

FENNEMORE. + **GK** Gallagher & Kennedy

Joining forces December 1, 2026



Condemnation Summit XXXVI

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Condemnation Summit XXXVI

Welcome Remarks

Jennifer Cranston | Gallagher & Kennedy
Ashley Mahoney | Nossaman LLP

Today's Agenda

9:00 a.m.	Welcome Remarks
9:15 a.m.	The Other Eminent Domain: Private Condemnations
10:15 a.m.	Morning Networking Break
10:30 a.m.	Meet Justice Maria Elena Cruz
11:30 a.m.	Hosted Lunch
12:30 p.m.	A View from the Bench
1:30 p.m.	Afternoon Networking Break
1:45 p.m.	Relocation 101
3:00 p.m.	Cookie Break Sponsored by Integra Realty Resources
3:15 p.m.	Condemnation Experts: Disclosure, Discovery, and Best Practices
4:45 p.m.	Conclusion

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The Other Eminent Domain: Private Condemnations

Jeffrey Gross | Berry Riddell

Arizona Constitution Art. 2 § 17

“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.”

A.R.S. § 12-1202(A)

“An owner of or a person entitled to the beneficial use of land, mines or mining claims and structures thereon, which is so situated with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity over, across, through, and on the premises, may condemn and take lands of another, sufficient in area for the construction and maintenance of the private way of necessity.”

A.R.S. § 12-1201

“ ‘Private way of necessity’ as used in this article means right of way on, over, across, or through the land of another for means of ingress and egress, and the construction and maintenance thereon of roads, overhead transmission lines, pole lines, power lines, canals, ditches, flumes, shafts, tunnels, pipe lines, drains, including, but not limited to, embankments, diversion dams, dikes, ditches, canals, flumes and levees for the purpose of removing water from land or preventing accumulation of water on land, and tramways, including, but not limited to, aerial tramways and industrial railroads, for mining, milling, lumbering, agricultural, domestic or sanitary purposes.”

Private Way of Necessity

- Nonexistence of other access rights

OR

- Inadequacy of existing access

AND

- Greatest public good/least private injury

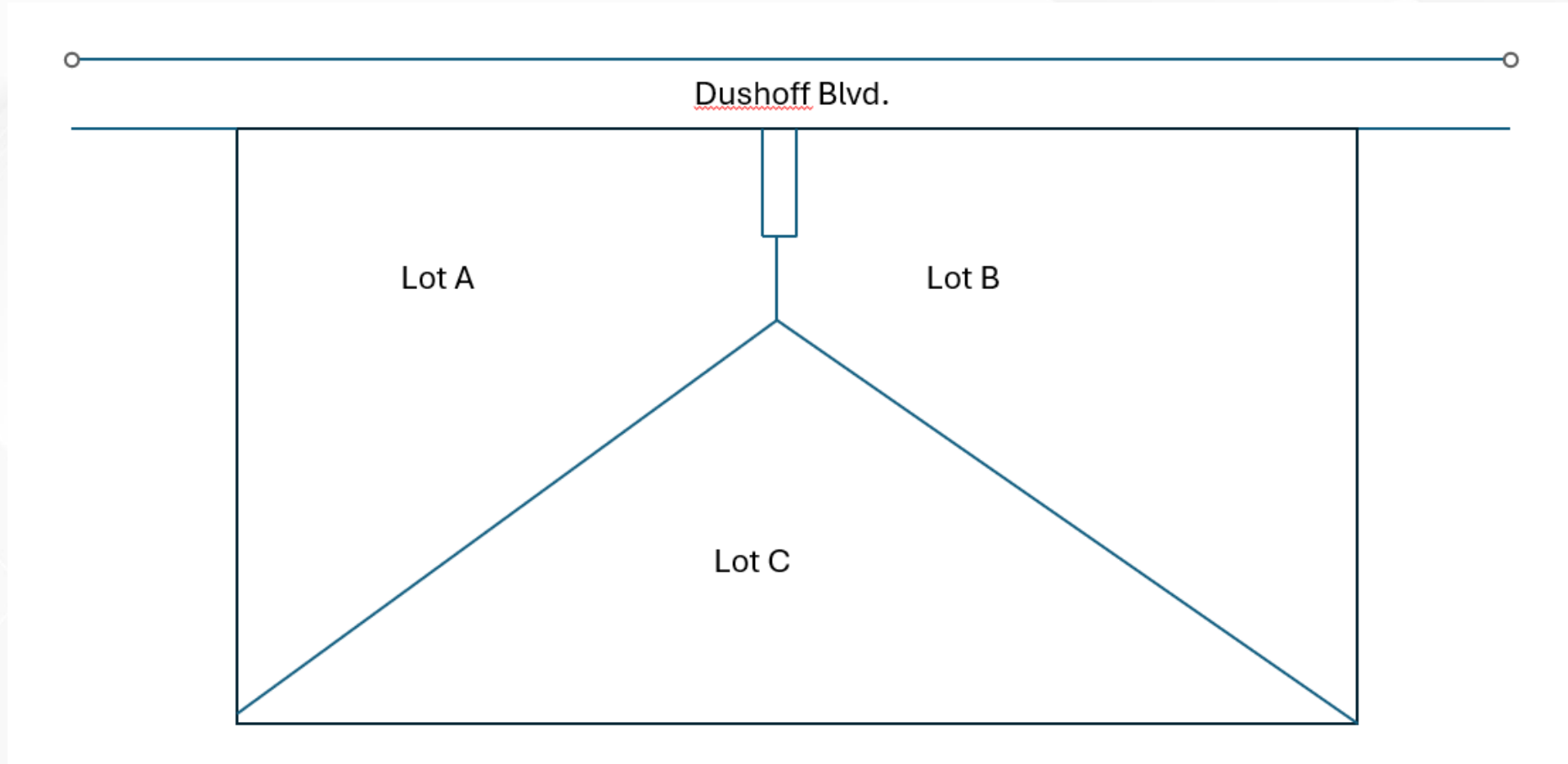
Nonexistence of Other Access Rights

- No express easement or other access right
- No prescriptive easement
- No implied easement/IMPLIED WAY OF NECESSITY
 - Plaintiff's burden to prove no other access

Express Access Right

- Easement document
- Deed
- Dedication
- Restrictive covenant
- Patent
- Settlement agreement
- Congressional act (*e.g.* GLO)

Implied Easement/Implied Way of Necessity



Inadequacy of Existing Access

- No alternative legal route that is both adequate and reasonable
 - The burden is on the party seeking condemnation to establish the absence of an adequate alternative route
- Mere cost or inconvenience in building a road on the condemnor's property is insufficient
- Prospective use may be considered as well as present necessity
- Determining adequacy is a “clash of values” that balances plaintiff's necessity for access against defendant's constitutional right to protect their property

