No. _____

IN THE

Supreme Court of the United States

DIETMAR AND LINDA HANKE,

Defendant-Intervenors, Petitioners,

v.

STATE OF ARIZONA and FOOTHILLS RESERVE OWNERS' ASSOCIATION, INC., an Arizona Corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the Intervenors have an absolute right to intervene as a separate, bona fide Party in the State's action to take common lands of their HOA pursuant to ARCP[1] Rule, 24(a) (2)?
2. Does the State's failure to provide Notice and Summons to HOA homeowners per ARS[2] §12-1145 constitute fatal error?
3. Did the State's Settlement with the HOA fairly settle the Intervenors' Takings Claims?
4. Was the Trial Court's approval of the State's HOA Taking settlement, over and above the Intervenor's objection to the taking and without addressing the prohibitions and supremacy clause contained in Prop207[3] raised by the Intervenors, a reversible error?
5. Was the Intervenors' Interlocutory Appeal, based on Prop207's prohibitions, properly rejected by a single Judge Pro Temp., allegedly because the trial judge's order was not a "final ruling," when in fact the immediate consequences were irrefutably final?
6. Was the Trial Court's declaration of Summary Judgement plain error?
7. Was the Trial Court's insistence on the statutory formula for damages plain error?

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1 ARCP = Arizona Rules of Civil Procedure

2 ARS = Arizona Revised Statutes

3 ARS 12-1136 (5) (b) and 12-1137

8. Did the State's and HOA's experts fail to correctly interpret statutory language to quantify real-world bank value losses per ARS?
9. Is the Substitute Facility Remedy the Only "Just" Remedy?
10. Does ARS Prohibit Punitive Damages in this Case?
11. Was the Court's failure to proceed to trial a reversible error?
12. Was the Award of Fees to the HOA's Attorney Proper?

PARTIES TO THE PROCEEDING

1. Plaintiffs: **State of Arizona, ex rel., John Halikowski, Director, Dept. of Transportation**

2. Defendants: **Foothills Reserve Master Owners' Ass'n, Inc., an Arizona Non-profit Corp., et. al**

3. Defendant - Intervenors Petitioners: **Dietmar and Linda Hanke, Individuals**

RELATED PROCEEDINGS

Arizona Supreme Court	**CV-23-0088-PR**
Court of Appeal	**CA-CV 22-0216**
Interlocutory Appeal	**CA-CV 18-0463**
Maricopa Trial Court	**CV2017-010359**

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PETITION FOR WRIT OF CERTIORARI

Linda and Dietmar Hanke, the Intervenors, respectfully petition this court for a Writ of Certiorari to review the judgment of the Arizona Supreme Court, and remand for a re-trial.

CASES BELOW

Trial Court – Maricopa Superior Court

CV2017- 010359 (01 Aug 22 & 08 Aug 22)

Interlocutory Appeal – Arizona Div. 1 of the Court of Appeals

CA-CV 18-0463 (02 Nov 18)

Arizona Div. 1 of the Court of Appeals

CA-CV 22-0216 (07 Mar 23)

Arizona Supreme Court

CV-23-0088-PR (08 Nov 23)

JURISDICTION

This Court has jurisdiction based on the avoidance/denial of the following US and/or Arizona Constitutional Due Process guarantees by the courts below: (a) a requested jury trial, (b) the complete disregard of "just" compensation appropriate to the circumstances, (c) the lack of any kind of homeowner Notice, (d) the complete disregard and exclusion of Art. III Intervenors from the State-HOA Possession and Just Compensation negotiations and settlement, (e) the Court's deviation from the AZ RCAP requiring two judges for a decision to dispose of the Intervenors' Interlocutory Appeal, (f) the complete disregard of a Constitutionally superior voter initiative law to the contrary, (g) the selection of the most intrusive build option, (h) the complete lack of any sort of Discovery, (i) the blatant inequity of awarding damages to the Intervenors well below everyone else in the affected HOA, even those that didn't buy their homes before the ADOT Show and Tell, and (j) assessing penalties for failing to immediately adhere to a non-existent rule of Civil Appellant Procedure. All of the above conflict with Substantive and/or Procedural Due Process as guaranteed by the United States Constitution, per authority of the Fifth and Fourteenth Amendments, and Title 12, Chapter 8 of the Arizona Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution –

Sec. 1, Fifth Amend. to U.S. Constitution - Right to a *Just Compensation*

Sec. 1, Fifth and Fourteenth Amend. to U.S. Constitution's – no one shall be deprived of life, liberty or property without due process of law.

Seventh Amend. to U.S. Constitution – Right to a jury – In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Arizona Constitution –

Art.2, Sec. 4 – No person shall be deprived of life, liberty, or property without due process of law.

Art.2, Sec. 17 – Whether the contemplated use be really public shall be a judicial question, just compensation having first been made and determined as such without regard to any legislative assertion that the use is public. Just compensation shall be ascertained by a jury.

Art.2, Sec. 23 – "The right of trial by jury shall remain inviolate."

Art.2, Sec. 32 – The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.

Art. 6, Sec. 26 – Each justice, judge shall... take and subscribe an oath that he will support the Constitution of the United States and the Constitution of the State of Arizona.

BACKGROUND

In 2003, Intervenor Dietmar Hanke, began looking for a new home in the greater Phoenix area. Having previously lived in high-density locations such as El Segundo, CA and Mission Viejo, CA, the Intervenor was looking for a quieter location, with scenic views, clean air, etc. After one year of searching greater Phoenix and environs, Mr. Hanke came upon the new Foothills Reserve development south of South Mountain in Phoenix.

This new development offered affordable homes with desirable layouts miles away from any commercial or industrial zoned areas. The home layouts and options were very appealing. What's more, the developer was very accommodating to Hanke's customization requests. Significantly, though remote, the location was within a few miles of supermarkets, banks, and specialty stores. Intervenor moved in August 2005 as an original owner. ADOT posted a handbill on Intervenor's front door two months later, inviting him to come down to the Grace Inn Hotel[4] to "learn about the freeway."

