Clerk of the Superior Court
*** Electronically Filed ***
07/02/2019 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-010359 06/28/2019

HONORABLE TIMOTHY J. THOMASON

CLERK OF THE COURT
N. Johnson
Deputy

STATE OF ARIZONA, et al.

MICHELLE BURTON

v.

FOOTHILLS RESERVE MASTER OWNERS ASSOCIATION INC, et al.

DALE S ZEITLIN

DAVINA DANA BRESSLER
DIETMAR HANKE
2729 W REDWOOD LN
PHOENIX AZ 85045
JOE ACOSTA JR.
JUDGE THOMASON

MINUTE ENTRY

East Court Building – Courtroom 713

10:59 a.m. This is the time set for Oral Argument on the State's Motions for Allowable Damages and Changes in Traffic flow and the Homeowners' Motions for Summary Judgment on Severance Damages and Taking of Private Easement. Plaintiffs, State of Arizona and John Halikowski, are represented by counsel, Michelle Burton and Joe Acosta, Jr. Defendants, Foothills Reserve Master Owners' Association, Inc., Corey E. Churchill, Abigail C. Churchill, Timothy Raymond Eull, and Jill Barnard, are represented by counsel, Dale S. Zeitlin. Intervenor, Dietmar Hanke, appears on his own behalf.

A record of the proceedings is made digitally in lieu of a court reporter.

Oral argument is presented on the motions.

For the reasons stated on the record,

IT IS ORDERED taking the motions under advisement.

Discussion is held regarding the scheduling order.

11:59 a.m. Matter concludes.

LATER:

Foothills Reserve Traffic Flow

The State of Arizona has filed a Motion for Pretrial Order Re: Changes in Traffic Flow. The Court has considered the Motion and the Response. Related thereto, the Foothills Reserve Master Owners Association, Inc. (the "Association") has moved for summary judgment on the issue of severance damages for the taking of the private easement of access to the intersection of Chandler Boulevard and Pecos Road. The State has cross moved for summary judgment. The Court has considered those Motions, Responses and Replies. The Court has also considered the brief filed by the Intervenor on May 24, 2019. The Court has also considered the arguments of counsel and Intervenor.

The State claims that the homeowners here should not be allowed to claim damages for changes in traffic flow resulting from the freeway in question. The homeowners, on the other hand, claim they are entitled to "severance damages for the taking of the private easement of access to the intersection of Chandler Boulevard and Pecos Road." Those claimed damages could include compensation for changes in "traffic flow."

The homeowners all own homes with driveways that are located on internal streets. It is undisputed that none of those streets are removed, changed or blocked as a result of the subject freeway project. Rather, as part of the freeway project, the intersection of Pecos Road and Chandler Boulevard was eliminated and is no longer available as an access route for the Foothills Reserve subdivision.

According to the homeowners, after that interchange was eliminated, the Foothills subdivision was landlocked and could not access the general system of streets. As a "mitigation" measure, the City constructed a new segment of Chandler Boulevard, which provided access to the Foothills subdivision.

As a result, homeowners in the Foothills Reserve subdivision going to and from the freeway have to use a different route than they used before the taking. Of course, the subdivision can still be accessed; it just may be a bit more inconvenient to do so. The State contends that any "inconvenience" resulting from homeowners having to use a different route to access the neighborhood is not compensable. The homeowners disagree.

The State cites *Garretson* as controlling. *City of Phoenix v. Garretson*, 234 Ariz. 332 (2014). The property in *Garretson* was immediately west of the Talking Stick Resort Arena. It was bounded by three streets, one of which was Jefferson. When the City constructed the light rail along the south side of Jefferson, it blocked two existing driveways on Jefferson. Access to the subject parcel, meaning ingress and egress to and from the abutting road, was completely eliminated with respect to the Jefferson side of the parcel. In its decision, the Arizona Supreme Court accepted the definition of "right of access", as being the "common law right of access from the landowner's property to abutting public roads," as stated in *City of Wichita v. McDonald's Corp.*, 971 P.2d 1189, 1197 (Kan. 1999). *Garretson* noted that the *McDonald's* court distinguished the right of access, which may be compensable, from the regulation or reduction of traffic flow, which is not compensable, even if it causes a reduction in value of the parcel. 234 Ariz. at 337. *Garretson* held that the City's action in blocking the driveways and preventing access to and from Jefferson was a destruction of Garretson's preexisting access to Jefferson, which was compensable.

