



Condemnation Summit XXV

October 11, 2019 | Arizona Biltmore





Opening Remarks: Program Introduction & Greetings

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



Preparing for Condemnation: The Appraiser Perspective

Gerald N. Zaddack, MAI, CRE, Zaddack Valuation Advisors, LLC

Peter J. Martori, Martori & Company, LLC

Jennifer Cranston, Gallagher & Kennedy

Condemnor v. Condemnee



Basic Property Information

- Title and survey documents (title report, phase I, survey, recent improvements or site costs)
- Legal documents (complaint, order of immediate possession, etc.)
- Description of acquisition
 - If TCE, duration
 - If easement, scope (including parties' respective rights and obligations)
- Contact information for property owner or owner's representative



Additional Information (if available)

- Historic data
 - Purchase sale agreement
 - Listings, unsolicited offers, and letters of intent
 - Leases and related info (rent roll, P&L statement, capital improvements)
- Future plans
 - Development plans
 - Change in zoning, entitlements, platting, general plan amendments
 - Opportunity zones
- Project information
 - Plans, sketches, designs
 - When project became known

Additional Factors Impacting Approach

- Is the appraisal being commissioned pre- or post-filing
- Status of project – what percentage of plans complete
- Project influence issues
 - When was the project known
 - Were any land planning regulations modified based on the anticipated project
- What is the larger parcel
- Should the improvements be included in the appraisal
- Theme the Scope of Work

Opposing Side's Appraisal

- When do you want it?
- How do you use it?
- Does the approach vary based on engagement by condemnor/condemnee?
- When is a USPAP Standard 3 Review needed



Appraiser's Litigation Wish List



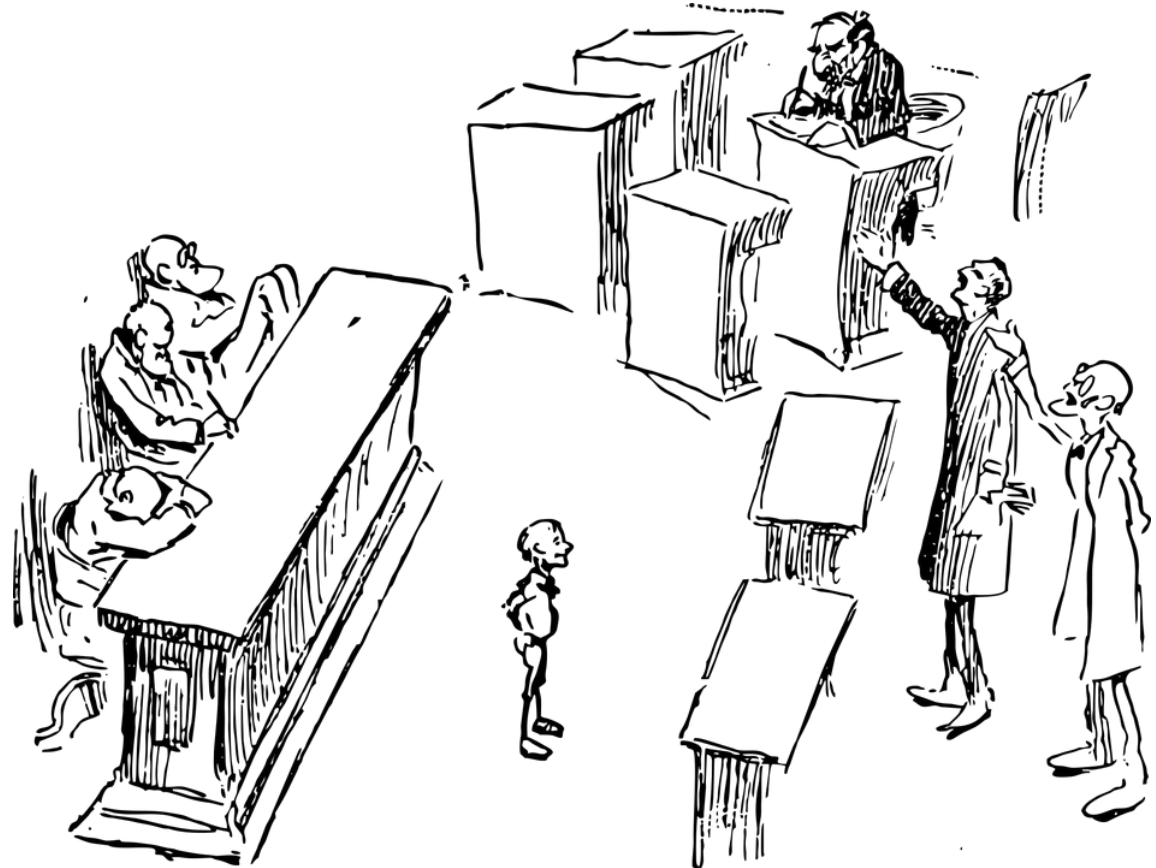
- Communicate **BEFORE** setting case schedule
- Keep appraiser updated on schedule revisions
- Thoughtful discussion/analysis of work file production
 - USPAP record keeping requirements
 - Work product protection under ARCP 26(b)(4)
 - Drafts protected
 - Communications protected except compensation, facts or data considered, assumptions considered

