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10/05/2016 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-033210 10/04/2016

HONORABLE DAVID B. GASS

CLERK OF THE COURT
L. Stogsdill
Deputy

MARICOPA COUNTY JEAN WEAVER RICE

v.

NORTHERN PARKWAY INVESTORS L L C JAMES T BRASELTON

UNDER ADVISEMENT RULING

This case brings two sayings to mind. To paraphrase the movie, *Field of Dreams*, "If you build it, they will come." The parties, however, dispute who was building what and who was coming to whom. Then there is the old retail saying, "If you break it, you buy it." The condemnation equivalent is, "If you build it, you pay for it."

The parties have been engaged in this long-running dispute over what constitutes just compensation. The condemnation relates to two separate highway projects involving NPI's land, specifically the SR303L portion built by the Arizona Department of Transportation (ADOT) and the Northern Parkway built by Maricopa County. The parties have singled out a third section, the access ramps that connect SR303L and the Northern Parkway (the Disputed Section).

The parties agree that Maricopa County must pay just compensation to defendants Northern Parkway Investors, L.L.C. (NPI) for partial takings and severance damages, if any, related to Maricopa County's construction of the Northern Parkway on part of NPI's land. The parties, however, dispute Maricopa County's obligations to compensate NPI for the impact of the Disputed Section. And five years into the litigation, the parties continue to refine their positions. At oral argument, NPI's counsel clarified that NPI is not asking for severance damages regarding land that the ADOT condemned for the Disputed Section. Maricopa County also has asked the

court to resolve an issue regarding NPI's right to severance damages for any alleged substantial impairment or circuity of access claim.

As the court explains below, under the facts of this case, the Disputed Section ultimately is part of ADOT's SR303L, not the Northern Parkway. As a result, Maricopa County is not liable to NPI for any damages associated with the Disputed Section or changes that ADOT made to SR303L.

In making this ruling, the court has reviewed and considered the record, including the following:

- Stipulation Addressing the Before Condition and the After Condition (Docket # 90);
- Joint Stipulated Statement of Facts (Docket # 96);
- Defendant Northern Parkway Investors' Motion for Summary Judgment Re: "Definition of the Project" and the "After Condition" (Docket # 94) (NPI's MSJ).
    - Defendant Northern Parkway Investors' Separate Supplemental Statement of Facts In Support of Motion for Summary Judgment Re: "Definition of the Project" and the "After Condition" (Docket # 95).
    - Maricopa County's Response to Defendant's Motion for Partial Summary Judgment Re: "Definition of the Project" and the "After Condition" (Docket # 104).
    - Defendant Northern Parkway Investors' Reply In Support of Motion for Summary Judgment Re: "Definition of the Project" and the "After Condition" (Docket # 109).
- Maricopa County's Motion for Partial Summary Judgment on the After Condition and To Preclude the Award of Severance Damages Unless the Value Is Directly Attributable to the County (Docket # 98).
    - Plaintiff Maricopa County's Separate Statement of Facts in Support of Motion for Partial Summary Judgment (Docket # 97);
    - Maricopa County's Notice of Filing Appendix (Docket # 99);
    - Defendant Northern Parkway Investors' Response to Maricopa County's Motion for Partial Summary Judgment on the After Condition and To Preclude the Award of Severance Damages Unless the Decrease in Value Is Directly Attributable to the County (Docket # 102);

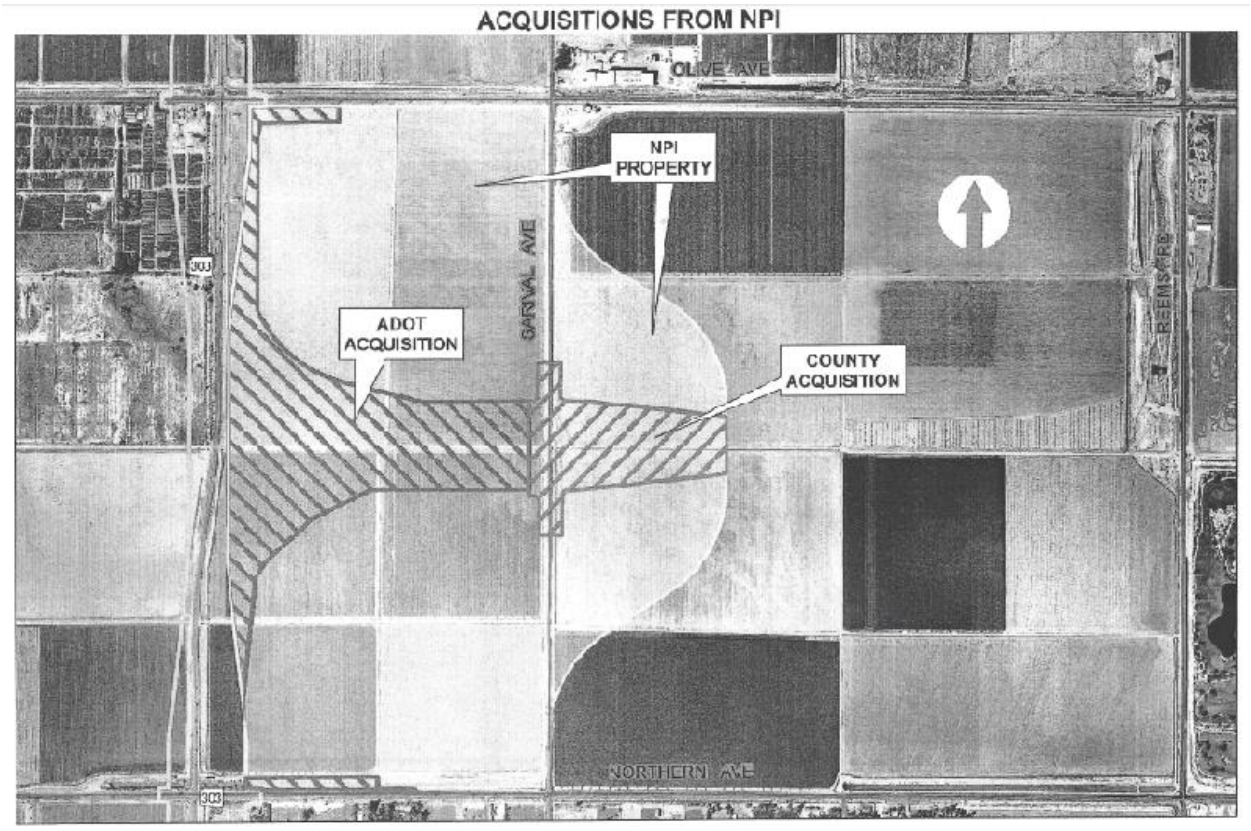
  - Defendant Northern Parkway Investors' Response Controverting Maricopa County's Separate Statement of Facts in Support of Motion for Partial Summary Judgment (Docket # 103);
  - Maricopa County's Reply to Northern Parkway Investors, L.L.C.'s Response to County's Motion for Partial Summary Judgment (Docket # 108)
  - Maricopa County's Reply to Northern Parkway Investors, L.L.C.'s Response Controverting County's Separate Statement of Facts (Docket # 107);
- Maricopa County's Notice of Lodging Exhibits and the attached documents (Docket # 111);
- Defendant Northern Parkway Investors' Notice of Submitting Exhibit "A" for Reference at April 25, 2016, Oral Argument and Inclusion in Record (Docket # 112);
- Defendant Northern Parkway Investors' Motion to Strike Plaintiff's Exhibit Dated December 16, 2010 (Docket # 113);
  - Plaintiff Maricopa County's Opposition to Defendant Northern Parkway Investors' Motion to Strike Plaintiff's Exhibit Date December 16, 2010 (Docket # 114);
- Maricopa County's Notice of Lodging Additional Authority (Docket # 115);
- Defendant Northern Parkway Investors, L.L.C.'s Post-Oral Argument Supplemental Brief (Docket # 120); and
- Maricopa County's Supplemental Memorandum of Law on the Issue of Severance Damages Recoverable Based on a Claim of Circuity of Access (Docket # 121).

