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COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, Colorado 80203	
Appeal –District Court, County of Garfield The Honorable John Fowler Neiley Case No. 2013CV30159	
Appellee/ Plaintiff: MICHAEL J. SOS v. **Appellant/Defendant:** ROARING FORK TRANSPORTATION AUTHORITY, a statutory regional transportation authority.	
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ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I 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 does not comply with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g). It contains 11,758 words. A Motion to Exceed Word Limit pursuant to C.A.R. 28(g)(3) was filed contemporaneous with this brief.

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). In response to each issue raised, the appellee has provided 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.

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ISSUES PRESENTED

The Appellant's (RFTA's) Statement of Issues does not raise any challenge to the trial court's extensive findings that RFTA's construction damaged, and resulted in a taking of, the Appellee's (Sos') property. Thus, to the extent that later sections of RFTA's brief appear to challenge those findings, any such challenge is inappropriate.

Sos otherwise accepts RFTA's Statement of Issues.

STATEMENT OF THE CASE

This is an inverse condemnation case arising from RFTA's construction of a large wall and earthen bank (the "RFTA Wall") contiguous to and on Sos' property as part of a larger parking structure. R. CF, pp. 5-7. The RFTA Wall prevents Sos from utilizing the affected portion of his property. R. CF, p. 684.

Once construction was complete and Sos observed the RFTA Wall's encroachment onto his property, he brought this action for inverse condemnation under Article II, Section 15 of the Colorado Constitution, which creates a cause of action when property is taken or damaged for public use without payment of just compensation. R. CF, p. 669.

The parties ultimately resolved the issue of whether a taking occurred on cross motions for summary judgment. R. CF, p. 692. The District Court ruled that the RFTA Wall's encroachment onto Sos' property did constitute a taking, for which the measure of damage was restoration damages. R. CF, p. 692.

The parties then litigated the amount of the damages in a three-day hearing

before a three-commissioner panel. R. CF, p. 1359. Sos quantified his damages through expert testimony that explained the estimated cost of designing and building an engineered wall sufficient to reclaim the usefulness of the damaged portion of Sos' property without destabilizing the RFTA Wall (the "Post-RFTA Wall"). R. CF, p. 1350. At the hearing, the Commissioners agreed with Sos' presentation and approach, determined his method to be reasonable, and awarded him $75,000 in restoration damages for the estimated cost of constructing the Post-RFTA Wall. R. CF, p. 1370.

FACTS

RFTA's inverse condemnation of the Sos property

A. RFTA's exercise of eminent domain

RFTA is a regional transportation authority created pursuant to section 43-4-601 *et seq.*, C.R.S. R. CF., pp. 6, ¶ 2 & 58, ¶ 2. RFTA has repeatedly affirmed and utilized its power of eminent domain to acquire properties.

For example, RFTA's Board of Directors, in a resolution dated August 22, 2011, acknowledged RFTA's statutory power of eminent domain and designated and authorized the Chief Executive Officer to utilize the same if necessary in the construction of the VelociRFTA bus rapid transit stations and related facilities. R. CF, pp. 474-76. The construction that caused the condemnation of the Sos property was one such facility. *Id.*

RFTA asserted to Sos that it had condemnation authority in correspondence dated August 17, 2011, entitled "Notice of Intent to Acquire." R. CF, pp. 348-59. In that Notice, RFTA informed Sos that it was necessary to acquire a temporary easement on his property to construct, install and maintain facilities that are part of RFTA's VelociRFTA bus rapid transit project. R. CF., p. 348. The correspondence included a booklet on condemnation stating that if Sos and RFTA were unable to negotiate a resolution, RFTA could acquire his property "by exercising its power of eminent domain." R. CF, p. 357.

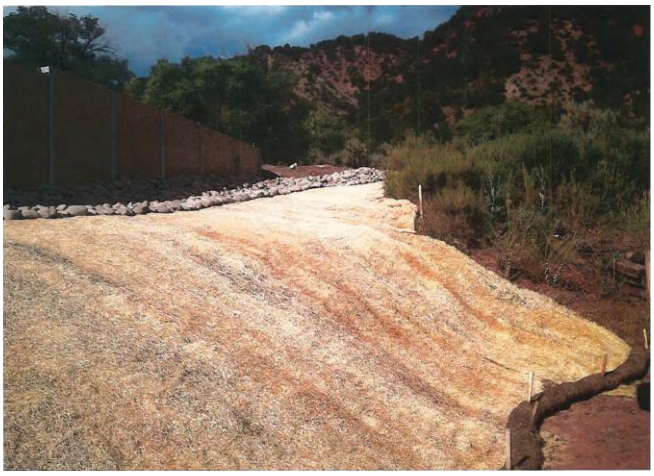
RFTA also filed two separate Petitions in Condemnation in the District Court for Pitkin County pursuant to the resolution discussed above. R. CF, pp. 736-45. In both, RFTA alleged that it was proceeding under its power of eminent domain. R. CF, pp. 737, ¶ 3 & 742, ¶ 3. In both cases, RFTA submitted proposed orders containing findings that the properties in question "had been duly and lawfully taken and condemned by petitioner Roaring Fork Transportation Authority pursuant to the statutes and the constitution of the State of Colorado," and the judge entered RFTA's proposed order containing those findings. R. CF, pp. 719-28.

B. Construction of the RFTA Wall

RFTA purchased the site contiguous to Sos' property from the Rudd Limited Liability Company on March 23, 2012, for the construction of a bus station. R. CF, pp. 360-61.

RFTA's bus-station project included the construction of the RFTA Wall, which included a large wall on RFTA's side of the property line and an earthen bank on Sos' side of the line. R. CF, p. 470. Although the RFTA Wall's earthen bank was of similar dimension and location to an earlier embankment that had preceded the RFTA Wall, it imposed a significant new intrusion on the Sos property: unlike the earlier berm, the RFTA Wall's earthen bank was a necessary structural element of RFTA's large adjacent wall. R. CF, p. 462. The RFTA Wall thus, according to both Sos and RFTA's engineers, physically intruded by imposing a significant and ongoing increase in force loading and burden on Sos' property, resulting in a tangible and measurable effect, requiring an engineered remedy. R. CF, pp. 671, 674, 684-85; R. Tr. (Apr. 26, 2016), pp. 196, l. 9–197, l. 4, & 201, l. 9–204, l. 9; Supp. R. Ex., p. 49.

The condition of the property in question prior to the construction of the RFTA Wall, and after the RFTA Wall's construction, is depicted in the photos below:



Supp. R. Exs. 4 & 15, pp. 40 & 51; R. Tr. (Apr. 25, 2016), p. 40, ll. 1-14, p. 41, ll. 11-21, p. 42, ll. 13-23, p. 45, ll. 1-15.

1. Use of the Sos Property Pre-RFTA

Sos had been storing used tires in this northeast area of his property for over twenty years because it is the only place he can store tires on his property; for most of that period of time, he was able to control the movement of tires so they could be taken to the local landfill. R. Tr. (Apr. 25, 2016), p. 38, ll. 4-19. He seldom, if ever, used the small embankment in question to store tires prior to the RFTA construction. Supp. R. Ex. 1, p. 37; Supp. R. Ex. 4, p. 40. Instead, the RFTA property's prior owner permitted Sos to park a truck on his property whenever needed for additional tire-storage space. R. Tr. (Apr. 25, 2016), p. 40, l. 20–p. 41, l. 10; Supp. R. Ex. 6, p. 42.

2. The 2014 Tire-Recycle Law

In 2014, the General Assembly passed a tire-recycle law, C.R.S. § 30-20-1401 *et seq.*, that created additional demands upon Sos and the area of his property in question. R. CF, p. 443. The tire recycler parks his trailer in the area, and Sos, now subject to the recycler's schedule in removing tires, has lost flexibility to control when the used tires are trucked away. R. Tr. (Apr. 25, 2016), pp. 48, l. 7–49, l. 7; *see also* Supp. R. Ex. FF, p.181; Supp. R. Ex. V, p. 171.