Trial Preparation

- Any new issues?
- Give appraiser opportunity to prepare outline of key issues (collaborate, don't dictate)
- Face to face preparation
- Advance review of trial exhibits to be used during appraiser's testimony

Trial Presentation

- Establish appraiser's qualifications (even if opposing party doesn't challenge)
- Exhibit mix
 - Visit the courtroom prior to trial
 - PowerPoint / technology
 - Old school board with aerials and sales grids





Questions?

Thank you



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Morning Networking Break

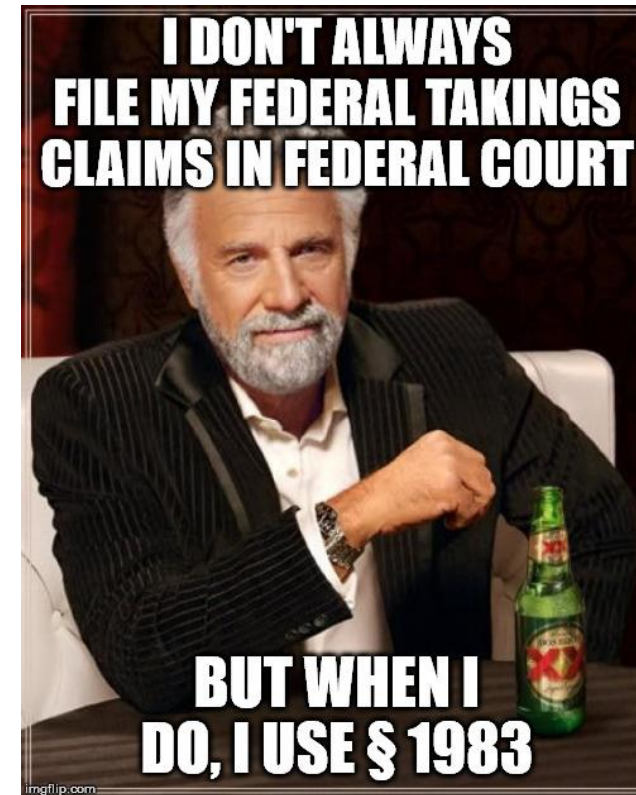




Knick and the Death of Inverse Condemnation?

Laura Curry, Jennings, Strouss & Salmon
Larry Schubart, Stubbs & Schubart, P.C.

Knick v. Township of Scott, Pennsylvania, 17-647, 2019 WL 2552486 (U.S. June 21, 2019)



Eleventh Amendment

- *Williams v. Utah Dep't of Corr.*, 928 F.3d 1209 (10th Cir. 2019)
- *Bay Point Properties, Inc. v. Mississippi Transp. Comm'n*, 937 F.3d 454 (5th Cir. 2019)

Timing of Takings Suit

- *Campbell v. United States*, 932 F.3d 1331 (Fed. Cir. 2019)

Justice Thomas

- “Still, “[w]hen the government repudiates [its] duty” to pay just compensation, its actions “are not only unconstitutional” but may be “tortious as well.” *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 717, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999) (plurality opinion). I do not understand the Court's opinion to foreclose the application of ordinary remedial principles to takings claims and related common-law tort claims, such as trespass. I therefore join it in full.”
- *City of Dublin v. RiverPark Group, LLC*, 2019 -Ohio- 1790, 2019 WL 2068668 (Ohio App. 10 Dist., 2019)

*Arizona Elec. Power Coop., Inc. v. DJL
2007 LLC, 1 CA-CV 16-0097, 2019 WL
2052325 (Ariz. App. May 9, 2019)*



Arizona Constitution, Article 2, Section 17

- No private property shall be taken or damaged for public or private use without just compensation having first been made, paid into court for the owner, secured by bond as may be fixed by the court, or paid into the state treasury for the owner on such terms and conditions as the legislature may provide, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law.



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Lunch





An Hour With: Arizona Supreme Court Justice James Beene

Laura Curry, Jennings, Strouss & Salmon



Playing (and Practicing) by The Rules

Rita Looney, Arkansas Department of Transportation (ARDOT)

This Ethics session will address these questions:

- What is required in a communication of solicitation?
- Under what circumstances am I required to report to the appropriate authority that another lawyer has committed a violation of the Rules of Professional Conduct?
- How much do I need to know about technology to be a competent attorney, keeping my client's information confidential?
- When does a relationship cause a conflict of interest in representation?

