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<tr><td>COLORADO COURT OF APPEALS<br>2 East 14th Avenue<br>Denver, Colorado 80203<br><br>Appeal - District Court, County of Garfield<br>The Honorable John Fowler Neiley<br>Case No. 2013CV30159</td><td rowspan="2">DATE FILED: May 9, 2017 6:16 PM<br>FILING ID: E0F3AE0E5CA12<br>CASE NUMBER: 2016CA1198<br><br>▲COURT USE ONLY▲</td></tr>
<tr><td>Appellee/Plaintiff: MICHAEL J. SOS<br><br>v.<br><br>Appellant/Defendant: ROARING FORK TRANSPORTATION AUTHORITY, a statutory regional transportation authority.</td></tr>
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<tr><td colspan="2">OPENING BRIEF</td></tr>
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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

**The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).**

☒**It contains 9,475 words (**principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

**The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).**

☒**For each issue raised by the appellant**, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

☐**In response to each issue raised, the appellee** must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

**I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.**

*/s/ Joseph Rivera*
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Joseph Rivera
Jesse D. McLain

Counsel of record for Defendant-Appellant, Roaring Fork Transportation Authority

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## TABLE OF AUTHORITIES

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Pursuant to C.A.R. 28(a), Appellant Roaring Fork Transportation Authority (RFTA) submits it Opening Brief (Brief).

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

**I. Whether the trial court erred in finding that RFTA is authorized by statute to exercise the power of eminent domain.**

**II. Whether the trial court erred in finding that restoration costs are the appropriate measure of damages in this case.**

**III. Whether the trial court erred in allowing Mr. Sos to present evidence of personal damages and damages to the tire business he conducts on his property as the basis for restoration costs.**

**IV. Whether Mr. Sos' evidence of restoration costs is admissible.**

**V. Whether the trial court erred in denying RFTA's proposed jury instructions.**

## NATURE OF THE CASE, PROCEDURAL HISTORY, RULING, ORDERS AND JUDGMENT PRESENTED FOR REVIEW

This is a damaging case without merit. Article II, Section 15 of the Colorado Constitution, the "Takings Clause," creates a cause of action when property is taken or damaged for public use without payment of just compensation by an entity that has the power of eminent domain, but which has refused to exercise that power. *Scott v. Cnty. of Custer*, 178 P.3d 1240, 1244 (Colo. App. 2007).

However, RFTA does not hold the power of condemnation because no state statute specifically and unequivocally grants this power to RFTA. Where there is

no express or unequivocal grant of the condemnation power, the power of condemnation is not granted expressly or by implication.

In addition, RFTA's construction of the bus station did not damage Sos' property because the bus station did not cause a decrease in its market value or impair how Sos uses the property. To state a valid damaging claim, the landowners must establish that the public improvement made upon land abutting their lands "substantially damaged" their land.

Because the trial court improperly declined to dismiss Sos' claim at summary judgment, the parties proceeded to a valuation hearing on April 25 -27, 2016. At the valuation hearing, a commission improperly awarded Sos $75,000 in restoration costs. The commission's award was a direct result of the trial court's misinterpretation and misapplication of condemnation law. The trial court incorrectly found that the proper measure of compensation for this case to be restoration costs, as opposed to diminution in fair market value of Sos' property, and, compounded this mistake by permitting Sos to establish restoration costs based on his personal and business uses of his property. The diminution in fair market value is the standard measure of compensation for injury to real property and personal or business reasons may not serve as the basis for damages in a condemnation case.

The commission also improperly received and considered an expert opinion. The commission improperly permitted one of Sos' expert witnesses to offer an expert opinion of the total amount of restoration costs based on speculative construction designs. The construction designs assumed that Sos possessed the legal right to enter and use RFTA's property and the construction costs resulting from the construction designs serve as the basis for Sos' restoration costs claim against RFTA.

Consequently, RFTA now brings this appeal.

## RELEVANT FACTS

Appellee Michael Sos (Sos) is the owner of the Alpine Tire Company. R. Tr. April 25, 2016, p. 34, line 6 to line 12 (Sos Test.). Alpine Tire Company's street address is 2750 S. Glen Avenue, Glenwood Springs, Colorado; it is located on Lots 4 and 5, Block 2 of the Southglen Subdivision No. 1. *Id.*; Supp. Ex., p. 000091 (hereinafter "Sos' Property" or "Property"). Sos has owned Alpine Tire Company since 1980 and has operated Alpine Tire Company on the Property since 1993. *Id*.

RFTA owns and operates a bus rapid transit station in Glenwood Springs; this station is part of a larger rapid transit project that operates over the entire Roaring Fork Valley. R. Tr. April 27, 2016, p. 382, line 9 to 25 (hereinafter "Bus

Station"). RFTA completed construction of the Bus Station in September 2013. R. Tr. April 27, 2016, p. 383, line 23 to p. 384, line 1.

Sos' Property and the Bus Station site are immediately adjacent to each other and share a common property line. Supp. Ex., p. 000037 (Sos Ex. # 1); p. 000159, p. 000180 (RFTA Ex. EE), p. 000207. The Bus Station site lies to the immediate north of Sos' Property. *Id*. Both properties slope downward from east to west. Supp. Ex., p. 000043, pp. 000167-69, and pp. 000178-79 (views of shared property line prior to Bus Station construction).

RFTA purchased the Bus Station site from Wayne Rudd. R. Tr. April 27, 2016, p. 388, line 17 to line 25; Supp. Ex., p. 000159. Before he sold his property to RFTA, Mr. Rudd operated a car dealership on it. *Id*. Mr. Rudd's car dealership contained a single commercial building and was otherwise completely paved with asphalt. Supp. Ex., p. 000159 and 000180 (aerial views of Sos' Property prior to Bus Station construction); Supp. Ex., p. 000178 and 000179 (views of shared property line prior to Bus Station construction).

A) **The Bus Station does not physically occupy any portion of Sos' Property.**

The Bus Station wall parallel to Sos' Property has two components: a mechanically stabilized earth (MSE) and a façade wall. R. Tr. April 27, 2016, p.

387, line 17 to p. 388, line 10 (N. Senn Test.); Supp. Ex., pp. 000207-08 (stamped wall design plans).

The distance from the MSE wall to the property line ranges from 4 to 8 feet. R. Tr. April 27, 2016, p. 387, line 17 to p. 388, line 10; Supp. Ex., pp. 000207-08 (stamped wall design plans). The distance from the MSE wall to the property line increases as the wall moves west to east. *Id*. The façade wall is 18 inches in front of the MSE wall. *Id*.

