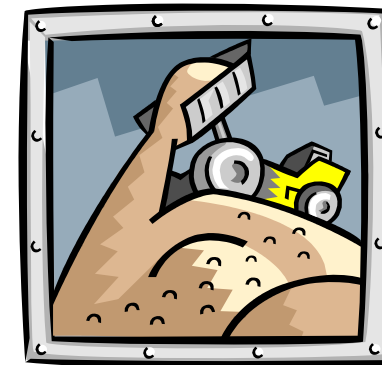




# Actual Cost Elements

## §24.301

- Searching
- Low Value / High Bulk



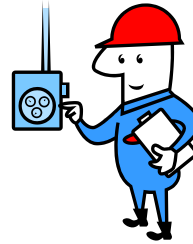




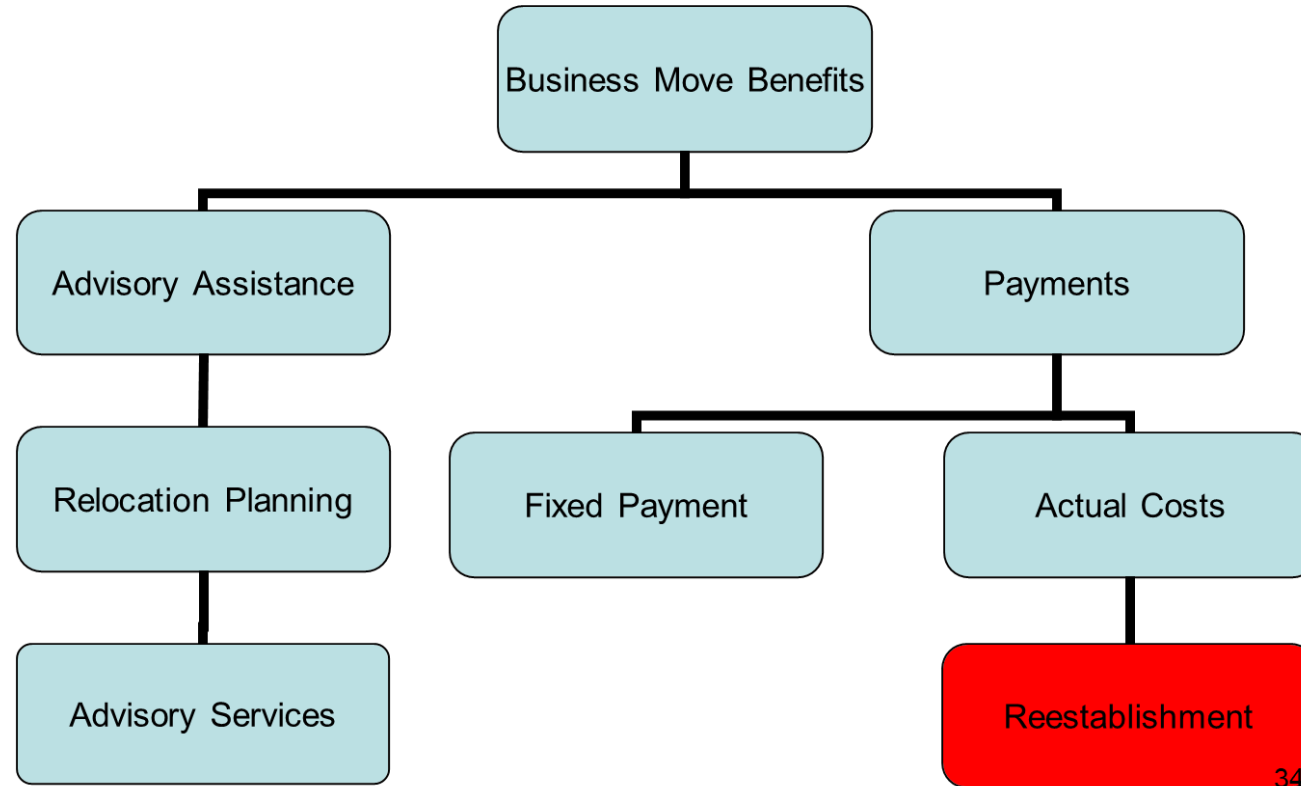
# Actual Cost Elements

## §24.303

- Utility Connection
- Professional Services at New Property
- Impact Fees



# THE BIG PICTURE



# Reestablishment Expenses

## §24.304

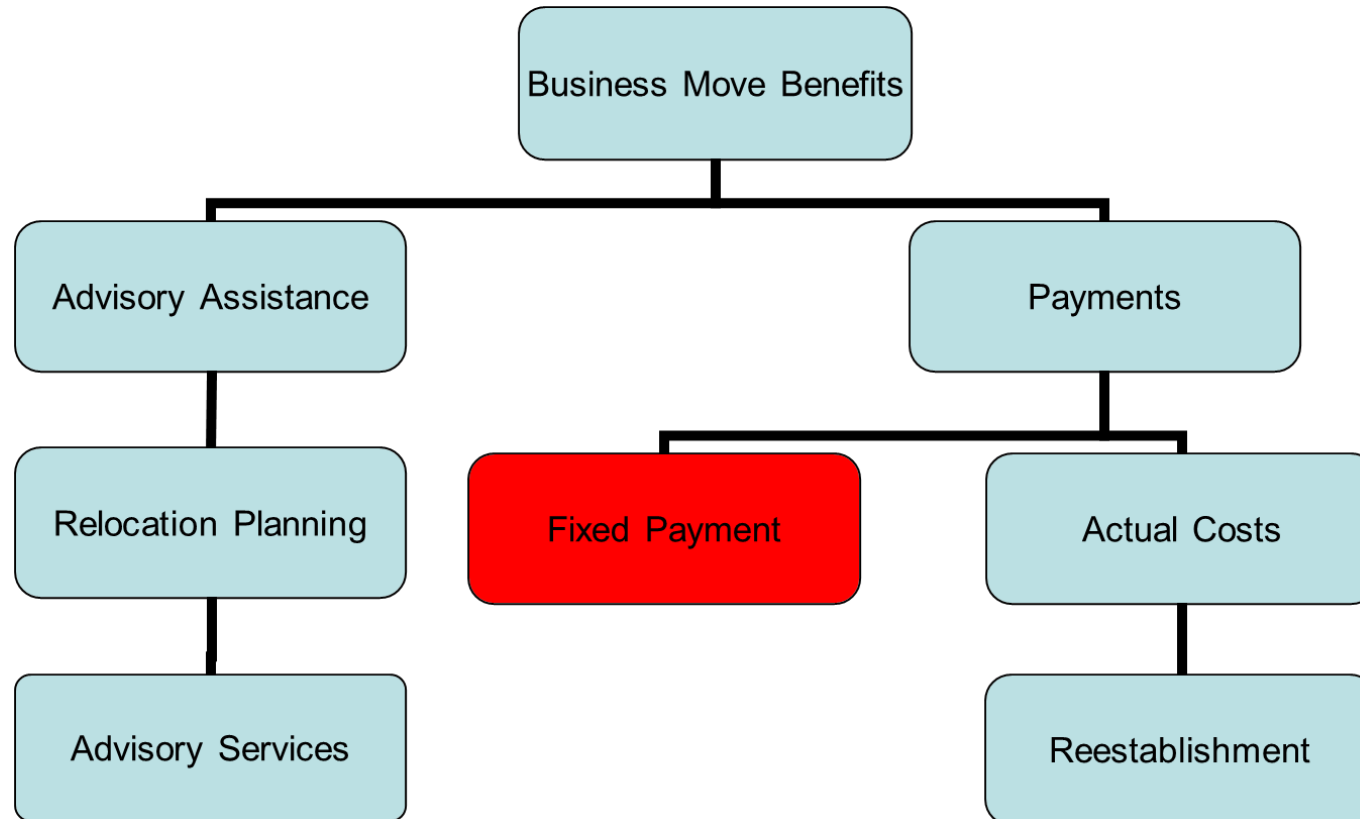
- \$25,000 Aggregate
- Code Modification
- Other Property Modifications
- Exterior Signage

# Reestablishment Expenses

## §24.304

- Redecoration
- Advertisements
- Estimated Increased Costs
- Other

# THE BIG PICTURE



# FIXED PAYMENT \$24.305

- \$1,000 - \$40,000
- Criteria
- Patronage
- Number of Businesses
- Payment Calculation

# Questions

- Expected Changes
- Global Settlements
- Turbo Relocation



# Condemnation Summit XXIV

Afternoon Networking Break







# Undocumented ROW and Other Title Nightmares

**Chris Kramer**, Jennings, Strouss & Salmon

**Jerry Zaddack**, Strategic Valuation Group of Arizona



# Condemnation Summit XXIV

Thank You!

