

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-014352

12/14/2016

HONORABLE DANIEL J. KILEY

CLERK OF THE COURT
M. King/C. Green
Deputy

TOWN OF WICKENBURG ARIZONA

CHRISTOPHER W KRAMER

v.

GARCIA RODRIGUEZ MARTINEZ
PARTNERS L L C, et al.

RICHARD F FAERBER

DAVINA DANA BRESSLER

MINUTE ENTRY

The real property at issue in this case (the "Subject Property") consists of a 46,862-square-foot vacant parcel known as Maricopa County Assessor Parcel Number 505-13-031K, which is located in the Powder House Wash area in Wickenburg, Arizona. *See, e.g.*, Exhibit 1. The Subject Property is long, narrow and irregularly shaped. *See id.*; Exhibits 6, 7, 8. The northern portion of the Subject Property, which constitutes approximately one-half of the area of the parcel, is roughly parallel to Constellation Road, while the southern portion of the property is at an angle to Constellation Road. *See id.*

Defendant Salvatore Gatto Partners, L.P. ("SGP") owned the Subject Property from 2007 until March 2016, when SGP sold the Subject Property to Defendant Garcia Rodriguez Martinez Partners, L.L.C. ("GRMP"). GRMP and SGP, along with Defendants Camilla Hart, Otto Kruger Investments, L.L.C., and Victor Bada Partners, L.P. (collectively, "the Property Owners") all either own or have an interest in the Subject Property. First Amended Complaint in Condemnation and Application for Immediate Possession ("Complaint") at ¶¶ 1, 3-4, 6, 8-13; Separate Answer of Defendants Garcia Rodriguez Martinez Partners, LLC, Camilla Hart, Otto Kruger Investments, LLC, Victor Bada Partners, LP, and Salvatore Gatto Partners, LP to Plaintiff's First Amended Complaint in Condemnation and Application for Immediate

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Possession (“Answer”) at ¶¶ 2, 4-8.

The Town of Wickenburg (the “Town”) seeks to condemn the Subject Property for use in connection with a flood control project (the “Flood Control Project”). Complaint at ¶ 14. Answer at ¶ 9.

On August 25, 2014, the Town experienced significant flooding and resulting damage to homes in the Powder House Wash area as a result of what Steve Boyle, who serves as the Town’s Community Development and Neighborhood Services Director, described as “a significant monsoon event.” Exhibit 4 at unnumbered page 5. Almost a year later, on July 18, 2015, an even more severe storm hit the area, leading to even more severe flooding and damage. *Id.* Mr. Boyle testified at the hearing in this matter on December 8, 2016 (the “December 8th Hearing”) that the flooding on these two occasions was caused, or at least exacerbated, by the fact that the wash is not straight, and the fact that the flow of water through the wash was impeded by sediment and debris that had accumulated over time. As a result of those two circumstances, floodwaters overflowed the banks of the wash at two bends in the wash. He further testified that “seven homes” in the Powder House Wash area suffered “major damage” as a result of these two flooding events. *See id.* at unnumbered pages 14-15, 21. These seven residential properties, along with the Subject Property and another vacant parcel in the Powder House Wash, were deemed to be “at highest risk of future flooding.” Exhibit 3 at p. 2.

After the July 2015 flooding event, the Town began working on the Flood Control Project in conjunction with the Maricopa County Flood Control District (the “FCD”). The overall purpose of the Flood Control Project is to facilitate the flow of water through the Powder House Wash to the Hassayampa River, thereby reducing the risk that rainwater will overflow the banks of the wash and flood the surrounding area. To accomplish this goal, the Flood Control Project will “channelize” the Powder House Wash so that, during a flooding event, water will be able to flow toward the Hassayampa River in a southwestern direction on a relatively straight path roughly parallel to Constellation Road, rather than flowing on its current irregular path. The channelization will run across the northern portion of the Subject Property and then continue toward the Hassayampa River across other parcels that have been acquired as part of the Flood Control Project. *See* Exhibits 7, 8. Mr. Boyle testified at the December 8th Hearing that the land directly east of the planned channel, which includes the southern portion of the Subject Property, is intended to be used as “sediment catch basin,” explaining that accumulated sediment that is cleared from the channel each year will be deposited in the catch basin.

