



# Condemnation Summit XXXII



# Condemnation Summit XXXII

## Welcome Remarks

Jennifer Cranston | Shareholder, Gallagher & Kennedy  
Ashley Mahoney | Associate Attorney, Nossaman LLP

# Today's Agenda

- 9:00 a.m. Welcome Remarks
- 9:15 a.m. **Prop 207 – Overview and Insights**
- 10:15 a.m. Morning Networking Break
- 10:30 a.m. **What Condemnation Practitioners Need to Know About the 2024 Uniform Relocation Act**
- 11:30 a.m. **The Income Approach – Basics and Beyond**
- 12:30 p.m. Hosted Lunch
- 1:30 p.m. **Views from the Superior Court Bench**
- 2:30 p.m. Afternoon Networking Break
- 2:45 p.m. **Is it a Taking?**
- 3:45 p.m. Cookie Break Sponsored by Integra Realty Resources
- 4:00 p.m. **What Jurors Wish You Knew:  
A Lawyer's Journey from Juror to Trial Counsel**



## Condemnation Summit XXXII

# Prop 207 – Overview and Insights

William Fischbach | Shareholder, Tiffany & Bosco

# LITIGATING CASES UNDER ARIZONA'S PRIVATE PROPERTY RIGHTS PROTECTION ACT, A.R.S. § 12-1134

# Private Property Rights Protection Act

## A.R.S. § 12-1134

- Arizona voters adopted the Act in 2006 via ballot initiative Proposition 207, sometimes referred to as “Prop 207.”
- Codified at A.R.S. § 12-1134
- Purpose of Prop 207 was to strengthen and codify “the rights of a property owner when the state or a local government exercises the power of eminent domain.” See Arizona Secretary of State 2006 Election Information Pamphlet. Such rights were “in addition to the current statutory constitutional rights.” *Id.*

Proposition 207 also provides that a property owner is entitled to just compensation if the value of a person’s property is reduced by the enactment of a land use law. A land use law is defined as a law that regulates the use or division of land, such as municipal zoning laws, or regulates accepted farming or forestry practices.

*Id.*

# Private Property Rights Protection Act

## A.R.S. § 12-1134

- A.R.S. § 12-1134(A): “A. If the existing rights to use, divide, sell or possess private real property are reduced by the enactment or applicability of any land use law enacted after the date the property is transferred to the owner and such action reduces the fair market value of the property the owner is entitled to just compensation from this state or the political subdivision of this state that enacted the land use law.”
- A.R.S. § 12-1134(D): “The owner shall not be required to first submit a land use application to remove, modify, vary or otherwise alter the application of the land use law to the owner’s property as a prerequisite to demanding or receiving just compensation pursuant to this section.”

# Private Property Rights Protection Act

## A.R.S. § 12-1134

- Exempt from Arizona's Notice of Claim statute. See § 12-821.01(H) ("This section does not apply to any claim for just compensation pursuant to chapter 8, article 2.1 of this title..")
- A.R.S. § 12-1134(A): "E. If a land use law continues to apply to private real property more than ninety days after the owner of the property makes a written demand in a specific amount for just compensation to this state or the political subdivision of this state that enacted the land use law, the owner has a cause of action for just compensation in a court in the county in which the property is located, unless this state or political subdivision of this state and the owner reach an agreement on the amount of just compensation to be paid, or unless this state or political subdivision of this state amends, repeals, or issues to the landowner a binding waiver of enforcement of the land use law on the owner's specific parcel."



# Private Property Rights Protection Act

## A.R.S. § 12-1136 Definitions

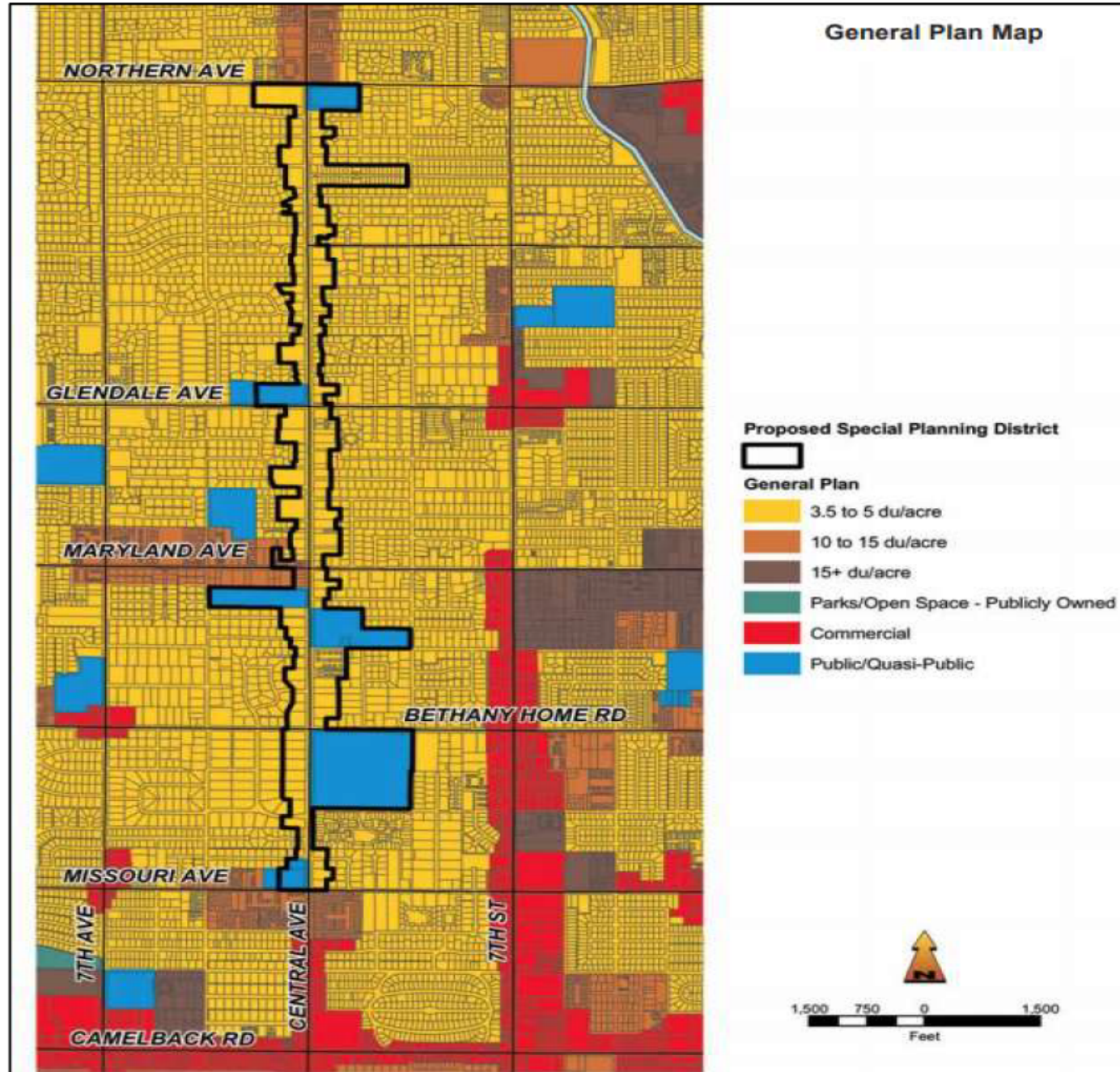
- “Fair market value” means the most likely price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all the uses and purposes to which it is adapted and for which it is capable.
- “Just compensation” for purposes of an action for diminution in value means the sum of money that is equal to the reduction in fair market value of the property resulting from the enactment of the land use law as of the date of enactment of the land use law.
- “Land use law” means any statute, rule, ordinance, resolution, or law enacted by this state or a political subdivision of this state that regulates the use or division of land or any interest in land or that regulates accepted farming or forestry practices.



