

DISTRICT COURT, EL PASO COUNTY, COLORADO P.O. Box 2980, 20 East Vermijo Colorado Springs, CO 80903	▲ COURT USE ONLY ▲
Petitioner: BOARD OF COUNTY COMMISSIONERS OF EL PASO COUNTY, COLORADO V. Respondents: RICHARD A. AND KITTY M. WEST, et al.	
Case Number: 04 CV 3978 Div.: 15 Ctrm.: 503	
<p style="text-align: center;">FINDINGS OF FACT, CONCLUSIONS OF LAW, and ORDER</p>	

THIS MATTER was tried to the Court on January 5-7, 2005, and the Court has considered the arguments of counsel, the testimony of the witnesses, and the documents and other matters submitted into evidence. The Court now enters the following Findings of Fact, Conclusions of Law, and Order.

Findings of Fact

1. El Paso County seeks to condemn private property for the construction of an extension of Milam Road north into Cathedral Pines Filing 1, platted December 16, 2004, located near the Black Forest Regional Park (the “Park”). Milam Road would be extended north of Shoup on the line between Sections 11 and 12, and after running due north for some measure would turn east into the Park and eventually end in Cathedral Pines. Respondents own the easternmost portion of Section 11 on which the road would run, and it is this property that the County seeks to condemn.

2. In 1987, the County developed a Major Corridor Transportation Plan. [Exhibit 32]. Milam Road was shown on the plan as a possible corridor for future development. Although Milam Road was shown as a possible minor collector road on the 1987 Plan, it is undisputed that the County has never undertaken to design or to plan the extension of Milam.

The County has never appropriated money in its regular budget for the extension of Milam. The County has never included Milam Road on its list of priority transportation projects when additional construction money might become available [Exhibits 18 and 19]. The County argues that the Milam Road extension is not only needed for access to the new Cathedral Pines development but also to improve the intersection of Milam Road and Shoup Road as well as to improve access to the Black Forest Regional Park. The Court finds that but for Cathedral Pines development, the County would not be pursuing an extension of Milam Road.

3. Subsequent to the 1987 Plan, a number of entities (including governmental entities) representing all the relevant constituents in El Paso County adopted a detailed Black Forest Preservation Plan whose goal was to set out general considerations in the development of the Black Forest area. The construction of Milam Road north from Shoup through Hodgen appears to the Court to be inconsistent with the Black Forest Preservation Plan. Mr. McCarty, Director of the County DOT, testified in his deposition that the extension of Milam would be prohibited by the Black Forest Preservation Plan.

4. In 2001, the County Department of Transportation hired Ms. Jude Willcher as Senior Transportation Planner to oversee the development of a new, comprehensive transportation plan. The planning process was conducted over the span of three years, culminating in a public hearing and review process. [See Exhibit 14 concerning the final stages of development of the 2004 Transportation Plan].

5. During 2000, Kings Deer Development, LLC (“Kings Deer”) entered into several separate contracts to purchase the land that would eventually constitute its Cathedral Pines development and began discussions with the County regarding the development of the property. The County stated that they required that Cathedral Pines be developed consistent with the 1987 Plan that contemplated the extension of Milam Road. Kings Deer closed on the property the day before trial in this matter and has been instrumental in directing the proposed course of the road.

6. Dan Potter, a principal of Kings Deer, testified that his feeling was and always has been that he was going to extend Milam Road north of Shoup for the benefit of the proposed development, and he did not care what anyone else thought. Kings Deer entered onto the Respondent’s property without permission for the purpose of surveying the proposed road and cut down some trees on Respondent’s property.

7. Initially Kings Deer proposed locating its main access along the westernmost portion of Section 12 that lies within the Black Forest Park. A number of area residents objected that the proposed route was barred by the Sisk Act, and brought a court action to enforce the Sisk Act that limits the use of property to those purposes for which it had been used prior to the conveyance.

