
SECTION 3-E

Negotiating Condemnation Clauses



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Negotiating Condemnation Clauses
Presented by Michael R. McCormick, Esq.
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1) Introduction

- a) A “condemnation clause” in a lease determines what happens if a governmental entity condemns, or acquires under threat of condemnation, all or a portion of the leasehold.
- b) Most condemnation clauses in leases are boilerplate and are drafted with little understanding of Colorado eminent domain law
- c) This presentation will cover a few basic eminent domain concepts and strategies that will help you in reviewing and revising condemnation clauses.
- d) Your strategy will vary depending on whether you represent the landlord or the tenant and what your bargaining power is.
- e) Caution and Disclaimer: These are only some general concepts, not legal advice. Practitioners are advised to consult more in-depth treatises (see references and further reading below) dealing with specific circumstances that may be applicable to their situation.

2) Ability to Contractually Apportion Awards

- a) Landlords and tenants claiming an interest in a condemnation award may contractually determine how these funds are to be distributed. *See, e.g., Total Petroleum, Inc. v. Farrar*, 787 P.2d 164, 167 (Colo. 1990); *Vivian v. Board of Trustees*, 383 P.2d 801, 803 (Colo. 1963).

3) Overview of Condemnation Proceedings

- a) Three phases: immediate possession, valuation, and apportionment.
 - i) First Phase: Immediate Possession
 - (1) Condemnor seeks possession of the property to construct the project in return for making a deposit into the court registry to insure just compensation is paid. CRS § 38-1-105(6).

(2) Landlord and tenant(s) are permitted to withdraw three-fourths of the amount of the condemnor's appraisal from the court registry (or more if the condemnor consents) but only if they can agree among themselves on how to distribute the withdrawal. CRS § 38-1-105(6)(b).

ii) Second Phase: Valuation

(1) Commission or jury determines the amount of just compensation to be paid by the condemning authority. C.R.S. § 38-1-105.

iii) Third Phase: Apportionment

(1) Resolution of how the award will be apportioned—that is, distributed—among all of the parties with any interest in the property (landlord, tenant, lender, easement holders, etc.) CRS § 38-1-105(3).

(2) Generally, a leasehold tenancy is a property right entitled to compensation if taken or damaged as a result of a condemnation action. *See, e.g., Fibreglas Fabricators, Inc. v. Kylberg*, 799 P.2d 371, 375 (Colo. 1990).

4) Explicit waivers

a) Example: “In the event of any condemnation, the Tenant shall not be entitled to any part of the award paid for such condemnation and Landlord shall receive the full amount of such award, the Tenant hereby expressly waiving any right or claim to any part thereof.” Is this enforceable against the tenant?

b) Explicit waivers of all compensation are probably enforceable. *See, Total Petroleum, Inc. v. Farrar*, 787 P.2d 164, 167 (Colo. 1990); *Fibreglas Fabricators, Inc.*, 799 P.2d at 375; *Montgomery Ward & Co. v. City of Sterling*, 523 P.2d 465, 468 (Colo. 1974).

c) However, the law does not look with favor on clauses causing forfeiture of the tenant's interest due to condemnation. *See Sackman, Nichols' The Law of Eminent Domain* § 7A:G11.05 and 11.06 at 5-110. Therefore, such a waiver should include express, clear, and unmistakable intent.

Negotiating Condemnation Clauses

Michael R. McCormick, Esq.

- d) It is common for landlords to include such explicit waivers of any compensation to the tenant. Many tenants sign these waivers without reading them, and greatly regret that they did so later. Such a waiver can lead to catastrophic consequences for the tenant.
- e) Counsel for tenant should not agree to an explicit waiver unless counsel explains to the tenant orally and in writing that they will get nothing if the leasehold is condemned.