As noted above, Mr. Boyle testified that seven homes in the Powder House Wash area sustained “major damage” as a result of the prior flooding events. The FCD purchased six of these seven residential properties for use in connection with the Flood Control Project. The homes on these six properties have been, or are in the process of being, demolished as a step in

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the process of implementing the Flood Control Project.

For its part, the Town was to acquire three parcels in the Powder House Wash area: the seventh residential property, which was not acquired by the FCD; the Subject Property; and another vacant parcel. To date, the Town has acquired two of the three parcels - - the remaining residential property and the vacant property - - but has not yet acquired the Subject Property.

The Town offered to purchase the Subject Property from the Property Owners for \$9,264.91 in February 2016. After initially agreeing to sell the Subject Property for that sum, and then proposing an increased sale price, the Property Owners ultimately declined to sell the Subject Property. *See* Exhibits 31-51.

At a meeting on April 18, 2016, the Town Council approved Resolution No. 1923 authorizing the condemnation of the Subject Property for flood control purposes. *See* Exhibit 2. The Town Council expressly found that “acquisition of the property...is necessary for public flood control purposes, and it is in the public interest to acquire the property.” *Id.* at p. 2. Approximately a week before the Town Council convened to vote on Resolution 1923, council members were provided with a staff report addressing the planned condemnation of the Subject Property for flood control purposes. Exhibit 3.

Jeff Springer, who is the manager of the limited liability company that owns the Subject Property, testified at the December 8th Hearing that on February 26, 2016, he visited the Subject Property and observed a third party, later identified as Art Barber, removing sand from the Subject Property for sale. Specifically, Mr. Springer testified that he observed a tractor on the property piling sand into a large mound. Tractor tire tracks all throughout the Subject Property made clear that the tractor had been driven across the length of the property. Mr. Springer testified that he confronted the tractor operator, Mr. Barber, and told him that he was trespassing on private property and must leave. Mr. Barber complied. Mr. Springer did not call the police to report the trespassing. Mr. Springer testified that, at some unspecified later point, he sent an email to someone at the Town about the incident. That email was not offered as an exhibit at the December 8th Hearing.

The Property Owners complain that a significant quantity of commercially valuable sand has been removed over a long period of time from the Subject Property without their permission, and further complain that the Town was aware of this unauthorized removal of sand and took no action to stop it. Separate Defendants’ Position Statement Regarding Plaintiff’s Application for Immediate Possession (“Defendants’ Position Statement”) at pp. 3, 7. Photographs and other evidence presented by the Property Owners at the December 8th Hearing does, in fact, support their assertion that sand has been removed from the Subject Property. Exhibits 22-28. The Court finds no reliable evidence, however, that Town officials participated or acquiesced in the

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extraction of sand from the Subject Property. The only evidence on this point was a statement made by Mr. Springer, as part of a non-responsive answer to a question posed by counsel for the Town, that Mr. Barber told him that the Town knew about his removal of sand from the Subject Property. The Court does not consider a hearsay statement by Mr. Barber to constitute reliable evidence of what the Town did or did not know. Even if one were to assume the truth of the Property Owners' accusation that the Town was aware that Mr. Barber was removing sand from the Subject Property to sell for profit and took no action to stop it, that circumstance would have no bearing on the condemnation issue before the Court.¹

The parties agree that the only issues the Court need resolve at this time are the following:

1. whether the Town's proposed acquisition of the Subject Property is for a "public use";
2. whether the use to which the Subject Property is to be applied is a use authorized by law, and that the taking is necessary to such use;
3. the amount of probable damages that the Property Owners will sustain if the Subject Property is acquired by the Town; and
4. whether the Town should be granted immediate possession of the Subject Property.

See Plaintiff's Position Statement Regarding Public Use and Necessity ("Plaintiff's Position Statement") at p. 3; Defendants' Position Statement at p. 4.

