

**COLORADO COURT OF APPEALS**

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**Appeal from:**

The District Court for Boulder County, 20th Judicial District

The Honorable Norma Angelica Sierra, Presiding  
Case Number: 2016CV030791

**Petitioner-Appellant:**

THE CITY OF LAFAYETTE, a Home Rule Municipality and a Colorado Municipal Corporation

▲ COURT USE ONLY ▲

**Respondents-Appellees:**

TOWN OF ERIE URBAN RENEWAL AUTHORITY;  
CDM PIPELINE COMPANY, INC.; BRIAN NELSON  
AND SHAWNA NELSON; PUBLIC SERVICE  
COMPANY OF COLORADO; and TOWN OF ERIE

Court of Appeals  
Case Number:  
2017CA000595

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**OPENING BRIEF OF CITY OF LAFAYETTE**

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

**The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).**

It contains 7,296 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

**The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).**

**For each issue raised by the appellant**, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

**In response to each issue raised, the appellee** must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

**I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.**

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By: \_\_\_\_\_

Donald M. Ostrander, No. 12458

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	v-vi
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	1
I. Nature of the Case .....	1
II. Statement of Relevant Facts .....	1
III. Procedural History.....	3
IV. The Ruling, Judgment or Order Being Appealed .....	4
SUMMARY OF ARGUMENT .....	5
ARGUMENT .....	8
I. Lafayette’s Condemnation is for a Proper Public Purpose. ....	8
A. Standards of Review .....	8
B. Preservation of Issue for Appeal.....	9
C. Contentions and Reasoning.....	9
1. Condemning for Open Space is a Valid and Recognized Public Purpose .....	9
2. The <u>Telluride</u> Case Clarified that Home Rule Municipalities May Condemn Extraterritorially for Open Space Purposes .....	12
3. The Shaklee Factors Support a Finding of Public Purpose for this Project.....	14
II. There is No Bad Faith or Fraud Behind Lafayette’s Decision to Condemn this Property .....	16
A. Standards of Review .....	16

B.	Preservation of Issue for Appeal.....	16
C.	Contentions and Reasoning.....	17
1.	Lafayette’s Condemnation was Undertaken With Good Faith; Therefore, its Finding of Necessity Cannot be Disturbed .....	17
2.	The Public Purpose of Blight Elimination Will Still be Met After Lafayette’s Condemnation .....	23
3.	Open Space and Community Buffers Have Long Been a Coveted Aim of Boulder County, Lafayette, and Various Other Boulder County Municipalities .....	26
4.	Previous Attempts Were Made to Protect this Property as Open Space in Conjunction With Boulder County.....	31
	CONCLUSION.....	33

## TABLE OF AUTHORITES

### Cases

City & County of Denver v. Block 173 Associates,

814 P.2d 824 (Colo. 1991)..... 10, 12, 17

City and County of Denver v. Board of Com'rs of Arapahoe County,

156 P.2d 101 (Colo. 1945).....24

Colorado State Bd. of Land Comm'rs v. Dist. Court In & For Jefferson Cnty.,

430 P.2d 617 (Colo. 1967).....17

E-470 Pub. Highway Auth. v. 455 Co., 3 P.3d 18 (Colo. 2000) .....8, 16

Milheim v. Moffat Tunnel Improvement Dist., 211 P. 649 (Colo. 1922),

aff'd, 262 U.S. 710 (1923)..... 10, 12

Mortensen v. Mortensen, 309 P.2d 197 (Colo. 1957) ..... 17, 18, 19

Public Serv. Co. v. Shaklee, 784 P.2d 314 (Colo. 1989)..... 6, 14, 15

Shaklee v. District Court, 636 P.2d 715 (Colo. 1981).....10

Thornton by Utils. Bd. v. Farmers Reservoir & Irrigation Co.,

575 P.2d 382 (Colo. 1978).....24

Thornton Development Authority v. Upah, 640 F.Supp. 1071 (D. Colo. 1986).....10

Town of Telluride v. San Miguel Valley Corp., 185 P.3d 161

(Colo. 2008)..... 6, 11, 12, 13, 15

**Statutes**

C.R.S. § 29-20-101, et al......26

C.R.S. § 29-20-104(g).....26

C.R.S. § 29-7-104 .....11

C.R.S. § 29-7-107 .....11

C.R.S. § 31-25-101 .....25

C.R.S. § 31-25-107 .....22

C.R.S. § 31-25-201(1).....11

C.R.S. § 38-1-101 .....12

C.R.S. § 38-1-101(1)(a) .....9

C.R.S. § 38-1-101, et seq. .....3

C.R.S. § 38-1-105(6)(a) .....4

**Other Authorities**

Colorado Constitution Article II, § 15 .....9

**Rules**

C.R.C.P. 12(b)(1).....4

## **STATEMENT OF THE ISSUES**

1. Did the trial court err when it ruled that Lafayette’s condemnation lacked a proper public purpose?
2. Did the trial court err when it ruled that Lafayette’s condemnation lacked good faith and subsequently Lafayette did not have the authority to condemn?

## **STATEMENT OF THE CASE**

### **I. NATURE OF THE CASE**

In this eminent domain case, the City of Lafayette (“Lafayette”), a home rule city, sought to acquire by condemnation an approximately 22-acre parcel owned by the Town of Erie Urban Renewal Authority (“TOEURA”) to provide a community buffer through open space and preservation of rural land access. TOEURA and the Town of Erie (“Erie”) (collectively, the “Respondents”), filed a Motion to Dismiss citing lack of jurisdiction. The trial court ruled that the condemnation was not for a public purpose and lacked the necessary good faith. Thus, the trial court granted the Motion to Dismiss and ruled that Lafayette was not authorized to condemn the property. This appeal followed.

