9-30-1985

Aldrich v. District Court of Eighteenth Judicial Dist.

SUPREME COURT, STATE OF COLORADO

CIVIL ACTION NO. 85SA291

ORIGINAL PROCEEDING, DISTRICT COURT, ARAPAHOE COUNTY, COLORADO, NO. 83CV1185

RESPONSE TO PETITION FOR WRIT OF PROHIBITION AND ORDER TO SHOW CAUSE

LAUREN E. ALDRICH and J. ELAINE ALDRICH, Petitioners,

v.

THE DISTRICT COURT OF THE 18TH JUDICIAL DISTRICT, in and for the County of Arapahoe; and THE HONORABLE JOYCE S. STEINHARDT, Respondents.

Respondents answer the Petition for Writ of Prohibition and the Court's Show Cause Order as follows:

I. RECORD FOR REVIEW

In addition to the materials appended to Petitioners' Petition, Respondents append and incorporate herein the following documents:

1. Memorandum Brief in Support of Motion for New Trial;

2. Reply Brief in Support of Petitioner's Motion for New Trial;

3. Response to Respondent's Motion to Strike;

4. Motion for Hearing;

5. Notice of Hearing;

6. Offer of Proof; and

7. Subpoenas and Returns of Service thereof to Commissioners Macrum, Brown and Grace.

To correct information in Petitioners' Petition, the undersigned's proper address is:

James A. Windholz
MEHAFFY, RIDER, WINDHOLZ & WILSON
1655 Walnut Street, Suite 310
Boulder, CO 80302

II. STATEMENT OF CASE

The action in the District Court was in eminent domain initiated by the Littleton Riverfront Authority (hereinafter "Authority") for the acquisition of the property of Petitioners. On February 10, 1984, a commission awarded $475,000.00 to Petitioners as the preliminary compensation for their property, which amount was deposited in the Registry of the Court by the Authority as required by C.R.S. Section 38-7-103. The Authority obtained title and possession of the property pursuant to the District Court's Order of February 16, 1984. Petitioners did not appeal such order as allowed by C.R.S. Section 38-7-102. The remaining issue of the just compensation to be awarded in this action was considered by a three-member commission on May 30 and 31, and June 3, 1985, pursuant to C.R.S. Section 38-1-101, et seq. The commissioners returned their Report on June 3, 1985, in the amount of $623,700.00. Subsequent to such decision, James A. Windholz telephoned each of the commissioners separately regarding said award. Each of the commissioners freely discussed matters related to the hearing process.

In the course of such discussions, it was discovered that in determining the just compensation to be paid for the property, the commission had decided the value of the subject property by determining the value of the land acquired and the cost of the

building thereon. The commission determined the land value to be the difference between the values presented by the Petitioners' witnesses ($13.33 per square foot) and the Authority's witnesses ($11.75 per square foot) or $12.54 per square foot for 30,000 square feet of land, which is a total value of $376,000.00. The commission also determined the cost of the building by utilizing the difference between the values presented by the Petitioners' evidence ($59.00 per square foot) and the Authority's evidence ($51.00 per square foot), which was $55.00 per square foot for a 4,500-square-foot building, for a total cost of the building of $247,500.00. These respective amounts for the land and improvements total the final award of the commission of $623,700.00.

The Petitioners and the Authority had presented evidence that in deciding the value of the subject property, the commission must determine the value of the land and the cost of the building <u>less</u> <u>depreciation</u> for the life of said improvement. No evidence was presented that the value of the property could be determined in any other manner. Petitioners presented evidence of depreciation of 23.3% of the improvement, and the Authority presented testimony of two experts that the depreciation to be applied was 37% or 40%. That the commission failed to apply depreciation to the cost of the building is substantiated by the fact that the amount of the commission's award equals its determination of the value of the land and the cost of the building without application of depreciation. On the basis of the commission's failure to follow the evidence presented and other errors

of law, the Authority filed a Motion for New Trial with supporting affidavit (Appendix 3 and 4 of Petitioners' Petition). Along with its Reply to Petitioner's Response (Appendix 2 attached hereto and incorporated herein), the Authority requested a hearing to present evidence to support its Motion (Appendix 4 attached hereto and incorporated herein). This Motion was granted, and a hearing by telephone conference was set for August 14, 1985 (Appendix 5 attached hereto and incorporated herein). The commissioners were subpoenaed (Appendix 7 attached hereto and incorporated herein) and appeared to testify at such hearing. However, because of delay caused by the Court's conference calling equipment, the time limitations imposed by Rule 59 C.R.C.P., and the Court's heavy docket, the District Court determined that it did not have time for a hearing and that it would rule on said Motion by August 16, 1985, as required by the strict limits of Rule 59, C.R.C.P. The Authority immediately submitted an Offer of Proof (Appendix 6 attached hereto and incorporated herein). On August 15, 1985, the District Court entered its Order Granting the Authority's Motion for New Trial (Appendix 1 of Petitioners' Petition).

Subsequently, Petitioners requested a Writ of Prohibition of this Honorable Court.

III. ARGUMENT

A. Writ Of Prohibition Is Not A Proper Remedy For Petitioners In This Action.

Petitioners request a Writ of Prohibition directing the

District Court to strike the affidavit of James A. Windholz and deny the Motion for New Trial. If a decision of the District Court is discretionary, prohibition or mandamus is not afforded as a remedy to a party who claims error thereof, but may be a ground for appeal following final judgment. Rule 121(d) C.A.R. The granting of a motion for new trial is not an appealable order and the validity of such order may be raised on appeal after final judgment. Rule 59(g) C.R.C.P. Resolution of a motion for new trial is within the District Court's discretion and shall not be reviewed absent a clear showing of abuse of discretion and that an appeal would not provide an adequate remedy. Western Food Plan Inc. v. District Court, 198 Colo. 251, 598 P.2d 1038 (1979); Public Service Co. of Colorado v. District Court, 638 P.2d 772 (Colo. 1981); People v. Gallagher, 194 Colo. 121, 570 P.2d 236 (1977); People in Interest of P.N., 663 P.2d 253 (Colo. 1983). The scope of inquiry of this Court is limited to examining the jurisdictional grounds upon which the District Court acted to determine whether such trial court exceeded its jurisdiction or abused its discretion. City of Colorado Springs v. District Court, 184 Colo. 177, 519 P.2d 325 (1974). The expense and time of a new trial do not allege sufficient grounds that an appeal is not an adequate remedy. Public Service Co. of Colorado v. District Court, supra. Petitioners have not alleged sufficient grounds for the extraordinary relief requested.

B. The Respondent Did Not Abuse Its Discretion In Granting The Motion For New Trial.

1. The affidavit of counsel meets the requirement of Rule 59(a) C.R.C.P. Cawthra v. Greeley, 154 Colo. 483, 391 P.2d 876 (1964).

