

**Section 15. Taking property for public use - compensation, how ascertained.**

Private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

**Source:** Entire article added, effective August 1, 1876, see L. 1877, p. 30.

**Cross references:** (1) For judicial aspects of the question of necessity when property is to be taken under this section for public or quasi-public purposes, see: *Rothwell v. Coffin*, 122 Colo. 140, 220 P.2d 1063 (1950); *Pine Martin Mining Co. v. Empire Zinc Co.*, 90 Colo. 529, 11 P.2d 221 (1932); *Jennings v. Bd. of Com. Montrose Co.*, 85 Colo. 498, 277 P. 467 (1929); *Haver v. Matonock*, 75 Colo. 301, 225 P. 834 (1924); *Colo. & Utah Coal Co. v. Walter*, 75 Colo. 489, 226 P. 864 (1924); *Snider v. Town of Platteville*, 75 Colo. 589, 227 P. 548 (1924); *Wassenich v. City & County of Denver*, 67 Colo. 456, 186 P. 533 (1919); *Lavelle v. Town of Julesburg*, 49 Colo. 290, 112 P. 774 (1910); *Kirkwood v. School Dist. Summit County*, 45 Colo. 368, 101 P. 343 (1909); *Schneider v. Schneider*, 36 Colo. 518, 86 P. 347 (1906); *Union Pac. R. R. v. Colo. Postal Telegraph Co.*, 30 Colo. 133, 69 P. 594 (1902); *Gibson v. Cann*, 28 Colo. 499, 66 P. 879 (1901); *Warner v. Town of Gunnison*, 2 Colo. App. 430, 31 P. 238 (1892). (Compare: *Town of Eaton v. Bouslog*, 133 Colo. 130, 292 P.2d 343 (1956) and *Otero Irr. Dist. v. Enderud*, 122 Colo. 136, 220 P.2d 862 (1950); *Crystal Park Co. v. Morton*, 27 Colo. App. 74, 146 P. 566 (1915); *Thompson v. DeWeese-Dye Ditch Co.*, 25 Colo. 243, 53 P. 507 (1898); *Seidler v. Seely*, 8 Colo. App. 499, 46 P. 848 (1896); *Sand Creek Lateral Irrigation v. Davis*, 17 Colo. 326, 29 P. 742 (1892).)

(2) For jurisdiction of federal court, when (properly) invoked, see *County of Allegheny v. Frank Mashuda Company*, 360 U.S. 185, 79 S. Ct. 1060, 3 L. Ed. 2d 1163 (1959) and *Louisiana Power and Light Company v. City of Thibodaux*, 360 U.S. 25, 79 S. Ct. 1070, 3 L. Ed. 2d 1058 (1959).

(3) For taking of private property for private use, see § 14 of this article; for deprivation of property without due process of law, see § 25 of this article; for eminent domain, see articles 1 to 7 of title 38.

Money to be paid or deposited before property disturbed. Until the compensation ascertained in one of the two ways provided shall have been first paid or deposited, the title or proprietary rights of the owner cannot be divested, nor can the property be needlessly disturbed. McClain v. People, 9 Colo. 190, 11 P. 85 (1886).

The owner is entitled to receive compensation for property taken for public use before his property is taken or his possession disturbed. Keller v. Miller, 63 Colo. 304, 165 P. 774 (1917).

**Purpose of this section** of the constitution is to provide a remedy in damages for injury to property, not common to the public, inflicted by the state or one of its political subdivisions; and this section is not limited in application to condemnation proceedings. *Srb v. Bd. of County Comm'rs*, 43 Colo. App. 14, 601 P.2d 1082 (1979).

The purpose of this section is to prevent a property owner from being made to suffer an uncompensated injury, not common to the public, as a result of the construction of a public improvement. Such improvements are frequently made or authorized by counties; and to say that because of that fact damages so suffered cannot be recovered is to deny to the language of the constitution its obvious import. *Bd. of Comm'rs v. Adler*, 69 Colo. 290, 194 P. 621 (1920).

The actual purpose of this section is to place a limitation even upon legislative enactment. Under the restriction of this section the general assembly itself must exercise care in declaring to be a "public use" (and hence entitled to the right of eminent domain) only that which may meet the legal tests of such use as determined by the judiciary. *Potashnik v. Pub. Serv. Co.*, 126 Colo. 98, 247 P.2d 137 (1952).

This section applies to proceedings in eminent domain, and to situations in which such proceedings would be proper, i.e., where condemnation would be necessary were the required property not otherwise acquired. *Bd. of Comm'rs v. Adler*, 69 Colo. 290, 194 P. 621 (1920).

But applicability of section is not limited to such proceedings. *Bd. of Comm'rs v. Adler*, 69 Colo. 290, 194 P. 621 (1920).

This provision is not limited in its application to condemnation proceedings. *Game & Fish Comm'n v. Farmers Irrigation Co.*, 162 Colo. 301, 426 P.2d 562 (1967).

