442 P.3d 402
Supreme Court of Colorado.

CAROUSEL FARMS METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado Petitioner,
v.
WOODCREST HOMES, INC., a Colorado corporation, Respondent.

Supreme Court Case No. 18SC30
|
June 10, 2019

Certiorari to the Colorado Court of Appeals, Court of Appeals Case No. 15CA1956.

Attorneys and Law Firms

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En Banc

Opinion

JUSTICE, HOOD delivered the Opinion of the Court.

¶1 A subdivision development contemplated by Woodcrest Homes seems to have been yet another

casualty of the 2007-2008 financial crisis. Before the economic downturn, Woodcrest was poised to construct the new development adjacent to the town of Parker. But with the economy in dire straits, Woodcrest secured only a small parcel—known as Parcel C—stuck between two larger parcels that were necessary for completion of the project. Now, over a decade after the failed development, a special metropolitan district controlled by a competitor, Century Communities, seeks to condemn Parcel C and finish what Woodcrest started.

¶2 But Woodcrest objects. It claims that the entire condemnation proceeding is really a sham designed to benefit Century. Woodcrest maintains that the condemnation violates both the public use protections of the Colorado Constitution and the statutory prohibition on economic development takings. According to Woodcrest, the purpose of the taking, at the time it occurred, was to satisfy contractual obligations between Century and Parker. Because the public would not be the beneficiary *at the time of the taking*, Woodcrest contends that this condemnation violates the Colorado Constitution. Moreover, it argues, the taking effectively transfers the condemned land to Century, which violates section 38-1-101(1)(b)(I), C.R.S. (2018), the state's anti-economic development takings statute.

¶3 We disagree. The centerpiece of our jurisprudence on takings and public use is that the taking must, at its core, benefit the public. The condemnation of Parcel C will do just that, with the intended construction of various utilities, public rights of way, and sidewalks. There is nothing in the Colorado

Constitution that prohibits private parties from incidentally benefiting from any particular condemnation. Additionally, Colorado's prohibition on economic development takings has no bearing on the condemnation at issue here: The plain language of section 38-1-101(1)(b)(I) prevents public entities from transferring condemned land to private entities. But there was no transfer, and the only entity involved was a public one, the special district.

¶4 Before reaching any of those issues, however, the parties ask us to clarify whether clear error or de novo review applies to a trial court's public use determination. Because public use is ultimately a legal question, we review it de novo, while deferring to the trial court on underlying historical facts.

¶5 Therefore, we hold as follows. First, takings questions present mixed issues of law and fact, with public use being a question of law that is reviewed de novo. Second, takings that essentially benefit the public will survive constitutional scrutiny, even if, at the time of the taking, there is an incidental private benefit. As a result, the taking here is valid. Third, the plain language of section 38-1-101(1)(b) only limits the transfer of condemned land to a private entity and, because there was no transfer and no private entity involved here, that section is inapplicable.

I. Facts and Procedural History

¶6 In 2006, the respondent, Woodcrest Homes, began the process of securing three parcels to build a

new development that would be annexed into the town of Parker. Woodcrest purchased Parcel C, a small parcel around twenty feet wide that totaled about 0.65 acres, sandwiched between two approximately twenty-acre parcels known as Parcels A and B. This sliver of land offered Woodcrest an opportunity to plan utilities for its development, as Parcel C already contained a sewer line, a water line easement, and a natural drainage system with culverts. Although Woodcrest was under contract to purchase Parcels A and B, the "weak housing market" left Woodcrest unable to move ahead.

¶7 Fast forward to 2012, when Century acquired Parcels A and B. In 2013, Century offered to purchase Parcel C from Woodcrest, tendering nearly $45,000. Woodcrest rebuffed the offer, remarking that it subsidized, at great cost, Century's ability to complete the development, given that Century intended to use Woodcrest's plans for the development. Undeterred, Century told Woodcrest that it would continue to pursue development and that, if Woodcrest didn't accept some offer, Century would condemn Parcel C with the "Town Council's support."[1] Then, using nearly identical plans to Woodcrest's—which included using an already encumbered Parcel C for sewage, roads, and other public improvements—Century approached Parker. Century asked for the same deal that Woodcrest had in 2006, and Parker agreed that it would annex the

[1] As it turns out, Parker doesn't typically exercise its eminent domain power and had little intention of using it here.

development and approve the development's plat, if Century owned all three parcels.

¶8 Century then created a metropolitan district called Carousel Farms (the District). This quasi-municipal structure empowered the District to raise revenue through municipal bonds and, more importantly, condemn property through eminent domain. The District was run solely by Century employees and officers. The District made a final offer to Woodcrest, which Woodcrest rejected. Then, the District sought to condemn Parcel C. But, before it could do so, the District needed to amend the agreement with Parker so that it was the District's possession of Parcel C, not Century's, that was the prerequisite for plat approval and annexation. Parker obliged, and the District initiated condemnation proceedings.

¶9 At the immediate possession hearing in district court, Woodcrest argued that the District was acting as a puppet for Century. To Woodcrest, the District was a mere façade designed to empower Century to acquire Parcel C and complete the development, making the taking not for a public use but for a private one. The district court disagreed, holding that the taking was indeed for public use. The court subsequently adopted the District's proposed findings of fact and conclusions of law, verbatim or almost verbatim.

¶10 A division of the court of appeals disagreed and reversed. First, it concluded that, in condemnation proceedings, the district court's findings of fact were reviewed for clear error and its legal conclusions

reviewed de novo. *Carousel Farms Metro. Dist. v. Woodcrest Homes, Inc.*, 2017 COA 149, ¶ 32, ___ P.3d ___. However, it reasoned that the district court's findings were subject to heightened scrutiny because the district court adopted the prevailing party's proposed findings of fact and conclusions of law verbatim.[2] *Id.*

¶11 Second, the division held that the taking was not for public use, as the taking "itself" was to satisfy the District's contractual obligations, which were, under any metric, not a public use. *Id.* at ¶¶ 36–38. The eventual dedication for utilities and roads was a "step removed" and couldn't save the taking from infirmity. *Id.* at ¶ 37.

¶12 Third, the division concluded that the taking was not necessary to accomplish a public use, as there was no public use even in play. *Id.* at ¶ 41. Moreover, the division reasoned that, because the District was composed of Century employees only, formed after Century couldn't privately acquire Parcel C, and only initiated to meet contractual obligations, the taking was done in bad faith. *Id.* at ¶¶ 43–44.

¶13 Finally, the division held that the taking also violated section 38-1-101(1)(b)(I), which prohibits takings that transfer property to private entities for

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[2] It's unclear whether the trial court adopted the proposed findings of fact and conclusions of law verbatim or nearly verbatim, and the parties disagree on this fact. But this disagreement ultimately doesn't matter, as there is no more heightened scrutiny than de novo review, which we hold is the appropriate standard of review for public use determinations.

the purpose of economic development. *Id.* at ¶ 48. To the division, the taking effectively transferred the land to the developer, violating the spirit of section 38-1-101(1)(b)(I) and the rule that the "law may not be used to permit one to accomplish indirectly what he may not achieve directly." *Id.* at ¶ 52 (quoting *Salle v. Howe*, 793 P.2d 628, 631 (Colo. App. 1990)).

¶14 The District petitioned this court for review and we granted certiorari.[3]

II. Analysis

¶15 We begin by addressing the appropriate standard for appellate review of takings questions.

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[3] We granted certiorari to review the following issues:

1. [REFRAMED] Whether the court of appeals should review for clear error a trial court's determination that a condemning authority sufficiently demonstrated that a taking is for public use.
2. [REFRAMED] Whether the court of appeals erred in concluding a metropolitan district failed to prove condemnation of a parcel was for public use and necessary, where the subdivision that would principally benefit from the condemnation did not exist at the time of the taking and development of the subdivision was conditioned on the district's acquisition of the parcel.
3. [REFRAMED] Whether the court of appeals erred in concluding that a metropolitan district's condemnation of a parcel violated section 38-1-101(1)(b), C.R.S. (2017), when the condemned parcel would be dedicated to the public and would not be transferred to a private entity.

While Colorado caselaw has been somewhat muddled on this subject, we conclude that takings questions present mixed issues of law and fact. We therefore defer to a trial court's factual determinations, but we review de novo the legal determination of whether something is for a public use. Next, we analyze the District's taking and determine that, because the taking was essentially for public benefit, it meets the public use requirements of the state constitution and the relevant statutes. Finally, we examine section 38-1-101(1)(b)(I). Because (1) the plain language of the statute only covers transfers from public entities to private entities and (2) the District is a public entity that never initiated any sort of transfer, this statutory provision doesn't apply.

A. Public Use and the Standard of Review

¶16 Our takings cases have sown confusion as to the appropriate standard to review a trial court's public use determination. Sometimes, we have intimated that the standard is clear error—essentially holding that public use is a fact question left to the trial court. *See*, *e.g.*, *City & Cty. of Denver v. Block 173 Assocs.*, 814 P.2d 824, 828–29 (Colo. 1991) ("In examining the stated public purpose for a condemnation, we look to whether the stated public purpose is supported by the record. If so, our inquiry ends."); *Pub. Serv. Co. of Colo. v. Shaklee*, 784 P.2d 314, 318 (Colo. 1989) ("[A]lthough conflicting evidence was presented at trial, the evidence supports the trial court's conclusion that the condemnation was for a public use. . . ."). Other times, we have stated that the inquiry involves a mixed question of law and fact.

See, *e.g.*, *Glenelk Ass'n, Inc. v. Lewis*, 260 P.3d 1117, 1120 (Colo. 2011) (citing *Fowler Irrevocable Tr. 1992-1 v. City of Boulder*, 17 P.3d 797, 802 (Colo. 2001)) (stating that the court of appeals defers to findings of fact "unless they are . . . clearly erroneous" but "review[s] legal conclusions de novo"); *Fowler*, 17 P.3d at 802 (citing *E-470 Pub. Highway Auth. v. The 455 Co.*, 3 P.3d 18, 22 (Colo. 2000)) ("We defer to the trial court's findings of fact and conduct de novo review of its legal conclusions.").[4]

¶17 We conclude that takings present mixed questions of law and fact, with public use determinations reviewed de novo.

¶18 As a general proposition, findings of fact should be reviewed for clear error, and legal conclusions should be reviewed de novo. *See E-470*, 3 P.3d at 22 (citing *Valdez v. People*, 966 P.2d 587, 598 (Colo. 1998) (Kourlis, J., dissenting)). The judicial system takes this approach for at least two reasons. First, judicial economy—trial courts make factual findings and appellate courts "pronounc[e]" law. *See* J. Jonas Anderson, *Specialized Standards of Review*, 18 Stan. Tech. L. Rev. 151, 159–60 (2014). Without this division, district

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[4] While *Glenelk* and *Fowler* are not prototypical eminent domain cases—they are private condemnation and inverse condemnation cases, respectively—the standards and rules for both types of cases are the same as eminent domain cases like the one before us, other than a few particularities not relevant here. *See Glenelk*, 260 P.3d at 1120–21; *Fowler*, 17 P.3d at 802. In any event, de novo review of public use determinations is the most appropriate standard of review, as we explain below.

courts would need to reexamine the law in each case, rendering their already time-consuming trial work completely unmanageable. *Id.* at 160. And if appellate courts were forced to take a fine-toothed comb to the factual disputes in each case, the appellate docket would likewise suffer a major backlog. *Id.* But because district courts are required to follow appellate precedent and appellate tribunals review legal conclusions de novo, this bifurcation of duties enables appellate tribunals to more efficiently create legal uniformity.

¶19 Second, institutional competence. For example, appellate tribunals don't (and, indeed, can't) make findings of fact. *See Valdez*, 966 P.2d at 598 (Kourlis, J., dissenting). Without the ability to make factual findings, it's unclear how an appellate court could review factual determinations "anew." *See De novo*, Black's Law Dictionary (10th ed. 2014) (defining the Latin term "de novo" as "anew"). And, because appellate courts don't make findings of fact, trial judges are the only ones who have the "unparalleled opportunity to determine the credibility of the witnesses and the weight to be afforded the evidence." *See M.D.C./Wood, Inc. v. Mortimer*, 866 P.2d 1380, 1384 (Colo. 1994) (quoting *Page v. Clark*, 592 P.2d 792, 796 (Colo. 1979)). The trial judge is essential in sorting the factual wheat from the chaff.

