

EMINENT DOMAIN

*State of Arizona*<sup>1</sup>

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**What is Eminent Domain?**

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The authority of the government to take or damage privately owned property is referred to as the power of eminent domain. It is also commonly called condemnation. The Arizona Constitution (Article 2 Section 17) authorizes the exercise of eminent domain authority if the taking is for a public use and the property owner is paid just compensation. Arizona's Constitution and state statutory provisions regarding eminent domain are not limited by the Fifth Amendment of the United States Constitution. Rather, the State's laws are required to be consistent with the Fifth Amendment.

**What is "public use" and "necessity?"**

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Arizona Revised Statute §12-1112 provides that the taking of private property must be for a public use and that the taking is necessary to such public use. Arizona case law has generally interpreted public use to include:

- Use of the land by the public;
- Promoting the public welfare; or

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<sup>1</sup> The information provided is an overview of the eminent domain process in Arizona. This summary is not intended as a full and complete review of Arizona law regarding eminent domain. Property owners should consult with an attorney regarding issues they are confronted with in a condemnation.

- Promoting the purposes of a governmental entity.

In *Bailey v. City of Mesa*, 206 Ariz. 224, 230, 76 P.3d 898, 904 (App. 2003) the Arizona appellate court held that the “...anticipated public benefits must substantially outweigh” any character of private use of the land taken.

### **Who is Eligible to Condemn?**

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The State, as the sovereign, may exercise the power of eminent domain in Arizona under Article 2, Section 17. The State may also delegate the power of eminent domain to governmental entities which then act as agents of the State. Examples of when other government entities act as agents of the State include the following:

- A person seeking to acquire property for public uses authorized by A.R.S. §12-1115(C). A.R.S. §12-1201 and §12-1202.
- A public service corporation which is condemning property for a use designated by A.R.S. §12-1111.
- Incorporated cities and towns. A.R.S. §9-276.
- The State Parks Board. A.R.S. §41-511.05, 41-511.06, 41-502.
- A city or town for utility services. A.R.S. §9-516.
- The Arizona Power Authority for development and utilization of power (A.R.S. §30-123).
- An agricultural improvement district. A.R.S. §48-2340, 48-2341.
- A county flood control district for flood control purposes. A.R.S. §48-3603, 48-3621.
- A city or town for public right-of-ways. A.R.S. §48-502, 48-503, 48-504, 48-508.
- A city, town, or county for airport purposes. A.R.S. §28-8416.
- A city, town, or county on behalf of a regional transportation authority for implementation of a regional transportation plan. A.R.S. §48-5123, 48-5313.
- A county or a board of supervisors for local or federal-county highways. A.R.S. §28-6701, 28-6704.
- A county for toll roads. A.R.S. §28-6805.
- The Director of The Department of Transportation. A.R.S. §28-368 and 28-7091-7103.
- A city, town or county for public housing projects. A.R.S. §36-1403, 36-1407.
- A state public body or federal agency for a public works project. A.R.S. §12-1141-1162.

### **What Property May Be Condemned?**

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In the State of Arizona, real property and certain rights associated with real property may be condemned. In the context of condemnation, real property includes the rights of use

disposition, and includes the rights over surrounding areas such as rights to light, air, support soil and to access.

The United States Supreme Court opinion in *Koontz v. St. Johns River Water Mgmt. Dis.*, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013) held that some personal property, i.e. cash and crops, may also be protected by the Constitution.

#### **A. Private Property Interests Protected by the Arizona Constitution**

Examples of private property which may be condemned in Arizona include:

- All real property belonging to any person, including all water rights.
- A private easement.
- An unexpired option to purchase real property.
- An unexpired lease.
- An easement of ingress and egress on a property.
- A contract to purchase and remove aggregates or minerals.
- Buildings and improvements on leased property.
- Damaged or taken personal property.
- Easements for the control over the air space.

### **The Condemnation Process and Proceedings.**

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#### **A. Statutory Prerequisites.**

A.R.S. §§12-1111 through 12-1129 establish the general procedures for a direct condemnation in Arizona. These procedures include: at least twenty days prior to filing a condemnation complaint (lawsuit) the condemning authority must deliver to the property owner a written offer to purchase A.R.S. §12-1116(1); an estimate of the just compensation to be paid (§12-1116(1)); and one or more appraisals supporting the offered compensation (§12-1116(2)). Additionally, a survey of the property and an accurate legal description of the property to be taken must be completed. (A.R.S. §12-1115).