8. After a trial that Kings Deer participated in, before Judge Samelson, an Order was entered on October 12, 2001 barring construction of the road because of the Sisk Act provisions. [Exhibit 24.] Judge Samelson had previously concluded that no easement existed,

and thus the effect of the his ruling was to preclude use of Section 12 for the extension of Milam Road.

9. The Court of Appeals affirmed the decision of the trial court in the Sisk Act case, and concluded: “[W]e agree with the trial court that [the other uses] are secondary to the road’s primary purpose – access to the developer’s new housing development.” *Friends of Black Forest v. County Com’rs*, 80 P.3d 871, 882 (Colo.App. 2003). [Exhibit 25.] This determination of the road’s primary purpose was limited to the provisions of the Sisk Act and does not bind the Court in this condemnation proceeding.

10. Court of Appeals also noted the trial court’s determination that the developer and the County had colluded in an attempt to assert an easement claim pursuant to C.R.C.P. 36(b) and thus the County’s “admission” of an easement was disallowed.

11. A little more than a year after the trial court entered its order in the Sisk Act case, but before the appellate decision was published, the developer instituted a separate action to establish an easement along the easternmost portion of Section 11 (the “Quiet Title Action”). This action was instituted approximately the same time that the condemnation was first approved. The Kings Deer’s stated purpose in the Quiet Title Action (02CV627) was to reduce the amount of property that the County would condemn and consequently that the developer would be compelled to purchase based on an alleged easement created in 1921 by a reservation in a deed. Exhibit 1, page 3, ¶ e. This Court recently granted Summary Judgment in 02CV627 finding that no easement exists on the east side of Section 11 that lies adjacent to Section 12.

12. In conjunction with its Quiet Title Action, the developer entered into an Agreement [Exhibit 1] with the County under the terms of which the County agreed to condemn property in Section 11 to the extent necessary for a road if the developer and the County lost their Sisk Act Appeal. The Agreement provides:

- a. Kings Deer controlled the amount to be paid to property owners in settlement;
- b. Kings Deer was responsible for paying all of the costs of acquiring the fee simple interests needed for the road;
- c. Kings Deer was responsible for paying all of the road construction costs;
- d. Kings Deer had a the right to consult with the County’s outside counsel; and
- e. Kings Deer controlled the decision of whether or not to proceed with the condemnation process prior to the filing of any lawsuit.

13. The County then passed a resolution (the “First Condemnation Resolution”) approving the prospective development. [Exhibit 4]. The Board of County Commissioners made the decision to condemn the access into Cathedral Pines without consulting the County Director of Transportation. The First Condemnation Resolution contains the following provisions:

:

- a. The resolution states that the necessity of the road is based on the 1987 transportation plan.
- b. The County states that “immediate possession” is necessary.
- c. The County’s states that “immediate necessity” is based on “the public health, safety and welfare, due to bidding and construction deadlines”. There is no evidence that the County itself has ever had any bidding or construction deadlines.
- d. The resolution was passed and recorded nearly two years before the County’s filing of the Petition to condemn.
- e. Plans for the road were prepared and ultimately completed by the Kings Deer engineers in June of 2004.
- f. Resolution 02-462 (Exhibit 5) it states that the County “recognizing the special benefit that will accrue to the property belonging to Kings Deer Development LLC . . . “

14. Shortly thereafterwards Kings Deer and the County entered into a Condemnation Agreement. The County and Kings Deer then cooperated on the filing of the Quiet Title Action. Mr. Potter admitted in his testimony that the action was brought to reduce the acreage and cost of the taking. The Condemnation Agreement (Exhibit 1, p. 3, paragraph E) speaks directly to the coordination between the County and developer:

After the filing of litigation in the eminent domain and in the event that the County or King’s Deer prevails in any litigation to confirm a roadway easement for its use and benefit of the west side of the section line 11/12, the County shall seek, to the extent allowed by law or to the extent allowed by the trial court, to reduce the amount of private property to be acquired in said litigation in eminent domain.

