

CHAPTER 36

EMINENT DOMAIN

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36:1 INSTRUCTION TO COMMISSIONERS AS TO DUTIES

This is a proceeding brought by the petitioner, (*name*), to acquire certain property for (*insert brief description, e.g., “park,” “highway”*) purposes, which is a public use.

The respondent(s), (*name[s]*), (is) (are) the owner(s) of the property (or of some interest in the property).

The property that the petitioner seeks to acquire is designated as (*insert identification, e.g., “Parcel A”*) and is (shown on the attached exhibit) (described as follows: [*insert description*]).

You are to determine the reasonable market value of the property actually taken (and, if evidence is received by you with regard to any compensable damages to the residue, you may thereafter receive evidence as to any specific benefits to such residue and, if you find either or both damages or specific benefits to exist, then you are also to determine them). (It is not your duty, however, to attempt to determine who may own what interests in the property, or the nature, extent or value of any such interests.)

After you have received all the evidence, the court will instruct you further in writing as to the law you should follow in making your determination(s).

You may request this court or the clerk of this court to issue subpoenas to compel witnesses to attend your proceedings and to testify. For the purpose of taking testimony you may hold and adjourn such meetings as may be required, and any one of you may administer oaths to the witnesses who appear before you. You shall hear the testimony and receive any other evidence in accordance with law, and you may request me or any other judge of this court to rule on the propriety of any evidence or on any of the parties' objections to any of the evidence.

You shall view the property and thereafter, having received all the evidence and having been further instructed by this court, you shall without fear, favor or partiality ascertain the reasonable market value of the property actually taken (and the amount of compensable damages, if any, and amount and value of any specific benefit, if any, to the residue of any land not taken).

You shall make, sign and file with the clerk of this court a certificate of your determination(s). You must all agree on your determination(s). The certificate should also accurately describe the property in question. A form for your certificate will be furnished to you later.

Notes on Use

1. Use whichever parenthesized words and phrases are appropriate. All references to damages or benefits to the residue should be omitted, for example, if there is a total taking of the property. § 38-1-115(2), C.R.S.

2. If the case is tried before a board of commissioners appointed by the court, this instruction is required to be given by the court in writing after the commissioners have taken their oaths. § 38-1-105(1) and (2), C.R.S. This same section also requires the court to instruct the commissioners in writing at the conclusion of the testimony as to the law they should follow in reaching their conclusions.

3. If the case is tried to a jury pursuant to section 38-1-106, C.R.S., a suitable instruction explaining the case should be given prior to the taking of evidence, and another instruction setting forth a statement of the case should be given along with other appropriate instructions at the close of the trial. The initial instruction to the jury may be based on the first five paragraphs of this instruction.

4. If less than a fee interest is being condemned (for example, an easement), this instruction should be appropriately modified. Similarly, modification will be required if personal property is being acquired, or if more than one parcel of land is involved in the proceeding.

5. This instruction and the other instructions in this chapter are for use in eminent domain proceedings. The provisions apply to both real and personal property. *See* § 38-1-117, C.R.S. The instructions may also be used in inverse condemnation actions, which are tried as if they were eminent domain cases. **City of Northglenn v. Grynberg**, 846 P.2d 175 (Colo. 1993); **G & A Land, LLC v. City of Brighton**, 233 P.3d 701 (Colo. App. 2010); **Sos v. Roaring Fork Transp. Auth.**, 2017 COA 142, ¶ 12 n.2, 487 P.3d 688.

6. The other instructions in this chapter apply to both jury and commission trials and should be given in both types of proceedings. § 38-1-115.

Source and Authority

1. This instruction is supported by section 38-1-105(2), which sets out the basic duties and powers of the commissioners, and by section 38-1-115, which sets forth the determinations the commissioners are to make.

2. This instruction and the other instructions in this chapter are also supported by sections 38-1-101 to -122, C.R.S.; Colorado Constitution, article II, section 15; and the procedures and law outlined therein.

3. The role of a board of commissioners or a jury is limited to determining the amount of compensation owed for the condemnation, with all other questions and issues for the court. § 38-1-101(2)(a), C.R.S.; **City of Aurora v. Powell**, 153 Colo. 4, 383 P.2d 798 (1963). Commissioners serve a hybrid role as both judge and juror. **State Dep't of Highways v. Copper Mountain, Inc.**, 624 P.2d 936 (Colo. App. 1981). As such, commissioners are entitled to make evidentiary rulings at trial. *See* § 38-1-105(2); **Reg'l Transp. Dist. v. 750 West 48th Ave., LLC**, 2015 CO 57, ¶ 15, 357 P.3d 179; **Goldstein v. Denver Urban Renewal Auth.**, 192 Colo. 422, 560 P.2d 80 (1977); **City of Westminster v. Jefferson Ctr. Assocs.**, 958 P.2d 495 (Colo. App. 1997); **State Dep't of Highways v. Mahaffey**, 697 P.2d 773 (Colo. App. 1984); **State Dep't of Highways v. Pigg**, 656 P.2d 46 (Colo. App. 1982). But judicial evidentiary rulings control over commission rulings, whether made before or after the commission has considered evidence. **Reg'l Transp. Dist.**, ¶¶ 16-17, 23. Thus, the court's prior *in limine* orders can be modified only

by the court itself, and the commission cannot disregard them. *Id.* at ¶¶ 19-20. And the court has authority to instruct the commission that evidence admitted by the commission is irrelevant and must be disregarded. *Id.* at ¶ 22.

