District Court, Garfield County, Colorado Court Address: 109 8th Street Glenwood Springs, Colorado 81601 Telephone: (970) 945-5075	DATE FILED: July 22, 2015 2:44 PM CASE NUMBER: 2013CV30159
Plaintiff: **MICHAEL J. SOS** v. Defendant: **ROARING FORK TRANSPORTATION AUTHORITY, a statutory regional transportation authority**	**▲COURT USE ONLY▲**
	Case Number: 2013CV30159 Division: F Courtroom: D

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

PROCEDURAL SUMMARY

This is an inverse condemnation case. The matter is before the Court on Plaintiff Michael Sos' ("Sos") Motion for Partial Summary Judgment Regarding RFTA's Taking or Damaging of Plaintiff's Property, filed on April 30, 2015. On the same date, Defendant Roaring Fork Transportation Authority ("RFTA") filed its Motion for Summary Judgment dealing with essentially the same issues as those raised in Sos' Motion.

RFTA and Sos own adjacent properties. Sos claims that RFTA has taken or damaged his property by constructing a large retaining wall on RFTA's property that adversely affects Sos' use and enjoyment of his property. Sos claims this is a taking or damaging under Article II, Section 15 of the Colorado Constitution. RFTA denies that a taking or damaging has occurred. Both parties have fully briefed their respective Motions and submitted expert reports, affidavits, and other exhibits in support of their arguments. The Court has reviewed all the filings and attachments.

Sos has also filed an Amended Motion to Strike Portions of the Affidavit of Nicholas Senn and to Prohibit Further Opinion Testimony. RFTA has responded to that Motion as well, and the issue is fully briefed. The issue raised in Sos' Motion to Strike concerns RFTA's late disclosure of Nicholas Senn's expert opinion affidavit that was filed with RFTA's Response to Sos' Summary Judgment Motion. The Court has denied the Motion to Strike by a separate order filed contemporaneously with this order.

Having reviewed the Motions and all the related materials, and for the reasons stated below, the Court hereby GRANTS Sos' Motion for Partial Summary Judgment on the issue of whether a taking or damaging has occurred, DENIES RFTA's Motion for Summary judgment, and enters the following Order:

UNDISPUTED FACTS

Based on the pleadings and the parties' respective Motions, the Court finds that the following basic facts are not in dispute.

1. Sos owns a parcel of real property located on Grand Avenue in Glenwood Springs, Colorado ("Sos Property"). The Sos Property is more completely described by its legal description in the First Amended Complaint ("Complaint") which the Court incorporates by reference.

2. RFTA also owns a parcel of real property on Grand Avenue in Glenwood Springs, Colorado which is further described in the Complaint and which is incorporated by reference ("RFTA Property"). The RFTA Property lies immediately to the north of the Sos Property, and the properties share a common boundary.

3. Sos operates his business, Alpine Tire Company, on the Sos Property. RFTA operates a bus transit station on the RFTA Property. The RFTA bus transit station is a relatively recent

improvement that was constructed by RFTA between 2012 and 2013 (the "Project"). The improvements on the Sos Property predate the construction of the RFTA Project.

4. As part of the Project, RFTA constructed a large structural wall on its property to support a parking area and other structural components of the bus transit station (the "Wall"). The Wall consists of various parts including earth walls and a concrete façade. The Wall is located completely within the RFTA Property and sits approximately 3 feet north of the Sos Property boundary. The area between the Wall and Sos Property boundary is sloped downward from north to the south and was excavated, filled, and otherwise altered, improved, restored, and revegetated as part of the Project.

5. Sos claims that the Wall exerts physical force onto the Sos Property and that the Wall relies on the Sos Property for lateral and subjacent support. RFTA disputes that the Wall exerts any significant force upon the Sos Property or that it relies on the Sos Property for support. Alternatively, if the Wall does any of these things, RFTA claims the impact is *de minimus* and does not rise to the level of a taking or damaging under Article II, Section 15 of the Colorado Constitution.

6. Sos claims that the Wall prevents him from fully utilizing the northeastern corner of his property. Sos intends to excavate into the sloping hillside on that portion of his property to increase the tire storage area necessary for his tire business. He claims that the existence of the Wall now requires him to take extra measures to engineer and install a retaining wall to address the added lateral and subjacent support forces imposed by the Wall. He claims that these additional measures are required to avoid undermining the support for the Wall. He has obtained an expert opinion that quantifies the additional expenses he will incur to construct a suitable

retaining wall. Sos' expert estimates that the added cost to engineer the retaining wall is approximately $75,000.

7. Both parties have hired experts to render expert opinions about the Wall and its claimed impact on the Sos Property pursuant to C.R.C.P. 26(2)(B)(I). All of the specially retained experts did on-site evaluations, took various measurements, and performed calculations to determine the degree to which the Wall affected the Sos Property. The Court has reviewed the specially retained experts' opinions and their qualifications and has determined that they are all competent to render their respective opinions pursuant to C.R.E. 702.

