

<p>DISTRICT COURT, DOUGLAS COUNTY, STATE OF COLORADO Douglas County Justice Center 4000 Justice Way, Suite 2009 Castle Rock, Colorado 80109 303.663.7200</p>	
<p>TOWN OF PARKER, COLORADO, a Colorado Home Rule Municipality,</p> <p style="text-align: center;">Petitioner;</p> <p>v.</p> <p>LINDA B. SMITH, 9432 PARTNERSHIP, a Colorado General Partnership, HIGHGRADE INVESTMENTS LIMITED LIABILITY COMPANY, a Colorado Limited Liability Company, PARKER WATER AND SANITATION DISTRICT, a Colorado Special District, FIRST UNITED BANK, a Colorado Banking Institution, COLORADO STATE BANK AND TRUST, a Colorado Banking Institution, DIANNE BAILEY, in her Official Capacity as Public Trustee for Douglas County, and SHARON K. JONES, in her Official Capacity as Treasurer for Douglas County,</p> <p style="text-align: center;">Respondents.</p>	<p>• COURT USE ONLY •</p>
<p>Attorneys for Respondents Smith and 9432 Partnership: Bruce G. Smith, # 3646 Darling, Bergstrom & Milligan, P.C. 1515 Arapahoe Tower 1, Suite 530 Denver, Colorado 80202 Office: 303.623.9133 Facsimile: 303.623.9129 bsmith@dbm-law.com; beikenberry@dbm-law.com www.dbm-law.com</p>	<p>Case No: 07cv 2281</p> <p>Division: 6</p>
<p>MOTION TO DISMISS PETITION IN CONDEMNATION WITH SUPPORTING AUTHORITY</p>	

Respondents, Linda B. Smith and 9432 Partnership (“Respondents” or the “Smiths”), by their attorneys Darling Bergstrom & Milligan, PC, and pursuant to C.R.C.P. Rule 12(b) move to dismiss this action in condemnation, on the following grounds.

Summary of Motion

The Town of Parker brings this action to condemn the property of Respondents for purposes of open space, parks and open space view corridor. The land being condemned lies outside the Town boundaries. C.R.S. § 38-1-101(4)(b) specifically prohibits any municipality from condemning property outside its boundaries for such purposes in absence of consent of the landowner and the local government in whose territory the property is located. Neither the landowner nor Douglas County, in whose boundaries the property resides, has consented to this condemnation. The Town therefore lacks legal authority for this taking and this Court lacks subject matter jurisdiction.

Factual Background to Motion

The Smiths' property consists of over 80 acres of land in Douglas County devoted to a nursery and landscaping business. For several years, Parker has sought unsuccessfully to obtain the great majority of the Smiths' land for parks and open space. In 2004, the Colorado legislature passed HB04-1203, which expressly prohibits any municipality, including any home rule town or city, from condemning land outside its boundaries for "parks. . . open space. . . preservation of views or scenic vistas." C.R.S. § 38-1-101(4)(b)(II). The only exception to this prohibition is where the landowner and the local government in whose jurisdiction the property lies have consented. *Id.* Here neither the Smiths nor Douglas County has consented to the taking of the land. In spite of this prohibition, and in fact in the face of it, the Town of Parker by Ordinance No. 1.287, Series of 2006, brought this action to condemn the Smiths' land.

In addition, upon information and belief¹ the Town has or is at least indirectly applying trust funds granted to the Town under Greater Outdoors Colorado, C.R.S. § 33-60-102 (“GOCO”), for this project. This application is prohibited by the Colorado Constitution, Article XXVII, Section 9, which precludes the expenditure of GOCO funds for acquiring property by condemnation.

