

Eminent Domain Law in Colorado—Part I: The Right to Take Private Property

by M. Patrick Wilson

Government and Administrative Law articles provide information to attorneys dealing with various state and federal administrative agencies, as well as attorneys representing public or private clients in the areas of municipal, county, and school or special district law.

Column Editors:

Carolyne C. White, of Brownstein Hyatt & Farber, P.C., (303) 223-1197, cwhite@bhf-law.com; Brad Bailey, Assistant City Attorney, City of Littleton—(303) 795-3725, bbailey@littletongov.org; Tiffanie Bleau, Denver, of Light, Harrington & Dawes, P.C.—(303) 298-1601, tbleau@lhdlaw.com

About The Author:

This month's article was written by M. Patrick Wilson, who represents local governments and private property owners in eminent domain and other real property disputes. He serves as Special Counsel at Murray, Dahl, Kuechenmeister & Renaud LLP and is a certified mediator with Landispute, LLC—(303) 493-6670, pwilson@mdkrlaw.com.



Part I of this article discusses the exercise of the power of eminent domain, including sources of authority, public purpose, necessity, and negotiations, as well as practical issues related to the filing of a condemnation action and obtaining immediate possession.

This article provides a general overview of the procedural and substantive law of eminent domain, the process by which one party condemns or "takes" the real property of another on the payment of just compensation. It is written for the practitioner who does not specialize in eminent domain law, but who may represent either a party with eminent domain authority or a property owner faced with the prospect of condemnation.

This article will be published in two parts. Part I discusses the prerequisites for the proper exercise of the power of eminent domain and the means by which "immediate possession" of property may be acquired pending a valuation trial. Part II, which will be published in the November 2006 issue of *The Colorado Lawyer*, will address the process and rules by which "just compensation" is assessed.

Eminent Domain Authority

The right of eminent domain (or condemnation) is an inherent aspect of sovereignty possessed by the federal govern-

ment and each state.¹ Although a condemnation action usually is brought by a government authority, in some instances, a private party may condemn property rights for certain specified purposes.

The right of condemnation under Colorado law is primarily derived from and constrained by two provisions of the Colorado Constitution: Article II, §§ 14 and 15. Section 14 addresses the taking of property for private use, and limits such acquisitions for private ways of necessity and land rights that are necessary for reservoirs, drains, flumes, or ditches for agricultural, mining, milling, domestic, or sanitary purposes.² Private property may be taken for private use only for one of the specific purposes listed.³ This right is available to any party needing a right-of-way for such purpose; however, a public entity already possessing the power of eminent domain normally may not invoke the right to bring a private condemnation under § 14.⁴

Article II, § 15 of the Colorado Constitution addresses the taking of property for public use. This provision governs most condemnations in Colorado and

CRS § 38-1-202

In 2006, the general assembly passed and Governor Owens signed Senate Bill 154, which is an attempt to collect in a single statutory location all of the circumstances in which eminent domain authority may be exercised. This information, to be codified at CRS § 38-1-202, lists the entities that have been expressly granted the power of eminent domain and lists the statutory source of that authority. This provision does not grant, restrict, or in any other way affect the substantive or procedural aspects of eminent domain law, but simply and conveniently provides one location in the Colorado Revised Statutes where this information can be found.

"All condemnations under Colorado law in some way must be justified as advancing the public interest; the property must be used by the public, or the acquisition must serve a public purpose or generate a public benefit."

provides the constitutional requirement that just compensation be paid for any taking, whether for public or private use. Furthermore, § 15 states that private property cannot be "taken or damaged" without the payment of just compensation.⁵ Thus, when only a portion of a landowner's property is taken, just compensation may include any resulting diminution in value to the remainder of property, as well as payment for the property rights actually taken.⁶

Public Entities

The right of eminent domain for a public use may be exercised by the federal government, the State of Colorado, or by any political subdivision thereof that has been expressly granted the power of eminent domain, including administrative agencies, municipalities, counties, and certain special districts. The State of Colorado possesses the power of eminent domain as an independent sovereign; however, any agency of the state or other political subdivision, with the exception of home rule municipalities exercising their authority under Article XX of the Colorado Constitution, must have express or necessarily implied statutory authority to exercise the power of eminent domain.⁷ Although the right to condemn for certain purposes may be implied from a legislative scheme that clearly evinces a legislative intent to provide for the right,⁸ there is a presumption against finding an implied right of eminent domain not expressly granted by statute.⁹

Thus, statutory cities and towns, counties, special districts, and agencies of the state usually must be able to point to specific statutory authority to exercise the power of eminent domain. The statutory eminent domain authority granted to these political subdivisions often is limited in scope to acquiring property interests necessary to perform specific functions.¹⁰ The eminent domain authority of home rule municipalities, on the other hand, arises from Article XX of the Colorado Constitution and generally may be exercised, at least with respect to matters of local concern, without regard to statutory

limitations imposed by the general assembly.¹¹ Article XX has been held to provide home rule municipalities with as much authority over local affairs as constitutionally could have been conferred to a municipality by the legislature under a republican form of government.¹² Thus, home rule municipalities have broad eminent domain authority with respect to matters of local concern.

Private Entities

In addition to various government agencies and political subdivisions, certain private entities have express statutory authority, over and above any rights granted by Article II, § 14, to condemn private property. Among these are pipeline and other transmission companies, as well as certain utility providers.¹³ Although they may be private, for-profit corporations, these companies have the right to condemn private property in furtherance of their essential functions, largely on the premise that their functions are public in nature, and because their services often are regulated by the government, are available to all citizens, and provide a benefit to the public at large.¹⁴

Inverse Condemnation

A condemnation action affirmatively initiated by a party with the power of eminent domain should be distinguished from an inverse condemnation action. In an inverse condemnation action, a property owner initiates a claim that a governmental entity, which has the power of eminent domain, has taken or damaged private property for a public purpose, but has failed to initiate a condemnation action to assess compensation.¹⁵ Although not specifically addressed in this article, inverse condemnation actions generally are tried pursuant to the same substantive and procedural rules applicable to traditional condemnation actions.¹⁶

Property Subject to Condemnation

Both real and personal property are subject to condemnation, although there is little reported use of eminent domain

authority to acquire personal property independent of real property. Usually, there is no need to condemn personal property, because most types of personal property are fungible and can be purchased instead of condemned. Only specific real property is unique.