Sos had always maintained the area in question, and in the wake of the tire-recycle law's passage, he considered building a landscape wall in place of the berm. R. Tr. (Apr. 25, 2016), p. 41, l. 11–p.42, l. 18; Supp. R. Ex. 4, p. 40. Sos wanted to

remove the embankment back to his property line not only for tire storage, but also for snow storage, easier access and utilization of his service bays, and to park the recycler's trailer—all necessitated by the 2014 tire-recycle law. R. Tr. (Apr. 25, 2016), pp. 46, l. 24–47, l. 8, & 48, ll. 2-6.

3. Necessity of the RFTA-Wall's Earthen Bank

The removal of the earthen embankment adjacent to the RFTA Wall toward the end of RFTA's construction by RFTA's general contractor, Gould Construction, was not at Sos' request, but for ease of RFTA's construction. R. Tr. (Apr. 27, 2016), p. 394, ll. 12-15. Sos had requested, consistent with the parties' temporary easement agreement, that the earthen embankment not be put back in place, but RFTA's contractor informed him that it had to be reinstalled to stabilize the RFTA Wall—without it the RFTA Wall would fail. R. Tr. (Apr. 25, 2016), pp. 45, l. 1–46, l. 13; Supp. R. Ex. B, pp.156-58.

When RFTA's contractor removed a portion of the earthen bank in question (not all the earthen bank was removed), the RFTA Wall did not immediately fail because it was still being supported by a stepped-up bank extending on to Sos' property. Supp. R. Ex. 9. p. 45 (depicts the earthen embankment looking east as opposed to 44 looking west); R. Tr. (Apr. 26, 2016), pp. 199, l. 7–200, l. 17. And when RFTA's contractor returned the earthen bank on Sos' property to its approximate pre-Wall configuration, there were inherent changes to the bank: it was now a structural

element, necessary to maintain the RFTA Wall's stability and subjected to lateral forces imposed by the RFTA Wall. R. Tr. (Apr. 26, 2016), pp. 196, l. 9–197, l. 4.

C. Damages Caused by the RFTA Wall

At the compensation hearing, Sos presented a "sweep analysis" demonstrating the difficulty he has in accessing the north service bays on his property without full access of his northeast corner and highlighting his critical need for the additional flat space in the area taken by RFTA. R. Tr. (Apr. 25, 2016), pp. 165, l. 17–166, l. 16; Supp. R. Ex. 39, pp. 141-47.

1. Retaining Walls Before and After the RFTA Wall

Sos' engineering witness, Robert Pattillo—a structural engineer with forty years of professional experience—was accepted, without objection, as an expert in structural engineering and retaining-wall design and construction. R. Tr. (Apr. 26, 2016), pp. 186, l. 12–187, l. 25.

Pattillo's stated design goals in any plan to construct a wall to offset the RFTA Wall were to reclaim as much property for Sos as possible, while at the same time incurring the most reasonable costs possible. R. Tr. (Apr. 26, 2016), p. 208, ll. 19-24.

To calculate restoration costs, Pattillo designed a hypothetical retaining wall to reclaim Sos' property as it existed prior to RFTA's construction (the "pre-RFTA Wall"), which allowed him to compare the design and cost differences for any wall that could be built with the RFTA Wall in place. R. Tr. (Apr. 26, 2016), pp. 204, l. 10–205, l. 3, & 205, l. 15–206, l. 1; Supp. R. Ex. 30, pp. 111-12 [Sos Ex. 30].

The pre-RFTA Wall included an assumption that there would have been no objection to a temporary construction easement granted by Rudd (or RFTA). R. Tr. (Apr. 26, 2016), p. 211, l1. 13-18. While RFTA objected to this evidence, it presented no contrary evidence (e.g. evidence that Rudd (or RFTA) would have refused to grant such an easement). The commission, Retired Chief Judge Ossola presiding, ruled that Pattillo's pre-RFTA construction wall design and testimony were admissible, determining that the cooperation of any adjacent landowner in granting easements was a matter of weight of the evidence to be determined by the Commissioners. R. Tr. (Apr. 26, 2016), p. 214, ll. 13-15.

Pattillo's recommended design for a post-RFTA retaining wall was a soil-nail wall, which provided the needed stability to the RFTA construction, provided stability during its construction, and reclaimed a similar amount of property as the pre-RFTA Wall would have reclaimed (the "post-RFTA Wall"). R. Tr. (Apr. 26, 2016), p. 208, l. 25–p. 210, l. 7; Supp. Ex. 30, pp. 113-19. The post-RFTA Wall, like the pre-RFTA Wall, required an assumption that RFTA would not object to granting a subterranean easement for the soil nails, which would have in no way affected the stability of, or utilization of, any of RFTA's property or improvements, including the RFTA Wall. R. Tr. (Apr. 26, 2016), pp. 248, l. 23–249, l. 6. RFTA objected to evidence of the post-RFTA Wall because of this assumption, and the commission reiterated its previous ruling: RFTA's objection went to the evidence's weight, not admissibility. R. Tr. (Apr. 26, 2016), p. 214, ll. 13-15.

Pattillo did also design an alternative post-RFTA retaining wall based on a step-back design, which would be adequate to accommodate the lateral forces imposed on Sos' property and would not rely on any easements or agreements from RFTA (the "post-RFTA Wall Alternative"). R. Tr. (Apr. 26, 2016), p. 207-08. The evidence of the Post-RFTA Wall Alternative was admitted without objection. *See* R. Tr. (Apr. 26, 2016), p. 210-11. This wall carried a higher construction cost than the post-RFTA Wall, and it did not reclaim as much of Sos' property. R. Tr. (Apr. 26, 2016), p. 226, l. 17–p. 227, l. 14; R. Tr. (Apr. 26, 2016) p. 228, ll. 20-22; Supp. R. Ex. 29, p. 103.

2. Comparative Costs of the Pre- and Post-RFTA Retaining Walls

For the soil-nail portion of the post-RFTA Wall, Pattillo received a bid of $35,119.20 from B&Y Drilling, with whom he had significant experience and who he knew to be cost effective. R. Tr. (Apr. 26, 2016), p. 217, ll. 10-22; Supp. R. Ex. 34, pp. 135-40. The commission admitted B&Y Drilling's estimate of the cost to construct the soil-nail portion of the wall over RFTA's objection. R. Tr. (Apr. 26, 2016), p. 219, ll. 18-20.

Pattillo testified that in addition to B&Y Drilling's soil-nail work, the post-RFTA Wall would need cantilevered concrete walls at the ends, which would be consturcted by El Jebel Concrete. R. Tr. (Apr. 26, 2016), p. 219, l. 21–p. 220, l. 12.

Sos' concrete expert, James Marshall, reviewed both Pattillo's pre-RFTA Wall design drawings, and post-RFTA Wall construction design drawings. R. Tr. (Apr. 26, 2016), p. 264, l. 4–p. 265, l. 18; Supp. R. Ex. 30, pp. 111-19.

Marshall testified that the cost to construct the concrete portion of the post-RFTA Wall would be $64,221. R. Tr. (Apr. 26, 2016), p. 273, l. 17–p. 274, l. 16; Supp. R. Ex. 40, p. 149. This was in addition to and separate from B&Y Drilling's $35,119.20 soil-nail construction bid, for a total estimated cost of $99,340.20 to construct the post-RFTA Wall. R. Tr. (Apr. 26, 2016), p. 276, ll. 3-8.

Marshall testified that the pre-RFTA Wall, by contrast, would cost only $25,095, total, to construct. R. Tr. (Apr. 26, 2016), p. 271, l. 22–p. 272, l. 2; Supp. R. Ex. 40, p. 148.

RFTA offered no evidence of alternative wall designs or reclamation costs in opposition to the evidence admitted through Pattillo and Marshall.

SUMMARY OF THE ARGUMENTS

RFTA has the power of eminent domain pursuant to an express statutory grant at sections 38-1-202(1)(f)(XXXIX) and 43-4-604(1)(a)(IV), C.R.S. To the extent these statutes are ambiguous, RFTA's eminent-domain power is confirmed by established principles of statutory construction, as well as RFTA's conduct. Prior to the instant litigation, RFTA consistently represented to landowners—including Mr. Sos—that it held the power of eminent domain, and it successfully exercised that authority in two condemnation cases in Pitkin County District Court.

