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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

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

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REPLY BRIEF OF CITY OF LAFAYETTE

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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 5,699 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

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INTRODUCTION

The City of Lafayette (“Lafayette”) is attempting a condemnation of roughly 22-acres (the “Property”) that would leave the Town of Erie Urban Renewal Authority (“TOEURA”) and the Town of Erie (“Erie”) (collectively, the “Respondents”) an approximate 23-acre area at Nine Mile Corner for an urban renewal project. Lafayette seeks this condemnation for open space purposes.

At the 2-day evidentiary hearing, Respondents indicated that this condemnation was unprecedented but they tellingly did not take “the position that that [sic] is not possible under the law.” TR 2/15/17pm, p 21:4-9. Lafayette acknowledges this is a case of first impression, and an important one at that. This case will determine whether citizens can protect their town’s boundaries from the urban sprawl of adjoining towns and whether a municipality’s desire for open space can be pushed out by another’s economic concerns. If this is decided in favor of Respondents, the next logical step is that Erie starts condemning property already devoted to open space for its urban renewal program.

ARGUMENT

I. Lafayette’s Condemnation is for a Proper Public Purpose.

A. The Shaklee Factors Support a Finding of Public Purpose for this Project.

Pursuant to Public Serv. Co. v. Shaklee, 784 P.2d 314 (Colo. 1989)(“Shaklee I”), 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 truly provide an analysis of the factors. CF, pp 705; 713. Respondents claim the “trial court analyzed these factors” and provides page numbers, yet doesn’t cite to any specific parts of the record where the court actually discussed all four factors. Answer Brief, p 20.

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 a portion of 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 entire land.

Factor (2) is the needs of the community. Respondents state, “Lafayette has plenty of vacant land in this area and within its own municipal boundaries that it could designate as open space.” Answer Brief, p 21. This is literally the only place an open space and buffer can be placed here to separate Lafayette and Erie, yet there are other undeveloped lands on which a shopping center can be built. See, EX P8, p 484; TR 2/14/17am, p 26:21-24.

Factor (3) is the character of the benefit conferred on the community. As Lafayette’s Ordinance No. 20, Series 2016 (“condemning ordinance”) 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 physically merging with Erie at this corner.

Factor (4) is the necessity of the improvement in the development of the resources of the state. As discussed throughout this Appeal, 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 Town of Telluride v. San Miguel Valley Corp., 185 P.3d 161, 168 (Colo. 2008).

The trial 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.

B. Lafayette’s Condemnation for Open Space and Community Buffer 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, “the question whether the contemplated use be really public shall be a judicial question,” and C.R.S. § 38-1-101(1)(a) (regarding takings by the state and its political subdivisions).

The Colorado Supreme Court has ruled 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). 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). “In examining the stated public purpose for a condemnation, we look to whether the stated public purpose is supported by the record. If support exists, our inquiry ends.” Sheridan Redevelopment Agency v. Knightsbridge Land Co., L.L.C., 166 P.3d 259, 265 (Colo. App. 2007)(citing Block 173).

“The court determines whether the purpose for the taking is public or private... There is no formula for determining whether the purpose for the taking is public. 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, 1076-77 (D. Colo. 1986)(internal citations omitted).

“In evaluating whether legislative power is being exercised for a public purpose, the court exercises an extremely narrow authority. ‘It is not for the court to oversee the choice of the boundary line nor to sit in review on the size of a particular project area.’ Berman, supra, at 35-36.” Oberndorf v. Denver, 696 F. Supp. 552, 560 (D. Colo. 1988). “In reviewing a condemning authority's finding that a proposed taking is for a public use, the court's role is to determine whether the essential purpose of the condemnation is to obtain a public benefit.” Denver

W. Metro. Dist. v. Geudner, 786 P.2d 434, 436 (Colo. App. 1989)(internal citations omitted). There have been no allegations of Lafayette reaping a private benefit here. No one has claimed that a member of the Lafayette city council, or any other individual involved in the condemnation, will personally benefit from the condemnation.

Lafayette’s City Council passed the condemning 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.

