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COLORADO SUPREME COURT
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Denver, CO 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▲

Case No. 2018SC30

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BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF RESPONDENT

Certificate of Compliance

I hereby certify that this brief complies with all requirements of C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The Amicus brief complies with the applicable word limits set forth in C.A.R. 29(d) and C.A.R. 28(g).

X It contains 4,077 words (amicus brief does not exceed 4,750 words).

The Amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

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/s/ Diana Simpson

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CONSTITUTIONAL PROVISIONS

Interest of the *Amicus Curiae*

Founded in 1991, the Institute for Justice (IJ) is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. As part of that mission, IJ has litigated cases challenging the use of eminent domain to seize individuals' private property and give it to other private parties. Among the cases that IJ has litigated are *Kelo v. City of New London*, 545 U.S. 469 (2005), in which the Supreme Court infamously held that the U.S. Constitution allows government to take private property and give it to others for purposes of "economic development," and *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006), in which the Ohio Supreme Court expressly rejected *Kelo* and held that the Ohio Constitution provides greater protection for private property than does the U.S. Constitution.

Kelo did recognize one important limitation on the power of eminent domain: Private property may not be taken "under the mere pretext of a public purpose, when [the] actual purpose [i]s to bestow a

private benefit." *Kelo.* 545 U.S. at 478. That limitation is central to this case because the petitioners are advocating a rule whereby certain uses of property would *per se* satisfy the Fifth Amendment's public use requirement, without regard to the underlying purpose of the taking. IJ submits this brief to show that the constitutional limits on pretextual takings are well established and that the Court of Appeals correctly applied the rule in holding that the proposed taking in this case was unconstitutional.

Introduction and Summary of Argument

Carousel Farms (Developer) is a private developer that wants to construct a residential subdivision. In order to get approval for this subdivision, the Town of Parker (Town) insisted that the Developer acquire a particular parcel (Parcel C) of land, without which the proposed subdivision would fail to meet the Town's density requirements for development.[1] The current owner of Parcel C, however, does not wish to sell the land for the price that the Developer

[1] *See* Supp. R. at 00132 – 00151, Ex. Q; R. Tr. (Mar. 19, 2015), 32:23–35:5; R. Tr. (Mar. 20, 2015), 10:7–11:1; 14:7–17; 30:10–31;18; 42:1–8; 53:24–54:22; R. Tr. (Sept. 22, 2015); 150:7–159:6; 163:8–166:7; 176:18–177:1; 179:20–181:3.

offered. Instead of negotiating with the owner, the Developer adopted a different strategy. It created a metropolitan district (District), placed its own employees on the board of directors, and then instructed them to seize Parcel C using eminent domain. The Court of Appeals correctly ruled that this is illegal.

The District's arguments to the contrary reflect a fundamental misunderstanding of eminent domain law. According to the District, this taking is constitutional because the District plans to use Parcel C for "public improvements" such as roads and sewers, which will serve the new subdivision. Because roads and sewers are public uses, the District argues, the taking satisfies the public use requirement of the Fifth Amendment. Although the trial court accepted this legal argument, it is incorrect. Decades of precedent, from the United States Supreme Court, this Court, and many others, make clear that a taking is not automatically constitutional simply because the property at issue will ultimately be turned to a public use, such as a road. Rather, a taking is unconstitutional whenever the asserted public use is a mere

pretext for conferring a private benefit on a private party. That is precisely what is happening here.

The evidence clearly showed that the District had not contemplated the proposed "public improvements" on Parcel C until after the Developer failed to acquire that land at the price it preferred.[2] Indeed, the District *did not even exist* until the Developer created it, after the Developer threatened to exercise eminent domain *itself* and refused to pay a price that Woodcrest would accept.[3] The proposed "public improvements" are simply a pretext for the real reason that this land is being taken: to satisfy the Town's requirement that Parcel C be included in the subdivision, thereby advancing the Developer's commercial interests. Because satisfying a private contractual obligation is not a legitimate public use, the proposed taking is unconstitutional.

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[2] R. Tr. (Mar. 19, 2015), 5:7–7:5; 17:18–25; 18:16–19:10; 20:15–21:7; 24:4–27:5; R. Tr. (Sept. 22, 2015), 220:23–223:19; R. Tr. (Mar. 19, 2015), 5:10–7:5; R. Tr. (Sept. 22, 2015), 220:23–223:5); Supp. R. at 00273.