¶20 What does this mean for condemnation proceedings? For starters, when it comes to appellate review of public use determinations, the chaff has already been discarded. The facts have been "found" and the record set by the trial court. And while the

debate over the standard of review here demonstrates that the distinction between law and fact isn't always a bright one, fact questions "usually call[] for proof" and legal questions "usually call[] for argument." Clarence Morris, *Law and Fact*, 55 Harv. L. Rev. 1303, 1304 (1942). Whether the District condemned Parcel C asks for proof—the trial court needs some sort of evidence that Woodcrest isn't still in possession and control of the parcel. And the District's alleged use of Parcel C as drainage and roads—not to build, say, a home for the CEO of Century—also demands proof. The trial judge's presence is key for sorting through such issues. *Cf. Mortimer*, 866 P.2d at 1384. These are the "fact" questions that takings cases present. But whether the uses are public tends toward legal pronouncement, *cf.* Anderson, *supra* at 159–60, and "calls for argument," *cf.* Morris, *supra* at 1304—in other words, the "legal" part of takings' mixed review. Moreover, having an appellate tribunal look to and set standards around the varied circumstances in which takings arise helps generate the uniformity and workload reduction for which the bifurcated role between trial and appellate courts was, in part, created. *Cf.* Anderson, *supra* at 159–60.

¶21 The Supreme Court has also stated that cases that "require courts to expound on the law" are best suited toward de novo review. *See U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Village at Lakeridge, LLC*, ___ U.S. ___, 138 S. Ct. 960, 967, 200 L.Ed.2d 218 (2018). More concretely, de novo review is appropriate "when applying the law involves

developing auxiliary legal principles of use in other cases." *Id.* There is "[n]o precise line" for public use determinations. *See Tanner v. Treasury Tunnel, Mining & Reduction Co.*, 35 Colo. 593, 83 P. 464, 465 (1906). Thus, when analyzing whether something is a public use, there must be a "degree of elasticity capable of meeting new conditions and improvements, and the ever-increasing needs of society." *Id.* So, because there isn't a strict, immutable test through time, courts are tasked with doing just what the Supreme Court suggests that courts do with de novo review—expound on the law so as to create a set of principles for use in other cases. In other words, public use determinations fit neatly into the framework and principles behind de novo review.

¶22 Therefore, takings cases present mixed issues of law and fact, and a trial court's public use determination should be reviewed de novo. Any cases from this court or the court of appeals holding otherwise are overruled.[5]

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[5] It's unclear whether the division below applied a de novo or clear error standard to its review. It implies that the standard of review is de novo when it cites to *Glenelk. Carousel Farms*, ¶ 32 (citing *Glenelk*, 260 P.3d at 1120). But it then reasons that, because the trial court adopted the prevailing party's proposed findings of facts and conclusions of law verbatim, the findings are subject to heightened scrutiny. *Id.* Heightened scrutiny would be irrelevant if the division was applying de novo review, as there exists a no less deferential standard, therefore suggesting that the division was applying clear error with heightened scrutiny. To the extent that the division applied clear error, we disagree.

B. The Taking Essentially Created a Public Benefit

¶23 We now analyze whether the taking satisfied the public use requirement of our state constitution and statutes. Because the taking's purpose was essentially to benefit the public, we reverse the division's judgment.

¶24 The Colorado Constitution requires that, when the government takes private land, it must pay just compensation and the land must be put to a public use. *See* Colo. Const. art. II, § 15. The General Assembly has confirmed the importance of this prohibition by further enacting these requirements into statutory law. *See* § 38-1-101(1)(a), C.R.S. (2018) ("Notwithstanding any other provision of law, in order to protect property rights, without the consent of the owner of the property, private property shall not be taken or damaged by the state or any political subdivision for a public or private use without just compensation."). Additionally, even if a taking is found to satisfy the public use requirement, the land taken must also be necessary to the intended public use. *See Mortensen v. Mortensen*, 135 Colo. 167, 309 P.2d 197, 199 (1957).

¶25 The term "public use" is inherently amorphous. As noted above, we long ago observed that there is "no precise line" and the meaning of public use is flexible, having a "degree of elasticity capable of meeting new conditions and improvements, and the ever-increasing needs of society." *Tanner*, 83 P. at 465. To help guide courts, we have set out factors to consider,

but these are by no means exhaustive or exclusive. *See Shaklee*, 784 P.2d at 318 (quoting *Larson v. Chase Pipe Line Co.*, 183 Colo. 76, 514 P.2d 1316, 1318 (1973)). Those factors are: "[T]he physicial [sic] conditions of the country, the needs of a community, the character of the benefit which a projected improvement may confer upon a locality, and the necessities for such improvement in the development of the resources of a state." *Tanner*, 83 P. at 465; *accord Shaklee*, 784 P.2d at 318 (quoting *Larson*, 514 P.2d at 1318).

¶26 These guidelines, however, only assist a court in assessing whether the taking is "essentially for public benefit." *Tanner*, 83 P. at 465.[6] It's quite possible that the four *Tanner* factors point in different directions, rendering them unhelpful in the final analysis. But so long as the taking is "essentially for public benefit," it can withstand constitutional scrutiny. *Id.* This means that the fundamental and intrinsic nature of the taking must be for public benefit. *See Essential*, Webster's New College Dictionary (2005) (defining "essential" as "of or constituting the intrinsic, fundamental nature of something"). Of course, private parties may benefit, perhaps significantly. *See Shaklee*, 784 P.2d at 318–19 (holding that a public utility could

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[6] Colorado doesn't adhere to a strict definition of public "use." *See*, *e.g.*, *Rabinoff v. Dist. Court*, 145 Colo. 225, 360 P.2d 114, 119–121 (1961) (reasoning that the public use requirement of the Colorado Constitution contemplates takings for a public purpose and not only use by the public). Thus, public use, as used in the state constitution, more accurately reflects a demand that takings serve a public purpose or benefit, as *Tanner* and others have articulated. *Id.*; *see also Tanner*, 83 P. at 465.

condemn property so that it could service the Coors Brewery because the public could eventually use the new power line). But if the purpose and benefit are essentially public, then the taking offends neither the state constitution nor section 38-1-101(1)(a).[7]

¶27 Here, the taking is essentially for public benefit. Parcel C will be used for public right of ways, storm drainage, and sewer improvements. It is difficult to argue that those functions don't essentially benefit the public. It is true that Century will also benefit from the taking, but, as we already explained, that doesn't somehow change the essential benefit from public to private. If a utility company can condemn a large strip of land to supply power to a private, for-profit corporation because residents might use the power line in the future, then the District may condemn Parcel C for planned improvements that will benefit the community. *See Shaklee*, 784 P.2d at 318–19.

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[7] Permitting some private benefit by public taking may strike some as unusual. But Colorado is no stranger to this method of encouraging development. Our constitution and statutes contemplate wholly private takings for numerous non-public projects, like drains, mining, and milling. *See* Colo. Const. art. II, § 14; § 38-1-201, C.R.S. (2018) ("[T]he power of eminent domain allows . . . individual property owners and corporations to condemn property . . . when condemnation is necessary . . . to allow beneficial use of private property."); § 38-2-104, C.R.S. (2018) (enabling "the owner of any coal or other mineral lands, not contiguous to any railroad in this state" to "exercise the right of eminent domain and condemn [property]" for the purpose of connecting mineral lands to a railroad).

¶28 Significantly, Parcel C was always going to be used for those improvements—even under Woodcrest's original plan—because Parcel C is encumbered by easements and utilities and is best suited for those purposes. While review of potentially improper takings can often be problematic because courts don't know ex ante whether the land will be used as claimed, here we know from the start how the District will utilize Parcel C. *See* Ilya Somin, *Overcoming Poletown*, 2004 Mich. St. L. Rev. 1005, 1015 ("In the absence of any binding obligations to deliver on the promised economic benefits, nothing prevents municipalities and private interests from . . . failing to provide any such benefit[] once courts approve the taking. . . .").

¶29 The division reasoned that the eventual dedication of the land to a public purpose is insufficient because the "taking itself" wasn't for a public purpose. *Carousel Farms*, ¶ 35. That is, the *first* benefit to be received (even if a minor one) is satisfying the contractual obligations between the District and Parker, which isn't a public benefit in any sense. *Id.* at ¶¶ 35–37. Thus, the argument goes, because that first benefit itself isn't public, the entire taking doesn't pass constitutional muster. *Id.*

¶30 This analysis fails for two reasons. First, the test is, and has been since 1906, whether the taking is "essentially for public benefit." *See Tanner*, 83 P. at 465; *accord Buck v. Dist. Court*, 199 Colo. 344, 608 P.2d 350, 351 (1980). A taking may have some sort of antecedent benefit that isn't public, so long as the essential benefit is ultimately public. Presumably, developers and towns

frequently enter into agreements before land is condemned. How else would towns garner the political support to complete parks or other public works projects? The town likely would need to hire a developer and sign a contract before it exercised its eminent domain power and spent taxpayers' dollars on the condemnation. But the division's reasoning would have all agreements of this sort fail, because the *first* benefit or purpose is to satisfy that contractual obligation, even though the essential benefit is ultimately building parks or other public works for the town.[8]

¶31 Second, it relies on flawed precedent on takings and public benefit. The division cites another division's opinion in *American Family Mutual* for the proposition that the taking itself must be for a public purpose, and, in turn, *American Family Mutual* cites *Trinity Broadcasting* for the same notion. *See Carousel Farms*, ¶ 35 (citing *Am. Family Mut. Ins. Co. v. Am. Nat'l Prop. and Cas. Co.*, 2015 COA 135, ¶ 30, 370 P.3d 319, 327); *American Family Mutual*, ¶ 30, 370 P.3d at 327 (citing *Trinity Broad. of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 921 (Colo. 1993)). But *Trinity Broadcasting* made no such declaration.

¶32 In *Trinity Broadcasting*, we held that water damage that occurred because of accidental leaking

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[8] This, of course, isn't to say that 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.

from town-owned water towers wasn't a taking. 848 P.2d at 921. However, we weren't discussing public use at all. The issue was whether the leakage itself counted as an *act* of eminent domain, not whether the leakage was for public use. *Id.* at 921–22. And while leakage in another case could count as a taking, the leakage in *Trinity Broadcasting* didn't because the government lacked "the intent to take the property or to do an act which has the natural consequence of taking the property." *Id. Trinity Broadcasting* thus has no effect on this case. No one questions that the condemnation of Parcel C was an act of eminent domain. The only issue is whether that act was essentially for the public benefit, which we conclude it was.

¶33 That still leaves us with the question of whether the taking was necessary for the intended public use. *See Mortensen*, 309 P.2d at 199 (quoting *Rothwell v. Coffin*, 122 Colo. 140, 220 P.2d 1063, 1065 (1950)) ("The question of necessity simply involves the necessity of having the property sought to be taken for the purpose intended."). Absent fraud or bad faith, the condemning authority's necessity determination "is final and conclusive and will not be disturbed by the courts." *Colo. State Bd. of Land Comm'rs v. Dist. Court*, 163 Colo. 338, 430 P.2d 617, 619 (1967). In the District's case, the taking was necessary for the purpose intended because the District needs Parcel C to assemble the land and build the sewage, drains, and so on that the development calls for. That should be the end of the analysis, as the necessity determination is meant to be

"final and conclusive," unless there is fraud or bad faith. *See id.*

¶34 The division, however, held that the District acted in bad faith because it was run by Century employees, who condemned the property to meet the District's contractual obligations, and only did so once negotiations with Woodcrest failed. *Carousel Farms*, ¶¶ 43–44. But Century and the District always sought to build public improvements and have the development annexed into Parker, and we already rejected the notion that the District and Parker's desire to fulfill their contractual obligations predominated over the essential public purpose of the taking. Moreover, developer employees frequently comprise the sole managers of special districts in their early stages.[9] Therefore, neither of these two facts sufficiently demonstrates the District's bad faith.