Legal Argument

The clear and unambiguous language of C.R.S. § 38-1-101(4) prohibits Petitioner from bringing an action to condemn the Respondents’ property. Consequently, this Court should dismiss Petitioner’s Petition in Condemnation because this Court lacks jurisdiction over the subject matter. Further, this Court should dismiss Petitioner’s Petition in Condemnation because Petitioner is indirectly using funds provided by Great Outdoors Colorado (“GOCO”) to acquire the property at issue in contravention of the Colorado Constitution and the public policy of the State of Colorado.

In its Petition in Condemnation, Petitioner cites, as authority to condemn Respondent’s property, the following: § 15.5 of the Charter for the Town of Parker, Article XX, § 1 of the Colorado Constitution, C.R.S. § 38-1-101, et seq., C.R.S. § 38-6-101, et seq., and C.R.S. § 31-25-201(1). *See* Petition, ¶ 2. Since Section 38-1-101(4)(c) circumscribes the Town’s scope of authority under the other statutes cited, the only issue is whether that Section contravenes Article XX of the Colorado Constitution. That very issue is pending before the Colorado Supreme Court in *Town of Telluride v. San Miguel Valley Corporation*, 07-SA-101, which will be argued by the end of 2007 with an anticipated decision forthcoming in early 2008. Unless and until the

¹ The Town is recipient of GOCO funds for purposes of the expansion of Salisbury Equestrian Park, which abuts the Smiths’ property, and is believed to be the project for which it is condemning the property. Upon information and belief, the funds may be used in part to acquire the Smith property. Respondents have requested a copy of the Town’s application and once provided may seek leave to supplement this motion.

Supreme Court rules to strike down Section 38-1-101(4), it is presumed to be constitutional. *People v. Hickman*, 988 P.2d 628, 634 (Colo. 1999). A party challenging the constitutionality of a state statute must prove it unconstitutional beyond a reasonable doubt. *Id.* These circumstances raise a serious question of Parker's good faith in bringing this proceeding at this time. In its Petition the Town does not seek or claim the need for immediate use or taking of the Smiths' property. Pending a decision of the Supreme Court, therefore, this action and the related *lis pendens* serve only to compel the Smiths to mount what is otherwise an unnecessary defense and to unduly encumber their property. The Town also puts this Court in the posture of either ruling in a manner that may quickly become moot, or deferring its decision while keeping a case suspended unnecessarily. The appropriate remedy, given the strong presumption of constitutionality of a state statute and this posture, is to dismiss this action without prejudice.

When a party files a motion challenging the court's subject matter jurisdiction, if the underlying facts are undisputed fact finding is not required and the legal effect of the underlying facts constitutes a question of law. *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402, 406 (Colo. App. 2004). *See also Seefried v. Hummel*, 148 P.3d 184 (Colo. App. 2005) (an evidentiary hearing is unnecessary where a motion to dismiss for lack of subject matter jurisdiction can be resolved on undisputed facts). This is the situation at least as to C.R.S. § 38-1-101(4). When a trial court's subject matter jurisdiction is challenged, the [Petitioner] has the burden of proving jurisdiction. *Egle v. City and County of Denver*, 93 P.3d 609, 611 (Colo. App. 2004). This Court determines subject matter jurisdiction by examining the substance of the claim based on the facts alleged and the relief requested. *See, City of Aspen v. Kinder Morgan, Inc.*, 143 P.3d 1076 (Colo. App. 2006).

The power of eminent domain lies dormant in the state until the Legislature speaks. *See Department of Transportation v. Stapleton*, 97 P.3d 938, 941 (Colo. 2004) (emphasis added). “Accordingly, a party may not condemn private property without demonstrating that the taking has been statutorily authorized, either expressly or implicitly.” *Id.*, (citation omitted). Thus, in order for Petitioner to condemn Respondent’s property it must demonstrate that it has been expressly or implicitly authorized by law to condemn the disputed parcel. The law cited by the Town neither expressly nor implicitly authorizes it to condemn Respondent’s property. Consequently, Petitioner’s action is unlawful and this Court must dismiss Petitioner’s action.