B) **Before and after RFTA built the Bus Station, there was an earthen embankment on the shared property line.**

Prior to RFTA's construction of the Bus Station, an earthen embankment existed on the shared property line between the Sos' Property and Bus Station site. Supp. Ex., pp. 000167-68 and 000178-79 (views of shared property line prior to Bus Station construction). The earthen embankment sloped downward from north to south. *Id*. Supp. Ex., p. 000043; R. Tr. April 25, 2016, p. 60, line 13 to line 17 (Sos Test.) (Sos Ex. # 7, Supp. Ex., p. 000047, depicts the earthen embankment prior to RFTA's construction of the parking lot).

Near the completion date of RFTA's construction of the Bus Station, pursuant to an easement agreement between Sos and Gould Construction, the project's general contractor, Gould Construction completely removed the earthen embankment. Supp. Ex., p. 000156-58.

When the construction crews removed the earthen embankment pursuant to Sos' request, the Bus Station walls had already been constructed. Supp. Ex., p. 000044 (depicts the earthen embankment removed after the Bus Station has been installed). The Bus Station walls were stable and did not fail upon the removal of the earthen embankment. *Id*.

RFTA commissioned a survey of the earthen embankment before construction crews removed it. R. Tr. April 27, 2016, p. 406, line 17 to p. 407, line 8; Supp. Ex., p. 000092.

Construction crews restored the earthen embankment to its original configuration and contours. Nick Senn, an endorsed expert for RFTA, and R. Pattillo, an endorsed expert for Sos, each testified that the earthen embankment was restored to its exact, pre-construction of Bus Station dimensions. R. Tr. April 27, 2016, p. 406, line 17 to p. 407, line 8 (N. Senn Testimony); R. Tr. April 26, 2016, p. 196, line 9 to line 18 (R. Pattillo Test.); R. Tr. April 25, 2016, p. 48, line 22 to p. 49, line 4 (Sos Test.) (Exhibit FF, Supp. Ex., p. 00181, shows the restored embankment "after the final grading done").

C) **Before and after RFTA built the Bus Station and throughout the course of this litigation, Sos used the earthen embankment and the area adjacent to it to store used tires for his tire business.**

Sos has been storing used tires in this area for more than twenty years. R. Tr. April 25, 2016, p. 36, line 3 to p. 38, line 19 (Sos Test.); Supp. Ex., p. 000037 (Sos' Ex. # 1).

Before RFTA built the Bus Station, Sos used the earthen embankment and the area adjacent to it to store scores of tires. *Id*. Sos parked a tractor trailer on the toe of the earthen embankment and filled the trailer with tires. R. Tr. April 25, 2016, p. 58, line 4 to line 7 (Sos Test.) (Sos' Ex. 1 depicts the way Sos stored used tires on his Property prior to RFTA's construction of the Bus Station); R. Tr. April 25, 2016, p. 59, line 6 to line 11 (Sos Test.) (Sos' exhibit # 4 depicts the earthen embankment and Sos' use of the area for tire storage "right before" RFTA began constructing the Bus Station.); Supp. Ex., p. 000037 (Sos' Ex. #1) and p. 000040 (Sos' Ex. #4). Sos stacked dozens of tires immediately south and immediately east of the tractor trailer filled with tires. *Id*. *See also* Supp. Ex., pp. 000042-43, 159, 180 (earthen embankment before RFTA's construction).

While the property north of Sos' Property belonged to the previous owner, Wayne Rudd, Sos used it to store used tires because he needed additional space for

used tire storage. R. Tr. April 25, 2016, p. 40, line 20 to p. 41, line 7 (Sos Test.); Supp. Ex., p. 000042 (Sos' Ex. 6).

Sos' used tire storage needs increased as a result of HB 14-1352 which took effect on July 1, 2014. Because of the passage of HB 14-1352, "The needs for [Sos' tire business] have changed considerably, and now we have a very strong need for the property". R. Tr. April 25, 2016, p. 48, line 7 to line 21 (Sos Test.); Supp. Ex., pp. 000001-32 (Engrossed version of HB 14-1352).

After RFTA constructed the Bus Station, Sos' use of the earthen embankment and the area adjacent to it did not change: he continued to use the area to store all of the used tires he removed from vehicles serviced by his tire business. R. Tr. April 25, 2016, p. 48, line 22 to p. 49, line 7 (Sos Test); Supp. Ex., p. 000181. *See also* Supp. Ex., pp. 000040, 161, 163-68, 169-72, 181, 186-89 (earthen embankment during and after RFTA's construction).

D) **Sos claims RFTA's construction of the Bus Station necessitates the removal of the earthen embankment and the installation of a retaining wall in its place to create a flat area on his Property for uses solely related to his tire business.**

After RFTA's construction of the Bus Station, Sos explored options for removing the earthen embankment on his Property and installing a retaining wall: "Well, I wanted to use it for my business; to store tires there, to drive on it, to plow

snow on it, pull my trailer there." R. Tr. April 25, 2016, p. 46, line 24 to p. 47, line 6 (Sos Test.).

Sos acknowledged that he sought to remove the earthen embankment and construct a retaining wall for reasons solely related to his use of the Property for his tire business. R. Tr. April 25, 2016, p. 82, line 22 to p. 83, line 5 (Sos Test.) (need for the retaining wall is based solely on the business needs of Sos' tire business); R. Tr. April 25, 2016, p. 85, line 12 to line 22 (Sos Test.) (same); R. Tr. April 25, 2016, p. 75, line 15 to line 20 (2014 tire statute, larger vehicles that we now accommodate, the need for business, tire storage).

By installing a retaining wall, Sos expects to obtain "880 square feet" of level ground. R. Tr. April 25, 2016, p. 166, line 17 to line 22 (Sikora Test.). Sos seeks the "880 square feet" of level ground for uses solely related to his tire business: it will be used to store used tires and to enable large vehicles to more easily maneuver into the service bays of Sos' tire shop. R. Tr. April 25, 2016, p. 172, line 6 to line 8 (Sikora Test.).

The 880 square feet represents approximately 2% of the Property. In total, Sos' Property covers approximately 40,000 square feet. R. Tr. April 27, 2016, p. 359, line 24 to p. 360, Line 16 (R. Chase Test.); Supp. Ex., p. 000191.