The court also considered the oral argument on May 5, 2016 and the discussion on July 28, 2016.

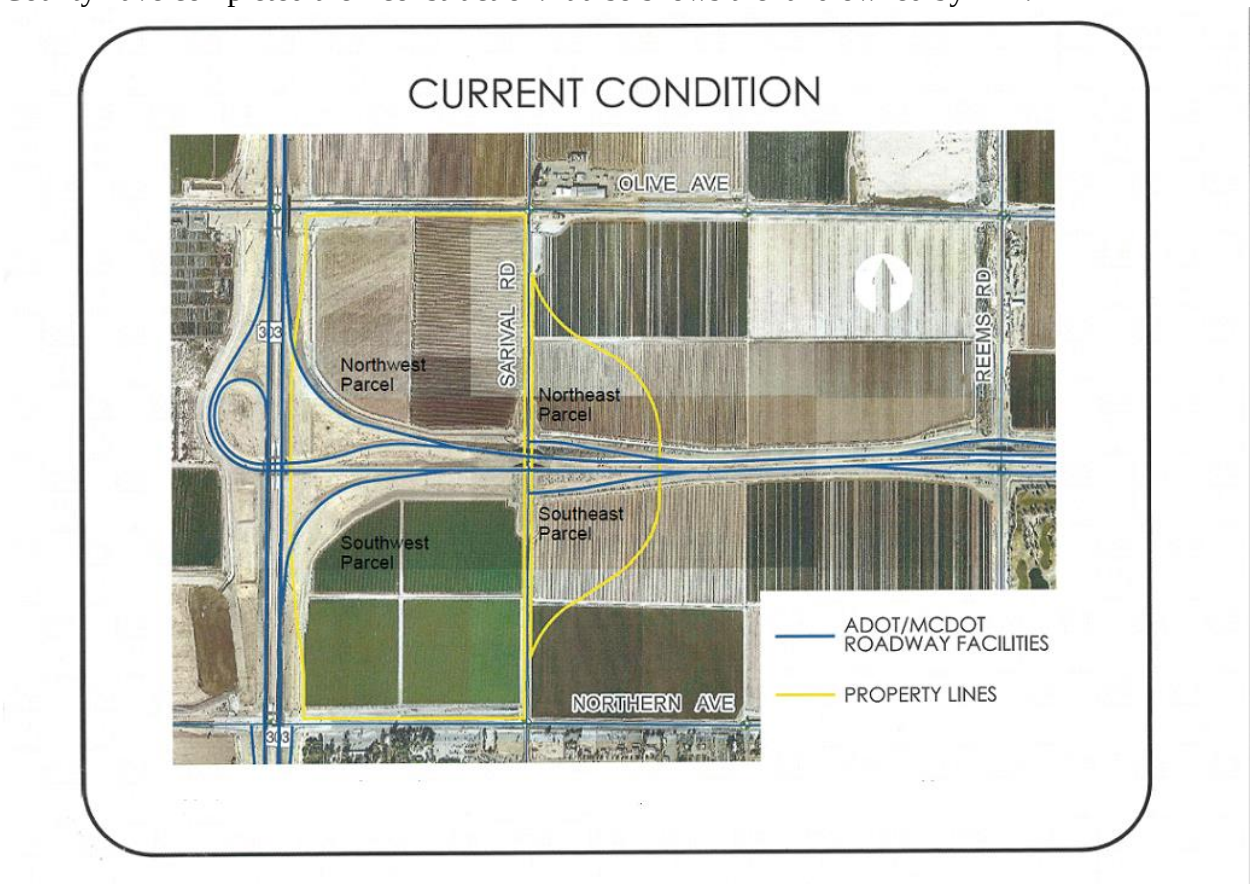
IT IS ORDERED denying Defendant Northern Parkway Investors' Motion to Strike Plaintiff's Exhibit Dated December 16, 2010 (Docket # 113). The Court will consider the evidence presented and give it the weight it deserves.

Background
A View From Above

As explained above, the SR303L and the Northern Parkway Projects involved two different governmental entities. The following diagram shows the areas that were condemned and the relevant condemning entity as they relate to the Disputed Section and the Northern Parkway.


ACQUISITIONS FROM NPI
OLIVE AVE
NPI PROPERTY
GARVAL AVE
ADOT ACQUISITION
COUNTY ACQUISITION
REEMS RD
303
NORTHERN AVE

The following diagram shows the condition on the ground now that ADOT and Maricopa County have completed their construction. It also shows the land owned by NPI.



A Brief History

ADOT has been planning SR303L for decades. Maricopa County also has been planning the Northern Parkway for a long time, but not quite as long as ADOT has been planning SR303L. Still, for a significant time, both were being planned at the same time by the two different governmental entities.

By April 26, 2010, Maricopa County was defining the Northern Parkway as extending from the Sarival Avenue section line and extending east to US60 (Grand Avenue). By that same date, ADOT was planning to construct SR303L and the access ramps between SR303L and the Northern Parkway.

Six months later, on December 16, 2010, Maricopa County filed a condemnation action against NPI. The documents attached to the complaint (specifically Exhibit B) show Maricopa

County's Northern Parkway project ending 159.30 feet west of Sarival Avenue, which the parties appear to have rounded to 159 feet for purposes of the pending motions. At that point, those same documents show "ADOT SR303L Project XX" extending west of the termination point of the Northern Parkway. In short, by the time this condemnation action was filed, it was no secret that Maricopa County was not taking any NPI property beyond 159 feet west of Sarival Avenue for the Northern Parkway.

