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David A. Shore

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LA PLATA ELECTRIC ASSOCIATION V. CUMMINS: A RADICAL DEPARTURE OR A CONSISTENT INTERPRETATION OF PRE-EXISTING EQUITIES IN COLORADO CONDEMNATION LAW?

INTRODUCTION

The transformation of Colorado into a permanent home for millions of people has not left the wild frontiers of the past unscathed. In fact, the developing communities' constant demands for electricity, transportation and water inevitably create legal turbulence in areas that were previously untouched by modern development. Compensating property owners for the arduous transitions inherent in modernization is a complex task.

On November 10, 1986, the Supreme Court of Colorado decided three cases which explicate many problems faced by property owners and their adversaries, the condemning authorities.¹ All three cases—the leading case being *La Plata Electric Association v. Cummins*²—involved property owners who had portions of their land condemned by electrical companies as easements for the construction of power lines.³ The property owners sought compensation for the diminution in value of the remainder of their properties resulting from the unsightliness of a power line,⁴ loss of view⁵ and aesthetic damage.⁶ This comment first describes the existing law in the majority and minority jurisdictions with respect to compensation for the diminution in value of the remainder of property taken in eminent domain. Next, it analyzes the development of condemnation case law in Colorado. Finally, this comment analyzes the impact the *La Plata* decision will have on Colorado law.

I. BACKGROUND

A. *Origins of the Dispute*

In order to understand the cases involving the unsightliness of electrical power lines and the loss or impairment of view, it is helpful to discuss general concepts with regard to condemnation. In eminent domain proceedings, real property is conveniently divided into two categories:

1. See *La Plata Elec. Ass'n v. Cummins*, 728 P.2d 696 (Colo. 1986); *Bement v. Empire Elec. Ass'n*, 728 P.2d 706 (Colo. 1986); *Herring v. Platte River Auth.*, 728 P.2d 709 (Colo. 1986).

2. 728 P.2d 696 (Colo. 1986).

3. *La Plata*, 728 P.2d at 697; *Bement*, 728 P.2d at 707; *Herring*, 728 P.2d at 710. In these cases, the condemning authorities developed the respective properties to improve electrical services to the communities.

4. *La Plata*, 728 P.2d at 697.

5. *Bement*, 728 P.2d at 706.

6. *Herring*, 728 P.2d at 709 (involved the construction of electrical power lines and an electrical substation).

ries.⁷ One category consists of takings that condemn entire parcels of property. The measure of damages in this category is the value of the condemned parcel of property at the time of the actual taking.⁸ This established standard of recovery is consistent with the United States and Colorado Constitutions which mandate just compensation for takings of real property.⁹

The second category of eminent domain proceedings consists of property that is partially taken. Partial takings frequently occur as a result of the government's continuing struggle to accommodate the changes inherent in developing communities. Just compensation for partial takings is judicially determined in two ways. One test courts use to determine just compensation is the "before and after" rule.¹⁰ This rule measures damages by determining the difference between the value of the whole property immediately before the taking and the value of the remaining property immediately afterward.¹¹ The second test courts use in partial takings is often referred to as the "modified before and after" rule.¹² This rule requires compensation to property owners for the fair market value¹³ of the land taken and for the damages to the remainder of the property.¹⁴ Although the majority of courts allow compensation for property owners in accordance with the "before and after" rule, some courts do not allow compensation for consequential damages.¹⁵

La Plata, Bement and Herring firmly establish that Colorado follows the majority rule with respect to valuation of property taken. These decisions allow parties to present evidence and to recover damages for the diminution in value to their remaining property caused by the installa-

7. Goldstein & Goldstein, *Aesthetic Damages and Loss of View*, 197 N.Y.L.J., May 20, 1987, at 1, col. 1.

8. *Id.* at 2.

9. U.S. CONST. amend. V provides: "[N]or shall private property be taken for public use, without just compensation."; COLO. CONST. art. II, § 15 provides: "Private property shall not be taken or damaged for public or private use without just compensation."; see also *Seaboard Air Line Ry. v. United States*, 261 U.S. 299, 304 (1923) (stated that the property owner is to be indemnified fully, as if property had not been taken); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893) (determined that just compensation includes the full and perfect monetary equivalent of the property taken).

10. See, e.g., *Pierpont Inn, Inc. v. State*, 70 Cal. 2d 282, 449 P.2d 737, 74 Cal. Rptr. 521 (1969) (permitted the jury to consider loss of view and beach access as factors in determining severance damages).

11. *Id.* at 746, 74 Cal. Rptr. at 530. See generally Annotation, *Eminent Domain: Compensability of Loss of View From Owner's Property - State Cases*, 25 A.L.R.4th 671 (1973) [hereinafter Annotation, *Eminent Domain*].

12. G. SCHMUTZ, *CONDEMNATION APPRAISAL HANDBOOK* 97, 98 (1963) [hereinafter SCHMUTZ].

13. The "fair market value" is the highest price at which a seller can sell property to a willing buyer in the open market. It is assumed that the buyer and seller are acting freely and exercising reasonable judgment. *Little v. Burleigh County*, 82 N.W.2d 603, 608 (N.D. 1957).

14. SCHMUTZ, *supra* note 12, at 97.

15. See generally Annotation, *Eminent Domain, supra* note 11, at 689-93. "Consequential damages" are damages to the remaining property arising from injuries caused by the construction of public improvements. *United Power Ass'n v. Heley*, 277 N.W.2d 262, 265 (N.D. 1979).

tion and maintenance of electrical power lines. In order to properly analyze these cases, it is helpful to review the law in the jurisdictions which allow recovery for consequential damages.