E) **The sole measure of damages in this case is based on the cost to remove the earthen embankment and install a retaining wall in its place.**

As the basis for the cost of constructing the retaining wall, Sos relied on the wall designs and wall construction estimates of his endorsed expert. Robert Pattillo. At Sos' direction, Mr. Pattillo designed two walls: he designed a wall to retain the embankment as it existed prior to the construction of the RFTA facility and another wall to retain the embankment with the RFTA Bus Station in place, "to see what the difference in the designs and the difference in the costs would be to determine what the impact their development had on Mr. Sos". R. Tr. April 26, 2016, p. 204, line 21 to p. 205, line 3 (R. Pattillo Test.); R. Tr. April 26, 2016, p. 211, line 2 to line 4 (R. Pattillo Test.).

Each of Mr. Pattillo's wall designs would require easements permitting Sos to use the Bus Station site for construction. Sos does not have the required easements. R. Tr. April 27, 2016, p. 407, line 23 to p. 408, line 3. One of Mr. Pattillo's wall designs requires the use of the Bus Station site for a "layback cut", approximately 20-30 feet into RFTA's property. R. Tr. April 26, 2016, p. 211, line 5 to p. 212, line 7 (R. Pattillo Test.); Supp. Ex., p. 000112 ("layback cut" marked as "Temporary Excavation"). Mr. Pattillo's other wall design requires the use of soil nails that would intrude into RFTA's property to stabilize the retaining wall. R.

Tr. April 26, 2016, p. 209, line 17 to p. 210, line 7 (R. Pattillo Test.); Supp. Ex., p. 000116-118 (soil nails). Soil nails are "fairly long steel bars" which "are drilled into the hillside behind the wall and attached to that facing wall." R. Tr. April 26, 2016, p. 209, line 17 to p. 210, line 7 (R. Pattillo Test.); Supp. Ex., p. 000116-118.

In designing each wall, Mr. Pattillo assumed that the required easement could be obtained by Sos from RFTA. R. Tr. April 26, 2016, p. 212, line 1 to line 7 (R. Pattillo Test.); R. Tr. April 26, 2016, p. 213, line 3 to p. 214, line 4 (R. Pattillo Test.). However, Sos could not show he held any legal right to the necessary easements. R. Tr. April 27, 2016, p. 407, line 23 to p. 408, line 3.

## SUMMARY OF THE ARGUMENTS

This Court should reverse the award to Sos' for damages for inverse condemnation because he did not prove the required elements of an inverse condemnation claim. To establish a viable inverse condemnation claim, as contrasted to a tort claim, Sos needed to show that there was a taking or damaging of his Property, for a public purpose, without just compensation, by a governmental or public entity that has the power of eminent domain, but which has refused to exercise that power. *Scott v. Cnty. of Custer*, 178 P.3d 1240, 1244 (Colo. App. 2007).

An inverse condemnation could not have occurred in this case because RFTA does not have the power of condemnation. The statute under which RFTA was formed does not expressly or impliedly authorize transportation authorities to acquire property through condemnation.

Second, since RFTA's Bus Station does not physically occupy Sos' Property in any way, even if RFTA held the power of condemnation, Sos would be required to show that RFTA's construction of the Bus Station caused a substantial diminution in the market value of his Property or caused a substantial deprivation of the economic uses of his Property. However, the unrebutted evidence demonstrated that RFTA's construction of the Bus Station did not result in a diminution in the fair market value of Sos' Property, and did not impair the economic use the Property.

Finally, the trial court improperly found that the appropriate measure of damages was restoration costs, rather than diminution in fair market value. The trial court then compounded this mistake by permitting Sos to rely on his personal and business uses of the Property to support his claims for restoration costs, even though personal and business uses are not compensable in condemnation. In addition, the evidence that Sos relied on to establish his restoration cost is

incompetent as a matter of law because it is premised upon unfounded and speculative assumptions.

## ARGUMENT

### I. RFTA does not hold the power of eminent domain.

#### A) Standard of Review

Statutory interpretations are questions of law. Questions of law concerning the application, interpretation and construction of statutes are reviewed *de novo*. *Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892, 897 (Colo. 2008).

#### B) Preservation of Issue for Appeal

RFTA preserved this issue for appeal at the following portions of the Record: R., pp. 378-79 and R., pp. 697-701.

In this case, the trial court incorrectly found that state statutes expressly and impliedly grant RFTA the power of eminent domain. R., p. 689. The trial court found C.R.S. § 38-1-202(1)(f)(xxxix) and C.R.S. § 43-4-604(1)(a)(IV) expressly grant RFTA the authority to condemn based on its status as a regional transportation authority. R., p. 689 and pp. 767-69. The trial court also found that C.R.S. § 38-1-202(1) and the Regional Transportation Authority Law, Art. 4 of

Title 43, combine to impliedly grant RFTA the power of eminent domain based on its status as a regional transportation authority. R. 770-71.

### C) Contentions and Reasoning

#### 1) C.R.S. § 38-1-202(1)(f)(xxxix) and C.R.S. § 43-4-604(1)(a)(IV) do not expressly or impliedly grant to RFTA the power of condemnation.

"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 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). "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).

The power of condemnation is narrowly construed. The Colorado Supreme Court has been clear that the authority to exercise the power of condemnation, being against the common right to own and keep property, must be given expressly or by clear implication; it can never be implied from doubtful language. *Coquina Oil Corp. v. Harry Kourlis Ranch*, 643 P.2d 519, 522 (Colo. 1982). A court must interpret any statute conveying the power of condemnation narrowly and resolve

uncertainty in the ambit of the condemnation power against the person or entity asserting the right to condemn. *Id*.

**i) C.R.S. § 38-1-202(1)(f)(xxxix) and C.R.S. § 43-4-604(1)(a)(IV) do not expressly grant RFTA the power of condemnation.**

C.R.S. § 38-1-202(1)(f)(xxxix) is not an authorizing statute and does not expressly grant regional transportation authorities the power to condemn. Instead, the purpose of C.R.S. § 38-1-202(1), (1)(f)(xxxix), and (1)(f) is to list local government entities which may hold the power of condemnation. To this end, the statute merely provides that "to the extent and within any time frame specified in the applicable authorizing statute" 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." is among those single purpose districts, special districts, authorities, boards, commissions and other governmental entities "that may exercise eminent domain for limited purposes" (emphasis supplied).

The plain text of C.R.S. § 38-1-201(2)(e) affirms that C.R.S. § 38-1-202(1)(f)(xxxix) does not convey the power of condemnation to RFTA. C.R.S. § 38-1-201(2)(e) expressly states that "part 2" is not intended to "[g]rant new eminent domain authority to any governmental entity" or "[r]epeal, limit, or otherwise modify the authority of any governmental entity" to exercise eminent

domain. Instead, the purpose of part 2 is "ensure that Coloradans can easily determine" which governmental entities may exercise the power of eminent domain and "to further ensure that Coloradans can easily identify the procedural requirements" that entities must follow when exercising the power of eminent domain. C.R.S. § 38-1-202(1)(c).

