DATE FILED: August 1, 2024
CASE NUMBER: 2023CA351

SUMMARY
August 1, 2024

**2024COA80**

**No. 23CA0351, *City of Westminster v. R. Dean Hawn Interests* — Eminent Domain — Condemnation — Fair Market Value — Comparable Sales — Executory Contracts for the Purchase and Sale of Land**

In this condemnation case, a division of the court of appeals concludes, for the first time, that an executory contract for the purchase and sale of land is relevant and admissible, at the district court's discretion, as evidence of the value of the condemned property. The division further discerns no abuse of discretion in the district court's admission of three comparable sales at the valuation hearing and affirms the omnibus order.

COLORADO COURT OF APPEALS **2024COA80**

---

Court of Appeals No. 23CA0351
Jefferson County District Court No. 20CV30231
Honorable Diego G. Hunt, Judge

---

The City of Westminster, a home rule municipality and a Colorado municipal corporation,

Plaintiff-Appellant and Cross-Appellee,

v.

R. Dean Hawn Interests, a Texas limited partnership,

Defendant-Appellee and Cross-Appellant.

---

ORDER AFFIRMED AND CASE
REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE FREYRE
Lipinsky and Schutz, JJ., concur

Announced August 1, 2024

---

Hamre, Rodriguez, Ostrander & Prescott, P.C., Donald M. Ostrander, Richard F. Rodriguez, Stephanie Ceccato, Emily N. Ostrander, Englewood, Colorado; David R. Frankel, City Attorney, Greg D. Graham, Deputy City Attorney, Westminster, Colorado, for Plaintiff-Appellant and Cross-Appellee

Faegre, Drinker, Biddle & Reath LLP, John R. Sperber, Sean J. Metherell, Rebecca A.R. Smith, Denver, Colorado, for Defendant-Appellee and Cross-Appellant

¶ 1 In this eminent domain action, petitioner, the City of Westminster (Westminster), appeals the district court's omnibus order admitting evidence at the valuation trial of three comparable sales and an executory contract for the purchase and sale of a parcel of real property adjacent to the condemned land. The latter evidentiary ruling presents a novel issue, as no Colorado court has decided whether an executory contract for the purchase and sale of land is admissible as evidence of the value of condemned property. Consistent with other jurisdictions that have considered this issue, we hold that such a contract is admissible at the district court's discretion. In addition, respondent R. Dean Hawn Interests (RDHI) requests an award of its appellate attorney fees. We affirm the omnibus order and remand for the district court to determine the amount of and award RDHI its reasonable appellate attorney fees and costs.

## I. Background

¶ 2 Westminster filed a petition in condemnation[1] seeking to condemn 37.65 acres (the taken property) of RDHI's 105.66-acre land (the subject property) for the purpose of constructing a drinking water treatment facility. The subject property consists of two parcels. The first is 60.75 acres, and the second, made up of five subdivided lots, is 44.91 acres. Westminster did not seek to condemn approximately 68.35 acres (the remainder) of the subject property.

[1] The petition originally named as a respondent Jerry DiTullio in his official capacity as the Treasurer of Jefferson County, where the property is located. However, after DiTullio filed a disclaimer in interest, the court dismissed him from the action pursuant to the parties' stipulation.

Survey Plan of the Subject Property

¶ 3 According to the survey plan depicted above, the taken property is bordered by open space to the east and south, the remainder to the north, and open space and a highway to the west.

Survey Plan of the Taken Property

¶ 4 As the survey plan above shows, the taken property is partially subdivided into five lots on the east side and one lot in the northwest corner.

¶ 5 The taken property is zoned for mixed-use development and is situated along U.S. Highway 36, just southeast of the Church Ranch Boulevard–104th Avenue interchange.

¶ 6 The parties agreed that the taken property's highest and best use was for large-scale mixed-use development, including retail, office, and multifamily housing.