Roadmap for Discussion

- Solicitation – ER 7.3
- Reporting Professional Misconduct – ER 8.3(a)
- Topic Problem: Solicitation Letters
- Topic Problem: Internet Marketing Vouchers

- Competence – ER 1.1
- Confidentiality of Information – ER 1.6(e)
- Topic Problem: Technology and Travel
-
- Conflict of Interest – ER 1.7
- Topic Problem: Joint Representation

Solicitation – ER 7.3

- (a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from the person contacted or employ or compensate another to do so when a motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:
 - (1) is a lawyer; or
 - (2) has a family, close personal, or prior professional relationship with the lawyer.
- (b) A lawyer shall not solicit professional employment or knowingly permit solicitation on the lawyer's behalf from the person contacted by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
 - (1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer;
 - (2) the solicitation involves coercion, duress or harassment; or
 - (3) the solicitation relates to a personal injury or wrongful death and is made within thirty (30) days of such occurrence.

Solicitation – ER 7.3

- (c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known or believed likely to be in need of legal services for a particular matter shall include the words “Advertising Material” in twice the font size of the body of the communication on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).
 - (1) At the time of dissemination of such written communication, a written copy shall be forwarded to the State Bar of Arizona at its Phoenix office.
 - (2) Written communications mailed to prospective clients shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted delivery.
 - (3) If a contract for representation is mailed with the written communication, the contract shall be marked “sample” in red ink and shall contain the words “do not sign” on the client signature line.
 - (4) The lawyer initiating the communication shall bear the burden of proof regarding the truthfulness of all facts contained in the communication, and shall, upon request of the State Bar or the recipient of the communication, disclose how the identity and specific legal need of the potential recipient were discovered.

Solicitation – ER 7.3

- (d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Reporting Professional Misconduct – ER 8.3(a)

- (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority, except as otherwise provided in these Rules or by law.

Topic Problem: Solicitation and Reporting Professional Misconduct

Letter Sample 1 & 2

Q: Is it ethical to use internet marketing vouchers or coupons for legal services?

- **State Bar of Arizona – Ethics Opinion 13-01:**

The Committee has not been presented with any specific voucher or coupon to review, and the terms and conditions of each, along with other unique facts and circumstances, would need to be reviewed and analyzed to make a final determination as to whether a lawyer could ethically participate in an Internet marketing voucher or coupon program. Nevertheless, given the numerous potential and probable ethical issues with such a program, the Committee believes that participation in such a program would likely result in violations of the Ethical Rules. In short, the Internet marketing voucher or coupon model gives rise to potential issues and ethical violations pursuant to one or more of ERs 1.1, 1.2, 1.6, 1.7, 1.9, 1.15, 1.16, 1.18, 5.4, 7.1, and 7.2. Practitioners are discouraged from using an Internet marketing voucher or coupon system and, if they opt to do so, they must proceed with caution and only after careful consideration and analysis of the ethical rules and implications.

Competence – ER 1.1

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

- *Comment 6:* To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, ***including the benefits and risks associated with relevant technology***, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Confidentiality of Information – ER 1.6(e)

A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

- *Comment 22:* Paragraph (e) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision.

Topic Problem – Maintaining Competence and Confidentiality of Information

An attorney traveling abroad wishes to re-enter the U.S. through a customs checkpoint. The attorney has an electronic device (USB thumb drive, laptop, phone, etc.) that contains confidential client information. While crossing the border, U.S. Customs and Border Protection (“CBP”) agents claiming lawful authority, order the attorney to unlock the device so that it can be searched.

- Are any rules of professional responsibility implicated by this search?

NYCBAR Ethics Opinion 2017-5 (2017) – Ethical Duties Regarding U.S. Border Searches of Electronic Devices Containing Clients’ Confidential Information

- Rule 1.1 – Duty of competence
- Rule 1.6 – Duty to protect confidential information
- Under these rules, a lawyer should:
 - Take reasonable measures to prevent unlawful access by 3rd parties
 - Refrain from conduct that may result in lawful access by 3rd parties without client consent.

Conflict of Interest – ER 1.7

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- *Comment 11:* When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment.

Potential Conflict of Interest?

"Jane Doe currently represents the Plaintiffs in a lawsuit pending against your client. Jane's husband, John Doe, then files a lawsuit against that same client of yours. These two lawsuits have largely the same subject matter at issue. Although they are not in practice together, Jane shows up to assist John with all of the hearings in his case against your client, without ever going on record as counsel in that case. What, if any, ethical rules are implicated by this?"

Q: What information must I disclose when representing multiple clients in a single matter?

State Bar of Arizona – Ethics Opinion 07-04:

- The lawyer must explain the possible effects of the common representation on the lawyer's obligations of loyalty, confidentiality and the attorney-client privilege.
- In addition to the confirming writing required by ER 1.7(b), informed consent usually will require that the lawyer explain the advantages and disadvantages of the common representation in sufficient detail so that each client can understand why separate counsel may be desirable.
- Finally, during the course of the matter, the lawyer must continue to evaluate whether conflicts have arisen that may require additional disclosures and consent or withdrawal from the representation.



