

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2011-008646

09/03/2015

HONORABLE DAWN M. BERGIN

CLERK OF THE COURT  
C. Fitch  
Deputy

STATE OF ARIZONA, et al.

RON ASCHENBACH

v.

B D 218 L L C, et al.

DALE S ZEITLIN

DAVINA DANA BRESSLER

**UNDER ADVISEMENT RULING**

The Court has considered the following: (1) the State's Motion for Partial Summary Judgment (No Compensation for Changes to Knox Road) filed on March 13, 2015; (2) Defendant's Response; (3) the State's Reply; (4) Defendant's Sur-Response; (5) the State's Sur-Reply; and (6) the arguments presented by counsel at the July 8, 2015 hearing. It now makes the following findings and orders.

**Factual Background**

In September 2010, the Arizona Department of Transportation ("ADOT") Board issued a resolution approving the improvement of State Route 24 (aka the Gateway Freeway). The resolution authorized acquisition of 15.12 acres owned by Defendant, which was part of a larger parcel of 215 acres (the "Property").<sup>1</sup> The main cross streets bordering the Property were: Warner Road on the north; Ellsworth Road on the west; Ray Road on the south and Hawes Road/Loop 202 interchange on the east.

Prior to the resolution, the City of Mesa had passed ordinances approving two Development Master Plans ("DMP"). The Entrada at San Tan DMP (the "Entrada DMP") was

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<sup>1</sup>An Order of Possession for the 15.12 acres was entered in this case on May 11, 2011.

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approved in 2007 and called for the construction of 88<sup>th</sup> Street running north-south, and bordering the Property on the west; and construction of Knox Road, which would run east-west from Hawes Road to Ellsworth, and would border the Property on the south. The Gateway 202 Airpark DMP (“the Gateway DMP”) was approved in 2009. The Gateway DMP reflected the construction of Knox Road as a through-street between Hawes and Ellsworth, and the authors emphasized that such a through-way would help to achieve the business development goals of the Gateway DMP. Because the authors were also aware that ADOT was contemplating the construction of SR 24 in the area subject to the Gateway DMP, they submitted an alternate plan reflecting construction of the SR 24.

Pursuant to ADOT’s August 2010 resolution, it began construction of SR 24 in a north-south direction between Hawes Road and 88<sup>th</sup> Street, which resulted in severing access to the Property from the Hawes Road/202 interchange via Knox Road, and in the elimination of Knox Road as a through-street from Hawes to Ellsworth.

**Legal Analysis**

The State contends that Defendant is not entitled to compensation for the loss access from Hawes to the Property via Knox Road because: (1) Knox Road cannot be considered as part of the “before” condition of the Property; and (2) even if it could, the loss of access is not compensable under Arizona law.

**1. Should Knox Road Be Considered as Part of the “Before” Condition for Purposes of Valuation?**

The State contends that Knox Road should not be considered as part of the “before” condition because: (1) it never existed; (2) there had been no precise proposed alignment for Knox Road or 88<sup>th</sup> Street; (3) there had been no dedication of right-of-way for Knox Road or 88<sup>th</sup> Street; and (4) there had been no physical improvements like paving, curbs or gutters for Knox Road or 88<sup>th</sup> Street. The State cites no authority to support such stringent requirements for an improvement to be considered part of the “before” condition, however, and Arizona law actually provides a much more flexible standard.

In Arizona, a condemnee must only show a “reasonable probability” that the land taken would have been improved. See *Flood Control District of Maricopa County v. Hing*, 147 Ariz. 292, 299, 709 P.2d 1351, 1358 (App. 1985) (involving rezoning); *City of Tucson v. DeConcini*, 155 Ariz. 582, 748 P.2d 1206 (App. 1987) (involving anticipated remodeling of a restaurant).

Here, the City of Mesa had passed two ordinances providing for the construction of Knox Road as a through-street. In addition, Lee Engineering prepared a Traffic Analysis on behalf of

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ADOT in May 2011 identifying the “before” condition as including Knox Road as a through-street, and the “after” condition as severing access from Hawes Road to the Property via Knox Road due to the construction of SR 24.<sup>2</sup> The testimony of Frank Mizner, a land planner retained by ADOT, was consistent with the assessment of Lee Engineering. These facts are more than sufficient to create a genuine issue of material fact for the jury.

**2. If Knox Road Is Considered Part of the “Before” Condition, Is Defendant Entitled to Present Evidence of the Effect of the Construction of SR 24 on the Value of the Property?**

The State argues that even if Knox Road is part of the “before” condition, Defendant cannot recover for the loss of access due to the construction of SR 24 under Arizona law, and it should be precluded from presenting such evidence at trial. In *City of Phoenix v. Garretson*, 234 Ariz. 332, 322 P.3d 149 (2014), the City constructed part of the light rail and a wall in front of the defendant’s property in downtown Phoenix, blocking access to two driveways on the north end of his property, which bordered Jefferson Street. The Court rejected the State’s argument that the loss of access was non-compensable because the defendant had ways to get to the south side of his property that were not “unreasonably circuitous.” Instead, 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. As noted above, however, a landowner who claims or establishes only substantial impairment is not entitled to compensation unless the remaining access is unreasonably circuitous.