Examples – Arizona Case Law

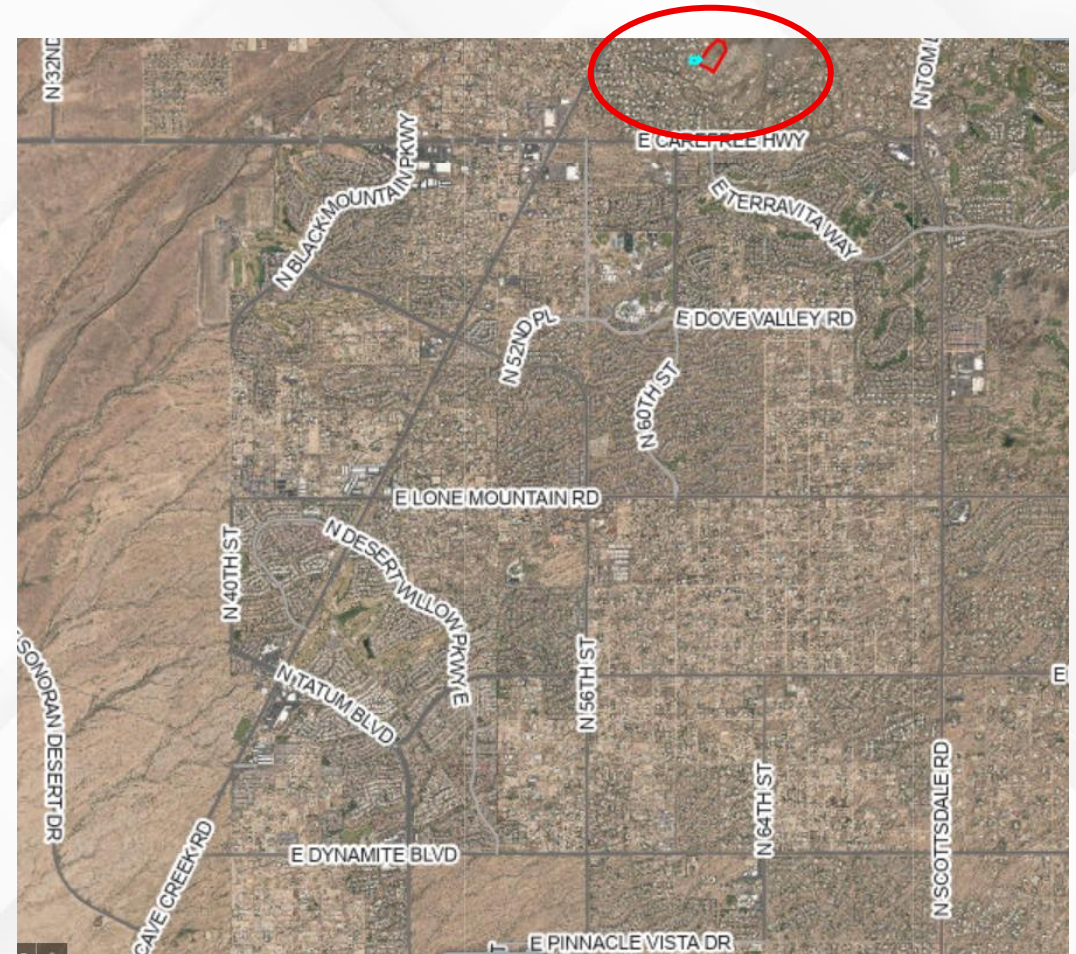
- Existing 12-foot access road across neighbor's parcel was inadequate and allowed private condemnation when city required 20-foot driveway to issue building permit. *Dabrowski v. Bartlett*, 246 Ariz. 504 (App. 2019).
- Existing roadway that is “arduous, unkept, lengthy and burdensome,” and that is “steep and rocky, crossing washes, impassable by ordinary passenger car” and that adds 45 miles and two hours of travel to a trip to the closest major town, was not inadequate. *Siemens v. Davis*, 196 Ariz. 411 (App. 2000).
- Implied way of necessity that had historically been limited to horseback access to work cattle was adequate for a proposed residential development because the scope of an implied easement can accommodate normal development. *Tobias v. Dailey*, 196 Ariz. 418 (App. 2000).

Process

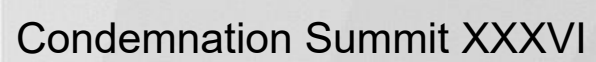
- Investigation and route selection
- Statutory offer
- Complaint
- Immediate possession?
- Trial issues:
 - Necessity
 - Reasonableness
 - Just compensation
- Judgment
- Final order of condemnation

Case Study - *College Book Centers, Inc. v. Carefree Foothills Homeowners' Ass'n*, 225 Ariz. 533 (App. 2010)

- Client owned a patented mining claim from 1912 with no access rights to a public road.
- Residential subdivision with CC&Rs developed around mining claim, cut off access.
- Client also owned an adjacent lot in the subdivision, but CC&Rs prevented use of any “structure” other than for single-family residential purposes.







College Book Centers, Pt. 1

- Private condemnation to condemn the HOA members' interests in the CC&Rs that prevented use of the lot for a road
- Plaintiff's burden to prove no alternative access
- Claims:
 - Waiver of right to enforce CC&Rs
 - Implied easement (or lack thereof)
 - Private condemnation and assessment of just compensation
- Jury: HOA waived right to enforce CC&Rs

College Book Centers, Pt. 2

- Court of Appeals
 - HOA did not waive the right to enforce CC&Rs
 - College Book Centers failed to prove implied easement
 - Remanded to consider private condemnation claim
- Retrial
 - Jury found necessity
 - Jury assessed nominal just compensation

Thank You



Jeffrey Gross
Attorney
Berry Riddell

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Morning Networking Break

We will resume at 10:30 a.m.

Condemnation Summit XXXVI

Meet Justice Maria Elena Cruz

Meet Justice Cruz



Meet Justice Cruz



***If you Don't
CRUZ***



YOU LOSE

Meet Justice Cruz



Meet Justice Cruz



Meet Justice Cruz



Thank You



Jennifer Cranston
Shareholder
Gallagher & Kennedy



Justice Maria Elena Cruz
Arizona Supreme Court

Condemnation Summit XXXVI

Hosted Lunch

We will resume at 12:30 p.m.

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A View from the Bench

Judge Danielle Constant | Pima County Superior Court

THE GOOD, THE BAD, AND THE UGLY

A view from the bench

What does my judge want from me?

- All judges are, of course, different
- Clarity in the request
- Anything that makes the judge's life easier



THE GOOD

- Proactiveness
- Scheduling Clarity
 - OSC
 - Trials
- Timeliness
- Educating Your Judge

THE BAD

- Deposition Issues
- Preparedness
- Jury Trial Considerations
 - Calling Jurors
 - Responsiveness
 - Exhibits

THE UGLY

- Disclosure and Discovery Disputes
- Settlement Issues
- Last-Minute Changes

Thank You



Judge Danielle Constant
Pima County Superior Court

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Condemnation Summit XXXVI

Afternoon Networking Break

We will resume at 1:45 p.m.

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Relocation 101

Myrlene Francis | Tierra Right of Way Services

What is Relocation?

- The purpose of the Uniform Relocation Assistance and Real Property Acquisition Policies Act (Uniform Act) Subpart C of 49 CFR Part 24 requires public agencies using federal funds to proactively inform, assist, and compensate people, businesses, farms, and nonprofits that must move because of a public infrastructure project, ensuring they have fair treatment, adequate replacement facilities, receive assistance in moving and reestablishing themselves as well as eligible financial assistance throughout the relocation process.
- No person shall be required to move without proper notice, advisory assistance, and the availability of comparable replacement housing and relocation benefits as required by the Uniform Act.
- Today we will review applicable portions of 49 CFR Part 24
- Final rule is effective June 3, 2024
- Subpart C—General Relocation Requirements

Who is Relocated?

Relocation benefits apply to **displaced persons**, including:

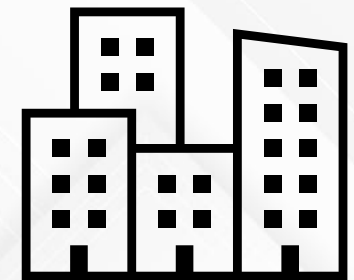
- Residential occupants (owners and tenants)
- Businesses
- Farms
- Nonprofit organizations
- Individuals and entities that are permanently displaced
- Individuals and entities that are temporarily displaced due to a project

The displacement must occur as a direct result of a federal or federally assisted project, such as a highway, transit facility, flood control project, airport expansion, utility project, or public infrastructure improvement.



Who must provide Relocation Assistance?

- The displacing agency (state department of transportation, county, city, transit agency, utility district, airport authority, or other public agency using federal funds or federal assistance) is responsible for providing notices, advisory services, and relocation benefits.



Persons NOT Displaced.

49 CFR Part 24

Final rule is effective June 3, 2024.

Subpart C—General Relocation Requirements

§ 24.2 Definitions and acronyms.

iv. *Persons not displaced.* The following is a nonexclusive listing of persons who do not qualify as displaced persons under this part:

- A. A person who moves before the initiation of negotiations, unless the agency determines that the person was displaced as a direct result of the program or project;
- B. A person who initially enters into occupancy of the property after the date of its acquisition for the project;
- C. A person who has occupied the property for the purpose of obtaining assistance under the Uniform Act;

Persons NOT Displaced.