Property that already is dedicated to a public use is subject to the "prior public use" doctrine. This rule provides that property dedicated to a public use still is subject to condemnation, but only to the extent the new use does not materially interfere and is consistent with the prior public use.¹⁷ As such, a public park may be subject to condemnation for an underground pipeline easement, provided that the surface is restored after installation, because the use of underground pipelines normally is not inconsistent with the prior public use of the surface as a public park. However, a public park would not be subject to condemnation for a new public highway without express constitutional or statutory authority allowing what likely would be considered an inconsistent public use.

Where a government authority has been expressly granted the power of dominant eminent domain, it may condemn other public property irrespective of a conflict with a prior public use.¹⁸ However, property owned by the State of Colorado may not be condemned by a party claiming dominant eminent domain authority under Colorado law,¹⁹ and property of the United States cannot be condemned under Colorado law.²⁰

Public Use or Purpose

All condemnations under Colorado law in some way must be justified as advancing the public interest; the property must be used by the public, or the acquisition must serve a public purpose or generate a public benefit. This public use or purpose requirement is a fundamental concept and the power of eminent domain cannot lawfully be exercised without some connection to a legitimate public objective.

There is no set formula for determining what constitutes a public purpose. What may be justified as a public use or purpose



Stan panicked, "this long just to get an application? How long to process a claim?"

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in one context may not be considered a public purpose at a different time or location, or under a different set of facts.²¹ Some uses are clearly public, such as the acquisition of land rights for public streets and highways, parks, schools, water facilities, or other instances where a public facility or use will actually be located on the property acquired.

However, Colorado law also permits the condemnation of property even when it will not ultimately be owned or even used by the public. Such is the case of private condemnations under Article II, § 14, condemnations by private utilities, and the acquisition of blighted or slum properties by urban renewal authorities, which then convey those properties to private redevelopers. Although the property acquired in this manner eventually may be held by a private party and not actually used for public facilities, a public benefit is deemed to arise from the acquisition of the property.

The condemnation authority granted to private utilities and the right of private parties to condemn ways of necessity and rights-of-way for water works can be considered to advance the public interest to

some extent.²² The private utilities with the power to condemn generally are required to serve everyone equally with everyday necessities such as water, electricity, natural gas, or telecommunication services. As such, even private utilities have been deemed to provide a public service and, therefore, have the power of eminent domain for these purposes.²³

The private condemnation provisions authorized by Article II, § 14 of the Colorado Constitution were drafted at a time when the development of the state was of high public importance. Under this thinking, the act of appropriating and having a right of way for the conveyance of water to a beneficial use was deemed to be a public benefit. Similar public objectives were deemed to be met by the condemnation of private ways of necessity, which promoted the efficient use of lands by not allowing landlocked parcels to "go to waste" for lack of access.²⁴ Without at least some connection to the public interest—whether that be by actual public use, such as a public road, school, or open space park, or by providing rights of way for water, utilities, or for access to lands—a condemnation for a purely private benefit is unconstitutional.²⁵

The question of whether a contemplated use qualifies as a public use is a judicial question to be determined by the court without regard to the condemning entity's assertion that the use is public.²⁶ Deference is not given to the condemning authority's finding that a public purpose is being served; instead, the court must determine, in an *in limine* proceeding, whether the purpose for the taking is public or private.²⁷ The court's role is to determine whether the essential purpose of the condemnation is to obtain a public benefit.²⁸ If the primary purpose of a condemnation is to advance a private interest, the existence of an incidental public benefit may not justify the exercise of eminent domain authority.²⁹

Urban Renewal

Eminent domain for urban renewal purposes allows property that has been found to be blighted, as defined by statutory standards, to be condemned and then re-conveyed to another private party for redevelopment.³⁰ Some have argued the use of eminent domain in this context lacks a sufficient public purpose. However, the U.S. Supreme Court and the Colo-

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Urban Renewal Condemnations

Under current law, an area may be found to be blighted, and therefore subject to condemnation by an urban renewal authority, if at least four of the following factors are found to substantially impair the sound growth of the municipality, retard the provision of housing accommodations, or constitute an economic or social liability, and the area is a menace to the public health, safety, morals, or welfare:

- 1) slum, deteriorated, or deteriorating structures;
- 2) predominance of defective or inadequate street layout;
- 3) faulty lot layout in relation to size, adequacy, accessibility, or usefulness;
- 4) unsanitary or unsafe conditions;
- 5) deterioration of site or other improvements;
- 6) unusual topography or inadequate public improvements or utilities;
- 7) defective or unusual conditions of title rendering the title nonmarketable;

8) the existence of conditions that endanger life or property by fire or other causes;

9) buildings that are unsafe or unhealthy for persons to live or work in because of building code violations, dilapidation, deterioration, defective design, physical construction, or faulty or inadequate facilities;

10) environmental contamination of buildings or property; or

11) the existence of health, safety, or welfare factors requiring high levels of municipal services or substantial physical underutilization or vacancy of sites, buildings, or other improvements.¹

If the landowner and tenants consent to the inclusion of the property in an urban renewal area, the power of eminent domain may be exercised on a finding of any one of these factors.²

1. CRS § 31-25-103(2).

2. CRS § 31-25-103(2)(l).

rado Supreme Court have found that the use of eminent domain to rid communities of blight and slum conditions satisfies a legitimate public purpose.³¹

Much of the recent attention on the use of eminent domain for urban renewal stems from the U.S. Supreme Court's 2005 decision in *Kelo v. City of New London*,³² in which the Court upheld the use of eminent domain by a Connecticut municipality to condemn property for a private corporation's new headquarters. The Court found that the public purpose requirement was satisfied on the grounds that the taking would provide the community with much-needed economic development.