In addition to the ordinance passed by the Lafayette city council, the record was replete with other evidence that the true public purpose of the condemnation was for open space on behalf of their citizens, and not to control Respondents’ land use. A quote in a 2012 Boulder Camera article from Boulder County Commissioner, Cindy Domenico, was introduced at the hearing. In reference to Respondents’ acquisition of Nine Mile Corner, Domenico stated, “It’s small but crucial because it’s an area between the Town of Erie and the City of Lafayette, but preserving it would preserve the identity of this unique community in the county... It matters to me, because it matters to the constituents in that area.” EX P25, p 533; TR 2/15/17am, p 13:14-21. Gary Klaphake, Lafayette City Administrator (“Klaphake”) agreed that Domenico’s concerns were “a pretty widely shared concern among the city council members, [him]self, [his] staff, and the neighborhood at that time.” TR 2/15/17am, p 13:22-25. Klaphake testified about the Beacon Hill residents coming to see him on a “regular basis” because they “think that their edge of their city has been abandoned by the large shopping center being out in their backyard.” TR 2/14/17pm, p 118:11-15. There was

testimony that Lafayette citizens, Beacon Hill residents in particular, did not want “their city boundaries adjoining Erie’s city boundaries.” TR 2/15/17am, p 21:10-17.

Erie’s City Manager, A.J. Krieger (“Krieger”) testified that the Beacon Hill residents are “opposed to any development” north of their neighborhood. TR 2/14/17am, p 112:2-11. Respondents’ witness, James Dixon, told the court that in discussing the development of Nine Mile Corner, Klaphake “did mention that he would be an advocate for the residents of Lafayette, which obviously is part of Beacon Hill.” TR 2/14/17pm, p 13:13-15. Dixon also indicated that with Mr. Klaphake’s experience, Klaphake could anticipate the objections the Beacon Hill residents would raise if a commercial enterprise were built right up against their neighborhood. TR 2/14/17pm, p 17:9-19.

Evidence was introduced as to the importance of open space to the Lafayette citizens. Surveys of Lafayette citizens showing support to purchase additional land around the city to create a buffer between Lafayette and neighboring communities. Surveys supporting open space funding at existing or increased levels. See EX P12 – P13, pp 58-62. Also, a 2012 ballot measure wherein 80.45% of Boulder County voters approved a legacy tax for the acquisition and maintenance of open spaces. EX P15, p 66-67, TR 2/15/17am, p 10:1-12. Klaphake further testified that as time

went on “these open space programs and attempts to acquire buffers” not only became more and more popular, but “important.” TR 2/15/17am, p 10:13-21.

The City of Lafayette now has 1,300 acres of solely and jointly owned designated open space which Klaphake detailed 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 P5, pp 475-479.

Lafayette and Erie both have adopted various policies in their communities through their Parks, Recreation, Open Space and Trails (“PROSTs”) and Comprehensive Plans expressing the importance of open space and community buffers. EX P35, pp 649-650, 657; EX P43, p 821; EX P45, p 869; EX P46, p 871. This concept of preserving community boundaries and providing open space for citizens is not new, nor a subterfuge for a wrongful condemnation. Plentiful evidence of these matters was put before the court. Whereas Respondents’ position as to Lafayette’s purpose is purely circumstantial; based on inference and innuendo.

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.” Telluride, 185 P.3d at 165. Lafayette took legislative action through the adoption of the condemning ordinance 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 the preservation of Lafayette’s local and unique character. EX 25, pp 1026-1028. By its very nature, open space is intended to prevent development.

The Comprehensive Plans and PROSTs; the Open Space surveys and vote; Klaphake’s, Krieger’s and Dixon’s testimony about the Lafayette constituents opposing this development; and the Daily Camera article all support Lafayette’s stated public purpose, thus satisfying Block 173. As contemplated by Upah, Lafayette’s condemnation is for open space; an “actual use by the public.” Per Block 173 and Sheridan, the court’s inquiry should have ended there. Thus, the

trial court overstepped its Oberndorf's "extremely narrow authority" and committed reversible error.

