TO: Senate Agriculture, Natural Resources, and Energy Committee
House Agriculture, Livestock, and Natural Resources Committee
Senate Local Government Committee
House Local Government Committee

FROM: Condemnation of Conserved Property Task Force

DATE: October 19, 2011

RE: Final Task Force Report

The Condemnation of Conserved Property Task Force ("Task Force") has met as required by section 38-30.5-112, C.R.S., and submits the following report, as required by that section.

Task Force Members

The Task Force included representatives of county commissioners, city officials, utilities, conservation easement holders, landowners, and appraisers. A complete list of task force members is attached to this report.

Charge of Task Force

The Task Force was created by SB 11-050, "to study the valuation of property being condemned that is subject to a conservation easement" and to report its findings and recommendations, including "statutory modifications to ensure that the property interests condemned are valued fairly and appropriately." (38-30.5-112 (2)(a), C.R.S.)

The charge of the Task Force is further described in section 38-30.5-112 (3)(a), C.R.S., to include:

- Matters relating to the valuation of conservation easements subject to condemnation, including a review of the application of the "undivided basis rule";
- Perceived deficiencies in existing condemnation law from the perspective of conservation easement holders;
- Opportunities to address identified deficiencies under existing law;
- Consideration of appraisal practice, tax, and apportionment implications; and
- Potential changes to existing law to address specific problems.

Task Force Meetings and Deliberations

The Task Force's discussions revolved around two main issues – what is the appropriate method of valuing property with a conservation easement that is subject to condemnation when (i) the conservation easement is extinguished by the taking and (ii) when the terms of a conservation easement have been violated by a partial taking.

The initial discussions of the Task Force involved making sure that everyone was using terminology the same way and bringing focus to the issues to be discussed. In these early conversations, members described and discussed the current valuation process. The Task Force had discussions about the various purposes for which conservation easements are created, how the purpose of the conservation easement relates to the purpose of the take by the condemning authority and how that affects the extent of a taking, the extent of a taking related to a utility corridor in various situations, the impact of temporary and permanent surface disruptions, whether valuations are necessary if there is no taking, and numerous other topics related to current practices and procedures. One method used by the group to explore these issues was the presentation of hypothetical examples that allowed each Task Force member the opportunity to illustrate issues of concern to them. Copies of the hypothetical scenarios considered by the Task Force are attached to this report. Analysis of the hypothetical scenarios has not been included.

Other resources considered by the Task Force and attached to this report include the case of Montgomery Ward v. Sterling, 523 P.2d 465 (1974), in which the Colorado Supreme Court describes the "undivided basis" rule for valuing condemned property, as applied in Colorado; and Colorado statutes and federal regulations concerning the determination and apportionment of value.

Conservation easements can be created to protect agriculture, wildlife corridors, wilderness, and view sheds. The conservation purposes and the language of each easement can vary and allow for different permitted and prohibited uses. Members of the Task Force agree that virtually every case involving a conservation easement and the subsequent acquisition of real property interest by an entity authorized with the power of eminent domain is unique and that the appropriate venue for resolution of whether a condemnation or taking has occurred is with the judicial process. The majority of the Task Force believes that the nature and extent of the proposed new use, the nature of the interests involved, and the unique restrictions incorporated in individual conservation easements suggest that questions related to whether or not there has been a taking are best resolved on a case-by-case basis.

The two primary areas of debate can be summarized as follows:

Valuation in the context of extinguishment of a conservation easement. The Task Force members all agreed to apply the undivided basis rule when the conservation easement is extinguished by eminent domain (aka 'fee simple taking'). In other words, the entire parcel is to be valued as though it were unencumbered by the conservation easement.

Valuation in the context of a partial taking which violates the terms of a conservation easement.

a.) Viewpoint/concerns expressed by representatives of local government, conservation easement holders and landowners

When less than a fee simple interest is acquired by the condemning authority (utility, state highway department, cities, counties, etc.) through the eminent domain process and the terms of a conservation easement have been violated, representatives of local government, conservation easement holders, and landowners believe that the property interests acquired should be valued as if the conservation easement was not an encumbrance.

