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: 2018SC_____
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(a), including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

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

☒ It contains 3,749 words (principal brief does not exceed 3,800 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(a).

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 Petition for Writ of Certiorari pursuant to C.A.R. 49.

I. ADVISORY LISTING OF ISSUES

Whether the Court of Appeals ("COA") erred by introducing a new standard of review that allows any Colorado appellate court to disregard the clear error standard of review in any case if the appellate court "believes" a mistake has been made.

Whether the COA erred in applying a "heightened scrutiny" standard where (1) a trial court did not adopt a party's proposed order verbatim, and (2) there was adequate support in the record for the trial court's order.

Whether the COA incorrectly interpreted and applied C.R.S. § 38-1-101(1)(b) to an eminent domain proceeding brought by a metropolitan district where the property was never to be transferred to a private entity.

Whether the COA erred in reversing well-established eminent domain law that provides that permits and approvals are not required prior to the initiation of a condemnation proceeding.

Whether the COA erred in imposing another element to consider in the public purpose and necessity determination; that is, consideration of <u>when</u> the property being condemned will actually be put to the public use.

Whether the COA erred in concluding there was no public purpose simply because there was some incidental private benefit.

II. COLORADO COURT OF APPEALS OPINION

The published COA opinion, *Carousel Farms Metropolitan District v. Woodcrest Homes, Inc.* (Case No. 15CA1956) ("Opinion"), is attached hereto as Appendix 1.

III. JURISDICTION

Jurisdiction is proper under Colorado Constitution article VI, § 2, and C.A.R. 49. The Opinion was announced on November 30, 2017. No Petition for Rehearing was filed.

IV. STATEMENT OF THE CASE

A. The District and the Carousel Farms Development

The District is a metropolitan district formed pursuant to Title 32, C.R.S., in 2013 and 2014 to provide the financing for all of the planned public improvements within the 40 acre Carousel Farms Development ("Carousel Farms"), including roadways and water, storm drainage and sanitary sewer improvements through tax exempt bonds. R. Tr. 03/19/15 p.18, ll.18-21; SUPP.CF.Ex.9, pp. 00291-00372, at p. 00343; Ex. D, pp. 00294-00301; Ex E, pp. 00302-00307). Century Communities and its subsidiaries ("Century") are the developers of Carousel Farms. R. Tr. 03/19/15 p.7, l.22-p.8, l.8. Carousel Farms is made up of three parcels: Parcel A (northern parcel, approximately 20 acres), Parcel B (southern

parcel, approximately 20 acres), and Parcel C owned by Woodcrest Homes, LLC, ("Woodcrest"), containing approximately 0.65 acres ("Parcel C"). SUPP.CF. Ex.2, p. 00423 (map depicting Carousel Farms and its 3 parcels); a copy of Ex. 2 is attached as Appendix 6. Parcel C already is encumbered by a Parker Water & Sanitation District ("PWSD") sewer line and a Stonegate metro district easement. R.CF. pp. 0009-00010; SUPP.CF, Ex. 2, p. 00424; R.Tr. 3/19/15 p.23, ll.8-13. Parcel C is being acquired for a roadway, and water, storm drainage and sanitary sewer improvements, all of which will be dedicated to the Town of Parker ("Town") and/or PWSD upon completion. R. CF, pp.00178-00201 at p.00183, ¶19; SUPP.CF. Ex. 9, pp.00291-00372 at p.00343, ¶B; Ex. D (pp.00294-00301); Ex. E (pp.00302-00307); SUPP.CF. Ex. 10, pp.00283-00290 at ¶¶ 5 (p.00285), 10 (p.00286), 11 (p.00286).

Century began its efforts to develop Parcels A, B and C after the recession, by purchasing Parcels A and B. R.Tr. 3/19/15, p.15, ll.7-12. After formation, the District began attempts to acquire Parcel C, because it was needed for public improvements for Carousel Farms. SUPP.CF. Ex. 13, p.00264-00270. The District's attempts to negotiate with Woodcrest for the purchase of Parcel C in late 2014 – early 2015 were futile. Woodcrest was unwilling to sell, except at an

exorbitant price. SUPP.CF. Ex. 23, p.00208-00209. This condemnation action followed.