The statute authorizing the creation of regional transportation authorities is C.R.S. § 43-4-601, *et. seq*. C.R.S. § 43-4-605 lists the powers of a regional transportation authority. Nowhere in section 605 is there any mention of condemnation or eminent domain. The only mention of the power of condemnation in the entire Regional Transportation Authority Law is in C.R.S. § 43-4-604(1)(a)(IV). Rather than authorizing the use of condemnation, section 604 expressly limits the power of condemnation: it precludes a regional transportation authority board from delegating the power of "[i]nstituting an eminent domain action." C.R.S. § 43-4-604(1)(a)(IV). The only mention of the power of condemnation in Regional Transportation Authority Law, Part 6 of Title 43, Article 4, is the above limitation on the power. The entire Part 6 is silent on whether a regional transportation authority can exercise that power and, aside from section 604, contains no text relating to the power of eminent domain.

By contrast, where the General Assembly intends to grant the power of condemnation, it expressly and unequivocally grants the power:

- Regional Transportation Districts, C.R.S. § 32-9-119(k): "To condemn property for public use";
- Water and sanitation districts, C.R.S. § 32-4-406(1)(j): "To have and exercise the power of eminent domain…"; and
- Fire protection districts, C.R.S. § 32-1-1002(1)(b): "To have and exercise the power of eminent domain …"

**ii) C.R.S. § 38-1-202(1)(f)(xxxix) and C.R.S. § 43-4-604(1)(a)(IV) do not impliedly grant RFTA the power of condemnation.**

The power to condemn must be specifically granted, or it is withheld. In *Beth Madrosh Hagodol v. City of Aurora*, 248 P.2d 732 (Colo. 1952), the Colorado Supreme Court held that the power of condemnation cannot be found by implication in the absence of a specific and unequivocal grant of the power of condemnation.

> 'By necessary implication', above mentioned, vague or doubtful language must be excluded. It follows that if there is doubt, then there has been no grant of such power by the state. The power is specifically and unequivocally granted, or it is withheld.

*Beth Madrosh*, 248 P.2d at 735 (*citing Mack v. Town of Craig*, 191 P. at 101) (emphasis supplied).

In three different cases, the Colorado Supreme Court subsequently affirmed the rule articulated in *Beth Madrosh Hagodol v. City of Aurora* and held the power of condemnation cannot be found by implication in the absence of the General Assembly's specific and unequivocal grant of the power to condemn.

In *Dep't of Transp. v. Amerco Real Estate Co.*, 380 P.3d 117 (Colo. 2016), the Court rejected the department of transportation's broad interpretation of C.R.S. § 43–1–208(3). Relying on the phrase "other proceedings under this part 2", as it appears in subsection 208(3), the Department of Transportation argued that the Transportation Commission's authority and discretion to condemn property had been delegated to the department's right-of-way engineer. *Id*. at 123. However, the Court rejected the department's interpretation because the decision of whether and how to condemn a specific property for a particular purpose is "non-delegable in the absence of express statutory authorization". *Id*. at 122 (emphasis supplied). "Title 38 expressly recognizes the authority of both the department and the [Transportation Commission] to exercise the power of eminent domain, but only as specifically granted, under distinctly different circumstances, by other expressly

enumerated statutory provisions, including those of title 43." *Id*. at 120 (emphasis supplied).

In *Larson v. Sinclair Transp. Co.*, 284 P.3d 42, 43 (Colo. 2012), based on its status as a "pipeline company", pursuant to C.R.S. § 38-5-105, Sinclair asserted a right to condemn a pipeline easement to convey petroleum. The Court held that C.R.S. § 38-5-105 did not grant condemnation authority by clear implication to companies for the construction of pipelines conveying petroleum. *Id*. at 46. The Court held that C.R.S. § 38-5-105 could not be interpreted to convey the power of condemnation by implication to a pipeline company constructing a pipeline conveying petroleum because pipeline companies may only condemn to convey specific substances and petroleum is not among those substances specifically listed in the statute granting the power to condemn to pipeline companies. *Id*. at 45.

In *Coquina Oil Corp.*, 643 P.2d at 519, an oil and gas lessee asserted a right to condemn a private right-of-way across the Harry Kourlis Ranch pursuant to Colo. Const. Art. II, Sec. 14 and C.R.S. § 38-1-102(3). The oil and gas lessee asserted that it held the power of condemnation because C.R.S. § 38-1-102(3) was silent as to the class of persons who may assert the right to condemn private property for private use. *Id*. at 521. The oil and gas lessee contended that because the statute was silent as to the class of person who may assert the power of

condemnation, the statute was ambiguous, and this ambiguity should be resolved broadly to expand the right of condemnation to the lessee. *Id*. at 521. The Court rejected the lessee's contention. The Court held the federal oil and gas lessee did not hold the right to condemn by implication because Colo. Const. Art. II, Sec. 14 and C.R.S. 38-1-102(3) did not "explicitly state" that the power of condemnation may be asserted by a federal oil and gas lessee. Instead, the Court held any ambiguity in the statute authorizing condemnation must be resolved against the party asserting the right to condemn. *Id.*

Here, under the standard set forth by *Beth Madrosh Hagodol v. City of Aurora* and its progeny, the trial court erred in finding that RFTA held the power of condemnation by implication. Where there is no express or unequivocal grant of the condemnation power, the power of condemnation may not be found by implication. *Beth Madrosh*, 248 P.2d at 735. *See Dep't of Transp. v. Amerco Real Estate Co.*, 380 P.3d at 122 (in order to delegate the power of eminent domain, there must be "express statutory authorization"); *Larson v. Sinclair Transp. Co.*, 284 P.3d at 45 (condemnation power not available for petroleum pipelines because petroleum is not among the substances specifically referred to by the General Assembly in the statute granting to pipeline companies the power to condemn); *Coquina Oil Corp. v. Harry Kourlis Ranch*, 643 P.2d at 521 (held any ambiguity in

the statute authorizing condemnation must be resolved against the party asserting the right to condemn).

Sos will likely argue that because RFTA was co-petitioner in three other unrelated condemnations it should be estopped from denying that it has the power of eminent domain. However, as the cases cited above clearly indicate, Sos' likely reliance on this argument would be misplaced. To find RFTA holds the power of condemnation, this Court must find a statute that expressly and unequivocally grants the power of condemnation to RFTA. *Beth Madrosh*, 248 P.2d at 735. Sos will not be able to provide to this Court any authority for the proposition that the power of condemnation may be implied by estoppel. Moreover, if it were to accept Sos' estoppel argument, this Court would also have to accept the illogical result of this reasoning: that is, persons or entities may acquire the power of condemnation simply by asserting its existence in contexts where it is unchallenged.