¶ 7 RDHI sought compensation for the taking and damages to the remainder because of the condemnation. To determine just

compensation, Westminster and RDHI each retained an expert to opine on the value of the taken property and the amount of any damages to the remainder caused by the taking. Westminster hired Stephen M. Rothweiler, and RDHI hired David B. Clayton. Rothweiler valued the taken property at $9,429,000 and concluded that there was no damage to the remainder. Clayton valued the taken property at $31,091,344 and concluded that there was a diminution of $5,947,046 in value to the remainder. After arguing numerous motions in limine before the district court, the parties proceeded to a valuation trial before an appointed board of three commissioners. The commissioners awarded RDHI $25,469,728 for the taken property and $1,631,362 in damages to the remainder.

¶ 8 Westminster challenges two of the district court's pretrial evidentiary rulings. It contends that the court erroneously allowed RDHI to introduce into evidence (1) three of the comparable sales, Clayton Sale Nos. 2, 5, and 6, (collectively, Clayton's comparable sales), that Clayton used in his expert report; and (2) a contract between RDHI and Erickson Living Properties, LLC for the purchase and sale of the remainder (the Erickson agreement). We discern no abuse of discretion in the court's rulings.

## II. Clayton's Comparable Sales

¶ 9 Westminster contends that the district court should have excluded evidence of Clayton's comparable sales from the commissioners' consideration because the underlying properties were dissimilar from the taken property. It argues that the taken property constitutes "vacant agricultural land" lacking modern entitlements and any "meaningful development infrastructure," while the properties underlying Clayton's comparable sales contain numerous entitlements, including subdivided lots with roadways; utilities infrastructure; dedicated land for parks, trails, and other public facilities; and approved townhome lots.

¶ 10 RDHI responds that the taken property is not raw agricultural land but is partially subdivided (as Westminster concedes) and surrounded by development infrastructure, including roads, water, sewage, recreational trails, open space, and dry utilities. RDHI asserts that it obtained sewer service commitments for the taken property. RDHI also argues that both experts used properties with entitlements for comparison due to the scarcity of properties similar to the taken property and made appropriate valuation adjustments for those entitlements.

### A. Additional Facts

¶ 11 Both experts used the sales comparison method for valuing the taken property. Clayton selected six property sales, and Rothweiler selected six different property sales. While Westminster objected to all six of Clayton's comparable sales in the district court, on appeal, it only challenges the three comparable sales mentioned above.

¶ 12 Clayton Sale No. 2 consists of 26.624 acres of land located in Jefferson County. It is zoned for planned mixed-unit development and is located 0.25 miles south of I-70 and West 32nd Avenue. That property sold on July 19, 2018, for $11,597,400, or $10 per square foot.

¶ 13 Clayton Sale No. 5 consists of approximately 26.92 acres of vacant land located in Denver. The property is zoned for industrial mixed use and is 0.44 miles south of I-70 and Central Park Boulevard. It sold on November 10, 2020, for $39 million, or $33.26 per square foot.

¶ 14 Clayton Sale No. 6 consists of approximately 29.42 acres of land located in Jefferson County. The property is zoned for a planned unit development and is in the "southerly corner of

Northwest Parkway at Via Verra." It sold on November 19, 2019, for $13,663,800, or $11.66 per square foot.

¶ 15 The district court found that the taken property was "sufficiently unique given the location and nature of the property" and that "there is a scarcity of comparable sales . . . as evidenced by the sales selected by both party's experts." The court ruled that evidence of Clayton's comparable sales would be admissible at the trial.

¶ 16 At the valuation trial, Clayton testified that he selected his comparable sales because the underlying properties were large development tracts, were proximate to highways, and exhibited neighborhood characteristics similar to those of the taken property. Clayton described the taken property as a large tract of land in an urban setting surrounded by high-quality developments. Clayton testified that the land is not raw land because of the infrastructure in place, such as an existing sewer line leading up to the taken property, paved roads surrounding the taken property, and highway access points. In performing his analysis, Clayton adjusted the purchase price of Clayton's comparable sales properties to account

for material differences between those properties and the taken property.

¶ 17 Clayton also testified to the scarcity of additional comparable property sales. He was asked why he chose several of the comparable sales referenced in his report, despite the underlying properties' dissimilarities to the taken property. His answers consistently mentioned scarcity. For example, when asked why he used Clayton Sale No. 6, which involved comparing an improved property to the taken property, Clayton responded,

> Again, it's a matter of scarcity of sales and you — you have a lot of comparability issues and you try to use those that you think are best, but sometimes you are going to have to make adjustments and especially when you have a scarcity of similar land in terms of the sale record.