¶35 The division's fundamental concern seems to be with the order of the condemnation: The District

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[9] The process of developer-initiated special district formation is by no means peculiar to the District here or Colorado as a state. The Colorado Department of Local Affairs informs as follows: "Metropolitan districts, since they can offer multiple services, are often established by developers to finance, through the issuance of municipal bonds, the infrastructure necessary to support a new subdivision." Special District Assistance, *Special Districts: A Brief Review for Prospective Homeowners* 3 (Colo. Dep't Loc. Aff.), https://drive.google.com/file/d/0B0m67XbcqVYRbVJYVGFmLURqeU0/view[https://perma.cc/VGT3-N6DW]. And across the United States, special districts spend nearly $175 billion and have almost $300 billion in debt. Nadav Shoked, *Quasi-Cities*, 93 B.U.L. Rev. 1971, 1977 (2013). Nationally, there are almost as many special districts as there are counties, cities, and towns combined. *Id.*

was only formed after Century failed in negotiations with Woodcrest. True, but there isn't an order-of-formation or order-of-negotiation requirement in the Colorado Constitution or the special district statutes. Holding that there is would involve inserting such a requirement into the statute. And that is not for us to do. *See State v. Medved*, 2019 CO 1, ¶ 19, 433 P.3d 33, 37 (quoting *People v. Diaz*, 2015 CO 28, ¶ 15, 347 P.3d 621, 625) ("In interpreting a statute, we must accept the General Assembly's choice of language and not add or imply words that simply are not there.").

¶36 Moreover, eminent domain was partly designed to overcome the "holdout" problem that occurred here. *See* Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 74–75 (1986) ("Without an exercise of eminent domain, . . . owner[s] would have the power to hold out. . . . If even a few owners held out, others might do the same."). The District exercised the power of eminent domain to prevent a holdout owner from thwarting the assembly of adjacent properties that would benefit the public.

¶37 The division's and Woodcrest's reliance on *Geudner* is also unavailing. *Carousel Farms*, ¶ 45. There, one family operated a special district, and all the land within the district was owned by the family or corporations controlled by the family. *Denver W. Metro. Dist. v. Geudner*, 786 P.2d 434, 435 (Colo. App. 1989). One of the family-owned corporations, Denver West Properties (DWP), contracted to sell a parcel of land within the district. *Id.* As a condition of the sale, the purchaser wanted a gulch on the property moved. *Id.*

An engineering firm developed three proposals for flood mitigation of the ditch, but the most "hydrologically sound" option required keeping the gulch on the sale property, which DWP didn't like. *Id.* So, DWP directed the engineering firm to develop a mitigation plan that would relocate the gulch off the sale property. *Id.* at 435–36. The proposal moved the gulch to Geudner's land. *Id.* at 436. When Geudner wouldn't sell the portion of the land to which the gulch would be moved, the district then sought to the condemn property in order to complete the sale. *Id.* at 435–36. The difference between the taking in *Geudner* and the District's taking is clear: In *Geudner*, there was never an initial intention to benefit the public—the justification of flood mitigation was added once the purchaser wanted the gulch moved. *See id.* And, even then, the most "hydrologically sound" mitigation plan wasn't the chosen one, because that plan required the gulch to remain on the property in question. *Id.* Here, the trial court found, with ample record support, that Century (and then the District) always planned on putting public improvements on Parcel C; there wasn't a post-hoc public-use justification.

¶38 In sum, so long as the essential benefit of a taking is public, the taking passes constitutional muster. That was the case here.

C. Private Entities, Transfers, and Takings

¶39 After briefly addressing the standard of review, we proceed to interpret section 38-1-101(1)(b)(I).

We conclude that the statute doesn't apply to the taking here, as there wasn't a transfer from a public entity to a private one.

1. Standard of Review and Principles of Interpretation

¶40 Issues of statutory construction, like the issue before us, are questions of law that we review de novo. *See Doubleday v. People*, 2016 CO 3, ¶ 19, 364 P.3d 193, 196. The primary purpose is to give effect to the intent of the legislature. *Id.* Words and phrases are to be given their plain and ordinary meanings, read in context, and construed according to the rules of grammar and common usage. *Id.* A statute is to be read as a whole, giving consistent and sensible effect to all its parts. *Id.* at ¶ 20, 364 P.3d at 196.

2. No Transfer, No Private Entity

¶41 Section 38-1-101(1)(b)(I) unambiguously applies only to transfers of property to private entities. The section states, in part: "For purposes of satisfying the requirements of this section, 'public use' shall not include the taking of private property for *transfer* to a *private* entity for the purpose of economic development or enhancement of tax revenue." § 38-1-101(1)(b)(I) (emphases added).

¶42 First, this section only covers "transfer[s]." *Id.* Without a transfer, it doesn't spring into action. Webster's defines a "transfer" of property as "to make

over or convey (property, title to property etc.) to another." *Transfer*, Webster's New College Dictionary (Michael Agnes, ed., 2004). And Black's defines a "transfer" of property as "a conveyance of property or title from one person to another." *Transfer*, Black's Law Dictionary (10th ed. 2014). Thus, under no circumstance can the word "transfer" apply to a situation in which someone keeps property. In our case, that means that the condemning authority—here, the District—needs to actually convey the condemned property to someone else. But that never happened. The District condemned Parcel C and then kept it. Consequently, the statute doesn't apply.

¶43 But let's assume it somehow did. The property still needs to be conveyed to a private entity. *See* § 38-1-101(1)(b)(I) ("'[P]ublic use' shall not include the taking of private property for transfer to a *private* entity. . . . (emphasis added)). The only entity involved, however, was a public one—the metropolitan district. Metropolitan districts are special districts that offer many of the same services as towns, such as safety, transportation, street improvement, and fire protection. *See* § 32-1-103(10), C.R.S. (2018). And, of course, they also have the power of eminent domain. *See* § 32-1-1004(4), C.R.S. (2018). Therefore, the District functions as a public entity, not a private one. *See Public entity*, Black's Law Dictionary (10th ed. 2014) (defining "public entity" as a "governmental entity, such as a state government or one of its political subdivisions"). So, even if there somehow was a transfer, it wouldn't have been to a private entity. In other words, the

statute wasn't designed to limit a public entity from taking a property and keeping it.

3. *Kelo* Doesn't Dictate a Different Result

¶44 Both the division below and Woodcrest argue that allowing the District to do what it did here would be to permit Century to accomplish indirectly what it couldn't do directly. For them, *Kelo v. City New London* and Colorado's anti-*Kelo* statute prevent the District from finishing the developer's project. *See* § 38-1-101(1)(b)(I); *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005). However, *Kelo* and section 38-1-101(1)(b)(I) don't affect the outcome.

¶45 First, as we just explained, the anti-*Kelo* statute, section 38-1-101(1)(b)(I), doesn't apply when a public entity takes a property and keeps it for itself. The division implies that, through a "manipulation of circumstances," Century violated the spirit of Colorado's anti-*Kelo* statute. *Carousel Farms*, ¶ 52. But, the spirit of a statute doesn't displace its plain language. *Cf. Doubleday*, ¶ 19, 364 P.3d at 196 ("We look first to the language of the statute, giving words and phrases their plain and ordinary meanings."). If the legislature wanted to forbid districts from doing what the District did here, then it could have built safeguards into the metropolitan district statute or the takings statute. And, if districts couldn't work with developers, it's unclear why all districts would have the power to "enter into contracts and agreements affecting the affairs of

the special district." *See* § 32-1-1001(1)(d)(I), C.R.S. (2018).

¶46 Second, *Kelo* doesn't change any of this. In *Kelo*, the city of New London sought to condemn a wide swath of land and transfer it to a private company for economic development. 545 U.S. at 473–75, 125 S.Ct. 2655. The Supreme Court said that such a taking didn't violate the Fifth Amendment, but left room for the states to enact more stringent regulations. *Id.* at 489–90, 125 S.Ct. 2655. In Colorado, that more stringent regulation is section 38-1-101(1)(b)(I). Still, the fact that Colorado took the Supreme Court's advice and enacted a tougher regulation doesn't change the plain language of that regulation.

¶47 The plain language of section 38-1-101(1)(b)(I) only limits the transfer of condemned land to a private entity. Because there was no transfer and no private entity involved here, that section is inapplicable.

III. Conclusion

¶48 The Colorado Constitution requires that condemnation benefit the public, but it doesn't prohibit a private party from also benefiting. When a condemnation's benefits are essentially public, as they are here, there is no constitutional violation. We reach this conclusion through de novo review because, regardless of our previous inconsistencies, public use determinations are best suited toward such review. And although Colorado has a prohibition on economic development

takings, that prohibition isn't implicated here because the only entity involved is a public one, which kept the condemned property for itself.

¶49 We therefore hold as follows. First, takings questions present mixed issues of law and fact, with public use being a question of law that is reviewed de novo. Second, takings that essentially benefit the public will survive constitutional scrutiny, even if, at the time of the taking, there is an incidental private benefit. As a result, the taking here is valid. Third, the plain language of section 38-1-101(1)(b) only limits the transfer of condemned land to a private entity and, because there was no transfer and no private entity involved here, that section is inapplicable.

¶50 Accordingly, we reverse the division's judgment and remand for further proceedings consistent with this opinion.

444 P.3d 802
Colorado Court of Appeals, Division II.

CAROUSEL FARMS METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado, Petitioner-Appellee,
v.
WOODCREST HOMES, INC., a Colorado corporation, Respondent-Appellant.

Court of Appeals No. 15CA1956
|
Announced November 30, 2017

Douglas County District Court No. 15CV30013, Honorable Richard B. Caschette, Judge

Attorneys and Law Firms

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Opinion

Opinion by JUDGE HARRIS

¶ 1 Appellant, Woodcrest Homes, Inc., owned a .65-acre parcel of land (referred to as Parcel C) outside the Town of Parker. Century Communities, Inc., and its

subsidiaries (collectively, the Developer) acquired the parcels to the north and south of Parcel C, with a plan to create a development—Carousel Farms—comprising all three parcels. Under its agreement with the Town, the Developer could not move forward with its development plan until it acquired Woodcrest's land.

¶ 2 Woodcrest, though, declined to sell Parcel C for the price offered. So the Developer threatened to condemn the property. When Woodcrest did not acquiesce, the Developer created the Carousel Farms Metropolitan District (District), the appellee, which promptly initiated condemnation proceedings and took possession of Parcel C.

¶ 3 The District defends the condemnation of Woodcrest's property as a lawful exercise of its power of eminent domain on the theory that Parcel C will ultimately be used for a public purpose. In accordance with the Developer's proposed development plan, the infrastructure for the Carousel Farms subdivision, including public improvements such as roads and sewers, will be located on Parcel C.

¶ 4 We conclude that the District cannot meet its burden by showing that, under the Developer's plan, once approved, the taking will result in the property's eventual use for public purposes. Rather, the taking itself must be necessary to serve a public purpose.

¶ 5 Here, the taking was carried out by the District, acting as a sort of alter ego of the Developer, to ensure that the Developer met its contractual obligations to the Town. True, once those obligations are

satisfied and the development plan can proceed, the District intends to put the property to a public use. But this amounts to a classic case of the tail wagging the dog—the District condemned property to advance the private development process, the completion of which would then require the construction of infrastructure, which qualifies as a public purpose necessitating the condemnation of Parcel C. We do not agree that this scenario passes constitutional or statutory muster, and therefore we reverse.

I. Background

A. Woodcrest Begins the Development Process and Buys Parcel C

¶ 6 Carousel Farms comprises two twenty-acre parcels (Parcel A and B) and the .65-acre strip of land sandwiched between them (Parcel C), located in unincorporated Douglas County.

¶ 7 Woodcrest initially intended to develop Carousel Farms. As a prerequisite to development, the three parcels had to be annexed into the Town, rezoned as planned development, and approved as a subdivision—an extensive process that entailed the preparation and approval of a sketch plan, a preliminary plan, and a final plat. As the Town explains in its municipal code, "[e]ach step is a distinct process involving the submittal of an application, an application fee, required plans and reports, referrals of the proposal to other agencies and public hearings/meetings." Parker Mun. Code 13.07.040(a)(2).

