



The Law Offices of Steven C. Vondran

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Serving Southern California and Greater Phoenix Arizona!

## GENERAL EMINENT DOMAIN TIMELINE IN ARIZONA EMINENT DOMAIN CASES

### LEGAL MEMORANDUM\*

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(1) The City, Town or County makes offer to purchase property. This may come from an acquisition agent of the City or town. If so, it is in your best interest to reject any offers from these individuals as they are professionals paid to acquire your land for as cheap as possible.

(2) Owner attempts to negotiate fair deal for the constitutionally required “*just compensation*.” Usually this process ends in a rejection of an artificially low offer by the municipality.

(3) City council will authorize the acquisition of your property by either negotiation or condemnation setting in motion the formal acquisition process.

(4) At this point it is in your best interest to retain the services of an eminent domain or condemnation attorney. As your counsel, we will attempt to provide “comps,” appraisals and other proof to the City to show the true value of the property. If they will not accept our reasonable offers and counteroffers, then we must ultimately reject their offers foreclosing pre-litigation negotiation.

(5) Assuming no agreement can be reached as to the constitutionally required “just compensation” due you as owner of the property, the municipality will then file a “Complaint in Eminent Domain.” A notice of Lis Pendens is also filed with the County recorder. A Lis Pendens simply lets the public know (i.e. someone who may be looking to purchase your property) that there is a legal action affecting your property. In this case, an eminent domain lawsuit has been filed. A Lis Pendens therefore “clouds the title” to your property.

Types of Interests the “*Condemnor*” (the City, Town, or County) may be seeking from you as owner of the property: Note: you are the “*Condemnee*”

A. Condemnor can seek a **fee simple absolute interest** (meaning they want to acquire full ownership rights to all or some of your property or land).

B. Condemnor may seek a lease interest in your property

(6). Along with the municipalities filing of a complaint in Eminent Domain, they will also file what's called an "*Application for Order for Immediate Possession*." This must be served on the property owner or their attorney pursuant to A.R.S. Section 12-1116 along with Order to Show Cause (signed by Judge) as to why immediate possession should not be allowed. The paperwork will normally contain an order to appear on a given date to address the issue of immediate possession. For a list of defenses to immediate possession see out "eminent domain defenses" article on our website.

**Note:** the Parties can stipulate to allow immediate possession. In this event, and in any event, the municipality must post of a "*probable damages*" bond pursuant to A.R.S § 12-1116 generally in the amount of the so-called fair market value as set forth in the City's appraisal. This bond must be deposited by the Plaintiff (the government) with the Clerk of the Superior Court where the eminent domain lawsuit was filed. Note: the posting of the bond merely evidences the Defendant-landowner's acknowledgement of the municipalities "*right*" to condemn, and usually acknowledges that the taking is for a "*public use*," (as required under Arizona Condemnation law) but does not concede the amount of "*just compensation*" actually owed to the property owner.

Upon the parties stipulating to allow immediate possession, the Court will Quash the Order to Show Cause.

**Note2:** Parties can stipulate to a release of the cash bond. In order to obtain release of the funds, it will be necessary for the Defendant-landowner to provide to the City an "*indemnitor's bond*" in the event that someone else would come forward claiming a right of ownership in the property. Defendant, Upon Court Order and Signing of the Indemnitor's Bond, may then **withdraw the cash bond with interest** thereon at the prime rate from the date the Order for Immediate Possession was granted.

(7) After all of the foregoing has taken place, certain legal challenges to the City's Complaint may be raised in the Answer to the Complaint (Normally an in-state Defendant will have 20 days to respond to the Summons). Your answer can admit or deny allegations made in the complaint. As a matter of practice, you will generally want to deny the municipalities determination of "just compensation" as this is routinely one-sided representing an unrealistically low assessment of what the property is worth. Other legal challenges, (as outlined below) can be asserted and raised where appropriate, in the answer. Recognized defenses to an Arizona Eminent Domain Action are as follows:

A. Condemnee can show that there is no "**Necessity for the taking**" (for example, that the proposed taking is not "*Necessary for a Public Use*")

1. **Greatest Public Good Least Private Injury** (Pursuant to A.R.S. Section 12-1115 the municipality must show that the "location" of the proposed taking will result in the "greatest public good and least private injury."). The gist of this defense is that the City, town or municipality has to think things through before they go condemning private property. They cannot, for example, take

(condemn) a strip of land right through the middle of your property without meeting this test. This is a challenge to the “necessity” of the taking under Arizona law.

2. **The exercise of Eminent Domain power must be within the allowable limits of the “Police Powers”** (the state and its subdivisions have the right to regulate and exercise the power of eminent domain only if it is necessary for the health, welfare, safety, morals and aesthetics of the state or the municipality). Exceeding these powers makes the act unlawful.

3. In order to satisfy the “*necessity*” requirement under Arizona eminent domain laws, there must be a **true public use**. The government cannot take private land and give it to another private party for development purposes. Proposition 207, passed by the Arizona legislature, specifically prohibits this type of condemnation. Please see our **Arizona Proposition 207 Guidebook**.