5) Bonus Value

- a) If a tenant is paying rent that is below the market rate, then the tenant can present evidence of compensable “bonus value” of the lease during the apportionment phase (see above for descriptions of the three phases of a condemnation proceeding). *See, e.g., Fibreglas Fabricators, Inc. v. Kylberg* 799 P.2d 371, (Colo. 1990); *Montgomery Ward & Co. v. City of Sterling*, 523 P.2d 465 (Colo. 1974).
- b) The “bonus value” is the difference between market rental rates and the contract rate provided for in the lease. In other words, if the tenant is getting a good deal on the lease, then the tenant can ask to be compensated for the difference between the lease rental rate and the market rental rate over the life of the lease.
- c) Example: The tenant is paying \$10/psf for a term of ten years. The market rate in that area is \$20/psf. The government condemns the property. The tenant argues that because it was paying \$10/psf less than the market rent of \$20/psf, the landlord was effectively giving the tenant \$10/psf per year less than the market rate. Can the tenant recover the difference?
- d) Yes, the tenant would probably recover the bonus value (\$10/psf for 10 years). *See, e.g., Fibreglas Fabricators, Inc. v. Kylberg*, 799 P.2d 371 (Colo. 1990); *Montgomery Ward & Co. v. City of Sterling*, 523 P.2d 465 (Colo. 1974).
- e) The condemnation clause should explicitly state whether the tenant will recover the bonus value. Landlords will want an explicit waiver of bonus value. Otherwise, the bonus value could consume the entire award and the

Negotiating Condemnation Clauses
Michael R. McCormick, Esq.

landlord may get nothing. Tenants will want an explicit award of bonus value to ensure compensation for it.

- f) The condemnation clause should specify whether any options to renew the lease will be considered in determining the bonus value. The landlord will not want the options to be considered, because it would lead to more compensation if the lease is below market rental rates. The tenant will want the options considered for the same reason.

6) Automatic Termination Clauses

- a) Example: “If, during the term of this Lease . . . the entire Leased Premises shall be taken as a result of the exercise of the power of eminent domain . . . [then] this Lease Agreement shall [automatically] terminate. . .” The Tenant claims \$600,000 based upon its remaining leasehold interest (i.e. bonus value – see above). Does the tenant get anything?
- b) The tenant got nothing. *See Montgomery Ward & Co. v. City of Sterling*, 523 P.2d 465 (Colo. 1974).
- c) Why? If the lease terminates then there is no bonus value to recover. A tenant is generally entitled to compensation for the condemnation of the tenant’s unexpired leasehold interest. However, the tenant may forego its right to compensation, and permit the landlord to receive all the condemnation proceeds, where the lease agreement contains a legally adequate automatic termination clause.
- d) Where a lease indicates that it will automatically terminate on the condemnation of the property and is otherwise silent about allocation of the award, a tenant may be deemed to have waived all rights to compensation. Many tenants agree to these automatic termination clauses without realizing they may be waiving their rights to any compensation.
- e) If you represent the tenant, then don’t agree to an automatic termination clause unless you explain to your client in writing the lease will terminate and they will not get bonus value if the property is condemned.

7) More On Termination

- a) There is little, if any, law on how extensive a partial taking must be to end a lease as a matter of law. To deal with this ambiguity, a condemnation clause should address under what specific circumstances the lease will terminate. If the lease terminates, then the tenant may not be liable for rent and may vacate the property
- b) Beware of automatic termination clauses. If the lease is above or below market rental rates, then one of the parties could use this clause to be freed from the lease, even if there is no significant impact to the tenant's business operations. If the landlord wants the tenant to stay, then they should not include an automatic termination clause.
- c) Tenant will want lease to terminate if loses something critical to their business. Examples:
 - (1) Anchor tenant leaves;
 - (2) Specific part of property condemned;
 - (3) Tenant loses percentage of sales; or
 - (4) Tenant loses access to major highway.
- d) Options to terminate
 - i) The condemnation clause may give one or both parties the option to terminate.
 - ii) The landlord probably will want the sole option to terminate the lease to keep the tenant in place as long as possible should the landlord so desire. Otherwise, the tenant may flee the property due to the condemnation.
 - iii) The tenant also will want an option to terminate the lease, and as much discretion regarding termination as possible. For example, the tenant may be given an option to terminate if one of the above conditions (something is lost that is critical to their business) is met. Otherwise, the project could put the tenant out of business. An option to terminate also will give the tenant more leverage in any negotiations concerning how the award will be apportioned.

