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<tr><td>District Court, Adams County, Colorado
17th Judicial District
Adams County Justice Center
1100 Judicial Center Drive
Brighton, CO 80601
Thornton Development Authority,

Petitioner,

v.

Thornton LLC, et al.,

Respondent.</td><td>DATE FILED: November 22, 2022 1:44 PM
CASE NUMBER: 2022CV31024

σ COURT USE ONLY σ</td></tr>
<tr><td></td><td>Case Number:22CV31024

Division A Courtroom 506</td></tr>
<tr><td colspan="2">ORDER – Immediate Possession</td></tr>
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The matter is before the Court based upon the Motion by the Plaintiff, Thornton Development Authority (The Authority) for immediate possession of property sought by the Authority for condemnation. The condemnation is sought pursuant to § 31-25-101, et seq. C.R.S.

The action was filed on August 1, 2022. After an enlargement of time, defendant Thornton LLC (Respondent) filed an answer on August 24, 2022. On November 2, 2022 a hearing was held with testimony and evidence admitted at the hearing.

The foregoing were the only parties appearing at the hearing. Prior to the hearing these parties filed a stipulation concerning the disputed issues to be decided at the hearing. Based upon the stipulation filed on October 25, 2022 the stipulations and issues to be decided were as follows:

A. Statutory Authority. Respondent-Landowner is not contesting that Petitioner has the statutory and constitutional authority to condemn the Property.

B. Ultimate Need and Necessity. Respondent-Landowner is not contesting that there is a public need and necessity to acquire the Property for an Urban Renewal Project (the “Project”) as identified in the First Amended Petition in Condemnation.

C. Immediate Need. Respondent-Landowner is not contesting that there is an immediate need to obtain possession of the Property for the Project and immediate possession will not result in needless disturbance of Respondent-Landowner’s property rights.

D. Public Purpose. Respondent-Landowner is not contesting that there is a public use and purpose for condemnation of the Property, and the Project serves a public purpose.

E. Contested Issues to be Determined at the Immediate Possession Hearing.

The two contested issues to be determined at the hearing are:

1. Good Faith Negotiations. Whether Petitioner negotiated in good faith with Respondent-Landowner to acquire the Property, and if further attempts to reach an agreement before filing the Petition in Condemnation would have been futile.

2. Deposit Amount. The amount of the deposit required for Petitioner to take possession of the Property under C.R.S. § 38-1-105(6)(a).

Petitioner contends that the charter for the City of Thornton (The City) does not allow the city to condemn property but another entity, The Authority does possess that authority to do so.

Respondent contends that The Authority is akin to an alter-ego of the City of Thornton as there are members of the respective entities who perform in both roles. Thus, an original offer made by The City must be considered along with the later offer made by The Authority.

Here, the parties filed pre-hearing briefs, made oral closing arguments, and written closing arguments. The Court has reviewed the written materials and have given them consideration in the Court's findings and orders.

The import of the foregoing is that the City of Thornton had made overtures about purchasing the property from Respondent for a period of time. These offers were much greater than the offers made by The Authority prior to the initiation of the condemnation proceedings. The offers made by The Authority were made after the completed appraisal by Noesner. Prior to the final appraisal The City relied upon a preliminary appraisal by the entity that employs Mr. Noesner.

In November of 2021, the City of Thornton (The City) offered a total of 11 million dollars to purchase the property with 7 million dollars to be put into escrow for remediation of the environmental contamination. This offer was based upon a draft appraisal by Valuation Consultants, Inc. A counter-offer was made by Respondent for a higher amount, however, the City of Thornton declined to accept the counter-offer.

At the hearing Petitioner called Robert Noesner, Jack Denman, and Chad Howell to testify. Respondent called Bernie Buescher, Jay Brown, and David Clayton as witnesses. Noesner and Clayton were accepted as expert witnesses. Their respective areas of expertise were commercial real estate and appraisal of such properties. Clayton had additional expertise in the area of environmentally distressed properties.

The property in question is commonly known as the Thornton Shopping Center and the land is approximately 15.6 acres.

Mr. Brown testified as the representative for Thornton LLC. He explained the property was purchased in 2005. Not long thereafter he received information that prior to the purchase dry cleaning businesses operated on the property and purportedly had caused environmental contamination on the property and also to some properties to the south of the property. The property is a business property that leases buildings to clients. He was aware that the property was considered "blighted".

