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Condemnation challenges during development approvals

In Colorado, real estate developers have various tools available to fund public infrastructure improvements in new developments.

One of those tools is the creation of a special district under Title 32 of the Colorado Revised Statutes. Special districts are created routinely in order to fund the construction of public improvements through the issuance of tax-exempt bonds.

Bond financing typically involves an independent market-based review of the financial viability of the development within the district, including the anticipated improvements. The issuance of special district bonds for the improvements is financially beneficial to the homeowners who eventually purchase homes in a new development because it helps keep the price of homes lower. In this regard, if the developer had to fund the public improvements itself and without special district bond financing, it would then have little choice but to recover such cost through the sale price of the lots and homes in the development (thus, of course, increasing the sale price).

In comparison, the tax-exempt bonds of a special district are paid off over time through a debt-service mill levy on the property within the development based on the appraised value of the property. These mill levy payments are “in the



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nature of taxes” and therefore are not only paid over time, but also they are tax deductible to each individual property owner.

Once a special district is created, it is a separate quasi-governmental entity with all of the powers enumerated in Title 32. One of those powers is the power of eminent domain, also known as condemnation. Under the power of eminent domain, a special district can “take” private property, in exchange for payment of just compensation, for a public purpose.

Courts routinely have held that a special district can condemn private property in order to construct public infrastructure improvements.

When special districts are created to fund and manage construction of public infrastructure, the districts must work with the local municipalities to obtain development approvals for the project. Typically, local municipalities require special districts to construct various improvements in order to move forward to develop property (and, in most instances, the completed public improvements within the

development will be dedicated to the local municipality). These requirements can be imposed before, during and after certain development approvals are obtained. Special districts therefore can find themselves in between a proverbial rock and a hard place when seeking to move forward with condemnation to construct improvements before having formal approval to move forward with the larger development project.

As explained above, a special district must prove that the condemnation is for a “public purpose.” Case law in Colorado has created the following framework with respect to the timing of establishing a public purpose in the context of a planned future development:

- The Colorado Supreme Court has held that a condemning authority may condemn private property in order to construct infrastructure pursuant to a development agreement with a private party. *Carousel Farms Metro. Dist. v. Woodcrest Homes, Inc.*, 442 P.3d 402, 409–10 (Colo. 2019).

- It also is well settled that 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. *Silver Dollar Metro. Dist. v. Goltra*, 66 P.3d 170, 173 (Colo. App. 2002).

- While not a condition prec-

edent, the Colorado Supreme Court has indicated that the likelihood that a condemning authority will obtain the necessary permits and approvals may be relevant to a trial court’s determination of public use. *Pub. Serv. Co. v. Shaklee*, 784 P.2d 314 (Colo.1989).

- If a condemning authority has a low likelihood of obtaining necessary approvals for the project to go forward, the trial court may find that there is no current public purpose for the condemnation. That is, a condemnation action to support a public benefit that may never be initiated is premature. *Bd. of Cty. Comm’rs of Cty. of Morgan v. Kobobel*, 176 P.3d 860, 865 (Colo. App. 2007).

The practical effect of this case law is as follows:

- A special district can move forward with condemnation pursuant to a development agreement associated with a planned future development.

- There is no absolute requirement that a special district obtain final development approvals prior to instituting condemnation.

- If final development approvals have not been obtained prior to instituting the condemnation, the court will need to determine whether there is a high likelihood that the project actually will move forward. While absolute certainty is not required, the court will look at several factors to

determine the likelihood that the development will go forward: Is there a reasonable likelihood that no development will move forward due to decisions over which the special district has no control? For example, is there another governmental body that must grant approval for the development in concept and might that approval be withheld? Additionally, is the development included in any long-term plans by the municipality? Has a plat been obtained? Is the property zoned for the development or is a zoning variance necessary? And is the development physically possible?

- Assuming that the special district can establish that the development is likely to move forward and is not precluded by something over which the special district has no control, the special district should be able to establish that its condemnation has a public purpose.

Special districts should carefully analyze the timing of any condemnation in light of the status of their planned future development. While there is a lack of bright line rules, condemnations can be too early or too late so it is important to analyze the framework set forth above before instituting a condemnation.

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