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COLORADO SUPREME COURT
2 East 14th Avenue
Denver, Colorado 80203

Court of Appeals, State of Colorado
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

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Case No.
2018-SC-000030

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 53(c) including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

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

_X_ It contains 3,761 words (less than 3800 for principal briefs).

__ It does not exceed 12 pages.

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.

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s/ David D. Schlachter
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Respondent, Woodcrest Homes, Inc. ("Woodcrest"), by and through its attorneys, Dymond ● Reagor, PLLC for its Response to Petition for Writ of Certiorari, submits the following:

I. Introduction.

The Court of Appeals decision is in accord with Supreme Court decisions. It does not conflict with other Court of Appeals decisions. The Court of Appeals has not departed from accepted and usual course of judicial proceedings. Therefore, the Petition for Certiorari should be denied.

II. Counter Statement of Case

Carousel Farms Development (CFD) is a proposed residential development consisting of three parcels of land, Parcels A & B, owned by Century Communities (Developer) and Parcel C, owned by Woodcrest. (Opinion ¶1, 6; (R. Tr. (9/22/15) p. 221, l. 16–p. 222, l. 19).

The Town of Parker's municipal code requires that the land within CFD be annexed into the Town of Parker. Woodcrest initially attempted to develop all three parcels as CFD, purchasing Parcel C and entering contracts to purchase Parcels A & B, and commencing the CFD application. Woodcrest abandoned this project in approximately 2006, without completing all the requirements. (Opinion ¶ 7, 8).

In 2012, Developer revived the CFD application using the engineering drawings prepared for Woodcrest. (Opinion ¶9). Developer was required to meet all the same requirements Woodcrest was required to meet (Opinion ¶10) and proceeded to enter into contracts to purchase Parcels A & B.

On January 7, 2013, Developer contacted Woodcrest offering to buy Parcel C. Woodcrest considered Developer's offer of purchase too low, advising Developer it would need to "increase substantially" its offer to reflect the work Woodcrest had contributed to the development, which would benefit Developer. (Opinion ¶11; (R. Tr. (3/19/15) p. 46, l. 5-14; R. Tr. (9/22/15) p. 227, l. 11–p. 229, l. 2).

On January 30, 2013, Developer advised Woodcrest that it would pay $45,000 for Parcel C, and if rejected, would acquire Parcel C by means of eminent domain. (Opinion ¶12; R. Ex. M, p. 18; Supp. R. p. 00208, 00206 and 00152; R. Tr. (9/22/15) p. 229, l. 3-p. 231, l. 20). It is undisputed that Developer, as a private party, has no right to exercise the power of eminent domain in this matter. Developer also advised Woodcrest that if they did not sell, the Town of Parker would exercise powers of eminent domain to acquire Parcel C, despite the Town of Parker stating it would not exercise eminent domain powers, desiring that the two private parties reach a mutual agreement. (Opinion ¶¶13, 14).

On January 6, 2014 Developer entered into an Annexation Agreement with the Town of Parker for Parcels A & B. The Annexation Agreement stated that the Town would not annex Parcels A & B, nor would it approve any plats for CFD, unless Developer also owned Parcel C. (Opinion ¶10; R. Ex. K 00001–00012; R. Tr. (3/19/15) p. 41, l. 15-p. 43, l. 7; R. Tr. (3/20/15) p. 13, l. 17-p. 14, l. 16; p. 28, l. 13-p. 32. l. 12; p. 33, l. 11-20; Todd Amberry, representative for Developer and District; R. Tr. (3/19/15) p. 5, l. 10-11; p. 36, l. 12-p. 38, l. 15; R. Tr. (9/22/15) p. 220, l. 3–p. 223, l. 5, Stacey Nerger, representative of the Town of Parker Planning commission; R. Tr. (3/20/15) p. 5, l. 9-11; p. 8, l. 14-p. 9, l. 13, p. 18, l. 18-p. 20, l. 3, p. 23, l. 12-24; R. Tr. (9/22/15) p. 215, l. 1-p. 216, l. 5).