### **II. STATEMENT OF RELEVANT FACTS**

Three parcels of land sit at the Southeast corner of Arapahoe Road and Highway 287 in between Lafayette and Erie, and collectively are now known as Nine

Mile Corner. Ex 31, p 1091. Historically, these parcels sat in unincorporated Boulder County. The 22-acre parcel which Lafayette seeks to condemn is known as the “Nelson” property and it was designated as Rural Preservation under the East Central Boulder County Comprehensive Development Plan Intergovernmental Agreement (“ECIGA”) and the Boulder County Countywide Coordinated Development Plan (“Super IGA”). EX P8, p. 484; EX P11, p. 500. Under both of these documents, the rural land designation served “the purpose of preserving a community buffer serv[ing] the economic and civic interests of their citizens...” EX 21, p. 997; EX P11, p. 486.

“TOEURA and Erie purchased Nine Mile Corner in a series of transactions between 1998 and 2013, an[d] annexed Nine Mile Corner into Erie in 2015.” CF, p 65. Nine Mile Corner was annexed into Erie and the land use designation changed from rural preservation to regional commercial. CF, p 65; TR 2/14/17am, p 76:14-15; EX 3, p 930; EX P20, pp 520-523. Respondents began planning a large shopping center on the entire Nine Mile Corner, which abuts a Lafayette residential neighborhood, Beacon Hill. TR 2/14/17am, p 9:4-5; pp 69:4-70:19. After attempts to purchase the “Nelson” property failed, Lafayette began condemnation proceedings to preserve the existing open space buffer between Lafayette and Erie. See, CF, pp



1-6. Lafayette chose to only condemn the southern “Nelson” parcel, as opposed to all three parcels on the entire 43-acre corner.

At the time of the condemnation filing (July 2016), Respondents’ development of Nine Mile Corner was still a conceptual idea without a commitment from King Soopers or any other anchor tenant. EX 31, p 1101. The Nine Mile Corner Project had not submitted a formal proposal to the Planning Commission, received a CDOT access permit or even completed a land use application. TR 2/14/17am, pp 71:4-72:4; pp 102:24-104:15. In fact, the Nine Mile Corner proposed site plan was not released to the public until it was attached to Respondents’ Motion to Dismiss in September 2016. TR 2/14/17pm, pp 2:21-3:7. Lafayette’s City Council was not privy to any of this information at the time they adopted their condemnation ordinance in May 2016.

### **III. PROCEDURAL HISTORY**

This is an eminent domain action filed pursuant to C.R.S. § 38-1-101, et seq. in which Lafayette sought to condemn 22 acres of property owned by TOUERA to preserve the open space buffer between the Erie and Lafayette communities, (the “Property”). CF, pp 1-6. Erie and the other Respondents were named in the suit because they were thought to have a record interest in the Property or per statute. CF, p 3.

Respondents jointly filed a Motion to Dismiss for lack of jurisdiction pursuant to C.R.C.P. 12(b)(1). CF, pp 63-85. Lafayette sought immediate possession of the Property per C.R.S. § 38-1-105(6)(a), but the District Court ruled that it would not set a hearing on immediate possession until the motion to dismiss was decided. CF, pp 18-22; pp 312-313.

An evidentiary hearing on the motion to dismiss was held on February 14-15, 2017. On February 16, 2017, in a written Order the District Court granted the motion to dismiss, ruling that Lafayette had not proven that the condemnation was for a proper public purpose and therefore the court lacked jurisdiction to proceed. CF, pp. 529-543. This ruling effectively established that Lafayette cannot condemn the Property.

Respondent's Motion for Attorney Fees and Bill of Costs and Lafayette's Request for a Hearing on the matter are still pending before the District Court. CF, pp 544-685.

#### **IV. THE RULING, JUDGMENT OR ORDER BEING APPEALED**

Lafayette is appealing the District Court's February 16, 2017 Order Granting Respondents' Motion to Dismiss. CF, pp. 529-543.

## **SUMMARY OF ARGUMENT**

In granting Respondents' Motion to Dismiss, the trial court ruled that Lafayette's condemnation is not in furtherance of a proper public purpose and lacked good faith. Each ruling is wrong.

Boulder County and its municipalities have long stressed the importance of open space and community buffers. At this point, Lafayette has acquired around 1,300 acres in an effort to protect its flanks and keep from merging with other communities. Just east of Nine Mile Corner is the Kneebone Open Space property; a 30-acre open space area acquired solely by Lafayette to buffer itself from Erie. The Kneebone acquisition extends all the way to Arapahoe Road. On Nine Mile Corner, Lafayette practiced restraint by only seeking to acquire the 22-acre southern "Nelson" parcel; stopping short of obtaining the entire 45-acre, three parcel area up to Arapahoe Road, thus leaving the remaining property in Respondents' hands.

Lafayette's City Council chose to condemn this land "for open space purposes and to protect Lafayette's unique community character by providing a buffer from neighboring communities" when they adopted the condemnation ordinance. The Colorado eminent domain statutes recognize open space as a valid "public purpose." The Colorado Supreme Court went further by authorizing

condemning open space outside of a home rule municipality's territory in the Town of Telluride v. San Miguel Valley Corp., 185 P.3d 161 (Colo. 2008) case. In the present case, the District Court's Order failed to provide an analysis under the public purpose factors identified in Public Serv. Co. v. Shaklee, 784 P.2d 314 (Colo. 1989)("Shaklee I"). If it had, the Court's analysis would have surely favored Lafayette's legislative determination. Lafayette, a home rule municipality, is continuing its preservation of a community buffer that was protected by the ECIGA and Super IGA by undertaking a condemnation for open space, a true public purpose.

