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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.	▲ **COURT USE ONLY** ▲
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APPELLANT'S REPLY IN SUPPORT OF OPENING BRIEF

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 5,695 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.

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INTRODUCTION

The $75,000 award of restoration costs to Sos resulted from a combination of errors that built upon each other. The correction of any one of these errors by this Court mandates a dismissal of the case or, at the very least, a reversal of the awarded restoration costs.

At the outset, the trial court incorrectly held that RFTA holds the power of eminent domain and a damaging resulted from RFTA's construction of the Bus Station and improperly granted Sos a valuation trial. When this Court corrects these errors and rules that RFTA does not hold the power of condemnation or that a damaging did not occur, Sos' condemnation claim fails as a matter of law and must be dismissed.

In administering the improperly granted valuation trial, the trial court and commission further erred in three related ways. First, the trial court unlawfully set restoration costs as the measure of damages. The trial court then compounded this error by permitting Sos to present and rely on improper evidence as the basis for his claim to restoration costs: Sos' alleged need to restore the Property was impermissibly based on Sos' business uses of it. The commission then committed prejudicial error by permitting Sos to establish the actual cost of restoration based

upon incompetent evidence. When this Court corrects any of these errors, Sos' claims either fail as a matter of law or the award of compensation is reversed.

ARGUMENT IN REPLY

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

Sos incorrectly contends that RFTA's conduct in participating in earlier condemnation actions combined with C.R.S. §§ 38-1-202(1)(f)(XXXIX) and 43-4-604(1)(a)(IV) establish that RFTA has the power of eminent domain. This argument lacks merit for two reasons: (A) Sos fails to establish any legal significance to RFTA's presence as a co-petitioner in condemnation actions in Pitkin County and (B) C.R.S. §§ 38-1-202(1)(f)(XXXIX) and 43-4-604(1)(a)(IV) do not expressly or impliedly confer the power of condemnation to RFTA, either independently or in combination.

A) Sos fails to establish any legal significance to RFTA's presence as co-petitioner.

The Colorado Supreme Court approved the use of co-petitioners in situations where there is uncertainty as to the authority to condemn or as to the scope of the powers granted. In *Dep't of Transp. v. Stapleton*, 97 P.3d 938 (Colo. 2004), the Colorado Department of Transportation (CDOT) and the Board of County Commissioners of Pitkin County (County) served as co-petitioners in a condemnation action because both were unsure whether they held the power to

condemn land to construct a parking and transit facility. As co-petitioners, both CDOT and the County asserted in their pleadings they were authorized to exercise the power of eminent domain. *Id*. at 939-40.

On appeal, the Court reviewed the question of whether CDOT or the County possessed the statutory authority to condemn land to construct a parking and transit facility. The Court offered no critique of the presence of CDOT and the County as co-petitioners or the reason for it. Instead, upon finding that CDOT possessed the necessary statutory authority, the Court concluded it analysis. *Stapleton*, 97 P.3d at 940-41. The Court found it unnecessary "to reach the issue of whether the County also possesses statutory authority to condemn the same property." *Id.*

The partnership between CDOT and the County in *Stapleton* is very similar to RFTA's partnership with the Town of Basalt in the Pitkin County condemnations cited by Sos. Confronted with uncertainty regarding its condemnation powers, RFTA partnered with the Town of Basalt. Pursuant to *Stapleton*, RFTA and the Town of Basalt served as co-petitioners in condemnation actions in Pitkin County, 2011cv339 and 2011cv333. R. 736-40 (2011cv339) and R. 741-45 (2011cv333). The Town of Basalt's presence as a co-petitioner protected the condemnations from challenges relating to the power to condemn. The Town of Basalt, as a home rule city, unquestionably held the power to condemn for the

purpose of constructing bus rapid transit stations and related improvements. In the event a respondent challenged to the power to condemn, with the Town of Basalt as a co-petitioner, it would be unnecessary to reach the issue of whether RFTA held the power of condemnation. *Stapleton*, 97 P.3d at 940-41.