On August 28, 2014, Developer submitted a proposed Metropolitan Service Plan to the Town of Parker. The Service Plan stated that a metropolitan district would "finance" the construction of the public roadways and utilities which Developer was required to construct under the Municipal Code. (Opinion¶16; Supp. R. p. 00041-00123 at 00045). The District acknowledges that its formation of the District was for the purpose of "providing the financing" for this infrastructure. (Petitioner's Brief, page 2).

On September 2, 2014, the Town held a public hearing on the CFD sketch and preliminary plan. The Town conditioned approval of the plan on the Developer

acquiring and rezoning Parcel C and including it within the Annexation Agreement. The addition of Parcel C allowed the Developer's sketch and preliminary plan to 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." (Opinion ¶15).

On September 23, 2014, Developer created District, which was formally organized on November 19, 2014. The District's Board of Directors consisted solely of Developer's employees. The only landowner within the proposed District boundaries was the Developer, owning parcels A & B. (Opinion ¶¶ 16 & 17; R. Tr. (3/19/15) p. 5, l. 10-p. 7, l. 5; R. Tr. (9/22/15) p. 220, l. 23–p. 223, l. 5; Supp. R. p. 00273).

On December 10, 2014, District issued Woodcrest a Notice of Intent to Acquire Parcel C, followed by a Resolution of Necessity on December 14, 2014. (Opinion ¶¶ 18 & 19; Supp. R. 00264-00266; Supp. R. p.00269). The District commenced eminent domain proceedings on January 7, 2015. The Immediate Possession hearing was scheduled for March 19, 2015.

On March 16, 2015, Developer and the Town executed an amendment to the Annexation Agreement allowing the District, rather than Developer, to own Parcel

C to satisfy the requirement that Parcels A, B, & C have consolidated ownership. The District was not a party to the agreement with the Developer acting on its behalf. (Opinion ¶¶ 22, 43, & 44; Supp. R. p. 00260).

At the Immediate Possession hearing Woodcrest argued that Developer was using the District to accomplish what Developer could not do on its own; exercise eminent domain powers to acquire Parcel C against Woodcrest's agreement, to satisfy Developer's obligations under the Annexation Agreement. Woodcrest also argued that District failed to establish both public purpose and necessity, due to its bad faith in exercising eminent domain powers for the benefit of the Developer.

The Trial Court rejected Woodcrest's arguments and adopted District's proposed order, virtually verbatim. A comparison of the District's Proposed Order (Petition Appendix 4) and the Trial Court's Order (Petition Appendix 3), reveals that the District's Proposed Findings of Fact ¶¶ 1–11, 12–21, and 22–27, 28, 32, 33, 34, & 36 are identical to the Trial Court's Order, ¶¶ 1–11, 13-21, 22–27, 32 & 34 respectively. The trial court made minor modifications in paragraph 12 and added three paragraphs regarding the District's expert in its paragraphs 29–31.

Likewise, the Trial Court's Conclusions of Law ¶¶ 1–16, 17, 18, 19–25, 26, & 27 are virtually identical to District's Proposed Conclusions of Law ¶¶ 1–16, 18, 19, 21–27, 28, 29, & 30 respectively. There were only minor changes in a few

sentences. The Trial Court omitted District's ¶¶ 17 & 20 incorporating their basic content in paragraphs 16 and 3 respectively.

The Court of Appeals agreed with Woodcrest's arguments and reversed the Trial Court's Immediate Possession Order, remanding the matter to the Trial Court for orders regarding attorney fees and costs. The Valuation Hearing and its results were not issues on appeal.

III. Reasons to Deny Petition for Writ of Certiorari

A. The Court of Appeals Opinion is in accord with Supreme Court Decisions and does not conflict with other Court of Appeal Decisions.

1. The proper standard of review was applied.

The Colorado Supreme Court addressed when a higher scrutiny of factual findings of the trial court is necessary in *Uptime Corp. v. Colorado Research Corp.*, 420 P.2d 232 (Colo. 1966). The Court of Appeals followed the Supreme Court's ruling. (Opinion ¶32). The Court in *Uptime,* found that "[w]ith the exception of one or two small changes in words and the rearranging of a paragraph, the findings of fact and conclusions of law as prepared by the plaintiff were adopted verbatim by the trial judge". *Id* at 233, and held that

> Where the findings of the trial court are verbatim to those submitted by the successful litigant, we will, of course, scrutinize them more critically and give them less weight than if they were the work product of the

> judge himself, or, at least bear evidence that he has given them careful study and revision. *Id*. at 235.