Whereas the concept and the specific phrase, "community buffer," is referenced by Erie, Lafayette and Boulder County in various Comprehensive Plans, Intergovernmental Agreements ("IGAs"), and Parks, Recreation, Open Space and Trails Master Plans ("PROST"); there is no set definition for it. Erie's own city manager admitted that there is no rule of thumb in terms of size for a community buffer and that defining one is "a very case-specific kind of an exercise." Community buffers are quite different from internal setbacks and land use codes used within a community or municipality, and those standards are inapplicable when developing a buffer *between* communities. In the specific case

of Nine Mile Corner, Lafayette chose the property to condemn based on “the natural break lines” (the ditch), “the topography,” and “the setting.”

This condemnation was undertaken for a proper public purpose (open space) and in good faith. Lafayette’s city council found that “Acquisition of such property is necessary for the public purpose of open space and benefits associated with open space, as well as preservation of Lafayette’s local and unique character, and buffering of Lafayette from development activities in neighboring communities.” Absent a showing of bad faith, this finding cannot be disturbed. Respondents produced evidence at trial as to how their proposed shopping center would be laid out and what tenants might go where and how Lafayette’s acquisition would affect this, but Lafayette knew none of this information when they decided to undertake this condemnation. What Lafayette did know was that Erie was coming across Arapahoe Road right up against Lafayette’s Beacon Hill neighborhood; obliterating any discernible break between the two municipalities. Lafayette made the legislative determination to condemn the “Nelson” property based on Lafayette’s history and this area’s history of creating open space and protecting buffers between communities. Respondents have no documents or testimony to show a lack of good faith on behalf of Lafayette; therefore, Lafayette’s finding of necessity must stand.

As the District Court found in this case, both Respondents' and Lafayette's plan for the Property will eliminate blight, a proper public purpose.

## **ARGUMENT**

### **I. Lafayette's Condemnation is for a Proper Public Purpose.**

#### **A. Standards of Review.**

The conclusions in the trial court's Order Granting Respondents' Motion to Dismiss present both factual and legal conclusions. Specifically, whether Lafayette's condemnation is for a proper public purpose is a mixed question of fact and law. In an eminent domain case, when an appellate court is faced with a mixed question of fact and law, the court may take a number of different approaches:

The court may treat the ultimate conclusion as one of fact for purposes of review and apply the clear error standard. Alternatively, the court may conclude that a mixed question of fact and law demands de novo review. Finally, the court may review the findings of fact for clear error and still look de novo at the legal conclusions that the trial court drew from those factual findings.

E-470 Pub. Highway Auth. v. 455 Co., 3 P.3d 18, 22 (Colo. 2000) (internal citations omitted).

**B. Preservation of Issue for Appeal.**

This issue was preserved in Lafayette’s Petition in Condemnation (CF, p2 ¶¶ 6-7); in Lafayette’s Motion for Immediate Possession (CF, p19 ¶¶ 1-2); in Lafayette’s Reply to Respondents’ Response to Petitioner’s Motion for Immediate Possession (CF, pp 308-310); in Lafayette’s Response to Respondents’ Motion to Dismiss and Request for Discovery (CF, pp 314-325); at the evidentiary hearing (TR 2/15/17pm, p 31:2-7); and throughout the trial Court’s Order (CF, pp. 529-543).

**C. Contentions and Reasoning.**

**1. Condemning for Open Space is a Valid and Recognized Public Purpose.**

The public purpose requirement is derived from Colorado Constitution Article II, § 15, which requires the judiciary to determine whether a contemplated use is public:

Private property shall not be taken or damaged, for public or private use, without just compensation . . . and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

See also, C.R.S. § 38-1-101(1)(a) (applying the same principles to takings by state or political subdivisions of the state).

The Colorado Supreme Court has ruled that it is for the courts to determine if a contemplated use is really a public use. Shaklee v. District Court, 636 P.2d 715, 717 (Colo. 1981); Thornton Development Authority v. Upah, 640 F.Supp. 1071, 1076 (D. Colo. 1986). However, a court need only determine that the stated public purpose for a condemnation is supported by the record. City & County of Denver v. Block 173 Associates, 814 P.2d 824, 828-829 (Colo. 1991). A legislative determination of public use must stand unless the condemning authority has acted in an arbitrary and wholly unwarranted manner. Milheim v. Moffat Tunnel Improvement Dist., 211 P. 649 (Colo. 1922), aff'd, 262 U.S. 710 (1923).

Lafayette's City Council passed an ordinance on May 3, 2016 declaring an intent to acquire this property, by condemnation if necessary, "for open space purposes and to protect Lafayette's unique community character by providing a buffer from neighboring communities." EX 25, p 1026. City Council further found, "Lafayette has, and continues, to recognize the importance of acquiring open space land within its designated planning area... [to serve] as an important buffer from neighboring communities." Id. "Boulder County and most every municipality within Boulder County, including the Town of Erie, have recognized the public importance of protecting the unique characteristics of the various communities within the County by providing a buffer through open space and



preservation of rural land...” Id. “Lafayette has engaged in intergovernmental agreements with Boulder County and neighboring communities for the specific purpose of preserving agricultural lands and providing a buffer between Lafayette and its neighboring communities.” Id. “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, p 1027.