Admittedly, Article XX, § 1 confers a portion of the sovereign power of condemnation on home rule municipalities. *See City of Thornton v. Farmers Reservoir and Irrigation Co.*, 194 Colo. 526, 534, 575 P.2d 382, 388 (1978) (stating that a portion of the sovereign power of eminent domain is granted by the State of Colorado to home rule municipalities). Petitioner’s power to condemn, however, is not as unlimited nor as extensive as it asserts. *See City of Thornton*, at 536, 389 (acknowledging that the powers of a home rule municipality are generally superior to statutory limitations with respect to local and municipal matters; *however, in matters of statewide concern, the state’s statutes must govern*) (emphasis added).

Article XX, § 1, which grants home rule powers to the Town of Parker, sets forth Petitioner’s power of condemnation. It states in pertinent part:

[A home rule municipality] shall have the power, within or without its territorial limits, to construct, condemn and purchase, purchase, acquire, lease, add to, maintain, conduct, and operate *water works, light plants, power plants, transportation systems, heating plants, and any other public utilities or works or ways local in use and extent*, in whole or in part, and everything required therefor, for the use of [the home rule municipality] and the inhabitants thereof ... and ... the same or any part thereof may be purchased by

proceedings at law as in taking land for public use by right of eminent domain.

Colo. Const., Art. XX, §1 (emphasis added). Section 1 provides Petitioner with the power to condemn property outside of its jurisdiction, but this extraterritorial power of condemnation is limited to those circumstances expressly set forth in Section 1, which expression does not include extraterritorial condemnation for “the purpose of securing open space, parkland, and open space view corridors on, over and through” Respondent’s property. *See* Petition, ¶ 4.

Nor can Petitioner argue that extraterritorial condemnation for “the purpose of securing open space, parkland, and open space view corridors on, over and through” Respondent’s property, *see* Petition, ¶ 4, falls under the “and everything required therefor” language of § 1. *See City of Thornton*, at 535-36, 389-90 (finding that the Article XX, § 1 constitutional term “water works” comprehends and includes water and water rights). Thus, Article XX, § 1 neither expressly nor implicitly authorizes Petitioner’s condemnation action against Respondent, and C.R.S. § 38-1-101(4) expressly prohibits it. As such, Petitioner’s condemnation action is unlawful. *See City of Thornton*, at 534, 389 (stating that home rule municipalities do not have power to exercise the right of eminent domain in any *unlawful purpose*); *see also Fishel v. City and County of Denver*, 106 Colo. 576, 583, 108 P.2d 236, 240 (1940).

Article XX, § 6 of our State’s Constitution, although not specifically cited by Petitioner as authority to condemn Respondent’s property, is nonetheless instructive in understanding “the portion” of the power to condemn possessed by Petitioner. In discussing the power and authority vested in home rule municipalities by the state of Colorado, § 6 specifically *limits Petitioner’s plenary authority* to “local and municipal matters.” *Colo. Const., Art. XX, § 6*; *see also City & County of Denver v. Mountain States Tel. & Tel. Co.*, 67 Colo. 225, 184 P. 604 (1919) (stating §

6 confirms the power set out in §§ 1, 4, and 5 of Article XX and invests the people of the municipality with all other powers necessary, requisite, or proper for the government and administration *of its local and municipal matters*) (emphasis added).

Petitioner's action in condemning Respondent's property is not a purely local and municipal matter. When a home rule municipality exercises its authority outside of its territorial boundaries, the action necessarily involves a matter of mixed state and local concern, *see Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 37 (Colo. 2000), and state law is invoked and may restrict the powers of a home rule municipality. Consequently, in matters of mixed state and local concern, a home rule municipality cannot overrun or disregard state law. Rather, a home rule provision and a state statute may coexist, as long as the measures can be harmonized. However, if the home rule municipality's action conflicts with an action taken by the state legislature in a matter of statewide or mixed concern, *the state statute supersedes the home rule authority. Id.* (citation omitted).