Unlike Connecticut law, however, the Colorado Urban Renewal Act does not provide for the right of condemnation solely for economic development purposes.³³ Colorado law allows for the use of eminent domain to eliminate blight or slum conditions, and it is this objective that satisfies the "public purpose" requirement, even though the property taken may subsequently be conveyed to a private concern.³⁴ In fact, the elimination of slum or blighted conditions is the only statutory basis for the exercise of eminent domain by an urban renewal authority.³⁵ After the blighted conditions have been ameliorated, an urban renewal authority loses its statutory powers of eminent domain over that property.³⁶

Despite the existence of statutory limitations on the use of eminent domain for urban renewal, political objections to its use have resulted in several recent amendments to the Urban Renewal Act. In 2004, the legislature amended the law to fur-

ther restrict the basis on which a property may be considered to be blighted and therefore subject to condemnation. Other prerequisites and restrictions also were added at that time.³⁷ In 2006, additional restrictions on the ability to condemn property for urban renewal were considered by the legislature. One such measure, House Bill 1411, which was passed and signed by the Governor, attempts to define "public use" so as not to include a taking of private property for transfer to another private party for purposes of economic development or enhancement of tax revenue.³⁸

Necessity

An issue closely related to, and often confused with, public purpose is that of necessity.³⁹ Necessity involves the need for the property to be acquired for the purpose intended.⁴⁰ The concept of necessity may include the extent and nature of property interests to be acquired, the timing of the acquisition, and other similar issues, such as the location or route selected for the proposed public improvement or use.

Necessity for the condemnation is an essential element of the right to exercise eminent domain authority; however, unlike the "public use or purpose" requirement, a finding of necessity by the condemning authority generally will not be disturbed by the courts absent a finding of fraud or bad faith.⁴¹ A party may not challenge the necessity of a condemnation by conclusory allegations of bad faith or fraud; the challenge must allege specific facts that, if true, would amount to bad faith or fraud.⁴²

There are no clear guidelines from the courts as to what constitutes "bad faith." In the context of an urban renewal taking, the Colorado Supreme Court held that bad faith may be supported by a showing that the purpose of the condemnation was not within the scope of action authorized under the Urban Renewal Act and was undertaken as a subterfuge for an improper purpose.⁴³ Another decision suggested that, where the taking of property for a private way of necessity causes great loss to the landowner that might readily be avoidable, this can be a factor in considering an allegation of bad faith.⁴⁴ A Colorado Court of Appeals decision found bad faith where the primary purpose of the taking was to advance private interests where members of the condemning authority's board stood to gain personally as a result of the condemnation.⁴⁵

The question of necessity is limited to whether the property sought to be taken is necessary for the purpose intended. Whether an enterprise is feasible or practicable and whether it will be a success are not for the court's determination.⁴⁶ Similarly, Colorado law does not require a condemning authority to demonstrate that it has obtained development permits or approvals as a condition precedent to proceeding with a condemnation.⁴⁷

Failure to Agree

Another statutory prerequisite of the right of eminent domain is a showing that the condemning authority and the property owner were not able to agree on the compensation to be paid.⁴⁸ Failure to agree on a voluntary transfer of the property is a prerequisite to the initiation of a

"The attorney representing a condemning authority must ensure that: (1) the condemnor possesses the necessary authority to exercise the right of eminent domain; (2) the acquisition of the property is necessary for a proper public purpose; and (3) there has been a failure to agree on the compensation to be paid for the acquisition of the property."

condemnation proceeding, and the petitioner has the burden to establish a failure to agree.⁴⁹ Often referred to as the "good faith negotiations" requirement, this prerequisite is satisfied when the condemning authority makes a reasonable, good faith offer to purchase the property from the owner and allows the owner sufficient time to respond. It is not necessary to send the offer to other parties with an interest in the subject property, such as lessees, mortgagees, and easement holders, because a failure to agree with the fee owner usually satisfies the requirement.

The "failure to agree" prerequisite is not applicable if the owner is incapable of consenting to the acquisition, if the owner cannot be located with due diligence, or if the owner is a non-resident of the state.⁵⁰ A "failure to agree" also may be presumed if: (1) the owner does not timely respond to an offer; (2) the owner makes a counteroffer that is unacceptable to the condemning authority; or (3) further negotiation otherwise would be futile.⁵¹ Lengthy or face-to-face negotiations are not required,⁵² and there is no requirement to

negotiate with parties having an interest in the property that is not of record.⁵³

Prior to Filing a Condemnation Action

After determining that certain property rights are necessary for a public purpose, the condemning authority must provide notice of its intent to acquire those rights and that it may do so by eminent domain if a voluntary conveyance cannot be achieved.⁵⁴ The condemning authority must provide this notice, along with a description of the property interest to be acquired, to the property owner and to anyone having an interest of record in the property at issue as soon as it determines that it intends to acquire the interest in the property.⁵⁵ If the property rights have an estimated value of \$5,000 or more, this notice also must inform the landowner that the condemnor is required to pay the reasonable costs of an appraisal obtained by the property owner.⁵⁶ The condemning authority must pay for only one appraisal, and if the parties with various inter-

ests in the property—such as the fee owner, a mortgagee, and an easement holder—cannot agree on one appraisal, the condemning authority is relieved of this obligation.⁵⁷

As discussed above, in addition to providing notice of its intent to acquire the property, the condemning authority also must make a reasonable, good faith offer to the landowner for the property rights sought. At least one offer must be in writing.⁵⁸ The good faith offer must include an adequate legal description of the property interests sought and should be based on a competent appraisal of those property interests. Especially in large, complex, or high-value acquisitions, it is important for both parties to engage the services of a qualified appraiser who is familiar with the nuances of eminent domain law.