What the Intervenor learned there later was that a freeway would be built right through his lot. ...but the "specifics had not yet been determined." The local homebuyer reaction was immediate: some (those who paid the absolute lowest downpayment possible) walked away, others rented out - sometimes to numerous adults - and moved way. Still others attempted to sell before the news got out

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[4] The Grace Inn was a local hotel where ADOT had rented an exhibition room with tables.

into the market. And some even sold to corporations for liquidation or for temporary housing of executives.

Ten years later, in 2015, ADOT began demolishing 21 homes, perimeter walls, view fencing, mail kiosks, etc. in very close proximity to the Intervenors. Condemnation blight set in and home values plummeted. In combination with the 50% general price slump in home prices in the Phoenix market between the end 2005 to mid-2020[5], relocating was not a viable option. The neighborhood was in limbo.

In 2017 the Intervenors discovered the relevant Eminent Domain action on the local superior court docket. In short order, the Intervenors intervened with Article III standing.

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[5] *S&P CoreLogic Case-Shiller AZ-Phoenix* ***Home Price Index*** (https://fred.stlouisfed.org/series/PHXRNSA)

STATEMENT OF THE CASE

What distinguishes this case from the typical eminent domain case is that here the Intervenors' private home estate is at stake. Few such cases are reported for obvious economic reasons. No public defenders are available. And, it's a conflict where the best that can be hoped for is to be made marginally whole, and that after much time, effort, and expense. Intervenors are, and have been from the beginning, proceeding pro se.

This case presents questions of great and increasing importance concerning state eminent domain power in the context of homeowners living within a Homeowners Association (HOA). According to the U.S. Census Bureau, 82% of newly built homes sold in 2021 were a part of an HOA." [6] The "trend is expected to continue, as growing cities have found that outsourcing new infrastructure (things like sewers, roads and parks) to developers of planned projects creates more housing without overburdening current city budgets." [7]

This case also presents questions pertaining to the taking of "collectively owned" land (aka "common land") within an HOA for the construction of an elevated HAZMAT Truck Route freeway (the "L202" South Mountain Freeway), without any articulable public need and with clear and much less expensive alternatives readily available nearby, albeit without the benefit of stimulating the state's economy by the infusion of federal construction

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6 As reported in *Real Estate News* (February 15, 2023)

7 Ibid

funding to blast through mountain ridges. Furthermore, such freeway offers no offsetting benefit to the local communities, especially not to the HOA in question here.

This taking is also in direct conflict with an "*Advance Purchase Directive*"[8] issued by Maricopa Association of Governments ("MAG"), a federally chartered Metropolitan Planning Organization ("MPO"), in 1987 (37 years ago), which authorized ADOT to purchase the requisite land for the L202 before homes are built thereon. (Trl/11628205/Ex. 4)

Two cases readily come to mind: the *King's Prerogative in Saltpeter*[9] and *Kelo v. New London*[10]. Both involve private homeowner properties. The former stands for the concept that the sovereign can take land when it is "necessary" for a public need (i.e. national defense), not just "desirable" for public use. Even then, the landowner must receive just compensation. It is the basis for the final clause of the Fifth Amendment.

The latter stands for the unpopular concept that economic development is a necessary government interest per se. This is a self-serving proclamation for both the growth of government and the funding of private land development companies and interests. It unjustly prioritizes the interests of a few over the many, the newcomers over the existing landowners. "Build it and they will come".

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8 *Advance Purchase Directive (Trl/11628205/Part 5 of 11)*

9 *King's Prerogative in Saltpeter,* English Reports Citation: 77 E.R. 1294

10 *Kelo v. New London,* 545 U.S. 9 (2005)

In response to *Kelo*, Arizona voters overwhelmingly enacted the Private Property Rights Protection Act, "Prop 207", A.R.S. Title 12, Ch. 8, Art. 2.1, in 2006, to specifically exclude "economic development"[11] as a reason for the taking of private land. Here, in this case, economic development of the East Valley is the state's prime goal.

In this case, the State has lost sight of the most basic concepts at play and focused only on the mechanical application of statutory accounting protocols and questionably relevant and dated case law, rather than the equity inherent in the term "just compensation", the proscriptions of Prop 207 against a taking altogether, and in identifying who the actual aggrieved landowners are. The Courts below have also collectively and individually totally ignored US and Arizona Constitutional concepts of Just Compensation, Notice, and Due Process in addition to the Arizona law relevant to this scenario.

ARGUMENTS

1. Do the Intervenors have an absolute right to intervene as a separate, bona fide Party in the State's action to take common lands of their HOA pursuant to ARCP Rule, 24(a) (2)?

The Intervenors ("Hankes") also have Art. III

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[11] ARS 12-1136(5)(b) Specifically: (5) "Public Use" (b) Does not include the public benefits of economic development, including an increase in tax base, tax revenues, employment or general economic health.

Standing.[12] Both are based on their individual beneficial and equitable ownership of the HOA's common lands. As such, the Interveners can intervene on the side of the Defendant or Plaintiff, or as adversaries to both.[13]

Homeowners are the only beneficial and equitable owners of the collectively owned common lands and are thus the only proper parties to oppose the State's Taking. The HOA is merely legal title holder, a custodial owner on behalf of the homeowners, much like a brokerage house whose name is on shares of stock for trading convenience on behalf of its clients, the true owners. The HOA paid nothing for such lands and has no capacity to "use and joy", nor any ability to sell such lands. Instead, it has a fiduciary duty to maintain and preserve such lands on behalf of the homeowners.

The HOA is legal title holder principally for convenience: for consolidated maintenance and to avoid re-titling each of the numerous common parcels upon the (re)sale of each home within a 611 home HOA. Further, homeowner "easements of use" of the HOA's common lands must be appurtenant to their home ownership pursuant to Arizona law.[14]

Thus, the Intervenors are genuine parties, not just advisory parties, and have a full-fledged right to intervene where the collectively owned common

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[12] Tyler R. Stradling and Doyle S. Byers, "*Intervening in the Case (or Controversy): Article III Standing, Rule 24 Intervention, and the Conflict in the Federal Courts*," 2003 BYU L. Rev. 419 (2003).

