

June 2021

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Recommended Citation

Glenn G. Saunders & Willard S. Snyder, Proposed Eminent Domain Law for Colorado, 29 Dicta 332 (1952).

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PROPOSED EMINENT DOMAIN LAW FOR COLORADO

GLENN G. SAUNDERS AND WILLARD S. SNYDER

of the Denver Bar

Colorado legislation in the field of eminent domain is divided into three main categories: (1) classifications of those who may exercise the power of eminent domain; (2) procedures for effectuating the exercise of eminent domain powers; and (3) devices for use by municipalities in financing the cost of projects involving the use of eminent domain. This article is confined to the second of the above categories.

Eminent domain procedures should be simple and quick. They can be, because there are only two issues: (1) the right of the petitioner to exercise the power of eminent domain; and (2) the determination of the amount which should justly be paid to the respondent. Analysis of present legislation would reveal that its various fragments were apparently designed from time to time to meet special existing situations, and there is no necessary relationship or correlation between the fragments. Rather than discuss these fragments, it appears that the most sensible way to approach this problem is to suggest the legislation which should cover the field of procedure in eminent domain and then briefly analyze the suggestions. We believe this to be a sound approach, because the ultimate objective of the bar association is to create a comprehensive new eminent domain law of which procedural sections would be a necessary part.

The following sections concerning procedure in eminent domain under Colorado law are proposed for the consideration of the bar.

Section 1. A petitioner shall commence a proceeding in eminent domain by filing a verified petition as hereinafter prescribed in the district court of the county in which the property to be taken or some part thereof is located.

Section 2. A petition in condemnation shall contain the following:

- a. A caption as in other civil actions, provided however that the parties shall be called "petitioner" and "respondent," and the petition shall be entitled "petition in condemnation."
- b. A clear and concise statement of the following:
 1. The name of the petitioner.
 2. The authority of the petitioner to prosecute the proceedings including a statement of the use to which the property to be taken is intended to be put by the petitioner.
 3. A statement that the compensation to be paid cannot be agreed upon by the parties interested, or that some one or more of the respondents is incapable of consenting or cannot be found.

4. The names of all persons interested as owners or otherwise as appearing of record. Unknown persons, if any, shall be designated as "all unknown persons who claim any interest in the subject matter of this action."

5. An accurate description in such form as will be capable of being generally understood by those familiar with titles to property setting forth the interest in the property to be taken in the proceedings.

6. A prayer asking that the compensation to be paid for the interest sought by the petitioner be determined, and that upon deposit into the registry of the Court of said amount, the Court enter a decree vesting in the petitioner title to the interest or interests in the property described in the petition and for such other relief as may be proper in the premises.

c. The petition shall be signed as provided by the rules of civil procedure and shall be verified by the oath of the petitioner or of someone in behalf of the petitioner.

d. A map of the land or lands sought to be taken shall be attached to the petition whenever a map will aid understanding of the description of the land sought to be condemned.

Section 3. Summons shall be issued as provided by the rules of civil procedure. In every case, except service by publication, the petition shall be attached to and served with the summons. In event, of service of process by publication, the publication shall be once each week for three successive weeks. Except as otherwise herein provided, service and proof of service of the summons shall be as provided by the rules of civil procedure.

The summons shall be captioned as in other civil actions, except that it shall be entitled "summons in condemnation," and the parties will be called "petitioner" and "respondent." It shall contain substantially the following language:

To the above named respondent....: You are hereby summoned and required to file with the clerk of the above mentioned court an answer to the petition in condemnation which is attached hereto and made a part hereof or make written appearance herein within 20 days after the service of this summons upon you. If you fail to do so, the Court will proceed as provided by law to determine the amount to be paid you and the other respondents herein if any there be, for the property to be taken hereunder, and the Court will proceed to cause said property to be conveyed to the petitioner without further notice to you. If you desire to question the authority of the petitioner to maintain this action, or if you desire to have the amount to be paid on account of the taking herein contemplated determined by a jury, you will make such facts known by your answer or you will be conclusively presumed to have waived any right to question petitioner's authority or to demand a jury trial.

If service upon you is made outside the state of Colorado or by publication you are required to file your answer within 30 days after service of this summons upon you or 30 days after the first such publication.

A description of the interests in property to be taken is as follows:

Dated at, Colorado this day of,

Section 4. A *lis pendens* may be filed in the manner and with the effect as provided by the rules of civil procedure. The petitioner shall be liable for all abstracting fees arising as the result of the filing of such *lis pendens* which may become a charge against any other person in the normal course of evidencing such person's title.