RFTA's construction of the RFTA Wall resulted in the taking or damaging of Sos' property. The RFTA Wall imposes significant lateral forces upon the Sos property, and depends upon the earthen berm on the Sos property for its lateral support. The RFTA Wall conscripted a portion of Sos' property to RFTA's service: RFTA's own engineers admit that Sos cannot excavate his property down the level he previously could, because if he did the RFTA Wall would be compromised and could fail.

Restoration damages were a proper measure of damages in this case, because Sos demonstrated a use, personal to him, for the taken property, and presented a reasonable proposal for restoring that use. Colorado applies the Restatement (Second) of Torts in determining the appropriate measure of damages in inverse condemnation cases. *See Scott v. Cty. of Custer*, 178 P.3d 1240, 1248 (Colo. App.

2007). A claimant who can show a use, personal to him, for property which has been taken or damaged may elect to seek restoration damages, not diminution of fair market value. Where restoration damages are appropriate, the claimant must only show that his proposal for restoration is reasonable. Comment "b" to the Restatement confirms that the reasonableness of any proposed restoration may be unrelated to the property's fair market value. Whether to allow restoration damages in lieu of diminution rests within the discretion of the trial court.

The commission's award of restoration damages was proper notwithstanding that Sos had not yet built the wall he proposed, and notwithstanding that no retaining wall had existed prior to RFTA's construction. Evidence of Sos' increased need to reclaim the damaged area of his property was properly admitted, because the imposed burden of lateral support flowed not from a single, transitory invasion, but from an ongoing invasion and permanent change.

Expert-witness evidence of damages which assumed that neither RFTA nor its predecessor in title would object to modest easements was also properly admitted. The evidence was relevant, probative, and assisted the Commissioners in determining a reasonable award of damages. The assumptions were reasonable under the circumstances and RFTA introduced no contrary evidence.

Finally, the trial court committed no error by denying RFTA's proposed jury instructions in this case. Consistent with applicable law and the legal finding that restoration costs were the proper measure of damages, the court rejected proposed

instructions that would have instructed the commission that Sos' 'business uses' were not a proper basis for a compensation award; Sos claimed no business damages, but instead only claimed damages, personal to him, relating to his own real property titled in his own name. His use of his property over time was relevant in determining the reasonableness of restoration costs. Also, proposed instructions requiring damages be based on diminution in value of the fair market value of the property were properly rejected based on the trial court's prior legal determination to allow Sos to seek restoration costs. The reasonable cost to build a wall to restore Sos' use of his property has no connection to the overall diminution in the fair market value of his property.

ARGUMENT

RFTA has the power of eminent domain.

A. Standard of Review

Sos agrees with RFTA's statement regarding the standard of review.

B. Preservation of Issue for Appeal

Sos agrees that RFTA preserved this issue for appeal.

C. RFTA has the power of eminent domain.

RFTA, as a regional transportation authority created under C.R.S. §43-4-601 *et seq.* (the "Regional Transportation Authority Law"), was granted the power of eminent domain by the Colorado legislature. *See* C.R.S. §§ 38-1-202(1)(f)(XXXIX), 43-4-603, & 43-4-604(1)(a)(IV). RFTA has successfully exercised its power of eminent domain in two cases before the Pitkin County District Court, and asserted it in numerous negotiations with landowners. R. CF, pp. 348-59, 468, 689 & 771. The District Court in this case thus not only ruled that RFTA has the power of eminent domain, it found RFTA's arguments to the contrary so disingenuous that it sanctioned RFTA for advancing them. R. CF, pp. 692-93, 766 & 781.

1. RFTA's power of eminent domain was expressly created by statute.

The General Assembly conferred the power of eminent domain upon regional transportation authorities, such as RFTA, via express statutory grant:

> The following governmental entities, types of governmental entities, and public corporations … may exercise the power of eminent domain:

…

> 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.

C.R.S. § 38-1-202(1)(f)(XXXIX).

Section 43-4-604(1)(a)(IV), C.R.S., authorizes RFTA's board of directors to exercise the power of eminent domain at a public hearing or in executive session, but restricts the board from delegating that power to officers or agents:

> 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:
>
> …
>
> Instituting an eminent domain action, which may be at a public hearing or in executive session…"

That RFTA's power of eminent domain is not specifically reiterated again in section 43-4-605, C.R.S. has no bearing on this analysis, because the preface to section 605 states that the powers listed within it are "[i]n addition to any other powers granted to [RFTA] pursuant to this part 6." C.R.S. § 43-4-605(1). One such other power is the power to institute an eminent domain action, either at a public hearing or in executive session, as granted by section 604(1)(a)(IV), C.R.S.

2. Prior to this litigation, RFTA consistently asserted, and twice exercised, its power of eminent domain.

RFTA recognized this power of eminent domain in the resolution of its board of directors authorizing the acquisition of the property that is the subject of this litigation:

> 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.

(RFTA Resolution No. 2011-12, R. CF, pp. 474-76.) RFTA then, pursuant to that resolution, successfully exercised its power of eminent domain in two cases before the Pitkin County District Court, Case Nos. 2011CV333 and 2011CV339. R. CF, pp. p. 720, ¶ 3; 725, ¶3; 737 & 742.

Indeed, RFTA has made statements in this litigation indicating that its contrary position in this case is actually an effort at obtaining, through disingenuous means, an appellate opinion reaffirming its power of eminent domain. R. CF, p. 698, ¶ 3.

3. Established principles of staturtory construction confirm RFTA's power of eminent domain.

RFTA's argument that it does not possess the power of eminent domain is based on strained principles of statutory construction that do not withstand legal scrutiny.

A reviewing court's "primary task in construing a statute is to determine and give effect to the intent of the General Assembly." *People ex rel. Morgan Cnty. Dep't of Human Servs. ex rel. Yeager*, 93 P.3d 589, 593 (Colo. App. 2004). Courts should adopt interpretations that harmonize the separate parts of a statutory scheme, seeking to "give effect to every word in the statute," and avoiding constructions that are "strained or forced" or would put different parts of the same statutory scheme at odds with one another. *Id.* at 593–94.

The power of eminent domain in Colorado is created by statute, and may be conferred "either expressly or implicitly." *Dep't of Transp. v. Stapleton*, 97 P.3d 938, 941 (Colo. 2004). Although the power of eminent domain may not be created by "vague or doubtful language" and will not be implied "where the statute relied upon by the condemning body is either silent on the subject of condemnation altogether or does not clearly indicate that the legislature intended … such authority," it does exist by "necessary implication," even absent an express grant, where needed to accomplish the legislature's underlying intent in adopting the condemnation statute. *Id.*

Here, the General Assembly created RFTA's power of eminent domain by express grant, stating that it "may exercise the power of eminent domain…as authorized in section 43-4-604(1)(a)(IV), C.R.S.," and that the powers of its board that may not be delegated include "[i]nstituting an eminent domain action, which

may be at a public hearing or in executive session." C.R.S. §§ 38-38-1-202(1)(XXXIX) & 43-4-604(1)(a)(IV).

Even if, for the sake of argument, that those enactments do not constitute an express grant, they confer the power of eminent domain via necessary implication. The statute is not "silent on the subject of condemnation altogether." *See Stapleton*, 97 P.3d at 941. Nor is the statutory language "vague or doubtful." *See id.* Instead, the provisions of sections 38-38-1-202(1)(f)(XXXIX) and 43-4-604(1)(a)(IV), C.R.S. regarding eminent domain "clearly indicate that the legislature intended for [RFTA] to have such authority." *See id.*

As the District Court noted, if the legislature believed that RFTA's board did not have the power of eminent domain to begin with, "[i]t would produce an absurd result" and "would be pointless and contradictory" to expressly restrict RFTA's board from delegating the power to institute an eminent-domain action and then describe the manner in which such an action may be pursued. R. CF, p. 769. "It would be equally absurd for the legislature to have included the express reference to § 43-4-604(1)(a)(IV) in § 38-1-202(1)(f)(XXXIX) of the Act if the legislature believed that the Regional Transportation Authority Law did not create a right of eminent domain." *Id.*

In sum, that the General Assembly granted RFTA the power of eminent domain is apparent on the face of the statute and reaffirmed, not only by applicable principles of statutory construction, but by RFTA's own conduct.