## II. RFTA's construction of the Bus Station did not result in taking or damaging of Sos' Property.

### A) Standard of Review

The question of whether RFTA has committed a taking or a damaging is a legal conclusion and, therefore, subject to a *de novo* review. *Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 386 (Colo. 2001).

B) **Preservation of Issue for Appeal**

RFTA preserved this issue for appellate review in the following portions of the Record: R., pp. 245-50, R., pp. 381-85, and R., p. 1077.

The trial court's rulings on this issue may be found at R., pp. 681-85.

C) **Contentions and Reasoning**

RFTA's construction of the Bus Station did not result in a taking or damaging Sos' Property. Sos cannot establish that his Property was actually taken by RFTA because the Bus Station does not physically occupy any portion of it. Sos cannot establish that RFTA's construction of the Bus Station supports a damaging claim because RFTA's construction of the Bus Station did not cause a substantial decrease in the market value of his Property or cause any substantial change in how he used the Property prior the construction of the Bus Station and throughout the course of this lawsuit.

**1) RFTA's construction of the Bus Station did not result in a physical taking of Sos' Property because the Bus Station does not physically occupy any portion of Sos' Property.**

Article II, Section 15 of the Colorado Constitution, the "Takings Clause," creates a cause of action when property is taken or damaged for public use without payment of just compensation. The trial court correctly determined that this is not a regulatory taking case or a physical ouster or physical appropriation case. R., p.

679. Therefore, because there was no physical occupation of the Sos property, this case implicates only the damaging element of the Takings Clause.

**2) RFTA's construction of the Bus Station did not "substantially damage" Sos' Property.**

To state a valid damaging claim pursuant to Article II, Section 15 of the Colorado Constitution, the landowners must establish that the public improvement made upon land abutting their lands "substantially damaged" their land and the landowner must also establish the harm to her property caused by the public improvement is different in kind than the harm imposed by the public improvement onto the general public. *Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d at 388; *City of Northglenn v. Grynberg*, 846 P.2d 175, 179 (Colo. 1993). Here, the trial court lacked the evidentiary basis to find RFTA's construction of the Bus Station "substantially damaged" Sos' Property. The unrebutted evidence established that the construction of the Bus Station did not reduce or diminish the fair market value of Sos' Property. Furthermore, Sos failed to establish RFTA's construction of the Bus Station substantially harmed his Property in any other way.

**i) RFTA's construction of the Bus Station did not result in a taking or a damaging because there exists no evidence of any diminution of the fair market value of Sos' Property.**

Sos did not allege or provide any evidence of a decrease in the fair market value of his Property resulting from RFTA's construction of the Bus Station. Instead, the uncontroverted evidence on this issue is that the construction of the Bus Station did not cause any diminution in the market value of Sos' Property. Rick Chase, RFTA's expert real estate appraiser, testified that the market value of Sos' Property was the same before and after RFTA's construction of the Bus Station: the market value of Sos' Property remained $1,540,000.00, with $790,000.00 attributed to land value and $750,000.00 attributed to the improvements. R. Tr. April 27, 2016, p. 367, line 4 to p. 368, line 8 (R. Chase Test.); Supp. Ex., p. 000191 (RFTA's Ex. PP).

**ii) RFTA's construction of the Bus Station did not result in a taking or a damaging because there exists no evidence of any substantial change in Sos' use of his Property.**

It is undisputed that Sos uses of his Property did not change after RFTA constructed the Bus Station. In *Troiano v. Colo. Dep't of Highways*, 463 P. 2d 448, 453 (Colo. 1970), the Court held that a hotel did not bring a viable damaging claim because improvements which result in a "mere inconvenience and mere circuity of route necessary for access or egress occasioned by a public improvement are not compensable items of damage." In this case, it is undisputed that Sos operated his tire business in the same manner before and after RFTA's construction of the Bus

Station. *See* Facts Section of this Brief, subsections b. and c. There exists "no rationale in the law for holding the mere presence of the structure [Bus Station] to be compensable." *Id*. at 456.

**iii) Without relying on Sos' alleged person and business uses of his Property, Sos cannot establish that he suffered a unique or special damage.**

To state a valid damaging claim, Sos must establish the harm to his Property caused by the Bus Station is different in kind than the harm the Bus Station imposes onto the general public. *Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d at 388; *City of Northglenn v. Grynberg*, 846 P.2d at 179. However, as discussed in Part IV(C)(1) of this brief, Sos cannot satisfy this requirement because personal and business uses of the condemned property interest are non-compensable in condemnation cases.

**3) The trial court improperly applied tort law and Sos' alleged personal and business uses of his Property to find that RFTA's construction of the Bus Station resulted in a damaging of Sos' Property.**

The trial court found that RFTA's construction of the Bus Station resulted in a damaging of Sos' Property. The trial court found that a damaging existed because the Bus Station created an additional burden of lateral support on Sos' Property and he would incur additional construction costs before he regained the full use of it. R., p. 684-85.

However, the trial court's reasoning is unsound because (A) it impermissibly relies on tort law and (B) the additional construction costs contemplated by the trial court arise solely from Sos' future business uses of his Property.

**i) The trial court lacked any legal basis to apply tort principles to this case.**

*Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 17 P.3d 797, 805 (Colo. 2001) (*Fowler II*) approved relying on tort law in condemnation cases under limited circumstances: that is, where "its discussion aids the just compensation inquiry in a temporary taking case involving physical damage to the property" (emphasis added). However, there exists no authority or precedent to apply tort principles to the facts of Sos' inverse condemnation claim. Here, unlike the facts in *Fowler II* or *Scott v. Cnty. of Custer*, 178 P.3d 1240 (Colo. App. 2007), there has been no temporary physical occupation of property, no substantial damage to the surface or appurtenances, and then a return of the damaged property to the landowner in a physically damaged condition.

**ii) Even under the improperly applied tort principles, the trial court lacked the evidence necessary to find that RFTA's construction of the Bus Station "substantially damaged" Sos' Property.**

Although the trial court found the Bus Station "damaged" Sos Property because it imposed a new and additional burden of lateral support onto it, R., p.

681-83, it lacked the evidence necessary to make this finding. The trial court lacked any evidence of a net increase in the lateral load upon Sos' Property resulting from RFTA's construction of the Bus Station because no previous lateral load measurements were placed before the trial court.

