

DISTRICT COURT, EAGLE COUNTY, COLORADO 885 Chambers Avenue, P.O. Box 597, Eagle, CO 81631	DATE FILED: June 30, 2023 4:04 PM CASE NUMBER: 2022CV30193
<p>Petitioner: TOWN OF VAIL, a Colorado home rule municipality,</p> <p>v.</p> <p>Respondents: THE VAIL CORPORATION, a Colorado corporation; PETER E. KATSOS, in his individual capacity; HOLY CROSS ELECTRIC ASSOCIATION, INC., a Colorado corporation; and TEAK J. SIMONTON, in her official capacity as the COUNTY TREASURER OF EAGLE COUNTY.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <p>Case Number: 22CV30193</p> <p>Division: 4</p>
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS	

THIS MATTER came before the Court for hearing on a Motion for Immediate Possession filed by the Petitioner, the Town of Vail (the "Town"), seeking to obtain immediate possession of the real property that is the subject of this condemnation action (the "Subject Property" or "Property" as more specifically defined herein). Respondent, the Vail Corporation ("Vail Resorts"), opposes the Motion and challenges the Town's right to condemn. In its Answer to the Petition in Condemnation, Vail Resorts included a Cross-Petition pursuant to C.R.S. § 38-1-109. A three-day immediate possession hearing was held on May 8 - 10, 2023 (the "Hearing").

THE COURT, after hearing evidence and argument, reviewing the exhibits and the file, and being otherwise fully advised in the premises, makes the following findings of fact, conclusions of law and orders:

I. PROCEDURAL HISTORY

A Petition in Condemnation was filed by the Town on October 14, 2022. A Motion for Immediate Possession was filed by the Town on the same date. The matter was originally set for hearing on an expedited schedule to commence on January 30, 2023. With the general agreement of the parties, the January 30th court date was vacated to allow the parties an opportunity to mediate the issues before the Court and to attempt to amicably resolve all or some of the issues.¹ The case was rescheduled for the May, 2023 dates to allow time for the mediation to occur. Ultimately, the mediation was unsuccessful and the Hearing was necessary.

During the Hearing, the Court heard testimony from Town witnesses Mayor Kim Langmaid, Kristen Bertuglia, and Sean Koenig, as well as expert witnesses Bill Andree, Matt Gennett and Melanie Woolever. The Court also heard testimony from Vail Resort witness Bill Rock and expert witnesses Tim Nelson and Marianne Batchelder. The Court admitted Town exhibits: A, B, E, H-M, O-T, Y, Z, AA, BB, FF, HH (first four pages only), KK, PP, SS, and VV; and Vail Resort exhibits 1-5 (5a-5e), 7-9, 12, 17, 18, 20, 21, 31, 40, 53, 55, 62-64, 65(J-L), 66A, 66(F-O), 67, 69, 70, 72-75, 80, 81, 83-86, 89-92, 94(C-E), 94G, 94H, 95A, 95D, 96A, 96F, 97B, 97D, 97(F-J), 98A, 98D, 104(A-E), 113, 115, 123, and 129-131.

During this phase of this condemnation action, the Court must rule upon the Town's Motion for Immediate Possession brought pursuant to C.R.S. § 38-1-105(6) and determine if the Town has met its burden of establishing by a preponderance of the evidence: 1) its legal authority to condemn the property in question; 2) whether the Town's intended use of the property is a public use or purpose; 3) whether there is a necessity to acquire the property for a public use or purpose; 4) whether there was a failure to agree on the compensation to be paid for

¹ Formally, the Town took no position on Vail Resort's Motion Regarding Ongoing Mediation; however, both parties generally agreed that being provided time to attempt resolution would be beneficial.

the property rights sought after good faith negotiation; and 5) the amount of deposit to be placed with the Court pending a final ascertainment of value. *Dep't of Transp. v. Stapleton*, 97 P.3d 938, 939 (Colo. 2004). The Court must also address Vail Resorts' asserted objections, defenses, and challenges to the condemnation action, and must also address Vail Resorts' Cross-Petition.

While there are five factors to be addressed by the Court during an immediate possession hearing, the disputed issues were narrower for this Hearing. The amount of deposit should the Court grant the motion for immediate possession was stipulated.² There was no dispute that the Town has the legal authority to condemn the Subject Property. While there was some dispute as to the Town's negotiation tactics, there is little dispute that there were good faith negotiations and a failure to agree on the compensation. The primary issue that this Court must address is whether the Town intends the use of the Subject Property to be for a public use or purpose and whether there is a necessity to acquire the Subject Property for that public use or purpose.

Even more specifically, the issue before the Court is whether the Town acted in bad faith and had an ulterior motive for the condemnation. The motive not being for the preservation of the Subject Property to protect the bighorn sheep herd, but to block a development which was argued to be unpopular with neighbors and influential residents of the Vail community. If the Court finds, as argued by the Town, that the motive was to provide open space for the bighorn sheep herd and that the Subject Property is necessary for this purpose, the motion for immediate possession will be granted. If the Court finds, as argued by Vail Resorts, that the motive was to block the development and/or that there is no necessity to condemn this property, the motion for immediate possession will be denied. The parties presented substantial collateral evidence in an attempt to persuade the Court as to true motive of the condemnation. As stated by the Court

² The parties stipulated to the amount of deposit the Town would make if awarded immediate possession of the Subject Property. The deposit amount agreed to was \$12,000,000.

during Hearing, depending on how it was interpreted, much of the evidence presented could support or undermine the position of either party.

