



Condemnation Summit XXXI



Condemnation Summit XXXI

Welcome Remarks

Jennifer Cranston | Shareholder, Gallagher & Kennedy
Jordan Leavitt | Partner, Nossaman LLP

Today's Agenda

- 9:00 a.m. Welcome Remarks
- 9:15 a.m. **How to Win in Court and at Mediation**
- 10:15 a.m. Morning Networking Break
- 10:30 a.m. **Court of Appeals Update with Judge Gass**
- 11:30 a.m. **Analyzing Title Reports for Eminent Domain Actions**
- 12:15 p.m. Hosted Lunch
- 1:15 p.m. **Cross-Examining the Expert Appraiser**
- 2:30 p.m. Afternoon Networking Break
- 2:45 p.m. **Preparing for Condemnation: Pre-Filing Acquisition & Appraisal Practices**
- 3:45 p.m. Cookie Break Sponsored by Integra Realty Resources
- 4:00 p.m. **Condemnation Case Law Update 2024**



Condemnation Summit XXXI

How to Win in Court and at Mediation

Sally Duncan | Convergent ADR, Retired Maricopa County Superior Court Judge
Kenneth Fields | Fields Mediation, Retired Maricopa County Superior Court Judge

Expectations from the Bench in Condemnation Cases

- Know your judge.
- Educate your judge.
- Short/concise motions.

Ariz. R. Civ. P. 80

Rule 80 – General Provisions [Effective January 1, 2024]

A. Agreement or Consent of Counsel or Parties. If disputed, no agreement or consent between parties or attorneys in any matter is binding, unless:

- 1) it is in writing; or
- 2) it is made orally in open court and entered in the minutes; or
- 3) it is made before a mediator or judicial officer, is memorialized either before a certified reporter or in an audio or video recording, and, in the case of a mediated agreement, the parties state that the terms of the agreement may be disclosed, as necessary, to gain court approval of the agreement or to enforce the agreement.

Rule 80 (a), AZ R.CIV.P, and Attorney Agency Scope in Settlement Agreements

- What does the change mean (there are disagreements among mediators)?
- How to manage a conflict between recorded agreement and written agreement?
- Suggest screen-sharing to modify the agreement until all parties agree and sign.
- Unauthorized recording – AZ law and US law.

Settlement Term Sheet

(CASE NAME & NUMBER)

-----, each, a "Party" and collectively as the "Parties," have agreed during their mediation on March 26, 2024 to the following terms in settlement of all matters disputed between them, including those raised in ----- case no. -----.

1. **Binding Settlement.** The Parties acknowledge that this Settlement Term Sheet (including the attachment) sets forth the substantive provisions of a binding and enforceable agreement.

2. **Formal Settlement Documents.** The Parties shall prepare and sign traditional settlement documentation memorializing this settlement. Until such documents are executed, the substantive provisions of this Settlement Term Sheet remain binding and enforceable upon the Parties. The final settlement documentation shall contain traditional settlement terms and shall also address the terms set forth in this Settlement Term Sheet. The act of memorializing the Parties' settlement agreement is ministerial and the Parties shall work diligently together to complete the settlement documentation.

3. **No Admission of Wrongdoing.** In entering into this Settlement Term Sheet, no Party admits any liability or wrongdoing whatsoever. Each Party expressly denies any wrongdoing.

4. **Cash Payment to *.** * shall pay to * the sum of \$*, in good funds, upon execution of the final settlement documents.

5. **Non-Disparagement.** No Party will make any voluntary statements, written, oral or in any other manner, or cause or encourage others to make such statements, that are negative, critical or adverse to the business or business reputation of or that disparage the personal and/or business reputation, products, practices or conduct of the other Party.

6. **Confidentiality.** In consideration of their mutual promises of confidentiality, the Parties agree to keep the terms and conditions of this Settlement Term Sheet and any final settlement agreement confidential, except as necessary to effectuate its provisions or as required by law, rule, regulation, court order, tax or other reporting requirement or as agreed to by the Parties in writing. The parties agree that confidentiality is a mutual benefit and that no additional consideration has been paid for the same.

7. **Mutual Releases.** The final settlement document shall include mutual releases of the Parties and their attorneys, affiliates, parents, subsidiaries, officers, directors, employees, sales representatives, assigns and anyone whose conduct may be imputed to the Parties as described in the attached term sheet. Each side shall bear its own costs and attorney's fees.

8. **Authority to Sign.** Each Party expressly and severally represents and warrants that it is authorized to enter this Settlement Term Sheet and that the person signing on behalf of that Party is authorized to do so, and that this Settlement Term Sheet when executed is a binding obligation of, and enforceable against, such Party in accordance with its terms.

9. **Disclosure of Terms to Court.** The parties agree that the terms of their agreement may be disclosed, as necessary, to gain court approval of the agreement or to enforce the agreement. Ariz.R.Civ.P. 80(a)(3).

DATED: -----

(PLAINTIFF)

(PLAINTIFF)

(Defendant)
By: _____
Its: _____

(DEFENDANT)

SEE TERM SHEET ON NEXT PAGE

TERM SHEET

- 1. *
- 2. *
- 3. *

Expectations from the Mediator

- Different approaches by mediators on how to start and conduct a mediation.
- The benefit of bracket mediation?
- Multi-party mediation (focusing on how to alert a party that the others are reaching an agreement without disclosing confidential information).

Mediation Future

- The Role of Artificial Intelligence in Mediation by Mediators and Attorneys
- Women Mediators in Non-Family Cases

Thank You



Sally Duncan
Convergent ADR
Ret. Superior Court Judge



Kenneth Fields
Fields Mediation
Ret. Superior Court Judge



Condemnation Summit XXXI

Morning Networking Break

We will resume at 10:30 a.m.



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Court of Appeals Update with Judge Gass

Judge David Gass | Arizona Court of Appeals, Division One
Jennifer Cranston | Shareholder, Gallagher & Kennedy

Thank You



Judge David Gass
Arizona Court of Appeals,
Division One



Jennifer Cranston
Shareholder
Gallagher & Kennedy



Condemnation Summit XXXI

Analyzing Title Reports for Eminent Domain Actions

Ron Aschenbach | Assistant Attorney General, Arizona Attorney General's Office

What are we trying to do?

- Article II, Section 17 of the Arizona Constitution
- Obligations to Get it Right
 - Ariz. R. Civ. P., Rule 11(b) requires “reasonable inquiry” and “evidentiary support”
 - Ariz. St. S. Ct. Rule 42 RPC 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.

What happens if you goof up?

YOU TAKE SUBJECT TO ANY INTEREST NOT NAMED
IN THE LAWSUIT

In the Matter of Condemnation of Land for the Valley View Park
Aquatic/ Roadway, 687 N.W.2d 103 (Iowa 2004)

OR

RULE 11(c) SANCTIONS

What is the statutory basis that makes title reports worthwhile?

- A.R.S. § 33-401 Statute of Frauds – No estate... freehold... shall be conveyed unless the conveyance is by an instrument in writing.
- Ownership transfer by deed delivery.
- A.R.S. § 33-411.01 – All documents evidencing the sale or transfer of land or an interest in land shall be recorded with the county recorder.
- A.R.S. § 33-412 – Failure to record means the transfer is void as to creditors and subsequent purchasers for value for consideration without notice.
- Recording gives “constructive” notice to the entire world.

Title v. Ownership

- Ownership is “[t]he bundle of rights allowing one to use, manage, and enjoying property, including the right to convey it to others.”
- Title is “[L]egal evidence of a person’s ownership rights in property. . . .”

Black’s Law Dictionary (9th Ed.)

How does it work?

- Tract index / abstract of title / title mill.
- Gather all documents for a given parcel tract.
- Title examiner reviews the documents for the report.
- The report is for the entire parent parcel.
- The project / acquisition is not considered.
- Title examiner does not know anything about the parcel beyond the documents.

Title Report

- Schedule A – Record title holder and legal description of the property
 - Schedule B – Exceptions
 - Requirements
 - Five Year Chain of Title
- Defendant's list created from all the above

Litigation Guarantees

- **Schedule A**
 - Names of Assured
 - Date
 - **Purpose**
 - Estate Type
 - Vested Entity
 - Legal Description
- **Schedule B**
 - Exceptions
- **Schedule C**
 - Defendant's List

IS A TITLE REPORT OR LITIGATION GUARANTEE THE END OF ANY INQUIRY?

Examples of “Off Record” Risks

- Unrecorded transfers
- Fraudulent transfers
- Erroneous transfers
- Unrecorded Leases
- Adverse Possession
- Unrecorded easements which are marked on the ground
- Death
- Divorce
- Marriage
- Corporate Merger
- Corporate Dissolution

Title Records

- Get copies of everything that could be important on Schedule B, requirements, and the five-year chain of title.
 - Title Company
 - Recorder's Office
- **READ THEM!!!!**
- In some instances, get the deeds of adjoining owners.

What else??

- Review the contact report
- Check
 - Google Earth
 - County Assessor Aerials
- Site visit to the property

Who do you name??

- Title Holder
- Anyone with an ownership interest
- Anyone who may have an ownership interest
- Lien Holders
- County Treasurer (taxes and remove from tax roll)
- Easement Holders (maybe)
- Lessees (maybe)
- Mineral Interest (maybe)

EXAMPLE 1 – ERRONEOUS FILING

ARIZONA DEPARTMENT OF TRANSPORTATION

RIGHT OF WAY GROUP

RIGHT OF WAY TITLE REPORT

The undersigned has examined the title to the property described in SCHEDULE A-1 and the record owner is:

~~Timothy Burns and Sherryl N Burns (Note: Other conveyance deeds by the Burns show they are husband and wife)~~

~~Paul V Long and Faye T Long, Trustees of the Long Family Trust dated June 4, 1999 (See Note in Item No. 1a of the Five Year Chain of Title as to why the Longs are now being shown as the vested owners.)~~

The Heirs and Devisees of the estate of Paul V Long and Faye T Long, deceased (Per Obituaries found on line. A Revocation of Trust of the Long Trust was recorded in Fee #2017-024875.)

(Note: Because the Burns believe they are the fee title holders, title issues with conveys and releases, the Longs passing away, and the Trust being revoked, this parcel may need to be condemned to clear the title.)

~~Mailing Address: 7303 North 14th Street, Unit 11, Phoenix, AZ 85020-5138~~ 723 Black Drive, Prescott, AZ 86301

Situs Address: N/A

By virtue of that certain:

SEE FIVE YEAR CHAIN OF TITLE

Upon compliance with REQUIREMENTS herein, satisfactory title will vest in the State of Arizona subject to encumbrances set forth in SCHEDULE B.

FIVE YEAR CHAIN OF TITLE

1. Warranty Deed dated January 30, 2006, recorded February 7, 2006 in Book 6096 of Official Records, page 629 / Fee #2006-013158 from Richard T Morgan, a single man to Arizona Land Artisans, LLC, an Arizona limited liability company. (Note: The LLC has gone inactive per the Arizona Corporation Commission.)
- 1a. Deed in Lieu of Foreclosure dated December 15, 2008, recorded January 20, 2009 in Book 7386 of Official Records, page 463 / Fee #2009-003102 from Timothy Burns and Sherryl N Burns, husband and wife to Paul V Long and Faye T Long, Trustees of the Long Family Trust dated June 4, 1999. (Note: This deed transferred all of TB-1 as shown on Recorded of Survey recorded April 7, 2006 at Fee #2006-036281. The legal descriptions in Item Nos. 1 shown above and 2 shown below herein are only for the southern portion of TB-1 (APN 304-09-132). A Release and Full Reconveyance of the Deed of Trust (6826-684) against TB-1 was recorded in Book 7386 of Official Records, page 459 removing the Deed of Trust. In 2011, a new Release and Full Reconveyance recorded in Fee #2011-045308 has a legal description for TB-2 and a portion of TB-1 that excludes the southern portion of TB-1, but this release does not references the proper Deed of Trust that covered TB-1. The Deed of Trust referenced is Book 6826 of Official Records, page 689 was against TB-2 as shown on Recorded of Survey Plat recorded April 7, 2006 at Fee #2006-036281. Therefore, the new Release and Full Reconveyance has no effect on TB-1. It is the opinion of this examiner that the parties were trying to correct an error because the Burns did not acquire the property from the Longs and encumbered all of TB-1 in error.)
2. Warranty Deed dated July 10, 2009, July 17, 2009 in Book 7538 of Official Records, page 643 / Fee #2009-043623 from Timothy Burns and Sherryl N Burns (members) who acquired title as Arizona Land Artisans, LLC to Timothy Burns and Sherryl N Burns. (Note: Other conveyance deeds by the Burns show they are husband and wife and contains a partial legal description which may be for APN 304-09-132.)

Note: See attached history of APN 304-09-132 for full chain of title.

END OF FIVE YEAR TITLE CHAIN

EXAMPLE 2 – LEASES

ARIZONA DEPARTMENT OF TRANSPORTATION

RIGHT OF WAY GROUP

RIGHT OF WAY TITLE REPORT

The undersigned has examined the title to the property described in SCHEDULE A-1 and the record owner is:

 Red Olive Properties, LLC, an Arizona limited liability company 

Property Address: 13379 W Grand Ave, Surprise, AZ 85374
Mailing Address: 1600 Corn Camp Rd, Buttonwillow, CA 93206

By virtue of that certain:

SCHEDULE A-1
(SEE ATTACHED FIVE YEAR CHAIN OF TITLE)

Upon compliance with REQUIREMENTS herein, satisfactory title will vest in the State of Arizona subject to encumbrances set forth in SCHEDULE B.

SCHEDULE A-1
(SEE ATTACHED SCHEDULE A-1)




Contiguous Property: None: X See Schedule A-2: Not Searched: Not Applicable:

Encumbrances and Requirements are **not** included for property in Schedule A-2.

REMARKS: Report based on [REDACTED] Title Agency [REDACTED]
• Update 01/12/2016 – Schedule A-1 Added Parcel No. 2 as an Appurtenant Easement. Moved Schedule B Item No. 5 to Requirement No. 8, added additional information to Requirement No. 2 and added New Requirement Nos. 6, 7 and 9. RWK

REQUIREMENTS

1. Payment or proration, as applicable, of all taxes, penalties and/or interest, if any, which may be due at the date of acquisition.

2. Record Full Mutual Termination from Lessee and Lessor of unrecorded lease referred to in Memorandum of Lease from Bell Grande II, L.C., an Arizona limited liability company (Landlord) to GMRI, Inc., a Florida corporation (Tenant), dated January 17, 2003, recorded February 11, 2004 in Instrument No. 2004-0139050;

Thereafter the tenant's interest in said leasehold was assigned from N and D Restaurants, Inc., a Florida corporation (successor-in-interest to GMRI, Inc., a Florida corporation) to ARCP RL Porfolio I, LLC, a Delaware corporation by that certain Assignment of Ground Lease dated July 28, 2014, recorded August 19, 2014 in Instrument No. 2014-0546147.

 NOTE: An unrecorded Assignment and Assumption of Lease dated November 23, 2008, by and between GMRI, Inc., as assignor, and N & D Restaurants, Inc., as assignee is disclosed by recorded document shown above.
3. Record Full Mutual Termination from Lessee and Lessor of unrecorded lease referred to in Memorandum of Lease from Bell Grande II, L.C., an Arizona limited liability company (Landlord) to GMRI, Inc., a Florida corporation (Tenant), dated October 30, 2003, recorded March 5, 2004 in Instrument No. 2004-0229173.

Prepared by and Return to:
Beth Tanner
Darden Restaurants, Inc.
5900 Lake Ellenor Drive
Orlando, FL 32809

11680-7-1-1--
Fimbrazr

FIRST AMERICAN TITLE

NCS-11680 //

MEMORANDUM OF LEASE

This Memorandum of Lease, dated the 30 day of October, 2003, is by and between BELL GRANDE II, L.C., an Arizona limited liability company, ("LANDLORD") and GMRI, Inc., a Florida corporation, ("TENANT").

RECITALS:

A. On January 17, 2003, LANDLORD and TENANT entered into a written lease agreement ("LEASE") for certain premises situated in the City of Surprise, County of Maricopa, and State of Arizona, as more particularly set forth in the LEASE and described on the attached Exhibit "A" (the "PREMISES"); and

B. The parties desire to place their interests in the LEASE as a matter of record.

NOW, THEREFORE, the parties represent as follows:

1. The term of the LEASE will be ten (10) Lease Years, as defined in the LEASE, commencing on the COMMENCEMENT DATE as determined in accordance with its terms.

2. In conjunction with such leasing, LANDLORD has granted to TENANT certain easement rights over the properties described on the attached Exhibit "B". The property described on Exhibit "B" shall hereinafter be referred to as "CENTER".

3. TENANT has the option to renew the LEASE for four (4) additional period(s) of five (5) Lease Years each.

4. During the TERM of this LEASE, and provided that TENANT is not in default and is open and conducting business as the CONTEMPLATED USE, LANDLORD will not permit any property owned, leased, or controlled by LANDLORD within the CENTER, to be used or conveyed for use as a restaurant featuring or specializing in the sale, at retail, of Italian food in a manner similar to TENANT or any parent, subsidiary or affiliated company of TENANT. Featuring or specializing, for the purpose of this provision, means that such items are identifiable as major menu items in terms of sales volume or public identification. This restriction will not be applicable to the sale of unprepared foods intended for off-premises consumption. This restriction will not be applicable to property in the CENTER owned or controlled by Lowe's or Target.

5. During the TERM of the LEASE, LANDLORD will maintain in the CENTER a minimum parking ratio of 4.5 spaces per 1,000 buildable square feet. TENANT will maintain on the PREMISES a minimum parking ratio of 10 spaces per 1,000 building square feet.

6. LANDLORD will maintain the PROTECTED AREA described in the LEASE as parking and access as shown on the Site Plan attached hereto as Exhibit "C". Any changes to the PROTECTED AREA shall require the prior written consent of TENANT.

LANDLORD and TENANT have signed this Memorandum of Lease as of the day and year first above written.

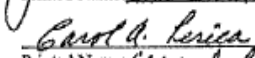
(LANDLORD)
BELL GRANDE II, L.C., an
Arizona limited liability
company

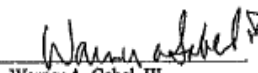
By: Bell Grande, L.C., an
Arizona limited liability
company, its Sole Member

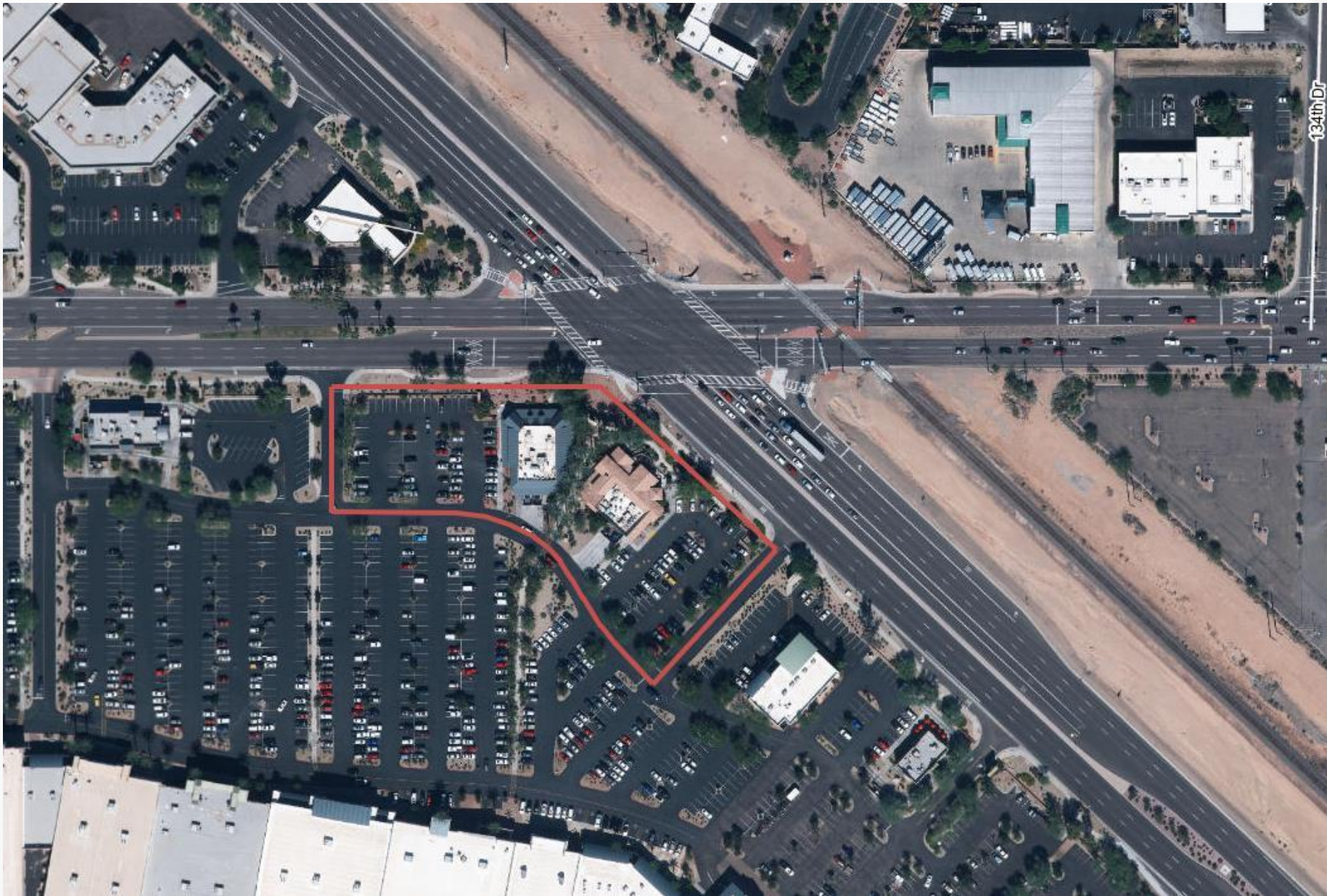
By: CC&G
Strategic Investments, L.C., an
Arizona limited
liability company, its
Member

Signed and delivered
in the presence of:


Printed Name: Julie Sweetish


Printed Name: CAROL A. PERICA

By: 
Warner A. Gabel, III
President/Managing Member









EXAMPLE 3 – LEASES

ARIZONA DEPARTMENT OF TRANSPORTATION

RIGHT OF WAY GROUP

RIGHT OF WAY TITLE REPORT

The undersigned has examined the title to the property described in SCHEDULE A-1 and the record owner is:

Galleria Palms Associates, Inc., a Delaware corporation

Address: Situs: 1600 East La Jolla Drive, Tempe AZ, 85282
Mailing: 3131 South Vaughn Way, # 301, Aurora, CO 80014

By virtue of that certain vesting deed and chain of title: Special Warranty Deed from Magellan Galleria Palms Limited Partnership, an Arizona limited partnership to Galleria Palms Associates, Inc., a Delaware corporation, dated 01/04/1999, recorded 01/04/2000, in Document No. 2000-004600.