15. Despite the First Condemnation Resolution’s statement that immediate possession was required, the condemnation proceedings were not filed until nearly two years later. Certain unforeseen events did contribute to a portion of this delay.

16. On July 29, 2004, the County and Kings Deer entered into a Supplement to the Condemnation Agreement (“Supplemental Condemnation Agreement”) [Exhibit 2]. This Supplemental Condemnation Agreement made several changes to the initial agreement: deleting the initial allocation of the right to terminate the condemnation by Kings Deer; changing in the method of payment for the taking; requiring an additional cash contribution from the County to cover the appraisals. Kings Deer’s obligations were not changed.

17. On or about August 31, 2004, the County and Kings Deer revised the Supplemental Condemnation Agreement (the “Revised Supplemental Condemnation Agreement”) [Exhibit 3] to require Kings Deer to contribute an additional \$50,000.

18. At approximately the same time, the County passed another resolution (the “Second Condemnation Resolution”) [Exhibit 6]. The Second Condemnation Resolution

recited that the condemnation was necessary as a “step toward fulfilling the County’s approved transportation plan in this area. . . .” By the time this resolution was drafted, the 2004 Plan was nearly complete.

19. In September of 2004, the County passed the new 2004 Transportation Plan. [See Exhibits 12 and 13]. As initially drafted, the 2004 Plan showed Milam Road being extended through to Hodgen Road as a “minor collector.” The final 2004 Transportation Plan did not show Milam Road north of Shoup although the County was certainly aware of the proposed Cathedral Pines development. The extension of Milam Road to the north was not shown even on the 2030 Transportation Plan. A County official testified that the fact that the Milam Road extension was not shown on the 2004 Transportation Plan did not mean it would not be built. The plat reserves a 120 foot right of way for Milam Road to be extended north to Hodgen Road.

20. The final recorded plat of Cathedral Pines Filing No. 1 was introduced into evidence on the first day of trial. The plat received final approval from the Board of County Commissioners on December 16, 2004. The plat does not require the condemnation of Milam Road. The Planning Department and the County Commissioners have approved the development fully aware that the condemnation might be denied. They appear to have satisfied themselves that the development can proceed consistent with the County’s requirements without Milam Road.

21. A Kings Deer representative testified it has taken lot reservations for all of the lots in the first filing, as well as additional lots in subsequent filings. The reservations do not contain a right to rescind if the condemnation is dismissed.

22. With respect to the issue of immediate possession, the Court notes that the developer testified that its construction crews would begin building the Milam Road extension immediately upon being given leave to do so by the Court. The developer commenced work on the interior roads in the development immediately after the plat was approved.

23. The land that the County seeks to condemn is heavily forested with mature, old-growth trees whose presence substantially enhances the economic and esthetic value of the Respondents’ lots. One of the Respondents lives within sixty to seventy feet of the proposed road path, and maintains an out building just twenty-five feet from the proposed road. The actual removal of trees and commencement of construction of the road would have immediate and irreversible adverse impacts. Although this impact is relevant to the Court’s inquiry with respect to the question of immediate possession, it is not relevant to the question of the propriety of the condemnation.

Conclusions of Law

El Paso County is a county whose general powers include the right to pursue condemnation subject to proper statutory and Constitutional limits.

The parties stipulated: the Board of County Commissioners has the power of eminent domain and is authorized to maintain this proceeding; there has been a failure of good faith negotiations; the amount of the deposit in the event of the court authorizing immediate possession. The parties litigated the two remaining issues: public use or purpose and necessity.