C.R.S. § 31-25-201(1) grants cities the right to exercise eminent domain for the purpose of acquiring open space. C.R.S. §§ 29-7-104, -107 grants municipal corporations the authority to condemn property for “the preservation or conservation of sites, scenes, open space, and vistas of scientific, historic, aesthetic, or other public interest.” Colorado Constitution Article XX “grants home rule municipalities the power to condemn property for open space and park purposes.” Town of Telluride v. San Miguel Valley Corp., 185 P.3d at 165.

Lafayette took legislative action through the adoption of Ordinance No. 20, Series 2016 and declared the acquisition of the property was for the public purpose of open space and the benefits associated with open space, as well as preservation of Lafayette’s local and unique character, and buffering of Lafayette from development activities in neighboring communities. EX 25, pp 1026-1028.

Lafayette’s stated public purpose is supported by the record, thus satisfying Block 173 Associates. Additionally, Lafayette did not act in an arbitrary and wholly unwarranted manner in violation of Milheim when it made its legislative determination. Thus, the trial court’s second guessing of Lafayette’s determination of a public purpose constitutes reversible error.

**2. The Telluride Case Clarified that Home Rule Municipalities May Condemn Extraterritorially for Open Space Purposes.**

Lafayette is a home rule municipality, whereas Erie is merely a statutory town. TR 2/14/17am, p 92:6-10. In Telluride, a home rule municipality challenged the constitutionality of subsection 4b. of C.R.S. § 38-1-101 which limited its ability to condemn for open space outside its territorial limits. The Supreme Court found this section of the statute to be unconstitutional as to home rule municipalities, but did not address its application as to statutory municipalities. Today, this restriction has not been challenged and remains in place as to statutory municipalities. The defendants in Telluride were private developers with economic motivations much like the Respondents in this case.

“[A]rticle XX grants home rule municipalities the power to condemn property, within or outside of territorial limits, for any lawful, public, local, and municipal purpose.” Telluride, 185 P.3d at 166. “Section 31-25-201(1), C.R.S. (2007), grants cities the authority to condemn extraterritorially ‘as in the judgment

of the governing body of such city may be necessary' for 'park or recreational purposes,' 'parkways," and 'open space' within five miles of a city's boundaries. Id. at 168. "In sum, the General Assembly's ability to confer upon municipalities the power to condemn for parks and open space is evidenced by the numerous statutes which in fact confer that power, thus confirming that parks and open space are lawful, public, local, and municipal purposes within the scope of article XX." Id.

The Telluride Court goes on to state that, "many Colorado home rule municipalities of all sizes and geographies manage extensive open space programs," and provides a footnote listing many examples, including Lafayette. Id. The Court then states, "a number of these home rule municipalities have seen fit to acquire open space outside their municipal boundaries," and provides another footnote of examples, of which Lafayette was not listed. Id. In conclusion, the Court held "that the extraterritorial condemnation of property for open space, parks, and recreation constitutes a lawful, public, local, and municipal purpose within the scope of Article XX." Id. at 169. The Property Lafayette seeks to condemn is within 5 miles of the Lafayette city boundaries. In fact, the Property borders Lafayette; therefore, this open space condemnation is authorized by both statute and the Telluride case.

### **3. The Shaklee Factors Support a Finding of Public Purpose for this Project.**

Pursuant to Shaklee I, 784 P.2d at 318, there are four factors to consider when determining if a project has a public purpose. The District Court's Order Granting Respondents' Motion to Dismiss cited these four factors, yet failed to provide any analysis of the factors. CF, pp 705; 713.

Factor (1) is the physical condition of the land. The entire Nine Mile Corner consists of a former reservoir and the "Kuhl" property to the north that are both essentially separated by a ditch from the "Nelson" property. EX 31, p 1091; TR 2/14/17am, p 120:18-23. The "Kuhl" and "Nelson" properties were historically designated as rural preservation and contain "free-standing residential units with auxiliary buildings." EX P8, p 484; EX 3, pp 930-931. As the aerial map shows, this land is undeveloped and wide open. See, EX 3, p 931. Lafayette's condemnation for open space would have this land remain in its current and natural state. Respondents are planning on building a commercial retail center that will drastically change the condition of the land.

Factor (2) is the needs of the community. Whereas there are other undeveloped lands on which a shopping center can be built, this is literally the only place an open space and buffer can be placed here to separate Lafayette and Erie. See, EX 3, p 931; TR 2/14/17am, p 26:21-24. Lafayette's residents place great

importance on open space and community buffers to retain Lafayette's unique community identity. See, EX P12 – P13, pp 501-505.

Factor (3) is the character of the benefit conferred on the community. As Lafayette's Ordinance No. 20, Series 2016 states, this condemnation is "for open space purposes and to protect Lafayette's unique community character by providing a buffer from neighboring communities," and to protect "the unique characteristics of the various communities within the County by providing a buffer through open space and preservation of rural land..." EX 25, p 1026. The sole purpose of Lafayette's condemnation is to preserve the character of the Lafayette community and keep it from becoming physically merged with Erie.

Factor (4) is the necessity of the improvement in the development of the resources of the state. As discussed elsewhere in this brief, open space and community buffers are of utmost importance to the natural resources of the state and its individual communities. This is demonstrated by its inclusion in Comprehensive Plans, IGAs and at least eighteen municipalities managing "extensive open space programs" according to Telluride, 185 P.3d at 168.

This Court committed reversible error by not providing an analysis under Shaklee I. If it had, a proper public purpose would have been found. A proper public purpose authorized by both case law and the eminent domain statutes, and

wholly supported by the record. A proper public purpose as determined by Lafayette's City Council after careful consideration and deliberative process.

