

# When Loss of Access to a Public Street Is Compensable: An Arizona Case Study

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**Access**—The ability to get to one’s property from a public road—is a vital part of property ownership, particularly for commercial land such as shopping centers. Unfortunately, access is often restricted or eliminated by government actions, which can have a significant impact on the value of the land.

On April 17, 2014, the Arizona Supreme Court issued a decision in *City of Phoenix v. Garretson*<sup>1</sup> that could open the door for landowners in Arizona to receive compensation when a government action results in loss of existing access to a public street. Because the rationale for the decision involved a provision of the Arizona Constitution that is common in the constitutions of many other states, *Garretson*’s impact could be felt beyond Arizona’s borders.

## Facts

Garretson owns a commercial parking lot, slightly less than an acre, at the southwest corner of Jefferson and First Streets in downtown Phoenix. In 2005, the property was adjacent to the path of the City’s planned light rail project along Jefferson Street. At the time, the property had two driveways onto Jefferson Street, an access point on Madison Street to the south (a minor neighborhood street) and future access to First Street to the east.

In 2007, the City filed an action condemning a temporary right of entry to Garretson’s property, but did not take any land. As part of the light rail project, the City built train tracks and a concrete curb that permanently blocked both driveways along Jefferson. The curbing destroyed access to and from Jefferson, but did not affect access to or from Madison or First Streets.

Believing that the property had been left with inferior access that negatively impacted its value, Garretson hired an appraiser who was prepared to testify that the potential development of the interim parking lot use for office space was harmed by the loss of access to Jefferson, which decreased its value by almost \$2 million.

The City’s position was that the property still had access to Madison Street and potential access to First Street, so Garretson could not seek compensation as a matter of law. The City’s primary argument, based on Arizona precedent, was that closure of the driveways was simply a restriction on traffic flow, and hence a valid exercise of the police power that was non-compensable as long as the property retained reasonable access to the street system. After the trial court agreed with the City and entered summary judgment barring Garretson from seeking damages for loss of access, the parties stipulated to a judgment that permitted Garretson to appeal the access issue.

On appeal, the case would hinge on this question: Does the government’s destruction of existing access to a public street give rise to a claim for just compensation when the property retains secondary access to other public streets?

## The Arizona Supreme Court Recognizes a Claim for Loss of Access to an Existing Public Street

Before the Arizona Supreme Court’s ruling in *Garretson*, a common notion among Arizona condemnation attorneys was that property owners were entitled to compensation for loss of access under very limited circumstances. Specifically, earlier cases suggested that loss of access was not compensable unless (1) some of the landowner’s property was being acquired for a public project<sup>2</sup> and (2) the loss of access left the property totally or effectively landlocked.<sup>3</sup>

In *Garretson*, the court clarified that a property owner is entitled to just compensation under the Arizona Constitution for loss of existing access to a public street even if no portion of the property is being taken for a government project. And the property owner may have a claim for compensation if access to a public street is destroyed, even though the property has other means of access. Accordingly, the court permitted Garretson to pursue a claim for the loss of value to his property caused by the City’s elimination of access to Jefferson Street for its light rail project despite the fact that the property remained accessible via Madison Street and, in the future, from First Street.<sup>4</sup>

The court also reaffirmed the rule that a property owner may be entitled to compensation, even when direct access is not destroyed, if the value of the land is reduced by a change that substantially impairs access. However, a property owner who claims only substantial impairment of access is not entitled to compensation unless the remaining access is “unreasonably circuitous,” which will depend on the facts of each case. Though the court did not give any examples of situations that would rise to the level of substantial impairment of access, the following possible scenarios could support an unreasonable circuitry claim:

- Redirecting traffic from direct access to a highway to a frontage road that requires visitors to drive a significant distance out of their way to get to the property;

- Replacing direct access to a major arterial with cross-access easements to neighboring property that would require drivers to negotiate access to the major arterial through a busy or convoluted parking lot or would create an unreasonable burden on business-related traffic (such as large delivery vehicles);
- Relocating a major thoroughfare as part of approval of a master plan that substitutes indirect access to and from feeder streets or driveways for prior direct access to the major thoroughfare.

Following *Garretson*, if access to Arizona property is destroyed or substantially impaired, the owner is entitled to just compensation. Ordinarily, the amount of compensation will be measured by the difference in value with and without the access, and in Arizona will be determined by a jury in the event the parties cannot agree.

### **The Impact of *Garretson* in Arizona and Beyond**

The court's decision in *Garretson* can provide a means of recourse to landowners whose access is affected by a government act. The court has made it clear that cities, counties and the state are no longer free to cut off a property's access to a street as part of a public project, such as light rail, without paying just compensation.

However, the reach of *Garretson* may go beyond the realm of traditional condemnation. The court explicitly stated that its holding was based on the "damages" provision of Arizona's constitution: "No private property shall be taken or **damaged** for public or private use without just compensation . . ." <sup>5</sup> Indeed, the court recognized that the case did not involve a "taking" or "severance damages" as traditionally understood in eminent domain cases, but whether the elimination of preexisting access damaged the property. <sup>6</sup> And the court broadly held that a landowner's existing means of ingress and egress is a property right that is protected by the constitutional damages provision. <sup>7</sup> Thus, the *Garretson* analysis could theoretically apply to any public act that either eliminates access points or substantially impairs access without actually invading or taking any property rights. <sup>8</sup>

For example, cities have been known to impose access restrictions on approvals of site plans for shopping centers, such as requiring driveways from public streets to corner "pad" sites to be relocated to the interior of the center, or entirely eliminating access to and from neighborhood streets. While *Garretson* has not changed the law that alterations in traffic flow (such as limiting access to right in/right out or installing a median divider) are non-compensable, removing access to a public street through an administrative process may be "damage" to property for purposes of just compensation under Arizona's constitution.

Finally, Arizona is among the approximately two dozen states that recognize a constitutional right to compensation for "damage" to private property. Therefore, the Arizona Supreme Court's opinion in *Garretson* may provide precedent for property owner rights outside Arizona.

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<sup>1</sup> 322 P.3d 149 (Ariz. 2014). Available at <http://www.azcourts.gov/Portals/0/OpinionFiles/Supreme/2014/CV-13-0181-178550.pdf>.

<sup>2</sup> *Rutledge v. State*, 100 Ariz. 174, 412 P.2d 467 (1966) (no compensation for damages where there is no physical invasion of property).

<sup>3</sup> *State ex rel. Herman v. Wilson*, 103 Ariz. 194, 438 P.2d 760 (1968) (destruction of access compensable where substitute access was unreasonably circuitous).

<sup>4</sup> In fact, *Garretson* later installed a driveway to First Street.

<sup>5</sup> ARIZ. CONST. art. 2, § 17 (emphasis added).

<sup>6</sup> 322 P.3d at 151.

<sup>7</sup> *Id.* at 153.

<sup>8</sup> The court stated that "there is no constitutionally protected right of access to a particular roadway," 322 P.3d at 153-154, but held that there is a constitutionally recognized right to compensation for destruction of a preexisting means of access to a roadway.