- D. An owner-occupant who moves as a result of an acquisition of real property (voluntary sale without use of eminent domain), or as a result of the rehabilitation or demolition of the real property;
- E. A person whom the agency determines is not displaced as a direct result of a partial acquisition;
- F. A person who, after receiving a notice of relocation eligibility, is notified in writing that he or she will not be displaced for a project;
- G. An owner-occupant who conveys his or her property, as described in (voluntary sale without use of eminent domain), after being informed in writing that if a mutually satisfactory agreement on terms of the conveyance cannot be reached, the agency will not acquire the property.
In such cases, however, any resulting displacement of a tenant is subject to the regulations in this part;

Persons NOT Displaced.

- H. A person who retains the right of use and occupancy of the real property for life following its acquisition by the agency;
- I. A person who is determined to be in unlawful occupancy prior to or after the initiation of negotiations, or a person who has been evicted for cause, under applicable law. However, advisory assistance may be provided to unlawful occupants at the option of the agency in order to facilitate the project;
- J. A person who is not lawfully present in the United States and who has been determined to be ineligible for relocation assistance in accordance; or
- K. Temporary, daily, or emergency shelter occupants are in most cases not considered displaced persons.

****At a minimum, agencies shall provide advisory assistance to all occupants at initiation of negotiations.**

What does the regulation require?

Foundational relocation requirements, include:

1. Relocation Notices

- Occupants must receive timely written notices explaining their rights and project impacts.
- Agencies must keep affected persons informed throughout the process.

2. Comparable Replacement Housing

- A displaced residential occupant generally cannot be required to move unless a comparable replacement dwelling is available.
- This protects displaced persons from being left without suitable housing.

3. Relocation Advisory Services

- Agencies must provide counseling, referrals, planning assistance, and information about available replacement properties.
- Special attention is required for persons with significant relocation challenges.

What does the regulation require?

4. Temporary Relocation Protections

- Persons who must move temporarily receive notices, advisory services, and reimbursement for reasonable out-of-pocket costs.
- Temporary displacement generally may not exceed 12 months before the person is considered permanently displaced and eligible for additional benefits.

5. Claims and Payments

- Procedures are established for claiming and receiving relocation payments.
- Agencies must explain documentation and eligibility requirements.

Why Relocation Planning?

Relocation Planning* may begin between conceptual alignment adoption and 30% Design

Only those that may need to move from their property will be contacted:



**Relocation planning helps determine the needs and assistance required*

When do the requirements apply?

The requirements apply whenever public project causes a person or entity to move from property they occupy.

Key timing requirements include:

- Relocation planning should begin early in project development.
- Before displacement, occupants must receive appropriate notices.
- Before residential displacement, a comparable replacement dwelling generally must be available.
- Assistance continues through the relocation process until the move is completed and eligible claims are resolved.



Where do these regulations apply?

- Federal funding and Federal grants
- Federal-aid transportation funding
- Other forms of federal financial assistance subject to the Uniform Relocation Assistance and Real Property Acquisition Policies Act (Uniform Act)
- Examples include:
 - Highway projects
 - Local roadway improvements
 - Transit projects
 - Airport expansions
 - Water and wastewater facilities
 - Flood control projects
 - Utility relocations funded with federal assistance
- Most public Agencies have adopted the Uniform Act for delivery of all public projects regardless of funding source.
- Arizona Revised Statutes § 28-7142, and § 11-962, Relocation Assistance Advisory Services.
- Arizona Revised Statutes §11-968,
- 49 Code of Federal Regulations sections 24.201 through 24.503.

Why do these regulations exist?

Congress enacted the **Uniform Relocation Assistance and Real Property Acquisition Policies Act (Uniform Act)** to ensure that individuals and organizations affected by public projects do not bear an unfair burden for improvements that benefit the public.

The regulations are intended to:

- Prevent economic hardship caused by displacement.
- Ensure fair and equitable treatment.
- Promote uniform practices among agencies.
- Protect housing opportunities.
- Help businesses and farms remain viable after relocation.
- Reduce disruption to families, communities, and local economies.

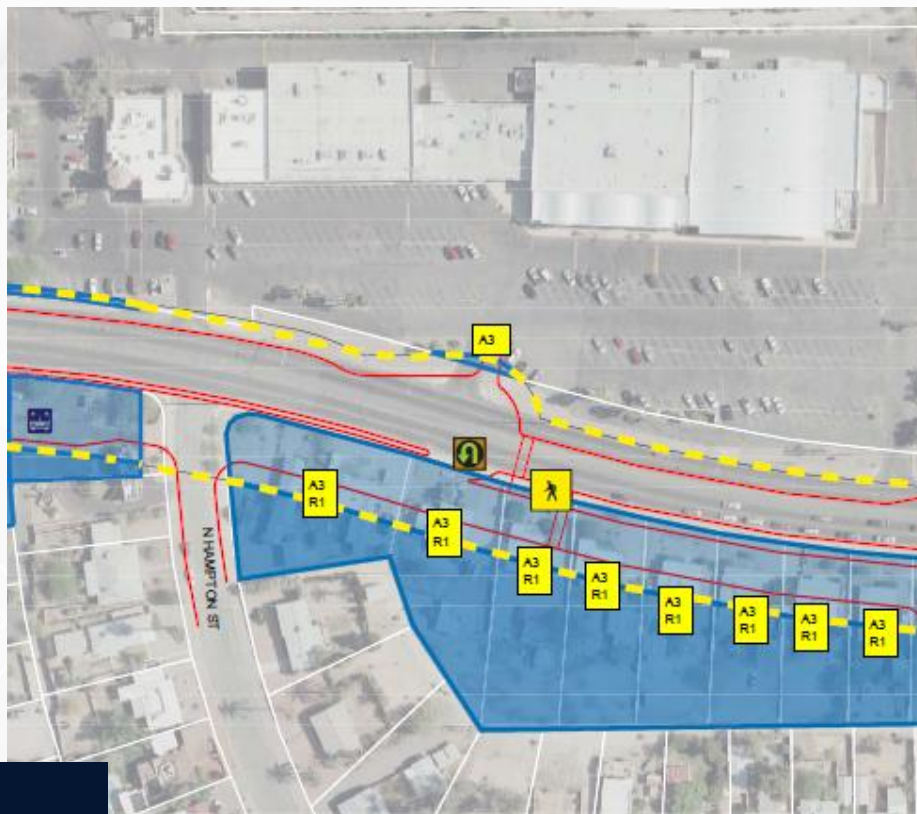
How are the requirements implemented?

1. Identify Potential Displacements

- During project development, the agency evaluates whether the proposed public infrastructure project will require:
 - Residential relocations
 - Business relocations
 - Farm relocations
 - Nonprofit organization relocations
 - Temporary occupancy disruptions
- This early planning allows the agency to determine relocation needs, costs, available housing, and business replacement opportunities.

City of Tucson

Grant Road Phase 2

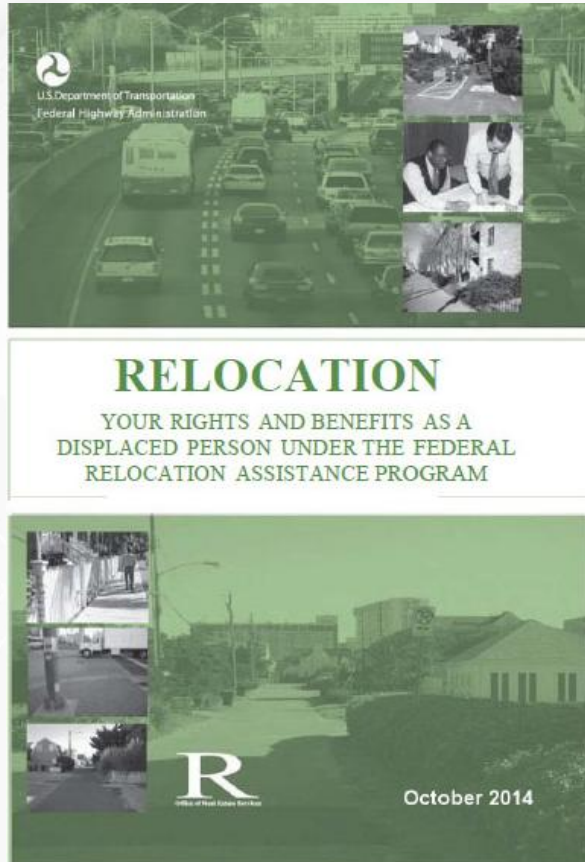


2008 Transportation Planning

Present Day



How are the requirements implemented?