At least one stated goal of these Task Force members is to prevent any financial benefit from accruing to condemning authorities for condemning conserved properties rather than properties that have not been conserved. Although it was acknowledged that utilities do not make siting decisions based on a financial desire to put utility corridors on conserved properties, these members of the Task Force sought to ensure that two, otherwise similar parcels would not have dramatic differences in value for condemnation purposes just because of the presence of a conservation easement.

Requiring that the property subject to a conservation easement be valued as though unencumbered by the easement in every case serves a couple of objectives. First, it advances the goal of treating comparably situated parcels similarly. Because all interests are valued together, the aggregation of all of the property rights of two comparable properties will yield similar values. This would remove any financial benefit to locating corridors on conserved properties. This requirement would also support the adopted public policy of encouraging land conservation because it would ensure the public investment in tax credits for conservation easements is maintained.

Second, it simplifies the job of the appraiser. The appraiser would no longer have to determine in advance how much of a conservation easement would be taken; he or she would simply value all of the property interests associated with a single parcel. It would be left to the landowner and the land trust, in a subsequent apportionment hearing, to determine how to divide the proceeds awarded at the valuation hearing. Finally the proponents of this recommendation feel that it preserves the opportunity for condemning authorities to argue that, whatever the value is determined to be, they are not violating the terms of the conservation easement and therefore have not taken it, in whole or in part, and do not owe any compensation to the easement holder.

In addition to the above concerns, one of the landowner members of the task force stressed that conservation easement holders own real value in the land. As such, the landowner expressed the need to have the conservation easement holder participate at the onset of all negotiations and throughout any subsequent condemnation proceedings.

b.) Viewpoint/concerns expressed by representatives of utilities

Utility representatives and those representing condemning authorities believe that when less than a fee simple interest is acquired through eminent domain, and the acquisition or take does not interfere with or materially affect an encumbrance (e.g. conservation easement or another utility easement) on the property, then the property should be valued as encumbered. Utility representatives stated that appraisers currently consider the impacts of existing encumberances on fee property when determining the highest and best use of the property. And that to eliminate or "carve out" an exception for conservation easements and no other encumbrance would artificially inflate the actual value of the property on the open market. The utilities want to ensure that properties continue to be valued as encumbered when that encumbrance is not being affected to ensure that neither windfalls nor underpayments would result from misapplication of the undivided basis rule. Overpayment would result in a windfall to either the property owner or the conservation easement holder depending on the apportionment, and ultimately the windfall will be at the expense of the public who will pay twice for the same conservation easement; once through taxes and a second time as a utility rate payer/customer. The utilities believe that the current statutory and case law properly considers the affect every encumbrance has on a property's value when establishing its fair market value and that the current practice provides for adequate compensation to each affected real property interest in the property that is either taken or damaged by the condemning authority.

The Land Trusts expressed a concern that utilities may be motivated to seek out properties encumbered with a conservation easement if the value of the property being acquired for the utility easement is lower due to it being encumbered by a conservation easement. The utilities responded that their siting processes are not solely motivated by the cost of the easement or other real property interests to be acquired. To the contrary, utility representatives explained that the existence of conservation easements is one of many factors considered in the siting process which includes considerations such as environmental impacts, construction and cost issues related to the length of linear facilities, and impacts on land.

c.) Viewpoint/concerns expressed by representatives of the appraiser community

The appraiser members of the task force explained that they believe that any new legislation addressing this issue would most likely create more problems than it could fix and that in general the current process is not broken.

The valuation of any interest is properly appraised using an analysis of the value before the acquisition and then the value after the acquisition. The valuation of an interest to be acquired must take into account the affect of the acquisition on the land interest of the parties that have an ownership in the property. If a parcel is encumbered by a conservation easement there could be little affect all the way to a total 'take' of that conservation easement interest. The affect on the underlying landowner can also have a sliding scale, which may or may not mirror the affect on the easement.

The conservation easement is somewhat of a negative restriction; it is not like a zoning overlay that would negate development above the allowed uses. The overall conclusion is that barring other specific direction which would be derived from negotiation between the parties or a legal ruling, the entire ownership should be appraised.

Conclusion

Over the last several months, the task force members had a thorough and civilized discussion about the valuation of condemned property that is subject to a conservation easement. Despite everyone's best intent, the task force agreed that it could not reach consensus on what, if any, legislative changes are necessary. In light of the risks and complexities associated with this issue, the task force's recommendation is that no legislative changes be made.