A. Public Use

The Arizona Constitution allows governmental entities to exercise the power of eminent domain to take private property for public use if just compensation is paid to the property owner for the taking and damage to the property. Ariz. Const. Art. II, § 17. *See also City of Phoenix v. Superior Court*, 137 Ariz. 409, 411, 671 P.2d 387, 389 (1983) ("At the outset, we note that generally no condemning body may exercise the power of eminent domain unless the property which is to be taken is to be put to a 'public use'.").

The Court finds that the acquisition of property for use in a flood control project is a

¹ Whether the Property Owners may properly assert other claims in separate proceedings based on the unauthorized removal of sand from their property is, of course, a different issue, and one that this Court need not address at this time.

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public use for which the power of eminent domain may properly be exercised. *See Bailey v. Myers*, 206 Ariz. 224, 228, 76 P.3d 898, 902 (App. 2003) (“When the government proposes to take a person’s property to build streets, jails, government buildings, libraries or public parks that the government will own or operate, the anticipated use is unquestionably public.”).

B. Necessity

Before property may be taken, the condemnor must establish that the use to which the property is to be applied is a use authorized by law, and that the taking is necessary to such use. A.R.S. § 12-1112; *City of Phoenix v. Phoenix Civic Auditorium & Convention Ctr. Ass’n*, 99 Ariz. 270, 276, 408 P.2d 818, 822 (1965).

Public necessity often means...public convenience and advantage.” *City of Phoenix v. Phoenix Civic Auditorium*, 99 Ariz. at 276, 408 P.2d at 822 (citation and internal quotations omitted). “The word ‘necessary’, when used in or in connection with eminent domain statutes, means reasonable necessity, under the circumstances of the particular case.” *City of Tacoma v. Welcker*, 65 Wash.2d 677, 683, 399 P.2d 330, 335 (1965).² “Necessary” does not mean “indispensable.” *Id.* “The meaning of the term “necessary” is “interwoven with the concept of public use...and embraces the right of the public to expect and demand the service and facilities to be provided by a proposed acquisition or improvement.” *Id.* “Reasonable necessity for use in a reasonable time is all that is required.” *Id.*

A court must apply “a deferential standard of review” when considering a challenge to a legislative determination of necessity. *Bailey*, 206 Ariz. at 227 n. 1, 76 P.3d at 92 n. 1. Specifically, a court must defer to a legislative determination of necessity absent fraud or arbitrary and capricious conduct. *City of Phoenix v. McCullough*, 24 Ariz.App. 109, 114, 536 P.2d 230, 235 (1975) (“[A] condemnor’s determination of necessity should not be disturbed on judicial review in the absence of fraud or arbitrary and capricious conduct.”).

Action is arbitrary and capricious if it is “unreasoning action, without consideration and in disregard for facts and circumstances; where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.” *Maricopa Cty. Sheriff’s Office v. Maricopa Cty. Employee Merit Sys. Comm’n*, 211 Ariz. 219, 223, 119 P.3d 1022, 1026 (2005) (citation and internal quotations omitted).

² Arizona courts have noted that decisions from the State of Washington are persuasive in construing the eminent domain provision of the Arizona constitution. *See Bickel v. Hansen*, 169 Ariz. 371, 374, 819 P.2d 957, 960 (App. 1991).

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A court reviewing a legislative determination of necessity considers whether “the findings of the governing body have some reasonable support in the facts.” *City of Phoenix v. Superior Court*, 137 Ariz. at 416, 671 P.2d at 394. If so, “the findings of the governing body must be sustained,” even “though those findings may be reasonably doubtful or fairly debatable.” *Id.* See also *Tucson Comm. Dev. & Design Ctr. v. City of Tucson*, 131 Ariz. 454, 459, 641 P.2d 1298, 1303 (App. 1981) (“If the evidence is such that the city could reasonably have found necessity...the resolution is not arbitrary. Even if the City’s action is reasonably doubtful or even fairly debatable, we cannot substitute our judgment for that of the City Council.”) (citations, internal quotations, and internal punctuation omitted).