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Afternoon Networking Break





Avoiding Condemnation: Stakeholder Involvement in Project Design

Shannon Breslin, Tucson Electric Power

Carla Kahn, City of Phoenix, City Manager's Office

Jennifer Cranston, Gallagher & Kennedy



Customer Focused

Proactive & Creative
Build Relationships
Opportunities & Constraints
Save Time & Money
Generate Revenue

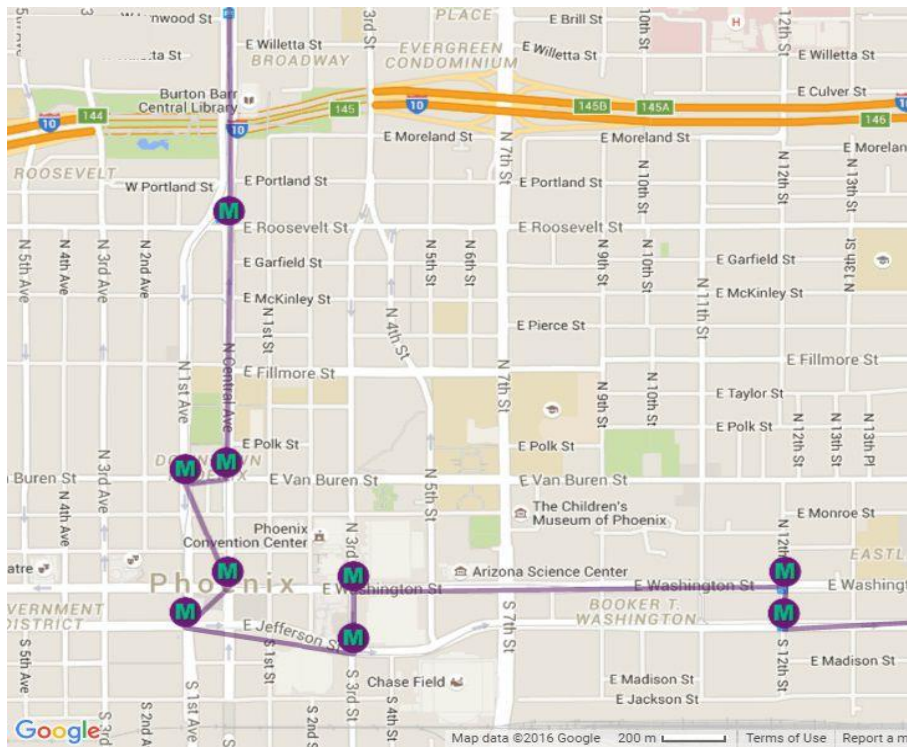


Planning = Success

- Land Rights
 - Right-of-Way Research, Consultation and Validation
 - Coordination & Negotiation with Landowners
 - Acquisition, Permitting and Disposition of Land Rights
- Land Use and Environmental Permitting
 - Natural and Cultural Resources Research & Consultation
 - Local, State, Federal and Tribal Jurisdictional Permitting
 - Liaison with regulators, governing jurisdictions, and other key stakeholders
- Timing is Critical
 - Tribal, Federal, State, Local

Rattlesnake Pass - Typical Tangent Construction – Marana line Apr 1943

Engage the Community



Who are the stakeholders?

What do they value?

Will they be affected?

How do you involve them?



IN PERSON



Projects www.tep.com/projects/

Transmission Line Projects

Irvington-East Loop 138 Kilovolt (kV) Transmission Line

Tucson Electric Power (TEP) is developing plans for a new transmission line to help serve growing energy needs. The project would help Davis-Monthan Air Force Base satisfy its energy resiliency requirements and improve electric reliability for customers in Tucson.

[Learn More](#)

Irvington to Kino 138-Kilovolt Transmission Line and Kino Substation Projects

Tucson Electric Power (TEP) has proposed building a new 138-kilovolt (kV) transmission line and substation and upgrading existing facilities in the City of Tucson to strengthen electric reliability for customers and, in particular, to meet growing energy needs in the area of South Kino Parkway and East 36th Street.