RFTA also entered a similar partnership with the City of Glenwood Springs. Like the Town of Basalt, the City of Glenwood Springs unquestionably holds the power of eminent domain for the purpose of constructing bus rapid transit stations and related improvements. And pursuant to its partnership with RFTA, the City Council of Glenwood Springs adopted a resolution authorizing condemnation and was prepared to act as a co-petitioner in a condemnation action. R. 698, ¶ 3. However, this partnership proved unnecessary because RFTA negotiated a pre-filing purchase of the property necessary for the Bus Station from the landowner.

Curiously, Sos fails to inform this Court of the Town of Basalt and RFTA's presence as co-petitioners. Sos directs this Court's attention to RFTA's presence in the condemnation actions filed in Pitkin County as evidence that RFTA unequivocally holds the power of eminent domain. Amend. Answer Br. ("Answer"), pp. 13-14. However, in making this argument to this Court, Sos

declines to make any mention of the Town of Basalt's presence in the case as RFTA's co-petitioner. *Id*.

This Court must also reject the argument that RFTA obtained the power of condemnation by participating in a condemnation action as a co-petitioner because it leads to an absurd result. Under this reasoning, in cases where the power of condemnation was not challenged by a respondent, an entity would obtain the power of eminent domain merely by asserting it. It creates a new power for an agency by estoppel. There is no authority for the power of eminent domain to be created by estoppel.

B) C.R.S. §§ 38-1-202(1)(f)(XXXIX) and 43-4-604(1)(a)(IV) do not expressly or impliedly confer the power of condemnation to RFTA, either independently or in combination.

1) C.R.S. § 38-1-202(1)(f)(XXXIX) does not expressly or impliedly grant the power of condemnation to RFTA.

Numerous Colorado courts have clearly stated in numerous cases that the power of condemnation cannot be found in the absence of a specific and unequivocal grant of the power. *Mack v. Town of Craig*, 191 P. 101, 101 (Colo. 1920) ("When the right to exercise the power [of eminent domain] can only be made out by argument or inference, it does not exists."); *Beth Madrosh Hagodol v. City of Aurora*, 248 P.2d 732, 735 (Colo. 1952) (the power of condemnation cannot be found by implication in the absence of a specific and unequivocal grant

of the power); *Town of Parker v. Colo. Div. of Parks and Outdoor Recreation*, 860 P.2d 584, 588 (Colo. App. 1993) (the court provides examples of state statutes where the Colorado General Assembly specifically and unequivocally granted the power of condemnation to an entity).

C.R.S. § 38-1-202(1)(f)(XXXIX) cannot be reasonably interpreted as a specific and unequivocal grant of the power of eminent domain to RFTA. To do so would render meaningless C.R.S. § 38-1-201(2)(e), which clearly states that this Part 2 of Title 38, Article 1 does **not** grant, restrict or modify the power of eminent domain. Any fair reading of section 201(2)(e) defeats even the most strained attempt to interpret C.R.S. § 38-1-202(1)(f)(XXXIX) as granting the power of eminent domain to RFTA.

2) C.R.S. § 43-4-604(1)(a)(IV) does not expressly or impliedly grant the power of condemnation to RFTA.

C.R.S. § 43-4-604(1)(a)(IV) does not grant of the power of eminent domain; instead, it restricts and limits it. Section 604(1)(a)(IV) precludes the delegation of the power of eminent domain. Pursuant to the standards set forth by *Mack v. Town of Craig* and its progeny, this restriction on the delegation of the power of eminent domain cannot expressly or impliedly grant the power to RFTA.

Sos contends the Colorado General Assembly intended to convey the power of condemnation by establishing a procedure restricting the delegation of it. *See* R.

766-72 (Or. on Mot. to Alter or Amend Order Granting Partial Summ. J); Answer, pp. 13-17. However, the court specifically addressed and rejected this argument in *Town of Parker*.

In *Town of Parker*, 860 P.2d at 588, the town asserted the power to condemn state-lands based on language in C.R.S. § 38-3-101 that created a procedural pathway related to the use of the condemnation power. The court of appeals found the procedural pathway could reasonably be interpreted in two ways: it could be interpreted expansively as both a grant of the power to condemn state-lands for entities already holding the power of condemnation and a procedural pathway for doing so; or, it could be interpreted narrowly as merely establishing the procedure to be followed by entities otherwise authorized to condemn state-owned lands. *Town of Parker*, 860 P.2d at 588.

