

Eminent Domain: A Reference Guide

Joseph Rivera
Murray Dahl Kuechenmeister & Renaud LLP
710 Kipling Street, Suite 300
Lakewood, Colorado 80215
(303) 493-6678
jriviera@mdkrlaw.com

Joseph Rivera is special counsel with the firm of Murray Dahl Kuechenmeister & Renaud LLP. His practice specializes in land use matters and eminent domain litigation for both public and private entities. Mr. Rivera also represents local governments in employment matters and other types of litigation, trials, and appeals. He earned his law degree from the University of Colorado School of Law and has a M.S. in Public Policy from Arizona State University and a B.A. from the University of Colorado at Boulder.

Prior to joining Murray Dahl Kuechenmeister & Renaud LLP, Mr. Rivera worked in the Litigation Section of the Denver City Attorney's Office, as a Deputy District Attorney for the 17th Judicial District (Adams County), and as a Judicial Fellow for Colorado Supreme Court Justice Alex Martinez.

Eminent Domain: A Reference Guide

1) Authority to Use Power of Eminent Domain

- a) Art. II, § 14 of Colorado Constitution. Taking private property for private use.
 - I) “Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes or ditches on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes.”
- b) Art. II, § 15 of Colorado Constitution. Taking property for public use — compensation, how ascertained.
 - I) “Private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.”
 - II) “taken or damaged” – a “damaging” is different than a “taking”.
 - A) We have held that including damaging in the just compensation provision of the Colorado Constitution affords a property owner greater protections than those afforded by the U.S. Constitution. The word “damaged” is in the Colorado Constitution in order to grant relief to those property owners who have been substantially damaged by public improvements made upon land abutting their lands, but where no physical taking by the government has occurred. *Pub. Serv. Co. of Colorado v. Van Wyk*, 27 P.3d 377, 388 (Colo. 2001).
- c) Entities authorized to use the power of eminent domain
 - I) Home rule cities. Art. XX, §§ 1 – 6 of Colorado Constitution.
 - A) “In view of the wide scope of such enumerated cases in which the power might be exercised-probably then considered as being all-inclusive-and the circumstance as we have so many times held, that this amendment was designed to give as large a measure of home rule in local municipal affairs as could be granted under a Republican form of government, we have no doubt that the people of Colorado intended to, and, in effect, did thereby delegate to Denver full power to exercise the right of eminent domain in the effectuation of any lawful, public,

- local and municipal purpose.” *Fishel v. City & Cnty. of Denver*, 108 P.2d 236, 240 (Colo. 1940).
- B) As a home rule municipality, the town has certain authority to exercise eminent domain powers. *Town of Parker v. Norton*, 939 P.2d 535, 536 (Colo. App. 1997).
- II) Statutory cities and towns - statutory delegation of eminent domain powers
- A) Statutory cities and towns, counties, special districts, and agencies of the state must be able to point to specific statutory authority to exercise the power of eminent domain, and the authority is often limited.
- B) Examples
- i) C.R.S. § 31-25-201. Authorizes the use of power of eminent domain to acquire property for parks and recreational facilities.
 - ii) C.R.S. § 31-25-402. Authorizes the use of power of eminent domain to acquire property for pedestrian malls.
- III) Other governmental entities.
- A) C.R.S. § 38-1-202 provides a list of governmental entities which may exercise the power of eminent domain.
- B) Examples
- i) Colorado Dep’t of Transportation
 - ii) Special districts
 - iii) Sanitation districts
 - iv) Urban renewal authorities
- IV) Express or implied statutory authority required
- A) “The power of eminent domain lies dormant in the state until the General Assembly speaks.” *Dep’t of Transp. v. Gypsum Ranch Co., LLC*, 244 P.3d 127, 129 (Colo. 2011).
- B) “The authority to condemn must be expressly given or necessarily implied.” *Mack v. Town of Craig*, 191 P. 101, 101 (Colo. 1920). The power of eminent domain is “specifically and unequivocally granted, or it is withheld.” *Beth Madrosh Hagodol v. City of Aurora*, 248 P.2d 732, 735 (Colo. 1952),
- C) “The right to condemn private property is therefore a creature of statute and exists to the extent, and only to the extent, permitted by the General Assembly.” *Dep’t of Transp. v. Amerco Real Estate Co.*, 380 P.3d 117, 120 (Colo. 2016).
- V) Limitations on the power of eminent domain
- A) Property owned by the State of Colorado. Absent clear legislative authority, property owned by the State of Colorado cannot be condemned. *Town of Parker v. Colo. Div. of Parks*, 860 P.2d 584, 588 (Colo. App. 1993).

