

December 13, 2017

Landmark Colorado Supreme Court Decision Provides Clarity for Metropolitan Districts

On Monday, the Colorado Supreme Court issued its opinion and ruling in *UMB Bank v. Landmark Towers Association*, 2016SC455, holding that a challenge to the results of a TABOR election brought by a homeowner's association years after the election took place is subject to, and time barred by, section 1-11-213(4), C.R.S. (2016), which requires an election contest to be filed with a district court no later than 10 days following certification of the election's results. The case was brought by the homeowner's association of a condominium development challenging the results of a TABOR election that took place several years ago. The purpose of the election was to form a new metropolitan district that could issue bonds, secured by taxes levied on all owners within the district, to finance new development and infrastructure in the area.

Before the court, the HOA argued that although its challenge was brought more than three years after the TABOR election, its claim falls under two exceptions to the statutory deadline and is not time barred. First, the HOA asserted that the statute of limitations was equitably tolled because the condominium owners first learned of the district's existence when they received unexpectedly high property tax bills years after the TABOR election. Second, the HOA argued that its claim is not subject to the time bar because it concerns the substance of the ballot issues that were presented in the election and not the procedural aspects of the election itself. 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, who held sham option contracts that did not qualify them as eligible electors, 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.

However, the court rejected both of the HOA's arguments, holding that the HOA's challenge is subject to the 10-day time limit and therefore time barred. First, the court held that equitable tolling is inapplicable to the 10-day time limit because section 1-11-213(4) is a non-claim statute, as opposed to a statute of limitations. Equitable defenses, such as tolling, are inapplicable to claims under non-claim statutes because the existence and availability of such claims is conditioned on whether the claim has been asserted within the specified period of time, regardless of whether equity or the interests of justice would dictate a different result. The court reasoned that section 1-11-213(4), which states that courts are without jurisdiction over any election contest filed after the 10-day challenge period, evidences the legislature's intent to create a non-claim statute and renders equitable tolling inapplicable.

Second, the court held that the HOA's claim was not a challenge to the substance of the ballot issue but rather a challenge to the means by which the TABOR election results were obtained. The court characterized the HOA's claim as arguing that the election was invalid because ineligible voters participated while eligible voters did not receive notice or an opportunity to participate. Considering this, the HOA's claim fell under section 1-11-213(7), which provides for challenges to receiving illegal votes and rejecting legal votes. Challenges under section 1-11-213(7) are subject to the 10-day time limit, suggesting that such claims concern the means by which election results were obtained, not the legality or constitutionality of a ballot issue's substance. The court's decision reverses the Colorado Court of Appeals ruling in favor of the HOA and its partial holding 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 broad decision by the Court of Appeals further held that the district organizers' contracts were sham agreements with no legal consequence and did not impose an actual obligation to pay property taxes, while the owners' purchase contracts qualified them as eligible electors entitled to receive notice of the TABOR election. 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 for then-existing districts on grounds that the electors were not properly qualified.

December 13, 2017

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.

By clarifying when the results of a TABOR election are considered final and immune from challenge, the court's decision protects the Colorado bond market and the thousands of metropolitan districts across Colorado from the uncertainty and threat posed by election contests brought years after districts were formed, bonds were issued, and property taxes were levied. However, the court did not address whether district organizers may properly qualify themselves as eligible electors by entering into option contracts to purchase taxable property within a district before a TABOR election. This practice, which the legislature condoned through its passage of SB 16-211 as to districts created on or before May 3, 2016, is commonly used by developers when no eligible electors yet live in an area that is sought to be established as a district. Therefore, although the court provided clarity as to when a challenge to a district election can be brought, it left unanswered questions 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.

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

Carolynne C. White

Shareholder
cwhite@bhfs.com
303.223.1197

Sarah M. Clark

Senior Policy Advisor and Counsel
sclark@bhfs.com
303.223.1139

Kate B. Stevenson

Associate
kstevenson@bhfs.com
303.223.1280

This document is intended to provide you with general information regarding the legislative and regulatory issues summarized herein. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorneys listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.