In many ways this case has been pitted as the critical need for workforce housing versus the critical need to protect wildlife habitat. Both the Town and Vail Resorts acknowledge that both needs are important and that both entities have an obligation to address these needs. Despite these acknowledgments, the Town and Vail Resorts have been unable to work together to jointly focus on addressing these needs and meeting these obligations, at least as to the Subject Property. Instead of meeting their responsibilities and addressing workforce housing and protection of wildlife habitat in a responsible fashion, the Town and Vail Resorts have chosen to defer this decision to the Court. While this is their right, it is also a failure on the part of the Town and Vail Resorts. Moreover, while this case has been pitted as workforce housing versus bighorn sheep, it is not legally the issue before the Court. The Court will not and cannot determine which need supersedes the other in this dispute. The Court will not and cannot determine whether the Town is being irresponsible in foregoing workforce housing. The Court will not and cannot determine whether the bighorn sheep herd will survive or perish based upon this development. The issues that this Court must decide is whether the Town has met the requirements for immediate possession or whether, as argued by Vail Resorts, they are acting in bad faith. This is the limit of the issues before the Court.

II. FINDINGS OF FACT

1. The Town of Vail is a home rule municipality with a charter reserving all authority under Art. XX, Sec. 1-6 of the Colorado Constitution. *See* Ex. E (Excerpts from Town Charter).

2. Vail Resorts owns a 23.3-acre vacant parcel in East Vail (the aforementioned “Subject Property”) depicted on the maps admitted as Exhibits 1 and 3 and in the photographs included in the Town’s Draft Appraisal, Ex. J.

3. The Town has for many years identified the Subject Property (also referred to as the “Booth Heights” parcel) as a priority to acquire for open space and environmental protection. It was identified in the Town's 1994 Open Lands Plan. Ex. H, p. 18 (1994 Open Lands Plan). This objective was reiterated in the Town’s 2018 update to the Open Lands Plan. Ex. I, p. 56.

4. Prior to 2016, it was commonly believed that the Subject Property was owned by the Colorado Department of Transportation. In 2016, the Town determined that the Property was actually owned by Vail Resorts and informed Vail Resorts that it owned the Property.

5. Despite the prioritization of the Subject Property for open space, following the determination that it was owned by Vail Resorts, Vail Resorts, with the encouragement of the Town, began the process of rezoning the Property for workforce housing.

6. In 2017, Vail Resorts applied for and received approval to rezone the Subject Property from 23.3-acres of Two-Family Residential (R) zoning to a combination of 5.4 acres dedicated to workforce housing and approximately 18 acres dedicated to Natural Area Preservation (“NAP”). In 2019, the Town's Planning and Environmental Commission (“PEC”) voted 4-3 to approve Vail Resorts' development proposal for the Subject Property (generally referred to as the “Project”). The approval of this development was controversial for a number of reasons. These reasons included the bighorn sheep; however, the development was also unpopular with residents who did not want the workforce housing near their property.

7. The PEC imposed a number of wildlife mitigation terms on the development. Ex. 53 (PEC minutes from August 26, 2019). The mitigation measures included, among others: (1) a prohibition on pets in all rented units; (2) construction timing limitations controlled by the Colorado Parks and Wildlife; (3) a prohibition on short-term rentals, (4) a prohibition on resident activity outside the Housing Parcel; (5) an education program for all residents about the surrounding wildlife and plan compliance; (6) conditions on resident behavior in all leases and HOA documents and restrictive covenants relating to the same; (7) an enforcement right for the Town; (8) electronic monitoring with game cameras; (9) a tree/landscape buffer between the housing and the Booth Creek cliffs; (10) a conservation easement over the NAP Parcel; and (11) a \$100,000 contribution for habitat enhancement. Ex. 5(a)-(e) (the “Mitigation Plan”).³

8. The approval of the development was appealed to the Town Council. On October 15, 2018, the Town Council voted 4-3 to uphold the PEC's approval of the development proposal. Ex. 55., Day 1, 81:20 to 82:8; Ex. 104. The Town Council approved the development on the basis that it met the development criteria under the Town's Municipal Code. After the Town Council upheld the PEC's decision, the development approval was appealed by Town citizens to the Eagle County District Court. In the appeal, the Town defended its development approval process. The appeal was unsuccessful. An Order affirming the Town's approval of the development project was entered on October 19, 2020. *See Essin, et al. v. Town of Vail, Town Council*, Eagle County Case 2019CV30255.

³ This is an example of evidence that depending on how interpreted can be used to support or attack either position. One form of argument is that it shows that the bighorn sheep herd could be protected through mitigation efforts. Another form of argument is that this shows that the Town has always prioritized the bighorn sheep population in this area and that the condemnation is a further step to protect the herd.