¶ 18 Rothweiler used six different comparable properties and adjusted their values to better reflect the taken property. Rothweiler also testified to the scarcity of comparable sales. While discussing why he used sales from 2016 in his analysis, Rothweiler stated, "You don't have to look at immediate sales. Would you rather have immediate sales? Of course you would. But as highlighted earlier, the scarcity of these sales does not allow that."

### B. Standard of Review and Applicable Law

¶ 19 When private property is condemned for a public purpose, the property owner is entitled to recover an amount equal to the loss suffered due to the taking, which includes compensation for any damage to the remainder of the property if only a portion is taken. *E-470 Pub. Highway Auth. v. 455 Co.*, 3 P.3d 18, 23 (Colo. 2000). "Just compensation is measured by the actual fair market value of the property, taking into consideration its most advantageous use at the time of the condemnation." *Palizzi v. City of Brighton*, 228 P.3d 957, 962 (Colo. 2010).

¶ 20 In determining fair market value, the fact finder may consider the highest and best use to which the property may reasonably be applied in the future. *CORE Elec. Coop. v. Freund Invs., LLC*, 2022 COA 63, ¶ 18. In doing so, the scope of admissible evidence of a property's value is expansive. *Id.* However, the fact finder may not consider evidence of the property's highest and best use that is too speculative. *Id.*

¶ 21 The purpose of a valuation proceeding is to replicate the marketplace. *Palizzi*, 228 P.3d at 963. In such a proceeding, the fact finder must determine how much a willing buyer would pay for

the property if the owner had voluntarily offered the property for sale. *Id.* An accepted method for proving the amount a willing buyer would pay for the property is the comparable sales approach. *Denver Urb. Renewal Auth. v. Berglund-Cherne Co.*, 193 Colo. 562, 565, 568 P.2d 478, 480 (1977). Under this approach, the value of condemned property is to be determined, in part, by the price paid for similar property:

> Evidence of the price paid for similar property in a voluntary sale is admissible on the question of value of the property condemned, provided the properties sold are similar in locality and character to the property in question and not so far removed in point of time to make a comparison unjust or impossible.

*Dep't of Highways v. Schulhoff*, 167 Colo. 72, 80, 445 P.2d 402, 406 (1968).

¶ 22 "Whether a comparable sale is sufficiently similar to be of probative value in determining the value of the land taken is for the [fact finder] to determine in its discretion. The commission also determines what weight, if any, is to be given to comparable sales." *City of Englewood v. Denver Waste Transfer, L.L.C.*, 55 P.3d 191, 196 (Colo. App. 2002). "Similarity does not mean identical, but

having a resemblance," and necessarily varies with the circumstances of each particular case. *Goldstein v. Denver Urb. Renewal Auth.*, 192 Colo. 422, 426, 560 P.2d 80, 84 (1977) (quoting *Wassenich v. City & Cnty. of Denver*, 67 Colo. 456, 464, 186 P. 533, 536 (1919)).

¶ 23 Where there is a scarcity of sales of comparable properties, greater leniency is afforded to the selection of comparable sales. *See City of Westminster v. Jefferson Ctr. Assocs.*, 958 P.2d 495, 498 (Colo. App. 1997) (allowing use of subdivided land sales to value undeveloped raw land where there was a lack of comparable sales); *Bd. of Cnty. Comm'rs v. Vail Assocs., Ltd.*, 171 Colo. 381, 390, 468 P.2d 842, 847 (1970) (recognizing that use of subdivided sites may be necessitated by lack of comparable sales).

