

District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80302 (303) 441-3771	DATE FILED: February 16, 2017 2:47 PM CASE NUMBER: 2016CV30791 ▲ COURT USE ONLY ▲
THE CITY OF LAFAYETTE, Petitioner, v. TOWN OF ERIE URBAN RENEWAL AUTHORITY et al, Respondents.	
ORDER GRANTING RESPONDENTS' MOTION TO DISMISS	

On February 14 and 15, 2017, the following actions were taken in the above-captioned case. Donald Ostrander and Stephanie Ceccato appeared for Petitioner. Mikaela Rivera and Darrell Waas appeared on behalf of Respondents. The Clerk is directed to enter these proceedings in the register of actions:

COURT REPORTERS: February 14, 2017: Allison Lee, Trish Butler. February 15, 2017: Penny Selleck, Kim Ritter.

WITNESSES: Petitioner's Witnesses: Mark Keefer. Respondent's Witnesses: A.J. Krieger, James Dixon, Gary Klaphake, and Karen Blumenstein.

EXHIBITS: *Petitioner's Exhibits:* Respondent stipulates to Exhibits P1-P3, P8, P10-P20, P23-P28, P30-P43, P45, and P46. Exhibits P4-P6 admitted at hearing. *Respondents' Exhibit:* Petitioner stipulates to Exhibits 1-65. Counsel shall ensure that all exhibits admitted have been filed electronically.

BACKGROUND: The City of Lafayette ("Petitioner" or "Lafayette") filed a Petition in Condemnation on July 14, 2016 pursuant to §38-1-101, C.R.S., et seq and Article XX Sections 1 and 6 of the Colorado Constitution. The property at issue is within the municipal boundaries of the Town of Erie ("Erie"). Erie and Town of Erie Urban Renewal Authority (TOEURA), (collectively "Respondents"), request that the court find Petitioner does not have a proper public purpose in its efforts to condemn Respondents' property and that, as a result, the Court lacks jurisdiction to proceed. The motion before the Court is a Motion to Dismiss pursuant to C.R.C.P. 12(b)(1), filed September 12, 2016. Prior to a hearing on immediate possession, the Court directed that Respondents' Motion to Dismiss be resolved.

APPLICABLE LAW

C.R.C.P. 12(b)(1) addresses the Court's subject matter jurisdiction. An action can be dismissed due to the Plaintiff's failure to meet certain statutory prerequisites. Because a court's subject matter jurisdiction is fundamental to its inherent ability to enter any other meaningful orders, the court will ordinarily consider any question as to its jurisdiction before addressing any other motion. In assessing subject matter jurisdiction, courts are not bound by the parties' pleadings but instead must look to the underlying substance of the complaint with respect to the facts alleged and the relief sought." *Barry v. Bally Gaming, Inc.*, 320 P.3d 387 (Colo. App. 2013). The trial court's jurisdiction may turn on disputed facts, in which case the court cannot determine on the face of the pleadings but instead may hold an evidentiary hearing and make factual findings related to its jurisdiction. *Medina v. State*, 35 P.3d 443 (Colo. 2001).

Whether a court has subject matter jurisdiction depends entirely on the nature of the claim and the relief sought. *State ex. rel Suthers v. Johnson Law Group*, P.3d 961 (Colo. App. 2014).

The power of eminent domain can be exercised only as prescribed by statute, and proceedings must be conducted strictly according to the procedures in statute. "Notwithstanding any other provision of law, in any condemnation action, without the consent of the owner of the property, the burden of proof is on the condemning entity to demonstrate, by a preponderance of the evidence, that the taking of private property is for a public use, unless the condemnation action involves a taking for the eradication of blight, in which case the burden of proof is on the condemning entity to demonstrate, by clear and convincing evidence, that the taking of the property is necessary for the eradication of blight." §38-1-101(2)(b), C.R.S.

Title 38 further provides: "In order that each local government and the state enjoy the greatest flexibility with respect to the planning and development of land within its territorial boundaries, it is necessary that the powers of a home rule or statutory municipality to acquire by condemnation property outside of its territorial boundaries be limited to the narrowest extent permitted by article XX of the state constitution." 38-1-101(4)(a)(II), C.R.S.