9. Mayor Langmaid was one of the three Council Members who voted against the approval with the others being Council Member Foley and Council Member Mason. The Town Council directed staff to find an alternate site for Vail Resorts' proposed housing project. Ex. 104. Throughout the process, from PEC approval to Town Council approval and direction to find an alternative site, the bighorn sheep were part of the discussion, but not the sole issue being raised. Rockfall, landslides and aesthetics were also addressed by those who did not support the project.

10. Vail Resorts and the Town participated in negotiations on the Subject Property for extended period of time. Though approved, the Project was voluntarily delayed for over a year. *See Exhs. 72-74.* In November 2020, Vail Resorts requested a 30-day pause so that its leadership could focus on safely re-opening Vail Mountain in the COVID-19 pandemic.

11. At or about this time, the Town took aggressive and arguably abusive negotiation tactics for a condemning authority. In late 2020, early 2021, the Town: (1) granted two no-bid contracts to Triumph Development West, LLC (“Triumph”) in exchange for Triumph abandoning the Project; (2) required that Triumph claim ownership over the Property’s plans so Vail Resorts could not use them; (3) attempted to acquire the Subject Property’s entitlements; and (4) reversed its prior entitlement extensions. Exhs. 80, 81, 83-86, 89-91. While the Town was working its way through these agreements with Triumph, it was suggested at a Council meeting that the Town should apply “strategic pressure on Vail Resorts” by taking advantage of the upcoming expiration of Vail Resorts’ master lease for employee housing at the Town-owned Timber Ridge property (the “Master Lease”). Ex. 81, p. 4.

12. A few weeks later, the Town sent Vail Resorts two letters. The first letter “serve[d] as written notice” of the Master Lease’s expiration and stated that the Town would not grant its permission to holdover. Ex. 83. The second letter referenced the Master Lease, acknowledged the lease had been in place for “more than 15 years” to provide housing for “approximately 165 Vail Resorts employees” but tied the renewal to Vail Resorts’ willingness to “re-engage with the Town in discussions regarding the alternate housing sites initiative.” Ex. 84.

13. Ultimately the Town agreed to extend the Master Lease, but only for 2/3 of the units previously leased to Vail Resorts, and not before forcing Vail Resorts’ employees to move out of Timber Ridge as a result of the Notice.

14. These negotiation tactics were well within the rights of Town; however, the clear intent was to put pressure on Vail Resorts to accept the Town’s purchase offer or at least continue negotiations. The use of collateral issues and pressures is not what would be anticipated from a condemning authority.

15. Following the approval of the rezoning application, but prior to the condemnation decision, there was a change in the makeup of Town Council. In 2021, Jonathon Stauffer was elected to the Town Council. With Mayor Langmaid, Council Member Mason, Council Member Foley and now Council Member Stauffer, there were four members of Town Council who supported the condemnation process.⁴

16. Ultimately, the condemnation process moved forward. The Town extended a written offer to Vail Resorts to acquire the Subject Property for \$7.8 million in a letter dated March 23, 2022. Ex. J. An appraisal of the Subject Property, which valued it at \$7.8 million dollars accompanied that offer.

⁴ This can be argued as evidence of bad faith by the Town Council or argued as the continuing evolution of Town Council’s position over time and with the change in makeup of the Town Council.

17. During a public meeting on May 3, 2022, during which lengthy public comment were heard, the Town Council adopted Resolution #22-2022, authorizing the Town to acquire the Subject Property through negotiations or, if necessary, eminent domain. Ex. K.

18. The Town and Vail Resorts exchanged a number of communications in May and June of 2022 in which the Town expressed its desire to acquire the Subject Property and offered Vail Resorts other sites for its workforce housing project. Ex. M, O, P, Q and R. Mayor Langmaid testified that "[t]he Town's objective was to find a solution and to acquire the bighorn sheep habitat, to create open space, and to find an alternate site for the housing." Langmaid testimony, Day 1, 105:25 to 106:3.

19. Based upon a second appraisal of the Subject Property obtained by the Town, the Town extended a second written offer to Vail Resorts to acquire the Subject Property for \$12,000,000 in a letter dated September 22, 2022. Ex. S. This offer exceeded the second appraisal's conclusion of value for the Subject Property. Vail Resorts declined this offer in a letter sent to the Town dated October 3, 2022. Ex. T.

20. The Town filed its Petition in Condemnation and Motion for Immediate Possession on October 14, 2022.

21. A significant portion of the Hearing was dedicated to the presentation of evidence about the impact on the bighorn sheep herd should this development occur and the necessity of the Subject Property as open space for the preservation of the bighorn sheep herd. The parties offered testimony from three bighorn sheep experts at the Hearing: (1) Bill Andree; (2) Marianne Batchelder; and (3) Melanie Woolever.

22. Colorado has approximately 86 herds of bighorn sheep. The S2 herd is the bighorn sheep herd in the Vail area. The current estimate is that the S2 herd has approximately 85 sheep. The Town's focus was that the Subject Property is critical winter habitat especially for ewes and lambs. Vail Resorts' focus was that Subject Property was not prime sheep habitat, that there were similar developments that have been approved by the Town in the habitat which have not impacted the herd and that herd has been habituated to human activity.

23. The material disagreement presented to the Court by the experts was whether "indirect impacts" from the Project would cause the herd to abandon the important Winter Concentration Area below the Booth Height cliffs or whether the herd would (or already had) become habituated to the same type of activity the Project would produce.