SB 50 Task Force Appointees

CCI Appointee

Chip Taylor

CML Appointee

Geoff Wilson

Utility Representatives

Julie Stencil

Rick Thompson

Tim Knapp

Conservation Easement Holder Representatives

Conrad Lattes

Bruce Talbott

Larry Kueter

Landowner Representatives

Don Holmes

Ben Duke

Appraiser Representatives

Kevin Shea

Dave Peterson

CONSERVATION EASEMENT CONDEMNATION SCENARIOS

Conrad Lattes

Below are several scenarios in which property rights are condemned. The dollar values have been picked only to find round numbers to deal with so that we can discuss the impacts of different methods of valuation. The use of the modified undivided basis rule as set forth in these scenarios is how land subject to a conservation easement was valued in the example of a total taking in Boulder County. These scenarios are offered to help to clarify the valuation issue the Conservation Easement Task Force has been asked to address.

For each of the following scenarios, there is an assumption that Parcel 1 and Parcel 2 are identical in every respect, except for the fact that Parcel 1 is not encumbered by a conservation easement and Parcel 2 is encumbered by a conservation easement conveyed to a land trust. Each parcel is 100 acres of vacant land, adjacent to a state highway, and is used for grazing. The highest and best use of the property has been found to be agricultural and rural residential uses. Each parcel, without consideration of the conservation easement, is appraised at $10,000 per acre and has a total value of $1,000,000. The conservation easement prohibits construction of any structures other than wildlife friendly fences on Parcel 2 and the conservation purposes described in the conservation easement are protection of agriculture, viewshed, and ground nesting birds. At the time the conservation easement was created, an appraisal found that the value of the land subject to the conservation easement is $400,000 and the owner of Parcel 2 received State of Colorado tax credits of $300,000 based upon a donated value of $600,000. The conservation easement states that, in the event of full or partial condemnation of Parcel 2, any proceeds will be split between the landowner (40%) and land trust (60%).

<u>Scenario 1</u>: Parcel 1 and Parcel 2 are each condemned in their entirety by the federal government to build a military base.

<u>Parcel 1</u>
The Parcel 2 landowner receives $1,000,000 (fair market value of 100 acres at $10,000 per acre).

<u>Parcel 2</u>
The just compensation owed for Parcel 2 depends on how it is valued.

- If Parcel 2 is valued as unencumbered by the conservation easement, the federal government pays $1,000,000 ($10,000 per acre for 100 acres) which is then apportioned between the landowner ($400,000) and the land trust ($600,000). The landowner is made whole because he receives the fair market value of his property interests taken. The land trust is also made whole because it can reinvest its proceeds in additional conservation projects, which will satisfy its responsibility under state and federal regulations. The State of Colorado is also made who because the benefit it received for tax credits issued will be protected by the land trust's investment in additional conservation projects.

- If the "modified undivided basis rule" is followed (this rule is described in the case of *Montgomery Ward & Co. v. City of Sterling*, 523 P.2d 465 (Colo. 1974) and was handed out at the first meeting of the Committee), Parcel 2 would be valued as encumbered by the conservation easement (i.e. $400,00). The federal government would pay $400,000 which would be apportioned (pursuant to the terms of the conservation easement) with $160,000 to the landowner and $240,000 to the land trust. In this scenario, neither the landowner nor the land trust are made whole because the landowner and land trust each only receive 40% of the value of the real property rights that were taken. The State of Colorado is also harmed because it paid tax credits for a conservation easement that cannot be replaced in value with the proceeds awarded to the land trust. If the modified undivided basis rule is applied in this manner, it also provides a financial incentive to condemning authorities to condemn land subject to conservation easements because it is less expensive.

<u>Scenario 2</u>: Partial condemnation of Parcel 1 and Parcel 2 by CDOT to widen the highway and add light rail.

If CDOT condemns a 200 foot wide strip of land adjacent to the existing highway, it will take 10 acres from Parcel 1 and from Parcel 2. The landowners retain their interests in 90 acres and the conservation easement continues to encumber the remaining 90 acres. Assuming there is no finding of either damages to the remainder, the valuation of the takings from Parcel 1 and Parcel 2 are identical to those in Scenario 1 above. The Parcel 1 landowner receives $100,000. Depending on whether the modified undivided basis rule is applied, the Parcel 2 landowner receives either $40,000 or $16,000 and the land trust receives either $60,000 or $24,000.