¶ 24 A district court's evidentiary determinations are reviewed for an abuse of discretion. *Palizzi*, 228 P.3d at 962. "A [district] court abuses its discretion only if its decision was manifestly arbitrary, unreasonable, or unfair, or based on an erroneous understanding or application of the law." *CORE Elec.*, ¶ 16. We review de novo whether the court misapplied the law in its evidentiary ruling. *Id.*

C. Analysis

¶ 25 We discern no abuse of discretion and conclude Clayton's comparable sales were admissible, for four reasons. First, both experts opined that there was a scarcity of comparable sales to use in their valuations. Indeed, both Clayton's and Rothweiler's selections of platted subdivisions to use as comparable sales corroborate their scarcity opinions. And the court made a scarcity finding based on the experts' opinions. While Westminster challenges this finding on appeal, we do not consider it further because it took a contrary position in the district court and never asked the court to disregard its expert's opinion on this issue. *See Sterenbuch v. Goss*, 266 P.3d 428, 435 (Colo. App. 2011) (arguments not presented to or ruled on by the district court cannot be raised for the first time on appeal).

¶ 26 Second, while the taken property is vacant land, it is far from raw or undeveloped land, as Westminster contends. Bruce O'Donnell, president of Starboard Realty Group, LLC, was qualified as an expert by RDHI to opine on the value of the taken property. O'Donnell testified to the entitlements that run with the taken property, including access points and perfected utility easements. O'Donnell also testified that a portion of the land was previously

subdivided, albeit in 1893. O'Donnell opined that "the point of all of this is that there's been work done and planning done to make this property more ready for development than just a typical piece of vacant land." We are not persuaded by Westminster's argument that, because the subdivision of the platted acreage occurred in 1893, this fact should not be considered. Westminster cites no authority for its position, so we conclude that the timing of the property's subdivision goes to the weight of the evidence and not to its admissibility. *See Palizzi*, 228 P.3d at 962 (the admissibility of evidence for property valuation is expansive, rather than restrictive).

¶ 27 Third, Clayton's comparable sales involved properties that resemble the taken property. All consist of vacant tracts of land between twenty-six and thirty acres, with varying degrees of entitlement, surrounded by developments, and with highway access. While there are undoubtedly differences between those properties and the taken property, the similarities are sufficient for consideration by the fact finder. *See Goldstein*, 192 Colo. at 426, 560 P.2d at 84 (declining to adopt a strictly-defined foundation requirement for similarity and holding that the "root consideration

is whether the comparable sale was sufficiently 'similar,' in one or more aspects, to be probative of the fair market value"). Moreover, the fact that some speculation is required does not defeat the admissibility of the evidence, but instead, goes to the weight it should be given. *City of Englewood*, 55 P.3d at 196.

¶ 28 Fourth, the record shows that Clayton adjusted the valuation for each comparable sale to reflect the entitlement differences between it and the taken property. For example, Clayton Sale No. 5 was already zoned and approved for multifamily development at the time of sale. To account for this superior characteristic, Clayton decreased the sale price. Additionally, Clayton Sale No. 2's sale price was increased by $13 million to accommodate a site contribution fee. Finally, the price of Clayton Sale No. 6 was decreased to account for its superior infrastructure, such as constructed roads and water and sewer lines.

¶ 29 We are not persuaded that *Schulhoff*, 167 Colo. 72, 445 P.2d 402, and *Vail*, 171 Colo. 381, 468 P.2d 842, on which Westminster relies, require a different result. Those cases concerned a valuation method not employed by the experts in this case. In those cases, the supreme court held that it is speculative to hypothetically carve

up a tract of land into residential building sites, estimate the value of each site, and then add the site values together to obtain a fair market value. Thus, those cases are inapposite.

¶ 30 Accordingly, we discern no abuse of discretion in the district court's decision to admit evidence of Clayton's comparable sales.

## III. The Erickson Agreement

¶ 31 Westminster next contends that the district court abused its discretion by deciding that the Erickson agreement could be admitted at the valuation trial. It reasons that, because the sale of the remainder was not yet completed, the sale was "wholly speculative," and the Erickson agreement constituted an option contract or an offer that was not admissible as evidence of the taken property's value. Westminster further contends that Clayton misused the Erickson agreement to bolster his expert opinion and that the admission of the Erickson agreement was unfairly prejudicial because it substantially influenced the commissioners' decision. We address and reject each of these contentions.