Upon compliance with REQUIREMENTS herein, satisfactory title will vest in the State of Arizona subject to encumbrances set forth in SCHEDULE B.

SCHEDULE A-1

Lot 1, GALLERIA PALMS, according to Book 419 of Maps, page 15, records of Maricopa County, Arizona.

EXCEPT all access rights as acquired in Warranty Deed recorded 12/03/1963, in Docket 4828, page 502, in Quit Claim Deed recorded 07/29/1964, in Docket 5150, page 519, and in Final Order of Condemnation recorded 07/28/1967, in Docket 6675, page 966, records of Maricopa County, Arizona.

Contiguous Property: None: See Schedule A-2: Not Searched: Not Applicable:

Encumbrances and Requirements are not included for property in Schedule A-2.

REMARKS: [REDACTED] Title Agency [REDACTED] Commitment No. [REDACTED]

REQUIREMENTS

The following are the requirements to be complied with:

NOTICE:

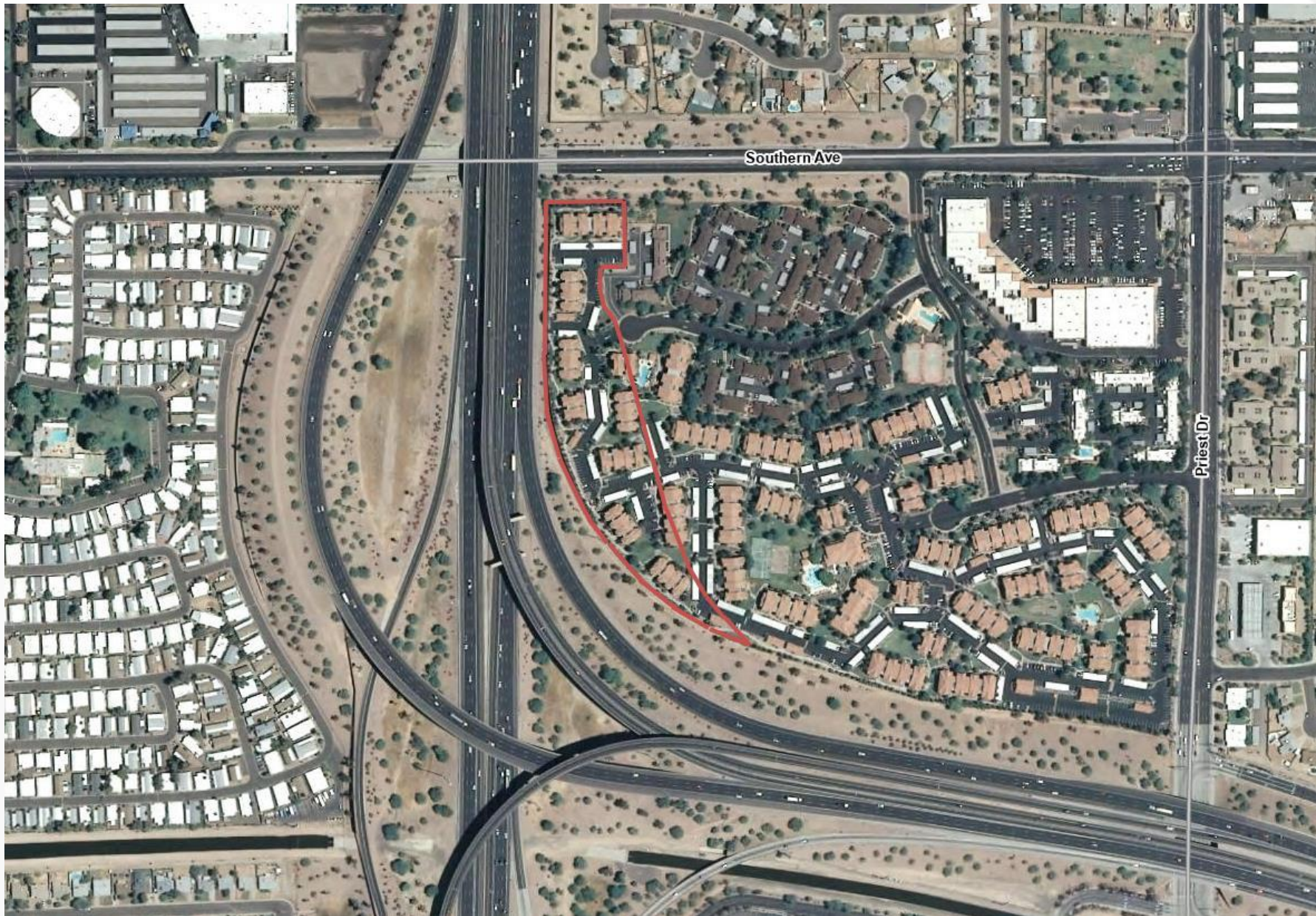
Pursuant to Arizona Revised Statutes 11-480, effective January 1, 1991, the County Recorder may not accept documents for recording that do not; (a) contain print at least ten-point type (pica) or larger, (b) Have margins of at least one-half inch along the left and right sides, one-half inch across the bottom and at least two inches on top for recording and return address information, and (c) Each instrument shall be no larger than 8-1/2 inches in width and 14 inches in length.

1. Proper showing that all regular and special assessments levied by Salt River Project Agricultural Improvement and Power District, now due and payable are paid in full.
2. Proper showing that all regular and special assessments levied by Fiesta Village Homeowners Association, now due and payable are paid in full.
3. Proper showing that all regular and special assessments levied by Tempe Crossroads Owners Association, now due and payable are paid in full.
4. Proper showing that all regular and special assessments levied by Tempe Village Homeowners Association Unit II, Inc., now due and payable are paid in full.
- ★ 5. Proper showing as to any lessees, tenants or parties in possession of said premises or any portion thereof, and disposition of the rights of said parties.

G|K

Gallagher & Kennedy

NOSSAMAN LLP





EXAMPLE 4 – MINERAL RESERVATION

Mineral Reservation

- Highest and best use of mining decorative rock.
- Exception in legal description.
 - EXCEPT all oil, gas and minerals, as reserved in instrument recorded in Book 48 of Deeds, page 603.

Mineral Reservation

. . . all oil, gas, coal and minerals whatsoever, already found or which may hereafter be found, upon and under said lands, with the right to prospect for, mine and remove that same and to use so much of the surface of said lands as shall be necessary and convenient for shafts, wells, tanks, pipe lines, rights of way, railroad tracks, storage purposes and other and different structures and purposes necessary and convenient for digging, drilling and working of any mines or wells which may be operated on said lands.

Mineral Reservations Can Create “Split” Estates

- Surface Estate
- Mineral Estate, if:
 - Substances are commercially valuable
 - Separate and distinct from the soil

Spurlock v. Santa Fe Pacific Railroad Co.
143 Ariz. 469, 694 P.2d 299 (App. 1984).

Thank You



Ron Aschenbach
Assistant Attorney General
Arizona Attorney General's Office



Condemnation Summit XXXI

Hosted Lunch

We will resume at 1:15 p.m.



Condemnation Summit XXXI

Cross-Examining the Expert Appraiser

Steven Cole | Principal, Southwest Appraisal Associates
Jennifer Cranston | Shareholder, Gallagher & Kennedy

Appraiser Brulee

Brulee means:

- to burn the top of a dish, usually one that has been covered in sugar:
 - I like to serve this in individual dishes and brûlée the tops. Sprinkle with more sugar and put under the grill to brulee.



G|K

Gallagher & Kennedy

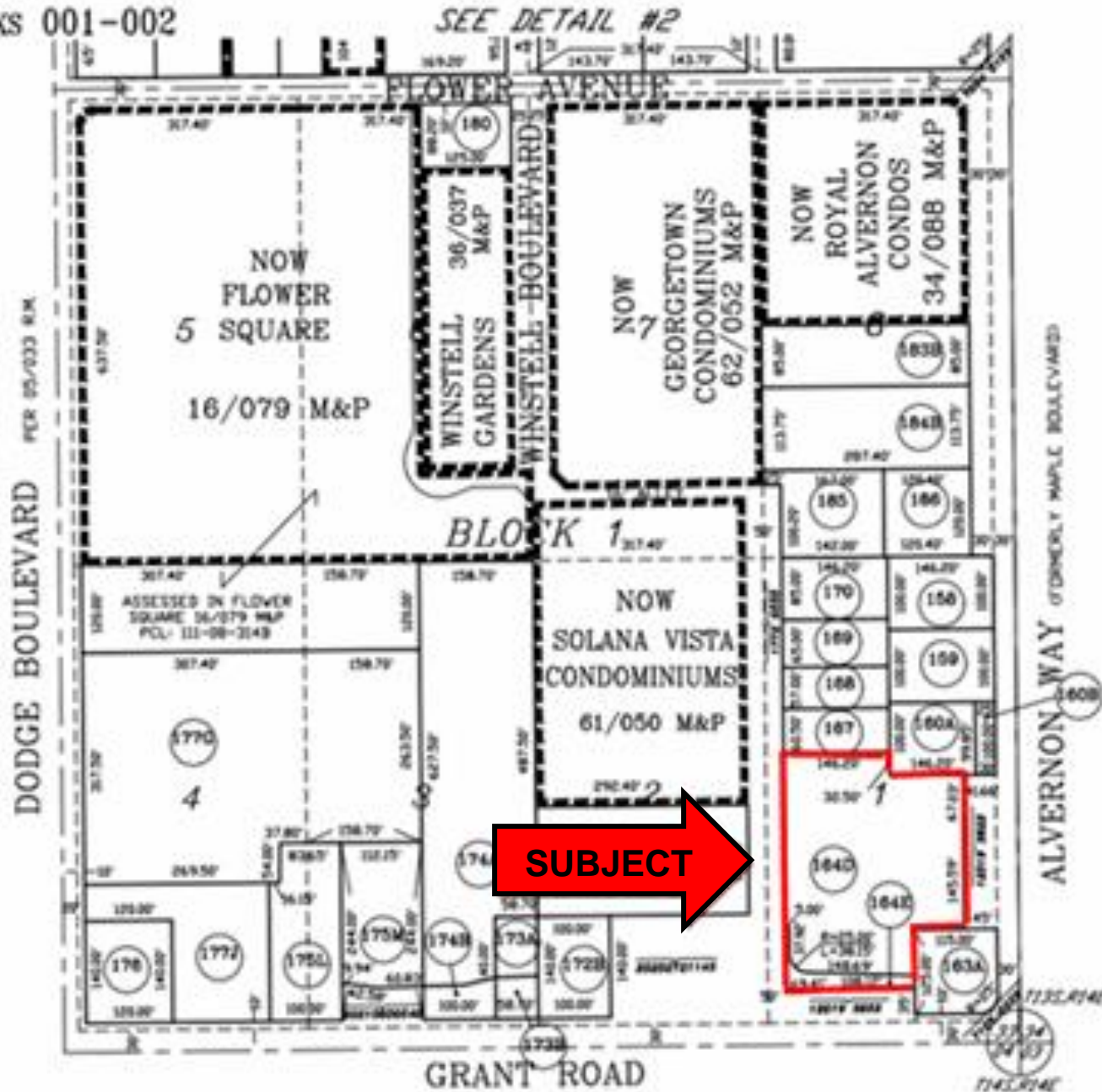
NOSSAMAN LLP

Property Identification

- The property appraised is located at 2415 N Alvernon Way, Tucson, Pima County, Arizona.



N Alvernon Way & E Grant Rd



Aerial of Subject Property – Before Acquisition



“Before” & “After”

- The stand-alone retail building consists of 13,650 square feet of building area, according to the building plans, on which I have relied.
- The Pima County Assessor reports a building area of 13,565 square feet.
- Before the acquisition by the City of Tucson, the property contained 71,759 square feet.
- After the acquisition of 5,035 square feet, the subject site consists of 66,724 square feet.

CATALINA FARMS ANNEX

BLOCK 1

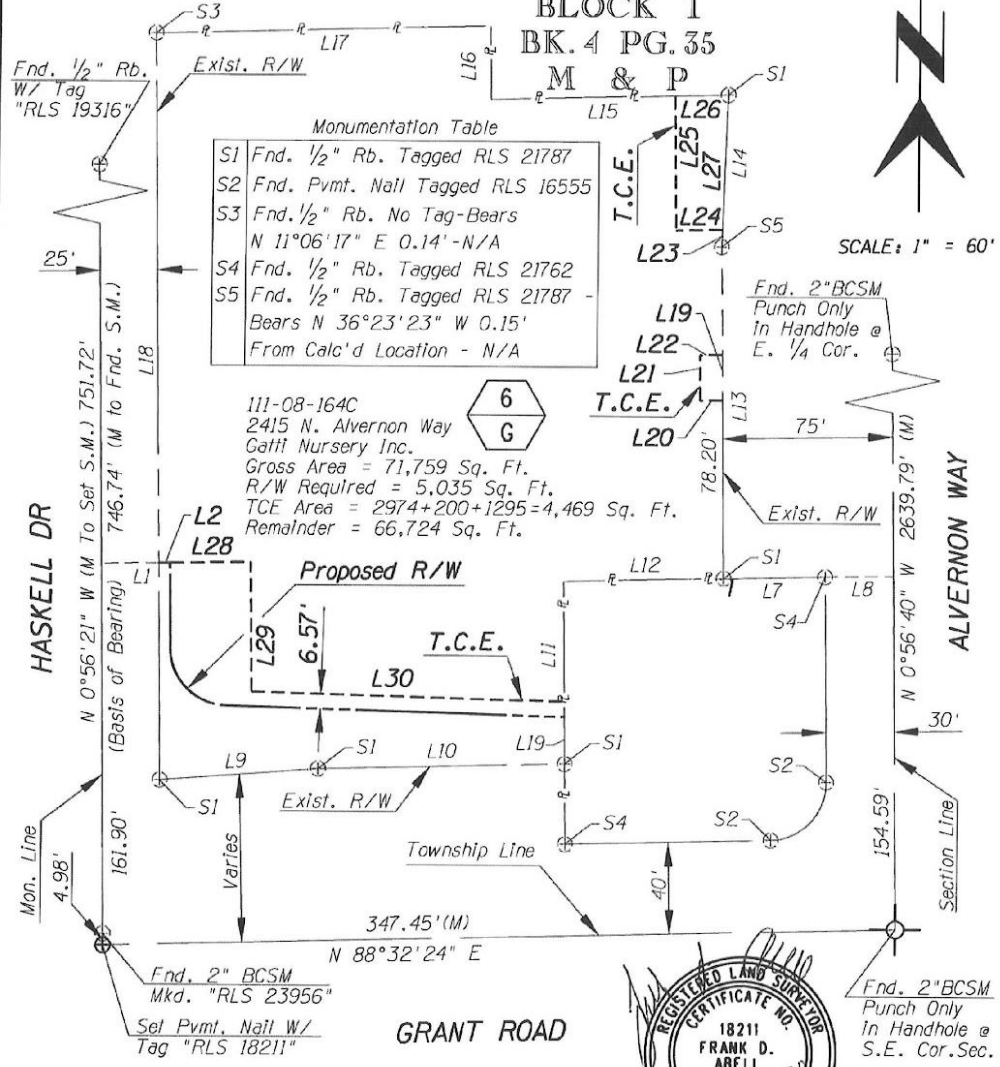
BK. 4 PG. 35

M & P

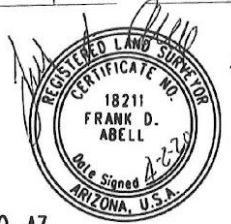
PRINTED BY: FABELL
PRINT SCALE: 1" = 60'

RENTABLE PLOTTER: TB
PLOT DRIVER: 241999.DWG, PDF, XML, MFL, E, IBM, PLOT

PROJECT ID: 0602020241999
CLIENT NUMBER: 012149



SCALE: 1" = 60'



Note: For Additional Information See
C.O.T. R/W Plans R-2015-003.

SEC. 33, T-13-S, R-14-E, G. & S.R.M., PIMA CO., AZ.

Drawn: AY
Scale: See Above

CITY OF TUCSON
GRANT ROAD
PALO VERDE BLVD. TO VENICE PL.
TEMP. CONST. ESMT. PARCEL 6G

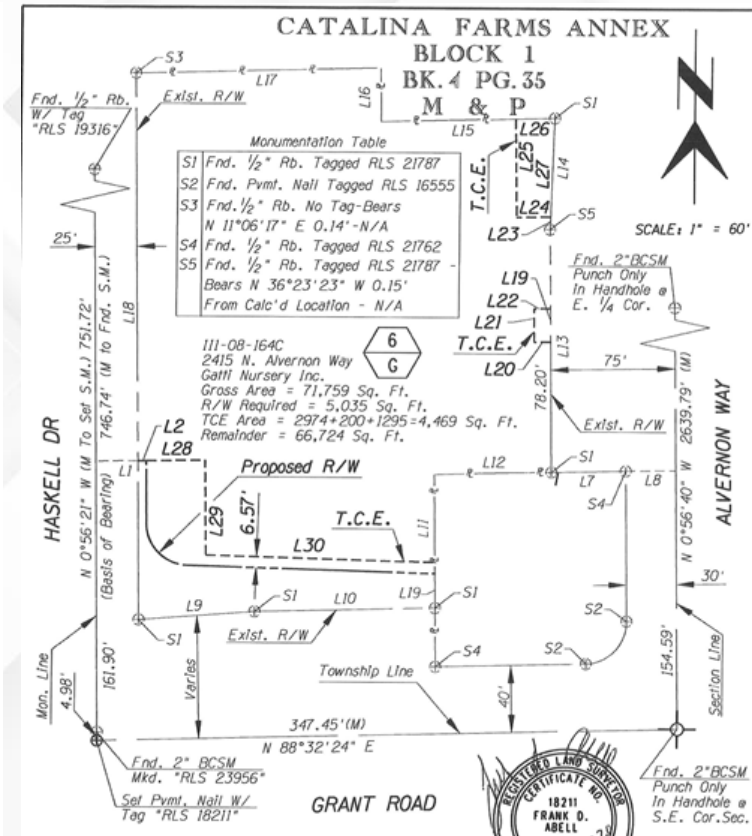
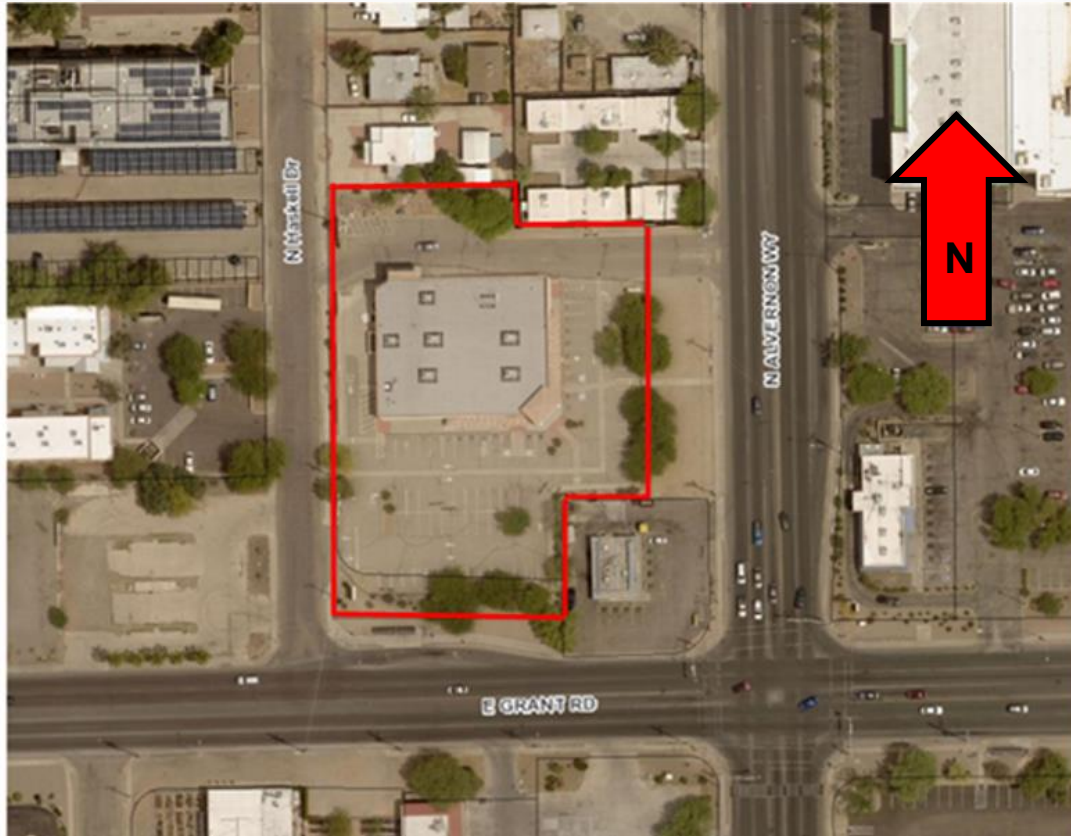
City of Tucson, Arizona
ENGINEERING DIVISION
DEPICTION OF EXHIBIT "A"

241999-TCE-6G.DGN

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3/10/2020 11:52:18 AM

“Before” & “After”

- Aerial of Subject Property – Before Acquisition



Former Walgreens Drug Store

- Closed since 2015



Lease Summary

- The original lease was signed July 9, 2002, between Bencor/Grant-Alvernon LLC, Landlord, and Walgreens Arizona Drug Co, Tenant. The lease was to commence July 1, 2003, and to continue to June 30, 2078, a period of 75 years. However, the lease provided the tenant an option to terminate as of the last day of the 300th month, or 25 years later. That date will be June 30, 2028.
- The lease terms are net of all operating expenses to the landlord, NNN. The lease provides the right to the tenant to sublease the space. The lease has two amendments. Significantly, the Second Amendment states the rent will be \$37,500 per month, plus rental taxes.