Article II, Section 15 of the Colorado Constitution requires that private property only be taken for a public use. Furthermore, Article II, Section 15 states that "the question of whether the contemplated use be really public shall be a judicial question, and

determined as such without regard to any legislative assertion that the use is public.” Courts in Colorado consider the following factors to determine whether there is a public purpose: (1) the physical conditions of the land; (2) the needs of the community; (3) the character of the benefit conferred on the community; and (4) the necessity of the improvement in the development of the resources of the state. *Public Service Co. of Colorado v. Shaklee*, 784 P.2d at 318.

“Generally, however, there are two uses which may be deemed public. The first is public employment or actual use by the public. The second is public advantage or benefit.” *Thornton Dev. Auth. V. Upah*, 640 F. Supp. 1071, 1077 (D. Colo. 1986). In *Thornton*, the TDA was condemning a “blighted” area to build a shopping center—what the court considered a public advantage or benefit. *Id.* Of note, both this federal case as well as several Colorado state cases stand for the notion that eventual private ownership does not undermine public use. *Id.*; *City and Cty of Denver v. Eat Out, Inc.*, 75 P.3d 1141, 1144 (Colo. App. 2003). “Furthermore, a use may be public though not many people enjoy it; the requirement is only that the improvement be open to all.” *Bd. of Cty. Comm’rs of Cty. of Morgan v. Kobobel*, 176 P.3d 860, 863 (Colo. App. 2007) (citing several state and federal cases).

FACTUAL FINDINGS

1. Petitioner is organized as a home rule municipality in the State of Colorado. Erie is a statutory city. Both Petitioner and Erie have eminent domain authority pursuant to §38-1-101, C.R.S., et seq. and Article XX of the Colorado Constitution.
2. Petitioner and Erie, along with Boulder County, were signatories to the East Central Inter-Governmental Agreement (Ex. 21), a comprehensive plan which, in part, intended to regulate land use and “maintain the unique and individual characters of Lafayette and Erie.” This Agreement specifically recognized it would serve citizens to maintain some rural development for the purpose of preserving a community buffer. This agreement was adopted in December 1994 and expired on its own terms in December 2014.
3. Petitioner and Respondent, along with seven other municipal jurisdictions in Boulder County, along with the County, were signatories to what is referred to as the Super IGA,” a comprehensive development plan. (Ex. 52). The Super IGA permitted withdrawal. Erie gave notice of its withdrawal on July 1, 2013, and Lafayette gave similar notice on July 9, 2013. Which municipality elected to leave the Super IGA first remains an issue of strong contention between the parties, and

conflict over these issues created ill feelings on the part of some which have not been resolved.

4. Discussions occurred for continuing the cooperative agreement known as East Central IGA. The issue of revenue sharing appears to have been an ongoing challenge, as was the removal of certain properties designated as rural preservation.¹
5. The Court understands that selected e-mail communication between the municipalities does not fully reflect their positions on continuing to negotiate the IGA's continuation, but it is insightful. Upon receiving a draft agreement from Boulder County on October 22, 2014, Erie Mayor Tina Harris responded to Boulder County and Lafayette: "Erie remains willing to participate in a good faith effort aimed at negotiating an agreement that will accomplish exactly the kinds of things described in the recitals; greater economic vitality, more efficient delivery of services and utilities, and the reduction of friction between their respective governments." (Ex. 39). Lafayette Mayor Christine Berg wrote to City Manager Gary Klaphake "Clearly we are not going to agree to any sort of an extension. I thought I made that pretty clear in our meeting because of the Beacon Hill neighborhood." (Ex. 40).
6. Once Erie and Lafayette withdrew from the Super IGA, and the East Central IGA expired, both municipalities were left free to develop properties previously designated rural preservation. Without a revenue sharing agreement, both had an obvious financial interest to do so.
7. Commercial development ensued along the Highway 287 corridor. This includes a Walmart, a King Sooper's, the Lafayette Promenade, Chili's McDonalds Walgreens, Burger King and Discount Tire, all within the boundaries of Lafayette. [See Ex. 1 below, a map showing the location of all properties referred to in this Order.]
8. Erie owned a reservoir on the southeast corner of Arapahoe and Highway 287. Erie was cited by the U.S. Department of Justice for destroying wetlands and entered into a consent decree in 2003. Ten years later, Erie stopped filling the reservoir.

