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COLORADO SUPREME COURT 2 East 14th Avenue Denver, Colorado 80203 Colorado Court of Appeals Case No. 2015CA1956 Opinion by Judge Harris, Dailey and Plank, JJ. concur Douglas County District Court Case No. 2015CV30013 Honorable Richard B. Caschette, Judge	
PETITIONER: CAROUSEL FARMS METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado v. **RESPONDENT:** WOODCREST HOMES, INC., a Colorado corporation	**▲COURT USE ONLY ▲**
Attorneys for Petitioner: Jody Harper Alderman, Atty Reg. #24450 Carrie S. Bernstein, Atty Reg. #34966 Amanda E. Bradley, Atty Reg. #29489 Amy E. Arlander, Atty Reg. #33200 ALDERMAN BERNSTEIN LLC 101 University Blvd., Suite 350 Denver, Colorado 80206 Phone: 720-460-4200 e-mail: csb@ablawcolorado.com	Case No: 2018SC000030

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Certificate of Compliance

I hereby certify that this brief complies with all requirements of C.A.R. 32 and C.A.R. 53(d), including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 53(d).

☒ It contains 3,116 words (principal brief does not exceed 3,150 words, exclusive of appendix).

☒ I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 32 and C.A.R. 53(d).

ALDERMAN BERNSTEIN LLC

E-filed per Rule 121. A duly signed copy is on file at the offices of Alderman Bernstein LLC

/S/ Carrie S. Bernstein

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Petitioner Carousel Farms Metropolitan District ("District"), by and through its attorneys, Alderman Bernstein LLC, submits the following Reply to Response to Petition for Writ of Certiorari.

I. INTRODUCTION

Carousel Farms Metropolitan District v. Woodcrest Homes, Inc. (Case No. 15CA1956) ("Opinion") is garnering national attention. The opening speaker at the January 2018 national 35th Annual ALI CLE Eminent Domain and Land Valuation Conference began the conference by concluding that the Opinion was the "most interesting" eminent domain appellate case in the country in 2017, in part, because an appellate court had "somehow" concluded that a condemnation for a public road did not meet the public purpose test.[1]

The Colorado Court of Appeals ("COA") has "so far departed from the accepted and usual course of judicial proceedings," that it is necessary for the Supreme Court to exercise its "power of supervision," pursuant to C.A.R. 49(a)(4), and grant this Petition for Writ of Certiorari. The COA clearly disagreed with the Trial Court's findings of fact and conclusions of law, and, without being able to find any legal error made by the Trial Court, the COA misapplied the "heightened

[1] Undersigned counsel attended in person the 35th Annual ALI CLE Eminent Domain and Land Valuation Conference held in Charleston, SC, January 25-27, 2018. Robert H. Thomas, Esq., from Honolulu and Amy Brigham Boulris, Esq., from Miami presented the "Eminent Domain National Law Update" from 9:15 a.m. – 10:15 a.m. on January 25, 2018. Mr. Thomas spent approximately 10 minutes discussing the Opinion.

scrutiny" standard as a means to ignore the extensive findings of fact and conclusions of law from the Trial Court's Possession Order and reach its own, contrary findings of fact and conclusions of law. In doing so, the COA: (1) misapplied C.R.S. § 38-1-101(1)(b), (2) imposed a condition precedent on metropolitan districts' power of eminent domain, that is, approval of a final plat prior to condemnation, and (3) misapplied long-standing Colorado law on public use and necessity. This Court should grant certiorari to reverse the Opinion.

II. REASONS FOR GRANTING WRIT

A. The COA Erred in Applying "Heightened Scrutiny" to the Possession Order.

Only two Supreme Court cases discuss the applicability of subjecting a trial court order to "heightened scrutiny" when the trial court adopts a party's proposed order: Uptime Corp. v. Colorado Research Corp., 161 Colo. 87, 420 P.2d 232 (1966), and Ficor, Inc. v. McHugh, 639 P.2d 385 (Colo. 1982). In 1966, in Uptime, the Supreme Court decided for the first time whether an appellate court can review a trial court order adopted verbatim from a party's proposed order with "heightened scrutiny." In doing so, the Supreme Court examined cases from other jurisdictions and stated that "even those courts which most strongly condemn the uncritical adoption of findings prepared by the prevailing party are unwilling to

reverse unless the findings themselves are inadequate. If sufficient and supported by the evidence, the findings will be sustained." 161 Colo. at 92.