B. *The Majority View Regarding Compensation for the Remainder*

The evaluation of several cases reveals that the primary issue in eminent domain proceedings is whether property owners are entitled to compensation for a diminution in value to the remainder of their property. In a partial taking, the majority of jurisdictions compensate property owners for the damage to the remainder of their property resulting from the improvement.¹⁶ This general rule is not limited to cases involving utility companies that condemn private property for the construction of power lines; instead, this rule applies to a variety of partial taking scenarios.¹⁷

Generally, there are three important arguments in favor of permitting the trier of fact to consider elements affecting the remainder of property, such as impairment of view, beach access and freedom from noise, in order to determine just compensation. The first argument contends that these elements, although not compensable per se under the definition of property,¹⁸ directly affect the property's fair market value, loss of which is compensable.¹⁹ Therefore, elements that increase or decrease the value of the property must be considered in order to accurately determine the extent of compensation the property owner is entitled to recover.²⁰ Some courts hold that every factor affecting the value of the property must be evaluated to properly satisfy the requirement of just compensation.²¹

The second line of reasoning in favor of permitting the trier of fact to consider elements affecting the remainder is based on the presumption that factors such as loss of view, unsightliness and aesthetic damages are bona fide elements of damage requiring compensation.²² The basis for this argument is not that these elements are unpleasant to property owners; instead, the grounds for requiring compensation di-

16. See, e.g., *Dennison v. State*, 22 N.Y.2d 409, 411-13, 239 N.E.2d 708, 709-11, 293 N.Y.S.2d 68, 69-71 (1968) (reasoning that loss of privacy and seclusion, and impairment of view, resulting from the construction of a highway are factors that determine consequential damages to the remainder).

17. E.g., *Campbell v. United States*, 226 U.S. 368 (1924) (land condemned by the United States was used as a site for a plant that produced nitrates); *United States v. 760.807 Acres of Land*, 731 F.2d 1443 (9th Cir. 1984) (land taken for the construction of a safe harbor which was used to load and unload explosives).

18. See generally Bockrath, *Aesthetics and Condemnation Awards: Problems in Preserving the Aesthetic Environment Through Eminent Domain*, 7 NAT. RESOURCES LAW. 621, 621-31 (1974).

19. *Ohio Pub. Serv. Co. v. Dehring*, 34 Ohio St. 532, 533, 172 N.E. 448, 449 (1929).

20. *State ex rel. State Highway Comm'n v. Hesselden Inv. Co.*, 84 N.M. 424, 426, 504 P.2d 634, 636 (1972) (all elements affecting the fair market value should be considered, even though some of the damages are not guaranteed property rights).

21. *Keinz v. State*, 2 A.D.2d 415, 156 N.Y.S.2d 505, *appeal denied*, 3 A.D.2d 815, 161 N.Y.S.2d 604 (1956).

22. See, e.g., *Illinois Iowa Power Co. v. Rein*, 369 Ill. 584, 596, 17 N.E.2d 582, 588 (1938); *Board of Trade Tel. Co. v. Darst*, 192 Ill. 47, 61 N.E. 398 (1901).

rectly result from the potentially adverse effect these elements have on potential buyers.²³ In short, the construction of an easement that is distasteful to a prospective buyer diminishes the market value of the property and, therefore, requires compensation.²⁴ This argument stems from the constitutional requirement that a reduction in value should not be borne by the owner whose property was taken for a public purpose without his consent.²⁵

The final argument states that a sovereign power should be required to fully indemnify a property owner for proximate and consequential damages flowing from an act in condemnation.²⁶ The exercise of eminent domain is based upon the theory that, while the taking of property may greatly inconvenience the property owner, the resulting improvements promote the welfare of the general public.²⁷ Therefore, there is no reason why an individual property owner whose land is taken *in invitum*²⁸ should suffer financial loss that may be prevented by the condemning authorities' award of proximate and consequential damages.²⁹

The dilemma of determining diminution in value to the remainder appears before the courts as an evidentiary issue. The condemnor bears the burden of proving the value of the land taken and the owner bears the burden of proving damage to the remainder.³⁰ In the majority of jurisdictions when a partial taking occurs, a landowner is *not* required to show any peculiar damages to his property that are not suffered by the community at large.³¹ Instead, the landowner must prove that his land was damaged as a direct result of the taking.³²

The value of the property taken, as well as the effect of the construction and maintenance of the improvement, are elements frequently presented to the trier of fact by witnesses attempting to assist in determining the extent of damages.³³ The majority of courts hold that if a property owner's view is partially obstructed by the construction of a public improvement which effectively impairs the view, forcing the viewer to look across a newly constructed improvement, the property owner is entitled to compensation.³⁴

23. *Central Ill. Pub. Serv. Co. v. Westervelt*, 67 Ill. 2d 207, 210, 367 N.E.2d 661, 663 (1977).

24. *Id.*

25. *See supra* note 9 and accompanying text.

26. *South Buffalo Ry. Co. v. Kirkover*, 176 N.Y. 301, 303, 68 N.E. 366, 368 (1903).

27. *Id.* at 302, 68 N.E.2d at 368.

28. "In invitum" is a term applied to a proceeding against an unwilling party. BLACK'S LAW DICTIONARY 704 (5th ed. 1979).