2. The Respondent had a sufficient basis for granting the Motion for New Trial. The affidavit of counsel is corroborated by the amount of the award of the commission and the Offer of Proof submitted by the Authority. The District Court's decision to grant the Motion for New Trial was discretionary. People v. Gallagher, supra. These documents and facts before such Court provide an adequate basis for its discretionary decision.

3. The District Court's decision to grant the Motion for New Trial did not require inquiry into the thought processes of a jury.

A commission in an eminent domain proceeding is not a jury, but is a combination of civil juror and judge. State Department of Highways v. Copper Mountain Inc., 624 P.2d 936 (Colo.App. 1981). A commission in condemnation is differentiated from a jury, in that the former shall consider only the evidence presented at the hearing. Routt County Development Co. v. Johnson, 23 Colo.App. 511, 130 P.2d 1081 (1913). The testimony or affidavit of a juror may be reviewed to determine if misconduct had the capacity to influence the verdict, not whether it actually influenced the verdict. T.S. by Pueblo County Department of Social Services v. G. G., 679 P.2d 118 (Colo.App. 1984). Here, the failure to apply depreciation as dictated by the evi-

dence presented to the commission resulted in an increase of the final valuation award of between $57,667.50 and $99,000.00. Therefore, the test of challenging a jury verdict as well as a report of a commission in condemnation has been satisfied.

C. The Authority Presented Its Motion For New Trial In A Timely Manner.

The Authority tendered its Motion for New Trial on the ground of the commission's misconduct, inter alia, within fifteen days after entry of the judgment as required by Rule 59 C.R.C.P.

D. The District Court Had Sufficient Grounds To Grant A Motion For New Trial Because Of The Misconduct Of The Commission Which Resulted In An Excessive Verdict.

The Authority requested a new trial based upon the irregularity of proceedings, errors of law and misconduct of the commission, thereby resulting in a denial of a fair hearing and an excessive award. Appendix 3 of Petitioners' Petition. The District Court granted said Motion, finding that "the alleged errors committed by the commissioners are such that the amount of the award is excessive." Appendix 1 of Petitioners' Petition. The record before such Court and submitted herewith, adequately supports said findings.

E. Submitted herewith and incorporated herein is a Brief in Support of Response to Petition for Writ of Prohibition and Order to Show Cause.

WHEREFORE, Respondents respectfully request that this Honorable Court dismiss the Petition for Writ of Prohibition,

vacate its Order to Show Cause and grant such further relief as may be proper.

Respectfully submitted this 30th day of September, 1985.

MEHAFFY, RIDER, WINDHOLZ & WILSON

By: _____

James A. Windholz #1253
Attorney for Respondents
1655 Walnut Street, Suite 310
Boulder, CO 80302
Telephone: (303) 447-8741

CERTIFICATE OF MAILING

I certify that a true copy of the foregoing Response to Petition for Writ of Prohibition and Order to Show Cause was mailed by U.S. mail, postage prepaid, this 30th day of September, 1985, to the following:

Malcolm Murray
GORSUCH, KIRGIS, CAMPBELL,
WALKER AND GROVER
1401 - 17th Street, Suite 1100
Denver, CO 80202

Honorable Joyce S. Steinhardt
Division 6
Arapahoe County District Court
2069 West Littleton Boulevard
Littleton, CO 80120

_____

DISTRICT COURT, COUNTY OF ARAPAHOE, STATE OF COLORADO

CIVIL ACTION NO. 83CV1185, DIVISION 6

MEMORANDUM BRIEF IN SUPPORT OF MOTION FOR NEW TRIAL

THE LITTLETON RIVERFRONT AUTHORITY, A Colorado Urban Renewal Authority, a body corporate and politic, Petitioner,

v.

LAUREN E. ALDRICH and J. ELAINE ALDRICH, Parcel No. 1, et al., Respondents.

Petitioner, by its attorney, James A. Windholz, respectfully submits the following memorandum brief in support of its Motion for New Trial.

I. THE COMMISSION ERRED BY NOT APPLYING DEPRECIATION TO THE VALUE OF THE BUILDING WHEN DETERMINING THE COMPENSATION BY THE COST APPROACH METHOD.

A. The Commission's Failure To Apply Depreciation To The Building Cost Is Not Supported By The Evidence.

At the hearing on final compensation, the Commission was presented with evidence by both parties as to the manner of determining the fair market value of the property by the cost approach method. There was no contradictory evidence of the manner of applying said method. The cost approach method for valuation, as presented by both parties at the hearing, is summarized as follows:

> Determine the land value as if the land were vacant, add the cost to reproduce the building located on the subject property, less depreciation for the life of the building at the date of valuation.

The Respondents presented evidence that the amount of depreciation to be applied was 23.3%. The Petitioner presented evidence that the depreciation to be applied was 37% or 40%. No evidence of depreciation of less than 23.3% was presented at the hearing, and there was no evidence that the determination of value by the cost approach method could be made without applying depreciation to the building cost.

The Commission failed to apply any depreciation to the building cost. Such a determination is not supported by the evidence presented at the hearing; and, therefore, the Commission

Report must be vacated. Stark v. Poudre School District R-1, 192 Colo. 396, 560 P.2d 77 (1977).

B. The Commission's Failure To Apply Depreciation To The Cost Of The Building Results In A Requirement That The Petitioner Pay Respondents To Replace Their Property, Contrary To Law.

The amount the Petitioner is required to pay to acquire the property owned by Respondents is defined as the price for which the property could have sold on the open market when the owner was willing to sell and the purchaser willing to buy, but neither was under an obligation to do so. Department of Highways v. Schulhoff, 167 Colo. 72, 445 P.2d 402 (1968). The Commission was so instructed by Instruction No. 4. The determination of value based upon the cost to replace the building without applying depreciation thereto results in a valuation award not related to the market value of the property. City and County of Denver v. Hinsey, 177 Colo. 178, 493 P.2d 348 (1972); Schulhoff, supra.

Because such determination is contrary to the evidence presented at the hearing, the instructions given by the Court and case law, Petitioner is entitled to a new hearing to determine final compensation. Stark, supra; 58 Am.Jur.2d New Trial, Sections 134, 135 and 137 (1971).

II. THE COMMISSION'S VIEW OF PROPERTIES OTHER THAN THE SUBJECT PROPERTY IS IMPROPER AND REQUIRES VACATION OF THE REPORT OF THE COMMISSIONERS.

Instruction No. 16 to the Commission provided that: "You may not view any properties other than the parcel of property formerly owned by the Respondents" and "If anything you see during the viewing conflicts with evidence presented at the hearing, you must only consider the evidence presented at the hearing in determining the reasonable market value of the property."

The Commission did not adhere to the Court's instruction by viewing properties other than the subject site including, several of the comparable sales properties which had been used by the witnesses for both Respondents and Petitioner in presenting their opinions of value. The Commission further violated the Court's instruction by basing its use and consideration of the comparable sales upon factors presumed from its collective view of the properties rather than the evidence presented at the hearing.

