

Eminent Domain Law in Colorado—Part II: Just Compensation

by M. Patrick Wilson

Government and Administrative Law articles provide information to attorneys dealing with various state and federal administrative agencies, as well as attorneys representing public or private clients in the areas of municipal, county, and school or special district law.

Part II of this article addresses some of the key procedural and substantive rules governing the assessment of just compensation in a taking of private property, including important concepts in evaluating compensation claims for property actually taken, as well as remainder damages and specific benefits.

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This two-part article provides a general overview of the procedural and substantive law of eminent domain—the process by which one party condemns, or “takes” the real or personal property of another, on the payment of just compensation. Part I was published in the September issue of *The Colorado Lawyer*,¹ and addressed the right of eminent domain, the issues of public use and necessity, and the means by which “immediate possession” of the property can be acquired pending a valuation trial. Part II addresses the process and rules by which “just compensation” is to be assessed.

The question of whether the right of eminent domain is being properly exercised—that is, whether there is proper authority, a public purpose and necessity, and a failure of negotiations—is determined in advance of the valuation proceedings. When these questions are not contested or previously have been determined by the court, the parties must resolve the issue of the amount of compensation to be paid for the taking. If not by agreement, the amount of compensation is determined in a valuation trial.

Valuation Trial Proceedings: Jury or Commission of Freeholders

The property owner (also referred to as the condemnee or respondent) has the right to have the valuation portion of the case tried to a commission of three

landowners or to a jury of six landowners who reside in the county in which the petition is filed.² Only the property owner may demand a jury.³ Unless more than six jurors are requested, a landowner need not advance any jury fee to preserve the right to a trial by jury.⁴ The respondent may demand more jurors (not to exceed twelve) when the fees for such additional jurors are advanced to the district court.⁵ A jury must be demanded before the appointment of commissioners and before the time for a defendant to appear and answer has expired.⁶

The jurors must be “freeholders.” This means they must own real property and reside in the county in which the action has been filed.⁷ As in any other jury trial, the jurors are subject to *voir dire*, and a challenge for cause will be sustained if a juror does not qualify as a freeholder.⁸ In fact, a valuation determination by a jury not consisting entirely of freeholders may be grounds for a mistrial.⁹ If a jury is requested by the respondent, the case will proceed similarly to a typical civil action, with the court presiding over the proceedings from start to finish.

If the landowner does not request a jury, the case is tried to a panel of three commissioners who also must be “disinterested and impartial freeholders”; however, they do not necessarily have to reside in the same county where the action is filed.¹⁰ The three commissioners usually are appointed by the court, but some courts allow the parties to nomi-

nate suggested commissioners. Some jurisdictions select commissioners from a pool of retired judges, and others maintain a list of qualified commissioners from which a judge may choose.

The chair of the commission often is a practicing attorney and the other two commissioners usually have some real estate experience—such as having worked as a real estate broker, appraiser, or lender—although there is no occupational requirement in the statutes. As with jurors, the commissioners are subject to *voir dire*, which must take place at least thirty days before trial, and any commissioner is subject to disqualification for cause.¹¹ The commissioners typically are paid a reasonable professional fee that is set by the court and assessed as a cost to the condemner.¹²

The commissioners may serve as both finder of fact and, to a limited extent, finder of law.¹³ In addition to being authorized to administer oaths and request the issuance of subpoenas to compel testimony, during the valuation proceedings the commissioners may make rulings on the admissibility of evidence.¹⁴ The commissioners may request a ruling from the court during the trial on any legal issue, but the district court judge usually does not preside over the day-to-day trial proceedings.¹⁵ In a valuation trial to a commission, the court's involvement at the beginning generally is limited to appointing the commissioners, administering their oath, issuing preliminary instructions to the commissioners, and ruling on any pre-trial *in limine* issues raised by the parties.¹⁶

Because the judge does not preside over a valuation trial to a commission, the court generally is free to continue with its regular docket. In fact, the valuation portion of the case may not even be tried in a courtroom, but may be held in an unused jury deliberation or conference room in the courthouse. By stipulation of the parties and with the court's approval, the valuation trial can even be held outside the courthouse, in counsel's conference room or at another location. By not requiring a jury, a courtroom, or a significant amount of the judge's time, the parties to an eminent domain action potentially can avoid the delays and continuances that afflict many civil trials. This, combined with budget cuts in the court system, may mean that the parties have to provide their own court reporter in commission trials, a cost that also is taxed to the condemning authority.

Valuation Trial Proceedings: Conduct of Trial

The respondent-landowner has the burden of proof in the valuation trial.¹⁷ Thus, the respondent puts on its case first, then the petitioner puts on its valuation and rebuttal evidence, and the respondent is afforded an opportunity for rebuttal evidence. At the close of evidence, the parties submit instructions to either the jury or the commission.¹⁸ As in any other civil trial, these instructions must be approved by the court before being tendered. If the case is tried to a commission, the commissioners must view the property prior to ascertaining the compensation to be paid for the taking.¹⁹ If tried to a jury, on the request of any party, the court, in its discretion, may order the jurors to view the property prior to making an award of compensation.²⁰

After hearing the evidence, viewing the property, and being instructed on the law, the jury or commission ascertains the amount of compensation owing for the taking and states the same in a report (if tried to a commission) or a verdict (if tried to a jury).²¹ The commission's report or the jury's verdict must contain an accurate description of the land to be taken, the compensation awarded for the land actually taken, and, in the case of a partial taking, any damages or special benefits to the remainder.²² Any objection to a commission's report or a jury's verdict must be raised when the award is returned, before the commission or jury is discharged.²³

On receiving the verdict or report, the court offsets any damages by any specific benefits that have been shown to exist.²⁴ The court then enters the verdict or report in the court records and calculates interest that may be owing.²⁵ The court also may entertain a request for costs and attorney fees.²⁶ On payment of all compensation owing either to the party entitled thereto or to the court registry, the court will enter a "rule and order" conveying the property to the condemner.²⁷ This rule and order is recorded with the clerk and recorder, and is deemed to have the same effect "as if it were a deed of conveyance from the owner. . . ."²⁸

