



BRIGGS ALEXANDER

A Professional Law Corporation

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May 2, 2023

**NOTICE OF OBJECTION BY PROPERTY OWNER
AGENDA ITEM NO. 17 (RES-2023-061)**

VIA E-MAIL:

Town Council & Attorney
Town of Castle Rock
100 N. Wilcox Street
Castle Rock, CO 80104

RE: NOTICE OF OBJECTION TO TAKING

Project: I-25 Crystal Valley Interchange Project (the "Project")
Parcel No.: 2505-224-00-010
Owner: Hyperion Fund, L.P.

Dear Mayor Jason Gray:

This office represents Hyperion Fund, L.P., the owner of real property comprising 4.677 acres and located in unincorporated Douglas County with Parcel No. 2505-224-00-010 (the "Property"). This correspondence shall serve as notice of objection to the Town of Castle Rock's (the "Town") intention to exercise its eminent domain powers with respect to the taking of the Property.

On April 24, 2023, the Town Attorney, Michal Hyman, submitted a letter to the Town requesting authorization to institute eminent domain proceedings to acquire fee simple title to, and seek immediate possession of, the Property. The Town's Council has set a hearing on this matter currently scheduled for May 2, 2023. The Property owner hereby **requests an extension** to the hearing date in order to permit the Town Council to become apprised of the facts and circumstances surrounding the taking of the Property and the lack of good faith negotiations relating to the sale of the Property.

If no such extension is be granted, please adhere to the substance of this letter and DENY the Town Attorney's request.

The Town Council's Responsibilities and Obligations.

The Town Council must abide by Colorado law and the Town's Municipal Code. Section 14.01.070 of the Town's Municipal Code states, in whole:

14.02.070. Eminent domain. Any ordinance authorizing the exercise of the Town's power of eminent domain shall contain a provision substantially in conformance with the following:

Should **good faith negotiations** fail to result in an agreement with the property owner on value of the property or other terms of the acquisition, the Town Attorney shall so advise the Town Council and request Town Council authorization to institute eminent domain proceedings and acquire immediate possession of the property. Upon receipt of such request, the Town Council at a regular or special Town Council meeting shall consider the request, at which time the property owner will have the opportunity to be heard. Upon conclusion of the hearing, the Town Council shall approve or deny the request for commencement of filing a petition in condemnation. If the request is denied, the Town Attorney will continue negotiations with the property owner.

(Ord. No. 2019-018 , § 1, 7-2-2019) (Emphasis added). Note that the Municipal Code requires the Town Council to determine whether negotiations took place between the Town Attorney and the Property owner, whether those negotiations were conducted in good faith, and whether good faith negotiations failed to produce an agreement whereby the Property owner would transfer title to the Town.

C.R.S § 38-1-121 further states that a condemning entity (the Town) shall “negotiate in good faith for the acquisition of any property interest sought prior to instituting eminent domain proceedings....”

The Town Attorney is currently requesting authorization from YOU to institute proceedings for a taking of the Property. If the Town Council denies the request, the Town attorney, pursuant to Castle Rock’s Municipal Code “will continue negotiations with the property owner” and will be able to return to the Town Council if negotiations are not successful to request Town Council’s approval to begin legal proceedings for the taking.

The Town Council should deny the Town Attorney’s request and request that the Town Attorney attempt further negotiations prior to instituting formal legal proceedings.

There Have Been No Good Faith Negotiations Between the Property Owner and Town Attorney.

The Property Owner and Town Attorney have not engaged in meaningful negotiation regarding the Property. Only one offer has been made by the Town and the parties have not yet been able to reach an agreement for the sale of Property from the owner to the Town pursuant to a threat of condemnation.

On May 7, 2019, Ordinance #2019-009 was passed by the Town Council to authorize a partial taking of the Property for the Project. The purpose of the Project is undetermined and unspecified but may relate to the Town’s intention to connect Crystal Valley to Interstate 25. The May 2019 ordinance requires only a partial taking of the Property to, essentially, create two intersections on Crystal Valley Road where the Property is situated. The Property owner have had to transfer a portion of his Property to the Town to effectuate the construction of the Project and to build the off-ramps and roads required. The Property owner would have been permitted to own and control a substantial portion of the Property (the remainder) to enjoy rights that accompany property

ownership; such as possession, use, improvement and/or sale.

During this time, the Property owner was under the reasonable expectation that the Town only intended to take a small portion of the Property and sought an independent appraisal for such partial taking. The Property owner expended approximately \$8,000 to \$9,000, at the cost of the Town, to receive such independent appraisal.

However, approximately three and half years later, in or around November 2022, the Town substantially changed position and substantially changed the design of the Project from consisting of two intersections, to consisting of one larger roundabout with distant, winding and circling roads. This shift in design perpetuated the shift in need from a partial taking of the Property to a full take of the Property. Instead of taking a portion of the Property, the Town now requires the entire portion of the Property and passed a new ordinance, Ordinance #2022-029, to authorize the full taking of the Property.