### A. Additional Facts

¶ 32 On April 4, 2022, RDHI and Erickson executed the Erickson agreement for Erickson's purchase of the remainder, along with a

small additional parcel of land that is not part of this condemnation action. Erickson indicated that it intends to build a senior housing facility on the remainder, with 1,500 independent living units. Erickson agreed to buy 73.9 acres from RDHI for $51,500,000 and paid a $515,000 deposit. The Erickson agreement included a due diligence period during which Erickson could terminate the contract and receive a refund of its deposit.[2] Erickson sought two extensions of that period, and that period had not expired by the time of the valuation trial. By the time of trial, Erickson had taken significant steps toward the property's development, including hiring a government relations firm to work with Westminster to ensure certain entitlements.

¶ 33 On April 4, 2022, the last day of discovery, RDHI filed a supplemental disclosure, draft witness list, and draft exhibit list that identified new witnesses and documents concerning the Erickson agreement. On April 11, RDHI filed a supplemental disclosure, authored by Clayton, in which Clayton discussed the Erickson agreement and how it compared to his and Rothweiler's

[2] We note that Erickson has not terminated the Erickson agreement or exercised the purchase option as of the parties' briefing.

valuations. In particular, Clayton noted that Erickson was a leading national senior living developer with an existing community in Highlands Ranch near a major highway and with mountain views and that the Erickson agreement was in the process of being recorded in Jefferson County. Clayton also noted that the sales price did not include the costs of expanding Westminster Boulevard or additional entitlements, consistent with his valuation. Additionally, Clayton said the Erickson agreement reflected the highest and best use of the remainder and noted it was an "after condition" sale that reflected Erickson's knowledge of the public project. Finally, Clayton noted that, while the Erickson agreement contained market information about subdividing the remainder, it said Erickson intended no such subdivision, so profits were built into the sales price and rendered unnecessary any need for a subdivision analysis. Notably, Clayton did not alter any of his calculations or valuations based on the Erickson agreement, but he said the Erickson agreement supported his valuation opinion.

¶ 34 On April 12, Westminster filed a motion to strike the supplemental disclosures and for related relief. Westminster argued that the Erickson agreement and any testimony related

thereto was barred by Colorado law. It contended that a witness who intends to give value opinions at an eminent domain hearing may only testify as to completed sales transactions and that, since the due diligence period for the purchase of the remainder was not over, the Erickson agreement constituted an offer or option contract and did not reflect a completed sale. Moreover, Westminster asserted that Colorado case law holds that offers and option contracts are inadmissible as evidence of a property's value in condemnation proceedings.

¶ 35 In its reply, RDHI argued that Westminster conflated the law on offers to purchase property, which are generally inadmissible to show value, with the law on executed contracts, which are generally admissible to show value.

¶ 36 The district court found the Erickson agreement relevant to the question of just compensation and, therefore, admissible.

B. Controlling Law

¶ 37 As mentioned, the admissibility of evidence for property valuation is expansive, rather than restrictive. *Palizzi*, 228 P.3d at 962.

> The purpose of the valuation proceeding is to replicate the marketplace, and thus the fact finder is tasked with determining how much a willing buyer would pay for the property if the owner had voluntarily offered it for sale. In so doing, the fact finder may consider any competent evidence that affects the present market value of the land which a prospective seller or buyer would consider.

*Id.* (citations omitted).

¶ 38 An offer to purchase land that does not result in an actual sale is inadmissible to prove the value of the subject land. *Ruth v. Dept. of Highways*, 145 Colo. 546, 550, 359 P.2d 1033, 1035 (1961) ("[E]vidence of mere negotiation would have no probative value in the present context."). No Colorado case has specifically addressed whether an executory contract for the purchase and sale of land, entered into in good faith by sophisticated parties, is probative of the fair market value of condemned land. Indeed, the closest a Colorado court has come to answering this question was in *Loloff v. Sterling*, 31 Colo. 102, 108, 71 P. 1113, 1115 (1903), which held that bona fide cash offers of sale and similar offers to purchase are inadmissible in a valuation proceeding and that "evidence of this character should be limited to actual sales."