¹ Revenue sharing refers the collection of taxes by the municipality in which the retail business is located and sharing it with neighbors, who are presumed to contribute customers for these businesses.

When it was drained, Erie obtained a non-jurisdictional determination by the U.S. Army Corps of Engineers in spring 2014.

9. A.J. Krieger is Erie's Town Administrator, and has served in this capacity since August 2011. He testified one of the earliest goals identified to him is the diversification of the Town's revenue base. Erie has a population of approximately 24,000 and about \$5 million in annual tax revenue.
10. TOEURA was formed in the fall of 2011. Its board of trustees is identical to that of Erie's board of commissioners, which is a common practice in Colorado.
11. In January 2012, TOEURA purchased what is referred to as the Nelson property, immediately south of the reservoir. In February 2012, TOEURA purchased what is referred to as the Kuhl property, immediately east of the reservoir. These properties were formerly designated rural preservation. Collectively, the reservoir, the Nelson and the Kuhl properties comprise Nine Mile Corner.
12. Through Mr. Krieger, TOEURA informed Lafayette in March 2012 of its acquisition of these properties. Mr. Krieger recollects Mr. Klaphake stating he would support residential development but, in any event, did not indicate in that meeting that the area should be preserved for open space or for a buffer. On the following day, March 5, 2012, the parties continued discussions about amending the East Central IGA. Mr. Krieger does not recollect Lafayette Mayor Cutler mentioning the need for open space or for a community buffer. Mr. Krieger testified that in spring 2015, the Lafayette mayor came to an Erie trustees meeting and requested a 300' buffer, but that Lafayette never mentioned a community buffer prior to serving Erie the Petition in Condemnation.
13. In February 2012, Erie commissioned a blight survey and a number of blight factors were identified on Nine Mile Corner, including the absence of sidewalks, overhead utilities, and incomplete water and sewer service. A 2015 blight survey specific to Nine Mile Corner identified seven factors and supported the adoption of an urban renewal plan. (Ex. 2).
14. An urban renewal plan was completed for Respondents in September 2015. (Ex. 3). It identified that blight impairs the growth of a municipality and enumerated steps for eliminating it. TOEURA selected a developer and hired a consultant, Karen Blumenstein, to develop the site and identify interested tenants. Preliminarily,

trees were cleared and structures on site demolished. A land use application for the eastern portion of the site was submitted to Erie in October 2016 and for designation of the site as a planned development district.

15. Immediately south of Nine Mile Corner is a residential development – identified as Beacon Hill – that lies within Petitioner’s territorial limits. Nine Mile Corner slopes from north to south, with the incremental altitude being approximately 40 feet.
16. Across Highway 287 to the west of Nine Mile Corner is a property owned by Tebo Properties, LLC. This property remains in unincorporated Boulder County; future annexation of this property to either Lafayette or Erie is a possibility. [The northeast corner of this parcel belongs to Erie.] To the west of the Tebo property is a property identified as Weems, now a mixed-use but mostly residential community annexed by Lafayette in either 2014 or 2015. Both Tebo and Weems had been designated rural preservation. Weems was also “shopped out” to Erie, and Lafayette modified with growth limitation ordinance to annex the property. The Lafayette Promenade, south of the Tebo property and within Lafayette’s boundaries, was designated a specifically regulated parcel. To the north of Nine Mile Corner, across Arapahoe, is a Safeway which is within Erie’s boundary.
17. James Dixon, previously employed by Tebo Partnership, LLP, testified that both Lafayette and Erie were vying to annex the Tebo property, and that conversations began before expiration of the East Central Inter-Governmental Agreement. In his meetings with Mr. Klaphake, Mr. Dixon recalls that Mr. Klaphake was adamant that no commercial development would go in the Nine Mile Corner, but did not specifically say a buffer was necessary.
18. Respondents have developed a preliminary plan for the development of Nine Mile Corner. (Ex. 4). The plan includes residential development on the eastern one-third of the property and commercial development on the western two-thirds, adjacent to Hwy. 287. The plan includes two anchors, potentially Lowe’s and King Sooper’s. The proposed plan includes a 100’ setback between the property and Beacon Hill, which would include a road and a landscape setback.
19. King Sooper’s, currently operating in Lafayette, has a new store prototype that is at least twice as large as the existing store on Highway 287. One such store has opened in Erie on Highway 7, and is 123,500 square feet. Both Lafayette and Erie have maintained discussions with King Sooper’s in an effort to attract the grocery to sites