The State argues here that access here has not been destroyed, as it was in *Garrestson*. Rather, there has just been a change in traffic flow. The homeowners' right to access their properties still exists. According to the State, any inconvenience resulting from the freeway, and the resultant change in traffic flow, is not compensable, even if it results in some decrease in value.

The homeowners frame the issue differently. They contend that they are entitled to compensation for damages arising from the taking of the private easement of access to the intersection of Chandler Boulevard and Pecos Road. The final plat of record included the Chandler-Pecos intersection. The homeowners contend that they had private easement rights in Chandler Boulevard and Pecos Road. They argue that the taking destroyed those easement rights and the attendant right of access, which is compensable, whether or not the homeowners' properties are on streets that abut the street to be closed, relying on *Thorpe v. Clanton*, 10 Ariz. 94, 100 (1906).[1] While the homeowners acknowledge that the general rule is that one whose property does not abut the closed street is ordinarily not entitled to compensation for the closing of a street, if he or she still has reasonable access to the general system of streets, *Uvodich v.*

[1] The homeowners also contend that the subdivision itself abuts the subject intersection, even if individual homes do not. This argument is rejected. The subject valuation here involves severance damages to each individual parcel, not damages to the "subdivision." The individual lots do not abut the subject interchange.

Arizona Bd. of Regents, 9 Ariz. App. 400 (1969), they contend that they have, in fact, lost general access to the system of streets.

Thorpe, a case decided when Arizona was still a territory, found that the general rule is that the owner of a lot has a right "to have all the streets and alleys, designated upon the map, kept open and unobstructed, and to enforce that right…" 10 Ariz. at 101 The property owner "acquires an easement in the street or way upon which his lot is situate, and in such other streets or ways as are necessary or convenient to enable him to reach a highway." *Id*. When this easement right is interfered with, the property owner must show special damage. In other words, there must be proof that the claimant was injured in a way not suffered by the general public. *Id.* at 102.

Another decision, *Drane v. Avery*, held that plaintiff had standing to sue when a dedicated street was obstructed. The plaintiff in *Drane* suffered special damage because that street was the only means of access to his property. *Drane v. Avery*, 172 Ariz. 100 (1951).

The homeowners contend that *City of Phoenix v. Garretson*, 234 Ariz. 332 (2014), discussed above, is distinguishable because that case did not involve homes or lots subject to a recorded plat. Moreover, according to the homeowners, *Garretson* still had access to the general system of streets, but was still provided compensation. The homeowners argue that *Garretson* actually stands for the proposition that a preexisting right of access can be a property right, the destruction of which gives rise to a right of compensation.

The homeowners here have clearly not lost permanent access to the general system of streets. South Chandler Boulevard closed permanently south of Cotton Lane in 2017. The City opened the Chandler Boulevard extension, referred to in a recent Stipulation as the "connection segment," to provide access to the Foothills Reserve community in July of 2017. Obviously, the residents have been accessing their neighborhood over the last two years. As such, it is evident that the homeowners have not lost general access to the system of streets.

In reality, *Garretson*, and the various cases discussed in the *Garretson* decision, are not that helpful here. *Garretson* addressed a situation where the owner's access to an "abutting" road was completely eliminated or substantially impaired. Indeed, the court held "that a property owner is entitled to compensation if the government either completely eliminates or substantially impairs the owner's access to an abutting road and thereby causes the property's fair market value to decrease." *Id.* at para. 28. This rule applies even if there are other reasonable alternative means of access.

Here, the homeowners did not lose access to an abutting road. Rather, the only possible claim is that the homeowners lost access to the Chandler Blvd. and Pecos Road intersection. The homeowners' parcels do not abut that intersection. As such, the situation in *Garretson* is clearly not applicable here.

The general rule is that "one whose property does not abut on the closed street ordinarily has no right to compensation for the closing or vacation of the street if he still has reasonable access to the general system of streets." *Uvodich v. Arizona Board of Regents*, 9 Ariz. App. 400, 403 (1969). "A decrease in the value of his property because of diversion of traffic away from it affords no basis for compensation." *Id.* Put another way, closing one means of access to the general system of streets, while still providing access to the street system, is not compensable.

Of course, the homeowners did not have private easement rights in Chandler Boulevard and Pecos Road. Rather, they were dedicated to the public. As such, the homeowners here had easement rights no greater than those of the public in general. As such, the issue really comes down to whether the homeowners suffered special injuries.

