

DISTRICT COURT, PARK COUNTY, COLORADO

Court Address: Park County District Court  
300 – 4<sup>th</sup> Street  
Fairplay, Colorado 80440

**Petitioner:**

WILL-O-WISP METROPOLITAN DISTRICT, a quasi-municipal corporation of the State of Colorado

v.

**Respondents:**

MAGNESS LAND HOLDINGS LLC, a Colorado limited liability company; NORTH FORK ASSOCIATES, a limited partnership; WOODSIDE LTD., a Colorado corporation; WOODSIDE PARK UNIT 5 HOMEOWNERS' ASSOCIATION, a/k/a WOODSIDE PARK UNITS 5 AND 6 HOMEOWNERS' ASSOCIATION, a Colorado non-profit corporation; and MICHELLE A. MILLER, in her official capacity as Treasurer of Park County.

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Case Number: 06-CV-320

Division B

**PETITIONER'S IMMEDIATE POSSESSION HEARING BRIEF**

Petitioner, Will-O-Wisp Metropolitan District (the "District"), through its counsel, Faegre & Benson, LLP, submits the following Immediate Possession Hearing Brief for the Court's consideration in connection with the possession hearing currently scheduled on May 8, 2007.

## I. INTRODUCTION

In this eminent domain action, the District seeks to acquire the property interest (the “Property”) for the construction of an access road, a water pipeline, pumping station, and related facilities (the “Project”). Notwithstanding multiple communications with Respondent Magness Land Holdings, LLC (“Magness”) seeking to acquire the Property, the District was unable to reach a voluntary agreement. The District has therefore decided to exercise its statutory right of eminent domain under C.R.S. §32-1-1004(4) and C.R.S. §32-4-406(1)(j) and other relevant law to acquire the necessary interests. The Property to be acquired is identified and described in greater detail in the Petition in Condemnation. The District requires immediate possession of the Property to proceed with its Project and therefore, has filed a Motion for Immediate Possession as authorized by C.R.S. § 38-1-105(6)(a).

## II. HEARING ISSUES

A hearing for immediate possession is an *in limine* proceeding in which immediate possession of the property may be granted to the condemning authority once adequate security is deposited for the benefit of the respondents and other prerequisites to condemn have been established. Bd. of County Comm’rs v. Highland Mobile Home Park, Inc., 543 P.2d 103, 107 (Colo. App. 1975). The only issues to be decided at the immediate possession hearing are:

- (1) whether the District has the authority to condemn the Property;
- (2) whether the Property will be put to a public use or public purpose;
- (3) whether there has been a failure of the parties to agree upon the amount of just compensation for the acquisition of the Property; and
- (4) whether there is a need for immediate possession;

- (5) the amount of security that the District must deposit in order to obtain immediate possession of the Property.<sup>1</sup>

All of these issues will be discussed below.

**A. The District's Authority to Condemn**

Metropolitan districts are granted all the general powers given to special districts in C.R.S. § 32-1-1001, as well as additional powers. A metropolitan district has the power of eminent domain and dominant eminent domain and, in the manner provided by Article I of Title 38, C.R.S., may take any property necessary to the exercise of the powers granted, for specified purposes, which include the water pipeline project contemplated herein. See, C.R.S. § 32-1-1004(4). See also C.R.S. § 32-4-406(1)(j).

**B. The Taking is for a Public Purpose**

Article II, Section 15 of the Colorado Constitution requires that private property may only be taken for a public use or public purpose. This prerequisite is satisfied if the essential purpose of the condemnation is to obtain a public benefit. Denver West Metro. Dist. v. Geudner, 786 P.2d 434 (Colo. App. 1989). The determination is made by examining the needs of the community, the character of the benefit that a projected improvement may confer upon the locality, and the necessities for the public improvement. Tanner v. Treasury Tunnel, Mining & Reduction Co., 83 P. 464, 465 (Colo. 1906). Public use or purpose must be given a broad construction that does not defeat the powers of the government to acquire property for the benefit of the public. City & County of Denver v. Block 173 Assocs., 814 P.2d 824, 828-29 (Colo. 1991).

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<sup>1</sup> See C.R.S. § 38-1-105(6)(a); Shaklee v. Dist. Ct., 636 P.2d 715, 717-18 (Colo. 1981); Thornton v. Farmer's Reservoir & Irrigation Co., 575 P.2d 382, 391-92 (Colo. 1978); Colo. State Bd. of Land Comm'rs v. Dist. Ct., 430 P.2d 617, 619 (Colo. 1967); Swift v. Smith, 210 P.2d 609, 615 (Colo. 1948).