Apportionment Hearing

If more than one party has a claim to a compensable interest in the property, the various respondents either must agree on their respective shares of the award or proceed to an apportionment hearing.²⁹ Pursuant to the undivided basis rule (dis-

cussed below) the condemner pays into the court registry one aggregate amount of compensation for all interests in the property to be acquired. A final rule and order is entered on payment of the amount owing, and title to the estate being acquired passes to the condemner. A rule and order conveys to the condemner all interests that the owner and any other named parties may have in the property described therein.³⁰ At that point, the condemner no longer is involved in the proceedings and the owners of the various interests that were acquired must apportion the proceeds among themselves by agreement or litigate their competing claims in a subsequent proceeding before the court.³¹

Appeals

Although an award of immediate possession under CRS § 38-1-105(6)(a) is an interlocutory order that cannot be immediately appealed (except pursuant to Colorado Appellate Rule 21),³² a final judgment for an award of compensation in an eminent domain valuation trial may be appealed to the Colorado Court of Appeals, as with any other final judgment.³³ On making the deposit into the court registry, the petitioner may take possession of the property pending an appeal. If the property owner prosecutes the appeal and later decides to withdraw the funds on deposit before the appeal is decided, the appeal is dismissed.³⁴ If the condemner appeals, the property owner may withdraw the funds deposited pending the determination of the appeal if a surety or bond in double the amount withdrawn is provided.³⁵

How Compensation Is Ascertained

The sole issue for the valuation trial is the amount of compensation owing. This includes the value of the property actually being taken, as well as any damages or specific benefits to any remainder property that is not being acquired. Issues that are not relevant to determining compensation should be excluded from trial,³⁶ but evidence that is in any way relevant to the issue of compensation should be admitted.³⁷ Evidence that may be admissible includes not only opinions of value but also evidence relating to the property's highest and best use; the possibility of future, non-speculative uses; costs to cure negative impacts from the condemning authority's project; and damages and special benefits to the remainder property.



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Evidence in the valuation trial consists largely of appraiser testimony, although competent valuation testimony may be received from any qualified witness.³⁸ The owner of the property to be condemned, even if not otherwise qualified, usually may testify as to the property's value.³⁹ Valuation testimony often is supported by other expert witnesses, such as land use planners; traffic, geotechnical, or other types of engineers; cost estimators; and others, depending on the issues presented in the case.

Property rights taken in condemnation proceedings usually are valued pursuant to standard appraisal methodologies—comparable sales, capitalization of income, and cost of reproduction less depreciation⁴⁰—although in certain instances other types of valuation analysis may be admissible.⁴¹ The comparable sales approach has been recognized to provide the best evidence of value, although all three approaches commonly are accepted.⁴² Any witness who relies on the sale of other property to estimate value of the subject property (under a comparable sales analysis) must personally confirm each sale with either the buyer or seller and examine the recorded instrument.⁴³ Typically, only completed sales (and not offers or contracts) may be used as evidence to show value under the comparable sales approach in eminent domain proceedings.⁴⁴

All compensation is determined as of a specific date of value. If the condemnor takes immediate possession of the property prior to a valuation trial, the date of value is the date the condemnor takes possession of the property.⁴⁵ If immediate possession is not sought, the date of value is the date of the valuation hearing.⁴⁶ In an appreciating or depreciating market, or where other pertinent factors are in flux, the date of value can have a material effect on the compensation that ultimately may be owing. If strict adherence to the statutory definition of the date of value would be fundamentally unfair in a given situation, there is precedent for a court to establish an alternative date of value.⁴⁷

Highest and Best Use

In a valuation trial, the present market value of the property is assessed in light of the most advantageous use to which the property reasonably may be applied.⁴⁸ Although evidence of speculative or prospective values is not permitted, the property is to be valued in its current condition, but with proper consideration of

the most advantageous use to which it reasonably might be applied.⁴⁹ If such future use rises to the level of being probable, any reasonable future use to which the property may be adapted or applied by people of ordinary prudence and judgment may be considered, but only insofar as it may assist the jury in arriving at the present market value.⁵⁰ The commission or jury is to determine the present value—not a future value—giving appropriate consideration to reasonably probable future uses.

Compensation: Value For the Land Taken

The compensation to be paid for the property actually taken in an eminent domain action is determined by its reasonable market value. "Market value" for eminent domain purposes is the actual cash price at which the owner would be willing to sell and the purchaser would be willing to buy on the open market, where neither is under an obligation to do so.⁵¹ The ultimate question of compensation often is viewed as "what has the owner lost, not, what has the taker gained."⁵² However, the owner must be put in as good a position pecuniarily as if the property had not been taken.⁵³

Taking All or Part of a Parcel

When an entire parcel is being taken, the valuation issues are relatively straightforward, although appraisers can differ significantly on the property's highest and best use and its ultimate value. In contrast, when only a portion of a larger parcel is taken, the valuation issues can be more complicated. Not only is there the possibility for remainder damages and benefits, but there also can be disagreement on how the part taken should be valued. In a partial taking, the value of the interest taken normally is assessed as a part of the larger parcel. Under this scenario, the entire larger parcel typically is valued, and a per-unit rate (often expressed in terms of dollars per acre or per square foot) is applied to the interest being taken. After this determination is made, any effect on the value of the remainder property is ascertained.⁵⁴

Valuing the part taken as a part of the whole may seem straightforward, but consider the hypothetical situation where the subject property has land both within and outside the floodplain. Assume also that floodplain-encumbered land has a significantly lower market value. The value of

the whole parcel typically would reflect a blended value of higher-value development land and lower-value floodplain land. If, however, the part to be taken is wholly within the floodplain, that interest arguably should not be valued on the per-unit value of the whole parcel, but rather as purely floodplain land. Conversely, if the part to be taken is entirely outside the floodplain, it arguably would be unfair to the landowner to value it based on the entire parcel's per acre "blended" value, which reflects that a significant portion of the larger parcel is undevelopable floodplain. Case law suggests that a partial taking should be valued as part of the whole "so long as the parcel is sufficiently uniform and that method of valuation is not detrimental to the owner because it does not accurately value the property taken at its highest and best use."⁵⁵

Fee Simple, Easement, or Temporary Takings

Although a fee simple taking will be valued at 100 percent of the unit rate, the taking of an easement (or some other lesser interest) may be valued at a lower amount, often expressed as a percentage of the full fee value. A condemnor may acquire an easement and leave the fee with the owner, or conversely may take the fee, subject to a easement or other interest reserved in the owner or other respondent. In either case, something less than the "full bundle of sticks" is being acquired, and the taking must be valued accordingly.