Usually, the offer is made only to the fee owner of the property. Under Colorado's undivided basis rule, the condemnor is required to offer (and ultimately pay) compensation for the undivided (and unencumbered) interest in whatever property right or estate the condemnor has deemed necessary for its intended use. Thus, the condemnor need not make separate offers to the fee owner, the mortgagee, and the easement holder, but is required to offer and pay only one amount, representing the value of the undivided basis in the property being acquired.⁵⁹ The various interest holders in the property must agree or litigate as to their proportional share of the compensation paid.⁶⁰ The issue of apportioning the condemnation proceeds between the various interest holders is decided after the total compensation is assessed, and occurs without the participation of the condemnor.

The fact that the property is to be valued on an undivided basis does not mean that the effect of encumbrances on the property are ignored for purposes of valuation.⁶¹ Thus, for example, if a ditch right-of-way bisects a parcel and thereby limits its potential uses, the property will be valued accordingly. The undivided basis rule does not preclude a condemnor from taking "subject to" certain property interests

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that may be compatible with its intended use. For example, a city could condemn the fee interest in a parcel for a municipal park, but take that property subject to an existing underground pipeline easement. The undivided basis rule simply allows the condemner to offer (and ultimately to pay) one amount, based on the undivided and unencumbered estate it seeks to acquire.

For public projects that receive federal funding, relocation benefits must be provided under the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 ("Relocation Act").⁶² Compliance with the Relocation Act also is required of an urban renewal authority when the property is to be ultimately transferred to another private party.⁶³ Relocation benefits are in addition to the compensation owing for property rights condemned and generally provide for reimbursement of certain moving and relocation expenses. The Act contains additional requirements for parties acquiring property either by condemnation or with the threat of condemnation. Issues relating to relocation benefits typically are determined separately from the eminent domain compensation issues.⁶⁴

Filing a Petition in Condemnation

Eminent domain proceedings are special statutory proceedings that are to be construed strictly according to statute.⁶⁵ Collateral or extraneous issues that change the scope of eminent domain proceedings generally are not permitted.⁶⁶ Constitutional and other objections to the eminent domain proceedings must be raised in those proceedings, instead of being pursued in collateral injunction proceedings.⁶⁷

Generally, the Rules of Civil Procedure are applicable in eminent domain cases, unless contradicted by statute.⁶⁸ As with any other civil action, a civil action cover sheet should be served with the initial pleadings, pursuant to C.R.C.P. 16. However, as a special statutory proceeding entitled to preference on the court's docket,⁶⁹ expedited eminent domain proceedings are not subject to the simplified rules of civil procedure under C.R.C.P. 16.1, unless the parties stipulate to operate under those procedures.

The attorney representing a condemning authority must ensure that: (1) the condemner possesses the necessary authority to exercise the right of eminent do-

main; (2) the acquisition of the property is necessary for a proper public purpose; and (3) there has been a failure to agree on the compensation to be paid for the acquisition of the property. Also, the condemning authority must comply with its own rules and procedures with respect to exercising that authority. For example, a municipality may need to refer to its own charter or code to ensure that it follows its own procedures and policies. This often entails the passage of a resolution or ordinance from

the city council or other governing body. The same may be true for the exercise of eminent domain authority by a special district or a corporation that has the power of eminent domain.

After determining that it can properly exercise the right of eminent domain, the condemner may file a petition in condemnation with the district court in the county where all or part of the subject property is located.⁷⁰ A summons served in an eminent domain action is somewhat different



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from that in other types of civil actions, and service by publication is specifically authorized.⁷¹

The parties to be named in the petition are the condemning authority (the "petitioner") and all parties with an interest of record in the property to be acquired (referred to as "respondents"). Condemnation counsel often will obtain a title commitment and name the fee owner of the property, as well as all parties with recorded interests in the property who are listed in the exceptions section of the title commitment. Not every exception listed in a title commitment will need to be named in the action. Counsel should review the various instruments of record to determine if they potentially are affected by the proposed taking. Usually, each respondent's recorded interest is listed in the petition in condemnation as the reason for their being named in the action. If the names of interested parties are unknown, the petitioner may name them as "unknown parties" and proceed to serve those parties by publication.⁷²

The county treasurer also should be named, as it has a statutory interest in all taxable real property.⁷³ If there is a deed of trust on the property, the public trustee also should be named. There may be additional parties with interests not of record who may need to be named as respondents in the condemnation action. An example would be a lessee in possession with an unrecorded lease. Also, title commitments often do not cover mineral interests and, if the proposed taking would limit surface access to, or otherwise affect the mineral estate, the mineral estate owner may need to be joined.

Of course, the condemning authority takes subject to the interest of any party who is not named in the action. Further, any party who is not named in the action, but who claims an interest in the property to be taken or damaged, may file a cross petition and seek to intervene in the action.⁷⁴

The petition should allege, with respect to the property rights sought:

- 1) the authority to condemn;
- 2) that the taking is for a public use or purpose;
- 3) that there is a need for the property to be acquired; and
- 4) that the parties have failed to agree on the compensation to be paid.

