Drafting Condemnation Clauses for Leases in Colorado—Issues and Strategies

by Michael R. McCormick

Most leases in Colorado include a condemnation clause that addresses what happens if the leased property is condemned by a public entity using eminent domain. This article discusses drafting lease condemnation clauses in Colorado.

Colorado courts recognize that landlords and tenants claiming an interest in a condemnation award may contractually determine how these funds are to be distributed.[1] Most leases between sophisticated parties include a condemnation clause addressing how their respective interests will be handled in the event of a taking by a governmental entity. Unfortunately, most condemnation clauses are given little attention at the time the leases are being drafted and often are created by lawyers with little understanding of the eminent domain process and how it may vary from jurisdiction to jurisdiction.

This article provides an overview of the eminent domain process in Colorado and identifies issues and strategies applicable to drafting condemnation clauses.[2] Although no condemnation clause can prevent all litigation, a well-crafted condemnation clause can help avoid many disputes. This article is a basic discussion concerning common issues. Practitioners are advised to consult more in-depth treatises[3] dealing with specific circumstances that may be applicable to their situation.

Overview of Condemnation Proceedings

Generally, a condemnation[4] proceeding has three phases. These are: immediate possession, valuation, and apportionment.[5]

Immediate Possession

In the immediate possession phase, the condemnor asks the court to provide possession of the property to construct the project in return for depositing a sufficient sum in the court's registry to pay just compensation when ascertained.[6] The 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.[7]

Valuation

In the valuation phase, a commission or jury determines the amount of just compensation to be paid by the condemning authority in return for its obtaining title to the property.[8] 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." This means that the value of the entire property as a whole is determined as if owned by a single entity.[9]

Nonetheless, Colorado law differs from pure "undivided fee" jurisdictions because encumbrances that positively or negatively affect the overall value also must be considered.[10] For example, if a tenant is paying rent that is above the market rate, evidence of that rental is admissible during the valuation phase to determine the overall value of the property.[11]

Apportionment

Following the overall value determination, the condemnor deposits the award, takes ownership of the property interest acquired, and moves on with its project. The parties with an interest in the property, however, have another issue to resolve or litigate: how the award will be apportioned—that is, distributed—among them. This subsequent process is called the apportionment phase of the case.[12]

A leasehold tenancy is a property right entitled to compensation if taken or damaged as a result of a condemnation action.[13] An apportionment proceeding provides a tenant the only basis under

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Colorado law to establish the separate value of its leasehold interests and rights. This is because 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.[14] For this reason, settlements between landowners and condemnors cannot preclude the rights of tenants to otherwise obtain their rightful share of the settlement amount.[15] However, a condemnation clause may impact or determine this issue.

Apportionment via Agreement

Condemnation clauses addressing how an award is to be apportioned may control the distribution between the parties regardless of how the compensation was determined at a valuation trial or in a settlement with the condemnor. In the 1990 Colorado Supreme Court decision *Total v. Farrar*, the landlord owned several leasehold properties as part of the same "larger parcel," one of which was leased by a gas station.[16] The landlord settled the case with the condemnor based on a highest and best use of the entire larger parcel—that is, a parcel including all of its tenants' properties—as commercial redevelopment, which would require demolishing the gas station tenant's property.[17] Because the gas station's improvements contributed nothing to that highest and best use, the landlord argued that the gas station tenant should get nothing in the apportionment phase.[18]

The Colorado Supreme Court disagreed and determined that the parties had contractually agreed in the lease that the contributory value of the improvements was to be determined based exclusively on its relationship to the individual leased premises rather than the entire larger parcel owned by the landlord and, under that scenario, the improvements did have value for which the gas station tenant could recover.[19] Thus, it is important for both the landlord and tenant to recognize that the condemnation clause can provide for a different method of apportionment than what might be implied by the valuation phase or a settlement between the landlord and the condemnor.