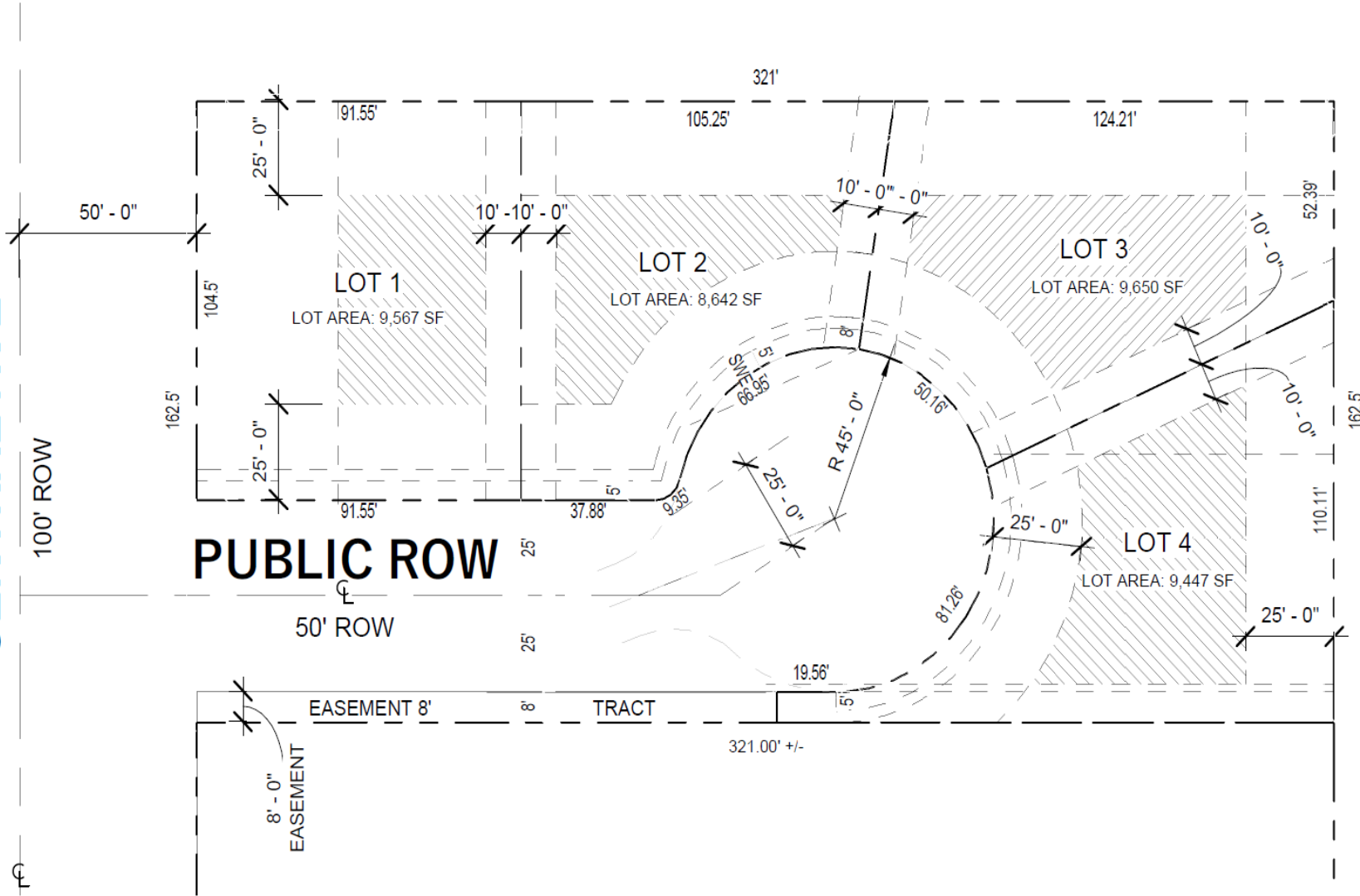




# NORTH CENTRAL AVENUE SPECIAL PLANNING DISTRICT MAP



# CENTRAL AVE



## LAND USE SUMMARY

ADDRESS: 7019 N CENTRAL AVE PHOENIX AZ 85020  
 PARCEL NO 160-31-022

AREA: 52,141 SF - 1.20 AC

ZONING: R1-10 SUBDIVISION

MAX DENSITY: 3 DU/AC (4.5 DU)

MIN LOT WIDTH: 80'  
 MIN LOT DEPTH: 96'  
 MINIMUM LOT AREA: 10,000 SF

SETBACKS:  
 FRONT: 25'  
 REAR: 25'  
 SIDE: 10' & 3'

NORTH CENTRAL AVENUE SPECIAL PLANNING DISTRICT STANDARDS

\*MINIMUM CENTRAL AVENUE 100'  
 FRONTAGE

LANDSCAPE SETBACK 40'

# Private Property Rights Protection Act

## A.R.S. § 12-1134

- Plaintiff may potentially recover pre-judgment interest. See *Dos Picos Land Ltd. P'ship v. Pima County*, 225 Ariz. 458, 466, ¶ 24 (App. 2010).
- Potential Defenses: not a “land use law” or exempt.
- Jury instructions: Do not rely on RAJIs.
- A.R.S. § 12-1135(D): “A prevailing plaintiff in an action for just compensation that is based on diminution in value pursuant to § 12-1134 may be awarded costs, expenses and reasonable attorney fees.”

