



Condemnation Summit **XIX**

October 21, 2016

Arizona Biltmore | 2400 East Missouri Avenue | Phoenix, Arizona

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Condemnation Summit XIX

Registration & Networking

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Opening Remarks: Program Introduction & Greetings

Steve Hirsch, Quarles & Brady LLP

Chris Kramer, Gust Rosenfeld P.L.C.

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Trial and Witness Preparation Tips: Developing and Executing a Case Theme

Presenters:

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Stephanie Heizer, City of Scottsdale

Cassandra Ayres, Beus Gilbert PLLC

William “Bill” Jameson, AZ Office of the Attorney General

Ethan Steele, Ethan Steele Law

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Development of a Trial Theme

Condemnor Perspective

Condemnee Perspective

Know Your Case

- Facts
 - Project Type
 - Location
- Special Issues
 - Impacts to a Particular Property

Know Your Opponent

- Who is the party or testifying representative?
 - Private Owner vs.
 - Corporate Owner
- Who is the opposing counsel?
 - Special considerations for condemnor when property owner appears pro per

Know Your Audience

- Jury Trials
 - The potential jury pool
- Bench Trial
 - The judge (history and background)

Know Your Location

- Urban Settings vs. Rural Settings

Know Your Witnesses

- Owner or Owner Representative
- Other Fact/Lay Witnesses
- Expert Witnesses

Prepare Your Witnesses

- First Impressions Matter: Appearance & Demeanor
 - While testifying
 - While not testifying
 - While roaming the courtroom halls

Prepare Your Witnesses

- Direct Exam
 - Basic Communication Skills
 - Familiarize with Facts
 - Testimony of other witnesses & experts
 - Understanding of exhibits
 - Specific Topics
 - Testimony supporting case
 - Testimony rebutting opposing side
- Understanding and incorporating case theme

Prepare Your Witnesses

- Cross Exam
 - Review prior deposition (or hearing) testimony
 - Anticipate questions from opposing side & formulate responses
- Additional Considerations For Experts
 - Rebutting opposing expert report
 - Simplify difficult valuation concepts
- Closing Arguments

Thank You!

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Morning Networking Break

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The Intersection of Environmental Due Diligence, Condemnation and Valuation

Presenters:

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Bernadette M. Duran-Brown, Nossaman LLP

John Loper, John Loper & Associates

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Summary of Issues to Address

- Why does environmental due diligence matter?
- Why do we do environmental due diligence?
- Why does it matter to right-of-way acquisition?
- How can it impact appraising property?
- How can you avoid liability?
- Real world examples

Why You Should Care

Municipalities, state agencies, developers, purchasers, lessees and security interest holders who purchase, accept as a gift or donation, condemn, or foreclose on ("take an interest in") contaminated commercial real estate:

1. May be liable for substantial environmental clean up costs.
2. May incur liability as an owner or operator.
3. May incur liability as a generator or transporter.

In order for public agencies to proceed with public projects, they often have to comply with state and/or federal laws regarding assessing environmental impacts. A poorly prepared assessment:

1. May impact ability to acquire property
2. May impact valuation of property in condemnation action

Why We Do Environmental Due Diligence

1. Federal: Non-Condensation Context
 - A. Comprehensive Environmental Responsibility, Compensation, and Liability Act of 1980 ("CERCLA" – 42 U.S.C. §§ 9601 to 9675).
 - B. Strict Liability – Federal and all states.
 - C. Joint and Several Liability – Federal and most states except Arizona and Utah.
2. Federal: Condensation Context
 - A. National Environmental Policy Act ("NEPA" – 42 U.S.C. § 4331 et seq.).

Why We Do Environmental Due Diligence - cont.

3. Similar State Laws

- A. California Environmental Quality Act (“CEQA” - Cal. Pub. Res. Code § 21000 et seq. & “CEQA Guidelines” – 14 CCR § 1500 et seq.)
- B. Arizona Water Quality Assurance Revolving Fund (“WQARF” – Arizona Revised Statutes § 49-281 *et seq.*)

4. Valuation Implications

- A. Uniform Standards of Professional Appraisal Practices (“USPAP”)

Where Environmental Due Diligence and Condemnation Intersect

Public agencies must consider:

- How its project will impact the environment, including property acquisitions and mitigation measures, and
- The state/condition of the properties being acquired.

Inadequate environmental assessment can cause:

- Project delays
- Increased project costs
- Legal problems – Right-to-Take challenges or Petitions for Writ of Mandate
- Unanticipated contamination clean-up
- Potential liability

Evaluating Potential Environmental Problems

- Environmental Contamination is identified as adverse environmental conditions resulting from the release of hazardous substances into the air, surface water, groundwater or soil. Generally, the concentrations of these substances would exceed regulatory limits established by federal, state and/or local agencies. (AO 9)
- Review Environmental Reports when available
- Review any regulatory findings related to environmental issues with the property when known to the appraiser.
- Common "flags" which may indicate common sources of environmental contamination:
 - Petroleum or chemical storage and/or processing
 - Presence of underground storage tanks (UST)
 - Presence of above ground storage tanks, especially those without containment structures
 - Surface staining from petroleum or chemical agents
 - The presence of lead based paint or asbestos, often based on the age of the improvements
 - Historical uses known to the appraiser which may suggest environmental contamination

Right-to-Take Challenges

Property owners can challenge the agency's right-to-take the property due to:

- Changes to the project after environmental approval
- “Minor” changes to scope of property acquisition after approval
- No environmental approval
- Environmental approval inadequate

The Problem: Contamination

Example: The property being acquired is contaminated

- Remediation of contaminated properties can be extremely expensive
- Costs are often unknown until remediation is well under way
- Costs can exceed – sometimes, dramatically exceed – the value of the underlying property

Appraising Contaminated Properties

- Appraisers are not typically qualified environmental experts; however, they retain an obligation to remain vigilant to potential environmental issues in order to conform to the Uniform Standards of Professional Appraisal Practices (USPAP).
- Appraisers may utilize a hypothetical condition or extraordinary assumption to avoid dealing with undisclosed environmental issues; however, the appraiser must be careful to not provide an appraisal which may be misleading or which may not meet the requirements of the client.
- The Competency Rule of USPAP requires an appraiser to *be aware of, understand, and correctly employ those recognized methods and techniques necessary to produce a credible appraisal.* {Standards Rule 1-1(a)}
- An appraiser need not be an expert on the scientific aspects of environmental contamination to appraise an impacted property but may rely on data from qualified experts; however, the appraiser should utilize appropriate extraordinary assumptions regarding this information. (USPAP AO 9)

The Problem: Liability

- Liability can attach to any “owner or operator” – even owners that have nothing to do with the contamination
- Liability can survive the owner’s sale of the property
- This means a condemnee can remain liable for contamination even after the property is condemned
- Categories of Federal Responsible Parties (See 42 U.S.C. § 9607(a)):
 - The owner and operator of a...facility, ("Owners" and "Operators").
 - Any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of ("Owners" and "Operators").