Similarly, a condemnor may need only a temporary easement as part of a public works project. Temporary takings require the payment of just compensation, which usually is measured by the fair rental value of the property during the period of the temporary easement, assuming the property is returned to its pre-existing condition at the end of the term.⁵⁶

Project Influence

In valuing the property actually taken, the fact of the condemnation and the project are not to be considered.⁵⁷ Under the "project influence rule," any enhancement of or depreciation in the value of property to be acquired that occurs on account of the project may not be considered.⁵⁸ The principle behind the rule is to prevent either a windfall to the landowner based on project enhancements or, conversely, a diminution in value caused by the same project for which the property is being taken.⁵⁹

The project influence rule applies only to the assessment of compensation for the property actually being taken, and not to remainder damages or specific benefits. Damages and benefits necessarily must take into consideration the taking and the project improvements. Thus, for example, that portion of a landowner's property actually being taken for a new highway interchange may not be valued as if it already had the enhanced access the project will bring. However, any remainder damages or specific benefits accruing to the rest of the larger parcel—that is, the remainder parcel—may be based on the project and its improvements.

Compensation: Damages To the Remainder

In addition to compensation for the value of the land taken, the Colorado Constitution provides that landowners be compensated for any damage resulting to their remaining property.⁶⁰ For example, if a condemnation is a partial taking that will leave the landowner with a remainder parcel, and if that remainder's value is diminished as a result of the taking of

the land or the project improvements to be built thereon, any diminution in value to the remainder parcel is considered damages that must be compensated. There are, of course, no severance damages (or benefits) when the entire parcel is acquired.

Generally, all damages that are the "natural, necessary and reasonable" result of the taking may be compensable.⁶¹ There are, however, a number of limitations on what is considered a compensable damage in condemnation proceedings. For example, personal annoyance or inconvenience to the owner resulting from the use of the property taken may not form the basis for an award of damages.⁶² Similarly, impairment of access and business profits, discussed *infra*, may be compensable damages only under particular circumstances.

In addition, damages to the remainder usually must be established by showing that the reasonable market value of the remainder parcel has been diminished.⁶³ This typically involves appraising the value of the remainder parcel before the taking and then after the taking, so as to arrive at a net decrease in value.⁶⁴ Although

the *existence* of remainder damages may be shown by a wide array of competent evidence, the *extent* of damages usually may be shown only in terms of a diminution in market value.⁶⁵ Elements of damages, such as the cost of restoration of property and the estimate of replacement value, are admissible only if they have a bearing on and influence the value of the remainder parcel.⁶⁶ However, at least in the context of temporary takings in an inverse condemnation case, damages have been permitted based on evidence of restoration costs.⁶⁷

The property owner has the burden of proof and must establish the existence and amount of damages,⁶⁸ including: (1) the existence of damages to the remainder property; (2) that the taking or the project caused these damages; and (3) the amount of compensation owed.⁶⁹ Severance damages can be measured by the effects of: (1) the acquisition of the property actually taken; and (2) the expected uses of the property actually taken, on the reasonable market value of the remaining property.⁷⁰ Thus, if the acquisition of a portion of property leaves the remainder too small for a particular high-value use,

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the claim for damages would be the difference between that high-value use and the value of the use to which the remainder property still may be applied. Also, if the public improvement to be constructed on the part taken results in a diminution in value of the remainder, that too can serve as the basis for a claim for damages.

Examples of the types of severance damages a condemnee may experience include impaired access or site utility, change in the highest and best use, aesthetic impairment, loss of view and loss of visibility, and inability to use appurtenant water or mineral rights. The loss of view and aesthetic impairment is a compensable element of damages under Colorado law,⁷¹ but it currently is unclear if loss of visibility (being able to be seen) is a compensable item of damages.⁷²

If there is no taking of a landowner's property, any claimed damages resulting from uses of adjacent property generally are not compensable in an eminent domain action.⁷³ Rather, such claims may be brought in an inverse condemnation case and recovered only to the extent they are different in kind, not merely in degree,

from that suffered by the public in general.⁷⁴

Impairment of Access

One issue of damages that must be considered by the court prior to a valuation trial is a claim of impaired access. If a landowner claims that the taking results in an impairment of access to the property, the court must determine, in advance of trial—that is, *in limine*—whether it rises to the level of a “substantial impairment” of access. Only on a finding of substantial impairment of access may a respondent present evidence on that element of damages.⁷⁵ However, unlike other damages, whether property actually is taken is immaterial to the issue of damages to the remainder of the property for loss or limitation of access.⁷⁶

Business Profits

A loss of business profits or goodwill resulting from a condemnation generally are not considered compensable in an eminent domain action.⁷⁷ Because a condemnation of real property does not usually “take” the business being operated on the

land, and because a business usually may be relocated, courts generally have disallowed compensation for purely business losses.⁷⁸ However, where the business income is derived directly from the land itself, such as with farming, ranching, or timber operations, business losses may be considered in assessing compensation.⁷⁹ This rule does not prohibit evidence of business income, but such evidence may be admissible only for establishing the viability of a particular use of that property.⁸⁰

Compensation: Specific Benefits

Specific benefits are positive effects from the taking or public project that result in a measurable increase to the remainder property's market value.⁸¹ Remainder damages, under certain circumstances, may be offset by special benefits to the remainder property that result from the taking or the project.⁸² To be used as an offset, benefits must be specific to the parcel being damaged and may not consist of general benefits available to the