**It marks boundary beyond which people have forbidden lawmakers to pass and have commanded their courts to hold any such passage illegal.** How inviolable that constitutional inhibition is, is demonstrated by the fact that the supreme court once inadvertently permitted its protection to be threatened (*North Sterling Irrigation Dist. v. Dickman*, 59 Colo. 169, 149 P. 97 (1915)), but at the first opportunity overruled the dangerous precedent and returned to the solid ground of strict construction. *Bd. of Comm'rs v. Adler*, 69 Colo. 290, 194 P. 621 (1920); *San Luis Valley Irrigation Dist. v. Noffsinger*, 85 Colo. 202, 274 P. 827 (1929).

**Right to condemn private property is creature of statute**, pursuant to which it must clearly appear either by express grant or by necessary implication. *Game & Fish Comm'n v. Farmers Irrigation Co.*, 162 Colo. 301, 426 P.2d 562 (1967).

Private property may not be condemned, even for a purpose which is judicially determined to be a public use within the meaning of this section, in the absence of express or necessarily implied statutory condemnation authority. *Buck v. District Court*, 199 Colo. 344, 608 P.2d 350 (1980); *Bd. of County Comm'rs v. Intermountain Rural Elec. Ass'n*, 655 P.2d 831 (Colo. 1982); *Dept. of Transp. v. Stapleton*, 81 P.3d 1105 (Colo. App. 2003), *rev'd on other grounds*, 97 P.3d 938 (Colo. 2004).

**Subject to constitutional guarantees.** The power of eminent domain is an attribute of sovereignty, conditioned by the requirement that just compensation be paid for the taking. *Colo. ex rel. Watrous v. District Court of United States*, 207 F.2d 50 (10th Cir. 1953).

The right of eminent domain recognizes the due process provision of the constitution, provides for the legal and orderly acquisition of private property for public use, and for just compensation for the taking. *Town of Sheridan v. Valley San. Dist.*, 137 Colo. 315, 324 P.2d 1036 (1958).

Whatever may have been the ancient right of condemnation, it has been restrained by constitutional limitations in the protection of individual property rights. *Game & Fish Comm'n v. Farmers Irrigation Co.*, 162 Colo. 301, 426 P.2d 562 (1967).

The Colorado Constitution, as well as the federal constitution, protects against an arbitrary exercise of eminent domain to correct a blighted area by the urban renewal authority. *Urban Renewal Auth. v. Daugherty*, 271 F. Supp. 729 (D. Colo. 1967).

**Deprivation of use must meet standard of reasonableness.** Although, under its police power, there are situations in which a government may deprive the owner of a certain use of property and not be in violation of the

**Property interests are defined by existing rules or understandings that stem from an independent source such as state law.** Dove Valley Bus. Park v. County Comm'rs, 945 P.2d 395 (Colo. 1997)

**Property includes right to freely possess, use and alienate chattel or land.** Property, in its broader and more appropriate sense, is not alone the chattel or the land itself, but the right to freely possess, use and alienate the same; and many things are considered property which have no tangible existence, but which are necessary to the satisfactory use and enjoyment of that which is tangible. City of Denver v. Bayer, 7 Colo. 113, 2 P. 6 (1883).

\* Property is more than the mere thing which a person owns. It is elemental that it includes the right to acquire, use, and dispose of it. The constitution protects these essential attributes of property. City & County of Denver v. Denver Buick, Inc., 141 Colo. 121, 347 P.2d 919 (1959).

\* dispose of it = sell, use as collateral

dispose - to bestow for an object or purpose (use as collateral)  
to get rid of (sell)

**Right of action not taken away by governmental immunity.** A "right of action" cannot be unconstitutionally taken away or damaged by the application of sovereign immunity to a tort claim, since there is no "right" in the absence of a statute granting such. *Abeyta v. City & County of Denver*, 165 Colo. 58, 437 P.2d 67 (1968).

**As just compensation clause creates exception to doctrine of governmental immunity.** *Srb v. Bd. of County Comm'rs*, 43 Colo. App. 14, 601 P.2d 1082 (1979).

**Individual or agency inflicting damage responsible for loss.** Whosoever damages the property of another, whether he be an individual or an agency of the state, must be held responsible in damages for the loss caused thereby. *Game & Fish Comm'n v. Farmers Irrigation Co.*, 162 Colo. 301, 426 P.2d 562 (1967).

if, in the execution of any power, no matter what it is, the government, federal or state, finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner. *City & County of Denver v. Denver Buick, Inc.*, 141 Colo. 121, 347 P.2d 919 (1959).

No immunity by government

**Unlawful taking not act of state.** When a state agency enters upon land or injures land within the meaning of this section without paying just compensation therefor, or without having commenced condemnation proceedings to ascertain the compensation due for the taking or injury, the act of the state agency is unauthorized and unlawful and is not the act of the state of Colorado. Colo. ex rel. Watrous v. District Court of United States, 207 F.2d 50 (10th Cir. 1953).