The Problem: Liability - cont.

- Any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity at any facility...owned by another party or entity... ("Arranger" or "Generator").
- Any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities...or sites selected by such person... ("Transporter").

The Problem: Agency Liability

- By acquiring the property, the condemning agency may expose itself to liability as an owner
- Often, the project will require that the agency remediate the contamination immediately
- Level of clean-up can vary by project, i.e. property for a highway vs. property for a school
- Fighting with the condemnee over liability can run up legal fees

Valuation Methods

- It is often not possible to make a typical direct valuation of an environmentally contaminated property due in large part to the unique characteristics and circumstances of each situation. In some cases it may be possible to make comparisons or analyze sales or income information, but care must be exercised.
- It can be difficult to locate and research sale of property with comparable environmental conditions in the subject market area. It may be necessary to research sales from outside the subject market area. All sales should have similar environmental conditions.
- Groups of properties such as a neighborhoods or districts of environmentally impacted sales may be used for comparison to measure the impact of environmental contamination as well as for control groups.
- The most common methodology is a form of before and after appraisal valuing the property a “unimpaired” and “as is” or “as impaired” with the difference representing the diminution in value attributed to the contamination.

Valuation Methods - cont.

- Property value diminution represents the cost of remediation and related costs, any effects on the use of the site in its remediated condition, as well as any measurable environmental risk and/or stigma. The time required for remediation and the effects on use during remediation must be considered.
- The remediation costs considered must be those considered by the market which generally includes those which are necessary to achieve regulatory compliance. This may include continuing risks and increased operating costs after remediation.
- Consideration of stigma must be based on market reactions rather than opinion or judgement.
- Both the impaired and unimpaired valuations must meet the requirements of USPAP particularly observing: (AO9)
- *Standards Rules 1-2(e) Identify characteristics of the property that are relevant to the type and definition of value and intended use of the appraisal.*

Valuation Methods - cont.

- *Standards Rule 1-3(b) develop an opinion of highest and best use for the property.*
- The appraiser must consider the highest and best use in both the unimpaired and impaired conditions. The appraiser must consider the fact that site remediation and any remaining limitations on the site may alter, or limit, its highest and best use in the remediated condition. Environmental risk and/or stigma may deter site development or redevelopment and thus limit the highest and best use until the environmental risk is reduced to levels acceptable in the local market. (A09)
- The presence of environmental contamination or a history of contamination may affect financing availability and/or the cost of financing.
- The final conclusions must be supported by market driven data developed utilizing the recognized methods of valuation including the sale comparison, cost and income approaches.

How to Avoid Liability

1. The Traditional Federal Defenses:
 - A. Act of God.
 - B. Act of War.
 - C. The "Innocent Owner" Defense – 42 U.S.C. § 9607(b)(3):

An act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant...*if the defendant establishes* by a preponderance of the evidence that:

How to Avoid Liability - cont.

- i. No contractual relationship exist — “The term ‘contractual relationship’, for the purpose of section 9607(b)(3) of this title, **includes**, but is not limited to, land contracts, deeds, easements, leases, or other instruments transferring title or possession, **unless**:
 - (1) the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, **and**
 - (2) one or more of the circumstances described in ii, iii or iv below is also established by the defendant by a preponderance of the evidence.” 42 U.S.C. § 9601(35)(A).

How to Avoid Liability - cont.

- ii. At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility. Conducted *all appropriate inquiry* at the time of purchase. Or,
- iii. The defendant is a government entity which acquired the facility by escheat [reversion of property to the state in the absence of legal heirs or claimants], or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation. However,

How to Avoid Liability - cont.

- (1) Uncertainty results from whether eminent domain authority is involuntary.
 - Settlement vs. condemnation.
 - Local jurisdictions differ.
- (2) Because of uncertainty, EPA recommends securing the defense by conducting AAI. Or,
 - iv. The defendant acquired the facility by inheritance or bequest.
 - v. As to ii, iii, and iv above, the defendant exercised due care with respect to the hazardous substance of concern, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances.

Additional Defenses

2. The "New" Federal Defense – Public Law 107-118 (H.R. 2869) - "Small Business Liability Relief and Brownfields Revitalization Act of 2001" ("Brownfields Amendments"). Added two new defenses:

A. Contiguous Property Owner Defense:

Exempts from owner or operator liability a person that owns land contaminated solely by a release from a contiguous, or similarly situated property owned by someone else, if the person:

- i. Did not cause or contribute to the release or threatened release; and
- ii. Is not potentially liable or affiliated with any other person potentially liable; and

Additional Defenses - cont.

- iii. Exercises appropriate care in respect to the release; and
- iv. Provides full cooperation, assistance, and access to persons authorized to undertake the response action and natural resource restoration; and
- v. Complies with all land use controls and does not impede the performance of any institutional controls; and
- vi. Complies with all information requests; and
- vii. Provides all the legally required notices regarding releases of hazardous substances; and
- viii. Conducted all appropriate inquiry at the time of purchase and did not know or have reason to know of the contamination.

Additional Defenses - cont.

B. Bona Fide Prospective Purchaser Defense:

Exempts bona fide prospective purchasers (and their tenants) from owner liability so long as the person does not impede the performance of a response action or natural resource restoration, if the purchaser follows these requirements:

- i. All disposal took place before the date of purchase; and
- ii. The purchaser made *all appropriate inquiries* prior to acquisition; and
- iii. Exercises appropriate care with respect to any release after acquisition; and
- iv. Provides full cooperation, assistance, and access to persons authorized to undertake response actions or natural resource restoration; and

Additional Defenses - cont.

- v. Complies with land use restrictions and does not impede performance of institutional controls; and
- vi. Complies with all information requests; and
- vii. Provides all the legally required notices regarding releases of hazardous substances; and
- viii. Is not potentially liable or affiliated with any other person potentially liable.

This means you can knowingly acquire contaminated property and not be liable if you conducted a Phase I first and satisfied the above requirements.