A. General Standards Applicable to Adjudication of Petition in Condemnation

1. Public Use / Public Purpose

a. With respect to the first element, Colorado’s Constitution has long-embodied the requirement that the judiciary alone has the power to ascertain whether an intended use is a “public” use for which the condemnation power may be exercised:

[W]henever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined without regard to any legislative assertion that the use is public. Colo. Const., Art. II, Section 15

b. The language of the Constitution is important to the extent that it compels the Court to determine whether a proposed use is “really public” and not merely “alleged to be public”. This unique use of language makes it clear, as does the prohibition against using legislative assertions as evidence of the intended use, that the Court must independently consider all the myriad facts and circumstances involved.

c. Pursuant to the express language of the Constitution, the County’s attestation that the proposed Milam Road extension is for a “public use” – whether through its witnesses or through Resolutions – is legally irrelevant and the Court must determine based upon the facts in evidence whether the “alleged” public use is “really public.” Thornton Dev. Auth. v. Upham, 640 F.Supp. 1071, 1076 (D.Colo. 1986)(deference is not given to the condemning authority’s finding of a public use and no showing of bad faith is necessary with respect to this issue).

d. In making this determination, the Court is not directed to look at incidental or secondary beneficiaries of the condemnation, but rather must decide whether the “primary” or “essential” purpose for the condemnation is to benefit a public use. Silver Dollar Metropolitan Dist. v. Goltra, 66 P.3d 170, 172 (Colo.App. 2002); Denver West Metro v. Geudner, 786 P.2d 434, 436 (Colo.App. 1989). *See also* Bailey v. Myers, 76 P.3d 898 (Ariz.App. 2003)(interpreting identical Arizona constitutional provision to end that “the constitutional requirement of ‘public use’ is only satisfied when the public benefits and characteristics of the intended use substantially predominate over the private nature of that use.”)

e. Colorado law requires a case-by-case assessment based on the particular facts of the case. *See generally*, Buck v. District Court, 608 P.2d 350, 351 (Colo. 1980).

f. The Colorado Supreme Court stated in Public Service Company of Colorado v. Shaklee, 784 P.2d 314 (1989): “No definition, however, has as yet been formulated which would serve as an infallible test in determining whether a use of property sought to be appropriated under the power of eminent domain is public or private. . . .in determining whether or not a use is public, the physical conditions of the country, the needs of a community, the character of the benefit which a projected improvement may confer upon a locality and the necessities for such improvement in the development of the resources of a state, are to be taken into consideration.”

g. The Court also stated in Shaklee that the owners of the property to be condemned have the burden of proving that a taking is not for a public purpose.

h. This Court also notes that “the issues of necessity and public purpose are closely related, and to some extent, interconnected”. See Thornton Development Authority v. Upah, 640 F. Supp. 1071 (Dist. Colo. 1986).

2. Necessity of Taking

The second element required for the taking of private property is that the taking must be necessary to the use for which the property is being condemned.” The condemning authority’s determination that a taking is necessary is entitled to judicial deference. The general standards applicable to this determination have been summarized as follows:

The determination of necessity is an essential part of the power of eminent domain, and once necessity is determined by legislative act, no further finding or adjudication is required. The determination of necessity is not reviewable by the judiciary absent a showing of fraud or bad faith. City of Thornton v. Farmers Reservoir & Irr. Co., 194 Colo. 526, 575 P.2d 382 (1978); Colo. State Bd. of Land Comm'rs v. Dist. Court, 163 Colo. 338, 430 P.2d 617 (1967).

The question of necessity simply involves the necessity of having the property sought to be taken for the purpose intended. Whether an enterprise is feasible or practicable, and whether it will be a financial success, cannot be questioned in determining necessity, and such questions are not for the court's determination. See Mortensen v. Mortensen, 135 Colo. 167, 309 P.2d 197 (1957); Gibson v. Cann, 28 Colo. 499, 66 P. 879 (1901). Silver Dollar Metropolitan Dist. v. Goltra, 66 P.3d 170, 172 (Colo.App. 2002).