[3] R. Tr. (Mar. 19, 2015), 46:5–14; R. Tr. (Sept. 22, 2015), 227:11–229:2; R. Ex. M at 18; Supp. R. at 00152, 00208, 00206; R. Tr. (Sept. 22, 2015), 229:3–231:20.

Argument

Overwhelming authority demonstrates that eminent domain may not be used where the proposed public use is a mere pretext for conferring private benefits on private parties. Reviewing courts are required to assess the motive for a taking, and not just the proposed use itself. Such review must be particularly searching in cases like this one, where the power of eminent domain is being wielded by a government entity that functions as the alter-ego of a private developer. The evidence in this case clearly showed that the proposed taking was initiated in order to advance the private interests of the Developer. In numerous other cases from around the country, courts have rejected proposed takings where the proposed public use conveniently materialized in time to justify the taking. The result here should be no different.

1. The Fifth Amendment prohibits condemnations where the asserted public purpose is a mere pretext for conferring a private benefit on a private party.

The constitutionality of a taking does not turn solely on whether the proposed use of the property being taken is a traditionally public

one. Although takings for roads, parks, and utilities are frequently constitutional, they are not *per se* constitutional. To the contrary, overwhelming authority demonstrates that courts have a duty to evaluate the motives of the condemning authority to determine whether the asserted public use is the real reason for the taking or just a pretext to benefit a private party. Courts have repeatedly rejected takings for even such "classic" public uses as roads and parks—when the property owner makes a sufficient showing of pretext.

The United States Supreme Court's last word on the question of public use was in *Kelo v. City of New London*, 545 U.S. 469 (2005). Although the decision was a defeat for the property owners—the Court infamously held that the power of eminent domain can be used to transfer private property to other private parties for purposes of "economic development"—the Court nonetheless reaffirmed the longstanding principle that private property cannot be taken "under the mere pretext of a public purpose, when [the] actual purpose was to bestow a private benefit." *Id.* at 478. While the *Kelo* Court found that

the proposed taking at issue in that case was not pretextual, the Court emphasized that its holding was based on the specific facts of the case:

- There was "no evidence of an illegitimate purpose." *Id.*
- The taking was "executed pursuant to a 'carefully considered' development plan." *Id.*
- And the plan "was not adopted to benefit a particular class of identifiable individuals." *Id.*; *see also*, *id.* at 490 (Kennedy, J., concurring) ("[T]ransfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.").

The Court's discussion of pretext provides a roadmap for the kinds of evidence that *would* demonstrate an unconstitutional pretextual taking.

The *Kelo* Court's holding was neither dicta nor an aberration. Many other courts, before and since *Kelo*, have recognized that pretextual takings are unconstitutional. In 1991, this Court considered the constitutionality of a proposed taking where the stated public purpose was to eliminate blight. *City & Cty. of Denver v. Block 173 Assocs.*, 814 P.2d 824 (Colo. 1991). This Court accepted that the property at issue was in fact blighted and that the elimination of blight

was a public purpose. Nevertheless, this Court held that if the "primary purpose" of the taking was not to eliminate blight but rather to advance private interests, then the taking would be unconstitutional. *Id.* at 830. This Court remanded so the property owner would have an opportunity to prove that the taking was pretextual.

The Supreme Court of Georgia held likewise in a 1981 case concerning a proposed taking where the government had planned to build a public park on the land being taken. All parties had agreed "that a public park for recreational purposes is a public purpose." *Earth Mgmt., Inc. v. Heard Cty.*, 283 S.E.2d 455, 459 (Ga. 1981). Nevertheless, the property owner argued that the proposed park "was a mere subterfuge utilized in order to veil the real purpose" of the taking—preventing the property owner from building a waste disposal facility. *Id.* at 460. The court agreed with the property owner, explaining that the record clearly demonstrated that the condemning authority had no previous interest in building a park, and that it did not even evaluate the suitability of the condemned land for a park before seizing it. *Id.* Accordingly, the court invalidated the taking.

The Supreme Judicial Court of Massachusetts decided a remarkably similar case in 1987. The Town of Burlington had proposed condemning a parcel of private property, again, for the ostensible purpose of building a park. *See Pheasant Ridge Assocs. Ltd. P'ship v. Town of Burlington*, 506 N.E.2d 1152, 1154 (Mass. 1987). The court concluded that, on the record, it was clear that the proposed park was a mere pretext. The town's actual objective was to prevent the construction of a proposed low-income housing development. The court pointed out:

> that in recent years the town had studied its needs for parks and recreation and that neither the [site of the proposed taking] nor any parcel in the general vicinity of that site had been considered for acquisition for park or recreational uses. . . . The matter of taking the subject site came forward only when the plaintiffs' proposal became known.