Where the instructions of the Court are disregarded, a new trial is warranted. Reynolds v. Farber, 40 Colo.App. 467, 577 P.2d 318 (1978); Hover v. Clamp, ___ Colo. ___, 579 P.2d 1181 (1978); 58 Am.Jur.2d New Trial, Section 134 (1971).

III. THE COMMISSION'S VALUATION BASED UPON IMPROPER FACTORS AND MISCONDUCT REQUIRES VACATION OF ITS REPORT.

A. Consideration By The Commission Of Any Preliminary Amount Paid Respondents By Petitioner Or Any Interest Accruing To Respondents Is Improper.

The Commission was not allowed to know the amount of the deposit made by Petitioner for the property by the Pre-Trial Order of the Court of October 17, 1984.

No evidence was presented to the Commission of the deposit by the Petitioner or any interest to be paid Respondents by Petitioner.

The only determination to be made by the Commission was the compensation for the property acquired by Petitioner. C.R.S. Section 38-1-101, et seq. The Commission was so instructed by the Court.

The Commission's concern or consideration that Respondents may not have received any funds from the Petitioner for their property from the date of possession or at any other time was prejudicial to Petitioner and an improper consideration of matters not in evidence at the hearing. Stark, supra.

B. The Consideration By The Commission Of The Business Conducted By Respondents On The Property Is Improper And Prejudicial To Petitioner.

The business profits of Respondents are inadmissible at the hearing on final valuation. The business is not being condemned by the government and may be relocated. Denver Urban Renewal Authority v. Berglund-Cherne Co., 193 Colo. 562, 568 P.2d 478 (1977). The value of Respondents' business or disposition thereof were not at issue at the hearing on final valuation. The Commission's consideration of these matters and the resulting determination to compensate the Respondents for being "cleaned out" is improper, prejudicial to Petitioner, and contrary to the evidence. Stark, supra; Burns v. McGraw-Hill Broadcasting Company, Inc., 659 P.2d 1351 (Colo. 1983); Marks v. District Court, 643 P.2d 741 (Colo. 1982).

C. The Commission's Consideration Of The Respondents' Business, The Incorrect Assumption That Respondents Were Not Paid Any Preliminary Funds By Petitioner And Other Improper Considerations Resulted In An Excessive Determination Of Value Based Upon Bias, Sympathy And Prejudice.

The Commission was advised by Instruction No. 15 that the decision could not be influenced by bias, prejudice or sympathy. However, concern or consideration of the efforts and hard work of Respondents in their motorcycle business, confusion and concern over preliminary deposits and interest thereon or interest on the final award, and consideration that Respondents had been "cleaned out" by Petitioner support the excessive award herein based in part upon bias, prejudice and sympathy.

MEHAFFY, RIDER, WINDHOLZ & WILSON

By: s/ JAW

James A. Windholz #1253
Attorney for Petitioner
1655 Walnut Street, Suite 310
Boulder, CO 80302
Telephone: (303) 447-8741

CERTIFICATE OF MAILING

I certify that a true copy of the foregoing Memorandum Brief in Support of Motion for New Trial was mailed by U.S. mail, postage prepaid, this 17th day of June, 1985, to the following:

Malcolm Murray
GORSUCH, KIRGIS, CAMPBELL,
WALKER AND GROVER
1401 - 17th Street, Suite 1100
Denver, CO 80202

Sue A. Gothard

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO

CIVIL ACTION NO. 83CV1185, DIVISION 6

REPLY BRIEF IN SUPPORT OF PETITIONER'S MOTION FOR A NEW TRIAL

THE LITTLETON RIVERFRONT AUTHORITY, A Colorado Urban Renewal Authority, a body corporate and politic, Petitioner,

v.

LAUREN E. ALDRICH and J. ELAINE ALDRICH, Parcel No. 1, et al., Respondents.

Petitioner, by its attorney, James A. Windholz, submits the following Reply to Respondents' Response to Petitioner's Motion for New Trial, and Response to Respondents' Motion to Strike.

I. THE AFFIDAVIT OF THE UNDERSIGNED IS SUFFICIENT TO SUPPORT ITS MOTION FOR NEW TRIAL UNDER RULE 59 C.R.C.P.

Respondents rely on People's Natural Gas v. Public Utilities Commission, 626 P.2d 159 (Colo. 1981) and Hansen v. Dillon, 156 Colo. 396, 400 P.2d 201 (1965) to support their argument that the undersigned's Affidavit is insufficient pursuant to Rule 59 C.R.C.P. However, in both of these cases, the courts' rulings were based on factors not present in this case.

In People's, the Colorado Supreme Court ruled that the commission did not abuse its discretion in denying plaintiff's request for post-hearing, pre-appeal discovery when the only evidence offered by plaintiff to support its request was a claim that: "There was a 'distinct similarity' between '[t]he Commission's decision in this case with regard to reparations' and 'the contentions advanced by the Assistant Solicitor General in her

statement of position.' Otherwise, Peoples claimed a right to discovery based on nothing more than their 'information and belief.'" People's at 161.

In Hansen, the Court ruled that the trial court had not abused its discretion in striking the losing counsel's affidavit which was "chock-full of conclusions." The Hansen court based its decision of what constitutes a sufficient affidavit on the test set forth in Cawthra v. Greeley, 154 Colo. 483, 391 P.2d 876 (1964). The Cawthra court held that:

> The reason for the requirement of a supporting affidavit is at once obvious. It is a most salutary rule to require a supporting affidavit where there is an accusation of misconduct on the part of a juror in a motion for a new trial, the movant thereby proving his good faith and, by particularizing, demonstrating that his allegation of juror misconduct - a most serious charge - is based on knowledge, not suspicion or mere hope.
> at 486.

Here, the Affidavit filed with Petitioner's Motion for New Trial is based upon statements made by the individual Commissioners to counsel for Petitioner and meets the Cawthra test. The statements regarding the manner in which the Commissioners reached their decision and the fact that they failed to apply depreciation to that amount is corroborated by the amount of the award itself. The Commissioners' determination of the value of the property was $623,700.00. The figures provided in the Affidavit as the amounts determined by the Commissioners to be the value of the land and the building were $376,200.00 and $247,500.00, respectively. Said amounts total $623,700.00. The

Affidavit is supported by facts and is more than hope or suspicion.

Two of the Commissioners have refused to execute an affidavit regarding factual matters related to Petitioner's motion. The undersigned has been unable to reach the third Commissioner regarding such affidavit.

II. A CONDEMNATION COMMISSION IS NOT A JURY AND, THEREFORE, IS NOT BOUND BY ALL RULES APPLICABLE TO JURORS.

The Colorado condemnation statutes allow the property owner to have the just compensation of his property determined by a jury or by a board of commissioners, or by the court if both parties so agree. C.R.S. Section 38-1-101. A commission is not the same as a jury. A commissioner is a combination of a civil juror and judge. State Department of Highways v. Copper Mountain, Inc., 624 P.2d 936 (Colo.App. 1981). Rule 606, C.R.E., and all of the cases cited by Respondents to support their arguments are cases involving a jury and not a commission, including the condemnation case used by Respondents, Gunnison v. McCabe Hereford Ranch, 84CA0270, decided May 30, 1985 (incorrectly cited in Respondents' brief as Dennison v. McCabe Hereford Ranch, 84CA1270). Therefore, such cases are not applicable here.