# Thank You



**William Fischbach**

Shareholder  
Tiffany & Bosco







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## Morning Networking Break

We will resume at 10:30 a.m.



## Condemnation Summit XXXII

# What Condemnation Practitioners Need to Know About the 2024 Uniform Relocation Act

William Bassoff | Associate Attorney, Nossaman  
Christopher Kramer | Partner, Nossaman

# New Regulations – Not a New Act

- [Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs](#)
- [Outline of Changes to Regulations Implementing the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 \(as amended\)](#)

# Big Picture

- Temporary Relocation
- Changes to Moving Expenses
- Waiver Valuations
- Miscellaneous Changes



**Federal Highway  
Administration**

G|K

Gallagher & Kennedy

 NOSSAMAN LLP

TEMPORARILY RELOCATED

RELOCATED

**TEMPORARY RELOCATION**

# Temporary Relocation

- “Displaced person” now includes persons who are required to move temporarily. 49 CFR § 24.2(a)
- Temporarily displaced persons must be provided the notices and relocation advisory services required for other persons.

# Temporary Move

- Same notice requirements as permanent displacement.
- For dwelling occupants, at least one comparable dwelling must be made available.
- If a business is (1) required to vacate the property or (2) denied physical access to the property, the business will be temporarily relocated and reimbursed for “all reasonable out-of-pocket expenses.”
- Reasonable and necessary costs of temporarily moving personal property and, when appropriate, storage.

# Conversion to Permanent Displacement

- A temporary move may not exceed 12 months.
- If it does, that person is considered permanently displaced.
- Agency may not deduct temporary relocation assistance benefits previously provided if the move becomes a permanent displacement.



# Notice of Eligibility

- Normally, triggered by notice of intent to acquire.
- Where agency is not acquiring the property, relocation eligibility may also be triggered by the notice of intent to rehabilitate and/or demolish the improvements on the property.

# Relocation and Attorneys' Fees

- Reimbursable business, farm, or non-profit expenses now include attorneys' fees incurred in negotiating the purchase of replacement site.
- Individuals are not entitled to attorneys' fees. Cosmetic changes are also not eligible for reimbursement.

# CHANGES TO MOVING EXPENSES AND SELF-MOVES



# Note

- Temporarily displaced persons are now expressly eligible for relocation.
- So, the following applies to both the permanently displaced and the temporarily displaced.

# Various New Payment Limitations

- Searching expenses increased to \$5,000 (previously \$2,500).
- Reestablishment expenses increased to \$33,200 for small business, farm, or non-profit org (previously \$10,000).
- Purchase price differential [difference in dwelling value] increased to \$41,200 (previously \$31,000).
- Fixed payment for businesses increased to \$53,200 (previously \$40,000).

# Self-Move Reimbursement (Residential)

Four options:

1. Fixed Residential Moving Cost Schedule
2. Actual Move Cost
3. Moving Cost Estimate
4. Commercial Mover Estimate

# Self-Move Reimbursement (Commercial)

Three options:

1. Commercial move based on the lower of two bids from commercial movers.
2. Receipts and bills for labor/equipment.
3. Up to \$5,000 for small uncomplicated non-residential personal property move, as determined by qualified agency staff.

# Tenant Moving Expenses

- Maximum of \$1,000 for dwelling application fees and/or credit reports.



# Changes to Eligibility for Replacement Housing

- Person must occupy property for 90 days (down from 180) prior to notice in order to be eligible for replacement housing payment.
- Replacement housing payments for homeowners-occupants may not exceed \$41,200 (up from \$31,000).

# Storage

- Storage is an approved expense for up to 12 months where storage is a reasonable and necessary moving expense for the displaced person.
- A longer period can be approved for unusual circumstances.

# WAIVER VALUATIONS

WAIVER

# Waivers

- An appraisal is not required if:
  - Property is being donated; and
  - Agency determined the valuation problem is “uncomplicated.”
- “Unnecessary” if within the appropriate threshold, \$15,000 by default.
- Federal agency can increase the \$15,000 threshold to \$35,000 if property owner is offered an appraisal.
- Federal agency can increase the \$35,000 threshold to \$50,000 if property owner is offered an appraisal, acquisition is uncomplicated, property has low fair market value, and other reporting requirements.

# Waiver Valuations Overview

- Tier 1: < \$15,000
  - Uncomplicated.
- Tier 2: \$15,000 - \$35,000
  - Uncomplicated, offer to appraise is made, federal approval.
- Tier 3: \$35,000 - \$50,000
  - Uncomplicated, offer to appraise is made, low fair market value, federal approval, compliance with written request to federal agency, reporting requirements.

# Waiver Valuations and USPAP

- Waiver valuations are not appraisals by definition in this part (See § 24.2). Persons preparing or reviewing a waiver valuation are precluded from complying with Standards Rules 1, 2, 3, and 4 of the “Uniform Standards of Professional Appraisal Practice,” as promulgated by the Appraisal Standards Board of The Appraisal Foundation (See appendix A to this part, sections 24.102(c) and 24.103(a)).
- Because a waiver valuation is not an appraisal, a review of a waiver valuation is not required. However, some recipients may also be subject to State laws or agency requirements to review a waiver valuation.