¶ 39 But other jurisdictions that have considered this issue have held that executory contracts for the purchase and sale of the subject property or a comparable property are admissible in condemnation proceedings. *See United States v. 428.02 Acres of Land*, 687 F.2d 266, 270 (8th Cir. 1982) ("[W]hen the trial judge effectively precludes all evidence of sales, or contracts for sale, of property that is comparable to the property being condemned, the ultimate goal of just compensation may be defeated."); *Wolff v. Puerto Rico*, 341 F.2d 945, 947 (1st Cir. 1965) ("A sale conditioned on a reclassification is nonetheless a sale, and the fact that it was not consummated cannot be an objection.") (citation omitted); *City of Phoenix v. Clauss*, 869 P.2d 1219, 1223 (Ariz. Ct. App. 1994) (executory contracts for sale are admissible as comparable sales in condemnation proceedings); *People ex rel. Dep't of Pub. Works v. Kawamoto*, 40 Cal. Rptr. 685, 686-87 (Ct. App. 1964) (actual consummation of land sale not essential to admissibility of evidence of sales agreement for purpose of supporting expert opinion concerning value of condemned property); *Arnold v. Me. State Highway Comm'n*, 283 A.2d 655, 659 (Me. 1971) (enforceable contact for sale of property in condemnation proceedings admitted

as "strong and significant evidence" of fair market value at the time of the taking); *W. Mich. Univ. Bd. of Trs. v. Slavin*, 158 N.W.2d 884, 888 (Mich. 1968) (bilateral sale agreements, binding on both parties, are admissible to show value of condemned property); *State v. Clevenger*, 384 S.W.2d 207, 210 (Tex. Civ. App. 1964) (although contract for sale of land was not consummated because the purchaser forfeited earnest money placed in escrow, the contract was admitted as a comparable sale for purposes of valuing condemned land).

¶ 40 For instance, in *United States v. Certain Parcels of Land*, the trial court refused to admit a written contract for the sale of the condemned property executed shortly before the taking. 144 F.2d 626, 629-30 (3d Cir. 1944). The appellate court held that the trial court should have admitted the contract for the sale of the condemned property as evidence of the property's market value. *Id.* The court reasoned that, because market value is the just compensation owed to the owner of the land taken, evidence of the sales price of the land immediately before the taking was relevant. *Id.*

¶ 41 Additionally, in *City of Phoenix*, the trial court precluded an appraiser from testifying about sales of comparable properties that had not yet closed. 869 P.2d at 1223. The Arizona Court of Appeals noted that "[o]ffers to purchase are suspect because they often represent the opinion of one person and are difficult to authenticate." *Id.* In contrast, it noted that, even though the comparable sales had yet to close, the evidence implied a bilateral enforceable agreement. *Id.* It held that, although such an agreement is executory, executory contracts are admissible as comparable sales in condemnation proceedings. *Id.*

¶ 42 Moreover, "[b]ona fide contracts and options to purchase property to be taken by eminent domain may be admitted to ascertain its fair market value. This is true even in jurisdictions where mere offers are ruled inadmissible." 5 Julius L. Sackman et al., *Nichols on Eminent Domain* § 21.03, LexisNexis (3d ed. database updated Sept. 2023).

¶ 43 We are persuaded by these authorities and hold that executory contracts for the purchase and sale of land are admissible in condemnation proceedings.

### C. Analysis

¶ 44 Applying our holding to the Erickson agreement, we discern no abuse of discretion in the district court's ruling admitting the Erickson agreement and conclude that it was relevant to the question of fair market value and just compensation for three reasons.

¶ 45 First, we are not convinced that the Erickson agreement constituted an option contract or an offer of sale that rendered it speculative and, instead, conclude that it documented a binding contract for sale of the property executed between two sophisticated parties. Indeed, "in purchase and sale agreements, unlike in option contracts, a valid contract to buy is formed when both parties have agreed to the terms and have undertaken obligations pursuant to [those] terms." *Clark v. Scena*, 83 P.3d 1191, 1194 (Colo. App. 2003); *see also French v. Centura Health Corp.*, 2022 CO 20, ¶ 26 (to be enforceable, a contract requires mutual assent to an exchange between competent parties for legal consideration).