Construction of the RFTA Wall resulted in a taking of Sos' property.

A. Standard of Review

Sos agrees with RFTA's proposed standard of review. To the extent RFTA's brief purports to challenge evidentiary findings, the standard of review is abuse of discretion, not *de novo*.[1] *See* Opening Brief Part II(C)(2)(i) (concerning no evidence); Part II(C)(2)(ii) (concerning no evidence); and Part II(C)(3)(ii) (concerning no evidence); *People v. Harris*, 43 P.3d 221, 225 (Colo. 2002) ("the trial court's discretion will not be overturned on appeal unless the court's evidentiary ruling was manifestly arbitrary, unreasonable, or unfair."); *Chavez v. Parkview Episcopal Med. Ctr.*, 32 P.3d 609, 610 (Colo. App. 2001).

B. Preservation of Issue for appeal

Sos agrees with RFTA's statement regarding preservation of the stated issue for appeal.

C. The RFTA Wall occupies Sos' property through its engineered design; Sos' property now provides the RFTA Wall integral support, and has become a part of its foundation.

A taking or damaging of a property interest occurs when an entity clothed with the power of eminent domain substantially deprives a property owner of the use and enjoyment of his or her property. *City of Northglenn v. Grynberg*, 846 P.2d 175, 178 (Colo. 1993). *See also Scott v. County of Custer*, 178 P.3d 1240, 1248 (Colo.

[1] Since RFTA does not identify any challenges to the Trial Court's findings in its statement of issues, no such challenges should be considered.

App. 2007) (citing *Fowler Irrevocable Trust 1992–1 v. City of Boulder*, 992 P.2d 1188, 1193 (Colo.App. 1999) (*Fowler I*); *Fowler Irrevocable Trust 1992–1 v. City of Boulder*, 17 P.3d 797 (Colo. 2001) (*Fowler II*)). A taking can occur whenever a government interferes with the physical use, possession, enjoyment, or disposition of private property, or if the government exercises dominion and control over private property. *Grynberg*,846 P.2d at 182. This remains true even if only a portion of the property is affected by the government's action. *Herring v. Platte River Power Authority*, 728 P.2d 709, 712 (Colo. 1986).

When a landowner alters his property, he is only entitled to the lateral support from his neighbor that would have been needed to support his soil in its natural state. *Vikell Inv. Pac., Inc. v. Hampden, Ltd.*, 946 P.2d 589, 593–94 (Colo. App. 1997). A landowner has no duty to provide subjacent support for his neighbor's new construction. *See Pecanty v. Miss. S. Bank*, 49 So. 3d 114, 118 (Miss. App. 2010) (right of lateral support "applies to land in its natural state and not to the additional weight of buildings or other structures placed on the land.").

Thus, no neighbor has a right to engage in construction at or near his neighbor's property line if such construction would increase the lateral load placed upon his neighbor's property above its natural state. To do so deprives the neighbor of the full use of the affected land by conscripting it to provide subjacent support for the new construction. This bedrock principle was stated over a hundred and thirty years ago in the U.S. Supreme Court case of *Transp. Co. v. Chi.*, 99 U.S. 635, 645

(1878), which confirmed that the right of adjoining landowners to lateral support extends only to the soil in its natural condition and does not protect structures that increase downward and lateral pressure.

The Colorado Supreme Court has expanded upon the legal foundations of *Transp. Co.,* finding that Colorado's takings clause 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). Public entities have no right to build any structure that, by its construction, would thereafter limit an adjacent landowner's full use of his property. *See* 3 TIFFANY REAL PROP. § 753 (3d ed.).

The trial court found that the physical nature of the taking in this case was a fact agreed to by all experts, both RFTA's and Sos'. R. CF, p. 674. Indeed, RFTA's rebuttal expert's report provided the clearest written explanation of the physical taking:

> [W]e agree [with Sos' experts] 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. This is no different than any other property line adjacencies where previous construction across the property line impacts future development that follows. RockSol Consulting Group very clearly pointed this out in their June 5, 2014 letter. There are some constraints on slope cuts in the soil at the property line given the depth of the RFTA foundations. While there is some upper soil that can be removed that is not impacted at all by the foundation construction to the north, temporary shoring would still be required to

> lower existing grade on the Sos property so as not to disturb finished grade north of the property line.
>
> …
>
> JVA is in agreement with Baker and RockSol that the forces imposed by the RFTA wall [while being] far less than suggested by HP Geotech and Pattillo [yet exist, nonetheless].

R. CF, p. 975 (emphasis added).

RFTA's Rebuttal Report confirmed that the RFTA Wall rendered Sos' property "necessary to the stability of the RFTA retaining wall foundation." *Id*. (emphasis added). By nature of the Wall's design, Sos' property was taken by RFTA to form an integral part of its foundation, making Sos' property a "necessary" part of the Wall, requiring him to keep it undisturbed to keep the RFTA Wall upright. This physical imposition from the RFTA Wall cannot be eliminated, because it is an intrinsic part of the physical structure itself. Thus, the harm caused to Sos by the RFTA Wall represents a harm to his actual real property, caused by an "artificial structure placed upon it so as to effectively… impair its usefulness." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982).

1. Because the RFTA Wall physically occupies Sos' property, there is no legal requirement for him to show "substantial damage." Even so, Sos' property has suffered "substantial damage."

RFTA's assertion that there cannot be a "taking" without a showing of "substantially damaged" property (regarding fair market value) misstates the law; this premise does not appear in either of the cases RFTA cites for that proposition (which, themselves, are inapplicable). Nor does the word "substantially" appear in

the Colorado Constitution. *See* Colo. Const. art. II, § 15 ("Private property shall not be taken or damaged, for public or private use, without just compensation"). The Colorado Supreme Court has held that by including the word "damage," the Colorado Constitution "affords a property owner greater protections than those afforded by the U.S. Constitution." *Van Wyk*, 27 P.3d at 388.

RFTA's arguments suggesting an aggrieved owner must show "substantial damage" specifically related to "fair market value" are incorrect—those argumants are based on the cases of *Van Wyk* and *Grynberg*, which are inapplicable to this case.

In *Van Wyk*, the Colorado Supreme Court considered whether an increase in voltage carried across existing power lines and the resulting increase in electromagnetic radiation was or could be considered a "taking." *Van Wyk*, 27 P.3d at 387. The Court declined to find a physical invasion "[b]ecause we have concluded that noise, electric fields, and radiation are intangible, not physical, invasions, and because PSCo has not substantially deprived the Van Wyks of the use and enjoyment of their property." *Id.* at 388 (citing *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 695 (Colo. 2001)) (finding a taking will occur when a government "substantially deprives a property owner of the use and enjoyment of that property.").

In *Grynberg*, the court considered whether the construction of a reservoir over a party's mineral estate, together with the drilling of a single test hole in the mineral estate, together with the publishing of the geological information from that test hole,

constituted a "taking." *Grynberg*, 846 P.2d at 175. Under those unique circumstances the Court found no taking, because the drilling of one test hole was merely a single, transitory invasion, and because it did not interfere with Grynberg's use, possession, enjoyment, or disposition of his coal lease. *Id.* at 183.[2]

Unlike the case of *Van Wyk*, the forces projected on Sos' property from the RFTA Wall are not a mere annoyance to his person and affective of his property value, they alter the physical nature of his north-east corner, by impressing the land in that corner into the service of supporting the RFTA Wall, and preventing Sos from otherwise improving or using it. Unlike the case of *Grynberg*, these forces do not amount to a "single, transitory physical invasion," but rather a permanent change to the Sos property which impacts the soil itself, ruling out most all productive uses of the affected property. Thus, RFTA's arguments that Sos' Property has not been physically "damaged" by the RFTA Wall are too narrow.