24. While the parties seem to believe that this is a critical determination to be made by the Court, the Court disagrees. Despite the extensive testimony, this Court is not in a position to determine that the proposed housing development will cause the bighorn sheep herd to abandon the Subject Property or that the bighorn sheep herd is habituated to similar activities and will continue the use of the Subject Property. Reasonable experts can and did disagree. The Court will not make the finding of fact that either party is seeking.

25. There is sufficient evidence to support the Town's position that the proposed development will have a negative impact on the S2 herd and that the herd will benefit from maintaining this as open space. Bill Andree has studied and managed the S2 herd for over thirty two (32) years. He has the most direct experience with the S2 herd. It was the opinion of Mr. Andree that if the Subject Property is not preserved that the ewes and lambs will not become habituated to the activity, will abandon the area and it will be the downfall of the S2 herd. This opinion was based upon a number of factors including, but not limited to, the Subject Property

being the last undeveloped property between two developments, the impact of a high population housing project on bighorn sheep, and the location near the Booth Height cliffs which are an important escape route for the bighorn sheep.

26. The testimony of Mr. Andree is sufficient to provide credible evidence that this development will have a significant negative impact on the herd. This is the critical finding for purposes of this Hearing and Order. The fact that there is a dispute as to the impact on the herd and that there have been other developments approved by the Town does not in and of itself support that the Town is acting in bad faith. The Town may rely on the experts it deems appropriate so long as the expert opinion is credible and there is sufficient evidence to support the Town's position. The Court does not make a factual finding that the development will be the downfall of the S2 herd as testified by Mr. Andree. The Court's finding is only that there is sufficient and credible evidence to support the Town's position that the Project will be detrimental to the survival of the herd and that the preservation of the Subject Property is necessary to meet the purpose of preservation of the herd.

27. While not to the level of seeking condemnation of real property, the Town has shown a continuous interest in protecting bighorn sheep habitat, and made previous efforts to do so, including habitat improvement efforts, prescribed fires on Town and CDOT land, manual thinning of vegetation in conjunction with the U.S. Forest Service, requesting the U.S. Forest Service for trail closures at the Booth Creek trailhead, attempting to discourage trail use during certain seasons, installation of wildlife fencing along public roads, closing access to Town land in sheep habitat, and funding a documentary video educating the public about the bighorn sheep. *See* Ex. H (1994 Open Lands Plan), Ex. I (2018 Open Lands Plan; Ex. PP (letter sent to U.S. Forest Service).

28. There was evidence introduced by Vail Resorts that the Town has allowed development in or near other areas of bighorn sheep habitat—these developments include a restroom facility at the Booth Falls trailhead, the Town's Public Works site, approval of increased enrollment at the Vail Mountain School, and construction of, or improvements to duplex single-family homes in the Booth Creek/Katsos Ranch neighborhood. Ex. 2. It is not factually disputed that these developments have occurred and that they have occurred in bighorn sheep habitat; however, as to the impact on the bighorn sheep herd, there is not necessarily a direct comparison between the other developments and this Project.

29. These other developments are all largely contained within the footprint of existing developed areas and are not comparable to the Booth Heights' proposed development. The Subject Property is located in an area that has been largely undeveloped, with the nearest areas of development being the Pitkin Creek Townhomes (developed in the 1990's and approximately 1,000 feet to the east), and the eastern portion of the Katsos Ranch development (plated and zoned in the early 1970's and approximately 1,500 feet to the west). Ex. B, p. 12. More than the other areas, the Subject Property is the critical winter habitat for the lambs and ewes which are vital for the continued sustainability of the S2 herd.

30. Again, the Court is not making a factual determination as to the viability of the S2 herd should the development occur; however, there is evidence to differentiate this Project from the other developments.

31. Vail Mayor Langmaid and Sustainability Director Kristen Bertuglia testified that the purpose of the condemnation is for open space and protection of environmentally sensitive bighorn sheep habitat. Langmaid testimony, Day 1, p. 88: 8-12; 94:2-9; Bertuglia testimony, Day 1, 265:22 to 266:1. Mayor Langmaid testified that the Town Council determined that

acquiring the Subject Property was necessary to effectuate these purposes. Langmaid testimony, Day 1, 95:12-18.

32. Mayor Langmaid also testified that the Town did not want the Subject Property to be developed for any purpose: "The Town doesn't want to see anything built on that land. Whether it's a single-family home, whether it's affordable housing, whether it's some other use, the Town does not want to see any development on the bighorn sheep habitat." Langmaid testimony, Day 1, 97:13-21.

33. Mayor Langmaid further testified that if the Subject Property was to be condemned, the Town would place the Subject Property under an open space designation and there would be no development, public facilities or public trails located on the Subject Property. Langmaid testimony, Day 1, 58:18 to 59:3; 61:7-10.

