

Tower Tussle: The Colorado Battle Over Extraterritorial Condemnation

IB-2006-E • April 2006

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The Issue

Should government be allowed to condemn privately-owned land outside its jurisdiction for the purpose of preventing development or mandating open space? Colorado lawmakers have said no, and in 2004, they passed a law forbidding municipalities from condemning extraterritorial private property.

Two years later, however, at least two Colorado municipalities are attempting to condemn land outside their city limits. The cities say they want to preserve vistas; the landowners say they should not be prohibited from responsibly using their land—especially by a governmental entity reaching beyond its jurisdiction.

A currently waged battle at the base of the foothills just outside Denver pits a consortium of television stations against the city of Golden.

Background

Billed by the *Rocky Mountain News* in December 2005 as “one of the most remarkable abuses

of eminent-domain power in recent state history,” Golden’s proposal to forcibly acquire 65 acres of

land outside of its jurisdiction raises serious questions about the ability of local governments conducting extraterritorial condemnation for the purpose of expanding open space or preventing development.¹

The property in question is owned by the Lake Cedar Group, a consortium of local television stations, including CBS 4, 7 News, 9 KUSA, and UPN 20. The City of Golden is seeking to acquire the land to prevent Lake Cedar Group from building the proposed tower on the property. Lake Cedar Group owns adjacent property on which TV towers exist currently.

According to Golden Spokeswoman Sabrina Henderson, the city wants to acquire the land at a cost of \$1.7 million to taxpayers, to prevent construction of the proposed tower and turning the land into open space. The city believes that broadcasters would be forced to move to an alternate location, and the existing towers would then be demolished. The city’s intention for the last several years, Henderson says, has been to maintain the city’s mountain backdrop.²

Golden’s announcement of the plan in late 2005 came on the heels of Lake Cedar’s ten-year attempt to obtain zoning approval from the Jefferson County

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Board of Commissioners for the replacement of the existing broadcast towers and transmitters with a single consolidated digital tower and building.

According to Lake Cedar, the process has been marred by turnover on the board, political opposition from local activists, and confusion surrounding federal telecommunications mandates.³ The tower plan was approved twice by county commissioners, in 2003 and 2004, but was postponed by the most recent commission in 2005, when it voted two to one to send the case back to District Court Judge Brooke Jackson's courtroom. Jackson had twice remanded the case to the county on "specific safety issues."⁴

Why A Tower?

According to the Lake Cedar Group, Denver is the last major metropolitan area in the nation to not house a High Definition Television (HDTV) tower. Currently, limited HDTV is available through a series of low powered antennas positioned in downtown Denver. The problem, according to Lake Cedar, is that "transmissions from a downtown

building are not a viable option for long-term digital format broadcasts" because they do not provide a digital signal that can reach portions of the Denver area or any areas beyond.⁵

Due to Denver's unique geography with mountains to its west, signals placed at lower altitude areas, including downtown locations, interfere with digital signal quality, Lake Cedar says.

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functioning by 2009 under Federal Communications Commission standards.

Lake Cedar makes the case that its proposed consolidated tower on Lookout Mountain would be 80 feet shorter than the tallest tower to be replaced, which stands at 810 feet; the new tower would decrease radio frequency levels on the mountain below the level currently being emitted from the existing towers. Finally, the new tower would be placed 130 feet farther down slope, making it less visible than the existing towers on the mountain backdrop.⁶

As a condition of its ongoing quest for zoning approval in Jefferson County, Lake Cedar has committed in writing to return the approximately 73.5 acres of land on which the existing towers stand to a natural state once the towers are removed in favor of the new consolidated digital tower located on adjacent property. The consortium has also committed to maintaining that land as open space. The adjacent parcel, which Golden is seeking to condemn, contains 65 acres and, if condemned, would come at a total cost to taxpayers of \$1.7 million.