The opinion in *Town of Parker* relied on *Coquina Oil Corp. v. Harry Kourlis Ranch*, 643 P.2d 519 (Colo. 1982), to hold the narrower interpretation controlled. 860 P.2d at 588. Under the rule articulated by *Coquina Oil Corp.*, courts must construe condemnation statutes narrowly and against the person asserting the power of condemnation. *Town of Parker*, 860 P.2d at 588. Consequently, the mere existence of a procedural pathway, alone, does not convey the power of condemnation. *Id*. at 588-89.

3) RFTA does not expressly or impliedly hold the power of eminent domain because the Colorado General Assembly did not define the scope or purpose of such a power.

To lawfully condemn land, there must be an express or implied statutory basis granting the authority to condemn and a similar statutory basis defining the purpose and scope of the power. In *Stapleton*, *supra* at 944, the Court found lawful exercise of the power of condemnation requires two related components: the statutory authority to condemn and the statutorily defined purpose or scope of the condemnation power. To determine whether the power of condemnation is properly exercised, in addition to the statutory basis of the power to condemn, there must be also be a "sufficiently direct functional relationship" between the statutorily defined purpose for which an entity may condemn and the actual condemnation. *Id*. *See Bd. of Cnty. Comm'rs v. Intermountain Rural Elec. Assoc.*, 655 P.2d 831, 833-34 (Colo. 1982) (the court held that the county possessed the power to condemn but this power did not extend to office buildings); *Town of Parker*, 860 P.2d at 587-89 (the court held the town possessed the power to condemn but not the power to condemn state-owned lands).

Here, it cannot be reasonably argued that C.R.S. §§ 38-1-202(1)(f)(XXXIX) and 43-4-604(1)(a)(IV) provide any express or implied guidance relating to the scope or purpose of RFTA's power to condemn. There is no elaboration in the

statute of the purpose or the scope of the power conferred. There is only a restriction on its delegation. Consequently, RFTA's power to condemn is not perfected and does not exist because Colorado General Assembly did not expressly or impliedly define the scope or purpose of such a power.

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

A) RFTA's construction of the Bus Station did not result in a taking of Sos' Property.

The trial court correctly held this is not a physical takings case. R., p.679. The trial court correctly found this case is not "a physical ouster or physical appropriation case" because RFTA did not physically occupy Sos' Property. R., p.679. And RFTA does not appeal this finding by the trial court. *See* section II(C)(1) of RFTA's Opening Br.

To the extent that Sos' Answer contends that the trial court incorrectly found that RFTA's construction of the Bus Station constituted a physical taking of Sos' Property, RFTA requests that this Court dismiss this challenge as procedurally improper and contrary to condemnation law. Sos has not filed a cross-appeal regarding this issue.

B) RFTA's construction of the Bus Station did not result in a damaging of Sos' Property.

The trial court misapplied the law to find that RFTA's construction of the Bus Station resulted in a damaging of Sos' Property. Article II, Section 15 of the Colorado Constitution provides, in relevant part: "Private property shall not be taken or damaged, for public or private use, without just compensation." The word 'damaged' is in the constitution to grant relief to property owners whose property "had been *substantially damaged* by the making of such public improvements abutting their lands, but whose land had not been physically taken by the government." *City of Northglenn v. Grynberg*, 846 P.2d 175, 179 (Colo. 1993) (emphasis supplied). *See Pub. Serv. Co. v. Van Wyk*, 27 P.3d 377, 388 (Colo. 2001) (same).

Here, in its Order on Cross Mot. for Summ. J., the trial court correctly determined a damaging claim requires a substantial injury: "RFTA is correct in arguing that the injury under a damaging claim must be 'substantial'." R. p. 684 *citing Grynberg*, 846 P.2d at 179.

However, in determining the measure of damages, the trial court erred in three ways: it incorrectly applied restoration costs as the measure of damages; it then used restoration costs as the basis to find RFTA's construction of the Bus Station resulted in a substantial damaging of the Property; and it permitted Sos to

establish restoration costs by impermissibly relying upon his business uses of the Property.