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public at large.⁸³ For benefits used to reduce severance damages, they must, at a minimum: (1) result from the public improvement that justified the taking; (2) not be speculative or uncertain; and (3) relate “directly and peculiarly” to the land in question. Further, special benefits may not be used to offset compensable damages if the remaining property is subject to a special assessment for those same benefits.⁸⁴

Evidence of specific benefits may offset remainder damages in any condemnation action. However, in acquisitions for highways or transportation projects, such as RTD’s upcoming “Fastracks” projects, special benefits may be used to offset up to 50 percent of the compensation owed for the property actually taken, in addition to any damages.⁸⁵ The Colorado Supreme Court recently upheld this statutory offset of just compensation against a challenge that it allowed a taking without the payment of cash compensation.⁸⁶ In essence, the Court ruled that an enhancement of value to the landowner’s remaining parcel served as adequate compensation not only for remainder damages, but also for as

much as one-half of the compensation owing for the land actually taken.

Many of the evidentiary rules applicable to severance damages are equally applicable to special benefits. However, the condemnor has the burden of proof to establish the existence and amount of any special benefits.⁸⁷

Other Rules of Compensation

There are a number of other legal concepts that apply in condemnation valuation trials. The proper consideration of those concepts, as well as the resolution of any disputes over their application, can have a profound effect on the outcome at trial.

In general, valuation theories and evidence that do not comport with applicable statutes or case law may be excluded on the filing of an *in limine* motion to the court, or by objection and argument during trial—either to the court or the commission. Courts generally should strive to resolve evidentiary issues prior to a valuation trial when presented with a timely motion *in limine* or other pleading.⁸⁸ The

resolution of legal issues prior to trial often help narrow and focus the issues for trial, and can lead to a settlement. However, if the court does not rule on the evidentiary issue prior to trial, the judge likely will have to rule on the issue during a jury trial; or, if tried to a commission, the commissioners are authorized to decide the issue during trial. The evidentiary rules pertaining to eminent domain actions should be adhered to but need not be applied in a manner that will lead to a fundamentally unfair result.⁸⁹

Larger Parcel

To properly assess compensation, remainder damages, and specific benefits, it is important to determine the nature and extent of the “larger parcel.” The larger parcel includes both the land to be taken and all remainder property. In essence, the larger parcel defines what may be compensable in an eminent domain action—either compensation for land actually taken or damages to the remainder. In addition, the larger parcel determination can affect the highest and best use determination.

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For purposes of compensation in an eminent domain action, what property should be included in the larger parcel traditionally has been defined under a rule known as the “three unities”: unity of title (common ownership); physical unity (contiguous or proximate); and unity of use (capable of being used as one economic unit).⁹⁰ The third element, “unity of use,” has become the most critical factor in determining the larger parcel question, even in the face of diverse ownership or non-contiguity.⁹¹ If property is not properly included in the “larger parcel,” any reduction in that property’s value, even if it is shown to result directly from the taking, is not compensable as severance damages in an eminent domain action.

Undivided Basis

Under the undivided basis rule, the condemnor is required to pay compensation for the undivided (unencumbered) interest in whatever property right or estate the condemnor has deemed necessary for its intended use. Separate awards to each respondent, such as the fee owner, easement holder, and lien holder, are not permitted on account of the undivided basis rule.⁹² Rather, the condemnor is required only to offer and pay one amount, representing the value of the undivided basis in the property being acquired.⁹³ The various interest holders in the property must agree or litigate as to their proportional share of the compensation paid.⁹⁴

Just as a separate award is not made to each party with an interest in the property, separate awards are not made for the land and any improvements or appurtenances.⁹⁵ Thus, a commission or jury may not return separate awards for land and improvements, for land and water rights, or for land and any costs to repair or restore property. Similarly, litigants may not present such evidence of separate values. However, if such improvements, appurtenances, or costs to repair either enhance or diminish the value of the property, evidence of this enhancement or diminution may be admitted, but only to show their effect on the overall property’s reasonable market value.⁹⁶

As with improvements and other appurtenances, the effect of encumbrances on the property are not ignored for purposes of valuation under the undivided basis approach.⁹⁷ The undivided basis rule also does not preclude a condemnor from taking “subject to” certain property interests that may be compatible with its intended use. For example, a city could condemn the fee interest in a parcel for a municipal park but take that property subject to an existing underground pipeline easement.

The undivided basis rule simply allows the condemnor to offer (and ultimately to pay) one amount based on the undivided and unencumbered estate it seeks to acquire. If more than one party has an interest in the compensation paid for that

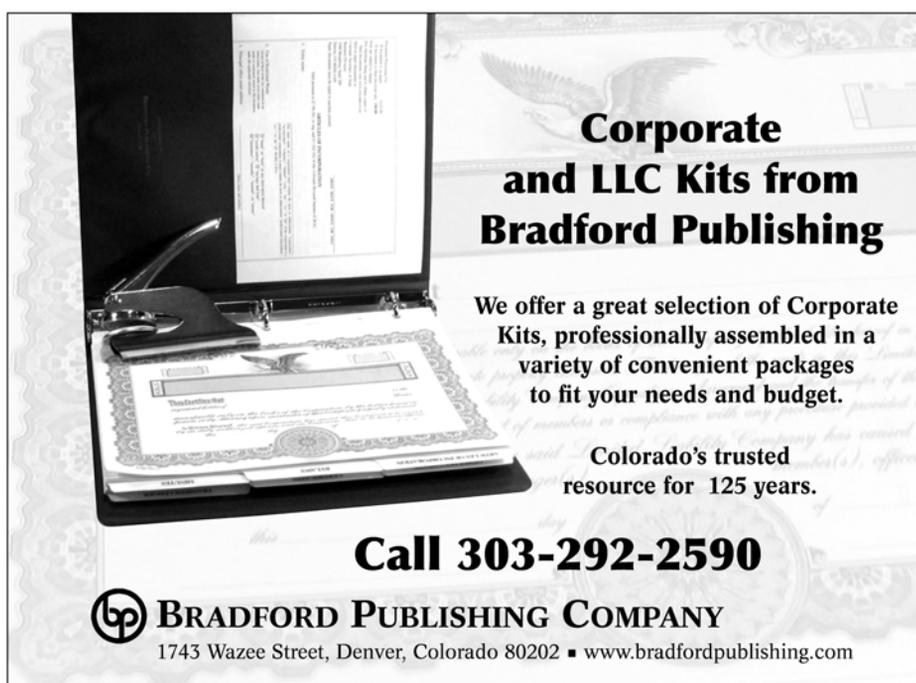
interest in the property, the apportionment of the compensation does not involve the condemnor.