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"It is a waste of taxpayer money to spend a million and a half dollars to acquire open space when comparable open space can be obtained and maintained at absolutely no cost to the taxpayer," noted Marv Rockford, a former general manager for CBS 4 and now the spokesman for the Lake Cedar Group.⁷

Lake Cedar continues to raise concerns about Golden's ability to finance such a massive condemnation effort, alleging that Golden's leaders have publicly admitted the city will likely face a budget shortfall in the coming years and that total cost of the proposal, including legal fees, could cost millions of taxpayer dollars far beyond the \$1.7 million currently being discussed.⁸

What If No Tower is Built?

If Lake Cedar is forbidden from consolidating the four existing analog towers into one digital tower, the stations say they will have no choice but to con-

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tinue to operate from their existing towers, a move that would result in Lookout Mountain not receiving the benefits of tower consolidation. In addition, if Golden is successful in condemning the stations' property, Lake Cedar says it would have no viable alternative on which to build a new tower or towers.⁹

Lake Cedar representatives have explored hosting the tower at other sites, including high rises in downtown Denver, but these buildings were not tall enough to provide an adequate signal to the entire metro Denver area, and at another site east of Denver which Lake Cedar says was impermissible due to Federal Aviation Administration flight path restrictions in this area adjacent to Denver International Airport.¹⁰

If Lake Cedar's effort to build the tower is stopped—either by Golden, by Jefferson County Commissioners, or a court ordered permanent injunction—the stations risk not being able to meet FCC mandates requiring the delivery of HDTV to consumers by 2009.

The mandate comes from Congress, which passed a law requiring all conventional “analog” TV broadcasting to end by 2009.¹¹ In place of analog, HDTV is to be provided over the airwaves on a non-subscription basis.

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broadcast spectrum. The change will free up scarce and valuable spectrum for other uses, including first responder communication in emergencies.¹²

The Opposition's Argument

Joining Golden has been a group of citizen activists and their attorney, who together have established Canyon Area Residents for the Environment (CARE).

The coalition maintains three arguments against allowing the tower consolidation to occur. First, members say the towers present a documented and real threat to public safety and that Jefferson County is ethically obligated to remove the towers.

CARE members assert that the new tower would more than double the effective radiated power of the existing towers to over 9 million watts. According to the group's web site: “If you can see the top of the towers (from your property) you will be affected! Even if you can't see them, your property values will be affected.”¹³

CARE members maintain that medical evidence indicates that the towers have, and continue to cause, serious health problems in neighboring residents. The group says the FCC is ignoring numerous studies that indicate biological impacts from electromagnetic radiation exposure at levels far lower than experienced by much of our community.

The exposure to as little as two microwatts per centimeter squared may have long term health effects, CARE says, including an increased probability of cancer. The group points to other Colorado counties, including Adams, Arapahoe, and Douglas, which have lowered allowable emissions for radiation to 2 microwatts per centimeter squared, a level they say is 200 times lower than the FCC allows.

Lake Cedar adamantly denies the validity of claims about a link between exposure to radiation and cancer or other health conditions, saying that radio frequency levels will decrease if the four towers are consolidated into the proposed digital tower, and noting that “the Jefferson County record. . . is replete with the testimony of scientists and engineers, qualified experts, who have testified under oath that the Lake Cedar project will make Lookout

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Mountain safer for residents and visitors, not less safe.”

The stations also maintain that the most recent reliable study on cancer rates in the area demonstrates that the “incidence of disease is within the range that would be expected even if there were no towers.”¹⁴ This view is supported by statements made by Jefferson County Health officials to commissioners that “there is no conclusive proof that low level RF is a causal agent for cancer or for other adverse health effects,” as well as a conclusion drawn by the United Nation’s World Health Organization, which found that there is no convincing evidence that “exposure to (radio frequency emissions) shortens human life span or causes cancer.”¹⁵

CARE members contend that Lookout Mountain exceeded FCC radiation limits for six of the last 18 years. They blame lax zoning enforcement for a decline in property values since 2003, with residents testifying under oath that they were unable to sell their homes because of concerns about the tower.