Just Compensation

“In condemnation, the amount of loss which a property owner is compensated when his or her property is taken. Just compensation should put the owner in as good a position pecuniarily as he or she would be if the property had not been taken.”

Page 123, The Dictionary of Real Estate Appraisal

Interest To Be Appraised

Unit rule:

*“When land in which various stakeholders have separate interests is condemned by the government in an eminent domain proceeding, the amount of compensation to be paid must be determined as if the property was owned **in fee simple absolute** by a single owner and without reference to the other attached interests.”*

People v. Lynbar, Inc.

253 Cal. App. 2d 870, 62 Cal. Rptr. 320 (1967)

*“It seems to us that this whole must be the **total** of what the various involuntary sellers had to sell and not the undivided fee which the condemnor is seeking to acquire....”*

People v. Lynbar, Inc.

253 Cal. App. 2d 870, 62 Cal. Rptr. 320 (1967)

*“It could have also been a recognition of the fact that **actual capitalized rents** need to be considered when valuing property, because **the market will recognize rents which substantially exceed market rent** - think of drug stores and fast-food chains which for various reasons want specific locations. While the site may not seem all that different, it is. The market tells us so.”*

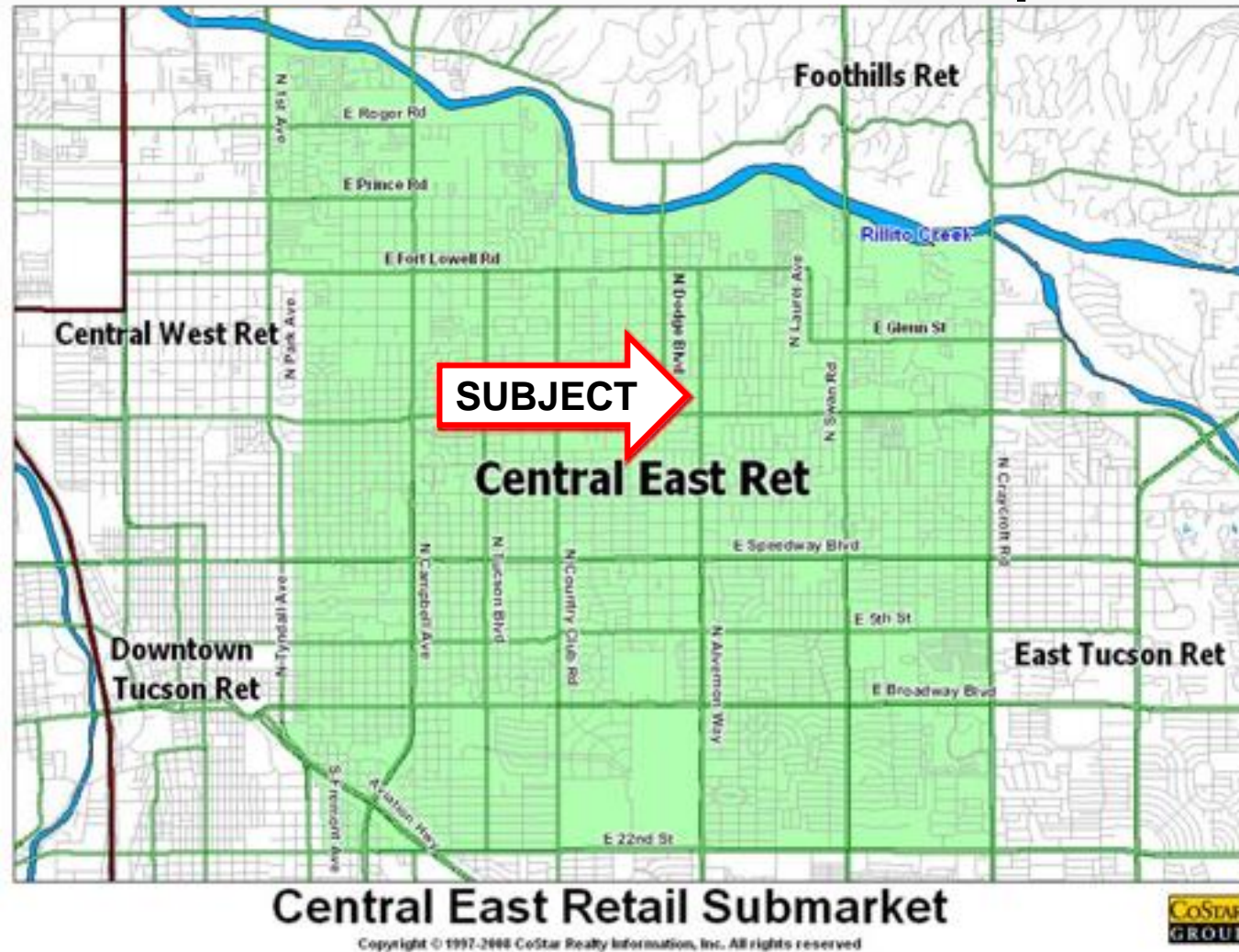
Reality of the Marketplace

“We say this because this very valuable leasehold is one of the things which such a buyer and seller would consider in the open market in fixing the price at which the ownership of the property would be transferred. To say that the existing of such a lease should be ignored by resorting to the legal fiction and legal pretense of a single owner is to ignore the realities of the marketplace. If compensation is to be just and if the property owner is to be made whole for this involuntary loss of property to the state, this cannot be permitted to happen.”

Neighborhood Map



Central East Retail Submarket Map



<i>Source: CoStar</i>	4Q 2020 Central East	4Q 2020 Metro Tucson
No. of Buildings:	857	3,810
Total GLA (SF):	4,853,568	21,706,554
Total Vacancy (SF):	126,778	552,436
Vacancy Rate (%):	2.6%	2.7%
YTD Net Absorption	8,106	82,386
YTD Deliveries (SF):	-2,255	126,271
Under Construction (SF):	0	60,497

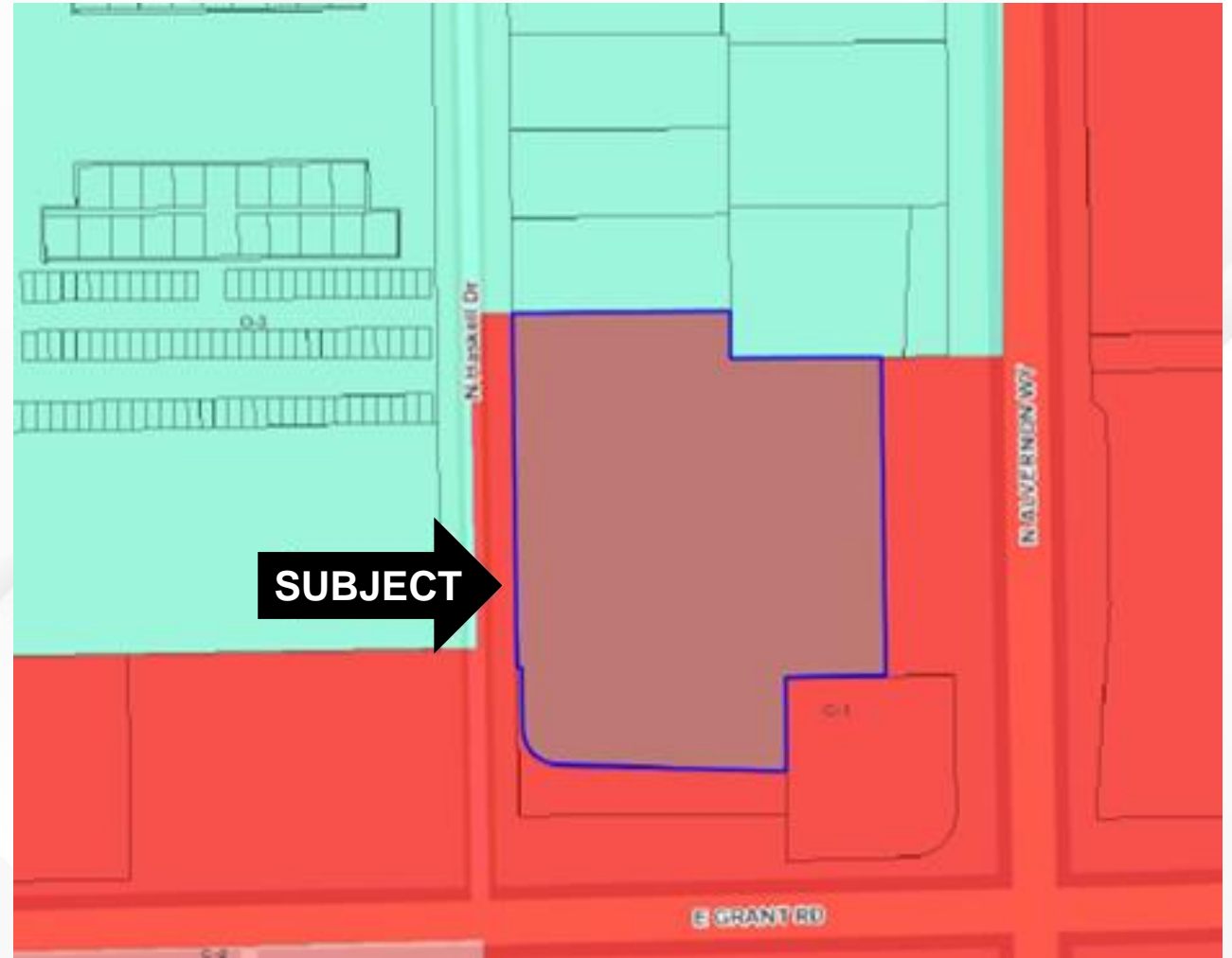
DEMAND STATISTICS FOR GENERAL RETAIL IN EAST CENTRAL SUBMARKET

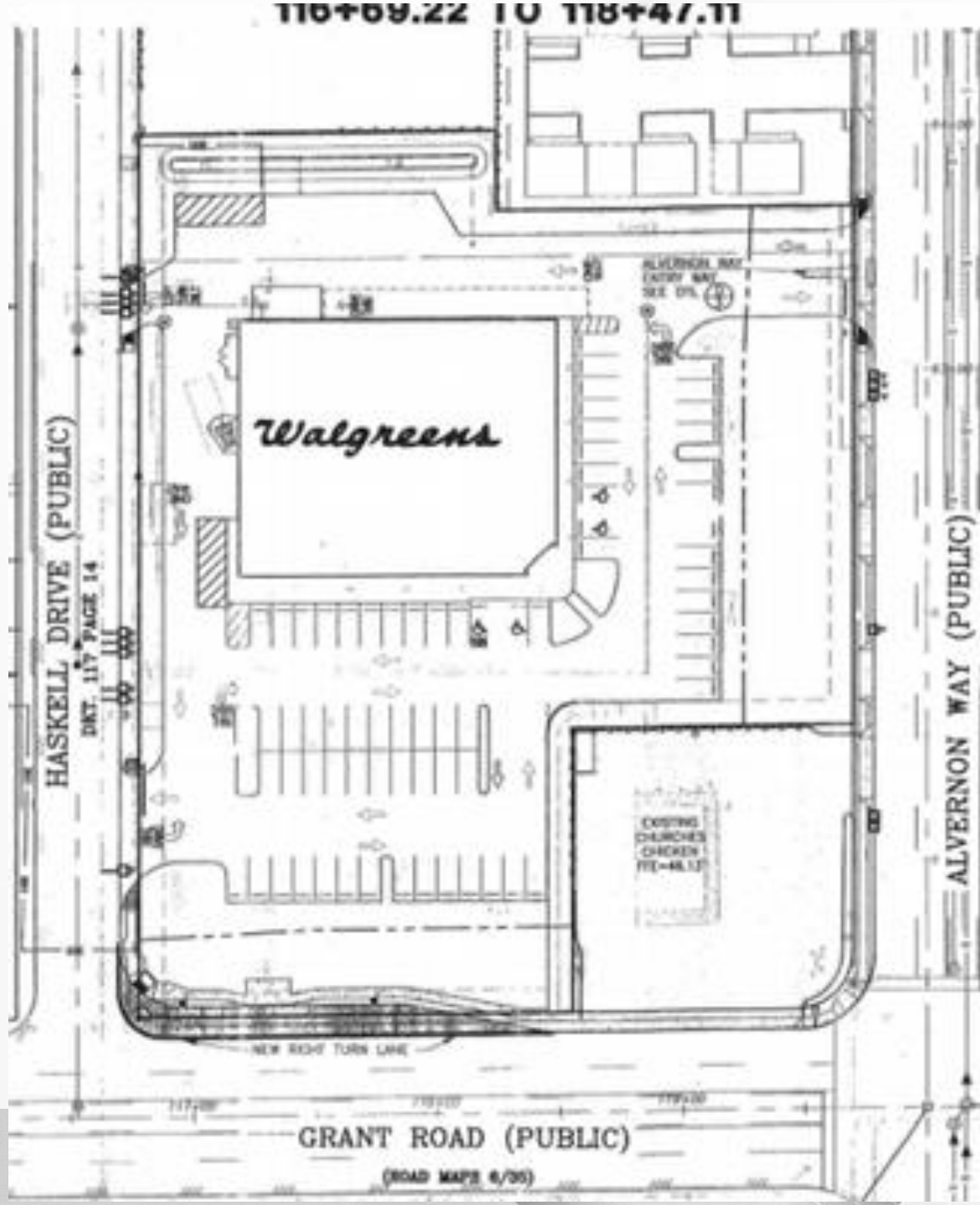
Date	Vacancy Rate	YID Absorption (SF)	Market Rent (Gross)/PSF
2017 Q4	3.1%	117,522	\$17.59
2018 Q4	3.3%	-18,180	\$17.87
2019 Q4	2.8%	-6,018	\$18.15
2020 Q4	2.6%	8,106	\$18.16

