

# Between a Rock and a Hard Place

## Condemning Property When in the Process of Obtaining Development Approvals

Guest article by Jamie Cotter, Spencer Fane LLP

Typically, special districts in Colorado are required by local municipalities to construct various improvements in order to move forward to develop property. These requirements can be imposed before, during, and after certain development approvals are obtained. Special districts can find themselves 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.

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 is also 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 precedent, 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 will actually move forward. While absolute certainty is not required, the court will look to the following 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?
  - ◊ 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?
  - ◊ 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.

It is also important to note that this analysis is based on the current statutory framework set forth in Titles 32 and 38. In May of this year, Senate Bill 21-262 was introduced in the Senate. Senate Bill 21-262 proposes an amendment to Title 32 that would prohibit a metropolitan district from using its power of “dominant” eminent domain outside the boundaries of the municipality that approved its service plan without first obtaining written consent from the municipality from which the property to be condemned is located. Metropolitan districts have the power of dominant eminent domain which means, very generally, that districts can condemn property interests held by other governmental entities (other than the state or a school board) so long as the district’s planned use does not negatively impact the other governmental entity’s prior public use.

If Senate Bill 21-262 becomes law it will affect the development approvals that a metropolitan district will need before attempting to condemn any property owned by another governmental entity outside the boundaries of the municipality that approved its service plan. For example, a district whose service plan was approved by the Town of Erie cannot condemn property from another governmental entity in Broomfield without the written approval of Broomfield. Even with this potential change in the law, the analysis of development approvals required when a special district is condemning privately-owned property set forth above will not change. This potential change will only affect condemnation of publicly owned property outside the boundaries of the municipality that approved the metropolitan district’s service plan. 🟡

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