B. Woodcrest's Challenges, the Trial Court Decision and the Opinion

At the immediate possession hearing, Woodcrest unsuccessfully argued that (1) Parcel C was not being condemned for a "public purpose," but, instead, for a private purpose; (2) that the District had failed to show necessity for Parcel C; and (3) that the condemnation was being pursued in bad faith. At the two-day hearing, the Trial Court heard the testimony of three District witnesses and received approximately 46 exhibits into evidence. Woodcrest cross-examined the District's witnesses, but called no witnesses of its own.

At the Trial Court's request, the parties filed detailed proposed orders. The Trial Court adopted, in part, the District's Proposed Findings of Fact and Conclusions of Law ("Proposed Order"), rejected Woodcrest's challenges, and granted the District possession of Parcel C ("Possession Order"). R. pp.00122-00177 (a copy of the Proposed Order is attached as Appendix 4); R. pp. 00178-00201 (a copy of the Possession Order is attached as Appendix 3).

Six months later, a three-day valuation trial was held before a Commission. The District asserted that the just compensation for the taking of Parcel C was $14,100 (R. Tr. 09/23/15, p. 75, ll.23-p.103, l.13), while Woodcrest asserted that

the just compensation was at least $863,277. R. Tr. 10/03/15, p.51, ll.7-14; generally, R. Tr. 10/03/15, p.4, l.24-p.15, l.14. The Commission concluded that the value of Parcel C was $57,982. R., CF, p.01197, ¶3. Woodcrest did not recover its attorney fees pursuant to C.R.S. § 38-1-122(1.5).

Woodcrest appealed the Possession Order. The COA reversed the Trial Court, finding (1) no public purpose; (2) no necessity; and (3) bad faith.

V. REASONS FOR GRANTING WRIT

The Opinion reflects a results-driven outcome that flouts the clear error standard of review, long standing Colorado eminent domain case law on the public use and necessity requirements, and unambiguous statutory language in C.R.S. § 38-1-101(1)(b), in an effort to vilify not just the District, but many metropolitan districts and other Title 32 districts for acquiring property through their statutory power of eminent domain at a relatively early stage of a development.

In the State of Colorado, successful development relies heavily on the ability of metropolitan districts to finance public infrastructure within developments (that municipalities and counties are unable and unwilling to finance) and to acquire property through eminent domain from property owners unwilling to sell their property for such public infrastructure. By requiring that plats or other entitlements be approved prior to a metropolitan district's exercise of its statutory

authority to acquire property by condemnation, the Opinion places conditions on a metropolitan district's power of eminent domain that are not express or implied in the authorizing statutes or in long standing Colorado case law. These new preconditions force municipalities to either approve final plats before property is acquired, use their own power of eminent domain to acquire property necessary for public infrastructure, or forego development within their jurisdictions. The Opinion puts a stranglehold on metropolitan district financed developments in Colorado, and quite possibly prohibits a metropolitan district from exercising its statutory power of eminent domain.

A. The COA Introduced a New Standard of Review, Allowing Any Colorado Appellate Court to Disregard the "Clear Error" Standard of Review In Any Case on Appeal.

The COA refused to apply the clearly erroneous standard of review the Trial Court's findings of fact, and instead, substituted its own factual findings for those of the Trial Court, resulting in a reversal of the Trial Court's decision despite a record containing ample support. Opinion, ¶ 32. First, the COA improperly applied a "heightened scrutiny" standard to the Possession Order. Then, the COA circumvented the "clearly erroneous" standard because the COA "believed" the Trial Court had made a mistake in its Possession Order. Opinion, ¶ 32. In doing

so, the COA went so far as to make a finding of bad faith, although the Trial Court had explicitly found no bad faith.

1. COA Misapplied the "Heightened Scrutiny" Standard of Review.

To open the door for a full review of the record, the COA declared that the Possession Order was subject to "heightened scrutiny" because the Trial Court adopted, although not verbatim, much of the District's Proposed Order. Opinion, ¶ 32; see App. 3 & 4. The Opinion relies on Trask v. Nozisko, 134 P.3d 544, 549 (Colo. App. 2006), for the proposition that when a trial court adopts the prevailing party's proposed findings of fact and conclusions of law verbatim, the trial court order's findings are subject to "heightened scrutiny."