He added that the City of Thornton had somewhat recently issued a number of code violation summons for the property and he spent approximately $500,000 to remedy the code violations.

Later the anchor store on the property, Albertson's, did not renew the lease after merging with another company and closing several stores.

He also testified that he had the property under partial contract at one point somewhat recently and the purchaser withdrew the original offer and made an offer of roughly one million dollars for the property apparently after assessing the risks of the environmental issues. It is notable that a sale of a ¾ acre parcel of the property sold in early 2021 for approximately $1,637,000. The same property later was sold to another entity for approximately 2.2 million dollars. That parcel had been previously leased to a Wendy's restaurant. Noesner report, page 15.

A 2017 corrective action plan indicted that the environmental contamination had migrated off-site. In 2022 an environmental contamination abatement study was done by ERO Resources Corp. The Court finds ERO is in the business of environmental remediation. That study indicated the abatement costs for the environmental contamination could range between 10.5 million and roughly 18 million dollars. The costs estimated for demolition and asbestos abatement was estimated to be between roughly 1.7 million dollars and roughly 2.15 million dollars in additional costs. Noesner report, Page 15.

Mr. Howell testified concerning the attempted negotiations and offers ultimately made by the authority after receiving the final appraisal from Mr. Noesner. Noesner testified that the costs of remediating the environment damage to the property exceeds the value of the property without contamination.

In June of 2022 the Authority sent an offer to Respondent offering $100,000 to purchase the property. That offer was not responded to. The foregoing offer was made after a letter indicating an intent to acquire was issued by the Authority to Respondent. The offer, if you will, was made after Noesner completed his appraisal and valuation of the property.

Mr. Clayton testified that the "as is" value of the property is approximately 6.5 million dollars for the compensation and preliminary deposit amount based upon his appraisal.

There were two major differences in the appraisal approaches of the experts. Noesner's was based upon the demolition of the improvements of the property in order to remediate the environmental contamination in the areas of contamination. This appraisal also included costs for asbestos abatement and demolition of 90% of the existing improvements at the Shopping Center.

Mr. Clayton believed the mitigation could be completed by other, less expensive, methods. His estimated environmental contamination cost for remediation was 6.5 million dollars. Mr. Clayton also testified to what is depicted in Exhibit K. His testimony was that subdividing the property, here the contaminated property as Larger Parcel 1, and uncontaminated property depicted as Larger Parcel 2. His testimony included that Larger Parcel 2 could be developed independently and has an individual value of roughly 1.8 million dollars. He testified that such a methodology is used nearly exclusively in imminent domain cases.

Clayton also used a reconciled sales comparison approach and income approach when reaching the unimpaired value of the property. He found the unimpaired value of the property to be 13 million dollars. Using those calculations, the as is value for the purposes of the preliminary deposit is 6.5 million dollars.

Mr. Clayton also testified that because the ERO estimates included demolition and asbestos abatement, the value of the property had been under-estimated by Noesner's appraisal.

In sum, Respondent contends there was no good faith negotiations for the purchase of the property prior to the filing of the case. The contention continues that the offer made by the Authority was not a "reasonable good faith offer." § 38-1-102(1) C.R.S. The argument is based in part on case law from other jurisdictions. In the event that the Court were to conclude that there were good faith negotiations Respondent contends the Authority should deposit a minimum of 6.5 million dollars prior to the trial on the merits to the commissioners. § 38-1-105(6)(a) C.R.S. It was made clear to the Court that the preliminary deposit may properly be used for ongoing expenses associated with the subject property.

The Authority contends that is has engaged in good faith negotiations and a reasonable good faith offer was made based on Noesner's final appraisal and that The Authority received no response or counter-offer. The Authority contends that the second offer of one million dollars made by the prospective purchaser when that arm's length offer was made represents the most accurate amount for the preliminary deposit.

Authority and Jurisdiction

Whether a petitioner engages in good faith negotiations and the parties failed to agree upon compensation is jurisdictional in nature. § 38-1-102(1) C.R.S.

The Court finds that the testimony of both expert appraisers was credible.

§ 31-25-105(1)(e) C.R.S., expressly grants an urban renewal authority the power to acquire "any interest in property" by condemnation, "including a fee simple absolute title," in the manner provided for the exercise of the power of eminent domain by any other public body.

The Colorado Constitution, Article II, § 15, requires the judiciary to determine whether a contemplated use is public: Private property shall not be taken or damaged, for public or private use, without just compensation . . . and 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.