Under tort law, a landowner is absolutely entitled to the lateral support of his or her soil in its natural state by the soil of adjoining lands. *Vikell Investors Pac., Inc. v. Hampden, LTD,* 946 P.2d 589, 593 (Colo. App. 1997). When land is no longer in its natural state, but has been filled or altered, the entitlement to lateral support from adjoining land is not forfeited, but the landowner is entitled only to the lateral support from adjoining property that the land would have needed in its natural state, before it was filled or altered. *Id*. at 594 *citing* Restatement (Second) of Torts Section 817 (1979). Any improvement to the land is an artificial condition of the land. *Id*.

Here, the land was not in its natural state. An auto dealership with a paved parking lot had previously abutted the Sos Property. There were no measurements of the lateral load imposed by the auto dealership onto Sos' Property. There also are no measurements of the lateral load imposed by the Bus Station site onto Sos' Property. Consequently, without these vital reference points, there is absolutely no evidentiary basis for the trial court's finding that the additional lateral load

imposed by RFTA's construction of the Bus Station "substantially damaged" Sos' Property with an additional and substantial burden.

#### iii) The trial court improperly relied on Sos' business uses of his Property to find that RFTA's construction of the Bus Station resulted in a taking or a damaging of his Property.

As discussed in Part IV(C)(1) of this brief, because the measure of damages for this case is based upon Sos' personal and business uses of the Property, the trial court's decision to rely on restoration costs as the measure of damages is not supported by the law or any admissible evidence.

## III. Diminution of fair market value of Sos' Property is the only appropriate measure of damages for this case and there has been no diminution of value the Property.

### A) Standard of Review

The trial court's ruling regarding the appropriate measure of damages presents mixed issues of law and fact. Consequently, this Court should defer to the trial court's findings of fact where there is sufficient evidence in the record to support them; however, the trial court's conclusions of law are subject to a *de novo review*. *People v. Broder*, 222 P.3d 323, 326 (Colo. 2010).

B) **Preservation of Issue for Appeal**

RFTA preserved this issue for appellate review in the following portions of the Record: R., pp. 491-493, R., pp. 904-909, R., pp. 955-962, R., pp. 1026 and 1035, R., pp. 1076-1081, R., p. 1078, and R. pp. 1083-1085, specifically p. 1085.

The trial court's rulings on this issue may be found at R., p. 691.

C) **Contentions and Reasoning**

The trial court's reliance on restoration costs as the measure of damages is not supported by the law or any admissible evidence.

**1) Unless there is a sound basis to depart from it, diminution of fair market value is the presumptive measure of compensation in condemnation cases.**

The diminution in fair market value is the standard measure of compensation for injury to real property. *Dandrea v. Bd. of Cnty. Comm'rs*, 356 P.2d 893, 896 (Colo. 1960) ("The time-tested measure or damages ordinarily applied to cases involving injury to property is the difference between the reasonable market value of the property before and after the impairment."); *Scott v. Cnty. of Custer*, 178 P.3d 1240, 1248 (Colo. App. 2007) ("Generally, the proper measure of compensation for injury to real property is the diminution of market value.").

Where, as here, only a portion of a landowner's property is alleged to have been taken, the standard measure of compensation would be the fair market value

of the property interest actually taken and any diminution in the fair market value of the remainder. *La Plata Elec. Ass'n, Inc. v. Cummins*, 728 P.2d 696, 698 (Colo. 1986) ("When a portion of a landowner's property is taken, just compensation includes compensation for damage to the remainder of the property as well as compensation for the actual taking. The proper measure of compensation for damage to the remainder is the reduction in the market value of the remaining property that is caused by the taking."); *Herring v. Platte River Power Auth.*, 728 P.2d 709, 711 (Colo. 1986) (same).

**2) In this case, there exists no sound basis to depart from diminution of the fair market value as the presumptive measure of damages.**

The Colorado Supreme Court and its court of appeals have found that a court may depart from market value as the measure of damages where the property interest at issue (i) has no market value or (ii) was physically occupied, harmed, and then returned to the landowner. Absent special circumstances, the diminution in market value resulting from the condemnation is the proper measure of damages. *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 992 P.2d 1188, 1197 (Colo. App. 1999) (*Fowler I*), *rev'd on other grounds by Fowler II*.

Here, none of the conditions necessary to justify a departure from market value as the presumptive measure of damages are present. Sos' Property has a

defined market value and there exists no evidence of any harm to the market value of the Property. In addition, the alternative measure of damages endorsed by *Fowler II* and *Scott v. Cnty. of Custer* is not appropriate in this case because the factual circumstances justifying a deviation from the diminution of market value standard are not present: RFTA never physically occupied or altered Sos' Property.

**i) A court may depart from the fair market measure of damages where the landowner establishes that the condemned property interest has no market value.**

"Before the injured party may resort to a measure of damages other than before and after market value of the property, he should prove that the premises have no market value." *Dandrea v. Bd. of Cnty. Comm'rs*, 356 P.2d at 896. *See Big Five Mining Co. v. Left Hand Ditch Co.*, 216 P. 719, 720 (Colo. 1923) (affirming that the diminution of fair market value is presumptive measure of damages in a condemnation case and departing from this standard to value a "mining claim " because such a property interest "has no market value at all"); *City of Boulder v. Orchard Ct. Dev. Co.*, 527 P.2d 931, 933 (Colo. App. 1974) ("It is well established that the replacement cost of improvements on the land is not the measure of damages in condemnation cases where there is a market value for the property taken.").

Here, Sos did not establish that his Property had no value at all. In fact, the unrebutted testimony of Mr. Chase established that the property had a market value. Rick Chase, RFTA's expert real estate appraiser, valued Sos' Property at $1,540,000.00 and offered his undisputed expert opinion RFTA's construction of the Bus Station did not diminish this value in any way. R. Tr. April 27, 2016, p. 367, line 4 to p. 368, line 8 (R. Chase Test.); Supp. Ex., p. 000191 (RFTA's Ex. PP).

**ii) Restoration costs may serve as an independent measure of just compensation where the property interest at issue was temporarily occupied, physically harmed or damaged, and the damaged property was later returned to the landowner.**

Under *Fowler II*, 17 P.3d at 806-07, and *Scott v. Cnty. of Custer*, 178 P.3d 1240, 1247 (Colo. App. 2007), restoration damages may serve as independent factor in limited cases where there has been physical occupation of property, an alteration of the surface or appurtenances, and the property was then returned to the landowner in a damaged condition. In *Fowler II*, the city's contractors used the landowners' property as a base station for a major public improvement, caused extensive damage to it, and then returned the property to the landowner without repairing the damage. *Fowler II*, *supra* at 806-07. In *Scott v. Cnty. of Custer*, *supra* at 1247, the county entered the landowners' property and removed fifty-eight trees.