<u>Scenario 3</u>: Condemnation of an easement for overhead transmission lines by an electric utility.

An easement for a 100 foot wide strip of land through the center of Parcel 1 and Parcel 2 is condemned for high voltage transmission lines. Each easement will affect 5 acres. Other than towers and overhead lines, no other infrastructure will be permitted under the easement. The towers and overhead lines would not be allowed under the conservation easement because they impact agricultural potential, the viewshed, and habitat for ground nesting birds. Appraisers have found that the value of the easement is 25% of the underlying fee simple property and that there are no damages to the remainder of the parcels.

<u>Parcel 1</u>
The Parcel 1 landowner receives $12,500 (25% of $50,000, the fair market value of 5 acres).

<u>Parcel 2</u>
The just compensation owed for Parcel 2 depends on how it is valued.

- If Parcel 2 is valued as unencumbered by the conservation easement, the federal government pays $12,500 (25% of the fair market value of 5 acres in fee simple) which is then apportioned between the landowner ($5,000) and the land trust ($7,500).

- If the modified undivided basis rule is followed, the portion of Parcel 2 condemned would be valued as encumbered by the conservation easement (i.e. 40% of the unencumbered value of 5 acres, or $20,000). The electric utility would pay 25% of this figure ($5,000) which would then be apportioned between the landowner ($2,000) and the land trust ($3,000).

<u>Scenario 4</u>: Condemnation of an easement for an underground pipeline by a gas company.

An easement for a 100 foot wide strip of land under the center of Parcel 1 and Parcel 2 is condemned for a high pressure gas pipeline. Each easement will affect 5 acres. There will be a temporary disturbance of the surface during construction but there will be no above-ground improvements. Any disturbance of the surface is prohibited by the conservation easement, but there will only be a temporary impact upon the agricultural potential of the land and the viewshed. The habitat for ground nesting birds will be disturbed for a period of years. Appraisers have found that the value of the easement is 10% of the underlying fee simple property and that there are no damages to the remainder of the parcels.

<u>Parcel 1</u>
The Parcel 1 landowner receives $5,000 (10% of $50,000, the fair market value of 5 acres).

<u>Parcel 2</u>
The just compensation owed for Parcel 2 depends on how it is valued.

- If Parcel 2 is valued as unencumbered by the conservation easement, the gas company pays $5,000 (10% of the fair market value of 5 acres in fee simple) which is then apportioned between the landowner ($3,000) and the land trust ($2,000).

- If the modified undivided basis rule is followed, the portion of Parcel 2 condemned would be valued as encumbered by the conservation easement (i.e. 40% of the unencumbered value of 5 acres, or $20,000). The electric utility would pay 10% of this figure ($2,000) which would then be apportioned between the landowner ($800) and the land trust ($1,200).

Larry Kueter

On a parcel of 100 acres not encumbered by a conservation easement, a utility company is going to condemn an easement for an overhead transmission line over 5 acres. The landowner and utility each have an appraisal done and agree the value of the land is $10,000 an acre and the easement represents 25% of the value of the property. The utility and landowner shake hands and agree they have a deal and the utility will send the contract in the next couple weeks and close soon after. The landowner has also been talking to the ABC Land Trust about a conservation easement on the 100 acres, but doesn't think to tell either the utility or land trust about the conversations with the other. The landowner closes on the conservation easement before signing the contract with the utility. The conservation easement has a proceeds clause that says the conservation easement represents 60% of the value of the land.

The utility runs title and discovers the conservation easement. It contacts the land trust, which is a little irritated the landowner didn't tell them about the utility easement, but otherwise recognizes the utility has the right to condemn and agrees with the values agreed to by the landowner and the utility.

Is there any policy justification for the utility to reconsider the price it will pay for their easement, given the fact that the property is now subject to a conservation easement.