# Negotiations and Conflict of Interest

- An appraiser, review appraiser, or waiver valuation preparer may be authorized to act as the negotiator for the acquisition if the offer is \$15,000 or less.
- Agencies can negotiate a value up to \$35,000 if no waiver valuation is used, an appraisal is performed and reviewed, funding Federal agency approval is obtained, and the requesting agency has quality control process in place set forth in written procedures approved by funding Federal agency.

# **DISCUSSION: WAIVER VALUATIONS, NEGOTIATIONS, AND COMPLIANCE WITH USPAP**





# MISCELLANEOUS, ETC.

MISC.



# Miscellaneous Changes

- **Reverse Mortgages:** A reverse mortgage can be replaced if (1) the property owner obtained it more than 180 days before initiation of negotiations and (2) property owner can obtain similar reverse mortgage on the dwelling.
- **Rental Assistance:** Tenant or homeowners can receive up to \$9,570 for rental assistance if they have occupied dwelling for at least 90 days prior to initiation of negotiations.

# Thank You



**William Bassoff**  
Associate Attorney  
Nossaman



**Christopher Kramer**  
Partner  
Nossaman



## **Condemnation Summit XXXII**

# **The Income Approach – Basics and Beyond**

Thomas Baker, MAI, SRA | Baker & Associates

William Dominick | Managing Director, Integra Realty Resources

# Income Capitalization Approach – Basics

- In all jurisdictions, the courts appear to accept evidence developed through the income capitalization approach when the property in question is or is likely to be income-producing or sufficient market data to develop the sales comparison approach is not available.

# Income Capitalization Approach – Basics

Defined:

- “Specific appraisal techniques applied to develop a value indication for a property based on its earning capability and calculated by the capitalization of property income.”

# Income Capitalization Approach – Basics

## Components:

- Estimate Gross Economic (or Market) Rent or Income
- Less: Allowance for Vacancy and Credit Losses
- Effective Gross Income (EGI)
- Less: Total Expenses (maybe includes Reserves for Replacements)
- Net Operating Income (NOI)

# Income Capitalization Approach – Basics

Convert Income to Value:

$$V = \frac{I}{R}$$

$$\frac{\text{Comparable Property's Income}}{\text{Comparable Property's Price}} = \text{Capitalization Rate}$$

$$\frac{\text{Subject Property's Income}}{\text{Capitalization Rate}} = \text{Subject Property's Value}$$



# Fee Simple Estate vs. Leased Fee Estate?

- When an appraisal assignment involves the valuation of the fee simple interest in a leased property, the valuation of the **entire bundle of rights applies**.
- A **lease never increases** the market value of real property rights to the fee simple.
- Any potential value increment in excess of a fee simple estate is attributable to the particular lease contract, and even though the rights may legally “run with the land,” they constitute **contract rather than real property rights**.

(Appraisal of Real Estate, 15<sup>th</sup> Edition, Appraisal Institute)

# Market Rent vs. Contract Rent?

- The first step in the income capitalization approach is to estimate the annual gross rental income the property being appraised would produce if it were 100% occupied.
  - As with a recent and unforced sale of the subject property (See Section 2.3.3.4), if the property is actually rented, its current rent is often the best evidence of its economic (or market) rent and should be given appropriate consideration by the appraiser in developing an opinion of the gross economic rent of the property. (Yellow Book)

# Market Rent vs. Contract Rent?

- Appraisers typically use rent comparables in estimating the market rent of the property being appraised, whether or not the conclusion conforms to the property's actual rent schedule.

# Overall Capitalization Rate

- Derived from comparable sales is preferred method
- Sales that have same highest and best use.
- Current sales, capitalization rates can change over time.
- Level of risk associated with comparable should be similar to subject.

# Overall Capitalization Rate

- Appraisers must make certain that the net operating income of each comparable property is calculated and estimated in the same way that the net operating income of the subject property is estimated. (*Meaning market rent not contract rent!*)
- Capitalization rates from leased properties provide capitalization rates for the leased fee, not the fee simple.

# Income Approach – After Condition

- Acquisition may impact rental rates, vacancy factor, or capitalization rate.
- Change in rental rate, vacancy rate, or capitalization rate in after value can result in loss in after value and can be used to support severance damages.
- Estimate of damages should not be speculative, but rather based on market supported data.
- May be limited number of sales to reflect after condition.
- Damages can be analyzed by capitalizing net rent loss resulting from the market supported damage.

# Example 1 – Loss of Parking in Partial Take

## Before Condition

- Hypothetical subject is general retail building with parking ratio of 1 space per 250 square feet of building area. Code parking is 1 space per 300 square feet of building area. Subject has adequate parking per code and market.

## After Condition

- Partial acquisition reduces parking spaces on property to 1 space per 360 square feet of building area. Parking is now below code, but considered legally non-conforming. No change in Highest and Best Use.

# Example 1 – Loss of Parking in Partial Take

## Question?

- Does loss of parking impact value of the Remainder in the After Condition?

## Answer – Maybe

- Conduct parking ratio study of market data.
- Analyze sales and rental rates of properties with similar parking ratios to subject property after acquisition.
- If rental rates are lower due to reduced parking ratio, then this could be utilized to support severance damages.
- Occupancy could also be impacted, reducing NOI and value.
- Capitalization rate may also be impacted based on perceived risk.



# Example 2 – Change in Highest and Best Use

## Before Condition

- Hypothetical subject is general retail building with parking ratio of 1 space per 250 square feet of building area. Code parking is 1 space per 300 square feet of building area. Subject has adequate parking per code and market.

## After Condition

- Partial acquisition reduces parking spaces on property to 1 space per 360 square feet of building area. Parking is now below code, but considered legally non-conforming. No change in Highest and Best Use.

# Example 2 – Change in Highest and Best Use

## Question?

- Does loss of parking impact value of the Remainder in the After Condition?

## Answer – Maybe

- Likely need Architect/Engineer to opine to impact of project regarding ability to cure; Condemnor and Condemnee likely to have very different opinions (hard to believe, right?).
- If a reasonable/practical cure is not an option, then impact on rent and/or occupancy and/or capitalization rate is considered like in Example 1.

# Questions and Discussion



# Thank You



**Thomas Baker**  
MAI, SRA  
Baker & Associates



**William Dominick**  
Managing Director  
Integra Realty Resources



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## Hosted Lunch

We will resume at 1:30 p.m.