The petition also should specify the purpose for which the property is sought.⁷⁵ An adequate legal description of the property to be acquired should be attached as

an exhibit to the petition.⁷⁶ If an easement or some other estate less than a fee interest is to be taken, a description of the uses and restrictions associated with the easement should be provided so that the landowner may assess the impact of the taking.⁷⁷

After filing the petition in condemnation, condemnation counsel should record a *lis pendens* with the county clerk and recorder in each county where the subject property is located.⁷⁸ This places would-be purchasers, lenders, and others on notice of the pending condemnation. A copy of the *lis pendens* must include a copy of the legal description and also must be filed with the court and served on all parties.

Responding to the Condemnation

Counsel representing a property owner named in a condemnation action should gather as much information from the condemning authority as possible to understand the project and its impact on the remainder parcel if only part of the property is being taken. Right-of-way plans and project construction documents provide useful information and usually can be obtained from the condemning authority or its right-of-way agent.

Although there is no requirement that a property owner respond to an offer made by a condemning authority, by communicating with a condemnor early on, a landowner sometimes may be able to negotiate certain changes in the taking, its timing, and/or the project construction itself that may alleviate some of the landowner's concerns, and possibly eliminate or reduce potentially compensable damages. However, the condemnor is under no duty to negotiate and may proceed without considering the landowner's requests.

If an appraisal is warranted, the landowner should retain a qualified appraiser to value the taking and assess damages to any remainder property. If the estimated value of the property to be acquired is \$5,000 or more, the cost of the appraisal is borne by the condemning authority. To ensure that the reasonable costs of this appraisal will be reimbursed promptly, the appraisal must be submitted to the condemnor within ninety days of the date of the condemnor's notice of its intent to acquire the property, although an extension oftentimes can be negotiated.⁷⁹ If others are named as respondents, the parties should work to agree on one appraisal.

Technically, there is no need to file an answer in a condemnation case,⁸⁰ but it is good practice to do so. Private property may not be taken without the payment of just compensation even when a landowner fails to file an answer and the court normally would enter default. However, filing an answer ensures the right of the landowner to object to the taking.⁸¹ A timely answer also sets an "at issue" date for purposes of the Rules of Civil Procedure and enters landowner counsel's appearance so that subsequent filings are properly served.

Immediate Possession

An eminent domain action theoretically is made up of three phases: immediate possession (discussed below), valuation (wherein compensation is assessed), and apportionment (wherein final condemnation proceeds are allocated). The immediate possession phase of an eminent domain action is the process by which the petitioner may obtain possession and use of the subject property pending a determination of compensation owed for the taking. Thus, where a project's schedule demands that the property rights be available prior to the final determination of compensation, the petitioner may file and serve a motion for immediate possession and obtain a hearing before the court on that issue.⁸² A petitioner may not "needlessly disturb" the respondent's possession of the property,⁸³ but can move the court for a hearing on its motion for immediate possession as early as thirty days after service of the petition in condemnation.⁸⁴

If quick possession of the property is needed on account of a project's construction schedule, or for any other legitimate reason, the motion for immediate possession may be served with the summons and petition, along with a notice to set a hearing on immediate possession. Given that dates for a valuation trial usually are set many months or even years after the commencement of suit, this procedure provides the petitioner with an irrevocable right to possess, use and improve the property at issue, thereby allowing a public project to go forward pending a valuation trial.

Immediate possession proceedings are tried to the court and all issues regarding the "legal sufficiency" of the condemnation action are heard and determined at this time.⁸⁵ At this stage of the proceedings, the following usually are determined:

- the condemnor's authority to condemn

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- the public purpose or use of the subject property
- the necessity of the taking
- whether the parties were unable to agree on the compensation
- the amount of security the petitioner must deposit with the court in order to have possession.

The respondent must raise any challenge to the condemnation on these or any other grounds during the immediate possession phase; failure to do so may result in a waiver of the challenge.⁸⁶ A property owner who successfully challenges the petitioner's right to condemn is entitled to recover reasonable attorney fees and costs.⁸⁷ A condemner generally may abandon a condemnation at any time before taking title, but may be liable for any damages suffered by the property owners, in addition to costs and attorney fees.⁸⁸

The issue of a deposit also is determined at the immediate possession hearing.⁸⁹ If the petitioner is awarded immediate possession, it must deposit with the court registry an amount that serves as security for the ultimate payment of compensation, once ascertained. The petitioner is entitled to possession only after the

court has entered an order for immediate possession and the required deposit is made with the registry of the court. The amount of the deposit often is stipulated to by the parties. However, a landowner may challenge the petitioner's proposed deposit and offer evidence that a larger amount should be required. After the deposit is made, at the direction of the court, the respondents may withdraw up to 75 percent of the highest valuation evidence presented by the petitioner, or a greater amount if the petitioner consents.⁹⁰ Of course, any amount deposited with the court will offset the amount finally awarded as just compensation.⁹¹ No pre-judgment interest is awarded on any portion of a final award that is offset by the amount of the deposit.⁹²

An urban renewal authority can obtain immediate possession of the property and also may obtain fee title to the property pending a final valuation trial.⁹³ Obtaining title at the outset of the condemnation action through vesting proceedings enables an urban renewal authority to immediately begin work to eliminate blighted conditions by conveying or encumbering the property as needed as part of the

redevelopment plan. In urban renewal vesting proceedings, a more formal procedure is followed to determine the amount of the deposit required pending a final valuation trial.⁹⁴

Parties often will stipulate to immediate possession, which may be entered into at any time after the initiation of the condemnation action. By stipulating to possession, the property owner usually waives any challenge to the condemnation itself, reserving only the right to contest the amount of compensation. If the parties agree to the terms of possession prior to the initiation of a condemnation action, the parties may enter into an agreement for possession and use. Typically, after the condemner obtains possession, whether by court order, stipulation, or agreement, the only remaining issues to be tried are the amount of compensation owed for the taking and the subsequent apportionment of the condemnation proceeds among the various respondents.

