

Public Use  
or Purpose,  
Necessity, and  
Pretextual  
Takings in  
Colorado Eminent  
Domain Law

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*This article discusses the public use or purpose and necessity elements in eminent domain proceedings. It also covers the related issue of pretextual takings.*

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**E**ntities with eminent domain power must satisfy four preconditions before initiating a condemnation action: (1) the condemnor must have authority to condemn the property for the stated purpose; (2) the acquisition must be for a public use or purpose; (3) the property must be necessary for the stated purpose; and (4) the parties must have failed to agree on the compensation amount.<sup>1</sup> This article compares the closely related public use or purpose and necessity elements in the context of acquiring private property for public projects.

#### **What is a Public Use or Purpose?**

“Public use” and “public purpose” are sometimes used interchangeably in eminent domain law. The term “public use” comes from the state constitution and is incorporated into eminent domain statutes. Colorado case law adopted the “public purpose” test to determine whether a taking is for a “public use.” This article uses these terms accordingly: “public use” when referencing, for example, the state constitution; and “public purpose” when referencing, for example, cases discussing the public purpose test.

The right to take private property for a public use is derived from Colo. Const. art. II, § 15, which provides in relevant part: “whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.”<sup>2</sup> Thus, the court must decide whether a contemplated use is a public use.<sup>3</sup> In most cases, condemnors must prove by a preponderance of the evidence that a particular use is public.<sup>4</sup> However, the burden of proof is greater in the urban renewal context, where the condemnor must prove by clear and convincing evidence that the use is public.<sup>5</sup> Unlike the determination of necessity, the court does not defer to the condemnor’s determination that a use is public.<sup>6</sup>

#### ***The Public Purpose Test***

There is no precise definition of “public use,”<sup>7</sup> which has been characterized as “inherently amorphous” and “flexible.”<sup>8</sup> Courts may consider several factors, including (1) the country’s physical conditions, (2) the community’s needs, (3) the character of the benefit the project may confer upon a locality, and (4) the needs for such improvement in the development of the state’s resources.<sup>9</sup> These factors have been described as “guidelines” to assist a court in assessing whether a taking is essentially for a public benefit, but these factors are not exhaustive or exclusive.<sup>10</sup> Thus, courts must determine whether a contemplated use is a public use on a case-by-case basis. This opens the door to challenges in many condemnation cases.

“Public use” means that the taking serves a public purpose or benefit but doesn’t necessarily mean the public must use the property being taken.<sup>11</sup> In Colorado, courts

apply the public purpose test<sup>12</sup> to determine whether the project's overall objective confers a public benefit.<sup>13</sup> If a project is essentially for a public benefit and advantage, a court will find a public use.<sup>14</sup> "Essentially for a public benefit and advantage" means that the "fundamental and intrinsic nature of the taking must be for public benefit."<sup>15</sup> Private parties may benefit (even significantly) from the project or property acquisition, so long as the purpose and benefit are essentially public.<sup>16</sup> Conversely, if the primary purpose of the condemnation is to advance private interests, the existence of an incidental public benefit does not prevent a court from finding it does not meet the public purpose test.<sup>17</sup>

#### *Applying the Public Purpose Test*

Colorado courts have liberally construed public use or purpose. In an early case, a landowner argued that a railroad company's condemnation for construction of dust levees parallel to its tracks was not a public use.<sup>18</sup> The Colorado Supreme Court rejected that argument, finding that the railroad served the public and the dust levees benefited the railroad, thus serving a public purpose.<sup>19</sup> In another case involving the Public Service Company of Colorado, landowners argued that an easement condemnation for construction of a power line to exclusively serve the Adolph Coors Company was not a public use.<sup>20</sup> The Colorado Supreme Court recognized the "difficulty of formulating a definition of public use which is applicable to the myriad of circumstances which can arise in an eminent domain case."<sup>21</sup> It determined that the public had the right to use the power transmitted by the line on equal terms with Coors and accordingly held the use was public.