The trial court ruled that the RFTA Wall rendered the northeast corner of Sos' Property partially unusable for the purposes it could have been used for prior to the Wall's construction. *See* R. CF, pp. 674-76. This amounts to physical taking under both Federal and Colorado law. *See Griggs v. Allegheny Cty., Pa.*, 369 U.S. 84, 88,

[2] The Court specifically declined to analyze whether the increased burden of the reservoir, itself, upon the mineral estate constituted a taking, for procedural reasons. *Id.* at 181,188.

82 (1962) (finding that rendering a person's property unusable may constitute a taking under certain circumstances).

i. RFTA's argument that a diminution of fair market value is the only measure of damage available to Sos is a misstatement of the law.

RFTA is wrong to suggest that a diminution of fair market value is the only appropriate measure of damages in an inverse condemnation case. The Colorado Supreme Court has often recognized that the costs of restoration may be an appropriate measure of compensation in such cases. *See Scott*, 178 P.3d at 1247; *Fowler I*, 992 P.2d at 1193 *, aff'd in part and rev'd in part,* 17 P.3d 797 (Colo. 2001) (*Fowler II*); *Bd. of Cty. Comm'rs v. Slovek,* 723 P.2d 1309, 1315–16 (Colo. 1986).

In this case, restoration damages were an appropriate measure of damages, and properly applied in the trial court, as outlined by Sos' Answer to RFTA's Argument II.(C)(3), below.

ii. RFTA's argument that a taking or damaging may only be found where a "substantial change" has occurred in Sos' use of his property is a misstatement of the law.

This argument of RFTA's has no merit. RFTA took or damaged a section of Sos' property by the construction of the RFTA Wall. RFTA's argument suggests that unless this taking or damaging actually shut down operations of Sos' business or otherwise caused a change in his use of his property, that it cannot be compensable. This is not a legal doctrine. The sole case cited for this false premise, *Troiano v.*

Colo. Dep't of Highways, 463 P.2d 448 (Colo. 1969), does not stand for this proposition.

The *Troiano* case involved a private motel, who sued CDOT (then CDOH) because in building I-70, CDOT put in an exit ramp (viaduct) such that the Plaintiff's would-be guests would now have to take an exit several blocks past her motel, and then double-back on secondary streets, to stay at the motel. *Troiano*, 463 P.2d at 448. Plaintiff also argued that the unsightliness of the viaduct in front of her motel had essentially destroyed its economic value, working a compensable "damaging." *Id.* The Supreme Court confirmed the trial court's ruling that a change in the routing of public access, without more, did not give rise to an inverse condemnation claim, and that to the extent the viaduct was unsightly, that harm was suffered by the public at large, not this one individual motel owner. *Id.*

In this case, Sos' access to his property by the public is unaffected, and the difficulties he faces with traffic flow <u>on</u> his property are very much unique to him, not the public. He did not claim damages from interrupted public access, and he did not claim damages related to the unsightliness of the RFTA Wall; instead he claimed an actual, physical taking and damaging of his property by the physical forces imposed by the RFTA's Wall. The *Troiano* case is thus irrelevant, and RFTA's argument, unavailing.

iii. RFTA's argument that Sos cannot show a unique damage is specious.

RFTA's suggestion that Sos can show no unique damage (as opposed to the public at large) flowing from the installation of a looming parking structure wall at his property's boundary, depending on his property for its support, adjacent to actively used areas of his property, are specious. Sos incorporates all the assertions made above concerning the physicality of the taking in refutation of RFTA's claim, and all the arguments in support of the correct application of "restoration damages" in this case (flowing form a damage to a use personal to him), below. For all those reasons, Sos clearly suffered "a unique or special injury which is different in kind from, or not common to, the general public," which is the standard to show injury in a "damage" based takings case under the Colorado Constitution. *Grynberg*, 846 P.2d at 178.

2. The trial court properly applied tort law because there had been a physical taking or damaging of Sos' property. The court considered evidence of Sos' personal uses of this property because such evidence was relevant and probative of the appropriate measure of damages – "restoration damages."

i. RFTA is incorrect to assert the trial court lacked a basis to apply tort principles; this is a physical takings case.

RFTA first argues that tort law principles should not have been applied in this case because there was no "temporary physical occupation," no "substantial damage," and no "return of the damaged property to the landowner in a physically

damaged condition." Supp. R. Opening Brief, p. 26. This is not the standard outlined by *Fowler II*, *Scott*, or Colorado law.

In *Scott*, Custer County removed 58 of Scott's trees from a 50-acre parcel, which affected only .156 acres of that parcel. *Scott*, 178 P.3d at 1244. Even under those circumstances, the Court found that a taking had occurred and that the taking was "substantial" enough to satisfy that concept in an inverse condemnation claim. *Id.* The Court in *Scott* also recognized reclamation costs and expenses were an appropriate measure of damages for Scott to pursue, even while ultimately determining not to award them because Scott could not identify a damage "personal to him" related to the loss of the trees. *Id.* at 1249.

Likewise, in *Fowler*, restoration and reclamation costs were again recognized as appropriate compensation mechanism in a temporary takings case where the city had damaged a portion of Plaintiff's property only while temporarily occupying it. *Fowler II*, 17 P.3d at 807.

RFTA's Brief's argument inverts *Fowler II* by suggesting restoration damages may *only* be recoverable in a temporary takings case; this is untrue. *Scott*, the other case cited by RFTA, confirms that they may also be awarded in permanent takings (or damaging) cases.

The facts of the present case, involving the permanent physical imposition of a wall that has conscripted Sos' property's use indefinitely, presents a more dramatic

example than either *Scott* or *Fowler II,* both of which allowed tort principles to be applied even in less dramatic takings cases.

ii. RFTA's argument that the trial court lacked an evidentiary basis to extrapolate from known facts is specious.

RFTA next suggests the Court should be estopped from extrapolating that the lateral forces imposed by the RFTA Wall were more significant than those that existed before the Wall's construction, despite the opinions of multiple engineering experts on this point. This hyper-technical argument suggests that Sos' case is doomed by Sos' failure to have had the foresight, years before RFTA's illegal taking of his property, to have hired a soils engineer to measure the lateral forces imposed by his neighbor's empty parking lot. This cannot be.

It is also incorrect. Sos' engineering expert, Pattillo, presented unrebutted evidence of the lateral forces imposed upon Sos' lot by the neighboring lot at the time RFTA purchased it, and the lateral forces imposed by the addition of the RFTA Wall. Patillo did this through his presentation of evidence of the three walls he designed to hold back those forces, and by demonstrating the difference in the type, caliber and cost of the Pre-RFTA Wall with the Post-RFTA Wall. R. Tr. (Apr. 26, 2016), pp. 205-09. Further, RFTA failed to rebut the reasonableness of any of Pattillo's substantive testimony on this point at trial. This is an unpersuasive argument.

iii. RFTA is wrong that the trial court improperly relied upon Sos' business uses of his property to find a physical taking.

RFTA misunderstands the role of the evidence presented at trial relating to Sos' use of his property. RFTA's taking was a physical taking of property. Sos was entitled to elect the measure of his damages and he elected to seek restoration damages, as was proper and allowable under, e.g., *Scott,* 178 P.3d at 1248 and *Fowler II*, 17 P.3d at 807. To demonstrate the reasonableness of his claimed damages, Sos had to demonstrate that his use of the damaged or taken property was sufficiently personal to him to allow an award. *See* Restatement of Torts § 929 (1979), cmt. b. The evidence presented was relevant and probative of those issues. Sos incorporates all responses below in Parts III and IV(C)(1) of this Response.

The correct measure of damages in this case was "restoration damages," which were correctly applied and determined by the Commission. Evidence of diminution in value is irrelevant to a restoration damages analysis.

Colorado courts have long held that restoration damages may be the proper measure of damages in an inverse condemnation case when the aggrieved party elects to pursue them, if the trial court confirms they are appropriate because the injury is sufficiently "personal" to the plaintiff. *See* Restatement (Second) of Torts § 929 (1979), cmt. b. To determine the amount of damages in such a case, the Commission merely has to determine if the Plaintiff's request is "reasonable" in relation to the sought-after restoration. The fair market value of the property has no bearing on a reasonableness analysis.