2. Inform Affected Occupants

- The agency provides required relocation notices explaining:
 - Project impacts
 - Eligibility requirements
 - Relocation rights
 - Available benefits
 - Contact information for relocation assistance staff
- A key principle of Subpart C is that displaced persons must be fully informed of their rights and entitlements.

How are the requirements implemented?

3. Conduct Relocation Planning

- Relocation agents meet with affected occupants to determine:
 - Household needs
 - Accessibility requirements
 - Income and occupancy information
 - Business operational requirements
 - Special relocation challenges
 - The agency develops a relocation plan based on these needs.



How are the requirements implemented?

4. Provide Advisory Services

- The agency actively assists displaced persons by:
 - Identifying replacement housing
 - Referring occupants to available properties
 - Assisting businesses in locating replacement sites
 - Coordinating relocation schedules
 - Explaining eligibility and claim procedures
 - The agency's role is not simply to provide money but also to help occupants successfully relocate



Relocation assistance = reimbursement package for actual, reasonable and necessary costs of moving

Relocation
Assistance

can
include

Relocation advisory services

Replacement housing

Moving cost reimbursement

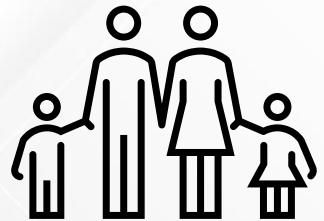
Related eligible expenses

**The Agency does not move parties. We assist with planning, coordination of the move, then reimbursement for the eligible move expenses.*

How are the requirements implemented?

5. Ensure Comparable Replacement Housing Is Available

- Before a residential occupant is required to move, the agency generally must ensure that at least one comparable replacement dwelling is available that is:
 - Decent, safe, and sanitary
 - Functionally equivalent
 - In an appropriate location
 - Affordable to the displaced occupant
- This requirement is one of the Uniform Act's most important protections.



How are the requirements implemented?

6. Process the Relocation

- The occupant relocates to the replacement property while the agency:
 - Coordinates move dates
 - Approves eligible expenses
 - Provides technical assistance
 - Maintains communication throughout the move
 - For temporary moves, the agency reimburses reasonable and necessary out-of-pocket expenses associated with the temporary relocation.



Reimbursement of Eligible Expenses - Residential

- A Residential displaced person is eligible for actual, reasonable, and necessary moving expenses for moving personal property from a dwelling.
- Replacement housing payment for 90-day homeowner-occupants may not exceed **\$41,200**.
- Replacement housing payment for 90-day tenants and certain others, eligible for a payment not to exceed **\$9,570** for rental assistance or down payment assistance.
- Replacement housing of last resort. Whenever a program or project cannot proceed on a timely basis because comparable replacement dwellings are not available within the monetary limits for owners or tenants, as appropriate, the agency shall provide justified additional or alternative assistance.
- On a case-by-case basis, for good cause, which means that appropriate consideration has been given to:
 - The availability of comparable replacement housing in the program or project area;
 - The resources available to provide comparable replacement housing; and
 - The individual circumstances of the displaced person.

No relocation payment received by a displaced person or person shall be considered as income for the purpose of the Internal Revenue Code of 1954, which has been redesignated as the Internal Revenue Code of 1986 (title 26, U.S.C.), or the Social Security Act (42 U.S.C. 301 et seq.

Reimbursement of Eligible Expenses – Non-Residential

- A business or farm operation is entitled to reimbursement for actual expenses, not to exceed **\$5,000**, as the agency determines to be reasonable, which are incurred in searching for a replacement location.
- The Federal funding agency may, on a program wide or project basis, allow a **one-time payment of \$1,000** for search expenses with minimal or no documentation as an alternative payment method.
- Moves from a business, farm, or nonprofit organization. Eligible expenses for moves from a business, farm, or nonprofit organization include those expenses described in paragraphs (g)(1) through (7) and (11) through (18) of this section and § 24.303. Personal property as determined by an inventory from a business, farm, or nonprofit organization.

Reimbursement of Eligible Expenses – Non-Residential

- A small business, farm, or nonprofit organization is entitled to receive a payment, **not to exceed \$33,200**, for expenses actually incurred in relocating and reestablishing such small business, farm, or nonprofit organization at a replacement site.
- A displaced business may be eligible to choose a fixed payment in lieu of the payments for both actual moving and related expenses, as well as actual reasonable reestablishment expenses. Such fixed payment, except for payment to a nonprofit organization, shall equal the average annual net earnings of the business, **not less than \$1,000 nor more than \$53,200**.

How are the requirements implemented?

7. Pay Eligible Relocation Benefits

- Following the move, the agency reviews documentation and reimburses eligible expenses, which may include:
 - Moving costs
 - Related relocation expenses
 - Temporary relocation costs
 - Housing replacement benefits
 - Certain business reestablishment expenses
- Claims must be submitted and processed according to established procedures.



Claims - Items of Importance

Items of Importance:

- Time for filing a Claim for reimbursement of Eligible Expenses.

1. All claims for a relocation payment shall be filed with the agency no later than 18 months after:

- For tenants, the date of displacement or temporary move.
- For owners, the date of displacement or the date of the final payment for the acquisition of the real property, whichever is later.

2. The agency shall waive this time period for good cause.

Claims - Items of Importance

No waiver of relocation assistance.

- An agency shall not propose or request that a person waive his or her rights or entitlements to relocation assistance and benefits provided by the Uniform Act and this part.

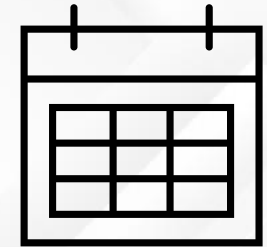
Documentation.

- Any claim for a relocation payment shall be supported by such documentation as may be reasonably required to support expenses incurred, such as bills, certified prices, appraisals, or other evidence of such expenses.

How are the requirements implemented?

8. Maintain Compliance and Documentation

- The agency documents:
 - Notices provided
 - Advisory contacts
 - Replacement housing determinations
 - Claim reviews
 - Payments made
 - Relocation decisions
- These records demonstrate compliance with the Uniform Act.



Thank You



Myrlene Francis
Project Manager, Arizona Right of Way
Tierra Right of Way Services

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Afternoon Networking & Cookie Break

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We will resume at 3:15 p.m.

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Condemnation Experts: Disclosure, Discovery, and Best Practices

Ashley Mahoney | Nossaman

Gerald Zaddack | Zaddack Valuation Advisors

Alyssa Strong | Artisan Right of Way

WHAT IS AN ACQUISITION FILE?

The record connecting valuation, negotiation, and condemnation

The Rules Governing The Acquisition File

- Uniform Act and 49 CFR Part 24: acquisition protections and compliance
- 23 CFR Part 710: additional requirements for Federal-aid highway projects
- State Requirements: parcel processing, review, and records
- Arizona law, agency requirements, and approved project procedures

The Federal Recordkeeping Standard

49 CFR § 24.9 — Recordkeeping and reports

- **Records:** Document acquisition and displacement activities in enough detail to demonstrate Part 24 compliance.
- **Retention:** At least 3 years after each owner and displaced person's final payment, or the funding-agency required retention period, whichever is later.
- **Confidentiality:** Applies to use as public information, unless applicable law provides otherwise.
- **Reporting:** Federal agencies submit an annual summary to the Lead Agency by November 15.