The evidence in this case will show that the Property is being taken for valid public purposes. Essentially the Property is being taken in order to expand and improve the District's current water supply system.

**C. The District Engaged in Good Faith Negotiations Prior to Commencing this Condemnation**

Under Colorado law, good faith negotiations require only that a condemning authority provide a landowner with a reasonable good faith offer and a sufficient time to respond. City of Thornton, 575 P.2d at 392. Good faith negotiations do not require extensive, face-to-face discussions, see id., or increased offers by the condemning authority in response to a landowner's counteroffer. See City of Holyoke v. Schlachter Farms R.L.L.P., 22 P.3d 960, 963 (Colo. App. 2001). Sufficient time to respond has been found to be as little as fifteen days between the condemning authority's first offer and the filing of the condemnation action. See City of Thornton, 575 P.2d at 391-92. If the property owner does not respond to the offer, or rejects the offer without making an acceptable counter-offer to the condemning authority, a condemnation action may be instituted. See id.

Where a failure to negotiate has been alleged by a landowner, the failure may be excused if the condemning authority can establish that negotiations would have been futile. *See, e.g., Vivian v. Bd. of Trustees*, 383 P.2d 801, 804 (Colo. 1963) (condemnor established that negotiations would have been futile where the landowners placed conditions on the purchase of the subject property that were clearly rejected by the condemnor); Larson v. Chase Pipeline Co., 514 P.2d 1316, 1317 (Colo. 1973). Such futility can also be established where the owner contests the legal authority of the condemnor to acquire the property. See, e.g., State v. Hurliman, 368 P.2d 724, 731-33 (Or. 1962) (negotiations futile because landowner contested condemnor's legal authority to condemn); Aronoff v. City of Dallas, 316 S.W.2d 302, 306 (Tex.

App. 1958) (same); City of Shreveport v. Kansas City, S.&F. Ry. Co., 166 So.2d 471, 473 (La. 1936) (same); Skamania Boom Co. v. Superior Court, 91 P. 637, 639 (Wash. 1907) (same).

The offer need only reflect the condemning authority's reasonable assessment of the just compensation owed to the landowner for the property interests being acquired. City of Holyoke, 22 P.3d at 963-64. As a general matter, an offer based on an appraisal should be considered reasonable absent a showing that it was made in bad faith. City of Holyoke, 22 P.3d at 963-64; Bd. of County Comm'rs of Jefferson County v. Blosser, 844 P.2d 1237, 1239 (Colo. App. 1992). In any event, an offer is not unreasonable solely because: (1) a landowner has obtained an appraisal that is substantially higher than the condemning authority's offer, see Interstate Trust Bldg. Co. v. Denver Urban Renewal Auth., 473 P.2d 978, 981-82 (Colo. 1970); (2) the property cannot be replaced for the amount of the offer, see Old Timers Baseball Ass'n v. Housing Auth., 224 P.2d 219, 222-23 (Colo. 1950); or (3) the condemning authority testifies at the immediate possession hearing that the property is worth more than the offer, see id.

The District will establish at the immediate possession hearing that Magness received multiple offers and communications in an effort to reach agreement on a voluntary acquisition of the Property prior to this case being filed, including an offer that was higher than the District's appraised value of the Property. Such offers were either ignored or rejected. Further negotiations would have been futile.

**D. The District has a Need for Immediate Possession of the Property**

At any time during an eminent domain proceeding, a condemning authority may request the right to take possession of, and use, the property that is the subject of the condemnation. C.R.S. § 38-1-105(6)(a). The purpose of this procedure is to ensure that necessary public projects are not delayed while the determination of just compensation is made. To obtain

immediate possession, the condemning authority must demonstrate that possession of the property is required for the public project and that a grant of possession will not result in needless disturbance of the landowner's possessory or other rights in the subject property. See Colo. Const., Art. II § 15.

At the hearing, the District will establish that immediate possession of the Property is currently needed.