It is common for landowners to agree to sell their property to the condemning authority after receiving a notice of intent to acquire the property without the public entity actually filing a condemnation proceeding. Although the terms "condemnation" and "award" are used in this article, the condemnation clause should state that its terms also apply to apportionment of sales proceeds resulting from sales made to a condemnor under threat of, or in lieu of, condemnation.[20]

Bargaining Power

Before considering specific strategies and issues, knowing the landlord's and tenant's bargaining power is important at the outset when drafting or negotiating a condemnation clause. If the tenant is leasing a small 2,000-square-foot space in a commercial building owned by the landlord, the tenant probably will not have much bargaining power. On the other hand, if the tenant is leasing a large and vacant parcel of land (ground lease) for the tenant to construct a building on, the tenant will have significant bargaining power. Knowing the client's bargaining power will help the practitioner decide how hard to push during negotiations.

Common Traps to Avoid

Condemnation clauses can—and often do—change common law rules, often with the tenant waiving some or all of its constitutional rights to compensation. However, as noted in *Nichols on Eminent Domain*, the law does not look with favor on clauses causing forfeiture of the tenant's interest due to condemnation.[21] A lease provision will be construed not to have that effect if its language and the circumstances possibly permit.[22] Notwithstanding this rule, landlords commonly request that the tenant explicitly waive any and all compensation related to a condemnation proceeding and permit the award to be recovered solely by the landlord. Unfortunately, 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.

Further, Colorado law creates several traps for the unwary regarding condemnation clauses. A tenant is generally entitled to compensation for the condemnation of the tenant's unexpired leasehold interest.[23] 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.[24] 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.[25] Many tenants agree to these automatic termination clauses without realizing they may be waiving their rights to any compensation.

In contrast, an automatic termination clause is different from a clause giving the tenant the option to terminate. Such an option may not by itself waive the right to condemnation proceeds, particularly if the option is not exercised.[26]

In addition, even in the face of true automatic termination clauses, tenants may retain rights to share in the condemnation proceeds if additional provisions allow the tenant to do so.[27] In contrast, clauses waiving a right to share in the condemnation proceeds but allowing tenants to pursue separate claims against the condemnor may be interpreted as precluding any right to compensation. This is because, as discussed above, there is generally no right under Colorado law for a tenant to directly pursue separate claims.[28]

The condemning authority must give notice to anyone having an interest of record in the property involved.[29] If the lease is not recorded, the condemning authority is not required to provide notice to the tenant. Accordingly, the condemnation clause may require the landlord to provide the tenant a copy of any notice of intent to acquire the property within a certain number of days of receipt, so that the tenant will have adequate notice of the condemnation proceeding.[30]

Terminating the Lease

If the condemnor takes all the property, the lease terminates, because there is nothing left to lease from the landlord. However, what if the condemnor takes or purchases only part of the property—does the lease terminate?

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. The trigger date for termination could be the date of receipt of a notice of intent to acquire the property, the date a condemnation action is filed, or the date possession is granted. Likewise, the lease should address whether the lease terminates if the condemning authority purchases the property under threat of, or in lieu of, condemnation.[31]

Alternatively, the condemnation clause may give one or both parties the option to terminate. This should include a deadline to exercise the option in writing within a certain number of days of a defined event, such as the date that the option holder receives written notice of intent to acquire the property.

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. The tenant also will want an option to terminate the lease, and as much discretion regarding termination as possible. 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.

Whether and under what conditions the lease will terminate may be the subject of heavy negotiations between the landlord and tenant. Because each party may have concerns about the other party having an option to terminate the lease, it is common for the lease to terminate only if defined conditions are met that would substantially impair the tenant's use—for example, the lease will terminate only if a certain percentage of the building or parking spaces are lost or the tenant loses a certain percentage of sales. Care should be taken to specify these conditions as much as possible to avoid disputes.

If a specific area is critical to the tenant's business operations (for example a parking area in front of the building), the tenant may want to have a special right to terminate if that area is taken. The parties should include a diagram showing the specific area at issue. A tenant also may want the right to terminate if an anchor tenant terminates its lease as a result of the condemnation. The landlord, in return, may want rights to repair the damages and replace the anchor tenant without terminating the lease.

Loss of access is not compensable unless there is "substantial impairment" of access.[32] However, any loss of access can be devastating to a commercial tenant. The tenant may want to request a special right to terminate the lease based on a defined loss of access (for example, loss of access to an adjacent major arterial), regardless of whether there is substantial impairment. The landlord, in return, will want a right to replace the access without terminating the lease.