Although a petitioner may seek immediate possession at any time, it is not required. If the petitioner does not seek immediate possession before the valuation trial, possession and title transfer at the

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conclusion of the valuation trial, when compensation is paid and the final rule and order is entered. Also, if immediate possession is not sought, there is no requirement that the condemnor make a deposit into the court registry and pre-judgment interest does not accrue. Of course, even in the absence of an immediate possession hearing, the condemnor still must establish its authority, the public purpose, and necessity for the taking of the property, and the parties' failure to agree; these issues would be tried to the court immediately prior to the valuation trial.

The determinations made by the court at the immediate possession hearing (authority, public purpose, necessity, and failure to agree) are interlocutory and may not be appealed until after the conclusion of the valuation trial. If a party wishes to immediately appeal one of these *in limine* rulings, its only recourse is to seek an extraordinary writ under Rule 21 of the Colorado Appellate Rules.⁹⁵

Conclusion

With the recent public attention drawn to the use of eminent domain, in particu-

lar by the *Kelo* decision,⁹⁶ it is important to recall that condemnation is a valuable tool that must be contemplated in any society where growth, economic development, and the development of public facilities are desirable. Parties exercising the right of eminent domain, however, must do so only in appropriate circumstances and only as a last resort. The law of eminent domain must continue to strike a balance between the competing interests of the larger community's welfare and individual private property rights.

NOTES

1. *City of Thornton v. Farmers Reservoir & Irr. Co.*, 575 P.2d 382 (Colo. 1978). The Court stated:

The power of eminent domain is an inherent attribute of sovereignty limited only by applicable portions of the State and Federal Constitutions; the exercise of the right of eminent domain is the exercise of the sovereign power.

2. For condemnation of private ways by necessity, see *Bear Creek v. Genesee Foundation*, 919 P.2d 948 (Colo.App. 1996); *West v. Hinksmom*, 857 P.2d 483 (Colo.App. 1992); *Bear Creek Dev. Corp. v. Dyer*, 790 P.2d 897 (Colo.App. 1990). For condemnation of land rights related

to the use of water, see Colo. Const., Art. XVI, § 7 (providing for the taking of right-of-way for the purpose of conveying water); *Bd. of County Comm'r's of County of Park v. Park County Sportsmen's Ranch, LLP*, 45 P.3d 693, 709 (Colo. 2002).

3. *Crystal Park Co. v. Morton*, 146 P. 566 (Colo.App. 1915).

4. *Dep't of Highways v. Denver & Rio Grande Western R.R. Co.*, 789 P.2d 1088 (Colo. 1990); *Clear Creek School Dist. RE-1 v. Holmes*, 628 P.2d 154 (Colo.App. 1981). The Colorado Supreme Court has strictly construed this provision of the constitution. See, e.g., *Coquina Oil Corp. v. Harry Kourlis Ranch*, 643 P.2d 519 (Colo. 1982) (holding that an oil and gas lessee does not have the power to acquire a private right of way by necessity on the grounds that it was not the fee owner of land needing access).

5. Note the constitutional requirement for just compensation not only for property rights that are actually "taken," but also those that are "damaged."

6. *La Plata Elec. Ass'n, Inc. v. Cummins*, 728 P.2d 696 (Colo. 1986); *E-470 Public Highway Auth. v. 455 Co.*, 983 P.2d 149 (Colo.App. 1999), aff'd, 3 P.3d 18 (Colo. 2000). The compensation owed for the taking and damaging of private property will be more thoroughly discussed in Part II of this article.

7. *Bd. of County Comm'r's v. Intermountain Rural Elec. Ass'n*, 655 P.2d 831 (Colo. 1982);



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Mack v. Town of Craig, 191 P. 101 (Colo. 1920); *Town of Parker v. Colo. Div. of Parks*, 860 P.2d 584 (Colo.App. 1993).

8. *Dep't of Transp. v. Stapleton*, 97 P.3d 938, 941 (Colo. 2004); *Beth Medrosh Hagodol v. City of Aurora*, 248 P.2d 732 (Colo. 1952) (the right to condemn private property, if not expressly granted by statute, can be found only through necessary implication).

9. *Town of Eaton v. Bouslog*, 292 P.2d 343 (1956) (authority to exercise the power of condemnation, being against the common right to own and keep property, must be given expressly or by clear implication; it can never be implied from doubtful language); *City of Aurora v. Commerce Group Corp.*, 694 P.2d 382, 385 (Colo.App. 1984).

10. See, e.g., CRS §§ 31-25-201 (statutory cities may condemn property for park purposes only under certain specified conditions), 38-6-101 (statutory towns generally may not condemn property outside of the town boundaries), 30-20-402(1) (counties may condemn land necessary for water or sewer facilities), 22-32-111 (school districts may acquire school sites), and 43-3-106 (State Department of Transportation may condemn rights of access and land for local service roads).

11. *City of Thornton*, *supra* note 1.

12. *Fishel v. City and County of Denver*, 108 P.2d 236, 240 (Colo. 1940) (finding that Denver possessed "full power to exercise the right of eminent domain in the effectuation of any lawful, public, local and municipal purpose"); *Denver v. Hallett*, 83 P. 1066 (Colo. 1905).

13. See, e.g., CRS §§ 38-2-101 (certain corporations), 38-4-101 (common carriers), 38-5-101 (transmission companies), and 38-5.5-101 (telecommunication providers).

14. *Pub. Serv. Co. of Colorado v. Shaklee*, 784 P.2d 314 (Colo. 1989) (condemnation of private

property by private electric utility company for construction of transmission line was for public use).