[13] www.law.cornell.edu/wex/intervene

[14] A.R.S. Title 42, Ch. 13, Art. 9, Sec. 13403

lands and/or the State's demolition of homes and collectively owned assets are implicated. The HOA is merely an administrator charged with fiduciary duties to protect and preserve the common lands on behalf of the homeowners.

2. Was the Trial Court's Ruling that the HOA can adequately represent all homeowners with respect to the Taking in error?

Indeed, the HOA's counsel, and at times the Trial Judge, morphed the case caption multiple times and held on to several/all homeowners in addition to the HOA as named defendants for nearly the duration of the litigation.[15] During most of the litigation, counsel for the HOA also pursued (and the court recognized) representation of a class action defendant group of individual homeowners[16], conceding that the Court and even he believed that the rightful owner(s) of the common lands were indeed the homeowners.

But both those strategies proved to be too cumbersome and complicated[17]. So, the Court and the HOA abandoned the class action and at the very end dispensed with the individual homeowner defendant strategy.

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[15] Specifically: (Trl/ 9051571/ Pltfs; Trl/9180500/ Pltfs; Trl/ 9194476/ PLTFs & Capt; Trl/9689025/ Capt & 2 Homeowner Pltfs; Trl/14003376/Pltfs; Trl /13712462/ Pltfs; and, Trl /9235815/ Pltfs).

[16] (e.g. Trl/04-05-18/"Matter Under Advisement"; Trl/02-07-2018/"Ruling", etc.)

[17] Comment: Class-Action Defendant classes are rare and no one in the court seemed to have any such experience.

Further, the State and its lawyer relied on a single clause in the HOA's governing contractual document (the "CC&R's") to convince the Trial Court that the HOA must represent the homeowners in the negotiation for the Taking. But the State is not a party to that contract and thus cannot enforce any contract provision therein.

Nor was the relevant clause interpreted correctly. First, it merely contains an "appointments" clause, but not any exclusionary language. Second, the CC&Rs is a contract of adhesion with respect homeowners. And third, any contractual clause that removes all land defense rights from those who, in the end, have paid for such, and which rights are owned appurtenant to their home[18], is unconscionable, and thus the must be stricken. Further, the very same CC&Rs expressly convey the right to any homeowner to enforce any covenant in the CC&Rs that the State, as a homeowner prior to any condemnation proceeding, had violated.

Still further, the HOA is merely an incidental beneficiary and can muster no reason why it should be characterized as an intended beneficiary. "The contract itself must indicate an intention to benefit that person" per District Judge Teilborg in *Norton v. First Federal Savings* , 624 P.2d 854, 856 (Ariz. 1981). This is especially so when the HOA and the State have unclean hands due to the previous uncontested state demolition of 21 HOA homes in 2015 (prior to ADOT filing anything), and failed to pay and collect, respectively, monthly dues on such

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[18] ARS 42-13402, C, 4.

thereafter, in violation of the very CC&R's the courts below now want to enforce. During all those two years, the HOA stood idly by, with the exception of hiring a law firm to try to force the Intervenors to abandon their enforcement of the CC&Rs against the State.

Finally, the State's and the Trial Court's reliance on *Catalina Foothills Unified Sch. Dist. No. 16, v. La Paloma Prop. Owners Ass'n, Inc.*[19] is miscast and likely an artifact of AI. In that case (a) members of that association included renters and golf club members who owned no property, (b) the paramount concern was child safety, and (c) there was no resultant change in usage for the members, other than the exact timing of the short periods of time when such children were dropped-off or picked-up from their school. None of this provides any guidance for the case at hand. Facts do matter, not just key words.

Here, in this case, the Intervenors were not informed of when/where such negotiations would take place and thus prevented from participating in the negotiations for the Taking altogether. This is likely a reversible error by any standard.

3. Does the State's failure to provide Notice and Summons to the HOA homeowners per ARS §12-1145 constitute fatal error?

The homeowners, who are easily identifiable on county records, were never given Notice of the

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[19] *Catalina Foothills Unified Sch. Dist. No. 16, v. La Paloma Prop. Owners Ass'n, Inc.*[19], 229 Ariz. 525 (Ariz. Ct. App. 2012)

State's eminent domain filing as required by ARS §12-1145. Even if *Catalina Foothills* were relevant law, given Notice, the homeowners here could have easily recalled any HOA Board Members beholden to ADOT. The Intervenors had already done so once before, in short order, and by a large 2:1 margin. But this case was well underway before it was found on the Trial Court docket by the Intervenors.

The Intervenors and other homeowners could also then have participated in the court proceedings from the beginning of the State's action, unhampered by delusions of spending grandeur on the part of the HOA board members. Further, after the State's decade of psychological warfare against the homeowners, in conjunction with the ADOT-stimulated high homeowner turnover, and against a backdrop of plummeting home values, the few remaining original owners who had purchased their homes at a premium prior to the State's Grace Inn Show and Tell (2005)[20], likely may have felt less hopeless and more inclined to get involved.

Adding insult to homeowner injury was MAG's 1987 "Advance Purchase Directive"[21] which directed ADOT to purchase all undeveloped land required for the L202 "before homes were built thereon".[22] That Directive was the only "Notice" on the Intervenors' Title Report. Ironically, federal funds were generally available to ADOT for such purchases. Significantly, the L202 was ultimately

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20 Grace Inn: see page 2, paragraph 2 above.

21 (Trl./11628205/Ex4)

22 Federal Funds were available from DOT to purchase such vacant lands.

built precisely on the land identified in the Directive.

The net result of the above was that home buyers were given Title Notice that essentially prohibited the L202's construction on their lands; and yet, 28 years later, the State failed to provide any kind of Legal Notice to the homeowners that their lands would be taken after all. What was the State's motive not to provide such? There are no good reasons. How difficult would it have been for the State to provide Notice of the demolition of 21 homes and the taking of their common lands? Thus the HOA's inexperienced Board of Directors allowed the State to take such lands (after having taken 21 homes already) with hardly any opposition[23] and prepared themselves to spend whatever millions in compensation they were going to receive from the State.

It was the Intervenors who produced the MAG Directive into this litigation. Why didn't the attorney for the HOA find such? Or the HOA itself? The financial motive should be obvious.