Section 5. If any respondent shall question the authority of a petitioner to exercise the power of eminent domain in any case, he shall file an answer stating his grounds for questioning such authority in plain succinct language and the issue thus raised shall be tried before any trial or hearing with respect to compensation to be paid by petitioner on account of the taking. Within ten days of receipt of such answer, petitioner may, but shall not be required to, file a reply to such answer. If any respondent shall desire to have the compensation to be paid by the petitioner fixed by a jury he shall so indicate in writing by answer. If any respondent desires neither to question petitioner's authority nor demand a jury he shall merely make a written appearance in the action. No other pleading shall be allowed.

Section 6. All questions regarding compensation shall be determined by commissioners or jury as the case may be. All other questions shall be determined by the court.

Section 7. If no respondent shall demand a jury trial as provided in this act, the Court shall appoint, as a board of commissioners, three freeholders to determine the compensation to be paid and shall fix the time and place for the first meeting of such commissioners. The commissioners before entering upon the duties of their office shall take an oath to faithfully and impartially discharge their duties as commissioners. Any one of them may administer oaths to witnesses, issue subpoenas, and compel witnesses to attend and testify. They shall hear the allegations and proofs of the parties and a record of the proceedings shall be kept; and after viewing the premises they shall file with the clerk of the court a certificate setting forth their determination of the compensation to be allowed. Upon notice to other parties, any party may move for confirmation of the certificate, and the Court may thereupon confirm the certificate or any part thereof or may set it aside for irregularity or for error of law in the proceedings before the commissioners, or upon the ground that the award cannot be sustained by the evidence. If

the certificate or any part thereof is set aside, the Court shall appoint new commissioners and direct a re-hearing of the whole issue of compensation or of the part of the award set aside. If the certificate is confirmed, the court shall proceed as hereinafter set forth. The commissioners shall be allowed reasonable compensation for their services, the amount of which shall be fixed by the Court.

Section 8. After the filing of the petition in condemnation, a motion may be filed requesting the right of possession during the pendency of the action, or the pendency of appellate proceedings respecting the action. In event the motion is filed prior to verdict or finding of value by commissioners, it shall be supported by the affidavit of a qualified appraiser as to the value of the interest to be taken and as to the value of one year's rental of such interest. If the motion is filed thereafter, it shall be supported by the affidavit of a qualified appraiser as to the value of one year's rental of such interest. When a respondent shall have entered his appearance in the proceeding, either personally or by his attorney, said respondent or his attorney shall be served, unless previously served as hereinafter provided, with the motion, affidavit and notice of hearing at least 48 hours before the time of hearing. Respondents who are not in default and who have entered no appearance shall be served either at the time of the service of the summons or thereafter with the motion, affidavit and notice of hearing at least one week before the time of the hearing, such service to be made as provided by the rules of civil procedure for the service of summons. Respondents, if any, who are being or have been served with the summons by publication, and who have not entered an appearance in the proceeding, need not be given any notice of the hearing for immediate possession provided that an order of the Court authorizing such service by publication shall have been entered prior to the time of the hearing. If there is pending and undetermined a pleading questioning the right of the petitioner to maintain the whole or any part of the eminent domain proceedings, a date for the hearing on immediate possession may be set but the question of the right to maintain the action shall first be determined.

Section 9. Upon the hearing of the motion for immediate possession, the Court may forthwith enter an order for such possession upon the payment into the registry of the court for the protection of the respondent or respondents of: (a) an amount equal to the appraised value of the interest to be taken if determined prior to verdict or appraisal by commissioners, or the amount of the verdict or appraisal if known, which amount shall be held in the registry of the court pending the final determination of the proceedings; and (b) an amount equal to one year's rental value of the property to be taken for the immediate use of the respondent or respondents to be paid them, if more than one, as may appear equitable to the court. If possession shall have been taken prior to the verdict of the jury or award by the commissioners and if the

petitioner desires to maintain such possession during appellate proceedings, the amount deposited in the registry of the court on account of the appraised value shall be increased or diminished so as to equal the amount of the verdict or award. Whenever it shall appear to the court that the amount finally determined to be due the respondent or respondents will not be payable within the period for which rental shall have been allowed, whether such delay shall occur in the trial court or due to review proceedings, the trial court shall have and retain jurisdiction and shall exercise it to provide, by appropriate order or other process, so that the respondent or respondents shall be paid sufficient amounts, from time to time, as will be equal to the rental value of the property to be taken, provided that at no time shall more than one year's advance rental value be required to be deposited for or paid to respondent or respondents.

Section 10. If the Court shall not be satisfied on the affidavit or other proof offered to him by petitioner or respondent or respondents as to the amount which should be paid into the registry of the court for any of the purposes above mentioned, the Court may appoint some qualified person to investigate and report promptly to the Court as the Court's witness under oath regarding such matters. The fee of such witness shall be such reasonable amount as the Court shall fix and shall be paid by the petitioner as a part of the cost of the suit.