Interest, Costs, and Attorney Fees

A property owner is entitled to pre-judgment interest on the amount of the award from the date the condemnor takes possession of the property to the date of the final award.⁹⁸ This applies only where the condemnor obtained immediate possession of the property prior to the valuation trial. No interest accrues on any amount of a deposit made in connection with obtaining immediate possession that the landowner could have withdrawn.⁹⁹ Interest is owed only on the portion of the final award that exceeds the immediate possession deposit. If a final judgment amount is less than what previously has been deposited by the condemnor and withdrawn by landowner, the landowner must repay the excess and may owe interest on the excess amount that was withdrawn.¹⁰⁰

By statute, if an acquisition is valued at more than \$5,000, the condemnor must reimburse the landowner for the reasonable cost of one appraisal.¹⁰¹ However, even if payment of appraisal costs is not initially made under this statute, the landowner usually may recover its appraisal and other costs pursuant to C.R.C.P. 54(d).¹⁰² In condemnation proceedings, the landowner is entitled to compensation for all reasonable costs incurred, regardless of whether he or she prevails.¹⁰³ To require a landowner whose property is being condemned to incur the costs of litigation without reimbursement has been deemed to unfairly reduce the just compensation required to be paid, in violation of Article II, § 15, of the Colorado Constitution.¹⁰⁴ Similarly, when a landowner recovers a final award of compensation that is less than a previously made statutory offer under CRS § 13-17-202, the condemnor is not entitled to recover its actual costs.¹⁰⁵

The rationale of not requiring a landowner to spend any portion of his or her just compensation on litigation costs has not been fully extended to cover the landowner’s attorney fees.¹⁰⁶ A landowner may recover attorney fees in a condemnation action only under certain circumstances. For example, a landowner may recover reasonable attorney fees if the court determines that the petitioner is not authorized to acquire the real property



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sought.¹⁰⁷ Thus, if a landowner is successful in challenging any of prerequisites at the immediate possession hearing (authority, public purpose, necessity, or failure to agree) and the case is dismissed, he or she may recover reasonable attorney fees in challenging the action.

Further, if a final award of just compensation (where the final award is greater than \$10,000) equals or exceeds 130 percent of the last written offer made by the condemnor prior to filing the condemnation action, the condemnor shall reimburse the owner's reasonable attorney fees.¹⁰⁸ Thus, a condemnor could be liable for a landowner's attorney fees if it made a final written offer of \$100,000 for a parcel of land, and a final award was returned in an amount of \$130,000 or more. This provision is intended to provide the condemnor with an incentive to not "low-ball" its offer of just compensation.

Occasionally, a condemnor will increase its last written offer to an amount exceeding its own appraised value, so as to minimize the risk of exposure for attorney fees. Although the condemnor must honor that higher offer if accepted, if the offer is not accepted, the condemnor is not bound by it and may present evidence of a lower valuation at trial. Should the condemnor subsequently move to amend the extent or nature of the property interests to be acquired, a court may prorate the last written offer for purposes of assessing attorney fees.¹⁰⁹

In addition to compensation, interest, costs, and fees, counsel should determine if the project is subject to the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act and determine if additional relocation benefits are available.¹¹⁰ Although limited primarily to projects receiving federal funding, the Colorado General Assembly has made relocation benefits available to landowners whose property is condemned by urban renewal authorities for subsequent transfer to private redevelopers.¹¹¹

Conclusion

The assessment of just compensation owing to a landowner whose property has been taken is the critical phase of a condemnation proceeding. The valuation phase must balance two competing interests: the right of private property owners to be fairly compensated for what has been taken or damaged for public use, and the right of the public to acquire property for public purposes at its reasonable mar-

ket value. Colorado law provides for an equitable process by which this balance may be struck and just compensation assessed, whether by jury or commission.

In addition to certain statutory guidelines, there are many substantive rules that have developed over the years in the case law. The practitioner must be aware of these rules and work proactively with valuation witnesses to properly develop a sound case.

NOTES

1. Wilson, "Eminent Domain Law in Colorado—Part I: The Right to Take Private Property," 35 *The Colorado Lawyer* 65 (Sept. 2006).
2. See CRS §§ 38-1-105(1) and -106.
3. CRS § 38-1-106.
4. *Town of Red Cliff v. Reider*, 851 P.2d 282 (Colo.App. 1993).
5. CRS § 38-1-106.
6. *Id.*
7. *Id.*
8. *State Dept. of Highways v. Ogden*, 638 P.2d 832 (Colo.App. 1981).
9. *Id.*
10. Compare CRS § 38-1-105(1) (commission of freeholders) with CRS § 38-1-106 (jury of freeholders residing in the county in which the petition is filed).
11. CRS § 38-1-105(1).
12. *Id.*
13. CRS § 38-1-105(2); *State Dept. of Highways v. Mahaffey*, 697 P.2d 773 (Colo.App. 1984).
14. *Mahaffey*, *supra* note 13; *State Dept. of Highways v. Pigg*, 656 P.2d 46 (Colo.App. 1982); *City of Aurora v. Webb*, 585 P.2d 288 (Colo.App. 1978).
15. CRS § 38-1-105(2); *Bd. of County Comm'rs v. Vail Assocs.*, 468 P.2d 842 (Colo. 1970).
16. *Id.*
17. *Jagow v. E-470 Public Highway Auth.*, 49 P.3d 1151 (Colo. 2002) (landowner has burden of proof as to compensation, except for any offsetting special benefits); *Bd. of County Comm'rs v. Noble*, 184 P.2d 142 (Colo. 1947).
18. CRS §§ 38-1-105(1) (commission) and -107(1) (jury). Instructions for eminent domain actions are found in Chapter 36 of the Colorado civil jury instructions. These same basic instructions are used whether the case is tried to a jury or a commission.
19. CRS § 38-1-105(2).
20. CRS § 38-1-107(1). The party requesting the jury to view the subject property must advance that expense; however, the condemnor ultimately may have to reimburse the landowner for this cost of litigation, regardless of which party requested the jury view.
21. See *Colorado Jury Instruction* 36:8 (Civ. 4th Ed.).
22. CRS § 38-1-115. Each of these three elements (value for the property actually taken, damages to the remainder, and specific benefits to the remainder) must be separately stated.