29. *South Buffalo*, 176 N.Y. at 302, 68 N.E.2d at 368.

30. *Department of Pub. Works & Bldgs. v. Bloomer*, 28 Ill. 2d 267, 271, 191 N.E.2d 245, 248 (1963).

31. *See generally* 4 P. NICHOLS, THE LAW OF EMINENT DOMAIN §§ 14.01-.02 (J. Sackman Rev. 3d ed. 1985) [hereinafter 4 P. NICHOLS].

32. *City of Crookston v. Erickson*, 244 Minn. 321, 325, 69 N.W.2d 909, 912 (1955).

33. *Missouri Power & Light Co. v. Creed*, 32 S.W.2d 783, 787 (Mo. App. 1930) (the court held that witnesses must present evidence concerning the damages incurred from the taking of the property, which is not purely remote, speculative or conjectural).

34. *Purchase Hills Realty Assocs. v. State*, 35 A.D.2d 78, 312 N.Y.S.2d 934, 937, *aff'd*,

C. *The Minority View*

The minority decisions, which do not allow compensation, are based on three arguments. The first argument generally states that every element of consequential damages in an eminent domain proceeding should not be considered by the trier of fact. The minority stresses that a property owner is not entitled to compensation for consequential damages resulting from an interference with an interest shared in common with the general public. In order to justify compensation, the property owner must establish that the injury is special or peculiar to the property; if the damage differs only in degree from that suffered by the general public, it is not compensable.³⁵ Therefore, when an abutting landowner shares the same impairment, a property owner is not entitled to recover merely because a part of his property was needed to construct the improvement.³⁶

The second argument states that there are certain inconveniences which property owners must endure without monetary compensation.³⁷ The basis for this argument is that individual landowners must bear the burden of modernization in order to promote the general welfare of developing communities.³⁸ Similarly, any rights a landowner possesses to land abutting a public improvement are subordinate to the public right to enjoy the improvement.³⁹

Lastly, the minority contends that courts should not consider elements such as aesthetic damage and unsightliness in fixing condemnation awards to the owner of the remaining land.⁴⁰ The minority reasons that factors affecting compensable damages necessarily involve physical disturbances of property rights. Subsequently, remote, speculative and uncertain elements do not afford a basis for the allowance of damages,⁴¹ but simply reflect the particular grievance of the landowner.⁴²

30 N.Y.2d 615, 282 N.E.2d 127, 331 N.Y.S.2d 41 (1970) (construction of a highway that separated the remainder from a golf course entitled the property owner to recover consequential damages, despite the fact that the golf course could still be seen from the remainder).

35. *Dennison v. State*, 22 N.Y.2d 409, 411, 239 N.E.2d 708, 710, 293 N.Y.S.2d 68, 73 (1968); *see generally* 26 AM. JUR. 2D *Eminent Domain* § 202 (1966).

36. *See generally* Covey, *Frontage Roads: To Compensate or Not to Compensate*, 56 N.W. U.L. REV. 587 (1961).

37. *See, e.g.*, *Bopp v. State*, 19 N.Y.2d 368, 373, 227 N.E.2d 37, 40, 280 N.Y.S.2d 135, 139 (1967).

38. *Id.*

39. *See, e.g.*, *State ex rel. Schiederer v. Preston*, 170 Ohio St. 542, 546, 166 N.E.2d 748, 752 (1960) (raising grade of abutting street promoted the health, safety and welfare of the community); *State Highway Comm'r v. Easley*, 215 Va. 197, 202, 207 S.E.2d 870, 875 (1974) (the landowner's right of access to a public road was condemned pursuant to an exercise of state's police power to regulate the flow of traffic).

40. *Illinois Power & Light Corp. v. Barnett*, 338 Ill. 499, 501, 170 N.E. 717, 719 (1930).

41. *Illinois Power Co. v. Wieland*, 324 Ill. 411, 155 N.E. 272 (1927).

42. *Illinois Power & Light Corp. v. Peterson*, 322 Ill. 342, 153 N.E. 577, 579 (1926).

D. *Colorado Case Law*

In the landmark case of *Lavelle v. Town of Julesburg*,⁴³ the Colorado Supreme Court established that a property owner cannot be compensated for damages shared by the general public.⁴⁴ In *Lavelle*, an owner of three contiguous lots was denied compensation for noise, smoke, vapors and increased fire hazards resulting from the condemnation of an adjacent lot which was used as a means of ingress and egress to the landowner's property. The court held that the owner of condemned property is entitled to recover damages to the remainder only if the property owner can prove that the damages suffered were peculiar to the land.⁴⁵ Accordingly, the court denied recovery since the property owner could not prove that he incurred special damages because the landowner's damages were suffered by the general public.⁴⁶

The pertinent question raised in *Farmers' Reservoir & Irrigation Co. v. Cooper*⁴⁷ was whether the decrease in the fair cash market value of the remainder resulted from the construction and operation of a canal. The court stated that the interference with the property owner's use of water necessarily depreciated the market value of the property; consequently, the petitioner must be compensated to the extent of the interference.⁴⁸ In *Cooper*, the compensable damages were not awarded for the decrease in value of the water appropriated, but were awarded as a result of the canal which depreciated the value of the landowner's property by depriving the landowner of the use of his water.⁴⁹ The court held that in condemnation proceedings, damages — present and prospective — that are the natural, necessary or reasonable incident of a taking must be assessed.⁵⁰

In a 1947 condemnation proceeding in which land was taken for highway construction, the Colorado Court of Appeals affirmed an instruction which required just compensation for private property taken for public purposes.⁵¹ The court stated in *Noble* that the property owner was entitled to recover the value of land taken as well as the damages to the remainder.⁵² The court also stated that in order to determine the real value of the land and the damages to the remainder, men of ordinary prudence and judgment must not only consider the present condition of the property, but also any future, reasonable use of such property.⁵³

In *Mack v. Board of County Commissioners*,⁵⁴ the court reaffirmed the

43. 49 Colo. 290, 112 P. 774 (1911).