It is within this constitutional framework that C.R.S. § 38-1-101 and Petitioner's condemnation action against Respondent's property come into play. Petitioner's action in condemning Respondent's property conflicts with the provision of §38-1-101(4). Thus, the statute prevails and Petitioner's action is unlawful and must be dismissed. In 2004, the General Assembly amended § 38-1-101 to include subsection (4). Subsection (4)(a)(I) states, "The acquisition by condemnation by a home rule ... municipality of property outside of its territorial boundaries involves matters of both statewide and local concern...." §38-1-101 (4)(a)(I). This legislative declaration places a home rule municipality on notice that the provisions of §38-1-101 (4) will supercede and prevail over any municipal action found to conflict with the statute.

Notwithstanding this notice, Petitioner passed an ordinance authorizing the acquisition of Respondent's property (the "Ordinance"), and proceeded with its condemnation action.

The Ordinance demonstrates Petitioner's misunderstanding of its home rule powers of condemnation. In the Ordinance, Petitioner states:

[T]he Town Council of [Petitioner] is cognizant of the existence of C.R.S. § 38-1-101(4) ... which purports to limit the authority of [Petitioner] as a home rule municipality to condemn property extraterritorially...

[T]he Town Council of [Petitioner] finds and determines that notwithstanding the provisions of C.R.S. § 38-1-101(4), the constitutionally derived condemnation powers of a home rule municipality may not be limited by the General Assembly....

See Ordinance No. 1,287, Series of 2006, attached hereto as **Exhibit A**. The Ordinance then sets forth Petitioner's stated purpose for acquiring Respondent's property – to secure "open space, parkland, and open space view corridors on, over and through" Respondent's property. *See* Petition, ¶ 4. The Ordinance conflicts with the provisions of § 38-1-101 (4).

Section 38-1-101(4) and the Ordinance are in direct conflict with each other. Because of this conflict and because this is a matter of both statewide and local concern, the provisions of Section 38-1-101 supersede the Ordinance. This Court's responsibility is to construe this § 38-1-101 as written, giving full effect to the words chosen, as it is presumed that the General Assembly meant what it clearly said. *See State of Colorado v. Nieto*, 993 P.2d 493, 500, (Colo. 2000). *See Spahmer v. Gullette*, 113 P.3d 158, 162 (Colo. 2005) (stating the Court must give effect to every word in a statute, adopting a construction that does not render any term superfluous).

A similar prohibition of this action lies in Article XXVII, Section 9 of the Colorado Constitution related to use of GOCO funds: "No moneys received by any state agency pursuant

to this article shall be used to acquire real property by condemnation through the power of eminent domain.” The Town of Parker is a state agency under C.R.S. § 33-60-102. If, as is understood by the nature of the monetary grant to the Town, GOCO funds are being applied to indirectly fund, even in part, the acquisition of the subject property, it is prohibited by the Colorado Constitution and void.

For the reasons stated above, Petitioner does not have the authority to condemn Respondents’ property. As Petitioner is without authority to condemn Respondents’ property, this Court is without subject matter jurisdiction to grant Petitioner’s Request for Relief.

WHEREFORE, Respondents, Linda B. Smith and 9432 Partnership, respectfully request this Court dismiss Petitioner’s Petition in Condemnation without prejudice, award Respondents their attorney fees under C.R.S. § 38-1-122, and render such other relief as this Court deems appropriate. Respondents specifically reserve all other defenses and issues related to this action.

Respectfully submitted this 24th day of October, 2007.

Respectfully submitted,

This document was filed electronically pursuant to Rule 121 § 1-26. The original signed document is on file at counsel's office.

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of October, 2007, a copy of this **MOTION TO DISMISS PETITIONER'S PETITION IN CONDEMNATION** was sent via LexisNexis® electronic filing to the following:

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/s/ **Teresa A. Rinen**
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