#### **B. Filing an Eminent Domain Complaint (A.R.S §12-1117).**

The complaint in a condemnation action must set forth:

- The name of the person asserting the public use for which the property is sought, as plaintiff.
- The names of all owners and claimants of the property, if known, or a statement that they are unknown, as defendants.
- A statement of the authority to condemn.
- If a right-of-way is sought, the location and general route, accompanied with a map of the route.
- A description of each piece of land sought to be taken, and whether the land includes the whole or only a part of an entire parcel or tract.

A property owner and any person claiming an interest in the property identified in the complaint has a right to defend their interest. (A.R.S §12-1120).

**C. Notice & Service (A.R.S §12-1119).**

The clerk of the court must issue a summons containing:

- The names of the parties.
- The general description of the property.
- A statement of the public use for which it is sought.
- A reference to the complaint for description of the respective parcels.
- Notice to defendants to appear and show reasons why the property described should not be condemned as requested for in the complaint.

An owner cannot be deprived of land without the statutorily prescribed and constitutionally required notice. The failure to properly serve a copy of the summons and complaint upon a property owner renders the judgment void.

**D. Venue & Jurisdiction (A.R.S §12-1116(A)).**

Actions for condemnation must be brought “as other civil action in the superior court of the county in which the property is located.”

**E. Immediate Possession (A.R.S. §§12-1116(E) - (O)).**

The condemning entity may apply for an order granting immediate possession of the property sought to be condemned – the right to possess the property prior to entry of a final judgment. The only issues to be determined at a hearing on immediate possession are necessity and probable damages. A.R.S. §12-1116(H). An order of immediate possession cannot be appealed until after a final judgment is entered. Immediate possession gives the condemning entity the right of legal possession, but not title to the property. Title does not pass until a final judgment is entered, the just compensation has been paid, and a final order of condemnation is issued by the court. A.R.S. §12-1126.

**F. Burdens of Proof.**

The condemning entity has the burden of proof as to the following issues:

- a. To show that it has taken the steps necessary to authorize the initiation of the condemnation action. *Flecha Caida Water Co. v. City of Tucson*, 4 Ariz. App. 331, 420 P.2d 198 (1966).
- b. To prove special benefits. *Pima County v. Gonzales*, 177 Ariz. 566, 869 P.2d 183 ((App.1998).
- c. On the issue of project influence. *City of Phoenix v. Claus*, 177 Ariz. 566, 869 P.2d 1219 (App. 1994).

The property owner or party claiming an interest in the property being taken has the burden of proof as to the following issues:

- a. The amount of just compensation and severance damages. *State ex rel. Ordway v. Buchanan*, 154 Ariz. 159, 741 P.2d 292 (1987).

- b. Whether the condemning authority has properly balanced the greatest public good versus the least private injury under A.R.S. 12-115. *Queen Creek Summit, L.L.C. v. Davis*, 219 Ariz. 576, 201 P.3d 537 (App. 2008).

**G. Decision Making as to Compensation A.R.S. §12-1122.**

The trial court or jury is required to determine the value of the part taken, severance damages, and special benefits. The compensation must be determined for each source of damage separately. The right to a jury trial may be waived.

**H. Appeals**

The right to appeal and the procedures for defending a condemnation appeal are generally the same as for other civil actions. The Arizona Rules of Civil Appellate Procedure and A.R.S. §12-2101 *et. seq.* apply.

Payment by the condemning entity of the judgment does not prohibit the property owner from appealing on the issue of damages. *City of Phoenix v. Johnson*, 220 Ariz. 189, 204 P.3d 447 (App 2009).

**Challenging the Government’s Right to Take.**

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A property owner or person claiming an interest in any of the property described in the complaint, may appear, plead, and defend the condemnation lawsuit. A.R.S. §12-1120. A taking does not occur, however, until the government takes possession of the property. This may occur when the governmental entity obtains an order for immediate possession or upon satisfaction of a judgment and entry of the final order of condemnation. *Gardiner v. Henderson*, 103 Ariz. 420, 443 P.2d 416 (1968). Accordingly, the passing of a resolution to condemn is not a taking (*Shock v. Jacka*, 105 Ariz. 131, 460 P.3d 185 (1969) and *Geronimo Hotel, Inc. v. City of Tucson*, 121 Ariz. 446, 591 P.2d 72 (App. 1979)); and mapping and planning are insufficient to cause a taking (*Weintraub v. Flood Control District*, 104 Ariz. 566, 456 P.2d 936 (1969).