A. Standard of Review.

Sos disagrees with the Standard of Review offered by RFTA. The correct standard for reviewing a trial court's decision whether to allow restoration damages in an inverse condemnation case is abuse of discretion. *Scott*, 178 P.3d at 1248 ("We thus consider whether the trial court here abused its discretion by not departing from the diminution in value standard."). *See also Slovek,* 723 P.2d at 1317 ("[S]election of the cost of restoration as the proper measure of damages [is] within the limits of a trial court's discretion.").

B. Preservation of Issue for Appeal.

Sos agrees that RFTA preserved issues raised in its Section III for appeal.

C. Contentions and Reasoning.

The trial court correctly allowed Sos to seek restoration damages, and the Commission appropriately determined that Sos' proposed method of restoration was reasonable, and awarded him damages equal to the reasonable cost of the proposed restoration. RFTA's appeal on this basis must be denied.

1. Restoration damages are appropriate for a Plaintiff to seek in certain cases.

Restoration and related costs are a proper standard or measure of compensation in inverse condemnation cases. *See, e.g., Van Wyk*, 27 P.3d at 388; *Fowler II*, 17 P.3d at 805-806; *Scott*, 178 P.3d at 1248. The Colorado Supreme Court in *Scott* best explained how a Court may find that restoration damages are appropriate in an inverse condemnation case:

> [T]he trial court has discretion to apply the cost of restoration as the measure of compensation in an appropriate case. 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. There is no set list of factors the trial court must consider, but the court's principal goal is to reimburse "the plaintiff for losses actually suffered." The court must also "be vigilant not to award damages that exceed the goal of compensation and inflict punishment on the defendant or encourage economically wasteful remedial expenditures by the plaintiff."
>
> Because no set list of factors exists for the trial court to consider, the court has broad discretion when determining the standard of compensation.

Scott, 178 P.3d at 1248 (citations omitted) (emphasis added).

2. There was a sound basis for the trial court to allow Sos to seek restoration damages.

RFTA's assertion that restoration damages may only be utilized when a Plaintiff's property has suffered no diminution in value is a misstatement of law. The cases RFTA cites do not stand for this proposition. A trial court has wide discretion to allow restoration damages whenever the evidence demonstrates that a payment of the diminution of value "likely will not adequately compensate the property owner for some personal or other special reason." *Fowler II,* 17 P.3d at 805.

Here, the evidence at trial indicated the diminution in value occasioned by the RFTA Wall was slight, but that the actual harm imposed on Sos by the RFTA Wall was personally quite burdensome because of how Sos used his property, because of the configuration of the preexisting buildings on the lot, because of the flow of traffic through his lot, and because of the passage of the tire recycling statute which

exacerbated these problems. For the reasons explained in Sos' Answer Brief Section IV, below, this evidence was correctly admitted and all of it supported the trial court's decision to allow restoration damages, which was within its "broad discretion." *Scott*, 178 P.3d at 1248.

i. A trial court has broad discretion to allow restoration damages; RFTA's statement of law to the contrary is limited and untrue.

The modern law of when and whether to allow a Plaintiff in an inverse condemnation case to seek restoration damages is outlined by *Scott* and *Fowler II*. Both of these cases allowed the trial court broad discretion to make the determination of whether restoration damages were appropriate on a case by case basis. *See Scott*, 178 P.3d at 1248; *Fowler II,* 17 P.3d at 805. Neither *Scott* nor *Fowler II* refer to a "bright line" test based on fair market value like the kind RFTA suggested by citation to *Dandrea v. Bd. of Cty. Comm'rs*, 356 P.2d 893 (Colo. 1960), *Big Five Mining Co. v. Left Hand Ditch Co.,* 216 P. 719 (Colo. 1923), and *City of Boulder v. Orchard Ctr. Dev. Co.*, 527 P.2d 931 (Colo. App. 1974). *See Scott*, 178 P.3d at 1240; *Fowler II*, 17 P.3d at 797. Sos believes either that the modern doctrines outlined by *Scott* and *Fowler II* have overruled these earlier cases on this point, or that these older cases are meaningfully distinguishable from *Scott* and *Fowler II*.

In the first case, *Dandrea*, it is not clear whether this was an inverse condemnation case at all. The opinion explains almost nothing about the actual claims raised, other than to state that the property owner was seeking damages

related to the City's decision to adjust the elevations of the road adjacent to his property. *Dandrea*, 356 P.2d at 345. Though Westlaw's headnotes suggest that the case relates to "eminent domain," in the opinion the words "eminent domain," "inverse condemnation" and "taking" (in the legal sense) do not appear. It is therefore unclear whether the claims discussed in *Dandrea* were even brought under Colo. Const. art. II, § 15; if it were an inverse condemnation case, the facts suggest it was a "damages" case with no claim of a physical "taking," setting it apart from the instant case in a significant manner.

The second case, *Big Five Mining Co.*, is neither a condemnation case nor an inverse condemnation case, but rather a private dispute between two citizens related to property damage. *Big Five Mining Co.*, 216 P. at 719–20 . It is inapplicable to this proceeding or any of the concepts for which it is being cited.

In the last case, *Orchard Ctr. Dev. Co*., the action was not an inverse condemnation case at all but a condemnation action, instituted by the City of Boulder. *Orchard Ctr. Dev. Co*., 527 P.2d at 932. This is not the case here, where Plaintiff seeks damages for RFTA's inverse condemnation. The holding of this case is not relevant.

Finally, RFTA's statement that restoration damages are available if a property is rendered valueless is at odds of the Restatement from which the concept of restoration damages arises. The Restatement (Second) of Torts § 929 provides the origin for restoration damages as a measure of damages in an inverse condemnation

case. *See Fowler II*, 17 P.3d at 804. Comment b to the Restatement recognizes that the restorative cost standard will be appropriate even if the cost of restoration is disproportionate to the diminution of the value of the land, so long as there is a reason, personal to the owner, for restoring the original condition of his land:

> If a building such as a homestead is used for a purpose personal to the owner, the damages ordinarily include an amount for repairs, even though this might be greater than the entire value of the building. So, when a garden has been maintained in a city in connection with a dwelling house, the owner is entitled to recover the expense of putting the garden in its original condition *even though the market value of the premises has not been decreased by the defendant's invasion*.

Restatement (Second) of Torts § 929 (1979) cmt. b (emphasis added)). The case at issue here is a perfect corollary to comment b's hypothetical. The fair market value of Sos' property may not have been injured by the RFTA Wall, but his personal use of his property had been negatively impacted, making restoration damages appropriate.

ii. Restoration damages may be awarded under a variety of scenarios, subject to the discretion of the trial court; RFTA's statement of law is limited and untrue.

RFTA's arguments on this point are repetitive and duplicative. As an Answer to RFTA's argument Sec. III.(C)(2)(ii), Sos incorporates in full his earlier Answer to RFTA's argument Sec. II.(C)(3)(i), as if restated in full herein.

3. The trial court committed no reversible error by establishing restoration costs as the measure of damages.

The trial court committed no reversible error. It exercised its discretion to determine that the appropriate measure of damages was restoration damages, as it was entitled to do. Calling the matter "obvious," the trial court's factual findings supporting its decision were as follows:

1. The claimed damages were unique to Sos' property;

2. A damage award based on diminution in value would be an inadequate measure of damages;

3. "Damages to remedy the forces imposed by the [RFTA] Wall [were] appropriate in this case;" and

4. The cost of designing and building the proposed retaining wall was the only measure of what it would take to put Sos "'in the same pecuniary position as though the taking had not occurred' and to reimburse him 'for losses actually suffered'"

R. CF, p. 692 (citing *Fowler II*,17 P.3d at 805–06). The explained basis by the trial court matched the "principal goal" of restoration damages, which is "to reimburse 'the plaintiff his losses actually suffered," after considering "the nature of the owner's use and of the injury." *Scott*, 178 P.3d at 1248 (citations omitted). This decision was also in keeping with the purposes and findings outlined by, e.g., *Scott, Fowler II*, and the Restatement (Second) of Torts § 929.

The Commissioners' award of compensation to Sos after the damages hearing was supported by admissible evidence.