III. CREDIBILITY

While witness credibility is always an important factor for the Court to consider, this is not a case in which the credibility of most witnesses is questionable. The wildlife experts testified credibly. They have different opinions on disputed factual issues. The other witnesses were for the most part fact witnesses who provided historical information to the Court. The significant exception to this is Mayor Langmaid. Mayor Langmaid was adamant that her actions and by extension the actions of the Town Council were all related to the preservation of the bighorn sheep herd. If the Court accepts this testimony, it goes a long way in resolving this dispute. Similarly, if the Court does not accept that testimony and finds her testimony to be incredible, it goes a long way in resolving this dispute. In many ways, the Court finds the testimony of Mayor Langmaid to be the most critical testimony it received.

Mayor Langmaid has long been an opponent of this development. While it was not the only factor that she addressed, the preservation of the bighorn sheep has been a consistent issue for her. This factor is supported by other evidence, including the Town's historical designation of this site for open space and ongoing efforts to protect the S2 herd. It is even supported by the mitigation requirements of the PEC approval. Again, while it was not the only concern raised by the Mayor, the consistency in which she has raised these concerns, strengthens her credibility.

This is not to say that there is no evidence which raises concerns about the actions of the Town. Related to this development, there was concern raised about matters other than the bighorn sheep, including the impact on neighboring properties. The negotiation tactics the Town took are not what one would expect to see from a condemning authority. However, that does not mean that the Mayor and Town Council were acting to block an unpopular development. It means that Town took an unnecessarily aggressive and unfortunate approach in an attempt to bring Vail Resorts to the table.

Similarly, the approval of Vail Resorts' rezoning and the defending of the approval on appeal could be argued as inconsistent with the hearing testimony of Mayor Langmaid. However, this is not how the Court interprets that evidence. The rezoning application met the Town code requirements. The Town therefore had an obligation to approve and an obligation to then defend the approval. As the makeup of Town Council changed, the position of Town Council changed and moved toward condemnation.

Overall, the Court finds the testimony of Mayor Langmaid to be consistent, supported by other evidence, and credible.

IV. CONCLUSIONS OF LAW

A. Motion for Immediate Possession

As stated above, the Town must establish by a preponderance of the evidence: 1) its legal authority to condemn the property in question; 2) whether the Town's intended use of the property is a public use or purpose; 3) whether there is a necessity to acquire the property for a public use or purpose; 4) whether there was a failure to agree on the compensation to be paid for the property rights sought after good faith negotiation; and 5) the amount of deposit to be placed with the Court pending a final ascertainment of value. *Dep't of Transp. v. Stapleton*, 97 P.3d 938, 939 (Colo. 2004).

1. First Factor - Legal Authority

The Town is a home rule municipality which possesses the legal authority to condemn property for any lawful, public, local, and municipal purpose. Article XX, Sec. 1-6 of the Colorado Constitution; Ex. E (Town Charter excerpts); *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161 (Colo. 2008) (home rule municipalities may condemn property for any lawful, public, local, and municipal purpose). Section 1.2 of the Town Charter specifically reserves to the Town all of the Article XX home rule powers.

Article XX vests in home rule municipalities every power which the legislature "could have conferred" – meaning that if the General Assembly can confer a power upon any statutory city, town, county, district or other entity, a home rule municipality like Vail has reserved and possesses that power without legislative action. *Town of Telluride*, 185 P.3d at 168. Because the legislature has the power to authorize political subdivisions to exercise eminent domain for parks, recreation, open space, and habitat preservation (*see* C.R.S. §§ 24-33-107(2)(a), 29-7-104,

32-1-1005(1)(c), 31-25-201(1), 38-6-110), home rule municipalities automatically have that right upon adoption of their charters.

This eminent domain authority extends to condemning land for open space. *Town of Telluride*, 185 P.3d at 168 ("we conclude that condemnation for open space and parks is in fact a lawful, public, local, and municipal purpose within the scope of article XX"). *See also Town of Silverthorne v. Lutz*, 370 P.3d 368, 373 (home rule article grants home rule municipalities the authority to condemn property for open spaces and parks).

The Court concludes that the Town of Vail possesses and may exercise the authority to condemn real property for a public purpose or use, including condemning property for open space and wildlife habitat preservation. The Town lawfully invoked this authority in the instant case with the Town Council's adoption of Resolution #22-2022 and pursuant to its home rule Charter and Art. XX of the Colorado Constitution.

2. Second and Third Factors - Public Purpose and Necessity

The parties cite significant case law to support their positions on public purpose and necessity. Not surprisingly, no cases cited are factually analogous to this case. The Court finds that the case which provides the most guidance is *City of Lafayette v. Town of Erie Urban Renewal Authority*, 434 P.3d 746 (Colo. App. 2018). While the facts in *Lafayette* are not particularly helpful, the legal analysis is. The *Lafayette* court does a clear job of outlining the steps in the analysis when bad faith becomes an issue.⁵

⁵ In *Lafayette*, the City of Lafayette ["City"] attempted to condemn property from the property owner, the Town of Erie ["Erie"]. The stated public purpose was to create an open space community buffer. The trial court found that the City's condemnation was motivated by bad faith. While the stated public purpose was open space, this was a pretext. The purpose of the condemnation was to keep King Soopers from moving to Erie. The trial court granted the property owner's motion to dismiss. This was affirmed by the Colorado Court of Appeals.