4. The failure of one of the three commissioners to view the property being taken does not warrant overturning the commission's ascertainment of value. **Bd. of Cty. Comm'rs v. McClure Venture**, 41 Colo. App. 524, 594 P.2d 585 (1978).

5. Section 38-1-105(1) requires commissioners to be "disinterested and impartial" and directs the court to conduct a voir dire examination to determine those facts.

6. Disputes as to ownership are to be determined in separate proceedings. § 38-1-105(3); **Vivian v. Bd. of Trs. of Colo. Sch. of Mines**, 152 Colo. 556, 383 P.2d 801 (1963).

36:2 BURDEN OF PROOF AS TO ISSUES

The burden of proof is on the respondent, (*name*), to prove by a preponderance of the evidence what the reasonable market value was of the property actually taken on (*insert valuation date*) (and, also, to prove the damages, if any, to the residue). (The burden of proof is on the petitioner, (*name*), to prove by a preponderance of the evidence the amount and value of the specific benefits, if any, to the residue.)

By “burden of proof” is meant the obligation resting on the party who has the burden of proving a proposition to prove the same by a preponderance of the evidence presented in the case, regardless of which party may have produced such evidence.

A fact or proposition has been proved by a “preponderance of the evidence” if, considering all the evidence, you find it to be more probably true than not.

Notes on Use

1. Omit the parenthesized references in the first paragraph to damages or specific benefits if there is a total taking of the property. § 38-1-114(1) and (2)(b), C.R.S.

2. In cases involving partial acquisitions, damages and specific benefits are treated differently depending on the nature of the condemnation and this instruction will need to be modified based upon the evidence received.

3. For actions under section 38-1-114(1) that do not involve highway acquisitions or transportation projects undertaken by the regional transportation district created by title 32, article 9, of the Colorado Revised Statutes, specific benefits can be offset by the court only against damages to an owner’s remaining property. Thus, if no evidence of damages has been received, the parenthesized references in the first paragraph to both damages and specific benefits should be omitted. If evidence of damages has been received but evidence of specific benefits has not, omit the reference only to specific benefits.

4. For actions under section 38-1-114(2) involving highway acquisitions or transportation projects undertaken by the regional transportation district, specific benefits can be offset against damages to an owner’s remaining property and up to 50% of the value of the taken property. *See* § 38-1-114(2)(d). Accordingly, omit the parenthesized references in the first paragraph to damages or specific benefits only if no evidence has been received for that item.

5. The valuation date to be inserted in the first paragraph is the date “the petitioner is authorized by agreement, stipulation, or court order to take possession or the date of trial or hearing to assess compensation, whichever is earlier.” § 38-1-114(1) (acquisitions in general); § 38-1-114(2)(a) (highway or RTD transportation project acquisitions).

Source and Authority

1. This instruction is supported by section 38-1-114, which defines the valuation date and the manner in which damages and special benefits are treated in different kinds of acquisitions.

See also **E-470 Pub. Highway Auth. v. Revenig**, 91 P.3d 1038 (Colo. 2004) (interpreting statute regarding offset of specific benefits against the property taken in highway acquisitions).

2. The standard for and allocation of the burden of proof between the parties on the various issues is derived from **Board of County Commissioners v. Noble**, 117 Colo. 77, 184 P.2d 142 (1947). *See also* **Jagow v. E-470 Pub. Highway Auth.**, 49 P.3d 1151 (Colo. 2002).

3. For authorities relating to the definition of preponderance of the evidence, see the Source and Authority to Instruction 3:1.

4. Though section 38-1-114(1) refers to the “true and actual” value of the property, the Colorado Supreme Court has construed this to mean “reasonable market value.” **Vivian v. Bd. of Trs. of Colo. Sch. of Mines**, 152 Colo. 556, 559–60, 383 P.2d 801, 803 (1963). *See also* paragraph 2 of the Source and Authority to Instruction 36:3.

5. The valuation date provided by the statute should not be applied strictly if the result would be fundamentally unfair. **Bd. of Cty. Comm’rs v. Delaney**, 41 Colo. App. 548, 592 P.2d 1338 (1978). *But see* **City of Glendale v. Rose**, 679 P.2d 1096, 1098 (Colo. App. 1983) (the “equitable considerations which led us to adopt the rule in **Delaney** . . . are applicable only to that portion of an award of compensation attributable to ‘damages to the remainder’ and not to the portion allocated to ‘value of the land taken’”).

6. Under section 38-1-114(1), the valuation as determined on the valuation date set out in this instruction is an “initial determination,” “subject to adjustment for one year . . . to provide for additional damages or benefits not reasonably foreseeable at the time of the . . . determination.” The same rules apply to highway and RTD transportation project acquisitions. § 38-1-114(2)(a).