About nine months later, on September 21, 2011, the State of Arizona filed CV2011-017658 (State of Arizona ex rel John Halikowski v. Northern Parkway Investors, LLC, et al.) (the ADOT Action). Maricopa County also was a named defendant in the ADOT Action. The ADOT Action sought to condemn the portions of NPI's property that ADOT needed to construct SR303L, including the Disputed Section (the access ramps between SR303L and the Northern Parkway). When ADOT filed the companion lawsuit, it reaffirmed Maricopa County's position in this lawsuit: ADOT was responsible for any condemnation and any construction beyond 159 feet west of Sarival Avenue.

NPI and ADOT resolved the ADOT Action. The amount of the ADOT settlement is irrelevant. However, NPI was uniquely situated to protect its interests given the two pending matters, particularly with regard to settlements. *See Uvodich v. AZ Bd. of Regents*, 9 Ariz. App. 400, 406, 453 P.2d 229, 235 (1969). Therefore, the fact that NPI and ADOT negotiated their settlement in the ADOT Action with this matter pending is a peculiar fact and circumstance that this court may and does consider in assuring that NPI receives compensation that is just. *See id.*

Stipulated Before Condition and Impact on the Analysis

For purposes of Maricopa County's obligation to NPI, the parties have asked the court to resolve the "Definition of the Project" and the "After Condition" as it relates to the Disputed Section. By resolving those two issues, the court by necessity resolves who is obligated to pay NPI for any damages related to the Disputed Section and related changes to the access ramps on SR303L.

To move this matter forward, the parties entered into several stipulations, including what constitutes the Before Condition. *See* Stipulation Addressing the Before Condition and the After Condition (Docket # 90); Joint Stipulated Statement of Facts (Docket # 96).[1] The parties stipulated that the Disputed Section is not part of the Before Condition. As a result, the Disputed Section was planned and exists in fact on the ground, but it does not exist for purposes of the analysis. For purposes of the After Condition, the parties have left it to the court to resolve

[1] The Court adopts both sets of stipulated facts in their entirety without repeating them here. The Court will refer to those facts as appropriate throughout this ruling.

whether the Disputed Section exists or not. As a result, the stipulated Before Condition makes the resolution of this issue seem somewhat circular, when in fact it is not. And given the above parameter, neither the parties nor the court found any case that is exactly on point.

Both parties argue that the other is asking the court to engage in the children's game of "let's pretend." Both parties are correct. Given the stipulated Before Condition and Arizona law, the court has two options, both of which involve pretending. And that is precisely what the court must do with regard to the After Condition.

NPI's Approach

NPI takes the position that the court should include the Disputed Section in the After Condition. If the court entered such a ruling, Maricopa County would be responsible for paying just compensation for the impact of the Disputed Section on the land that Maricopa County condemned as part of this action even though Maricopa County did not condemn the land on which the Disputed Section is built and did not build the Disputed Section.

NPI says the Court must include the Disputed Section in the After Condition because the Disputed Section exists on the ground today. NPI's logic invites the court into the circle. "There are only two possible answers to the 'after condition' question. Either it includes the Disputed Section or it does not." *See* NPI's MSJ at p. 9, ll. 25-26 (Docket # 94). NPI says that because Maricopa County stipulated that the Disputed Section was not part of the Before Condition, it must be part of the After Condition. *See id.* at p. 6, ll. 21-23. NPI goes on to reason that "[b]ecause the Disputed Section is not part of SR 303L, it must be part of Northern Parkway." *See id.* at p. 8, ll. 12-13. In other words, NPI jumped into the "let's pretend" circle but now wants to get out of it.

If the court uses a broad "Definition of the Project" as NPI seeks, there are three projects: (1) The SR303L built by ADOT without the Disputed Section but ADOT nonetheless would have condemned the land for the Disputed Section, and (2) the Northern Parkway condemned and built by Maricopa County, and (3) the Disputed Section, pretending it was built by Maricopa County on ADOT's land. The court would include the Disputed Section in the After Condition by pretending that ADOT had not planned to build the Disputed Section as of the valuation date. ADOT nonetheless condemned the land for the Disputed Section without any plan to build the Disputed Section, and then Maricopa County constructed the Disputed Section on ADOT's land.

Maricopa County's Approach

Maricopa County takes the position that NPI's just compensation should be calculated as if ADOT never constructed the Disputed Section. The appraisal would assume that the Northern

Parkway ends where it currently connects to ADOT's access ramps between SR303L and the Northern Parkway, which is 159 feet west of the centerline of Sarival Avenue. The traffic for the Northern Parkway would empty onto Sarival Avenue and the western entrance to the Northern Parkway would be from Sarival Avenue.

Maricopa County says that ADOT condemned the portion of NPI's land it needed to construct the Disputed Section and paid what the parties agreed was just compensation for the land ADOT condemned and severance damages. Maricopa County's logic goes on to say that NPI is attempting to shift ADOT's obligations onto Maricopa County by asking the court to include the Disputed Section in the After Condition. In other words, Maricopa County wants to stay in the "let's pretend" circle in part and get out of it in part. Maricopa County wants the court to recognize that to the extent NPI is entitled to severance damages for the Disputed Section, the actual condemning entity, ADOT, should pay those damages.

If the court accepts Maricopa County's position and uses a narrow Definition of the Project, there are still three projects, but they are: (1) The SR303L without the Disputed Section built by ADOT, (2) the Northern Parkway without the Disputed Section built by Maricopa County, and (3) the Disputed Section built by ADOT. The court would have to "pretend" that the After Condition nonetheless does not include the Disputed Section because a governmental entity other than Maricopa County condemned and took the land for it but either has not planned it or at least has not constructed it yet so it is not part of the present analysis.

Overview of Law
Partial Taking and Severance Damages

This case involves a partial taking. Both sides correctly state the law regarding just compensation when a partial taking occurs. Just compensation for a partial taking involves two elements: (1) the fair market value of the property actually condemned and (2) severance damages, which are any damages suffered by the remaining property as a result of both the severance from the part taken and the construction of the proposed improvements, whether or not they ultimately are constructed in the manner proposed. *See* A.R.S. § 12-1122(A).