As outlined by the *Lafayette* court:

- The burden of proof is on the condemning entity to demonstrate, by a preponderance of the evidence, that the taking of private party is for a public use.
- Courts may review condemnation actions to determine if “the essential purpose of the condemnation is to obtain a public benefit.” Even if a condemnation decision is motivated in part by a public benefit, “the existence of an incidental public benefit does not prevent a court from finding ‘bad faith’ and invalidating a condemning authority’s determination that a particular acquisition is necessary.”
- “The issues of necessity and public purpose are closely related and, to some extent interconnected.”
- “While the existence of a public purpose is always subject to judicial review, the necessity of an acquisition of a specific parcel of property may only be reviewed by a court upon a showing of bad faith.”
- If bad faith is at issue, the courts may look behind an entity’s stated condemnation purpose and finding of necessity.

City of Lafayette, 434 P.3d at 751-752 (citing and quoting *Denver W. Metro District v. Geudner*, 786 P2d 434, 436 (Colo. App. 1989).

Here, the public purpose and necessity issues are very much interconnected. The Town’s position is that the public purpose for the condemnation is to preserve open space of the bighorn sheep herd and that the Subject Property is necessary to meet that stated purpose. Vail Resorts’ argument is that while there could be an incidental public purpose, this is a pretext. The motivation for the condemnation is not for a lawful public purpose. The motivation for the condemnation is to block an unpopular development. Vail Resorts has sufficiently raised a bad

faith argument that the Court must address both public purpose and necessity. This Court must look behind the Town's stated purpose and finding of necessity and determine whether the evidence supports the Towns' stated purpose and necessity for the condemnation of the Subject Property.

There are a number of factors that support the Town's position. This property has historically been looked at for open space. This goes back to the 1994 Open Lands Plan. While there was a period of time that the Town supported workforce housing on this property, it was by a 4-3 margin. When it was approved, there were significant conditions in place which were meant to protect the bighorn sheep herd. While not the extent of condemnation, the Town has long put a priority on the health of bighorn sheep herd. In addition to significant conditions of land use approval, the efforts have included habitat improvement efforts, prescribed fires on Town and CDOT land, manual thinning of vegetation in conjunction with the U.S. Forest Service, requesting the U.S. Forest Service for trail closures at the Booth Creek trailhead, attempting to discourage trail use during certain seasons, installation of wildlife fencing along public roads, closing access to Town land in sheep habitat, and funding a documentary video educating the public about the bighorn sheep. The protection for the bighorn sheep herd is not a new issue for the Town and especially not for the Mayor and the Council Members who supported the condemnation.

The bad faith arguments center primarily around the conduct of the Town related to the Triumph deals, the Timber Ridge Master Lease, and the changing position of the Town. The Triumph deal and the Timber Ridge Master Lease are concerns to this Court and have been addressed herein. It was not a proper approach for a condemning authority to take. The Town should never have attempted to coerce Vail Resorts as part of the process to obtain the Subject

Property. The condemning power is significant and so is the responsibility. However, this action does not lead to a finding of pretextual conduct. Rather, it actually supports the urgency that the Town gave to the acquisition of the Subject Property and the protection of the herd.

The changing position of the Town is less of a concern to the Court. The Project was approved with significant conditions focused on the wellbeing of the bighorn sheep herd. It met the Town's development guidelines. It was defended on appeal. It was proper for the Town to approve and then defend or for the Town to change course and condemn. The Town leadership was not static. By the time the condemnation process was authorized, the Town Council had more members who prioritized the preservation of the bighorn sheep over the workforce housing development.

While the Court stated it would not analyze this case as habitat protection versus workforce housing, the fact that this condemnation will effectively block a workforce development does have significance. The Town has significantly invested in and supported workforce housing. This is not an objectionable issue to the Town. It is an issue that the Town generally supports. This is a development that potentially will have a significant impact on the bighorn sheep herd. In this instance, the Town made a policy decision to prioritize the preservation of wildlife habitat over the development of workforce housing. It is local government that makes policy decisions, not a trial court.

While there is considerable evidence to support that the public purpose is as stated by the Town – to protect critical habitat for the bighorn sheep herd, the Court must consider the necessity of the Subject Property to meet that public purpose. The Court must examine the nexus between the public purpose and the Subject Property. There are other developments within the bighorn sheep range. However, there is significant evidence that the Subject Property is critical

winter range for the lambs and ewes which are necessary for the preservation of the herd. The testimony presented by Bill Andree is that the specific characteristics and location of the Subject Property makes it necessary for the survival of the herd, and particularly the lambs and ewes. This is a large undeveloped space between the Pitkin Creek Townhomes and the eastern portion of the Katsos Ranch development. The Property characteristics, including the location below the Booth Height Cliffs, makes it important escape terrain for the bighorn sheep. There is sufficient and credible evidence that the Subject Property is critical and necessary for the survival of the herd.

The Court also looks at and incorporates the credibility findings that it has made. The Court found the testimony of Mayor Langmaid to be credible. Her position was that this condemnation process was solely to protect the herd. There is evidence to support that position. This credibility finding is an important factor in determining that this condemnation process was for a proper public purpose and that there is a necessity to acquire the Property for the public purpose.