[Learn More](#)

Irvington Campus Modernization

- RICE Generation and Line Relocation
- Sundt Generation Station Air Quality Permit

Transmission Line Projects

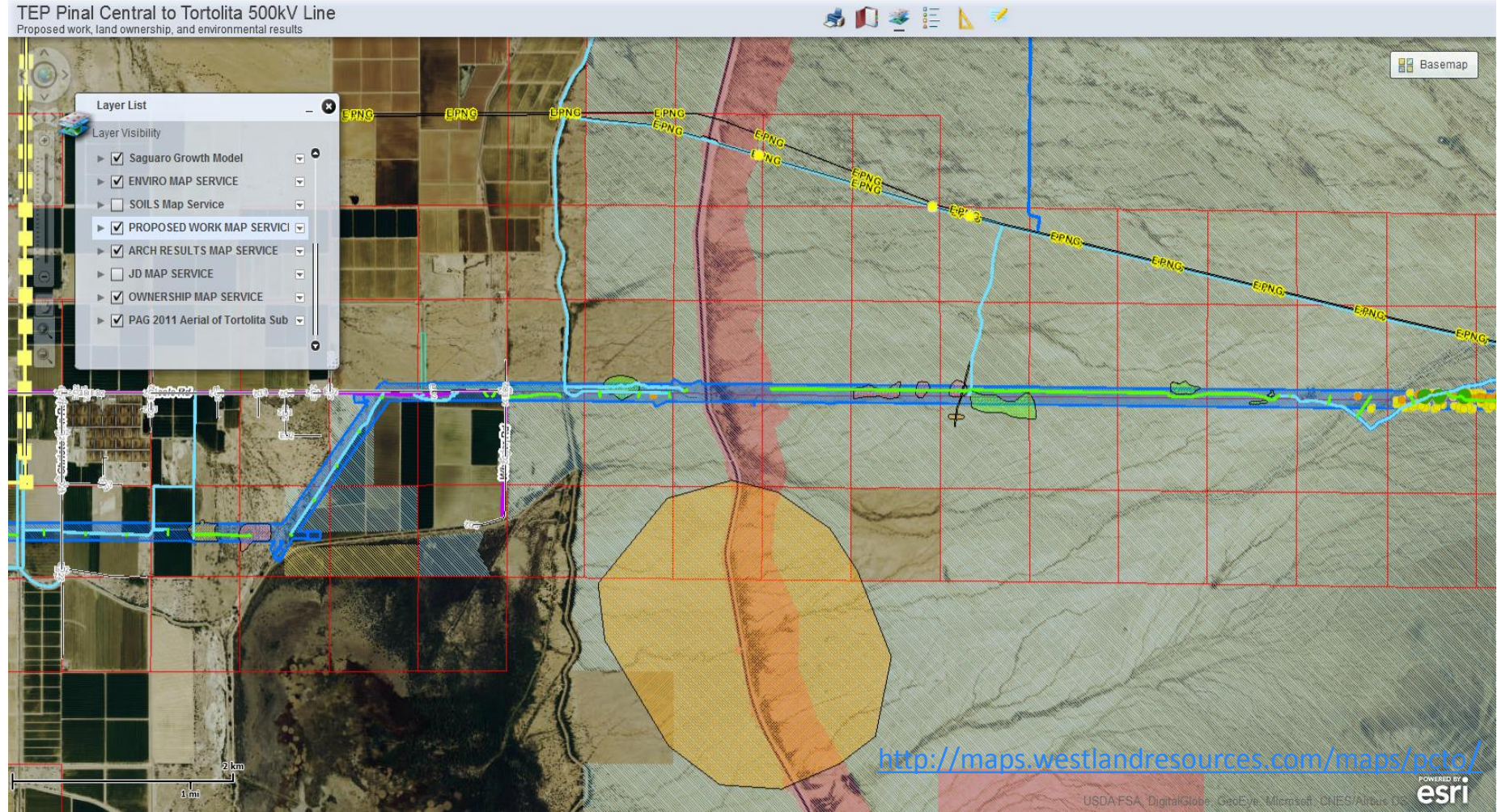
- Irvington to Kino 138 kV
- Irvington-East Loop 138 kV
- Rosemont 138 kV
- Sonoran to Wilmot 138kV