## Condemnation Summit XXXII

# Views from the Superior Court Bench

Honorable Joseph R. Georgini, Honorable John D. Napper,  
Honorable David W. Thorn, and Honorable Timothy M. Wright

# Thank You



**Hon. Joseph Georgini**  
Pinal County Superior Court



**Hon. John Napper**  
Yavapai County Superior Court



**Hon. David Thorn**  
Cochise County Superior Court



**Hon. Timothy Wright**  
Gila County Superior Court





## **Condemnation Summit XXXII**

# **Afternoon Networking Break**

We will resume at 2:45 p.m.





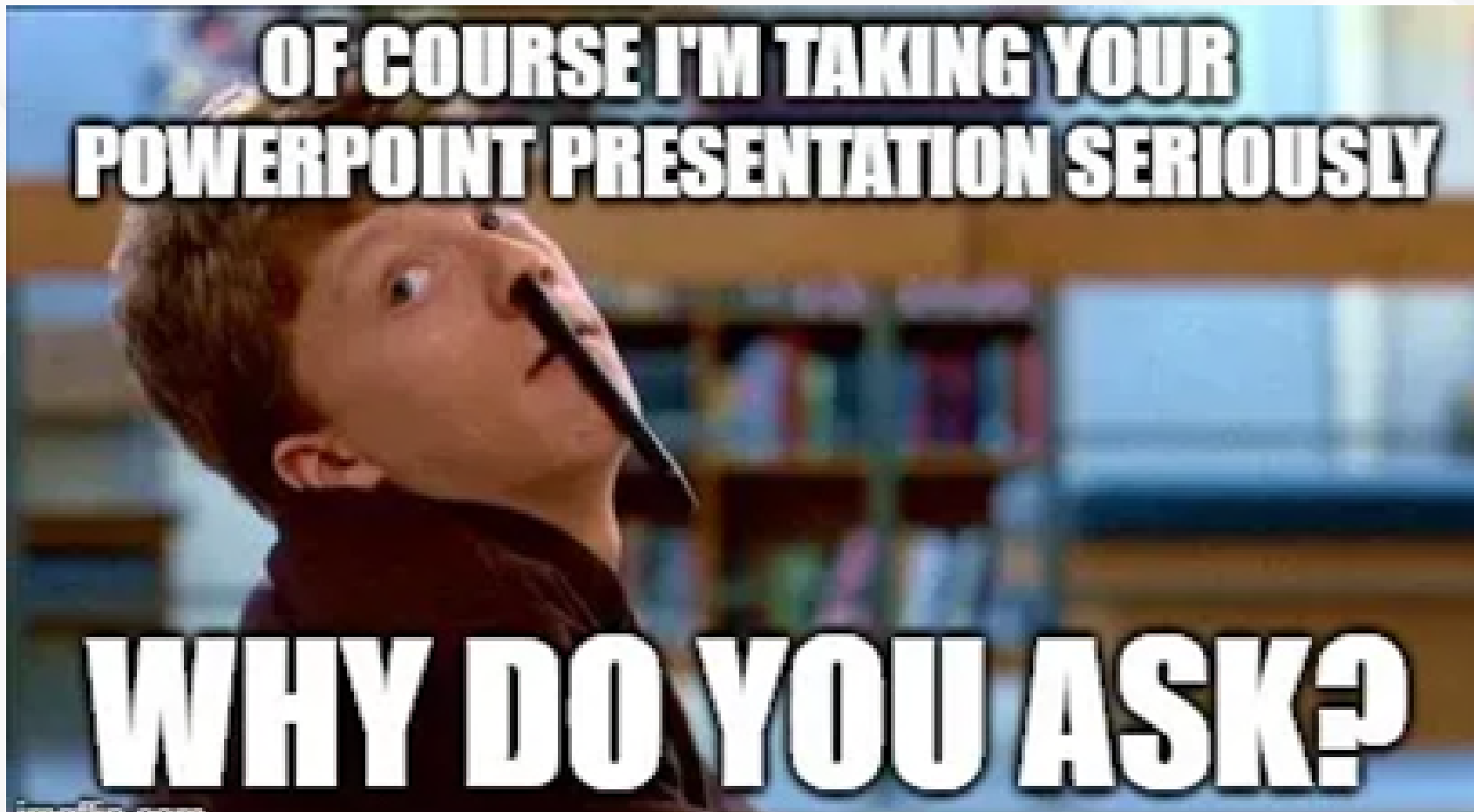
## Condemnation Summit XXXII

### Is it a Taking?

Vail Cloar | Member, Dickinson Wright

Jennifer Cranston | Shareholder, Gallagher & Kennedy

# Why Are We Asking? (What's the Point of this Presentation?)



# The Answer: Money!!!

Taking = Compensation

No Taking = No Compensation



# Inverse Condemnation Refresher

Two “categorical” forms of taking:

- A physical invasion of property by (or authorized by) the government – no matter how minor – is a *per se* taking.
  - *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)
  - *Horne v. Dep’t of Agric.*, 576 U.S.350 (2015)
  - *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021)
- Another recognized form of taking is a “confiscatory” regulation which denies all economically beneficial or productive use of property. *Lucas v. S. C. Coastal Council*, 505 U.S. 1003 (1992)

# Inverse Condemnation Refresher

- Other government regulations and restrictions may also constitute a taking if they go “too far.” *Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922)
- The US Supreme Court articulated a three-factor test for determining whether a regulation results in a taking:
  - The economic impact on the claimant;
  - The extent to which the regulation interferes with the claimant’s distinct investment-backed expectations; and
  - The character of the government action.
- *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978)

# Are We Clear?



# Coal!

- Bituminous Mine Subsidence and Land Conservation Act prohibits coal mining in a manner that causes subsidence to public buildings, noncommercial buildings used by the public, dwellings, and cemeteries.
- Formula used by government generally requires 50% of the coal under those buildings to be left as support, and government can revoke permit if subsidence occurs and not remedied.
- State recognizes mineral estate, surface estate, and support estate.
- 90% of the coal to be mined is severed mineral estate coal, typically with a waiver of damages by surface estate holders.
- Sounds familiar, right?