C. Nine Mile Corner is Still Conceptual.

Lafayette's condemnation is for the public purpose of open space and community buffer, not to control Respondents' land use decisions and not to prevent a King Soopers move. Respondents continue to convey the impression that King Soopers is leaving the current Lafayette location and going to Nine Mile Corner. This is just not so. Lafayette is still in negotiations with King Soopers and there could even be a relocation within Lafayette. TR 2/14/17pm, pp 134:22-135:18; TR 2/15/17am, p 20:7-15. 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.

Respondents continue to claim that the 22-acre taking by this condemnation would remove access from Hwy 287 to the Nine Mile Corner site. Answer Brief, p 14. This is also not so. Lafayette has CDOT approval of an access control plan and a permit for a full movement intersection south of Nine Mile Corner at Lucerne Drive (Hix-Snedecker). TR 2/14/17pm, pp 125:7-126:4. This location of a light at Lucerne will prevent access being built into the Nine Mile Corner property from Hwy 287, with or without the 22-acre portion Lafayette seeks to condemn. TR 2/15/17am, p 104:5-14. Respondents' plans for Nine Mile Corner are still theoretical, with many unresolved issues including securing anchor tenants and much needed access.

D. Other Development Does Not Negate the Need for Open Space Here.

As the land use plan map of this area shows, Nine Mile Corner is the only place open space and a buffer are needed to physically separate the Lafayette and Erie communities. See EX P35, p 150. Everywhere else, these two municipalities are separated by major roads or existing open space areas.

The City of Louisville and Lafayette are touching in spots, but as explained at the hearing, that happened years ago; before open space was even a concept. TR 2/14/17pm, pp 34:16-35:4, p 38:1-3. Otherwise, Lafayette is surrounded by Unincorporated Boulder County. When Respondents attempt to use the TEBO,

Weems, and Lafayette Promenade developments as examples of areas Lafayette isn't trying to instill community buffers, it's disingenuous. Those areas don't abut another "community;" therefore, a community buffer there is not needed.

Respondents continue to point at examples of Lafayette neighborhoods built close to commercial shopping and Lafayette's commercial development along Highway 287; along with details of Lafayette's internal setbacks and land use standards. The trial court found: "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 crucial distinction and allow for the merging of communities without any discernable space between the two. If Respondents' shopping center gets built according to their latest plan, there will be a mere 165 feet separating Lafayette and Erie at this corner. None of the existing internal Lafayette properties, or future planned developments run this risk. Once again, Respondents and the trial court have confused issues instead of focusing on the matter at hand. Lafayette is validly using condemnation with the public purpose of creating open space to preserve a community buffer in the only plausible spot between these two communities.

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

A. Lafayette's Condemnation was Undertaken With Good Faith

As detailed above, Lafayette proceeded with this condemnation at the request of its' citizens and to protect a portion of the open space that currently exists between it and the Town of Erie on this corner. Respondents have tried to equate this with Pheasant Ridge Assoc. Ltd. Partnership v. Town of Burlington, 506 N.E.2d 1152, 1155 (1987). A Massachusetts case cited by Block 173. Pheasant Ridge with a much different fact pattern than the present case. The development Burlington sought to block was partially for low income housing. Massachusetts had such a need for low income housing that they passed legislation

known as the Anti-Snob Zoning Act to help facilitate the construction of this housing and bypass local regulations. It was found in Pheasant Ridge that there was nothing in the record to support Burlington's claim that it did not act in bad faith and that the "manner in which the town dealt with the attempted acquisition of the subject parcel was not in accord with its usual practices." Pheasant Ridge, 506 N.E.2d at 775, 778. The court went on to find that the alleged purposes for the taking were not proposed until minutes before the town meeting. Id.

Lafayette provided evidence to show that its citizens for years had protested development right up against their neighborhood, and of Lafayette (and Erie and Boulder County) protecting open space and community buffers. Lafayette proceeded with this condemnation via its usual practices in the same manner that it has for past takings and passed a multi-page ordinance with many findings to support its reasons. Of course, the most important distinction between Pheasant Ridge and our current case is that Lafayette's true purpose for the condemnation is the stated purpose, open space and community buffer.