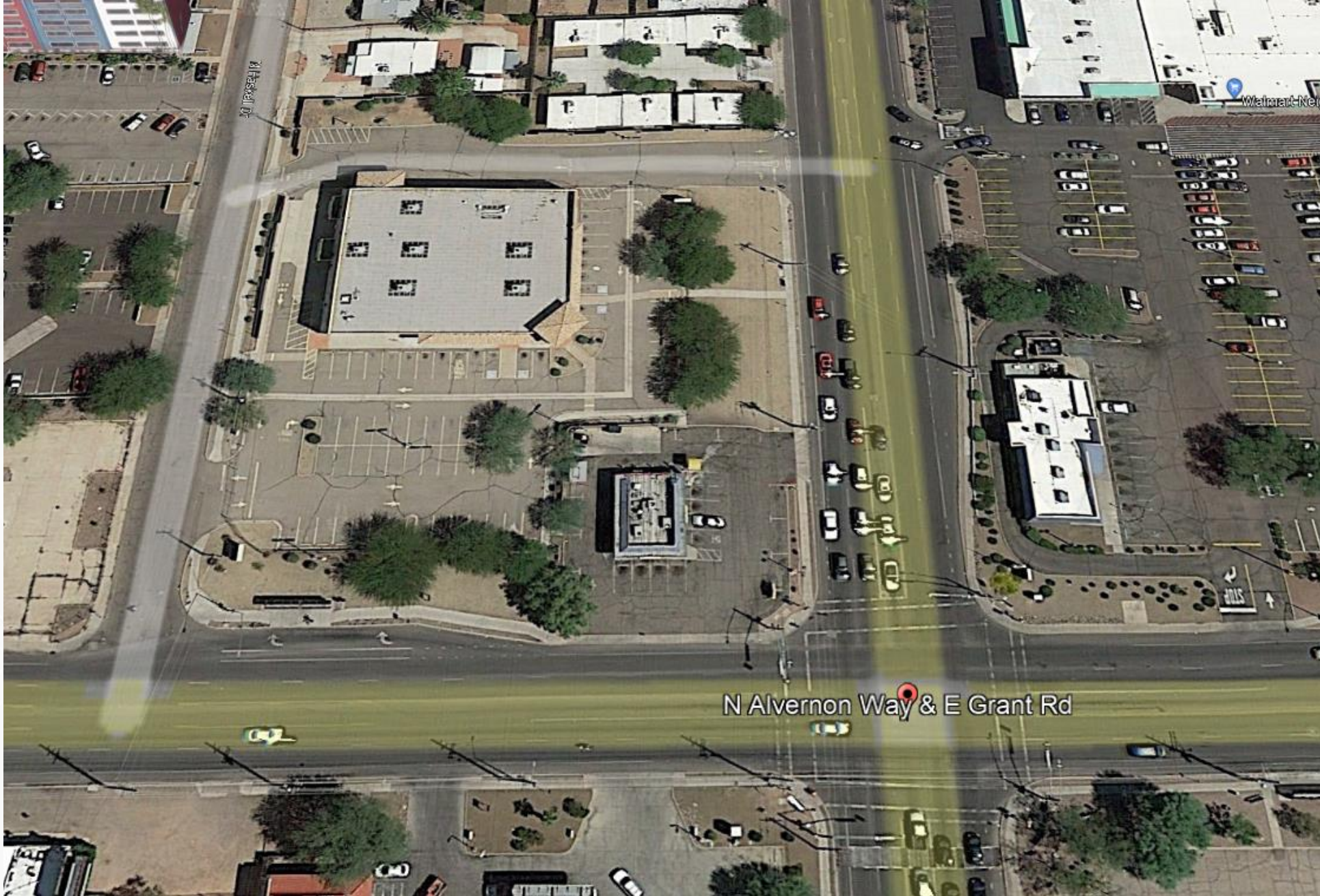
Source: CoStar

Zoning Map

- C-1 Zoning – City of Tucson
- 71,579 SF



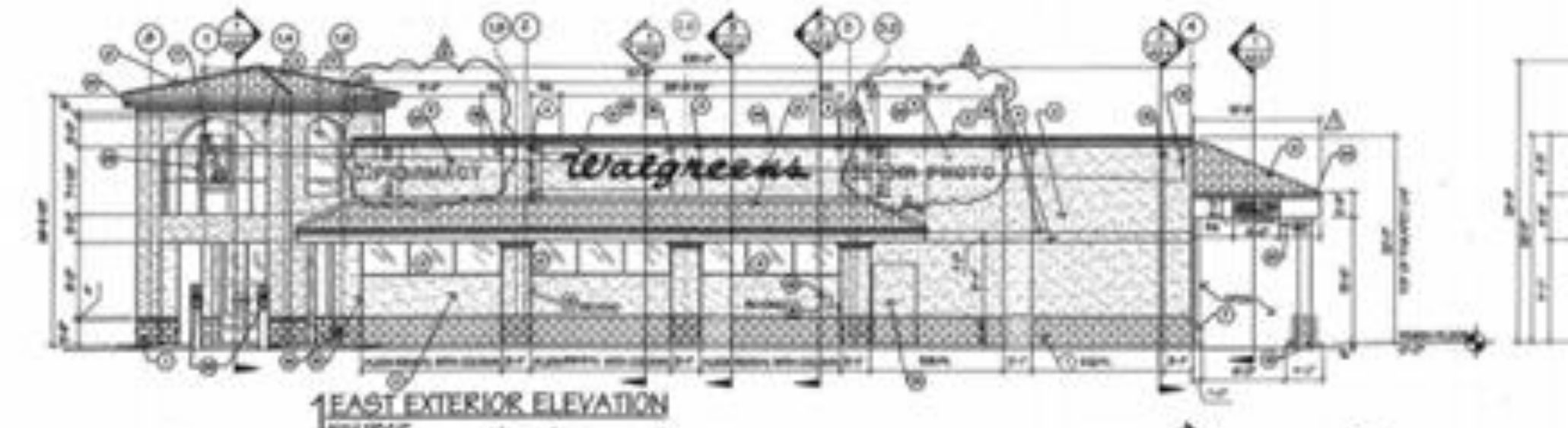




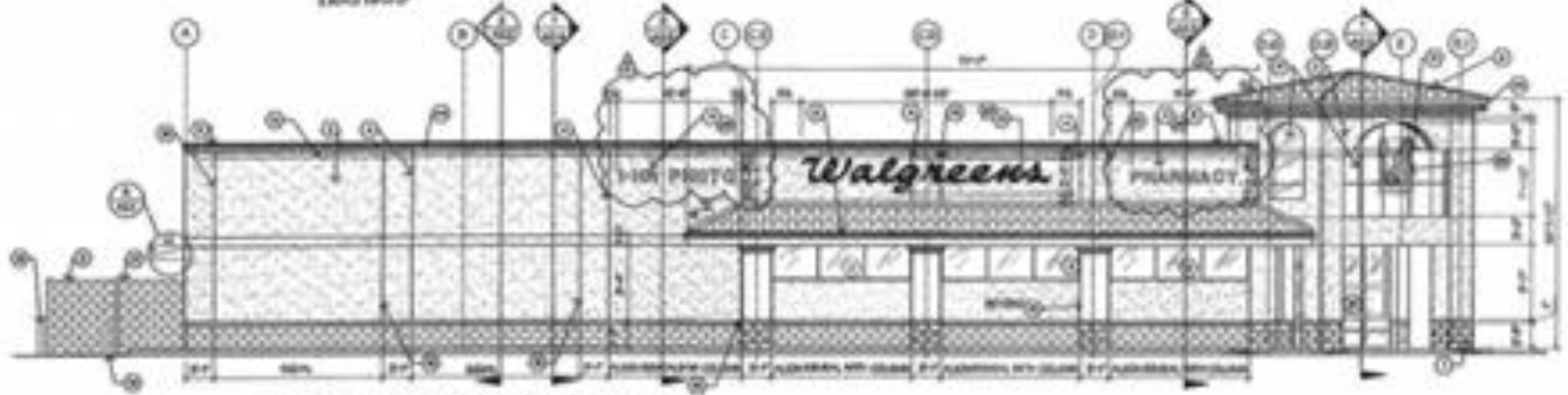
N Alvernon Way & E Grant Rd

E Grant Rd

Walmart Neighborhood Market



1 EAST EXTERIOR ELEVATION
SCALE 1/8" = 1'-0"



2 SOUTH EXTERIOR ELEVATION
SCALE 1/8" = 1'-0"

G|K

Gallagher & Kennedy

NOSSAMAN LLP

Improvements Analysis

GENERAL INFORMATION:

Gross Building Area: 13,650 Square Feet

Year Built / Age: 2003

Floor Area Ratio: 19.02%, based on a building area of 13,650 SF and a site area of 71,759 SF, according to a City of Tucson survey.

PARKING: 71 total parking spaces, including four ADA spaces. There are 14 spaces along the south boundary, fronting Grant Road. The City of Tucson off-street parking regulations require one space per 200 SF of building area. Based on this regulation, the subject's 13,650 SF retail store requires 69 spaces [$13,650 \text{ SF} \div 200 \text{ SF/space} = 68.25 \text{ spaces}$], which slightly exceeds zoning requirements. The parking ratio per 1,000 SF of building area is 5.2, before the acquisition.

Improvements Analysis (continued)

EFFECTIVE AGE: The actual age of the improvements is 17 years. The effective age is estimated to be 17 years based on the observed condition.

LIFE EXPECTANCY: Based on Life Expectancy tables in MVS, an average to good quality Class C drug store has a 40-year life expectancy. Based on the life expectancy table in MVS, the remaining economic life is about 23 years.



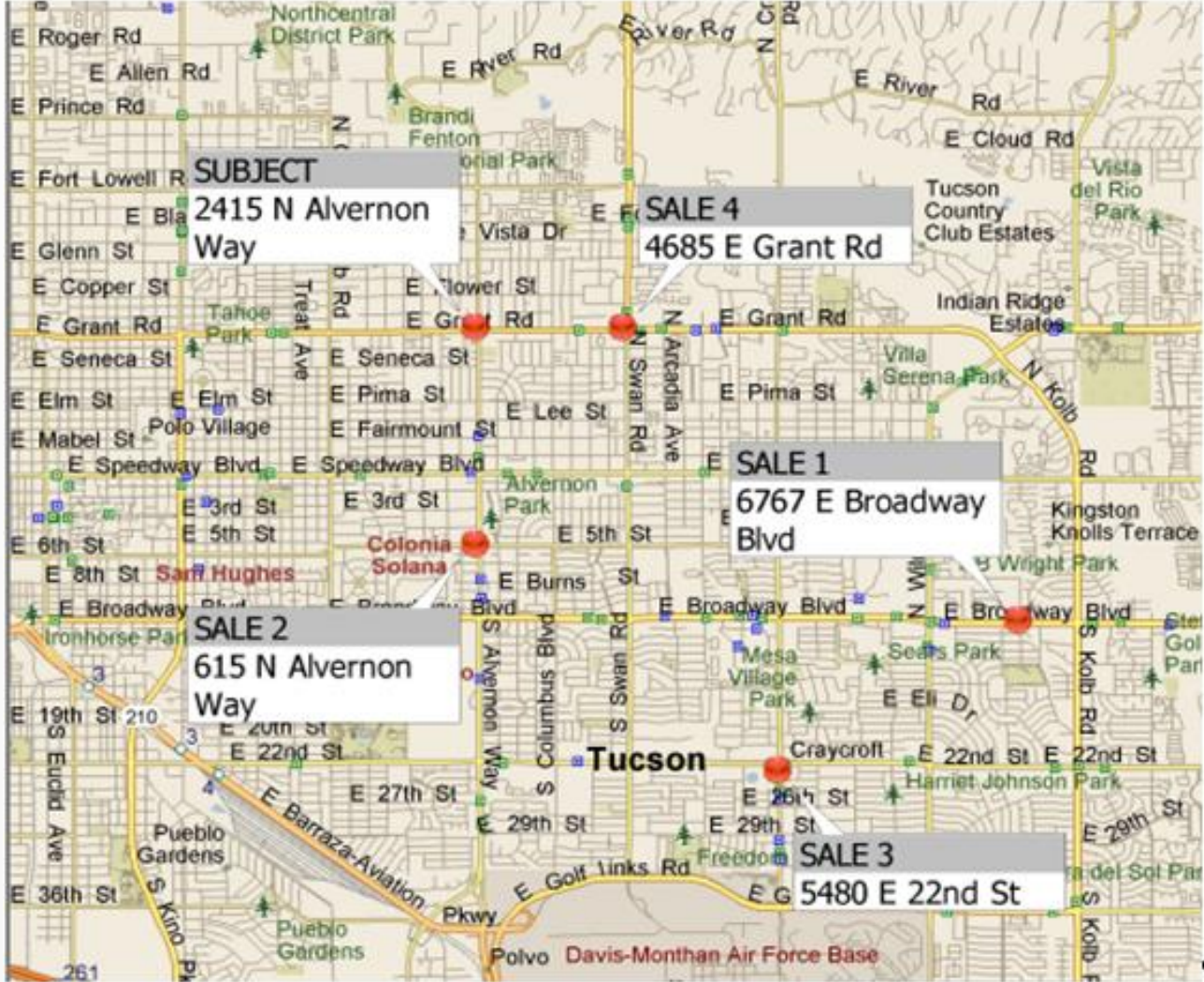
Highest and Best Use – “Before” Condition

- It is most advantageous to the property owner to continue to receive rents from Walgreens until the early termination date, 25 years after the lease commenced.
- The maximally productive and highest and best use is to continue to receive rent from Walgreens under the terms of the lease until June 30, 2028.

Project Influence

- Any influence in valuation caused by the project prior to the date of valuation is considered by the appraiser. However, the effect of these influences, if any, is disregarded in the valuation of the subject property, pursuant to Arizona Revised Statutes 28-7097.

Improved Sales Map



Comparable Improved Sale One

COMPARABLE:

PROPERTY NAME:

LOCATION:

TAX CODE NUMBER:

RECORDS:

Instrument:

Date Recorded:

Affidavit of Fee No:

SELLER:

BUYER:

INTEREST CONVEYED:

TERMS:

CONDITIONS OF SALE:

GROSS LEASABLE AREA (GLA) SQ. FT.:

SITE SIZE IN SQ. FT.:

SITE COVERAGE RATIO:

PARKING SPACES PROVIDED:

SALE PRICE:

SALE PRICE PER GLA SQ. FT.:

OCCUPANCY:

NET OPERATING INCOME:

NOI PER SQ. FT.:

CAPITALIZATION RATE (OAR):

PHYSICAL DESCRIPTION:

General Location:

Access / Visibility / Traffic Counts:

Topography / Shape:

Quality:

Flood Risk:

Year Built / Condition:

ZONING:

THREE YEAR HISTORY:

MARKETING TIME:

CONFIRMED WITH:

DATE CONFIRMED:

COMMENTS:

This was a portfolio transaction with 23 corporately owned Walgreen's stores across 13 states, all of which are located on hard corner locations. At the time of sale Walgreen's executed a sale/leaseback for all locations, with the 15-year absolute net leases, with a 5% rent increase in years 6 and 11. Twelve 5-year renewal options are also included in the leases.

IMPROVED COMP 1

Walgreens (Part of a Portfolio)

6767 E. Broadway Blvd

133-21-158F

Special Warranty Deed

October 29, 2019

20193020153

Walgreen Arizona Drug Co

WBTUAZD01 LLC

Leased Fee

Conventional Financing

Arm's-length

17,786

90,010

19.8%

71 spaces

\$5,422,399

\$304.87

100% Leased Fee (Walgreen's)

\$266,240

\$14.97

4.91%

Average - East Tucson

Good/Good/46,460 VPD

Level / Irregular

Average

Zone X

1997 / Average

C-1, Commercial Zone

No prior sales

111 DOM

Patricia Jacek, Broker for Buyer (847) 730-9330

July-21

Comparable Improved Sale One

- 6767 E. Broadway Boulevard - Front

- Aerial View



SUMMARY OF COMPARABLE IMPROVED SALES

SALE COMP	SALE DATE	PROPERTY LOCATION	ACTUAL SALE PRICE	GROSS SQ. FT.	PRICE PER SQ. FT.	NOI / SF	YEARS LEFT ON LEASE	TENANT
1	Oct-19	6767 E. BROADWAY MIDTOWN	\$5,422,399	17,786	\$304.87	\$33.00	14 YEARS	WALGREENS
2	Dec-19	615 N. ALVERNON WAY MIDTOWN	\$4,050,000	14,889	\$272.01	\$18.06	3 YEARS	CVS DRUG
3	Jul-20	5480 E. 22ND ST MIDTOWN	\$4,100,000	14,482	\$283.11	\$25.54	9 YEARS	WALGREENS
4	Nov-20	4685 E. GRANT MIDTOWN	\$7,396,226	15,608	\$473.87	\$25.31	15 YEARS	WALGREENS
¹ Adjusted sale price for cash equivalency and/or development costs (where applicable)								
SUBJECT	11/4/20	2415 N. Alvernon Way Tucson, Az	---	13,650	---	\$37.50	8 YEARS	WALGREENS

Market Conditions

- According to the CoStar Trend Report using retail sales in the Tucson MSA with sale dates from 2018 through 2020, the number of transactions increased from nine (9) in 2019 to 15 in 2020, and the average sale price per building square foot increased about 10% from \$189.75 to \$209.01.

Location Adjustments

Category	Subject	Sale 1	Sale 2	Sale 3	Sale 4	Listing 5
2020 Median Household Income (Within 1 Mile Radius)	\$33,673	\$33,637	\$28,897	\$36,491	\$25,655	\$25,655
2020 Median Home Value (Within 1 Mile Radius)	\$215,568	\$96,588	\$83,434	\$117,084	\$119,342	\$119,342
2020 Population (Within 1 Mile Radius)	23,613	13,778	16,947	13,071	141	141
Traffic Volume (Grant & Alvernon) (2-Way Vehicles Per Day)	64,000	9,000	21,000	31,544	12,622	12,622

Tenancy / Remaining Lease Term

- As previously discussed, the remaining lease term for the subject is about 7.7 years (92 months). Based on information derived from CoStar and marketing brochures, Sale One has about 14 years remaining on the Walgreens lease and a downward adjustment is indicated. Sale Two has about 3 years remaining, and an upward adjustment is indicated. Sale Three has about 9 years and 2 months left on its lease. Sale Four has about 15 years remaining, which is superior to the subject.

Economic Characteristics, NOI

- Under the subject's lease with Walgreens, the contract rent is about \$37.50 per square foot, with no escalations, until June 30, 2028. All the comparable sales have lower contract rents than the subject. A typical buyer would be willing to pay more for a property with higher rents, all other elements considered equal.

IMPROVED SALES ADJUSTMENT MATRIX - BEFORE

	SUBJECT	IMPROVED COMP 1		IMPROVED COMP 2		IMPROVED COMP 3		IMPROVED COMP 4	
ELEMENTS OF COMPARISON	2514 N. Averson Way	6767 E. Broadway Blvd	Price / sq ft Adjustments	615 N. Averson Way	Price / sq ft Adjustments	5480 E. 22nd St	Price / sq ft Adjustments	4685 E. Grant Rd	Price / sq ft Adjustments
SALE PRICE / PER SQUARE FOOT	--	\$5,422,399	\$304.87	\$4,050,000	\$272.01	\$4,100,000	\$283.11	\$7,396,226	\$473.87
TENANCY	Walgreens	Walgreens (Part of a Portfolio)		CVS Drug Store		Walgreens		Walgreens	
NOI Per SF	--	\$14.97		\$18.06		\$25.54		\$25.31	
OAR	--	4.91%		6.64%		9.02%		5.34%	
PROPERTY RIGHTS CONVEYED	Leased Fee	Leased Fee		Leased Fee		Leased Fee		Leased Fee	
Adjustment		0%	\$0.00	0%	\$0.00	0%	\$0.00	0%	\$0.00
			\$304.87		\$272.01		\$283.11		\$473.87
FINANCING TERMS	Assume Cash to Seller	Conventional Financing		Cash to Seller		Private financing		Conventional financing	
Adjustment		0%	\$0.00	0%	\$0.00	0%	\$0.00	0%	\$0.00
			\$304.87		\$272.01		\$283.11		\$473.87
CONDITIONS OF SALE	Assume Arm's-length	Arm's-length		Arm's-length		Arm's Length		Arms Length	
Adjustment		0%	\$0.00	0%	\$0.00	0%	\$0.00	0%	\$0.00
			\$304.87		\$272.01		\$283.11		\$473.87
MARKET CONDITIONS (TIME)	November 4, 2020	October 29, 2019		December 19, 2019		July 17, 2020		November 18, 2020	
Adjustment	Date of Value	1%	\$3.05	1%	\$2.72	0%	\$0.00	0%	\$0.00
ADJUSTED SALE PRICE PER SF			\$307.92		\$274.73		\$283.11		\$473.87
LOCATION	Average / Central / Vacant	Average / East / Walgreens		Good - Central Tucson		Average - Central Tucson		Good - Central Tucson	
General/Tenancy	Good/Good/64,000 VPD	Good/Good/46,460 VPD		Good/Avg/32,691 VPD		Good/Good/73,000 VPD		Good/Good/73,000 VPD	
Access/Visibility/Traffic Counts			0	+	+	0	0	0	0
Adjustment			0	+	+	0	0	0	0
PHYSICAL CHARACTERISTICS	13,650	17,786		14,889		14,482		15,608	
GLA in Square Feet (Size)			+	0	0	0	0	0	0
Adjustment			+	0	0	0	0	0	0
Construction / Quality / Appeal	Masonry / Class C, Average	Average		Average		Average		Average	
Adjustment			0	0	0	0	0	0	0
Year Built / Renovated / Condition	2003 / Average	1997 / Average		2002 / Average		2004 / Average		1997 / Good	
Adjustment			0	0	0	0	0	-	-
Site Coverage Ratio / Parking Ratio	19.02% / 5.2 per 1,000 SF	19.8% / 4.0		21.4% / 4.8		36.4% / 4.8		23.3% / 4.3	
Adjustment			+	+	+	+	+	+	+
Tenancy / Remaining Term	National Oper. / 17.7 Yrs. (Assume)	National Oper. / ±14 Yrs		National Oper. / ±3 Yrs		National Oper. / ±9 Yrs.		National Oper. / ±15 Yrs.	
Adjustment			-	+	+	0	0	-	-
Economic Characteristics (NOI)	\$33.00 PSF	\$15.00		\$18.06		\$25.54		\$25.31	
Adjustment			+	+	+	+	+	+	+
ADJUSTED SALE PRICE / SF		LESS THAN	\$307.92	GREATER THAN	\$274.73	EQUAL TO	\$283.11	LESS THAN	\$473.87

Adjustments to Sale Prices

- Some characteristics may require quantitative rather than qualitative adjustment, such as market conditions (time) as described above, or expenditures made immediately after purchase. But quantitative adjustment is not appropriate for characteristics for which reliable numerical adjustments cannot be derived from market data. Indeed, without adequate market support, the apparent precision of quantitative adjustments would convey a false sense of accuracy.

Market Value “Before” – Sales Appr.

- Strongest weight is given to Sales Two and Three greater similarities. Based on the foregoing data and analysis, it is my opinion that the “as is” value of the subject property, indicated through the Sales Comparison Approach, in the before condition, is approximately \$280.00 per square foot, as calculated below:

$$\$280/\text{SF} \times 13,650 \text{ SF} = \$3,822,000$$

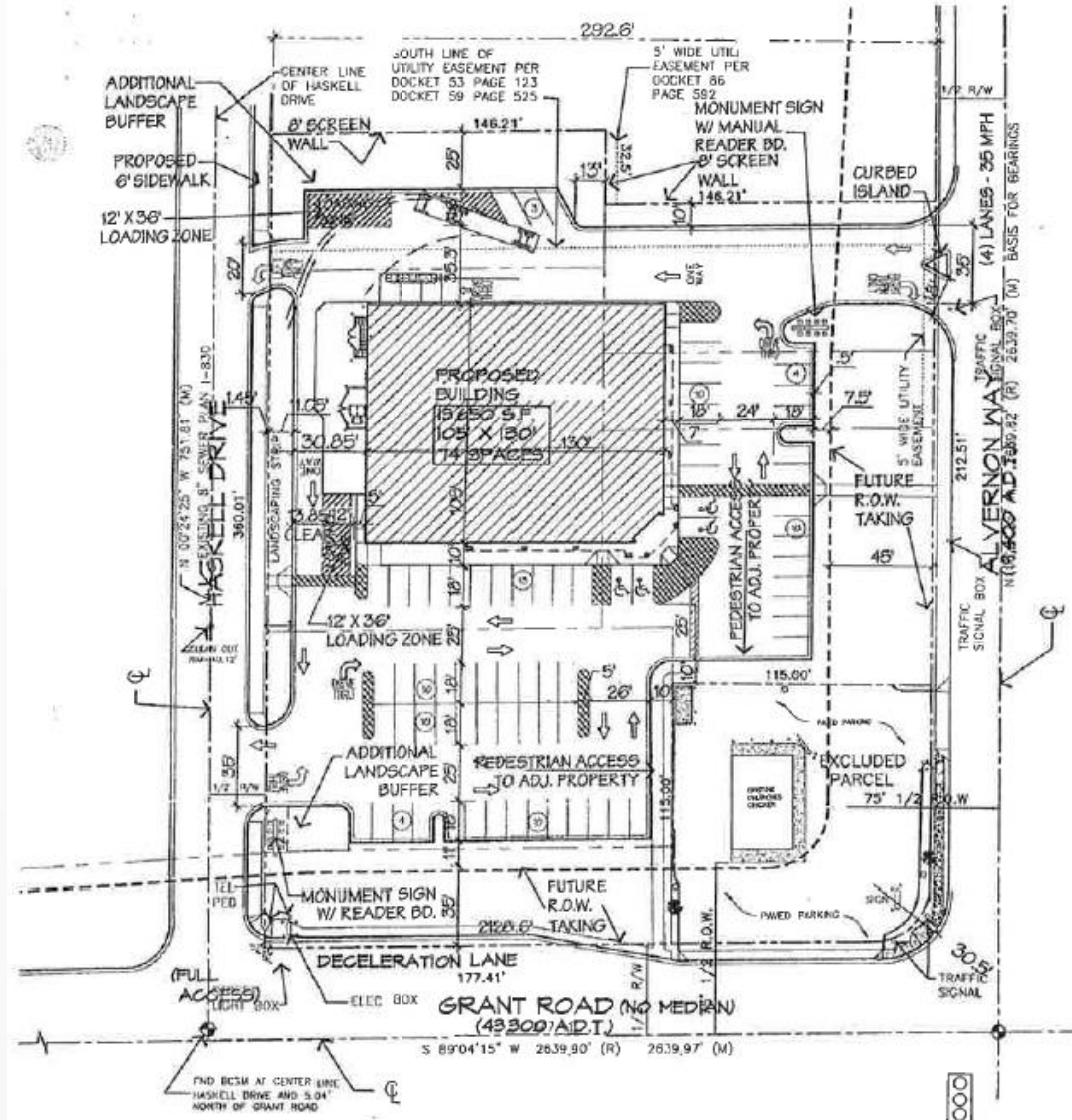
Rounded to \$3,820,000

Value of Remainder, As Part of Whole

Market Value of the Subject, Before Condition	\$3,820,000
Value of Right of Way to be Acquired	(\$93,148)
Site Improvements to be Acquired	<u>(\$47,392)</u>
Value of the Remainder, as Part of the Whole	\$3,679,460

Valuation “After” The Acquisition

- After the acquisition, the highest and best use of the subject property, as improved, is continued retail use. The size of the remainder parcel is sufficient for the continued commercial/retail use of the improvements. However, since Walgreens closed operations at this location in 2015, it is unlikely that the subject improvements will attract a national pharmacy like Walgreens. The net loss of 14 parking spaces raises the Site Coverage Ratio to 20.5%. The reduced number of available spaces may impact customer volume during peak hours. Since drug stores are typically rented as a triple net investment, the rent amount is related indirectly to potential sales volume generated at a specific location. A buyer would be willing to pay more for a property that can generate a high volume of sales. However, I have been unable to isolate a loss in value due to a somewhat lower parking ratio.