8. Sos' expert, HP Geotech did on site evaluations, took various measurements, and issued a report dated March 19, 2015, which stated, in relevant part, as follows:

> the constructed RFTA wall and earth embankment structure supporting their parking lot do impose significant loads to the Alpine Tire Company property… If the [proposed retaining]wall had been constructed prior to the RFTA wall construction, an "active" earth pressure loading of about 50 pcf, equivalent fluid unit weight, could have been used for design…With the addition of the RFTA wall, a retaining wall would now need to be designed for the "at-rest" earth pressure loading to limit potential lateral movement, estimated at about 70pcf, equivalent fluid unit weight, plus surcharge loading consisting of the RFTA wall and additional earth weight next to the bottom of the RFTA wall (estimated at about 1 ½ feet above original ground surface). The total effect of the RFTA wall construction and grading is that a retaining wall will now need to be designed and constructed for the higher at-rest earth pressure loading plus surcharge loading from the RFTA wall and the additional 1 ½ feet of backfill depth amounting to about an additional 70% loading. The risk to the new retaining wall construction will also be much higher now due to the importance to minimize potential for ground movement of the wall excavation that could result in settlement and distress to the RFTA wall and parking lot. *Sos Exhibit 7*.

9. Plaintiff's expert Robert Pattillo of Pattillo Associates Engineers, Inc., rendered the following opinion in his March 23, 2015, report:

> With regard to the effect that the RFTA embankment wall has had on the Alpine Tire property, I believe there is no dispute among the engineers in this case that the vertical support and stability of the embankment and its façade wall depends on the subsurface lateral support provided by the earthen slope on the Alpine Tire

> side of the property line. This is especially the case for the eastern end of the RFTA wall where grade differences are large. The disputed issue between engineers seems to be the degree of impact…Clearly the construction of the elevated RFTA wall and the increased adjacent grades that accompanied it have resulted in a substantial increase in the horizontal pressures for which a new Alpine Tire retaining wall must be designed. Moreover, the mere presence of the RFTA wall significantly increases the difficulty of construction for any retaining wall that would be built near the property line because of the risks associated with the temporary excavation that would threaten the stability of the RFTA wall during the construction period." *Sos Exhibit 8*.

10. RFTA is relying on expert civil engineering reports authored by Michael Baker Jr., Inc., RockSol Consulting Group, Inc., and JVA Consulting Engineers. These reports were prepared between October 11, 2013, and April 16, 2015. *See Sos Exhibits 9, 10, and 11, Sos Reply Exhibit 2*. Michael Baker, Jr. rendered the following opinion in his report dated October 11, 2013:

> With the current RFTA walls and parking lot configuration, a retaining wall would be required for the hypothetical scenario related to removing the slope and lowering the ground surface on the property south of the Glenwood Springs Station [Sos Property], and the retaining wall would need to support a surcharge from the RFTA walls and parking lot; the surcharge would be similar in magnitude to the surcharge described in the HP Geotech memo dated August 27, 2013, but the comparative increase in load would be smaller than described in the HP Geotech memo:.. "at-rest" lateral load coefficients are not required, compared to "active" lateral load coefficients…The comparative increase in load is approximately 20% rather than 70%.

11. RockSol's Report dated June 5, 2014, states as follows:

> Foundation soil in front of and below the Bottom of Wall elevation on RFTA property, laterally to the RFTA property boundary, needs to remain undisturbed to maintain continued stability of RFTA Wall 2 and Façade 2. Because maintaining the foundation soil is important for maintaining continued stability of RFTA Wall 2 and Façade 2, we recommend the proposed cut slope configuration be determined and submitted. The proposed cut slope shall meet these constraints: If a proposed cut slope south of the property boundary [Sos Property] cannot stand up for the duration of the construction excavation condition, temporary shoring (excavation support) is necessary to support the RFTA Wall 2 foundation soil below the Bottom of Wall elevations laterally to the property boundary…HP Geotech letter, Retaining Wall Design Analysis, paragraph on page 2: We do not object to the stability analysis procedure (the lateral soil pressure loadings seem to be underestimated, the surcharge loadings seem to be overestimated, and the combined loadings are reasonable.)

12. JVA's reports dated March 22, 2015, and April 16, 2015, stated as follows:

> [W]e agree that a portion of the earth in the natural grade on the Sos property south of the property line is necessary to the stability of the RFTA retaining wall foundation…JVA is in agreement with Baker and RockSol that the forces imposed by the RFTA are far less than suggested by HP Geotech and Pattillo. *April 16, 2015, Rebuttal Report, Sos Exhibit 2, Reply*.

> Our analysis yielded results that showed the existing RFTA wall superimposed a maximum additional load at 5850.0' of between 29 psf and 37 psf on future construction within two feet of the property line. JVA's analysis indicates that the forces imposed by the RFTA wall on the neighboring property are more in line with the findings of RockSol and Baker, and we believe that HP Geotech's findings overestimate the impact of the wall on the Sos property…There are limits to how much grade can be lowered and removed on the Sos property without impacting the RFTA retaining wall…JVA has determined that the forces superimposed on the proposed Sos wall are relatively small. The added costs to construct a wall on the Sos property should be relatively small since the affected area is limited to a small section in the northeast corner of the property. *March 22, 2015, report*.

13. Based on the foregoing expert reports, the Court finds that Mr. Pattillo's summary of the reports is essentially correct. All the experts agree that *some* lateral or subjacent force loading is imposed on the Sos Property as a result of the construction of the Wall. The experts disagree on the amount of that loading and the resultant impacts on the Sos Property. The experts also all agree that some preventive measures will need to be taken during the construction of the Sos retaining wall and that the wall must be engineered to compensate for the additional loads imposed by the Wall. Again, the experts only disagree as to the quantitative impact, whether the additional costs would be large or, as JVA claims, "relatively small."