- B) Property owned by the United States. *United States v. 161 Acres of Land*, 427 F. Supp. 582, 584 (D. Colo. 1977) (“the State of Colorado can create no right to condemn federally owned lands”).
- C) Prior Public Use Doctrine
 - i) Generally under what is commonly called the "prior public use" doctrine, where land has once been appropriated for public purposes in the exercise of eminent domain it cannot again be condemned to public use by the city or town for street or other inconsistent purposes without constitutional or statutory authority for doing so. *Beth Medrosh Hagodol v. City of Aurora*, 248 P.2d 732, 736 (Colo. 1952); § 32:77. Property already devoted to public use, 11 McQuillin Mun. Corp. § 32:77 (3d ed.).

2) Pre-Filing Requirements

- a) Resolution finding that the land to be condemned is necessary for a public purpose
 - I) Public Purpose. The power of eminent domain cannot be lawfully exercised without some connection to a legitimate public objective.
 - A) A public use is one essentially for the public benefit and advantage. *Tanner v. Treasury Tunnel Mining & Reduction Co.*, 83 P. 464, 465 (Colo. 1906).
 - B) No definition has been formulated which would serve as an infallible test in determining whether a use of property sought to be appropriated under the power of eminent domain is public or private. *Buck v. District Court*, 608 P.2d 350, 351 (Colo. 1980). However, the courts will consider the physical conditions of the country, the needs of the community, the character of benefit which a projected improvement may confer upon a locality, and the resources of the state. *Larson v. Chase Pipeline Co.*, 514 P.2d 1316, 1317-18 (Colo. 1973).
 - C) There is no formula for determining whether the purpose for the taking is public. Generally, however, there are two uses which may be deemed public. The first is public employment or actual use by the public. The second is public advantage or benefit. *Thornton Dev. Auth. v. Upah*, 640 F. Supp. 1071, 1076–77 (D. Colo. 1986)
 - II) Necessity. The question of necessity is limited to whether the actual property sought to be taken is necessary for the purpose intended.
 - A) The question of necessity simply involves the necessity of having the property sought to be taken for the purpose intended. *Mortensen v. Mortensen*, 309 P.2d 197, 199 (Colo. 1957).

- B) Basically, necessity involves the selection of the location of the property to be acquired and the quantity of the land required. *Thornton Dev. Auth. v. Upah*, 640 F. Supp. 1071, 1076 (D. Colo. 1986).
 - C) Whether an enterprise is feasible or practicable, and whether it will be a financial success, cannot be questioned in determining necessity, and such questions are not for the court's determination. *Silver Dollar Metro. Dist. v. Goltra*, 66 P.3d 170, 172 (Colo. App. 2002).
- b) Notice of Intent. The condemnor must provide adequate notice to the record landowners.
- I) “As soon as a condemning authority determines that it intends to acquire an interest in property, it shall give notice of such intent, together with a description of the property interest to be acquired, to anyone having an interest of record in the property involved.” C.R.S. § 38-1-121(1).
 - II) If the property interest at issue has an estimated value of \$5,000 or more, the condemning authority must also inform the record owners of the property of their right to an appraisal, paid for by the condemnor, and must be provided at least 90 days to get it. C.R.S. § 38-1-121(1).
- c) The condemnor must show that it has negotiated with the landowners in good faith and there was a failure to agree.
- I) Petition in condemnation may not be filed with the court unless the amount of compensation to be paid for the property “cannot be agreed upon by the parties interested” or the owner of the property is incapable of consenting, is unknown (residence or identity), or is a nonresident of the state. C.R.S. § 38-1-102(1).
 - II) Good faith negotiation
 - A) The good faith negotiation prerequisite is satisfied when the condemning authority makes a reasonable, good faith offer to purchase the property from the owner and allows the owner sufficient time to respond. *Sheridan Redevelopment Agency v. Knightsbridge Land Co.*, 166 P.3d 256, 266 (Colo. App. 2007).
 - III) Failure to agree
 - A) Lengthy or face-to-face negotiations are not required. *City of Holyoke v. Schlachter Farms R.L.L.P.*, 22 P.3d 960, 963 (Colo. App. 2001).
 - B) A condemnation action may be commenced where “the property owner remains silent or rejects the offer without making an acceptable counteroffer.” *Bd. of Cnty. Comm’rs v. Blecha*, 697 P.2d 416, 417-18 (Colo. App. 1985).
 - IV) Futile to continue negotiation
 - A) The requirement of failure to agree is met if the condemnor has initiated negotiations with the property owner and if further attempts to

reach an agreement would be futile. *Bd. of Cnty. Comm'rs v. Blosser*, 844 P.2d 1237, 1239 (Colo. App. 1992).

d) Final written offer

I) At least one offer must be in writing. C.R.S. § 38-1-121(6).