Good Business Practice

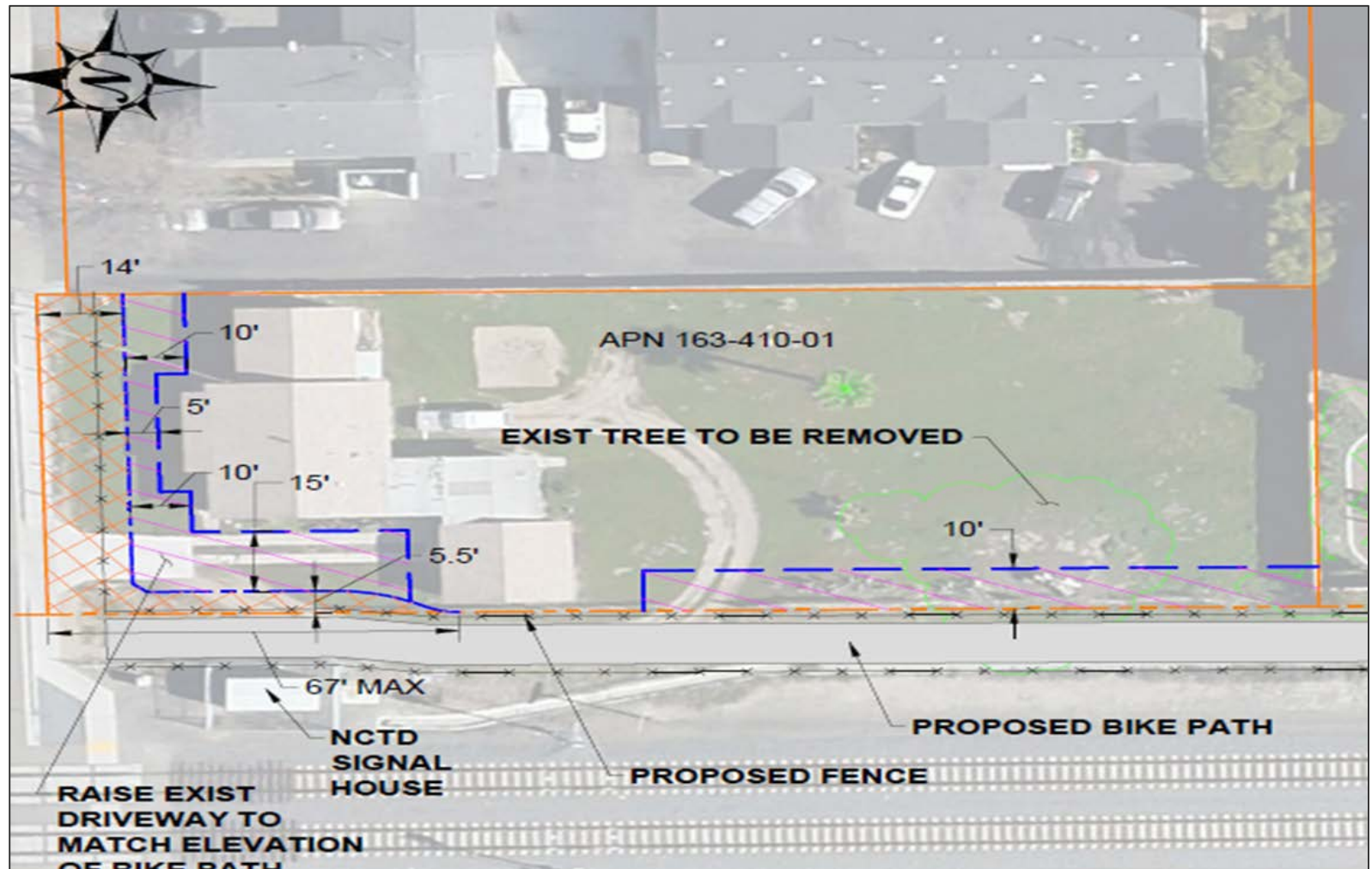
Even if municipal client believes it has the CERCLA Defenses without needing to conduct environmental due diligence, a Phase I will assist in:

1. Identifying potential hazards and environmental concerns associated with the site.
2. Making informed decisions about purchasing the site.
3. Negotiating purchase price.
4. Making informed decisions about developing the site.
5. Making off-site disposal determinations, i.e., hazardous versus non-hazardous.
6. Avoiding becoming an operator, generator, and/or transporter.

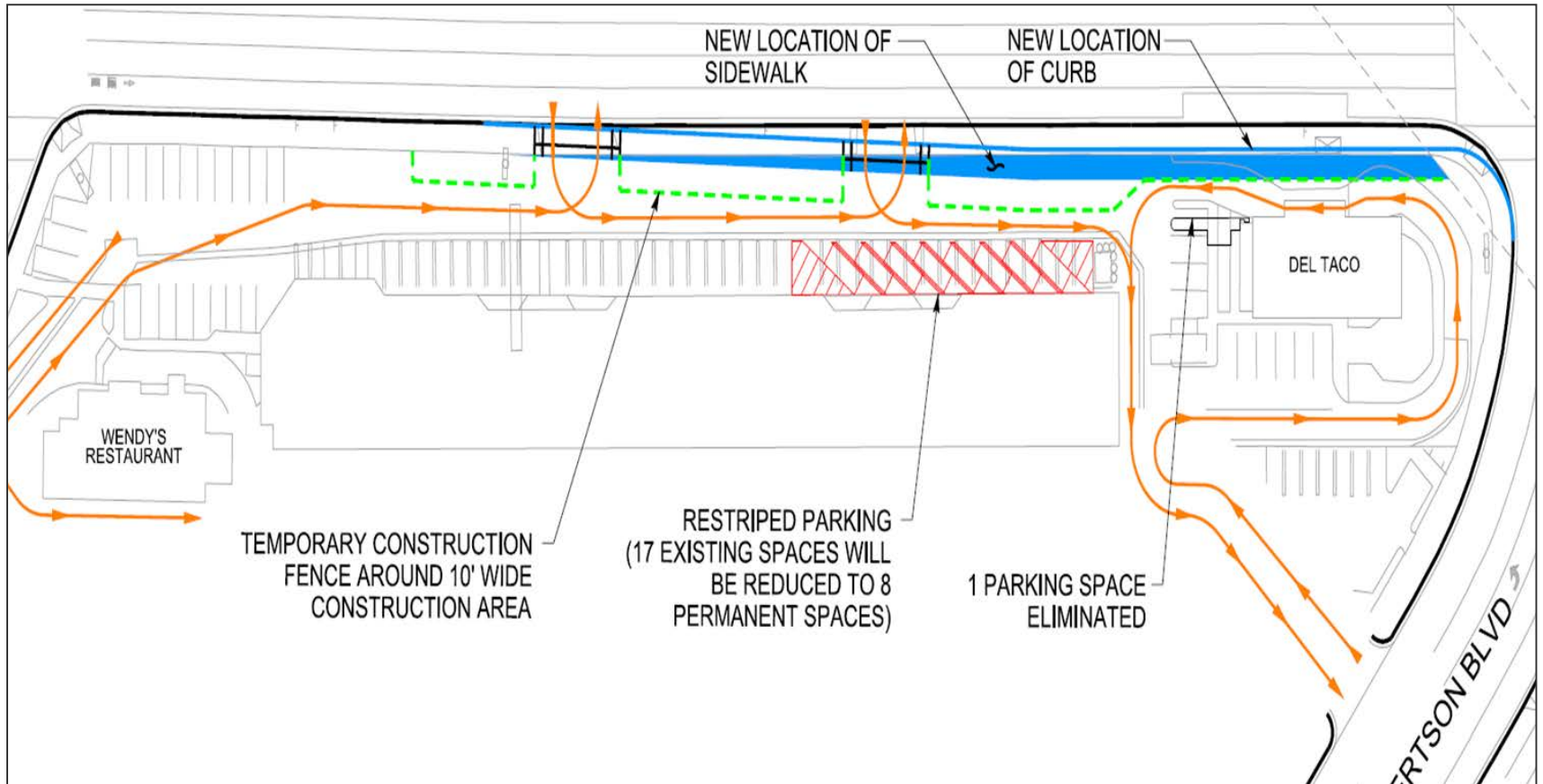
Examples of Why You Should Involve the ROW Team During Environmental Assessment