within their boundaries. While discussions remain underway with King Sooper's, there is no final agreement committing King Sooper's to Nine Mile Corner. Due to the significant tax implications of King Sooper's remaining within Lafayette or moving to Erie, this pits the two communities. Respondents contend that Lafayette's true purpose in this condemnation action is not to create open space, but to preclude commercial development at Nine Mile Corner and, more specifically, the possibility that King Sooper's will move to this site.

20. The Colorado Department of Transportation (CDOT) has an access control plan for Highway 287 which limits full movement intersections to certain locations. These include Hwy. 287 and Arapahoe and Hwy. 287 and Baseline. Between these two points, Petition has an access permit approved for Lucerne Blvd. and Hwy. 287, envisioned as access for development on the west side of Hwy. 287.
21. Support by Lafayette residents for the acquisition of open space is strong, and was supported by 84% of residents in the 2012 elections. The election question did not qualify the use of open space as a buffer between communities. Lafayette has acquired land to ensure the city will not fuse with Longmont to the north, and it partnered with Broomfield to purchase open space when the Northwest Highway was built.
22. In contrast, 98% of Erie residents surveyed indicated support for increased efforts to attract retail and more shopping opportunities.
23. Mr. Klaphake has served as Lafayette's city manager for nearly 19 years and, in this capacity, has represented Petitioner's interests in many of the dealings previously discussed. During his tenure, he has observed the Town of Erie becoming a larger city, and moving towards Lafayette along Arapahoe. He testified that when Erie acquired the Safeway property on the northeast corner of Hwy. 287 and Arapahoe, Lafayette said "no closer."
24. In April 2013, Lafayette published its Parks, Recreation, Open Space and Trails ("PROST") open space priorities, and the Nine Mile Corner did not appear on the list. This remained true through 2016. (Ex. 35). Respondents believe this signifies Petitioner did not then have its eyes on the property, whereas Petitioner explains this was a strategic decision on which properties they believe Boulder County may want to partner in acquiring. Boulder County is not being asked to contribute to any costs Lafayette may be required to pay Erie for the property in condemnation.

25. On February 17, 2016, a representative of the Lafayette Chamber of Commerce, Vicki Trumbo (Ex. 17) addressed Roger Caruso, Mr. Klaphake's assistant, about rumors that King Sooper's is moving, and expressed "getting nervous" after being told by a King Sooper's representative the store was being moved to Erie. Caruso agreed to reach out to corporate, and laid out ideas for the Promenade or Tebo properties "if we can get Tebo in the city."
26. As Lafayette continued to consider that Erie was pursuing development of Nine Mile Corner, and that it too was speaking to King Sooper's, Lafayette began to consider how to foreclose on Erie's plans. These efforts included hiring a water lawyer, filing a CORA request, contacting DOJ about the 2003 consent agreement and, ultimately, hiring condemnation counsel. Mr. Caruso and Mr. Klaphake both communicated with King Sooper's.
27. On May 3, 2016, Petitioner's City Council adopted an ordinance Declaring the Intent to Acquire Real Property for Open Space Purposes and to Protect Lafayette's Unique Community Character by Providing a Buffer from Neighboring Communities; and Authorizing the Staff, Consultants, and City Attorney to Initiate Negotiations and Proceedings, Including Litigation if Necessary, for Such Acquisition. The Ordinance states that "Lafayette considers buffering itself from neighboring communities, and the acquisition and availability of open space and agricultural land as one of the highest public purposes that are valued by the citizens of Lafayette." (Ex. 25).
28. Less than three months elapsed from the e-mail to Mr. Caruso about King Sooper's leaving Lafayette (February 17, 2016) to the ordinance authorizing litigation being passed (May 3, 2016). The Petition itself was filed July 21, 2016.
29. The Petition in Condemnation proposes to take 22 acres on the southern portion of Nine Mile Corner, with the margins largely coinciding with the former Nelson property. If Lafayette prevails, Erie would have the remaining 23 acres on the north, abutting Arapahoe, coinciding with the former reservoir site and Kuhl property.
30. Respondents present evidence of numerous examples within Petitioner's boundaries where commercial development has been permitted next to residential development with setbacks of less distance than what is proposed in Respondent's plan for Nine Mile Corner. For example, at the Jax Outdoor Gear site, homes are located within 6" to 40' of the store property. The YMCA is 29' to residences located

in unincorporated Boulder County. Respondents indicate these examples reflect the manner in which Lafayette would protect its residents in the transition between commercial and residential land use.