Geoff Wilson

A. Rancher Bob sells a conservation easement to the adjacent town, which enables him to continue to ranch the land rather than developing it for a Wal-Mart. The Town buys the easement because its residents like the view of the mountains across Bob's ranch, and don't want that view ruined by any form of development. Ecological considerations play no role in the value attached by the Town's residents; it's ALL about the view. Indeed, Town residents with a view across Bob's Ranch are regularly able to sell their property at a premium because of the easement and the unobstructed view. WOW (War of the Worlds) Transmission Co. takes an easement across Bob's ranch and builds a series of transmission towers across the view. Nearby residents see their $900-$1.2M homes' values decline $150-200K, due to their new "industrial use" view, of the powerline. How much does WOW owe the Town, if anything? How much does WOW owe the private property owners, if anything?

B. Same facts as A., except that the Town (using voter approved bonded debt and a mill levy increase) has purchased Rancher Bob's ranch in fee simple absolute (Bob ranches the property as a lessee). Different answers?

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III.

Also, as to Case No. 1, the defendant asserts that the trial court erred in admitting evidence of his involvement in two other robberies which occurred the day following the robbery alleged in this case.

[4, 5] Although evidence which shows that the defendant committed other offenses is generally not admissible, Stull v. People, 140 Colo. 278, 344 P.2d 455 (1959), nevertheless, evidence of other transactions is admissible for the purpose of showing plan, scheme, or design. Here, the other two robberies were both committed in a similar way to the one charged and occurred the following day. This evidence was admitted in conformity with the *Stull* requirements for the limited purpose of showing a plan, scheme, or design by the defendant. People v. Lamirato, Colo., 504 P.2d 661 (1972) and People v. Dago, 179 Colo. 1, 497 P.2d 1261 (1972).

IV.

In Case No. 2, the defendant states that his plea of guilty should be vacated for failure to comply with Crim.P. 11. Specifically, the defendant argues that the trial court failed to inform him that a material element of the offense of aggravated robbery was the intent, if resisted, to wound, maim, or kill.

[6, 7] Since this issue was not raised in either the Crim.P. 35(b) motion or at the hearing, it is not properly before this court for review. People v. McClellan, Colo., 515 P.2d 1127 (1973). In making this ruling, we note that the record demonstrates rather clearly that the guilty plea was entered with an understanding of the nature of the crime of aggravated robbery. People v. Marsh, Colo., 516 P.2d 431 (1973). The plea of guilty was entered on January 9, 1968, which was more than two years prior to the United States Supreme Court's decision in Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) which sets forth standards that must be complied with by a trial court before it can accept a plea of guilty. The guilty plea here adequately complies with the pre-*Boykin* requirements that it be made voluntarily and with a full understanding of the charge. *See* People v. Alvarez, Colo., 508 P.2d 1267 (1973).

The indication from the defendant's argument that *Boykin* be given retroactive effect is clearly rejected in Ward v. People, 172 Colo. 244, 472 P.2d 673 (1970). *Accord*, Cox v. Kansas, 456 F.2d 1279 (10th Cir. 1972) and Green v. Turner, 443 F.2d 832 (10th Cir. 1971).

Judgment affirmed.

MONTGOMERY WARD & CO., INCORPORATED, an Illinois corporation, Petitioner,

v.

CITY OF STERLING, Colorado and the State Department of Highways, Division of Highways, State of Colorado, Respondents.

No. C-375.

Supreme Court of Colorado,
En Banc.
June 17, 1974.

Condemnation proceeding. The Court of Appeals, 511 P.2d 512, affirmed the condemnation award and the lessee of the condemned premises brought certiorari. The Supreme Court, Pringle, C. J., held that lessee, which operated store on land sought to be condemned, was not entitled to establish value of its leasehold interest independently of value of entire property and that when a lessee has compensable rights in the leasehold, these rights are not affected by the lessor's settlement with the condemnor.

Reversed and remanded.

1. Eminent Domain ⇐130

The property being taken by the exercise of eminent domain must be valued on

an undivided basis rather than by the "sum of the interest" approach. C.R.S. '63, 50-1-6; 1967 Perm.Supp., C.R.S., 50-1-6(3), 50-1-22.

2. Eminent Domain ⇐131, 202(1)

The "undivided basis" rule of valuing condemned property does not ignore the value which an encumbrance may add to or subtract from the fair market value of the property as a whole but contemplates that where the contract rental adds to the fair market value of the property, evidence of that rental is relevant in determining the compensation to be paid. C.R.S. '63, 50-1-6; 1967 Perm.Supp., C.R.S., 50-1-6(3), 50-1-22.