There are two types of "public uses" of private property: the first is public employment or actual use by the public. *Thornton Development Authority v. Upah*, 640 F.Supp. 1071, 1077 (D. Colo. 1986). This urban renewal project is for public advantage or benefit. § 31-25-102(3) C.R.S., has been interpreted as recognizing planned elimination of urban blight constitutes a public purpose. *Oberndorf v. City & County of Denver*, 900 F.2d 1434, 1442 (10th Cir. 1990).

"The question of necessity simply involves the necessity of having the property sought to be taken for the purpose intended." *Town of Silverthorne v. Lutz*, 370 P.3d 368, 375 (Colo. App. 2016) (quoting *Silver Dollar Metro. Dist. v. Goltra*, 66 P.3d 170 (Colo. App. 2002)).

The Thornton City Council long ago determined that the subject property is blighted. The Council much later determined that the condemning authority was authorized to acquire the subject property by eminent domain if necessary.

The immediate need requirement to be determined by the Court to ensure that there will not be a needless disturbance of the property.

The foregoing requirements, other than the good faith negotiations, have been stipulated by the parties. The Court after review of the amended complaint and file finds these legal prerequisites have been met.

The prerequisite of a failure to agree upon the purchase price for the property sought to be condemned generally requires only that the condemning authority make a reasonable good faith offer to reach an agreement with the owner of the property for its purchase. Lengthy or face-to-face negotiations are not required. The making of a reasonable offer to purchase in good faith by letter and allowing the property owner time to respond is sufficient. If the property owner remains silent or rejects the offer without making an acceptable counteroffer, a condemnation action may be instituted. *Lutz, supra, at* 375.

Here, the linchpin of Respondent's contention involves the significant difference in proposed purchase amount between the original negotiations between The City prior to the decision to proceed by condemnation and the amount offered once a decision to proceed by condemnation was granted to The Authority. *See*, Exhibit D. The Court finds that the difference was and is extraordinarily significant. Exhibits A, D. and 5. Respondent also relies on the testimony and reports of Mr. Clayton. Exhibits F through J.

However, the Court also finds that The Authority could and did reasonably rely on the report prepared by Noesner which was based in large part on the environmental study by ERO. Exhibit 7. Even deducting the demolition and asbestos abatement costs included in the Noesner appraisal, the environmental remediation costs could far exceed the value of the property without the contamination on the subject property and the remediation of the nearby property where the suspected migration of contaminants occurred.

The owner of the property never responded to the offer in the letter depicted in Exhibit 5. Based upon the foregoing, the Court finds The Authority engaged in good faith negotiations when making the written offer to the property owner and receiving no response to the offer.

The Court specifically finds The Authority could reasonably rely on the final appraisal and remediated costs in determining a reasonable value of the property prior to making the offer.

Preliminary Deposit

Noting the foregoing contentions, the Court must determine the amount of the preliminary deposit by The Authority prior to taking immediate possession. Petitioner believes a preliminary deposit in the amount of one million dollars is appropriate based upon the negative value of the entire parcel and the last offer to buy the property in an arm's length transaction.

Respondent, based in large part on Mr. Clayton's appraisal, believes the appropriate deposit amount should be approximately 6.5 million dollars. The reasonable inferences from the testimony of Clayton is that the property and adjacent contaminated property could have the

contamination remediated and still have the “as is” value of 6.5 million even after deducting the remediation costs.

While the Court finds both appraisals to be credible, the Court finds the appraisal based upon the reconciled income and comparison approach to be most credible. Thus, the Court finds the most credible valuation of the property, if unimpaired by the contamination, to be $ 13,000,000.

The Court also finds that the minimum environmental remediation estimate completed by ERO and used in Mr. Noesner’s appraisal to be the most credible. The minimum environmental remediation cost estimate was $10,500,000 based upon the report.

The Court will find and conclude that the jurisdictional prerequisite of good faith negotiations has been met by The Authority. The Court will further find that a preliminary deposit in the amount of $ 2,500,000 in the court registry will be required from The Authority prior to taking immediate possession of the property. This number is reached by taking the $ 13,000,000 estimated value of the property if uncontaminated in Mr. Clayton’s appraisal and deducting the $ 10,500,000 minimum remediation costs estimated by ERO and contained in Mr. Noesner’s appraisal.

Done and Signed this 22nd Day of November, 2022.

By the Court: ________________________________
Mark D. Warner
District Court Judge