The role of the commission is discussed at length in Routt County Development Co. v. Johnson, 23 Colo.App. 511, 130 P. 1081 (1913). The question before the court in Routt County was whether the commissioners had the power under the statute to take into consideration information or knowledge which was acquired aside from the sworn testimony and evidence presented at

the trial. After discussing the statute which allows the commission to subpoena witnesses, the court states:

> It will be noticed that the commissioners are invested with considerable power; but it is specifically provided that the issues of values and damages, submitted to them for determination, shall be found from the "proofs and allegations" of the parties, and after a view of the premises.
>
> * * *
>
> The commissioners in this case were clearly under a misapprehension as to their powers and duties under their appointment. Their findings of values and damages should have been based solely upon the evidence produced at the trial.
>
> * * *
>
> Should we uphold the commissioners as to their method of arriving at the value of and damage to the land in issue as disclosed by their report, we would be upholding a method which is in direct opposition to that prescribed by the statute, namely, that such values are to be found from the proofs and allegations of the parties and a view of the premises.
> at 1083.

The decision of Routt County is cited with approval in Stark v. Poudre School District R-1, 192 Colo. 396, 560 P.2d 77 (1977). In Stark, the same issue of commissioner misconduct is presented by affidavits of parties other than the commissioners themselves. However, the trial court decision was reversed without addressing such issue.

The Aldrich Commission, in addition to other errors, failed to apply depreciation, despite the evidence presented by Petitioner and the Respondents that depreciation must be applied to the cost of the building. The evidence before the Commission was that the depreciation to be applied must be between 23.3% and

40%. No witness of either party or of the Commission testified to a lesser percentage of depreciation or that depreciation should not be applied at all.

The inquiry of whether the Commission applied depreciation does not delve into the thought processes or deliberations of the Commission. Using the representations of all the Commissioners that they used the cost approach method of valuation, valued the land and the building at the difference between the evidence of values presented by the Respondents and Petitioner, the amount of the report reveals that the Commissioners did not apply depreciation as required by the evidence. The Commissioners' reason for not applying depreciation is not necessary to find that the Commissioners failed to follow the evidence presented.

III. PETITIONER'S ALLEGATIONS OF ERROR BY THE COMMISSION ARE SUFFICIENT GROUNDS FOR GRANTING A NEW TRIAL.

Assuming arguendo application of Rule 606, C.R.E., and the strict test for reversing a jury decision for misconduct set out in T.S., by Pueblo County Department of Social Services v. G. G., 679 P.2d 118 (Colo.App. 1984) cited in Respondents' brief, the Commission's decision should nevertheless be reversed. The test set forth in T.S. is, "The party seeking relief must establish that the misconduct had the capacity to influence the result." 679 P.2d at 119.

Here, the Commissioners failed to apply depreciation to the building cost they determined to be $247,500.00. The evidence presented by Petitioner was that depreciation should be 40%

of the cost of the building. Applying this amount to $247,500.00 would have reduced the Commission's decision by $99,000.00. Respondents presented evidence that the depreciation to be applied to the cost of the building was 23.3%. Applying that amount to $247,500.00 would have reduced the award by $57,667.50. Therefore, the Commission's failure to apply depreciation not only had the capacity to influence the result, it did in fact affect the result significantly.

Although Rule 606(b), C.R.E., prohibits jurors from testifying as to the effect of improper matters on their deliberations, the capacity of such matters to influence their decision may be ascertained from an examination of the matters themselves. The testimony or affidavit of the juror may be examined from that perspective. T.S., supra.

The remainder of the cases cited by Respondents involve situations where the effect of the improper considerations may not have affected the decision. That is not the situation here where the Commissioners did not apply depreciation to the building cost when using the cost approach method of valuation.

IV. PETITIONER'S MOTION IS TIMELY MADE.

Respondents argue that Petitioner must have raised all the issues in its Motion for New Trial prior to the discharge of the Commissioners. To date, Petitioner has not been advised formally of the decision of the Commissioners by the Court and has no knowledge whether the Commissioners have been formally discharged by the Court.

In addition, the case cited by Respondents to support their argument, Evergreen Fire Protection District v. Huckeby, 626 P.2d 744 (Colo.App. 1981), involved a situation where the commissioners were reconvened thirteen months after the hearing on final valuation to correct an error in the legal description of the property. Petitioner was allowed to submit interrogatories to the commissioners at that time regarding their valuation over respondent's objections and without reviewing a transcript of the trial as requested by respondent. Based on these facts, the court found error. To extend the court's ruling in Evergreen to all fact situations would give no effect to Rule 59, C.R.C.P.

The Colorado Rules of Civil Procedure apply to actions in eminent domain. Stalford v. Board of County Commissioners of the County of Prowers, 128 Colo. 441, 263 P.2d 436 (1953). Rule 59, C.R.C.P., specifically allows a party to request post-trial relief within fifteen days of entry of judgment. Petitioner's Motion for New Trial was filed within said time period. Rule 59, C.R.C.P., was repealed and reenacted in its present form effective January 1, 1985. Common law is superseded by statutes or rules promulgated by the state's highest court which expressly repeal such prior law or are inconsistent therewith. C.R.S. 2-4-211; Shoemaker v. Mountain States T & T Co., 38 Colo.App. 321, 559 P.2d 721 (1976).

V. CONCLUSION.

Because a condemnation commission is not a jury, the rules controlling a commission must be followed, not those con-

trolling a jury. To determine the fact that the Aldrich Commissioners failed to apply depreciation to the cost of the building, although they used the cost approach method to determine the value of the subject property, does not mandate an inquiry into the thought processes of the Commissioners. The failure of the Commissioners to apply depreciation to the building substantially affected the final amount determined by the Commissioners as the fair market value of the Aldrich property. Therefore, a new trial should be granted.

Respectfully submitted,

MEHAFFY, RIDER, WINDHOLZ & WILSON

By: _____

James A. Windholz #1253
Attorney for Petitioner
1655 Walnut Street, Suite 310
Boulder, CO 80302
Telephone: (303) 447-8741

CERTIFICATE OF MAILING

I certify that a true copy of the foregoing Reply Brief in Support of Petitioner's Motion for a New Trial was mailed by U.S. mail, postage prepaid, this 26th day of July, 1985, to the following:

Malcolm Murray
GORSUCH, KIRGIS, CAMPBELL,
WALKER AND GROVER
1401 - 17th Street, Suite 1100
Denver, CO 80202

_____

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO

CIVIL ACTION NO. 83CV1185, DIVISION 6

RESPONSE TO RESPONDENTS' MOTION TO STRIKE

THE LITTLETON RIVERFRONT AUTHORITY, A Colorado Urban Renewal Authority, a body corporate and politic, Petitioner,

v.