A. Standard of Review

Sos disagrees with the standard of review cited by RFTA. The alleged errors involve evidentiary rulings. The evidentiary rulings do not involve application of legal standards but rather the application of the Colorado Rules of Evidence to the admission or exclusion of evidence; such alleged errors are reviewed on the basis of abuse of discretion. *Hock v. N.Y. Life Ins. Co*., 876 P.2d 1242, 1251–52 (Colo. 1994).

B. Preservation of Issue for Appeal

Sos agrees that RFTA preserved issues raised in its Section IV for appeal.

C. The award of damages was proper.

1. Sos's evidence of use was of personal use as required for restoration damages, not, as RFTA argues, "business use."

RFTA argues that the Commissioners' award of compensation must be set aside, and a new trial or hearing held, because RFTA was prejudiced by the admission of evidence of "business uses" which are not compensable in a condemnation case. The argument is without merit. Sos introduced evidence of his personal use of his property, but made no claim for compensation and introduced no evidence of, e.g., lost profits, loss of business income, or diminution of business value. RFTA's Brief cites condemnation cases where the standard or measure of damages was diminution of value, not restoration costs, which makes such cases

inapplicable to the situation in this case. Yet even in RFTA's cited cases, evidence of the effect of a taking on a business was acknowledged as admissible if it could aid the Commission in determining issues of market value. *Dandrea v. Bd. Of Cnty. Comm'rs.*, 356 P.2d at 896; *Denver v. Bayer*, 2 P. 6, 7 (Colo. 1883).

Where, as here, the standard or measure of damages is restoration costs, evidence of the plaintiff's use of his affected property is even *more* relevant to assist in determining the appropriate proposal for restoration, the reasonableness of the costs of restoration, and the needs, personal to the owner, for seeking restoration in the first place. *Scott*, 178 P.3d at 1248; *Fowler II*, 17 P.3d at 805; *Slovek*, 723 P.2d at 1316; *McEwen v. MCR, LLC*, 291 P.3d 1253, 1262– 64 (Mont. 2012). All the cases cited above utilized and relied upon the Restatement (Second) of Torts § 929, comment b, in coming to their respective conclusions. All of these opinions agreed with the premise that such evidence is essential if "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 compensation necessary to reimburse the plaintiff for losses actually suffered.'" *Fowler II*, 17 P.3d at 805 (citing *Slovek*, 723 P.2d at 1316).

Sos identified his personal uses of damaged portions of his property both before and after RFTA's construction. R. CF, pp. 256-57. He testified to his need to reclaim his property in question in order to effectively utilize it for tire and snow storage and for better access, and that he understood the only way to accomplish

this was to construct an engineered wall. R. Tr. (Apr. 25, 2016), pp. 37-38. In summary, given the standard of restoration costs as the measure of damages, the admission of evidence of Sos' past, present, and intended future uses of his property was relevant, and of proper probative value. CRE 401 & CRE 403.

2. The award of damages is not dependent on Sos having actually constructed the post-RFTA Wall.

RFTA next argues that Sos' award of damages must be set aside because Sos presented no evidence that he had actually yet constructed the retaining wall in question. This argument is without merit. Sos presented extensive evidence regarding the reasonable cost of the wall he would have needed to build prior to RFTA 's construction, compared to the cost of the retaining wall he would need to build to reclaim and reasonably utilize his property. R. Tr. (Apr. 25, 2016), pp. 53-54. It is the well-established law of compensatory damages that an award can be based upon the costs of repair, notwithstanding that the repair may not have yet been accomplished. *Airborne, 8. v Denver Air Ctr., Inc.*, 832 P.2d 1086, 1091 (Colo.App. 1992); *Keefe v. Bekins Van & Storage Co.*, 540 P.2d 1132, 1135 (Colo.App. 1975).

3. The absence of a pre-RFTA retaining wall is similarly inapposite.

RFTA next argues that Sos' award of damages must be set aside because there was no evidence that RFTA's construction caused damage to Sos' property, because he had no wall prior to RFTA's construction. The argument is without

merit. The trial court entered findings of undisputed facts including the following: "All experts agree that some lateral or subjacent force loading is imposed on the Sos property as a result of the construction of the Wall (RFTA raised earthen bank and wall)." R. CF, p. 674. Further, the Court found that "it is an undisputed fact that the Wall imposes some lateral force on the Sos property that exceeds the lateral forces that existed prior to the Wall's construction." R. CF, p. 677. The Court further found 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." R. CF, p. 677.

Sos introduced evidence of the design and cost of a wall he would have had to have built (the "pre-RFTA Wall"), and subtracted that cost from the most reasonably designed retaining wall that he would now have to construct. R. Tr. (Apr. 25, 2016), pp. 54-55. This "net" restoration cost is the amount Sos presented as the necessary, reasonable cost to regain reasonable use of his property. This net cost is compensable as damages because (1) the fact of damage was clearly established and (2) all appropriate basis upon which to calculate reasonable restoration damages were in evidence. *Great West Food Packers, Inc. v. Longmont Foods Co., Inc.*, 636 P.2d 1331 (Colo. App. 1982); *Peterson v. Colo. Potato Flake & Mfg Co.*, 435 P.2d 237, 239 (Colo. 1967).

4. It was proper to consider the impact of the 2014 tire-recycling law on Sos' use of his property.

RFTA next argues that Sos' award of damages must be set aside since evidence of his increased need for the use of the damaged property resulting from the passage of the 2014 tire recycling statute should not have been admitted. The argument is without merit. RFTA first states that restoration costs attributable to this law are not compensable since the use is related to Sos' tire business. For all the reasons stated previously, the admission of evidence regarding use of and need for tire storage on the property in question was proper and relevant in determining reasonable restoration costs and the same met the legal standards for admission. CRE 402 & CRE 403. The statute may have affected his business operations, but the increased need for use of the damage property were personal to him, as the fee simple owner of this property, who merely used his property to facilitate his business.

RFTA further argues that since the tire recycle statute was passed after the RFTA construction damaging Sos' property, the evidence of increased need should not have been admitted. The argument is without merit. At the Commissioners' hearing, there was no objection by RFTA to this evidence. The trial court found that the RFTA construction was not a single transitory invasion of the Sos property. It has been recognized that in similar, albeit trespass cases, a plaintiff can introduce evidence of and recover any damages up to the time of trial resulting

from a continuing trespass. *Hawley v. Mowatt*, 160 P.3d 421, 424 (Colo. App. 2007). Where the damaging is on a continual basis until Sos can construct a wall to reclaim his property, evidence of increased need for use of the property is relevant to his reasonable restoration costs and his need for the manner and type of restoration sought. Such evidence meets the criteria of relevancy and has probative value. CRE 401 & CRE 403.

5. Patillo's assumptions were reasonable because they served to minimize Sos' damage calculation.

RFTA next argues that Sos' award of damages should be set aside because his evidence of damages relied on an expert's opinion which was, itself, based on unreliable, unsupported assumptions. The argument is without merit. The assumptions involved two of the wall designs of structural engineer, Robert Pattillo. One design assumed there would be no objections by Rudd, RFTA's predecessor in title, for a temporary construction easement (to build a the Pre-RFTA Wall), and a second design assumed there would be no objection by RFTA for a permanent "subterranean" easement not affecting RFTA property (to build a "Post-RFTA wall"). R. Tr. (Apr. 26, 2016), pp. 248-249.

For support, RFTA relies on *Farrar v. Total Petroleum, Inc.*, 799 P.2d 463, 467 (Colo. App. 1990). The case is inapposite since it stands for the proposition that facts crucial to an ultimate expert opinion but that are contrary to undisputed evidence in the case cannot be relied upon by an expert. In this case, RFTA

provided no contrary evidence, like, for example, testimony from either a RFTA Board member or RFTA's predecessor, Rudd, that no easement would be granted or that one would not have been granted if requested. Pattillo's assumptions were reasonable under the circumstances and, without any contrary evidence presented, may not be disregarded. RFTA's objections to the evidence on this basis elicited from both Pattillo and from concrete expert, James Marshall, were overruled by Judge Ossola, and the Commission utilizing the balancing and finding that the issue involved a matter of weight not admissibility. R. Tr. (Apr. 26, 2016), pp. 257-61; CRE 403.