Where the record of evidence is available for review, and the trial court has adopted a proposed order nearly verbatim, the appellate court properly reviews the evidence with higher scrutiny.

The Court in *Uptime* stated that "we must assume that the findings of fact and conclusions of law are fully supported by the evidence" *Id* at 234, where the sufficiency of the evidence cannot be determined because the record was <u>not</u> presented to the Court. The Supreme Court did not hold that where the record of evidence <u>is</u> available, as in this matter, it is improper for the Court to apply a higher degree of scrutiny to the evidence to determine if the findings of the trial court are supported by the evidence. The Supreme Court stated that "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 235. Where the evidence is available to review, a higher scrutiny of the same is proper. The Trial Court's near verbatim adoption of one party's proposed factual findings and conclusions of law is the trigger for a higher degree of scrutiny.

In this matter, the trial court adopted the District's proposed order with minor changes, re-ordering, or modifying as noted in the Counter Statement of Facts. The Court of Appeals' own reference to the evidence, which was not incorporated in the

trial court's adopted order from the District, clearly illustrates the appropriate higher scrutiny required when a trial court merely adopts a proposed order of a party virtually verbatim, omitting critical evidence.

Colorado law establishes that a higher scrutiny of factual findings is the appropriate standard of review, and is consistent with other Court of Appeals decisions. In *Trask v. Barz and Mi Vida Enterprises, Inc*., 135 P.3d 544 (Colo. App. 2006), the Court followed *Uptime* and held that where findings of fact and conclusions of law are adopted from a party verbatim,

> the trial court's findings are subject to a heightened scrutiny. It is not good practice for the trial court to delegate the responsibility of drafting findings of fact and conclusions of law and to adopt them without apparent review. The task of the trial court is not limited to picking winners and losers. However, 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. *Uptime,* supra. Here, because the trial court adopted the adverse claimant's proposed findings of fact and conclusions of law verbatim, we will scrutinize them more critically than if they were produced by the trial court itself. *See* *Uptime*, supra. *Trask*, supra, at 549.

The Court of Appeals correctly applied higher scrutiny in this matter. (Opinion ¶32). Where a higher scrutiny standard is applied, Colorado Court of Appeals decisions have held that such scrutiny requires a clear error standard of review. The entire record is reviewed for clearly erroneous findings, lacking support of competent evidence, which leads the reviewing court to the conclusion that

"although there [may be] evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746, 766 (1948); *see St. James v. People,* 948 P.2d 1028 (Colo.1997)". *Quintana v. City of Westminster*, 56 P3d 1193,1196 (Colo. App., 2002).

Schlagel v. Teegarden, 89 P.3d 419, 422 (Colo. App. 2004) held "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 Quintana v. City of Westminster,* 56 P.3d 1193 (Colo.App.2002)."

The standard of review applied by the Court of Appeals in this matter, applying a higher scrutiny in the review of the evidence, and determining there is clear error in the findings of fact because the entire evidence leaves the Court with the definite and firm conviction that a mistake has been committed, is the correct standard of review applied by the Court of Appeals. (Opinion ¶32).

2. <u>The Court of Appeals ruling on "public purpose" and "necessity" is consistent with existing case law.</u>

Applying the above standard of review, the Court of Appeals correctly found that the evidence did not support a conclusion that the District could exercise its powers of eminent domain in the acquisition of Parcel C.

The Court of Appeals' finding that the District's taking was not for a public purpose follows established Supreme Court and Court of Appeals decisions. The Supreme Court in *Trinity v. City of Westminster*, 848 P.2d 916 (Colo. 1993), evaluating a claim of inverse condemnation, which is the "mirror image of eminent domain" (*Id* at 921), stated that "the taking must be a reasonably foreseeable consequence of an authorized action. In other words, the government must have the intent to take the property or to do an act which has the natural consequence of taking the property." *Id*. at 921 – 922.

