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# Colorado Court of Appeals Limits Special Districts' Authority to Use Eminent Domain to Achieve Developers' Purposes

February 2018 • [Andrew L. W. Peters](#) and [Brian J. Connolly](#)

Virtually anyone engaged in land development will at some point encounter the holdout—the landowner from whom the developer needs a right-of-way or easement, and who names an extraordinary price or just won't sell. For private assemblers in particular, this type of encounter often proves problematic. Unlike government entities that enjoy condemnation authority, those private parties cannot compel land transfers.

Basic as that point may seem, the recent Colorado Court of Appeals decision in [Carousel Farms Metropolitan District v. Woodcrest Homes, Inc.](#) has added a complication, concluding that a metropolitan district could not condemn a property for the purpose of helping a private developer satisfy its contractual obligations to another government. This alert unpacks that conclusion, reviewing the circumstances that led up to it, its reasoning, and its potential implications for private land assemblers and special districts.

## The Factual Backdrop

Carousel Farms concerned a .65-acre parcel of land, Parcel C, sandwiched between two larger parcels, A and B. Parcel C's owner, Woodcrest Homes, Inc. had at one point aspired to develop all three parcels as a residential community but abandoned those plans during the Great Recession. Several years later, Century Communities, Inc. and

its subsidiaries arrived with similar ambitions, and, after securing Parcels A and B, approached Woodcrest about Parcel C. The latter refused Century's approximately \$45,000 offer.

Woodcrest's refusal placed Century in a bind. Under the terms of an annexation agreement with the Town of Parker, the Town would not approve the annexation or platting of the property until Century owned all of its constituent parcels. Effectively, then, Century could not satisfy the agreement's conditions, and could not develop the property, unless Woodcrest conveyed Parcel C.

Forgoing a higher offer, Century instead threatened to condemn the parcel. When Woodcrest was unmoved, Century formed a metropolitan district that in turn initiated condemnation proceedings. The district's board of directors, who were all Century employees, explained in a resolution approving the action that the district needed the land to construct public improvements. Soon afterward, Century and the Town agreed to amend the agreement to allow the district's ownership of Parcel C to satisfy its requirements.

After a hearing, a lower court granted Century possession of Parcel C, and Woodcrest appealed, resulting in the opinion that is the subject of this Alert.

## The Opinion

On appeal, a unanimous three-judge panel of the Court of Appeals concluded the condemnation was improper, focusing on three elements we explore in a bit more detail.

First, in any condemnation or "taking" action, the condemning authority must show that the taking will advance a public purpose—a purpose found lacking in *Carousel Farms*. Although the district argued that Parcel C would eventually be used for public improvements, the division looked toward the taking's more immediate purpose, which it identified as helping Century satisfy its obligations to the Town under the annexation agreement. Because the district could not construct any public improvements before Century fulfilled its own obligations to the Town, the court refused to consider the public purpose of those contingent actions. "In other words," the court observed, "the taking of Parcel C was a step removed from any public purpose."

Second, describing the district as "a sort of alter ego of the Developer," the division concluded the district had acted in bad faith. The panel recognized that developers' employees often control special-district boards in those districts' infancy, but the district's attorney conceded that the practice created a conflict of interest in this case. The court also considered it significant that the district carried out the threat that Century had made.

Third, the division concluded that the condemnation circumvented and therefore violated Colorado's prohibition on taking private property for transfer to a private entity for the purpose of economic development. The original annexation agreement had required Century to own Parcel C, but Colorado's limitation prevented the district from simply transferring Parcel C to Century, so, in the court's view, Century amended the agreement and accomplished indirectly "through a manipulation of the circumstances" what it could not have done directly.

## The Implications

Setting aside Carousel Farms for a moment, at least two facts remain true: landowners with leverage will continue to seek concessions from private land assemblers, and governments will continue to create contractual obligations for developers. Given that, how should developers and special districts approach this decision? Two items deserve note.

**The timing:** Century, the developer in Carousel Farms formed the district only after threatening Woodcrest with condemnation. Irrespective of whether Century would have created the district anyway—and it would have—the threaten-first, create-second approach appeared to influence the court's bad-faith and private-transfer analyses, in part because it suggested Century formed a government to exercise a power it did not enjoy for a benefit it could not receive. Had the condemnation occurred before Century's obligations arose, the court might have found it more difficult to draw that inference.

**The purpose:** The court focused not on the condemnation's eventual public benefit but on its implicit purpose of satisfying Century's obligations under the annexation agreement. The court's reasoning, i.e., a condemnation does not have a public purpose when the public benefit can be realized only if a private party fulfills its own contractual obligations, could have broader implications—potentially prohibiting any condemnation action initiated before a private party wins development approval. Read more narrowly, the opinion suggests that, when a government conditions development approval on a private party's securing some property interest, a special district cannot condemn that property interest unless the condemnation action would have some public benefit even if the approval never materialized.

Without further guidance from Colorado courts, it is difficult to say how Carousel Farms will affect development. A petition for certiorari is currently pending before the Colorado Supreme Court, however, so we may soon receive that guidance. And in the meantime, we suggest that special districts carefully consider how they time and justify condemnation proceedings.

development and governmental agreements. For more information on this Otten Johnson Alert or for help evaluating your current situation, contact any of the attorneys in the Land Use practice group. For a listing, [click here](#).

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