14. There is one additional expert opinion that the Court must address. In its Response to Sos' Motion for Partial Summary Judgment, RFTA submitted the affidavit of Nicholas Senn who is an employee of RFTA. RFTA provided a late designation of Mr. Senn as a CRCP 26(a)(2)(C)(II) expert witness *after* his affidavit had previously been submitted in response to

Plaintiff's Motion for Partial Summary Judgment and after the expert disclosure window had closed.[1]

15. Senn opines that, based on the "RFTA Designers" the Wall and the concrete façade are "independently, externally, and globally stable." From this, he then renders an opinion that the Wall and the concrete façade "do not rely upon Sos' property or any other landowners' property for lateral or global support." *Affidavit ¶¶ 9 and 13*.

16. Sos moved to strike Senn's expert opinions. The Court denied that Motion under a separate order. However, notwithstanding Mr. Senn's affidavit and for the reasons stated below, the Court finds as a matter of law, that his expert opinion is purely conclusory and that it fails to create a material issue of fact that would preclude summary judgment.

17. "Expert affidavits may be used to support or resist a motion for summary judgment. However, affidavits containing mere conclusions are insufficient to satisfy the burden of showing the existence or absence of a genuine issue of material fact." *White v. Jungbauer*, 128 P.3d 263, 264 (Colo. App. 2005); *Ginter v. Palmer & Co.*, 585 P.2d 583, 585 (Colo. 1978); *Norton v. Dartmouth Skis, Inc.*, 364 P.2d 866, 867 (Colo. 1961); *Smith v. Mehaffy*, 30 P.3d 727, 730 (Colo. App. 2000).

18. The Court has reviewed the expert disclosure provided by RFTA for Mr. Senn. That disclosure is nothing more than a copy of his affidavit. The affidavit merely states that Senn is employed by RFTA and that he was the construction supervisor for the bus station project. It also states that he earned a degree in civil engineering in 1990.

[1] It is obvious to the Court that the late disclosure of Senn's opinion was a last ditch effort by RFTA to inject a question of material fact into the Motions for Summary Judgment. Notwithstanding this fact, RFTA's strategy has no bearing on the Court's analysis of his expert opinion.

19. The disclosure and the affidavit provide virtually no factual support for his opinion. Senn does not provide any CV or other documentation to demonstrate that he is qualified by education, training or experience to render such an expert opinion. He does not state that he performed any independent studies or calculations specific to lateral force loads to reach this conclusion (as did the other experts in the case). He does not state that he was involved in the design or construction of the Wall, other than in his capacity as the construction supervisor. He does not state that he reviewed the plans or designs with an eye towards a loads analysis. He does not state that he has any training or expertise in calculating or evaluating lateral or subjacent loads. Nor does he explain why his opinion seems to contradict the other experts who have conducted studies in the case and come to different conclusions, including RFTA's own experts. In short, Senn's opinion is a mere conclusion with no substantive underlying factual support or explanation.

20. Moreover, even if the Court accepts Senn's opinion at face value, the fact that he concludes that the Wall does not rely upon Sos' property for support is not dispositive of the question whether a taking has occurred. The Court will accept as fact Senn's opinion that the Wall is independently stable and does not rely on the Sos property for support. However, just because the Wall is currently independently stable does not necessarily mean that it exerts no lateral forces on the adjacent property. Nor does it necessarily mean that the Wall's stability would not be affected by excavation on the Sos Property. Mr. Senn's affidavit offers no opinion specific to any impacts to the Sos Property. It is carefully limited to the Wall's current inherent stability and its current condition only *on the RFTA Property*. He avoids rendering any opinion on whether the Wall exerts lateral force on the Sos property or what effects excavation on the Sos Property might have. In contrast, RFTA's other experts make specific findings on these

precise issues. Consequently, while the Court has not excluded Mr. Senn's opinion, the Court finds that it is purely conclusory and further, that even taken as true and accurate, his opinion does not create a genuine issue of material fact.

21. Accordingly, the Court finds that it is an undisputed fact that the Wall imposes some lateral force onto the Sos Property that exceeds the lateral forces that existed prior to the Wall's construction. The Court further finds that it is undisputed that if Sos develops and excavates his property as anticipated, some additional measures will need to be undertaken to maintain the stability of the Wall on the RFTA Property. The only significant dispute relates to the quantitative amount of the force on the Sos Property and the amount of additional cost that may be incurred by Sos in connection with the construction of Sos' proposed retaining wall and other improvements. These are factual issues relating to damages which must be decided by the jury.

SUMMARY JUDGMENT STANDARD OF REVIEW

Summary judgment is appropriately granted when there is no genuine issue of any material fact, and the moving party is entitled to judgment as a matter of law. *C.R.C.P. 56(c)*. The party requesting summary judgment has the burden of establishing the non-existence of a material fact. *Continental Airlines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987). The purpose of a motion for summary judgment is to expedite the litigation where the facts are undisputed or so certain as not to be subject to dispute and the court can determine the issue strictly as a matter of law. *Morland v. Durland Trust Co.*, 252 P.2d 98 (Colo. 1952).