IV. Did the State's Settlement for the Taking with the HOA only, fairly settle the Intervenors' Claims?

Since the negotiations and subsequent court-approved settlement between the State and the HOA for the taking of HOA land did not include the Intervenors, it constituted manifest error, at least with respect to the Intervenors, per *Zipes v. Trans*

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[23] It was the Intervenor that convinced an HOA Board Member to get an attorney in the first place.

World Airlines Inc.[24] Further, per *Garnier v. Alexander*[25], "Parties who choose to resolve litigation through settlement may not dispose of the claims of a third party without that party's agreement."[26] Clearly the Intervenors' claims were different and clearly the Intervenors are a legitimate party to this litigation. And clearly the Intervenors did not so stipulate.

Further still, in *FDIC v. United States*, 1996 U.S. Dist. LEXIS 19644 (D. Or. 1996), the District Court noted that an Intervenor, is a "full participant in the lawsuit and is treated just as if it were an original party. And as a general proposition, the original parties may not stipulate away the claims of the intervenor." It's a pretty simple concept, yet the courts below ignored such.[27]

Additionally, neither the State nor the HOA had, nor could have, objected to the Intervenors' intervention, as it was *not* "permissive". It was based on their estate in land. Neither the courts below, nor the attorney for the HOA, seemed to comprehend or acknowledge that.

Finally, the settlement between the State and the HOA only, had no logic, reason, or "basis of valuation" that was ever disclosed to the court, the homeowners, or the Intervenors. The settlement did not even include the approximately eight acres of common lands that became inaccessible due to the

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24 *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982)

25 *Gamier v. Alexander*, 801 F.2d 799 (6th Cir. 1986).

26 "Significantly, the Intervenors did not so stipulate."

L202 itself. Basically, the HOA gave the State what it could not take and for an unjustified amount. The assessor's valuation of $500 per common parcel[28] provided no guidance for actual market value or a Fair Market Value.

The State's and the HOA's failure to disclose the results of any common land valuation or valuation method (especially one that also included lands that became inaccessible to the condemned after the taking) also did not provide any meaningful guidance for a fair settlement.[29] After all, the actual value of common lands and elements, are reflected in the values of the homeowner's estates, not the assessor's nominal valuations of such common lands or a dubious bank appraisal. This is yet another basic and logical concept of common interest communities.

V. Was the Trial Court's approval of the State / HOA settlement, over and above the objection to the taking raised by the Intervenors, and without addressing the prohibitions and supremacy clause contained in AZ Prop207, a reversible error?

AZ Prop207[30], was an Arizona voter initiative in the wake of the infamous *Kelo* decision and now codified as the Private Property Rights Protection Act[31], is also protected by AZ Prop105[32], which

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[28] As *required* by ARS 42-13403

[29] ARS 28-7098

[30] ARS 12-1136(5)(b) and ARS 12-1137

[31] ARS Title 12, Ch. 8, Art. 2.1

prohibits the Legislature from repealing voter-approved measures, the governor from vetoing such, and the legislature from modifying such.

There has been no judicial challenge to Prop207's economic development prohibition (ARS 12-1136(5)(b)) to date; so, there is no guidance from the judiciary to this day. Identified by the Interveners at the very beginning of this litigation, Prop 207 is and remains an untested and unaddressed voter initiative law with respect to ARS 12-1136(5)(b) and state takings.

Factually, a freeway is a "public use", but that is not the "purpose" of the L202. The only apparent purpose of the L202 is to facilitate the very "economic development" of Phoenix's East Valley prohibited by Prop207, which is now – three plus years after the L202's opening – being developed at a very fast pace. Build it and they will come.

This can easily be seen by looking at the time progression of the area on Google Earth or in the propaganda published on-line by MAG itself. Clearly, this new law's prohibition warranted judicial review and a trial with the presentation of evidence in this case. Failure to do such is manifest reversible error.

The operative question is the following: "does the taking of land in location A to build infrastructure for the economic development of land in location B fall under the ambit of the ARS 12-1136(5)(b) prohibition?"

Finally, the Intervenors never did stipulate to the taking of lands and thus any agreement towards

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[32] Ariz. Const. art. 4, pt. 1, § 6(A)-(D))

that end between the State and the HOA is facially invalid. (Tr/9517090/Notice of Objection).

VI. Was the Intervenors' Interlocutory Appeal, based on Prop207's prohibitions, properly rejected by a single Judge Pro Temp., allegedly because the trial judge's order was not a "final ruling," when in fact the immediate consequences thereof were final?

This logic flies in the face of reality, as the land was subsequently fenced off from the remainder of HOA lands and summarily destroyed with finality. Twenty-one homes within the HOA had already been demolished by ADOT without any objection from the HOA in violation of the very same CC&R's the HOA's lawyer now uses as a basis for charging the Intervenors with legal fees for their lawyer's opposition.

Physical finality overrules any subsequent final ruling by the court to the contrary, the absence of a Rule 54(b) statement notwithstanding. It's implicit.

Further, the ruling by a single judge (CA-CV 18-0463) also appears to facially violate ARS 12-120F, which requires that a "majority of two of the three (appellate) judges shall be sufficient to render a decision." This violation of logic and judicial rules speaks strongly for a reversible error, and possibly more.

It is also quite telling that the ruling by the Judge Tempore cites the reason for denying the Interlocutory Appeal was that the Trial Judge had

not signed the Orders. Essentially, the Orders[33] that precipitated the irreversible damage were not challengeable for lack of a court signature.

VII. Was the Trial Court's declaration of Summary Judgement[34] "plain error"?

There were no disputes as to material facts or evidence, as the State, supported by the Trial Court, simply did not produce anything requested by the Intervenors and the Trial Court simply chose to ignore or summarily dismiss countervailing facts and concepts at law to avoid both a trial and a jury altogether.

Both the State and the Court insisted that (a) the State's statutory Eminent Domain power to declare a "public purpose" and to condemn is absolute and (b) that statutory "just compensation" formulas (i.e. bank values) were superior to concepts in equity, constitutional guarantees, voter enacted statutes, sound statistical analysis, reality, and even relevant case law. This mindset begs the question of why even have a lawsuit in order to take land? Shouldn't it then just be a ministerial act by the County Recorder and Assessor's Offices?