¶ 8 To meet those obligations, Woodcrest bought Parcel C and entered into contracts to buy Parcels A and B. It executed an annexation agreement and successfully progressed through the sketch plan and preliminary plan phases of the subdivision process. The final plat prepared by Woodcrest's engineering firm was never approved, however, because Woodcrest did not ultimately acquire Parcels A and B. After six months without further progress, Woodcrest's development plans were deemed abandoned.

B. The Developer Takes Over Development of Carousel Farms

¶ 9 About five years later, in 2012, the Developer stepped in. At the immediate possession hearing, the Developer testified that it essentially picked up where Woodcrest had left off: the engineering firm had retained all the development plans so the Developer was "able to pick those plans up." It contracted to buy Parcels A and B and began the subdivision process, making some adjustments to Woodcrest's plans along the way.

¶ 10 In January 2014, the Town entered into a new annexation agreement (the Agreement) with the then-current owners of Parcels A and B. Under the terms of the Agreement, the Town would not annex Parcels A and B, nor would it approve any plats for Carousel Farms, unless the Developer owned all three parcels, including Parcel C. This latter condition was contained in the following provision:

2. Consolidation of Ownership of the Property and the Strip Parcel. The Town has no obligation to approve (including the setting of any public hearings) any plats for the Property until all of the following conditions are satisfied:

a. [The Developer] or its assign is the owner of the Property [Parcels A and B] and the real property described in Exhibit C [Parcel C] . . . (the "Strip Parcel").

b. The Strip Parcel [Parcel C] is zoned PD-Planned Development. . . .

c. The Strip Parcel [Parcel C] is made subject to this Agreement by an amendment hereto.

(Formatting omitted.)

¶ 11 In the meantime, the Developer made overtures to Woodcrest to acquire Parcel C. In January 2013, it offered to buy the parcel for approximately $45,000. But Woodcrest declined that offer, noting that it had essentially subsidized the Developer's entitlement process because the Developer had used Woodcrest's development plans and because the owners of Parcels A and B had retained Woodcrest's earnest money, presumably reducing the Developer's purchase price of those parcels. Woodcrest told the Developer that its offer "must increase substantially."

¶ 12 The Developer did not make another offer. Instead, two weeks later, it sent Woodcrest a notice that it intended "to move forward with annexation into the Town of Parker." If Woodcrest did not accept the

offer "expeditiously," condemnation proceedings would be initiated "with Town Council's support." The Developer did not explain the basis for its authority to condemn Woodcrest's property, and Woodcrest assumed that it was the Town that might move to condemn Parcel C.

¶ 13 In fact, though, the Town never considered condemning Woodcrest's property. At the possession hearing, the Town's representative testified that the Town did not even want to "talk about" the possibility of taking Parcel C because the Town "d[oesn't] do condemnation." Rather, as the Town's representative explained, the Town preferred that "the two property owners," meaning the Developer and Woodcrest, "work it out by themselves."

¶ 14 But the Developer made no further attempts to "work it out" with Woodcrest. Instead, it simply moved forward with its development plans. It closed on Parcels A and B and, in the fall of 2014, the former owners assigned their rights and obligations under the Agreement to the Developer.

¶ 15 On September 2, 2014, the Town held a public hearing on the Carousel Farms sketch and preliminary plan. The Town's planning department conditioned approval of the plan on the Developer acquiring and rezoning Parcel C and including it within the Agreement. According to the planning department representative, only with the addition of Parcel C would the Developer's sketch and preliminary plan satisfy the density requirements under the Parker 2035

Master Plan. The Town approved the plan on the condition that "[t]he Woodcrest Parcel shall be acquired, rezoned to Carousel Farms PD and made a part of the Carousel Farms Annexation Agreement."

C. The Developer Forms the District and the District Condemns Parcel C

¶ 16 During the fall of 2014, the Developer also created the District, a new metropolitan district that would serve Carousel Farms. According to the District's service plan, the District's primary purpose was to finance the construction of public improvements authorized to be constructed as part of an "Approved Development Plan," such as a final plat.

¶ 17 At the time the District was created, the Agreement still required "[c]onsolidation of [o]wnership of the Property [Parcels A and B] and the Strip Parcel [Parcel C]" as a condition precedent to approval of the Carousel Farms final plat. More specifically, the Town was not obligated to set a hearing on the Developer's plat until "[the Developer] or its assign, [was] the owner of the . . . 'Strip Parcel.' "

¶ 18 On December 10, 2014, the District, acting through its Board of Directors, who were all employees or principals of the Developer, issued to Woodcrest a "Notice of Intent to Acquire" Parcel C. The notice explained that the District was "proceeding with the construction of certain street and related improvements" for "the Carousel Farms development, which improvements are required by the Town of Parker (the

'Project')." Due to "the immediate need for this Project," the notice continued, "the District must obtain [Parcel C] promptly." The District warned that if Woodcrest rejected the offer, the District would "initiate eminent domain proceedings to acquire [Parcel C], so that it can proceed with the Project."

¶ 19 The District then approved a "Resolution of Necessity," stating that "in order to construct and install the Public Improvements for the property within and served by the District, it is necessary for the District to acquire" Parcel C. As part of the resolution, the District's Board of Directors found that

> it is necessary to the public health, safety, and welfare of the property owners and residents of the District for the District to construct the Public Improvements and it is necessary for the public health, safety and welfare of the property owners and residents of the District to exercise its power of eminent domain to acquire the Property. . . .

At the time of the resolution, the District had no residents, the only two property owners having sold their property to the Developer.[1]

¶ 20 When Woodcrest declined the offer, the District filed a petition in condemnation and request for immediate possession of Parcel C. The District's

[1] The record does not appear to include evidence of the date that Developer acquired parcels A and B. However, Woodcrest represented in its briefing that the Developer closed on the sale of the parcels between September 12 and 15, 2014, and the District did not dispute that representation.

petition asserted that "there is a public need and necessity to acquire [Parcel C] . . . for the construction of certain street and related improvements . . . for the Carousel Farms Development. . . ."

¶ 21 An immediate possession hearing was scheduled for March 19, 2015. The Developer's final plat had not yet been approved, but the Developer was now poised to satisfy the requirement that Parcel C be acquired and annexed into the Town as part of the proposed subdivision. But under the Agreement, the Developer—not the District—had to acquire Parcel C.

¶ 22 So, three days before the hearing, on March 16, 2015, the Developer and the Town executed an amendment to the Agreement. The amendment (though still ostensibly requiring "consolidation of ownership" of Parcels A, B, and C) made the *District's* ownership of Parcel C the new prerequisite to approval of a final plat. The District was not a party to the amendment; the Developer agreed to the new term.

D. The District Court's Ruling and Woodcrest's Appeal

¶ 23 At the immediate possession hearing, Woodcrest argued that the Developer was using the District to accomplish indirectly what the Developer had been unable to do directly: acquire Parcel C and thereby satisfy its obligation under the Agreement, clearing the way for the Town's approval of the Carousel Farms subdivision. The purpose of the taking, Woodcrest contended, was therefore primarily private,

not public. Woodcrest urged the district court to disregard the District's statement of necessity, based on the District's bad faith in pursuing condemnation on behalf of the Developer.

¶ 24 The district court rejected Woodcrest's challenges to the condemnation petition and granted the District's request to take immediate possession of Parcel C. In arriving at that decision, the court adopted the District's proposed findings of fact and conclusions of law verbatim. It determined that condemnation of Parcel C was for a public purpose and that Woodcrest's allegations of bad faith were vague and conclusory.

¶ 25 On appeal, Woodcrest reasserts its argument that the District's condemnation of Parcel C was not necessary to advance a public purpose but instead was initiated in bad faith, for the purpose of facilitating the Developer's compliance with the Agreement.

II. Legal Principles and Standard of Review

¶ 26 Under the state constitution, a governmental entity may not invoke the power of eminent domain unless it has eminent domain power, intends to use the property taken for a proper public purpose, and pays the owner just compensation for the property after giving the owner due process of law. Colo. Const. art. II, § 15. The power of condemnation has been restrained by constitutional limitations for the protection of individual property rights, and it lies dormant in the state until the General Assembly speaks. *Town of Parker v. Colo. Div. of Parks & Outdoor Recreation*, 860 P.2d 584,

586 (Colo. App. 1993). Thus, the authority to condemn must be conferred expressly by statute or necessarily implied from the rights, powers, and duties conferred by the General Assembly. *Id.* Narrow construction is the rule in determining the scope of an entity's condemnation power. *Id.*

¶ 27 The District is a metropolitan district, created pursuant to the Special District Act, sections 32-1-101 to -1807, C.R.S. 2017. Under section 32-1-1004(4), C.R.S. 2017, the District may exercise the power of eminent domain.

¶ 28 Still, any taking of private property by a governmental entity must be for a public purpose. § 38-1-101(2)(b), C.R.S. 2017; *see also Thompson v. Consol. Gas Utils. Corp.*, 300 U.S. 55, 80, 57 S.Ct. 364, 81 L.Ed.510 (1937) (implicit in the Fifth Amendment is a requirement that a governmental taking must be for a public, not private, purpose). There is no precise definition of public purpose; it must be determined on a case-by-case basis. *Bd. of Cty. Comm'rs v. Kobobel*, 176 P.3d 860, 863 (Colo. App. 2007). The relevant inquiry is whether the purpose of the condemnation is "for the public benefit." *State Dep't of Highways v. Denver & Rio Grande W. R.R. Co.*, 757 P.2d 181, 183 (Colo. App. 1988), *aff'd*, 789 P.2d 1088 (Colo. 1990).

¶ 29 The fact that private interests may benefit from the condemnation does not defeat a public purpose, so long as the "essential purpose" of the taking is to obtain a public benefit. *Kobobel*, 176 P.3d at 863. "Public purpose," however, does not include the taking

of private property for transfer to a private entity for the purpose of economic development. § 38-1-101(1)(b)(I).

¶ 30 Whether a contemplated use is a public use is an issue for judicial determination. *Silver Dollar Metro. Dist. v. Goltra*, 66 P.3d 170, 174 (Colo. App. 2002). Thus, on review, "the court's role is to determine whether the essential purpose of the condemnation is to obtain a public benefit." *Id.* The burden of proof is on the condemning entity to establish, by a preponderance of the evidence, that the taking of private property is for a public use. § 38-1-101(2)(b).

¶ 31 The condemning entity must also establish the "necessity" of the taking—that is, that condemnation of the particular property at issue is necessary to advance the intended public purpose. *Town of Silverthorne v. Lutz*, 2016 COA 17, ¶ 34, 370 P.3d 368. The issues of necessity and public purpose are "closely related and, to some extent, interconnected." *Denver W. Metro. Dist. v. Geudner*, 786 P.2d 434, 436 (Colo. App. 1989) (quoting *Thornton Dev. Auth. v. Upah*, 640 F. Supp. 1071, 1076 (D. Colo. 1986)). Ordinarily, once the condemning entity has established that the taking is for a public purpose, we will not second-guess its decision that a particular piece of property must be condemned to achieve that purpose. Absent a showing of bad faith, we will assume that the entity has selected the property necessary to carry out the purpose of the condemnation. *Colo. State Bd. of Land Comm'rs v. Dist. Court*, 163 Colo. 338, 342, 430 P.2d 617, 619 (1967). But if, for example, the primary purpose underlying a condemnation decision is to advance private interests, the

existence of an incidental public benefit does not prevent a court from finding bad faith and invalidating a condemning entity's determination that condemnation of a particular piece of property is necessary. *Geudner*, 786 P.2d at 436.

¶ 32 In condemnation proceedings, we ordinarily review the district court's findings of fact for clear error and its legal conclusions de novo. *Glenelk Ass'n v. Lewis*, 260 P.3d 1117, 1120 (Colo. 2011). However, where, as here, the district court adopts the prevailing party's proposed findings of fact and conclusions of law verbatim, the findings are subject to "heightened scrutiny." *Trask v. Nozisko*, 134 P.3d 544, 549 (Colo. App. 2006). And, even under the clearly erroneous standard of review, we can reverse the district court's factual findings when, although there may be some evidence to support them, we are nonetheless left, after a review of the entire record, with the definite and firm conviction that a mistake has been made. *See In re Estate of Schlagel*, 89 P.3d 419, 422 (Colo. App. 2003).

