

ARIZONA SUPREME COURT

CARL T. SANDBERG, JR. and GEETA GAJWANI SANDBERG; and SANDBERG TRUST, CARL AND GEETA SANDBERG, Trustees,

Plaintiffs/ Appellants,

v.

PIMA COUNTY; TUCSON ELECTRIC POWER COMPANY; COX COMMUNICATIONS, INC.; and VERIZON (VAW),

Defendants/ Appellees.

Arizona Supreme Court
No. CV-24-0299-PR

Court of Appeals
Division Two
No. 2 CA-CV 2023-0189

Pima County
Superior Court
No. C20201732

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

This unpublished memorandum decision does not warrant review. To start, several threshold obstacles would prevent the Court from reviewing the issues. The statute of limitations bars the Sandbergs' claims, the Sandbergs lack standing to assert the claims, and many of the issues in the Petition arise from a rejected proposed amended complaint that is not operative. Consequently, this case presents an extremely poor vehicle for review because even if the Court grants review, it will not reach the issues presented in the Petition.

In addition, the Petition is based on a fundamental misinterpretation of the Decision. The Petition relies entirely on the assumption that the Court of Appeals awarded fee title in a roadway to the County. But that's not what the Decision holds. The County did not claim, and does not need, fee title, and the Decision does not implicate fee title. Instead, the County has, at a minimum, a right-of-way easement that includes third-party utilities within its scope. Because the Decision does not implicate fee title, the Petition's issues—which rely on arguments about fee title—do not warrant review.

The Court should deny review.

BACKGROUND

This case involves Sunset Road in Pima County. After the original property owners voluntarily dedicated their land and petitioned to create a road, Defendant/Appellee Pima County established Sunset Road in the 1930s. Decision ¶ 2. A portion of the right-of-way was paved in the 1960s. *Id.* The Sandbergs bought two lots *adjacent to* (but not directly including any portion of) Sunset Road in 1986 and 1998. *Id.*

In 2019, the County authorized Defendants/Appellees Cox, TEP, and Verizon (the “utility defendants”) to place utility infrastructure on the unpaved portion of the County’s Sunset Road right-of-way. Decision ¶ 3. The infrastructure is in the right-of-way abutting land owned by the Sandbergs’ neighbors (the Williamses). It is not on land owned by the Sandbergs or even in the right-of-way abutting the Sandbergs’ land.

The Sandbergs sued the County and the utility defendants in 2020.

After extensive discovery, the County and utility defendants moved for summary judgment. Several months later, after the close of discovery, the Sandbergs sought leave to amend their complaint. Decision ¶¶ 4-5. Their proposed amended complaint sought to add claims on behalf of the

Sandbergs' neighbors (the Williamses), and claims for nuisance and zoning violations. Decision ¶ 5.

The superior court granted summary judgment, holding that the County had a right-of-way, and Arizona law authorizes the County to make a right-of-way available for utility infrastructure. Decision ¶ 6. The superior court also denied leave to amend. Decision ¶ 23.

The Sandbergs appealed both the merits and the denial of leave to amend. The Court of Appeals affirmed in an unpublished memorandum decision. On the merits, the Court of Appeals held that the Sandbergs' claims were time-barred. Decision ¶¶ 15-16. It also held that under [A.R.S. § 40-283\(D\)](#), the County was authorized to grant permission to construct utility infrastructure in the right-of-way. Decision ¶ 17. On leave to amend, the Court of Appeals held that the Sandbergs' motion suffered from undue delay and caused prejudice because they did not seek leave to amend until two and a half years into the case, after the close of discovery, and after summary judgment had been briefed and argued. Decision ¶¶ 21-22. The Court of Appeals further held that the amended complaint was futile. Decision ¶ 23.

REASONS TO DENY THE PETITION

I. Threshold obstacles make this case an exceptionally poor vehicle for review.

Before the Court could review the issues presented in the Sandbergs' Petition, the Court would need to resolve several threshold issues, any one of which would effectively preclude the Court from reaching the merits. These threshold issues make this case a poor vehicle for review.

A. The Court should deny review because the Sandbergs do not challenge the statute of limitations holding, the Decision's primary dispositive issue.