There is not much Colorado case law regarding bad faith and the necessity of condemnation, but the Geudner case is quite often cited. Geudner is a Colorado Court of Appeals decision where the court found the primary purpose of the taking was to advance private interests because individual members of the condemning

authority stood to gain personally from the condemnation. The court found bad faith and did not allow the condemnation to move forward. Once again, there has been no allegations made or evidence entered that any individuals or private interests associated with Lafayette will benefit from this condemnation. Based on Lafayette's continued and unwavering general stance on open space and community buffers, and the long standing efforts Lafayette has made to protect this particular Property, there is simply no fraud or bad faith on behalf of Lafayette.

B. Lafayette's 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, 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.

Respondents incorrectly claim Lafayette showed no evidence of a need for the 22 acres. Answer Brief, p 23. Perhaps Klaphake didn’t use the exact term “need,” but he did explain to the court how Lafayette’s City Council and Mayor came to determine the land needed in this condemnation. Klaphake explained that 22 acres is 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 the condemning ordinance. Klaphake testified that out of the 1,300 acres of Lafayette’s open space, this 22 acres designation would be “somewhat in the middle... the more typical assemblage.” TR 12/15/17am, p 8:2-16. It should be noted, Lafayette is not only limiting their acquisition to less than half the available land, Lafayette is leaving Respondents with the much more visible corner of the Property.

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 38:11-15. This answer is sufficient for Mortensen, because the property being sought is for the purpose intended- an open space buffer.

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. Further, as Respondents point out in their Answer Brief, wherever King Soopers moves it needs over 120,000 square feet of space and Klaphake was “fully aware” of these requirements. Answer Brief, pp 13-14. Kings Soopers’ requirement of 120,000 square feet translates into less than 3 acres, and they would need about another 10 acres for parking. TR 2/15/17am, pp 19:22-20:4. The acreage left at Nine Mile Corner after the condemnation would be roughly 23 acres; plenty of space for a King Soopers, and then some.

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 716-717.

In Respondents’ Answer Brief, they made no effort to refute Lafayette’s evidence regarding their bad faith and fraudulent behavior regarding the use of Erie’s

town funds to buy Nine Mile Corner when they were prohibited from doing so by the ECIGA. Respondents didn't address their citing to an Urban Renewal Plan that had not been created in their Resolution to buy the Property and they once again claimed that the February 2012 conditions survey contains this Property, when a comparison of Survey Subareas maps in the 2012 condition study to the map of the entire Nine Mile Corner in the Urban Renewal plan plainly demonstrates that this is false. See EX 2, p 913; EX 3, p 931. Erie poorly planned their city and is now attempting to misuse urban renewal in a land grab for commercial development.

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; leaving more than a sufficient amount of acreage for King Soopers' requirements. 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 court ignored all of this evidence when it found that Lafayette lacked good faith in its decision to condemn; therefore, Lafayette's legislative determination of necessity must stand.

C. Lafayette's Condemnation is Not Defeating Respondents' Blight Elimination.

Lafayette is purposely seeking to condemn only the portion of the land that is necessary for a legitimate community buffer. Respondents' urban renewal project on Nine Mile Corner is for the public purpose of eliminating blight. The court found that both Respondents' planned development and Lafayette's "intent to maintain the property as open space," would eliminate blight. CF, p 715.

There was evidence that the costs of land remediation would increase without the "Nelson" property, but Karen 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 public purpose under the Colorado Urban Renewal Law. See C.R.S. § 31-25-101, et al. In fact, C.R.S. § 38-1-101(1)(b)(I)(emphasis added) specifically states that "public use" **shall not** include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenue." However, this use of the land is exactly what the trial court extolled when it found, "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, p 712. The court also found that “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 715. The court further found that Respondents have “the right to pursue greater tax revenue and the elimination of blight.” CF, p 715. The trial court wrongly chose Respondents’ pursuit of economic development and enhancement of tax revenue (not a true public use as specifically set forth in a statute) over Lafayette’s legitimate public purpose of open space.