8) Rent Reduction

- a) If the lease does not terminate, then the tenant might want a temporary or permanent reduction in rent should the lease continue.
- b) Example: “If the property is partially condemned then the tenant will receive a reasonable reduction in rent for the remainder of the lease.”
- c) This will invite disputes over what is “reasonable.” A vaguely defined “reasonable reduction in rent” is almost certain to invite disputes, may be unenforceable, and could be construed against the drafter.
- d) Instead, any rent reduction should be based on specific terms and conditions.
Examples:
 - i) percentage reduction in rent based on the number of parking spaces taken;
 - ii) overall area of the tenant’s leased space taken; or
 - iii) tenant’s reduction in sales.
- e) The tenant will want any rent paid in advance of the condemnation to be refunded; otherwise, the tenant will risk forfeiture. The landlord probably would prefer to hold onto prepaid rent without refunding it.

9) Undivided Basis Rule

- a) In Colorado, instead of making individual awards to each interest holder in the property, the commission or jury determines the amount of just compensation on an “undivided basis.” *Total Petroleum, Inc. v. Farrar*, 787 P.2d 164, 166 (Colo. 1990). This means that the value of the entire property as a whole is determined as if owned by a single entity. *Id.* The condemnor then pays the award into the Court registry and the individual interest holders fight over how the award is distributed in the apportionment phase.
- b) “Separate right to bring a claim against the condemnor” provisions are common.

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Michael R. McCormick, Esq.

- i) Example: “Although all damages in the event of any condemnation belong to the Landlord, Tenant shall have the right to claim and recover from the condemning authority, but not from the Landlord, such compensation as may be separately recoverable by Tenant in Tenant’s own right.” Will tenant recover anything?
 - ii) No, the tenant would probably recover nothing because of the undivided basis rule. An apportionment proceeding provides a tenant the only basis under Colorado law to establish the separate value of its leasehold interests and rights. *Montgomery Ward & Co. v. City of Sterling*, 523 P.2d 465 (Colo. 1974); *Gifford v. City of Colorado Springs*, 815 P.2d 1008, 1011 (Colo.App. 1991). A tenant cannot present separate evidence regarding the value of its leasehold interests at the valuation proceeding or pursue such claims in a separate action.
 - iii) Accordingly, these “separate right to bring a claim” provisions are probably worthless to the tenant. However they are quite common.
- 10) Priority of Payment (Dividing the Pie)
- a) What if the condemnation award is not big enough to satisfy all of the individual conflicting claims (multiple tenants, lenders, easement holders, etc.) on the property?
 - b) As noted above, the parties can contractually agree how to allocate an award during the apportionment phase. *See, e.g., Total v. Farrar*, 787 P.2d 164. The condemnation clause can set forth who gets paid in what order.
 - c) The condemnation clause should address these issues by either prioritizing claims, making distributions on a pro rata basis, or a combination of both.
 - i) Any pro rata distribution should carefully define what property is being used for the pro-ration (for example, the landlord’s entire shopping center, the leased premises, etc.), which specific interests will be pro-rated, and the method of pro-ration.