Lake Cedar disputes such statements, noting that most of the concerned residents purchased their homes well after the towers were built, demonstrating that the area presents a viable and desirable place to purchase a home.

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Second, CARE members say that Jefferson County must immediately impose a ban on any future broadcast tower additions on the mountain backdrop because of a promise made 12 years ago by Jefferson County Commissioners.

The promise, members say, assured residents that high-powered broadcast towers on Lookout Mountain would be phased out by the enforcement of zoning regulations. CARE notes that most of the broadcast towers are non-conforming uses under current county zoning regulations, and while Lake Cedar

agrees that some of the towers are non-conforming, they note that the towers are still legal because they were permissible under state and county law when built five decades ago.

CARE interprets a state law as requiring non-conforming uses to be phased out of existence as quickly as possible as a mandate on Jefferson County Commissioners to remove the existing towers.¹⁷

Third, the tower’s opponents also maintain that it should not be built because of concerns over interference between radio frequencies and other technological equipment and advances, contending that the proposal would adversely affect research at the nearby Colorado School of Mines and equipment used by intensive care units used by hospitals more than 10 miles away. In addition to residential impacts, including interference with home appliances, including computers, and garage door openers.

What the Colorado Legislature Says

While the Colorado legislature has thus far not intervened in Lake Cedar’s ongoing zoning quest, it has prohibited extraterritorial condemnations like the one currently being attempted by Golden.

In 2004, the Colorado General Assembly took up consideration of the so-called “Telluride Amendment” legislation, designed to prevent government officials from condemning land outside the jurisdiction for open space. At the center of the debate was the scenic ski town of Telluride.

At the time, then-Senate Majority Leader Mark Hillman, R-Burlington, fought aggressively for inclusion of the amendment, which ultimately passed the Senate 22-13 as part of House Bill 1203, a larger property rights reform measure.¹⁸

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sell regardless of the price,” Hillman told *Telluride Watch* reporter K.C. Mason after the bill’s passage, “If a property right can be overturned by a simple majority vote of your neighbors, then it really doesn’t mean anything to begin with.”¹⁹

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The amendment succeeded in spite of tenacious opposition from the Colorado Municipal League and environmental groups. Elise Jones, executive director of the Colorado Environmental Coalition

said “the Senate voted to thwart the will of the people of Telluride in order to satisfy the greed of a single developer. In the process, the legislature has weakened the ability of all Colorado communities to protect their quality of life by safeguarding open space for current and future generations.”²⁰

In 1993, Telluride voters voted to allocate 20 percent of sales and uses tax revenues to acquire the “Valley Floor”, the area of privately-owned land on the eastern outskirts of Telluride, as open space. For several years prior to the 2004 legislative session, Valley Floor landowner Neal Blue and Telluride officials had unsuccessfully attempted to agree on development plans for his 572 acres in the area.

This statutory change prohibited local municipalities from condemning land outside of their jurisdiction to establish open space.

While the bill was signed into law by Governor Bill Owens, it provided little relief to Blue and his San Miguel Valley Corporation as the town’s council continued in its efforts to condemn the property.

Colorado's Home Rule Cities

Colorado’s “Home Rule” cities are defined under Article XX of the Colorado Constitution as having a population of 2,000 or more residents and having the power to “make, amend, add to, or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.”

In addition, the constitution stipulates that “such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.”²¹

After the passage of House Bill 1203, Judge Charles R. Greenacre ruled against Blue and the SMVC’s motion to dismiss Telluride’s lawsuit seeking acquisition of Blue’s property through eminent domain.

Citing Article XX, Greenacre ruled that the Colorado General Assembly did not have the authority to enact a statute to limit the power of eminent domain to a home rule city like Telluride. “There is simply no authority for the proposition that the General Assembly may regulate, much less prohibit, a home rule municipality’s constitutional eminent domain powers,” Greenacre wrote.²²

Greenacre also specifically disagreed with Blue’s contention that the so-called “Telluride Amendment” pre-empted the town’s powers of condemnation. Greenacre also ruled, contrary to SMVC’s arguments, that the town has a right to condemn for purposes of preserving open space and that the town had not acted in bad faith in its condemnation efforts.