Long standing Arizona precedent explains severance damages as follows:

> [W]here only a part of the property is taken, the measure of severance damages is the difference between the market value of the remainder before and after the taking. *Pima County v. DeConcini,* 79 Ariz. 154, 285 P.2d 609 (1955). "Market value" in this context generally means what the property would bring on the open market assuming a willing buyer and a willing seller. *City of*

> *Tucson v. El Rio Water Co.*, 101 Ariz. 49, 415 P.2d 872 (1966). Thus, market value consists of all those elements which either an owner or a prospective buyer could reasonably urge as affecting the fair market price of the property. *Andrews v. Cox*, 127 Conn. 455, 17 A.2d 507 (1941).

See City of Scottsdale v. Church of the Holy Cross Lutheran, 132 Ariz. 416, 419-20, 646 P.2d 301, 304-05 (App. 1982).

In calculating the value, the ultimate fact finder is bound by the "Project Influence Rule." *See State v. Hollis*, 93 Ariz. 200, 205-07, 379 P.2d 750, 753-54 (1963).

> 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.

City of Phoenix v. Clauss, 177 Ariz. 566, 569, 869 P.2d 1219, 1222 (App. 1994).

Finally, the property owner is not entitled to damages that are remote or speculative. *Arizona Water Co.*, 7 Ariz. App. at 58, 436 P.2d at 152 (citations omitted). In that regard, a property owner is not entitled to profits or loss of future expectations. *See Church of the Holy Cross Lutheran*, 132 Ariz. at 420, 646 P.2d at 305. To recover for the impact on planned development, the evidence must allow the finder of fact to find by a reasonable probability that

the property owner's "development plans would come to fruition within the reasonably foreseeable future. Absent such proof, evidence of plans for future development is too speculative and remote to form the basis of finding market value at the time of taking." *See id.*

Valuation Factfinder Must Engage in Some Level of "Let's Pretend"

Valuing property can present unique challenges and can be quite difficult. *See City of Tucson v. Rickles*, 109 Ariz. 82, 85, 505 P.2d 253, 256 (1973). The court must consider the "peculiar facts and circumstances of the case if necessary so as to assure the property owner compensation which is just, as contemplated by the Arizona Constitution." *See Uvodich*, 9 Ariz. App. at 406, 453 P.2d at 235. In that regard, just compensation under the "Project Influence Rule" requires that the valuation be based on a set of facts that are not true because the fact finder cannot consider any increase or decrease that the project itself causes to the fair market value. *See Hollis*, 93 Ariz. at 205-07, 379 P.2d at 753-54. As a result, the proper analysis requires a valuation must be based on conditions that do not in fact exist on the ground. *See id.*

NPI argues that any valuation must be based on the exact conditions on the ground. *See Rickles*, 109 Ariz. at 85, 505 P.2d at 256. To that end, NPI focuses on the following out-of-context quote from *Rickles*, which reads as follows: "Games of 'let's pretend' should play no part in condemnation cases." *See id.* (citations and punctuation omitted). NPI is incorrect.

The *Rickles* case and the other authorities on which *Rickles* relies show that the reference to "let's pretend" has to do with valuation and speculative damages, not with the before and after conditions on which the valuation is based. The court begins by reviewing the quote from *Rickles*, which reads:

> Admittedly the valuation of a portion of a trailer park must be a difficult task. But that fact is not sufficient justification for abandoning the requirement of our Constitution and statutes that a landowner receive reasonable compensation, nor is it sufficient justification for abandoning the assessment of damages as carefully and specifically as possible under the circumstances. It is our opinion that in ascertaining damages, all facts must be considered. '(R)emote and speculative damages (should be) disregarded * * *.' Arizona Water Co. v. City of Yuma, 7 Ariz. App. 53, at 58, 436 P.2d 147, at 152 (1968); 1 L. Orgel, Valuation Under the Law of Eminent Domain s 59 (2d ed. 1953). **Games of 'let's pretend,' *Id.*, § 57 at 266, should play no part in condemnation cases.**

Id. (emphasis added). NPI focuses on the emphasized sentence.

Rickles itself made the above statement within a discussion of valuation methods and damages, not an analysis of before and after conditions on the ground. Immediately following the above discussion, *Rickles* said,

> We find it difficult at this juncture to state that one particular mode of assessing the market value of the land and improvements taken would have been superior to all others. There are probably several techniques which would have been adequate. A procedure which might have been used, but which neither the Rickles' nor the City's formula adequately pursued is a combination of three well-accepted approaches-prior sales, capitalization of rental income, and reproduction (or rearrangement) costs less depreciation.

Rickles, 109 Ariz. at 85, 505 P.2d 253 at 256. *Rickles* relied in part on *Arizona Water Company*, which analyzes speculative damages, not before and after conditions on the ground:

> As a general rule, remote and speculative damages are disregarded in condemnation cases. Loss of income during the reinvestment period is a good example of remote and speculative damages. It would be a matter of conjecture to attempt to determine the loss of income during the reinvestment period. It is possible that The Company might never find an investment from which it could secure a rate of return similar to that made on the property condemned. Conversely, due to changes in economic conditions, it might be able to make an investment with a rate of return somewhat higher than it is presently receiving. Such damages would not be measurable with any degree of certainty and they should be rejected as too speculative.

Arizona Water Co., 7 Ariz. App. at 58, 436 P.2d at 152 (citations omitted).

Ultimately, to establish the fair market value of property that is subject to condemnation, the fact finder must engage in a certain level of "let's pretend." The property owner is entitled to be compensated for the fair market value of the property based on what the property would have been worth had the taking not occurred. *See* A.R.S. § 12-122(A). The "Project Influence Rule" itself requires that the valuation be based on a set of facts that are not true. *See Hollis*, 93 Ariz. at 205-07, 379 P.2d at 753-54 (precluding consideration of any increase or decrease that the project itself causes to the fair market value). Instead, a proper analysis requires a valuation must be based on conditions that do not in fact exist on the ground. *See id.* And as part of that analysis,

the property owner is not entitled to damages that are remote or speculative. *Arizona Water Co.*, 7 Ariz. App. at 58, 436 P.2d at 152 (citations omitted).

The Court also reviewed the relevant sections of 1 L. Orgel, Valuation Under the Law of Eminent Domain § 59 (2d ed. 1953). Copies of the relevant sections are attached as Exhibit A because the edition is out of print and difficult to find. The reference to "a pure game of let's pretend" related to Orgel's discussion and disagreement with a case from Iowa, *Kucheman v. C., C. & D.. R'y. Co.*, 46 Iowa 356 (1877).[2] The issue in that case is quite different. The same condemning entity placed a railway on a right of way, with about one half of the railway on one property and one half of the railway on the adjoining property. Orgel's explanation of the *Kucheman* ruling uses the reference to "let's pretend":

> To direct that, when a railway line is located with one rail on the owner's land and one rail off his land, some division damages should be made between the two tracts of land (as the two judges of the Iowa court were ready to do) is simply to play a pure game of "let's pretend." Small wonder that other courts, in a similar fact situation, throw up their hands at making any distinction and allow the owner to recover the entire damage that has been done to his remaining property by reason of the adjacent public improvement.