31. Respondents and their proposed developer have conducted meetings with Beacon Hill residents about an appropriate buffer and other concerns, such as lighting. Petitioner contends that Lafayette residents have registered complaints with their elected officials about the planned development. Mr. Krieger testified Respondents offered to utilize the Lafayette land code in the project, but received no response.
32. The Lafayette Municipal Code does not have a reference for a “buffer” in its code, but it does require a 20’ setback between commercial and residential properties.
33. Karen Blumenstein, a land developer, has worked with Erie since 2012 to evaluate Nine Mile Corner and develop a public-private partnership in a retail development. She is familiar with the condition and constraints of the property. This involves assessment of how much cost is involved in developing the property and how much revenue it could yield. Aside from the 40’ grade in topography and the previously identified blight factors, she testified the former reservoir results in poor dirt underneath which requires the foundations be stabilized to prevent buildings from settling. Fill dirt is available on the southern portion of the site, and this would be unavailable if this portion is taken by Lafayette.
34. In her opinion, reducing Nine Mile Corner by the 22 acres proposed to be taken by Lafayette would reduce the retail from a regional to a community shopping center. The former draws from a larger geographical area and results in more revenue. If it is reduced to a community shopping center, the costs for developing the property would remain, including addressing the ditch, but the revenue to be generated would be significantly diminished. The ditch on the property would need to be piped and/or relocated. It is acknowledged that some of these expenses could be paid by whatever compensation Lafayette would pay to Erie if the taking is permitted. Ms. Blumenstein testified about the “synergy” retail tenants build with each other in a development. This position is supported by Mr. Dixon, who has also long been engaged in development. He states the two sections on the Nine Mile Corner are “useless without the whole.”
35. Lafayette presented an expert witness, Mark Keefer, a professional city planner, to opine that a store the size of the proposed King Sooper’s could still be sited on the

remaining 23 acres if Lafayette prevails. The Court finds that the remaining site could accommodate a retailer of this size, but that based on Ms. Blumenstein's testimony, the appeal of the property would be significantly reduced. There is no question that the remaining portion of the site would remain developable, but it would not generate as much revenue in part due to fewer co-tenants. Ms. Blumenstein testified that size is not the issue, but rather it is the condition of the site and how much it would cost to get it to a developable state. A community grocer, for example, would generate tax revenue of \$110-\$150 per square foot, whereas a large grocer could generate \$400-\$500 per square foot. Her calculation is that Erie could generate \$43 million in annual tax revenue if two anchor stores are located on site, \$37.5 from a single anchor store, but only \$8.5 million if the lower 22 acres are removed from the site. Given Ms. Blumenstein's expertise and extensive experience in land development, the Court attaches greater weight to her testimony in this regard than to Mr. Keefer's, whose expertise is in city planning.



ANALYSIS AND ORDER

As municipalities in Boulder County have experienced population growth, with residents interested in maintaining both open space and amenities that support a high quality of life, it was inevitable that the time would come when geographic limitations would pit Boulder County municipalities – absent a cooperation agreement – against one another. An examination of county maps over the last several decades reflect the “greening” of these geographical areas, as more open space is shown on each succeeding map. (Exs. P4, P5, P6). Counsel for both parties acknowledge that Boulder County is a national leader in the high priority that is accorded to acquiring and maintaining open space. Boulder County holds more than 100,000 acres of open space, and the City of Lafayette holds approximately 1,300 acres of open space, either solely or jointly with other entities. Yet there is only so much land available within the county, and there is an increasing population with attendant housing and related pressures.