# *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987)

- SCOTUS says, yeah, we remember *Pennsylvania Coal v. Mahon*, but nope. No taking.
- Reasons that the real problem in *Mahon* was the lack of a public purpose—and relies on the *Agins* line of cases. (Spoiler alert: SCOTUS kills this prong of its analysis in 2005).
- Also finds it important that *Mahon* made mining “commercially impracticable.”
- Cannot balance the investment backed expectations, because it was a straight facial challenge.



# Regulation of Pole Attachments

- Pole Attachment Act authorized the FCC to regulate cable company attachments to utility poles to ensure the rates, terms, and conditions are just and reasonable.
- Utility company entered into pole attachment agreements with various cable companies, charging them between \$5.50 and \$7.15 per pole.
- Cable companies filed complaints with the FCC, and the FCC ordered the rates be reduced to \$1.79 per pole.
- Utility challenged the FCC's order as violating the 5<sup>th</sup> Amendment of the Constitution.



# *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987)

- The Eleventh Circuit, relying on *Loretto*, held that the Act violated the 5<sup>th</sup> Amendment.
- The US Supreme Court held that *Loretto* did not apply.
- The statute in *Loretto* required landlords to permit physical attachment by cable companies.
- But the Pole Attachment Act merely regulates the rents to be charged by utility companies that voluntarily enter into leases with cable companies.
- Additionally, the Court held that the rates established by the FCC were not confiscatory because the formula used to set the rates was based on the allocated cost to construct and operate the pole.

# Removal of Bridge Access

- Sole access to property from road via pedestrian bridge.
- Bridge built on top of DOT retaining wall and encroaches on DOT right-of-way.
- DOT needs to repair retaining wall; orders removal of bridge.
- Bridge removed and hauled away.
- Landowner continues to access property via ladder for a year before filing suit for a de facto taking.

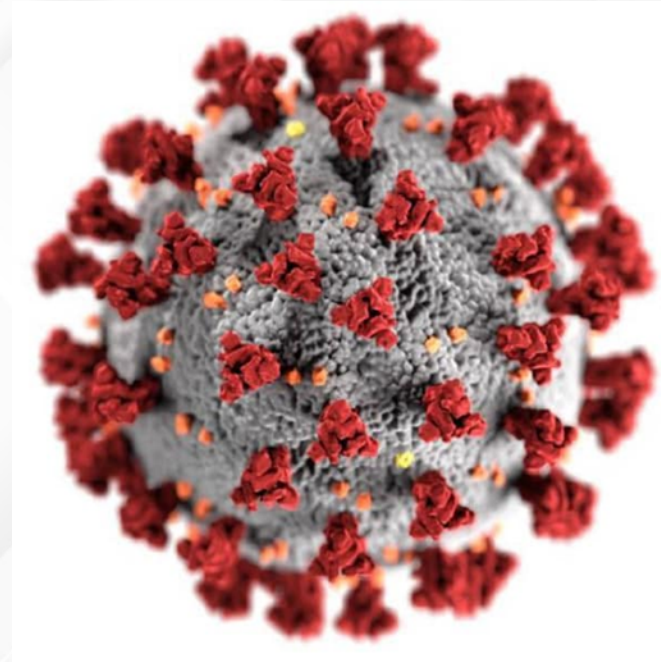


# *N-Jie v. Pa. Dep't of Transp.*, 300 A.3d 1131 (Pa. Commw. Ct. 2023)

- The Court's Ruling:
  - Right to remove an encroachment (police power).
  - Removal of the bridge was necessary to access and replace the damaged retaining wall.
  - Police power not limitless; must be exercised reasonably.
  - Interference with access to the property was unreasonable and prolonged.
  - Landowner entitled to compensation.

# COVID Eviction Moratorium

- CARES Act imposed a 120-day moratorium on commencing eviction proceedings for non-payment of rent.
- After that expired, CDC issues “Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19,” preventing actual evictions. Extended.
- SCOTUS sort of holds CDC order exceeded its authority. Taking has to be “authorized.”
- Argument is straightforward: forcing me to let renters stay was a physical appropriation.

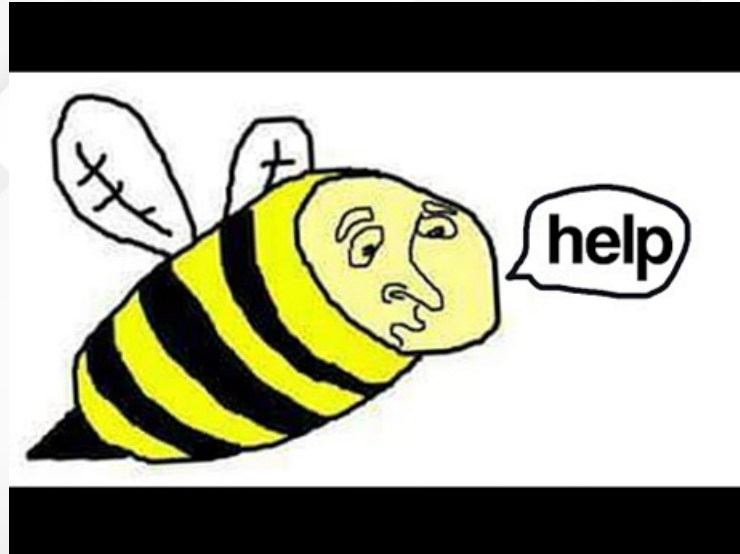


# *Darby Dev. Co. v. United States*, 112 F.4th 1017 (Fed. Cir. 2024)

- Federal Circuit holds it at least states a claim.
- Rejects that action was not “authorized”—authorized does not mean lawful (makes sense, otherwise nothing is a taking), but means chargeable to the government.
- Concludes that this is Cedar Point, government is making you allow someone there you don’t want.
- But.... How far does that go?

# Incidental Destruction of Property

- Mosquito abatement program to protect against travel related Zika virus.
- Three cases of the virus reported in the County.
- County orders aerial pesticide spray in targeted areas.
- Issues press release in advance of aerial spray implementation.
- Plaintiff beekeepers do not receive notice, do not take measures to protect their hives, and their bees die.
- Beekeepers sue County for an uncompensated taking of their property.