Nothing in *Kucheman* or Orgel's discussion in section 57 suggests that a condemning entity must pay for damages that resulted from another condemning entity's actions on a different, but related, project. Indeed, Orgel discusses two different cases that make that point. *See id.* (discussing *Horton v. Colwyn Bay Urban Council*, L. R. 1 K. B. 327 (1908) and *Keller v. Miller*, 63 Colo. 304, 165 P. 774 (1917)).

Horton makes a strong point with regard to recoverable damages at issue in this case. As Orgel explains:

> The *Horton* case affirmed a holding that an owner was entitled only to recover damages for the running of a sewer underneath his land, but not for additional damages due to the adjacency of a station and reservoir located on other property. The case is particularly interesting because the owner had vainly argued that, but for the taking of his land for the running of the sewer, the entire project would have been impossible. [The judge] brushed this argument aside with a citation of an earlier dictum . . ..

[2] Orgel incorrectly showed the case as having been decided in 1896.

Keller also suggests that NPI cannot recover the damages it seeks in this case. As Orgel explains:

> Finally, in *Keller v. Miller*, it was held that, where an irrigation ditch is run through the owner's land, the owner may recover damages from seepage, etc., only to the extent that it has been caused or may be caused from that part of the right of way sought to be condemned on his land.

Id. at page 265 (quotations omitted).

NPI cites no authority that suggests a contrary result. NPI is entitled to the damages that result from Maricopa County running the Northern Parkway across NPI's land. NPI, however, may not recover for the impact of actions that ADOT, a wholly separate governmental entity, took on adjacent land, even if the projects are related and even if NPI establishes, which the court assumes for purposes of the pending motions, that the Disputed Section would not have been built had it not been for Maricopa County's Northern Parkway project.

Analysis: Definition of the Project and After Condition

The above discussion guides the court's reasoning. By necessity, the court's reasoning appears somewhat circular because of the starting point. The parties put the court into a "let's pretend" circle with their stipulation that the Before Condition does not include the Disputed Section. The court must ignore the reality that the Disputed Section was in fact part of ADOT's SR303L plan on the valuation date. Then the court must decide how to treat the Disputed Section for purposes of the After Condition. As a result, the parties chose the starting point on the circle that directs the court's analysis.

The unique facts of this case together with the stipulation as to the Before Condition make it highly unlikely that such a situation will arise again. And for the same reason, no cases in Arizona or from other jurisdictions are directly on point. The above discussion, however, identifies some unique, older cases that provide significant guidance on the issue.

After a careful review, the court concludes that Maricopa County's position ultimately is correct. To rule otherwise would require Maricopa County to pay for severance damages that are attributable to ADOT's taking and development of the Disputed Section, an obligation the court cannot impose on Maricopa County under existing law. And it still ensures that NPI receives just compensation. *See Uvodich*, 9 Ariz. App. at 406, 453 P.2d at 235.

To the extent NPI argues that ruling in Maricopa County's favor shifts a burden to NPI, NPI's alleged damages are speculative at best and are not recoverable. *See Church of the Holy Cross Lutheran*, 132 Ariz. at 420, 646 P.2d at 305. Any compensation cannot include special damages for loss of profits or loss of future expectations. NPI chose to settle with ADOT. What ADOT and NPI took into account in their settlement negotiations is unknown and irrelevant. What is known is that ADOT constructed the Disputed Section, and NPI knew that ADOT constructed or at least intended to construct the Disputed Section when NPI settled with ADOT.

The court, therefore, concludes that the SR303L portion and the Disputed Section were two steps in what is, in essence, a single project. As a result, the "Definition of the Project" here includes the Northern Parkway up to the easternmost point of the Disputed Section, which is 159 feet west of the centerline of Sarival Avenue. The After Condition is the SR303L (excluding the Disputed Section) as planned on the effective date of the condemnation.

Definition of the Project

The Definition of the Project for valuation purposes is the portion of the Northern Parkway that ends 159 feet west of Sarival Avenue. Any development farther west of Sarival Avenue is attributable to ADOT's SR303L project, not Maricopa County's Northern Parkway project.

The After Condition

The court must define the After Condition as it applies to the Northern Parkway and as it applies to the SR303L.

With regard to access to the SR303L, the stipulated Before Condition included a full diamond interchange, entry and exit ramps between SR303L North and SR303L South at Northern Avenue. The stipulated Before Condition also included a second full diamond interchange, entry and exit ramps between SR303L North and SR303L South and Olive Avenue. The Olive Avenue interchange, however, was conditional because of safety issues related to a railway line that runs through the area where one of entry and exit ramps would have been sited.

The SR303L before condition on the date of valuation is the same as the stipulated Before Condition here. The valuation on the date of the condemnation includes the originally planned interchanges.

The following subsequent changes, therefore, are not a part of the After Condition and should not be considered in the valuation:

- Elimination of the exit ramp from SR303L South to Northern Avenue;
- Elimination of the entry ramp from Northern Avenue onto SR303L North;
- Elimination of the interchange at Olive Avenue, which was designated as conditional all along because of safety concerns; and
- Addition of the Disputed Section.

The following, therefore, is the After Condition and must be used in the valuation:

- SR303L as planned on the valuation date as follows:
  - An exit ramp from SR303L South to Northern Avenue;
  - An exit ramp from SR303L North to Northern Avenue;
  - A conditional exit ramp from SR303L South to Olive Avenue; and
  - A conditional exit ramp from SR303L North to Olive Avenue.

- No development or construction of the Disputed Section.

Substantial Impairment or Circuity of Access

At oral argument, a significant issue in the case became evident. NPI seeks to recover for substantial impairment or circuity of access to SR303L. The very narrow issue before the court is whether as a matter of law Arizona allows a non-abutting property owner to recover from Maricopa County for alleged substantial impairment or circuity of access to SR303L, ADOT's controlled access highway, as a result of ADOT's post-valuation date changes to the interchanges on SR303L. For several reasons, NPI cannot establish the right to such a recovery.

Damages Not Attributable To Northern Parkway

First, the alleged substantial impairment or circuity of access has to relate to the project at hand. The court could find no precedent from any jurisdiction that allowed a property owner, abutting or not, to recover from one governmental entity because a different governmental entity eliminated or substantially impaired access to a controlled access highway.