LAUREN E. ALDRICH and J. ELAINE ALDRICH, Parcel No. 1, et al., Respondents.

Petitioner, by its attorney, James A. Windholz, responds to Respondents' Motion to Strike within its Reply Brief filed herewith regarding Petitioner's Motion for New Trial. Petitioner incorporates said Reply Brief herein by reference.

WHEREFORE, Petitioner respectfully requests that Respondents' Motion to Strike be denied, that Petitioner be awarded its costs and attorney's fees, and such further relief as the Court deems proper.

MEHAFFY, RIDER, WINDHOLZ & WILSON

By: _____
James A. Windholz #1253
Attorney for Petitioner
1655 Walnut Street, Suite 310
Boulder, CO 80302
Telephone: (303) 447-8741

CERTIFICATE OF MAILING

I certify that a true copy of the foregoing Response to Respondents' Motion to Strike was mailed by U.S. mail, postage prepaid, this 26th day of July, 1985, to the following:

Malcolm Murray
GORSUCH, KIRGIS, CAMPBELL,
WALKER AND GROVER
1401 - 17th Street, Suite 1100
Denver, CO 80202

_____

APPENDIX 3

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO

CIVIL ACTION NO. 83CV1185, DIVISION 6

MOTION FOR HEARING

THE LITTLETON RIVERFRONT AUTHORITY, A Colorado Urban Renewal Authority, a body corporate and politic, Petitioner,

v.

LAUREN E. ALDRICH and J. ELAINE ALDRICH, Parcel No. 1, et al., Respondents.

Petitioner, by its attorney, James A. Windholz, respectfully requests that the Court hold a hearing on Petitioner's Motion for a New Trial as soon as possible for the presentation of evidence, testimony and argument regarding said Motion and the Affidavit of the undersigned.

Respectfully submitted,

MEHAFFY, RIDER, WINDHOLZ & WILSON

By: James A. Windholz #1253
Attorney for Petitioner
1655 Walnut Street, Suite 310
Boulder, CO 80302
Telephone: (303) 447-8741

CERTIFICATE OF MAILING

I certify that a true copy of the foregoing Motion for Hearing was mailed by U.S. mail, postage prepaid, this 26th day of July, 1985, to the following:

Malcolm Murray
GORSUCH, KIRGIS, CAMPBELL,
WALKER AND GROVER
1401 - 17th Street, Suite 1100
Denver, CO 80202

Sue A. Gothard

APPENDIX 4

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO

CIVIL ACTION NO. 83CV1185, DIVISION 6

NOTICE OF HEARING

THE LITTLETON RIVERFRONT AUTHORITY, A Colorado Urban Renewal Authority, a body corporate and politic, Petitioner,

v.

LAUREN E. ALDRICH and J. ELAINE ALDRICH, Parcel No. 1, et al., Respondents.

PLEASE TAKE NOTICE that there shall be a hearing on Petitioner's Motion for New Trial. Such hearing shall be held by telephone conference call at 8:15 a.m. on Wednesday, August 14, 1985. Petitioner shall be available at telephone number 761-1481, and Respondent shall be available at telephone number 534-1200, unless further notice is provided to all parties.

MEHAFFY, RIDER, WINDHOLZ & WILSON

By: _____

Lawrence C. Rider #771
for James A. Windholz #1253
Attorneys for Petitioner
1655 Walnut Street, Suite 310
Boulder, CO 80302
Telephone: (303) 447-8741

CERTIFICATE OF MAILING

I certify that a true copy of the foregoing Notice of Hearing was mailed this 9th day of August, 1985, addressed as follows:

Malcolm Murray
GORSUCH, KIRGIS, CAMPBELL,
WALKER AND GROVER
1401 - 17th Street, Suite 1100
Denver, CO 80202

Sue A. Gothard

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO

CIVIL ACTION NO. 83CV1185, DIVISION 6

OFFER OF PROOF

THE LITTLETON RIVERFRONT AUTHORITY, A Colorado Urban Renewal Authority, a body corporate and politic, Petitioner,

v.

LAUREN E. ALDRICH and J. ELAINE ALDRICH, Parcel No. 1, et al., Respondents.

Petitioner, by its attorney, John E. Hayes, submits the following offer of proof pursuant to Rule 103, C.R.E., as the evidence which Petitioner would have presented at the hearing which had been scheduled by telephone conference before the Court at 8:15 a.m. on August 14, 1985.

1. Petitioner had subpoenaed the three Commissioners who heard the evidence on final compensation, Wayne Brown, Jeannette Grace, and James Macrum. Such witnesses were present to testify at the hearing set for August 14, 1985.

2. It was anticipated that the testimony of said witnesses would have presented the fact that in making the decision on final valuation, the commission did the following:

A. Assigned a value to the land acquired by Petitioner of $376,200.00. Said amount represents the difference between the evidence of values of the land presented by the Petitioner and the Respondents.

B. Assigned a cost of $247,500.00 to the building on the subject land. Said amount represents the difference between the evidence of costs to reconstruct the building presented by the Petitioner and the Respondents.

C. No depreciation was applied to the amount determined to be the cost to reconstruct the building.

3. It was anticipated, based upon previously held telephone conferences, that one or more Commissioners would testify as follows:

A. That a factor in the determination of one Commissioner's award was his determination that the Respondents should be compensated for being "cleaned-out" by the Authority.

B. That one of the Commissioners also considered the number of years and hard work the Respondents had devoted to their business which had been located on the acquired property.

C. One Commissioner was confused and/or concerned that Respondents had not received any compensation from the Petitioner prior to the final hearing and were not receiving any interest on the award.

D. The Commissioners viewed sites other than the subject property, including comparable sales sites. One Commissioner disagreed with one of the expert witness's characterization of a comparable site.

4. James A. Windholz, attorney for Petitioner at the hearing on final valuation, who had spoken with the Commissioners regarding the above matters, was also present to testify, if necessary, regarding the matters stated in his affidavit filed with Petitioner's Motion for New Trial and to verify the aforesaid matters.

Respectfully submitted as an offer of proof and in support of Petitioner's Motion for New Trial.

McMARTIN, BURKE, LOSER & FITZGERALD

By: _____

John E. Hayes #5279
Attorney for Petitioner
3333 South Bannock Street, #600
Englewood, CO 80110
Telephone: (303) 761-1481

CERTIFICATE OF MAILING

I certify that a true copy of the foregoing Offer of Proof was mailed by U.S. mail, postage prepaid, this 15th day of August, 1985, to the following:

Malcolm Murray
GORSUCH, KIRGIS, CAMPBELL,
WALKER AND GROVER
1401 - 17th Street, Suite 1100
Denver, CO 80202

_____

NTY OF ARAPAHOE
TE OF COLORADO

Division 6

SERVICE

LITTLETON RIVERFRONT AUTHORITY, A
orado Urban Renewal Authority, a body
porate and politic,

Petitioner,

v.

JREN E. ALDRICH and J. ELAINE ALDRICH,
cel No. 1, et al.,

Respondents.