Section 11. The compensation to be paid on account of any taking in eminent domain shall include payment for the value of the interest in property taken, the damages if any to the interest of the respondent or respondents in that part of the whole property not included in the taking, and as an offset to such damage, the benefit if any to the interest of the respondent or the respondents in that part of the whole property not taken, each of said three items being in every case itemized in the verdict of the jury or certificate of the board of commissioners unless the whole property be taken.

Section 12. Inspection of the property which is the subject of any eminent domain proceeding by any person or persons connected with the proceedings as witness, commissioner, juror, or judge may be made at any reasonable time, and in case of failure of the parties to agree, the judge may make an appropriate order or orders respecting such inspection.

Section 13. Every value shall be fixed as of the time of its determination, and successive hearings on value may be held if necessary so that at the time of final taking the amount received by the respondent or respondents shall be the exact and true value of the property interest of which respondent or respondents will be deprived by the proceeding as near as may be.

Section 14. Any jury to determine the compensation to be paid shall consist entirely of freeholders and shall be a jury of six or twelve as designated by the respondent or respondents in any answer filed in such proceedings. In the absence of any designation as to number, a jury of six shall be used. Jurors shall be selected in the manner customary in civil actions.

Section 15. When the compensation to be paid by the petitioner shall have been finally determined, the petitioner shall pay such amount into the registry of the court within five days of such final determination and shall thereupon be entitled to a decree as hereinafter set forth, provided that the amount so to be paid into the registry of the court shall be diminished by the amount of any unearned rental previously paid to the respondent or respondents on account of immediate possession having been taken by the petitioner; provided further that if petitioner has not and does not take possession, he shall not be obligated to make such payment in case he shall elect to undertake appellate proceedings or dismiss the proceedings in the district court within said five days.

Section 16. The final decree in eminent domain proceedings shall recite the description of the interest in property taken and the name of the petitioner for whose benefit the decree is entered and the names of all the respondents. It shall also recite the payment into the registry of the court of the amount of money entitling the petitioner to the issuance of a final decree, and when issued and recorded in the office of the clerk and recorder of the county or counties where the property so taken is located, the final decree shall act and be a conveyance of the interest so described to the petitioner so named effective as of the date of such recording.

Section 17. The courts shall give eminent domain proceedings under this act preference over all other civil actions except injunction and workmen's compensation suits in the matter of setting same for hearing or trial and in hearing the same to the end that all such actions shall be quickly determined.

* * * * *

It is contemplated that the general sections of any eminent domain law will provide as a matter of substantive law for those in whom the power of eminent domain is vested and that their determination of the necessity for the taking will be conclusive upon the court in the absence of fraud, malice, oppression or the like. It is also assumed that any interest in property real or personal and in the entirety or in part may be taken. The present statute contemplates a fee simple title which would apply only to real estate and which overlooks that in many cases only an easement is required. The present statute fails to contemplate that war time conditions may create shortages of personal properties which are absolutely needed by public utilities such as radio equipment, automobiles, pipe, wire and the like, and it is doubtful whether such prop-

erty could be reached under the present procedures. Yet such personal properties are absolutely essential to the continuation of our functioning as an organized community.

It will be noted that we also contemplate that reasonable effort shall be made to contact the owner of the property and attempt to secure it by negotiation before any eminent domain proceeding can be started. We regard the federal practice of a declaration of seizure without the necessity of prior negotiations to be arbitrary and high-handed. We believe that the federal employees in almost every case endeavor in good faith to negotiate with property owners before filing such declarations, but there appears no reason why any government employee or anyone else who has the power of eminent domain should not be required to make a good faith effort to avoid litigation as a condition precedent to the right to exercise the strong power of eminent domain.

CONSTITUTIONAL AMENDMENT NO. 1 NEEDS SUPPORT OF THE BAR

The Colorado Bar Association, acting through its Judiciary Committee, has had placed on the ballot a constitutional amendment which deals with the Compensation, Services and Retirement of Judges.

These are the principle changes advocated by the amendment:

1. Salaries of Judges may be increased or decreased *during their terms of office.*
2. A judge may not run for any other elective office, other than judicial, without first resigning his judicial office.
3. Any judge found to be permanently disabled by reason of mental or physical infirmities, *shall* be retired. The Attorney General will initiate the action by motion to the Supreme Court, and after full investigation the decision shall be made.

The proposed constitutional amendment No. 1 was drafted by the Colorado Bar Association Judiciary Committee with the aid of members of the Supreme Court. It has been approved by the District Judges' Association and the County Judges' Association.

The changes from the present law are obvious. They are vitally necessary. Supreme Court Justices who are elected for a period of ten years find themselves bound to the same salary for the entire decade. Regardless of economic conditions, the legislature is powerless to increase the salary of an incumbent elective officer. The same is true, of course, of District and County Judges. We have the untenable situation now of the most experienced judges receiving the lowest salaries—it was their misfortune to