Here, NPI's alleged substantial impairment or circuity of access does not relate to the project at hand, the Northern Parkway. Instead, the alleged substantial impairment or circuity of access relates to the interchanges on ADOT's SR303L at Northern Avenue and Olive Avenue. They are not part of Maricopa County's Northern Parkway project and they were not constructed by Maricopa County. Instead, they, together with the Disputed Section, are part of ADOT's SR303L project. If NPI wishes to pursue damages for substantial impairment or circuity of

access from NPI's two properties that are east of Sarival Avenue, NPI must pursue those damages in an inverse condemnation action against ADOT, not in this action against Maricopa County.

Damages Result from General Traffic Control Actions

Second, the alleged substantial impairment or circuity of access under the circumstances here is the result of general traffic control actions, not a taking. *See City of Phoenix v. Garretson*, 234 Ariz. 332, 335-42, ¶¶ 7-30, 322 P.3d 149, 152-59 (2014). In *Garretson*, our Supreme Court summarized Arizona's condemnation law regarding elimination, or substantial impairment or circuity of access. All of the cases to which *Garretson* looked involved abutting properties. No Arizona case awarded damages for property that did not abut the roadway to which the owner claimed substantial impairment or circuity of access. As *Garretson* explained:

> In general, governmental entities may alter highways without compensating landowners whose property is devalued by various roadway projects and traffic flow changes. *See id.* "[N]ot all ... damage resulting from a highway improvement [is] compensable." *Rayburn v. State ex rel. Willey*, 93 Ariz. 54, 57, 378 P.2d 496, 498 (1963). Thus, a property owner is not entitled to compensation simply because changes in the type, features, or traffic flow of an abutting roadway, or the construction of a new road, reduce his property's value. Stated differently, there is no constitutionally protected right of access to a particular roadway, nor does a landowner's entitlement to compensation hinge on the nature or characterization of the old or new roadway.

See id. at 337-38, ¶ 18, 322 P.3d at 153-54.

Garretson further explained that a property owner may be able to recover if the government causes the property's fair market value to decrease because the governmental entity completely eliminates or substantially impairs access to "an abutting road." But nothing in Arizona's history suggests that a person who owns property that does not abut the road may recover from the governmental entity for eliminating or substantially impairing access to a controlled access highway. *See id.* at 335-42, ¶¶ 7-30, 322 P.3d at 152-59. In short, for those whose property does not abut the roadway, there is no right of recovery for roadway or traffic flow changes.

Damages Are Speculative or Remote

Third, NPI's alleged substantial impairment or circuity of access in this situation is speculative and remote. To the extent NPI seeks to recover for impaired or circuity of access, it must be based on NPI's current use. *See Church of the Holy Cross Lutheran,* 132 Ariz. at 420, 646 P.2d at 305 (property owner is not entitled to special damages for loss of profits or loss of future expectations). Here, NPI has offered no evidence of how the alleged impairment or circuity of access "substantially impairs" its access for purposes of its current farming use.

The Washington State authority on which NPI relies involves unique facts that are not present here. *See Union Elevator Warehouse Co., Inc. v. Washington*, 980 P.2d 779, 780-82 (Wash. App. 1999). In *Union Elevator*, the facts established that the changes affected one, and only one, property owner, the plaintiff in an inverse condemnation action. *See id.* at 782. In that case and under Washington law, *Union Elevator* held that a non-abutting property owner had to show (1) that the property owner's reasonable means of access had been obstructed and (2) that the property owner suffered special damages that were "different in kind, and not merely degree, from that sustained by the general public." *See id.* at 782-83 (quoting *State v. Wineberg*, 444 P.2d 787 (Wash. 1968)).

To begin, Arizona has no such authority, and no other jurisdiction has cited *Union Elevator*.[3] Next, even if Arizona adopted the Washington State approach from *Union Elevator*, NPI has offered up no credible evidence that its damages are "different in kind from that sustained by the general public." *See id.* at 783. Further, *Union Elevator* only allowed recovery against the governmental entity involved in constructing the actual roadway that created the access issue, not a different governmental entity. *See id.* Given the above, *Union Elevator* is an interesting case involving unique facts, but it does not support the proposition that NPI is entitled to recovery for substantial impairment or circuity of access here.

IT IS THEREFORE ORDERED denying Defendant Northern Parkway Investors, L.L.C.'s Motion for Summary Judgment Re: "Definition of the Project" and the "After Condition" (Docket # 94).

[3] One Arizona court cited to *Wineberg* for a proposition regarding expert testimony in condemnation cases, but not for the proposition regarding non-abutting properties. *See City of Scottsdale v. Eller Outdoor Adv. Co. of Ariz., Inc.*, 119 Ariz. 86, 96, 579 P.2d 590, 600 (App. 1978). The same is true for the few other states that have cited *Wineberg*. *See, e.g.*, *State v. Davis*, 499 P.2d 663, 669 (Haw. 1972); *Keller Lorenz Co., Inc. v. Ins. Assoc's Corp.*, 570 P.2d 1366, 1372 (Idaho 1977).

IT IS FURTHER ORDERED granting, as discussed above, Maricopa County's Motion for Partial Summary Judgment on the After Condition and To Preclude the Award of Severance Damages Unless the Value Is Directly Attributable to the County (Docket # 98).

IT IS FURTHER ORDERED setting a thirty-minute, in-person status conference in this division at **10:30 a.m. on November 16, 2016**. In preparation for the status conference, the parties shall submit an updated joint report and proposed scheduling order by **November 9 2016.**

NOTE: This Court utilizes FTR for an electronic record of the proceedings. However, any party may request the presence of a court reporter by contacting this division three (3) court business days before the scheduled hearing.

NOTE: All court proceedings are recorded digitally and not by a court reporter. Pursuant to Local Rule 2.22, if a party desires a court reporter for any proceeding in which a court reporter is not mandated by Arizona Supreme Court Rule 30, the party must submit a written request to the assigned judicial officer at least ten (10) judicial days in advance of the hearing, and must pay the authorized fee to the Clerk of the Court at least two (2) judicial days before the proceeding. The fee is $140 for a half-day and $280 for a full day.

PLEASE NOTE: If/when a party files a pleading within 48 hours of a scheduled event, the party should also e-mail same to the Court's Judicial Assistant at ldupuis@superiorcourt.maricopa.gov. and to fiskd@superiorcourt.maricopa.gov.