3. Eminent Domain ⇐202(1)

When the contract rental for the condemned property is less than the fair rental, the fair rental and not the contract rental is the relevant evidence on the issue of compensation. C.R.S. '63, 50-1-6; 1967 Perm.Supp., C.R.S., 50-1-6(3), 50-1-22.

4. Eminent Domain ⇐147

Lessee, which operated store on land sought to be condemned, was not entitled to have the interest of the owner and the lessee valued separately. C.R.S. '63, 50-1-6; 1967 Perm.Supp., C.R.S., 50-1-6(3), 50-1-22.

5. Eminent Domain ⇐136

Where condemnors took only a 35-foot strip and not the possessory interest to the entire lot under lease, lessee was not denied just compensation because the award was based on the unencumbered value of the 35-foot strip. C.R.S. '63, 50-1-6; 1967 Perm.Supp., C.R.S., 50-1-6(3), 50-1-22.

6. Eminent Domain ⇐136

The condemnor is not required to pay for an interest which was not lost by the condemnees. C.R.S. '63, 50-1-6; 1967 Perm.Supp., C.R.S., 50-1-6(3), 50-1-22.

7. Eminent Domain ⇐147

The value of owner's and lessee's joint loss by reason of taking of 35-foot strip was properly measured by the difference between the fair market value of the entire property prior to condemnation less its fair market value after condemnation. C.R.S. '63, 50-1-6; 1967 Perm.Supp., C.R.S., 50-1-6(3), 50-1-22.

8. Compromise and Settlement ⇐4

When a lessee has compensable rights in the leasehold, these rights are not affected by the lessor's settlement with the condemnor.

9. Stipulations ⇐17(2)

Where lessee was party in interest in condemnation proceeding because its compensation was affected by the amount which condemnors must pay for the entire property taken and lessee was not party to stipulation between the condemnors and the owner, stipulation was not proper basis for the award and the lessee was entitled to cross-examine the appraisers who allegedly set the value upon which the stipulation was based. C.R.S. '63, 50-1-6; 1967 Perm.Supp., C.R.S., 50-1-6(3), 50-1-22.

Walberg & Pryor, John E. Walberg, Denver, for petitioner.

John P. Moore, Atty. Gen., Joseph M. Montano, Chief Highway Counsel, Leonard Ripps, Sp. Asst. Atty. Gen., Denver, for respondents.

PRINGLE, Chief Justice.

Certiorari was granted to review the decision of the Court of Appeals in City of Sterling v. Plains Investment Co., Colo. App., 511 P.2d 512.

In October of 1970, the State Department of Highways and the City of Sterling filed a petition in condemnation to acquire a fee simple absolute in a thirty-five foot strip of land for a highway right-of-way. Plains Investment Company, who owned the subject property, had leased the lot to Montgomery Ward & Co. Wards operated a catalog store and auto repair garage at this location. Wards' lease was for a term of ten years to June 30, 1979, and provided Wards two options at the same rental, each for a further term of five years. It is undisputed that the condemnation of this land

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would make it necessary for Wards to relocate its store in Sterling. Both Plains and Wards were made respondents to the condemnation proceeding.

Wards filed an answer to the condemnation petition. It alleged that the fair rental value of the property exceeded the reserved rent and, therefore, it sought a judgment against the petitioners for the sum of the difference between the fair rental value and reserved rent over the remainder of the term of the lease.

Petitioners moved to dismiss Wards' answer. They characterized Wards' answer as a counterclaim and asserted that the lessee's interest in the award for the undivided fee, if any, should be ascertained in a subsequent proceeding.

The trial court ruled that Wards could not value its leasehold interest separate and apart from the reasonable market value of the property being condemned; however, it ruled that Wards could join with the owners in presenting any evidence to prove the reasonable market value of the undivided fee.

On September 1, 1971, a hearing was held to determine the value of the condemned property. It is apparent from the record that Plains and the condemnors had agreed prior to the hearing that $45,400 was a fair price for the fee and that Wards had not taken part in these negotiations. Counsel for both Plains and the condemnors stated that the fair rental value of the property had been considered in arriving at this figure. Counsel for Wards objected, stating that he had never seen any appraisal and that counsels' statements do not constitute proof that the fair rental value was properly considered in arriving at this valuation.