The parties should beware of condemnation clauses that automatically terminate the lease if there is a partial taking, no matter how slight. If the lease is above or below market rental rates, 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.

Rent Abatement

The tenant will want any rent paid in advance of the condemnation to be refunded; otherwise, the tenant will risk forfeiture.[33] The landlord probably would prefer to hold onto prepaid rent without refunding it.

If the lease does not terminate, the tenant might want a temporary or permanent reduction in rent should the lease continue. A vaguely defined "reasonable reduction in rent" is almost certain to invite disputes, may be unenforceable, and could be construed against the drafter.[34] Instead, the rent reduction should be based on specific terms and conditions. Examples might be a percentage reduction in rent based on the number of parking spaces taken, the overall area of the tenant's leased space taken, or the tenant's reduction in sales. These terms should be tailored to the tenant's business needs based on the specific uses and areas of the property. If there is a portion that is useless or of little value to the tenant, it should not be used as a reason to significantly reduce rent.

Dividing the Pie

As noted above, the parties can contractually agree how to allocate an award during the apportionment phase.[35] The question then becomes: What if the overall award is not big enough to satisfy all claims? Similarly, what if there are multiple tenants (and other interest holders, such as lenders or easement holders) with conflicting claims? The landlord probably 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 tenant will want its claims paid off the top, notwithstanding claims by other interest holders.

The condemnation clause should address these issues by either prioritizing claims, making distributions on a *pro rata* basis, or a combination of both. Any *pro rata* distribution should carefully define what property is being used for the pro-ration (for example, the landlord's entire shopping center or the leased premises), which specific interests will be pro-rated, and the method of pro-ration.

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.

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.

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

Bonus Value

Unless the tenant has waived compensation, the tenant should be compensated for the value of the lease during the apportionment phase.[36] The value of the lease is measured by the difference between market rental rates and the contract rate provided for in the lease. To the extent the lease contract rate is below market, the tenant has a compensable "bonus value" in the property, which can be extended over the life of the lease and discounted back to present value.[37] In other words, if the tenant is getting a good deal on the lease—its rent is below market rate—the tenant can ask to be compensated for the difference between the lease rental rate and the market rate over the life of the lease. If the tenant is getting a bad deal on the lease—its rent is above market rate—the tenant will benefit by getting out of the lease and will not receive any compensation.

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 landlord may get nothing. Tenants will want an explicit award of bonus value to ensure compensation for it.[38]

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.

If there is a partial taking and the landlord agrees to an abatement of rent, the landlord should request that the bonus value be adjusted to reflect the abatement of rent. This would avoid any double compensation to the tenant.

Improvements and Fixtures

If the condemnation clause does not specify who is entitled to compensation for improvements or fixtures, the parties may not like the outcome under common law. For example, a tenant is typically entitled to the value of any buildings or site improvements it has constructed on the property.[39] This may be true even when the lease requires the tenant to remove such improvements at the time the lease is terminated.[40] Owners of fixtures[41] on condemned property are also entitled to compensation.[42] However, even if the tenant constructs improvements or fixtures, if the lease gives ownership of same to the landlord on expiration of the lease, the landlord may receive the compensation for them, not the tenant.[43] 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.

The owner of the fixtures will want them to be valued "in place," as opposed to the much lesser price the fixtures likely would command if they were sold separately from the real property due to the costs of dismantling them and reinstalling them elsewhere.[44] The value in place is typically determined based on the cost approach—that is, the fixture's new reproduction cost less depreciation.[45]

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.

Repair and Restoration

Landowners may be surprised to find that a condemning authority will pay them money only in return for taking or damaging improvements. Normally, the condemnor will not undertake repairing the remainder property. The question becomes who would be obligated to rebuild or repair the premises in the event of a partial taking.

Usually, the parties will require the party that purchased or constructed the building or improvements to conduct the repairs. In most cases, the building and parking lot is the landlord's and the landlord will be compensated for them. If the lease survives, the tenant should be careful to require the landlord to repair the building, parking lot, and access improvements; specify how long they have to make repairs; and specify 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.

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. The tenant (or the landlord's lender—see the section regarding lenders below) also may want provisions requiring that the cost of repairs be placed in escrow and incrementally drawn by the landlord on proof of completion.

