

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);  
Ariz.R.Crim.P. 31.24



DIVISION ONE  
FILED: 03/01/11  
RUTH WILLINGHAM,  
ACTING CLERK  
BY: DLL

**IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE**

CITY OF PHOENIX, a municipal corporation, ) 1 CA-CV 10-0073  
)  
) DEPARTMENT E  
Plaintiff/Appellee, )  
) **MEMORANDUM DECISION**  
v. ) (Not for Publication -  
) Rule 28, Arizona Rules  
JOSEPH VANDENBERG, a single man, ) of Civil Appellate  
) Procedure)  
Defendant/Appellant. )  
)

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Appeal from the Superior Court in Maricopa County

Cause No. CV 2008-002232

The Honorable John C. Rea, Judge

**AFFIRMED**

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Office of the City Attorney Phoenix  
by Janis M. Haug, Assistant City Attorney  
Attorneys for Plaintiff/Appellee

Law Office of Steven C. Vondran, P.C. Newport Beach, CA  
by Steven C. Vondran  
Attorneys for Defendant/Appellant

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**I R V I N E**, Judge

¶1 Joseph Vandenberg ("Vandenberg") appeals the judgment of the trial court condemning a portion of his land for a City

of Phoenix (the "City") improvement project. For the reasons that follow, we affirm the judgment of the trial court.

#### FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to upholding the jury's verdict, and we will not overturn its decision where evidence exists that would allow a reasonable person to reach the same result. *College Book Ctrs., Inc. v. Carefree Foothills Homeowners' Ass'n*, 225 Ariz. 533, 536, ¶ 9, 241 P.3d 897, 900 (App. 2010). The City passed an ordinance "for construction of street improvements" authorizing the acquisition of certain parcels along 52nd street in Phoenix between McDowell and Thomas Roads. On January 31, 2008, in connection with the ordinance, the City initiated an eminent domain action against Vandenberg. It then filed an application for order of immediate possession and requested a hearing. On March 14, 2008, the trial court held a hearing on the City's application. Vandenberg did not appear at the hearing. He stated later that he did not appear because he believed the extent of the City's plans were for "curbs, gutters, and sidewalks,"<sup>1</sup> which he did not oppose. At the hearing, the court determined that the property sought to be

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<sup>1</sup> Property acquired pursuant to the ordinance was "for construction of street improvements." The City's complaint stated the land acquired pursuant to the ordinance was for "public purpose and use, to wit for street improvements on 52nd Street from McDowell Road to Thomas Road."

acquired by the City was necessary for a public use and granted the order for immediate possession.

¶3 After a trial, the jury determined just compensation for the taking of Vandenberg's land was \$7128 and \$0 for severance damages. The taking involved the east three feet of Vandenberg's property, totaling approximately 594 square feet. The court entered a final judgment on November 12, 2009. Vandenberg timely appealed.

#### DISCUSSION

¶4 Vandenberg argues that the condemnation of his property is unconstitutional because the taking was not necessary, does not satisfy the public use requirement and the jury verdict awarding \$0 for severance damages is not just compensation.<sup>2</sup>

¶5 Although Vandenberg argues the taking was neither necessary nor for public use, he effectively waived this argument by not presenting it at the hearing regarding the order for immediate possession.<sup>3</sup> See *Trantor v. Fredrikson*, 179 Ariz. 299, 300-01, 878 P.2d 657, 658-59 (1994) (holding that a party

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<sup>2</sup> Vandenberg does not contest the \$7128 he was awarded for the value of his land.

<sup>3</sup> Vandenberg claims the City's taking was excessive because its improvement project fit within its existing right-of-way and it did not need to take his land. Therefore, he claims, the non-use of his land is not necessary for public use.

must have afforded the trial court and opposing counsel the opportunity to correct any asserted defects in order to contest on appeal); see also *Schoenfelder v. Ariz. Bank*, 165 Ariz. 79, 88, 796 P.2d 881, 890 (1990) (noting that a party waives on appeal any argument not properly presented in the trial court). The trial court determined the subject property was a necessity for public use at that hearing, and Vandenberg was not present to argue otherwise. Vandenberg claims he did not contest the order because he was under the impression that the taking of his property was for "curbs, gutters and sidewalks."<sup>4</sup> Whatever his subjective understanding, however, the time to raise this issue was at the hearing regarding immediate possession. We cannot find that the trial court erred when it was not presented with a valid objection.

¶6 Even if Vandenberg had not waived the issues of necessity and public use, we would be unable to review the trial court's decision. The record contains a minute entry concerning the proceedings, but it does not contain the transcript from

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<sup>4</sup> At a status conference *after* the order of immediate possession was granted, Vandenberg contested the taking because he claimed it was not for a public use. Vandenberg indicated that at the time of the order of possession hearing, he had an attorney who was assisting him with a variance matter. He stated the attorney told him "there was no reason for [him] to show up because [the City] wanted [the property] for curbs, gutters and sidewalk."

that hearing. We must assume that the information presented at the hearing was sufficient to support the trial court's ruling.

