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COLORADO COURT OF APPEALS 2 East 14th Avenue, Suite 300 Denver, Colorado 80203	FILED IN THE COURT of APPEALS STATE OF COLORADO NOV 19 2008 Clerk, Court of Appeals ▲ COURT USE ONLY ▲
Arapahoe County District Court The Honorable J. Mark Hannen Case No. 03CV0762	
Appellants: THE CITY COUNCIL OF THE CITY OF CHERRY HILLS VILLAGE, COLORADO; and THE CITY OF CHERRY HILLS VILLAGE, COLORADO v. **Appellees:** SOUTH SUBURBAN PARK AND RECREATION DISTRICT, THE BOARD OF DIRECTORS OF THE SOUTH SUBURBAN PARK AND RECREATION DISTRICT, and ALL TAXPAYING ELECTORS OF THE TERRITORY SOUGHT TO BE EXCLUDED, AS A CLASS	No. 08CA1232
Andrew M. Low, No. 11,393 Terry R. Miller, No. 39,007 DAVIS GRAHAM & STUBBS LLP 1550 Seventeenth Street, Suite 500 Denver, CO 80202 Tel: (303) 892-9400; fax: (303) 893-1379 E-mail: andrew.low@dgslaw.com Kenneth S. Fellman, No. 11,233 KISSINGER & FELLMAN PC 3773 Cherry Creek North Drive, Suite 900 Denver, CO 80209-3819 Tel: (303) 320-6100; fax: (303) 320-6613 E-mail: kfellman@kandf.com	

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ISSUES PRESENTED FOR REVIEW

Background: This case arises from a city's withdrawal from the South Suburban Park and Recreation District (the "District"). The governing statute provides that a court may condition withdrawal on provisions that it finds to be "fair and equitable." The trial court concluded that the statute required the city to pay the District the $9.6 million fair market value ("FMV") of the District's parks that were located in the city. The city appealed, and this Court vacated and remanded. The trial court again ordered the city to pay the District the $9.6 million FMV.

Issues:

1. Did the trial court fail to obey this Court's mandate directing it to "delete its finding that the 'fair and equitable' criterion alone requires [the city] to reimburse the District for the FMV of the facilities," where the court's order on remand contained the essentially identical finding that, "in order for the exclusion to be fair and equitable, the City should pay to the District the FMV" of the facilities?

2. Did the trial court fail to obey this Court's mandate directing it to "further explain its rationale if it again awards the District FMV," where the court's further explanation was a single sentence suggesting that the District could

use the FMV payment to purchase replacement parks, but the District did not need and never said it wanted to purchase replacement parks?

3. Must the trial court's order again be vacated where the court stated that its order to pay FMV was intended to compensate the District for lost future tax revenue, where the governing statute expressly provides that after withdrawing from a special district, a city "shall not be subject to any property tax levied by the [district] for the operating costs of the special district"?

4. Should this Court hold that the city is to make no payment to the District where:

(a) after two opportunities, neither the trial court nor the District has articulated any legally sufficient reason for requiring the city to pay FMV; and

(b) the city's withdrawal has eased the financial burden on the District because the parks remain open to all residents of the District, just as before, but now the city pays 100% of the cost of maintaining the parks?

STATEMENT OF THE CASE

Course of Proceedings.

For many years, the City of Cherry Hills Village ("Cherry Hills") was included within the District. (*See* 1:243 ¶7.) In 2003, Cherry Hills filed a petition in the Arapahoe County District Court pursuant to section 32-1-501, C.R.S. (2008), *et seq.* for exclusion from the District. (1:4-7.) Following a trial, the court granted the petition but ordered Cherry Hills to pay the District a "transfer amount" of $9,660,838 (1:250 ¶3; 2:264), which the court found to be the FMV of four parks located within Cherry Hills but owned or controlled by the District. (*See* 1:244-47 ¶¶22-23.) The transfer amount was payable over 15 years, with interest added. (2:265-66 ¶6.)

Cherry Hills appealed the portion of the court's order directing it to pay the transfer amount (2:269-72), and the District cross-appealed the portion of the order granting the petition for exclusion. (2:290-94.) In its decision, this Court rejected the District's cross-appeal and accordingly affirmed the trial court's grant of the petition for exclusion. *City Council v. S. Suburban Park & Rec. Dist.*, 160 P.3d 376, 382-83 (Colo. App. 2007).

In Cherry Hills' appeal, however, this Court vacated the portion of the trial court's order directing Cherry Hills to pay the $9.6 million transfer amount. *Id.* at

381-82. This Court remanded for the trial court to reconsider its conclusion and, if it again ordered Cherry Hills to pay FMV, to "further explain its rationale." *Id.* On remand, the trial court received briefs from both sides and entered its "order on remand," which again ordered Cherry Hills to pay the $9.6 million FMV. (3:739 ¶22, 746 ¶3.) This appeal followed.

Statement of Facts.

A. The Petition for Exclusion.

Cherry Hills became part of the District when it was first organized in 1959. (1:63, 243 ¶7.) From 1976 to 2004, residents of Cherry Hills paid property taxes to the District totaling about $20 million. (4:155[2-10]; Ex. 43.)

By the late 1990s, the residents of Cherry Hills had become increasingly dissatisfied with the District's services. (1:5-6 ¶¶10-12.) Cherry Hills residents wanted better service by the District for parks, trails and open space. (*Id.*; 1:77-78.) The District's priorities, however, emphasized construction of brick and mortar facilities like ice arenas and recreation centers, none of which were located in Cherry Hills. (*See* 1:5-6 ¶¶9,11.) In addition, Cherry Hills residents paid a disproportionate share of the property taxes levied by the District. Cherry Hills residents made up only 4.2 percent of the District's population, but contributed almost 13 percent of the District's tax revenues. (1:243 ¶¶9-10.)