## **II. There is No Bad Faith or Fraud Behind Lafayette's Decision to Condemn this Property.**

### **A. Standards of Review.**

The trial court concluded, "[t]he absence of good faith bars Petitioner's power to acquire Respondents' property" in its Order Granting Respondents' Motion to Dismiss. CF, p 716. This finding of lack of good faith and subsequent barring of Lafayette's acquisition presents both factual and legal conclusions. In an eminent domain case, when an appellate court is faced with a mixed question of fact and law, the court may take a number of different approaches:

The court may treat the ultimate conclusion as one of fact for purposes of review and apply the clear error standard. Alternatively, the court may conclude that a mixed question of fact and law demands de novo review. Finally, the court may review the findings of fact for clear error and still look de novo at the legal conclusions that the trial court drew from those factual findings.

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### **B. Preservation of Issue for Appeal.**

This issue was preserved in Lafayette's Petition in Condemnation (CF, p2 ¶¶ 6-7); in Lafayette's Motion for Immediate Possession (CF, p19 ¶¶ 1-2); in

Lafayette’s Reply to Respondents’ Response to Petitioner’s Motion for Immediate Possession (CF, pp 308-310); in Lafayette’s Response to Respondents’ Motion to Dismiss and Request for Discovery (CF, pp 314-325); at the evidentiary hearing (TR 2/14/17am., p 27:9-18; TR 2/15/17pm., pp 30:17-33:10); and throughout the trial Court’s Order (CF, pp. 529-543).

**C. Contentions and Reasoning.**

**1. Lafayette’s Condemnation was Undertaken With Good Faith; Therefore, its Finding of Necessity Cannot be Disturbed.**

“It is well-settled law that in the absence of fraud or bad faith, the determination by a public agency as to the need, necessity and location of highways, or other public improvements, is final and conclusive and will not be disturbed by the courts.” Colorado State Bd. of Land Comm’rs v. Dist. Court in & for Jefferson Cnty., 430 P.2d 617, 619 (Colo. 1967). “A determination of necessity ... is not reviewable absent a showing of bad faith or fraud.” Block 173 Associates, 814 P.2d at 829. “The question of necessity does not involve the right to condemn, nor whether plaintiffs could ever make use of the property sought to be condemned if they obtained it. The question of necessity simply involves the necessity of having the property sought to be taken for the purpose intended.” Mortensen v. Mortensen, 309 P.2d 197, 199 (Colo. 1957)(internal citations removed). “The

question of necessity in condemnation proceedings presents itself in various aspects. What is proper to consider in determining this question will vary according to the circumstances of each particular case.” Id.

Gary Klaphake, Lafayette City Administrator (“Klaphake”) explained to the court how Lafayette’s City Council and Mayor came to determine what land to acquire in this condemnation. Klaphake explained the 22 acres were an appropriate size for this condemnation based on the City Council and the Mayor’s desire for an open space buffer in this location. TR 2/14/17 pm, pp 25:19-26:8. That this parcel was chosen based on “the natural break lines” (the ditch), “the topography,” and “the setting.” TR 2/14/17 pm, p 37:16-18. Klaphake stated that Lafayette “is creating 1,300 acres of open space around the city to protect its flanks.” TR 2/14/17 pm, pp 34:25-35:2. Klaphake goes on to detail City Council meetings, executive sessions and discussions with the mayor wherein the size of the condemnation was discussed and including an argument that “they should take the whole darn thing.” TR 2/14/17 pm, pp 120:6-122:14. “There was an appetite to take it all the way to Arapahoe, but we had to practice some restraint... Open space people would have loved to have the whole thing green, but you don’t always get what you want.” TR 2/15/17 am, p 24:10-16. City Council “had advice from their city attorney and others that ... practicing out some restraint was in their best



interests.” TR 2/15/17 am, p 25:17-21. Ultimately, City Council decided the open space buffer should be limited to the roughly 22 acres of the southernmost parcel and passed Ordinance No. 20, Series 2016. EX 25, pp 1026-1028.

When Klaphake was asked if “22 acres is absolutely necessary to create a buffer...” he responded, “It’s my position that the City Council determined that 22 acres was reasonable and appropriate.” TR 12/14/17pm, p 38:12-15. This answer is sufficient for Mortensen, because the property being sought is for the purpose intended- an open space buffer.

Whereas the concept and the specific phrase, “community buffer,” is referenced by Erie, Lafayette and Boulder County in Comprehensive Plans, IGAs, and PROSTs, there is no set definition. Erie’s City Manager, A.J. Krieger testified that there was no rule of thumb in terms of size for a community buffer. TR 12/14/17am, p 80:19-23. Krieger stated further, “‘buffer,’ ... incorporates more than just... a set dimension of a setback... And by definition, those are always going to be... a very case-specific kind of an exercise.” TR 12/14/17am, pp 80:23-81:8. Further, the City Council themselves made the legislative determination that “Acquisition of such property is necessary for the public purpose of open space and benefits associated with open space, as well as preservation of Lafayette’s

local and unique character, and buffering of Lafayette from development activities in neighboring communities.” EX 25, p 1027.

Klaphake denied ever advising City Council to acquire the area to prevent a King Soopers move. TR 12/14/17pm, p 122:15-19. Klaphake also denied that City Council was willing to engage in “some fraud by setting the boundaries of this in a way that they knew would stop King Soopers from moving.” TR 12/14/17pm, p 122:20-24. Respondents have no testimony that contradicts these statements, nor any documents that prove otherwise.