7. For a discussion of the difference between eminent domain proceedings and inverse condemnation actions with respect to the burden of proof and the amount of compensation due, see **Fowler Irrevocable Trust 1992-1 v. City of Boulder**, 17 P.3d 797 (Colo. 2001) (measure of just compensation for temporary taking in inverse condemnation action is fair rental value of property during the period of taking), and **Sos v. Roaring Fork Transportation Authority**, 2017 COA 142, ¶¶ 22-45, 487 P.3d 688 (discussing standards for determining inverse condemnation liability and court’s discretion to allow restoration costs as damages instead of diminished market value).

36:3 ASCERTAINMENT OF VALUE OF PROPERTY TAKEN

You are to determine the value of the property actually taken, and, after having determined such value, you are to state that value in your (certificate) (verdict).

The value you are to determine for the property actually taken is the reasonable market value for such property on (*insert valuation date*). “Reasonable market value” means the fair, actual, cash market value of the property. It is the price the property could have been sold for on the open market under the usual and ordinary circumstances, that is, under those circumstances where the owner was willing to sell and the purchaser was willing to buy, but neither was under an obligation to do so.

In determining the market value of the property actually taken, you are not to take into account any increase or decrease in value caused by the project for which the property is being acquired.

Notes on Use

1. In the first paragraph, use the parenthesized term certificate if the case is tried to a commission or verdict if tried to a jury.

2. In the second paragraph, insert the valuation date used in Instruction 36:2.

Source and Authority

1. This instruction is supported by section 38-1-115(1)(b), C.R.S., which requires the report of the commissioners or the verdict of the jury to state the value of the land or property actually taken.

2. The definition of market value is supported by **Department of Highways v. Schulhoff**, 167 Colo. 72, 445 P.2d 402 (1968); **Kistler v. Northern Colorado Water Conservancy District**, 126 Colo. 11, 246 P.2d 616 (1952); and **Vivian v. Board of Trustees of Colorado School of Mines**, 152 Colo. 556, 338 P.2d 801 (1963). *See also* **Goldstein v. Denver Urban Renewal Auth.**, 192 Colo. 422, 560 P.2d 80 (1977) (quoting with approval the definition of market value set out in an earlier version of this instruction); **Denver Urban Renewal Auth. v. Pogzeba**, 38 Colo. App. 168, 558 P.2d 442 (1976) (same).

3. The third paragraph is supported by **City of Boulder v. Fowler Irrevocable Trust 1992-1**, 53 P.3d 725, 727-28 (Colo. App. 2002) (under “the ‘project influence rule,’ just compensation cannot include any enhancement or reduction in value that arises from the very project for which the property is being acquired”). *See also* **Williams v. City & Cty. of Denver**, 147 Colo. 195, 363 P.2d 171 (1961) (an owner is not entitled to recover enhancement resulting from construction or proposed construction of public improvements on the property subject to condemnation); **Dep’t of Health v. Hecla Mining Co.**, 781 P.2d 122, 126 (Colo. App. 1989) (value cannot be “premised on future events which are contingent upon the completion or the existence of the very project which necessitates the public acquisition”).

4. Colorado follows the “undivided basis” rule when valuing condemned property. **Montgomery Ward & Co. v. City of Sterling**, 185 Colo. 238, 523 P.2d 465 (1974) (distinguishing between “undivided basis” rule, the sum of the interests approach, and the strict undivided fee rule for valuing condemned property). Under the undivided basis rule, all interests in the property, including any encumbrances, are deemed to be owned by one person and the property is valued as a whole, while taking into account the value which an encumbrance may add to or subtract from such value. *Id.* at 242, 523 P.2d at 467-68. Thus, in a valuation case to determine the overall compensation to be paid, a lessee of property is not entitled to have his leasehold interest valued separately, *see Vivian*, 152 Colo. at 560-61, 383 P.2d at 803-04, and is barred from bringing an inverse condemnation action against the condemning authority for a separate award for the leasehold interest. **Gifford v. City of Colo. Springs**, 815 P.2d 1008 (Colo. App. 1991).

5. The present reasonable market value of a property is considered in light of its most advantageous use at the time of the condemnation and determined under expansive evidentiary rules. **Palizzi v. City of Brighton**, 228 P.3d 957 (Colo. 2010) (jury should be allowed to consider reasonable probability of a future use, including development and the cost of achieving such use, if it relates to the present market value).

6. Where the government acquires property for public purposes, it may use the property in a manner inconsistent with a restrictive covenant without compensating the other landowners who are subject to that restrictive covenant. A restrictive covenant is not a compensable property right in an eminent domain proceeding. **Forest View Co. v. Town of Monument**, 2020 CO 52, ¶¶ 3, 30, 464 P.3d 774; *see also Smith v. Clifton Sanitation Dist.*, 134 Colo. 116, 300 P.2d 548 (1956).

36:4 ASCERTAINMENT OF DAMAGES AND SPECIFIC BENEFITS TO RESIDUE

You are also to determine the amount of compensable damages, if any, and the value of specific benefits, if any, to the residue of (*insert identification used in Instruction 36:1*), and, after having determined any such damages or specific benefits, you are to state the amount of any damages, and the amount and value of any specific benefits in your (certificate) (verdict).

