Colorado Supreme Court Hears Oral Arguments in Case That Could Pose Threat to Metropolitan Districts

On September 20, 2017, the Colorado Supreme Court heard oral arguments in *UMB Bank v. Landmark Towers Association*, 2016SC455. The case was brought by the homeowner's association of a condominium development regarding a TABOR election that took place several years ago. The purpose of the election was to form a metropolitan district that could issue bonds to finance new development and infrastructure in the area. The legal questions before the court concern when the results of a TABOR election are considered final and therefore immune from challenge, as well as the validity of using option contracts as a legal method of qualifying electors for an election to establish a metropolitan district.

During oral argument, the petitioner, UMB Bank, argued that the HOA's challenge is untimely because it is barred by the statutory time limit for challenging a TABOR election. UMB Bank contended that allowing a TABOR election challenge years after a district has been formed, bonds have been issued, and property taxes have been levied would create uncertainty that would negatively impact the Colorado bond market and pose a significant threat to the thousands of metropolitan districts across Colorado. UMB Bank further argued that the district organizers properly qualified themselves as electors by entering into option contracts to purchase taxable property within the district before the election. UMB Bank pointed out that this practice has been condoned by the legislature, complies with statutory requirements, and is commonly used by developers when no eligible electors yet live in an area that is sought to be established as a district.

The respondent HOA, Landmark Towers Association, took the narrower position that because of the unique circumstances presented by this case, the court could rule in the HOA's favor without threatening the validity of existing metropolitan districts. Specifically, the HOA argued that unlike other districts that are formed before any property owners or infrastructure exists, the district in this case was formed after construction began and most of the condominium units were under contract. These facts, the HOA contended, demonstrate that the district organizers in this case intentionally failed to provide the condominium owners with notice of the election, thus denying them their statutory and constitutional right to participate in the election and rendering the HOA's claims substantive and not subject to statutory time limits. Landmark further argued that the existence of eligible electors in the district precluded the district organizers from qualifying themselves as electors and that, even if there were no eligible electors living in the district, the district organizers' understanding that none of them would actually pay property taxes rendered their option agreements sham contracts, disqualifying the organizers as electors for the district election.

Last April, the Colorado Court of Appeals ruled in favor of the HOA, issuing a broad opinion that held, in part, that the statutory time limit did not bar the HOA's claims because the facts of the case met the standard for equitable tolling. The Court of Appeals further held that the district organizers' contracts were sham agreements with no legal consequence, while the owners' purchase contracts qualified them as eligible electors entitled to receive notice of the TABOR election, which they did not receive. In response to the Court of Appeals' decision, the General Assembly passed SB 16-211, which validated district elections held on or before May 3, 2016 (the date of the Court of Appeals' opinion), and which prevents a legal challenge to any such election on grounds that the electors were not properly qualified. The bill also ratified actions taken by a district board, where the board's directors were

qualified by virtue of having option contracts to purchase real property within the district. However, questions remain regarding the best and most legally defensible method to qualify electors and directors in forming new districts when no eligible electors are present in the district. The Colorado Supreme Court's decision could clarify these issues, and we anticipate a ruling sometime during the court's current term, which ends in June 2018.

Please contact **Carolynne White**, shareholder and **Real Estate Department** co-chair, or **Sarah Clark**, senior policy advisor and counsel in the firm's **Government Relations Department**, to get an expanded analysis of this pending court case in relation to a specific project or matter.

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