Further, neither the State nor the Courts seemed to understand/comprehend how (or why) to statistically define the loss in a home's value after 12 years of condemnation blight, followed by five years of destruction, construction, and ultimately, noise and pollution. The Intervenors produced plenty of

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[33] Order of Possession (10 July 18)

[34] Judgement: "Summary Judgement" Trl./13994585

irrefutable evidence, analysis, and logic to define such loss.

No expert disputed any of the Intervenors' Expert Report. Instead, the expert for the HOA subsequently amended his expert opinion significantly to incorporate the Intervenors' logic. But since there was no Discovery and no jury trial, only a bench trial without any cross examination or even opening or closing statements, there was no opportunity to cross-examine the State's experts, and most importantly, no record of the expert opinions - because there was no trial.

For 18 years, ADOT had been unable to articulate a "need" for the L202. The claim by the Courts below that the Intervenors had to show that there was "no public need" for the taking where it occurred is complete lunacy and a well-known logical fallacy: i.e. trying to "prove the non-existence of something."

Further, the court in *Queen Creek Summit v. Davis*[35], contrary to the ruling of the court below, held that per ARS[36] the condemnor must locate a taking "in the manner which will be most compatible with the greatest public good and the least private injury."[37] That did not happen in this case; far from it.

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35 *Queen Creek Summit v. Davis*[35] 219 Ariz. 576, 201 P.3d 537 (Ariz. Ct. App. 2008)

36 Arizona Revised Statutes 12-1115(A)

37 *Queen Creek Summit v. Davis*, 219 Ariz. 576, 201 P.3d 537 (Ariz. Ct. App. 2008)

Here, ADOT had the alternative of building the L202 on the nearly empty GRIC[38] lands (which extends from a hundred yards south of the L202's current location and for many miles beyond). ADOT had done such 20 miles farther east years ago involving the Pima Indian Community. Doing such would also have eliminated the need for drilling and blasting through South Mountain, moving mountains of earth, building complex on/off ramps, or taking residential land and homes.[39] But doing such would not have infused $750 M into the Arizona economy. The bulk of the truck traffic was already using The Beltline and W. Riggs Road one-half mile farther south on the GRIC lands.

Finally, Public Use was never disputed by the Intervenors. A jail is a public "use" too; but, is there really a "need" to build it in the middle of Old Town Scottsdale?

Again, there was no Discovery whatsoever during the four-year litigation. The Trial Court even summarily prohibited the Intervenors from interrogating legislative counsel altogether (with respect to Prop 207) right up front with a sweeping and unjustified prohibition.[40]

Production Requests and Interrogatories sent to ADOT, FDOT, and other government entities were simply ignored, denied, or "conveniently" could not be understood. Administrative proclamations

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38 GRIC = "Gila River Indian Community"

39 Since the L202 is co-funded by the Federal Dept. of Transportation, the option condemning reservation land is/was a viable, though unexplored option.

40 Trl/ (5/30/18) Ruling #926/"ME: "Under Advisement Ruling" on 05/30/2018)

were deemed absolute and superior to even voter-enacted statutes by ADOT. Good Faith Discovery Certificates were not signed by the State, and thus not enforced by the Court.[41] Absolutely no FOIA responses were ever received by the Intervenors from any entity.

The only production ever received by the Intervenor was from Maricopa County (when Maricopa County Attorney was in rehab), which clearly identified that the County was confused as to what lands were actually taken.

The State (AZAG) brazenly, and pursuant to some twisted form of logic, asserted that ARS §28-7097 meant, incredibly, that any reduction in real estate value due to the threat of a taking before the State's filing must simply "be ignored" altogether. And the Court agreed!

All four of the cases cited by the Trial Court below in its *Decision* for identifying valuation dates are totally irrelevant to this case. (Perhaps a glitch in the Attorney General's Office AI?[42]) All deal with the hypothetical values of empty/unimproved lands and speculative future values. One even claims detrimental reliance on a condemner's plan. Not one of these cases is even remotely relevant to the case at hand.

Intervenors' proximity damages were never addressed by the Courts, in spite of living less than 300 feet from the elevated HAZMAT Truck Route freeway and with their second-floor bedroom facing the L202. Yet, the Trial Court awarded proximity

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41 16 A.R.S. Rules of Civil Procedure, Rule 26.2(g)(1)(A)

42 https://azcapitoltimes.com/news/2024/03/01/ "courts move swiftly as AI enters legal system"

damages[43] to many of their neighbors, most much further away from the L202, and then only after The HOA's expert read the Intervenors' Expert Opinion on change of value. This inconsistency invokes suspicion of some kind of favoritism at play.

In the end, the Court's assertion that there was no "genuine dispute as to any material fact" is disingenuous and breathtaking in its scope and audacity and was driven by an unwillingness to accept the relevant law and ignore the associated facts.

VIII. Was the Trial Court's insistence on the statutory bank formula for damages unjust and plain error?

Such methods may be appropriate and fair for investors, businesses, and banks; those types of entities are all about money, and only about money. But it totally ignores what's important and desirable to homebuyers (not to be confused with "emotional attachment"). Home ownership is all about quality of life, which includes enjoyable/hedonistic attributes of a location such as peace and quiet, safe and crime free, uncongested, dark at night, pollution-free, scenic views, etc.

That, arguably, is why the framers of the

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[43] Overruled by the Court of Appeals, currently pending AZ Supreme Court review. However, the State and the Court of Appeals' reasoning confuses the smaller/larger parcel logic framework with the dominant/servient estate logic framework. Here, each homeowner is owner of their dominate estate (their home and easements) and the HOA's common lands are the servient estate by contract.

Constitution identified "just compensation" as the remedy for a taking (a concept at Equity, "fairness"), rather than appraised bank/market value. It's universal that "just compensation" is a concept at Equity, which demands that victims of eminent domain takings, not just banks, "be made whole" by a jury.[44] Hence the flurry of state initiatives nationwide after the Kelo v. New London decision.