Negotiating Condemnation Clauses

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- ii) This will vary and be the subject of heavy negotiations depending on landlord and tenant's business needs and bargaining power.
- d) The landlord will want its own (as well as its lender's and other easement holders') claims and expenses to be paid first, with any remaining tenant claims to be divided and paid on a pro rata basis. The landlord will also want any of its fees and costs incurred as a result of the condemnation (including, for example, any attorney fees, appraisal fees, fees for experts such as land planners, and copying costs) that were not reimbursed by the condemning authority to be deducted before the tenant receives any share of the award. The tenant will want to resist any such deduction.
- e) The tenant should request the landlord to reimburse the tenant for all the tenant's fees and costs incurred in connection with the condemnation, including the cost of a separate appraisal report for the tenant, regardless of whether the tenant gets reimbursed by the condemnor (most condemnors will not pay for a separate appraisal). Tenants also want to insure adequate funds to compensate them for bonus value, fixtures, and anything else they are seeking. Most landlords will not agree to these provisions unless it is a tenant with a lot of bargaining power.
- f) The landlord may want to cap the tenant's overall recovery at a "not to exceed" value. Obviously, the tenant would like to avoid any such limitation, especially where it is forced to accept a lower priority.
- g) To the extent that other leases or documents related to apportionment are available, they should be reviewed to check for conflicts. For example, if the landlord promised a first tenant priority to the apportionment award, there is a problem giving a second tenant priority status. Conflicts among leases and other property documents can only lead to more costs, as well as potential animosity.
- h) Many condemnation clauses do not address how a deposit should be apportioned among the interest holders during the possession phase, which is the first phase at the outset of the case. A condemnation clause can specify how such a distribution of the possession deposit will be made. For example, a certain percentage of the possession deposit could be distributed to the landlord and tenant(s) without prejudicing any claims that will be made during the later apportionment phase. This would allow the parties quicker

Negotiating Condemnation Clauses

Michael R. McCormick, Esq.

access to the possession deposit while still allowing them to make competing claims during the apportionment phase.

- i) Don't forget the lender! Many deeds of trust now have condemnation provisions giving the deed of trust holder most or all proceeds of any sale or award. The parties can agree to allocate a portion of a condemnation award to a third party, such as an interested lender. The landlord's attorney will want a provision requiring that the landlord's lender(s) gets paid under the deed of trust before any tenants are compensated, if at all. Without such a provision, the landlord may have to pay the entire award to the lender and still be left with a tenant's valid claim for compensation under the lease.

11) Improvements and Fixtures

- a) Example: "Upon the condemnation of the property, all alterations, additions, improvements and fixtures installed by the Tenant upon the Leased Premises shall become the property of the Landlord and Tenant shall receive no compensation whatsoever therefor." Enforceable against the Tenant?
- b) This may be enforceable against the tenant. Some authorities hold that even if the tenant constructs improvements or fixtures, if the lease gives ownership of same to the landlord on expiration of the lease, then landlord may receive the compensation for them, not the tenant. See Friedman and Randolph, Friedman on Leases Chapter 13, § 13.5.
- c) However, generally in Colorado a tenant is entitled to the value of any buildings or site improvements it has constructed on the property and owners of fixtures are entitled to compensation. See, e.g., *Denver Urban Renewal Auth. v. Steiner American Corp.*, 500 P.2d 983, 986 (Colo.App. 1972); *Piz v. Housing Auth.*, 289 P.2d 905 (Colo. 1955).
- d) Nonetheless, even if the tenant constructs improvements or fixtures, if the lease gives ownership of same to the landlord on expiration of the lease, then the landlord may receive the compensation for them, not the tenant. To avoid any waiver or disputes regarding these issues, the condemnation clause should specifically define what the improvements and fixtures are, set forth who will own them before and after the condemnation, and set forth who will be compensated for them if they are taken or damaged.

Negotiating Condemnation Clauses

Michael R. McCormick, Esq.

- e) Both the owner and the non-owner of the fixtures should make sure that improvements and fixtures are appropriately compensated for as part of the overall award entered at the valuation trial. If this is not done, they may be arguing over apportionment of an interest that was not fully accounted for in the award.

12) Repairs and Restoration

- a) Normally, the condemnor will not undertake repairing the remainder property but will only pay money for the condemnation award. Who is obligated to rebuild or repair the premises in the event of a partial taking?
- b) Usually, the parties will require the party that purchased or constructed the building or improvements to conduct the repairs.
- c) The condemnation clause should address: (1) who will undertake repairs to the remainder property; (2) how long they have to make repairs; and (3) who will approve the repairs. The condemnation clause also should state that the repairs will adequately replace the lost or damaged improvements to the same condition as before the taking.
- d) The condemnation clause also should address how much each party's share is reduced by the costs of repairs. The landlord probably will want the cost of repairing improvements to be deducted out of the award, either off the top or out of the tenant's share. The tenant will want the cost of improvements deducted solely out of the landlord's share.
- e) Landlords should not agree to restoration or repairs in excess of their net award after deducting their fees, costs, and amounts paid to their lender. Otherwise, these payments may consume the landlord's entire award and the landlord may be left with insufficient funds to meet its repair obligations.