Id. at 1157. Accordingly, the court rejected the proposed taking, notwithstanding that parks are usually considered classic examples of public uses.

Many other pre-*Kelo* cases took a similar approach. *See Armendariz v. Penman*, 75 F.3d 1311, 1321 (9th Cir. 1996) (en banc)

(invalidating a taking because the official rationale of blight alleviation was a mere pretext for "a scheme . . . to deprive the plaintiffs of their property . . . so a shopping-center developer could buy [it] at a lower price"); *Aaron v. Target Corp.*, 269 F. Supp. 2d 1162, 1174-76 (E.D. Mo. 2003), *rev'd on other grounds*, 357 F.3d 768 (8th Cir. 2004) (holding that a property owner was likely to prevail on a claim that a taking ostensibly to alleviate blight was actually intended to serve the interests of the Target Corporation); *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1229 (C.D. Cal. 2002) ("Courts must look beyond the government's purported public use to determine whether that is the genuine reason or if it is merely pretext."); *99 Cents Only Store v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) ("No judicial deference is required ... where the ostensible public use is demonstrably pretextual"); *Casino Reinvestment Dev. Auth. v. Banin*, 320 N.J. Super. 342, 345, 727 A.2d 102, 103 (Law Div. 1998) ("Where, however, a condemnation is commenced for an apparently valid public purpose, but the real purpose is otherwise, the condemnation may be set aside. "); *Borough of Essex*

Fells v. Kessler Inst. for Rehab., Inc., 289 N.J. Super. 329, 338, 673 A.2d 856, 861 (Law Div. 1995) ("public bodies may condemn for an authorized purpose but may not condemn to disguise an ulterior motive") (setting aside condemnation where the asserted purpose was to preserve open space, but the true purpose was to prevent a particular developer from building).

After *Kelo* reaffirmed that pretextual takings are illegal, the principle became even more firmly established in lower courts. For example, in *Franco v. National Capital Revitalization Corp.*, the District of Columbia Court of Appeals extensively discussed *Kelo*'s pretext holding. The court held that under *Kelo*, property owners have a "pretext defense" against condemnations and that, if they adequately plead the defense, they are entitled to discovery. *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 169 (D.C. 2007) ("*Kelo* recognized that there may be situations where a court should not take at face value what the legislature has said. The government will rarely acknowledge that it is acting for a forbidden reason, so a property owner must in

some circumstances be allowed to allege and to demonstrate that the stated public purpose for the condemnation is pretextual.").

In a 2008 decision involving a public road condemnation, the Hawaii Supreme Court also extensively discussed the *Kelo* pretext defense. The court held that "even where the government's stated purpose is a 'classic' one," such as the construction of a public road, "where the actual purpose is to confer a private benefit on a particular private party, the condemnation is forbidden." *Cty. of Hawaii v. C & J Coupe Family Ltd. P'ship*, 198 P.3d 615, 648 (Haw. 2008). In so holding, the court squarely rejected the dissent's argument that public roads are *per se* public uses under the Fifth Amendment. *Id.*

Other post-*Kelo* decisions are in accord. *See Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 338 (Pa. 2007) ("in order to uphold the invocation of the power of eminent domain, this Court must find that the recreational purpose was real and fundamental, not post-hoc or pre-textual."); *accord In re Opening Private Rd. for Benefit of O'Reilly*, 5 A.3d 246, 258 (Pa. 2010) (remanding for further proceedings to determine if the public was the "primary and paramount beneficiary of

the taking," as required by the Fifth Amendment); *Rhode Island Econ. Dev. Corp. v. The Parking Co., L.P.*, 892 A.2d 87, 107 (R.I. 2006) (rejecting proposed condemnation of an easement in a parking garage as pretextual).

Indeed, just a few months ago, another division of the Colorado Court of Appeals recognized the illegality of pretextual takings, even when the property is ostensibly for a classic public use—preserving open space. *See City of Lafayette v. Town of Erie Urban Renewal Auth.*, 2018 WL 2976324 (Colo. Ct. App. Div. VI, June 14, 2018). The court held that the proposed taking was unlawful because the record demonstrated that the true purpose was not to preserve open space, but rather to interfere with a planned commercial development. *Id.* at ¶ 22. The court emphasized that there was no evidence that the town had previously been interested in obtaining that land for open space. Moreover, the town's opposition to the planned development was longstanding. *Id.* at ¶ 23. On that record, the showing of pretext was clear.