PROJECT NO. 1K2H
 DATE: 2/25/01
 REV. 01/14/03
 REV. 01/20/03
 REV. 02/24/03
 REV. 02/25/03
 REV. 04/16/03
 REV. 04/17/03

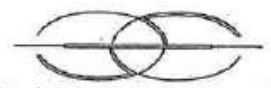


60 30 0 NORTH 60
 SCALE IN FEET

NOTE: 55FT TRUCK

SITE DATA
 LOT AREA: 89,522 SF. OR 1.59 ACRES
 LANDSCAPE: 27,527 SF (NOT INCLUDING FUTURE R.O.W. TAKING)

PROPOSED SITE PLAN
 (NWC) GRANT RD. & ALVERNON WAY
 TUCSON, AZ



CALLAHAN • GALLUP & Co.
 Architecture • Planning • Interior Design

9 East 4th Street • Suite 1000 • Tulsa, Oklahoma 74103
 (918) 584-8855 • (918) 584-2880 FAX

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 74 PARKING SPACES

Gatti 001005



SUMMARY OF COMPARABLE IMPROVED SALES - "AFTER"

SALE COMP	SALE DATE	PROPERTY LOCATION	ACTUAL SALE PRICE	GROSS SQ. FT.	PRICE PER SQ. FT.	NOI / SF	YEARS LEFT ON LEASE	TENANT/ OWNER
1	Mar-17	5123 E. SPEEDWAY MIDTOWN	\$2,640,000	13,164	\$200.55	\$14.00	7	WINDOW DEPOT
2	Apr-19	3436 N. COUNTRY CLUB MIDTOWN	\$1,670,000	8,978	\$186.01	\$11.98	7	DOLLAR GENERAL
3	Jan-20	3607 E. GRANT MIDTOWN	\$1,075,000	9,180	\$117.10	\$10.61	5	FAMILY DOLLAR
4	LISTING	7877 E. SYNDER NORTH EAST	\$2,923,000	14,944	\$195.60	\$12.71	5	WALGREENS
¹ Adjusted sale price for cash equivalency and/or development costs (where applicable)								
SUBJECT	11/4/20	2415 N. Alvernon Way Tucson, Az	---	13,650	---	\$37.50	8 YEARS	WALGREENS

Market Conditions

- However, the average sale price was stable from 2017 through 2020, ranging from \$1,799,384 in 2017 to \$1,728,588 in 2020.
- Overall capitalization rates increased slightly from 8.08% in 2017 to 8.57% in 2020.

Location – “After”

<u>Category</u>	<u>Subject</u>	<u>Sale 1</u>	<u>Sale 2</u>	<u>Sale 3</u>	<u>Sale 4</u>
2020 Median Household Income (Within 1 Mile Radius)	\$33,673	\$37,918	\$41,724	\$	\$25,655
2020 Median Home Value (Within 1 Mile Radius)	\$215,568	208,730	\$247,828	\$117,084	\$119,342
2020 Population (Within 1 Mile Radius)	23,613	15,918	13,839	13,071	7,635
Traffic Volume (Grant & Alvernon) (2-Way Vehicles Per Day)	64,000	40,062	16,135	45,000	12,622

IMPROVED SALES ADJUSTMENT MATRIX - AFTER

ELEMENTS OF COMPARISON	SUBJECT	IMPROVED COMP 1		IMPROVED COMP 2		IMPROVED COMP 3		IMPROVED COMP 4	
	2514 N. Alvernon Way	5123 E. Speedway Blvd	Price / sq ft Adjustments	3436 N. Country Club Rd	Price / sq ft Adjustments	3607 E. Grant Rd	Price / sq ft Adjustments	7877 E. Synder Rd	Price / sq ft Adjustments
SALE PRICE / PER SQUARE FOOT	--	\$2,640,000	\$304.87	\$1,670,000	\$186.01	\$1,075,700	\$283.11	\$2,923,000	\$195.60
TENANCY	Vacant	Window Depot		Dollar General		Family Dollar		Walgreens	
NOI Per SF	--	\$14.00		\$11.98		\$11.05		\$12.71	
OAR	--	6.98%		6.44%		8.94%		6.50%	
PROPERTY RIGHTS CONVEYED	Leased Fee	Leased Fee		Leased Fee		Leased Fee		0	
Adjustment		0%	\$0.00	0%	\$0.00	0%	\$0.00	0%	\$0.00
FINANCING TERMS	Assume Cash to Seller	Conventional Financing		Cash		Cash to Seller		Assume Conventional Fin.	
Adjustment		0%	\$0.00	0%	\$0.00	0%	\$0.00	0%	\$0.00
CONDITIONS OF SALE	Assume Arm's-length	Arm's-length		Arm's-length		Arm's-length		Assume Arm's-length	
Adjustment		0%	\$0.00	0%	\$0.00	0%	\$0.00	0%	\$0.00
MARKET CONDITIONS (TIME)	November 4, 2020	March 8, 2017		April 25, 2019		January 6, 2020		Listing	
Adjustment	Date of Value	3%	\$9.15	1%	\$1.86	1%	\$2.83	0%	\$0.00
ADJUSTED SALE PRICE PER SF			\$314.02		\$187.87		\$285.94		\$195.60
LOCATION	Average / Central / Vacant	Average/Central/Window Depot		Average/Central/2ndGen		Average - Central Tucson		Good/North/Walgreens	
General/Tenancy	Good/Good/64,000 VPD	Avg/Good/40,062 VPD		Avg/Below/Avg/16,135 VPD		Below/Avg/Avg/45,000		Good/Avg/13,500 VPD	
Access/Visibility/Traffic Counts			0	+	+	+	+	-	-
Adjustment			0						
PHYSICAL CHARACTERISTICS	13,650	13,164		8,978		9,180		14,944	
GLA in Square Feet (Size)			0	-	-	-	-	0	0
Adjustment			0						
Construction / Quality / Appeal	Masonry / Class C, Average	Masonry/Class C/Average		Metal / Class S/Below/Average		Metal / Class S / Below/Avg		Masonry / Class C / Average	
Adjustment			0	+	+	+	+	0	0
Year Built / Renovated / Condition	2003 / Average	2011/Average		2014/Average		1998 / Fair		2001/Good	
Adjustment			0	0	0	+	+	-	-
Site Coverage Ratio / Parking Ratio	20.46% / 4.18 per 1,000 SF	31.8% / 4.78		25.4% / 5.01		25.2% / 5.45		17.2% / 5.02	
Adjustment			+	0	0	0	0	-	-
Tenancy / Remaining Term	2nd Gen / 7.7 Yrs	National Oper. / ≥7 Yrs.		Discount Store / 7 Yrs		Discount Store / ±5 Yrs		National Oper. / ±5 Yrs.	
Adjustment			-	0	0	0	0	-	-
Economic Characteristics (Rent)	\$11.00 - Asking	\$14.00		\$11.98		\$10.61		\$12.71	
Adjustment	NNN		-	-	-	-	-	-	-
ADJUSTED SALE PRICE / SF			LESS THAN \$314.02		LESS THAN \$187.87		LESS THAN \$285.94		LESS THAN \$195.60

Market Value, After

$$\$120/\text{SF} \times 13,650 \text{ SF} = \$1,638,000$$

Rounded to \$1,600,000

**MARKET VALUE FOR THE SUBJECT INDICATED THROUGH
THE SALES COMPARISON APPROACH IN THE AFTER
CONDITION.....\$1,600,000**

Severance Damages

“Value of the Remainder, as part of the Whole	\$3,679,460
“As Is” Market Value, After the Acquisition	<u>\$1,600,000</u>
Severance Damages	\$2,079,460

SEVERANCE DAMAGES.....\$2,079,460



Total Award

Land to be Acquired for New Right of Way	\$93,148
Site Improvements to be Acquired	\$47,392
Severance Damages	\$2,079,46
Special Benefits	\$0
Total Award	\$2,220,000

Audience Participation Time!

Who wants to try their hand at cross-examining Steve?

Anyone want to rehabilitate Steve on re-direct?

Key Take-Aways From the Appraiser

Select “Good” Comparable Sales:

- Opinion of market value can be supported by studying the market’s reaction to comparable sales & competitive properties.
- Most reliable if sufficient, recent, reliable sales.
 1. Similar highest & best use of comparable sales or listings.
 2. Identify features that matter to buyers & sellers. Interview when verifying.
 3. Similarity in elements of comparison, esp. location, physical characteristics.
 4. Sales that recently occurred reflect current market conditions.

Key Take-Aways From the Appraiser

How to Pick “Good” Comparable Sales:

- Sale of similar property interest, i.e., fee simple title, leased fee, etc.
- Sale transacted with cash or its equivalent (institutional financing).
- Conditions of sale should EXCLUDE: sales made under duress, uninformed purchasers or sellers, related parties, government entities, project influences, and exchanges.
- Similar Market Conditions (recent date of sale).
- Similar Location.
- Similar Physical Characteristics.
- Similar Economic Characteristics.
- Same Highest and Best Use
- Non-realty Components: Exclude personal property or business value.

Key Take-Aways From the Appraiser

Additional tips for picking “good” sales:

1. Exclude sales that may have been influenced by project.
2. Obtaining reliable verification of sale information affects my selection of which sales might be used in the appraisal.
3. For court, attempt verification with all parties to the transaction.
4. Prior sale of the subject property, “Extremely probative.”
5. Appraisal may include sales after date of value, if reliable.

Key Take-Aways From the Appraiser

Preparing for Trial:

- My visit to a property buyer who complained about “Another appraiser taking photographs with a professional photographer.”
- Verifying sale with broker, buyer, and seller.
- Analyze pertinent information. What matters to buyers and sellers.
- Revisit subject property and comparable sales before trial.
- Internalize important facts about the appraisal.
- Be enthusiastic about your opinion in court. (Not deposition.)
- Tell the truth.

Handling Unexpected Questions

- Confucius say,
“Think first before
mouth moves.”



G|K

Gallagher & Kennedy

NOSSAMAN LLP

Key Take-Aways From the Appraiser

How to Handle Unexpected Questions:

- Answer truthfully.
- *“Experience has shown that triers of fact have an uncanny knack for distinguishing between the expert witness who is an advocate for his client and is testifying to a false value and the expert who is testifying to his unbiased opinion of value.”*

“Real Estate Valuation in Litigation,” Appraisal Institute, Page 447.

Key Take-Aways From the Attorney

Cross-Examination at Trial v. Deposition:

- Remember your audience
 - Deposition is typically for you and the judge
 - Trial is for the jury
- Keep it simple and direct, not the time to explore
 - Know your theme (see next slide) and stick with it
 - Limit to a handful of key points
- Avoid arguing with the witness
 - Get what you can and cut your losses
- Impeach with prior statements
 - Use deposition testimony and expert's reports and publications
 - Takes time to set up, so choose carefully
 - Inconsistencies that can be easily explained don't help

Key Take-Aways From the Attorney

Identify the Purpose of the Cross:

- Honest but mistaken
 - Bad assumptions or instructions
 - Incomplete investigation
 - Outside area of expertise
- Purposefully exaggerating or biased
 - Personal bias (rare)
 - True believer (common)
 - Financial motive – not as compelling
 - USPAP violations – only if significant or unfair
- Some good, some bad
 - Helpful testimony or evidence
 - Narrow disputed issues

Key Take-Aways From the Attorney

Follow the “Rules” . . . *kind of*:

- Be prepared, but listen
 - Prepare questions based on detailed review of deposition, expert’s report, and file
 - But pay attention to testimony at trial for helpful testimony, inconsistencies, or something new
- Ask leading, “yes” or “no” questions
 - Statement followed by “true,” “correct,” “right,” etc.
 - Unless you know the expert will hang him (or her) self
- Don’t ask the “big” question
 - Save the conclusions for your expert and your closing statement
 - But sometimes it’s worth the risk
- Be yourself, not your boss or someone on TV
 - Unless it works for you

Thank You



Steven Cole
Principal
Southwest Appraisal Associates



Jennifer Cranston
Shareholder
Gallagher & Kennedy





Condemnation Summit XXXI

Afternoon Networking Break

We will resume at 2:45 p.m.



Condemnation Summit XXXI

Preparing for Condemnation: Pre-Filing Acquisition & Appraisal Practices

Smedmore Bernard | Managing Director and Principal, Four Corners Valuations
Cheryl Eamick | President and Designated Broker, Sonoran Land Resources

PREPARING FOR CONDEMNATION

BEGIN WITH THE END IN MIND!

Client is Ready to Start ROW Acquisition!



Even the Best Laid Plans Have Faults!

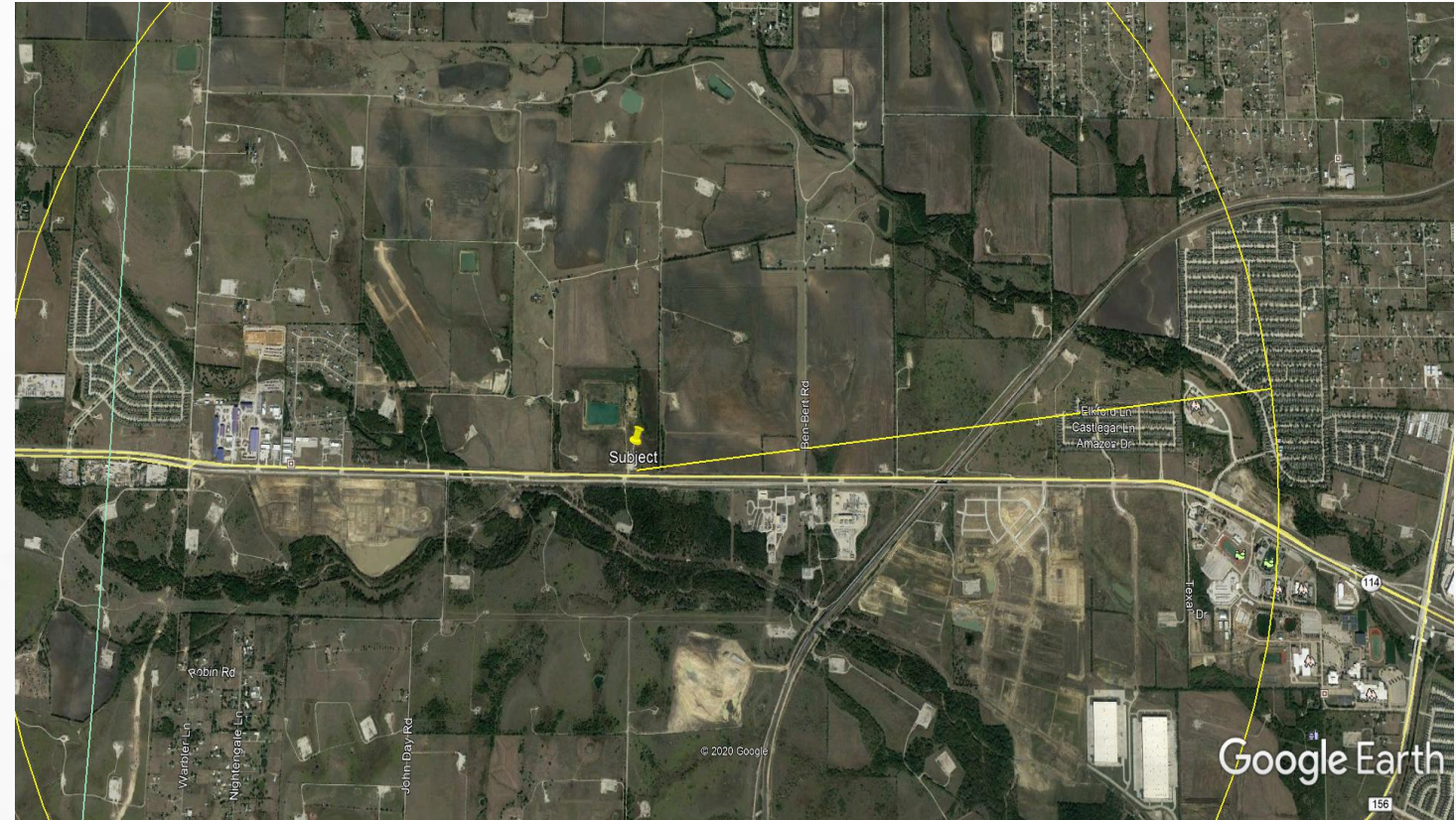
- Prior to project 30% design, allow ROW Agents and Appraisers to review project route.
 - Prepare a cost estimate commensurate with project impacts.
 - Identify title problems.
 - Identify potential severance damages (i.e., crops, parking, business access, etc.).
 - Avoid unnecessary severance damages.
 - Review of development projects happening in the project area or on the property.
 - Early reach out to landowners.