# *Yawn v. Dorchester Cnty.*, 1 F.4th 191 (4th Cir. 2021)

- District Court granted summary judgment in favor of the County, finding that the County exercised its police power.
- The Fourth Circuit:
  - Police power is not a *per se* exemption.
  - No right to compensation if the injury is only incidental to the legitimate exercise of police power.
  - Injury is incidental if the invasion is unintended and unforeseeable.
- Death of bees, while tragic, was not intentional or foreseeable.
- Therefore, no taking.



# Transfer of Title for Delinquent Property Taxes

- Owner fails to pay property taxes.
- Pursuant to statute, County sells tax certificate to Buyer for the amount of the unpaid taxes (\$588.21).
- After 3-year statutory period, Buyer notifies Owner that if Owner does not pay the unpaid taxes, fees, and interest (\$5,268.32), Buyer will obtain tax deed.
- County issues tax deed to Buyer, and Buyer obtains title free and clear of all encumbrances.
- At time tax deed is issued, the property's assessed value is \$59,759.
- Buyer files for quiet title and Owner counterclaims for violation of the 5<sup>th</sup> Amendment.

# *Cont'l Res. v. Fair*, 10 N.W.3d 510 (Neb. 2024)

- Initially, the Nebraska Supreme Court finds no taking.
- US Supreme Court issues its ruling in *Tyler v. Hennepin County*.
- Nebraska Court reconsiders.
- Owner had a protected property interest to the extent the property value exceeded the tax debt based on general property law and specific Nebraska statutes.
- Owner entitled to just compensation from . . .
- The company that purchased the lien and received the tax deed.

# Fire!

- Forest fire is growing out of control, feds are called in to help pursuant to various agreements.
- Forest Service enters onto private land to light “backfires and burnouts”—basically controlled burns.
- Complaint alleges feds “took timber and range vegetation owned by and located on the Ranches by intentionally lighting the inflammable materials to fuel its backfiring and burnout operations.”



# *McDonough Family Land, LP v. United States*, 172 Fed. Cl. 414 (2024)

- Federal Court of Claims says.... Yeah, duh, you lit their property on fire.
- Rejects that the claims sounded in trespass instead of in takings.
- Finds that burning property is a *per se* appropriation.
- But... what if the government did nothing?
- No good deed.

# School Fees

- Idaho's constitution requires the legislature to provide "free common schools."
- That provision of the constitution "creates an enforceable, individual right" under Idaho case law.
- Parents hated paying optional fees because that made school not free.
- Or, more eloquently, the parents "do not grieve the District's unlawful denial of education to their children. [The students] received all the education they desired. Further, they protest the government's confiscation of their money for a public education plainly required by Idaho law to be provided free of charge."

# *Zeyen v. Bonneville Joint District, #93*

- Ninth Circuit: “Huh? That ain’t property, bro.”
- Public education is whatever Idaho decides it is, not whatever you want it to be for your special snowflake.
- Not something definite and concrete like a chair or real property.
- Also, they were *optional fees*, not fees that were imposed for mandatory coursework (why isn’t this enough standing alone?).
- Generally, payment of money alone does not implicate the Takings Clause.
- And... the use wasn’t “public?”

# Key Takeaways



# Thank You



**Vail Cloar**  
Member  
Dickinson Wright



**Jennifer Cranston**  
Shareholder  
Gallagher & Kennedy





## Condemnation Summit XXXII

# Afternoon Networking & Cookie Break

*Sponsored by Integra Realty Resources*

We will resume at 4:00 p.m.



## **Condemnation Summit XXXII**

# **What Jurors Wish You Knew: A Lawyer's Journey from Juror to Trial Counsel**

Megan Carrasco | Associate Attorney, Snell & Wilmer

# Agenda

- About me
- Trial timeline
- Arizona's preemptory challenge framework
- How I ended up a juror
- Case background
- Juror likes and dislikes
- Application in my trial practice

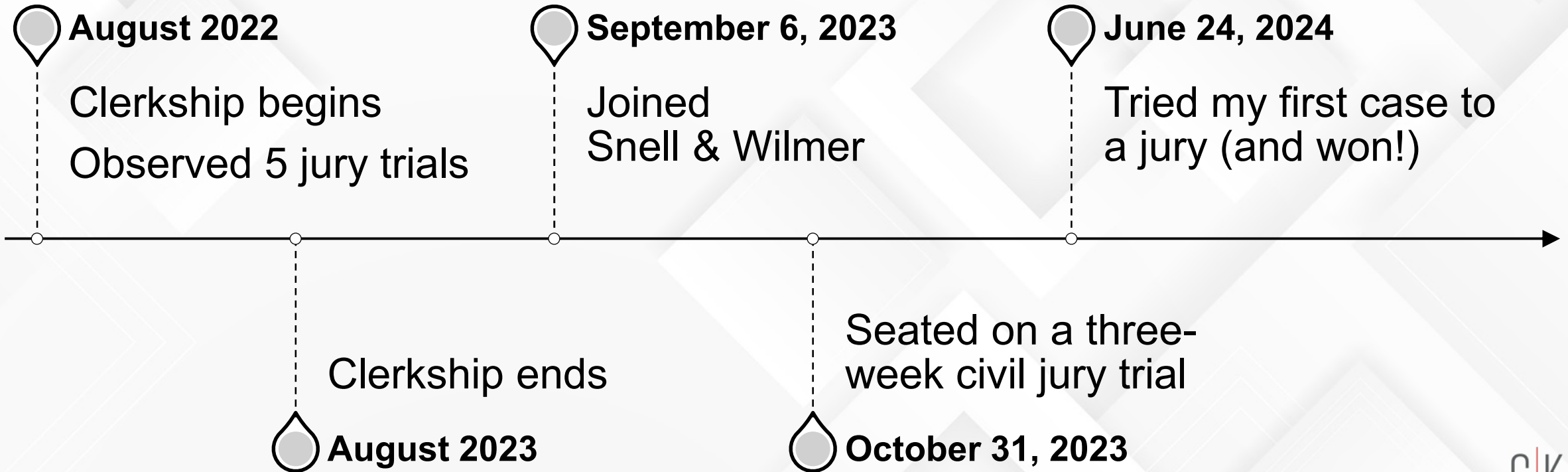
# About Me

- Commercial Litigation Attorney at Snell & Wilmer

I focus my practice on white-collar and government enforcement actions, construction litigation, gaming law, and patent litigation.

