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OVERVIEW OF EMINENT DOMAIN POWERS AND PROCEDURES

I. SOURCE OF POWER OF EMINENT DOMAIN

- A. Eminent Domain is an inherent sovereign power. The Constitution does not create the power, but simply places limitations upon its use. City of Thornton v. Farmers Reservoir & Irrigation Co., 194 Colo. 526, 575 P.2d 382 (1978); Town of Parker v. Colorado Division of Parks and Outdoor Recreation, 860 P.2d 584 (Colo. App. 1993).
- B. The power of condemnation lies dormant in the state until the legislature speaks. Potashnik v. Public Service Co., 247 P.2d. 137 (Colo. 1952).

II. CONSTITUTIONAL PROVISIONS

- A. Federal:
 - 1. Fifth Amendment to the United States Constitution states: “. . . nor shall private property be taken for public use, without just compensation.”
 - 2. Made applicable to the states through the Fourteenth Amendment.
- B. State (Colorado):
 - 1. Article II, Section 15 authorizes condemnation by public entities subject to payment of compensation for “taking or damage” to property. Thus, the Colorado Constitution may offer greater protection to property owners than the Federal Constitution as it provides for compensation in the event of “taking” or “damage” to property. Mosher v. City of Boulder, 225 F. Supp. 32 (D. Colo. 1964).
 - 2. Article II, Section 14 authorizes condemnation by private persons or private entities in limited circumstances. (See also C.R.S. § 38-1-102.)
 - 3. Article XX, Section 1 authorizes condemnation by Home Rule cities.
 - (a) Home Rule Charters give governmental entities authority to condemn pursuant to Article XX or authority to condemn pursuant to the statutes.

- (b) Enumeration of purposes for condemnation in Article XX are illustrations, not limitations, on the purposes for which condemnation can be used. Fishel v. City and County of Denver, 106 Colo. 576, 108 P.2d 236 (1940).
- (c) Condemnation pursuant to Article XX authorizes condemnation inside as well as outside the municipal boundaries.
- (d) Home Rule City may not be bound by the state statute enabling condemnation in certain circumstances. Thornton v. Farmers Reservoir, 575 P.2d 382 (Colo. 1978).

III. STATUTORY AUTHORITY TO CONDEMN

- A. Condemnation power lies dormant until expressly delegated by legislature. Potashnick v. Public Service Co. of Colorado, 126 Colo. 98, 247 P.2d 137 (1952).
- B. Numerous statutes exist vesting the power to condemn in favor of various governmental, quasi-governmental and private entities.
- C. Right or power to condemn must be expressly delegated or necessarily implied. Mack v. Town of Craig, 68 Colo. 337, 191 P. 101 (1920); Town of Parker v. Colorado Division of Parks, 860 P.2d 584 (Colo. App. 1993) (General grant of eminent domain power to home rule municipality confers no condemnation power over state-owned lands. Eminent domain power must be “expressly” given.)
- D. C.R.S. § 38-1-101 et seq. and 38-6-101 et seq. outline the general statutory procedures for condemning property.
- E. For federal condemnations Rule 71A of the Federal Rules of Civil Procedure apply.

IV. LEGAL PREREQUISITES TO EXERCISING POWER OF EMINENT DOMAIN

- A. Public Use Doctrine
 - 1. Taking must be for a “public use”. Tanner v. Treasury Tunnel Mining & Reduction Co., 35 Colo. 593, 83 P. 464 (1906) (Public use doctrine must be sufficiently elastic to meet new conditions as the needs of society change.)
 - 2. Court to determine if use is public, but legislative declaration is given great weight. Board of Commissioners v. Intermountain, 655 P.2d 831 (Colo. 1982); City and County of Denver v. Block 173 Associates, 814 P.2d 824 (Colo. 1991) (In urban renewal context, if record supports that

public purpose is being served, judicial inquiry ends.); Hawaii Housing Authority v. Midkiff, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984) (Great deference is given to condemnor's determination that a "public" purpose is being served.)

B. Necessity

1. Court cannot inquire into determination unless made fraudulently or in bad faith. State Board of Land Commissioners v. District Court, 163 Colo. 338, 430 P.2d 617 (1967).