- "The Project will create significant and unavoidable adverse impacts to the visual character and quality of the adjacent property"
- "Noise and vibration from construction will be significant and unavoidable and will exceed the FTA threshold"
- "The project will result in elimination of 20 parking spaces, leaving the property with insufficient parking and thereby creating a significant and unavoidable impact"

Impacts from Environmental Assessment on Condemnation Case



The Problem: Engineering Plans



Other Impacts: Environmental Assessment Causing Funding Concerns

- FTA and FHWA regulations (23 USC 108) do permit use of federal funds for ROW acquisition prior to completion of the NEPA process, but only for acquisitions negotiated without the threat of condemnation
- Case law is a bit of a mixed bag
 - *United States v. 0.95 Acres of Land* (9th Cir. 1993) 994 F.2d 696
 - *Lathan v. Volpe* (9th Cir. 1971) 455 F.2d 1111
- Acquisition cannot have adverse environmental impact or limit the choice of reasonable alternatives (e.g., agency has not determined how it will use the property)

Conclusion & Takeaways

- Environmental planning and awareness is an important part of the ROW process
- Any environmental considerations overlooked can end up delaying the project
- Every step in the ROW process should be aware of the importance of environmental due diligence and the impact it can have on the project
- Don't just read the Executive Summary of an environmental report and then stick it in a drawer
- Make sure the Phase I Environmental Site Assessment is viable at the time the site is being considered
- Follow up on, or at least explore all environmental recommendations

Thank You!

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Lunch

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A View From the Bench: Trial Judges Share Tips for Effective Advocacy & Testimony Emphasizing Professionalism, Ethics & Honesty

Presenters:

Honorable Judge Randall Warner, Maricopa County Superior Court

Honorable Judge Timothy Thomason, Maricopa County Superior Court

Honorable Judge Neil Wake, U.S. District Court, District of Arizona

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Thank You!

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Right To Take Challenges and How to Avoid Them

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Right to Take

- Public Use is a judicial question in all cases without regard to legislative declarations as to the nature of the use.
- Necessity is a legislative determination to which the court must defer.
 - Reasonably necessary in order to build the project as designed.

Timing of the Right to Take Challenge

- Felix v. Superior Court of Pima Cty., 92 Ariz. 247, 375 P.2d 730 (1962)
 - GVID v. Bryce
 - Yuma County v. Swenson
- City of Phoenix v. Harnish, 214 Ariz. 158, 150 P.3d 245 (Ct. App. 2006)

Time for Determining Validity of Taking

- Determined solely by the conditions as of the time of the taking
- Subsequent change of plans does not invalidate condemnation
- Subsequent abandonment of project does not invalidate condemnation

Beistline v. City of San Diego, 256 F.2d 421 (9th Cir. 1958)

Circle X. Land & Cattle Co. v. Mumford Indep. Sch. Dist., 325 S.W. 3d 859 (Tex. App. 2010)

Vilbig v. Hous. Auth. Of City of Dallas, 287 S.W. 2d 323 (Tex. App. 1955)

Steamboat Lake Water & Sanitation Dist. v. Halvorson, 252 P.3d 497 (Colo. App. 2011).

Challenges to Public Use

- Bailey v. Meyers, 206 Ariz. 224 (App. 2003)
- Tempe Marketplace
- Still good law?
 - City of Phoenix v. Phoenix Civic Auditorium & Convention Ctr. Ass'n, 99 Ariz. 270 (1965)
 - Cordova v. City of Tucson (Cordova II), 16 Ariz. App. 447 (1972)
 - Cordova v. City of Tucson (Cordova I), 15 Ariz. App. 469 (1971)

Prop 207: ARS 12-1131, et seq.

- Eminent Domain may be exercised only ... for a public use.

Public use means:

- possession, occupation , and enjoyment of the land by the general public or public agencies;
- creation or functioning of utilities;
- elimination of a direct threat to public health or safety; or
- acquisition of abandoned property.

Arizona Constitution

- "No private property shall be taken or damaged for public or private use without just compensation having first been made ..."
- - Arizona Constitution, Article II, Section 17