Substations

ONLINE

TEP Pinal Central to Tortolita 500kV Line

Proposed work, land ownership, and environmental results



Map Portal



IN THE FIELD

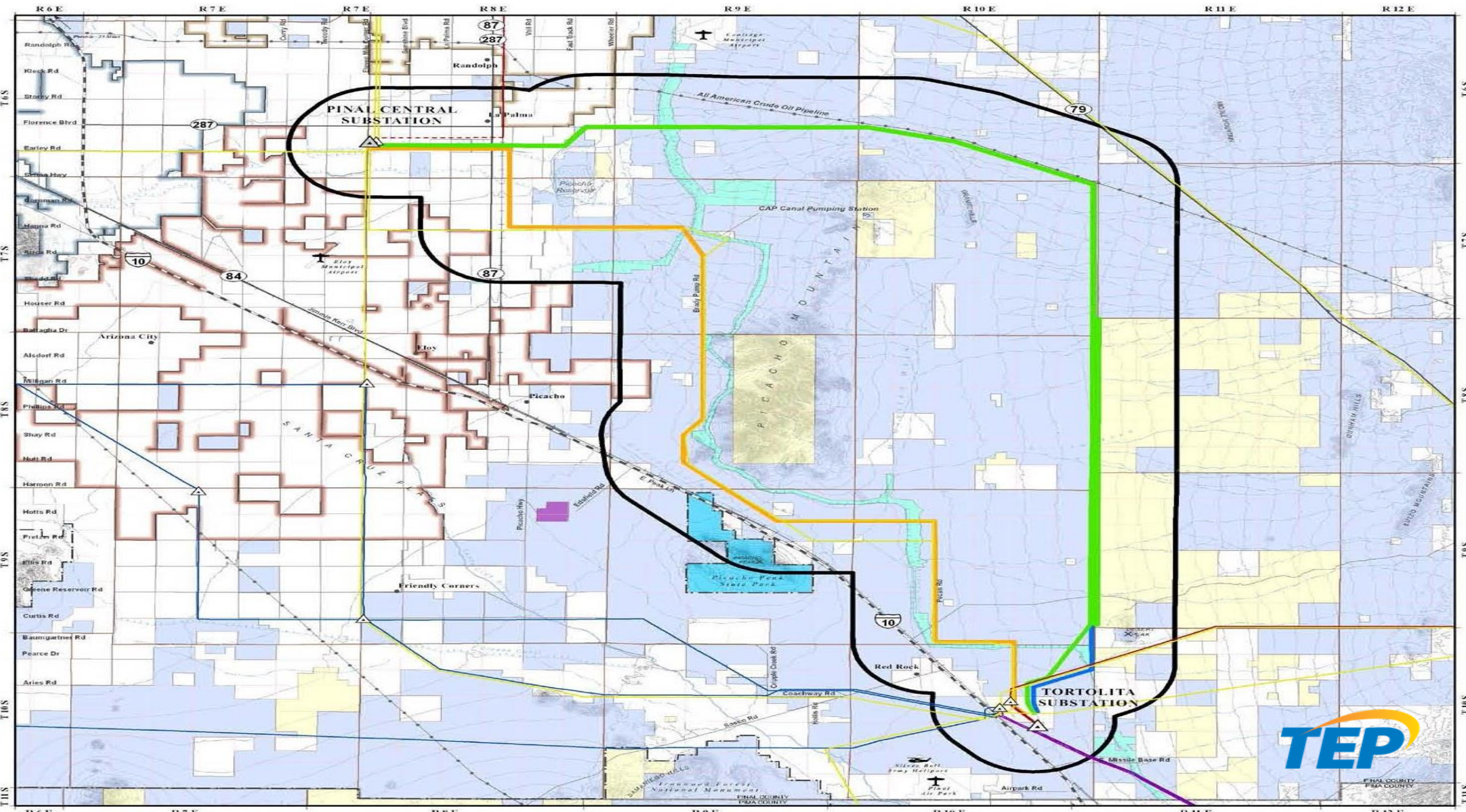
Pinal Central to Tortolita 500kV Transmission Line



Jennings Strouss
LAW FIRM



Gallagher & Kennedy



**PINAL CENTRAL
SUBSTATION**

**TORTOLITA
SUBSTATION**



PINAL COUNTY
PINAL COUNTY

Line Siting 2007-2012

Arizona Corporation Commission – Certificate of Environmental Compatibility (CEC)

- Study Area Development
- Alternatives Analysis
 - Natural and Biological Resources
 - Historic and Cultural Resources
 - Scenic and Visual Resources
 - Current and Future Land Use
 - Noise and Potential Interference with Communication Signals
- Extensive Public Involvement
 - Community Leader Briefings
 - Stakeholder Group
 - Public Open Houses
 - Fact Sheet/newsletter mailings
 - Telephone Information Line
 - Internet Web site, including online comment form
- Internal Planning, Coordination, Execution
 - Land Resources, Engineering, Construction

SUCCESS

PUBLIC AGENCIES & UTILITIES

- 17 Federal & State Agencies
- 6 Utilities & UPRR
- 2 Local Governments
- 7 Tribal Consultations

PRIVATE LAND RIGHTS & CONSULTATIONS

- 28 Rights of entry from private land owners
- 27 BIA private land owner canal road consents
- 15 Private easements and leases
- 16 Consultations with ranchers and farmers
- 270 Notices sent for ground rod consents
- 0 CONDEMNATIONS