The Court of Appeals affirmed because the Sandbergs' claims are time-barred. The longest applicable limitations period is two years. *See* Decision ¶¶ 14-16 (citing applicable limitations periods, including one year for "actions against any public entity," [A.R.S. § 12-821](#) and two years for trespass claims, [A.R.S. § 12-542\(3\)](#)).

The Sandbergs' Petition, however, does not identify the statute-of-limitations as an issue for this Court's review. Without reviewing and reversing on the limitations issue, however, the Sandbergs' claims cannot proceed and this Court would have no reason or opportunity to address the issues in the Petition.

The Petition does not meaningfully confront the statute of limitations. In a demonstrably false fleeting sentence, the Petition asserts that “a challenge to a road establishment, as a transfer of title, is ‘never barred by the statute of limitations.’” Petition at 11. But the cited sources do not contain that quotation. To the contrary, “the presence of a [d]isputed [r]oad[] is a permanent trespass,” which accrues when the “[r]oad was created.” *Maricopa Cnty. v. Rovey*, 250 Ariz. 419, 425, ¶ 19 (App. 2020). Here, that happened in 1930, when the original landowner petitioned to establish Sunset Road, including the area now used as the shoulder. Decision ¶ 2; *see also* Cox-TEP-Pima COA Answering Br. at 12. Moreover, the Petition offers no reasons why the Court should grant review on the limitations issue, which is merely a fact-bound application of settled law.

Because the Petition does not seek review of this dispositive threshold issue, the Court should deny the Petition.

B. The Court should deny review because the Sandbergs lack standing, which precludes review of the issues their Petition presents.

Another threshold issue also makes this case a poor vehicle for review. The Sandbergs’ Petition focuses on utility infrastructure in the right-of-way

shoulder. But the Sandbergs lack standing to pursue any claims about the infrastructure because it's not on their property.

Even under the most charitable view of the Sandbergs' property rights, the infrastructure still isn't on their land, and the Sandbergs don't claim otherwise. The infrastructure is on the portion of the shoulder abutting the Sandbergs' *neighbors'* property (the Williamses). But the Williamses aren't plaintiffs here, and the operative complaint (ROA 10) does not allege any assignment to assert claims on the Williamses' behalf. The Sandbergs are simply the wrong plaintiffs, and they lack standing. *See* Cox-TEP-Pima COA Answering Br. at 18-22. Although the Arizona Constitution does not have a "case or controversy" requirement to establish standing, Arizona courts consistently require a plaintiff to "first establish standing to sue." *Bennett v. Brownlow*, 211 Ariz. 193, 195, ¶ 14 (2005).

Although the Court of Appeals did not reach this issue (because it had already found the claims time-barred), this Court would need to confront the standing issue before it could award any relief to the Sandbergs. Because the Sandbergs lack standing, this Court would never reach the issues presented in the Petition. The Court should therefore deny review.

C. The Court should deny review because the Sandbergs do not challenge the denial of leave to amend their complaint, meaning that the Court could not review many of the issues in the Petition.

Over two years into the case, the Sandbergs sought leave to amend their complaint. Decision ¶ 21. The superior court denied leave to amend and the Court of Appeals affirmed that denial. Decision ¶¶ 22-23. The Petition does not seek review of this ruling, nor would review be appropriate on this garden-variety application of settled law. The Sandbergs do not even contest the ruling, other than a drive-by reference with no analysis (Petition at 10).

This is yet another reason why the Court should deny review. The Petition asserts issues and arguments that rely on the amended complaint, even though the Sandbergs never obtained leave to amend. For example, the Petition seeks review of nuisance and zoning issues. Petition at 3. But the operative complaint (ROA 10) has no nuisance or zoning claims. The Sandbergs tried to inject those claims via the rejected proposed amendment. Decision ¶ 5. Likewise, to avoid the fact that the utility infrastructure is not on the Sandbergs' property, the Petition repeatedly references the Williamses, who own the land abutting the right-of-way containing that

infrastructure. Petition at 3, 5, 7, 11. The Williamses were present only in the rejected proposed amendment, however. Decision ¶ 5.