C. Good Faith Negotiations

1. Condemning authority must make a bona fide offer (generally based on an appraisal or at least an opinion of value from a valuation expert) and provide to the landowner a reasonable length of time to consider such offer (generally held that 14 days is sufficient).

Note: Colorado Supreme Court (1950) held that good faith negotiations is a jurisdictional prerequisite. Old Timers Baseball Association of Colorado v. Housing Authority of City and County of Denver, 122 Colo. 597, 224 P.2d 219 (1950). However, the Colorado Court of Appeals (1993) held that good faith negotiations is not a restriction on the court's subject matter jurisdiction, but merely a condition precedent or element of the right to condemn. Minto v. Lambert, 870 P.2d 572 (Colo. App. 1993).

2. Condemnor is excused from negotiating if negotiations would be futile. Vivian v. Board of Trustees of Colorado School of Mines, 152 Colo. 556, 383 P.2d 801 (1963).

V. GENERAL PROCEDURES

A. Relocation Assistance in addition to "just compensation" if federal funds involved in the project

B. Condemnation is a special statutory proceeding

1. Collateral issues cannot be introduced into the proceedings. Thornton Development Authority v. Utah, 640 F. Supp. 1071 (D. Colo. 1986).

C. Procedural Rules

1. Rules of Civil Procedure apply where statute is silent or not in conflict. Boxberger v. State Highway Commission, 126 Colo. 526, 251 P.2d 920 (1952).

2. Rules of Evidence apply. Denver Urban Renewal Authority v. Berglund-Cherne Co., 568 P.2d 478 (Colo. 1977).

D. Jury v. Commission

1. The landowner has the option of presenting its case to a jury of freeholders or to a commission of three (3) disinterested persons who own property in the county in which the property is located (“Commissioners”).
2. If a commission is selected, the court rules on all preliminary matters, leaving only the issue of value to be determined by the Commissioners at trial. The trial is conducted in its entirety without the judge being present. However, the Commissioners can submit evidentiary or legal issues to the judge for resolution.

E. Immediate Possession – “Quick Take”

1. No earlier than thirty days after the Petition is served on the respondents, the condemnor, upon depositing into the registry of the court an amount to be determined by the court (usually the amount of the condemning authority’s final offer), may seek to take immediate possession of the property sought to be taken and commence construction of the project. Immediate possession is tantamount to a court-ordered possessory license, and does not constitute a conveyance of the landowner’s interest.

F. Burden of Proof

1. On landowner to prove value of the property taken and amount of damages to the remainder, if any, in a partial take situation.
2. On condemnor to prove it has the right to condemn and to prove amount of special benefits to the remainder, if any, in a partial take situation. Otero Irrigation District v. Enderud, 122 Colo. 136, 220 P.2d 862 (1950); Board of Commissioners v. Noble, 117 Colo. 77, 184 P.2d 142 (1941).

G. Valuation Trial

1. Only issues related to value are presented at trial. All other issues are to be determined by the court *in limine*.
2. Results in Award, which is the “just compensation” payable to the landowners.
3. Apportionment Hearing C.R.S. § 38-1-105(3).

4. Claims of persons with interests in property resolved after the valuation trial.

H. Rule and Order

I. Recovery of Costs – Generally, No Recovery of Attorneys’ Fees

1. The landowner’s costs, appraisal fees and expert witness fees are recoverable to the extent they are reasonable as part of the “just compensation” due for the taking. Department of Highways v. Kelley, 151 Colo. 517, 379 P.2d 386 (1963); City of Colorado Springs v. Berl, 658 P.2d 280 (1982).
2. The landowner’s attorney fees are not generally recoverable. Leadville Water Co. v. Parkville Water District, 164 Colo. 362, 436 P.2d 659 (1967).
3. However, there are statutory exceptions, such as where the condemnation award is 30% more than the last written offer made by the condemnor prior to litigation being filed. See C.R.S. § 43-4-506(h)(2)(B) (applies only to public highway authorities) and C.R.S. § 38-1-122(1.5) (applies to most other condemnors, but with significant statutory exceptions).