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 its value.

In this case, the trial court's decision to apply tort principles and award restoration costs as the measure of damages is incorrect as a matter of law. The trial court correctly found this to be a case with no physical intrusion and there exists no precedent under Colorado law to award restoration costs for this type of case.

Second, even if tort principles apply to this case, which they do not, the trial court misapplied them. The power to consider restoration costs as the measure of damages is not as expansive as the trial court or Sos suggests it is. Although it is true that in appropriate cases a court may consider restoration costs as the measure of damages, and there is no set list of factors guiding this determination, this power is not without limits. Here, the trial court exceeded those limits. In this case, restoration costs are improper as a matter of law in this case because (A) they are unreasonable in relation to the absence of any decrease in the fair market value of the Property resulting from RFTA's construction of the Bus Station and (B) the restoration costs are based solely on Sos' business uses of the Property.

A) Tort principles do not apply to this case.

Fowler Irrevocable Trust 1992-1 v. City of Boulder and *Scott v. Cnty. of Custer*—the only two cases applying tort principles to a condemnation action—do not support restoration costs as the measure of damages for this case. 17 P.3d 797 (Colo. 2001) (*Fowler II*); 178 P.3d 1240 (Colo. App. 2007) (*Scott*). *Fowler II* and *Scott* expressly limit their holdings to cases involving a **temporary** taking involving a physical intrusion and property damage. *Fowler II*, 17 P.3d at 805 ("temporary taking case involving physical damage to the property"); *Scott*, 178 P.3d at 1249 ("[i]n the context of a temporary, partial taking" involving damage to the property).

Here, unlike the facts in *Fowler II* and *Scott*, RFTA's construction of the Bus Station did not physically intrude onto the Property or result in a temporary taking that caused actual damage to the property.

Moreover, an award of only restoration costs to Sos is improper because such an award fails to provide to RFTA any of the required legal rights or relief. Restoration costs were appropriately considered in *Fowler II* and *Scott* because as temporary takings the landowners' legal interest in and occupation of the real property was re-established. However, here, restoration costs are not appropriate because they fail to contemplate the permanent transfer of a property

interest. In this case, both the trial court and Sos claim RFTA's construction of the Bus Station created a new servitude. *See* R. 683 and 685 (RFTA's construction of Bus Station "essentially created a de facto 'slope easement' on the Sos' Property" and "new servitude") and Answer, pp. 26 and 34 (RFTA's construction of Bus Station "conscripted the indefinite use of Sos' Property").

Consequently, pursuant to these theories of this case, the proper measure of compensation is not restoration costs. Instead, the proper measure of compensation for the permanent transfer of a property interest is the fair market value of the easement and any damages caused by the taking. "When private property is condemned for a public purpose, the property owner is entitled to recover an amount equal to the loss which he has suffered by reason of the taking and nothing more." *State Dept. of Highways v. Woolley*, 696 P.2d 828, 830 (Colo. App. 1984).

B) Even if this Court finds that tort principles deserve some consideration in this case, the trial court misapplied them.

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

Fowler II, *Scott v. Cnty. of Custer*, and *Fowler I*—the cases most relied upon by the trial court and Sos—each unequivocally hold that (A) diminution of fair market value is the presumptive measure of compensation in condemnation cases

and (B) trial courts must make express findings justifying any departure from this presumptive measure of damages. *Fowler II*, 17 P.3d at 802 and 805-06; *Scott*, 178 P.3d at 1248-49; *Fowler Irrevocable Trust v. City of Boulder*, 992 P.2d 1188, 1197 (Colo. App. 1999) (*Fowler I)*. *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.").

The diminution of fair market value is also the presumptive measure of damages for injury to property cases. *See Bd. of Cnty. Comm'rs v. Slovek*, 723 P.2d 1309, 1314-16 (Colo. 1986); *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.").

2) A trial court's authority to consider restoration costs is broad but not without limits.