Core Acquisition-file Records

- **Ownership:** Title to verify ownership, signing authority, encumbrances, and other title requirements
- **Acquisition Area:** plans sheet with legal description and exhibit identifying the type of land right and new right of way limits
- **Valuation and offer:** appraisal and review or waiver valuation, and written offer identifying land rights being acquired, improvements, cost to cure and severance damages
- **Negotiations:** Delivery evidence, contact report, owner submissions, responses, revised offers, and settlement approvals
- **Closing or condemnation:** Conveyance document, payment, recording, title policy or Litigation Guarantee, court deposit, Order of Immediate Possession

How We Maintain The Acquisition File

- Organize records by project and parcel using consistent folders.
- Use filenames that identify the date, document, and version.
- Save emails with their attachments and connect them to the contact report.
- Check the file for missing records before referral to counsel.

When the contact report says 'see email'...



but the email isn't in the file.

The Contact Report

- Record contacts and attempted contacts promptly and chronologically.
- Identify the date, method or place, participants, offers, and owner concerns.
- Document the agency's response, why agreement was not reached, and the next action.
- Use factual language and retain supporting emails, attachments, letters, and delivery records.

Illustrative entry:

- “Owner declined the offer, raised concerns about driveway access, and requested an engineering meeting.”

The Condemnation Handoff

- Provide the factual summary of negotiations such as settlement discussions, unresolved title, access, relocation, and possession issues.
- Include the Contact Report, current title, plans, legal descriptions, appraisal report, notices, and delivery evidence.
- Preserve emails, attachments, revised offers, and original records under the retention schedule or legal hold.

A complete record gives counsel the foundation for disclosure and discovery.

Introduction:



Introduction:

USPAP – Record Keeping

2024

Uniform Standards of Professional Appraisal Practice (USPAP)

Effective January 1, 2024

USPAP – Record Keeping

USPAP – Record Keeping

RECORD KEEPING RULE

330 **An appraiser must prepare a workfile for each appraisal or appraisal review assignment. A workfile must**
331 **be in existence prior to the issuance of any report or other communication of assignment results. A written**
332 **summary of an oral report must be added to the workfile within a reasonable time after the issuance of the**
333 **oral report.**

USPAP – Record Keeping – Workfile Definition

USPAP – Record Keeping – Workfile Definition

170 **WORKFILE:** documentation necessary to support an appraiser's analyses, opinions, and conclusions.

USPAP – Record Keeping

USPAP – Record Keeping

334 **The workfile must include:**

- 335 • **the name of the client and the identity, by name or type, of any other intended users;**
- 336 • **true copies of all written reports, documented on any type of media. (A true copy is a replica of the**
337 **report transmitted to the client. A photocopy or an electronic copy of the entire report transmitted to**
338 **the client satisfies the requirement of a true copy.);**
- 339 • **summaries of all oral reports or testimony, or a transcript of testimony, including the appraiser's**
340 **signed and dated certification; and**
- 341 • **all other data, information, and documentation necessary to support the appraiser's opinions and**
342 **conclusions and to show compliance with USPAP, or references to the location(s) of such other data,**
343 **information, and documentation.**

USPAP – Record Keeping – Restricted Reports & Oral Reports

USPAP – Record Keeping – Restricted Reports & Oral Reports

- Oral Reports are seldom used Eminent Domain Cases

344 A workfile in support of a Restricted Appraisal Report or an oral appraisal report must be sufficient for
345 the appraiser to produce an Appraisal Report. A workfile in support of an oral appraisal review report
346 must be sufficient for the appraiser to produce an Appraisal Review Report.

USPAP – Record Keeping – Retention Time Requirements

- Important limitation in light of some subpoenas
 - For example, if appraiser is asked to provide all reports within past 10 years

347 An appraiser must retain the workfile for a period of at least five years after preparation or at least two
348 years after final disposition of any judicial proceeding in which the appraiser provided testimony related
349 to the assignment, whichever period expires last.

USPAP – Record Keeping – Custody Requirements

- Relevant if the appraiser has moved to another company

350 An appraiser must have custody of the workfile, or make appropriate workfile retention, access, and retrieval
351 arrangements with the party having custody of the workfile. This includes ensuring that a workfile is stored in
352 a medium that is retrievable by the appraiser throughout the prescribed record retention period.

Relevant if the appraiser has moved to another company

USPAP – Record Keeping

USPAP – Record Keeping

353 **An appraiser having custody of a workfile must allow other appraisers with workfile obligations related to**
354 **an assignment appropriate access and retrieval for the purpose of:**

- 355 • **submission to state appraiser regulatory agencies;**
- 356 • **compliance with due process of law;**
- 357 • **submission to a duly authorized professional peer review committee; or**
- 358 • **compliance with retrieval arrangements.**

359 Comment: A workfile must be made available by the appraiser when required by a state appraiser
360 regulatory agency or due process of law.

USPAP – Record Keeping

USPAP – Record Keeping

361 **An appraiser who willfully or knowingly falls to comply with the obligations of this RECORD KEEPING RULE**
362 **Is in violation of the ETHICS RULE.**

USPAP – Ethics Rule

USPAP – Ethics Rule

<u>CONDUCT:</u>	249
An appraiser must perform assignments with impartiality, objectivity, and independence, and without accommodation of personal interests.	250
	251
An appraiser:	252

- **must not willfully or knowingly violate the requirements of the RECORD KEEPING RULE;**

USPAP – Ethics Rule



- Important Clarification is Willfully or Knowingly
 - For example, if the appraiser knowingly destroys a workfile before expiration of the retention period

USPAP – Ethics Rule

- Important Clarification is Willfully or Knowingly
 - Question for Audience – Other Examples of Willfully or Knowingly Violating Record Keeping

Guidance re: Workfile Content



- No universally applicable checklist of every document to include
- Generally should include items to allow another appraiser/regulator to understand and support the research, analyses, judgements and conclusions made in the appraisal

Guidance re: Workfile Content

Arizona Department of Insurance and Financial Institutions (DIFI)

- No Specific Checklist
- A July 2021 Newsletter Article - Items Not Typically Included
- All Comparable Sales Data Sheets
- Appraiser's Field Measurements
- Supporting Market Data
- Information Necessary to Support the Appraiser's Opinions

Guidance re: Workfile Content

Suggested Items to Include – From Colorado Division of Real Estate

- Data Regarding the Subject Property
- Building Plans
- Construction Cost Data
- Leases, Rent Rolls, Operating Expense Statements
- Market Research – CoStar, MLS, Vizzda, etc.

Guidance re: Workfile Content

Suggested Items to Include – From Colorado Division of Real Estate

- Paired-Sales Analyses
- Notes From Discussions With Real Estate Professionals
- Buyers, Sellers, Brokers, Leasing Agents
- Notes from Discussions with Others
- Planning & Zoning Officials, Engineers, Utility Providers
- Data Considered But Not Used – Particularly When Exclusion Materially Affects the Analysis