TE OF COLORADO)
) ss.
INTY OF BOULDER)

William Callaway, the affiant, being sworn, says:

1. That the affiant is over the age of eighteen (18) years and is not a party to this action.
2. That the affiant has duly served the following documents:
SUBPOENA, $10.00 Witness & Mileage Fee Check

*By: handing to and leaving with James F. Macrum Jr., at his place of siness, 1860 West Littleton Blvd., Littleton, Colorado.

On the 12th day of August, 19 85 at 11:21 A.M.
in the County of Arapahoe.

RVICE: $ 13.50
LEAGE: $ 10.50 (42 miles)
HER: $
TAL: $ 24.00

Affiant

SUBSCRIBED and SWORN TO before me, this 12th day of August, 19 85.

My Commission expires: Nov. 15, 1986

Notary Public
1002 Keystone Ct.
Lafayette, CO 80026
Address

tate place and manner of service.

APPENDIX 7

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO

CIVIL ACTION NO. 83CV1185, DIVISION 6

SUBPOENA

THE LITTLETON RIVERFRONT AUTHORITY, A Colorado Urban Renewal Authority, a body corporate and politic, Petitioner,

v.

LAUREN E. ALDRICH and J. ELAINE ALDRICH, Parcel No. 1, et al., Respondents.

TO: JAMES F. MACRUM, JR.
1860 West Littleton Boulevard
Littleton, Colorado

YOU ARE HEREBY ordered to attend and give testimony in the District Court in the County of Arapahoe, Colorado, on the 14th day of August, 1985, at the hour of 8:15 a.m. in the above-captioned action as a witness for the Petitioner. Such hearing is to be held by a telephone conference call. You are to appear at the offices of McMartin, Burke, Loser & Fitzgerald, 3333 South Bannock Street, Suite 600, Englewood, Colorado, at said date and time.

DATED: August 9, 1985.

MEHAFFY, RIDER, WINDHOLZ & WILSON

By: _____

Lawrence C. Rider #771
for James A. Windholz #1253
Attorneys for Petitioner
1655 Walnut Street, Suite 310
Boulder, CO 80302
Telephone: (303) 447-8741

This Subpoena is issued pursuant to Rule 45 of the Colorado Rules of Civil Procedure.

NTY OF ARAPAHOE
TE OF COLORADO

Division 6

SERVICE

LITTLETON RIVERFRONT AUTHORITY, A
orado Urban Renewal Authority, a body
porate and politic,

Petitioner,

v.

REN E. ALDRICH and J. ELAINE ALDRICH,
cel No. 1, et al.,

Respondents.

TE OF COLORADO)
) ss.
NTY OF BOULDER)

William Callaway, the affiant, being sworn, says:

1. That the affiant is over the age of eighteen (18) years and is not a party to this action.
2. That the affiant has duly served the following documents:
SUBPOENA, $10.00 Witness & Mileage Fee Check

*By: handing to and leaving with Jeanette M. Grace at her place of siness, 2323 South Troy, #210 D, Aurora, Colorado.

On the 12th day of August, 1985 at 12:00 P.M.
in the County of Arapahoe.

RVICE: $ 13.50
LEAGE: $ 10.50 (42 miles)
HER: $
TAL: $ 24.00

Affiant

SUBSCRIBED and SWORN TO before me, this 12th day of August, 1985.

My Commission expires: Nov. 15, 1986

Notary Public
1002 Keystone Ct.
Lafayette, CO 80026
Address

tate place and manner of service.

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO

CIVIL ACTION NO. 83CV1185, DIVISION 6

SUBPOENA

THE LITTLETON RIVERFRONT AUTHORITY, A Colorado Urban Renewal Authority, a body corporate and politic, Petitioner,

v.

LAUREN E. ALDRICH and J. ELAINE ALDRICH, Parcel No. 1, et al., Respondents.

TO: JEANNETTE M. GRACE
2323 S. Troy, #210-D
Aurora, Colorado

YOU ARE HEREBY ordered to attend and give testimony in the District Court in the County of Arapahoe, Colorado, on the 14th day of August, 1985, at the hour of 8:15 a.m. in the above-captioned action as a witness for the Petitioner. Such hearing is to be held by a telephone conference call. You are to appear at the offices of McMartin, Burke, Loser & Fitzgerald, 3333 South Bannock Street, Suite 600, Englewood, Colorado, at said date and time.

DATED: August 9, 1985.

MEHAFFY, RIDER, WINDHOLZ & WILSON

By: _____

Lawrence C. Rider #771
for James A. Windholz #1253
Attorneys for Petitioner
1655 Walnut Street, Suite 310
Boulder, CO 80302
Telephone: (303) 447-8741

This Subpoena is issued pursuant to Rule 45 of the Colorado Rules of Civil Procedure.

NTY OF ARAPAHOE
TE OF COLORADO

Division 6

SERVICE

LITTLETON RIVERFRONT AUTHORITY, A
orado Urban Renewal Authority, a body
porate and politic,

Petitioner,

v.

REN E. ALDRICH and J. ELAINE ALDRICH,
cel No. 1, et al.,

Respondents.

TE OF COLORADO)
) ss.
INTY OF BOULDER)

William Callaway, the affiant, being sworn, says:

1. That the affiant is over the age of eighteen (18) years and is not a party to this action.
2. That the affiant has duly served the following documents:
SUBPOENA, $10.00 Witness & Mileage Fee Check

*By: handing to and leaving with Wayne McGowen Brown at his place of
de, 1567 South Unita Way, Denver, Colorado.

On the 11th day of August, 19 85 at 9:00 A.M.
in the County of Adams.

RVICE: $ 13.50
LEAGE: $ 25.00 (100 miles)
HER: $
TAL: $ 38.50

Affiant

SUBSCRIBED and SWORN TO before me, this 11th day of August,
19 85.

My Commission expires: Nov. 15, 1986

Notary Public
1002 Keystone Ct.
Lafayette, CO 80026
Address

State place and manner of service.

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO

CIVIL ACTION NO. 83CV1185, DIVISION 6

SUBPOENA

THE LITTLETON RIVERFRONT AUTHORITY, A Colorado Urban Renewal Authority, a body corporate and politic, Petitioner,

v.

LAUREN E. ALDRICH and J. ELAINE ALDRICH, Parcel No. 1, et al., Respondents.

TO: WAYNE McGOWIN BROWN
1567 South Uinta Way
Denver, Colorado

YOU ARE HEREBY ordered to attend and give testimony in the District Court in the County of Arapahoe, Colorado, on the 14th day of August, 1985, at the hour of 8:15 a.m. in the above-captioned action as a witness for the Petitioner. Such hearing is to be held by a telephone conference call. You are to appear at the offices of McMartin, Burke, Loser & Fitzgerald, 3333 South Bannock Street, Suite 600, Englewood, Colorado, at said date and time.

DATED: August 9, 1985.