In *Slovek*, the county's negligent conduct caused temporary flooding which damaged the plaintiff's personal residential property. 723 P.2d at 1311. The water damaged trees and fencing and caused the death of a fish population that was being maintained in a pond. *Id.* The parties disagreed as to the appropriate measure of damages: the landowner sought restoration costs and the county sought diminution in the fair market value. *Id.* In remanding the case back to the trial court, *Slovek* held that the measure of damages for property damage could be the diminution in the property value before and after the injury to the property or, "in the appropriate case," the cost to restore the property. *Id*. at 1316.

Slovek declined to provide a "set list" of factors to trial courts defining the "appropriate case" to depart from the presumptive diminution of market value standard. *Id*. at 1315-16. When a trial court selects restoration costs as the measure of damages, it must "[justify] the deviation from the market standard" and it is important consider the factors provided Restatement (Second) of Torts § 929 comment b (1979). *Id*. at 1315. These factors include the nature of the owner's use of the property and injury to property, with particular attention devoted to examining "whether the owner uses the property as a personal residence, and

whether the owner has some personal reason for having the property in its original condition, or both," and whether the injury is reparable and at what cost. *Id*.

However, a trial court's authority to consider restoration costs is not without limits. In *Slovek*, the Court held restoration costs are only available where (1) they are not unreasonable in relation to the diminution of the injured property's fair market value and (2) the landowner produces evidence demonstrating that payment of diminution of market value will not adequately compensate her for "some personal or other special reason." *Id*. at 1317. *Slovek* articulates these standards using the following language:

> If the damage is reparable, and the costs, although greater than original value, are not wholly unreasonable in relation to that value, and if the evidence demonstrates that payment of market value likely will not adequately compensate the property owner for some personal or other special reason, we conclude that the selection of the cost of restoration as the proper measure of damages would be within the limits of a trial court's discretion.

Id. *See Razi v Schmitt*, 36 P.3d 102, 104-05 (Colo. App 2001) (same).

3) As a matter of law, in this case, restoration costs are not appropriate because they are unreasonable in relation to the diminution of the Property's fair market value.

In *Scott*, the court of appeals rejected restoration costs as the measure of damages in an inverse condemnation case because they were unreasonable in relation to the diminution of the damaged property's fair market value. 178 P.3d at

1249. *Scott* relied on the Restatement (Second) of Torts section 929 comment b as the basis for this holding: "if the cost of replacing the land in its original condition is disproportionate to the *diminution in the value of the land*," the appropriate measure of damages is diminution in value. *Id*. (emphasis in original).

In *Scott*, the landowner brought an inverse condemnation action against the county because its public works department inadvertently destroyed fifty-eight trees on a .156-acre strip of the landowner's property. 178 P.3d at 1243. The landowner sought $362,000 in restoration costs to replace the destroyed trees. *Id*. at 1249. However, as a matter of law, the trial court rejected the landowner's claims for restoration costs as unreasonable because the county's destruction of the trees diminished the fair market value of the landowner's entire 50-acre lot by only $277. *Id*. at 1248-49.

In *Razi v Schmitt*, the court of appeals also applied the standards set forth by *Slovek* and found that restoration costs were unreasonable as a matter of law because they were disproportionate to the injured property's fair market value. The court relied on *Slovek* to hold that restoration costs "two and one-half times" greater than the fair market value of the destroyed property are unreasonable as a matter of law. *Razi*, 36 P.3d at 105.

In *Razi*, the defendant started a series of fires in a commercial office building owned by the plaintiff. *Id*. at 103. After a criminal proceeding in which the court found the defendant guilty of arson and ordered him to pay the plaintiff and plaintiff's insurance company criminal restitution, the plaintiff then brought a civil action against the defendant seeking restoration costs to rebuild the destroyed commercial building. *Id*. at 103. After a bench trial in the civil action, the court awarded the plaintiff restoration costs. *Id*.

In *Razi*, restoration costs were more twice the amount of the diminution in fair market value of the commercial property caused by the arson's fire. 36 P.3d at 105. The plaintiff was to receive $573,313 to replace the commercial building. *Id*. at 103. However, the defendant's expert testified the fair market value of the destroyed building was between $85,000 and $210,000, depending on the valuation method. *Id*.