If the moving party meets its initial burden of demonstrating that there is no genuine issue of material fact, the burden shifts to the non-moving party to establish that there is a triable issue of fact. *Civil Service Commission v. Pinder*, 812 P.2d 645, 649 (Colo. 1991). If the non-moving party cannot present sufficient evidence to make out a triable issue of fact on its claim,

the moving party is entitled to summary judgment as a matter of law. *Continental Airlines v. Keenan*, supra, 731 P.2d at 713. The party opposing summary judgment may not rest upon mere allegations in the pleadings or mere argument of counsel, but its response must set forth specific facts showing that there is a genuine issue for trial. *C.R.C.P. 56(e)*; *People in Interest of J.M.A.*, 803 P.2d 187, 193 (Colo. 1990). Summary judgment is a drastic remedy and is only warranted where no question of material fact exists and the issues can be resolved as a matter of law.

Because the Court has determined that there is no issue of material fact regarding whether the Wall imposes a burden of lateral or subjacent support on the Sos Property, the only disputed issue is one of law: Does the imposition by RFTA of the burden of lateral or subjacent support onto Sos' Property constitute a taking under Colorado law.

TAKINGS STANDARDS

Article II, Section 15 of the Colorado Constitution provides that "property shall not be taken or damaged, for public or private use, without just compensation." "A property owner may bring an "inverse condemnation" claim when state action has the effect of substantially depriving the property owner of the use and enjoyment of the property, but the state has not formally brought condemnation proceedings." *City of Northglenn v. Grynberg*, 846 P.2d 175, 178 (Colo. 1993); *Thompson v. City & Cnty. of Denver*, 958 P.2d 525, 527 (Colo. App. 1998). Inverse condemnation and eminent domain actions both proceed under the same constitutional provision.

To prove an inverse condemnation claim, the property owner must establish: "(1) that there has been a taking or damaging of a property interest; (2) for a public purpose without just compensation; (3) by a governmental or public entity that has the power of eminent domain but which has refused to exercise it." *Id.; see also Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 386–87 (Colo. 2001). A taking may be effected by the government's physical occupation of the

land or by regulation. *Animas Valley Sand & Gravel, Inc. v. Bd. of Cnty. Comm'rs*, 38 P.3d 59, 63 (Colo. 2001). Whether a taking has occurred is a question of law for a court to decide. *Van Wyk*, 27 P.3d at 386; *Kobobel v. State, Dep't of Natural Res.*, 249 P.3d 1127, 1133 (Colo. 2011).

The specific legal standards for takings cases will vary depending upon a number of factors: whether the taking is regulatory or physical, whether the taking occurs under the Federal Constitution or the more expansive Colorado Constitution, the type of impact imposed on the claimant's property (actual physical appropriation, imposition of servient burdens, complete loss of use, or partial impairment), as well as the financial impact sustained by the property owner (diminution in value or cost of restoration/remediation). The specific facts in a particular case will determine the appropriate analytical framework the Court must apply to determine whether a taking has occurred as a matter of law. This case is not a regulatory takings case. Nor is it a physical ouster or physical appropriation case. It is a "damagings" case. Thus, to the extent the parties have cited authorities not dealing specifically with this type of takings claim, the Court finds that those decisions are not necessarily dispositive of the issues. (*See below e.g.*, *Animas Valley,* which is a regulatory takings case but which also has useful dicta relating to inverse condemnations generally).

The Colorado Supreme Court has interpreted the "damage" language in Colorado's takings clause to provide broader rights than the federal takings clause "but only insofar as it allows recovery to landowners whose land has been damaged by the making of ... public improvements abutting their lands, but whose lands have not been physically taken by the government." *Animas Valley Sand & Gravel, Inc. v. Bd. of Cnty. Comm'rs of Cnty. of La Plata*, 38 P.3d 59, 63 (Colo. 2001); *See Grynberg*, 846 P.2d at 179 (applying the "damage" clause to the activities of a government entity on the mineral estate underneath the surface estate owned by

the plaintiff landowner). "The 'damage' clause only applies to situations in which the damage is caused by government activity in areas adjacent to the landowner's land." *Animas Valley,* 38 P.3d at 63 (Colo. 2001). "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 Colo. v. Van Wyk,* 27 P.3d 377, 388 (Colo. 2001)(emphasis in original).

To recover in an inverse condemnation damaging case, "the owner must show a unique or special injury which is different in kind from, or not common to, the general public. The damage must be to the property or its appurtenances, or it must affect some right or interest which the owner enjoys in connection with the property and which is not shared with or enjoyed by the public generally. In no case has mere depreciation in value been grounds to award just compensation for a damaging of property." *Grynberg*, 846 P.2d at 179. "While we have held that depreciation in market value may be considered for the purposes of assessing damages to a property owner in a condemnation proceeding where a portion of a parcel of land is taken, we have never held that mere depreciation in value is grounds to award just compensation for a damaging of property…We continue to uphold that conclusion here" *Pub. Serv. Co. of Colorado v. Van Wyk*, 27 P.3d 377, 388 (Colo. 2001)(citations omitted).

Under the holdings in the cases and statutes referenced above, the Court finds that it must determine four issues as a matter of law to either grant or deny the cross motions for summary judgment:

1) has there been a taking or damaging of a property interest?

2) was the taking for a public purpose without just compensation?

3) was the taking done by a governmental or public entity that has the power of eminent domain but which has refused to exercise it?

4) Is the claimed damage a unique or special injury which is different in kind from, or not common to, the general public, and not solely a diminution in value?