Even when streets are dedicated by a plat, special injury must be shown to be eligible for compensation. *Thorpe, supra*. Interference with a party's only access constitutes special injury. *Drane v. Avery*, 72 Ariz. 100 (1951). Property owners may not, however, recover for a deprivation of one means of access to the general system of streets, as long as they have not lost total access. *Uvodich v. Arizona Bd. Of Regents*, 9 Ariz. App. 400 (1969). No such total loss of access is presented here.

Even though a property owner may have an easement right in a roadway by virtue of having purchased property subject to a recorded plat containing the roadway, the owner is not entitled to damages as a result of a closure of the roadway, unless the property abuts directly upon the portion of the roadway being vacated. *State v. Wineberg*, 444 P.2d 787 (Wash. 1968). This was the situation in *Garretson*, where the city eliminated direct driveway access to a roadway abutting the subject property. No such situation is presented here.

In their Reply brief, the homeowners essentially acknowledge that, in order to be able to recover, they will have to show that they lost access to the general system of streets. They contend, however, that they did lose such access. The homeowners argue that the subdivision was landlocked. The extension of Chandler Blvd., which did provide them access, was allegedly a "mitigation" measure. The Intergovernmental Agreement, which was the contractual basis for the Chandler Road extension, provided that the extension was a "mitigation measure" which was "for the proposed State Route 202…" In other words, according to the homeowners, the extension was part of the "project." As such, the homeowners contend that they are not prevented from receiving damages for the closure of the Chandler Blvd -- Pecos Road intersection. Rather, the fact that the

homeowners now have access to the system of streets, so the homeowners contend, goes only to the measure or amount of damages.

The homeowners' position is wrong. They act as if they no longer have access to the system of streets. That is clearly not the case. While they lost one means of access, they were provided another means of access. The authorities cited above clearly stand for the proposition that losing one means of access, while being provided another means, is not a special, compensable injury. Referring to the "new" access as a "mitigation" measure done as part of the relevant "project" does not change the reality that the homeowners have access after the taking. In fact, referring to the "mitigation" measure as part of the "project" makes it clear that the project here did not result in loss of general access to the system of streets.

During argument, counsel championed *State ex rel. Morrison v. Thelberg*, 87 Ariz. 318, 325 (1960), which was only discussed in passing in the briefs. *Thelberg*, however, dealt with the elimination of access to an abutting property owner. The Arizona Supreme Court found "that the State can neither take nor damage said easement of ingress or egress of an abutting proper owner without just compensation." 87 Ariz. at 324. As such, the *Thelberg* case is limited to abutting property owners and is consistent with *Garretson*, discussed above. It is not applicable here.

The homeowners here have no special injury. The prior interchange did not abut the homeowners' properties. The homeowners still have access to the system of streets. Accordingly, the homeowners are not entitled to compensation due to the loss of access to the Chandler Boulevard and Pecos Road intersection. The State's Motion for Summary is granted and the homeowners' Motion for Summary Judgment is denied.

Foothills – "Severance" Damages

The Court has considered the State's Motion Re: Allowable Damages, the Response and Reply. The Court has also considered the homeowners' Cross Motion for Summary Judgment on Severance Damages, the Response and Reply and the State's Cross Motion, Response and Reply. The Court has also read the Response filed by the Intervenor on February 17, 2019. The Court has also considered the arguments of counsel and Intervenor.

The State has condemned a common area fee simple owned by the Foothills Reserve Master Owners Association (the "Association"). In addition, individual homeowners, who are members of the Association, have asserted claims for compensation for the loss of their interest in the common area, including severance damages to their lots.

Under the applicable Covenants, Conditions, Restrictions and Easements ("CC&Rs"), the homeowners' interest in the condemned common area was an easement interest. An easement is "a right that one person has to use the land of another for a specific purpose." *Ammer v. Arizona Wa*ter Co., 169 Ariz. 205, 208 (1991). An easement appurtenant involves two interests; the dominant tenement, to which the right of use belongs, and the servient tenement, which is subject to the use. 169 Ariz. at 209.

The easement right here is not exclusive to any homeowner. Obviously, owners do not have the right to exclude other owners. The easement rights provided to the homeowners in the CC&Rs, however, are private rights of easement. They are not given to the public in general. In other words, the easement rights to the use and enjoyment of the common area are owned only by the homeowners, as they are appurtenant to the lots.