Photo: CeCe Aguda, 2015

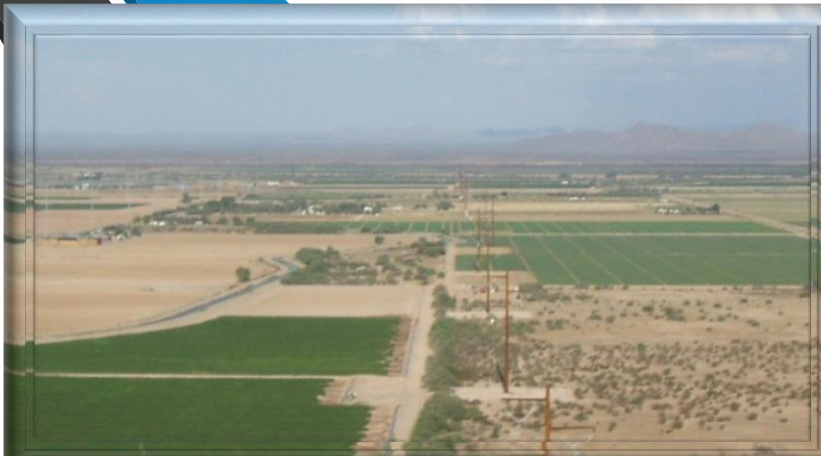
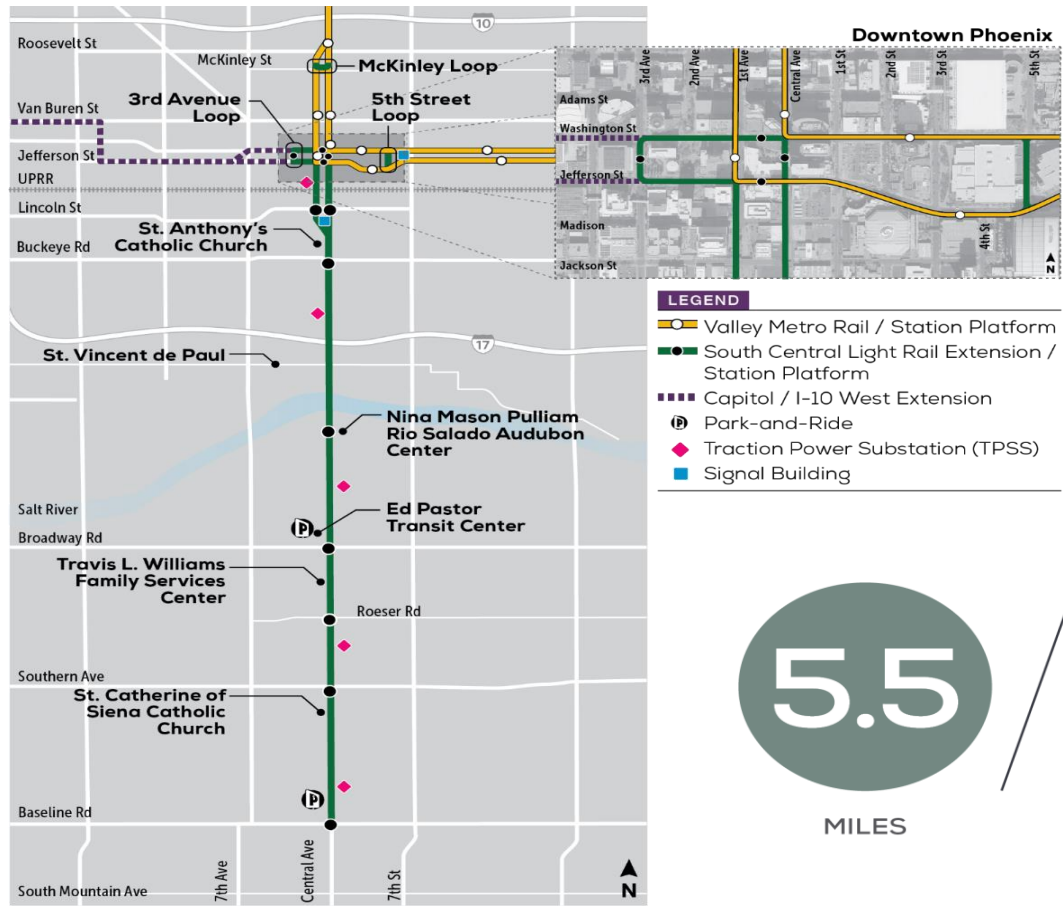


Photo: Kevin Graves, 2015





South Central Extension Light Rail/ Downtown Hub



Mistrust towards the Government & Transit Agency



Loss of identity & culture of the community

Provide opportunities for the community to take ownership

Request for Qualifications (RFQ) 4.34 COMMUNITY PARTICIPATION

The goal of this initiative is to generate long lasting opportunities by bringing jobs, workforce training and economic impacts to the communities our capital projects will serve



By Diego Perez



**Out of the 18
selected artists, 11
are local or regional**

- The Latino, African American, Native American, Anglo and Asian communities are symbolized here as Animalia
- The artist illustrates how powerful animal icons transcend across cultures

Meet the community where they are at

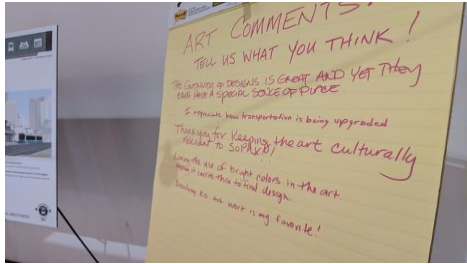
Community Office Before...