3. Motion for Immediate Possession

a. If the Court determines that the proposed taking is constitutional, the Court is empowered to grant the condemning authority immediate access to the property prior

to the valuation trial. Immediate possession is not an automatic right, however, but instead is a matter within the trial court's sole discretion. Colo.Rev.Stat. § 38-1-105(6)(a) (the trial court "may" grant immediate possession); Cucharas Sanitation & Water Dist. v. Mounsey, 805 P.2d 1177 (Colo.App. 1990); Vivian v. Board of Trustees of Colo. School of Mines, 383 P.2d 801 (Colo. 1963). *See also* McClain v. People, 11 P.85, 87 (Colo. 1886) (reasoning that "may" does not mean "shall").

b. Swift v. Smith, 201 P.2d 609 states: ". . . before the order for immediate possession is entered, the court must determine that its order will not result in needless disturbance of the possessory or other rights." *See* 614 (Colo. 1948).

B. Application of Standards to Specific Findings of Fact

1. Public Use / Public Purpose

a. The County asserts that the proposed extension of Milam Road will be available to the general public, and therefore it necessarily constitutes a "public use." Although the Court considers the fact that the public will be able to use the road as relevant, that finding alone does not end the inquiry. Instead, the Court must determine whether the condemnation is being conducted "primarily" or "essentially" for the benefit of the public, or instead has as its primary beneficiary the developer and the developer's private interests.

b. The County conceded that the primary function of the Milam Road extension is to serve the Cathedral Pines development:

i. In opening argument, the County acknowledged that the proposed development was driving the purported need for the road.

ii. The County's officials testified that the condemnation would not have been undertaken but for the development.

iii. The proposed extension terminates in the heart of Cathedral Pines development for the foreseeable future.

iv. The County has never attempted, outside the context of this development, to extend Milam Road on its own initiative.

For all these reasons, any use that may result from the construction of the road as it relates to improved access to the Black Forest Regional Park or improvement of the Shoup-Milam intersection are clearly secondary uses and not the "essential" or "primary" motivation for the Milam Road extension.

c. In conducting the inquiry outlined above as to whether the benefit to the developer predominates over any public, other courts have been careful not to give undue emphasis to purported "public benefits." *See* City of Novi v. Robert Adel Children's Funded Trust, 659 N.W. 2d 615, 619 (Mich.Ct.App. 2002) (when the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened

scrutiny the claim that the public interest is the predominant interest being advanced; there must be “substantial proof” that the primary benefit is to the public).

d. Phillips v. Foster, 211 S.E.2d 93 (Va. 1975) involved a developer who planned to develop a private housing subdivision that required certain drainage improvements. Although the necessary drainage easement would have provided some general benefit to the public by way of flood control, the Court found that the primary beneficiary of the easement was the developer.

In this case, the attempt to develop the [developer’s] 49-acre tract for private gain is the genesis and the basis for this condemnation . . . While the public may be incidentally affected as the result of [the drainage improvements] . . . this incidental public benefit is ancillary to and collateral to the underlying and primary purpose of the taking. That purpose in this case is for the improvement of one’s land at his neighbor’s expense, and for the establishment of a prosperous private enterprise by the former to the detriment of the latter. Such a taking is not for a public use within constitutional limitations . . . p. 96

Under the Virginia constitution – unlike Colorado’s – the legislature’s declaration of a public use is entitled to deference, but even with that deference the Virginia Supreme Court rejected the condemnation.

e. There is little doubt that the “genesis and the basis for this condemnation” is the development of Cathedral Pines for private gain. Negotiations between a developer and a governmental agency are to be expected in the development process but there are limits to the propriety of such dealings. The government’s condemnation power cannot be bartered through contract. As the United States Supreme Court has noted, the power of eminent domain is “so inherently governmental in character and so essential to the public welfare that it [is] not susceptible of being abridged by agreement.” *Contributors to Pennsylvania Hospital v. City of Philadelphia*, 245 U.S. 20, 22 (1917); *see also Chesapeake & O.RY.CO. v. Greenup County*, 175 F.2d 169, 173 (6th Cir. 1949).