The State relies on a cryptic statement in the plat dedication to an easement of "pedestrian access," in support of its contention that the easement rights are "public" in nature. It is not at all clear if that provision was intended to provide pedestrian access to just the homeowners or the public. Nonetheless, it is clear to the Court that the homeowners are the only persons granted the easement rights in the common area. Therefore, the easement rights are "private" in nature.[2]

Severance damages are those "which 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 plaintiff." A.R.S §12-1122(A)(2). Severance damages are awarded only when the land remaining is part of a "larger parcel." *City of San Diego v. Neumann*, 863 P. 2d 725, 729 (Cal. 1993).[3]

The homeowners contend that the "larger" parcel consists of, not just the fee interests in the lots, but also each homeowner's interests in the common area. Therefore, according to the homeowners, the taking of the servient estate entitles the homeowners to compensation. The State, on the other hand, contends that there is no "larger parcel" from which the easement rights were taken, because the common area was owned by the Association. Indeed, during argument the State contended that the damages sought here are not really "severance' damages at all. Rather, the State argued that homeowners should be compensated only for the "lost" easement and restrictive rights.

The State's position on this point is a little difficult to figure out and appears to be inconsistent. Indeed, the State agreed in its Response and Cross Motion that the measure of damages "is the difference in the value of the dominant property before and after the taking." As

[2] While the easement rights are "private," the homeowners do not have the right to exclude others. Homeowners certainly cannot exclude other owners. Further, the "pedestrian access" reference in the plat at least arguably prevents the homeowners from excluding "pedestrians" from the public in general.

[3] *City of San Diego* did not address a situation where easement rights were "severed" from the fee.

such, the State conceded that the focus of damage analysis is the diminution of value of the remaining lots. The State specifically stated that the subject valuation "means valuing the property before, with the covenant, and after, without the covenant." As such, the State admitted that we are dealing with damages which accrue to the portion not sought to be condemned, the fee ownership in the lots, by reason of their severance from the portion sought to be condemned, the easement and restrictive covenant rights in the common area. This is the essence of severance damages.

The parties clearly agreed in their briefs that a before and after analysis of what each homeowner "owned," including fee and easement interests, is appropriate. Indeed, after completion of all of the briefing it did not appear as if the parties really disagree that a before and after analysis is the appropriate methodology, irrespective of whether that analysis is called "severance" damages or some related methodology. As the State stated in its Response and Cross Motion, the "disagreement lies in what factors may be considered in the after condition."

The homeowners further allege that they have had three property rights taken away. The first right is the easement in the common area. There is no question that the homeowners are entitled to compensation for the taking of their interest in the common area. The second right is the right to restrict the common areas to open space and landscaping. The parcel maps state that the common area will not be improved with dwelling units. No dwelling units, however, are being constructed on the common area. As such, this restriction is irrelevant. However, the homeowners unquestionably had a general right to restrict the use of the common areas to natural open space. As such, the loss of this right, whether referred to as a restrictive covenant or otherwise, is a proper consideration in the before and after valuation analysis. Finally, the homeowners contend that they enjoy an enforceable restrictive covenant that restricts the subdivision to residential uses. This covenant, however, applies to "lots" and the State is not acquiring lots. Therefore, this alleged property interest is irrelevant.

A restrictive covenant imposed by the owner of a tract of land in pursuance of a general plan and development of property is a property right that runs with the land. *Colonia Verde Homeowners' Ass'n v. Kaufman*, 122 Ariz. 574 (App. 1979). Accordingly, the CC&Rs grant property interests that run with the land. The homeowners are entitled to be compensated for the loss of property rights. As noted above, they have lost their easement interests in the common area. That is a compensable loss. They have also lost their right to restrict use of the common area to open space and the like. That is also a proper consideration in the valuation analysis.

The critical question here is whether the analysis of the "after" condition may properly take the proximity of the lots to the freeway project into account. The homeowners have cited various cases providing that the owner of the dominant estate is entitled to compensation measured by the value of the dominant estate before and after the taking of the easement rights. *E.g., Redevelopment*

Agency v. Tobriner, 200 Ca. Rptr. 364, 367 (Cal. App. 1984). Accordingly, the homeowners contend that, under the Arizona Constitution and A.R.S. §12-1122, the homeowners are entitled to have their homes valued in a before and after condition, taking into account the proximity of the lots to the freeway.

As noted above, the State does not claim that it should not compensate the homeowners for the loss of easement rights in the common area, plus any applicable restrictive covenants that may have been taken. The State also does not dispute that the general manner to value the loss here is looking at the difference in value of each homeowners' property, with and without the property interests being taken.