23. *Evergreen Fire Protection Dist. v. Huckleby*, 626 P.2d 744 (Colo.App. 1981) (commission report); *Ft. Lyon Canal Co. v. Farnan*, 109 P. 861 (Colo. 1910) (jury verdict).

24. CRS § 38-1-114; *Colorado Jury Instruction* 36:4 (Civ. 4th Ed.) ("[a]ny adjustment or balancing [of damages and benefits] must be done by the court").

25. CRS § 38-1-116. Where immediate possession previously was taken and deposit made pursuant to CRS § 38-1-105(6)(a), interest runs from the date of taking possession to the date of the award and accrues only on the amount, if any, that the final award exceeds the amount deposited. Interest is paid at the statutory rate set at CRS § 5-12-106(2). As in any other civil action, post-judgment interest also may be owing if there is any meaningful delay between the date of the award and the date of the condemnor's final deposit to the court registry satisfying the judgment. On deposit of the amount fully satisfying the award of compensation, interest, and any other amounts owing, the condemnor is relieved of its responsibility for post-judgment interest for the period of time pending an appeal or an apportionment hearing. See *E-470 Public Highway Auth. v. 455 Co.*, 997 P.2d 1273, 1277 (Colo.App. 1999).

26. Interest, costs of litigation, and attorney fees are discussed below.

27. CRS § 38-1-105(3).

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28. *Id.*
 29. *Id.*
 30. *Id.*
 31. See *Total Petroleum, Inc. v. Farrar*, 787 P.2d 164 (Colo. 1990); *Montgomery Ward & Co. v. City of Sterling*, 523 P.2d 465 (Colo. 1974); *Vivian v. Bd. of Trustees*, 383 P.2d 801 (Colo. 1963); *City of Englewood v. Denver Waste Transfer, L.L.C.*, 55 P.3d 191 (Colo.App. 2002); *State Dept. of Highways, Div. of Highways v. Town of Silverthorne*, 707 P.2d 1017 (Colo.App. 1985).
 32. *Swift v. Smith*, 201 P.2d 609 (Colo. 1948) (because an order for temporary possession clearly is interlocutory, any review must be by an original proceeding).
 33. CRS § 38-1-110.
 34. CRS § 38-1-111. *But see Colorado Mountain Properties, Inc. v. Heineman*, 860 P.2d 1388, 1391 (Colo.App. 1993) (accidental withdrawal of minor amount of deposit, which was promptly repaid, does not warrant dismissal of appeal).
 35. CRS § 38-1-111.
 36. *Dept. of Transp. v. Auslaender*, 94 P.3d 1239, 1241 (Colo.App. 2004) (collateral or extraneous issues that change the scope of eminent domain proceedings are not permitted in such proceedings); *Denver Power & Irr. Co. v. Denver & Rio Grande R.R. Co.*, 69 P. 568 (Colo. 1902).
 37. *City of Westminster v. Jefferson Ctr. Assocs.*, 958 P.2d 495 (Colo.App. 1997) (the admissibility of evidence regarding property value is governed by an expansive, rather than restrictive, rule). See also *Waste Transfer, L.L.C.*, *supra* note 31 (“any competent evidence . . . which would be considered by a prospective seller or buyer as tending to affect the present market value of the land”); *E-470 Public High-*

way Auth. v. Jagow, 30 P.3d 798 (Colo.App. 2001) (“any relevant evidence concerning diminution of market value”).

38. *City & County of Denver v. Hinsey*, 493 P.2d 348 (Colo. 1972); *Bd. of Directors v. Calvaresi*, 397 P.2d 877 (Colo. 1964) (witness who owns, buys, sells, values, or manages real property in the vicinity of the property to be condemned was qualified to state an opinion of value). See also *Mack v. Bd. of County Comm’rs of Adams County*, 381 P.2d 987 (Colo.1963) (whether a witness is qualified to give an opinion in a particular field rests in sound discretion of trial court, and the court’s rulings thereon will not be disturbed in absence of a gross abuse of discretion).

39. *Denver Urban Renewal Auth. v. Berglund-Cherne Co.*, 568 P.2d 478 (Colo. 1977); *Baker Metro. Water & Sanitation Dist. v. Baca*, 331 P.2d 511 (Colo. 1958).

40. *Mahaffey*, *supra* note 13 at 775 states: Real estate appraisers commonly utilize three methods of property valuation: (1) Market data or comparable sales; (2) cost of construction or reproduction costs less depreciation; and (3) capitalization of income. Depending on the location and type of property involved, the appraiser may use any one, two, or all three methods to evaluate the fair market value of the property.

41. See *Waste Transfer, L.L.C.*, *supra* note 31 (allowing alternative valuation approach where there was a lack of comparable sales and the income and cost approaches could not provide an accurate estimate of value).

42. *Berglund-Cherne Co.*, *supra* note 39 at 480.

43. CRS § 38-1-118. In effect, these are conditions to what is, in effect, a statutory exception to the hearsay rule.

44. *Ruth v. Dept. of Highways*, 359 P.2d 1033 (Colo. 1961); *Loloff v. Sterling*, 71 P. 1113, 1115 (Colo. 1903).