Cheryl and Smed's
SOAPBOX

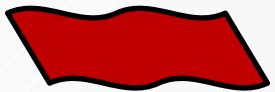
Case Study Location

- Subject is 250 Acres of Vacant Land
- Nearest Urban Density Subdivision 2.5 Miles



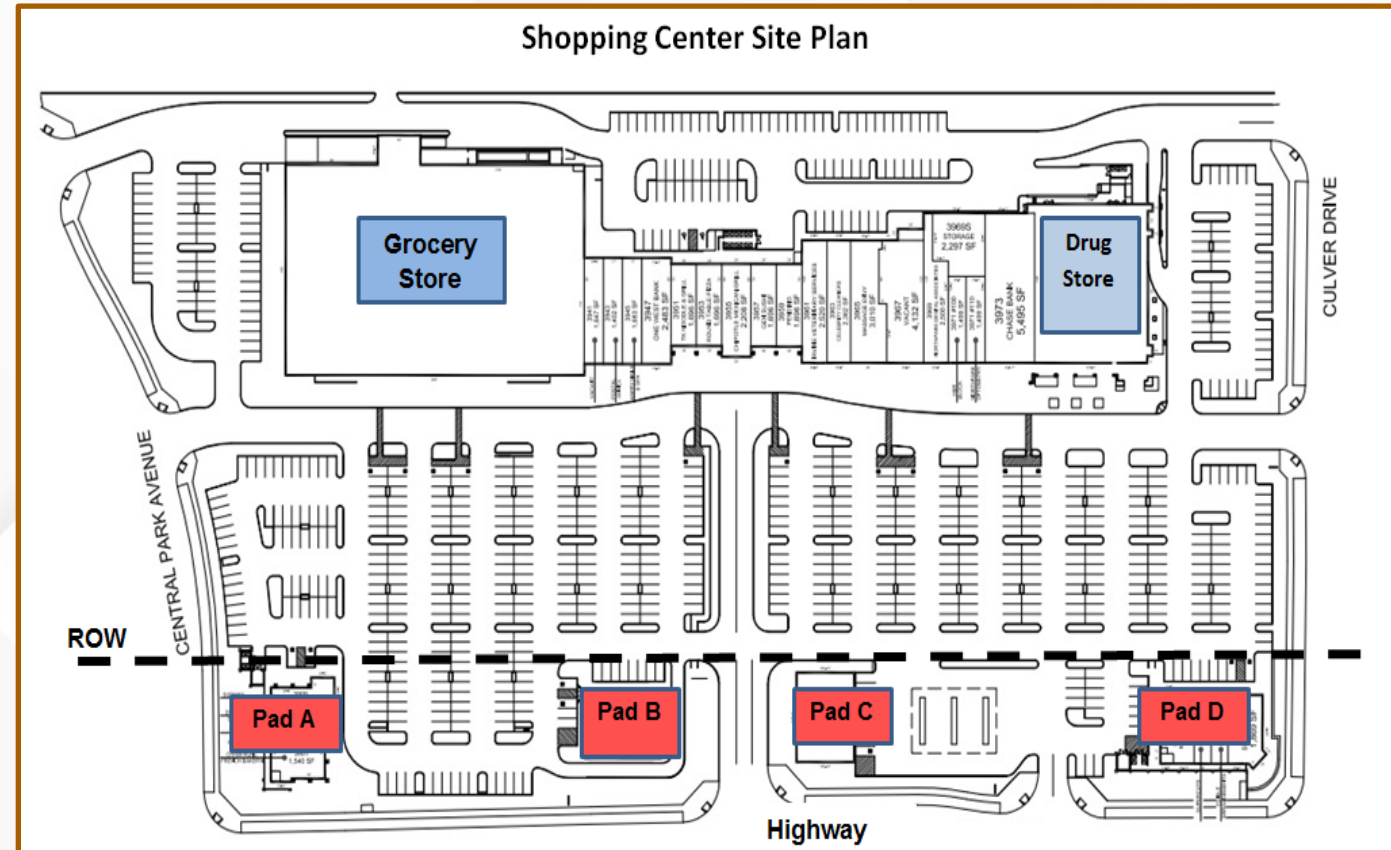
Appraisal Conclusion

- Highest and Best Use: ROW Area is a 6.5-acre strip Separate Economic Unit, out of a retail shopping center, out of a 250-acre tract.
- Comparable Sales All Branch Banks: User Sales – 8 to 12 miles from subject that sold for \$23 to \$27 per square foot.
- ROW Compensation: \$25 per square foot for total ROW Acquisition Area.
- Note the \$25 per square foot was based on pad site sales but applied to the total 6.5-acre Economic Unit.



What is the “Actual” Highest and Best Use?

- Landowner’s Proposed Land Plan



The “Actual” Highest and Best Use

1. Use:

Four Branch Banks as part of a Neighborhood Retail Shopping Center.

2. Timing for Use:

Immediate Development and Occupancy of ALL four pad sites with branch banks.

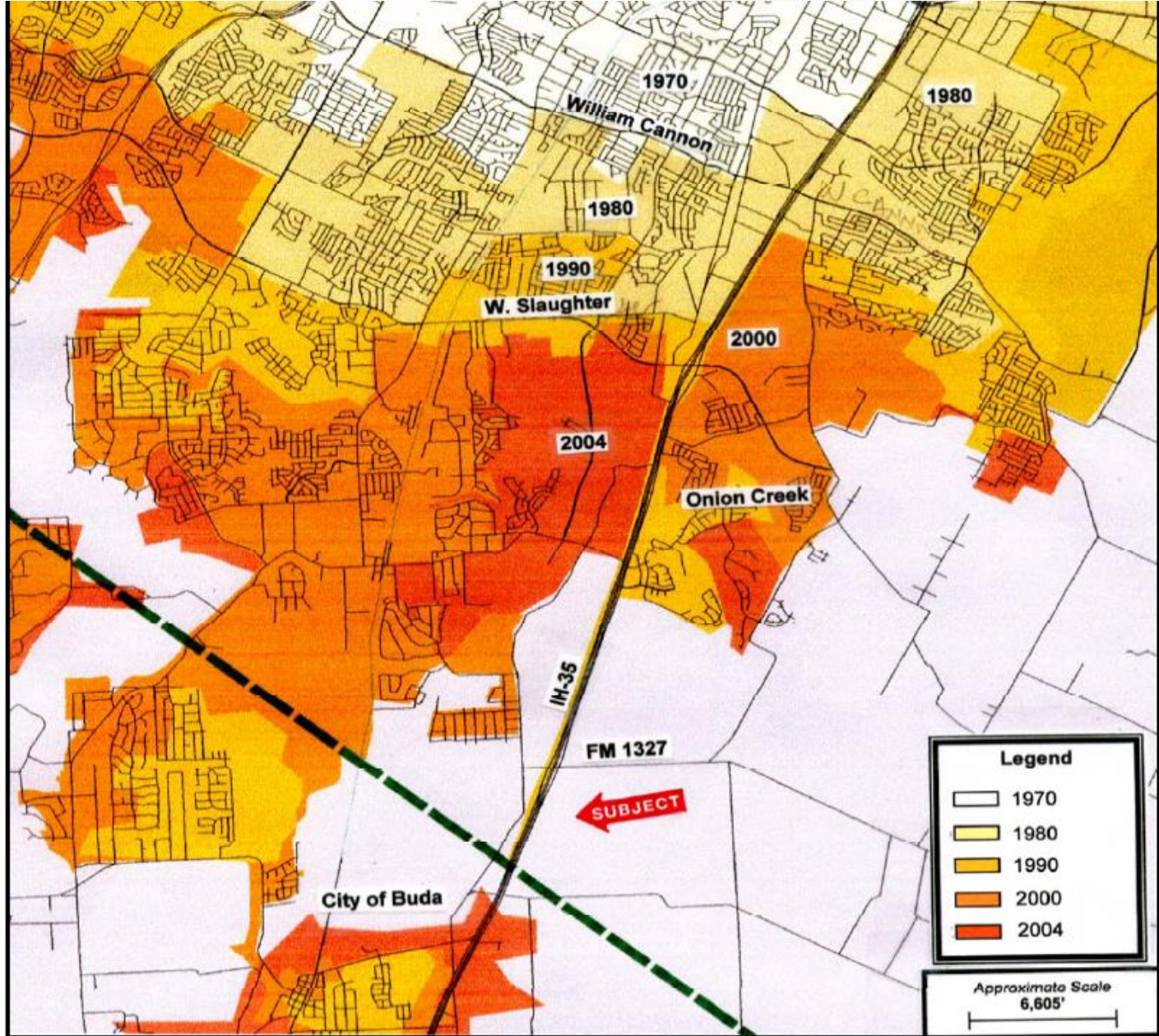
3. Market Participants:

Users: Population within about 1 to 3 miles.

Most Probable Buyer: Developer for branch banks.

A Rate of Growth Analysis Technique

- Case Study: 200 vacant acres fronting highway close to a major city.
- Purpose of Analysis: As part of support in forecasting development timing for subject vacant land appraisal.
- Analysis Technique: Scale Historical Urbanized Growth toward the Subject (urbanized = 50% of the area developed).



Urbanized Area Over Time

Rate of Urban Growth Analysis (continued)

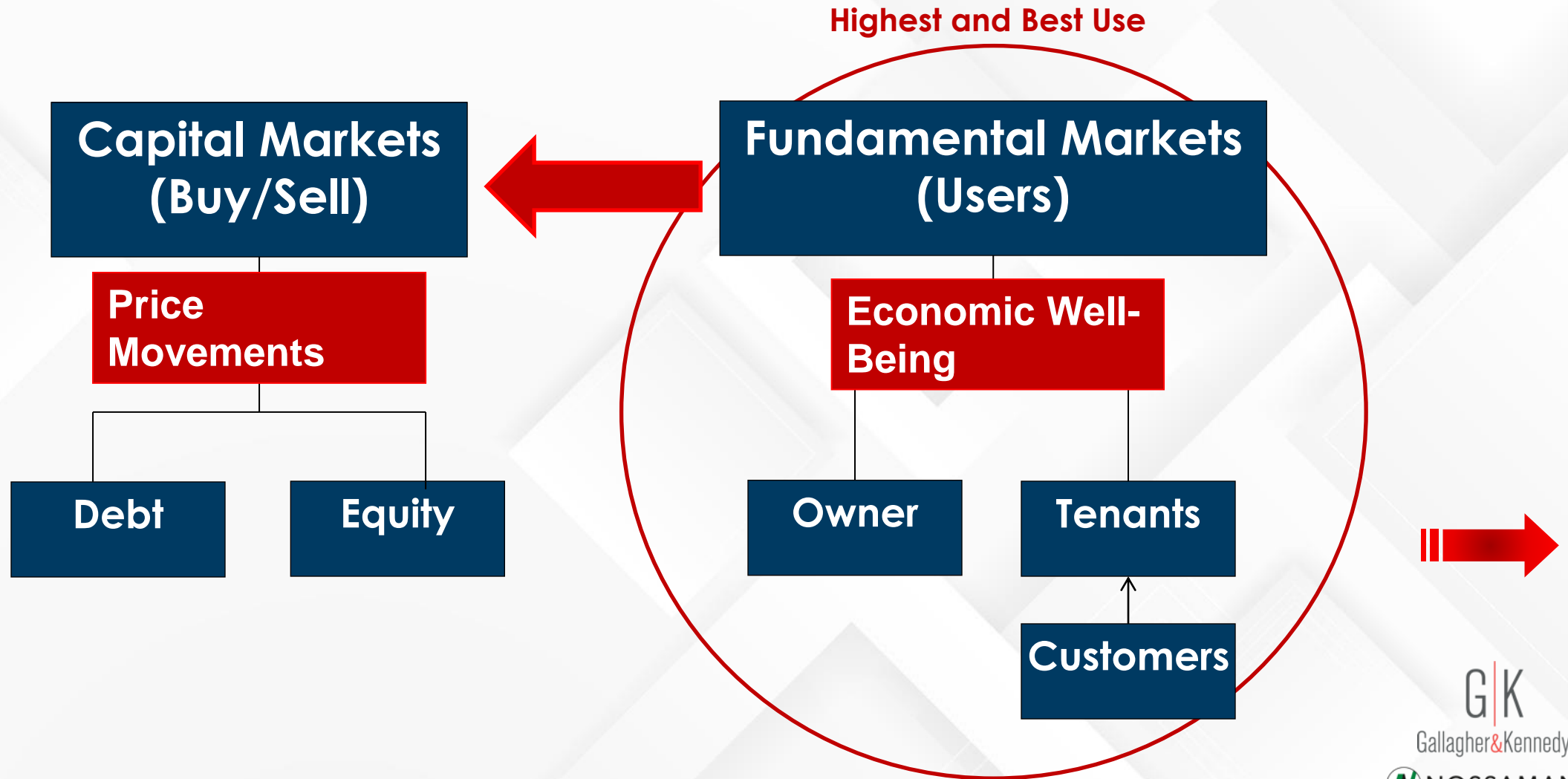
- Historical growth toward the subject over the last 24 years (1980-2004) was found to average 0.162 miles per year.
- Distance to the subject from current urbanized area is 1.63 miles.
- Based on historical growth it will be approximately 10 years before the subject area is urbanized.
- **1.63 miles ÷ 0.162 miles per year = 10.062 years**

PART 2 - HIGHEST AND BEST USE PRINCIPLES

“THE GOAL OF HIGHEST AND BEST USE ANALYSIS IS TO DETERMINE WHICH USE PRODUCES THE HIGHEST PRESENT VALUE OF THE FUTURE BENEFITS.”

SOURCE: *THE APPRAISAL OF REAL ESTATE* 15TH PG. 317

Two Real Estate Markets



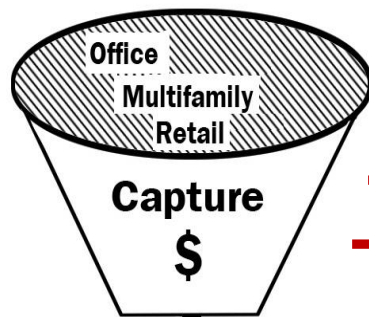
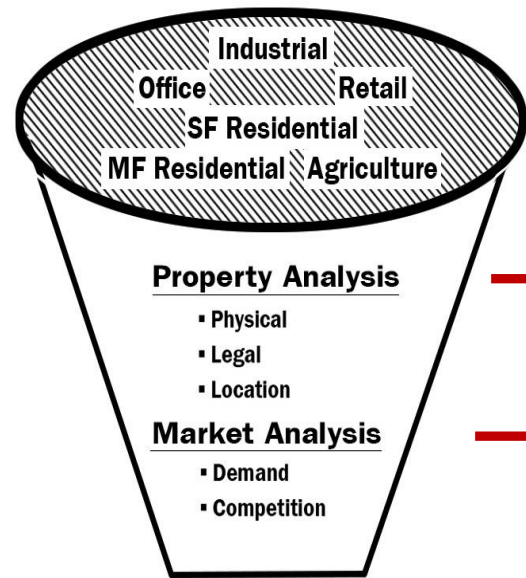
Overview Highest and Best Use Process

- The essential components of highest and best use analysis are:
 1. A specific property's physical, legal, and locational attributes that determine use.
 2. The economic demand for the potential alternative uses of that property.
 3. Estimates of the financial rewards for each alternative use.

- Source: *The Appraisal of Real Estate* 15th pg. 317

Highest & Best Use A Decision Making Process

Eight Step Process



Three Part Conclusion

Step #1

Step #2-5

Step #6

Step #7

Step #8

Source: Fanning, *Market Analysis for Real Estate 2nd Edition* (Appraisal Institute 2015) page 515

Appraisal Stumbling Blocks

- Defining the larger parcel.
- Defining acquisition including any temporary easements.
- Identifying all landowners.
- Approved legal description in place.
- Improvements on the site.
- Need for specialty reports:
 - Phase I ESA
 - Soils Studies
 - Engineer Reports
 - Site Improvements

ROW Stumbling Blocks

- Unanticipated ROW needs and severance damages.
- Timeline of the project tied to federal funding deadlines.
 - Right of immediate possession?
- Title Insurance Requirements and Clearing the Clouds.

Houston, We Have a Problem!



Right of Immediate Possession?

Unless you are the state, its subdivision, or a municipal corporation, immediate possession cannot be obtained because . . . **Arizona Constitution Article 2, § 17 says**

Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes. **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.** Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

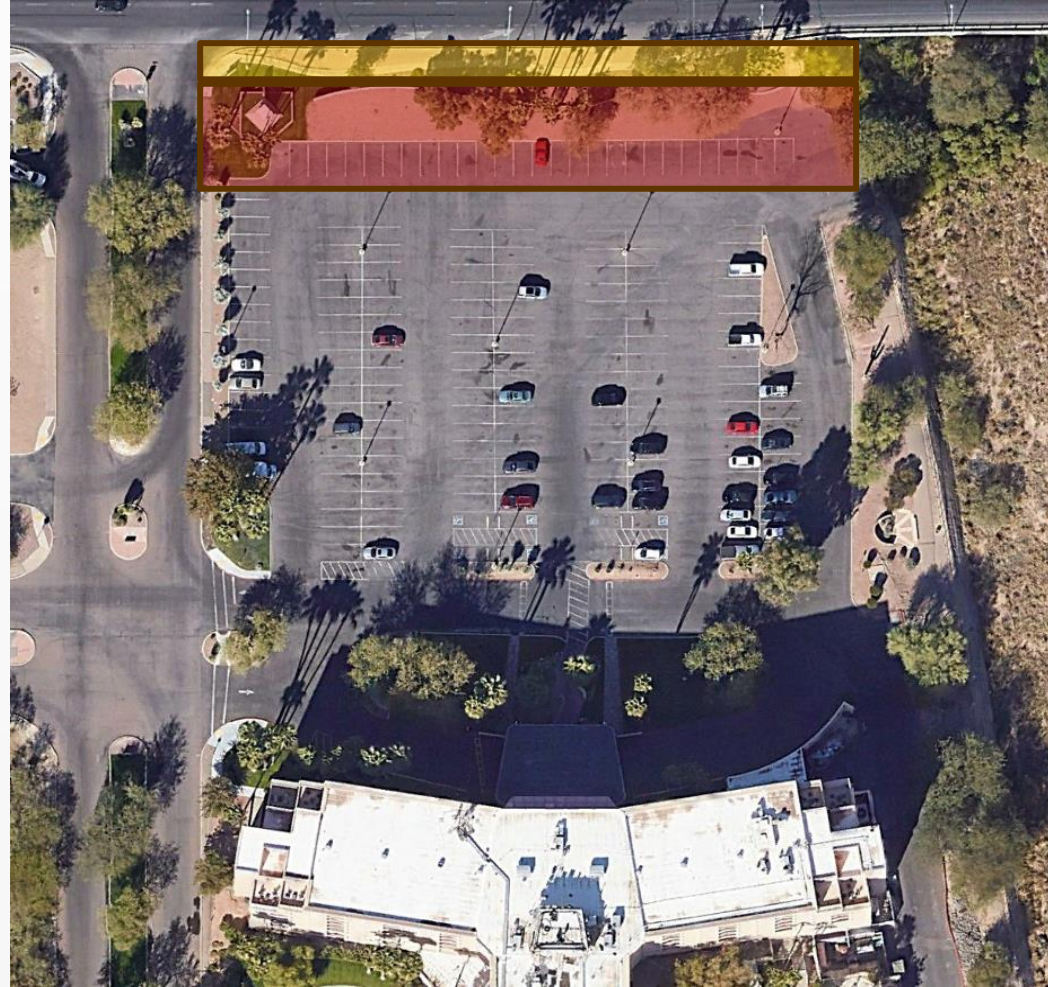
The Arizona Supreme Court has held (Hughes Tool Co. v. Superior Court, 91 Ariz. 154 (1962)) that this provision prohibited a private entity exercising eminent domain from obtaining prejudgment possession, because it requires the “advance jury determination of damages.”

G|K

Gallagher & Kennedy

NOSSAMAN LLP

Hotel Parking and Unplanned Temporary Construction Easement

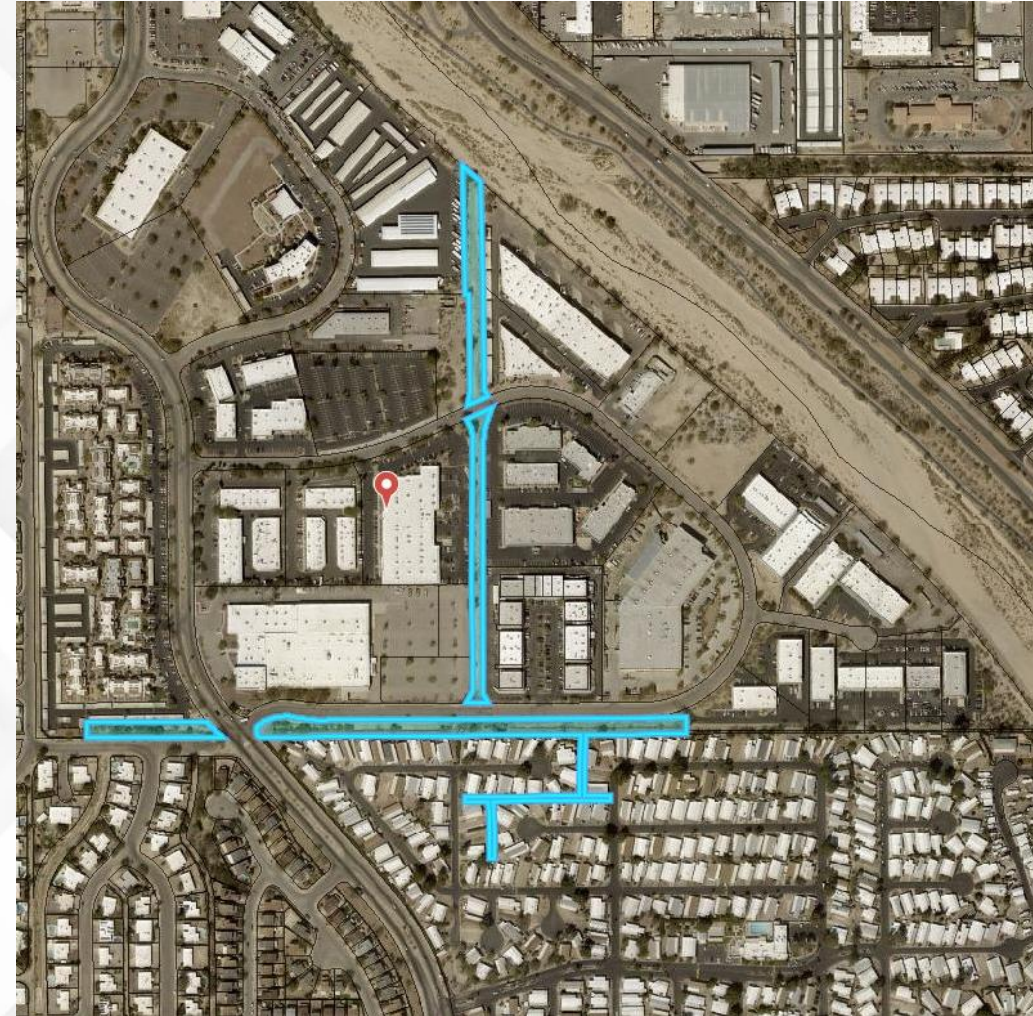


ROW

TCE

Defunct Corporation

- Parcel appears to be for drainage.
- Owned by a Defunct Corporation.
- Sole member of corporation was difficult to find and claimed they were not the owner.
- Condemned minor aerial crossing easement and TCE for \$150.65.