Respondents warn economic warfare will be set off across the state if Lafayette is allowed to proceed with condemnation and that “A ruling in Lafayette’s favor prioritizes one municipality’s economic endeavors over that of another’s.” Answer Brief, pp 25 and 42. Ironically enough, these risks are far more likely to occur if the trial court’s ruling is allowed to stand.

Respondents claim they will “suffer greatly from the proposed taking.” Answer Brief, p 40. Once again, this should be addressed in the just compensation portion of the proceedings; not used as a reason to prevent the condemnation action. Respondents also repeat a previous citation to Arizona-Colorado Land & Cattle Co.

v. Dist. Court In & For Tenth Judicial Dist., 511 P.2d 23, 24-25 (Colo. 1973)

wherein a private corporation is causing a great loss to the landowner. Answer Brief, p 38. As Lafayette already pointed out in its Response to Motion to Dismiss and Request to Discovery, “[t]his opinion is **limited to the narrow issue** of the selection of a route for an Easement by a Private corporation.” Arizona-Colorado, 511 P.2d at 25 (emphasis added) (internal citations omitted); so this concept is inapplicable in a home-rule city condemnation.

Respondents incorrectly warn this court that “... there is no legal impediment to Lafayette developing the property in the future, even if it condemns the property under the guise of open space,” Answer Brief, p 42. In Lafayette, once property is designated as open space, Lafayette’s Charter §12.1 requires an election to change that designation. CF, p 320. Yet again, Respondents’ warnings fail to ring true.

D. There is no Set Definition for Community Buffer.

Respondents point out that Klaphake “stated there are no objective or written standards for a buffer and admitted that Lafayette’s code contains no buffer standards.” Answer Brief, p 24. Erie, Lafayette and Boulder County use the phrase “community buffer” in Comprehensive Plans, IGAs, and PROSTs, and nowhere is a definition provided. Krieger (Erie’s own City Manager) 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 Lafayette 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 describes to the court the differences between setbacks and buffers and that community buffers are “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. “It’s not paint by numbers.” TR 2/14/17pm, p 49:22. Community buffers may not have a set definition in terms of size, shape or even prescribed land use, but there is no question that they are between communities. This 22-acre parcel is the only place where this works as such; the only place where the two communities will be touching without a buffer.

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. No matter what the size of that setback, it wouldn't be enough for Lafayette's desire to provide open space between the two communities. In order to truly provide open space via a community buffer here, Lafayette needs acres, not feet. "Different land uses and a sense of open space and buffer separation from another entity," is driving the condemnation. TR 2/14/17pm, p 32:14-18.

E. Lafayette Properly Negotiated for the Property.

Respondents continue to point out that Lafayette did not negotiate with them regarding the size of the setback at the proposed shopping center. Lafayette is not required to negotiate anything but price as part of condemnation good faith negotiations. "The prerequisite of a failure to agree upon the purchase price for the property sought to be condemned generally requires only that the condemning authority make a reasonable good faith offer to reach an agreement with the owner of the property for its purchase. Lengthy or face-to-face negotiations are not required." Thornton by Utils. Bd. v. Farmers Reservoir & Irrigation Co., 575 P.2d 382, 392 (Colo. 1978). Lafayette did attempt to negotiate the price with Respondents and were unable to acquire the Property through negotiation. CF, p 3. No further issues

were required to be discussed or negotiated prior to condemnation. Respondents don't get to choose the size of Lafayette's acquisition.

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.

OPPOSITION TO ERIE AND TOEURA'S REQUEST FOR ATTORNEY FEES AND COSTS

Respondents' request for attorney fees and costs should be denied. Lafayette's condemnation is legitimate and each party should bear their own fees and costs.

Respectfully submitted this 8th day of December, 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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PURSUANT TO CRCP RULE 121, SECTION 1-26(9)**

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CERTIFICATE OF DELIVERY

I hereby certify that on this 8th day of December, 2017, a true and correct copy of the foregoing **REPLY BRIEF OF CITY OF LAFAYETTE** was sent via Colorado Courts E-filing System, and properly addressed to the following:

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