In 1982, in Ficor**,** the Supreme Court clarified the applicability of the "heightened scrutiny" standard. 639 P.2d at 390. There, the trial court adopted without change the proposed findings of fact and conclusions of law submitted by a party at the court's request. Id. The appellant asserted that this permits an appellate court to examine the record "essentially on a de novo basis" and to arrive at its own factual conclusions. Id. The Supreme Court disagreed, stating:

> This is not the case. Although we will scrutinize a trial court's findings critically under these circumstances, *Uptime Corp. v. Colorado Research Corp.*, 161 Colo. 87, 420 P.2d 232 (1966), we will sustain those findings if they are supported by the evidence, *id*. As we stated in Uptime, "On appeal, the court will assume that the trial judge examined the proposed findings and agreed that they correctly stated the facts as he himself found them to be; otherwise, he would not have adopted them as his own." *Id.*, 161 Colo. at 93, 420 P.2d at 235.

639 P.2d at 390.

Woodcrest and the COA ignore Ficor and rely on Trask v. Nozisko, 134 P.3d 544 (Colo. App. 2006). But, even in Trask, a division of the Court of Appeals stated that "we will not overturn a trial court's findings of fact unless they are insufficient and fail to indicate the basis for the trial court's decision." Id. at 549.

Here, the Trial Court's findings are not inadequate. The Trial Court considered the findings in the District's Proposed Order, added to, deleted and revised them. Even the COA said that there was support for them in the record. The COA incorrectly invoked the "heightened scrutiny" standard. The COA has done exactly what the Supreme Court prohibited the appellate court from doing in Ficor, that is, examining the record "essentially on a de novo basis" and "arriv[ing] at its own factual conclusions," simply because the Trial Court adopted, in part, the District's Proposed Order. The Opinion goes beyond the rule first stated in Uptime in which appellate courts can only review a trial court order under a "heightened scrutiny" standard when (1) the proposed order was adopted verbatim; and (2) the findings themselves are inadequate and do not indicate the basis for the trial court's decision. Uptime, 161 Colo. 92-94; see Ficor, 639 P.2d at 390.

Trial courts frequently order parties to submit proposed orders. C.R.C.P. 121, Section 1-15(10), requires parties to submit in "editable format" a proposed order with each motion. Litigants often have no choice but to submit proposed orders. From a judicial economy standpoint, trial courts want and need parties to submit thoughtful proposed orders that can be adopted as their own, but trial courts and litigants need to have confidence that appellate courts will afford deference to such orders. If the Opinion stands, any appellate court can examine the record on a

de novo basis and arrive at its own factual conclusions, simply because the trial court adopted, in part, a proposed order.

B. The COA Disregarded the "Clear Error" Standard.

C.R.C.P. 52 sets forth the applicable standard for review of findings by the court without a jury: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses." In M.D.C./Wood, Inc. v. Mortimer, 866 P.2d 1380 (Colo. 1994), the Supreme Court reiterated this standard and further stated:

> We have consistently disapproved of the substitution of new factual findings by reviewing courts for those made by the trial court. [Internal citations omitted]. . . . . The sanctity of trial court findings is derived from the recognition that the trial judge's presence during the presentation of testimonial evidence provides an unparalleled opportunity to determine the credibility of the witnesses and the weight to be afforded the evidence which is before the court. [Internal citations omitted]. The testimony of the parties was contradictory on almost every material point in controversy. It is impossible to determine from the bare pages of the record whose testimony should be given credit relating to the facts. In such cases, the difficult task of finding those facts is best left to the trial court.

Id. at 1383-84; see Page v. Clark, 197 Colo. 306, 313, 592 P.2d 792, 796 (1979).

The clearly erroneous standard of review is relied upon by litigants, attorneys, and courts to ensure that the trial court, which has heard the evidence,

makes findings of fact based on its consideration of the evidence presented. It would up-end the entire justice system if appellate courts regularly substituted their own judgment for that of trial courts by making their own findings of fact in every case in which the reviewing court may have reached a different conclusion. There would be no certainty in a trial court's findings, and there would likely be even more appeals than ever before.

Here, there was ample support in the record for the Trial Court's findings. The Opinion even acknowledged that there "may be some evidence to support" the factual findings. See Opinion, p. 15. But, the COA ignored the required deference by relying on a seldom used exception that allows a full review of the record where the reviewing court "is left with the definite and firm conviction that a mistake has been committed," relying on In re Estate of Schlagel, 89 P.3d 419, 422 (Colo. App. 2003). The Opinion is the first time a Colorado appellate court has actually reversed a trial court's findings of fact because the appellate court simply believed the facts supported a different outcome. This Court should grant certiorari to correct this error.