*Id.* at 338, 322 P.3d at 156.

Because the light rail project “completely eliminated [defendant’s] preexisting access to Jefferson Street, leaving him with no means of ingress or egress to that street or any replacement roadway in that location...,” he was entitled to compensation. *Id.* at 336, 322 P.3d at 154.

Here, because Defendant’s right of access was not completely eliminated, it would have to rely on a claim of substantial impairment, which requires a showing that the remaining access is unreasonably circuitous. The State argues that, as a matter of law, Defendant cannot meet this standard because there are other ways of accessing the Property that are not unreasonably circuitous. Defendant counters that “unreasonable circuituity” is a question for the jury. The Court

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<sup>2</sup> The State urges the Court to disregard this report because it was issued in connection with a case that settled. The Court declines to do so, however, because it is directly applicable to the facts of this case.

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agrees. Given the unusual circumstances of this case, the Court cannot find as a matter of law that the taking by ADOT did not render access to the Property unreasonably circuitous.

Defendant also contends that the State's reliance on *Garretson* and other cases such as *Udovich v. Arizona Bd. of Regents*, 9 Ariz. App. 400, 453 P.2d 229 (App. 1969), is misplaced because, in contrast to this case, they do not involve the physical taking of property. Rather, they involve the state's exercise of police power in regulating safety and traffic, thereby implicating only the damages clause of Article 17 of the Arizona Constitution. The Court agrees with Defendant for the following reasons.

First, the *Garretson* Court itself clearly indicated that a separate analysis would apply to physical takings cases:

Because the City did not permanently take any of Garretson's land, this case does not involve a "taking or "severance damages" as traditionally understood in eminent domain or inverse condemnation actions. Rather, this case concerns the damages provision of Article 2, Section 17; the issue is whether the City's elimination of Garretson's preexisting access to Jefferson Street constitutes damage to his private property, supporting a claim for just compensation.

*Garretson*, 234 Ariz. at 334, 322 P.3d at 151 (emphasis added).

Second, Arizona's statute on severance damages in physical takings cases, A.R.S. §12-1122, contains broad language and does not exclude damages for loss of access:

A. The court or jury shall ascertain and assess:

2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages that will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff.

*See Selective Resources v. Superior Court in and For Pinal County*, 145 Ariz. 151, 154, 700 P.2d 849, 852 (App. 1984) (holding that "evidence of the changed conditions resulting from the severance or the construction of the improvement in the manner proposed [is] directly relevant to the issue of the damages contemplated by A.R.S. §12-1122(A)(2) and is also admissible to support the conclusions of valuation experts").

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Third, in *City of Phoenix v. Wilson*, 200 Ariz. 2, 8-9, 21 P.3d 388, 394-95 (2001), where the City physically took 1.4 acres of a five-acre unit, the court found that the defendant was entitled to compensation for the diminution in value of his property due to lessened visibility and decreased access to and from the intersecting streets.

Finally, several commentators have noted the distinction between cases involving physical takings and those that do not with respect to compensability for loss of access. For example, one commentator, in arguing for compensability for loss of access in non-physical takings cases, asserted that “application of the substantial impairment test for access seems unwarranted in light of the types of severance damages that are compensable in total or partial physical takings cases to the full extent that they diminish a property’s market value.” Ashley Mas, *Eminent Domain Law and "Just" Compensation for Diminution of Access*, 36 Cardozo L. Rev. 369, 391 (2014). The author further noted:

It seems incongruous that only for the right of access have courts carved out an exception to the market-based assessment of damages. Courts calculating severance damages in the event of a partial taking are not required to find substantial impairment...

*Id.* at 392. See also Alan T. Ackerman & Noah Eliezer Yanich, *Just Compensation and the Framers’ Intent: A Constitutional Approach to Road Construction Damages in Partial Taking Cases*, 77 U. Det. Mercy L. Rev. 241, 251 (Winter 2000).

For these reasons,

**THE COURT FINDS** that whether construction of Knox Road as a through-street was a “reasonable probability” is a question of fact for the jury.

**THE COURT FURTHER FINDS** that whether access to the Property after the taking is unreasonably circuitous is a question of fact for the jury.

**THE COURT FURTHER FINDS** that any diminution in value of the Property resulting from the loss of access to the Property from Hawes Road via Knox Road is compensable under Arizona law, given that this case involves a physical taking.

**IT IS THEREFORE ORDERED** denying Plaintiff’s Motion for Partial Summary Judgment.