III. The District's Condemnation of Parcel C

¶ 33 We conclude that the District failed to demonstrate that its condemnation of Parcel C was for a public purpose and necessary for such a purpose. And, by taking Parcel C, effectively on behalf of the Developer, the District also ran afoul of section 38-1-101(1)(b)(I)—the statue prohibiting a taking for transfer to a private entity for the purpose of economic development.

A. Public Purpose

¶ 34 The District insists that the condemnation of Parcel C was for a public purpose because the property would, upon the Town's approval of the subdivision, be used for public improvements such as roads and sewers.

¶ 35 We do not doubt that the planned improvements would benefit the public or, more accurately, the future residents of the proposed subdivision. The question, though, is not whether the condemned property will eventually be devoted to a public use, but whether the *taking itself* was for a public purpose. *See Am. Family Mut. Ins. Co. v. Am. Nat'l Prop. & Cas. Co.*, 2015 COA 135, ¶ 30, 370 P.3d 319 ("[T]he Colorado Constitution requires that the *taking itself* be accomplished for a public purpose.").

¶ 36 At the time of the condemnation, there was no subdivision. We acknowledge that a condemning entity is not required to obtain permits and approvals as a condition precedent to moving forward with a condemnation, *Goltra*, 66 P.3d at 173, but the point in the development process at which the condemnation occurs is relevant to the issue of public purpose, *id.* And here, it is not just that the subdivision had not been approved at the time of the condemnation; it is that there could be no subdivision unless Parcel C was somehow acquired. Thus, without Parcel C, there was no likelihood of a subdivision and no necessity for the public improvements that purportedly justified the condemnation in the first place. "A condemnation

action to support a public benefit that may never be initiated is premature." *Kobobel*, 176 P.3d at 865.

¶ 37 In other words, the taking of Parcel C was a step removed from any public purpose. A similar scenario arose in *American Family Mutual Insurance Co.* In that case, the state forest service initiated a prescribed burn on state property that spread unintentionally to surrounding land, resulting in significant property damage. *Am. Family Mut. Ins. Co.*, ¶ 2. The insurers of the property argued that the forest service had effectuated a taking of the property because the fire, at its inception, was for a public purpose. *Id.* at ¶¶ 29, 31. The division rejected that argument, reasoning that although the initial act of setting the fire served a public purpose, the resulting damage (or "taking") was a step removed from the original public purpose, and the initial public purpose could not support the later unintentional taking. *Id.* at ¶ 32.

¶ 38 Here, the essential purpose of the taking itself was to ensure that the terms and conditions of the Agreement were satisfied so that the Developer could seek approval of its final plat in the first place. Only then was approval of the subdivision even possible, and the likelihood of the need for public improvements substantial enough to justify the condemnation. *See Pub. Serv. Co. of Colo. v. Shaklee*, 784 P.2d 314, 317 n.3 (Colo. 1989) (Although obtaining a permit is not required before the entity can condemn property, "the likelihood that such a [permit] will be issued . . . may be relevant to the trial court's determination of public use."). The later planned public use for Parcel C "does

not transfer to and supply the 'public purpose' for th[e] [District's] taking." *Am. Family Mut. Ins. Co.*, ¶ 32.

¶ 39 When the primary purpose of a condemnation is to advance private interests, even if there will be an eventual public benefit, the condemnation is not for a public purpose. *See Geudner*, 786 P.2d at 436.

B. Necessity and Bad Faith

¶ 40 That brings us to the closely related issue of necessity. In its briefing on appeal, the District says we must accept its assertion of necessity, no questions asked, because it issued a "Resolution of Necessity" stating that acquisition of Parcel C was necessary for construction of the public improvements and because Woodcrest failed to show (or even allege) any bad faith on the part of the District. We disagree.

¶ 41 First, having determined that the essential purpose of the condemnation was to advance the Developer's interests, we cannot simultaneously determine that the acquisition of Parcel C was necessary to accomplish a public purpose.

¶ 42 Second, the evidence of bad faith is substantial. We recognize, as the District has pointed out, that in the early stages, special district boards are generally made up of the developer's representatives. But the representatives, when serving in their capacities as board members, may not take actions based on their own self-interests as the developer. *See Geudner*, 786 P.2d at 436-37. At oral argument, counsel for the

District conceded that the District's directors, all employees of the Developer, operated under a conflict of interest in pursuing condemnation of Parcel C. Under these circumstances, we must carefully scrutinize the District's decision to take Parcel C to ensure that it was not tainted by "bad faith." *Id.* at 436.

¶ 43 In our view, the evidence demonstrates that it was:

- From January 24, 2014, when it was executed, until March 16, 2015, a few days before the possession hearing, the Agreement required the Developer to acquire Parcel C, as part of a condition of "consolidated ownership" of Parcels A, B, and C.
- The Developer knew that it could not obtain approval for its final plat without acquiring Parcel C.
- When Woodcrest balked at the Developer's initial offer, the Developer did not negotiate further; instead, it threatened condemnation though it had no authority, on its own, to take Parcel C.
- In November 2014, the District was formally created. Two weeks later, the District sent Woodcrest a notice of intent to acquire Parcel C. At the time the District initiated condemnation proceedings, the Developer—not the District—was required to own Parcel C.
- On March 16, 2015, the Developer and the Town executed an amendment to the Agreement, stating that "[The District] is the owner

of . . . [Parcel C] (the "Strip Parcel"), to be dedicated for public use and ownership. . . ." The District did not sign the agreement; the vice president of the Developer signed on behalf of the Developer, confirming that the District was entering into the Agreement on behalf of the Developer.

- On August 17, 2015, the Developer and the Town executed a second amendment to the Agreement, requiring both the District and Developer to submit an amended final plat to the Town showing the dedication of Parcel C for public improvements. The District did not sign this agreement either.

¶ 44 This evidence establishes that, when the Developer could not obtain Parcel C at the desired price, the District stepped in to assist the Developer and ensure that the development process could proceed. The fact that the Developer threatened to condemn Parcel C when it had no authority to do so, and then created the District (which promptly initiated condemnation proceedings), suggests a kind of alter ego relationship between the District and the Developer, as does the fact that the Developer signed the amendments to the Agreement, but the District did not. In other words, the Developer spoke for the District and the District acted for the Developer.

¶ 45 These circumstances are similar to those presented in *Geudner*. In that case, the property within the metropolitan district was owned by members of one family, or entities controlled by the family, and

members of the family sat on the district's board of directors. 786 P.2d at 435. A family entity entered into a contract for the sale of a parcel of land within the district. As a condition of the purchase, the seller required the entity to relocate a ditch on the property. *Id.* The family entity offered to buy property from a neighboring parcel so it could relocate the ditch there, but the owner refused. The district then instituted condemnation proceedings. *Id.* at 436. The trial court dismissed the petition, finding that the proceedings were initiated in bad faith. On appeal, the district argued that once it was established that relocating the ditch would yield a public benefit, the trial court was precluded from reviewing the necessity of moving the ditch to the neighbor's property. *Id.* A division of this court affirmed the dismissal, concluding that, while the relocation of the ditch might have provided an incidental public benefit, the essential purpose of the condemnation was to assist the family entity in completing the transaction. *Id.* at 436-37.

¶ 46 The District says this case is unlike *Geudner* because the essential purpose here is not to advance the interests of the Developer but to provide improvements to the residents of the proposed subdivision, which will benefit the public "first and foremost." But that conclusory distinction fails, for the reasons we have already explained.

¶ 47 The immediate purpose of the taking was to ensure the Developer's compliance with the contract. The District has not pointed us to a single case in any jurisdiction, and we have not uncovered one through

our own research, where a court has approved a governmental entity's condemnation of private property to facilitate a private party's compliance with a contract. The government may not "take property under the mere pretext of a public purpose, when its actual purpose [is] to bestow a private benefit." *Kelo v. City of New London*, 545 U.S. 469, 478, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005).

C. The Prohibition on a Taking for Transfer to a Private Entity

¶ 48 In our view, the District's condemnation of Parcel C, undertaken on behalf of the Developer, also runs afoul of section 38-1-101(1)(b). That provision provides:

> (b)(I) For purposes of satisfying the requirements of this section, "public use" shall not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenue. Private property may otherwise be taken solely for the purpose of furthering a public use.
>
> (II) By enacting subparagraph (I) of this paragraph (b), the general assembly does not intend to create a new procedural mechanism to bring about the condemnation of private property. By enacting subparagraph (I) of this paragraph (b), the general assembly intends to limit only as provided in subparagraph (I) of this paragraph (b), and not expand, the definition of "public use."

Subsection 101(1)(b) was added to the general eminent domain statute in 2006, in response to the Supreme Court's decision in *Kelo*. *See* Michael R. McCormick, Kelo *Confined—Colorado Safeguards Against Condemnation for Public-Private Transportation Projects*, 37 Colo. Law. 39 (Mar. 2008); *see also* Ch. 349, sec. 1, § 38-1-101(1)(b), 2006 Colo. Sess. Laws 1749-50.

¶ 49 In *Kelo*, the Supreme Court held that the City of New London could, consistent with the Fifth Amendment, condemn private property for the purpose of transferring it to a private nonprofit entity established to assist the city with a redevelopment project, even though there was no showing by the city that the property was blighted. 545 U.S. at 479, 125 S.Ct. 2655. Colorado, like many other states, enacted legislation in the wake of *Kelo* to preclude the government from taking property and transferring it to a private entity.

¶ 50 We view the District's taking as a circumvention of our anti-*Kelo* statute. The Agreement, as well as the Town's municipal code, required the Developer to acquire at its own cost all of the parcels for the proposed subdivision. Then, under the Agreement and the municipal code, the Developer had to make certain improvements and dedicate certain property to the Town. *See* Parker Mun. Code 13.07.010.

¶ 51 Woodcrest's refusal to sell prevented the Developer from meeting those obligations. The Developer, though, had no power to condemn Parcel C. Nor, consistent with section 38-1-101(1)(b), could the

District condemn the property and transfer it to the Developer for installation of improvements and dedication to the Town. So, instead, the District, acting as a mere conduit for the Developer, executed an amendment to the Agreement that allowed the District to acquire Parcel C and then, bypassing the Developer, simply dedicated the property directly to the Town.

¶ 52 Thus, through a manipulation of the circumstances surrounding the condemnation proceeding, the District has skirted the prohibition against a governmental entity's taking of private property for transfer to a private entity for economic development purposes. Such action violates the principle that "the law may not be used to permit one to accomplish indirectly what he may not achieve directly." *Salle v. Howe*, 793 P.2d 628, 631 (Colo. App. 1990).

¶ 53 The District's circumvention of the statute reinforces our view that the condemnation proceedings were undertaken in bad faith.

¶ 54 Because we conclude that the District's condemnation of Parcel C failed to comply with constitutional and statutory requirements, we must reverse the district court's judgment of possession.

IV. Expert Witness Fees

¶ 55 After the court entered its preliminary order of possession, the case proceeded to a valuation hearing to determine just compensation. Woodcrest challenges the district court's denial of its request for

reimbursement of certain expert witness fees incurred in connection with the valuation hearing.

¶ 56 In light of our disposition reversing the judgment of possession, we vacate the court's order on Woodcrest's bill of costs and remand for reconsideration in accordance with section 38-1-122(1), C.R.S. 2017 (providing that a district court must award costs and attorney fees upon a finding that petitioner is not entitled to acquire real property).

V. Conclusion

¶ 57 The judgment of possession is reversed. The order on Woodcrest's bill of costs is vacated. The case is remanded to the district court for further proceedings consistent with this opinion.

Dailey and Plank*, JJ. concur.

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* Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2017.