C. Section 38-1-101(1)(b), C.R.S., is Inapplicable Because Parcel C Was Not Transferred to a Private Entity.

The Opinion and Woodcrest in its Response (pp. 14-15) ignore the critical first clause of section 38-1-101(1)(b)(1), C.R.S.; that is, the prohibition against

transferring the private property to a private entity. Section 38-1-101(1)(b)(1) only applies to takings where the private property is being transferred to a private entity for economic development or tax revenue enhancement. The vast majority of takings enhance tax revenue and/or benefit economic development in some way, so the critical clause in section 38-1-101(1)(b)(1) is the first clause that limits the application of the statute to only those takings where the condemned private property is transferred to a private entity after the taking.

The City & County of Denver's stock show redevelopment project is a good example. There, Denver, through its power of eminent domain, is acquiring significant numbers of property in and around the Stock Show complex. That project and those acquisitions are being publically marketed by Denver to serve the purpose of assisting economic development in Denver and increasing tax revenues. Denver is not transferring those properties to a private entity, so section 38-1-101(1)(b)(1) does not apply.

Here too, Parcel C was not acquired to be transferred to a private entity, but rather to public entities (the Town of Parker and Parker Water & Sanitation District) after construction of the public improvements. Therefore, on its face, section 38-1-101(1)(b)(1) does not apply. If the Opinion's interpretation of section 38-1-101(1)(b)(1) were to stand, hundreds of ongoing condemnation proceedings

across Colorado would be called into question because section 38-1-101(1)(b)(1) may prohibit a broad range of takings that incidentally increase economic development and enhance tax revenue.

D. The Opinion Reverses the Supreme Court's Long Standing Rule that Governmental Approvals and Permits are Not a Condition Precedent to the Exercise of the Power of Eminent Domain.

The COA concluded that before the District could condemn Parcel C, a final plat needed to be approved which would have shown definitive approval of the Carousel Farms subdivision. Opinion, at ¶¶ 35-39. Without that approval, the COA concluded, the condemnation was premature. Id.

A long line of Supreme Court cases explicitly hold that such approvals are not a condition precedent to the exercise of the power of eminent domain, and that a condemnation action is not premature absent such approvals. In Miller v. Public Serv. Co., 129 Colo. 513, 517, 272 P.2d 283, 285 (1954), the landowner asserted that the utility company could not condemn his property for a power plant without first obtaining permission for construction and location of the plant from the proper county authority. Although the denial of such a permit would have precluded the construction of a new plant, the Supreme Court rejected the argument, and stated:

> [I]t appears that such certificate is not necessary for the purposes of condemnation and relates solely to the question of use after the property has been acquired by condemnation. It is difficult to conceive how the utility

> could logically proceed in obtaining the certificate of convenience and necessity as to the particular land or property involved before it had acquired the right to use the land or obtained title thereto by condemnation. The so-called certificate is only a permit or license to use and enjoy land that has been condemned; it is not a condition precedent to the right to condemn; and has no relationship whatever with the matter of condemnation.

Id. (emphasis added). Following Miller, the Supreme Court repeatedly has held that governmental permits and approvals are not a condition precedent to a condemnation action. See Buck v. District Court, 199 Colo. 344, 348, 608 P.2d 350, 352 (1980)(securing approval for the project at issue from the PUC was not a condition precedent to condemning the property); Public Serv. Co. v. Shaklee, 784 P.2d 314, 316-17 (Colo. 1989) (obtaining a certificate of necessity from the PUC not required).

Both the COA and Woodcrest, however, rely instead on two more recent cases, Silver Dollar Metro. District v. Goltra, 66 P.3d 170, 173-74 (Colo. App. 2002), and Board of County Comm'rs v. Kobobel, 176 P.3d 860, 863 (Colo. App. 2007), to support the proposition that permits and approvals may need to be obtained before the initiation of the condemnation, otherwise the condemnation action is premature. In Goltra, a metropolitan district attempted to condemn property, not to build anything, but to conduct core drilling to obtain data to determine whether tunnel portals could be designed on the property. 66 P.3d at

173-74. The portals were part of a tunnel project being evaluated by state and federal agencies through an EIS process that not only involved the tunnel project but five other transportation projects, none of which had been selected as the preferred alternative prior to filing the condemnation action. Id. Under those unique facts, a division of the Court of Appeals held that the tunnel project was so uncertain and speculative as to not constitute a viable "public project" for which property could be condemned. Id.

In Kobobel, a county sought to condemn property for a road to a private cemetery. A division of the Court of Appeals, citing to Goltra, stated that a "condemnation action to support a public benefit that may never be initiated is premature." 176 P.3d at 865. The Court of Appeals in that case concluded that the county did not present "any evidence that cemetery access will be granted to the public, that future development is planned in the area, or even that the road will be improved from the overgrown two-track lane that exists now." Id. Under those unusual facts, the court held that "the condemnation would be premature." Id.