ANALYSIS

The facts of this case involve a claim for non-regulatory taking or damaging, by a regional transportation authority, where there has been no actual physical appropriation or ouster of the Sos Property. It is undisputed that the Wall and its related improvements lie entirely on the RFTA Property. Instead Sos seeks compensation for the imposition of the additional burden of support imposed on the northeast corner of his property. The measure of damages claimed by Sos for the claimed taking is the added engineering and construction costs imposed by the added lateral force to ensure that the excavation and development of the Sos Property does not damage the Wall.

1. Has there been a taking or damaging of a property interest?

Under the specific facts of this case, the Court finds as a matter of law that a "damaging" has occurred to the Sos Property as a result of RFTA's activities in constructing the Wall and imposing a lateral support obligation on the Sos Property. The decisions and standards articulated in *City of Northglenn v. Grynberg,* 846 P.2d 175, 178 (Colo. 1993) and *William E. Russell Coal Co. v. Bd. of Cnty. Comm'rs of Boulder Cnty.*, 270 P.2d 772, 775 (Colo. 1954) are particularly persuasive and controlling in this determination.

Both *Grynberg* and *Russell Coal* involved claims for subjacent support where there was no physical appropriation of the plaintiff's property. Both cases involved an analysis of the claimed economic impact the alleged taking had on the plaintiffs' ability to use and enjoy their

adjacent properties. Although both cases involved the relationship between the owner of the surface estate and underlying mineral estate, the Court finds that this is distinction without a difference. What matters is that the two property estates were immediately adjacent, and the defendants' activities on the adjacent estate arguably imposed a burden of support that did not exist previously. Both cases recognized the principle that the imposition of a burden of support on an adjacent property can sustain a takings claim.

In *Russell Coal*, the County and the State Highway Department condemned certain parcels of land for the construction of the Denver-Boulder Turnpike. A portion of the condemned property was the surface estate overlying Russell Coal's separate sub-surface mineral estate lying underneath the newly condemned roadway. Russell Coal argued that by condemning the surface estate and constructing a roadway thereon, the Defendants had increased the burdens on its mineral estate by creating a duty of subjacent support that did not previously exist. This new burden of subjacent support interfered with Russell Coal's mining operations and limited the amount of coal it could extract without causing injury to the defendants' surface estate. The Supreme Court found that a taking had occurred and stated:

> When the land in question was condemned and a highway constructed, that a servitude upon the underlying mineral estate was created admits of no argument. This being true, that servitude caused damage and the amount thereof is a question for a jury or a commission, and not to be escaped by an administrative determination that the servitude estate was freed from liability. *Id.* at 775.

This decision recognizes the general rule that a property owner owes a duty of lateral support to adjacent properties, and one who withdraws lateral support necessary to the support of land in another's possession can be held liable for a subsidence of the land, as well as for harm to artificial additions resulting from the subsidence. *Restatement (Second) of Torts* § 817 (1979). Colorado also recognizes the converse of this rule; specifically, that it is a "fundamental notion that a landowner cannot, by placing improvements on its land, increase its neighbor's duty to

support the land laterally. Otherwise, the party with the duty to maintain the lateral support would be responsible for improving the support to hold more than the natural land would have held." *Vikell Investors Pac., Inc. v. Hampden, Ltd.*, 946 P.2d 589, 594 (Colo. App. 1997).

Grynberg was an inverse condemnation case and involved similar facts to *Russell Coal*. There, the owner of the adjacent surface estate proposed to build a reservoir over Grynberg's subsurface mineral estate (also a coal mining interest). The claim asserted by Grynberg was essentially the same as that in *Russell Coal*; that is, the burden of subjacent support owed to the surface estate interfered with Grynberg's ability to mine his coal. The *Grynberg* court disagreed and found that a taking had not occurred. The court distinguished *Russell Coal* on the grounds that in the *Grynberg* case, the surface estate had already been severed from the mineral estate when Grynberg acquired his mineral interest; thus, the activities of the adjacent property owner did not impose any new burden on his mineral estate.

> Therefore, when Northglenn acquired the surface estate, the obligation of the mineral estate owner to provide subjacent support to the surface estate owner was one of the "bundle of rights" acquired by Northglenn along with title to the surface estate for the west half of Section 36. Grynberg, as the lessee, was bound by the mineral estate owner's duty of support so that Northglenn's purchase of the surface caused no change to him; Grynberg lost nothing that he had had previously. *Grynberg*, at 181.

In the current case, RFTA's construction of the Wall has created a new burden of lateral support on the Sos Property that did not previously exist. RFTA has essentially created a *de facto* "slope easement" on the Sos property.[2] The retained expert engineers all agree that the Wall has imposed *some* measurable force load or burden on the Sos Property. The fact that the amount of the load is in dispute is not wholly dispositive to finding a taking has occurred.

[2] Condemnors typically acquire and pay for slope easements as necessary to maintain lateral support for improvements. "A slope easement is an easement reserved to the condemnor to use whatever portion of the property is needed to provide lateral support for the roadbed." *City of Colorado Springs v. Andersen Mahon Enterprises, LLP*, 260 P.3d 29, 32-33 (Colo. App. 2010).

RFTA argues that no taking has occurred because the increased burden is *de minimus*. RFTA is correct in arguing that the injury under a damaging claim must be "substantial". "The intent of including the word 'damaged' in the constitution was to grant relief to property owners who had been *substantially damaged* by the making of such public improvements abutting their lands.." *Grynberg*, at 179 (emphasis added). However, the Court disagrees that the claimed damage in this case does not meet that standard. *Grynberg* is instructive on this point.