Parties agree that this case presents an unprecedented issue in Colorado, where one municipality is seeking to take, by eminent domain, property within the territorial boundaries of an adjacent municipality. Lafayette has never utilized its condemnation authority to create a buffer between municipalities, nor has Lafayette ever condemned property within another municipality. None of Boulder County’s open space was acquired through eminent domain.

Two separate condition studies reflect Nine Mile Corner is a blighted area. Both Erie’s development plans and Lafayette’s efforts to maintain the property as open space would eradicate blight, serving a public purpose. Respondents request that the Court find Lafayette does not have a proper public purpose in taking the southern portion of Nine Mile Corner and does not have the authority acquire this property. As Movants and as owners of the property to be condemned, Respondents bear the burden of proving that Lafayette’s taking is not for a public purpose. *Silver Dollar Metro Dist., v. Goltra*, 66 P.3d 170 (Colo. App. 2002).

In examining whether Lafayette has a true public purpose in acquiring this land, the Court utilizes the *Shaklee* factors: (1) the physical conditions of the land; (2) the needs of the community; (3) the character of the benefit conferred on the community; and (4) the necessity of the improvement in the development of the resources of the Petitioner.

Erie’s Proposed Site Development Plan Does Not Violate A Setback Requirement

Cross examination of Mr. Klaphake examined the difference between a land use setback and a community buffer. The first is required by the municipality's land use code to maintain a minimum distance between different types of development. A community buffer, on the other hand, is not referenced in Lafayette's municipal code, but would be the dividing point where one community ends and the other begins, a way of avoiding what Mr. Klaphake refers to as urban sprawl.

Lafayette's setback requirement between commercial and residential development is 20'. Erie's proposed plan maintains a 100' distance from the proposed development and the backyards of homes on Beacon Hill. Erie further presented examples of the setbacks required by Lafayette for comparable transitions within its boundaries. In his testimony, Mr. Klaphake testified a buffer refers to the residents of Beacon Hill "looking out at that shopping center." This speaks to a setback and not a buffer. It is unclear why Mr. Klaphake believes Beacon Hill residents merit any more consideration than Lafayette provide to the residents in unincorporated Boulder County when it permitted construction of Walmart in the early 2000s immediately east of residential development. There was no testimony from which to conclude that Beacon Hill homeowners had any expectation that the land to the north would remain undeveloped.

Respondents maintain, and this is supported by the evidence, that the condemnation proceeding was initiated before there could be substantive discussions between the parties about an appropriate setback. Mr. Klaphake recounted the requirements when Walmart opened in Lafayette— including tree planting, cutting off illumination, building a retaining wall, and the road's positioning – and it unclear why these conversations cannot occur with Respondents to ensure that any prospective tenant on its property will abide by comparable terms.

A "Community Buffer" at this Location Is Not a Proper Public Purpose

Case law does not offer an exact definition of "public purpose" in condemnation. "[T]he question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public." *Larson v. Chase Pipe Line Co. et al*, 514 P.2d 1316, 1317 (Colo. 1973) (quoting Colo. Const. art. II, s 15). "It was stated in *Tanner v. Treasury Tunnel Co.*, 35 Colo. 593, 83 P. 464 (1906), as follows: 'No definition, however, has as yet been formulated which would serve as an infallible test in determining whether a use of property sought to be appropriated under the power of eminent domain is public or private. No precise line is drawn between the uses which would be applicable in all cases. Doubtless this arises from the fact that the

courts have recognized that the definition of ‘public use’ must be such as to give it a degree of elasticity capable of meeting new conditions and improvements, and the ever increasing needs of society.” *Id.* at 1317–18. Of note, however, the court does provide some guiding considerations to determine whether a use is public: “the physical conditions of the country, the needs of a community, the character of a benefit which a projected improvement may confer upon a locality, and the necessities for such improvement in the development of the resources of a state.” *Id.*

The ideal of distinguishing communities is included in both parties’ comprehensive plans. Respondents point to there being no meaningful buffer between Louisville and Lafayette, and Petitioners respond that these two communities were historically founded as mining towns, before concepts of open space existed. Lafayette has taken steps to ensure open space remains between its boundaries and those of Longmont and Broomfield. While open space as a demarcation point between municipalities may be an ideal, as comprehensive plans are described as “aspirational,” in some instances it is simply too late. The communities have come so close together that it is impossible to create a meaningful buffer that can be identifiable on a map or when driving between the two communities. It is true that no buffer exists between Lafayette and certain parts of unincorporated Boulder County, and there are other places where Lafayette and Erie come into contact. Respondents’ counsel argues that there is no common understanding of what constitutes a buffer, and that community buffers may include open space and rural areas, as well as roads or a common area.