Guidance re: Workfile Content

Data Considered But Not Used

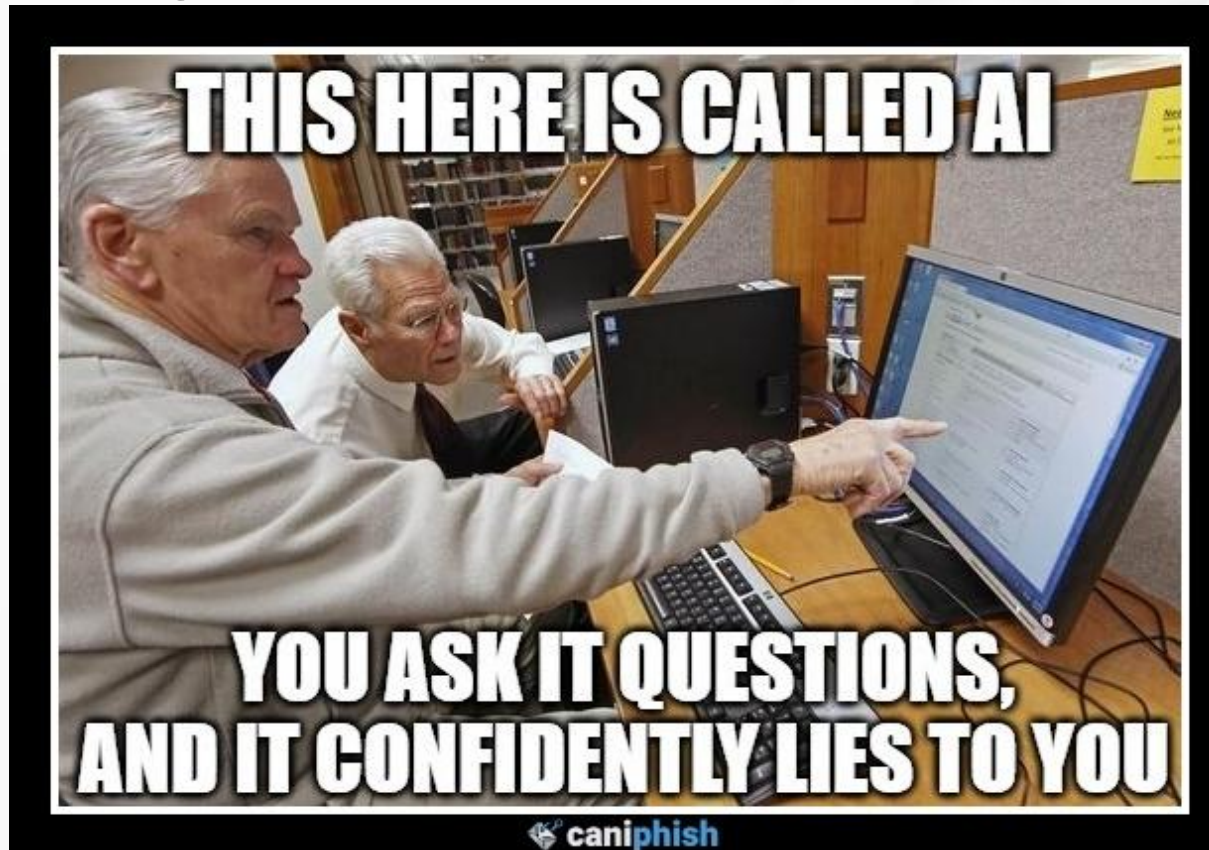
- Particularly When Exclusion Materially Affects the Analysis

Audience Question:

- Suppose You Identify 25 Sales
- Investigate 12 Sales
- Use 6 Sales In Your Report
- What Should The Appraiser's Workfile Contain?

Guidance re: Workfile Content

What About Including Your AI Results



Guidance re: Workfile Content

Advisory Opinion 41, Use of Technology in an Appraisal or Appraisal Review Assignment

April 23, 2026



**The Appraisal
FOUNDATION®**

Authorized by Congress as the Source of Appraisal
Standards and Appraiser Qualifications

APPRAISAL STANDARDS BOARD

Guidance re: Workfile Content

USPAP Advisory Opinion 41 – Published April 23, 2026

- *“Use of Technology in an Appraisal or Appraisal Review Assignment”*

“Appraisers use a range of tools, including spreadsheets, regression and statistical software, automated valuation models, machine learning systems, and generative artificial intelligence. These tools can support research, analysis, and the communication of assignment results. They also raise questions concerning scope of work, transparency, confidentiality, record keeping, and the credibility of assignment results” (AO-41, p. 2).

Guidance re: Workfile Content

USPAP Advisory Opinion 41 – Published April 23, 2026

- *“Use of Technology in an Appraisal or Appraisal Review Assignment”*
- Caveat –
 - Advisory Opinions Do Not Establish New Standards or Interpret Existing Standards.
 - Advisory Opinions Provide Guidance to Appraisers

Applying USPAP Advisory Opinion 41

- Key Distinction When Using AI in an Appraisal
 - AI as a Research Tool
 - AI as an Analytical Tool

Applying USPAP Advisory Opinion 41

- Record Keeping Obligation

346 1. **Relied upon:** If a tool's output was relied upon in developing an assignment result, the
347 workfile must include enough information to show how that output was used in forming
348 the appraiser's opinions and conclusions. This may include the tool's output, related data
349 and information and prompts or instructions used in the tool, and any analysis applied in
350 connection with the tool's output. The purpose is to document the information and
351 reasoning that contributed to the development of the assignment results.

Applying USPAP Advisory Opinion 41

- Record Keeping Obligation

352 **2. Reviewed but not relied upon:** The decision depends on the scope of work and the
353 actions of the appraiser's peers and the expectations of intended users in a similar
354 assignment. If reviewing the tool's output was an expected part of the process, the

355 documentation in the appraiser's workfile should be sufficient to show that the scope of
356 work was reasonable and that the conclusions are supported. This may include notes or
357 a short explanation of why the tool's output was not used, especially if that decision
358 affects the appraiser's conclusions.

Applying USPAP Advisory Opinion 41

- Record Keeping Obligations Depend on Role the Tool Played in the Assignment
 - Illustration –

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Question 6: I used a generative AI tool to create an output that I relied upon to develop an adjustment in the sales comparison approach. What do I need to retain in the workfile?

Applying USPAP Advisory Opinion 41

- Record Keeping Obligations Depend on Role the Tool Played in the Assignment

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Answer 6: If the output from the generative AI tool was relied upon in developing your adjustment and contributed to your assignment results, examples of items you may need to retain in your workfile might include:

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- The specific output generated by the tool that was used in developing the adjustment and the related data and information used when prompting the tool.
- The prompts or instructions provided to the tool sufficient to understand how the system was prompted.
- Sufficient information to explain how the tool's output was relied upon when developing the assignment results.

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If documentation is already included in your report, for example, through a summary of the development process, and it clearly demonstrates how the tool contributed to your assignment results in a manner sufficient for the intended use, then maintaining the report as part of your workfile may satisfy the RECORD KEEPING RULE. In most instances, you are not required to retain the tool's internal code, algorithms, or technical specifications.

Applying USPAP Advisory Opinion 41

- Discussion Examples

Example 1 — AI Used as a Search Tool

Suppose an appraiser asks an AI system:

“Find sales of freestanding Starbucks properties in Arizona between January 2024 and September 2026.”

The AI identifies 15 potential transactions. The appraiser then independently researches those properties through CoStar, assessor records, recorded deeds, offering memoranda, brokers, or other sources and ultimately selects six sales for analysis.

INCLUDE IN WORKFILE?

Applying USPAP Advisory Opinion 41

- Discussion Example 1 – ChatGPT Answer

In this situation, the AI has essentially served as a **tool for locating potential sources of information**. The appraiser's conclusions are ultimately based upon the independently obtained and verified transaction information.

AO-41 does not appear to require preservation of the entire AI search merely because AI helped identify the transactions. The more important workfile documentation is the information upon which the appraiser **actually relied** in developing the appraisal.

Applying USPAP Advisory Opinion 41

- Discussion Example 2

Example 2 — AI Used as an Analytical Tool

Now consider a different situation. The appraiser provides AI with information concerning ten Starbucks sales and asks:

“Analyze these transactions and determine whether there is a relationship between capitalization rate and remaining lease term.”

The AI performs the analysis and concludes that properties with longer remaining lease terms generally exhibit lower capitalization rates. The appraiser evaluates that analysis and relies upon it in selecting a 5.75% capitalization rate for the subject property.

INCLUDE IN WORKFILE?

Applying USPAP Advisory Opinion 41

- Discussion Example 2 – ChatGPT Answer

The AI performs the analysis and concludes that properties with longer remaining lease terms generally exhibit lower capitalization rates. The appraiser evaluates that analysis and relies upon it in selecting a **5.75% capitalization rate** for the subject property.

The situation is materially different because the AI output has contributed directly to the development of an assignment result.