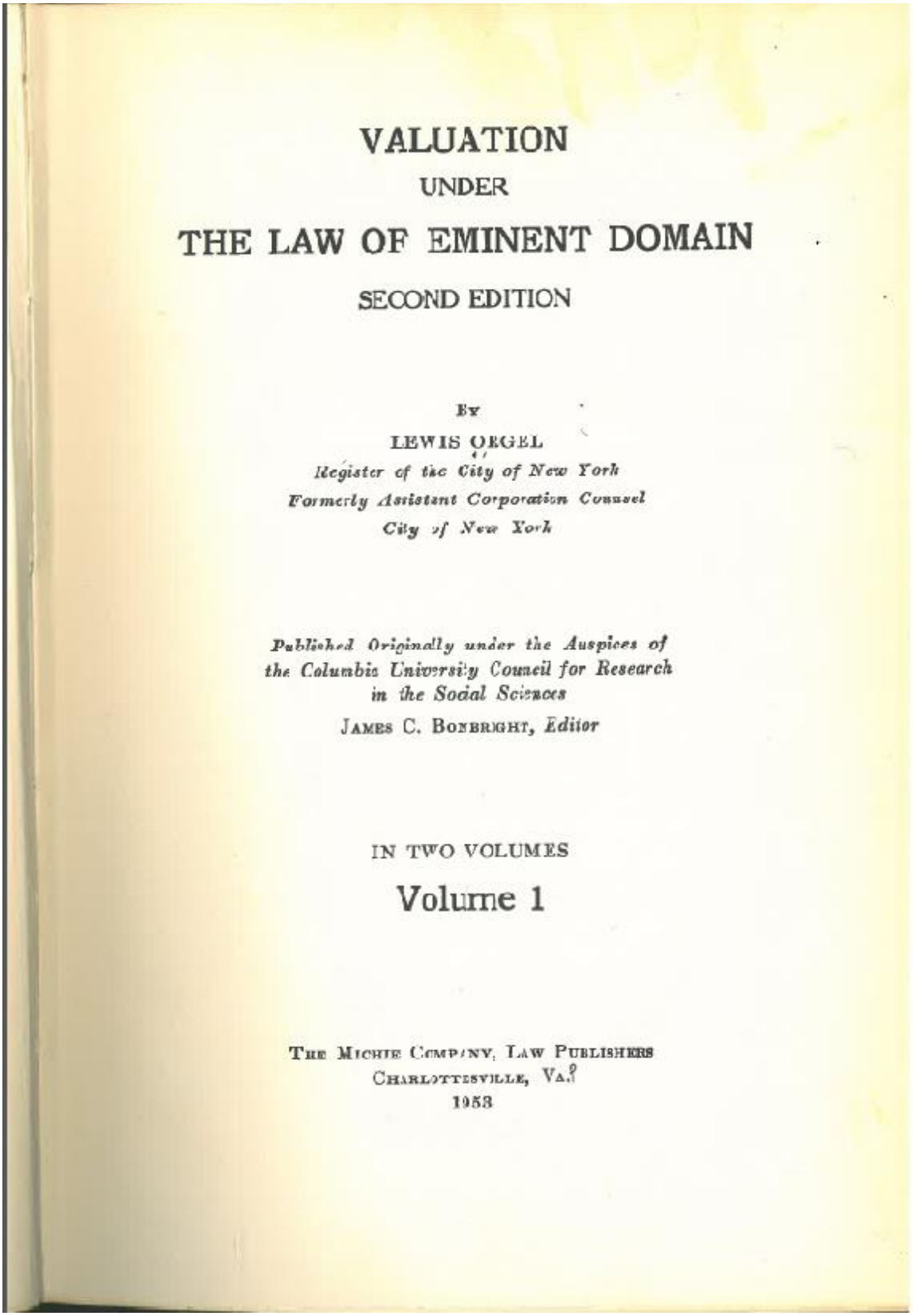
NOTE: COUNSEL SHALL UPLOAD AND E-FILE ALL PROPOSED ORDERS IN WORD FORMAT ONLY TO ALLOW FOR POSSIBLE MODIFICATIONS BY THE COURT.

IMPORTANT NOTICE REGARDING ONLINE PROFILE

Judge Gass maintains an online profile that answers many questions about courtroom and division procedures. Litigants and their attorneys should familiarize themselves with the online profile. You can find the online profile at the following link:

https://www.superiorcourt.maricopa.gov/JudicialBiographies/judges/profile.asp?jdgID=260&jdgUSID=9111.

Exhibit A



VALUATION
UNDER
THE LAW OF EMINENT DOMAIN
SECOND EDITION

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Published Originally under the Auspices of the Columbia University Council for Research in the Social Sciences
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IN TWO VOLUMES
Volume 1

THE MICHIE COMPANY, LAW PUBLISHERS
CHARLOTTESVILLE, VA.
1953

is *Kucheman* v. *Railway Co.*,[72] decided by a divided court. A railroad was built straddling the center line of a public street in which the abutting property owners had a fee to the center. The trial court had allowed an owner to recover for all the damages due to the operation of the railway on that street. On appeal by the taker, the appellate court granted a new trial. Two of the five judges thought that there should be no recovery whatsoever for damages for the occupation of the street by the railroad in a careful and prudent manner. One judge voted to affirm the lower court on the ground that the railway was a unity and that "the injury is not from the rail on plaintiff's land, but from the entire road regarded as one thing." The remaining two judges said:

> The track is in the middle of the street. One rail rests upon that half of the street in which the plaintiffs do not own the fee. They can recover only for the appropriation and use of their land. The instruction allows a recovery for the appropriation and use of land not theirs.
>
> We can lay down no rule for its ascertainment which we think would be of any practical benefit. The damages recoverable are somewhat more than one-half of the whole damages suffered, because the plaintiffs suffer somewhat more from the occupancy of their side of the street than from the other. With this thought in mind the jury must allow such portion of the entire damages as to them seems right.[73]

The *Horton* case[74] affirmed a holding that an owner was entitled only to recover damages for the running of a sewer underneath his land, but not for additional damages due to the adjacency of a station and reservoir located on other property. The case is particularly interesting because the owner had vainly argued that, but for the taking of his land for the running of the sewer, the entire project would have been impossible. Lord Alverstone, C.

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72. Kucheman v. C., etc., Ry. Co., 46 Iowa 366 (1894). This case was not, however, cited by Mr. Justice Butler.

73. Ibid. at p. 377.

74. Horton v. Colwyn Bay, etc., Council, 1 K. B. 327 (1908), cited supra n. 61.

J., brushed this argument aside with a citation of an earlier dictum by Lord Watson.[75]

Finally, in *Keller* v. *Miller*,[76] it was held that, where an irrigation ditch is run through the owner's land, the owner may recover damages from seepage, etc., only to the extent that it has been "caused or may be caused from that part of the right of way sought to be condemned on his land."

§ 57. Summary of Rules Limiting Damages to Those "Resulting from the Taking."