Vail Resorts has argued that factors to be considered by the Court to show bad faith or pretext include the following: 1) significant opposition to the Project; 2) inconsistent government actions; 3) lack of nexus between the taking and the purpose of the condemnation; 4) bad faith efforts to control or compel the property owner; and 5) a post-hoc justification for the condemnation. There is support in case law for these factors. They are certainly factors that the Court can and did consider. Some have been addressed above.

There was significant opposition to the Project. This is not a factual dispute. There were people who supported the workforce housing project and people who objected to the workforce housing project. It is not surprising that neighbors to the Project were included in those opposing

the Project. This alone does not show pretext or bad faith. It is a factor the Court considers when determining that bad faith has sufficiently been raised so that it cannot merely give deference to the Town's public purpose position. In certain instances, it could be part of ulterior motivation for a condemnation. While the Court considers the public pressure on the Town Council, as stated above, it finds that there was legitimate and primary public purpose for the condemnation.

The Court has considered and addressed the inconsistent government action. The Town has provided an explanation for its evolving position on the Subject Property, which the Court has found to be reasonable and credible.

The Court has found that there is a nexus between the taking and the public purpose. The stated public purpose is the preservation of the bighorn sheep herd. While there was disputed expert testimony on how critical the Subject Property is for the bighorn sheep, the Town presented credible expert testimony that the Subject Property is critical winter habitat, especially for the lambs and ewes. The Town further presented credible expert testimony that development in the Subject Property will have drastic impacts on the health and wellbeing of the herd.

The Court has addressed in length the "bad faith" efforts to control or compel the property owner. It was concerning. Again, it was considered by the Court and was a factor in the Court not merely giving deference to the Town's public purpose position. However, as addressed above, the Court does not find that it leads to the conclusion that the Town's purpose and necessity arguments were a pretext to block the Project. The Town has proven otherwise.

As far as post-hoc justification for the condemnation, that is one interpretation of the facts in this case. The Court has interpreted the evidence and made factual findings that the survival of the bighorn sheep herd has been a focus of the Town and that this was not a post-hoc justification. It may have increased in priority with the changing of the Town Council but was

not created as justification for the condemnation. It existed before and after the Petition for Condemnation was filed.

The Court finds that the Town has proven by a preponderance of the evidence that the use of the Property is for a public use or purpose, and that there is a necessity to acquire the Property for the stated public use or purpose.

3. Fourth Factor - Failure to Agree/Good Faith Negotiation

A prerequisite of exercising eminent domain authority is that the parties must fail or be unable to agree on the compensation owing for the property to be taken. C.R.S. § 38-1-102(1). The “failure to agree” prerequisite has been interpreted to require "good faith negotiations" between the parties. *See City of Holyoke v. Schlachter Farms R.L.L.P.*, 22 P.3d 960 (Colo. App. 2001) (good faith negotiation requirement is satisfied where the condemning authority makes a reasonable, good faith offer and allows the owner sufficient time to respond. "Lengthy or face-to-face negotiations are not required"); *see also Town of Silverthorne v. Lutz*, 370 P.3d at 375 ("[n]o actual negotiation is required, the parties need not speak face-to-face, and the property owner is not required to respond or make a counteroffer").

Here, the Town made two written offers to acquire the Subject Property prior to filing this action. One of these offers was not responded to and the other was expressly rejected by Vail Resorts. In addition to these cash offers, the Town also attempted to discuss with Vail Resorts on potential relocation of the workforce housing project.

The Court has addressed herein concerns about the Town’s negotiating tactics related to Triumph and the Timber Ridge Master Lease. The legal authority given to the government to condemn private property is significant, should not be taken lightly, and creates an obligation to use in a proper fashion. From this Court’s perspective, these tactics – while not illegal by statute

or case law – was a governmental overstep. With that said, an offer was made. The offer was improved. It was based on objective criteria. The Court concludes that prior to filing the condemnation action, the parties failed to agree on the compensation owing for the Subject Property and that the Town satisfied its good faith negotiations obligation by a preponderance of the evidence.

4. Fifth Factor - Amount of Deposit

The parties have stipulated that should the Court grant the Motion for Immediate Possession, the amount of the deposit shall be \$12,000,000.

5. Prior Public Use

It is not entirely clear whether Vail Resorts is still making the argument that the prior public use doctrine is a bar to the condemnation of the Subject Property. To the extent that it is at issue, the Court finds that it is not a bar. There was not a prior public use of the Property. There was a private use which may have provided public benefit; however, it was still a private use. Further, as a home rule municipality, the Town would not be prohibited from condemning property devoted to a public use. *See Beth Medrosh Hagodol v. City of Aurora*, 126 Colo. 267, 248 P.2d 732 (1952).

B. Cross Petition

Vail Resorts filed a Cross Petition relying on C.R.S. § 38-1-109. The Cross Petition alleges that the enactment of Ordinance 16, as will be more fully described herein, resulted in a temporary taking of Vail Resorts' use and enjoyment of the Subject Property which requires compensation. This compensation is an addition to any compensation that Vail Resorts should receive if the Motion for Immediate Possession is granted.

On May 3, 2022, the Town Council adopted Resolution #22-2022, authorizing the Town to acquire the Subject Property through negotiations or, if necessary, through eminent domain.