Wards still maintained that it had a right to prove its own loss at this hearing. Its offer of proof was the lease between Plains and Wards reserving a yearly rental of $7800 and a new lease for similar property reserving a yearly rental of $12,700. It alleged that moving to the new location hurt Wards' business and that Wards would have exercised its option to renew the Plains' lease.

Based on the stipulation, the court entered an order for a total award of $45,400 of which $26,735 was the value of land actually taken, including all interests therein, and $18,665 was the damage to the residue. It rejected Wards' offer of proof holding that it was only relevant to apportion the award.

On appeal, Wards alleges that (1) it should have been allowed to prove its loss by showing the value of the advantageous lease and (2) it was denied the right to cross-examine the appraisers which Plains and the condemnors used to value the unencumbered fee. Relying on Vivian v. Board of Trustees, 152 Colo. 556, 383 P.2d 801, the Court of Appeals affirmed.

We affirm the Court of Appeals with respect to Wards' first contention. We hold, however, that the case must be remanded for the purpose of determining the fair market value of the property based on competent evidence.

I.

The first issue involves the valuation technique by which the trier of fact determines the amount to be awarded for the taking of the condemned property. Wards argues that the condemned property should be valued by determining the respective values of the lessee's and lessor's interest and totaling them to determine the amount which the condemnors must pay for the property. This method of valuation is commonly referred to as the sum of the interest approach.

The condemnors argue that the property should be valued as a whole and, if necessary, a subsequent proceeding can be held to apportion the total award between the lessee and lessor. This method is normally referred to as the undivided fee rule. For our purposes, it is well put as follows:

> "The fee taking eliminates all lesser titles as well as the fee and vests the entire title, a fee simple absolute, in the condemnor. An award is made for such

unencumbered fee simple absolute and not for particular parts of the title. Where the land is subject to an existing lease, on distribution of the fund the lessor is entitled to the award minus the value of the lessee's rights. The lessee is entitled, insofar as the leasehold interest itself is concerned, to the bonus value of his lease, if there is such value. If he has made a good bargain the fair market value of his lease may exceed rent money due, in which case he has money coming. The award of the lessee for the unexpired residue of his term is its present money worth over and above the obligations of the lease." [1]

J. Sackman, Compensation Upon the Partial Taking of Leasehold Interest, S. W. Legal Foundation 3d Ann. Inst. on Eminent Domain, 35, 39 (1961).

[1] As we pointed out in Vivian v. Board of Trustees, *supra*, Colorado follows the rule that the property must be valued on an undivided basis, but with some distinctions from the strict undivided fee rule. *See* 4 Nichols, Eminent Domain, § 12.36 (rev.3d ed. 1971). This rule puts all the condemnees in the position of seeking to maximize the total award in the first proceeding. Only in a subsequent proceeding do the condemnees become adversaries. Under the undivided basis rule, the parties have an opportunity to agree on the apportionment of the award, thereby avoiding completely the difficult task of ascertaining the value of the separate interests. Also, the rule has the effect of curbing excessive awards. 1 L. Orgel, Valuation Under the Law of Eminent Domain, § 109 (2d ed. 1953). It simplifies and narrows the issues in the proceeding in which the condemnor has an interest. In addition, our eminent domain statute, 1967 Perm. Supp., C.R.S.1963, 50-1-6, provides for its use.[2]

[2-4] The undivided basis rule, as applied in Colorado and as distinguished from the undivided fee rule adopted in some states, does not ignore the value which an encumbrance may add to or subtract from the fair market value of the property as a whole. *See*, e. g., Englewood v. Reffel, 173 Colo. 203, 477 P.2d 361, where a permanent right-of-way easement diminished the fair market value of the land. *See also* Boston Chamber of Commerce v. Boston, 217 U.S. 189, 30 S.Ct. 459, 54 L.Ed. 725. Conversely, the rule contemplates that where the contract rental adds to the fair market value of the property, evidence of that rental is relevant in determining the compensation to be paid. *See* People v. Lynbar, 253 Cal.App.2d 870, 62 Cal.Rptr. 320. However, under our rule, where the contract rental is less than the fair rental, as Wards contends here, the fair rental and not the contract rental is the relevant evidence on the issue of compensation. This assures a fair return for the property valued as a whole. In none of the situations above mentioned is the test one of divided interests. Therefore, the trial court properly denied Wards' request that interests of the owner and the lessee be valued separately.