Here, under the standards set forth in *Scott* and *Razi*, the commission's award of $75,000 in restoration costs is unreasonable and economically wasteful as a matter of law. When determining whether the cost of restoration is unreasonable, the "court should look to the cost of restoration in relation to the diminution in value." *Scott*, 178 P.3d at 1249. Here, there is no evidence in the record that RFTA's alleged damaging of Sos' Property caused any decrease in its fair market

value. The only evidence in the record is from RFTA's expert land appraiser, Rick Chase, who opined that RFTA's construction of the Bus Station caused absolutely no decrease in the fair market value of Sos' Property. *See* Opening Br., pp. 23-24.

The trial court's principal goal is to reimburse "the plaintiff for loses actually suffered" and "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." *Scott,* 178 P.3d at 1248 *quoting Slovek*, 723 P.2d at 1316. In relation to absolutely no decrease in a fair market value of the Property, an award of $75,000 in restoration costs must be considered wasteful and punitive.

4) As a matter of law, in this case, restoration costs are not proper because Sos did not produce any evidence establishing that payment of diminution of market value would not adequately compensate him for "some personal or other special reason."

In *Razi*, 36 P.3d at 104, the court of appeals rejected the plaintiff's claim for restoration costs as the measure of damages because commercial or business uses of an injured property do not constitute a "personal or other special reason." In *Razi*, the court noted the plaintiff's injured property "was used strictly for commercial purposes," there was no testimony that he lived in the building or intended to inhabit the building in the future, or any other testimony establishing

the property was used for "special purposes" such as religious or charitable purposes. *Id*.

Slovek, Fowler II, and *Scott* do not provide any support for the proposition that commercial or business uses satisfy the "personal or other special reason" requirement. In *Slovek* and *Scott*, the landowners used the injured property for their personal residences. *Slovek*, 723 P.2d at 1311; *Scott*, 178 P.3d at 1242. In *Fowler II*, the contractor disturbed the "natural, grassed condition" of property that was not in any way devoted to a commercial use. *Fowler II*, 17 P.3d at 807.

Slovek advises trial courts to devote particular attention "whether the owner uses the property as a personal residence, and whether the owner has some personal reason for having the property in its original condition, or both." *Slovek*, 723 P.2d at 1316. However, in *Scott*, even the love of nature and damage to the aesthetic value of a personal residence was not sufficient "personal or other special reason" to justify an award of restoration costs. 178 P.3d at 1249.

Here, Sos attempts to satisfy the "personal or other special reason" standard solely on the Property's commercial use. And there is no question that Sos concedes this point. In his Answer, Sos contends his business uses of the Property satisfy the "personal or other special reason" standard set forth by *Slovek*. Answer, pp. 26-27 (Sos' "business uses were probative of the extent to which his use of the

taken property was sufficiently personal to him to allow an award"), pp. 28-29 (Sos satisfied the *Slovek* "personal or other special reason standard" through "the way Sos used his property [for business uses]). *See also* Opening Br., pp. 7-11.

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

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' alleged restoration costs. Here, the error was twofold: the trial court erred in admitting evidence of restoration costs and the improperly admitted evidence was incompetent as a matter of law.

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

The trial court's reliance on Sos' business uses of the Property to justify and measure restoration costs violated Colorado tort and condemnation law. The trial

court violated Colorado tort law by relying on Sos' business uses of the Property to justify using restoration costs as the measure of damages. As discussed in section III of this Reply Br., *Razi* unequivocally holds that business uses cannot satisfy the "some personal or other special reason" requirement established by *Slovek.*

The trial court compounded this error and violated Colorado condemnation law by relying on Sos' business uses of the Property to also serve as the measurement of restoration costs. In *City and Cnty. of Denver v. Tondall,* 282 P. 191, 192 (Colo. 1929), the Court held that evidence of the business uses, business costs, or business potential of property are not admissible as an element of compensation in condemnation cases. Since the Colorado Supreme Court's decision in *Tondall*, "Colorado courts have consistently held that compensation in a condemnation action does not include injuries to an ongoing business or lost business profits." *See* § 8.9 Business Profits Rule, pp. 114-17, Colorado Eminent Domain Practice, Leslie A. Fields; Opening Br., pp. 34-37.