Here, in this case, land has been taken and the location / environment has been destroyed and the court has offered $5,000 in compensation to the Intervenors[45]. After all, "[t]here are three things that matter in property: location, location, location."[46] And here, in this case, the location has been destroyed. Again, the Intervenors repeatedly requested a jury trial[47] and were denied such.

IX. Did the State's and HOA's experts even fail to correctly interpret statutory language to quantify real-world bank value losses per ARS?

Even if the statutory bank formula immediately above were proper and sufficient per se, the State and its experts completely misunderstood

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[44] U.S. Const. Amend VII: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, according to the rules of the common law."

[45] Minus $3,500 in court ordered Mediation and taxes - an Insult.

[46] This tricolon appeared in print as early as 1926 and is often attributed to the real estate magnate Harold Samuel.

[47] For example: Tr/12593705/Caption – one of many.

how to calculate damages under the Project Influence Doctrine[48], leading to perverted results. That section directs valuation "experts" to disregard any "decrease or increase in the market value of the real property before the date of valuation caused by the public project for which the property is to be acquired or by the likelihood that the property would be acquired for the project", which "likelihood" began in 2005 at the Grace Inn Show and Tell.

The State insisted, and the Trial Judge agreed, that such statutory language means that any decrease (or lack of increase) in property value measured at the time of the taking (from what it should have been, absent the 2005 Grace Inn event), should be completely ignored. The correct reference value, according to the court and the State, is the market value at the time of the State's filing. The Intervenors did not agree.[49] Logically, the State's and the Court's interpretation incentivizes lengthy delays between unofficial announcements and the actual taking to drive down condemnor acquisition costs.

In reality, the semantics require one to determine what the value *should have been* at the date of the State's filing, absent such a decrease in value caused by the informal announcement[50] at the 2005 Grace Inn event. Unfortunately, determining what such a decrease/lack of increase over a span of a dozen or more years in a dynamic market involves statistical analysis and resort to external references,

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48 As codified in ARS 28-7097

49 Trl/11628205/L15

50 Also called "Condemnation Blight"

i.e. the Case-Schiller Index[51] for Phoenix, not just bank accountant valuations. The Intervenors provided such, with a concise explanation, and it equated to $204,000 and is still growing.[52]

Every stockholder measures the value of his/her holdings against market indexes (DOW, NASDAC, etc.); but, somehow, the State and their appraisal "experts" don't know enough to compare a home's value against a relevant local market index to determine loss of value. And the courts ignored it altogether. It's likely, however, that a jury would understand.

Unfortunately, since there was no jury trial and Expert Opinions/Reports are not a part of the record if not introduced at trial, this information and the attendant arguments by the Intervenors were conveniently ignored.

And since expert reports could not be introduced in the Arizona court system per se, the Court was free to issue summary judgement to avoid expert testimony at a jury trial that would have clearly, unambiguously, and rigorously identified a minimum bank value loss[53] of over $200K to the Intervenors. That would have had major implications for the other homeowners and the

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51 https://fred.stlouisfed.org/series/PHXRNSA - No other "expert" even identified this source.

52 Mr. Hanke, who was prepared to testify as an expert on his own property's value and cross examine the State's expert, has a BS in Physics, MBA, and a JD, and has significant experience with many different types of statistical distributions and analyses.

53 Loss determined as of 2017 - the latest date market value was available.

State, both in this case and going forward. Even still, such a large sum would not be "just compensation", as the local environment before it was destroyed was scarce, if not unique.

X. Is the Substitute Facility Remedy the Only Just Remedy?

It is irrefutable that the relevant land/location and the Intervenors' enjoyment thereof (i.e. enjoying the common lands, quiet enjoyment of their backyard, sleeping at night, no respiratory issues from heavy diesel exhaust, no glaring stadium lights all night long, etc ...) has been severely damaged and is no longer fit for its intended purpose. A substitute facility in a different, but similar location with similar attributes, plus reimbursement for relocation costs, moving, tax adjustments, etc. as determined by a jury is the only "just" remedy that would make the Intervenors whole. It is the only remedy that is fair and just. The term "equity" demands it.

The Substitute Facility Doctrine is traditionally applicable to situations where the uniqueness of the taken estate in land was so unique that merely compensating the defendants for the taking with a decrease in bank value would not enable the aggrieved to replace such. Though the doctrine originates from takings of commercial property, the concept is likely more relevant herein as it is the only measure that guarantees a homeowner of "just" compensation.[54]

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[54] "The guiding principle of just compensation is reimbursement to the owner for the property interest

Citing *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 633 (1961), the Duke Law Journal paraphrases that case's teaching as "fair market value.... is not an absolute standard nor an exclusive method of valuation." Unfortunately, individual homeowners typically don't have the resources to hire lawyers to litigate specialized valuation formulas for them. So, their economic realities drive what ultimately comes to the courts. This is exactly where equity clearly conflicts with statutory law; and, just compensation is a concept at equity.

Quite simply, the salvage/discount value of the Intervenors' current home[55] plus $200K will not buy a comparable home in a location even remotely similar to the one they had bargained for in their current location. Where is the fairness in that? It's just not just. Especially in the circumstance where such home was bought by the Intervenors subject to a voter-enacted prohibition against exactly what has transpired.

It should not be lost upon this Court, that Susette Kelo never lived in her house after the taking, even though the condemning authorities had

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taken. He is entitled to be put in as good a position pecuniarily as if his property had not been taken. In many cases this principle can readily be served by the ascertainment of fair market value .... But this is not an absolute standard nor an exclusive method of valuation." *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 633 (1961)

55 The Intervenors' home is/was a well-kept, brand new, semi-customized home far from blighted neighborhoods, industry, commercial zones, airports, crime, etc...

upgraded it and moved to a new location.[56] The new location just wasn't anywhere close to what she had had in the "before" location.[57] That authority's solution was not equitable.

Here, in this case, the Intervenors bought a brand new, semi-customized home from a quality builder in a safe, picturesque, clean, quiet, serene, and scenic location. Now all those attributes are gone. Just because a bank/insurance company won't compensate a homeowner for such losses of enjoyment doesn't mean they don't exist. It's also hard/impossible to define an associated monetary value loss for each attribute above in the abstract. Further, banks, and many consumers, don't care about the above enumerated attributes. But a substitute facility overcomes all of those challenges.