Clouds on Title

- Reservations or reversionary clauses in the Patent.
- Property boundaries are in question.
- Vesting Deed is questionable – Defunct Corporations.
- Liens:
 - Tax Liens
 - Mechanics Liens
- Judgements.

Appraisal and Importance of the Title Commitment

- Accuracy of title commitment and how current it is.
- Transactions are accurate and any encumbrances.
 - Exclusive Easements (example: subsurface users)
- Identification of all users.

Thinking Outside the Box and In Regulatory Framework



MOVIECLIPS.COM

Avoid Condemnation Through Negotiation



- Listen to the needs and concerns of the landowner. It's not always about the money!
- OWLS! Landowner wants bird deterrents on a transmission line AND owls on his roof.
- Liability concerns. Landowner knew there were potential contaminants on the property and didn't want to be held liable for any of the Client's contractors being exposed.
 - Conducted additional soil testing in the easement area with landowner consent.
 - Added language to the easement with additional indemnification of the landowner.
 - Required easement staking and training for client and contractors to stay within the easement area.

Review “Current” Title Commitment

- Lien Holders - Requires Subordination or Consent
 - Property covered up with liens valued more than fair market value?
- Water Rights
- Exclusive Interests
- Scrivener’s Errors
- Mortgage or Foreclosure and Short Sales

Smed would be lucky if?

- ROW agent provides these things:
 - Past research, including any studies conducted on the property including specialty reports.
 - Maps with aerial photo showing project impacts.
 - Contact records with the landowner.
 - Legal description.
 - Title Commitment, including anything applicable to value.
 - Current and proposed land use.
 - Project timeframe.
 - Any prior ROW cost estimates of comps used to value ROW.

Legal Counsel Needs From Agent/Appraiser

- Current “litigation appraisal”
- Current “litigation title guarantee”
- Copies of all correspondence with landowner:
 - Agent – Landowner Contact notes
 - Agent research and all studies conducted on the property
 - Reach out letter
 - Right of Entry (if required, i.e., ground disturbance)
 - Offer letter
 - Certified mail receipts
 - Legal descriptions (include any temporary construction easements)
 - Demonstration of “Effective Notice”
 - 20 days for AZ and 30 days for federally funded projects

Litigation Appraisal

- Different Appraiser than the deposit appraiser may be required.
- Clearly identified subject property and scope of work.
- Seek advice and information from legal counsel (by telephone or in-person).
- Strong Fundamental Market Analysis.
 - Market research of subject property and its immediate market.
- Clear and strong highest and best use analysis.

Litigation Title Guarantee

- Is prepared solely for litigation guarantee.
- Offers protection that all parties as defendants/plaintiffs are named, so any judgment is binding.
- Issued with assurances to attorney and client.
- Is for the same amount shown in the litigation appraisal.

THIS LITIGATION GUARANTEE IS FURNISHED SOLELY FOR THE PURPOSE OF FACILITATING THE FILING OF THE ACTION REFERRED TO IN SCHEDULE A. IT SHALL NOT BE USED OR RELIED UPON FOR ANY OTHER PURPOSE.

Begin With the End in Mind



- Purpose and Need for Project

- A.R.S. § 12-1112 provides that the taking of private property must be for a public use and that the taking is necessary to such public use. Arizona case law has generally interpreted public use to include Use of the land by the public; promoting the public welfare; or promoting the purpose of a governmental entity.
- “Takings Clause” 5th Amendment limits the power of eminent domain by requiring “just compensation” be paid if private property is taken for a public use.

Bailey v. City of Mesa, 206 Ariz. 224, 230, 76 P.3d 898, 904 (App. 2003) the Arizona appellate court held that the “...anticipated public benefits must substantially outweigh” any character of private use of the land taken.

Kelo v. City of New London, 545 U.S. 469 (2005) US Supreme court held that use of eminent domain to transfer from one private landowner to another to further economic development does not violate the “Takings Clause of the Fifth Amendment.”

A scenic landscape featuring a winding asphalt road that curves through a valley. On the left, a steep, grassy hillside rises, with a few small figures of people visible on its crest. The sky is a vibrant mix of blue and orange, suggesting a sunset or sunrise, with wispy clouds and a large flock of birds in flight. The overall mood is contemplative and hopeful.

FINAL THOUGHTS
HAVE AN IDEA OF WHAT IS IN THE CURVE
BEFORE YOU GET THERE!

Thank You



Smedmore Bernard
Managing Director and Principal
Four Corners Valuations



Cheryl Eamick
President and Designated Broker
Sonoran Land Resources



Condemnation Summit XXXI

Afternoon Networking & Cookie Break

Sponsored by Integra Realty Resources

We will resume at 4:00 p.m.



Condemnation Summit XXXI

Condemnation Case Law Update 2024

Cassandra Ayres | Attorney, Berry Riddell LLC
Jordan Leavitt | Partner, Nossaman LLP

Arizona

- *Cao v. PFP Dorsey Investments, LLC*
- *State v. Foothills Rsrv. Master Owners Ass'n*

Cao v. PFP Dorsey Investments, LLC 2024 WL 1223893 (2024)



Factual Background

- Dorsey Place is a 96-unit condominium.
- Developer recorded a declaration subjecting the property to the Condominium Act (A.R.S. § 33-1201 et seq.).
- Key Provisions:
 - 1 vote per each unit owned.
 - Incorporated Condo Act as amended from time to time.
 - Condo may be terminated by agreement of 90% of Association votes.

Factual Background

- PFP Dorsey purchases 90 units in Nov 2018 (94% of the Association's votes).
- Xias owns 1 unit (bought in January 2018) & other individuals own 5 additional units.
- A.R.S. § 33-1228(c) provides “a termination agreement may provide that all of the common elements and units of the condominium shall be sold following termination.”

Termination Agreement

- April 2019 – Association circulated termination agreement
- Upon termination, Association will sell “all portions of and interest” in the Condo that do not belong to PFP Dorsey to PFP Dorsey.
- PFP Dorsey would pay fair market value for the units.
- PFP Dorsey ratified termination agreement, records deeds against Xias, and takes possession of Xias’ unit.

Key Issues

- Does A.R.S. § 33-1228(c) authorize an unconstitutional taking of private property for private use?
- Did A.R.S. § 33-1228(c) require all units to be sold pursuant to a termination agreement?

Key Holdings

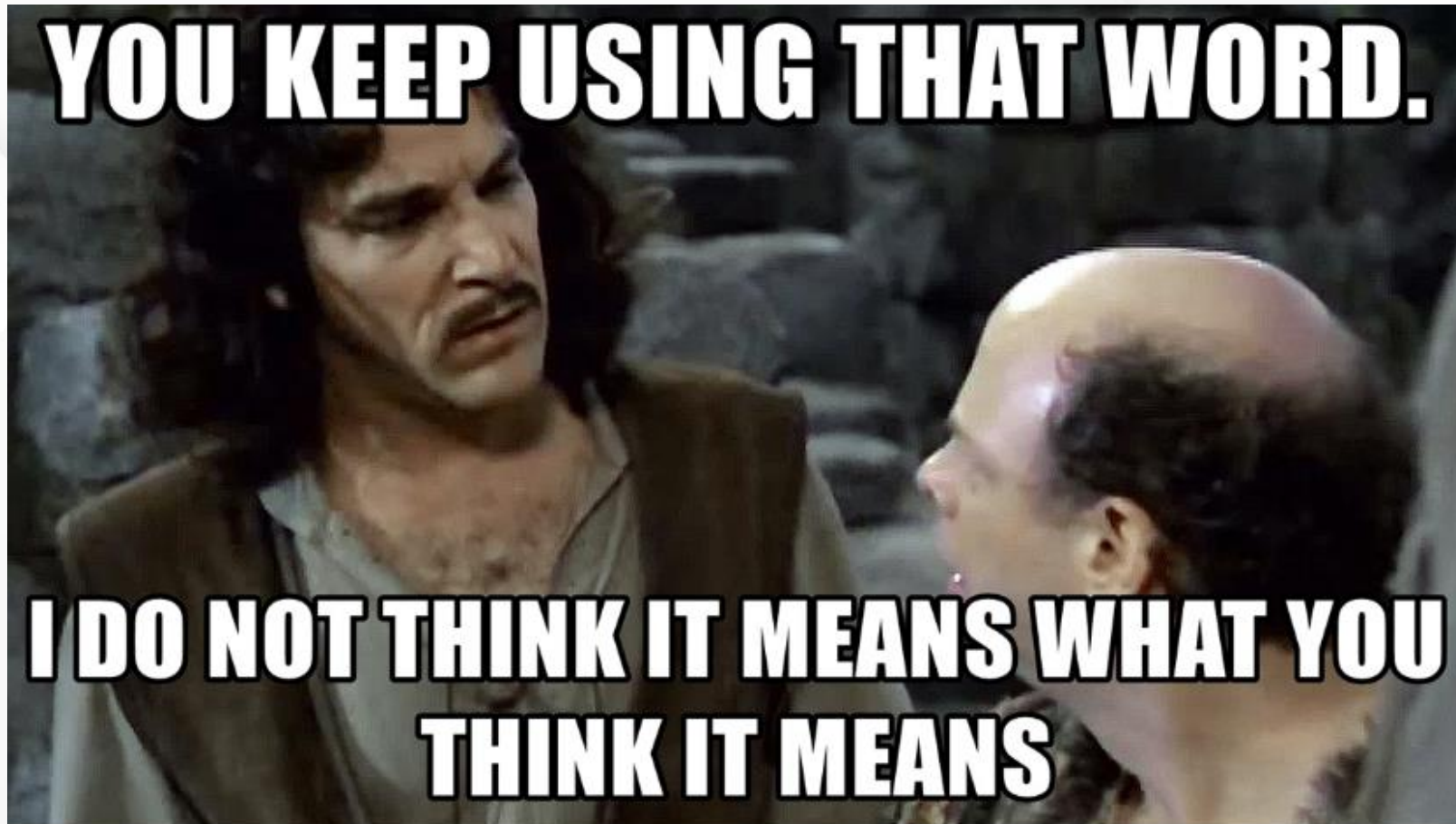
- Art. II, Sec. 17 not implicated in this case because dispute arose from parties' contract, not statute.
- A.R.S. § 33-1228(c) only authorized a sale of all condominium property if the termination agreement provided for a sale.

Eminent Domain Analysis



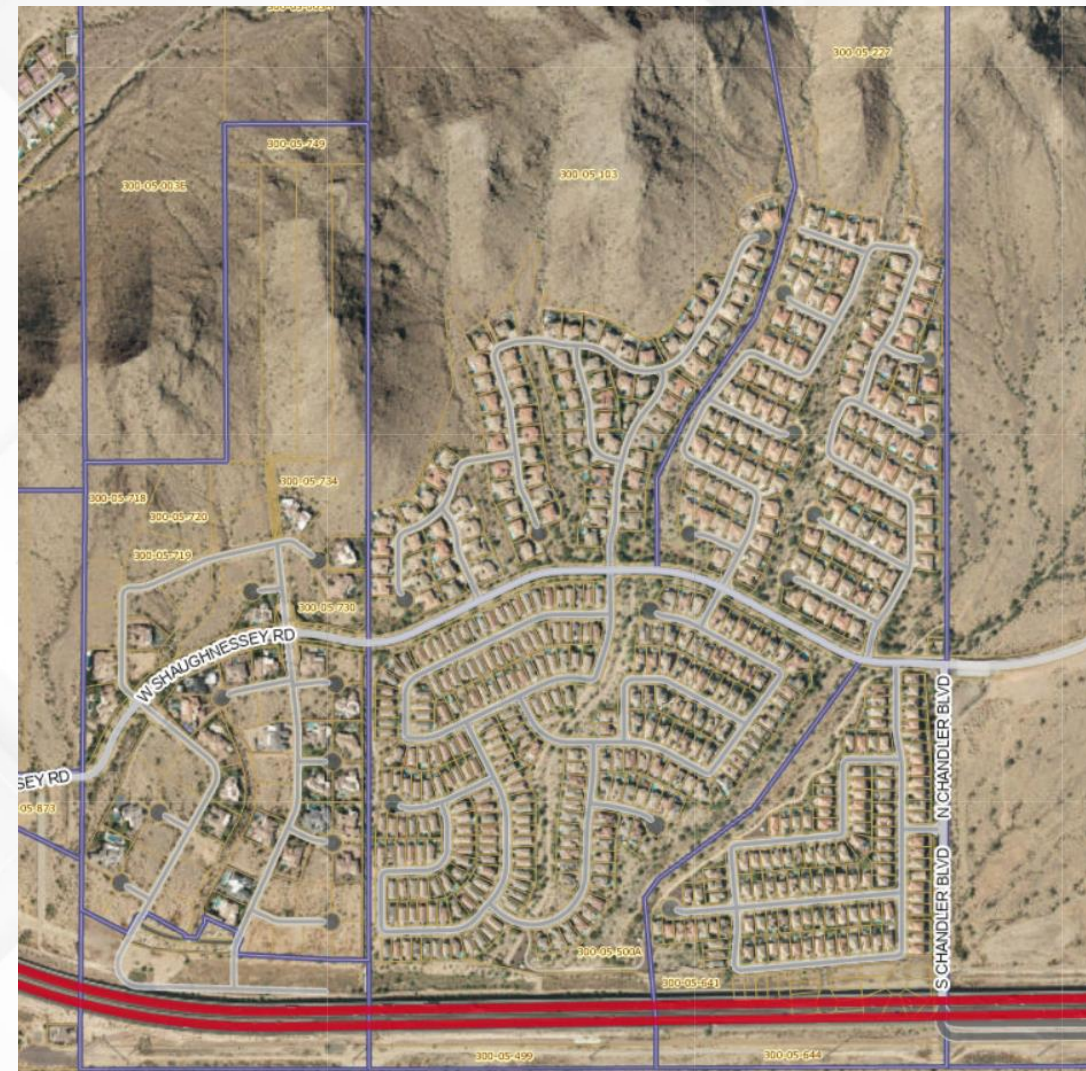
- Arizona Supreme Court (Eminent Domain)
 - Association’s power to force sale emanates from contract, not statute, & contracting parties may agree to waive constitutional rights.
 - Because Xias agreed to follow Condominium Act—including portion about termination agreements—Court does not address its constitutionality (Condominium Act “did not effect a taking of the Xias’ property”).

State v. Foothills Rsrv. Master Owners Ass'n
540 P.3d 1236 (App. 2023)



Background

- Foothills Reserve is a 590-home subdivision at the base of South Mountain.
- CCR – Each homeowner had “a nonexclusive easement for the use and enjoyment in and to the Common Areas.”
- Recorded Plat – Common Areas were to remain “open space” and “owned and maintained by the [Association] for landscaping at maintenance purposes.
- ADOT condemned the Common Areas to expand the South Mountain Freeway.



Background

- Homeowners sought compensation for a complete taking of their easements.
- ADOT “conceded that compensation was due for the value of the easement interests lost, measured by the market value of the home before (with the easement) and after (without the easement) but argued that the homeowners could not claim proximity damages because they had no possessory interest in the common areas.”
- The Superior Court found that the Homeowners could seek proximity damages.

The Stipulation

- The parties entered into a stipulation with two possible damage awards pending appeal of the proximity damages.
- **Option 1**: If no proximity damages, \$6,000,000 for the value of the condemned easements.
- **Option 2**: If proximity damages are available, \$6,000,000 for the value of the condemned easements **and** \$12,000,000 for proximity damages.

Issue on Appeal

- Whether 589 homeowners were entitled to proximity damages “when the state condemned their positive and negative easements, but did not condemn their homes.”

Holding

- Because an easement is not a parcel of land, the homeowners deserved no severance damages.

What does “Part of a Larger Parcel” mean?

Severance Damage Statute:

- *“If the property sought to be condemned constitutes only a part of a larger parcel, [a court or jury shall assess] the damages that will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff.” A.R.S. § 12-1122(A)(2).*

Court’s Analysis:

- “Part of a Larger Parcel” implies the property to be condemned “must be a smaller parcel.”
- Parcel means Parcel of Land
- Homeowners’ easements “were not parcels of land.”
- “Because an easement is not a parcel of land, the homeowners were not entitled to severance damages.”

Additional Analyses

- Severance damages are available only if the claimant owns the larger parcel from which the smaller parcel is condemned.
 - The HOA, not the individual homeowners, owned the common area.
- Court declined to address any constitutional challenge to the severance damage statute because it had not been briefed.

Petition for Review and Response

- Petition for Review filed on 2/5/24; Response filed on 4/5/24.
- Petition: “The seismic consequence: every taking of an easement (utility, conservation, access, air, etc.) or lease now no longer receives the constitutional guarantee of just compensation (which requires payment of severance damages).”
- Response: “The opinion correctly determined that Homeowners were not entitled to severance damages because although their easements were property, they were not parcels of land.”

SCOTUS

- *Sheetz v. County of El Dorado*
- *Tyler v. Hennepin County*
- *Devillier v. Texas*

Sheetz v. County of El Dorado, California

601 U.S. ____ (2024)



Factual Background

- George Sheetz wanted to build a prefabricated home on his property.
- County's General Plan conditions building permit on payment of a traffic impact fee.
- Fee amount is determined by a rate schedule based on type of development and location (but not on the particular project).
- Fee in this case was \$32,000.
- Sheetz alleges the fee violated the takings clause of the Fifth Amendment because the County did not make individualized determination under *Nollan/Dolan*.

Nollan/Dolan Test

- If a government can deny a building permit to further a legitimate police-power purpose, it can also place conditions on the permit to serve that end – this is a “hallmark of responsible land-use policy.”
- Two-Part Test: Permit conditions must have:
 1. ESSENTIAL NEXUS to the government’s land-use interest.
 2. ROUGH PROPORTIONALITY to the development’s impact on the land-use interest.

California Court of Appeals

- “Under California law, only certain development fees are subject to the heightened scrutiny of the *Nollan/Dolan* test,” not those which are generally applicable to broad class of property owners through legislative action.

Question Presented

- “Whether a permit exaction is exempt from the unconstitutional-conditions doctrine as applied in *Nollan* and *Dolan* simply because it is authorized by legislation.”

Holding

- The Fifth Amendment's takings clause does not distinguish between legislative and administrative land-use permit conditions.



Holding

- When the government withholds or conditions a building permit for reasons unrelated to its legitimate land-use interests, those actions amount to extortion.
- The Constitution provides no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation.
- A legislative exception to the *Nollan/Dolan* test conflicts with the rest of the Court's takings jurisprudence which does not distinguish between legislation and other official acts.

Unanswered Questions

- We do not address the parties' other disputes over the validity of the traffic impact fee, including whether a permit condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular development.
- These issues must first be considered by the State Court.