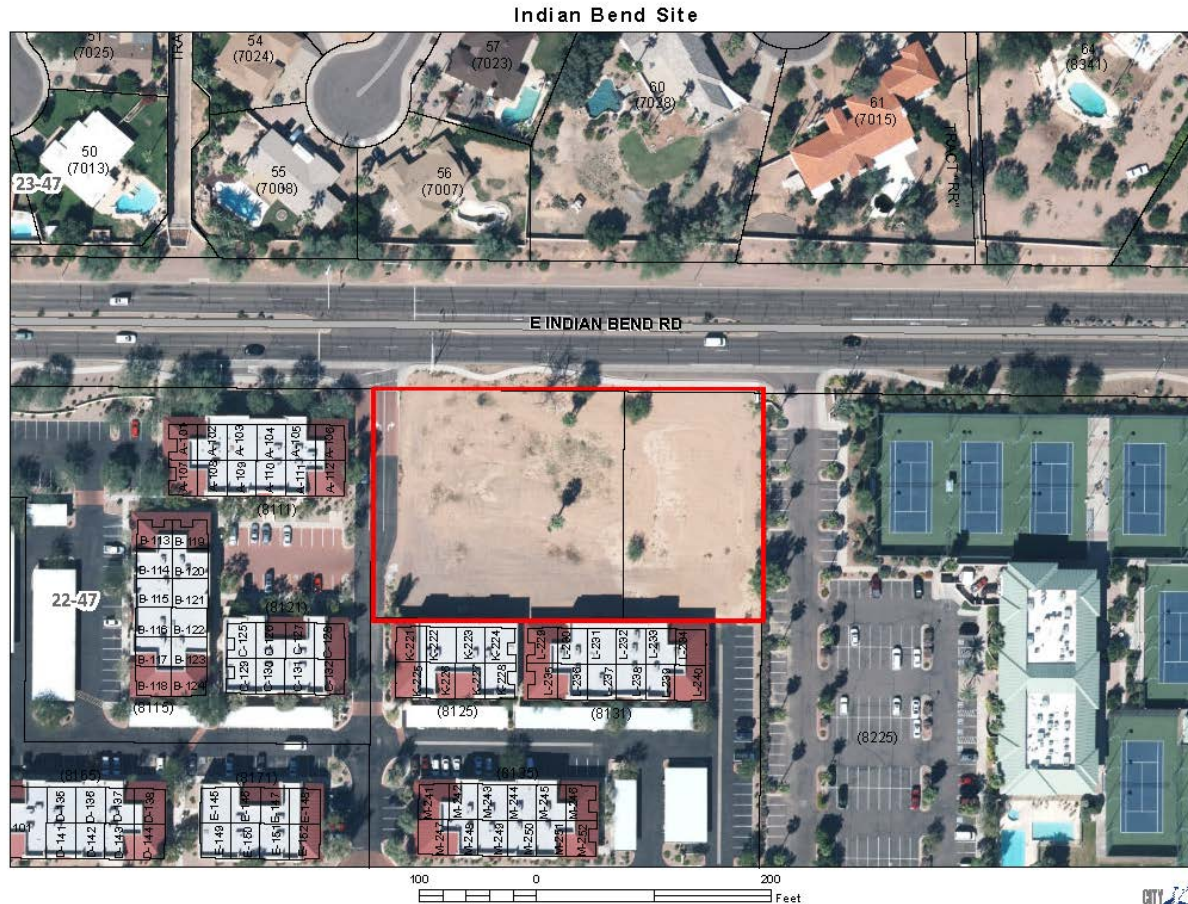
Some Other Uses Authorized By Law

- Private uses (Art. 2, Sect. 17)
- Railroads
- Mining activities
- Transport timber
- Private canals, ditches, flumes, aqueducts and pipes for irrigation
- Oil and gas pipelines
- Private ways of necessity

Necessity

- Standard of Review
 - City of Phoenix v. McCullough, 24 Ariz. App. 109 (1975)
- Yuma v. PMG, et al.
- Scottsdale v. Hing
 - A.R.S. 12-1115: Greatest public good/least private injury

Figure 1



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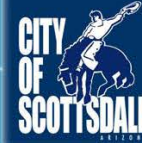
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Standard Criteria

Criteria



- Operational need; response time
 - Proximity to center of coverage area
 - Access to arterial roadways
- Cost
 - Appraised or estimated value
 - Potential relocation cost
 - Demolition
- Land use
 - Minimize negative impact on residential land uses

Figure 2

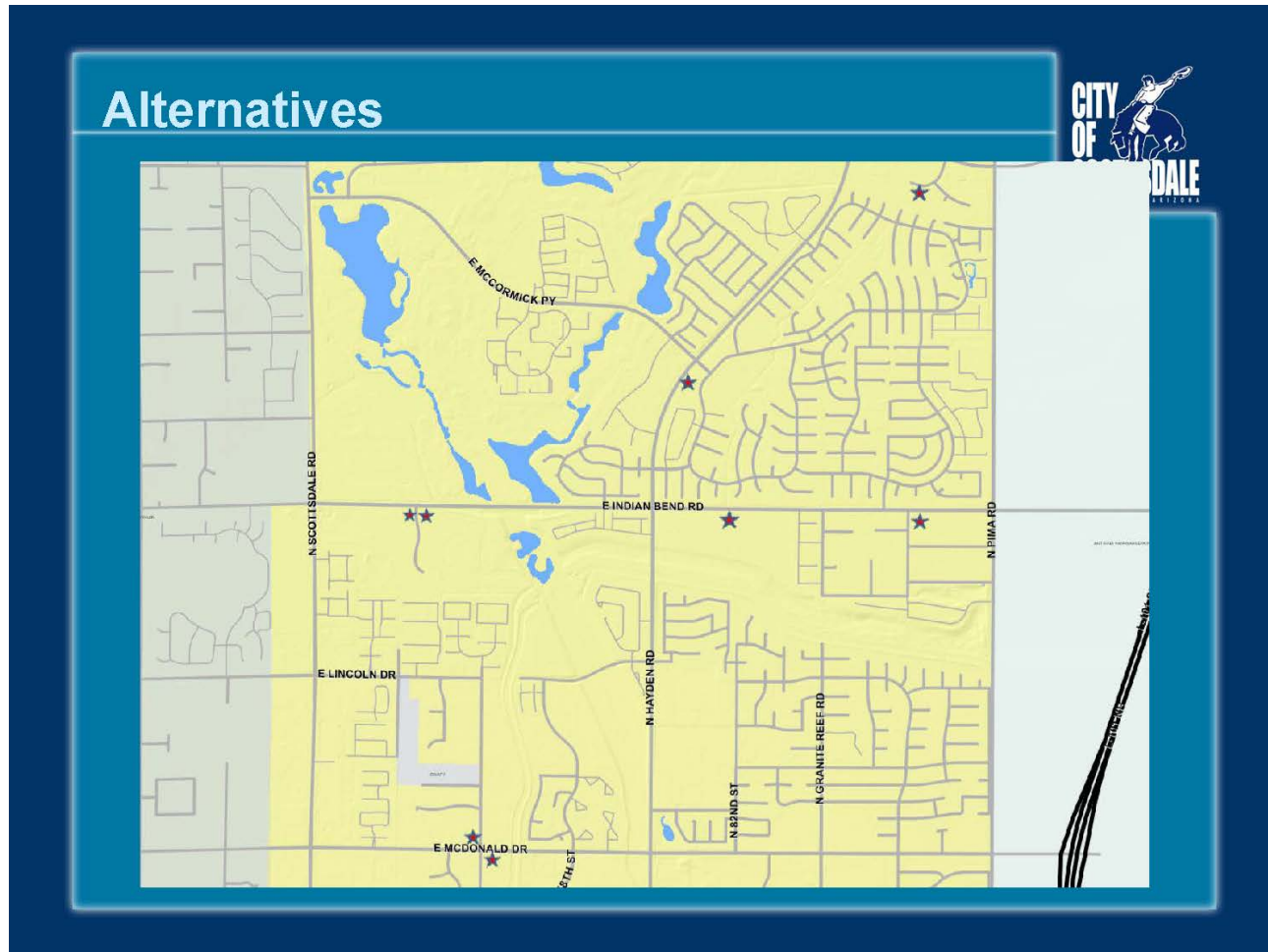
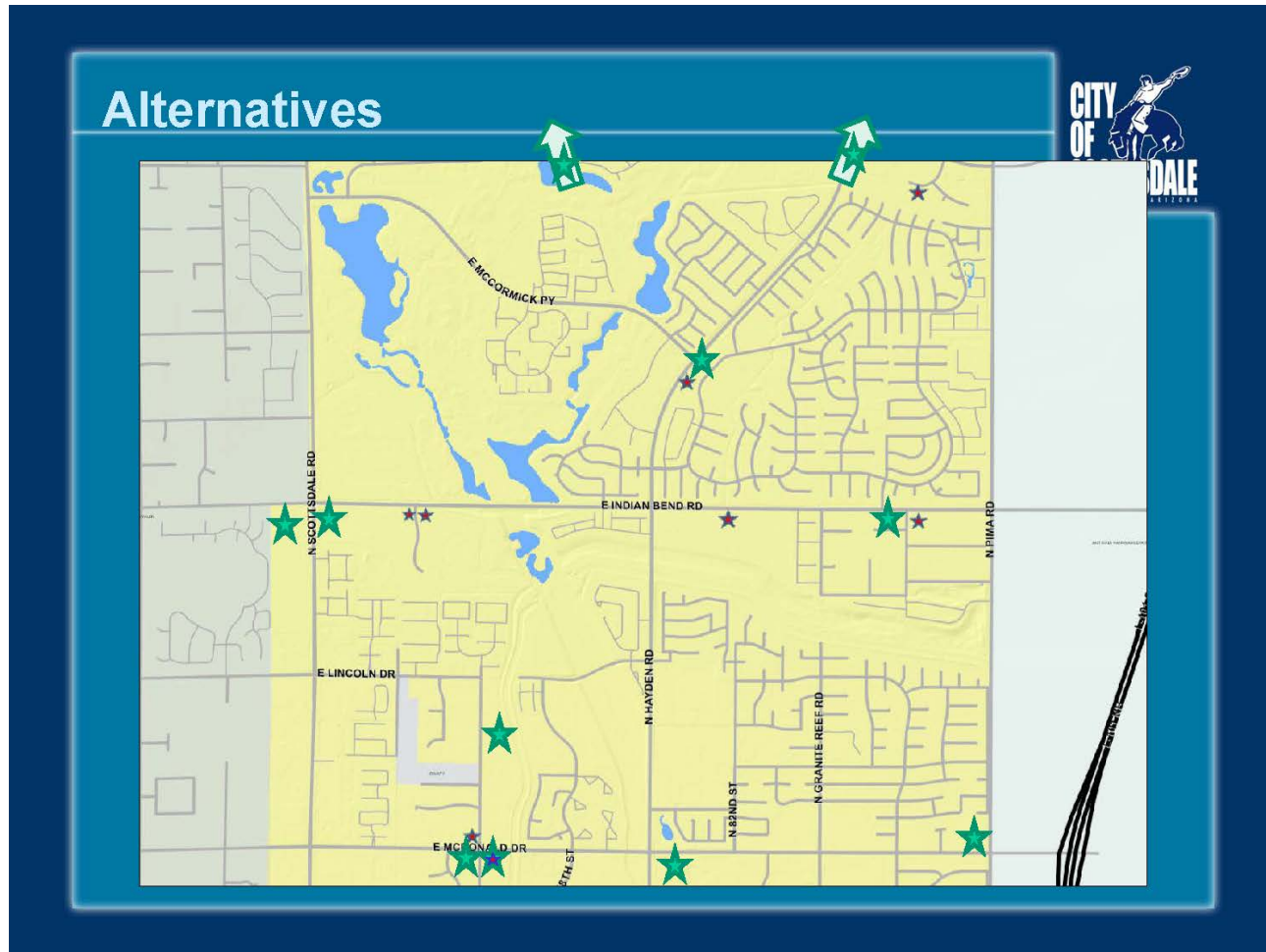