MEHAFFY, RIDER, WINDHOLZ & WILSON

By: _____

Lawrence C. Rider #771
for James A. Windholz #1253
Attorneys for Petitioner
1655 Walnut Street, Suite 310
Boulder, CO 80302
Telephone: (303) 447-8741

This Subpoena is issued pursuant to Rule 45 of the Colorado Rules of Civil Procedure.

SUPREME COURT, STATE OF COLORADO

CIVIL ACTION NO. 85SA291

ORIGINAL PROCEEDING, DISTRICT COURT, ARAPAHOE COUNTY, COLORADO, NO. 83CV1185

MEMORANDUM OF LAW IN SUPPORT OF RESPONSE TO PETITION FOR WRIT OF PROHIBITION AND ORDER TO SHOW CAUSE

LAUREN E. ALDRICH and J. ELAINE ALDRICH, Petitioners,

v.

THE DISTRICT COURT OF THE 18TH JUDICIAL DISTRICT, in and for the County of Arapahoe; and THE HONORABLE JOYCE S. STEINHARDT, Respondents.

Respondents submit the following memorandum of law in support of the Response to Petition for Writ of Prohibition and Order to Show Cause.

I. A WRIT OF PROHIBITION IS NOT A PROPER REMEDY FOR PETITIONERS IN THIS ACTION.

Resolution of a motion for new trial is within the District Court's discretion and shall not be reviewed absent a clear showing of abuse of discretion, and that an appeal would not provide an adequate remedy. People v. Gallagher, 194 Colo. 121, 570 P.2d 236 (1977); Western Food Plan, Inc. v. District Court, 198 Colo. 251, 598 P.2d 1038 (1979); Public Service Co. of Colorado v. District Court, 638 P.2d 772 (Colo. 1981); People in Interest of P. N., 663 P.2d 253 (Colo. 1983).

Despite the time and expense involved, the fact that a new trial may be necessary to correct an allegedly wrong decision does not render an appeal an inadequate remedy. Public Service Co., supra; Prinster v. District Court, 137 Colo. 393, 325 P.2d

938 (1958). Prohibition may not be used to restrain a trial court from committing error in lieu of an appeal. Leonhart v. District Court, 138 Colo. 1, 329 P.2d 781 (1958). Correction of alleged error is a function of appeal. Stiger v. District Court, 188 Colo. 407, 535 P.2d 508 (1975); Coquina Oil Corporation v. District Court, 623 P.2d 40 (Colo. 1981).

Circumstances where an appeal is an inadequate remedy include: where a party may lose the priority of its judgment lien, Weaver Construction Co. v. District Court, 190 Colo. 227, 545 P.2d 1042 (1976); a court has granted immediate possession of property in an action in eminent domain, Order of Friars v. Denver Urban Renewal Authority, 186 Colo. 367, 527 P.2d 804 (1974); or a court has granted a motion for new trial to a father whose parental rights had been terminated where the grounds for new trial were newly discovered evidence that did not meet the test for granting a new trial, People in Interest of P.N., supra. In P.N., this Court ruled that where the "newly discovered evidence" was not newly discovered, but the father's trial attorney elected not to present the evidence, the interest in the protection of the children afforded by the Children's Code outweighed the father's interest; and, therefore, a Writ of Prohibition was required.

Here, no such extraordinary factors exist. Just compensation for the subject property is the sole issue before the District Court. Petitioners have received the deposit of money which a panel of commissioners determined the Authority had to

pay preliminarily for the property. Petitioners are entitled to and shall receive interest on the difference between such deposit and the final award, in accordance with C.R.S. Section 38-1-116.

Whether the Court's decision "threatens to undermine the very foundation of the jury system" is an issue for an appeal and does not meet the test of extraordinary direct harm to Petitioners required to obtain a writ of prohibition.

B. The District Court Did Not Abuse Its Discretion In Granting The Motion For New Trial.

1. The affidavit of counsel is sufficient to support a Motion for New Trial.

Rule 59(a) C.R.C.P. requires that a Motion for New Trial on the basis of misconduct be supported by affidavit. The Authority's Motion was supported by the affidavit of its counsel, James A. Windholz. Appendix 4 of Petitioners' Petition.

> The reason for the requirement of a supporting affidavit is at once obvious. It is a most salutary rule to require a supporting affidavit where there is an accusation of misconduct on the part of a juror in a motion for a new trial, the movant thereby proving his good faith and, by particularizing, demonstrating that his allegation of juror misconduct - a most serious charge - is based on knowledge, not suspicion or mere hope."
> Cawthra v. Greeley, 154 Colo. 483, 486, 391 P.2d 876, 877 (1964).

The subject affidavit satisfies the purpose of requiring such document in accordance with the rule of Cawthra. The affidavit sets forth actual statements or comments of the commissioners conveyed to the affiant, and does not draw conclusions, state suspicions or derive assumptions from said state-

ments. Therefore, the affidavit does not come within the restrictions of Hansen v. Dillon, 156 Colo. 396, 400 P.2d 201 (1965), or People's Natural Gas v. Public Utilities Commission, 626 P.2d 159 (Colo. 1981).

2. There are sufficient grounds to support the District Court's ruling on the Motion for New Trial.

The affidavit supporting the Motion was corroborated by the amount of the final award reported by the commission. It would have been impossible to devise monetary values per square foot of land and building costs in view of the evidence presented at the hearing, which would equal the commission's award. Furthermore, the Offer of Proof (Appendix 6 hereto) was before the District Court at the time of its decision. The decision to grant a new trial is discretionary with the trial court. People v. Gallagher, supra. The scope of inquiry of this Court is limited to examining the jurisdictional basis upon which the District Court acted. City of Colorado Springs v. District Court, 184 Colo. 177, 519 P.2d 325 (1974). There was adequate evidence and documentation before the District Court to support its decision.

3. The District Court's decision to grant the Motion for New Trial did not require inquiry into the thought processes of a jury or a violation of Rule 606(b) C.R.E.

Landowners in a condemnation action may request that a jury, or a judge, or a commission of freeholders determine the just compensation of their property. C.R.S. Section 38-1-101.

Petitioners determined to have a commission of three freeholders make such determination. The powers and purposes of a commission vary from those of a jury in an eminent domain action. A jury in a condemnation proceeding functions similarly to a jury in other types of civil proceedings, with the court determining issues of law, C.R.S. Section 38-1-107(1); however, a commission is empowered to admit or reject evidence and issue subpoenas to compel witnesses to testify, C.R.S. Section 38-1-105. Very importantly, a commission may consider only the evidence presented at the hearing and may not consider facts within their own knowledge or other knowledge acquired aside from the evidence presented. Routt County Development Co. v. Johnson, 23 Colo.App. 511, 130 P.2d 1081 (1913). To allow otherwise would be "upholding a method which is in direct opposition to that prescribed by statute." Routt County Development Co. at 1083.

Here, after selecting a commission to determine the value of their property, Petitioners now seek remedies related to a jury proceeding in contravention of the requirements of the eminent domain statute and the holding of Routt County Development Co., supra.