Determining the cost of a substitute facility in a comparable location is, however, quite possible and the Intervenors have submitted their estimate to the State. Just because the majority of folks (those driving the pricing of homes) may tolerate a noisy, unsightly, brightly lit, unsafe environment doesn't mean those affected by the invasion of their community by an industrial strength freeway have to.

The Intervenors suggest that it's time for a new, clear precedent.

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[56] Https://www.nbcconnecticut.com/local/nothings-replaced-this-pink-house-yet/1855265/

[57] "Location, location, location." Harold Samuel coined this phrase in 1944 when he founded Land Securities, one of the United Kingdom's largest property companies.

XI. Does ARS Prohibit Punitive Damages in this Case?

The courts below have upheld the mantra that punitive damages are categorically prohibited in this case per ARS[58], which reads: "Neither a public entity nor a public employee acting within the scope of his employment is liable for punitive or exemplary damages."

It strains credulity for the State to maintain, and for the courts to agree, that conducting a long-term PSYOP campaign over a 12-year period to intentionally drive down property prices, stimulate homeowner turnover, and demoralize and disenfranchise homeowners, while flagrantly violating a relied-up MAG Directive, is somehow "within the scope".[59] The full extent of the PSYOP could be/could have been fleshed out with proper Discovery.

Further, blatantly and flagrantly violating the strictures and utility of Title Notice and the 1987 MAG Directive, ignoring the relevant prohibitions of Prop207, and failing to serve Notice to all owners, can't be considered accidental, harmless, or hyper-technical deviations from acceptable behavior and Rules. There must be some incentives/penalties associated with non-compliance with the aforementioned, lest they become the new normal into the future.

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[58] ARS 12-820.04 Punitive and exemplary damages; immunity

[59] This is likely a major reason that the state courts below had to limit Discovery and avoid witnesses at Trial, especially after the Intervenors submitted their witness list to the Trial Court.

In the end analysis, the actions of the Courts below, in conjunction with the State's modus operandi, evidence a strong motive to avoid the constitutionally guaranteed jury trial and punitive damages at all costs. How else could Arizona fuel its desired growth without trammeling the property rights of existing homeowners in order to make room for new owners and/or the roads/freeways that service their new neighborhoods?[60] There is much more here, but the courts below avoided Discovery and Production altogether.

Finally, the title of ARS 12-820.02 (Qualified Immunity) deviates from ARS 12-820.01 (Absolute Immunity) in one key word ("absolute"), the latter of which is arguably an appropriate exclusion for any independent and/or negligent actions of employees or contractors acting on their own. Here the actions of the state are obviously not independent acts by employees or contractors; rather, they are intentional acts of government. And in this case, in furtherance of a harmful and offensive state strategy, such acts are clearly not (should not be) within the scope of ARS 12-820.04 (Punitive and exemplary damages; immunity) protections.

To the contrary, announcing the taking of HOA land and homes in a public meeting in 2005, only to invade the HOA without any Notice and start mowing down homes in 2015, begin construction in 2017, and open the L202 in 2020 was surely an intentional strategy to drive community turnover up and homeowner engagement, resistance, and home values down.

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[60] Governor Doug Ducey: " ... encourage more people to move to Arizona and build its economy"

The lower courts' denial of Punitive Damages was incorrect. The State's actions were not judgement calls, are not within any scope, and are not independent acts by employees and/or contractors.

A jury would be able to recognize malevolent intentional acts and the state's motive to drive down acquisition costs behind them and be able to ascertain just compensation sufficient to hold such administrative agencies accountable and dissuade such tactics going forward.

XII. Was the trial court's avoidance of the requested Jury Trial reversible error?

The Arizona Constitution guarantees due process of law in Art. 2 Sec. 4.[61] Further, a jury trial composed of six jurors is guaranteed in Art. 2 Sec. 23.[62] The Fifth Amendment of the U.S. Constitution additionally requires "just compensation"[63] and "due process of law".[64] Finally, the Fourteenth Amendment of the U.S. Constitution in Sec. 1 prohibits the states from "taking property without due process of (state and federal) law".[65]

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61 Ariz. Const, Art 2, Sec. 4: "No person shall be deprived of life, liberty, or property without due process of law."

62 Ariz. Const, Art 2, Sec. 23: "The right of trial by jury shall remain inviolate."

63 Again: "just" is a concept at equity.

64 U.S. Const. "...nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

65 "...nor shall any state deprive any person of life, liberty, or property, without due process of law..."

The Intervenors expressly requested a Jury Trial on multiple occasions.[66] Indeed, the Trial Judge was preparing for a jury trial in the context of COVID restrictions and the Intervenors were preparing Jury Selection questions. Suddenly, inexplicably, after the State and HOA's attorney again had settled in secret negotiations between themselves, the Court decreed that the Intervenors were entitled to $5,000 gross[67], take it or leave it! "End of story," as far as the Court was concerned. The Court maintained that the case had been easily resolved through operation of Arizona's statutory framework (the "*Arizona Revised Statutes*" or "*ARS*"), as far as the Intervenors are concerned.

That court summarily denied the appeal and then *subsequently* issued a Memorandum Opinion.[68,69] On appeal to the AZ S. Ct., that court

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66 Trl/ID 9094829 (for example)

67 Mediation Decreed Settlement of $5,000 minus $3,500 cost of Mediation

68 Coincidently, the AZ Legislature had just passed legislation allowing the Memorandum Opinion to be published, the Headnote on the Memorandum Opinion notwithstanding. Further the Opinion includes several glaring mistakes and gaffes or intentional errors: e.g. ¶12 conveniently omits ARS Art. 2.1, 12-1136 5 (6); ¶13 omits teachings of Queen Creek Summit v. Davis, 219 Ariz. 576, 201 P.3d 537 (Ariz. Ct. App. 2008) p. 17 above.

69 "Memorandum Opinions are not meant to set precedent and typically do not include the court's reasoning or explanation, are not published, and a party may not cite them in courts," except since January 2015 in Arizona," www.law.cornell.edu/wex/memorandum_decision,which was coincidentally the very year when ADOT started demolishing homes within the HOA.

merely issued "Denied" on all four requests for review.[70] The absence of a jury trial did not seem to faze either appellate court whatsoever.