Figure 2a



Take Away for Condemnors: Make a Record on Necessity

- Why the property is necessary;
- Consideration of alternatives;
- Discussion of costs and benefits to public and harm to property owner.
 - ARS 12-1115: land shall be located in manner compatible with the greatest public good and least private injury.

Take Away for Condemnees

- Right to take challenges rarely succeed
- Must be prompt
- Take a special action if you lose
- Fully advise your client of the risks

Thank You!

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Afternoon Networking Break

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Making the Most of Your Mediation

Presenters:

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Robert Spear, Arizona Water Company

Gary L. Birnbaum, Dickinson Wright PLLC

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Mediation as a Tool for Public Projects: A Case Study of Phoenix's Light Rail Project

Presenter:

Gary Verburg, Gust Rosenfeld P.L.C.

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Legal and Ethical Parameters

- "[P]rivate property shall not be taken for public use, without just compensation." Fifth Amendment to the United States Constitution.
- Government shall not "make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation . . ." A.R.S. Const. Art. 9., section 7. (Arizona's gift clause prohibition).
- "A lawyer shall not bring or defend a proceeding or assert or controvert an issue therein, unless there is a good faith basis in law and fact for doing so . . ." ER 3.1.
- "It is the duty of the state, in the conduct of the inquest by which the compensation is ascertained, to see that it is just, not merely to the individual whose property is taken, but to the public which is to pay for it." *Searl v. School District, Lake County*, 133 U.S. 553, 562 (1890); *Bauman v. Ross*, 167 U.S. 548, 574 (1897).
- If federally funded, the following is required: agency determination of just compensation; offer may not be less than appraisal; and formal justification of settlement in excess of appraisal. 49 C.F.R. 24.101 et seq.

Summary of Facts Related to Light Rail Acquisitions

- Phase I of the project involved the taking of over 450 parcels of property.
- City employed a real estate services company to assist with title issues, initial estimates of value, and appraisals which were used to obtain voluntary acquisitions.
- In-house real estate officers negotiated with property owners to obtain voluntary acquisitions. Negotiations were based upon certified appraisals.
- City contracted with a non-lawyer to serve as an ombudsman to act as a mediator to resolve differences between the City and property owners.
- Cases which could not be resolved by voluntary acquisition were referred to the Law Department for condemnation.

Law Department Condemnation

- Due to the successful negotiation efforts of the Real Estate Division staff and mediation efforts of the ombudsman, less than 50 to 60 cases were referred to the Law Department for condemnation proceedings.
- Professionally legally trained mediators were used in most cases that the Law Department could not settle through negotiation.
- Of the condemnation cases filed by the Law Department and outside counsel representing the City, fewer than 10 cases went to trial.
- The recommended settlement amount presented by mediators was an extremely successful tool used to persuade City Council to settle cases.
- Trouble areas in litigation and mediation: severance damages; and appraisal issues based upon assumptions of highest and best use.

Aftermath

- Pursuant to federal regulations, the project was audited.
- Regulations require justification for payments over appraised value.
- Law Department was able to justify all cases referred to it based upon risks of litigation, cost of litigation and recommended settlements through mediation.
- Real Estate Division experienced difficulty justifying several cases mediated through the ombudsman mediation process.
- Federal government refused to allow the use of federal funds on the acquisitions which could not be justified.