The evidence presented does not support a finding that the Town Council acted arbitrarily or capriciously when it found that condemnation of the Subject Property “is necessary for flood control purposes.” Exhibit 2 at p. 2. Evidence was presented at the December 8th Hearing that, prior to passing Resolution No. 1923, the Town Council considered information from the staff about the flood damage sustained by Town residents during the flooding events in July 2015 and August 2014, and about the proposal for the Flood Control Project to reduce the risk of future floods. Exhibit 3. The Flood Control Project could hardly be successful if the Subject Property weren’t a part of it; the Subject Property literally runs through the middle of the parcels that have been acquired for the Flood Control Project. See Exhibits 7, 8.

At the December 8th Hearing, counsel for the Property Owners made an offer of proof that there is no engineering need for the Town to use the Subject Property as part of the Flood Control Project. The Property Owners presented no evidence on this point, however. The Court even offered to continue the hearing to a later date to give the Property Owners the opportunity to present evidence to support this offer of proof, but the Property Owners declined the Court’s offer.

The Court finds no evidence to suggest that the Town Council acted in an arbitrary and capricious manner in determining that acquisition of the Subject Property is necessary to the Flood Control Project. The Court further finds that the Town Council’s determination of necessity has reasonable support in the facts, and therefore must be sustained. *City of Phoenix v. Superior Court*, 137 Ariz. at 416, 671 P.2d at 394.

At the December 8th Hearing, counsel for the Property Owners also made an offer of proof that the Subject Property could be put to a number of other uses, including as a site for motocross or equestrian events or as an outdoor venue for private parties and similar occasions. Although it is not entirely clear, the Property Owners may have been intending to suggest that, if the proposed condemnation were denied and the Subject Property were to remain in private hands, the Property Owners could develop the property into a revenue-generating use that is consistent (or at least not inconsistent) with the Flood Control Project.

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For multiple reasons, the Court does not find the Property Owners' assertion on this point persuasive.

First, it is well-established that the availability of alternatives does not by itself justify overturning a legislative determination of necessity. *Catalina Foothills Unified Sch. Dist. No. 16 v. La Paloma Prop. Owners Ass'n*, 238 Ariz. 510, 515, 363 P.3d 127, 132 (App. 2015).

Second, there is no reason to believe that any of the proposed alternative uses hypothesized by counsel for the Property Owners are legally permissible, since the Subject Property is zoned only for residential use. When asked, for example, about the possibility that the Subject Property could be developed into a motocross racing site, Mr. Boyle testified that such a use would not be compatible with the residential character of the surrounding area.

Third, even if one were to assume that (1) it is *theoretically possible* for the Subject Property to be developed into a site for motocross or equestrian events or as an outdoor venue for private parties *and* (2) that such use would be consistent with the Flood Control Project, the Property Owners did not present any evidence to suggest that they *in fact* intend to develop the Subject Property in such a manner. There is no evidence to suggest that the Property Owners have made any effort since acquiring the Subject Property in 2007 to develop the property for use as a site for sporting events or a venue for private parties. Indeed, there is no evidence that the Property Owners have ever attempted to develop the Subject Property for any use whatsoever. In his testimony at the December 8th Hearing, Mr. Springer never expressed a willingness to develop the Subject Property for a site for sporting events, an outdoor venue for private parties, or in any other manner hypothesized by the Property Owners' counsel. Even if one were to assume, therefore, that counsel for the Property Owners was correct in suggesting it is theoretically possible for the Subject Property to remain in private hands and be developed in some manner that would be consistent with the Flood Control Project, there is no reason to believe that the Property Owners have any intention of actually doing so. Counsel's speculation about possible other uses of the Subject Property do nothing to call into question the validity of the Town Council's determination of necessity.