Klaphake explained the acquisition of a similar open space project known as the Kneebone property. “Lafayette created 30 acres of open space on the Kneebone property between Lafayette and Erie, all on the Lafayette side. So there’s a pattern of trying to keep the community separated and that pattern is just east of this property, and it exists today at 30 acres.” TR 2/14/17 pm, p 37:18-23. “As Lafayette saw Erie annex and building homes in our direction, they stepped in and used their open space money and bought that 30 acres.” TR 2/14/17 pm, p 111:14-16. “Lafayette acquired this 30 acres and not let it become homes as a community buffer, and hence why we think it’s similar to what we are trying to do here.” TR 2/14/17 pm, p 112:1-4.

At the time of the condemnation filing (July 2016), Respondents’ development of Nine Mile Corner was still a conceptual idea without a

commitment from King Soopers or any other anchor tenant. EX 31, p 1101. The Nine Mile Corner Project had not submitted a formal proposal to the Planning Commission, received a CDOT access permit or even completed a land use application. TR 2/14/17am, pp 71:9-72:4; 102:24-104:15. In fact, the Nine Mile Corner proposed site plan was not released to the public until it was attached to Respondents' Motion to Dismiss in September 2016. TR 2/14/17pm, pp 2:21-3:7. Klaphake was asked if City Council knew they were stopping a King Soopers by passing that ordinance and his reply was, "they didn't." TR 2/15/17am, p 23:6-17. As the Nine Mile Corner was still in such preliminary stages, Lafayette would have no idea as to how the project was going to look; where King Soopers or any other anchor was going to lease space; and what effect, if any, Lafayette's acquisition would have for the project. Lafayette's sole goal here is to keep a buffer of open space between Erie and Lafayette and not Lafayette continuing "its efforts to stymie Erie's development plans at Nine Mile Corner" or ensuring Erie doesn't engage in commercial development on Nine Mile Corner as the Court erroneously found. CF, pp 542-543.

It would be much easier to find a lack of good faith for Respondents' activity on this corner than Lafayette's. During the pendency of the ECIGA (1994 – 2014), Erie was effectively prohibited from purchasing the Property. In 2011, Erie created

TOUERA, named the Erie Board of Trustees as the governing body, and approved the purchase of the Property under the guise of urban renewal. TR 2/14/17am, pp 32:13-21; EX P10, p 485. As TOUERA was not a party to the ECIGA, this purchase was not technically prohibited, but Erie did provide the funds to TOEURA from the town's general funds. EX P25, pp 532-533. Respondents acquired the Property without first adopting an Urban Renewal Plan, contrary to C.R.S. § 31-25-107, and despite TOEURA citing the presence of "urban renewal plans" at the adoption of a Resolution approving the contract to buy this Property in November 2011. EX P10, p 485. Respondents' Highway 287 Urban Renewal Plan was not completed until September 2015; years after the land acquisition. EX 3, pp 926-955. By this point, Erie had annexed the Property and changed the land use to regional commercial, thus producing far different expectations when one is determining blight.

The court found that "two separate condition studies reflect Nine Mile Corner is a blighted area." CF, p 539. In fact, the February 2012 conditions survey does not contain this Property. Respondents represent that part of parcel id number 9 in this study, "Northeast southeast and southwest quadrants of the intersection of North 107th Street and Arapahoe Road," represents the entire Nine Mile Corner. EX 2, p 925. This proves wrong, when comparing any of the Parcels in Survey Subareas maps in the 2012 condition study to the map of the entire Nine Mile Corner in the

Urban Renewal plan. See, EX 2, p 913; EX 3, p 931. The only property from the Nine Mile Corner included in the 2012 condition study was the reservoir with the rounded southern boundary. The “Nelson” property is a perfect square that sits south of the reservoir. Additionally, the “Nelson” property lay outside the Erie municipal boundaries until its annexation in 2015; therefore, if it was included on this map in 2012, it would be represented with cross-hatching to show it is “outside of municipal boundary.” EX 2, p 913. This means that not only did Erie provide funds to purchase the property for urban renewal purposes in 2011 when Erie itself was prohibited from purchasing it by the ECIGA, but a site condition study for the Property wasn’t performed until 2015. EX P42, pp 716-732.

Given Klaphake’s un-contradicted account and explanation of how Lafayette made its legislation determination as to what portion of Nine Mile Corner it condemned and Lafayette’s lack of information regarding Respondents’ plans, no bad faith or fraud can be found here. Accordingly, necessity cannot be challenged.

**2. The Public Purpose of Blight Elimination Will Still be Met After Lafayette’s Condemnation.**

Petitioner is purposely seeking to condemn only the portion of the land that is necessary for a legitimate community buffer. Respondents have undertaken an urban renewal project on Nine Mile Corner for the public purpose of eliminating blight.

EX 3, pp 929-930. If property is already “devoted to a public use, it cannot be taken

for another public use which would nullify and defeat the one to which it is already devoted, except in cases where the overwhelming necessities of the public were such that, in order to serve their needs, or supply their necessities, the taking of such property becomes necessary.” City and County of Denver v. Board of Com’rs of Arapahoe County, 156 P.2d 101, 104 (Colo. 1945)( internal citations omitted).

“Colo. Const. Art. XX grants to home rule municipalities ample power to acquire by condemnation property already devoted to a public use.” Thornton by Utils. Bd. v. Farmers Reservoir & Irrigation Co., 575 P.2d 382, 391 (Colo. 1978).

Respondents can still build a shopping center here, and continue their purpose of eliminating blight, even after Lafayette’s condemnation; nothing about Lafayette’s acquisition for open space would create blight conditions. According to Respondents’ expert, Karen Blumenstein, the development would “change from a regional condition to a more neighborhood-oriented condition.” TR 2/15/17am, p 83:24-25. The Court’s factual finding #35 states:

The Court finds that the remaining site could accommodate a retailer of this size [the coveted proposed King Soopers], but 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.