II) 130% Rule

A) “[T]he condemning authority shall reimburse the owner whose property is being acquired or condemned for all of the owner’s reasonable attorney fees incurred by the owner where the award by the court in the proceedings equals or exceeds one hundred thirty percent of the last written offer given to the property owner prior to the filing of the condemnation action.” C.R.S. § 38-1-122(1.5).

III) Costs

A) Regardless of the outcome, the condemnor is required to pay the landowner’s reasonable litigation costs.

B) 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. *City of Westminster v. Hart*, 928 P.2d 758, 760 (Colo. App. 1996); *Denver Urban Renewal Auth. v. Hayutin*, 583 P.2d 296, 301 (Colo. App. 1978).

3) Immediate Possession Hearing

a) Prior to the valuation hearing, upon the court’s approval and payment of a security deposit, a condemnor may obtain possession of the subject property and begin project construction.

I) A petitioner may not “needlessly disturb” the landowner’s possession of the property, Art. II., § 15 of Colo. Constitution.

b) Amount of security deposit. C.R.S. § 38-1-105(3).

I) The court will determine the amount of the deposit based upon competent evidence of the fair market value of the land taken and resulting damages. *Swift v. Smith*, 201 P.2d 609, 615-16 (Colo. 1948).

II) The purpose of requiring a deposit is to provide the landowner with security for the payment of compensation and damages ultimately awarded at a later valuation hearing. *City of Englewood v. Reffel*, 533 P.2d 1241, 1244 (Colo. App. 1974).

III) The “owner may withdraw from the sum so deposited an amount not to exceed three-fourths of the highest valuation evidenced or testimony presented by the petitioner at the hearing for possession”. C.R.S. § 38-1-105(6)(b). Any withdrawal of deposit shall constitute a partial payment towards to the total amount of just compensation.

- c) Interest. C.R.S. § 38-1-116.
 - I) “No interest shall be allowed on that portion of the award which the owner and others interested received or could have received as a partial payment by withdrawal from the deposit as provided in section 38-1-105(6), nor shall interest be allowed for the period wherein the trial of the case is delayed or continued by or at the request of the respondent.”
- d) An immediate possession hearing is also the only opportunity for the Respondents to challenge the use of eminent domain.
 - I) “[A]t the hearing provided for in section 38-1-105, the court shall hear and dispose of all objections that may be raised touching the legal sufficiency of the petition or cross petition or the regularity of the proceedings in any other respect.” C.R.S. § 38-1-109.
 - II) “The court shall hear proofs and allegations of all parties interested touching the regularity of the proceedings and shall rule upon all objections thereto.” C.R.S. § 38-1-105.
 - III) A property owner who successfully challenges the petitioner’s right to condemn is entitled to recover reasonable attorney fees and costs. C.R.S. § 38-1-122(1).
- e) Challenges to the legislative finding that the condemned land is necessary for a public purpose.
 - I) Public Purpose.
 - A) Deference is not given to the condemning authority’s finding of a public purpose and no showing of bad faith is necessary with respect to this issue. *Thornton Dev. Auth. v. Upah*, 640 F. Supp. 1071, 1076 (D. Colo. 1986). The court determines whether the purpose of the taking is public or private. *Id.*
 - II) Necessity.
 - A) The rule for takings by public bodies remains that the determination of necessity is not reviewable by a court absent the pleading of specific facts showing fraud or bad faith. *Colo. State Bd. of Land Comm’rs v. District Court*, 430 P.2d 617, 619 (Colo. 1967). The issue of necessity cannot be raised by merely denying the allegation that the taking is necessary, and it cannot be raised by conclusory pleading of fraud or bad faith. *Id.* Rather, it can only be raised by pleading facts which, if true, would amount to fraud or bad faith. *Id.*
- f) Possession sets the date of value.
 - I) The date of value is the date of the taking and the “determinative evaluation date in establishing the reasonable market value of the subject property.” *Denver Urban Renewal Auth. v. Hayutin*, 583 P.2d 296, 302 (Colo. App. 1978).

- II) “[T]he right to compensation and the amount thereof, including damages and benefits, if any, shall be determined initially as of the date the petitioner is authorized by agreement, stipulation, or court order to take possession or the date of trial or hearing to assess compensation, whichever is earlier.” C.R.S. § 38-1-114(1).