Applying USPAP Advisory Opinion 41

Use of AI	Example	Workfile implication
Research lead only	Ask AI to find potential sales of Starbucks properties. The appraiser subsequently obtains and verifies the transactions through CoStar, public records, deeds, offering memoranda, brokers, or other primary/secondary sources.	The AI results function primarily as research leads. AO-41 does not appear to establish a blanket requirement to retain the AI search merely because AI helped locate the information. The independently researched information relied upon should be appropriately documented.
Information reviewed but not relied upon	Ask AI to identify potential Starbucks sales. The appraiser reviews the results, rejects certain transactions, and does not rely upon the AI-generated information in developing the final opinions and conclusions.	Documentation is not automatically required merely because the AI output was reviewed. Whether it should be retained depends upon the circumstances of the assignment and whether the information is necessary to demonstrate the appraiser's analysis and compliance with USPAP.
AI-generated analysis relied upon	Provide AI with ten Starbucks sales and ask it to analyze the transactions and determine whether capitalization rates vary based upon remaining lease term. The appraiser relies upon that analysis in selecting a capitalization rate.	The AI output has become part of the analytical process relied upon in developing an assignment result. The workfile should contain sufficient documentation to demonstrate how the AI output contributed to the appraiser's opinions and conclusions.

Guidance re: Workfile Organization

1	SUBPOENA DUCES TECUM	
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3	<u>DOCUMENTS TO BE PRODUCED</u>	
4	1. Your entire work file as it relates to the Case, including but not limited to:	
5	a) All documents, communications or records of communication relating to	
6	the Case, including but not limited to any facts or data utilized, reviewed,	
7	or considered by you in connection with the Case, and the scope of work,	
8	terms of engagement, facts, data, or assumptions provided to you by any	
9	attorney for the plaintiff in the Case.	
10	b) All documents, communications, or records of communications relating to	
11	information about the Case, the Property, or the Project provided by the	
12	plaintiff or any of the plaintiff's agents or other experts.	
13	c) Your engagement letter(s) for the Case.	
14	d) <u>Any and all</u> invoices or billing statements related to the Case.	
15	2. All appraisal reports prepared by you, within the past five (5) years, relating to the	
16	Project.	
17		
18		

Guidance re: Workfile Organization



Elon Musk's Desk

Guidance re: Workfile Organization



Albert Einstein's Desk



My Desk

Guidance re: Workfile Content

- Workfile Organization

Name	Date modified	Type
Correspondence	4/15/2025 5:27 AM	File folder
County Docs	4/15/2025 5:28 AM	File folder
Invoices	4/15/2025 5:29 AM	File folder
Land Sales	4/15/2025 5:29 AM	File folder
Legal Docs	4/15/2025 5:29 AM	File folder
Noise Study	4/15/2025 5:30 AM	File folder
Norris Design	4/15/2025 5:30 AM	File folder
Probability of Rezoning	4/15/2025 5:30 AM	File folder
Project Docs	4/15/2025 5:30 AM	File folder
Rebuttal	4/15/2025 5:30 AM	File folder
Report	4/15/2025 5:30 AM	File folder
Subject Docs	4/15/2025 5:31 AM	File folder
Update for TCE	4/15/2025 5:31 AM	File folder



Name	Date modified
Emails Received	4/15/2025 5:28 AM
Signed engagement letter	4/15/2025 5:27 AM



Name	Date modified
Kimley Horn	4/15/2025 5:30 AM
Landscape Plans	4/15/2025 5:30 AM
Paving Plan Sheets	4/15/2025 5:30 AM
Plant Inventory - Aerial	4/15/2025 5:30 AM
Property exhibit	4/15/2025 5:30 AM
T0099-Biological-Eval-CHR-McQ-to-Gilb	4/15/2025 5:30 AM
T0099-Final-Noise-Report-CHR-McQ-to-...	4/15/2025 5:30 AM
T0099-Prelim_Initial_Site_Assessment_CH...	4/15/2025 5:30 AM

Guidance re: Workfile Content

- Workfile Organization

Name	Date modified	Type
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Update for TCE	4/15/2025 5:31 AM	File folder



Name	Date modified
After Condition	4/15/2025 5:29 AM
Before Condition	4/15/2025 5:29 AM

Guidance re: Workfile Content

- Workfile Organization

Name	Date modified
After Condition	4/15/2025 5:29 AM
Before Condition	4/15/2025 5:29 AM



Name	Date modified
12201 E Cloud	4/15/2025 5:29 AM
NEC 148th St & Via De Arboles	4/15/2025 5:29 AM
NWC 124th & Cloud	4/15/2025 5:29 AM
SWC Power Rd & Victoria St	4/15/2025 5:29 AM

Guidance re: Workfile Content

- Workfile Organization

Name	Date modified
12201 E Cloud	4/15/2025 5:29 AM
NEC 148th St & Via De Arboles	4/15/2025 5:29 AM
NWC 124th & Cloud	4/15/2025 5:29 AM
SWC Power Rd & Victoria St	4/15/2025 5:29 AM



Name	Date modified	Type	Size
18329 E Victoria ST 8 - Notes	4/15/2025 5:29 AM	Adobe Acrobat D...	1,488 KB
18329 E Victoria ST 8, Gilbert, AZ _MLS - ...	4/15/2025 5:29 AM	Adobe Acrobat D...	114 KB
Aerial Measurement	4/15/2025 5:29 AM	JPG File	78 KB
Alta Survey	4/15/2025 5:29 AM	Adobe Acrobat D...	487 KB
B202112494 - CITY-LTTR.PDF	4/15/2025 5:29 AM	Adobe Acrobat D...	345 KB
Easement map	4/15/2025 5:29 AM	Adobe Acrobat D...	1,221 KB
Easements	4/15/2025 5:29 AM	Adobe Acrobat D...	1,039 KB
Email from Maricopa County re sewer for...	4/15/2025 5:29 AM	Adobe Acrobat D...	1,107 KB
Email from Maricopa County re zoning ...	4/15/2025 5:29 AM	Adobe Acrobat D...	846 KB
IMG_2594	4/15/2025 5:29 AM	JPG File	285 KB
IMG_2595	4/15/2025 5:29 AM	JPG File	262 KB
IMG_2596	4/15/2025 5:29 AM	JPG File	231 KB
IMG_2597	4/15/2025 5:29 AM	JPG File	243 KB
IMG_2598	4/15/2025 5:29 AM	JPG File	223 KB
Minor Land Division Book 1565, Page 49	4/15/2025 5:29 AM	Adobe Acrobat D...	865 KB
SWC Power Rd & Victoria - Affidavit - 20...	4/15/2025 5:29 AM	Adobe Acrobat D...	105 KB
SWC Power Rd & Victoria - WD - 2021003...	4/15/2025 5:29 AM	Adobe Acrobat D...	142 KB
SWC Power Rd & Victoria St - Aerial Phot...	4/15/2025 5:29 AM	JPG File	83 KB

Guidance re: Workfile Content

- Workfile Organization – Final Thoughts
 - Assists Attorney with Workfile Review
 - Reduces Client Costs
 - Assists Appraiser in Depo/Trial Preparation

When It Gets to Litigation

Disclosure & Discovery

- What the Parties Must Hand Over – Without Being Asked
- What Lives in the Pre-Litigation Acquisition File
- Where Privilege and Work Product Actually Hold
- Counsel and the Appraiser – Drafts, Data and Dates
- **What Is Discoverable Is Far Broader Than What Is Admissible**

The Agency's Rule 26.1 Duty

Affirmative Disclosure – No Request Required

- Factual Basis and Legal Theory of Each Claim or Defense
- Trial Witnesses and the Substance of Their Testimony
- Every Person With Relevant Knowledge
- Anticipated Subject Areas of Expert Testimony
- Documents and ESI That May Be Relevant – Rule 26.1(a)(9)
 - Even If the Party Does Not Intend to Use Them at Trial

Scope of the Duty

Possession Is Not the Limit

- Also Information the Party Can Ascertain by Reasonable Inquiry
- Goes Beyond the Office:
 - Right-of-Way, Engineering, Planning, Real Estate, Budget
 - Outside Consultants Working for the Agency
- Continuing Duty – Supplement Within 30 Days
- Rule 37 Sanctions, Including Preclusion of Evidence

No Deliberative Privilege

Rigel Corp. v. State, 225 Ariz. 65 (App. 2010)

- Arizona Declined to Create a Deliberative Process Privilege
- It Would Otherwise Shield Pre-Decisional, Deliberative Material Officials' Opinions, Recommendations and Policy Advice
- This Includes Internal Non-Lawyer Communications
- The Burden Is on the Agency to Justify Withholding

Internal Agency Communications

Generally Discoverable if Relevant

- Email and Memos Between Non-Attorney Employees
- Project Planning Documents and Committee Notes
- Engineering Studies and Design Alternatives
- Early and Internal Valuation Analyses
- Right-of-Way Acquisition Records
- Budget Documents and Project Correspondence

Don't Say That You are Going to Inverse a Bunch of People

“We have been advised through various sources that the construction of this frontage road will result in numerous inverse condemnation suits based on the Thelberg decision that the access rights of the abutting properties have been impaired and are entitled to compensation.