Challenging the government’s right to take must be raised early in the condemnation proceeding and prior to entry of an order for immediate possession.

**Inverse Condemnation.**

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An inverse condemnation generally arises when the government takes possession of private property or infringes on the use of property without properly exercising its authority of eminent domain. Article 2, Section 17 of the Arizona Constitution mandates that compensation be paid by the government when it causes a taking.

The venue for an inverse condemnation action is the same as for an action filed by a government entity.

In inverse condemnation cases, the date of the valuation is the date of the government's entry on the land. *Calmat of Ariz. v. State ex rel. Miller*, 176 Ariz. 190, 859 P.2d 1323 (1993).

In an inverse condemnation action, the landowner is entitled to interest from the date of taking. *Dos Rios Land L.P. v. Pima County*, 225 Ariz. 458, 240 P.2d 853 (App. 2010).

An owner may recover litigation expenses in a successful inverse condemnation action. A.R.S. §12-1128.

### **Just Compensation.**

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A property owner in Arizona must be paid "just compensation" for the taking or damaging of property by the government. Article 2, Section 17. "Just compensation" is the equivalent in money that places the property owner in as good a position financially as he would have been if his property had not been taken. *State ex rel. Miller v. Filler*, 168 Ariz. 147, 812 P.2d 388 (1991).

Arizona recognizes that the standard of "fair dealing" must be met in any eminent domain action. The trial court must use the measure of damages which is most appropriate under the circumstances to compensate the property owner. *State ex. rel. Herman v. Southern Pacific Co.*, 8 Ariz. App. 238, 445 P.2d 186 (1969).

#### **A. Who May Collect Compensation?**

Arizona law requires that compensation must be paid to "the owner" of property that is taken or damaged. Damages in eminent domain belong to the owner at the time of the taking.

"Each and every separate estate or interest" in the property must be identified and valued separately in a condemnation action. A.R.S. §12-1122. If there are separate interests in the property, compensation shall be separately determined and paid to the holders of those interests.

#### **B. Calculation of Compensation.**

If there is an ascertainable market value, it should be given great consideration. However, if the character of the property prevents an ascertainable market value, the cost to cure, replacement cost minus depreciation, capitalized cost of inconvenience, or other fair manners of compensation shall be given consideration.

**a. Market Value**

The court has the responsibility to bring the values of the real world marketplace into the courtroom. *City of Phoenix v. Wilson*, 200 Ariz. 2, 21 P.3d 388 (2001).

The market value of the property is determined by what a willing buyer would pay and a willing seller would accept. *Defnet Land & Inv. Co v. State ex rel. Herman*, 103 Ariz. 388, 442 P.2d 835 (1968).

Market value is defined as “...the most probable price in terms of cash in United States dollars or comparable market financial arrangements that the property would bring if exposed for sale in the open market, with reasonable time allowed which to find a purchaser, buying with knowledge of all uses and purposes to which it was adapted and for which it was capable.” A.R.S. §12-1122. *State v. McDonald*, 88 Ariz. 1, 352 P.2d 343 (1960).

Market value must also consider the reasonable probability of a future event, such as rezoning. *City of Tucson v. Estate of DeConcini*, 132 Ariz. 416, 646 P.2d 301(App. 1982). .

**b. When Market Value is Difficult to Ascertain.**

When an owner is able to prove there is market value is difficult to determine, the court must use the measure of damages most appropriate under the circumstances. *Selective Resources v. Superior Court*, 145 Ariz. 151, 700 P.2d 849 (App. 1984).

**c. Severance Damages.**

Compensation of a partial taking of property is the value of the land taken plus severance damages. Severance is defined as “the damages that will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff.” A.R.S. §12-1122(A)(2).

Any factor affecting the after condition value of the remaining property resulting from the taking may be considered when determining severance damages. *Selective Resources v. Superior Court*, 145 Ariz. 151, 700 P.2d 849 (App. 1984).

**d. Cost to Cure.**

Severance damages may be mitigated by evidence of repairs which will restore part or all of the value lost due to the taking or damages. The cost of such reconstruction or repair is known as the “cost to cure.” *County of Maricopa v. Shell Oil Co.*, 84 Ariz. 325, 327 P.2d 1005 (1958). Cost to cure expenditures must not exceed the difference between the market value before and after the taking.