After...Community Center Office



Build Trust & Relationships

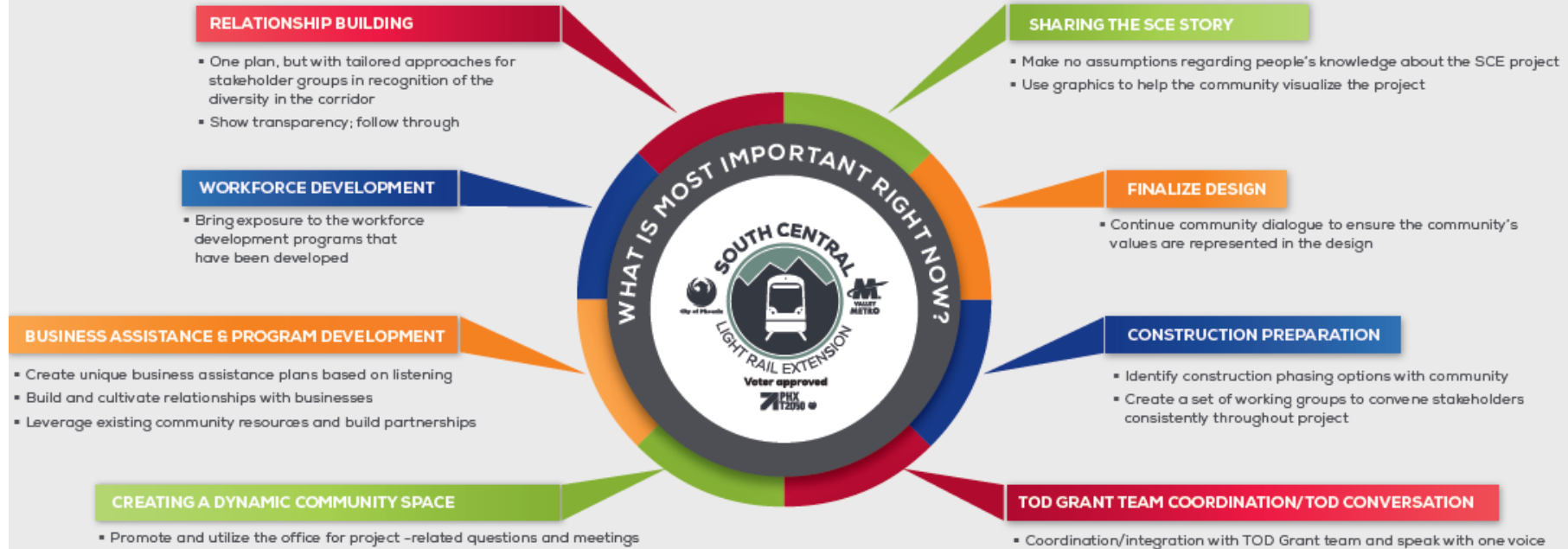


Engage through existing relationships

South Central Light Rail Extension | COMMUNITY ENGAGEMENT PLAN

GOAL: BUILD TRUST AND RELATIONSHIPS WITH THE COMMUNITY IN ADVANCE OF CONSTRUCTION, AND IMPROVE UNDERSTANDING OF LOCAL ISSUES AND STAKEHOLDERS.

TIMEFRAME: NOW - CONSTRUCTION



OUTREACH TARGETS

RESIDENTS/
NEIGHBORHOODS



BUSINESSES



SCHOOLS
(INDIVIDUAL & DISTRICT)



FAITH-BASED



ORGANIZATIONS/
COMMUNITY GROUPS



Takeaways

- Provide opportunities for the community to take ownership
- Meet the community where they are at
- Build trust and relationships through an authentic approach to community engagement

Thank you





Outside-The-Box Dispute Resolution

Hon. Carmine Cornelio (retired)

Kevin Ahern, Solo Practitioner

Danielle Constant, Jennings, Strouss & Salmon

Standard Mediation

- How to prepare
 - Preparing the client
- Mediation memos
 - The importance of being realistic
 - Exchange memos between parties?
- The mediation process
 - Mediator as facilitator or as evaluator?
- The mediator's goal(s)
 - What is affecting settlement efforts?

Different Options

- Pre-mediation preparation by the mediator
 - Preparation with the lawyers individually
 - Communicating directly with the clients without lawyers
- Different styles of mediating a case

Condemnation Mediations

- Site and comparable sales visits by the mediator
- The role of the experts
 - Present or absent?
 - Other involvement?
- Other guests at the mediation

Other ideas on Settlement

- Direct discussions between parties
- Mediating portions of the case
- Arbitration
 - Binding?
- Using a non-attorney (appraiser, ROW) to mediate or arbitrate
- Mediating over time
- Site visits during mediation for all parties



Discussion



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Thank You!