The COA's application of Kobobel and Goltra here is misplaced and is contrary to the long line of Supreme Court cases that hold that a condemnation action is not premature simply because approvals and permits are lacking. As found by the Trial Court: "The Town will not allow . . . updated applications for

plat approval or permits for the Carousel Farms Development until the Metro District owns the Subject Property." Possession Order, at ¶27. Here, unlike in Goltra and Kobobel, construction of the road and utility improvements for public use was a certainty because once Parcel C was acquired, plat approval would issue.[2] It is a common prerequisite for many projects that the condemning authority own all of property necessary for the project before permits and approvals are issued. If the Opinion stands, many entities with the power of eminent domain will be unable to actually initiate a condemnation proceeding until a multitude of approvals and permits are obtained, some of which cannot be obtained absent ownership of the property, creating chicken and egg scenario. That would hamper the ability to finance public infrastructure through metropolitan and other special districts, contrary to the intent of the legislature in creating special districts and empowering them with the power of dominant eminent domain. That is an onerous precondition for condemning authorities in Colorado and a significant reversal of long-standing eminent domain law.

[2] As it played out, once Parcel C was acquired through this condemnation proceeding, the Town approved the Filing No. 1 Final Plat that allowed a storm drainage line to be constructed through Parcel C that then allowed storm water to drain away from the homes being built in Filing No. 1 (southern portion of the development) to a detention pond north of Parcel C. All of that happened within 18 months of the District's acquisition of Parcel C and is on-going today.

E. Woodcrest Relies Incorrectly on Three Cases: *Am. Family Mutual Ins. Co. v. Am. Nat'l Proper. & Cas. Co.*, *Trinity Broadcasting v. City of Westminster*, and *Denver West Metro. District. v. Geudner*.

Both Am. Family Mutual Ins. Co. v. Am. Nat'l Proper. & Cas. Co., 370 P.3d 319 (Colo. App. 2015) and Trinity Broadcasting v. City of Westminster, 848 P.2d 916 (Colo. 1993) are inverse condemnation cases. The focus in Trinity and Am. Family Mutual Ins. Co. was whether there was a taking; that is, a showing that the government entity "intended to take private property or to do an act the direct, natural, or probably consequent of which is to result in a taking of private property." See Am. Family Mutual Ins. Co., 370 P.3d at 328; Trinity, 848 P.2d at 921-22.

In a direct condemnation case, like this one, there is no "taking" element. The government initiates the action because it is "taking" property under its power of eminent domain. The "taking" element required in an inverse condemnation case is inapplicable in a direct condemnation case. Woodcrest's reliance on those inverse condemnation cases is improper. Response, at pp. 9-11.

Woodcrest and the COA also incorrectly conclude that the circumstances in this case are similar to Denver West Metro. District v. Geudner, 786 P.2d 434 (Colo. App. 1989). Response, pp. 12-13; Opinion, ¶¶ 39-47. In that case, Denver West Properties, Inc. ("DWP") was owned by the same principals who controlled

the Denver West Metropolitan District's ("Metro District"). When DWP sought to sell a parcel of land it owned within the Metro District's boundaries, the purchaser demanded the relocation of Lena Gulch so that it no longer traversed DWP's sale property. Id. at 435-36. To meet that demand, DWP figured out a way to relocate Lena Gulch off the sale property and onto Geudner's property. Geudner refused to allow relocation of Lena Gulch onto his property, so the Metro District instituted a condemnation action to condemn Geudner's property for the relocated Lena Gulch.

The trial court there concluded the condemnation was initiated in bad faith and found that the essential purpose of the Metro 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 Metro 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. Id. A division of the Court of Appeals affirmed.

Here, because the facts of this case differ dramatically from those in Geudner, the trial court did not find bad faith and did not conclude that it was the private interests of the principals of the District that are to be advanced as the "essential" purpose for the condemnation of the Parcel C. Rather, the Trial Court concluded that all of the District's public improvements (water, sewer and roads)

on Parcel C and other parcels within the Development benefit the public first and foremost. The COA's reliance on Geudner, which involved clear bad faith, is incorrect.

III. CONCLUSION

The Opinion raises fundamental and important questions that should be addressed by this court. Foremost, the Opinion creates confusion for lower courts and all litigants regarding the level of deference accorded to a trial court's findings of fact upon appeal. For the foregoing reasons, the Court should grant the Petition for Writ of Certiorari.

Dated this 31st day of January, 2018.

Respectfully submitted,

ALDERMAN BERNSTEIN LLC

This document has been e-filed. Pursuant to C.R.C.P. 121, section 1-26(9), an original signature is on file at the offices of Alderman Bernstein LLC

_____

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2018, a true and correct copy of the foregoing was filed and served on the following by ICCES or placed in the United States mail, first class, postage prepaid, and properly addressed as following:

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