DISTRICT COURT, DOUGLAS COUNTY, COLORADO R.A. Christiansen Justice Center 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 720-437-6200	
Petitioner: CAROUSEL FARMS METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado, v. **Respondents:** WOODCREST HOMES, INC., a Colorado corporation; LAUREL D. HOLDEN AND BARTINA HOLDEN, individuals; STONEGATE VILLAGE METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado; and DIANE HOLBERT, in her capacity as Douglas County Treasurer	**▲ COURT USE ONLY ▲**
	Case Number: 2015CV30013 Division: 3
FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed Apr. 1, 2015)	

I. THE DISPUTE AND PROCEDURAL BACKGROUND

The Metro District brought this eminent domain proceeding against Respondents Woodcrest Homes, Inc., Laurel D. Holden and Bartina Holden, Stonegate Village Metropolitan District and Diane Holbert, in her capacity as Douglas County Treasurer, to acquire the real property described in the Corrected Exhibit A to the Petition in Condemnation in fee simple absolute, containing approximately 0.65 acres (the "Subject Property"). The Metro District seeks to acquire the Subject Property for the construction of certain street and related improvements, as well as, water, storm drainage and sanitary sewer improvements, in the Carousel Farms Development, which improvements are required by the Town of Parker (the "Project").

The Metro District, along with its Petition in Condemnation, filed a Motion for Immediate Possession of the Subject Property, pursuant to section 38-1-105(6)(a), C.R.S. Respondent Woodcrest Homes, Inc. ("Woodcrest"), the fee owner of the Subject Property, objected to the Metro District's Motion for Immediate Possession. No other respondents objected to the Metro District's Motion for Immediate Possession. A hearing was held on the Metro District's Motion for Immediate Possession on March 19 and 20, 2015.

The Court makes the following findings of fact and conclusions of law:

II. FACTUAL FINDINGS

Carousel Farms Development History:

1. Todd Amberry is the Vice President of Land Acquisition for Century Communities and a Carousel Farms Metropolitan District Board Member.

2. Parcel C ("Subject Property") has consistently been shown in all the plans for the Carousel Farms Development to be a public right of way, with a roadway, street improvements, water, sanitary sewer and storm water lines within that right of way.

3. In its current state, the Subject Property is a natural drainage way/storm water runoff with culverts. The Subject Property already contains a sanitary sewer line. See Exhibits 1-3, 27. There is also a 30 foot Stonegate exclusive water line easement running along the westerly 30 feet of the Subject Property. See Exhibit 17; Exhibit 7.

4. Mr. Amberry testified that the efforts to develop the Carousel Farms Development began many years ago. In the early 2000s, Woodcrest proposed a development to the Town of Parker ("Town") called Carousel Farms Development that included Parcels A (northern parcel), B (southern parcel) and C (the "Strip" or the Subject Property). Woodcrest submitted an annexation agreement to the Town to annex Parcels A, B and C into the Town. Woodcrest entered into real estate purchase and sales agreements with the prior owners of Parcels A and B in the early 2000s and paid

the prior owners of Parcels A and B additional monies to extend those contracts.

5. In the summer of 2006, Woodcrest purchased the Subject Property (Parcel C) from the Riverside Baptist Church South by Warranty Deed for $9,760.00. See Exhibit L.

6. Woodcrest, through Peak Civil Engineering, prepared the Carousel Farms Filing No. 1 Final Plat for the Carousel Farms Development, which is dated November 16, 2007 ("Woodcrest Final Plat"). See Exhibit 28. In the Woodcrest Final Plat, Woodcrest designates the Subject Property as a road (Flying Horse Drive) and for utilities. See Exhibit 28 (Sheet 3 of 4). In the Woodcrest Final Plat, the Subject Property was required to be dedicated to the Town and other public entities (i.e., Parker Water and Sanitation District). In the Woodcrest Final Plat, Flying Horse Drive connected to an improved Newlin Gulch Blvd, which connected to Main Street in the Town.

7. Sometime between 2007 and 2011, the prior owners of Parcels A and B and Woodcrest failed to extend the real estate purchase and sales agreements for Woodcrest to purchase Parcels A and B. Woodcrest, however, continues to own the Subject Property.

8. Century Communities and its subsidiaries, including Century at Carousel Farms, LLC and High Pointe Holdings, LLC, are the current developer (collectively, "Century") of the Carousel Farms Development.

9. Century began negotiating the purchase of Parcels A and B in late 2012 and contracted with both owners in November 2012. Century began discussions with Woodcrest's general counsel, John Baringer, to acquire the Subject Property in January of 2013. Century offered Woodcrest as much as $44,850 for Parcel C. This offer, however, was rejected by Woodcrest and no counteroffer was made. Century and Woodcrest have never reached an agreement regarding Parcel C.

10. Century began discussions with the Town to process the entitlements of the Carousel Farms Development in the late winter/early spring of 2013. The previous owners of Parcels A and B (with the support and involvement of Century) entered into the Carousel Farms Annexation Agreement with the Town and Parker Water and Sanitation District on January 6, 2014, to memorialize the steps needed to annex Parcels A, B and C into the Town and move forward with the application process for approval of the Carousel Farms Development. See Exhibit 5 & 6. Parcels A and B have since been annexed into the Town and have been rezoned Planned Development Zone or "PD," pursuant to paragraph 1 of the Annexation Agreement. See Exhibit 5 & 6.

11. Paragraph 2 of the Annexation Agreement specifically addresses the Subject Property (or Parcel C or the Strip), and contemplated that Century (as High Pointe Holdings, LLC, or its assigns), would become the owner of the Subject Property and rezone the Subject Property to PD. See Exhibits 5 & 6. Most recently, after the Metro District was formed, the Town

and Century amended the Annexation Agreement to change paragraph 2 to recognize the Metro District's involvement in the Carousel Farms Development. See Exhibit 15. Because the Metro District was now acquiring the Subject Property (Parcel C) and then was dedicating the Subject Property to the Town, pursuant to its Service Plan (see below), paragraph 2 was amended, so as to clarify that the Metro District likely will be the owner of the Subject Property (by way of this condemnation action). See Exhibit 15.

12. Assuming the Metro District will own the Subject Property, the Town will no longer require rezoning of the Subject Property to PD; rather, the Metro District will dedicate the Subject Property to the Town for public use and ownership upon completion of construction of the public improvements, which is consistent with the Service Plan. See Exhibit 15. Once the Metro District takes possession of the Subject Property, the Metro District and the owner of Parcels A and B (Century) may jointly apply to the Town for approval of any plats for Parcels A and B and the Subject Property, and the Town shall, at its discretion, approve any final plats for Parcels A and B and the Subject Property, and issue permits for the development of the Carousel Farms Development to allow construction of the public improvements in the Subject Property to proceed. See Exhibit 15.

Carousel Farms Metropolitan District:

13. In early 2013, Century engaged the law firm of McGeady Sisneros to initiate the formation [sic] a metropolitan district for the Carousel Farms Development to finance the public improvements for the Carousel Farms Development that the Town could not provide.

14. McGeady Sisneros prepared a Memorandum of the Schedule of Events for the Metro District that was updated on March 26, 2013. See Exhibit 30.

15. The Town approved the Service Plan for the Metro District on September 15, 2014 ("Service Plan"). See Exhibit 9.

16. The Metro District was officially organized on November 25, 2014, by the recordation of the Order and Decree of the District Court in and for Douglas County, Colorado in the real property records of Douglas County, Colorado. See Exhibit 11.

17. The boundaries of the Metro District include Parcel A and Parcel B, totaling approximately 39 acres. The Service Plan includes the Subject Property (Parcel C) as a future inclusion area. See Exhibit 9, at pp. 4, 7, Exs. A-1, A-2, C-1 and C-3.

18. Pursuant to the Service Plan, the Metro District has the authority to provide for the planning, design, acquisition, construction, installation, relocation, development and financing of public improvements within and without its boundaries. Pursuant to the Service Plan, the Metro District shall dedicate such public improvements, including the Subject Property,

to the Town or other appropriate jurisdiction (i.e., Parker Water and Sanitation District). See Exhibit 9 (p. 16); see also Intergovernmental Agreement between Metro District and the Town ("IGA") (Exhibit 10, at ¶¶ 5, 10, 11).

19. The Subject Property will be utilized by the Metro District to construct a roadway, together with associated water, storm drainage and sanitary sewer improvements, all of which will be dedicated to the Town and/or Parker Water and Sanitation District upon completion. Exhibit 3 shows the public improvements on the Subject Property, including the following: roadway (Hobble Drive connecting to Newlin Gulch Blvd.), sidewalks, landscaping, water (blue lines), storm drainage (grey/white dashed lines) and sanitary sewer (green lines). See Exhibit 9 (p. 9 para. B; Ex. D & Ex. E); Exhibit 10, at ¶¶ 5, 10, 11.

20. The roadways (Hobble Drive via Newlin Gulch Blvd), once dedicated to the Town, will connect to Main Street to the south of the Carousel Farms Development and to Chambers Road via the planned Newlin Gulch Blvd. connection through the neighboring development to the west (Newlin Crossing Planned Development). See Exhibit 9 (p. 9 para. B; Ex. D & Ex. E); Exhibit 10, at ¶¶ 5, 10, 11; Exhibit 16 (last page in particular).

21. The water, storm drainage and sanitary sewer lines will be dedicated to the Town and/or Parker Water & Sanitation District and connected to the

associated main lines. See Exhibit 9 (para. 1 on pg. 6 & para. 5 of pg. 6; p. 13); Exhibit 10, at ¶¶ 5, 10, 11.

The Metro District's Use of Its Powers of Eminent Domain to Acquire the Subject Property:

22. After the Metro District was officially organized on November 25, 2014, the Metro District held its first meeting in December 2014 and elected officers/board members. Mr. Amberry is a board member. At its December 2014 meeting, the Metro District Board passed a Resolution of Necessity to use its powers of eminent domain, if necessary, to acquire the Subject Property from Woodcrest. See Exhibit 12.

23. The Metro District is authorized to acquire property both inside and outside of its boundaries for roadways, water, storm drainage and sanitary sewer improvements, pursuant to section 32-1-1004(4), C.R.S.

24. After passing the Resolution of Necessity, the Metro District, through its attorneys, sent a Notice of Intent to Acquire and Final Offer Letter to Woodcrest to acquire the Subject Property ("Offer Letter"). See Exhibit 13. Woodcrest requested and was granted an extension to respond to the Offer Letter until January 2, 2015. Woodcrest responded in writing to the Offer Letter on January 5, 2015, stating its objection to any condemnation proceeding, but did not counteroffer. See Exhibits 25 & 26. Soon thereafter, the Metro District initiated this condemnation proceeding. As of the date

of the immediate possession hearing, Woodcrest had not made a counteroffer to the Metro District.

25. With its Petition in Condemnation, the Metro District filed a Motion for Immediate Possession, seeking possession of the Subject Property immediately, so as to move forward with the Project and comply with the Annexation Agreement and First Amendment to the Carousel Farms Annexation Agreement.

26. The Metro District seeks possession of the Subject Property as soon as possible, because the Town has required the Metro District to acquire the Subject Property in order for the Metro District and Century to move forward with the Carousel Farms Development. See Exhibits 5 & 15.

The Metro District's Relationship With Century of The Carousel Farms Development:

27. Mr. Amberry testified that the Carousel Farms Development is a new residential real estate development involving undeveloped or unimproved property. In Colorado, private developers typically initiate real estate projects and begin the entitlement. At a certain point in the entitlement process, the developer becomes the proponent of the formation of a metropolitan district to finance and construct the public improvements within the development.

28. Mr. Amberry testified that this is exactly what has happened with the Carousel Farms Development. Century owns the majority of the property that

makes up the Carousel Farms Development; Century (along with the previous owner) took steps to annex the properties that make up the Carousel Farms Development into the Town and into Parker Water and Sanitation District boundaries and rezone the Carousel Farms Development to a Planned Development Zone or "PD"; Century filed preliminary plats/sketch plans of the Carousel Farms Development with the Town to gain preliminary approval and begin the process of working with the Town's planners on the Carousel Farms Development. At that point, the Carousel Farms Development was far enough along and a firm enough project with the backing and support of the Town that it was appropriate and important to form the Metro District to finance the public improvements that would be a part of the Carousel Farms Development.

Deposit:

29. At the Immediate Possession Hearing, the only witness that testified concerning the value of the Subject Property was Carousel Farms' appraiser, Mr. Chris Koloskus.

30. Mr. Koloskus testified that the fair market value for the Subject Property is $14,100.00. See Exhibits 19 – 22. He further testified that there is no remainder or residue as a result of the taking of the Subject Property, so there are no damages to the residue to determine.