44. *Id.* at 300-01, 112 P. at 778.

45. *Id.*

46. *Id.*

47. 54 Colo. 402, 130 P. 1004 (1913).

48. *Id.* at 407, 130 P. at 1006.

49. *Id.*

50. *Id.*

51. *Board of County Comm'rs v. Noble*, 117 Colo. 77, 79, 184 P.2d 142, 143 (1947).

52. *Id.* at 79, 184 P.2d at 144.

53. *Id.*

54. 152 Colo. 300, 381 P.2d 987 (1963).

test used in Colorado to determine if property has been damaged.⁵⁵ This test measures the diminution in value of the remainder by comparing the fair market value of the remainder of the property before and after the actual taking.⁵⁶ Furthermore, the court stated that all natural, necessary and reasonable damages resulting from the taking which affect the market value of the remainder should be considered.⁵⁷

The first case in Colorado specifically dealing with impairment of view as a basis for awarding compensable damages was *Troiano v. Colorado Department of Highways*.⁵⁸ In *Troiano*, the landowner sought damages for a highway viaduct constructed adjacent to her established motel. The landowner argued that the newly constructed structure ruined the eye appeal of the land and the land's affinity with the roadway, resulting in the diminution in value of the property.⁵⁹ Despite these pleas, the court, adhering to legal precedent, applied the "different in kind" test,⁶⁰ and determined that the property owner's loss of view was *damnum absque injuria*,⁶¹ and therefore not compensable.⁶²

The court's reasoning was based on the "different in kind" test first enunciated in *City of Denver v. Bayer*.⁶³ According to this test, annoyance or inconvenience suffered by the general public is not a compensable property interest; rather, in order to constitute recoverable damages, a property owner must establish that the damage was peculiar to his property.⁶⁴ In ruling that the operation of a business, such as a motel, does not satisfy the requirements of the "different in kind" test, the court in *Troiano* concluded that there was no rationale in the law for holding that the mere presence of a structure requires compensation.⁶⁵

In *State Department of Highways v. Davis*,⁶⁶ the state condemned a narrow strip of land to construct a service road for a highway. The salient issues considered in *Davis* were the value of the property taken and the extent of damages to the remainder resulting from the impairment of

55. *Id.* at 304, 381 P.2d at 990. See also *Fenlon v. Western Light & Power Co.*, 74 Colo. 521, 223 P. 48 (1924); *Wassenich v. Denver*, 67 Colo. 456, 186 P. 533 (1919).

56. *Mack*, 152 Colo. at 302, 381 P.2d at 989.

57. *Id.*

58. 170 Colo. 484, 463 P.2d 448 (1969).

59. *Troiano*, 170 Colo. at 501, 463 P.2d at 448.

60. *Id.*

61. "Damnum absque injuria" is a loss which does not give one an action against the person who caused such loss. BLACK'S LAW DICTIONARY 354 (5th ed. 1979).

62. *Troiano*, 170 Colo. at 501, 463 P.2d at 455. See also *Earl v. Arkansas State Highway Comm'n*, 241 Ark. 11, 405 S.W.2d 931 (1966); *Blair v. State*, 19 A.D.2d 937, 244 N.Y.S.2d 274 (1963); *State ex. rel. Schiederer v. Preston*, 170 Ohio St. 542, 166 N.E.2d 748 (1960). According to these authorities, loss of light, air and ventilation constitutes general damages and not specific damages. See *Campbell v. Arkansas State Highway Comm'n*, 183 Ark. 780, 38 S.W.2d 753 (1931); *Probasco v. City of Reno*, 459 P.2d 772 (Nev. 1969); *Baldwin-Hall Co. v. State*, 22 A.D.2d 747, 253 N.Y.S.2d 651 (1964).

63. 7 Colo. 113, 118, 2 P. 6, 9 (1883); see also *Gilbert v. Greeley, Salt Lake & Pac. Ry. Co.*, 13 Colo. 501, 508-09, 22 P. 814, 816 (1889); *Hayes v. City of Loveland*, 651 P.2d 446, 448 (Colo. App. 1982).

64. *Bayer*, 7 Colo. at 118, 2 P. at 9.

65. *Troiano*, 170 Colo. at 501, 463 P.2d at 448.

66. 626 P.2d 661 (Colo. 1981), *rev'g* 42 Colo. App. 250, 596 P.2d 400 (1979).

access to the highway system.⁶⁷ The importance of this decision lies in the supreme court's holding that an abutting property owner is entitled to compensation only when a limitation or loss of access substantially interferes with his means of ingress and egress to and from his property.⁶⁸ The *Davis* court stated that the inconvenience caused by the use of a more circuitous route to gain access to his property does not constitute a substantial interference, since mere circuitry in route is identical — or possibly only differs in degree — to the inconvenience suffered by the general public.⁶⁹

II. *LA PLATA ELECTRIC ASSOCIATION V. CUMMINS*

A. *Facts*

On May 19, 1981, La Plata Electric Association ("La Plata") filed a petition in condemnation.⁷⁰ La Plata sought a fifty foot wide easement through the middle of a 19.533 acre parcel of land owned by Buckley D. and Laquita J. Wagner. The Wagner's land is located near the City of Durango and commands a view of the city and the surrounding mountains.