13) Excluding Non-Compensable Items

- a) Example: “. . . the tenant will be compensated for any portion of the award attributable to loss of profits; injury to business; loss of good will; and nuisance and annoyance during project construction.” Will the tenant recover for these items?

Negotiating Condemnation Clauses

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- b) The tenant will probably not recover anything for these items. These items are not compensable under Colorado eminent domain law. *See* C.J.I.-Civ 36:5 (Ascertainment of Damages to Residue – Limitations); Fields, *Colorado Eminent Domain Practice* (Bradford Pub. Co., 2008) at 11.2 (diminution in value rule), 8.9 (business profits rule). Accordingly, condemnation clauses purporting to award such items to the tenant are of dubious effect and the parties may wish to exclude them from the lease.
- c) Check to see that the items you are asking to be compensate for are allowable under Colorado eminent domain law. Please see References and Further Reading below.
- d) Although condemnation clauses in Colorado typically exclude compensation for the tenant for such items, the tenant is normally free to seek moving and relocation benefits from the condemning authority from funds available under the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 and Colorado’s version of the statute. Accordingly, condemnation clauses often state that the tenant may seek any such relocation assistance separately from the condemnor, but only to the extent that such claims or payments do not reduce the sums payable by the condemnor to the landlord.

14) Conclusion

- a) Leaving things to chance typically does not go well for attorneys. It is far better to be proactive and try to anticipate and prevent common disputes between landlords and tenants in the event of a condemnation proceeding. As the old saying goes, “everything is negotiable.”

15) Further Reading and References:

- a) Colorado Jury Instructions, Civil, Chapter 36 (Eminent Domain).
- b) Fields, *Colorado Eminent Domain Practice* (Bradford Pub. Co., 2008).
- c) Friedman and Randolph, *Friedman on Leases* Chapter 13.

Negotiating Condemnation Clauses

Michael R. McCormick, Esq.

- d) McCormick, Drafting Condemnation Clauses for Leases in Colorado – Issues and Strategies, *The Colorado Lawyer*, January 2014, Vol. 43, No. 1
- e) Sackman, Nichols' *The Law of Eminent Domain* (Nichols) § 7A:G11.05 and 11.06.
- f) Senn, *Commercial Real Estate Leases* Chap. 24 (5th ed., Aspen Publishers)
- g) Wilson, "Eminent Domain Law in Colorado—Part I: The Right to Take Private Property," 35 *The Colorado Lawyer* 65 (Sept. 2006);
- h) Wilson, "Eminent Domain Law in Colorado—Part II: Just Compensation," 35 *The Colorado Lawyer* 47 (Nov. 2006).

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NEGOTIATING CONDEMNATION CLAUSES

Strategies for the Government and
Landowners

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INTRODUCTION

- Lease Condemnation Clauses
 - What happens if leasehold condemned (who gets what)
 - Often boilerplate
 - Often wrong about Colorado law
 - Knowing basic concepts will help
 - Strategy depends on bargaining power and whether represent landlord or tenant

STRATEGY

—“Ninety percent of this game is half mental.”

—Yogi Berra

Ability to contract

- Parties can contractually determine how to distribute condemnation award (i.e. who gets what). See *Total Petroleum, Inc. v. Farrar*, 787 P.2d 164, 167 (Colo. 1990).

Three PHASES OF CONDEMNATION

- Immediate possession
 - Government makes deposit into Court registry in return for possession of property to begin constructing project
- Valuation
 - Jury or commission determines what just compensation government should pay in return for title to property
- Apportionment
 - How is condemnation award divided between interest owners? (landlord, tenant, lender, easement holders, etc.)

EXPLICIT WAIVERS

- Example: “In the event of any condemnation, the Tenant shall not be entitled to any part of the award paid for such condemnation and Landlord shall receive the full amount of such award, the Tenant hereby expressly waiving any right or claim to any part thereof.”
- Enforceable against the tenant?