Accordingly, and as referred to above, there does not appear to be a general dispute that there should be a before and after methodology used here. The damages consist of the difference in value of the subject parcels before and after the taking of the easement and restrictive covenant rights. That means the lots are valued before, with the subject easement rights and any restrictive covenants, and after, without the easement and restrictive covenant rights.

That leaves the issue of the "proximity" to the freeway. The Court has carefully considered the State's argument that the "proximity" to the freeway should not be considered. The State argues that the freeway project is not related to the taking. Rather, the freeway arose out of the project itself. As such, proximity damages are, according to the State, not part of the before and after analysis. *People ex re. Dept. of Pub. Wks. v. Symons*, 357 P.2d 451 (Cal. 1960); *see also Arkansas State Highway Commission v. McNeill*, 301 S.W.2d 425, 426-67 (Ark. 1964).

The Association distinguishes *Symons* because that case dealt with damages caused by a taking of property not owned by the property owner. Here, the easement rights in the common area being taken are owned by the homeowners. While *Symons* is distinguishable based on the facts, there is very relevant language from the *Symons* case.

The *Symons* decision noted that "(i)t has long been recognized that there is no right to recover for all elements of damage caused by the construction of a public improvement." Referring to *Eachus v. Los Angeles etc. Ry. Co.*, 103 Cal. 614, 617, the *Symons* court noted that the constitution does not "authorize a remedy for every diminution in the value of property that is caused by a public improvement. The damage for which compensation is to be made is damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated by the constitution; but the property itself must suffer some diminution in substance, or be rendered intrinsically less valuable by the reason of the public use. The erection of a county jail or a county hospital may impair the comfort or pleasure of the residents in that vicinity, and to that extent

render the property less desirable, and even less salable, but this is not any injury to the property itself so much as an influence affecting its use for certain purposes." 357 P.2d at 455. Citing *People v. Ricciardi*, 23 Ca. 2d 390, 144 P.2d 799, the *Symons* court continued---"Not every depreciation in value of the property not taken can be made the basis of an award of damages…damages may not be allowed for diminution of property value resulting from highway changes causing diversion of traffic, circuity of travel beyond an intersecting street, or other non-compensable items." *Id.* at 455. However, items that may be compensable are things such as impairment of light and air and impairment of view. *Id.* at 456.

As such, one could certainly argue, as the State does, that the proximity to the freeway is the type of depreciation in value that should not be considered as part of the damage analysis. The Court, however, rejects that premise for a few reasons. First, under a severance damage analysis, it is proper to consider the improvement building built. A.R.S. §12-1122(A)(2). Accordingly, proximity to a freeway is a proper consideration. *State ex rel. Miller v. Wells Fargo Bank*, 194 Ariz. 126, 129 (1998).

Even if this valuation did not involve a "pure" severance analysis, the Court still believes that the proximity to the freeway is a relevant consideration. There is no dispute that the loss of the right to a common area with open views and vistas is a compensable loss. Therefore, the loss of the open views and vistas is an appropriate valuation consideration. It does not appear to the Court to be practical to consider the loss of the right to have open views and vistas, yet ignore the freeway that ended up being placed on or near the common area.

Finally, this case does not, in the Court's judgment, involve an incidental infringement of the owner's pleasure or enjoyment. Rather, the homeowners here bought their lots along with valuable easement rights in a common area. As noted above, the easement rights were "appurtenant" to the lots. These homeowners had the right to expect that they would be able to enjoy the common area, with the concomitant open spaces and vistas. This is not a situation like having a hospital built nearby, with some resulting minor impact to value. Rather, this freeway resulted in real and direct damage to the homeowners' real property rights. As noted in the discussion of *Eachus* and *Ricciardi* above, impairment of light, air and view are compensable losses. The proximity to the freeway, and the loss of open space and views, are, therefore, proper considerations. In evaluating the decrease in value of the remaining lots, it is simply unrealistic to "ignore" the proximity to the freeway. *See Redevelopment Agency v. Tobriner, Supra.*

Accordingly, damages will be computed based on a before and after analysis. The damage analysis is to focus on the "lost" easement rights and restrictive covenants. As noted above, the easement rights consisted of the right to access and use the common area. The homeowners are also entitled to compensation for loss of any right to limit use of the common area to open space.

However, the right to restrict the lots to residential uses is irrelevant. Damages due to proximity to the freeway may also be considered.