4) Valuation Hearing

- a) May be heard by a jury or a commission.
 - I) A jury of freeholders (property owners); or
 - II) A commission.
- b) Just compensation is what must be paid in a condemnation action, while “reasonable market value” is how compensation is determined.
 - I) “Reasonable market value” means the fair, actual, cash market value of the property. It is the price the property could have been sold for on open market under the usual and ordinary circumstances, that is, under those circumstances where the owner was willing to sell and the purchaser was willing to buy, but neither was under an obligation to do so. CJI-Civ. 36:3 (CLE ed. 2014).
 - II) Just compensation reflects “what the owner has lost, not, what has the taker gained.” *Williams v. City and Cnty. of Denver*, 363 P.2d 171, 173 (Colo. 1961).
 - III) “The owner must be put in as good position pecuniarily as if the property had not been taken.” *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 17 P.3d 797, 802 (Colo. 2001).
 - IV) The standards guiding the commissioners' deliberations are essentially those of the free marketplace and the commissioners are charged with the duty of determining that price which the property would bring under ordinary and usual circumstances, for cash, assuming that the owner is willing to sell and the purchaser is willing to buy, but neither under any obligation to do so. *City of Aurora v. Webb*, 585 P.2d 288, 291 (Colo. App. 1978).
- c) Undivided Basis Rule
 - I) Under the undivided basis rule, one award is returned for all of the separate components or elements that make up title to the estate being acquired, and the separate components or elements are not independently valued. After that, the court holds an apportionment hearing pursuant to C.R.S. § 38-1-105(3), in which it determines the proper distribution to be made of the award among the various claimants. *Montgomery Ward & Co. v. City of Sterling*, 523 P.2d 465, 468 (Colo. 1974).
 - II) This rule puts all the condemnees in the position of seeking to maximize the total award in the first proceeding [valuation hearing]. Only in a subsequent

proceeding do the condemnees become adversaries [apportionment hearing].”
Montgomery Ward & Co. v. City of Sterling, 523 P.2d 465, 468 (Colo. 1974).

d) Project Influence Rule

- I) Requires that the condemnation project be disregarded in ascertaining the value of the property being taken. CJI-Civ. 36:3 (CLE ed. 2014) (“In determining the market value of the property taken, you are not to take into account any increase or decrease in value caused by the proposed public project.”).
- II) *Bd. of Cnty. Comm’rs v. HAD Enter., Inc.*, 533 P.2d 45, 46 (Colo. App. 1974) (the court of appeals held that an instruction directing the commission, in arriving at the fair market value of a leasehold interest, not to “consider in any way” the condemnation action and to value the property “as if no condemnation ever took place or ever was to take place” was a correct statement of the law).

5) Rule and Order and Apportionment Hearing

- a) Jury’s verdict or commissioner’s certificate of ascertainment becomes a final rule and order that transfers the condemned property interest.
 - I) 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. C.R.S. § 38-1-115.
 - II) Upon a finding of a proper verdict or commissioner’s certificate of ascertainment and the total amount owing in compensation has been made available to the Respondents, the court shall enter a rule and order transferring the property interest, which the petitioner must record. C.R.S. § 38-1-105(3) and (4).
- b) Apportionment Hearing
 - I) The Respondents will also have the opportunity to participate in an apportionment hearing conducted pursuant to C.R.S. § 38-1-105(3). 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. C.R.S. § 38-1-105(3).
 - II) Once the reasonable market value of property subject to eminent domain proceedings has been established, the apportionment of that amount among persons claiming an interest therein is a matter of no concern to the condemner. *Vivian v. Bd. of Trustees*, 383 P.2d 801, 803 (Colo. 1963).

6) Appeals

- a) The determinations made by the court at the immediate possession hearing (authority, public purpose, necessity, and failure to agree) are interlocutory and may not be appealed until after the conclusion of the valuation trial.
 - I) If a party wishes to immediately appeal one of these *in limine* rulings, its only recourse is to seek an extraordinary writ under Rule 21 of the Colorado Appellate Rules. *Potashnik v. Pub. Serv. Co.*, 247 P.2d 137, 138 (Colo. 1952); *Swift v. Smith*, 201 P.2d 609, 616 (Colo. 1948) (because an order for temporary possession clearly is interlocutory, appellate review must proceed as an original proceeding).
- b) “In all cases, upon final determination thereof in the district court, the judgment is subject to appellate review as provided by law and the Colorado appellate rules.” C.R.S. § 38-1-110.
 - I) A final determination is the dismissal of the condemnation petition;
 - II) A final determination can be a rule and order; or
 - III) A final determination can be a jury’s verdict or certificate of ascertainment and judicial confirmation of the award.