f. *Condemnation of 110 Washington Street*, 767 A.2d 1154 (Comm.Ct.Pa. 2001), concerned a condemning authority that entered into an agreement with a private developer, that granted the developer the power to abandon the condemnation altogether. The condemning authority agreed to pay a fixed amount of the condemnation costs, with the developer to pay the difference. Relying in part on the cases cited above, the court found that there had been an unlawful delegation of the eminent domain power to the developer. “[A]ny agreement which purports to transfer such power to a private individual must be deemed to be void and unenforceable.” *Id.* at 1161.

g. Kings Deer and its needs have driven the County’s use of the condemnation power in trying to acquire property for the construction of Milam Road north of Shoup. The County approved the Cathedral Pines plat on December 16, 2004 with access through Holmes

Road and Winslow Road and no requirement for the extension of Milam Road. In doing so the County created a public safety issue. The County now argues that Holmes and Winslow are not safe and appropriate access for Cathedral Pines. This argument creates a new “public use or purpose for the condemning of an extension of Milam Road.

h. In Shaklee, 784 P.2d 314 (Colo. 1989), the Supreme Court found that a power transmission line that was planned for the use of a single commercial consumer could be characterized as a “public use” because the public also had a right to use the power. In Shaklee the Court states the following should be considered in determining whether a use is public:

i. The physical condition of the country: The property to be condemned is heavily forested residential property.

ii. The needs of a community: The proposed road is needed to provide the best and safest possible access to the new development, additional access to the Black Forest Regional Park and to divert traffic from Holmes and Winslow. If “community” is viewed in a larger context of the entire County, the proposed road is not needed.

iii. The character of the benefit which a projected improvement may confer upon a locality: There would be an incidental benefit from an improved intersection and improved access to the Black Forest Park. The proposed road would provide safer access to the development via the Milam Road extension versus using Holmes and Winslow as access.

iv. The necessity for such improvement in the development of the resources of the state: The new development is not necessary.

i. Shaklee also stated, “Even if persons who benefit from the improvement agree to pay for it entirely, the taking of necessary property is valid as long as the use of the property is a public use.”

j. Condemnation of private property for public roadways is almost always found to be a public use, but see: City of Novi v. Robert Adell, 253 Mich. App. 330, 659 N.W. 2d 615 (2002). The Milam Road extension clearly will be available for public use both for those who live in the new development and the public at large.

k. The Colorado Supreme Court has not had the opportunity to address the issue of whether the condemnation of private property for a public roadway that primarily benefits a private developer is really a public use. This Court finds the decisions of other state courts listed above as instructive but not dispositive. In particular the Court notes that Arizona requires that the anticipated public benefits must substantially outweigh the private character of the end use. Michigan also requires substantial proof that the public is primarily to be benefited. Arizona’s interpretation of identical language “whether the contemplated use be really public” is quite different from Colorado’s interpretation. Rather than requiring that the public benefits substantially outweigh the private character of the end use and placing the burden of proof on the condemning authority, Colorado requires the owners of the property being condemned to prove the use is not public.

1. The Court concludes that the facts of this case regarding whether of not the proposed condemnation is for a public use or public purpose weigh evenly between the parties. Therefore, the Respondents have not carried their burden of proving the condemnation is not for a public use or benefit.

2. Necessity

a. The County's determination through its resolutions that the Milam Road is necessary is entitled to binding effect beyond the scope of this Court's review unless the determination is either the product of fraud or bad faith.

b. The County never conducted any planning to build the road itself. The County never charged its staff with designing a proposed road (and in fact Mr. McCarty attested that his staff did not have the free time, from which one would infer they were committed to more important projects for the County). The County made no attempt to acquire property for the road independent of the developer's push for more favorable access. The County never included Milam Road either in its standard road planning or in its prioritization for potential excess funds. The County never committed any funds to Milam Road in the ordinary course of its road planning.