31. Mr. Koloskus based his determination of fair market value on his finding of six (6) comparable sales. See Exhibits 19, 20 & 21. Those six sales were remnant parcels, just as the Subject Property is a remnant parcel. Those six sales were adjusted to the Subject Property for the following factors: access, location, topography, size, shape, zoning, and overall utility and use potential. See Exhibit 21.

32. Woodcrest purchased the Subject Property from a third party, in an arms-length transaction for $9,760.00. See Exhibit L.

33. On December 10, 2014, the Metro District sent its Notice of Intent to Acquire and Final Offer to Purchase the Subject Property. See Exhibit 13. Woodcrest has rejected the Metro District's offer of $44,850 and, to the Court's knowledge, has made no counteroffer.

III. CONCLUSIONS OF LAW

1. The Court may "authorize the petitioner, . . . , if not in possession, to take possession of and use, said premises during the pendency and until the final conclusion of such proceedings and may stay all actions and proceedings against such petition on account thereof, if petitioner pays a sufficient sum into court, or to the clerk thereof, to pay the compensation in that behalf when ascertained." C.R.S. § 38-1-105(6)(a). To obtain possession, the Metro District has the burden of proving the following: authority, public use and

purpose, necessity, good faith negotiations, immediacy and a sufficient deposit.

The Metro District Has The Authority To Acquire The Subject Property:

2. Colorado statutes specifically authorize eminent domain authority to a metropolitan district for the same purposes that the Metro District has set forth in its Petition – street improvements, water, sanitary sewer and storm water purposes. The Metro District, as a "metropolitan district," has the power and authority, under section 32-1004(4), C.R.S., to "exercise the power of eminent domain and dominant eminent domain . . . [to] take any property necessary to the exercise of the powers granted, both within and without the special district, only for the purposes of fire protection, sanitation, street improvements, television relay and translator facilities, water, or water and sanitation" pursuant to "article 1 of title 38, C.R.S." See Exhibit 9 (formation of Carousel Farms Metropolitan District); C.R.S. § 32-1-1004(4).

3. It is common practice in Colorado for a metropolitan district that has been recently formed to be controlled by those directly connected with the development. See Samuel L. Light, Metropolitan District Service Plans: An Overview of Municipal Review, 33 APR Colo. Law. 63, 64 (2004); see also C.R.S. § 32-1-808(2)(a) (describing, generally, the manner in which an individual may take or place title to taxable property in the name of another or enter into a contract to

purchase or sell taxable property for the purpose of attempting to qualify such person as an eligible elector for any special district election under particular circumstances, such as when property is undeveloped and there are not yet any homeowner board members).

4. The Court finds that the Metro District was properly formed and is authorized pursuant to section 32-1-1004(4) to exercise its power of eminent domain to acquire any property necessary to the exercise of the powers granted, including that property outside its boundaries (like the Subject Property), for the purposes of sanitation, street improvements, water, or water and sanitation.

5. Here, the Subject Property essentially splits the Carousel Farms Development in half and is already encumbered by public utilities and a natural drainage. Without the Subject Property, there essentially would be a no-man's land between the two other parcels that make up the Carousel Farms Development and the two parcels' infrastructure would not be connected. It is practical and necessary to utilize the Subject Property within the Carousel Farms Development's infrastructure plan and incorporate the roadways, water, and sewer lines into the Subject Property.

6. Woodcrest's contention that the Metro District was formed solely to condemn the Subject Property is incorrect. The Metro District was created primarily to finance public infrastructure as set forth in the Service Plan and has the authority to acquire the Subject

Property pursuant to its powers of eminent domain. See Exhibit 9.

The Subject Property Is Being Condemned For a Public Purpose:

7. "[I]n any condemnation action, without the consent of the owner of the property, the burden of proof is on the condemning entity to demonstrate, by a preponderance of the evidence, that the taking of private property is for a public use." C.R.S. § 38-1-101(2)(b). However, the owners of the property to be condemned have the burden of proving that the taking is not for a public purpose. Silver Dollar Metro. Dist. v. Goltra, 66 P.3d 170, 174 (Colo. App. 2002).

8. In reviewing the condemning authority's finding that a proposed taking is for public use, the court's role is to determine whether the essential purpose of the condemnation is to obtain a public benefit. If a project is essentially for a public benefit and advantage, it will be determined to be a public use. See, e.g., Buck v. District Court, 199 Colo. 344, 608 P.2d 350, 351 (1980). The fact that private interests may benefit from the condemnation does not defeat a public purpose. Board of County Comm'rs v. Kobobel, 176 P.3d 860, 863 (Colo. App. 2007).

9. A public purpose may be determined by considering: (1) the land's physical conditions; (2) the community's needs; (3) the character of the benefit conferred on the community; and (4) the improvement's necessity in developing the state's resources.

Sinclair Transp. Co., 228 P.3d at 206; Kobobel, 176 P.3d 860, 863 (Colo. App. 2007); Silver Dollar Metro. Dist. v. Goltra, 66 P.3d 170, 174 (Colo. App. 2002). "In examining the stated purpose for a condemnation, courts look to whether the stated public purpose is supported by the record. If so, our inquiry ends." County of Denver v. Block 173, 814 P.2d 824, 828-829 (Colo. 1991). Public purpose has been liberally construed by Colorado courts. The fact that private interests may benefit from the condemnation does not defeat a public purpose. City & County of Denver v. Eat Out, Inc., 75 P.3d 1141, 1144 (Colo.App.2003) (acquired property to be transferred to a private developer as an aspect of a larger public facility). Furthermore, a use may be public though not many people enjoy it; the requirement is only that the improvement be open to all. Public Service Company of Colorado v. Shaklee, 784 P.2d 314, 318 (Colo. 1989).

10. In Buck, the landowner argued that a condemnation by a railroad company for the construction of dust levees parallel to its tracks was not a public use. The Colorado Supreme Court rejected that argument, finding that the railroad served the public and the dust levees were beneficial to the railroad, thus serving a public purpose. Buck, 608 P.2d at 351-52. In Shaklee, the respondents argued that condemnation of an easement for construction of a power line by the Public Service Company of Colorado to serve the Adolph Coors Company was not a public use. The Colorado Supreme Court in Shaklee 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," and held the use was public because the Public Service Company could use the line to serve other customers. Shaklee, 784 P.2d at 318 (held easement for construction of a power line by PSCo to serve the Adolph Coors Company was a public use because PSCo could use the line to serve other customers). "Colorado law does not require a condemning authority to obtain development permits or approvals as a condition precedent to going forward with a condemnation proceeding." Goltra, 66 P.3d at 173, citing Shaklee, 784 P.2d 314 (Colo. 1989) (obtaining a certificate of necessity from the Public Utilities Commission (PUC) not required); Miller v. Pub. Serv. Co., 272 P.2d 283 (Colo. 1954) (same) (other citations omitted).

11. Here, the Metro District seeks to acquire the property for a myriad of public uses. Importantly, the Town supports the Carousel Farms Development and the use of the Subject Property as property for the Carousel Farms Development's and Town's public infrastructure, both present and future. See Exhibit 7 (Town approved Carousel Farms Subdivision Sketch/ Preliminary Plan). The Subject Property will be used to construct the public roadway improvements to both Hobble Drive and Newlin Gulch Blvd. Such roadway improvements are being required by the Town and will be dedicated to the Town, so that the public can eventually gain access to the Carousel Farms Development from Main Street and Chambers Road in Parker. The construction of this public roadway (with associated easements) will also facilitate the completion of

anticipated development on largely vacant and unused property to the west of the Carousel Farms Development.

12. The roadway system within Carousel Farms Development, including Newlin Gulch Blvd (which lies partially on the Subject Property) and Hobble Drive, connects to main arterial roads in Parker, such as Chambers Road and Main Street. Users of the roadway system, such as the individuals and businesses affected by the construction of the homes, as well as future homeowner residents within Carousel Farms Development, will benefit by the proposed improvements. Those roadways will be public roadways; any member of the public or emergency vehicles can drive on them. Compare to Kobobel, 175 P.3d at 863 (court concluded no public purpose where road went to a private cemetery not open to the public). In the Court's opinion, these road improvements, which will be dedicated to the Town, that include creating a new public roadway (Hobble Drive) and making improvements to an existing unimproved two lane road (Newlin Gulch Blvd) constitute a public purpose which will add better utility and road access. Moreover, condemnation supports the Town's long term plan of encouraging coordinated development of Carousel Farms and a large plot of property to the west of Carousel Farms as a whole. The Court finds that development of these adjoining properties will likely result in more efficient road access, expansion of utility easements and increased tax revenue for the Town.

13. While Woodcrest contends that the public use must be an existing public use, the Court is not persuaded. Generally, Colorado cases that examine the issue of public purpose also consider future public uses because it is a future public use that necessitates condemning property. For example, the Kobobel court concluded that a proposed road to a private cemetery did not constitute a public use, and upheld the trial court's finding that the road was unnecessary to the development of public resources because no public resources were accessible from this road *and* no development was planned in the future. 176 P.3d at 864-65. Here, on the other hand, the planned Hobble Drive and Newlin Gulch Blvd on the Subject Property are necessary to the development of current and planned public resources, including planned residential and commercial developments within the Town and Douglas County.

14. The Subject Property will be used for underground sanitary sewer lines, storm water lines and water lines that will allow service from the existing lines from outside of the Carousel Farms Development to provide service to the planned homes within the Carousel Farms Development. See Exhibit 3. Again, such uses constitutes a public purpose, as they are essentially for a public benefit and advantage, and the community (including the Carousel Farms community, the Town community and the Douglas County community) requires and needs these public services.

15. Also, the existing land conditions on the Subject Property indicate that the Subject Property is already being put to a public use. A 30 foot wide

waterline easement runs through the western portion of the Subject Property. An existing sanitary sewer line runs through the majority of the Subject Property. These existing public uses within the Subject Property make it practical for the Subject Property to continue to be used for public uses, including roadways, water lines, sanitary sewer lines and storm water lines. Importantly, the Subject Property will be dedicated to the Town, further demonstrating that the purposes serve and benefit the public.

16. Woodcrest contends that the facts in this case are analogous to the facts in Denver West Metropolitan District v. Geudner, 786 P.2d 434 (Colo. App. 1989). The Court disagrees. In Denver West Metropolitan District v. Geudner, 786 P.2d 434 (Colo. App. 1989), the Court of Appeals affirmed the trial court's dismissal of the Denver West Metropolitan District's ("District") petition to condemn the property of the landowner, Mr. Geudner, on the grounds that the petition for condemnation was initiated in bad faith. Id. at 436. In that case, the District's service plan provided that it was responsible for controlling flooding along Lena Gulch, a stream that runs through the District. Id. at 435. When a landowner consisting of the principal who controlled the District, Denver West Properties, Inc. ("DWP") sought to sell a parcel of land within the District, the purchaser of the property required the relocation of Lena Gulch so that it no longer traversed the sale property. Id. at 435-36. DWP's engineering firm submitted three proposals, each of which required that Lena Gulch traverse a portion of the sale property, and those

proposals were rejected. Thereafter, DWP directed the engineering firm to develop a proposal that would relocate Lena Gulch off of the sale property. Id. at 436. That proposal required that Lena Gulch traverse Geudner's property, instead of the sale property. Although DWP offered to purchase the Geudner's property, its offer was rejected, and the District thereafter instituted a condemnation action. In considering the reason for the condemnation, the trial court found and the Court of Appeals agreed that the essential purpose of the District's decision to condemn Geudner's property was to assist DWP in concluding its own commercial transaction and thereby advance the private interests of the District's officers. As such, the essential purpose was not for a public use, but rather, was to advance the private interests of DWP's officers.

17. Here, in contrast to Denver West Metro. District, it is not the private interests of the principals of the Metro District that are to be advanced as the "essential" purpose for the condemnation of the Subject Property. Rather, all of the public improvements (water, sewer and roads as shown in Exhibits 1, 2 and 3) that the Metro District intends to finance and construct will clearly benefit the public. First, the roadways within the Carousel Farms Development that lie on the Subject Property, including Hobble Drive and Newlin Gulch Blvd., connect to main arterial roads in Parker including Chambers Road and Main Street. Accordingly, as the Carousel Farms Development is constructed, the future owners of the new homes that will be constructed will obtain access to these arterial

roads by way of Hobble Drive and Newlin Gulch Blvd., which lie partially on the Subject Property. The Metro District's street improvements to Newlin Gulch Blvd. and Hobble Drive will benefit the public, as will the water and sanitation improvements that the Metro District will construct beneath the street.