Only a handful of Colorado appellate courts have determined that the use contemplated by the condemning authority lacked a public purpose. In the first, *Denver West Metropolitan District v. Geudner*, the Denver West Metropolitan District (DWMD) sought to condemn property to relocate a drainage ditch.<sup>22</sup> DWMD's entire board of directors comprised members of the same family that owned a company with commercial property under contract to sell to a third party. As a condition of the sale, the

purchaser required relocation of the ditch so it did not traverse the sale property. DWMD hired an engineering firm to study alternative routes for the ditch, and it proposed three routes, but all crossed the property. DWMD rejected the proposed routes and directed the engineering

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firm to find a route that did not cross the sale property. A fourth proposed alternative would cross another landowner's property, and DWMD pursued condemnation of that property for the route. Under those facts, a Court of Appeals division found that the public purpose was only incidental to the condemnation's overriding

private purpose, which was to "conclud[e] a commercial transaction" that would "advance the private interests of the District's officers."<sup>23</sup>

In the second case, *Silver Dollar Metropolitan District v. Goltra*, the Silver Dollar Metropolitan District (SDMD) sought to acquire property in fee to construct, operate, and maintain a roadway and tunnels.<sup>24</sup> The tunnel project was one of five possible alternative routes under evaluation by federal and state agencies at that time, and no preferred alternative had been selected. Nevertheless, SDMD contended it needed the property to conduct core drilling and obtain geotechnical information to complete the design of the tunnel portals and other structures. The trial court dismissed the petition, finding no public use for the property and that SDMD would be acting in bad faith by proceeding with the condemnation at that time. A Court of Appeals division affirmed, concluding that "whether there would ever be a project for which the property could be lawfully condemned" was germane to the determination of public purpose.<sup>25</sup> Thus, the condemnation was premature—the tunnel project would have to be selected as a preferred alternative before SDMD could even submit for permits necessary to build it. Were another alternative selected, SDMD would have taken property outside the project's scope that would never be put to a public use.

A third case involved a county that attempted to condemn property for access to a private cemetery.<sup>26</sup> In *Board of County Commissioners v. Kobobel*, a Court of Appeals division considered several factors, including that the general public had no right to visit the private cemetery, so access was not available to the public on equal terms. The county argued that potential future road users existed, but the Court reiterated the *Silver Dollar Metropolitan District* rule that "a public benefit that may never be initiated is premature."<sup>27</sup> It concluded that the purpose was to benefit private parties—"a few select members of the public" who would gain access to a private cemetery—and did not constitute a public purpose.<sup>28</sup>

Most recently, in *Carousel Farms Metropolitan District v. Woodcrest Homes, Inc.*, the Colorado Supreme Court revisited the public

use question in the context of a metropolitan district's condemnation of private property for a public road and utility project.<sup>29</sup> There, Woodcrest Homes owned a strip of land (Parcel C) that divided two larger parcels owned by Century Communities, a developer. Parcel C was encumbered by easements and contained utilities. As part of a development agreement between Century Communities and the Town of Parker, the Town agreed to annex the development and approve the plat if Century Communities owned all three parcels. It was undisputed that Woodcrest Homes and Century Communities both planned to use Parcel C for roads and utilities when they undertook development.

Century Communities formed Carousel Farms Metropolitan District (CFMD), whose board of directors comprised Century Communities' employees and officers. The Town and Century Communities amended their development agreement so that CFMD's ownership of Parcel C fulfilled the prerequisite for annexation and plat approval. Century Communities could not acquire Parcel C voluntarily, so CFMD proceeded with condemnation.

At the immediate possession hearing, Woodcrest Homes argued that the taking was primarily for a private purpose, because CFMD's board consisted of individuals related to the underlying developer, and the Town required Century Communities to acquire Parcel C before it would issue the development approvals. Thus, Woodcrest Homes argued, the first benefit fulfilled a private contractual obligation between CFMD and the Town, and the entire taking did not "pass constitutional muster."<sup>30</sup>

The trial court found the use was essentially public, but a Court of Appeals division reversed.<sup>31</sup> The Colorado Supreme Court focused its analysis on the intended uses of Parcel C—for public rights of way, storm drainage, and sewer improvements—and found that those functions essentially benefited the public. It stated that "[a] taking may have some antecedent benefit that isn't public, so long as the essential benefit is ultimately public,"<sup>32</sup> and noted that "[p]ermitting some private benefit by public taking may strike some as unusual. But Colorado is no stranger to this method of encouraging development."<sup>33</sup> The