c. The County showed no interest in the extension of Milam Road until the developer of Cathedral Pines began showing an interest in developing Cathedral Pines, at which point the County approved a design that extended Milam Road so that it terminated in the Cathedral Pines development.

d. The County argued at trial that if Holmes Road were to serve as the primary access to the development, as the recorded plat now shows, a number of substantial improvements would be required for public safety such as widening the road and lowering the height of some of the hills. Along these lines, the Court notes that:

i. When asked during his deposition whether alternate access was "insufficient," Mr. McCarty expressly rejected the use of the word "insufficient" to describe alternate accesses. Instead, he asserted that alternate accesses might well be sufficient, but they were not desirable in light of the impact on other residents. This expressed preference for Milam Road appears to be the developer's, not the County's preference.

ii. Mr. McCarty's deposition, in contrast to the testimony at trial, does not suggest that safety or other pragmatic considerations (beyond the effect on other landowners) led to his support of the Milam Road extension.

iii. The Court has also considered the evidence of close relationship and cooperation between the County and the developer with respect to the construction of access to Milam Road. This cooperation was evident to the court in the Sisk Act case.

iv. This Court has observed the close “hand in glove” relationship between the County and the developer first hand with respect to this matter. As set out in the findings of fact, the County introduced evidence of the final recorded plat in support of its arguments. The recorded plat suggests that the County did not view the Milam Road extension as necessary, because it approved the issuance of building permits even if the condemnation is dismissed.

v. The County’s argument concerning the necessity of Milam Road has shifted during the course of the litigation. During the trial safety issues concerning the use of Holmes Road and Winslow Road as access to Cathedral Pines became the primary argument. The safety issues have arisen only because the County chose to approve the plat with the Holmes and Winslow access and allowed construction to begin immediately. The County has stated previously that the plan was for Milam Road to handle 90% of the traffic going to and from Cathedral Pines.

e. The litigation over the proposed Milam Road extension has been protracted, covered several cases, and has been very public. There is little doubt that potential purchasers (especially people in the business who would purchase such lots) understand that the Milam Road extension is not a certainty. Kings Deer has taken reservations for all of the lots in Cathedral Pines Filing No. 1. The purchasers, according to Mr. Potter, do not have any right to revoke their reservation if the condemnation is not allowed. It is a reasonable inference from this fact that the purchasers of several scores of lot have determined for themselves that the viability of the development or the value of their lots does not, in fact, assume the existence of the Milam Road extension.

f. The Court has substantial concerns about the County and the developer’s conduct in pursuing this condemnation, however, the Court cannot conclude that the Respondents have proved the County’s actions have been fraudulent or in bad faith. The Court is unaware of any specific definition of “bad faith” in this context and so has used the Black’s Law definition: “generally implying or involving actual or constructive fraud or a design to mislead or deceive another.”

3. Immediate Possession

a. In assessing the County’s request for immediate possession, the Court begins with the undisputed facts that (a) the developer has expressed its intention to begin construction of the road immediately (indeed, within days of being given permission to enter the property, and (b) the immediate construction of the road would cause irreparable damage to the property itself, as well as to the property interests of the Respondents.

b. The fact of irreparable harm does not justify denial of immediate possession standing alone because the same harm will be visited on the property once the County takes title and begins construction. At the same time, however, the certain irreparability of the damage counsels the Court to act with caution.

c. The County authorized the condemnation more than two years ago, and its failure to set this matter for a hearing on immediate possession during the interim period makes it clear that immediate possession is not essential to the County's needs. The need for immediate possession – construction contracting and permitting requirements – is based on the developer's schedule not the County's.

d. Accordingly, the Court finds that the lack of need for immediate possession and that immediate possession would cause irreparable harm to the Respondents' property negates immediate need for possession

e. Request for immediate possession is denied at this time.

Court GRANTS Petition for Condemnation.

Court Denies request for immediate possession.

DATED this 23rd day of February, 2005.



District Court Judge