Starting with the hypothesis that an owner, part of whose property has been taken for a public purpose, may recover a pecuniary offset for all the injury that he sustains by virtue of the construction and operation of the public works on or near his property, we noted in the previous section one important qualification. This is a qualification designed to limit the owner's recovery to that portion of damage that is due to the taking of his property, and to exclude that portion that is due to the presence and operation of the public works on other, adjacent property. But how shall the distinction be drawn, and the separate damage that is "due to the taking" measured? The Massachusetts courts have tried one solution; and several other courts, including the United States Supreme Court, have occasionally tried another. By the Massachusetts rule, recovery is limited to those damages which are done to the remainder of owner's property over and above the damage that would have been done if the public works had just bordered on his property, without encroaching upon it. By the alternative rule, recovery is

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75. Lord Watson in Cowper-Essex v. Acton Local Board, 14 App. Cas. 153 (1889), referring to Caledonian Ry. Co. v. Ogilby, 2 Macq. 229, and City of Glasgow Union Ry. Co. v. Hunter, L. R. 2 H. L. Sc. 78, two earlier railway cases, first pointed out that in both these cases, "the use complained of as injurious was not of the part of the railway constructed on the land so taken, and was held in both cases to afford no ground for statutory compensation" and then deduced the general principle that "a proprietor is entitled to compensation for depreciation of the value of his other lands in so far as such depreciation is due to the anticipated legal use of works to be constructed upon the land which has been taken from him under compulsory powers."

76. Keller v. Miller, 63 Colo. 304, 165 P. 774 (1917), cited supra n. 61.

limited to the damage that is done by that part of the public works that is located on the land taken from the owner.

Apparently both rules are designed to approximate the same goal by distinguishing between damages suffered by property owners in the general neighborhood and special damages suffered by this particular owner because a part of his property was actually "taken." Yet the most enthusiastic defender of either rule could hardly claim that it makes more than a very rough and arbitrary division in most cases. Between the two, the Massachusetts rule is much the less artificial—though it is artificial enough, indeed—where the land taken from the owner and the adjacent land are combined for a unified purpose, such as for a railway right of way. To direct that, when a railway line is located with one rail on the owner's land and one rail off his land, some division of damages should be made between the two tracts of land (as the two judges of the Iowa court were ready to do) is simply to play a pure game of "let's pretend." Small wonder that other courts, in a similar fact situation, throw up their hands at making any distinction and allow the owner to recover for the entire damage that has been done to his remaining property by reason of the adjacent public improvement.

§ 58. Exclusion of Certain Kinds of Damages.

The second group of cases which purport to whittle down the owner's recovery to what may be something less than full indemnity, includes those which deny that the damage that is claimed is of a type that may be considered in determining the depreciation in the value of the property taken.

The generally accepted doctrine is that *any* type of damage may be considered in so far as it impairs the "fair market value" of the remaining property. And, indeed, the courts have followed the dictates of this doctrine to a very considerable degree, in that they have not restricted a jury to certain common, stereotyped forms of damage.[77] But they have nevertheless on occasion disallowed proof of certain kinds of damage, realized or expected, and the question

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77. The courts have been careful to insist that these damages must be considered in their bearing on market value and not as separate items of compensation. Mississippi State Highway Comm. v. Hillman, 189

arises whether this exclusion was, really, in violation of the doctrine that *all* injury to market value of the land must be compensated, or whether it is explicable in fact (as the courts generally assume in words) on the ground that the damage was either imaginary, or else that it was not a damage to the "market value" of the remaining land. The indefiniteness of the courts' conception of "market value" or "fair market value" of the land makes an answer to the last part of this question impossible in hard cases.

§ 59. Potential, Speculative and Remote Damages.

Students of the law of damages are familiar with those somewhat indefinite terms by which courts often characterize a claim for damages that they decide to disallow. "Potential damage" is one that has not occurred and that will not occur in the future save for the occurrence of some possible contingency. In eminent domain, the concept arises most frequently where the owner claims a damage from the use to which the taker *may* put the property in the future, even though his present plans do not contemplate such use.

"Speculative damage" may denote, either, a damage the very existence of which is doubtful; or else a damage the pecuniary seriousness of which is grossly conjectural.

"Remote damage" (as contrasted with "proximate damage") properly means a damage remotely connected with, or caused by, the act for which recovery is claimed. Strictly speaking, the mere fact that the damage may have been a remote consequence does not necessarily require that it be any the more speculative, or unreal, or remote in time, than a proximately caused damage. Actually,

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Miss. 850, 198 So. 565, 571 (1940); Department of Public Works & Buildings v. Caldwell, 301 Ill. 242, 247, 133 N. E. 642 (1922).

In Louisville, etc., R. Co. v. Burnam, 214 Ky. 736, 284 S. W. 391 (1926), a separate award was apparently made for cost of fencing although the court quoted with approval (p. 741) an earlier Kentucky case, Louisville, etc., R. Co. v. Barrett, 91 Ky. 487, 16 S. W. 278 (1891), where the court said: " 'Nothing can be allowed for fence as fence. The allowance should be for the depreciation of the land in consequence of the burden thus cast upon it.' " Howell v. Jackson County, 262 Mo. 403, 171 S. W. 342 (1914).

however, the remoteness, the speculative or doubtful character, and the distant futurity of the damage are so closely associated in the judicial mind that the terms are more often than not used interchangeably.[78]

If we may assume that the courts really mean to apply the doctrine that all damages which affect market value must be considered, and that all damages that do not affect market value must be excluded, we at least have a basis by which to determine whether a mere potential or speculative damage should be considered (mere remoteness, in the above sense, having nothing to do with the case).[79] The question, then, becomes whether the price for which the owner could sell his property to some other person would be affected by the realized, probable, or possible damage in question. If the damage is too trivial, or if its significance would not be appreciated by a nondiscriminating buying public, or if its possible occurrence would not be thought of, or would not worry a buyer, it may properly be disregarded by the fact-finding body just as it would be disregarded in the market place. Otherwise it must be considered to the extent that the market would consider it, even if the market would tend to *overdiscount* its likelihood or seriousness.

This, we say, would follow as a logical necessity from the premise that market value, and only market value, is the desired criterion of compensation. The preceding chapters of this study, however, have already prepared the student of eminent domain cases to expect from the courts no such rigid adherence to the market value standard.

§ 60. Damages from Potential Uses of the Property Taken.

Let us consider, first, cases where the owner of property taken

78. See United States v. Chicago, etc., R. Co., 82 F. (2d) 131, 136, 106 A. L. R. 942 (1936), where in rejecting the Government's contention that no damages should be allowed to the railway company in addition to the value of the part of its right of way condemned for a floodway easement, the court discussed at length what it termed the "confusion" between "so-called consequential damages" and "direct or proximate damages."

79. This test would not, of course, apply to property which the courts consider to have "no market value". See United States v. Chicago, etc., R. Co., 82 F. (2d) 131, 106 A. L. R. 942 (1936).