¶ 46 RDHI and Erickson agreed to the sale of the remainder, with Erickson paying a $515,000 deposit under the contract. Moreover, Erickson is in the business of developing retirement communities

and had developed a retirement property in Highlands Ranch, showing that two sophisticated parties executed the Erickson agreement. Further, Erickson had undertaken substantial efforts to move the property's development forward. Accordingly, we conclude that the Erickson agreement was not speculative but reflected the fair market value of the remainder at the time of the valuation trial. And it is the fact finder's task to determine just compensation based on *any competent evidence* that affects the present market value of the land. *Palizzi*, 228 P.3d at 962. Thus, we reject Westminster's assertion that the Erickson agreement was inadmissible, as a matter of law.

¶ 47 Second, the Erickson agreement's admission was consistent with the general standards for admissibility of evidence in eminent domain cases, which are expansive and favor the admissibility of evidence. *See id.* at 963. Because the determination of just compensation rests on what a willing buyer would pay a willing seller, *CORE Elec.*, ¶ 18, we conclude that the price Erickson was willing to pay for the remainder, knowing that a water treatment facility would abut its property, was relevant to the taken property's value.

¶ 48 Third, we reject Westminster's assertion that Clayton misused the Erickson agreement in his valuation. Contrary to this assertion, the record reveals that Clayton did not alter his valuation after receiving the Erickson agreement but, instead, described how the Erickson agreement supported his valuation.

¶ 49 Finally, even if the admission of the Erickson agreement was error, any error was harmless. Clayton and Rothweiler did not use the Erickson agreement as a comparable sale when calculating their appraisal valuations. And nothing in the record supports Westminster's assertion that the Erickson agreement unfairly swayed the commissioners' decision. Indeed, the commissioners were free to accept or reject all or portions of both experts' opinions, and their ultimate value determination was supported by Clayton's appraisal and expert testimony, irrespective of the Erickson agreement.

¶ 50 Accordingly, we discern no abuse of discretion in the district court's admission of the Erickson agreement.

## IV. Attorney Fees

¶ 51 RDHI requests appellate attorney fees under C.A.R. 39.1 and section 38-1-122(1.5), C.R.S. 2023. Section 38-1-122(1.5) states,

> In connection with proceedings for the acquisition or condemnation of property in which the award determined by the court exceeds ten thousand dollars, in addition to any compensation awarded to the owner in an eminent domain proceeding, the condemning authority shall reimburse the owner whose property is being acquired or condemned for all of the owner's reasonable attorney fees incurred by the owner where the award by the court in the proceedings equals or exceeds one hundred thirty percent of the last written offer given to the property owner prior to the filing of the condemnation action.

¶ 52 The outcome of the case resulted in an award of $27,101,909, which was $16,851,909 higher than Westminster's last written offer of $10,250,000. This constitutes 264% of Westminster's latest offer. Accordingly, section 38-1-122(1.5) serves as the legal basis for an award of RDHI's appellate attorney fees.

¶ 53 C.A.R. 39.1 provides the appellate court with the discretion to determine the amount of an award for attorney fees on appeal or to remand for a determination of those issues by the district court. We exercise our discretion and remand the case to the district court to determine the amount of and award RDHI the reasonable costs and attorney fees it incurred on appeal.

## V. Disposition

¶ 54 The order is affirmed, and the case is remanded for the district court to determine the amount of and award RDHI its reasonable appellate attorney fees and costs.

JUDGE LIPINSKY and JUDGE SCHUTZ concur.

# Court of Appeals

**STATE OF COLORADO**
**2 East 14th Avenue**
**Denver, CO 80203**
**(720) 625-5150**

**PAULINE BROCK**
**CLERK OF THE COURT**

## NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Gilbert M. Román,
Chief Judge

DATED: January 6, 2022

***Notice to self-represented parties**: You may be able to obtain help for your civil appeal from a volunteer lawyer through the Colorado Bar Association's (CBA) pro bono programs. If you are interested in learning more about the CBA's pro bono programs, please visit the CBA's website at https://www.cobar.org/Appellate*