“Residue” means that portion of any property that is not taken but that belongs to the respondent, (*name*), and that has been used by, or is capable of being used by, the respondent, together with the property actually taken, as one economic unit.

Any damages or specific benefits are to be measured by the effects the acquisition of, and the expected uses of, the property actually taken has on the reasonable market value of the residue. Any damages are to be measured by the decrease, if any, in the reasonable market value of the residue, that is, the difference between the reasonable market value of the residue before the property actually taken is acquired and the reasonable market value of the residue after the property actually taken has been acquired. Any damages that may result to the residue from what is expected to be done on land other than the land actually taken from the respondent are not to be considered.

Similarly, any benefits to the residue are to be measured by the increase, if any, in the reasonable market value of the residue due to the (construction) (improvement) of the (*insert brief description of the proposed improvement*). For anything to constitute a specific benefit, however, it must result directly in a benefit to the residue and be peculiar to it. Any benefits that may result to the residue but that are shared in common with the community at large are not to be considered.

Nothing should be considered as a factor of either damages or benefit unless you find that it increases or decreases the reasonable market value of the residue.

Any finding of damages or specific benefits to the residue shall not affect your determination of the value of the property actually taken.

You are to determine any damages or specific benefits as separate, independent items. You should not attempt to balance the two. Any adjustment or balancing must be done by the court.

Notes on Use

1. Use appropriate parenthesized words or phrases as described in the notes on use for the previous instructions in this chapter.
2. This instruction should not be given if there is a total taking of the property.

3. In partial acquisitions, the references to damages and benefits should be included or omitted according to the directions provided in Notes 2 through 4 to the Notes on Use for Instruction 36:2.

4. Instructions 36:3 and 36:5 must also be given with this instruction.

5. In highway or RTD transportation project acquisitions, when an appraiser is determining damages or special benefits to the residue and is forecasting such damages or benefits beyond one year from the date of appraisal, the appraiser “shall take into account a proper discount.” § 38-1-114(2)(c), C.R.S. If necessary to a proper evaluation of an appraiser’s testimony, another instruction based on this statute should be given.

Source and Authority

1. The definition of “residue” is supported by **Board of County Commissioners v. Noble**, 117 Colo. 77, 184 P.2d 142 (1947).

2. The rules relating to the measure of damages and benefits to the residue are supported by **La Plata Electric Ass’n v. Cummins**, 728 P.2d 696, 703 (Colo. 1986) (Landowner was entitled to compensation for damages, including aesthetic damages, caused to the residue and that were attributable to the use of the land taken from the landowner, but not on the land taken or purchased from others; such damages must be the “natural, necessary and reasonable result of the taking, as measured by the reduction in the market value of the remainder”); **Herring v. Platte River Power Authority**, 728 P.2d 709 (Colo. 1986) (same); and **Bement v. Empire Electric Ass’n**, 728 P.2d 706 (Colo. 1986) (same). *See also Jagow v. E-470 Pub. Highway Auth.*, 49 P.3d 1151 (Colo. 2002); **Mack v. Bd. of Cty. Comm’rs**, 152 Colo. 300, 381 P.2d 987 (1963); **Colo. M. Ry. v. Brown**, 15 Colo. 193, 25 P. 87 (1890); **Colo. Mountain Props., Inc. v. Heineman**, 860 P.2d 1388 (Colo. App. 1993); **W. Slope Gas Co. v. Lake Eldora Corp.**, 32 Colo. App. 293, 512 P.2d 641 (1973).

3. Section 38-1-115(1), C.R.S., requires damages and benefits to be set forth separately in the certificate or verdict. For the authorities supporting the rules regarding the offset of specific benefits against damages to the remainder or the value of the property taken, see the Notes on Use and Source and Authority for Instruction 36:2.

4. In cases involving a physical taking of property, whether by condemnation or inverse condemnation, the **La Plata** standard applies and a landowner need not prove that any damages to its remaining property are special and unique. But a landowner who is damaged by construction of a project on abutting land must prove that the damages to its own property are special and unique, in other words, not shared in common with the public generally. Whether the damages are special and unique is a threshold determination to be made by the court before such damage claims are presented to the jury. *See Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377 (Colo. 2001).

5. As to the propriety of treating non-contiguous land as “residue” when it has been used or is capable of being used with the property taken as one economic unit, see **Board of County Commissioners v. Delaney**, 41 Colo. App. 548, 592 P.2d 1338 (1978).

6. Generally, no evidence of special benefits to the remaining property from the improvement can be presented in a compensation proceeding when the government has levied a special assessment for the same improvement. **E-470 Pub. Highway Auth. v. 455 Co.**, 3 P.3d 18 (Colo. 2000) (general rule held inapplicable to temporary highway expansion fee to be used primarily for debt reduction and maintenance).

7. As to when the elimination of one of two access points between the residue and the public road system may constitute damage to the residue, see **State Department of Highways v. Interstate-Denver West**, 791 P.2d 1119 (Colo. 1990). *See also* **Dep't of Transp. v. First Interstate Commercial Mortg. Co.**, 881 P.2d 473 (Colo. App. 1994) (compensation for loss of access to street or highway is only required if ingress and egress to property is substantially impaired).