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 (see below for a discussion of same). Otherwise, these payments may consume the landlord's entire award and the landlord may be left with insufficient funds to meet its repair obligations.

Excluding Non-Compensable Items

Generally, the following are not compensable in an eminent domain proceeding under Colorado law: loss of access that is not "substantial impairment of access"; loss of view of the property (for example, no longer being able to see the property from the highway); loss of profits; injury to business; loss of good will; nuisance and annoyance during project construction; and costs of moving personal property.[46] 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. 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.[47] 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.

Do Not 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.[48]

The landlord's attorney will want a provision requiring that the landlord's lender 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.

Tenants want to make sure that there will be adequate funds to compensate them for bonus value, fixtures, and anything else they are seeking before the lender gets paid. Tenants also should be cautious in subordinating to lenders after the lease has been entered into to make sure that either the lease condemnation clause is excluded from the subordination or the lender agrees to be bound by the terms and conditions of the lease, including the condemnation clause, after the lender takes possession. Otherwise, the lender may be entitled to take the entire award and just apply it against the loan balance. Tenants also should except out of the lease condemnation clause any payments to lenders for any loans entered into by the landlord after the lease commenced.

Burden of Proof

There is no Colorado law dictating who has the burden of proof during the apportionment phase, nor are there any defined procedures. An apportionment hearing may be analogous to an interpleader action, in which each party bears the burden of proving its entitlement to deposit funds.[49] Accordingly, it is possible that each interest holder in a condemnation case may bear the burden of proving its entitlement to a portion of the award in the value of that interest by a preponderance of the evidence.

However, it is better to not leave the issue to chance. A condemnation clause could state that the burden of proof during the apportionment phase will be as stated above in the preceding paragraph. In the alternative, the parties could negotiate a different burden of proof. For example, a landlord might try putting the burden of proof on the tenant to prove its claim by clear and convincing evidence. Alternatively, a tenant might want the burden to be on the landlord to disprove the tenant's entitlement to certain compensation by clear and convincing evidence.

Paying Fees and Costs

A condemnor must reimburse a landowner for certain fees and costs pursuant to the Colorado Constitution and certain Colorado statutes.[50] However, some or all of the landlord's fees and costs often are not recovered, because either the statutory requirements were not met or a settlement was reached. The landlord will 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.

Although the statute requires the condemnor to reimburse the landowner for the reasonable costs of an appraisal, if the landlord and tenant cannot agree on who should do the appraisal and what interests should be appraised, the condemnor may not be required to reimburse either party for an appraisal.[51] Accordingly, the landlord should request that the tenant consent to the landlord obtaining an appraisal of the leased property on an undivided basis. This provision should give the landlord the flexibility of appraising a larger property if there are numerous leaseholds on the same property.

Condemning authorities often will refuse to pay a tenant's fees and costs. A common example is an appraisal obtained by the tenant. 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). Most landlords will not agree to this provision unless it is a tenant with a lot of bargaining power.

Conclusion

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 saying goes, "everything is negotiable."

Notes

1. *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).

2. Several of the concepts herein were addressed during a presentation by Jack R. Sperber of Faegre Baker Daniels, LLP, titled "Apportionment Hearings from A to Z" at the 2013 Colorado Eminent Domain CLE conference, available at www.cle.com. The author thanks Mr. Sperber for his always insightful thoughts and analysis.

3. *See, e.g.,* Sackman, *Nichols' The Law of Eminent Domain* (*Nichols*) § 7A:G11.05 and 11.06 (LexisNexis, 2008); Senn, *Commercial Real Estate Leases* Chap. 24 (5th ed., Aspen Publishers); Friedman and Randolph, *Friedman on Leases* Chap. 13 (Practicing Law Institute, 1990). These treatises include several sample condemnation clauses and analysis of same.

4. The term "condemnation" is used herein to mean the taking of private property for public use, as opposed to disapproval of the condition of a building. The term "eminent domain" often is used interchangeably with "condemnation."

