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Condemnation Negotiations: The Reasonable Good Faith Offer

In Colorado, condemning authorities cannot initiate any condemnation action without first making a "reasonable" and "good faith" offer to purchase the property. C.R.S. § 38–1–121(3); C.R.S. §38–1–102(1); *Town of Silverthorne v. Lutz*, 2016 COA 17, ¶ 29. These generic and inherently ambiguous terms can create pitfalls for condemning authorities. Merriam Webster defines "good faith" as "honesty or lawfulness of purpose." Similarly, "reasonable" is defined as "as much as is appropriate or fair." As an eminent domain practitioner, in every instance in which I have had to file a petition for condemnation, I have yet to see a situation where a condemning authority and landowner agreed about what compensation was "appropriate", "fair", or "honest." Given these varied opinions about what constitutes a reasonable good faith offer, courts have provided some guidance with respect to what is and is not required to meet this standard.

What is Required:

- The offer must be in a "reasonable" amount.
- The offer must be in writing.
- If the value of the property taken is more than $5,000, the offer must expressly tell the landowner that they have the right to obtain an appraisal that the condemning authority must pay for.
- The property being taken must be identified by attaching the proposed deed (either easement or fee) and a legal description/sketch.
- The offer must give the landowner a "sufficient time to respond."
- If the condemning authority ultimately files a petition to acquire the property, the petition must plead that the condemning authority met this jurisdictional prerequisite.

What is Not Required:

- Once the written offer is made, no actual negotiation is required.
- The parties do not need to speak face to face.
- If the landowner responds with a counteroffer, the condemning authority does not have to increase its initial offer.
- While the landowner has 90 days to obtain an appraisal of the property if the value of the property is more than $5,000, the condemning authority does not have to wait for the appraisal before filing a condemnation action.
- There are no requirements that the appraisal, construction drawings, sketches, or any project documents be attached to the written offer.

Tips for Meeting the Standard:

- Base any offer on an independent eminent domain appraisal of the property. Do not guess as to the value. Do not base the offer solely on an analysis of comparable sales. Make sure to evaluate whether the taking will result in any damages to the remainder of the property.
- Give the landowner at least 30 days to respond to the initial offer. If there is an emergency that may justify less than 30 days, make sure to discuss those issues with an eminent domain lawyer.
- If the landowner either (1) fails to respond to the offer within the time stated in the written notice, or (2) makes a counteroffer that the condemning authority does not accept, the condemning authority can file its petition in condemnation with the court.

Because courts have set a low bar to establish a "reasonable" and "good faith" offer, the above requirements and tips are the *minimum* steps necessary before filing litigation. Condemning authorities should endeavor not to merely meet this standard, but to exceed it. In addition to the above requirements, condemning authorities should consider engaging in the following best practices to greatly reduce the chances that litigation will be necessary at all.

Best Practices to Reduce Litigation:

- Start by contacting the landowner directly to explain the project and the need for the landowner's property.

- Provide the landowner with as much information as possible – descriptions of the project, timing of the project, construction drawings, legal descriptions, etc.
- Before sending the formal written offer, tell the landowner that it is coming and assure the landowner that the formal written offer is solely meant to advise them of their rights and that the condemning authority still wants to reach an agreement without litigation.
- Consider offering more than the appraised value of the property in the written offer. If the landowner is ultimately awarded more than 130% of the condemning authority's last and final written offer, the condemning authority will have to pay the landowner's attorney fees. Therefore, the amount of the last and final written offer should be carefully analyzed with an appraiser and eminent domain lawyer.

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