Mediation From Your Client's Perspective

Presenter:

Robert Spear, Arizona Water Company

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Know Your Client

- Conduct a thorough intake interview. Ask questions. Listen to the answers.
- How will condemnation affect your client?
- What stomach does your client have for the process and the costs?
- How does your client prefer to communicate?

Manage The Case

- Plan case management from day one.
- Understand subject property and impacts on your client.
- Manage and communicate with others working the case.
- Think long and hard before starting discovery or writing motions.
- Tell your client what you are doing.
- Review your bills.

Manage The Case

- Provide a budget to your client.
 - Update the budget as the case progresses.
 - Provide options in the budget.
- Avoid the temptation to speculate about property value.
- What if property value comes in lower than expected? Higher?

Getting To Mediation

- Discuss possible mediation with your client up front.
- Some considerations:
 - How quickly does your client need to resolve the case?
 - Nature of the property and client's use of the property?
 - Budget considerations?

Your Client And The Mediation

- Who is the mediator?
- What is the mediator's style and mediation format?
- How will this affect your client?
- Recognize mediation might become personal.
- Communicate with your client before, during, and after mediation.
 - Mediator
 - Roles
 - Experts
 - Process

Your Client And The Mediation

- Are there possible creative solutions?
 - Money isn't the answer to everything.
 - Understand the impact to your client's business and life.
 - Don't leave your client in a hole.
- Prepare your client for future case activities.

Key Considerations In The Mediation Of The Condemnation Case

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Why Mediate an Eminent Domain Case?

- Court Order
- Increased Control over Valuation
- Reduced Expense
- Expertise of the Mediator
- Creativity of Solutions

Types of Eminent Domain Mediation / When to Mediate?

- Before Litigation
- Before Order of Immediate Possession Hearing
- Before Trial
- During the Pendency of Appellate Proceedings

Pre-Mediation Planning

- Party Participation
- Participation by Experts and other Non-Parties
- Scheduling Mediation within the Condemnation Process

Selecting the Mediator

- Retired Judge
- Eminent Domain Experience
- Valuation Experience
- Mediation Experience
- Others

Mediation Approach or Style

- Facilitative
- Evaluative
- Blending of Approaches

Finding The Mediator

- Reputation
- Referrals
- Publications and Rankings
- Court Referrals
- ADR Organizations

Selecting The Appropriate Experts For Participation in the Mediation

- Valuation / Appraisal
- Zoning and Land Use
- Others (Traffic, Geologist, Water, etc.)

Pre-Mediation Preparation

- Preparing the Client
- Establishing Roles and Participation of Experts
- Preparation of Exhibits

Exhibits

- Persuasive Value
- Presentation Quality
- Examples (photographs, site plans, construction diagrams, charts / maps of comparable sales, etc.)

Preparing the Client

- Explaining the Mediator's Role
- Explaining the Client's Role
- Explaining the Process (e.g., Opening Remarks)
- Explaining the Other Side's Position
- Discuss Interests, Objectives and Goals
- Discuss Likely Outcomes
- Settlement Authority

Pre-Mediation Memoranda

- Confidential or Exchange Memoranda
- Non-Monetary Alternatives as Elements of Settlement
- Disclosure of Settlement Position
- What Not to Send to the Mediator

The Mediation Conference

- Reasonable Expectations of the Participants
- Opening Session with Mediator
- Opening Statements
- Presentation of Rebuttal(?)
- Private Caucuses
- Participation of the Experts

Neutral Case Evaluation

- Alternative to Mediation
- As Part of the Mediation Process

Call it Quits?

- Do you declare an impasse or adjourn?
- Re-Mediate?
- Solutions after Adjournment

Non-Monetary Solutions

- Development Rights
- Land Exchanges
- Project Redesign

Documenting a Mediation Settlement

- Value of Partial Settlements
- Ariz. R. Civ. P. 80(d)
- The "Agreement to Agree" Problem

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Thank You!

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Intersection of Legal & Appraisal Ethics

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What is USPAP?

- Uniform Standards of Professional Appraisal Practice. www.uspap.org
- Prior to 1991 appraisers and appraisals in Arizona, and most other states, were unregulated. (Many appraisal designations were created in the early 1930s.)
- USPAP represents the generally accepted and recognized standards of appraisal practice in the United States.
- Developed 1986 and 1987, USPAP has been adopted by major appraisal organizations in North America. (And many foreign countries.)
- In 1991, Arizona legislature adopted USPAP as state law.
- Arizona became a "Mandatory" state requiring all appraisals be prepared by state licensed or certified appraisers and comply with USPAP: which is the situation today.
- Many other states are "Voluntary" which means that only Federally Related Transactions need to be prepared by licensed or certified appraisers in compliance with USPAP.

What Does USPAP Include?

- Definitions
- Ethics Rule
- Record Keeping Rule
- Competency Rule
- Scope Of Work Rule
- Jurisdictional Exception Rule
- Standards 1,2,3,6,7,8,9,10

Only Standards 1, 2, and 3 apply to real property appraisal.

Advisory Opinions are issued by the Appraisal Standards Board but are not part of USPAP. They are issued for guidance clarification and advice. There are currently 31 active AO's.

Primary Ethics Components Of USPAP

- USPAP Ethics Rule
- USPAP Standard 1
- USPAP Standard 2
- USPAP Advisory Opinion 21
- USPAP Competency Rule
- Appraisal Institute Guide Note 4: (=USPAP Competency)
 - Reliance on Reports Prepared by Others
- USPAP Definition-Extraordinary Assumptions
 - (To be Renamed “Special Assumptions”)
- USPAP Definition-Hypothetical Condition

Ethics Rule

"An individual should comply (with ethics rule) any time that individual represents that he or she is performing the *service* as an appraiser"

Subsections:

- Conduct: Impartial; Objective; Independent; and without accommodation of personal interests.
- Management: reporting a predetermined result; favoring the cause of the client; assignment contingent upon opinion of value; contingent upon stipulated result.
- Confidentiality: must not disclose confidential information or assignment results to anyone other than: the client; parties specifically authorized by the client; state appraiser regulatory agencies; third parties as authorized by due process of law; a duly authorized professional peer review committee except when such disclosure to a committee would violate applicable law or regulation.

Unless confidential information and assignment results are redacted.

Standard 1

Real Property Appraisal, Development

"In developing a real property appraisal, an appraiser must identify the problem to be solved, determine the scope of work necessary to solve the problem, correctly complete research and analysis necessary to produce **a credible appraisal.**"

Standard 2

Real Property Appraisal, Development

"In reporting the results of a real property appraisal, an appraiser must communicate each analysis, opinion, and conclusion in a manner that is **not misleading**."