The plaintiff in *Grynberg* argued that an unauthorized drill hole into the mineral estate constituted a taking. The court disagreed, holding that although the drilling of the test hole was a "physical invasion" of Grynberg's property, it did not rise to the level of a taking because it did not "interfere with Grynberg's use, possession, enjoyment, or disposition of his coal lease. The drilling of the test hole, a single, transitory physical invasion of Grynberg's coal lease, does not translate to an exercise of dominion and control of the coal lease." *Grynberg*, 846 P.2d at 182.

In the present case, the Court finds as a matter of law that the newly imposed burden of lateral support is not a single transitory invasion of the Sos Property. Although the force may be less than Sos' engineers have asserted (and the Court will assume those experts are correct for purposes of summary judgment) the fact remains that the lateral force and the burden of support are permanent intrusions into Sos' property rights. The expert dispute pertains only to the degree of force not its existence on the Sos Property. As in *Russell Coal*, the burden, whatever its scope, permanently interferes with the use of the Sos Property. It therefore effectively diminishes Sos' "use, possession, enjoyment, or disposition" of his property. It is undisputed that Sos must address that new burden through engineering designs and additional costs for construction. The amount of these additional costs is a factual issue for the jury to decide when it considers damages and is not dispositive of the question whether a taking or damaging has occurred.

For the same reasons, the Court rejects RFTA's argument that the lateral force load is not a taking because it is "intangible." Unlike the noise, electric fields, and radiation discussed in *Pub. Serv. Co. of Colorado v. Van Wyk*, 27 P.3d 377, 388 (Colo. 2001), the lateral force loads in this case have a tangible and measurable effect on the use of the Sos Property. The lateral support burden requires an engineering remedy to physically address the added forces imposed by the wall. The intangible forces in the *Van Wyk* case did not share these traits.

RFTA next argues that Sos cannot establish a taking because no actual "physical invasion" of the property has occurred. The Court is not persuaded. RFTA appears to be applying the more stringent Fifth Amendment constitutional standard for non-regulatory takings. Moreover, RFTA's argument is directly contrary to the decision in *Grynberg*. The damaging clause in the Colorado Constitution is intended "to grant relief to property owners who had been substantially damaged by the making of such public improvements abutting their lands, *but whose land had not been physically taken by the government*." *City of Northglenn v. Grynberg*, 846 P.2d 175, 179 (Colo. 1993)(emphasis added); *See City of Pueblo v. Strait*, 36 P. 789, 791 (Colo. 1894). "Physical invasion is not required for a plaintiff to state a claim for relief in inverse condemnation proceedings." *Wheat Ridge Urban Renewal Auth. v. Cornerstone Group XXII, L.L.C.*, 176 P.3d 737, 742 (Colo. 2007). A plaintiff must show a legal interference that substantially impairs his use or possession of the property or that interferes with his power of disposition over his property. *see Bd. of County Comm'rs v. Flickinger*, 687 P.2d 975, 983 (Colo. 1984). The creation of a new servitude on another's property meets this requirement. "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of

time." *United States v. Dickinson*, 331 U.S. 745, 748, 67 S. Ct. 1382, 1385, 91 L. Ed. 1789 (1947); *Pub. Serv. Co. of Colorado v. Van Wyk*, 27 P.3d 377, 387 (Colo. 2001).

Finally, RFTA argues that a taking did not occur because RFTA did not intend to impose a burden of support on the Sos Property. RFTA relies on *Trinity Broad. of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 921 (Colo. 1993), and argues that as in *Trinity* it should not be found liable for a taking where the alleged damage arises from acts that are essentially negligent. The Court is not persuaded. First, *Trinity* is clearly distinguishable on its facts. The claims in that case arose from a leaky water tank that flooded the plaintiff's property. Obviously, the city in that case did not intend to build a leaky water tank or cause the claimed damage. Here, the claim is not that RFTA was negligent but rather that its construction activities, as designed, created a new burden on the Sos Property.

RFTA reads the *Trinity* decision too narrowly. Under the *Trinity* test a plaintiff may prove either (1) an intent on the part of the defendant to take the plaintiff's property; or (2) an intent on the part of the defendant to do an act which has the natural consequence of taking the property. *See Trinity*, 848 P.2d at 921–22. "The first prong focuses on the subjective intent of the defendant, while the second prong focuses on objective causation. Because it is presented in the disjunctive, the *Trinity* test provides a property owner two separate grounds for establishing a taking." *Scott v. Cnty. of Custer*, 178 P.3d 1240, 1244 (Colo. App. 2007). Here, the second prong of the *Trinity* test is applicable. The construction of the Wall by RFTA was an intentional act, the natural consequence of which was to impose a burden of lateral support on the Sos Property. It does not matter whether RFTA subjectively intended to impose that burden, the construction of the Wall naturally created the lateral burden.

For the foregoing reasons, the Court finds as a matter of law that Sos has met his burden to demonstrate a taking and "damaging" under Article II, Section 15.

2. **Was the taking for a public purpose without just compensation?** It is undisputed by the parties that RFTA has not paid any compensation to Sos for the taking. It is equally indisputable that the taking for the construction of the Wall and the operation of the RFTA bus station was for a public purpose. In condemnation proceedings, "the court's role is to determine whether the essential purpose of the condemnation is to obtain a public benefit." *City & Cnty. of Denver v. Eat Out, Inc.*, 75 P.3d 1141, 1144 (Colo. App. 2003); *Denver West Metropolitan District v. Geudner,* 786 P.2d 434, 436 (Colo. App. 1989).