5. For a more detailed description of the condemnation process, as well as a broader discussion of eminent domain issues, *see* Wilson, "Eminent Domain Law in Colorado—Part I: The Right to Take Private Property," 35 *The Colorado Lawyer* 65 (Sept. 2006); Wilson, "Eminent Domain Law in Colorado—Part II: Just Compensation," 35 *The Colorado Lawyer* 47 (Nov. 2006). *See also* Fields, *Colorado Eminent Domain Practice* (Bradford Pub. Co., 2008).

6. CRS § 38-1-105(6).

7. CRS § 38-1-105(6)(b) (owner may withdraw the funds "if all parties interested in the property sought to be acquired consent and agree to such withdrawal").

8. *See* CRS § 38-1-105(1) to (4).

9. *Total Petroleum, Inc. v. Farrar*, 787 P.2d 164, 166 (Colo. 1990).

10. *See, e.g., City of Englewood v. Reffel*, 477 P.2d 361, 363 (Colo. 1970); *Bd. of Directors v. Calvaresi*, 397 P.2d 877, 879 (Colo. 1964). *See also Montgomery Ward & Co. v. City of Sterling*, 523 P.2d 465,468 (Colo. 1974) (above-market lease that increased value of property to be taken into account).

11. *Montgomery Ward & Co.*, 523 P.2d at 468. Notice that this is the opposite of the "bonus value" situation discussed *infra* in which the tenant's rent is below market rate. When the rent is above the market rate, the landlord can present evidence during the valuation phase that the landlord is getting above market rate rents, which increases the overall value of the property. Later, during apportionment, the tenant should take nothing for the rental rate because the tenant is benefitting from getting out of the lease.

12. *See* CRS § 38-1-105(3).

13. *See, e.g., Fibreglas Fabricators, Inc. v. Kylberg*, 799 P.2d 371, 375 (Colo. 1990). *See also Nichols, supra* note 3 at § 5.02[6][a].

14. *See, e.g., Gifford v. City of Colorado Springs*, 815 P.2d 1008, 1011 (Colo.App. 1991); *Montgomery Ward & Co.*, 523 P.2d 465; *Total Petroleum*, 787 P.2d 164.

15. *See Montgomery Ward & Co.*, 523 P.2d at 469; *Total Petroleum*, 787 P.2d at 167-68.

16. *Total Petroleum*, 787 P.2d at 166-68.

17. *Id.*

18. *Id.*

19. *Id.*

20. The condemnation clause should define this to avoid disputes. For example, it could be defined as a sale to a governmental authority after it has issued a written notice of intent to acquire the property pursuant to CRS § 38-1-121 or other applicable law. On the other hand, depending on their needs and circumstances, the parties may want a broader definition, such as a sale to a governmental entity after receipt of project plans without a formal notice of intent to acquire.

21. *Nichols, supra* note 3 at 5-110.

22. *Id.*

23. *Fibreglas Fabricators, Inc.*, 799 P.2d at 375.

24. *Id.*

25. *Id.* (because lease automatically terminated on the condemnation of the property, tenant had no interest in the property and therefore lost all right to share in the condemnation proceeds).

26. *See, e.g., Texaco Refining and Marketing, Inc. v. Crown Plaza Group*, 845 S.W. 2d 340, 342 (Tex.App. 1992).

27. *See, e.g., Musser v. Bank of America*, 964 P.2d 51, 53-54 (Nev. 1998).

28. *See Gifford*, 815 P.2d at 1011.

29. CRS § 38-1-121.

30. This benefits the tenant, but for the landlord it is a mixed bag. On the one hand, tenants may react less strongly to news of a condemnation with advance notice. On the other hand, once the tenant hears about the condemnation, it may immediately vacate the property. Either way, the condemnation clause should clearly state what the landlord's duties are, if any, regarding notice to the tenant.

31. *See supra* note 20. *See also* the discussion of "Excluding Non-Compensable Items," *infra*, regarding claims for relocation benefits on termination.

32. *See, e.g., State Dep't of Highways v. Davis*, 626 P.2d 661, 664 (Colo. 1981).

33. *See* Senn, *supra* note 3 at 24-11.

34. *See, e.g.*, *C.J.I.* 30:32 (interpretation of an ambiguous term in a contract); *C.J.I.* 30:36 (dispute over meaning of unclear terms to be construed against the drafter).