Explicit waivers

- Explicit waivers of all compensation are probably enforceable.
- Law does not favor forfeiture - make sure to include express, clear and unmistakable intent of waiver.



EXPLICIT WAIVERS

- REMEMBER
 - Don't agree to an explicit waiver unless you explain to your client orally and in writing that they will get nothing if the leasehold is condemned!



BONUS VALUE

- “Bonus value” is the difference between the contract rental rate and the market rental rate.
- Example: The tenant is paying \$10/psf for a term of 10 years. Market rent in that area is \$20/psf. The government condemns the property. The tenant argues that because it was paying \$10/psf less than the market rent of \$20/psf, the landlord was effectively giving the tenant \$10/psf per year less than the market rate. Can the tenant recover the difference?

BONUS VALUE

- Yes, the tenant would probably recover the bonus value (\$10/psf for 10 years).
 - *See, e.g., Fibreglas Fabricators, Inc. v. Kylberg*, 799 P.2d 371 (Colo. 1990);
Montgomery Ward & Co. v. City of Sterling, 523 P.2d 465 (Colo. 1974).

BONUS VALUE

- REMEMBER
 - Landlords want an explicit waiver of bonus value.
 - Tenants want an explicit award of bonus value.



BONUS VALUE

- The condemnation clause should clarify whether “bonus value” also is recoverable to options to renew the lease as well as the initial term.



Automatic Termination clauses

- Example: “If, during the term of this Lease . . . the entire Leased Premises shall be taken as a result of the exercise of the power of eminent domain . . . [then] this Lease Agreement shall [automatically] terminate . . .”
- Tenant claims \$600K based upon its remaining bonus value (i.e. lease is under market rate).
- Does the tenant get anything?

AUTOMATIC TERMINATION CLAUSES

- The tenant got nothing.
 - See *Montgomery Ward & Co. v. City of Sterling*, 523 P.2d 465 (Colo. 1974)
- Why? If the lease terminates then there is no bonus value to recover.



Automatic termination clause

- REMEMBER
 - If you represent the tenant, then don't agree to an automatic termination clause unless you explain to your client in writing the lease will terminate and they will not get bonus value if the property is condemned!!!



MORE ON termination

- The Condemnation clause should address when and if lease terminates
- If the lease terminates, then the tenant may not be liable for rent and may vacate the property

MORE ON TERMINATION

- If the landlord wants the tenant to stay, then they should not include an automatic termination clause!



MORE ON termination

- Tenant will want lease to terminate if loses something critical to their business.
 - Examples:
 - anchor tenant leaves
 - specific part of property condemned
 - Tenant loses certain % of sales
 - Tenant loses access to major highway

MORE ON TERMINATION

- Options to Terminate
 - Can give one or both parties the option to terminate
 - The party with the most bargaining power will want an option to terminate and the other party to not have any option to terminate

RENT REDUCTION

- Example: “If the property is partially condemned then the tenant will receive a reasonable reduction in rent for the remainder of the lease.”

RENT REDUCTION

- “A reasonable reduction in rent” will invite disputes over what is “reasonable.”



RENT REDUCTION

- Better to use specific terms and conditions such as
 - % reduction in rent based on the number of parking spaces taken
 - overall area of the tenant’s leased space taken, or
 - tenant’s reduction in sales.

UNDIVIDED BASIS RULE

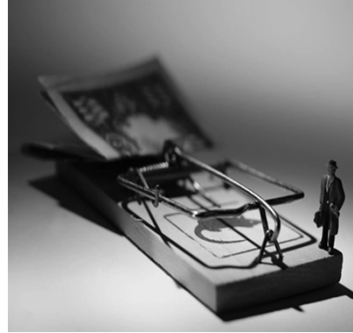
- Property is valued as a whole without regard to separate interests.
- Condemnor pays the award into the Court registry, and the individual interests fight over how the award is distributed in the apportionment phase.