The cost to cure is not the measure of damages to be separately determined without reference to the loss in fair market value of the remainder; it is the net

loss in market value of the remainder which constitutes severance damages and cost to cure evidence is relevant as having a bearing on such net loss.

**e. Special Benefits.**

If the jury determines that the remaining property has received “special benefits,” the monetary amount of those benefits is to be offset against any severance damages. This offset is limited to severance damages and cannot reduce the compensation for the part taken. *Taylor v. State ex rel. Herman*, 12 Ariz. App. 27, 467 P.2d 251 (1970).

*Special Benefits vs. General Benefits*

A general benefit is a benefit that is common to all other landowners to a greater or lesser degree, including those whose land is not taken as well as those whose land is partly taken.

General benefits arise from the public object, which justified the taking. Special benefits are those that arise from the peculiar relation of the land at issue to the public improvement.

Special benefits include:

- A unique benefit that is not shared by another parcel.
- A special benefit that may be shared by other parcels similarly situated.

General benefits include:

- The general or community benefit, shared with other property in the community arising from the public project.
- A local or neighborhood benefit, shared with other parcels in the vicinity.

*Taylor v. State ex rel. Herman*, 12 Ariz. App. 27, 467 P.2d 251 (1970).

## **Valuation Concepts.**

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**A. Date of Valuation.**

The date of valuation for determining just compensation and damages is the date of the summons of the condemnation action. A.R.S. §12-1123(A). The value of improvements made on the property after the date of service of the summons is not included in compensation and damages.

Actions taken by the condemning entity which reduce the value of the property to be condemned may result in a challenge to the date of valuation under the particular facts and circumstances of the case. *Uvodich v. Ariz. Bd. of Regents*, 9 Ariz. App. 400, 453 P.2d 229 (1969).

**B. Highest & Best Use.**

“Highest and best use” is generally defined as the reasonable and probable use of the property, which supports the highest value as of the date of valuation.

**C. Arizona Valuation Standards & Methods.**

In many cases, the value of the part taken and severance damages in condemnation proceedings can only be estimated.

Arizona courts recognize at least three traditional appraisal approaches:

1. The market data or comparable sales approach
2. The income approach
3. The cost approach

*City of Tucson v. Robles*, 189 Ariz. 82, 505 P.2d 253 (1975). The traditional methods do not all need be applied, but may be used in combination. Other methods of valuation may also be appropriate or necessary.

**D. Delivery of Appraisal.**

Arizona law requires all condemning entities, at least 20 days prior to filing a condemnation action, to deliver to the property owner and the sole lessee of record a written offer of just compensation and one or more appraisals supporting the offered amount. Furthermore, other owners in a substantial interest in the property may obtain a copy of the offer and appraisal by request. A.R.S. §12-1116(1).

Property owners may learn the identity of individuals who have appraised the subject property and whose testimony is intended to be used at trial. A party may also submit questions as to demonstrative exhibits prepared for trial and the terms of any offers received by the owners from third parties to purchase the subject property.

**E. Payment of the Judgment.**

The condemning entity must pay the full amount of the condemnation judgment, pending appeal, in order to take possession of the property until conclusion of the litigation.

The property owner is entitled to receive and payment of the judgment funds as soon as the owner complies with the statutory requirements of A.R.S. §12-1127(B), even while an appeal is pending.

**Interest.**

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Interest is to be paid on the compensation awarded under A.R.S. §12-1123(B). A.R.S. §44-1201 provides for a 10% interest on all judgments. However, interest on a judgment in a condemnation proceeding instituted by a city, county, town, a county flood district, the department of transportation, a power district, or an agricultural improvement district

shall be based on the “prime rate.” A.R.S. §9-409; A.R.S. §11-269.04; A.R.S. §28-7101 and A.R.S. §48-3628.

### **What if the Condemnation is Abandoned?**

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A.R.S. §11-972, 12-1129, and 28-7153 provide for the reimbursement of an owner’s attorneys’ fees and litigation expenses in the event that a condemnation case is abandoned by the condemning authority.

### **Attorneys’ Fees & Costs.**

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The general rule in Arizona is that a property owner is not entitled to recover attorneys’ fees and costs. But, an owner may recover litigation expenses in a successful inverse condemnation action. A.R.S. §12-1128.