Petitioners would have this Court adopt a combination of tests applicable to a jury and an action in eminent domain which would make it impossible to challenge the award of a commission in a condemnation matter. Petitioners seek a ruling that a commission is to be treated as a jury; and pursuant to Rule 606(b) C.R.E., members of such decision-making body may never

testify under oath regarding the award and/or the procedures related thereto after the award has been entered. Petitioners also request that this Honorable Court adopt the rule of the Court of Appeals in Poudre School District R-1 v. Stark, 35 Colo.App. 363, 536 P.2d 832 (1975), reversed without addressing this issue, Stark v. Poudre School District R-1, 192 Colo. 396, 560 P.2d 77 (1977), that the impeachment of a commission's verdict can only occur upon the commissioners' testimony under oath. Obviously, these arguments are inconsistent. Petitioners also request that this Court impose a very strict and narrow interpretation of Rule 606(b) C.R.E. and obviate the basis for a new trial by misconduct of the fact-finding body.

In interpreting the effect of Rule 606(b) C.R.E., the Colorado Court of Appeals has held:

> For jury misconduct to mandate reversal, the party seeking relief must establish that the misconduct had the capacity to have influenced the result . . . The test is not whether the irregular matter actually influenced the result, but whether it had the capacity of doing so . . . Examining the juror's testimony here in that light, we conclude that the evidence . . . possessed the capacity to influence the jury's result.
> T. S. by Pueblo County Department of Social Services v. G. G., 679 P.2d 118, 119 (Colo.App. 1984).

The facts here meet this test despite the fact that Rule 606(b) C.R.E. cannot be applicable to an action in eminent domain without reversing the decision of Routt County. The commissioners failed to apply depreciation to the cost of the building (no matter the reasons therefor) resulting in an excessive

award of between $57,667.50 (if applying Petitioners' evidence of the appropriate percentage of depreciation) and $99,000.00 (if applying the Authority's evidence of the greater percentage of depreciation). The failure to apply depreciation to the cost of the building had the capacity to influence the amount of the award.

Despite the foregoing, the fact situation in this case does not violate Rule 606(b) C.R.E. To rule that a commission is similar to a jury for purposes of Rule 606(b) would require the reversal of Routt County Development Co., supra, and the portion of the Court of Appeals' decision in Stark, supra, which this Honorable Court did not address previously. The state legislature has allowed that just compensation in eminent domain actions may be determined by a jury or a commission. A commission has more power and authority than a jury and, therefore, must have correspondingly increased duties as determined in Routt County Development Co., supra. Petitioners cannot utilize the commission at the trial level, then request in this extraordinary proceeding all the benefits without any of the limitations of the jury.

C. The Authority Filed Its Motion For New Trial In A Timely Manner.

Petitioners argue that the Authority must have raised all the issues in its Motion for New Trial prior to the discharge of the commissioners. To date, the Authority has not been advised formally of the decision of the commissioners by the District

Court and has no knowledge whether the commissioners have been formally discharged. The first time the undersigned was advised of the judgment entered on June 12, 1985, was the copy attached to Petitioners' Petition.

The case cited by Petitioners to support their argument, Evergreen Fire Protection District v. Huckeby, 626 P.2d 744 (Colo.App. 1981), involved a situation where the commissioners were reconvened thirteen months after the hearing on final valuation to correct an error in the legal description of the property. There, the petitioner was allowed to submit interrogatories to the commissioners at that time regarding their valuation over respondent's objections and without reviewing a transcript of the trial as requested by respondent. Based on these facts, the court found error. To extend the ruling in Evergreen to all fact situations would give no effect to Rule 59 C.R.C.P.

The Colorado Rules of Civil Procedure apply to actions in eminent domain. Stalford v. Board of County Commissioners of the County of Prowers, 128 Colo. 441, 263 P.2d 436 (1953). Rule 59 C.R.C.P. specifically allows a party to request post-trial relief within fifteen days of entry of judgment. Petitioner's Motion for New Trial was filed within said time period. Rule 59 C.R.C.P. was repealed and re-enacted in its present form effective January 1, 1985. Common law is superseded by statutes or rules promulgated by the state's highest court which expressly repeal such prior law or are inconsistent therewith. C.R.S.

2-4-211; Shoemaker v. Mountain States T & T Co., 38 Colo.App. 321, 559 P.2d 721 (1976).

D. The District Court Had Sufficient Grounds To Grant A Motion For New Trial Based Upon The Misconduct Of The Commission Causing The Verdict To Be Excessive.

The Authority requested a new trial based upon the irregularity of proceedings, errors of law and misconduct of the commissioners which resulted in a denial of a fair hearing and an excessive award. Appendix 3 of the Petitioners' Petition. The District Court granted said motion, finding that "the alleged errors committed by the commissioners are such that the amount of the award is excessive."

Both parties presented memoranda of law to the District Court regarding the Authority's motion. Appendices 1 and 2 hereto and Appendix 5 of Petitioners' Petition. Petitioners failed to present to the District Court the arguments contained in Part VII of their memorandum to this Honorable Court. Such arguments cannot be presented for the first time in this proceeding. Panos Investment Co. v. District Court, 662 P.2d 180 (Colo. 1983).

E. The arguments contained in the Authority's Memorandum Brief in Support of Petitioner's Motion for New Trial and Reply Brief in Support of Petitioner's Motion for New Trial are incorporated herein. Appendices 1 and 2 hereto.

II. CONCLUSION

Petitioners are not entitled to the extraordinary relief of a Writ of Prohibition, as an appeal subsequent to final judg-

ment would provide an adequate remedy herein. Petitioners have failed to show any abuse of discretion by the District Court. Petitioners' requests for this Court to adopt legal requirements, which would preclude any challenge of misconduct by a commission in condemnation, are without merit. The Authority's affidavit supporting its Motion for New Trial satisfies the requirements of Rule 59 C.R.C.P. and the restrictions of Rule 606(b) C.R.E. The commissioners' conduct must be judged by factors applicable to a commission in an eminent domain proceeding, not a jury.

The District Court's decision to grant the Motion for New Trial is supported by the record and applicable Colorado law.

Petitioners' Petition should be dismissed as it fails to state grounds upon which a Writ of Prohibition may be granted.

MEHAFFY, RIDER, WINDHOLZ & WILSON

By: _____

James A. Windholz #1253
Attorney for Respondents
1655 Walnut Street, Suite 310
Boulder, CO 80302
Telephone: (303) 447-8741

CERTIFICATE OF MAILING

I certify that a true copy of the foregoing Brief in Support of Response to Petition for Writ of Prohibition and Order to Show Cause was mailed by U.S. mail, postage prepaid, this 30th day of September, 1985, to the following:

Malcolm Murray
GORSUCH, KIRGIS, CAMPBELL,
WALKER AND GROVER
1401 - 17th Street, Suite 1100
Denver, CO 80202

Honorable Joyce S. Steinhardt
Division 6
Arapahoe County District Court
2069 West Littleton Boulevard
Littleton, CO 80120

_____