In Trask court cites to Uptime Corp. v. Colo. Research Corp., 161 Colo. 87, 420 P.2d 232 (1966) for this proposition. In Uptime, however, the Supreme Court held that a more careful scrutiny is only warranted when (1) the proposed order is adopted verbatim; and (2) findings themselves are inadequate and do not indicate the basis for the trial court's decision. Id. at 92-94. The Supreme Court stated:

> When the trial judge signs the findings, the responsibility for their correctness becomes his, and the findings, if otherwise sufficient, are not weakened or discredited because given in the form submitted by counsel. 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.

> It is only when the findings themselves are inadequate and do not indicate the basis for the trial court's decision that the judgment will be reversed.

Id. at 92-94 (internal citations omitted); see also Ficor, Inc. v. McHugh, 639 P.2d 385, 390 (Colo. 1982).

Two divisions of the court of appeals now have departed so far from the accepted and usual course of judicial proceedings, contrary to C.A.R. 49(a)(4), and expanded Uptime to allow "heightened scrutiny" anytime a trial court adopts, in part, a proposed order, despite adequate support in the record. The Supreme Court should grant certiorari to clarify to lower courts and litigants that proposed orders and the trial court's adoption of those proposed orders are only subject to heightened scrutiny under narrow circumstances, if any.

Here, the Trial Court did not adopt the District's Proposed Findings of Fact and Conclusions of Law ("Proposed Order") *verbatim*; rather, the Trial Court made revisions to the Proposed Order and even added to paragraphs, deleted entire paragraphs and combined paragraphs. Compare, e.g., Proposed Order (App. 4), at ¶¶8, 9, 11, 12 & 13 (public use section), with Possession Order (App. 3), at ¶¶8, 9, 11, 12 & 13. Further, the COA stated that there was evidence to support the Trial Court's findings. Opinion, p. 15. The COA did not conclude that the Trial Court's findings were somehow inadequate or that they failed to indicate a basis for the

Trial Court's decision. The Trial Court's findings are both detailed and comprehensive and set forth the basis for the decision. Therefore, the COA erred in applying a "heightened scrutiny" standard to the Possession Order.

2. *The COA Erred In Rejecting The Clear And Erroneous Standard of Review And In Substituting Its Own Findings of Fact For The Trial Court's.*

The COA bypassed the required deference to the Trial Court's findings of fact 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. That is unprecedented.

A scant number of appellate cases cite the proposition that "a finding is also clearly erroneous when the court, on reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been committed." See Schlagel, 89 P.3d at 422; Quintana v. City of Westminster, 56 P.3d 1193 (Colo. App. 2002). *No* division of the court of appeals has ever used this proposition to *reverse* a trial court's findings of fact. The Colorado Supreme Court discussed this proposition once, but under unique circumstances.

In neither Schlagel nor Quintana did the court of appeals reject the trial courts' findings, but rather in both cases the court determined instead that there was ample support for the trial courts' findings. See Schlagel, 89 P.3d at 422; Quintana, 56 P.3d at 1196. The only Colorado Supreme Court case that discussed the proposition that an appellate court can fully review the entire record where it believes a mistake has been made is St. James v. People, 948 P.3d 1028 (Colo. 1997). But, once again, the proposition was not applied to reverse a finding of the trial court. Rather, the Supreme Court reversed and remanded the case to the court of appeals to remand it to the trial court with directions that the trial court make a missing finding. Id. at 1034.

Here, there was no mistake made by the Trial Court; rather, the COA simply disagreed with the Trial Court's findings of fact. In fact, there was ample support in the record for the Trial Court's findings, which the Opinion acknowledges. See Opinion, p. 15. The "mistake" exception cannot be used by a reviewing court as a means to open up the entire record for review.

This case provides the opportunity for this Court to prohibit a reviewing court from disregarding the clear error standard by invoking the "mistake" exception, as the COA has done in the Opinion, and reiterate that in cases where

the clear error standard of review is applicable, an appellate court must defer to findings of fact made by the Trial Court.

B. The COA Incorrectly Applied C.R.S. § 38-1-101(1)(b) To An Eminent Domain Proceeding Brought By A Metropolitan District.