On July 14, 1981, the district court granted La Plata the use and possession of .853 acres of land owned by the Wagners for the construction of an electric transmission line.⁷¹ On June 7, 1982, the district court entered an order appointing a Board of Commissioners to determine the amount of compensation the Wagners would receive for their property.⁷² At a hearing held by the commissioners, both parties stated that the highest and best use⁷³ of the Wagner's property was for future development. The parties, however, presented polar evidence regarding the value of the remainder of the Wagners' property.

La Plata's appraiser testified that the construction of the power line caused no damage to the remainder of the property.⁷⁴ Buckley D. Wagner and two appraisers testified that the value of the remaining property was significantly reduced as a result of the unattractiveness of the power lines and the impairment of view.⁷⁵ La Plata's objection to the admission of evidence, regarding the diminution of value caused by the loss of view and aesthetic damage, was based on the theory that these causes are not compensable according to *Lavelle, Troiano* and *Davis*.⁷⁶ La Plata's objection was denied by the district court.

67. *Davis*, 626 P.2d at 663.

68. *Id.* at 664.

69. *Id.* at 664-65.

70. *La Plata Elec. Ass'n v. Cummins*, 703 P.2d 592 (Colo. App. 1985), *aff'd*, 728 P.2d 696 (Colo. 1986).

71. *Id.*

72. *Id.*

73. *United States v. 760.807 Acres of Land*, 731 F.2d 1443 (9th Cir. 1984); *see generally* 4 P. NICHOLS, *supra* note 33, at § 12.02[3].

74. *La Plata*, 728 P.2d at 697.

75. *Id.*

76. *Id.* *See supra* notes 44-47, 59-70 and accompanying text.

The district court, in accordance with the findings of the Board of Commissioners, entered a judgment stating that the value of the property taken was \$4,844 and the damages to the remainder of the property was \$5,000.⁷⁷ The trial court distinguished previous Colorado case law on the ground that the contemplated use of the Wagner's property specifically and uniquely affects the remainder of the property. The power line nearly bisected the Wagner's property, and the ensuing unattractiveness and loss of view did not generally affect any other landowner or the general public. Therefore, the trial court held that evidence concerning the adverse effect on the market value of the remainder, resulting from the installation and maintenance of a power line, was admissible.⁷⁸

On February 16, 1983, La Plata submitted to the Colorado Court of Appeals a Notice of Appeal. La Plata's appeal was based solely on the award of compensation for injury to the remainder of the Wagner's property. On January 3, 1985, the court of appeals affirmed the ruling of the district court.⁷⁹

Nevertheless, the court of appeals addressed the problem of whether a property owner is entitled to compensation from a different perspective. The court applied the "general damage/special damage" distinction and determined that the reduction in value of the remainder of the property, resulting from the erection of the power line, constituted special damages.⁸⁰ Consequently, the court allowed compensation for loss of view and aesthetic damages directly resulting from the public improvement which adversely affected the value of the remainder.⁸¹ The court of appeals held that in order to require compensation, the special nature of the damages must be supported by evidence that the diminution in the remainder's market value was caused by the improvement.⁸²

B. *The Holding of the Supreme Court of Colorado*

La Plata filed a Petition for Writ of Certiorari which the Supreme Court of the State of Colorado granted. Persuaded by the lower courts, the Colorado Supreme Court affirmed the judgment of the court of appeals. Justice Lohr, stating the majority's opinion, held that a property owner is entitled to recover all damages that are the natural, necessary and reasonable result of the taking, measured by the reduction in the market value of the remainder of the property.⁸³ Furthermore, the court held that a landowner may present any relevant evidence concern-

77. *Id.* See generally COLO. REV. STAT. § 38-1-105(1)-(2) (1982 & Supp. 1985) (grants statutory authority for the court to appoint a board of commissioners.)

78. *La Plata*, 728 P.2d at 697.

79. *La Plata Elec. Ass'n v. Cummins*, 703 P.2d 592 (Colo. App. 1985).

80. *Id.* at 594.

81. *Id.* See, e.g., *Union Elec. Co. v. Simpson*, 371 S.W.2d 673, 681 (Mo. App. 1963).

82. *La Plata*, 703 P.2d at 594.

83. *La Plata*, 728 P.2d at 696, 700.

ing the diminution of the land's market value caused by the taking.⁸⁴ Finally, the supreme court stated that the lower courts did not err in allowing evidence regarding the aesthetic damage and loss of view that caused a diminution in value of the Wagner's property.⁸⁵ In short, the court held that a property owner is entitled to present evidence and receive compensation for all damages to the value of the remainder resulting from a partial taking of real property.⁸⁶

Although the supreme court held in accordance with the lower courts, it did not follow the lower courts' reasoning. Instead, the court determined that the "general damage/special damage" distinction applied by the court of appeals had no validity in *La Plata*.⁸⁷ The supreme court applied the concept currently used in the majority of jurisdictions, simply, that a property owner suffering a diminution in value to his remaining property must be compensated.⁸⁸ The supreme court also based its holding on the principles of fairness and economic reality.⁸⁹