15. *Collopy v. Wildlife Comm'n*, 625 P.2d 994 (Colo. 1981); *Thompson v. City & County of Denver*, 958 P.2d 525 (Colo.App. 1998). See also *City of Northglenn v. Grynberg*, 846 P.2d 175 (Colo. 1993); *Ossman v. Mountain States Tel. & Tel. Co.*, 520 P.2d 738 (Colo. 1974) (inverse condemnation claims may be viable when there is a physical taking or occupation of property rights). But see *Pub. Serv. Co. of Colorado v. Van Wyk*, 27 P.3d 377, 388 (Colo. 2001) (rejecting inverse condemnation claim where the invasion is by intangible elements, such as noise, electric fields, or radiation). Colorado law also recognizes claims for "regulatory takings," in which the property owner claims a "taking" of property through the application of regulatory standards or requirements. See *Animas Valley Sand & Gravel, Inc. v. Bd. of County Comm'r's*, 38 P.3d 59 (Colo. 2001); *Quaker Court Ltd. Liability Co. v. Bd. of County Comm'r's of County of Jefferson*, 109 P.3d 1027 (Colo.App. 2004).

16. *Grynberg*, *supra* note 15; *Ossman*, *supra* note 15; *Hayden v. Bd. of County Comm'r's*, 580 P.2d 830 (Colo.App. 1978).

17. *Beth Medrosh Hagodol*, *supra* note 8 (land devoted to one public use cannot be condemned for inconsistent public use, unless legislative authority for such condemnation is granted, either expressly or by necessary implication).

18. *Town of Parker*, *supra* note 7 at 588 ("dominant eminent domain" means that the power of eminent domain is superior to that of other specific governmental subdivisions of the state, but not the state itself"). Only a few entities have been granted the power of dominant eminent domain; among them are water and

sanitation districts, fire protection districts, metropolitan districts, municipal public improvement districts, water conservancy districts, the Urban Drainage and Flood Control District, and the Regional Transportation District.

19. *Id.* But see CRS § 38-5-102 (certain utilities may condemn state lands).

20. *United States v. 161 Acres of Land*, 427 F.Supp. 582 (D. Colo. 1977).

21. *Buck v. Dist. Court for Kiowa County*, 608 P.2d 350, 351 (Colo. 1980); *Thornton Dev. Auth. v. Upah*, 640 F.Supp. 1071, 1077 (D.Colo. 1986).

22. See, e.g., *Pine Martin Mining Co. v. Empire Zinc Co.*, 11 P.2d 221 (Colo. 1932).

23. *Shaklee*, *supra* note 14.

24. *Pine Martin Mining Co.*, *supra* note 21.

25. *City and County of Denver v. Block 173 Assocs.*, 814 P.2d 824 (Colo. 1991).

26. Colo. Const., Art. II, § 15; *Potashnik v. Pub. Serv. Co.*, 784 P.2d 314 (Colo. 1952).

27. *Larson v. Chase Pipe Line Co.*, 514 P.2d 1316 (1973); *Upah*, *supra* note 21 at 1076.

28. *City and County of Denver v. Eat Out, Inc.*, 75 P.3d 1141, 1144 (Colo.App. 2003).

29. *Denver West Metro. Dist. v. Geudner*, 786 P.2d 434, 436 (Colo.App. 1989).

30. See CRS § 31-25-103.

31. *Berman v. Parker*, 348 U.S. 26 (1954) (finding that elimination of blighted or slum conditions satisfies the public use requirement of Article V of the U.S. Constitution); *Rabinoff v. Dist. Court*, 360 P.2d 114, 120 (Colo. 1961).

32. *Kelo v. City of New London*, 125 S.Ct. 2655 (2005).

33. This fact was re-emphasized by the Colorado General Assembly in 2006 with the passage of House Bill 1411, discussed below.

34. *Auraria Businessmen Against Confiscation, Inc. v. Denver Urban Renewal Auth.*, 517 P.2d 845, 849 (Colo. 1974); *Rabinoff*, *supra* note 31 at 121.

35. *Block 173 Assocs.*, *supra* note 25.

36. *Arvada Urban Renewal Auth. v. Columbine Prof'l Plaza Ass'n, Inc.*, 85 P.3d 1066, 1073 (Colo. 2004).

37. See CRS § 31-25-105.5.

38. House Bill 1411 also states that any condemning entity must establish, by a preponderance of the evidence, that the taking is for a public use, unless the condemnation is for the eradication of blight, in which case the urban renewal authority must show that the taking is necessary for the eradication of blight by "clear and convincing evidence."

39. *Silver Dollar Metro. Dist. v. Goltra*, 66 P.3d 170, 172 (Colo.App. 2002) (dissenting opinion); *Upah*, *supra* note 21 at 1077.

40. *Mortensen v. Mortensen*, 309 P.2d 197 (Colo. 1957).

41. *Block 173 Assocs.*, *supra* note 25 at 829; *Mack v. Bd. of County Comm'r's*, 381 P.2d 987 (Colo. 1963); *Goltra*, *supra* note 39 at 172; *Tracy v. City of Boulder*, 635 P.2d 907, 909 (Colo.App. 1981).

42. *Colorado State Bd. of Land Comm'r's v. Dist. Court*, 430 P.2d 617 (Colo. 1967).

43. *Block 173 Assocs.*, *supra* note 25 at 829.

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44. *Arizona-Colorado Land and Cattle Co. v. Dist. Court*, 511 P.2d 23 (Colo. 1973).

45. *Geudner*, *supra* note 29.

46. *Mortensen*, *supra* note 40; *Goltra*, *supra* note 39. See also *Ambrosio v. Baker Metro. Water and Sanitation Dist.*, 340 P.2d 872, 873 (Colo. 1959) (the expediency of the project or the fact that those seeking to condemn the land for the project might proceed in another way are not appropriate matters of defense in condemnation proceedings).

47. *Shaklee*, *supra* note 14; *Buck v. Dist. Court*, 608 P.2d 350 (Colo. 1980); *Goltra*, *supra* note 39.