Until this Opinion, no Colorado appellate court has fully interpreted C.R.S. § 38-1-101(1)(b).[1] The COA incorrectly interpreted section 38-1-101(1)(b) to prohibit the District's condemnation of Parcel C. Opinion, p. 24. The Opinion concludes that section 38-1-101(1)(b) is applicable to all condemnors and prohibits any taking that *may* have the incidental effect of aiding private economic development, going far beyond anything intended by the legislature.

Section 38-1-101(1)(b) was added to the eminent domain statute by the Colorado legislature in 2006 (House Bill 06-1411) in response to the U.S. Supreme Court's decision in Kelo v. City of New London, 545 U.S. 469 (2005). Section 38-1-101(1)(b)(1), most at issue here, states:

> (I) . . . "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.

[1] In Steamboat Lake Water & Sanitation Dist. v. Halvorson, 252 P.3d 497, 504 (Colo. App. 2011), the court of appeals included a brief discussion of section 38-1-101(1)(b), but in the context of the ability of a condemnor to acquire fee title.

Kelo and H.B. 1411 addressed urban renewal, condemnation for purely economic reasons, and the elimination of blight. The intent of the legislation in Colorado was to address these narrow issues and not to increase the burden of proof for a showing of public use in any other context.[2] Colorado courts have not expanded the scope of that legislation, until the Opinion.

1. The District Will Dedicate Parcel C to a Public Entity, Not Transfer It to a Private Entity.

The first clause of section 38-1-101(1)(b)(1) prohibits "the taking of private property for transfer to a private entity." The District is not condemning Parcel C and transferring it to a private party, the Developer. See Opinion, p. 26. Nor was the District formed to "circumvent" section 38-1-101(1)(b)'s prohibition on transferring condemned property to a private entity. Rather, after acquiring Parcel C and after the public road and utilities are constructed, the District is required to dedicate Parcel C and the public improvements to *public* entities – the Town and PWSD. SUPP.CF. Exs. 9, pp.00291-00372; 10, pp. 00283-00290. While the District will transfer Parcel C to other entities, those entities are not private.

[2] The text of the bill as introduced proposed a change to the burden of proof in cases involving the elimination of blight. The House committee amended that provision to confirm that the heightened burden of proof was required to show the property is "necessary for the eradication of blight" in the urban renewal context only. *Compare* original H.B. 1411, as introduced on April 28, 2006, and Preamended version of H.B. 1411, dated May 1, 2006, both which are attached as Appendix 5.

Section 38-1-101(1)(b), on its face, does not prohibit such a transfer to *public* entities. The COA erred in its application of section 38-1-101(1)(b)(1) to this case.

2. This Case Does Not Implicate Kelo Concerns.

The Colorado Supreme Court should grant certiorari to properly interpret section 38-1-101(1)(b), otherwise, because of the COA's broad application of the new statute, litigants can argue and trial courts can conclude that section 38-1-101(1)(b) prohibits a broad range of condemnations simply because economic development goes hand in hand with the condemnation. The District did what many metropolitan districts and other condemnors do: acquire private property through the statutorily authorized power of eminent domain for public infrastructure, i.e., road improvements and utilities, to serve future development, whether it be residential or commercial. The purpose for a condemnation may have incidental private benefits, but that does not mean that the condemnor is acquiring the property for private economic development purposes.

C. The Opinion is Contrary to Well-Established Condemnation Law on Public Purpose and Necessity.

1. The Opinion reverses long-standing eminent domain law that provides that permits and approvals are not required prior to the initiation of a condemnation proceeding.

A long line of eminent domain cases state that permits and approvals are not required prior to initiating an eminent domain action, and that the exercise of

eminent domain power is not premature if permits or approvals are still needed. See, e.g., Public Service Co. v. Shaklee, 784 P.2d 314, 316-17 (Colo. 1989); Silver Dollar Metro. Dist. v. Goltra, 66 P.3d 170, 173-74 (Colo. App. 2002); Board of County Comm'rs v. Kobobel, 176 P.3d 860, 863 (Colo. App. 2007). In Goltra, a division of the Court of Appeals stated: "Colorado law does not required a condemning authority to obtain development permits or approvals as a condition precedent to going forward with a condemnation proceeding." 66 P.3d at 173, citing Shaklee, 784 P.2d at 317.