Here, the circumstances of *Fowler II* or *Scott* are not present in this case: RFTA did not occupy Sos' Property or alter or destroy the Property's surface or improvements.

**3) The trial court erred by establishing restoration costs as the measure of damages in this case.**

The trial court misconstrued *Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d at 388, to stand for the principle that a damaging claim requires an alternative measure of damages because a decrease in the market value of real property, alone, will never support a damaging claim:

> 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.

R. 692 (Order on Mot. for Summ. J) (underlined emphasis added, italicized emphasis in original).

The trial court latched on to the statement from *Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d at 388, and *City of Northglenn v. Grynberg*, 846 P.2d at 179, that a "mere diminution in value" will never support a damaging claim. However, there is no case law that indicates that there can be damaging claim in the absence of a diminution in value.

## IV. The trial court's decision to rely on restoration costs as the measure of damages is not supported by any admissible evidence.

### A) Standard of Review

Evidentiary rulings at trial are generally reviewed for an abuse of discretion. However, whether a trial court applied the proper legal standard to admit evidence is a question of law which an appellate court reviews *de novo*. *McGillis Investment Co. v. First Interstate Financial Utah, LLC.*, 370 P.3d 295, 300 (Colo. App. 2015).

### B) Preservation of Issue for Appeal

RFTA preserved this issue for appellate review in the following portions of the Record: R., pp. 491-493, R., pp. 904-909, R., pp. 955-962, R, pp. 1026 and 1035, R., pp. 1076-1081, specifically p. 1078, R., pp. 1083-1085, specifically p. 1085, R., pp. 491-493, R, pp. 1028, 1033, and 1035, and R. Tr. April 26, 2016, p. 212, ln. 8 to p. 214, ln. 7.

The trial court's rulings on this issue may be found at R., p. 691; R. Tr. April 27, 2016 (Jury Conference), p. 6, line 6-15 and p. 8, line 4-12; R., pp. 1226-1252 (final jury instructions); and R. Tr. April 26, 2016, p. 212, line 4 to p. 214, line 15.

### C) Contentions and Reasoning

The commission's receipt and consideration of incompetent and inadmissible evidence constitutes prejudicial error. *Bd. of Cnty. Comm'rs v. Vail Assoc., Ltd*, 468 P.2d 842, 845-47 (Colo. 1970). Where there is prejudicial error,

the fact-finder's certificate of ascertainment and assessment must be set aside and the cause remanded for a new hearing. *Id*. *See Fowler II*, 17 P.3d at 804-05 (affirmed a new trial where "speculative values directly and materially contributed to the [damages award]"). In this case, at the valuation hearing, the commission received and considered inadmissible evidence of Sos' restoration costs based on his personal and business uses of the Property as an independent measure of damages.

**1) The trial court erred when it permitted Sos' personal and business uses of the Property to serve as the basis for restoration costs.**

As a matter of law, in condemnation cases, personal and business uses of the condemned property interest are non-compensable. Personal inconvenience or annoyance or interference with trade or business may not serve as the basis for damages in a condemnation case. *Dandrea v. Bd. of Cnty. Comm'rs*, 356 P.2d at 896.

Standing alone, evidence of the business uses, business costs, or business potential of property are not admissible as an element of compensation in condemnation cases. *City and Cnty. of Denver v. Hinsey*, 493 P.2d 348, 351 (Colo. 1972). *City and Cnty. of Denver v. Tondall*, 282 P. 191, 192 (Colo. 1929) (same); *City of Englewood v. Denver Waste Transfer*, LLC, 55 P.3d 191, 198-99 (Colo.

App. 2002) (same). The rationale for this rule is that the land is being condemned, not the business, and the business can be relocated elsewhere. *Id*. "Financial success in business is also too ephemeral and is tied to considerations involving the type of business which is being conducted, management, and a variety of other factors which are not tied to the land." *City and Cnty. of Denver v. Hinsey*, 493 P.2d at 351.

The trial court improperly permitted Sos to rely on the personal and business uses of the Property to serve as the basis for his restoration costs. The testimony from Sos was quite clear: the only purpose for removing the earthen embankment and replacing it with a retaining wall would be to facilitate his business use of the Property. R. Tr. April 25, 2016, p. 75, line 15 to line 20 (Sos Test.) (removing the earthen embankment related solely to needs of tire business); R. Tr. April 25, 2016, p. 82, line 22 to p. 83, line 5 (Sos Test.) (The sole function of the retaining wall is to create additional level space for Alpine Tire's business needs); R. Tr. April 25, 2016, p. 85, line 12 to line 22 (Sos Test.) (same). Moreover, there was no testimony that the removal of the earthen embankment and construction of the retaining wall would enhance the fair market value of Sos' Property. Sos' only stated reason for a retaining wall was the business related rationale of additional tire storage and easier vehicular access to the service bays of Sos' tire shop. In fact,

Mr. Sos has not yet suffered any damage because he presented no evidence that he has built the retaining wall.

In addition, the cost of the retaining wall is not compensable because it was clear from the evidence that Sos' desired retaining wall did not exist prior to the construction of the Bus Station. "It is not enough to show that the remainder property was damaged; the property owner must show that the condemnation caused this damage." *Jagow v. E-470 Pub. Highway Auth.*, 49 P.3d 1151, 1160 (Colo. 2002). Because there existed no retaining wall before RFTA built the Bus Station, the construction of the retaining wall would not restore Sos' Property to a condition that existed prior to RFTA's construction; rather, it would improve it beyond its natural state at public expense.

Similarly, Sos' reliance on the passage of HB 14-1352 as a basis for restoration costs is also misplaced. First, any restoration costs Sos attributes to HB 14-1352 are non-compensable as the statute relates solely to Sos' tire business because the statute changed how Sos must dispose of used tires generated by his tire business. Second, all the restoration costs Sos attributes to HB-14-1352 did not result from RFTA's construction of the Bus Station. RFTA's construction of the Bus Station preceded the passage of HB-14-1352; RFTA completed construction

in September 2013 and HB 14-1352 became effective on July 1, 2014. Supp. Ex., pp. 000001-32.