. . .

At the present time there exists between the two divided pavements several median crossovers which permit both north- and south-bound traffic to turn into these commercial properties. The elimination of these crossovers during the construction of the highway and subsequent trial of the inverse condemnation suits will provide the landowners with additional ammunition with which to persuade (sic) a jury of their damages.”

State ex rel. Herman v. Schaffer, 110 Ariz. 91, 96 (1973)

Attorney-Client Privilege

A.R.S. § 12-2234(B) – The Real Boundary

- Covers Agency Employee Communications With Counsel
 - Only if Made to Obtain or Provide Legal Advice
- Routing a Document Through Counsel Does Not Make It Privileged
- The Privilege Protects the Communication – Never the Underlying Facts
 - Sales Data, Measurements and Valuations Stay Discoverable

The Pre-Litigation ROW File

Created in the Ordinary Course – Not Work Product

- The Acquisition File Is Not Work Product Simply Because
 - Litigation Was Anticipated When It Was Created
- Offer Letters and the Appraisal Furnished to the Owner
- The Agent's Negotiation Notes, Logs and Call Records
- Internal Review Appraisals and Valuation Approvals
- Communications With the Owner, Tenants and Lenders

Audience Question

The Right-of-Way Agent's Notebook

- The Agent Keeps a Running Log of Every Owner Contact
- Some Entries Record the Agent's Own Impressions of Value
- Later Entries Are Copied to Outside Counsel
- What Is Disclosable? What Is Privileged? What Is Work Product?

Settlement Strategy

Current Case – Protected, With Limits

- Mental Impressions and Strategy Are Core Work Product
- Counsel's Settlement Evaluations and Authority Memos
- But the Underlying Facts Are Never Shielded
 - Comparable Sales, Severance Analyses, Cost-to-Cure Figures
- Watch the Line Between Strategy and Valuation Data

Settlement in Other Cases

A Different Answer

- Strategy in Other Condemnation Matters Is Generally
 - Not Discoverable and Not Relevant to This Taking
- Distinguish the Agency's Own Prior Acquisitions on the Project
 - Those May Be Relevant to Value and Are Often Discoverable
- Relevance and Proportionality Under Rule 26(b)(1) Govern

Testifying Experts

The Appraiser's File and Mind is Discoverable

- Rule 26(b)(4)(A) – Depose Any Disclosed Expert Witness
- Appraisal Reports of a Listed Appraiser Are Discoverable
- Facts and Data Considered in Forming the Opinions
 - “Any Information Furnished to a Testifying Expert That Such an Expert Generates, Reviews, Reflects Upon, Reads, and/or Uses in Connection With the Formulation of His Opinions, Even if Such Information Is Ultimately Rejected”
 - Synthes Spine Co. v. Walden, 232 F.R.D. 460, 463 (E.D. Pa. 2005)
- Consulting Experts – Only on Exceptional Circumstances
- Ties Directly to the USPAP Workfile Jerry Just Covered

Attorney-Expert Communications

Rule 26(b)(4)(C)

- Communications Are Protected Regardless of Form – Except:
 - Compensation for the Expert's Study or Testimony
 - Facts or Data Counsel Provided That the Expert Considered
 - “Considered” = Anything the Expert Generates, Reviews, Reflects Upon, Reads and/or Uses – Even if Ultimately Rejected
 - Synthes Spine, 232 F.R.D. at 463
 - Assumptions Counsel Provided That the Expert Relied Upon
- Draft Reports and Disclosures Are Protected
- Privilege Log for Any Withheld Communications

Attorney-Expert Communications

FROM: Condemnation Counsel
TO: Testifying Appraiser
SUBJECT: Frontage Road – Access Impacts

Please evaluate damages assuming the median closures substantially reduce customer access. I've attached the ROW agent's negotiation notes and the agency's internal traffic memorandum.

Attorney-Expert Communications

FROM: Testifying Traffic Engineer
TO: Condemnation Counsel | Testifying Appraiser
SUBJECT: RE: Frontage Road – Access Impacts

My preliminary analysis shows longer travel times but no physical loss of access. Draft report attached.

Counsel—should I describe this as “material impairment” or merely “circuitry”?

Attorney-Expert Communications

FROM: Testifying Appraiser
TO: Condemnation Counsel
SUBJECT: RE: Frontage Road – Access Impacts

I reviewed the traffic draft and agency memorandum. If access is materially impaired, I estimate damages at approximately \$750,000. If it is only diversion or circuitry, my opinion may be substantially lower.

Attorney-Expert Communications

FROM: Condemnation Counsel
TO: Testifying Appraiser | Testifying Traffic Engineer
SUBJECT: RE: Frontage Road – Access Impacts

Please revise both reports to emphasize that the closures affect access—not merely traffic flow. We need the opinions to align before depositions.

Attorney-Expert Communications

FROM: Testifying Appraiser
TO: Condemnation Counsel | Testifying Traffic Engineer
SUBJECT: RE: Frontage Road – Access Impacts

Understood. I will revise my analysis using the assumptions in your email. I considered the internal memorandum but do not intend to cite it in my report.

DISCUSSION

What must be disclosed—and what, if anything, remain protected?

Hinchee: Protection Stops at the Attorney–Expert Line

- **Personal notes** of a testifying expert are discoverable.
- **Expert-to-expert communications** and other nonlawyer communications are generally discoverable.
- **Rule 26** protects draft reports and attorney–expert communications—not every item prepared by or for a testifying expert.
- **Embedded core attorney opinion work product** may be redacted, with a privilege log under Rule 26(b)(5).

“The rule drafters did not” extend work-product protection to “a testifying expert’s notes and communications with non-attorneys.”

Persuasive—not controlling—in Arizona.

Eleventh Circuit federal authority

Republic of Ecuador v. Hinchee, 741 F.3d 1185, 1191–95 (11th Cir. 2013)

Discussion Example

Dates, Drafts and the Workfile

- Counsel Sends the Appraiser a Traffic Study on March 1
- A Draft Report Circulates March 10 – the Opinion Then Changes
- The Final Report Issues April 1
- What Comes Out? What Stays In? What Does the Workfile Show?

Practice Pointers

- Counsel – Date and Log Everything Sent to the Appraiser
- Counsel – Do Not Assume Internal Agency Email Is Protected
- Appraiser – Keep the Workfile Complete and Organized
- ROW Agent – Write the Acquisition File as if It Will Be Read
- Everyone - Do Not Include a Non-Attorney on Attorney-Expert Communications

Thank You



Ashley Mahoney

Partner
Nossaman



Gerald Zaddack

Owner & Appraiser
Zaddack Valuation Advisors



Alyssa Strong

Owner & Principal
Artisan Right of Way

We Appreciate Your Feedback!

- Scan here to complete our survey.



See you at Condemnation Summit XXXVII!

Save-the-Date for May 7, 2027