After learning of the shift, the Property owner sought another independent appraisal which is required to be reimbursed by the Town pursuant to Colorado law (C.R.S. § 38-1-121). This section states that “the condemning authority shall pay the reasonable costs of such appraisal.” Pursuant to this statute, the Town had paid the fee for the first appraisal obtained (for the partial taking). On the other hand, the Town refused and refuses to reimburse the Property Owner for the new appraisal it sought and obtained for a valuation of the full taking of the Property. Although the Property owner incurred approximately \$20,000 in costs to obtain such appraisal, the Town refused to reimburse the owner such amount. After argument between the parties, the Town offered to pay and the Property owner agreed to accept a partial payment of approximately \$8,000 under objection and Property owner’s reservation of right to demand the remaining reimbursement.

C.R.S § 38-1-121 also states that a Property owner is entitled to receive the Town’s appraisal of the condemned property “immediately” upon sending its own appraisal to the Town. On March 30, 2023 the Property owner submitted its independent appraisal to the Town Attorney. However, the Town did not reciprocate and did not send its appraisal to the Property owner. This is a sign of bad faith.

However, on or around April 10, 2023 the Town submitted a final offer to purchase the Property by way of letter and finally included a copy of its appraisal. The Town’s offer of \$816,228.00 is significantly below the market value of the Property, especially when considering the Property’s highest and best use. The Property owner’s appraisal valued the Property at \$1,228,556.00. In reliance on the appraisal it obtained from an independent source, the Property owner did not accept the Town’s offer of purchase.

Upon the refusal, no other offers were discussed. No other sum of money was offered for the taking of the Property. No compensatory property was offered to the Property. All negotiations for the taking of the Property ceased after the first rejection of the Town’s first offer. This is no negotiation at all. Therefore, no good faith negotiation has been made by and between the Town and Property owner and, on such information, the Town should reject and DENY the Town Attorney’s request to initiate formal proceedings for the taking of the Property. Such denial will cause the Town to engage in good faith negotiations for the talking of the Property without court intervention.

Objection to Taking of the Property and Objection to Public Purpose of the Taking.

Although this office and the Property owner have engaged in some negotiation for the sale of title from the owner to the Town, this office and the Property owner strongly object to the legality of the proposed condemnation and taking of the Property. The Constitution of the State of Colorado provides as follows:

Private property *shall not be taken* or damaged, for *public or private use, without just compensation*. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; 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.

Colo. Const. Art. II, Section 15. (emphasis added).

Any taking by a government entity of private property must service some public purpose. Although construction of roadways that connect Crystal Valley Road to Interstate 25 would serve a public purpose, the full-take of the Hyperion Fund, L.P. Property would not serve a public purpose. A feasible alternative design exists which would not necessitate the taking of the Property, or a lesser portion of the Property, however, it is apparent that the Town has elected to needlessly take private property and build its roadways without concern or consideration to owners of private property in the area. Here, it is not legally sufficient to take the position “[t]o improve operational efficiencies of the interchange a preferred alternate design was recommended...” to justify a full-take of the Property. After numerous attempts to understand the public purpose the taking of the Property would serve the Town, the Town refused to address the issue and continued to state that the Town elected for a preferred construction design. Not once has the Town made an attempt to justify the taking of the Property as necessary for the Project. The justice system does not allow takings unless there is a justifiable public purpose and a justifiable need to effectuate the taking. Therefore, this office objects to the Town’s attempt to exercise its eminent domain powers to the extent that the taking of the Property does not serve a public purpose. It is the opinion of this office and the Property owner that the Project can be completed via an alternative design without the taking of the Property.

Moreover, even if the taking of the Property was properly justified, the Town must provide “just compensation” to the Property owner for such taking. The Town made merely one attempt to negotiate the value of the Property and now seeks to institute formal proceedings for the taking when, potentially, resolution of the taking can be obtained without formal court proceedings by the Town’s act of providing just compensation.

C.R.S. § 38-1-121(6) states that “If the parties involved in the negotiations fail to reach agreement on the fair market value of the property being acquired, the condemning authority, prior to

proceeding to trial on the issue of valuation, shall furnish all owners of record a written final offer.” This statute contemplates and imposes that the parties involved in a taking will negotiate the value of the Property prior to submitting a written final offer. However, the Town skipped all negotiation and directly caused to be sent a “final written offer”. The Town should be cautious to approve a request for formal proceedings without having undergone the recommended procedure as interpreted by the Property owner.

Please keep in mind that C.R.S § 38-1-122 provides that a condemning authority that cannot prove it is entitled to take certain private property will be liable to pay reasonable attorneys fees in addition to all other costs assessed against the property owner who participated in the proceedings. The same section further provides for attorney’s fees when the proceedings cause the property to be valued at 130% of the final written offer prior to the filing of the action. It is almost undoubted that the Property is valued over 130% of the Town’s offer and it is believed that a jury of the formal legal proceedings will provide such valuation.

Based on the foregoing and especially in light of the Property owner’s objection to the public purpose of the taking of the Property, the Town Council should reject and **DENY** the Town Attorney’s request to institute formal proceedings for the Town’s exercise of eminent domain to take the Property.

Very truly,

/s/ Leon Alexander

Leon Alexander
Briggs & Alexander, APLC

Cc: Mayor Jason Gray
Mayor Pro Tem Kevin Bracken
Councilmember Ryan Hollingshead
Councilmember Laura Cavey
Councilmember Desiree LaFleur
Councilmember Max Brooks
Councilmember Tim Dietz

Michael Hyman, Town Attorney