J. Abandonment of Proceedings

1. Condemnor may abandon at any time before owner acquires a vested right to compensation, i.e., after award is paid into the court.
2. Right to abandon exists even if possession of property has been taken. Denver & New Orleans v. Lamborn, 8 Colo. 380, 8 P. 582 (1885).
3. Limited Exception: Estoppel. Piz v. Housing Authority of City and County of Denver, 132 Colo. 457, 289 P.2d 905 (1955).

VI. VALUATION ISSUES

A. Measure of Just Compensation

1. Full Take:
 - (a) The landowner is entitled to the “reasonable market value” of the property taken as of the date of value. C.R.S. § 38-1-114(1) and (2); Vivian v. Board of Trustees, 152 Colo. 556, 383 P.2d 801 (1963).

- (b) “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 the 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. Williams v. City and County of Denver, 363 P.2d 171 (Colo. 1961); Department of Highways v. Schulhoff, 167 Colo. 72, 445 P 2d 402 (1968).

2. Partial Take

(a) Non-Highway Cases

- (1) No offset of specific benefits against value of property taken.
- (2) In estimating the value of all property actually taken, the true and actual value at such time shall be allowed and awarded. No deduction therefrom shall be allowed for any benefits to the residue of said property. . . . In all cases the owner shall receive the full and actual value of all property actually taken. C.R.S. § 38-1-114(1).
- (3) Benefits may offset any or all damages to residue.
- (4) In estimating damages occasioned to other portions of the claimant’s property or any part thereof other than that actually taken, the value of the benefits, if any, may be deducted therefrom. . . . In case the benefit to the property not actually taken exceeds the damages sustained by the owner to the property not actually taken, the owner shall not be required to pay or allow credit for the excess. C.R.S. § 38-1-114(1).

(b) Highway Cases

(1) Total Take

If an entire tract or parcel of property is condemned, the amount of compensation to be awarded is the reasonable market value of the said property on the date of valuation. C.R.S. § 38-1-114(2)(b).

(2) Partial Take

- (a) If only a portion of a tract or parcel of land is taken, the damages and special benefits, if any, to the residue of said property shall be determined. C.R.S. § 38-1-114(2)(c).
- (b) Special benefits offset damages and up to 50% of the value of the part taken.
- (c) In determining the amount of compensation to be paid for such a partial taking, the compensation for the property taken and damages to the residue of said property shall be reduced by the amount of any special benefits which result from the improvement or project, but not to exceed fifty percent of the total amount of compensation to be paid for the property actually taken. C.R.S. § 38-1-114(2)(d).

B. Highest and Best Use

- 1. The property is to be valued at its highest and best use, even if the highest and best use is not the current use of the property. Stark v. Poudre School District, 560 P.2d 77 (Colo. 1977); City of Aurora v. Webb, 585 P.2d 288 (Colo. App. 1978).
- 2. The considerations are: legal permissibility, physical possibility, financial feasibility and maximum profitability.
- 3. The “reasonable probability” of zoning changes affecting highest and best use may be considered. Stark v. Poudre School District, 560 P.2d 77 (Colo. 1977).

C. Undivided Basis Rule

- 1. In valuing property in a condemnation action, the reasonable market value of the property must be determined without regard to the separate interests to which it may be subject. Accordingly, property must be valued as if it is owned by a single party. C.R.S. § 38-1-105(3); Total Petroleum, Inc. v. Farrar, 787 P.2d 166 (Colo. 1988); Clifford v. City of Colorado Springs, 815 P.2d 1008 (Colo. App. 1991).

D. Project Influence – The Scope of the Project Rule

1. The market value of the property must be determined as if the public project for which the property is being condemned had never occurred, or never was to occur. Williams v. City and County of Denver, 363 P.2d 171 (Colo. 1961); Board of County Commissioners v. HAD Enterprises, Inc., 533 P.2d 45 (Colo. App. 1974).

E. Date of Value

1. Earlier of date on which condemnor takes possession or commencement of the valuation trial. C.R.S. § 38-1-114.

F. Comparable Sales Approach Most Accepted

1. Comparison of subject property to like properties that have recently sold in the marketplace.
 - (a) Must be “open market” transactions.
 - (b) Appraiser must have personally confirmed sales price and examined public record to testify about comparable sales.
 - (c) Cannot consider sales where purchase price was enhanced as a result of the project for which the property is being taken.
2. Landowner cannot recover profits generated by business on the property.