In short, the decision below is in line with overwhelming authority from this Court and from other state and federal courts, going back decades. The Court of Appeals properly recognized that under the Fifth Amendment there is no such thing as a *per se* public use. *See Carousel Farms Metro. Dist. v. Woodcrest Homes, Inc.*, 2017 COA 149 2017 WL 5897715 (Colo. Ct. App. Div. II, Nov. 30, 2017), ¶ 46, cert. granted, No. 18SC30, 2018 WL 3222171 (Colo. July 2, 2018). Courts have a duty to examine the real reasons for a condemnation to ensure that constitutional safeguards are maintained.[4]

2. Judicial review must be especially stringent where the power of eminent domain is being wielded by a private party.

The cases above demonstrate that courts have a duty to independently consider the motivations for a proposed taking. That duty is particularly important in cases such as this one, where there

[4] Although the decision below does not distinguish between federal and state constitutional protections—and for purposes of this case the result is the same—it is noteworthy that the Colorado Constitution contains a unique provision requiring that "whenever an attempt is made to take private property for a use ***alleged*** to be public, the question whether the contemplated use be ***really*** public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public." Colo. Const. art. II, § 15 (emphasis added).

was no political process that might otherwise be trusted to ensure that the power of eminent domain is not abused. To the contrary, as the court below recognized, the district was essentially the alter-ego of the developer, and it exercised the power of eminent domain for the benefit of the developer without any supervision or oversight by an independent government entity. *Id.* at ¶ 44 ("The fact that the Developer threatened to condemn Parcel C when it had no authority to do so, and then created the District (which promptly initiated condemnation proceedings), suggests a kind of alter ego relationship between the District and the Developer, as does the fact that the Developer signed the amendments to the Agreement, but the District did not. In other words, the Developer spoke for the District and the District acted for the Developer.") Those circumstances merit the most searching judicial review.

The need for more searching review in cases where the risk of pretextual takings is highest was recognized by Justice Kennedy—the crucial fifth vote in *Kelo*—in his concurring opinion. He suggested that in some cases "the risk of undetected impermissible favoritism of

private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted." *Kelo*, 545 U.S. 469, 493 (Kennedy, J., concurring). No such presumption was necessary in that case, he explained, because the circumstances made such favoritism unlikely: "This taking occurred in the context of a comprehensive development plan meant to address a serious citywide depression . . . . The identities of most of the private beneficiaries were unknown at the time the city formulated its plans." *Id.*

The contrast with the present case could hardly be more stark. Whereas Justice Kennedy was concerned about situations where the private beneficiary of a taking might simply be *known* to the condemning authority, here the condemning authority was literally created by the private party and is under its direct control. Nor has any government entity engaged in "thorough deliberation" before adopting a "comprehensive" development plan, which the government believes will spur economic development in an economically depressed area, like in *Kelo*. 545 U.S. at 484. Rather, the planning has been undertaken entirely by the private Developer, and the District is simply acting as a

facilitator. Indeed, the District conceded that its "directors, all employees of the developer, operated under a conflict of interest in pursuing condemnation of Parcel C." *Carousel*, 2017 WL 5897715, ¶ 42. If ever there were a situation meriting a "presumption of invalidity," *Kelo*, 545 U.S. at 493, surely this is it. The Court of Appeals correctly concluded that "[u]nder these circumstance," "careful[] scrutin[y]" was warranted. *Carousel*, 2017 WL 5897715, ¶ 42.

3. The Court of Appeals correctly recognized that the proposed condemnation was pretextual.

In the proceedings below, the Developer did present evidence that parts of Parcel C would ultimately be dedicated to public uses such as a roadway, and the trial court credited that evidence. But both the Developer and the trial court erred in treating that evidence as sufficient to answer the constitutional public use question. As the cases above demonstrate, a taking is not *per se* constitutional just because the property will be ultimately dedicated to a traditional public use. As explained above, if the evidence shows that the essential purpose of a taking is to benefit a private party, then the taking is unconstitutional.

The Court of Appeals correctly drew the only conclusion that the record would support: The essential and immediate purpose of the District's condemnation of Parcel C was to satisfy the terms of the Developer's agreement with the Town of Parker. *Id.* ¶ 38; 47. Without Parcel C, the Town would not approve the development. Because the Fifth Amendment does not permit private property to be taken for purposes of satisfying a contractual agreement, the condemnation was properly invalidated.