C. *The Dissenting Opinion*

Justice Rovira, joined by Justices Erickson and Vollack, wrote the dissenting opinion which criticized the majority's holding for creating additional problems rather than solving the existing obstacles regarding compensation to the remainder.⁹⁰ The dissent reasoned that the majority incorrectly departed from the requirement that compensable damage to a property owner must be "different in kind" from the injuries suffered by the general public.⁹¹ According to the minority, *La Plata* incorrectly overrules *Lavelle* because the majority held that the "different in kind" test set out in *Lavelle* is not applicable when the diminution in property value results from a partial taking.⁹² The dissent argued that overruling *Lavelle* is inconsistent with the general rule that a property owner is not entitled to recover damages for impairments which are suffered by the general public and differ only in extent or degree.⁹³ Furthermore, the dissent contended that the "different in kind" criteria is established in Colorado case law,⁹⁴ and the factual distinction in *La Plata* does not constitute an adequate reason to overrule this test.⁹⁵

The dissent also voiced their displeasure with the majority's excep-

84. *Id.* at 703.

85. *Id.*

86. *Id.*

87. *Id.* at 700.

88. *Id.* See, e.g., *Kamo Elec. Coop., Inc. v. Cushard*, 455 S.W.2d 513, 515-16 (Mo. 1970).

89. *La Plata*, 728 P.2d at 701. See *infra* notes 103-06 and accompanying text.

90. *La Plata*, 728 P.2d at 706 (Rovira, J., dissenting).

91. *Id.* at 703 (Rovira, J., dissenting).

92. *Id.* (Rovira, J., dissenting).

93. *Id.* at 704 (Rovira, J., dissenting).

94. *Id.* at 703 (Rovira, J., dissenting). See, e.g., *Hayutin v. Colorado State Dep't of Highways*, 175 Colo. 83, 89, 485 P.2d 896, 899 (1971) (traveling a circuitous route is the kind of inconvenience that is merely different in degree, not in kind, from that sustained by the general public and, as such, is not compensable).

95. *La Plata*, 728 P.2d at 703 (Rovira, J., dissenting).

tion to the "general damage/special damage" distinction. This test states that an individual property owner must establish that the damage incurred to his property is peculiar or special to his property; as a result, it requires compensation that the general public is not entitled to recover.⁹⁶ The rationale behind the dissent's argument is that abolishing the "general damage/special damage" distinction is inconsistent with the *Davis* holding.

The dissent argued that the majority based their decision on the fact that the majority of jurisdictions require compensation when the land which is taken causes a diminution in value to the remainder. The dissent concluded that, although the majority of jurisdictions does not employ the "general damage/special damage" distinction, the construction of an electrical power line easement does not entitle property owners to recover compensation for partial takings. Instead, the dissent contended that the holdings in *Davis* and *Lavelle* are controlling in a *La Plata* scenario.⁹⁷

The dissent also based their argument on a different interpretation of the fairness doctrine. According to the dissent, the majority arbitrarily singled out "lucky" property owners to receive compensation.⁹⁸ The dissent believed that if the damage suffered by the property owner is the same type that the public suffers, a property owner should not be compensated simply because a portion of his property was condemned.⁹⁹ The dissent argued that it is inequitable to reward one property owner simply because a portion of his land was taken when another property owner, who does not have land taken and suffers from the identical infringement, receives no compensation.¹⁰⁰

Furthermore, the dissent contended that the majority's decision departed from the initial premise that the public should shoulder the costs of improvements. Finally, the dissent pointed out that the majority's holding, which required compensation for damages that are natural, necessary and reasonable, imposed a difficult standard. The dissent explained that the majority erred in not precisely defining the application and contours of this standard; as a result, it created uncertainty for the trial courts in determining the boundaries of such a broad proposal.¹⁰¹

III. ANALYSIS

In *La Plata*, the Supreme Court of Colorado faced the difficult task of determining whether a property owner is entitled to compensation for damages and diminution in value of the remainder of real property directly resulting from a partial taking. Extrapolating important issues raised by the majority opinion enables the reader to wade through the

96. *Id.* at 704 (Rovira, J., dissenting).

97. *Id.* at 705 (Rovira, J., dissenting).

98. *Id.* (Rovira, J., dissenting).

99. *Id.* (Rovira, J., dissenting).

100. *Id.* (Rovira, J., dissenting).

101. *Id.* at 706 (Rovira, J., dissenting).

labyrinth of confusion and to focus on why the majority reversed Colorado case law and held that property owners must be compensated. By analyzing specific arguments raised by the majority, distinguishing existing case law in Colorado and evaluating substantive arguments raised by the dissent, the importance of this decision radiates through the confusion and explicates the precise meaning and scope of the *La Plata* decision. Such an analysis not only explains why the court ruled correctly, but also explains the difficulty in understanding the opinion.