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The Court thus reaffirmed the public purpose test established in 1906, recognizing that an antecedent or incidental private benefit does not defeat a public use determination. However, the Court left the door open for an argument that when a taking doesn't benefit the public for a significant amount of time after the taking, it doesn't 'essentially benefit the public.'  
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Court observed that “[o]ur takings cases have sown confusion as to the appropriate standard to review a trial court's public use determination.”<sup>34</sup> It then established that takings cases present mixed issues of law and fact, and a trial court's public use determination is reviewed de novo, overruling any cases holding otherwise.<sup>35</sup> It reversed the Court of Appeals.

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#### **The Necessity Factor**

The necessity precondition addresses whether the property or property interest being condemned is necessary for the stated public purpose. It is well-settled law that, in the absence of fraud or bad faith, a public agency's determination as to the need, necessity, and location of public improvements “is final and conclusive and will not be disturbed by the courts.”<sup>38</sup> Therefore, generally, courts cannot question whether a particular project is feasible or practicable, or whether it will be a financial success.<sup>39</sup>

A challenge to necessity cannot be raised by simply denying the allegation that the taking is necessary or by conclusory allegations of fraud and bad faith; a party must plead specific facts that, if true, would amount to fraud or bad faith.<sup>40</sup> Condemnees often allege bad faith where metropolitan districts' boards consist of a developer's employees and officers who will benefit from the acquisition. But this fact alone is not dispositive; in *Carousel Farms*, the Colorado Supreme Court made clear that “developer employees frequently comprise the sole managers of special districts in their early stages,” and rejected the landowner's allegation of bad faith.<sup>41</sup> Accordingly, practitioners should carefully plead bad faith.

#### **Pretextual Takings**

Until recently, the issue of pretextual takings was not well established in Colorado case law. A taking is pretextual where its purpose

seems public, but it is actually motivated by bad faith.<sup>42</sup> For example, this may occur where an entity pursues a project for open space but has ulterior motives for the taking. Whether a taking is pretextual or truly for a public purpose is fact driven.

This issue arose recently in *Lafayette v. Erie Urban Renewal Authority*. There, the City of Lafayette, a home rule city, sought to condemn 22 acres of property from the Town of Erie, a statutory town, for a community buffer and open space.<sup>43</sup> The facts are peppered with intergovernmental agreements, annexations, property acquisitions, and urban renewal plans, which ultimately led to Erie owning approximately 45 acres known as Nine Mile Corner—vacant land ripe for development. Erie began to develop the site by hiring a developer, identifying potential tenants, and signing a development agreement. King Soopers was identified as a potential tenant because it had an existing store nearby in Lafayette but had developed a larger store prototype and was looking to move. Lafayette offered King Soopers a potential development site in Lafayette not far from the Nine Mile Corner site and in the same year adopted an ordinance authorizing condemnation of 22 acres of the Nine Mile Corner site. The trial court dismissed the condemnation petition for lack of proper public purpose.

On appeal, Lafayette argued that its city council determined the condemnation was necessary, so the court had to defer to that determination. Erie argued that Lafayette's actions were in bad faith because it was motivated by its desire to keep King Soopers' tax revenue, which constituted about 8% of Lafayette's sales tax revenue, in Lafayette.

Extensive evidence showed that Lafayette officials learned early on of King Soopers' intent to move and pursued multiple avenues to persuade King Soopers to stay in Lafayette. When those efforts failed, Lafayette proceeded with condemnation. The record also revealed that Lafayette had begun extensive planning for development, including annexing various parcels and rezoning, that Lafayette was not concerned about having community buffers between residential and commercial development, and that Lafayette had identified other


properties as open space priorities over the years, but not Nine Mile Corner. The Court of Appeals' decision commingled the public purpose determination with the necessity analysis, recognizing that public purpose and necessity are closely related "and, to some extent, interconnected."<sup>44</sup> Accordingly, where bad faith is at issue, "courts may look behind

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an entity's stated condemnation purpose and finding of necessity."<sup>45</sup> The Court noted that the timing of Lafayette's interest in condemning the property—after Erie's development plans took shape—was instructive on the matter of bad faith, as was its unexplained decision to take 22 acres with the resulting impact that the remaining property could not be developed as Erie originally planned. Thus, the trial court

appropriately reviewed Lafayette's finding of necessity to determine that the taking's ostensible public purpose—for a community buffer and open space—was a pretext for the ulterior motive of preventing Erie's development plans. The Court of Appeals affirmed.