CF, pp 537-538. There was testimony that the costs of land remediation would increase without the “Nelson” property, but Blumenstein failed to consider how the just compensation provided by Lafayette’s condemnation would help fund these costs. TR 2/15/17am, pp 84:7-86:8; pp 101:4-102:6. With a smaller shopping center, there would be decreased revenue, but revenue generation is not a recognized purpose under the Colorado Urban Renewal Law. See, C.R.S. § 31-25-101, et al.

The Court found:

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.

CF, p 541. The Court went on to say that Respondents have “the right to pursue greater tax revenue and the elimination of blight,” perpetuating its flawed reasoning that tax revenue is a valid purpose under urban renewal. Id. Since Lafayette’s project would eliminate blight and Respondents can still meet the public purpose of eliminating blight for their project, Lafayette is not nullifying or defeating Respondents’ public purpose. Therefore, the Court misapplied the law and this decision should be reversed.

**3. Open Space and Community Buffers Have Long Been a Coveted Aim of Boulder County, Lafayette, and Various Other Boulder County Municipalities.**

Various municipalities in Boulder County began entering into IGAs for purposes of land use control and conservation pursuant to C.R.S. § 29-20-101, et al. These IGAs helped communities with “planned and orderly development” and by “regulating the use of land on the basis of the impact thereof on the community or surrounding areas.” C.R.S. § 29-20-104(g). Lafayette, Erie and Boulder County entered into the East Central Boulder County Comprehensive Development Plan Intergovernmental Agreement (“ECIGA”) in 1994. EX 21, pp 997-1011. Boulder County brought nine of these municipalities together into a “Super IGA” in 2003 with the intent to “preclude increased development and urban sprawl which would obliterate the boundaries of the Municipal Parties.” Both Petitioner and Erie were signatories to the “Super IGA.” EX P11, pp 486-500. The ECIGA expired by its terms in 2014 and in 2013; both Erie and Lafayette opted out of participating in the renewal of the Super IGA.

Purposes of the ECIGA were identified as “ensur[ing] that the unique and individual characters of Lafayette and Erie, respectively, are preserved;” that the “preservation of the rural character of surrounding lands with the Plan Area, is in the best interest of the citizens of each of the Parties;” and that “the prohibition of



rezoning or other discretionary land use approvals by Boulder County and of annexation or development by Lafayette or Erie, of certain lands within the Plan Area, is intended to preclude increased development and urban sprawl which would obliterate the boundaries of Lafayette and Erie...” EX 21, p 997. The property that Lafayette seeks to condemn was designated rural preservation under the ECIGA and protected from development. EX P8, p 484. This property was also included as Rural Preservation in the Boulder County Countywide Coordinated Development Plan (“Super IGA”). EX P11, p. 500. Under both of these documents, the rural land designation served “the purpose of preserving a community buffer serv[ing] the economic and civic interests of their citizens...” EX 21, p. 997; EX P11, p. 487.

Boulder County has acquired a tremendous amount of open space; the progression of these acquisitions can be visualized when comparing the green areas on the maps of Boulder County Open Space from 1970 through 2014. EX P4, pp 470-474. The City of Lafayette now has 1,300 acres of solely and jointly owned designated open space which Gary Klaphake, Lafayette City Administrator discussed at the hearing. TR 2/14/17pm, pp 34:25-35:2; p 49:13-18; pp 110:16-112:21. “We are trying to do our best to keep communities separated.” TR 2/14/17pm, p 49:18-19. The progression of open space preservation by both Erie

and Lafayette can be visualized when comparing the green (yellow in 2015) areas on the maps of Boulder County Open Space zoomed in on the Lafayette/Erie area in 1970 and 2015. EX P8, pp 475-479.

In addition to the IGAs and actual open space acquisition, Lafayette, Erie and Boulder County have all adopted various policies and Comprehensive Plans in their communities expressing the importance of open space and community buffers. Lafayette's 2013 Comprehensive Plan states, "The City of Lafayette defines Open Space as property or rights acquired solely or jointly by the City of Lafayette with the intent that the property or rights be permanently protected and preserved as: community buffers..." and to "[e]ndeavor to purchase as open space any land within the planning area that has been designated as rural preservation or community buffer under an Intergovernmental Agreements (IGA'S) to which the City of Lafayette is a signator." EX P35, pp 649-650. At the adoption of the Comprehensive Plan, the ECIGA was still in place, and this Property was protected as rural preservation. The Plan also stated a policy goal of incorporating "significant wildlife habitat and corridors, community buffers ...designated by the City into open space reserves." EX P35, p 657. Lafayette's 2013 PROST contains a Community Buffer section which reads, "As Front Range communities continue to grow, it is increasingly important to preserve the areas that lie between them to

provide a discernible break between communities and to preserve and enhance a ‘sense of place’ within each community. Open lands adjacent to the City’s development limit; Provides a buffer between existing neighborhoods and other land uses; Provides a visible buffer between Lafayette and adjacent cities.” EX P45, p 869. This Property meets all of these criteria.

Erie’s 2010 PROST contains an Open Space chapter in which “Open Space benefits have been identified...[as] Separating or buffering communities to allow them to keep their individual identities; Enhancing community gateways...; Providing visual separation between built areas...; [and] Maintaining Erie’s rural character and creating corridors for the safe and enjoyable movement of people and animals.” EX P46, p 871. Erie’s 2015 Comprehensive Plan contains a section on the goal of Community Buffers to “work with neighboring communities to establish appropriate community buffers, which may include open space, rural areas, and/ or agricultural lands...The town will strive to retain its identifiable edges and preserve community character by promoting physical separation from neighboring municipalities using... open space acquisition...” EX P43, p 821.