In *American Family v. American National Property and Casualty Co*., 370 P.2d 319, (Colo. App. 2015), the Court of Appeals followed *Trinity*, supra, noting that there is a difference between the "taking" and the "public purpose" elements of condemnation.

> Colorado law is clear that a plaintiff may establish the 'taking' element by showing that the state intended to take private property or to do an act the direct, natural, or probable consequence of which is to result in a taking of private property. *Scott,* 178 P.3d at 1244. 'In other words, the government must have the intent to take the property or to do an act which has the natural consequence of taking the property.' *Id.* (quoting *Trinity,* 848 P.2d at 921–22). But even where the 'taking' element is shown, the plaintiff must also show that the

> taking was for a public purpose. *Trinity,* 848 P.2d at 921. The public purpose of an intended act (the prescribed burn) that ultimately results in an unintentional 'taking' (the wildfire) does not transfer to and supply the ‚public purpose' for that taking.[4] Stated differently, merely showing that the taking was the direct, natural, or probable consequence of the state's intended act does not necessarily establish that the taking was for a public purpose. *American Family*, supra, at 328.

Supreme Court and Court of Appeals decisions require that the "taking" be for a public purpose, not merely that the ultimate intended use be for a public purpose. The Court of Appeals correctly concluded that the District's "taking" of Parcel C was for the purpose of satisfying the Annexation Agreement conditions placed on the Developer, which were necessary to allow the Developer to obtain Town of Parker approval to commence the CFD. (Opinion ¶¶ 34–39). Only upon satisfying the contractual obligations of the Developer does there become a project which requires certain property to be dedicated for public purpose. Future intended use does not render the taking a public purpose.

3. The Court of Appeals ruling on the impact of Permits & Approvals is consistent with existing law.

The District incorrectly argues that the Court of Appeals Opinion is contrary to Colorado law regarding the obtaining of permits and approvals as a precedent to condemnation proceedings, as expressed in *Silver Dollar Metro Dist. v. Goltra*, 66 P.3d 170, (Colo. App. 2002). In *Goltra* the Court of Appeals upheld the trial court's

finding of no public use, noting that the likelihood of a project being approved is relevant to the determination of public use.

> If the utility is unable to obtain the required certificate, and therefore is unable to make any use of the land to be condemned, this fact may sustain the burden of the party opposing condemnation to show that the proposed use is not a public use because the utility will be precluded from making any use whatsoever of the condemned property. *Pub. Serv. Co. v. Shaklee,* supra*,* 784 P.2d at 317 n. 3. *Id.* at 174.

Noting that multiple requirements remained to be fulfilled before the project could begin, the Court held that "Thus, the District may be precluded from making any use whatsoever of the subject property. *See Pub. Serv. Co. v. Shaklee,* supra*; Denver W. Metro. Dist. v. Geudner,* supra*."* *Id.* at 174, concluding that "the trial court did not err in concluding that the taking was not for a public use." *Id.* At 175.

The Court of Appeals here, correctly applied Colorado law set forth in *Goltra,* supra, *Trinity,* supra, *American Family*, supra, and *Denver W. Metro. Dist v. Geudner*, 786 P.2d 434 (Colo. App. 1989, Cert Denied 1990). The purchase of Parcel C by Developer was a condition precedent to the Developer's ability to satisfy the Annexation Agreement, allowing the project to begin. Absent Developer's acquisition of Parcel C, Developer is precluded from obtaining approval of CFD, similar to the utility in *Goltra,* supra. Only once the project can proceed and exists does the need for public infrastructure become relevant, with an approved development requiring public roads and utilities (a public use). With no public use

existing prior to Developer's ownership of all three Parcels as required by the Annexation Agreement, District cannot exercise its power of eminent domain to help the Developer satisfy Developer's conditions precedent to approval of permits and approvals from the Town of Parker.