36:5 ASCERTAINMENT OF DAMAGES TO RESIDUE — LIMITATIONS

In order for you to determine damages to the residue, you must find that the residue itself (has been) (will be) damaged by some diminution in its reasonable market value, either as a result of its being severed from the land actually taken or because the adjacent public use on the land actually taken from the respondent (, but not on other land,) will render the residue less valuable.

Infringement of the owner’s personal pleasure or enjoyment in the use of the residue or even the owner’s annoyance or discomfort do not constitute compensable damages. Neither does the fact that the residue may be less desirable for certain purposes. Such matters are not compensable except as they are a natural, necessary and reasonable result of the residue being severed from the land actually taken or of the uses expected to be made of the land actually taken, and are measurable by a reduction in the market value of the residue.

(Damages may not be allowed which result from [describe any noncompensable damages] even though a decrease in the reasonable market value of the residue may result.)

Notes on Use

1. Use whichever parenthesized words are appropriate to the evidence in the case.
2. Omit the parenthesized clause in the first paragraph if the only relevant public use involved in the project will be on the land actually taken from the respondent.
3. Omit the parenthesized last paragraph unless some reference has been made in the evidence, or otherwise, to an item of damage that might affect the market value of the residue but which is not compensable as a matter of law. *See La Plata Elec. Ass’n v. Cummins*, 728 P.2d 696 (Colo. 1986).
4. This instruction must be given with Instruction 36:4.

Source and Authority

1. This instruction is supported by the authorities cited in the Source and Authority for Instruction 36:4.
2. The rule in **La Plata Electric Ass’n**, 728 P.2d at 701-03, is that damages to the residue need not be unique or peculiar to be compensable. When there is a partial taking, the “landowner is entitled to recover all damages that are the natural, necessary and reasonable result of the taking, as measured by the reduction in the market value of the remainder of the property.” *Id.* at 703.
3. A landowner cannot recover for loss of passing motorists’ views of residue from a highway. **Dep’t of Transp. v. Marilyn Hickey Ministries**, 159 P.3d 111 (Colo. 2007) (no

compensable loss when view from freeway of church building was blocked by elevated light rail wall built along freeway).

4. In contrast to damages based on the property's fair market value, losses suffered from the frustration of the landowner's special plan for the property are not compensable. **Bd. of Cty. Comm'rs v. DPG Farms, LLC**, 2017 COA 83, ¶ 29, 487 P.3d 291. But "[t]he line between evidence of a hypothetical development plan, the frustration of which is not compensable in damages, and evidence of potential income generation, the admission of which is relevant to an income approach, is not always easy to draw." *Id.* at ¶ 30. And a court may have discretion in certain circumstances to allow an award for restoration costs rather than diminished market value if "there is a reason personal to the owner for restoring the original condition." **Sos v. Roaring Fork Transp. Auth.**, 2017 COA 142, ¶¶ 39, 58, 487 P.3d 688 (quoting RESTATEMENT (SECOND) OF TORTS § 929 (1979) and affirming district court's rejection of jury instructions regarding diminution in value as measure of damages in inverse condemnation case).

36:6 ASCERTAINMENT OF MARKET VALUE, DAMAGES, OR SPECIFIC BENEFITS — MOST ADVANTAGEOUS USES

In determining the market value of the property actually taken (and the damages, if any, and specific benefits, if any, to the residue) you should consider the use, conditions and surroundings of the property as of the date of valuation.

In addition, you should consider the most advantageous use or uses to which the property might reasonably and lawfully be put in the future by persons of ordinary prudence and judgment. Such evidence may be considered, however, only insofar as it assists you in determining the reasonable market value of the property as of the date of valuation (or the damages, if any, or the specific benefits, if any, to the residue). It may not be considered for the purposes of allowing any speculative damages or values.

Notes on Use

Use the parenthesized clauses relating to damages and benefits, or such portions thereof, as are appropriate per Notes 2 through 4 to the Notes on Use for Instruction 36:2.

Source and Authority

1. This instruction is supported by **Ruth v. Department of Highways**, 145 Colo. 546, 359 P.2d 1033 (1961); **Board of County Commissioners v. Noble**, 117 Colo. 77, 184 P.2d 142 (1947); and **Wassenich v. City & County of Denver**, 67 Colo. 456, 186 P. 533 (1919).

2. The present reasonable market value of a property is considered in light of its most advantageous use at the time of the condemnation and is determined under expansive evidentiary rules. **Palizzi v. City of Brighton**, 228 P.3d 957 (Colo. 2010) (jury should be allowed to consider reasonable probability of a future use, including development and the cost of achieving such use, as they relate to the present market value); *see also* **State Dep't of Highways v. Mahaffey**, 697 P.2d 773, 776 (Colo. App. 1984) (citing this instruction and holding, “evidence of a reasonable future use is admissible to determine the present fair market value of property . . . and compensation is not limited to the value of the property for the uses to which it is devoted at the time of the taking”). A property’s “most advantageous use” is synonymous with its “highest and best use.” **Bd. of Cty. Comm’rs v. DPG Farms, LLC**, 2017 COA 83, ¶ 13, 487 P.3d 291 (discussing these terms interchangeably and delineating the four factors to be used in determining highest and best use). The determination of a property’s highest and best use is generally a factual question for the jury unless the evidence of highest and best use is so improbable or speculative that it should be excluded from the jury as a matter of law. *Id.* at ¶ 16.