Ex. K. On August 2, 2022, the Town enacted Ordinance 16 which suspended the issuance of any permits for the Subject Property from August 2, 2022 through November 1, 2022 and prohibited “any disturbance” of the Subject Property during that time, to “avoid irreparable damage” to the bighorn sheep herd. *See* Ex. 9. The Subject Property’s mitigation plan prohibited any “[h]eavy site construction including clearing, excavation, grading, [or] retaining wall construction” after November 14 and until June 1. Ex. 5. On October 14, 2022, the Town filed the Petition for Condemnation.

Vail Resorts argues that Ordinance 16 effectively shut down the workforce project for the entire building season from at least August 2, 2022 until June 1, 2023 and that it did so prior to being granted possession or use of the Subject Property through the condemnation process (and ultimately this Order).⁶

The Court does not disagree that the effect of Ordinance 16 and the filing of the Petition in Condemnation has had the impact of stopping the development from August 2, 2022 through the present. This was the purpose of Ordinance 16. However, the Court disagrees that C.R.S. § 38-1-109 provides that Vail Resorts is entitled to additional compensation for this time period or even part of this time period.⁷

⁶ It was generally agreed as part of the Case Management Process that Vail Resorts was not going to begin development of the Subject Property from June 1, 2023 to the date of issuance of this Order.

⁷ The Court also disagrees with the Town that the pending lawsuit in *Vail Corp. v. Town of Vail*, Eagle County District Court Case No. 22CV30163 is relevant to this issue. This lawsuit has separate issues and is not related to compensation for a temporary taking.

C.R.S. § 38-1-109 allows a party to intervene with a cross-petition if they are not named in the petition in condemnation but claim an interest in the property being taken. *Denver & R.G.R. Co. v. Griffith*, 31 P. 171, 172 (Colo. 1892). This is not the issue in this case. Vail Resorts is a party to the case.

C.R.S. § 38-1-109 has been interpreted to allow a named respondent to file a cross-petition where there are other lands that will be affected by the condemnation, which are not included in the petition. *Scanland v. Bd. of Cnty. Comm'rs*, 46 P.2d 894, 895 (Colo. 1935). This is also not the issue in this case. The “land” argued by Vail Resorts is property affected by the condemnation. There is no case law cited by Vail Resorts that supports valuation of property that is impacted by the pre-condemnation process, but that is part of the property to be condemned. For instance, if Vail Resorts had neighboring property that was being diminished by the condemnation, a cross-petition under C.R.S. § 38-1-109 may be appropriate. Whether there is another legal remedy is unclear, but the Cross-Petition is not supported by C.R.S. § 38-1-109 or the case law interpreting it.

Effectively, what Vail Resorts is arguing is that an inverse condemnation occurred by the enactment of Ordinance 16. “To establish a claim for inverse condemnation under the Colorado Constitution, a property owner must show that (1) there has been a taking or damaging of a property interest; (2) for a public purpose; (3) without just compensation; (4) by a governmental or public entity that has the power of eminent domain, but which has refused to exercise that power.” *City of Colorado Springs v. Anderson Mahon Enterprises, LLP*, 260 P.3d 29, 32 (Colo. App. 2010).

The Town has not refused to pursue eminent domain. In fact, Resolution #22-2022 was enacted prior to Ordinance 16 which authorized the eminent domain proceeding. Obviously, the Town pursued eminent domain. The “land” argued by Vail Resorts to be valued as part of just compensation is already part of the property that will be valued as part of just compensation.

V. ORDERS

IT IS HEREBY ORDERED that, based upon the above findings of fact and conclusions of law, the Court hereby **GRANTS** the Town of Vail's Motion for Immediate Possession as follows:

1. The Town of Vail, has the statutory authority to condemn the Subject Property;
2. The taking by the Town of Vail is for a public use and purpose;
3. There is a necessity for the Town of Vail to acquire the interests in the Subject Property;
4. There has been a failure of negotiations between the Town of Vail and Vail Resorts and the Town of Vail and Vail Resorts cannot agree on the compensation to be paid for the Subject Property;
5. Any disturbance of the possessory rights of Vail Resorts is necessary; and
6. The amount of \$12,000,000 is a sufficient deposit for the Town of Vail to take possession of the Subject Property until compensation is finally ascertained for the taking of the Subject Property.
7. The Town of Vail shall deposit the amount of \$12,000,000 into the Registry of the Court for possession of the Subject Property, and that the Clerk of the Court is directed to accept such funds and place them into a proper account, pending further orders of the Court.

8. Upon deposit of such funds, the Town of Vail shall have possession of the Subject Property described on the exhibit attached to the Petition in Condemnation, and the Town of Vail and its contractors, agents, and employees may, to the extent provided for in the exhibit, enter into, take and retain possession of said Property during the pendency of this proceeding, without interference from the Landowner, Vail Resorts, or any other Respondent, or their successors, assigns, heirs, devisees, personal representatives, guests or invitees, or any other person or persons claiming by, through, or under said Respondents.

IT IS FURTHER ORDERED that Vail Resorts' Cross-Petition for temporary taking is

DENIED.

SO ORDERED this 30th day of June, 2023

BY THE COURT:



Paul R. Dunkelman
District Court Judge