Likewise, the Court of Appeals decision does not contradict established Colorado law determining when a private benefit disqualifies an alleged public purpose. The Court of Appeals follows the precedent established in *Board of County Comm'rs v. Kobel*, 176 P.3d 860 (Colo. App. 2007) and *Goltra*, supra. (Opinion ¶36). The Court of Appeals also follows the precedent established by the Court of Appeals in *Denver W. Metro. Dist v. Geudner*, 786 P.2d 434 (Colo. App. 1989, Cert Denied 1990). *Geudner* held that "If 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 authority's determination that a particular acquisition is necessary. *See City of Thornton v. Farmers Reservoir & Irrigation Co.,* 194 Colo. 526, 575 P.2d 382 (1978)", *Id* at 436.

In a nearly identical factual situation as the current case, the *Geudner* Court held that "There is substantial evidence in the record before us to support the trial court's conclusion that the essential purpose underlying the District's decision to

condemn Geudner's property was to assist DWP in concluding a commercial transaction and thereby advance the private interests of the District's officers." *Id* at 436–437. The Court of Appeals confirmed the *Geudner* trial court's dismissal of the condemnation petition as advancing a private interest. The Supreme Court declined to review this holding. Likewise, the Supreme Court should deny the Petition to review the Court of Appeals decision in this matter.

4. The Court of Appeals reliance on §38-1-101(1)(b) is proper.

The District's argument that the Court of Appeals improperly interpreted C.R.S. §38-1-101(1)(b) is plagued with a wrong assumption that Developer's ownership of Parcel C is necessary to further a public use, thus permitting District to exercise eminent domain powers for the benefit of the Developer, a private party. Parcel C's ownership by the Developer is a requirement of the Developer *before* the Developer can begin developing the entire plat (Parcels A, B, & C) and reap the economic benefits a private developer receives when developing and selling residential homes. Once development is permitted, then Developer's requirement to provide portions of its property for public purpose arises.

Eminent domain powers cannot be used to benefit a private party for the purpose of economic development. C.R.S. §38-1-101(1)(b) plainly states: "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." District's attempt to exercise eminent domain is for Developer's benefit, to permit economic development of Developer's proposed project.

The statutory language is clear and unambiguous. C.R.S. §38-1-101(2)(b) addresses the burden of proof and does not modify this clear restriction stated in section (1)(b). The Court of Appeals correctly applied this clear statutory language, designed to prohibit the very action the trial court incorrectly permitted.

B. Overturning the Court of Appeals decision will violate the Constitutional rights of Woodcrest.

The Colorado Constitution provides the clear rule that private property **shall not** be taken, unless there is an exception. "Private property shall not be taken for private use unless by consent of the owner..." *Colorado Constitution Article II, §14.* "Private property shall not be taken or damaged, for public or private use, without just compensation ..." *Colorado Constitution Article II, §15*.

A private property owner's right to own property and not be compelled to sell is a fundamental right recognized by the Colorado Constitution and Colorado Courts.

This fundamental right cannot be violated in the absence of clear authority. *Potashnik v. Public Service Company,* 126 Colo. 98, 101, 247 P.2d 137 (1952).

The Colorado Courts have held that the court must interpret the power of eminent domain strictly, with all presumptions in favor of the landowner whose land is being taken. *Bly v. Story*, 241 P.3d 529, 533–34 (Colo. 2010); *State Dept. of Highways v. Denver & Rio Grand Western Railroad Co*., 757 P.2d 182, 183 (Colo. App. 1988).

The Court of Appeals' decision consistently follows the clear mandate of the Colorado Constitution and the legal precedent interpreting the Constitutional provision by the Supreme Court and Court of Appeals.

IV. Conclusion

There is no basis for granting the Petition for Writ of Certiorari. The Court of Appeals decision does not contradict Supreme Court decisions and is not contrary to other decisions of the Court of Appeals. The Court of Appeals in deciding this case did not depart from accepted and usual course of judicial proceedings. Therefore, there is no reason to review the Court of Appeals decision and the Petition for Writ of Certiorari should be denied.

Respectfully submitted this 24th day of January, 2018.

DYMOND • REAGOR, PLLC

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of January, 2018, a true and accurate copy of the foregoing was served via Colorado e-filing system and/or U.S. Mail as follows:

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Lisa Evans