"[I]n determining whether or not a use is public, the physical conditions of the country, the needs of a community, the character of the benefit which a projected improvement may confer upon a locality, and the necessities for such improvement in the development of the resources of a state, are to be taken into consideration." In *Larson v. Chase Pipe Line Co.,* 183 Colo. 76, 514 P.2d 1316 (1973).

Here, there is no doubt that the development of the bus terminal was for a "public use". RFTA's own public resolutions admit as much. With regard to RFTA resolution authorizing the acquisition of the properties needed to build the bus transit stations, RFTA stated:

> WHEREAS, a public purpose and public use exists to acquire the Subject Parcels and Easements or associated interests, in order to serve the public transportation needs of the citizens of the Roaring Fork Valley, through the construction of nine (9) BRT Stations and related facilities and improvements; …RFTA is authorized to acquire property through its power of eminent domain in accordance with Section 38-1-101 et seq., C.R.S. *See, Plaintiff's Exhibit 3 in Reply is Support of Motion for Partial Summary Judgment*.

Consequently, the taking of the Sos Property is likewise for that public use. *See also, Pub. Serv. Co. of Colorado v. Shaklee,* 784 P.2d 314, 318 (Colo. 1989).

3. Was the taking done by a governmental or public entity that has the power of eminent domain but which has refused to exercise it?

RFTA claims there is a disputed question of law whether it is a regional transportation authority with the power of eminent domain. RFTA's argument on this point does not withstand scrutiny. In his First Amended Complaint, ¶ 2, Sos alleges that RFTA, "now and at all times relevant herein, was a statutory regional transportation authority created pursuant to C.R.S. § 43-4-601 *et seq*. as amended…" RFTA admits this allegation.

In ¶ 3 of the First Amended Complaint, Sos alleges that RFTA "is by law vested with the authority to exercise the power of imminent (*sic*) domain to acquire property for public use, pursuant to C.R.S. § 38-1-202 *et seq*, but only through formal action of its board of directors pursuant to C.R.S. § 43-4-604, *et seq*." In response to ¶ 3, RFTA states that those allegations "state conclusions of law, which are for the Court to determine." RFTA is correct. In all condemnation cases, "[a]ll questions and issues, except the amount of compensation, shall be determined by the court unless all parties interested in the action stipulate and agree that the compensation may be so ascertained by the court." § 38-1-101, C.R.S.

Pursuant to § 38-1-202(1), C.R.S., regional transportation authorities, such as RFTA, are expressly given the power of eminent domain:

> The following governmental entities, types of governmental entities, and public corporations, in accordance with all procedural and other requirements specified in this article and articles 2 to 7 of this title and to the extent and within any time frame specified in the applicable authorizing statute, may exercise the power of eminent domain:
>
> (XXXIX) A regional transportation authority created pursuant to section 43-4-603, C.R.S., as authorized in section 43-4-604(1)(a)(IV), C.R.S.

Pursuant to § 43-4-604(1)(a)(IV), C.R.S., RFTA's board of directors has the power to exercise eminent domain to acquire properties it deems necessary for its statutory purposes but

may not delegate that power. "The board, by resolution, may delegate any of the powers of the board to any of the officers or agents of the board; except that, to ensure public participation in policy decisions, the board shall not delegate the following: (IV) Instituting an eminent domain action, which may be at a public hearing or in executive session…"

RFTA argues that because § 43-4-605, C.R.S. does not specifically list eminent domain among its enumerated powers that the Court cannot infer that power. No inference is necessary. The preface to § 605 specifically states that the powers listed therein are "[i]n addition to any other powers granted to the authority pursuant to this part 6…" As stated, § 604(1)(a)(IV) expressly provides that the board has the power of eminent domain and that such power cannot be delegated. RFTA also ignores the expressly created eminent domain power under § 38-1-202(1), C.R.S.

Finally, RFTA's own actions belie the argument. In its Resolution No. 2011-12, wherein the acquisition of properties necessary for it bus rapid transit facilities, including the Project, was authorized, RFTA's board of directors stated that it has the power of eminent domain:

> WHEREAS, RFTA is authorized to acquire property through its power of eminent domain in accordance with Section 38-1-101 et seq., C.R.S.; NOW, THEREFORE, BE IT RESOLVED, that if compensation to be paid for any of the Subject Parcels, Easements and/or other interest cannot be agreed upon by the parties interested…then legal counsel for RFTA is hereby authorized to institute an prosecute to conclusion such proceedings as are available under Article I of Title 38, Colorado Revised Statutes, through the exercise of the power of eminent domain. *See, Plaintiff's Exhibit 3 in Reply is Support of Motion for Partial Summary Judgment*.

The Court therefore finds as a matter of law that RFTA has the power of eminent domain and that it authorized the exercise of that power in connection with the Project.

4. Is the claimed damage a unique or special injury which is different in kind from, or not common to, the general public, and not solely a diminution in value?

It is indisputable that the lateral force loads applied to the Sos Property are unique and different in kind from, and not common to, those of the general public. The Wall is only adjacent to the Sos Property, and the need for lateral support is specific to the Sos Property. The impact to the Sos Property is not a damage or injury that is common to the general public. Sos has therefore satisfied the first prong of this requirement; however, RFTA argues that Sos cannot prove a taking because there has been no diminution in value to the Sos Property. RFTA relies on its expert appraisal from Chase and Company which concluded that "there is no diminution in the value of the property attributable to the project." *Exhibit 1 to RFTA Motion for Summary Judgment*. This expert opinion seems to be unrefuted. However, the Court finds that the Chase appraisal is not dispositive.