**B. The Condemnee can show a violation of “Substantive Due Process”** (the act of condemnation serves no legitimate governmental purpose and is arbitrary, capricious and/or done out of spite or malice)

1. The exercise of eminent domain / condemnation power cannot be exercised in an arbitrary & capricious fashion.

**C. The Condemnee can show a violation the “Equal Protection Clause”** of the United States Constitution.

1. To prevail in an equal protection challenge, it is generally necessary for the Condemnee/landowner to show that (a) there property is similarly situated to other landowners, who were (b) treated differently or more favorably, (c) without a rational of justifiable reason for the disparate treatment.

**Note:** There are other defenses to eminent domain that may be applicable in your case. Contact the Law Offices of Steven C. Vondran to discuss. Whether your case is in the Greater Phoenix, Buckeye, Goodyear, Casa Grande, Peoria, Chandler, Gilbert, Scottsdale or Inland Empire California, we are here to help you make sense of your case and to defend against the proposed taking it need be, or to insist on your right to fair and equitable “just compensation.”

(8) After the answer to the complaint is made the Court will set a Trial Date (often this trial date can be as long as 15-18 months out depending upon the number of witnesses involved, the types of legal challenges, and the Court’s calendar).

(9) Both sides then make their require Arizona Rules of Civil Procedure Rule 26.1 Disclosures. The disclosure will set out the witness and appraisers you expect to call if a settlement cannot be reached and an eminent domain trial becomes necessary.

(10) Once these disclosures are filed, depositions of expert witnesses and other potential witness can be performed. The owner is entitled to give testimony as to the value of their property. Normally, offers to purchase the property and “comps” go a long way toward proving the true value of the property.

(11) As referenced above, appraisers are hired to determine Just Compensation. The appraisal would follow the *comparable sales method*. Adjustments in value would be made in accordance with improvements made to the property, location differences and the like.

A. The **project influence doctrine** holds that under Arizona law, the *influence of a project* upon the determination as to the **highest and best use** of the property is prohibited (ex. if the project was being rezoned, and the rezoning required that a park be set aside, the park cannot be considered as the highest and best use of that portion of the property). This law usually is invoked in **freeway condemnation** settings where the *pre-announcement* as to the freeway alignment tends to artificially increase values of properties that will be situated along the announced freeway route.

B. Relevant Date of Valuation: The Defendant will need to proceed with hiring an appraiser to provide an opinion of value as of the date of the taking (i.e. the *date of issuance of the Summons for service of the Complaint upon the Defendant*).

(12) After Discovery is Complete: It is fairly common to engage in settlement negotiations, including a mediation conference, after the discovery stage has been completed and prior to setting the matter for trial. After both sides know what the competing appraisals look like, this is a great opportunity for settlement.

(13) If settlement reached, a Settlement Agreement and Mutual Release of Claims is Prepared. A Release of the Indemnitor's Bond is executed as is the Release of the Lis Pendens (if there is any property that will remain in owner's possession following the taking). A Judgment Pleading is filed with Court and an Order Approving and a Stipulation to Dismiss with Prejudice is filed.

(14) The Court will enter a Money Judgment (just compensation award) in favor of the Defendant/Condemnee. A Final Order of Condemnation will be Granted to Plaintiff allowing the passing of title and full possession to the Property.

(15) If Settlement cannot be reached, a Condemnation Trial will ensue:

A. Normally only **valuation witnesses** would testify. Typically in cases where there is little or no development involved at the time of the taking, it is not uncommon for land use planners/economists/engineers to testify as to *allowable uses of the property* and realistic uses in addition to the normal testimony of the *highest and best use of the property* solicited from an expert appraiser. Many times, the only witness required in an Arizona condemnation case is the expert testimony of the appraisers for both sides.

B. In condemnation cases, the owner or owner's representative may also testify as to their opinion of value.

C. A powerful weapon available for parties in a condemnation case is a *motion in limine*. A Motion in limine are typically filed and decided after all discovery has been completed but before trial. A motion in limine would be filed, for example, to exclude an expert witnesses testimony (i.e. to attack the city's

appraiser or so-called expert) and would require the judge to determine whether or not a particular expert witness would be allowed to testify at trial, or in the alternative, to decide whether he/she may testify as to some, but not all, of the appraiser's opinions or conclusions.

For example, we could file a motion in limine asking the Court to exclude the City's appraisal testimony inasmuch as it would violate the project influence doctrine. Or, we can challenge whether or not an expert witness is truly an expert witness qualified to make an opinion on a given topic.

If our motion in limini were granted, then the City would be faced with the option of proceeding to trial without this testimony, or without their expert witness. This can potentially lead to a fair settlement on the Courthouse steps.

FOR MORE INFORMATION ABOUT CONDEMNATION LAW OR EMINENT DOMAIN LAW IN ARIZONA CONTACT US FOR A FREE CONFIDENTIAL CONSULTATION. WHEN THE GOVERNEMENT IS EXERCISING ITS POWER OF EMINENT DOMAIN YOU ARE ENTITLED TO JUST COMPENSATION FOR THE PROPOSED TAKING OF YOUR PROPERTY. WE INSIST UP ON THIS.



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