### Conclusion

Public use or purpose and necessity are eminent domain prerequisites that are interconnected and often blurred. A condemnation must essentially serve a public benefit, and the decision to condemn property or a property interest must not involve fraud or bad faith. Without fraud or bad faith, a public agency's determination as to the necessity of particular property for a public project is final. But even if a condemnation furthers an apparent public benefit, it may fail if there is an ulterior motive for the taking and a court finds it is pretextual. 



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### NOTES

1. See CRS § 38-1-102(1); *Dep't of Transp. v. Stapleton*, 97 P.3d 938, 941 (Colo. 2004) (citing *Buck v. Dist. Ct.*, 608 P.2d 350, 352 (Colo. 1980) (petitioner must show authority to condemn property sought to be taken)); *Colo. State Bd. of Land Comm'rs v. Dist. Ct.*, 430 P.2d 617, 619 (Colo. 1967) (issue of necessity is a threshold issue to be determined before a valuation trial); *Thornton v. Farmer's Reservoir and Irrigation Co.*, 575 P.2d 382, 392 (Colo. 1978) ("failure to agree upon compensation is a prerequisite to the commencement of a condemnation proceeding").
2. Colo. Const. art. II, § 15.
3. *Shaklee v. Dist. Ct.*, 636 P.2d 715, 716-17 (Colo. 1981); *Larson v. Chase Pipe Line Co.*, 514 P.2d 1316, 1317 (Colo. 1973); *Potashnik v. Pub. Serv. Co. of Colo.*, 247 P.2d 137, 139-40 (Colo. 1952).
4. CRS § 38-1-101(2)(b).
5. *Id.*

6. See *id.*

7. *Tanner v. Treasury Tunnel, Mining and Reduction Co.*, 83 P. 464, 465 (Colo. 1906).

8. *Carousel Farms Metro. Dist. v. Woodcrest Homes, Inc.*, 442 P.3d 402, 408 (Colo. 2019) (citing *Tanner*, 83 P. at 465 (“no precise line” for public use determinations)).

9. *Id.*; *Buck*, 608 P.2d at 351; *Larson*, 514 P.2d at 1317-18.

10. *Carousel Farms*, 442 P.3d at 408 (citing *Tanner*, 83 P. at 465).

11. *Id.* at 409 n. 6.

12. *Rabinoff v. Dist. Ct.*, 360 P.2d 114, 118-21 (Colo. 1961) (applied public purpose test in context of urban renewal taking).

13. *Bd. of Cty. Comm’rs v. Kobobel*, 176 P.3d 860, 863 (Colo.App. 2007).

14. See, e.g., *Buck*, 608 P.2d at 351.

15. *Carousel Farms*, 442 P.3d at 409. See also *Pub. Serv. Co. of Colo. v. Shaklee*, 784 P.2d 314, 318-19 (Colo. 1989) (a public utility could condemn property to serve the Coors Brewery because the public could eventually use the new power line), *overruled on other grounds*, *Carousel Farms*, 442 P.3d at 408.

16. *Carousel Farms*, 442 P.3d at 409.

17. *Denver West Metro. Dist. v. Geudner*, 786 P.2d 434, 436 (Colo.App. 1989). In *Geudner*, the trial court commingled public use and necessity, finding “no public necessity” to relocate the ditch. The Court of Appeals acknowledged that “issues of necessity and public purpose are ‘closely related and, to some extent, interconnected’” (citing *Thornton Dev. Auth. v. Upham*, 640 F.Supp. 1071 (D.Colo. 1986)) and concluded there was no public use for the taking.

18. *Buck*, 608 P.2d at 351-52.

19. *Id.*

20. *Shaklee*, 784 P.2d at 318.