If Sos was asserting a damage claim solely for diminution in value, RFTA would have a valid point. It is clear that a mere diminution in value will not support a taking where the claim is one for "damaging" rather than a physical appropriation of property. "While we have held that depreciation in market value may be considered for the purposes of assessing damages to a property owner in a condemnation proceeding where a portion of a parcel of land is taken, we have never held that mere depreciation in value is grounds to award just compensation for a damaging of property…We continue to uphold that conclusion here" *Pub. Serv. Co. of Colorado v. Van Wyk*, 27 P.3d 377, 388 (Colo. 2001)(citations omitted).

Sos is not arguing that the measure of his damages is solely a diminution in value. Sos is seeking damages for the additional costs imposed on the Property to construct an engineered retaining wall to compensate for the added lateral support loads. This measure of damages is

akin to restoration damages which the Court has the discretion to allow. Thus, the Chase opinion does not resolve the question of whether a taking or damaging has occurred.[3] Restoration damages such as those sought by Sos are an appropriate remedy here.

A property owner is entitled to just compensation in an inverse condemnation action. "The role of just compensation is to put the landowner in the same pecuniary position as though the taking had not occurred" and to "award the compensation necessary to 'reimburse the plaintiff for losses actually suffered.'" *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 17 P.3d 797, 805-806 (Colo. 2001)(*Fowler II*)(citing *Board of County Commissioners v. Slovek*, 723 P.2d 1309,1316 (Colo. 1986). "The trial court has broad discretion when determining the standard of compensation." *Scott v. Cnty. of Custer*, 178 P.3d 1240, 1248 (Colo. App. 2007). The objective of just compensation is to afford "sufficient flexibility trial courts need to achieve fair results." *FowlerII*, at 805.

"Generally, the proper measure of compensation for injury to real property is the diminution of market value." *Id.* However, other measures of damages, such as the cost of restoration may be a suitable remedy in an appropriate case. "[T]he cost of restoration may be proper where the 'injury is susceptible of remedy at moderate expense, and the cost of restoring it may be shown with reasonable certainty.'" *Fowler II*, at 805-806 (citing *Big Five Mining Co. v. Left Hand Ditch Co.*, 73 Colo. 545, 549, 216 P. 719, 721 (1923)).

"When determining whether to depart from the diminution of value standard, the court considers the nature of the owner's use and of the injury." *Scott* at 1248. "The court must also 'be vigilant not to award damages that exceed the goal of compensation and inflict punishment on

[3] The Court also notes that the Chase opinion is suspect because it starts from the premise that no taking has occurred. "Since there has been no physical taking of any portion of the subject property by RFTA, all subsequent takings references in this report shall be termed "alleged takings." *Report at p. 2.*

the defendant or encourage economically wasteful remedial expenditures by the plaintiff.'" *Id*. (citing *Bd. of Cnty. Comm'rs of Weld Cnty. v. Slovek*, 723 P.2d 1309, 1316 (Colo. 1986)). "The landowner is not entitled to a windfall at the taxpayer's expense based on speculative considerations." *Fowler II*, at 804.

Here, the Court finds that there is good reason to depart from the diminution in value standard. The primary reason is obvious. In a "damaging" case, a mere diminution in value is never sufficient to support a takings claim. Thus, some alternative measure of damages *must* be considered by the Court or there would never be an available damages remedy for such takings. Sos has produced an expert opinion that estimates the cost to compensate for the lateral loads is approximately $75,000. Assuming that Sos actually constructs the wall and the additional engineering and construction costs are incurred, Sos would be entitled to such damages as necessary to put him "in the same pecuniary position as though the taking had not occurred" and to reimburse him "for losses actually suffered.'" *Fowler II*, at 805-806. RFTA will certainly argue that the claimed costs to remedy the taking are excessive and speculative. It is up to the jury to determine damages in this case, and they will consider whether these claimed damages are supported by the evidence or not. The Court finds as a matter of law that Sos has satisfied the fourth prong of the test. The claimed damages are unique to the Sos Property, and Sos is not seeking solely damages for a claimed diminution in value. Damages to remedy the forces imposed by the Wall are appropriate in this case.

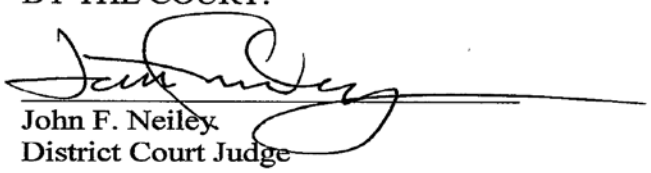
Sos has therefore proven, as a matter of law, that a taking or damaging has occurred pursuant to Article II. Section 15 of the Colorado Constitution.

CONCLUSION AND ORDER

For the reasons stated above, the Court GRANTS Sos' Motion for Partial Summary Judgment and DENIES RFTA's Motion for Summary Judgment. The court trial set for September 18, 23, 24, and 25, 2015, is vacated. The jury trial on damages remains set for November 16 through 20, 2015.

Done this 22nd day of July, 2015.

BY THE COURT:



John F. Neiley
District Court Judge