Significantly, the very same statutory framework relied upon above by the Trial Court, in 16 A.R.S. Rule 38(a), *The Rules of Civil Procedure*", also asserts that "[t]he right of a trial by jury is preserved to the parties inviolate" and "a party need not file a written demand or take any other action to preserve its right to a trial by jury."

Unfortunately, the Courts didn't see things that way. The Intervenors never accepted the $5,000 award and maintain that this was blatant reversible error.

XIII. Was the Award of Fees to the HOA's Attorney Proper?

After the Trial Court issued a Summary Judgement with respect to the Intervenors only, the Intervenors immediately filed an Appeal and a Motion to Separate, which was granted by the Chief Judge of the Court of Appeals. (Ap./22-0216/¶3)

When the Court (same Judge Pro Temp as in the Interlocutory Appeal above) later ruled that the Intervenors had to serve the HOA, who was not a party to the Intervenors' Appeal, the Intervenors formally questioned the clerk what then the purpose of a separation was and noted that neither ARCP

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[70] AZ SCt/Ord

rule 42(b), FRCP Rule 42, nor ARCAP Rule 4(f) require any such service. No response was had.[71]

Further, neither the Court nor the HOA's attorney have shown how any of the Intervenor's (in)action unreasonably "expanded and/or delayed" this decades-long land-grab debacle and 5-year court action. Even if they had, the HOA's lawyer fee demands are neither reasonable nor supported by any credible evidence or rationale.

Still further, under what theory of law or logic is work expended by a codefendant (the Intervenors), when such codefendant seeks to oppose plaintiff's taking altogether, or to secure additional compensation, to be considered an opposition to the HOA's fiduciary duty to protect and preserve the common assets of the HOA? It makes no sense, unless the HOA's lawyer's only motive was to preserve his contingency fee or try to smear the Intervenors.

Significantly, this demand to extract a face-saving penalty from the Intervenors is only the latest such attempt. Prior to that, the HOA attempted to collect fees from the Intervenors for pursuing their own damages rather that allowing the HOA to only pursue a claim pursuant to a CCR clause.

That assertion was pure folly as the HOA had repudiated that contract of adhesion two years earlier when it countermanded the Intervenors' express contractual right, articulated in that very

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[71] ARCAP Rule 4(f). "Every party filing a document with an appellate court must serve a copy of the document on ***all other parties to the appeal***, and on any amicus curiae." (emphasis added)

contract, to enforce the CC&Rs against the State's early demolition of 21 homes.

More significant, the HOA and its lawyer excluded the Intervenors of Right (with Article III standing) from participating in settlement negotiations for the Taking that directly affected their own separate property, as well as the collectively owned common property altogether.[72] Significantly, that Court ruling contained no signature by a judge,

In the end, it is the Intervenors that were injured by not being notified by the HOA and/or its attorney (a) that the State had filed, (b) that such attorney was not representing the homeowners directly after all, and (c) that he would not oppose the taking to begin with. These are hardly trivial points.

Indeed, it was the Attorney for the HOA who solicited and carried several homeowners for direct representation, kept a class action defendant group strategy going for nearly the duration, and - quite late in the litigation - filed to no longer represent the individual homeowners he had solicited earlier.[73]

Finally, it should be noted that the Court's dictated amount of $5,000 (minus $3500 in mediation fees) in damages for the Intervenors is less than the amount ordered by the Court for other homeowners on the Intervenors' street, many of whom bought much later than the Grace Inn Show and Tell.

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[72] Trl/94929497/Ruling

[73] Trl/13712462/Caption

REASONS FOR GRANTING THE WRIT

This taking, and the litigation surrounding this taking, has yielded the following factual conclusions by the Intervenors:

1. There is an apparent complete lack of understanding of the collective ownership model (i.e. HOAs) by the courts, by experts and lawyers, and among the general population.
2. A large percentage of new homes in the U.S. are in HOAs, and the percentage is growing. So, these types of situations are only going to increase in frequency.
3. Courts need to be educated on the difference between Permissive Intervention (e.g. family law, which is prominent in Arizona) and Intervention of Right.
4. Interpreting conflicts among laws, the hierarchy of laws, and the function of administrative proclamations at play in an eminent domain taking are often not known by judges and lawyers and litigants.
5. Transportation infrastructure lags home building (even when federal money is available to purchase vacant land in advance), when it should be (and in fact was decreed to be in this case) the other way around.
6. No one is accountable to homeowners in the government, whether at the federal, state, county, or municipal levels.
7. Proliferation of useless agencies and their burden on society/economy is too great. After many years of dealing with ADOT, we still have no idea what ADOT or MAG actually did do on the Loop202

Project. Private contractors did everything and no one in the AZ government is responsible or knows anything when asked. And what exactly is/was the function of MAG?[74] Intervenors suggest it's limited to obstruction and obfuscation?

8. Eminent Domain takings have a disproportionate negative impact on older/retired homeowners – no time, energy, or funds left to bounce back.
9. Where is the public defender in eminent domain? If one is accused of living in the wrong place, the best one can hope for is market value compensation for what is taken. Who pays for the legal fees and court costs, the move, the increased mortgage rates, the increased property taxes, etc? Eminent Domain in the USA today is a structurally unfair process for homeowners.
10. FOIA really doesn't work. Nor do Production Requests. Why can't litigants get relevant information from their government.
11. Federal and Arizona Constitutional guarantees (e.g. Just Compensation) do not work; Trial Courts don't know what their words mean or ignore such altogether.

CONCLUSION

This is a textbook case of denying justice to aggrieved homeowners (the Intervenors) in the largely untested field of eminent domain in the context of collective ownership, as opposed to common ownership. It is also a reminder of the lengths a state government will go to in order to

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[74] MAG (Maricopa Association of Governments)

achieve its growth goals. Intervenors request that this court grant certiorari to provide guidance to courts, lawyers, experts, government agencies and administrators, and homeowners on the concepts associated with eminent domain in the context of HOAs. Intervenors also request that this court require a jury trial and proper Discovery.

RESPECTFULLY SUBMITTED

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