UNDIVIDED BASIS RULE

- Example: “Although all damages in the event of any condemnation belong to the Landlord, Tenant shall have the right to claim and recover from the condemning authority, but not from the Landlord, such compensation as may be separately recoverable by Tenant in Tenant’s own right.” Will tenant recover anything?

Undivided basis rule

- Tenant would probably get nothing because there is no right to bring a separate case or claim against the condemnor because of the undivided basis rule.
 - See *Montgomery Ward & Co. v. City of Sterling*, 523 P.2d 465 (Colo. 1974); *Gifford v. City of Colorado Springs*, 815 P.2d 1008 (Colo. App. 1991).
- These “separate right to bring a claim” clauses are common – watch out.



Priority OF PAYMENT

- What if the award is not big enough to satisfy all of the individual claims (multiple tenants, lenders, easement holders) on the property?
- The condemnation clause can set forth who gets paid in what order.

PRIORITY OF PAYMENT

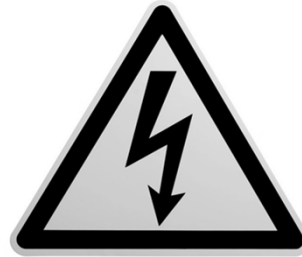
- The condemnation clause should prioritize claims, make distributions on a pro rata basis, or a combination of both.
- This will vary and be subject of heavy negotiations depending on landlord and tenant's business needs and bargaining power.

PRIORITY OF PAYMENT

- Fees and Costs
 - Landlord will want their fees and costs for the condemnation paid first.
 - Tenant will want their fees and costs paid first.
 - Tenants want to insure adequate funds to compensate them for bonus value, fixtures, and anything else they are seeking.

PRIORITY OF PAYMENT

- Watch for Potential Conflicts
 - Check other documents, such as other leases and deeds of trust for potential conflicts or priority!



PRIORITY OF PAYMENT

- REMEMBER - Don't forget the lender!
 - The landlord's attorney should include a provision stating that their lender(s) get paid under the deed of trust before any tenants are compensated at all.



IMPROVEMENTS AND FIXTURES

- Example: “Upon the condemnation of the property, all alterations, additions, improvements and fixtures installed by the Tenant upon the Leased Premises shall become the property of the Landlord and Tenant shall receive no compensation whatsoever therefor.” Enforceable against the Tenant?

IMPROVEMENTS AND FIXTURES

- This may be enforceable against the tenant.
- Some authorities hold that even if the tenant constructs improvements or fixtures, if the lease gives ownership of them to the landlord on expiration of the lease, then landlord may receive the compensation, not the tenant.
 - Friedman and Randolph, Friedman on Leases Chapter 13, § 13.5.

IMPROVEMENTS AND FIXTURES

- However, generally in Colorado, a tenant is entitled to the value of any buildings or site improvements they construct on the property and owners of fixtures are entitled to compensation. *See, e.g., Denver Urban Renewal Auth. v. Steiner American Corp.*, 500 P.2d 983, 986 (Colo. App. 1972).

IMPROVEMENTS AND FIXTURES

- The condemnation clause should specifically set forth:
 - what the improvements and fixtures are
 - who will own them before and after the condemnation, and
 - who will be compensated for them if they are taken or damaged.

REPAIR AND RESTORATION

- The condemnor pays money for the condemnation award but normally does not repair the remainder property. Who is obligated to repair the remainder property?

REPAIR AND RESTORATION

- The condemnation clause should address
 - who will undertake repairs to the remainder,
 - how long they have to make repairs
 - who will approve the repairs.
- Tenant should ask that the repairs will replace the lost or damaged improvements to the same condition as before the taking.

Non-compensable items

- Example “. . . the tenant will be compensated for any portion of the award attributable to loss of profits; injury to business; loss of good will; and nuisance and annoyance during project construction.” Will the tenant recover for these items?

NON-COMPENSABLE ITEMS

- Tenant will probably not recover. These items are not compensable under Colorado eminent domain law.

NON-COMPENSABLE ITEMS

- REMEMBER
 - Check to see that items you are asking to be compensated for are allowable under Colorado eminent domain law.
 - See references and further reading at end of handout materials.



CONCLUSION

- Comments or Questions?

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