In my free time, I participate in AWLA's judicial appointments committee, the State Bar Committees for Minorities and Women in the Law and Access to Justice, as well as am a contributing sports law editor for the ABA's publication *Business Law Today*.

# Trial Timeline



# CAN A LAWYER EVEN BE ON A JURY?

# State Versus Federal Court



**“A DEFENDANT’S OR  
LAWYER’S OBJECTION TO A  
PROPOSED JUROR, MADE WITHOUT  
NEEDING TO GIVE A REASON.”  
- PEREMPTORY CHALLENGE**



# Arizona Eliminates Peremptory Challenges in Civil Cases

## Arizona State Court

- As of January 1, 2022, the Arizona Supreme Court eliminated peremptory challenges to striking jurors in civil cases. See Ariz. R. Civ. P. 47.
  - *Exception:* If alternates are selected. *Id.* at (e)(5)
- Minimum of 8 jurors. A.R.S. 21-102.
  - Up to 6 alternate jurors.
- No unanimous verdict requirement.

# State v. Federal Juries

## Arizona Federal Court

- 28 U.S.C. 1870 permits 3 peremptory challenges per side.
- Between 6 and 12 jurors.
- Verdict must be unanimous (unless parties agree).

# My Experience as a Juror

- Maricopa County Superior Court Southeast
- Judge Adam Driggs
- October 31, 2023, through November 21, 2023 (14 trial days)
- 9:30 to 4:30 daily



# Case Background

- HOA versus contractor.
- HOA was responsible for roof upkeep.
- Roofs had leaks.
- HOA hired contractor to redo the roofs on 31 buildings for ~\$1,000,000.
- Roofs were still leaking.
- Asked for \$8,000,000 to fix.



# Picking a Jury

- 40 jurors
- Everyone had to answer basic questions about themselves.
- Then the lawyers followed up.
- Jurors who were struck:
  - Hated their HOA
  - Hated their roofing contractor
  - Had pigeon infestations in their homes



# Jury Make Up

- Started with 9, lost 1 to illness and 1 to a jurisdictional issue.
- 4 women; 3 men
- Occupations
  - Lawyer
  - Crap's dealer
  - Retired schoolteacher
  - Interventional Radiologist
  - Former COO of Fortune 500 Company
  - Nurse
  - VP of Events at a Casino

# JUROR LIKES

# Timing

- Think back to your formative years in school – the bell rings at the same time every day.
- The jury wants their one allotted break.
- We do NOT want to end early or come in late.
- Have a witness ready.
- Be aware of natural breaks in your questioning.



# Physical Exhibits

- Attention span for droning testimony is limited
- Demonstratives
- Physical exhibits can bring the facts to life
- Good Examples
  - Drone video footage
  - Roofing samples with coating
  - Parapet wall tops



# Experts

## Plaintiff's Expert

- Visited the site
- Did destructive testing
- Took 1,000s of photos
- Architect
- Demonstrated architecturally correct roofing architecture for 2023 standards.
- Testified that the roofs were so far from the 2023 standards that it would take \$8 million to remove, repair, and replace.

# Experts

## Defendant's Expert

- Visited the site
- No destructive testing
- Worked off Plaintiff's photos
- General contractor in Phoenix
- Made conclusions based on existing architecture at the project.
- Opined on damages ranging from \$0 to \$400,000.

# Witnesses

## **Plaintiff's Witnesses**

- Property Management Company Liaison
- HOA Board Members
- Homeowners
- Expert (construction)
- Expert (damages)

# Witnesses

## **Defendant's Witnesses**

- Project superintendent
- Sales representative
- Mid-level manager who used to apply foam roofing
- Company vice president
- Expert (construction and damages)

# JUROR DISLIKES

Technological  
ineptitude

Whispering

Losing  
objections

Long closings

Criticizing a lay  
witness' lack of  
formal  
education

Jargon

# **LEARN HOW TO USE COURTROOM TECHNOLOGY OR DON'T USE IT AT ALL. - ONE TAKEAWAY**



# Jury Deliberations

- Elect a foreperson (usually doesn't take very long)
- Jury instructions = rubric
- Exhibits: looked at maybe 3 (of several hundred)

## **Step 1: What's the contract?** **(~5 mins)**

- Are the scopes of work incorporated into the contract? Yes.
- Oral representations included? No.

## **Step 2: Was there a breach?** **(~1.5 hours)**

- Went through line item by line item.
- Marked ~12/50 line items as discussion topics.
- Discussed each one by one.

# Verdict in ~2 Hours



Complete Defense Verdict



Plaintiff Took Nothing

# MY EXPERIENCE AS A TRIAL LAWYER

# What Worked

- Taking it slow.
- Repetition. Repetition. Repetition.
- Lay it out for them.
- Organize your witness examinations.
- Point out exactly where they can find the answers in closing.
- Hit every single element.



**“I. DON’T. KNOW. THESE. PEOPLE.”**  
- MEGAN (THE JUROR) CARRASCO

**Condemnation**

**Interest 1: Fee Simple Owner**

Evidence: Exhibits

Evidence: Witnesses

Value of the Parcel Taken

Value of the Improvements on  
the Parcel Taken

Damages for the Portion of the  
Parcel Not Taken but Affected by  
the Taking

# Verdict in 1.5 Days



6/8 Defendants Found  
Liable



Compensatory & Punitive  
Damages Awarded

# Juror Feedback

- Attorneys with the big personalities get their attention.
- They love impeachment evidence.
- Preparedness shows (both for counsel and witnesses).
- Reasonableness of the ask (\$\$) matters to them.
- Defense should have spent more time proving their case.
- Attorneys can lose their credibility, too.



# Thank You



**Megan Carrasco**  
Associate Attorney  
Snell & Wilmer

# We Appreciate Your Feedback!

- Scan here to complete our survey.



**See you at Condemnation Summit XXXIII!**

**A Save-the-Date will be sent for Spring 2025**