Blue and SMVC had argued that Telluride failed to meet the standard of making a “reasonable good faith offer to reach agreement on the price with the property owner” because the town’s offer to buy Blue’s property was less than half of the \$48 million appraisal conducted on behalf of the corporation.”²³

Telluride Mayor John Pryor told reporters in 2004 that he was committed to litigation at any cost. “I know that litigation is expensive and the outcome is unpredictable,” he said. “If the other party is as aware as we are

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that litigation is not in either side's interest, then I'm hopeful we can reach a settlement. But if not, we're prepared to go forward with the lawsuit."²⁴

Having spent much of the last several years in a legal battle, Blue and town officials were ordered into mediation in 2005. A condemnation trial was set to begin in January 2006, but was postponed by the Telluride Town Council in late 2005, when it made the decision to turn the property's fate over to a town vote that occurred on Valentine's Day 2006.

The compromise measure asked voters to give their approval to a plan that would have annexed nearly 800 acres of land into the town, with most of the land, including 513 acres of Blue's property to be pre-

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served as open space. The remainder of the property would be used for private homes, a school, affordable housing, retail space and parks.

Prior to the election, newspaper articles indicated that local residents remained conflicted about the situation. Cari Mackey, a manager at Jagged Edge, said she would ideally like to see total preservation, but also understands the rights of landowners. "I would like to see it (as) open space, but I think it's hard to tell people what

to do with their land," she told the Telluride Daily Planet.²⁵

Voters turned down the proposal by a vote of 603 to 439; the mayor told residents in an election night speech: "It's been such an emotional thing for the council - and for all of us. You can be assured this council will return to condemnation action. We cannot wait until the valuation trial to start fundraising."²⁶

Council members, who had expressed unanimous support of the compromise measure, worried about the cost of condemnation following the "no" vote. "I just think the money's not there," council member

Jill Masters told a *Telluride Daily Planet* reporter. "I hope I don't read in four years that we gave away 91 percent of the valley floor."

With the outcome yet to be seen, and interpretation of the "Telluride Amendment" in doubt due to Greenacre's ruling, the door swung open to other local municipalities, including Golden, to condemn property outside their jurisdiction.

What Happens Next

The Lake Cedar Group now faces a plethora of scenarios that make the ultimate outcome of this case extremely hard to predict.

In the immediate future, the case lies in the hands of District Court Judge Brooke Jackson, who is likely to order one of the following three results. First, he could issue a permanent injunction forbidding the new consolidated tower from being built. Second, he could remand the case back to the commissioners for further deliberation. Third, he could lift his temporary injunction and allow for construction to proceed.

Regardless of judicial outcome, however, Golden's attempt to condemn Lake Cedar's property will be considered separately, meaning the commission could rule in favor of the tower proposal, but Golden could still independently pursue condemnation proceedings. Ultimately, such a move would require commission approval, but even an attempt by the city could tie up the project in years of litigation.

Due to this second element of the case, this issue becomes much larger than a debate over the viability and necessity of broadcast towers. It gets to the core of government's reach into the lives of every property owner, specifically raising questions about the following:

- Does a city with "Home Rule" status gain the right to ignore constitutionally protected property rights—or statutory efforts designed to

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protect them—in the name of expanding open space or preventing development?

- Is it fiscally responsible for government to pursue condemnation in an era of limited resources when litigation for such efforts can rise to hundreds of thousands of dollars—far beyond the actual market value of the property being pursued?
- Finally, how will Colorado address the ever-increasing burden on business to balance its regulatory demands from the federal government with mandates and decisions imposed by state and local governments?

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Endnotes

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- ⁵ http://www.hdtvcolorado.com/content_pages/overview.htm
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- ¹² <http://www.fcc.gov/mb/policy/dtv/>
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