21. *Id.*

22. *Denver West Metro. Dist.*, 786 P.2d 434.

23. *Id.* at 435-37.

24. *Silver Dollar Metro. Dist. v. Goltra*, 66 P.3d 170 (Colo.App. 2002).

25. *Id.* at 173.

26. *Kobobel*, 176 P.3d 860.

27. *Id.* at 865 (citing *Silver Dollar Metro. Dist.*, 66 P.3d at 175).

28. *Id.* at 865-66.

29. *Carousel Farms*, 442 P.3d at 404.

30. *Id.* at 409.

31. *Carousel Farms Metro. Dist. v. Woodcrest Homes, Inc.*, 444 P.3d 802 (Colo.App. 2017), *rev’d*, *Carousel Farms*, 442 P.3d 402.

32. *Carousel Farms*, 442 P.3d at 409.

33. *Id.* at 409 n.7.

34. *Id.* at 406.

35. *Id.* at 408.

36. *Id.* at 409.

37. *Id.* at 410 n.8 (“This, of course, isn’t to say there’s no time limitation whatsoever. It’s unlikely that a taking where the public doesn’t benefit for a significant amount of time would

essentially benefit the public. But, an incidental private benefit that results from fulfilling antecedent contractual obligations doesn’t implicate this longer time scale.”).

38. *Id.* at 410 (citing *State Board of Land Comm’rs v. Dist. Ct.*, 430 P.2d 617, 619 (Colo. 1967)); *Thornton*, 575 P.2d at 389 (determination of necessity is not reviewable by judiciary absent a showing of fraud or bad faith); *Dallasta v. Dep’t of Highways*, 387 P.2d 25, 27 (Colo. 1963) (determination of necessity is the agency’s responsibility and will not be disturbed by the court); *Mack v. Bd. of Cty. Comm’rs*, 381 P.2d 987, 989 (Colo. 1963) (determination by state of necessity of taking for highway purpose is final and conclusive unless bad faith is shown); *Welch v. City and Cty. of Denver*, 349 P.2d 352, 353 (Colo. 1960) (under “well-established principles,” absent showing of bad faith, determination of necessity will not be disturbed by courts); *Lavelle v. Julesburg*, 112 P. 774, 776 (Colo. 1911) (court will not substitute its judgment for that of another to whom a statute has delegated the power to determine what property shall be taken for a public use); *Silver Dollar Metro. Dist.*, 66 P.3d at 172; *Direct Mail Serv., Inc. v. Colo.*, 557 F.Supp. 851, 854 (D.Colo. 1983), *aff’d* 729 F.2d 672 (10th Cir. 1984). See also CRS § 38-6-105 (in proceedings by cities and towns, “[t]he court has no power to inquire into the necessity of exercising the power of eminent domain for the purpose proposed, nor into the necessity of making the proposed improvement, nor into the necessity of taking the particular property described in the petition”).

39. *Mortenson v. Mortenson*, 309 P.2d 197, 199 (Colo. 1957); *Silver Dollar Metro. Dist.*, 66 P.3d at 172.

40. *State Bd. of Land Comm’rs*, 430 P.2d at 619; *Lavelle*, 112 P. at 776 (conclusory allegation is insufficient to raise necessity issue); CRCP 9(b) (“In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.”).

41. *Carousel Farms*, 442 P.3d at 410-11.

42. See *City and Cty. of Denver v. Block 173 Assocs.*, 814 P.2d 824, 830 (Colo. 1991) (in the urban renewal context, landowner’s claim of no public purpose may be supported by evidence demonstrating that the project was undertaken in bad faith or fraud as a subterfuge to achieve an improper purpose rather than the authorized purpose of urban renewal), *overruled on other grounds*, *Carousel Farms*, 442 P.3d at 408.

43. *City of Lafayette v. Erie Urban Renewal Auth.*, 434 P.3d 746, 749 (Colo.App. 2018). See also Appellee’s Answer Brief, *Lafayette v. Erie Urban Renewal Auth.*, 2017 WL 11429847, which details the case facts.

44. *City of Lafayette*, 434 P.3d at 752 (citing *Denver West Metro. Dist.*, 786 P.2d at 436).

45. *Id.* at 752.