

Condemnation Update

Joseph Rivera
Murray Dahl Kuechenmeister & Renaud LLP

- 1) Principles and Procedures of Condemnation
- 2) Applied to Actual Cases

Authority to Condemn

- “Private property shall not be taken or damaged, for public or private use, without just compensation.” Art. II, § 15 of Colorado Constitution.
- Home Rule Cities. Art. XX, §§ 1 – 6 of Colorado Constitution.
- Before exercising the power of condemnation, statutory cities and towns must identify the statutory authority to do so.

Petition in Condemnation

- 1 • Satisfy Prerequisites to Filing the Petition
- 2 • The Petition and Immediate Possession
- 3 • The Valuation Hearing
- 4 • Title Transfer and Apportionment

1 Prerequisite - Necessary for a Public Purpose

“WHEREAS, if the Property Interests cannot otherwise be acquired in a timely manner, the exercise of the City’s powers of eminent domain to obtain immediate possession of and to acquire title to the Property Interests for the Project is necessary and required for the public health, safety, and welfare of the citizens of the City.”

1 Prerequisite – Notice of Intent

- a) An explanation of the project and legal description of the sought property interest;
- b) To all owners of recorded interests in the property; and
- c) If the value of the sought property is greater than \$5,000, notify the landowner(s) of their right to (a) an appraisal paid for by the condemnor and (b) 90 days to get it.

1 Prerequisite – Negotiate in Good Faith

- a) Good Faith Negotiation and Failure to Agree;
- b) Futile to continue negotiations; or
- c) Owner(s)
 - incapable of consent,
 - unknown (residence or identity), or
 - nonresident of the state.

1 Prerequisite – Final Written Offer

- a) At least one offer must be in writing. C.R.S. § 38-1-121(6).
- b) 130% Rule establishes when a condemnor may be responsible for landowner’s reasonable attorney fees. C.R.S. § 38-1-122(1.5).
- c) Regardless of the outcome, the condemnor is required to pay the landowner’s reasonable litigation costs.

2 Petition in Condemnation

- a) Authority to condemn;
- b) Taking serves a public use or purpose;
- c) Property is necessary for this purpose;
- d) Parties have failed to agree on the amount of just compensation.

2 Immediate Possession Hearing

- a) Upon the court’s approval and payment of a security deposit, a condemnor may obtain possession of the subject property and begin project construction
- b) Possession establishes the date of value
- c) Only opportunity for any party to challenge the use of eminent domain

3 Valuation Hearing

Determination of “Just Compensation”

- a) A judge, jury or commission
- b) Determines the amount of “just compensation” owed to the Respondents in terms of a “reasonable market value”

3 Valuation Hr’g: Principles of Just Compensation

“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 an 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).

3 Valuation Hr'g: Principles of Just Compensation

"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).

3 Valuation Hr'g: Principles of Just Compensation

- The burden of proof in a valuation trial is on the Respondents;
- By a "preponderance of the evidence";
- To establish the reasonable market value of the property being taken and, if a partial taking, the resulting damages to the remainder;
- By any competent evidence, apart from factors brought about by the condemnation, that would be considered by a prospective seller or buyer as tending to affect the present market value of the land.

3 Title Transfer and Apportionment

Rule and Order

- a) Judge, jury, or commission render a determination of just compensation;
- b) Accepted and approved by the court;
- c) Petitioner deposits into the court's registry the appropriate sum; and
- d) Court issues a rule and order which transfers the property interest

3 Title Transfer and Apportionment

Apportionment

- a) The Respondents agree to the division of the amount held in the court's registry; or
- b) The court holds an apportionment hearing where the court determines how the amount held within the court's registry is distributed among the Respondents.

Easement from an Undivided Interest

A city seeks to condemn a bike path easement over a small portion of the common area of a condominium development. The common area is owned by each individual condominium owner as an undivided interest. A HOA board governs the use and maintenance of the common area but does not have the authority to grant or sell the required easement.

- Good faith negotiation and failure to agree

Easement from an Undivided Interest

A city seeks to condemn a bike path easement over a small portion of the common area of a condominium development. The common area is owned by each individual condominium owner as an undivided interest. A HOA board governs the use and maintenance of the common area but does not have the authority to grant or sell the required easement.

- Fair market value of the property interest

Easement from an Undivided Interest

A city seeks to condemn a bike path easement over a small portion of the common area of a condominium development. The common area is owned by each individual condominium owner as an undivided interest. A HOA board governs the use and maintenance of the common area but does not have the authority to grant or sell the required easement.

- Title Transfer and Apportionment

Leasehold Interest

A city seeks to condemn a fee simple interest in property necessary for the construction of a major public improvement. The fee simple owner of the property leases the property to a construction company which uses the property to store heavy machinery and all of the modest improvements to the property were made by the lessee.

- Good faith negotiation and failure to agree

Leasehold Interest

A city seeks to condemn a fee simple interest in property necessary for the construction of a major public improvement. The fee simple owner of the property leases the property to a construction company which uses the property to store heavy machinery and all of the modest improvements to the property were made but the lessee.

- Fair market value of the property interest

Recorded Restrictive Covenants

Residential Covenant

BUILDING TYPE AND USE: All lots shall be known and described as residential lots and shall be used only for private, custom, site-built homes. Black Acre Estates is intended only for new homes of harmonious design, materials, color and appearance to complement the natural terrain and other homes constructed in the subdivision.

Recorded Restrictive Covenants

Commercial Covenant

- Restrictive covenants often place substantial restrictions on the permitted uses of a neighborhood strip mall, even long abandoned ones.
- Restrictions regarding appearance of building (size, shape), remodeling, and use and size of parking lot and parking spaces.
- Restrictive covenants prohibit the tenancy of certain types of businesses and, often, prohibit the tenancy of the original tenants' competitors.

Recorded Restrictive Covenants

Commercial and Residential Covenants

- Authority
 - C.R.S. § 38-1-105(5) authorizes cities and towns to bring an condemnation action where it has acquired defective title in property.
- Valuation
 - Are the covenants compensable and, if so, how are they valued?
 - What is the fair market value of a restriction?

Recorded Restrictive Covenants

Smith v. Clifton Sanitation Dist., 300 P.2d 548
(Colo. 1956)

v.

City of Steamboat Springs v. Johnson, 252 P.3d
1142 (Colo. App. 2010).

Recorded Restrictive Covenants

Smith v. Clifton Sanitation Dist.

Recorded Restrictive Covenants

City of Steamboat Springs v. Johnson

Recorded Restrictive Covenants

Smith v. Clifton Sanitation Dist.

- Key Distinction: Property Interest at Issue.
- Policy Reasons:
 - Contractual rights enforceable among private parties but not enforceable or compensable in condemnation proceedings
 - It is against public policy to restrict the government's eminent domain power through private agreements
 - To require compensation would create undue financial burden for the public.
- *Smith* is the minority view