The Opinion, however, reverses that well-established law and conditions a metropolitan district's exercise of its power of eminent domain on obtaining certain approvals, contrary to Goltra, Shaklee, and Kobobel. The Opinion requires that the development be far enough along such that the public infrastructure component is imminent, thereby taking away a metropolitan district's power of eminent domain provided for in section 32-1-1004(4). This Court must not allow the addition of such an onerous condition precedent in order for metropolitan districts to exercise their statutory power of eminent domain.

2. The Opinion adds a time consideration to the public purpose determination.

The COA has invented another element to consider in the public purpose determination; that is, a consideration of when the property being condemned will

actually be put to the public use. Opinion, pp. 16-18. The COA, for the first time, states: "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." Opinion, p. 16.

The COA relies on a recent inverse condemnation Court of Appeals case: Am. Family Mut. Ins. Co. v. Am. Nat'l Prop. & Cas. Co., 370 P.3d 319 (Colo. App. 2015). In that case, numerous insurers claimed that the forest service had "taken" their insureds' property for a public purpose, when a fire started by the forest service on state property unintentionally spread to surrounding private property. Id. at 324. A division of the Court of Appeals concluded that the public purpose prong was not met because the initial public purpose of the prescribed burn did not include "taking" the private property too for that same public purpose. Id. at 327.

The Opinion stated that the District's taking of Parcel C, similar to that in Am. Family Mut. Ins. Co., "was a step removed from any public purpose." Opinion, p. 17. The COA concludes that when the public improvements are too far off, because one or more intermediary steps must occur before construction of those improvements, then the public purpose prong cannot be met. Opinion, pp. 16-17. But, in most public improvement projects, there are a series of steps that

are required prior to actual construction of the public improvements within the condemned parcel. Goltra, Shaklee, and Kobobel allow for condemnors to initiate eminent domain proceedings well in advance of the actual construction of the public improvements. The COA's imposition of a time element is contrary to those cases.

Imposing a time restriction on condemning authorities' ability to exercise their statutory power of eminent domain infringes on those entities' ability to plan and complete public improvement projects throughout Colorado. And, for metropolitan districts in particular, it creates a chicken and egg situation that could prevent development from ever occurring, contrary to the primary purpose of Title 32, which is to encourage development through tax exempt bond financing of public infrastructure necessary to development.

3. The Opinion misapplies well-established eminent domain law regarding pubic use and necessity and incidental private benefits.

Colorado law provides that that a public purpose exists even where there is an incidental private benefit, and that the "relevant inquiry is whether the condemnation's essential purpose is to obtain a public benefit." Kobobel, 176 P.3d at 863; see Am. Family Mut. Ins. Co., 370 P.3d at 327; Goltra, 66 P.3d at 174; Denver West Metro. Dist. v. Geudner, 786 P.2d 434, 436 (Colo.App.1989).

The Opinion focuses solely on the private benefit to the Developer and ignores the "relevant inquiry" which is "whether the condemnation's essential purpose is to obtain a public benefit." The Opinion's entire analysis centers on the fact that the Amended Annexation Agreement required acquisition of Parcel C for approval of a final plat. Missing from the analysis (in contrast to the Possession Order) is the fact that all of Parcel C was acquired for public improvements, including a road, sewer, sanitation and water. No part of the private development, i.e., homes, will be constructed on Parcel C.

The Opinion allows Colorado courts to conclude that no public purpose exists where any private interest may benefit from the condemnation, a departure from well-established case law in Colorado. This standard restricts the power of eminent domain granted by the legislature to metropolitan districts and other Title 32 districts because every Title 32 condemnation is for public infrastructure to serve private development. This is the essence of Title 32 and the reason most development occurs in Colorado outside municipally served areas.

VI. CONCLUSION

The Opinion raises fundamental and important questions that should be addressed by this court. These important questions relate to appellate courts bypassing the clearly erroneous standard of review, the misapplication of a statute

and reversal of long-standing eminent domain law regarding public purpose and necessity. Foremost, the published Court of Appeals' opinion creates confusion for lower courts and all litigants regarding deference of a trial court's findings of fact upon appeal. For the foregoing reasons, this court should grant the petition for writ of certiorari.

Dated this 11th 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 11, 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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