¶7 Vandenberg also argues that the jury's determination that he was not entitled to any severance damages is not "just compensation" as is constitutionally required. He argues that he should be compensated for: (1) the changes in the grading because it may cause flooding, (2) waterlines that were buried during the street improvements, and (3) the reduction of his "buildable" land because of the City's setback requirement.

¶8 An owner of condemned property is constitutionally entitled to "just compensation." U.S. Const. amend. V; Ariz. Const. art. 2, § 17. "Just compensation is the amount of money necessary to put the property owner in as good a financial position as if the property had not been taken." *City of Phoenix v. Wilson*, 200 Ariz. 2, 5, ¶ 8, 21 P.3d 388, 391 (2001). Severance damages are calculated by comparing the value of the remaining property both before and after the taking. *Id.* at 9, ¶ 18, 21 P.3d 395. The value of the property taken from the landowner and the amount of severance damages to which he is entitled are questions of fact. *Id.* at 5, ¶ 8, 21 P.3d at 391; see Ariz. Rev. Stat. § 12-1122(A)(1) (2003).

¶9 The City presented evidence at trial related to the grading involved in the project. The City's engineer supervisor, who was in charge of design and construction, testified that

there was standard grading<sup>5</sup> put in behind the newly-constructed sidewalk. Vandenberg questioned whether the grading was "adequate" and whether water would affect his property. Despite Vandenberg's protests that the grading was inadequate, the City's inspector on the project testified that the project had "actually diverted almost all the water that would ever come against [Vandenberg's] fence."

¶10 The City also presented evidence as to the water lines. The City's inspector testified that, prior to the start of the job, the work crew searched for water lines. Although the plans showed four lines, only one was found. The inspector testified that, although his crew spent eight hours digging for the water lines, the additional three lines were never located. He testified that it was possible the lines were removed, abandoned or deteriorated prior to Vandenberg purchasing the property.<sup>6</sup>

¶11 Regarding the issue of buildable land due to setback requirements, one of the City's experts, a real estate appraiser, opined that the value of the remainder of Vandenberg's property was not damaged by the condemned portion

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<sup>5</sup> The grading used was standard "parkway" grading with a four-to-one-slope in compliance with the Maricopa Association of Governments' specifications.

<sup>6</sup> The record states that one water meter box was raised, and not buried, for the one active water line.

of the property. She explained that the taking was "very, very small" and that, looking at the "property as an entirely-improved property, it has not been damaged in any way." Because of the zoning of the land, the appraiser explained that Vandenberg was permitted to build twenty-six units on the property. After the taking, he still had that ability. When appraising the land, the appraiser noted improvements to Vandenberg's property, but those improvements were not factored into the compensation for the taking; the narrow strip of land taken did not contain any improvements. She concluded that the taking had no "negative impact on the value of the improvements or the vacant land." The expert opined that if Vandenberg were to sell his property after the taking, he was "not going to get any less in the market today if you go to sell that property than you would have before." Further, she stated the property may even be "a little bit more desirable to potential buyers now that the sidewalk is there than before when there w[ere] no curbs, gutters, no sidewalk."

¶12 Vandenberg did not present any evidence or expert testimony on the value of the taking or on any of the factors

that he asserts contribute to severance damages.<sup>7</sup> As such, the jury only had the City's witnesses to form its factual opinion as to the amount, if any, of severance damages. In the present case, the City argued, and the jury agreed, that Vandenberg's remaining property was not diminished in value after the condemnation. This conclusion was adequately supported by the evidence presented at trial.

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<sup>7</sup> The City pointed out in its answering brief that Vandenberg had not presented any evidence to counter the City's appraiser's opinion that the taking had no negative impact or effect on the value of Vandenberg's remaining property. Before trial, Vandenberg disclosed two lay witnesses who were willing to testify to the value of *their* land, the process of obtaining variances and acquiring an irrigation easement. Both of Vandenberg's proposed witnesses were precluded from testifying. Vandenberg states in his reply brief that he "offered and attempted to offer expert witness testimony in regard to severance damages but the trial judge improperly excluded [his] expert witness resulting in reversible and prejudicial error." Because Vandenberg raises this argument for the first time in his reply brief, we do not address it. See *Romero v. Sw. Ambulance*, 211 Ariz. 200, 204 n.3, ¶ 7, 119 P.3d 467, 471 n.3 (App. 2005) (an issue raised for the first time in a reply brief is deemed waived on appeal).