3. Regarding the probability of the property being rezoned, *see* **Stark v. Poudre School District R-1**, 192 Colo. 396, 560 P.2d 77 (1977) (evidence of the probability, but not of only a possibility, of a rezoning may be considered); and **State Department of Highways v. Ogden**, 638 P.2d 832 (Colo. App. 1981) (because the probability of rezoning may be considered to the extent such probability would reasonably be reflected in the market value of the property at the time of taking, improper to instruct jury that in determining value only the zoning in existence at the time of taking may be considered).

4. With respect to the valuation of unsubdivided land, see **Board of County Commissioners v. Vail Associates., Ltd.**, 171 Colo. 381, 389, 468 P.2d 842, 846 (1970) (“The measure of compensation is not the aggregate of values of individual plots into which the tract taken could best be divided, but rather the value of the whole tract as it exists at the time of condemnation, taking into consideration its highest and best future use.”); and **Department of Highways v. Schulhoff**, 167 Colo. 72, 445 P.2d 402 (1968).

5. Where the government acquires property for public purposes, it may use the property in a manner inconsistent with a restrictive covenant without compensating the other landowners who are subject to that restrictive covenant. A restrictive covenant is not a compensable property right in an eminent domain proceeding. **Forest View Co. v. Town of Monument**, 2020 CO 52, ¶¶ 3, 30, 464 P.3d 774; *see also* **Smith v. Clifton Sanitation Dist.**, 134 Colo. 116, 300 P.2d 548 (1956).

36:7 APPROACHES TO VALUATION

There are three generally established real estate appraisal methods: (1) the comparable sales method, which considers recent sales of comparable properties; (2) the cost of construction method, which estimates value based on the cost of replacing or reproducing a particular improvement; and (3) the income method, which considers the property's earning power. Depending on the location and type of property involved and other relevant circumstances, an (appraiser) (expert) may use any one, two, or all three of these methods to evaluate the reasonable market value of the property being taken.

You should consider all relevant factors that tend to provide a means for arriving at a fair determination of the property's reasonable market value. It is your duty to weigh the opinions and judge the credibility of the (appraiser) (expert) to determine which method or methods are most indicative of the reasonable market value of the property being taken.

Notes on Use

1. This instruction should be given only if witnesses have testified about using two or more of the established real estate appraisal methods to evaluate the property being taken.

2. If an appraiser or other expert witness relies upon other permissible approaches to determine value, this instruction should be modified to include a general description of such other approach.

Source and Authority

1. This instruction is supported by **Bly v. Story**, 241 P.3d 529 (Colo. 2010); **Denver Urban Renewal Authority v. Berglund-Cherne Co.**, 193 Colo. 562, 568 P.2d 478 (1977); **Board of County Commissioners v. DPG Farms, LLC**, 2017 COA 83, ¶¶ 25-28, 487 P.3d 291; and **State Department of Highways v. Mahaffey**, 697 P.2d 773 (Colo. App. 1984).

2. An appraiser may use any one, two, or all three traditional appraisal methods to evaluate the reasonable market value of the property being taken. **Mahaffey**, 697 P.2d at 775.

3. It is the duty of the trier of fact to weigh the witnesses' opinions and credibility and determine which appraisal methods are most indicative of reasonable market value. **Bly**, 241 P.3d at 537; **Berglund-Cherne**, 193 Colo. at 567, 568 P.2d at 481.

4. Other valuation methods, aside from the three traditional appraisal methods, are permitted in certain circumstances. **City of Englewood v. Denver Waste Transfer, L.L.C.**, 55 P.3d 191 (Colo. App. 2002). These circumstances may include a lack of sufficient comparable sales, conditions that make the market value of property uncertain, or other unique factors that apply to the property being taken. *Id.* at 196.

36:8 SALES OF COMPARABLE PROPERTIES

You have heard or seen evidence about market transactions involving properties that may be comparable to the property being taken. Sales of comparable properties are relevant evidence either to directly show the reasonable market value of the property being taken or to establish the basis for an (appraiser's) (expert's) opinion of reasonable market value. An (appraiser) (expert) may adjust a comparable sale to take into account various differences between the comparable sale and the property being taken.

In determining the weight of such evidence, you may consider the time of the comparable sale; the comparable property's size, location, zoning, and condition; and any and all other differences, facts, or circumstances.

An (appraiser) (expert) may use the comparable sales approach even if other methods of valuation are available.

Notes on Use

This instruction should be given only if comparable sales have been offered as direct evidence of value or if an expert witness has used the comparable sales approach.

Source and Authority

1. This instruction is supported by **Goldstein v. Denver Urban Renewal Authority**, 192 Colo. 422, 560 P.2d 80 (1977); **Kistler v. Northern Colorado Water Conservancy District**, 126 Colo. 11, 246 P.2d 616 (1952); **Wassenich v. City & County of Denver**, 67 Colo. 456, 186 P. 533 (1919); and **Loloff v. Sterling**, 31 Colo. 102, 71 P. 1113 (1903).