Because those issues are not in the operative complaint, and the Sandbergs elected not to seek review of the denial of leave to amend, the Court should deny review.

II. The Court should deny review because this case does not present the issues raised in the Petition.

Even if the Sandbergs could overcome those threshold issues, the Petition still does not warrant granting review. The Petition misrepresents the record, the law, and the Decision. Properly interpreted, the Decision in this case does not present the issues in the Petition, so it does not warrant review.

A. The issues related to fee title do not warrant review because the Petition misrepresents the Decision and the law.

The Petition misrepresents the Decision's holdings. It claims that the Decision held that "the legislature had effectively granted the equivalent of fee title to the County[.]" Petition at 2. But the Decision says nothing about fee title. No future court or litigant will interpret the Decision as establishing fee title, so there is no reason to review any of the Petition's issues concerning fee title.

Moreover, the entire premise of the Sandbergs' concerns about fee title reflects a misunderstanding of the law. Here's how this works. Nearly a century ago, the original landowner voluntarily petitioned to create Sunset Road and dedicate her land to the public. Decision ¶ 2; Cox-TEP-Pima COA Answering Br. at 12. This created a 60-foot-wide right-of-way, including the 30-foot-wide now-paved portion and the 15-foot-wide shoulders on each side. Decision ¶ 2; Cox-TEP-Pima COA Answering Br. at 12. After that, the deeds conveying property excluded the roadway. For example, when the Sandbergs bought their land, the deed conveyed only the "East 660 feet of the South 660 feet of the North 690 feet" of specified land. ROA95 ep 16. This includes the land up to, but *excluding* the shoulder and paved portion. Cox-TEP-Pima COA Answering Br. at 36-38. So the Sandbergs didn't directly acquire fee title to any part of the right-of-way, paved or unpaved.

To have any ownership claim, the Sandbergs need to rely on the common-law strips-and-gores doctrine. Under this doctrine, "[i]f land abutting on a public way is conveyed by a description covering only the lot itself, nevertheless, the grantee takes title to the center line of the public way if the grantor owned the underlying fee." *Rovey*, 250 Ariz. at 423, ¶ 9 (citation omitted). In other words, even though the deed's description excludes the

roadway, as an interpretive tool (largely to avoid the complexity of long-dead people owning narrow strips and gores all over the place), the law essentially gives free, bonus land that includes half of the roadway, up to the centerline.

But that doesn't give the landowner totally clear ownership. The bonus land is subject to a right-of-way easement in favor of the public. *See id.*; *see also* Cox-TEP-Pima COA Answering Br. at 35-36 (collecting citations). This makes sense, and any other rule would be madness. The doctrine applies *only* when someone owns land abutting a roadway, so the landowner cannot do whatever she wants with the property. For example, she obviously cannot fence in or block the very roadway that triggered the bonus land. Put differently, this free, bonus land comes with a giant asterisk in the form of the right-of-way easement.

From before Arizona became a state, a right-of-way easement includes utility infrastructure, and statutes around the country therefore allow the government to authorize private utility companies to erect infrastructure within the right-of-way easement. *See, e.g., Cater v. Nw. Tel. Exch. Co., 63 N.W. 111, 112-13* (Minn. 1895) (recognizing "settled law," long before Arizona statehood, that the "transmission of intelligence" is "included

within the public ‘highway easement’’’); *see also* Cox-TEP-Pima COA Answering Br. at 43-47 (collecting cases).

The Arizona Legislature enacted a statutory framework consistent with this common-law doctrine. [A.R.S. § 40-283\(D\)](#) allows a county board of supervise to authorize “a line, plant, service or system within the right-of-way,” essentially codifying the longstanding common-law doctrine that a right-of-way easement includes utilities. If there was any doubt about the common-law scope of a right-of-way easement, [A.R.S. § 40-283\(D\)](#) resolved them in Arizona.

Here, the Sandbergs bought lots adjacent to, *but not including*, a right-of-way. The strips-and-gores doctrine gives them extra land outside the description of their deeds, including the unpaved shoulder and paved portion of Sunset Road up to the centerline. But this bonus land is subject to a right-of-way easement, and a right-of-way easement allows the government to authorize utility companies to build infrastructure. That is exactly what happened in this case.