At the December 8th Hearing, counsel for the Property Owners argued that the Town only needs the Subject Property for a relatively brief period of time, and assert that a "temporary easement" would serve the Town's purposes just as well as a condemnation of the property. The Court sees no basis for this assertion. First, the Property Owners identify no statutory authority for a "temporary" condemnation. Second, there is no reason to believe that the Town intends to make only temporary use of the Subject Property. The Town intends to channelize the Powder House Wash, including the portion of the wash that flows across the northern portion of the Subject Property. There is no basis for counsel's suggestion that the channelization is intended to

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be temporary. Likewise, the southern portion of the Subject Property is intended to serve as a sediment catch basin, and there is no reason to believe that this use is only temporary.

In support of their assertion that the Town intends to use the Subject Property for only a brief period of time, the Property Owners note that the Town staff's presentation to the Town Council included a reference to the eventual use of the Subject Property as "open space" and a "[p]otential future Corps project/park." Exhibit 4 at unnumbered page 30. The fact that the Town ultimately hopes to develop a park on the Subject Property at some point after completing construction of the Flood Control Project does not establish that the Subject Property's use for flood control purposes is only temporary. A parcel may simultaneously serve flood control purposes and recreational purposes.³ The fact that, after completing construction of the Flood Control Project, the Town may attempt to put a portion of the Subject Property to recreational use by developing a park does not mean that the property's utility for flood control purposes has ended.

The Court finds that substantial evidence supports the Town's determination that the Subject Property is necessary for use as part of a flood control purpose, that there is no evidence (or even allegation) of fraud in the Town's determination, and that the Town did not act arbitrarily or capriciously.

C. Probable Damages

At a hearing for immediate possession, the Court must determine the probable damages to each owner and interest holder in the property. The Court may then grant the condemnor possession and full use of the property upon deposit of a bond in that amount. A.R.S. § 12-1116(H). The amount of the bond set by the Court at this stage of the proceedings is without prejudice to the property owner's right to establish damages in a higher amount at trial. A.R.S. § 12-1116(O).

When determining a property's value for condemnation, only legal uses of the property may be considered. *See, e.g., Gear v. City of Phoenix*, 93 Ariz. 260, 263, 379 P.2d 972, 974 (1963) ("[T]he availability of land for a use which is prohibited by law cannot be considered in determining its value in eminent domain proceedings.").

J. Douglas Estes, a certified general real estate appraiser, testified that "highest and best use" of the Subject Property is speculative investment or assemblage with neighboring

³ The Property Owners themselves elicited testimony at the December 8th Hearing that golf courses serve as part of the City of Scottsdale's flood control system; land in washes in Scottsdale serve as the site of golf facilities that can be used when the land is not flooded.

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properties. He further testified that the Subject Property cannot feasibly be developed because of its irregular shape and because of its location in an active wash. Mr. Estes testified that, in his opinion, the Subject Property has a value of \$500.00. *See also* Exhibit 20, Appraisal Report.

As noted above, the Property Owners argue that the highest and best use of the Subject Property is to extract sand for sale. Mr. Springer testified that the sand on the Subject Property is high quality “mason sand” and is therefore valuable. He testified that “seventeen thousand three hundred fifty-six yards of sand could be removed” from the Subject Property and sold for “approximately a value of a quarter million dollars.” He also testified that the Property Owners have never actually extracted or sold sand from the Subject Property.

Because the Subject Property is zoned for residential use, sand cannot legally be extracted from the property and sold for profit. Therefore, the Court does not consider the amount of profit that could be earned from illegal sand extraction in determining the Property Owners’ probable damages.

The Property Owners also argued that the Subject Property could be put to other, profitable uses, such as a venue for sporting events or for private parties. Because no evidence was presented as to the amount of money that could be earned from engaging in such activities, the Court has no evidence on which to make a determination of probable damages based on the potential use of the Subject Property for such events.

The Court finds Mr. Estes’s appraisal to be the best evidence - - indeed, the only evidence presented - - of the Subject Property’s value if put to legal use. The Court therefore determines probable damages to be \$500. This determination is, of course, without prejudice to the establishment of damages at a later stage of the proceedings. *See* A.R.S. § 12-1116(O).