2. Testimony regarding the consideration involved in a recorded transfer of property is admissible only if the witness has personally verified the sale, according to the requirements of section 38-1-118, C.R.S. Any such testimony is subject to rebuttal and objections as to relevance and materiality. *Id.*

3. Sales of comparable properties are relevant either as direct evidence of reasonable market value or as a basis for expert opinion on value. **Goldstein**, 192 Colo. at 424 n.1, 560 P.2d at 82 n.1.

4. Adjusting the purchase price of a completed sale is an accepted method for comparing the sale property to the property being taken. *See Goldstein*, 192 Colo. at 425-27, 560 P.2d at 83-84. The weight to be given such evidence lies within the discretion of the factfinder. *See id.*

5. When sales are so dissimilar in respect to either locality, character of the lands involved, or remoteness in time, such evidence may be inadmissible. **Bd. of Cty. Comm'rs v. Vail Assocs., Ltd.**, 171 Colo. 381, 468 P.2d 842 (1970); *see also Dep't of Highways v. Schulhoff*, 167 Colo. 72, 445 P.2d 402 (1968) (trial court properly ruled sales of individual sites within platted subdivision not comparable for purposes of determining value of unsubdivided

tract); **Sinclair Transp. Co. v. Sandberg**, 228 P.3d 198 (Colo. App. 2009) (upholding exclusion of sale because sale property not comparable in size, location, or future use), *rev'd on other grounds sub nom. Larson v. Sinclair Transp. Co.*, 2012 CO 36, 284 P.3d 42; **City of Westminster v. Jefferson Ctr. Assocs.**, 958 P.2d 495 (Colo. App. 1997) (distinguishing **Schulhoff**, 167 Colo. at 81, 445 P.2d at 407, and holding that, under the circumstances, trial court erred in instructing commission that it could not consider sales of platted, subdivided property in determining the fair market value of the property taken); **Bd. of Cty. Comm'rs v. Evergreen, Inc.**, 35 Colo. App. 171, 532 P.2d 777 (1974) (for platted and developed land, it was proper to admit sales of sites that were in a similar state of development).

6. Sales occurring after the date of value are admissible if they are sufficiently comparable in character, close in time, and in location to be probative of the value of the property being taken, and if the risk that the factfinder would be prejudiced, confused, or misled is slight. **State Dep't of Highways v. Town of Silverthorne**, 707 P.2d 1017 (Colo. App. 1985).

7. The parties are not entitled to indirectly increase or decrease the value of the property being taken by comparing it with project-influenced sales — sales of other land where the value was enhanced or depressed by the very project for which the subject property is being acquired — without adjusting for that influence. **Vail Assocs.**, 171 Colo. at 391, 468 P.2d at 847; *see also Bd. of Cty. Comm'rs v. Highland Mobile Home Park, Inc.*, 543 P.2d 103 (Colo. App. 1975) (presuming that the commission followed a stipulated instruction advising that the condemnor had not submitted any competent evidence of enhancement due to the project and instructing the commissioners to disregard any claim of enhancement in determining value); **Bd. of Cty. Comm'rs v. Tenbrook**, 491 P.2d 597 (Colo. App. 1971) (upholding the admission into evidence of recent sales near the interstate project where cross-examination revealed that the new interstate may not have caused any enhancement and the trial court specifically instructed the commissioners not to consider any enhancement from the project).

36:9 COST APPROACH

The cost to replace or reproduce improvements, less any depreciation, may properly be considered in arriving at a determination of the reasonable market value of the property being taken.

An (appraiser) (expert) may use the cost approach even if other methods of valuation are available.

Notes on Use

This instruction should be given only if a witness has testified about using the cost approach to evaluate the property being taken.

Source and Authority

This instruction is supported by **Bly v. Story**, 241 P.3d 529 (Colo. 2010); **Denver Urban Renewal Authority v. Berglund-Cherne Co.**, 193 Colo. 562, 568 P.2d 478 (1977); and **Farrar v. Total Petroleum, Inc.**, 799 P.2d 463 (Colo. App. 1990).

36:10 INCOME APPROACH

The income approach values the property being taken based on projections of the net income generated by the property during the remainder of its productive life. Under this approach, an (appraiser) (expert) analyzes a property's capacity to generate income. Then, using various techniques and mathematical procedures, the (appraiser) (expert) converts this income into an indication of the property's reasonable market value.

The income approach can be used on properties that produced income on the date of value, as well as properties that could produce income. The income approach depends upon the (appraiser) (expert) estimating the rental value or other income, as well as expenses and the rate of return over a period of time.

An (appraiser) (expert) may use the income approach even if other methods of valuation are available.

Notes on Use

1. This instruction should be given only if a witness has testified about using the income approach to evaluate the property being taken.
2. If an appraiser or other expert witness uses an income capitalization method or discounted cash flow analysis to determine value, modifications to this instruction or the use of additional instructions to reflect the details of that specific income valuation method may be appropriate.

Source and Authority

1. This instruction is supported by **Board of County Commissioners v. DPG Farms, LLC**, 2017 COA 83, ¶¶ 25, 27, 487 P.3d 291; **Bly v. Story**, 241 P.3d 529 (Colo. 2010); **Denver Urban Renewal Authority v. Berglund-Cherne Co.**, 193 Colo. 562, 568 P.2d 478 (1977); and **State Department of Highways v. Mahaffey**, 697 P.2d 773 (Colo. App. 1984).