Blight has been identified on Nine Mile Corner, and Colorado law recognizes blight elimination as a public purpose. Respondents’ planned development would eliminate blight, as would Petitioner’s intent to maintain the property as open space. Case law does not provide guidance when there are competing public interests, but Respondents’ plans for blight elimination through development were already underway when Petitioner raised the issue of obtaining open space to create a community buffer. This case represents an overreach on the part of Lafayette, whose interests in open space and community buffers are not superior to the interests of the property owners’ interests in revenue generation and blight elimination.

In bringing this condemnation action, Lafayette seeks to retain the benefit of the expired East Central IGA, i.e. a buffer between communities, without implicating any obligations, such as revenue sharing. The property in this instance is owned by TOEURA, and Erie, with current tax revenue of \$5 million, has the right to pursue greater tax revenue and the elimination of blight. Regardless of whether Respondents ultimately finalize an

agreement with King Sooper's or with another tenant, Lafayette cannot intervene by attempting a taking of this magnitude.

Lafayette's Development of Hwy. 287 Precludes Any Meaningful Community "Buffer"

The reality is that these two communities exist next to each other, if not entirely comfortably. It is disingenuous for Lafayette, after having developed much of the Highway 287 corridor, including properties previously identified as open space priorities (Weems and, potentially, Tebo) to attempt to preclude Erie from developing Nine Mile Corner. Erie's argument that Lafayette's claim of prioritizing open space and buffers is inconsistent with its actions along Highway 287 is valid. In fact, development on Nine Mile Corner is more in character with the area than a 22-acre buffer would be. If Lafayette's true interests are the concerns of the Beacon Hill homes that would back to the development, it is not necessary to take 22 acres. The testimony about how Petitioner arrived at this size designation is near ludicrous; while Mr. Klaphake indicates city council determined this was "reasonable and appropriate," there's no relationship between the size of the area designated for condemnation and the stated need.

With regard to the requirement that the condemning authority act in good faith in determining the necessity of the project, the question of necessity simply involves the necessity of having the property sought to be taken for the purpose intended." Town of *Silverthorn v. Lutz*, 370 P.3d 368. In passing the ordinance, City Council was well aware of the history between the two communities and of the facts determined in the Court's findings, as set forth above. The absence of good faith bars Petitioner's power to acquire Respondents' property.

The Court can make no assumptions that King Sooper's, Tebo and CDOT will make decisions favorable to Lafayette's interests. If Tebo elects to annex to Erie, would Lafayette seek to condemn 22 acres on the western boundary of the Tebo property in order to buffer Weems from Erie? There is no guarantee that CDOT will look unfavorably on Erie's application for a modification of the access control plan. But, even if all these developments were to resolve in the manner in which Lafayette seeks (King Sooper's stays within Lafayette, Tebo annexes to Lafayette, and CDOT denies Erie's request for modification of the access plan), Lafayette still does not have a public purpose or legal authority to take Erie's land by condemnation.

At present, Lafayette can continue its efforts to stymie Erie's development plans at Nine Mile Corner. It can use what Mr. Klaphake referred to as his "trump card," which is

building a signal light at Highway 287 and Lucerne; this would result in CDOT denying any other turn between Lucerne and Arapahoe into the property. Or, it can come to the table.

CONCLUSION

Based on the discussion set forth above, the Court finds that Lafayette does not have a public purpose in bringing the Petition in condemnation. The articulated need of acquiring open space for the purpose of creating a community buffer between Lafayette and Erie is inconsistent with Lafayette's actions in development the Hwy. 287 corridor. Instead, Lafayette's actions are more closely aligned with a previously articulated goal to ensure that Erie does engage in commercial development on Nine Mile Corner.

As there is no true public purpose found by the Court, it GRANTS Respondents' Motion to Dismiss the Petition in Condemnation.

DATED: February 16, 2016

BY THE COURT:



Norma A. Sierra, District Court Judge