Addressing the Pre-Condemnation Cloud

By Martin D. Beier[1]

In general, Colorado's state and local governments may exercise eminent domain to take private property (including commercial property) for a public use. The Colorado Constitution addresses property takings for public use and provides that private party cannot be "taken or damaged" without just compensation.[i] Condemnations under Colorado law must be justified as advancing the public interest. Although there is no set formula to determine what constitutes a public use, Colorado law also allows condemnation even if the property condemned will not ultimately be owned or used by the public.[ii] At the local level, such exercise often occurs in connection with urban renewal plans.

By law, urban renewal plans in Colorado may not be undertaken until the governing body, by resolution based on evidence at public hearing, determines the area to "a slum, blighted area, or a combination" of the two.[iii] If the actual purpose of an urban renewal plan is to eliminate or prevent blight or slums, the governmental authority has the power to condemn. Once an area is designated as blighted, the urban renewal authority may transfer condemned property to private developers without violating the "public use" requirement.[iv] During the condemnation, if the landowner disputes the reasonable market value of the condemned property that the government is willing to pay, the matter can be litigated in court where Colorado law affords an equitable process so that just compensation is assessed by a jury or a commission.[v]

The pursuit of urban renewal and elimination of run-down areas from commercial centers can be a laudable goal that also results in just compensation to landowners when local governments actively pursue the condemnation process from start to end. However, when a local government loses the will or momentum to complete the process by filing a condemnation action (or never really had the wherewithal to complete the process in the first place), property owners, and especially commercial owners and landlords, can find themselves stuck under a "pre-condemnation cloud" that paralyzes their ability to lease, sell or otherwise develop their own property. In such instances, overzealous or premature "blight" designation of a commercial area can harm individual commercial landlords and landowners when the blight designation persists without further substantial action by the condemning authority. Over time, the "blight"

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[1] This article is for informational purposes only and not for the purpose of providing legal advice. You should contact your attorney to obtain advice with respect to any particular issue or problem.

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designation can become a near insurmountable hurdle to new leasing or sale of the facility. Ironically, instances of premature blight designation can aggravate a "blighted" condition by preventing a temporarily depressed business neighborhood from recovering through an improving business cycle.

Unfortunately for commercial property owners and lessors in Colorado, an appellate court has determined that "nothing in [Colorado's] statutory scheme imposes a duty on a condemning authority 'to proceed without delay' in filing a condemnation petition to acquire property."[vi] It has been determined "inevitable that delays will occur during which property owners may be unable to develop, lease, or sell their properties because of the uncertainty created by the impending condemnation."[vii] The threat of condemnation is deemed ever present, and considered one of the accepted conditions of owning property. As such, "mere plotting and planning by a governmental body in anticipation of the taking of land for public use, and preliminary steps taken to accomplish this, does not, in itself, constitute a taking" of property requiring compensation.[viii]

Nonetheless, and within limits, Colorado law recognizes remedies to landowners in situations involving "blight" designations where a local governmental entity has cast a pre-condemnation cloud over property development but declines to move forward with the condemnation process.[ix] Local government may be found liable for inverse condemnation if it takes affirmative action, beyond mere protracted delay, which could allow a jury or judge to find the local government legally interfered with the owner's property resulting in the condemning authority's dominion and control over the property. What such a showing must be has yet to be determined by statute or in Colorado's published case law, but it appears that when there has been aggravated delay or untoward activity by a condemning authority after it has designated property as blighted, a remedy exists.

Tips to Address the Cloud of Blight:

- If a "blight" designation of commercial area is pending before local government, affected landlords, landowners and property management companies should use the public process and available media (newspapers, newsletters, social media, etc.) to encourage local government not to proceed unless it has the means complete its urban renewal plans, including the revenue to pay just compensation for property to be taken.

- If the commercial property is designated "blighted," affected owners or managers should preserve any current indications of value before the designation (e.g., appraisals) and document any subsequent harm caused by the designation over time, keeping contemporaneous records of lost lease or lost sale opportunities (e.g., letters of intent). Owners should also keep the contact information from these prospective tenants, buyers and/or brokers, as they may need to be contacted again later.

- Affected owners or managers should make periodic inquiries of the local entity's redevelopment efforts, and inform the governmental entity of any adverse effects that its

blight designation is causing which are specific to the property.

- Affected owners or managers should monitor the progress of the redevelopment efforts via review of local government meeting minutes and attendance or review of public hearings to check for signs of the process stalling. Government-prepared materials (agendas, hearing recordings, minutes, etc.) showing a lack of diligence, delay or inaction should be retained for later use, if necessary.

- Affected owners or managers should look for and document any governmental entity contact with the public or with third parties for signs that the entity is claiming ownership of the property, states affirmatively what public use the property will serve, or otherwise acts as if the condemnation is a "done deal" or will certainly happen.

- If progress stalls for or fails to adequately progress over a sustained period of time and actual harm is occurring, owners or managers should consult legal counsel experienced in inverse condemnation proceedings.[x]

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[i] COLO. CONST., ART. II, § 15.
[ii] C.R.S. § 38-1-101(b) (authorizing condemnation necessary for the eradication of blight).
[iii] C.R.S. § 31-25-107(1)(a).
[iv] *Berman v. Parker*, 348 U.S. 26 (1954); *Rabinoff v. Dist. Court*, 360 P.2d 114 (Colo. 1961).
[v] C.R.S. § 38-1-101.
[vi] *City of Colo. Springs v. Anderson Mahon Enterp., LLP*, 260 P.3d 29((Colo. App. 2010).
[vii] *G&A Land LLC v. City of Brighton*, 233 P.3d 701 (Colo. App. 2010).
[viii] *City of Colo. Springs v. Anderson Mahon Enterp., LLP*, 260 P.3d 29 (Colo. App. 2010).
[ix] *G&A Land v. City of Brighton*, 233 P.3d 701 (Colo. App. 2010).