2. The business profit rule generally requires the exclusion of business profits generated by an enterprise on the property. The foundation for the rule is that (1) the business itself is not being condemned and can be relocated, and (2) business profits are more a function of the entrepreneurial skills of management than of the value of the land. **Berglund-Cherne Co.**, 193 Colo. at 567, 568 P.2d at 481; **Auraria Businessmen Against Confiscation, Inc. v. Denver Urban Renewal Auth.**, 183 Colo. 441, 517 P.2d 845 (1974); **City & Cty. of Denver v. Hinsey**, 177 Colo. 178, 493 P.2d 348 (1972). Under the business profit rule, evidence of the character and volume of business conducted on the premises is admissible only for the purpose of showing a use to which the land could be put. **Berglund-Cherne**, 193 Colo. at 567, 568 P.2d at 482; **Hinsey**, 177 Colo. at 183, 493 P.2d at 351; **Denver Urban Renewal Auth. v. Cook**, 186 Colo. 182, 526 P.2d 652 (1974); **City & Cty. of Denver v. Quick**, 108 Colo. 111, 113 P.2d 999 (1941). But a crucial distinction must be made between “profits derived from a business conducted on the premises” and “profits derived from the land itself.” Only the first is

inadmissible under the rule. For example, evidence of agricultural and rental income is admissible as “profit[] derived from the land itself.” **Bd. of Cty. Comm’rs v. Delaney**, 41 Colo. App. 548, 592 P.2d 1338 (1978); **Berglund-Cherne**, 193 Colo. at 567, 568 P.2d at 482; **Montgomery Ward & Co. v. City of Sterling**, 185 Colo. 238, 523 P.2d 465 (1974); **Quick**, 108 Colo. at 115-16, 113 P.2d at 1001; **Farmers’ Res. & Irrigation Co. v. Cooper**, 54 Colo. 402, 130 P. 1004 (1913); *see also* **Mahaffey**, 697 P.2d at 775-77 (upholding admission of an opinion of fair market value that was based on estimated net income from the extraction of gravel from the property being taken). The fair economic rental value of commercial property is also evidence of “profit derived from the land itself” and is therefore admissible as a determinant of value in conjunction with the income approach. **Berglund-Cherne**, 193 Colo. at 567, 568 P.2d at 482 (citing 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN, § 180, p. 704 (2d ed. 1953)). In addition, evidence of business profits and losses may be directly admissible and compensable when the business itself is being taken. **Clare v. Florissant Water & Sanitation Dist.**, 879 P.2d 471, 473-74 (Colo. App. 1994) (“[A]n owner is entitled to compensation for the value of a business when a governmental authority appropriates the business.”).

36:11 REPORT OF COMMISSIONERS OR VERDICT FORM

**IN THE DISTRICT COURT IN AND FOR THE
COUNTY OF _____, STATE OF COLORADO**

Civil Action No. _____

Petitioner,

vs.

Respondent.

) (CERTIFICATE OF
) ASCERTAINMENT
) AND ASSESSMENT AND REPORT
) OF COMMISSIONERS)

) (VERDICT)
)
)
)

We, the (jury) (Commissioners), ascertain and assess:

**1. The property taken is described as (*insert "an accurate" description*) in the
Count(y)(ies) of (*name[s]*), State of Colorado.**

2. The value of the property actually taken is \$_____

(3. The damages to the residue of such property are \$_____)

**(4. The amount and value of the specific benefit to the residue of such
property is \$_____)**

Foreperson

**(We, Commissioners, do hereby make, subscribe and certify the above as our
ascertainment and assessment in the cause before us and submit the same as our report
and certificate of ascertainment and assessment.**

Commissioner

Commissioner

Commissioner)

Notes on Use

1. Use whichever parenthesized portions are appropriate for a Commission or Jury.
2. Use the paragraphs for damages and specific benefits as applicable per Notes 2 through 4 to the Notes on Use for Instruction 36:2.
3. In addition to the mandatory contents of the verdict or report, section 38-1-115(3), C.R.S., provides that the report of the Commissioners or the verdict of the jury may also contain such other findings or answers to interrogatories as the court in its discretion may require to establish the value of the property condemned on an undivided basis.
4. See the Notes on Use to Instruction 4:4 (verdict form for plaintiff).

Source and Authority

1. This form is supported by section 38-1-105(2), C.R.S., requiring commissioners to make, subscribe, and file a certificate of their ascertainment and assessment. *See also Pueblo & Ark. Valley R.R. Co. v. Rudd*, 5 Colo. 270 (1880) (construing an earlier form of the statute and holding that report or verdict must show damages and benefits were considered).
2. For a discussion of the property owner's right to a jury trial and a jury verdict, see sections 38-1-106 and 107, C.R.S.
3. The restrictions on the impeachment of jury verdicts set out in CRE 606(b) also apply to a Commissioners' certificate of ascertainment and assessment. *Aldrich v. Dist. Court*, 714 P.2d 1321 (Colo. 1986).