None of this is novel, and none of this warrants review. But it demonstrates why the Petition is so off-base. The Court of Appeals did not hold that the County has fee ownership; the County does not *need* fee

ownership to authorize the utilities to install infrastructure. Instead, the Decision properly relied on A.R.S. § 40-283(D) (Decision ¶ 17), which reflects Arizona's statutory codification of the pre-statehood common-law doctrine.

This also explains why the Sandbergs' argument about Article 2, § 17 does not warrant review. The petition claims that A.R.S. § 40-283(D) authorizes infrastructure "without directly acquiring any interest from Sandberg[.]" Petition at 2. But the government didn't need to acquire any interest because it already had a right-of-way easement. The easement is part of the "longstanding background restrictions on property rights" that do not violate the takings clause. *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 160 (2021). The Sandbergs' only claim to ownership of any portion of Sunset Road is based on the common-law strips-and-gores doctrine, but they want to get the benefit of that doctrine (free bonus land) without the right-of-way easement that accompanies it. Their free land came with an asterisk, but they want the free land without the asterisk. The County's actions do not violate the takings clause, and the issue does not warrant review because the Decision does not even present that issue.

B. The issues related to prescription do not warrant review because they also misrepresent the Decision and the record.

The Petition raises issues relating to creating roads by prescription (e.g., at 6), including contending that the Decision conflicts with decisions of this Court related to creating roads by prescription. Petition at 2-3 (citing *State ex rel. Miller v. Dawson*, 175 Ariz. 610 (1993); *Gotland v. Town of Cave Creek*, 175 Ariz. 614 (1993)). But the Decision expressly addressed this issue (including citing *Dawson*). The Court of Appeals confirmed that the Decision does not “implicate transfer of title to the County by prescription,” and the County “does not claim to have acquired title to the Sandbergs’ property by prescription.” Decision ¶¶ 12-13.

The Sandbergs’ arguments double down on the false premise, debunked above, that the County needed fee title. But the County’s ability to authorize utility infrastructure comes from the right-of-way easement, not fee title. That right-of-way easement stems from both the original landowner’s decision to voluntarily dedicate the roadway, and from the well-established strips-and-gores corollary. The right-of-way easement includes utilities, stemming both from the common law before statehood (let alone before the Sandbergs acquired their property), and from the statutory

codification of that doctrine in A.R.S. § 40-283(D). No part of this analysis relies on prescription.

This is also why the Sandbergs' arguments regarding A.R.S. § 28-7041(C) do not warrant review. The Sandbergs say, "The next issue is whether A.R.S. § 28-7041, as the COA held, was intended to convey the equivalent of fee title to the County[.]" But again, the County does not claim fee title, the superior court did not hold that the County has fee title, and the Court of Appeals did not hold that the County has fee title. The County did not need fee title. To try to justify review on this issue, the Sandbergs reiterate the fee-title issue, claiming "[t]he Opinion, in effect, transforms § 28-7041 into a statute conveying title[.]" Petition at 8. But that's not what the Decision holds, so the issue does not warrant review. The Decision says nothing about the statute affecting title because this case doesn't present that issue.

Similarly, the Petition claims (at 2) that the Decision effectively "transferred all rights of control of Sunset to the County, including the right to license use of the Shoulder to third parties for non-road purposes[.]" But this isn't a case of the County authorizing Walmart to build a store in the

right-of-way. The County authorized utility infrastructure, which falls squarely within the scope of a right-of-way easement.

* * *

In sum, three threshold issues make this case a poor vehicle for review because even if the Court granted review, those threshold issues would prevent the Court from addressing the issues presented in the Petition. In addition, this case does not actually present the issues raised in the Petition because the Petition misrepresents the holdings, the record, and the law.

ARCAP 23(f)(2) ADDITIONAL ISSUE

Pursuant to [ARCAP 23\(f\)\(2\)](#), Defendants/Appellees hereby identify the additional issue presented to but not decided by the Court of Appeals that the Supreme Court may need to decide if it grants review:

1. Whether the Sandbergs have standing.

CONCLUSION

The Court should deny review.

RESPECTFULLY SUBMITTED this 6th day of February, 2025.

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