If the rule were otherwise, then it would be a simple matter to bootstrap the power of eminent domain onto almost any contract. Unsurprisingly, this argument has been rejected. In *Denver West Metropolitan District v. Geudner*, a metropolitan district was functioning as an alter ego for a private developer—just as in the present case. 786 P.2d 434, 435 (Colo. App. 1989). The district in *Geudner* attempted to condemn private property so that it could relocate a drainage ditch. There was no question that by reducing flooding, a drainage ditch was a classic public use. But the evidence showed that the *reason* that the district wanted to relocate the ditch

was that the private developer—whose owners controlled the district—had entered an agreement to sell the land where the ditch was currently located, provided that the ditch be moved. The Court of Appeals had no trouble concluding that the power of eminent domain could not be invoked for the purpose of satisfying a contractual requirement, regardless of the specific use to which the property would ultimately be dedicated. *Id.* at 436-37; *see also Cty. of Hawaii v. C & J Coupe Family Ltd. P'ship*, 242 P.3d 1136, 1150-51 (Haw. 2010) (recognizing that a taking for a public road would be illegitimate if its true purpose were simply to comply with the conditions of a development agreement).

Tellingly, Carousel did not so much as cite *Geudner* in its brief, notwithstanding that it was one of the key precedents on which the Court of Appeals relied. Nor has Carousel disputed the Court of Appeals' key holding—that private property may not be taken "to facilitate a private party's compliance with a contract." *Carousel*, 2017 WL 5897715, ¶ 47. Instead, Carousel attacks a straw man by claiming that the Court of Appeals erroneously held "that a development [must]

be fully approved, prior to a metropolitan district's use of its power of eminent domain." Br. at 29. This is simply not what the opinion below says. The Court of Appeals "acknowledge[d] that a condemning entity is not required to obtain permits and approvals as a condition precedent to moving forward with a condemnation." *Carousel*, 2017 WL 5897715, ¶ 36. The Court merely held that "the point in the development process at which the condemnation occurs is relevant to the issue of public purpose." *Id.* That holding is clearly correct. As the cases above demonstrate, timing is often crucial evidence in determining whether a proposed taking is pretextual.[5] And courts appropriately look with extreme skepticism on proposed public uses that conveniently materialize after the condemning authority already had a reason to want to seize the property.

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[5] *See City of Lafayette v. Town of Erie Urban Renewal Auth.*, 2018 WL 2976324, ¶ 23 (Colo. Ct. App. Div. VI, June 14, 2018) ("Lafayette filed its action to condemn the property only after Erie's development plans began to take shape."); *Pheasant Ridge Assocs. Ltd. P'ship v. Town of Burlington*, 399 Mass. 771, 778, 506 N.E.2d 1152, 1157 (1987) ("The matter of taking the subject site came forward only when the plaintiffs' proposal became known."); *Earth Mgmt., Inc. v. Heard Cty.*, 248 Ga. 442, 447, 283 S.E.2d 455, 460 (1981) ("No other land was ever considered for the public park and no on-site surveying, planning or inspection was done prior to its condemnation.")

In the present case, there is no evidence that either the Developer or the District had previously determined that Parcel C was necessary for this project. It was only *after* the Town insisted that Parcel C be included in the development, *after* the Developer's first offer to purchase Parcel C was rejected, that the Developer created the District, staffed it with its own employees and agents, and initiated condemnation proceedings. Notably, the record does not even indicate that the Town had envisioned a specific public use for Parcel C. The Town only insisted on the inclusion of Parcel C in the development in order to satisfy its own density requirements. *Carousel*, 2017 WL 5897715, at ¶ 15. Under these circumstances, it was clear that the asserted "public uses" for Parcel C were simply a pretext for satisfying the agreement with the Town.

Conclusion:

The Court of Appeals should be affirmed.

Dated this 5th day of October, 2018.

Respectfully submitted,

INSTITUTE FOR JUSTICE

This document has been e-filed.

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**Pro Hac Vice* Application Pending

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Certificate of Service

I hereby certify that on October 5th, 2018, a true and correct copy of the foregoing, proposed Brief of *Amicus Curiae* Institute for Justice In Support of Respondent, attached to the Motion for Leave to File *Amicus Curiae* Brief of the Institute for Justice In Support of Respondent, was filed and served on the following via the Colorado e-filing system as follows:

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