A. *Requiring Compensation For Damage To The Remainder*

Two determinative arguments in *La Plata* which demand consideration are lost within the opinion. The first argument is hidden in the shadows of both the "fairness" and "economic reality" theories espoused by the court.¹⁰² The court addressed the problem of determining whether a diminution in value occurred by comparing a condemning authority to a private person who is acquiring or selling a parcel of land.¹⁰³ The majority stressed that a person who is contemplating the selling price of a portion of real property necessarily adjusts the price to include the value of the land actually taken as well as the diminution in value of the remainder.¹⁰⁴ The court reasoned that a condemning authority should be subject to the same burdens and benefits as a private party; therefore, the condemning authority's liability should be the equivalent of a private party's liability in the theoretical marketplace.¹⁰⁵

An important result of the holding is that it puts reins on the condemning authorities' expansive power. The requirement of monetary compensation forces condemning authorities to evaluate the most practical placement of improvements and to provide property owners, who are unable to resist the partial takings, some relief. The concept of bridling the condemning authorities' discretion is one way to ensure that the transitions of modernization occur smoothly. Without a requirement for compensation, the condemning authorities have a license to further their goals with whimsical and selfish decisions that leave property owners with diminutions in value of their property and no redress.¹⁰⁶

The second argument that demands consideration involves the specific criteria that serve as a condition precedent for an award of compensation in partial taking cases. The Fifth Amendment of the United States Constitution and the Colorado Constitution unquestionably provide the foundation for requiring compensation in eminent domain proceedings.¹⁰⁷ Nevertheless, just compensation cannot be required

102. *Id.* at 701.

103. *Id.*

104. *Id.*

105. *Id.* See generally Groy, *The Colorado Supreme Court Redefines Compensable Damages in Condemnation Action*, 16 COLO. LAW. 1829, 1830 (1987).

106. Brief for Appellees at 10, *La Plata Elec. Ass'n v. Cummins*, 728 P.2d 696 (Colo. 1986) (No. 85-82).

107. See *supra* note 9 and accompanying text.

merely on a constitutional basis. The holding of *La Plata* mandates that the elements required to bring cases within the realm of allowing compensation are a partial taking and a diminution in value of the remainder.¹⁰⁸ The majority's holding is difficult to understand because the reasoning used to arrive at their decision is not precisely stated. In fact, the majority's opinion is congested with extraneous material that overshadows the holding.¹⁰⁹ The confusion created in *La Plata* could have been prevented and the holding could have been more forceful had the majority explicitly stated the effect previous Colorado decisions had on *La Plata* and limited its analysis to a comprehensive explanation of how *La Plata* both overrules and accepts prior case law. It is essential to understand that the *La Plata* decision only applies to fact patterns involving a partial taking combined with a diminution in value of the remainder.

B. *Distinguishing Existing Colorado Case Law*

Had the Supreme Court of Colorado classified all partial takings into one category, the precedent established by prior Colorado cases of denying compensation would have been applied in *La Plata*. The court, however, recognized that denying compensation to property owners suffering a diminution in value of the remainder is an undesirable result, since it is contrary to constitutional requirements and to the notion of fairness. Therefore, when analyzing the majority's distinction of prior case law, it is important to consider the negative impact these cases could have if applied to a *La Plata* scenario.

The first Colorado decision that requires consideration is *Lavelle v. Town of Julesburg*,¹¹⁰ which held that a property owner could not be compensated for damages to the remainder for annoyance and inconvenience suffered by the general public.¹¹¹ The *Lavelle* court stated that if damage to the remainder is to some right or interest solely affecting the property owner then the owner is entitled to compensation as if the remaining property had been actually taken.¹¹² *La Plata* overruled *Lavelle*, holding that the "general damage/specific damage" test is no longer controlling in partial taking controversies. Overturning any case creates turbulence in the courts; however, the holding in *La Plata* is more compatible with the notions of growth and progress. Harnessing the power of condemning authorities and deciding who should bear the financial burden of progress are modern issues the courts are forced to handle. In *La Plata*, the court reevaluated the necessity of maintaining the "gen-

108. *La Plata*, 728 P.2d at 703.

109. Undefinable phrases, such as "adverse aesthetic impact" and "aesthetic damages," hinder the reader's ability to understand the majority's confusing opinion. Furthermore, the majority erroneously focused their analysis on Colorado case law which proved to be factually distinguishable from the instant case and, as a result, complicated the decision and retracted significance from the holding.

110. 49 Colo. 290, 112 P. 774 (1911).

111. *Lavelle* at 300, 112 P. at 778. See *supra* notes 45-47 and accompanying text.

112. *Lavelle* at 300-01, 112 P. at 778.

eral damage/specific damage" test and determined that the test must be altered to reflect the changes inherent in modern improvements.

The most pertinent argument raised by the dissent is the incompatibility of the supreme court's ruling in *State Department of Highways v. Davis* with the majority's holding in *La Plata*. The *Davis* court sets forth two rules which appear to make *Davis* irreconcilable with *La Plata*. First, the *Davis* court stated that "whether or not property is actually taken is immaterial to the issue of damages to the remainder of property for loss or limitation of access."¹¹³ If compensation was required for loss of view when there has not been a taking, any person with a view of an improvement would have a right to a lawsuit. This notion is clearly incompatible with our present legal system. Secondly, the *Davis* court only required compensation when the remainder has been damaged by a substantial limitation or loss of access.¹¹⁴ The court reasoned that any other result would create serious problems of fairness to the landowners similarly situated since the inconvenience suffered by the landowner is identical in kind to that suffered by the general public.

If, at first glance, one were to interpret the rules enunciated in *Davis* as controlling in a *La Plata* scenario, a landowner would not be compensated for a diminution in value to the remainder if the same injury was suffered by the common public. However, the crux of the issue is not whether the *Davis* holding is controlling in all eminent domain cases; instead, the primary concern is how to factually distinguish the two cases in order to preserve each individual holding. One of the most important distinctions between *Davis* and *La Plata* is that in *Davis*, which dealt with access to the landowner's property, the diminution in value of the remainder was not a direct result of a taking.¹¹⁵ The *Davis* court held that there was no compensable damage since the damage incurred to the landowner did not *substantially* interfere with his means of access to the highway, but merely inconvenienced the landowner's former prime access.¹¹⁶ Conversely, in *La Plata*, the partial taking was directly upon the property itself; therefore, it diminished the value of the remainder.