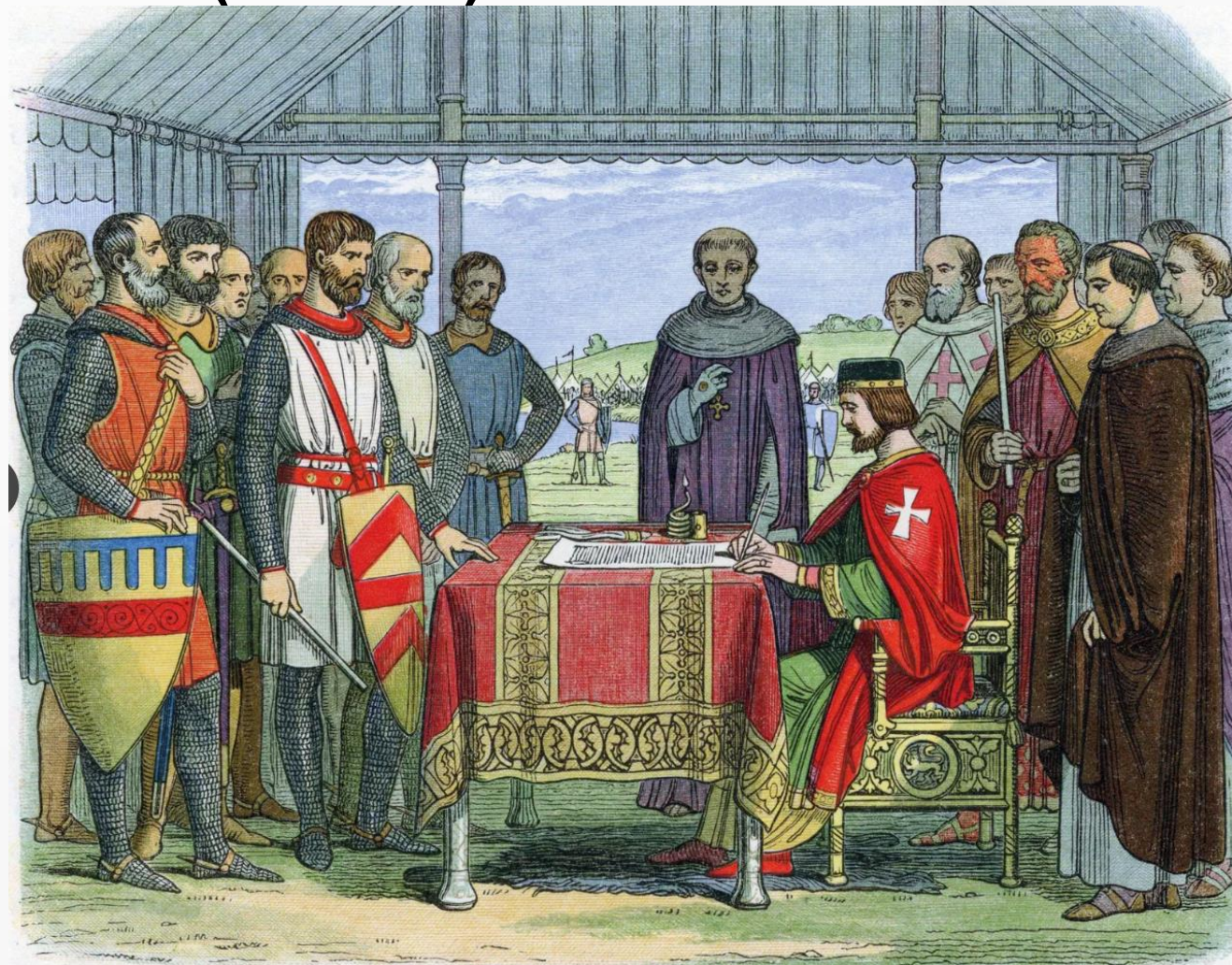
Implications for Arizona

HV & Canal LLC v. Ariz. DOT 2024 Ariz. App. Unpub. LEXIS 126

- Condemnor conditioned encroachment permit on the applicant building and paying for a right-hand-turn lane into its property.
- Was the imposed condition (\$150,000) an unconstitutional taking?
- “Assuming without deciding that the condition here implicated the application of the *Nollan/Dolan* test, we find no error...”
- Held there was a nexus between safety and traffic concerns and the requirement that HVC install a right-hand-turn lane.
- Petition for Review pending.

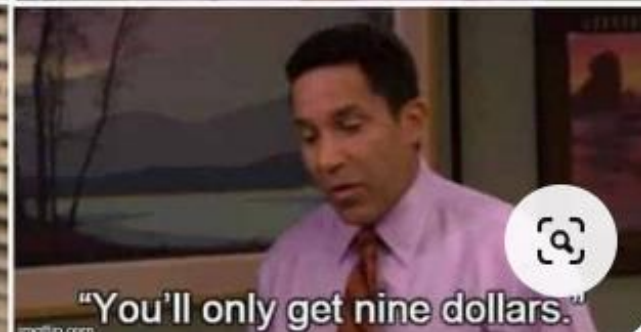
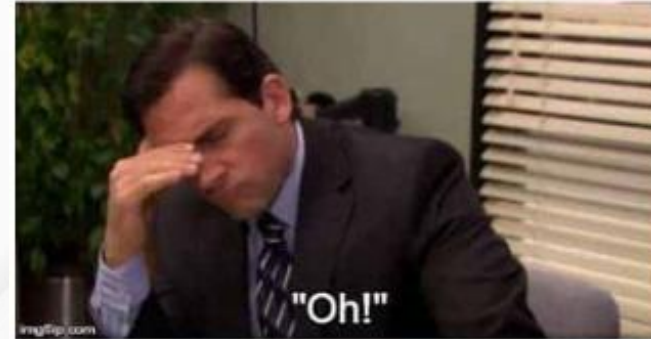


Tyler v. Hennepin County 143 S.Ct. 1369 (2023)



Case Overview

- Minnesota law allows the State to foreclose on property for delinquent property taxes and retain the tax debt, interest, cost of the sale, *and* the surplus proceeds.
- Whether the State's decision to retain the surplus proceeds constitutes a taking of property without just compensation in violation of the Fifth Amendment.



Factual Background

- Geraldine Tyler is 94 years old. In 1999, she bought a one-bedroom condominium in Minneapolis and lived alone there for more than a decade. But as Tyler aged, she and her family decided that she would be safer in a senior community, so they moved her to one in 2010. Nobody paid the property taxes on the condo in Tyler's absence and, by 2015, it had accumulated about \$2,300 in unpaid taxes and \$13,000 in interest and penalties.
- Acting under Minnesota's forfeiture procedures, Hennepin County seized the condo and sold it for \$40,000, extinguishing the \$15,000 debt. The County kept the remaining \$25,000 for its own use.

Holding

- “The County had the power to sell Tyler’s home to recover the unpaid property taxes. But it could not use the toehold of the tax debt to confiscate more property than was due. By doing so, it effected a “classic taking in which the government directly appropriates private property for its own use.””

Analysis

- What is Property and who defines it?
- Can the government take more from a taxpayer than it owes?
- Does precedent recognize the principle that a taxpayer is entitled to the surplus in excess of the debt owed?

Devillier v. Texas

(Argued before SCOTUS on 1.16.24)

- Median barrier/dam on Interstate Highway 10 (IH-10) in Texas



Background

- Complaint originates in state court
 - Count 1: Violation of Art. I, § 17 of Texas Const. for Taking/Damaging/Destruction of Property
 - Count 2: Taking of Property Without Just Comp. in Violation of Fifth Amendment to U.S. Const.
- **Texas removes to federal court**

Procedural Background

- Once in federal court, Texas moves to dismiss the Fifth Amendment claim:
 - Only way to bring such claim = 42 USC § 1983
 - States are not “persons” subject to § 1983

Procedural Background

- Magistrate: “classic Catch-22”; Texas’s stance “incredibly myopic”; “pretzel logic”
- District court: adopts magistrate’s report and recommendation, denies Texas’s MTD
- Appeal to 5th Circuit: may owners sue under the Takings Clause without invoking § 1983



Procedural Background

5th Circuit Court of Appeals

- Panel (3 judges) vacates & remands; holds that the Fifth Amendment Takings Clause as applied to the states through the Fourteenth Amendment does not provide a right of action for takings claims against a state.
- Subsequently rejects hearing the matter en banc (all judges) – 5 voted for, 11 against.

Question Presented

- “May a person whose property is taken without compensation seek redress under the self-executing Takings Clause even if the legislature has not affirmatively provided them with a cause of action?”

Key Quotes from Oral Argument

USSC: C.J. Roberts

“Isn’t it a Catch-22 to say they have to proceed in state court, they can’t proceed in federal court; and then as soon as they sue in state court, Texas removes it to federal court where you say they can’t proceed?”

Key Quotes from Oral Argument

USSC: J. Kagan

“Regarding an “ongoing violation of the Constitution” where the property has been taken and payment has not been made:
“[A]ren’t courts supposed to do something about that?””

Key Quotes from Oral Argument

USSC: J. Sotomayor

“This seems to me like a totally made-up case because they did exactly what they had to do under Texas law. ... [I]t’s almost a bait and switch[.]”

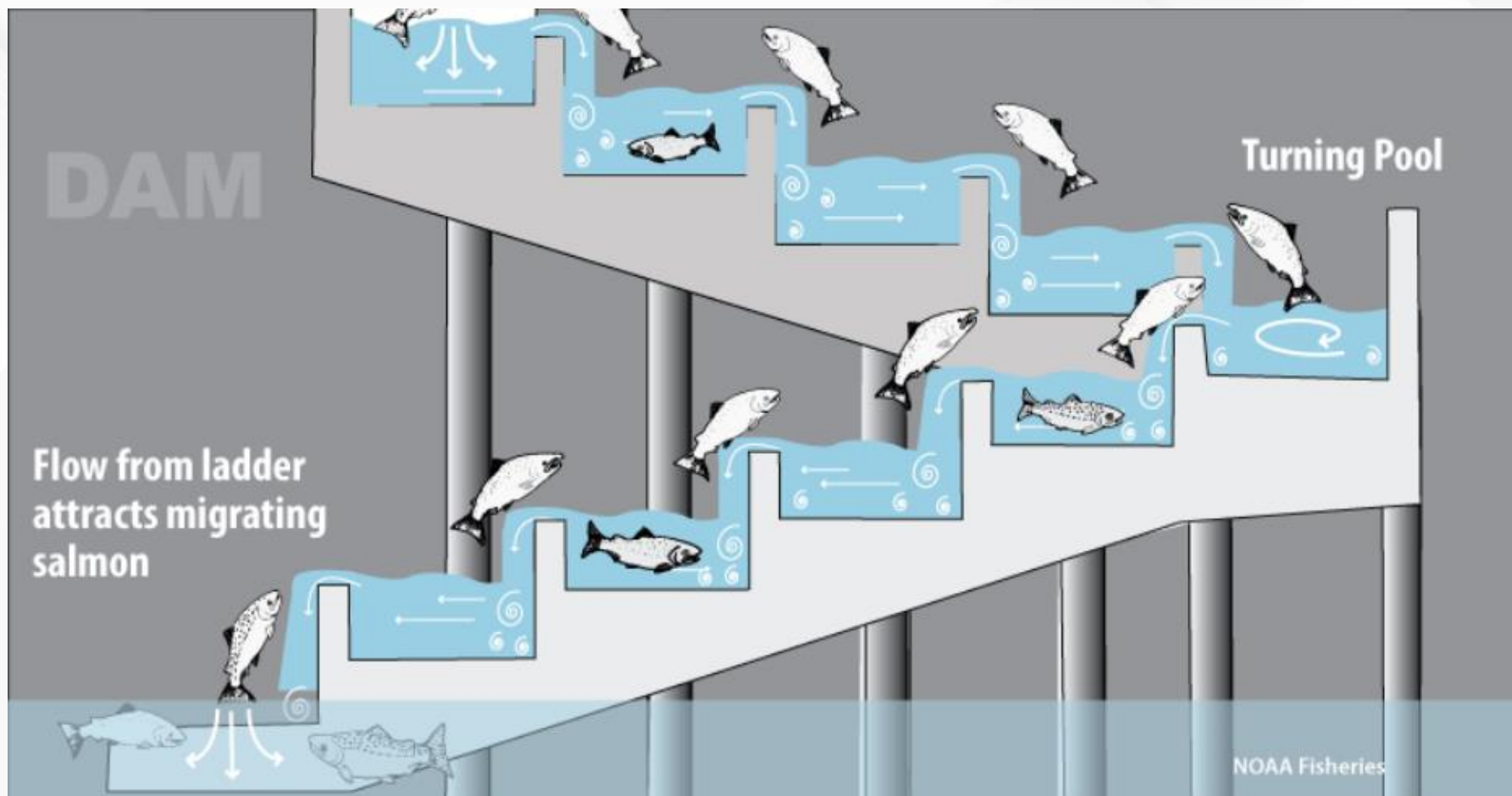
Breaking News – Decision Issued April 16, 2024!

- Texas law provides a cause of action that allows property owners to vindicate their rights under the Takings Clause.
- Constitutional concerns do not arise when property owners have other ways to seek just compensation.
- This case does not present circumstances in which a property owner has no cause of action to seek just compensation.

State & Circuit Court Decisions

- *City of Sammamish v. Titcomb* (Washington Court of Appeals)
- *Maslonka v. Pub. Util. Dist. No. 1 of Pend Oreille County* (Washington Supreme Court)
- *Brinkmann v. Town of Southold* (2nd Circuit)
- *Christ Vision, Inc. v. City of Keokuk* (Iowa Court of Appeals)

City of Sammamish v. Titcomb 525 P.3d 972 (Wash. App. 2023)



Factual Background

- Project: “To replace storm drainage infrastructure and to eliminate existing barriers to fish passage.”
- The City had statutory authority to condemn for storm drainage infrastructure but not for fish passage purposes.
- Trial Court dismissed the condemnation action because the City lacked authorization for purposes identified in the Ordinance.



Washington Statutes

- Standard: A political subdivision's authority to condemn property extends only so far as statutorily authorized and "must be conferred in express terms or necessarily implied."
- RCW 8.12.030 – Every City is authorized to condemn property for culverts, drains, and ditches.
- Salmon Recovery Act provides funds for improving fish runs but states, "no project included on a habitat project list shall be considered mandatory in nature and no private landowner may be forced or coerced into participation in any respect."

Issue

- May a condemnor condemn property if its primary purpose for the Project is statutorily authorized but its secondary purpose is not?



Holding

- The City is not divested of its authority to condemn for stormwater facilities just because the Project also provides fish passage benefits.

Analysis

- “Whether a municipality possesses the requisite authority to condemn private property is determined based on the purpose of the condemnation as articulated by the relevant legislative body.”
- Necessity – “Even if the decision was partially motivated by improper considerations, it will not be vacated so long as the proposed condemnation demonstrates a genuine need and the condemnor in fact intends to use the property for the avowed purpose.”

Maslonka v. Pub. Util Dist. No. 1 of Pend Oreille County, 533 P.3d 400 (Wash. 2023)



Factual Background

- 1955: Public Utility District constructs dam & purchases express easements from Maslonkas' predecessors in interest (Lester & Sullivan).
- 1993: Maslonkas purchase land bordering river; sellers (Cordes) inform them of periodic flooding.
- 2016: Maslonkas sue PUD for taking (inverse), trespass, nuisance, and negligence re flooding.

Issues

- Who bears the burden of providing whether the subsequent purchaser rule applies?
 - Is it a doctrine of standing or an affirmative defense?
- If an inverse condemnation claimant is barred by the subsequent purchaser rule, may it pursue alternative tort claims based on the same alleged governmental conduct?

Holding

- The right to inverse condemnation belongs to the property owner at the time of the taking; it does not pass to a subsequent purchaser unless expressly conveyed.
- Inverse condemnation claimants barred by subsequent purchaser rule are not entitled to alternative tort recovery (i.e. nuisance and trespass).

Analysis

- Subsequent Purchaser Rule is a doctrine of standing and claimant must “clearly demonstrate they are the property party to invoke judicial resolution of the dispute.”
- Failed to establish new taking because no evidence the dam’s operations changed after 1993 to increase flooding.
- May have an alternative claim if the tort did not arise to the level of a taking, but not the case here.

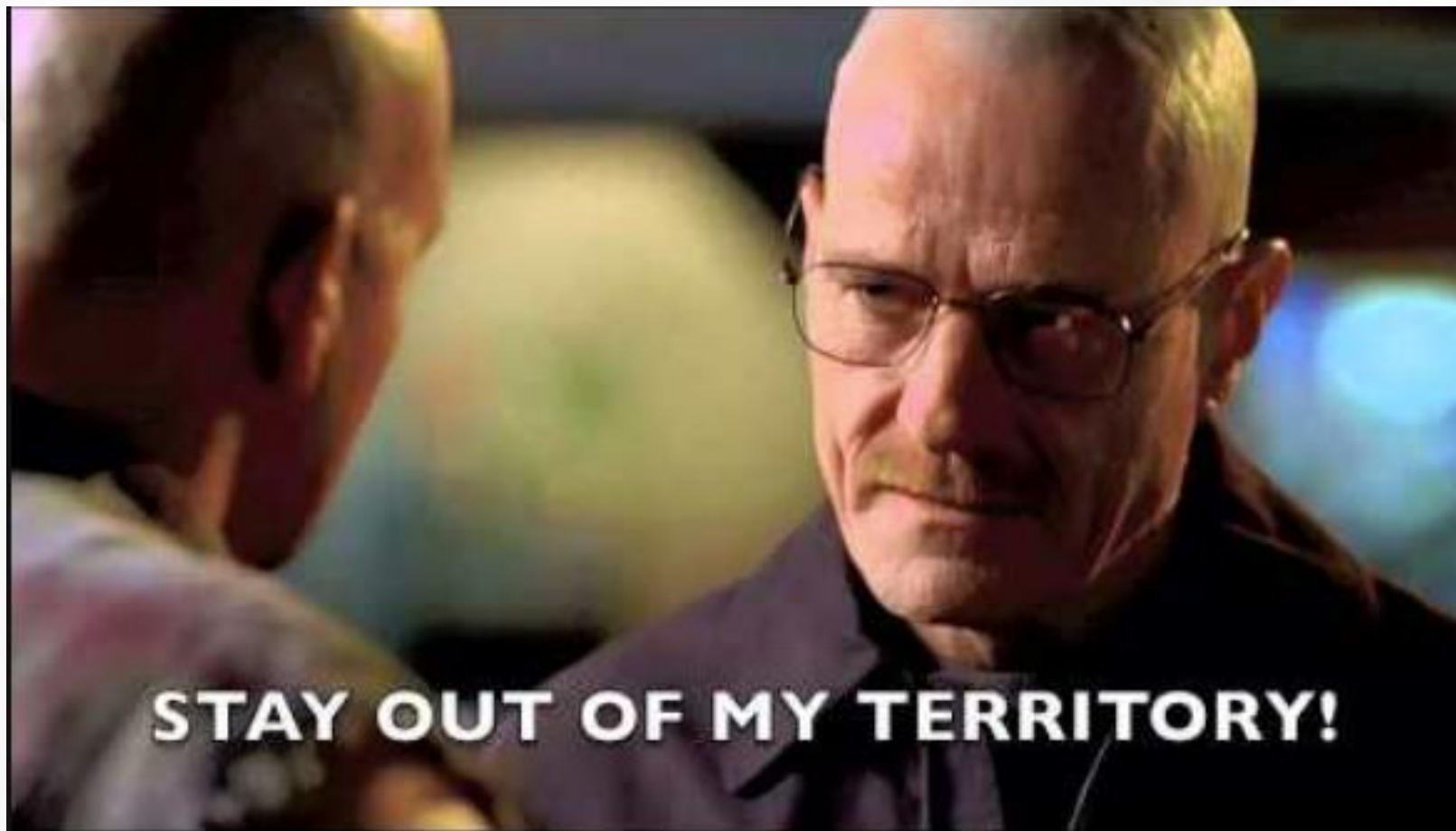
Maricopa Cty. V. Rovey

250 Ariz. 419 (App. 2020)

- “A claim for inverse condemnation is personal and does not pass to a grantee unless the grantor expressly conveys it... damages belong to the owner at the time of the taking.”

Brinkmann v. Town of Southold

2024 U.S.App. LEXIS 5994 (March 2024)



Factual Background

- Brinkmanns sign a purchase agreement for vacant land to develop a hardware store.
- After Brinkmann's spend years seeking permits, the Town authorized the acquisition of the property through eminent domain for a public park.
- The Brinkmann's claimed the park was simply a pretext for the real reasons for the acquisition; preventing the Brinkmann's from building a chain hardware store.



The Takings Clause

- “The Complaint alleges facts sufficient to support a finding that the decision to create the park was a pretext for defeating Brinkmanns’ commercial use, and was made after varied objections and regulatory hurdles that the Town interposed and that the Brinkmanns did or could surmount.”
- Two limitations on the right to exercise eminent domain: (1) the property must be for public use and (2) the owner must receive just compensation.
- The Court will not substitute its judgment for a legislature’s judgment as to what constitutes a public use unless the use is palpably without reasonable foundation.

Issue

- Is the Takings Clause violated when a property is taken for a public amenity as a pretext for defeating the owner's plans for another use?



Holding

- When the taking is for a public purpose, courts do not inquire into alleged pretexts and motives.
- A condemning authority has a complete defense to a public use challenge if the Project bears at least a rational relationship to well-established categories of public uses.
- Courts won't distinguish purpose and motivation.



Analysis

- Is the taking really for a public use?
- Is the taking necessary?
- Compatible with the greatest public good and least private injury?



Christ Vision, Inc. v. City of Keokuk

- 991 N.W.2d 543
(Iowa App. 2023)



Factual Background

- Christ Vision owned a Unitarian Church built in 1876, which was “an inspirational, important, and iconic Keokuk landmark.”
- In 2005, the City sent a letter to Church asking it to address deteriorating conditions.
- In 2011, City sent letters stating the Church should be razed.
- By 2016, no repairs had been made.
- After month-long hearing, the Court declared the Church a nuisance.
- Church did not meet the deadline and the City demolished the Church.

Issue

- Can a City's decision to enforce a nuisance law constitute a regulatory taking?

Analysis

- A condemnor's exercise of its related police powers over abandoned property did not constitute a taking.
- A person has no vested property right in a nuisance.
- Owner has no right to use their property to create public harm.
- *See Mutschler v. City of Phoenix*, 212 Ariz. 160 (App. 2006) (“public nuisances are not protectable property interests under the Fifth Amendment”).

Case Citations & Resources

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City of Sammamish v. Titcomb, 25 Wash. App. 2d 820 (2023), review granted (Wash. 9/7/2023)

- Wash. Supreme Court oral argument 1/16/2024 video available
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- USSC oral argument 1/16/2024 audio and transcript available
https://www.supremecourt.gov/oral_arguments/audio/2023/22-913

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Dolan v. City of Tigard, 512 U.S. 374 (1994)

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Nollan v. Calif. Coastal Com'n, 483 U.S. 825 (1987)

Yee v. City of Escondido, 503 U.S. 519 (1992)

Thank You



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See you at Condemnation Summit XXXII!

Fall 2024