**2) Robert Pattillo's expert opinion of the cost to construct the retaining wall is incompetent as a matter of law.**

Sos' expert's opinion is incompetent evidence as a matter of law because it is based on an unsupported assumption. An expert opinion that relies upon an unreliable, unsupported assumption is not competent evidence under CRE 703. *Farrar v. Total Petroleum*, 799 P.2d 463, 467 (Colo. App. 1990). "It is axiomatic that an opinion buttressed by assumed facts at variance with the actual facts has no evidential efficacy." *Dandrea v. Bd. of Cnty. Comm'rs*, 356 P.2d at 895.

In *Farrar v. Total Petroleum*, 799 P.2d at 467, the court of appeals found an expert's opinion to be incompetent evidence as matter of law because the expert's opinion was based on a speculative assumption. In *Farrar*, the expert witness offered an opinion of the total cost of reconstructing improvements on a condemned parcel. *Id*. at 455. However, the expert's ultimate opinion was based on construction costs obtained from a witness who admitted that he did not have the expertise to estimate such costs and that his construction cost estimates were speculative. *Id*. at 467.

Here, Sos' expert, Robert Pattillo, offered an expert opinion regarding the cost to construct the retaining walls. However, like the expert in *Farrar v. Total*

*Petroleum*, Pattillo's designs for the reinforced retaining walls relied upon the unfounded and speculative assumption that Sos has both the legal right to enter and to use RFTA's property in the construction of a both retaining walls. The evidence established that Sos did not have the legal right to enter and use RFTA's property for the construction of either retaining wall.

Sos' expert unreasonably relied upon his construction designs as the basis for his opinion of construction costs. Under CRE 703, a qualified expert may base his opinion upon any facts or data "of a type reasonably relied upon by experts in the particular field." "However, factual premises that are contrary to the undisputed evidence cannot, as a matter of law, be reasonably relied upon by any expert." *Farrar v. Total Petroleum*, 799 P.2d at 467. Here, it is undisputed that one of Mr. Pattillo's designs required temporary entry into and excavation of the RFTA property for its construction and the other wall designed by Mr. Pattillo required an entry into and excavation and a permanent intrusion into RFTA's property for the required soil nails. *See* Facts Section of this Brief, subsection e. It is also undisputed that Sos' does not have any legal right to intrude into RFTA's property to create space to construct a retaining wall or use the area underneath the Bus Station as anchor points to keep a retaining wall upright. *Id*.

### 3) Without Mr. Pattillo's opinion of construction costs, Sos has no admissible evidence of restoration costs.

The cost of constructing the retaining wall served as the sole basis of Sos' alleged restoration costs. Without Mr. Pattillo's expert opinion of the cost to construct the retaining wall, Sos is left with absolutely no evidence of restoration costs and no legal basis to support the commissioner's compensation award. An award for damages that lacks evidentiary support in the record is excessive as a matter of law and must be struck. *Jagow v. E-470 Pub. Highway Auth.*, 49 P.3d 1151, 1161 (Colo. 2002).

## V. The trial court erred in denying RFTA's proposed jury instructions.

### A) Standard of Review

The trial court has a duty to correctly inform the jury as to the applicable law of a case. In questions of jury instructions an appellate court first considers the given jury instruction *de novo* to determine whether the law is properly stated within the given instruction. *Bedor v. Johnson*, 292 P.3d 924, 926 (Colo. 2013).

### B) Preservation of Issue for Appeal

RFTA preserved these objections by filing with the court proposed commissioner instructions. R., pp. 1026, 1028, 1033, and 1035.

The trial court's rulings on this issue may be found at R., p. 691; R. Tr. April 27, 2016 (Jury Conference), p. 6, line 6-15 and p. 8, line 4-12; R., pp. 1226-1252 (final jury instructions).

C) **Contentions and Reasoning**

A trial court is obligated to instruct the jury correctly on the law applicable to the case. *Hansen v. State Farm Mut. Auto. Ins. Co.*, 957 P.2d 1380, 1384 (Colo. 1998). *See Gordon v. Benson*, 925 P.2d 775, 777-78 (Colo. 1996); *Jordan v. Bogner*, 844 P.2d 664, 667 (Colo.1993).

A trial court commits reversible error by giving an erroneous jury instruction. *Hise v. Romeo Stores Co.*, 199 P. 483, 485 (Colo. 1921). Courts have routinely held when the inaccurate instruction concerns a crucial fact in the case, reversal, remand, and a new trial are likely the only appropriate remedy. *Yampa Valley Elec. Ass'n, Inc. v. Telecky*, 862 P.2d 252, 258 (Colo. 1993).

In this case, the trial court erred by denying RFTA's proposed commissioner instructions.

**1) The trial court erred by denying RFTA's proposed commissioner instruction precluding the consideration of Sos' personal or business uses of his Property as a basis for compensation.**

RFTA submitted two proposed instructions asserting that personal or business uses of real property are non-compensable in condemnation cases. R, pp.

1028 and 1035. The trial court denied both instructions. In submitting these proposed instruction, RFTA also objected to the trial court's ruling permitting the commissioners' review of these uses as a basis for compensation. R., pp. 1138 and 1141-42. As noted earlier in Part IV(C)(1) of this brief, it was inadmissible to allow evidence of business uses of the Property to be used as a basis for determining compensation.

**2) The trial court erred by denying RFTA's proposed commissioner instructions establishing diminution of fair market value as the measure of damages for this case.**

RFTA submitted proposed instructions asserting the diminution of fair market value as the proper measure of compensation for this case. R., pp. 1026 and 1033. In submitting these proposed instruction, RFTA also objected to the trial court's ruling establishing restoration costs as the measure of compensation for this case. R., pp. 1137-38. As stated earlier in Part III(C) of this brief, it was improper to allow the commission to utilize a measure of damages other than diminution of market value.

## CONCLUSION

This Court must dismiss Sos' inverse condemnation claim because RFTA does not hold the power of condemnation. Even if the Court determines that RFTA has the power of condemnation, Sos has not proven that his Property has been

diminished in market value or that his use of his Property has been substantially impaired. In the alternative, this Court should set aside the commissioner's award of $75,000 because it was not supported by admissible or competent evidence.

**DATED** this 9th day of May, 2017.

Respectfully submitted,

MURRAY DAHL KUECHENMEISTER & RENAUD LLP

By: /s/ Malcolm Murray
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Joseph Rivera
Jesse D. McLain

**ATTORNEYS FOR ROARING FORK TRANSPORTATION AUTHORITY**

## CERTIFICATE OF MAILING

I certify that on May 9, 2017, a true and correct copy of the foregoing **OPENING BRIEF**, with the identified exhibits, was served via Colorado Courts E-Filing, electronic mail, and/or U.S. Mail on the following individuals, addressed as follows:

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