This argument, however, does not adequately explain the underlying distinctions between the two cases. Another critical distinction is that *Davis* is strictly a police action;¹¹⁷ whereas, *La Plata* is an electrical power company taking a portion of property to construct an electrical power line. In *La Plata*, a significant property right is taken as a result of a condemning authority taking a portion of a landowner's property. Whether this right is ambiguously labeled as a loss or impairment of

113. *State Dep't of Highways v. Davis*, 626 P.2d 661, 665 (Colo. 1981). See *supra* notes 66-69 and accompanying text.

114. *Davis*, 626 P.2d at 665.

115. In *Davis*, the claim of damage was based on the loss of prime highway frontage property; although the landowners retained two direct points of access onto the frontage road, the taking forced the landowners to travel an additional 300 feet to gain access to the highway.

116. *Davis*, 626 P.2d at 666.

117. *Id.* at 664 (the court stated that a property owner's right of access to and from land abutting a highway may be reasonably regulated for the public safety or welfare).

view or aesthetic damage, the crucial point is that a property owner is being denied the right to control the use of his property.¹¹⁸

Similarly, *Troiano v. Colorado Department of Highways*¹¹⁹ is distinguishable from *La Plata*. Although *Troiano* and *La Plata* appear to be similar because of the alleged loss of aesthetic view, it is important to recognize that in *Troiano*, unlike *La Plata*, the taking did not occur on the landowner's property.¹²⁰ Since the situation in *Troiano* does not satisfy the first requirement of a partial taking set forth in *La Plata*, the *Troiano* decision is clearly distinguishable from *La Plata*.

C. Evaluating Substantive Arguments Raised By The Dissent

1. Setting Aside the Different In Kind Test

In order to appreciate the significance of *La Plata*, it is essential to analyze the dissent's arguments and the dissent's inability to focus their criticism on the key elements of the majority's decision. The dissent argued that the "different in kind" test¹²¹ should have been applied to *La Plata*.¹²² In light of the previous discussion regarding the exact holding of *La Plata*,¹²³ it is more practical to determine the issue of compensation on whether there was a taking, rather than basing compensation on the degree of damages suffered on the property owner's land.¹²⁴

Furthermore, the dissent criticized the majority's statement that recoverable damages are "the natural, necessary and reasonable result of the taking."¹²⁵ The dissent apparently felt that this statement was ambiguous and was not supportive of the holding in *La Plata*. This criticism is hypocritical because the dissent's reliance on the "different in kind" test appears equally ambiguous and lacks precise definition.¹²⁶

2. The General Damage/Special Damage Test

The dissent, grasping for something concrete with which to rebut the majority's opinion, argued that the majority failed to abide by the "general damage/special damage" test.¹²⁷ The dissent reasoned that rejecting the test resulted in an arbitrary distinction between landowners who have had portions of their property condemned, and therefore compensated for their injury, and landowners who have not had portions of their property condemned, and therefore not compensated even though they suffer the identical injury. However, the dissent was unable

118. *La Plata*, 728 P.2d at 701 n.4.

119. 463 P.2d 448 (Colo. 1970). See *supra* notes 58-65 and accompanying text.

120. See *supra* note 62 and accompanying text.

121. See *supra* notes 63-64 and accompanying text.

122. *La Plata*, 728 P.2d at 703 (Rovira, J., dissenting).

123. See *supra* note 109 and accompanying text.

124. See Brief for Appellees at 9, *La Plata Elec. Ass'n v. Cummins*, 703 P.2d 592 (Colo. App. 1985) (No. 85-82).

125. *La Plata*, 728 P.2d at 700.

126. See Brief for Appellees at 7, *La Plata Elec. Ass'n v. Cummins*, 703 P.2d 592 (Colo. App. 1985) (No. 85-82).

127. *La Plata*, 728 P.2d at 703 (Rovira, J., dissenting).

to challenge the majority's opinion with sound legal arguments because the distinction between special and general damages is arguably as arbitrary as the formulation adopted in *La Plata*.

3. Fairness Arguments

The majority and the dissent partially based their decisions on their own notions of what constitutes a fair result. However, the majority's version commands the most attention because compensation is required when a property owner's right to determine the fate of his property is lost through condemnation.¹²⁸ Conversely, the dissent's version — a property owner, suffering a diminution in value of the remainder of his property from a partial taking, is not entitled to compensation since an adjacent property owner, who is suffering from the same type of damage, is not entitled to compensation — is not forceful because it merely appeals to one's emotions and lacks legal authority.¹²⁹

V. CONCLUSION

The *La Plata* decision enables the Colorado courts to make a definitive statement on how the law should be applied in partial taking proceedings which result in the diminution in value of the remainder. Although the court ruled correctly, this creative opinion was far from clear, due to the majority's failure to precisely explain how the court reached its holding. As a result, the dissent was unable to comprehend the opinion and to accurately rebut the reasoning behind the holding. Nevertheless, this confusion and lack of clarity does not mar this decision which provides for the longevity of private property¹³⁰ by limiting the power of the condemning authorities.

David A. Shore

128. *La Plata*, 728 P.2d at 701 n.4.

129. *Id.* at 703 (Rovira, J., dissenting).

130. *Id.* at 703 (Rovira, J., dissenting).