48. CRS § 38-1-102(1).

49. *Bd. of County Comm'r's of Jefferson County v. Blosser*, 844 P.2d 1237, 1239 (Colo. App. 1992).

50. CRS § 38-1-102(1).

51. See *Interstate Trust Bldg. Co. v. Denver Urban Renewal Auth.*, 473 P.2d 978 (Colo. 1970) (where landowner rejected the condemning authority's offers and by its actions declined invitation to negotiate, court rejected argument that no showing of good faith negotiations was made); *Bd. of County Comm'r's v. Blecha*, 697 P.2d 416 (Colo. App. 1985) (where county made offer and respondents failed to reply, court found that county negotiated in good faith); *Blosser*, *supra* note 49 at 1239 (landowner's silence in response to good faith offer deemed to satisfy failure to agree prerequisite).

52. *City of Holyoke v. Schlachter Farms R.L.L.P.*, 22 P.3d 960, 963 (Colo. App. 2001).

53. *Eat Out, Inc.*, *supra* note 28 (no need for city to negotiate with lessee with unrecorded lease).

54. CRS § 38-1-121(1).

55. *Id.*

56. *Id.*

57. CRS § 38-1-121(2).

58. CRS § 38-1-121(6).

59. *Montgomery Ward & Co., Inc. v. City of Sterling*, 523 P.2d 465, 467 (Colo. 1974).

60. CRS § 38-1-105(3).

61. *Gifford v. City of Colorado Springs*, 815 P.2d 1008, 1011 (Colo. App. 1991) (under Colorado's undivided basis rule of fair market valuation, the condemner must value the property as a whole, assuming ownership by one person, while taking into consideration the value of encumbrances on the fair market valuation of the property).

62. 42 U.S.C.A. §§ 4601 *et seq.* Colorado has adopted the requirements of this federal legis-

lation for projects receiving federal funding. See CRS §§ 24-56-101 *et seq.*

63. CRS § 31-25-105.5(4). This provision also requires the payment of certain "business interruption" expenses.

64. *Denver Urban Renewal Auth. v. Marshall Mfg. Co.*, 532 P.2d 746, 748 (Colo. App. 1975). See also *Auraria Businessmen Against Confiscation*, *supra* note 34.

65. *Bd. of Comm'r's v. Poundstone*, 220 P.2d 234 (Colo. 1923); *Denver Urban Renewal Auth.*, *supra* note 64.

66. *Denver Power & Irrigation Co. v. Denver & Rio Grande R.R.*, 69 P. 568, 571-72 (Colo. 1902); *Dep't of Transp. v. Auslaender*, 94 P.3d 1239, 1241 (Colo. App. 2004).

67. *Auraria Businessmen Against Confiscation*, *supra* note 34 at 847; *Ambrosio v. Baker Metro. Water and Sanitation Dist.*, 340 P.2d 872, 873 (Colo. 1959) (injunction will not lie to prevent suits in eminent domain, because there is adequate remedy at law for damages for the property taken).

68. *Stalford v. Bd. of County Comm'r's*, 263 P.2d 436 (Colo. 1953); *Cucharas Sanitation & Water Dist. v. Mounsey*, 805 P.2d 1177, 1179 (Colo. App. 1990). See also C.R.C.P. 81(a).

69. CRS § 38-1-119.

70. CRS § 38-1-102(1).

71. CRS § 38-1-103.

72. CRS § 38-1-103; C.R.C.P. 4(e).

73. CRS § 39-3-134.

74. CRS § 38-1-109.

75. CRS § 38-1-102.

76. *Boxberger v. State Highway Comm'n*, 251 P.2d 920 (Colo. 1953); *Colorado Fuel & Iron Co. v. Four Mile Ry.*, 66 P. 902 (Colo. 1901).

77. *State Dept. of Highways v. Woolley*, 696 P.2d 828 (Colo. App. 1984).

78. See C.R.C.P. 105(f).

79. CRS § 38-1-121(1) and (2). The cost of an appraisal, if not submitted/reimbursed under statute, usually may be subsequently recovered as costs under C.R.C.P. 54(d).

80. CRS § 38-1-109 states: "Except for such cross petition, there shall be no written pleadings . . ."

81. *Kaschke v. Camfield*, 102 P. 1061 (Colo. 1909).

82. CRS § 38-1-105(6).

83. Colo. Const., Art. II, § 15.

84. CRS § 38-1-105(6)(c). See also CRS § 24-56-117 (for condemnations subject to the relocation act).

85. CRS § 38-1-109.

86. CRS § 38-1-109 provides:

at the [immediate possession] hearing . . . the court shall hear and dispose of all objections that may be raised touching the legal sufficiency of the petition or cross petition or the regularity of the proceedings in any other respect.

CRS § 38-1-105(1) states: "The court shall hear proofs and allegations of all parties interested touching the regularity of the proceedings and shall rule upon all objections thereto." See also *Pine Martin Mining Co. v. Empire Zinc Co.*, 11 P.2d 221 (Colo. 1932).

87. CRS § 38-1-122 (1).

88. *Piz v. Housing Auth. of the City and County of Denver*, 289 P.2d 905, 910 (Colo. 1955); *Johnson v. Climax Molybdenum Co.*, 124 P.2d 929, 930 (Colo. 1942).

89. CRS § 38-1-105(6)(b).

90. *Id.*

91. *Id.*

92. CRS § 38-1-116.

93. See CRS §§ 37-7-101 *et seq.*

94. CRS §§ 38-7-102 and -103.

95. *Potashnik*, *supra* note 26 at 138; *Swift v. Smith*, 201 P.2d 609 (Colo. 1948) (because an order for temporary possession clearly is interlocutory, any review must be by an original proceeding).

96. *Kelo*, *supra* note 32. ■

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