45. CRS § 38-1-114(1). Possession usually passes when the condemnor makes the deposit into the registry of the court pursuant to CRS § 38-1-105(6)(a). See also *City of Glendale v. Rose*, 679 P.2d 1096 (Colo.App. 1983).

46. CRS § 38-1-114(1); *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 992 P.2d 1188 (Colo.App. 1999), *aff’d in part, rev’d in part on other grounds*, 17 P.3d 797 (Colo. 2001).

47. *Bd. of County Comm’rs v. Delaney*, 592 P.2d 1338 (Colo.App. 1978) (court allows evidence of cost of repairs necessitated by public project to include costs incurred after the date of value where the need for repairs only subsequently was discovered).

48. *Goldstein v. Denver Urban Renewal Auth.*, 560 P.2d 80 (Colo. 1977).

49. *Wassenich v. City and County of Denver*, 186 P. 533, 537 (Colo. 1920); *Dept. of Highways v. Schuloff*, 445 P.2d 402 (Colo. 1968).

50. *Stark v. Poudre School Dist. R-1*, 560 P.2d 77, 79 (Colo. 1977) (“totally speculative or conjectural estimate of future use of property” is inadmissible). See also *Colorado Jury Instruction 36:6* (Civ. 4th Ed.).

51. *Bd. of Comm’rs v. Noble*, 184 P.2d 142 (Colo. 1947); *Denver Urban Renewal Auth. v. Pogzeba*, 558 P.2d 442 (Colo.App. 1976). See also *Colorado Jury Instruction 36:3* (Civ. 4th Ed.).

52. *Williams v. City and County of Denver*, 363 P.2d 171, 173 (Colo. 1961), quoting *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910).

53. *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 17 P.3d 797, 802 (Colo. 2001).

54. Colorado’s valuation approach for partial takings is referred to as the “state rule.” It differs from the approach of other jurisdictions wherein the “before and after rule” is followed. In this latter approach, the entire property is valued before the partial taking, and then the remainder is valued after the taking. The difference in value is the total compensation owing and includes both compensation for the land actually taken and for any damages and benefits.

55. *Jefferson Ctr. Assocs.*, *supra* note 37.

56. *Fowler Irrevocable Trust*, *supra* note 53 (in the temporary taking context, the just compensation inquiry asks this question: considering the property’s highest and best use during the period of the temporary taking, what rental would the property have produced? Proof must simulate a willing lessor/willing lessee transaction, not a simulated sale of the property, and produce a fair rental value for the temporary taking period).

57. *Williams*, *supra* note 52; *Bd. of County Comm’rs of Eagle County v. HAD Enters., Inc.*, 533 P.2d 45, 46 (Colo.App. 1974); *Colorado Jury Instruction 36:3* (Civ. 4th Ed.).

58. *Williams*, *supra* note 52; *City of Boulder v. Fowler Irrevocable Trust 1992-1*, 53 P.3d 725, 728 (Colo.App. 2002).

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59. *Fowler Irrevocable Trust*, *supra* note 58 at 728 states:

This principle promotes fairness in valuing property by preventing a windfall to the property owner based on speculative potential enhancements in value while, at the same time, protecting the property owner from the injustice of assessing against it a diminution in the property's value caused by the same project for which it is being taken.

60. Colo. Const., Art. II, § 15. *See also La Plata Elec. Ass'n, Inc. v. Cummins*, 728 P.2d 696 (Colo. 1986); *E-470 Pub. Highway Auth. v. 455 Co.*, 983 P.2d 149 (Colo.App. 1999), *aff'd*, 3 P.3d 18 (Colo. 2000).

61. *La Plata Elec. Ass'n, Inc.*, *supra* note 60.

62. *Harrison v. Denver City Tramway Co.*, 131 P. 409 (Colo. 1913).

63. *Mack*, *supra* note 38.

64. *Colorado Jury Instruction* 36:4 (Civ. 4th Ed.).

65. *Western Slope Gas Co. v. Lake Eldora Corp.*, 512 P.2d 641 (Colo.App. 1973); *Colorado Jury Instruction* 36:5 (Civ. 4th Ed.).

66. *Mack*, *supra* note 38 at 990; *Ruth v. Dept. of Highways*, 359 P.2d 1033 (Colo. 1961).

67. *Fowler Irrevocable Trust*, *supra* note 53 at 806 (temporary takings jurisprudence recognizes that just compensation can encompass the cost of restoring the property to its pre-taking condition). Restoration costs otherwise may be admissible to show the existence of damages, or if they can form the basis for a diminution in value of the remainder property. Often, appraisers will rely on the amount of restoration costs as the basis for an opinion of the diminution of the remainder's market value.

68. *Colorado Jury Instruction* 36:2 (Civ. 4th Ed.).

69. *Jagow*, *supra* note 17 at 1158.

70. *Colorado Jury Instruction* 36:4 (Civ. 4th Ed.). A final award of damages (or specific benefits) is subject to adjustment for one year to provide for additional damages or benefits that were not reasonably foreseeable at the time of trial. CRS § 38-1-114(1) and (2)(a).

71. *La Plata Elec. Ass'n, Inc.*, *supra* note 60.

72. *See Dept. of Transp. v. Marilyn Hickey Ministries*, 129 P.3d 1068 (Colo.App. 2005) (allowing loss of visibility damages resulting from project improvements located on the land taken from the respondents). However, *certiorari* was granted by the Colorado Supreme Court in this case on March 20, 2006. No decision was available as of this writing.

73. *Keller v. Miller*, 165 P. 774 (Colo. 1917); *Marilyn Hickey Ministries*, *supra* note 72.

74. *State Dept. of Highways v. Davis*, 626 P.2d 661 (Colo. 1981); *Troiano v. Colorado Dept. of Highways*, 463 P.2d 448 (Colo. 1969); *Claassen v. City and County of Denver*, 30 P.3d 710 (Colo. App. 2000); *Thompson v. City and County of Denver*, 958 P.2d 525 (Colo.App. 1998).