35. *See, e.g., Total Petroleum*, 787 P.2d 164; *Vivian v. Bd. of Trustees*, 383 P.2d 801 (Colo. 1963); *Montgomery Ward & Co.*, 523 P.2d at 467-68.

36. *Fibreglas Fabricators, Inc.*, 799 P.2d at 375.

37. *See, e.g., Montgomery Ward & Co.*, 523 P.2d at 468.

38. There is often tension between the landlord and the tenant regarding "bonus value." If the rent is above market value, the landlord may seek compensation for the difference as a part of the valuation phase. *See* discussion of "Valuation" and *supra* note 11.

39. *See, e.g., Denver Urban Renewal Auth. v. Steiner American Corp.*, 500 P.2d 983, 986 (Colo.App. 1972).

40. *See, e.g., Texas Pig Stands, Inc. v. Krueger*, 441 S.W.2d 940, 945-46 (Tex.App. 1969).

41. A definition of improvements and fixtures and the distinctions between them is beyond the scope of this article. *See* Reeves, *Colorado Real Property Law* §§ 2.4.1 (Land) and 2.4.11 (Fixtures) (Bradford Pub. Co., 2005); *Reynolds v. State Bd. for Community Colleges & Occupational Educ.*, 937 P.2d 774 (Colo.App. 1996); *Piz v. Housing Auth.*, 289 P.2d 905 (Colo. 1955).

42. *Piz*, 289 P.2d 905; *Denver Urban Renewal Auth.*, 500 P.2d at 986 (recognizing that fixtures are a part of the realty for which compensation must be paid to the owner by a condemning authority).

43. *See, e.g.,* Friedman and Randolph, *supra* note 3 at § 13.5.

44. *See Jackson v. State*, 106 N.E. at 758 (N.Y. 1914) (opinion by Justice Cardozo) (cited with approval in *Denver Urban Renewal Auth. v. Steiner American Corp.*, 500 P.2d 983, 986 (Colo.App. 1972)).

45. *Nichols, supra* note 3 at § 28.03. *See also Universal Empire Industries, Inc. v. State of New York*, 566 N.Y.S.2d 442, 444 (N.Y.Ct.Cl. 1990) ("the proper method of valuing trade fixtures in place is by determining their sound value . . . and the sound value of a trade fixture in place is measured by the reproduction cost of the fixture less depreciation") (citations omitted).

46. *See* Fields, *supra* note 5 at §§ 11.9 (access damage claims), 7.11 (views of the property), 11.2 (diminution in value rule), 8.9 (business profits rule).

47. 42 USC §§ 4601 *et seq.*; 49 CFR §§ 24.1 *et seq.*; CRS §§ 24-56-101 *et seq.*

48. *See, e.g., C.J.I.* 30:9 (contract formation—third-party beneficiary); *East Meadows Co. v. Greeley Irrigation Co.*, 66 P.3d 214 (Colo.App. 2003) (requirements for creation of third-party beneficiary); *Musser v. Bank of America*, 964 P.2d 51, 54 (Nev. 1998) (interpreting condemnation provision disbursing proceeds to mortgage or other lien on the premises, then to the landlord for remainder attributable to land, then to tenant for remainder attributable to diminution in value of leasehold estate, and then to landlord and tenant for any remainder attributable to improvements); *K-Mart Corp. v. State*, 636 So.2d 131, 133 (Fla.Dist.Ct.App. 1994) (recognizing that "parties have a right to provide in their lease agreement the specific manner in which a condemnation award is to be apportioned," including creation of "a right under the contract primarily and directly benefiting a third party").

49. *See, e.g., United States v. 9.41 Acres*, 725 F.Supp. 421, 425 (W.D.Ark. 1989) ("The determination of who has title in an eminent domain proceeding is treated as a proceeding in the nature of interpleader.").

50. *See, e.g., City of Colorado Springs v. Berl*, 658 P.2d 280, 281 (reimbursement of landowner's costs recoverable against the condemning entity under Colo. Const. art. 11, § 15); CRS §§ 38-1-121(1) (reimbursement of costs of appraisal under certain conditions) and -122 (reimbursement of owner's reasonable attorney fees where award equals or exceeds 130% of last written offer given to property owner before filing of condemnation action).

51. *See* CRS § 38-1-121(2). ■