Wards maintains that an award based on the unencumbered value of the thirty-five foot strip does not provide a sufficient award for its loss. Wards asserts that the condemnation caused it to lose its right to possession of the *entire* premises. It argues that this loss is the present value of the difference between the fair rental val-

1. Some commentators believe that the lessor's interest should be valued and subtracted from the total, thereby ascertaining the lessee's interest. Boyer and Wilcox, An Economic Appraisal of Leasehold Valuation in Condemnation Proceedings, 17 U.Miami L.Rev. 245, 267 (1963). We do not decide that question here.

2. Wards argues that the 1966 amendment to C.R.S.1963, 50-1-6 evinces the legislative intent to engraft the separate interest valuation doctrine onto the undivided fee rule. We perceive no such intent. It is obvious from reading the amendment that the changes were made in section 50-1-6 to accommodate the addition of 1967 Perm.Supp., C.R.S.1963, 50-1-22, which provides for condemnation of personal property. 1967 Perm.Supp., C.R.S.1963, 50-1-6(3) does not require that Wards be allowed to prove its loss.

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[5-7] The short answer to this contention is that the possessory interest to the entire lot under lease was not taken by the condemnors. They only took a thirty-five foot strip. The remainder was retained by either the lessee or the lessor. *See* In Re Savin Hill Yacht Club Ass'n., 246 Mass. 75, 140 N.E. 299; 4 Nichols, Eminent Domain, § 12.42(1). In any event, the condemnor need not pay for an interest which was not lost by the condemnees. Englewood v. Reffel, *supra*; Boston Chamber of Commerce v. Boston, *supra*. The value of their joint loss can be measured by the difference between the fair market value of the entire property prior to condemnation less its fair market value after condemnation. Applying the undivided basis rule, as set out above, does not deny Wards its "just compensation."

II.

[8, 9] Wards argues that the trial court erred in denying it the right to cross-examine the appraisers who allegedly set the value upon which the stipulation was based. It is well-settled law that where a lessee has compensable rights in the leasehold, these rights are not affected by the lessor's settlement with the condemnor. A. W. Duckett & Co. v. United States, 266 U.S. 149, 45 S.Ct. 38, 69 L.Ed. 216; Chicago, B. & Q. R. Co. v. F. Reisch & Bros., 247 Ill. 350, 93 N.E. 383. Wards is a party in interest in this proceeding, for its compensation is affected by the amount which the condemnors must pay for the entire property taken. Although Wards may have waived its right to present its own evidence of value, as the Court of Appeals held, it did not waive its right to insist that the award be based on competent evidence and to cross-examine its source.

Wards was not a party to the stipulation between the condemnors and the lessor. Wards objected to admissibility of the stipulation and asserted its right to cross-examine the appraisers. Under these circumstances, the stipulation is not a proper basis for the award. Therefore, the judgment is reversed and the cause remanded to the district court for the purpose of ascertaining the value of the property taken consonant with the views expressed herein.

The PEOPLE of the State of Colorado
v.
Blair J. LAWTHER, Attorney-Respondent.
No. 26159.

Supreme Court of Colorado,
En Banc.
June 17, 1974.

Disciplinary proceeding. The Supreme Court, Pringle, C. J., held that failure of attorney to file reports in connection with the administration of the estate, despite repeated court orders to do so, failure of attorney to file income tax returns or inheritance tax applications and failure of attorney to remit to bonding company sums which have been paid to the attorney, ostensibly as premiums on surety bond, warrant disbarment.

Respondent disbarred.

Attorney and Client ⇐58

Failure of attorney, who has been hired by administrator of estate, to timely file reports despite court orders and failure to file income tax returns for estate or inheritance tax applications or to remit to bonding company sums paid to attorney, ostensibly as premiums on surety bond for the estate, warrant disbarment, especially where, on two occasions, such actions result in removal and imposition of surcharge against administrators.

John P. Moore, Atty. Gen., John E. Bush, Deputy Atty. Gen., L. James Arthur, Asst. Atty, Gen., Denver, for the People.