18. Further, the owner of a parcel to the west of Carousel Farms Development has submitted a development plan to the Town for Newlin Crossings that anticipates that access to the development will be gained from Main Street through what is now Newlin Gulch Blvd., and that a second access will be granted from Chambers Road directly onto an extended Newlin Gulch Blvd east towards the Carousel Farms Development. Thus, the Metro District's proposed improvements will also benefit that existing and future commercial and residential development and the public generally. Therefore, the Metro District's proposed street, water and sanitation improvements are intended for public use.

The Statutory Prerequisite of Failure to Agree on Compensation Was Met Prior to Initiating the Condemnation Action:

19. Failure to agree upon compensation is a prerequisite to the commencement of a condemnation proceeding. City of Thornton v. Farmers Reservoir & Irrigation Co., 194 Colo. 526, 575 P.2d 382, 392 (1978); see also City of Holyoke v. Schlachter Farms, R.L.L.P., 22 P.3d 960, 963 (Colo. App. 2001) citing C.R.S.

§ 38-1-102(1) (eminent domain proceedings may be instituted where, among other things, compensation for the required property "cannot be agreed upon by the parties interested"; C.R.S. § 38-1-121(3) (noting "the obligation of the condemning authority to negotiate in good faith . . . prior to instituting eminent domain proceedings"). The prerequisite "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." Farmers Reservoir, 575 P.2d at 392; Sheridan Redevelopment Authority v. Knightsbridge Land Company, L.L.C., 166 P.3d 259, 266 (Colo. App. 2007); City of Holyoke, 22 P.3d at 963. Making a reasonable offer to purchase by letter and allowing the property owner time to respond is sufficient. Farmers Reservoir, 575 P.2d at 392; City of Holyoke, 22 P.3d at 963. When the property owner does not respond or rejects the offer without making an acceptable counteroffer, a condemnation action may be commenced. Farmers Reservoir, 575 P.2d at 392; City of Holyoke, 22 P.3d at 963; Sheridan Redevelopment Authority, 166 P.3d at 266; see Board of County Comm'rs v. Blosser, 844 P.2d 1237, 1239 (Colo. App. 1992); Board of County Comm'rs v. Blecha, 697 P.2d 416, 417-18 (Colo. App. 1985).

20. In Thornton Development Auth. v. Upah, 640 F. Supp. 1071, 1075 (D. Colo. 1986), the federal district court pointed out that the Colorado statute only requires a failure to agree on compensation, but Colorado courts have implied a duty to negotiate in good faith.

The Upah court stated that the standard under Colorado law to determine whether a condemning authority has met the statutory prerequisite is whether the condemnor has made a "reasonable effort to agree upon the compensation to be paid. . . ." Id., quoting Kaschke v. Camfield, 46 Colo. 60, 65, 102 P. 1061, 1063 (1909). The court explained that this standard includes a "minimal notion of good faith negotiations." Upah, 640 F. Supp. at 1075.

21. Based upon Colorado law, the prerequisite of failure to agree upon compensation was met prior to commencement of this action. The Metro District, through its attorneys, sent a Notice of Intent to Acquire and Final Offer Letter to Woodcrest to acquire the Subject Property on December 10, 2014, giving Woodcrest until December 24, 2014, to respond. Woodcrest acknowledged receipt of the letter and requested, and was granted, an extension of time to respond to the Metro District's offer until January 2, 2015. Shortly thereafter, Woodcrest hired condemnation counsel, and although the Woodcrest's counsel responded to the Metro District's offer via letter dated January 5, 2015, Woodcrest never presented a counteroffer to the Metro District. Negotiations therefore failed, and the Metro District filed this condemnation action. The fact that there were no lengthy face to face negotiations or a formal counteroffer from Woodcrest does not preclude a finding that the Metro District met the prerequisite of good faith negotiations.

The Property that the Metro District Seeks to Acquire is Necessary to the Project:

22. It is well-settled law that, in the absence of fraud or bad faith, the determination by a local government as to the need, necessity and location of public improvements is final and conclusive and will not be disturbed by the courts. State Board of Land Comm'rs v. District Court, 163 Colo. 338, 342, 430 P.2d 617, 619 (1967); followed by City of Thornton v. Farmers Reservoir & Irrigation Co., 194 Colo. 526, 575 P.2d 382 (1978) (determination of necessity is not reviewable by judiciary absent a showing of fraud or bad faith); Mack v. Board of County Comm'rs, 152 Colo. 300, 381 P.2d 987 (1963) (determination by state of necessity of taking for highway purpose is final and conclusive unless bad faith is shown); Lavelle v. Town of Julesburg, 49 Colo. 290, 112 P. 774, 776 (1911) (court will not substitute its judgment for that of other to whom a statute has delegated the power to determine what property shall be taken for a public use).

23. The issue of necessity cannot be raised by mere denial of the allegation that the taking is necessary; nor can it be raised by a conclusory allegation of fraud and bad faith; but, rather, it can only be raised by pleading facts which, if true, would amount to fraud and bad faith. State Board of Land Comm'rs, 430 P.2d at 619; Lavelle, 112 P. at 776 (conclusory allegation insufficient to raise issue of necessity); C.R.C.P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."); Direct Mail Services. Inc. v. State of

Colorado, 557 F. Supp. 851, 854 (D. Colo. 1983) (determination of necessity by condemnor as required for eminent domain under Colorado law is not reviewable by judiciary absent a showing of bad faith or fraud).

24. Woodcrest, in its Answer, simply asserts that the Metro District is not exercising its rights of eminent domain "in good faith [and is] acting in bad faith [in] asserting a right to which it is not entitled, on behalf of private landowners." Woodcrest has only made, therefore, a conclusory allegation of bad faith, so its assertion that the Metro District is acting in bad faith should not be considered by this Court. See C.R.C.P. 9(b). Woodcrest did not present any evidence of bad faith at the immediate possession hearing.

25. Regardless, in December 2014, the Metro District approved a Resolution of Necessity for Acquisition of the Subject Property, which provides that the construction of the Project "is necessary for the public health, safety and welfare of the citizens residing within the territorial limits of the County." In the Resolution, the Metro District determined that the acquisition of the Subject Property was necessary for construction of the Project. This Court will not disturb the Metro District's determination of necessity.

The Need for the Subject Property is Sufficient to Require Immediate Possession:

26. Section 38-1-105(6)(a), C.R.S., which provides the Court authority to order possession, does not contain the word "immediate," or require any proof of

an emergency or immediacy of need. However, within the case law, the term "immediate possession" has been used. See Board of County Comm'rs v. Highland Mobile Home Park, Inc., 543 P.2d 103, 107 (Colo. App. 1975) (NSOP). In the Highland Mobile Home Park, Inc. case, the Court of Appeals described a hearing for immediate possession as an *in limine* proceeding "in which immediate possession of the property, if need be shown, may be granted to the condemning authority provided that adequate security is deposited for the benefit of the property owners."

27. The Court finds here that the need for possession is immediate. The Town will not allow Century and the Metro District to even file updated applications for plat approval or permits for the Carousel Farms Development until the Metro District owns the Subject Property. Possession of the Subject Property will permit the Metro District to move forward in a timely fashion and allow the development process for the Carousel Farms Development to proceed. Under such circumstances, the Metro District has demonstrated an immediate need for possession of the Subject Property.

Deposit Amount:

28. "At any stage . . . of any proceedings under this article, the court . . . may authorize the petitioner . . . to take possession of and use, said premises during the pendency and until the final conclusion of such proceedings . . . if such petitioner pays a sufficient sum

into court, or to the clerk thereof, to pay the compensation in that behalf when ascertained. The court . . . shall determine the amount a petitioner is required to pay or deposit pending any such ascertainment . . . " C.R.S. § 38-1-105(6)(a).

29. The purpose of an immediate possession deposit is to provide the landowner with security for the payment of compensation and damages ultimately awarded. City of Englewood v. Reffel, 522 P.2d 1241, 1244 citing Swift v. Smith, 201 P.2d 609, 613 (Colo. 1948); see also Denver & R.G.R. Co. v. Mills, 147 P. 681, (Colo. 1915) ("It is plain that the deposit under the statute is required for the sole purpose of making secure the award of compensation to be made for the taking of the land."); E-470 Public Hwy. Auth. v. The 455 Co., 997 P.2d 1273, 1276 (Colo. App. 1999).

30. In determining the "sufficient sum" for an immediate possession deposit, "it is incumbent upon the court or judge, when temporary possession is sought . . . to require competent evidence as to the market value of the premises sought to be taken and determine therefrom the amount of the deposit which will compensate the owner . . . " Swift, 201 P.2d at 615.

31. In consideration of the standard set forth in Swift, the Court concludes Chris Koloskus's testimony concerning the fair market value of the Subject Property is competent evidence.

32. The Court further concludes that Woodcrest's purchase of the Subject Property for $9,765.00 in 2006, as evidenced by the Warranty Deed (Ex. L), is

additional competent evidence that supports Chris Koloskus's determination of the fair market value of the Subject Property. The 2006 sale of the Subject Property was a free, open and voluntary sale and further supports the determination of fair market value made by Mr. Koloskus. See Epstein v. City & County of Denver, 133 Colo. 104, 108, 293 P.2d 308, 310 (1956) ("If not too remote in point of time, and if neither economic nor physical conditions have changed, it is uniformly held that voluntary prior sales of the subject property may be shown it [sic] evidence in eminent domain proceedings. . . . Such sales, when made under normal and fair conditions, are necessarily a better test of the market value than speculative opinions of witnesses; for, truly, here is where 'money talks.' ").

33. Woodcrest did not present any evidence contrary to the Metro District's evidence. Woodcrest suggested, however, that as a result of the Project, the fair market value of the Subject Property is much higher than $14,100.00. While the Court recognizes that Woodcrest rejected the Metro District's offer to purchase the Subject Property for $44,850, Colorado law prohibits the Court from valuing the Subject Property using Woodcrest's enhanced valuation approach because of the "project influence rule." Under the "project influence rule," "just compensation cannot include any enhancement or reduction in value that arises from the very project for which the property is being acquired." City of Boulder v. Fowler Irrevocable Trust 1992-1, 53 P.3d 725, 727-28 (Colo. App. 2002). Application of the project influence rule often requires

determining the scope of the project for which the property is being taken. Id. at 728. The court must determine whether the property was probably within the scope of the project from the time the government was committed to the project. Id. If it was, the property owner is not entitled to any increase in value, and is not charged with any decrease in value, occasioned by the government's undertaking the project. Id. Here, the Subject Property has always been included in the scope of the Carousel Farms Development, and, therefore, Woodcrest is not entitled to any enhancement or increased value of the Subject Property caused by the Metro District's concern over delay to the Project.

34. The Court therefore concludes that $14,100.00 is a "sufficient sum" for the Metro District to pay as an Immediate Possession deposit, in accordance with C.R.S. § 38-1-105(6)(a).

THEREFORE, IT IS ORDERED THAT: Upon the deposit of $14,100.00 with the clerk of the court, and subject to the terms of the Stipulation, Statement of Interests and Disclaimer Regarding Respondent Stonegate Village Metropolitan District, Petitioner and its contractors, agents, servants, and employees may enter into, take, and retain possession of the Subject Property, together with the right to demolish any improvements located thereon, and make cuts, fills, or in any other manner change the shape or configuration of said lands; and to build, construct, or otherwise improve the Subject Property, during the pendency of and until final conclusion of the valuation proceedings, without interference from Respondents, or any of

them, or their successors, assigns, heirs, devisees, personal representatives, guests or invitees, or any other person or persons claiming by, through, or under said Respondents, or any of them, and all actions and proceedings against Petitioner on account thereof shall be stayed.

IT IS SO ORDERED

Dated this 1st day of April, 2015.

BY THE COURT:

Richard Caschette
District Court Judge