Despite Erie having a PROST and Comprehensive Plan in place that extolls the importance of open space and community buffers, Respondents’ current site plan only contains setbacks between the commercial shopping center and the

Beacon Hill Neighborhood; a 100 foot building setback and a 65 foot landscape setback. TR 2/15/17am, p 79:14-17: EX 4, 956. Klaphake describes what community buffers are, how they're decided upon and the process involved, stating, "It's about how important it is to keep communities and its identity from just becoming one megalopolis of stuff..." TR 2/14/17pm, pp 135:19-136:23.

Respondents brought up multiple examples of Lafayette neighborhoods built close to commercial shopping and Lafayette's commercial development along Highway 287. EX 16, pp 975-986. At the evidentiary hearing, Respondents' counsel discussed the lack of internal buffers and small buffers between properties within Lafayette. TR 2/15/17pm, p 24:9-15. The Court's finding #30 states: "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." CF, p 710. The operative word in that sentence is *within* Petitioner's boundaries. Almost one-half of the Court's Analysis and Order is devoted to discussion on how "Erie's Proposed Site Development Plan Does Not Violate a Setback Requirement" and on how "Lafayette's Development of Hwy. 287 Precludes Any Meaningful Community 'Buffer.'" CF, pp 713-717. The Court

finds, “Erie’s argument that Lafayette’s claim of prioritizing open space and buffers is inconsistent with its actions along Highway 287 is valid.” CF, p 716.

What Respondents and the Court’s reasoning completely misses is the difference between a municipality’s *internal* land use, planning and development compared to a buffer *between* communities. These arguments all miss that very important distinction and allow for the merging of communities without any discernable space between the two. If Respondents’ shopping center gets built according to their plan, there will be a mere 165 feet separating Lafayette and Erie at this corner. Arguably creating a megalopolis of stuff, and completely going against the history of this area and its long-standing goal of creating open space and buffers between communities. The court’s ruling on this matter is unreasonable and reversible error.

**4. Previous Attempts Were Made to Protect this Property as Open Space in Conjunction With Boulder County.**

Respondents make much ado about this Property not being placed on the priority list for open space starting in 2007. TR 2/14/17pm, pp 77:4-88:23. The Court pointed out, “this remained true through 2016.” CF, p 709. The court goes on to say, “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.” Id.

The Court ignored testimony and evidence that supported Lafayette's strategic decision to not continue asking Boulder County to jointly acquire the Property as open space. In 2002 and 2004, Lafayette did ask for Boulder's support on purchasing this Property and put it on priority lists. CF, pp 358-360. Klaphake explained at the hearing that Boulder County has certain attributes, such as riparian areas and wetlands; that Boulder looks for in property when it partners with other municipalities to buy open space, and this Property doesn't contain those attributes. TR 2/15/17am, p 39:1-20. Rather than continue to ask Boulder County for a partnership on this Property, Lafayette chose to ask for help in purchasing other lands. Klaphake explained to the Court that these open space priority requests were "strategic document[s] on how the city and county wanted to work together, not on what we [Lafayette] wanted to acquire as open space. We bought open space in that same period without even being on that list." TR 2/15/17am, p 38:8-13. Lafayette not asking Boulder County to acquire this Property with them after 2004 has no bearing on whether Lafayette had "its eyes on this property," but rather it was a strategic decision as to what properties Lafayette thought Boulder County would be willing to partner. If allowed to proceed, Lafayette will fund this condemnation on their own. TR 2/14/17pm, p 115:12-18. The Court's ruling that this Property was not a priority for Lafayette is an unfair and reversible error.

This Property has been a protected community buffer for years. Lafayette undertook this condemnation to preserve that condition and for no other purpose. After deliberative process, Lafayette weighed the options of how much of the Nine Mile Corner to condemn and based on the “case-specific” details of this Property, decided on only the “Nelson” parcel. Lafayette knew they were taking less than half of the Property and leaving the rest for Respondents to develop. Lafayette knew that an open space would eliminate blight and serve the same purpose as Respondents’ urban renewal plan. Lafayette did not know any of Respondents’ plan specifics because they had not been created or made public. Information Lafayette did not have and therefore could not have used in deciding on the condemnation. The record does not support the Court’s finding that Lafayette lacked good faith when it made the decision to condemn; therefore, that legislative determination of necessity must stand.

### **CONCLUSION**

Lafayette’s condemnation was for a proper public purpose and undertaken with good faith. Accordingly, Lafayette respectfully requests that this Court reverse the trial court’s February 16, 2017 Order Granting Respondents’ Motion to Dismiss and remand the case to the District Court so that Lafayette may proceed with the immediate possession portion of the proceedings.

Respectfully submitted this 22<sup>nd</sup> day of September, 2017.

HAMRE, RODRIGUEZ, OSTRANDER & DINGESS, P.C.  
**S/ DONALD M. OSTRANDER'S DULY SIGNED PHYSICAL  
COPY OF THIS DOCUMENT IS ON FILE AT THE OFFICE OF  
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**CERTIFICATE OF DELIVERY**

I hereby certify that on this 22<sup>nd</sup> day of September, 2017, a true and correct copy of the foregoing **OPENING BRIEF OF CITY OF LAFAYETTE** was sent via Colorado Courts E-filing System, and properly addressed to the following:

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