Advisory Opinion 21- Valuation Services

- USPAP Advisory Opinion 21 expands on Ethics Rule by clarifying "acting as an appraiser," i.e. when an appraiser has to follow USPAP and when not.
- *Valuation Service* is divided into Appraisal Practice i.e. acting as an appraiser. May not be related to any USPAP Standards such as 1, 2, or 3. Valuation Services includes services pertaining to all aspects of property value and includes services performed by both appraisers and by others.
- *Appraisal Practice* includes Appraisal (Standards 1 & 2) and Appraisal Review (Standard 3). There is no doubt one is "acting as an appraiser."

Competency Rule

An appraiser must:

- be competent to perform the assignment,
- acquire the necessary competency to perform the assignment, or;
- decline or withdraw from the assignment

In all cases, the appraiser must perform competently when completing the assignment.

Guide Note 4-Reliance on Reports Prepared by Others

While this Guide Note is published by the Appraisal Institute (MAI,SRA) the principal is included in USPAP Standards 1 & 2.

Paraphrasing Comments to SR 2-3:

- When an appraiser has relied on work done by others he/she is responsible for the decision to rely on their work.
- The appraiser is required to have a reasonable basis for believing that those individuals performing the work are competent.
- The appraiser must have no reason to doubt that the work of those individuals is credible.

Extraordinary Assumption

- An assumption which if found to be false could alter the appraiser's opinions or conclusions.
- Extraordinary Assumptions presume as fact otherwise uncertain information.
- Reportedly, the Appraisal Foundation has replaced the word "extraordinary" with the word "special" which will appear in the 2018 to 2020 edition of USPAP.

Hypothetical Condition

A condition **contrary to what is known** by the appraiser to exist on the effective date of the assignment but is used for the purpose of analysis.

Relevant lawyer rule: ER 1.2

- (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Relevant lawyer rule: ER 1.6

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d), or ER 3.3(a)(3).

Relevant lawyer rule: ER 1.6

Comment [3]:

...The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

Relevant lawyer rule: ER 3.1

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a good faith basis in law and fact for doing so that is not frivolous, which may include a good faith and non-frivolous argument for an extension, modification or reversal of existing law...

Relevant lawyer rule: ER 3.3

- Can't knowingly:
 - make a false statement of fact or law to a tribunal
 - fail to correct a false statement of material fact or law previously made
 - fail to disclose to the tribunal controlling and directly adverse legal authority not disclosed by opposing counsel
 - offer evidence that the lawyer knows to be false

Relevant lawyer rule: ER 3.3

- Must take remedial measures if:
 - the lawyer, the lawyer's client or a witness called by the lawyer has made false statements
 - a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding
- In an ex parte proceeding, must inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, no matter if the facts are adverse

Relevant lawyer rule: ER 3.4

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law

Relevant lawyer rule: ER 4.1

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by ER 1.6.

Relevant lawyer rule: ER 4.4

- (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden any other person, or use methods of obtaining evidence that violate the legal rights of such a person.

Relevant lawyer rule: ER 8.4

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another,
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects,
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation,
- (d) engage in conduct that is prejudicial to the administration of justice

* * *

Hypo 1

- You're the **lawyer** for a commercial landowner.
- When you see the opposing party's appraisal, you realize that that expert made a significant and obvious error that benefits your client.

What should you do?

Hypo 2

- You're the **appraiser** hired by the lawyer for a commercial landowner.
- When you see the opposing party's appraisal, you realize that that expert made a significant and obvious error that benefits the landowner.

What should you do?

Hypo 3

- A **Lawyer** hires Appraiser to appraise a commercial property.
- When Appraiser submits his report, Lawyer realizes Appraiser has listed a non-existent (but minor) improvement to support a very generous value.

What should Lawyer do?

Hypo 4

- Lawyer hires **Appraiser** to appraise a commercial property. Appraiser relies on a construction-defect report prepared by Lawyer's client.
- Because Lawyer's client prepared it, Appraiser assumes it is OK and relies on it.

Has Appraiser done anything wrong?

Hypo 5

- A **Lawyer** hires **Appraiser** to appraise a commercial property. In a telephone call, Lawyer tells Appraiser:

"We want the highest value you can sign off on. I don't care what ethics rules you ignore. Now, let's talk deadlines."
- Appraiser ignores Lawyer's statement about the rules and proceeds to talk about deadlines.
- In a follow-up email to Appraiser, Lawyer says,

"We've hired you because of your high ethics and reputation. Thanks for signing on."

Has Appraiser done anything wrong? What about Lawyer?

Hypo 6

- Lawyer A hires Appraiser A to appraise Property A.
- For a separate matter, Lawyer B hires Appraiser B to appraise another nearby, comparable commercial property. The four find out that they are all involved with the two nearby properties.
- Appraiser A calls Appraiser B and suggests that they share data. Lawyer A, who is new to the world of condemnation law, calls Lawyer B and asks Lawyer B for help on Lawyer A's case.

What may Appraiser B tell Appraiser A?

What may Lawyer B tell Lawyer A?

Hypo 7

- GM has a manufacturing facility in Detroit. The city wants to acquire it to expand the airport.
- GM hires Attorney Al to help negotiate the sale. The city hires Smith to appraise the property.
- The city's review appraiser accepts Smith's appraisal. The city's offer is well below what GM thinks the property is worth. Smith has appraised other similar properties.
- The dispute is now in litigation and Attorney Al demands that Smith provide copies of all other appraisals he has prepared in the past 5 years.

Under what conditions may Smith comply? Is it ethical for Attorney Al to ask for the other appraisals?

Hypo 8

- Attorney Al finds that Smith had in his possession a Phase 1 for the contaminated property next door and had assumed the same contaminated soil conditions for the GM property.
1. Should Attorney Al agree with Smith's assumption?
 2. Was Smith acting ethically?
 3. Was the city acting ethically?
 4. Was Smith's appraisal credible?
 5. Was Smith's appraisal report misleading?

Hypo 9

- Your client is interested in making an unsolicited offer to purchase Property A.
- You advise your client to engage Appraiser Jones to provide his opinion of market value but because your client doesn't want the owner of Property A to know of his interest, you instruct Jones that he will not have access to any income and expense data or able to inspect the property.

Can Jones appraise Property A under these conditions?

Hypo 10

- Harry has owned a 200-unit apartment building for 20 years. Because he has not maintained nor upgraded the property, rents and occupancy have deteriorated to at least 25% below market.
- Harry can no longer afford the property and wants to sell. He hires Appraiser Adam to prepare an appraisal he can give to brokers and potential buyers.
- He tells Adam that the below-market condition and rents are due to Harry's failing health and financial condition. He tells Adam to appraise the property as if it were in good condition and at market rents and occupancy.

Can Adam accept this assignment?

Thank You!

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Condemnation Summit XIX

Thank You!

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