D. Immediate Possession

The Property Owners assert that the Town has failed to establish a need for immediate possession of the Subject Property. The Town presented evidence that, if an order for immediate possession were entered, the Town would immediately begin to clear away accumulated debris in the wash to ease the risk of floodwaters overflowing the wash’s banks. The Town also presented evidence that construction of the Flood Control Project will require permits not merely from the FCD, but from the Army Corps of Engineers; that the permitting process will take “at least six months”; and that the Town must begin the permit application process immediately if the Flood Control Project is to be completed by the start of next summer’s monsoon season. The Court finds that the Town has established an immediate need for the Subject Property.

E. Property Owners’ Allegation of the Town’s Failure to Comply With A.R.S. § 12-1116(A)

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The Property Owners assert that the Court lacks jurisdiction over this matter because the Town purportedly failed to comply with A.R.S. § 12-1116(A). Defendants' Position Statement at pp. 4-6. A.R.S. § 12-1116(A) provides in part that, at least 20 days before filing a condemnation action, the plaintiff must provide the property owners with a written offer to purchase the property and to pay just compensation, as well as an appraisal that supports the amount of the proposed compensation.

The Property Owners have never moved to dismiss this case based on purported non-compliance with A.R.S. § 12-1116(A). Instead, the Property Owners asserted in their Answer,

[a]s and for a further affirmative defense,...that this Court lacks jurisdiction over this matter at this time due to [the Town's] failure to comply with A.R.S. 12-1116(A)(2) prior to the bringing of this action...

Answer at p. 4. The Property Owners base this affirmative defense on their assertion that the appraisal report that was provided to them prior to the filing of the Complaint was marked "draft." Defendants' Position Statement at p. 5. The Property Owners have not alleged the existence of any differences between the draft and final appraisal reports other than the appearance of the word "draft" in the former. Likewise, the Property Owners have not suggested that they have been prejudiced in any way by the appearance of the word "draft" in the appraisal report they purportedly received prior to the filing of the Complaint.

The Property Owners bear the burden of proof on this affirmative defense. *See, e.g., City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, 184, 181 P.3d 219, 231 (App. 2008). At the December 8th Hearing, the only evidence on this issue presented on this point was that, at some unspecified point in time prior to preparing his Appraisal Report that was marked and admitted as Exhibit 20, Mr. Estes prepared a draft appraisal report that sets forth the same opinion of value as that set forth in Exhibit 20, *i.e.*, \$500.00. The Property Owners presented no testimony or other evidence to support their counsel's assertions that, prior to the filing of the Complaint, the only appraisal report they received from the Town was marked "draft." At no point did Mr. Boyle, Mr. Estes or Mr. Springer so testify. Moreover, the Property Owners do not dispute Mr. Estes's testimony that both Exhibit 20 and his prior draft appraisal report set forth the same opinion of value. The Court finds that the Property Owners have failed to meet their burden of proving their affirmative defense that the Court lacks jurisdiction to proceed because the Town failed to comply with A.R.S. § 12-1116(A).

Even assuming, however, the truth of the Property Owners' allegation that the only appraisal report provided to them prior to service of the Complaint was marked "draft," and further assuming that this circumstance establishes a violation of A.R.S. § 12-1116(A), the Court

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finds that the Property Owners would be entitled to no relief. Pursuant to A.R.S. § 12-1116(F), the Court finds that the Town's need for immediate possession of the Subject Property so they can promptly begin the lengthy permitting process so the process can be completed before next summer's monsoon season outweighs the Property Owners' interest.

Therefore, pursuant to the findings and conclusions of law set forth above,

IT IS ORDERED that Plaintiff Town of Wickenburg is entitled to immediate possession of the Subject Property upon posting a cash bond of \$500.00 with the Clerk of the Court. The Plaintiff shall submit a separate form of Order of Immediate Possession.

IT IS FURTHER ORDERED that the amount of the bond may not be introduced in evidence and is without prejudice to any party at the trial of this action.

Daniel J. Kiley
Judge of the Superior Court