**E. The District's Appraisal Evidence Will Reflect the Appropriate Deposit to be Made under C.R.S. § 38-1-105(6)(a)**

As a condition to obtaining immediate possession, a condemning authority must deposit a "sufficient sum" into the court registry. See C.R.S. § 38-1-105(6)(a). The deposit required by statute is neither payment nor part payment of the just compensation that will ultimately be determined at a valuation trial. Rather, the deposit provides the landowner with consideration for the possessory interests acquired and security for the payment of total compensation to be ultimately awarded at the valuation trial. City of Englewood v. Reffel, 522 P.2d 1241, 1244 (Colo. App. 1974). To determine the appropriate deposit at an immediate possession hearing, the Court is not expected to hold a full trial on the issue of just compensation:

There need be no trial whatever incident to immediate possession...there must be an investigation made by the court, and, either from the judge's own inspection or from affidavits from those competent to express opinions as to valuation, or from oral evidence of competent witnesses, there must be a determination of value which will be in an amount equal, in all probability, to compensation which will ultimately be awarded the landowner when the same is determined by a commission or jury .....

Swift v. Smith, 201 P.2d 609, 615 (Colo. 1948).

At the immediate possession hearing, the District will present the testimony of a competent appraiser establishing a value for the Property that reflects the likely compensation that will ultimately be awarded at the valuation trial. The evidence will show that the District's

determination of the value of the Property constitutes a sufficient sum to be deposited with the Court in order for the District to obtain immediate possession of the Property. Regardless of the deposit amount the Court may order however, our eminent domain statutes specify that the respondents are only entitled to withdraw 75% of the District's evidence of value presented at the hearing during the pendency of this action. See C.R.S. § 38-1-105(6)(b).

**F. Magness May Not Raise the Necessity For Acquiring the Property.**

It is "the province and right of the [condemning authority] to determine what property may be required to carry out a [public] purpose, and therefore what property must necessarily be condemned, if not otherwise, procurable, to effectuate it." City & County of Denver v. Bd. of Comm'rs, 156 P.2d 101, 106 (Colo. 1945). Substantial deference is to be given to a condemnor's determination of necessity. Colo. State Bd. of Land Comm'rs v. Dist. Ct., 430 P.2d at 619 (Colo. 1967). Absent a showing that the taking is unreasonable or fraudulent, a determination of necessity may not be reviewed by a court. City of Thornton v. Farmer's Reservoir, 575 P.2d 382, 389 (Colo. 1978). Questions about the feasibility or practicability of a public project or the project's financial success cannot be raised to challenge necessity. Mortensen v. Mortensen, 309 P.2d 197, 199 (Colo. 1957).

A determination of necessity generally may not be challenged, even in the face of considerable evidence that there is a better location for a project or a different way to proceed that will impact the landowner less significantly, absent a showing of bad faith or fraud. Dallasta v. Department of Highways, 387 P.2d 25 (Colo. 1963). Conclusory allegations of fraud and bad faith are insufficient. Colo. State Bd. of Land Comm'rs, 430 P.2d at 619. To prove fraud or bad faith, a condemnee must assert facts that "if true, would amount to fraud or bad faith." Id. Moreover, a showing of bad faith or fraud requires evidence that the condemnor had a dishonest

purpose, a personal interest in the condemnation involving a real or potential conflict of interest, or some similar improper motive. Denver West Metro. Dist. v. Geudner, 786 P.2d 434, 436 (Colo. App. 1989) (finding bad faith, but only based on strong evidence that the purpose of the condemnation was not to improve a drainage way, but to assist in a commercial transaction which would advance the personal interest of the condemning authority's officers).

Magness has not pled any facts indicating bad faith or fraud on the part of the District in its Answer. Thus, it has no basis for contesting the necessity of the taking. Deference must be given to the District's determination of the project's location, the extent of the taking and the scope of the interests required. Mortensen, 309 P.2d at 199; see also, Dallasta v. Dep't of Highways, 387 P.2d 25, 27 (Colo. 1963).

### CONCLUSION

For the reasons set forth above, and based on the evidence that will be presented at the immediate possession hearing, the District requests that at the conclusion of the hearing the Court enter an order granting the District the right to take possession of, and use, the Property for the purposes set forth in the Petition in Condemnation and that the Court require the District to deposit a sum into the Court Registry based on the determination of value made by its appraiser and presented at the hearing.

SUBMITTED this 10th day of April, 2007 through the JusticeLink electronic filing system pursuant to C.R.C.P. 121, § 1-26.

FAJERE & BENSON LLP



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 10th day of April, 2007, a true and correct copy of the foregoing Notice of Setting Immediate Possession Hearing was sent via JusticeLink to the following:

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/s/ Terri Lees

## **Anne Van Teyens**

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