75. *See State Dept. of Highways v. Interstate-Denver West*, 791 P.2d 1119, 1121 (Colo. 1990); *Davis*, *supra* note 74 at 665.

76. *Davis*, *supra* note 74.

77. *Auraria Businessmen Against Confiscation v. Denver Urban Renewal Auth.*, 517 P.2d 845 (Colo. 1974).

78. *Hinsey*, *supra* note 38 at 351 ("injury to a business conducted upon lands taken under the right of eminent domain . . . does not constitute an element of just compensation").

79. *Id.*

80. *Id.*

81. *E-470 Public Highway Auth. v. 455 Co.*, 3 P.3d 18, 23 (Colo. 2000); *Denver Joint Stock Land Bank v. Bd. of Comm'rs of Elbert County*, 98 P.2d 283, 286 (Colo. 1940).

82. CRS § 38-1-114.

83. CRS § 38-1-114(2); *Colorado Jury Instruction* 36:4 (Civ. 4th Ed.); *Mack*, *supra* note 38; *Denver Joint Stock Land Bank*, *supra* note 81; *San Luis Valley Irr. Dist. v. Noffsinger*, 274 P. 827 (Colo. 1929); *Western Slope Gas Co. v. Lake Eldora Corp.*, 512 P.2d 641 (Colo.App. 1973) (availability of natural gas resulting from construction of gas pipeline project was a benefit to all landowners in the area and should not, therefore, be used to offset damages).

84. *E-470 Public Highway Auth.*, *supra* note 60, *rev'd on other grounds* 3 P.3d 18 (Colo. 2000).

85. CRS § 38-1-114(2)(a).

86. *E-470 Public Highway Auth. v. Revenig*, 91 P.3d 1038 (Colo. 2004).

87. *Colorado Jury Instruction* 36:2 (Civ. 4th Ed.).

88. CRS § 38-1-101 provides that when property is condemned, "all questions and issues, except the amount of compensation, shall be determined by the court. . . ." *See also Troiano v. Colorado Dept. of Highways*, 468 P.2d 448 (Colo. 1969); *Fishel v. Denver*, 108 P.2d 236 (Colo. 1940).

89. *Upper Eagle Valley Sanitation Dist. v. Carnie*, 634 P.2d 1008 (Colo.App. 1981).

90. *See Noble*, *supra* note 17 at 143 (the larger parcel includes the land taken, along with "the property not taken but which belongs to the respondent which is contiguous or adjacent, and which respondent uses as a part of the unit operation of her property"); *Colorado Jury Instruction* 36:4 (Civ. 4th Ed.).

91. *See Bear Creek Dev. Corp. v. Genesee Found.*, 919 P.2d 948 (Colo.App. 1996); *Delaney*, *supra* note 47.

92. *See Gifford v. City of Colorado Springs*, 815 P.2d 1008 (Colo.App. 1991).

93. *See Montgomery Ward & Co., Inc. v. City of Sterling*, 523 P.2d 465, 467 (Colo. 1974).

94. CRS § 38-1-105(3).

95. *Dandrea v. Bd. of County Comm'rs*, 356 P.2d 893 (Colo. 1960); *City of Gunnison v. Mc-*

Cabe Hereford Ranch, Inc., 702 P.2d 768 (Colo. App. 1985):

As a general rule, the existence of natural land assets such as mineral or water rights can be considered in determining how they enhance the fair market value of a condemned piece of property, but it is not proper to evaluate such appurtenant rights separately.

96. *McCabe Hereford Ranch, Inc.*, *supra* note 95 at 770. *See also City of Boulder v. Orchard Court Dev. Co.*, 527 P.2d 931, 933 (Colo.App. 1974) ("evidence of elements of damages, such as cost of restoration and estimates of replacement value, are admissible if they would have a bearing on and influence opinion as to value").

97. *Gifford*, *supra* note 92 at 1011 (under Colorado's undivided basis rule of fair market valuation, the condemnor must value the property as a whole by assuming ownership by one person, while taking into consideration the value of encumbrances on the fair market valuation of property).

98. CRS § 38-1-116.

99. *Id.*; *E-470 Public Highway Auth.*, *supra* note 25.

100. *See E-470 Public Highway Authority v. Wagner*, 77 P.3d 902, 905 (Colo.App. 2003) (where landowner had agreed by stipulation to repay any excess withdrawal with interest).

101. CRS § 38-1-121(2).

102. *Dept. of Highways v. Kelley*, 379 P.2d 386 (Colo. 1963); *City of Colorado Springs v. Berl*, 658 P.2d 280, 281 (Colo.App. 1982).

103. The reasonableness of the costs incurred, including an award for expert witness fees, is a matter left to the discretion of the court. *See City of Lakewood v. DeRoos*, 631 P.2d 1140 (Colo.App. 1981).

104. *Denver Joint Stock Land Bank v. Bd. of Comm'rs of Elbert County*, 98 P.2d 283, 287 (Colo. 1940); *Denver Urban Renewal Auth. v. Hayutin*, 583 P.2d 296 (Colo.App. 1978).

105. *City of Westminster v. Hart*, 928 P.2d 758 (Colo.App. 1996) (statutory offers of settlement are inapplicable to condemnation proceedings).

106. *Dept. of Highways v. Intermountain Terminal Co.*, 435 P.2d 391, 395 (Colo. 1967) (attorney fees are not included within the meaning of "costs" as applied to Article II, § 15 of the Colorado Constitution and are not recoverable in eminent domain proceedings).

107. CRS § 38-1-122(1).

108. CRS § 38-1-122(1.5) (as amended in 2003). An earlier version of this rule applied to acquisitions by a public highway authority. *See* CRS § 43-4-506(1)(h)(II)(B).

109. *Wagner*, *supra* note 100 at 905.

110. 42 U.S.C.A. §§ 4601 *et seq.*; CRS §§ 24-56-101 *et seq.*

111. CRS § 31-25-105.5(4). ■