At the compensation hearing, Pattillo was offered without objection and accepted as an expert in structural engineering and retaining wall design, having spent 40 years in the profession and having designed many retaining walls. R. Tr. (Apr. 26, 2016), p. 187.

In his engagement in this matter, Pattillo's design goals were to design a wall to recover as much of Sos' property for him as possible at the most reasonable cost. R. Tr. (Apr. 26, 2016), p. 190. In that regard, and for damage or cost evaluation purposes, Pattillo designed a hypothetical, Pre-RFTA Wall which Sos would have needed to build, notwithstanding RFTA's construction. It was hypothetical in nature since it was designed long after RFTA's construction and only designed for the purpose of reducing damages and meeting the requirement to demonstrate "reasonable" restoration costs. *Scott*, 178 P.3d at 1248; *Fowler*

II, 17 P.3d at 805*;* Restatement (Second) of Torts § 929, cmt. b. The cost of the Pre-RFTA Wall was estimated by concrete expert Marshall to be $25,000; his estimation assumed there would be a temporary construction easement from Wayne Rudd, RFTA's predecessor in title. R. Tr. (Apr. 26, 2016), p. 272. There was significant evidence introduced supporting the likelihood that Rudd would not have objected to this easement. Further, RFTA presented no evidence at the hearing that such an easement would have been objected to.

Pattillo's recommended Post-RFTA Wall was of a soil-nail design which was chosen in order to meet his design criteria of recapturing as much of the Sos property as possible at the most reasonable cost. R. Tr. (Apr. 26, 2016), p. 209. The design reasonably assumed that RFTA would not object to a subterranean or underground easement which would in no way affect its improvements or property, and RFTA presented no evidence that it would not agree to such an easement. Pattillo's assumption was based on his 40 years as a structural engineer with expertise in that area as well as retaining wall designs. R. Tr. (Apr. 26, 2016), p. 185-86. Pattillo testified as to the costs involved with the construction of the soil nail portion of the wall and James Marshall testified as to the concrete construction of that portion of the wall. R. Tr. (Apr. 26, 2016), P. 227. Pattillo's design testimony and evidence as well as Pattillo's and Marshall's testimony and evidence of costs were accepted into evidence again utilizing the balancing test and finding that the admission of such evidence was a matter of weight and not

admissibility. R. Tr. (Apr. 26, 2016), p. 214 (Pattillo); R. Tr. (Apr. 26, 2016), p. 271 (Marshall); CRE 403. Further, such expert testimony and evidence was admissible since it was relevant and assisted Commissioners by providing a reasonable basis for computing damages. C.R.E. 401; C.R.E. 703. Also, while there may be some uncertainty as to whether RFTA would object to an easement, such uncertainty should not and would not bar recovery. *Tull v Gundersons, Inc.*, 709 P.2d 940, 943 (Colo. 1985). There is as much reason to speculate that RFTA would allow an easement that would diminish the award of damages being sought by its neighbor, Sos, as there is to speculate RFTA would not allow it, forcing Sos to seek increased damages to build a more expensive wall.

The Commissioners had great discretion in determining the admissibility of the damage evidence elicited from Pattillo and Marshall notwithstanding that Pattillo could not say with certainty whether such an easement would be granted. *Klein v. State Farm Mut. Auto. Ins. Co.*, 948 P.2d 43, 50 (Colo.App. 1997); *Vento v. Colo. Nat. Bank-Pueblo,* 907 P.2d 642, 645–46 (Colo.App. 1995). In any event, it is well established that, even if evidence regarding damages is somewhat uncertain, it still is admissible where the fact of damage *is* certain. *Great West Food Packers, Inc.*, 636 P.2d at 1333; *Peterson,* 435 P.2d at 239.

Lastly and significantly, Sos presented evidence through Pattillo of the design of a different wall: a step-back wall which did not rely on easements or any other agreements with RFTA. R. Tr. (Apr. 26, 2016), p. 207-08. The wall was not

necessarily recommended by Pattillo because it reclaimed less property for Sos and its cost was higher than the soil-nail wall. R. Tr. (Apr. 26, 2016), p. 208. However, from this unrebutted evidence, the Commissioners could reasonably deduce that the cost of the step-back wall would have been more than the cost of the soil-nail wall, and therefore an award equal to the cost of the proposed soil-nail wall less the cost of the Pre-RFTA Wall was the most reasonable under the circumstances. Again, uncertainty regarding damages will not defeat recovery if there is enough evidence in the record for the Commissioners to make a reasonable estimation of damages, which was the case here. *Tull*, 709 P.2d at 943.

6. The award of restoration costs was supported by admissible evidence.

RFTA next argues that Sos' award of damages must be set aside because there was no admissible evidence of restoration costs since Pattillo's opinions should have been stricken or disallowed. For all of the reasons stated above, the expert testimony and evidence offered by and through the structural engineer, Pattillo, and the concrete expert, Marshall, were appropriately admitted into evidence, and the Commissioners in their award are presumed to have considered the weight of the evidence to have allowed a reasonable estimate of damages. It was incumbent upon the Commissioners to award an amount which would have compensated Sos if the evidence was sufficient to allow a reasonable estimate of damages. *Great West Food Packers, Inc.*, 636 P.2d at 1333. They did so.

The trial court did not err in denying RFTA's proposed jury instructions.

A. Standard of Review.

Sos does not disagree with the standard of review cited by RFTA.

B. Preservation for Issue of Appeal.

Sos agrees that RFTA preserved issues raised in its Section V for appeal.

C. Argument.

1. The trial court properly disallowed jury instructions relating to the calculation of business damages.

RFTA argues that the trial court erred by denying a proposed, modified instruction of CJI-Civ. 36:5, and a special instruction offered by RFTA, both of which related to evidence of personal or business uses of property as a basis for determining compensation. R. CF, pp. 1028, 1035. This argument is without merit. Sos' claim, as the trial court noted, was for restoration costs from damages to his real property owned in his own name, and did not include claims for damages to his business. Sos' uses of his property and his personal reasons for restoration of his property were relevant in light of the trial court's previous rulings and the relevant law on restoration costs or damages. Restatement (Second) of Torts § 929 cmt. a & b; *Fowler II*, 17 P.3d at 804.

2. The trial court properly disallowed jury instructions relating to diminution in value.

RFTA next argues that the trial court erred by denying a proposed, modified instruction CJI-Civ. 36:3 and a special instruction proposed by RFTA. R. CF, pp.

1026 & 1033. The argument is without merit. The modified instruction was further modified by the trial court to comply with its prior rulings and Colorado law, and it was given as Instruction 17. R. CF p. 1217. RFTA's special instruction was rejected since it relied on the incorrect standard of measure of damages, namely, diminution of value and not restoration costs. *See Scott*, 178 P.3d at 1247; *Fowler II*, 17 P.3d at 804; *Slovek,* 723 P.2d at 1315–16; Restatement (Second) of Torts § 928.

CONCLUSION

Since the jury instructions were correct, the award of damages was supported by sufficient record evidence, restoration damages are a proper measure of damages in this inverse condemnation case, construction of the RFTA Wall constituted a taking or damaging of Sos' property, and RFTA has the power of eminent domain, this Court should AFFIRM the judgment below.

REQUEST FOR APPELLATE FEES

Sos requests judgment against RFTA for his appellate fees and costs as the prevailing party in this action pursuant to C.R.C.P. 54(d), C.R.C.P. 121 § 1-22, C.R.S. § 24-56-116, C.R.S. § 13-16-104, C.R.S. § 13-16-122, C.R.S. §38-1-116, C.R.S. § 5-12-102(4)(b), C.A.R. 39(a)(2), and C.A.R. 39.1.

DATED July 11, 2017.

Respectfully submitted,

WORRELL ▪ DURRETT ▪ GAVRELL

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CERTIFICATE OF MAILING

I certify that on July 11, 2017, a true and correct copy of the foregoing **RESPONSE BRIEF OF APPELLEE/PLAINTIFF**, 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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