B) The commission erred by permitting Sos to base his restoration costs on an incompetent expert opinion.

In its Opening Br., pp. 38-40, RFTA argued that Sos could not establish any restoration costs because the expert opinion that served as the bases for these costs is incompetent as a matter of law. Sos' construction design expert's opinion was incompetent because his designs assumed Sos possessed legal rights that he did not

possess. In his Answer, without the benefit of any citation to any relevant court decisions, Sos contends it was reasonable for his design expert, R. Patillo, to assume that Sos might somehow obtain the easements required by Patillo's designs. *See* Answer, pp. 35-36. However, Patillo's assumptions include far too much hope and speculation to be legally competent basis or the sole basis of Sos' restoration costs.

Because an easement is a legal right to enter and use the land of another, Patillo's assumptions that Sos would obtain two different easements from two different landowners are unreasonable as a matter of law. An easement is a legal right to do or maintain something on the land of another which, although a benefit to the land of the former, may be a burden on the land of the latter *and constitutes a legal interest in the property of another*. *De Reus v. Peck*, 162 P.2d 404, 406 (Colo. 1945) (emphasis supplied). Also, the assumptions that Sos might obtain each of the required legal interests from each of the landowners necessarily includes the assumptions the parties would agree on the cost, scope, purpose, and duration of the required easements. An easement must be definite and certain so that there may be no possible doubt as to its purpose, its location, its width, length, and termini. *Id*.

Sos also contends that Patillo's assumptions that he would obtain an easement from W. Rudd, the previous owner of the Bus Station property, and RFTA were reasonable inferences supported by evidence introduced at trial in accord with C.R.E. 703. This argument lacks merit for two reasons. Patillo's assumptions could not be reasonable inferences supported by the evidence he considered at trial because R. Patillo did not hear any of this evidence. At the request of Sos' counsel, the trial court entered a sequestration order that precluded the presence of any expert in the courtroom and precluded the attorneys from sharing any trial evidence with the experts. R. Tr. April 25, 2016, pp. 11-16.

Moreover, if such an opinion may be offered by Sos, it must be offered through an expert and the required expert testimony and required foundations for this type of expert opinion are absent from this case. Only an expert may offer an opinion regarding whether Sos would obtain an easement of the required scope, location, dimension, and duration from two different landowners. This testimony is the type of "scientific, technical, or other specialized knowledge" contemplated and required by C.R.E. 702. And Sos did not disclose the required expert or disclose the basis for such this type of expert opinion as required by C.R.C.P. 26. Moreover, there has been no showing that it is the type of knowledge reasonably relied upon by experts. C.R.E. 703.

In an inverse condemnation action, the landowner has the burden of proving the taking and the amount of compensation due. *Fowler II*, 17 P.3d at 802. Here, Sos fails to meet his burden to the extent that he relies on Patillo's opinion to establish compensation.

V. Sos is not entitled to attorney's fees.

RFTA disputes Sos' contention that he is entitled to attorney fees resulting from RFTA's appeal of the damages award. Any award of Sos' fees is dependent on at least two factors: (1) the ultimate result of RFTA's appeal and (2) the trial court's determination of the reasonable fees incurred by Sos in this appeal. *Reg'l Transp. Dist. v. 750 West 48th Ave.*, 369 P.3d 640, 648-49 (Colo. App. 2013) *rev'd other grounds*. Here, until these factors are addressed and resolved, any claim made by Sos to his fees remains undetermined and uncertain.

CONCLUSION

This Court must dismiss Sos' inverse condemnation claims because RFTA does not hold the power of condemnation and because Sos failed to establish his right to any compensation. In the alternative, this Court must find the commissions' review and consideration of Sos' restoration costs evidence constituted prejudicial error and set aside the commissioners' certificate of ascertainment and assessment and remand the case for a new compensation hearing.

DATED this 1st day of September, 2017.

Respectfully submitted,

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CERTIFICATE OF MAILING

I certify that on September 1, 2017, a true and correct copy of the foregoing **APPELLANT'S REPLY IN SUPPORT OF OPENING BRIEF**, with the identified exhibits, was served on the following individuals, addressed as follows:

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