**And remedy lies against individual state officer.** The remedy in Colorado for an unauthorized and unlawful taking or injury of private land for public use without compensation by a state agency is against the state officer, individually, to prevent his unlawful act or for appropriate redress if it has been consummated. Colo. ex rel. Watrous v. District Court of United States, 207 F.2d 50 (10th Cir. 1953).

**Action lies despite claim of immunity.** Notwithstanding a claim of sovereign immunity from a suit for damages resulting from the torts of agents of the state, upon a showing that the water rights of plaintiffs had been taken or damaged by the game and fish commission through pollution of the water, plaintiffs were entitled to relief in the form of "just compensation" for the property so taken or damaged, and to injunctive relief against a continuance thereof. Farmers Irrigation Co. v. Game & Fish Comm'n, 149 Colo. 318, 369 P.2d 557 (1962).

Shifts responsibility from state to individual actor.

**Party seeking to condemn property must pay costs of ascertaining damages.** If the parties cannot agree upon the amount of just compensation, it must be ascertained in the manner provided by law. The duty of ascertaining the amount is necessarily cast upon the party seeking to condemn the property, and he should pay all the expenses which attach to the process. Any law which casts this burden upon the owner should be held to be unconstitutional and void. *Keller v. Miller*, 63 Colo. 304, 165 P. 774 (1917); *Southwestern Land Co. v. Hickory Jackson Ditch Co.*, 18 Colo. 489, 33 P. 275 (1893).

An owner whose property is sought to be taken cannot be required to pay any portion of his reasonable costs necessarily incidental to the trial of the issues on his part, or any part of the costs of the plaintiff, for to require him to do this would reduce the just compensation awarded by the jury by a sum equal to that paid by him for such costs. *Dolores No. 2 Land & Canal Co. v. Hartman*, 17 Colo. 138, 29 P. 378 (1891); *Keller v. Miller*, 63 Colo. 304, 165 P. 774 (1917); *Leadville Water Co. v. Parkville Water Dist.*, 164 Colo. 362, 436 P.2d 659 (1967).

This section guarantees the owner a jury trial for ascertaining the value of the land taken and the damages to the residue, and if any part of such costs is taxed to him, his just compensation will be reduced equal to the amount he has to pay out for a jury, and that amounts to depriving him to that extent of the guaranteed just compensation. *Wassenich v. City & County of Denver*, 67 Colo. 456, 186 P. 533 (1919); *Dept. of Hwys. v. Kelley*, 151 Colo. 517, 379 P.2d 386 (1963).

Person causing damage to property rights is  
responsible for all legal costs including  
jury trial

**Inverse condemnation action is based on this section.** *Ossman v. Mountain States Tel. & Tel. Co.*, 184 Colo. 360, 520 P.2d 738 (1974).

In order to pursue an inverse condemnation claim under the Colorado Constitution, that is, to compel the state to exercise its power of eminent domain, a plaintiff must establish: (1) That there has been a taking or damaging of property interest, (2) for a public purpose without just compensation, (3) by a governmental or public entity that has the power of eminent domain but which has refused to exercise it. *Thompson v. City & County of Denver*, 958 P.2d 525 (Colo. App. 1998).

**Inverse condemnation proceeding is ordinarily only remedy available** to a litigant whose property has been taken for a public use without just compensation. *Collopy v. Wildlife Comm'n*, 625 P.2d 994 (Colo. 1981).

\* **To pursue an inverse condemnation claim under the Colorado Constitution**, i.e., to compel a public entity to provide compensation to a property owner, the property owner must establish: (1) There has been a taking or damaging of a property interest; (2) for a public purpose; (3) without just compensation; (4) by a governmental or public entity that has the power of eminent domain but which has refused to exercise that power. *Thompson v. City & County of Denver*, 958 P.2d 525 (Colo. App. 1998); *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 992 P.2d 1188 (Colo. App. 1999), *aff'd in part and rev'd in part on other grounds*, 17 P.3d 797 (Colo. 2001).

**In a regulatory inverse condemnation case, there is a two-tiered inquiry.** First, a court must determine whether a per se taking has occurred. Second, if a landowner is unable to prove a per se compensable takings claim (because the regulation has a legitimate purpose and the owner's land has not been rendered economically idle), the landowner may still be able to prove a takings has occurred under a fact-specific inquiry. *Animas Valley Sand & Gravel, Inc. v. Bd. of County Comm'rs of La Plata*, 38 P.3d 59 (Colo. 2001).

Where a regulation places limitations on land that fall far short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a number of complex factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. No one factor is dispositive. Each case must be decided on its own facts. *Animas Valley Sand & Gravel, Inc. v. Bd. of County Comm'rs of La Plata*, 38 P.3d 59 (Colo. 2001).

In a regulatory takings case, a court must determine the regulation's effects on the full rights in the land. Thus, in assessing a takings claim, a court must look to the regulation's effect on the property as a whole, not simply the portion affected by the exaction. *Animas Valley Sand & Gravel, Inc. v. Bd. of County Comm'rs of La Plata*, 38 P.3d 59 (Colo. 2001).

“the extent to which the regulation interferes with reasonable investment backed expectations”

includes using equity as collateral for a loan.