As a result, in 2002 Cherry Hills residents voted to withdraw from the District and to assume for themselves the responsibility for maintaining their parks and providing recreational services. (1:69, 78 7th¶.) Pursuant to section 32-1-502, C.R.S. (2008), Cherry Hills filed a petition and plan in the Arapahoe County District Court for exclusion from the District. (1:4, 58.) Among other things, the plan proposed that Cherry Hills take over maintenance of parks and other facilities located within city limits that were either owned or managed by the District. (1:68-69 §§C.4, D.)

B. The Facilities Located Within Cherry Hills.

The District's facilities located within Cherry Hills consisted principally of four parks (Blackmer Common, Dahlia Hollow, John Meade, and Three Pond) totaling 33.37 acres. (1:67.) Blackmer Common consists of open space adjoining the Highline Canal (4:98[16-24]), while the other three parks are modestly improved with amenities like paths, benches and play structures. (Ex. F at 4, 7-8.) The District owned three of the parks outright, while Cherry Hills and the District jointly owned Three Pond Park. (1:68 §C 1st¶, 245 ¶23(d).) The District also managed a number of other improvements within Cherry Hills, including bridle trails, fences, and footbridges. (1:67 §B 2nd¶, 246-47 ¶¶23(h)-(j).) All these improvements, collectively, are referred to as the "Parks."

None of the Parks is fenced or access-controlled. (1:70 §E.) Any member of the general public — whether a resident of the District or not — can use the Parks at will. (*Id.*)

C. The Parties' Proposed Plans for Exclusion of Cherry Hills.

Cherry Hills' proposed plan called for the Parks to be transferred to Cherry Hills, which thereafter would assume all responsibility for maintaining them. (1:67 §B, 69 §D.) Residents of the District would continue to have the same access to the Parks that they had enjoyed before. (1:70 §E.) The only difference would be that the District no longer would be required to pay to maintain the Parks. (1:68-69 §§C.4, D.) Because this transfer would impose no cost on the District — and actually would decrease the District's operating expenses — Cherry Hills proposed that it make no payment to the District to compensate for the transfer of the Parks. (1:68-69 §C.) As required by statute, Cherry Hills proposed to continue paying its share of the District's indebtedness existing as of the date of exclusion. (1:70 §G.)

The District opposed Cherry Hills' petition for exclusion. (1:15.) It argued that Cherry Hills would be unable to provide its residents with the same services offered by the District. (1:17-18 §B.) The District also argued that the exclusion

statute required Cherry Hills to compensate the District for the FMV of the Parks, which the court later found to be $9.6 million. (1:20 §D 3rd¶, 3:739 ¶22.)

Because the Parks would remain available to District residents, the District did not propose purchasing replacement parks. (*See* 1:20-22 §§D, E.) Other than the general loss of future tax revenues, which occurs whenever a municipality withdraws from a special district, the District did not identify any specific expense that it would have to pay due to the exclusion of Cherry Hills. (*Id.*)

D. The Trial Court's First Order, and the First Appeal.

The court entered Findings of Fact and Conclusions of Law (the "First Order") granting the petition for exclusion (1:250 ¶1), but the court adopted the District's proposal that Cherry Hills be ordered to pay the FMV of the Parks. (1:244 ¶22.) The First Order did not explain why Cherry Hills should pay that amount. The court found, without further explanation: "[I]n order for the exclusion of the subject territory to be fair and equitable, the City must pay to the District the fair market value of the facilities to be transferred to the City." (*Id.*)

On appeal, this Court concluded that this finding "suggests that the trial court treated the 'fair and equitable' criterion as requiring reimbursement for the FMV of the facilities." *City Council*, 160 P.3d at 381. The division concluded that this finding was error because the statute "does not require a trial court to

order a city to reimburse a special district for the FMV of the transferred facilities." *Id.* The division ordered the trial court to "delete its finding that the 'fair and equitable' criterion alone requires Cherry Hills to reimburse the District for the FMV of the facilities." *Id.* at 383.

In light of its holding, this Court concluded that "discerning exactly why the court made this award [of FMV] would be problematic." *Id.* at 381. Accordingly, this Court directed "that remand is necessary to allow the court to reconsider this award and further explain its rationale if it again awards the District FMV." *Id.* at 381-82.

E. Proceedings on Remand.

The trial court received briefs from both sides. (3:580, 622, 641, 667.) Cherry Hills argued that its exclusion had imposed no additional expenses on the District and had, in fact, saved the District money while allowing the District to continue offering its residents access to the Parks. (3:626-28.) Cherry Hills further argued that the statute barred a special district from imposing property taxes on a municipality after it is excluded from the district (3:628), and that it was impermissible for the court to evade the statutory bar by awarding any amount as a surrogate for lost future tax revenues. (3:672-74.)

The District argued that the court should, once again, award the $9.6 million FMV of the Parks. (3:588-89.) The District sharply criticized this Court's decision, arguing that "the Court of Appeals misinterpreted the Trial Court Order." (Page following 3:580.) Despite this Court's direction that the trial court delete its finding that the statute's "fair and equitable" criterion required Cherry Hills to reimburse the District for the FMV of the transferred facilities, the District argued:

> This Court will seek in vain to find anything within the Trial Court Order that should be deleted pursuant to the direction of the Court of Appeals.

(3:581.) The District later reiterated that "[t]here are no provisions of the Trial Court Order that can be deleted pursuant to the Court of Appeals' direction, because no such provisions exist." (3:588.)

The District was particularly critical of this Court's conclusion, *City Council*, 160 P.3d at 381, that the First Order was internally inconsistent. (3:582-83.) The District argued on remand that "[t]he Court of Appeals' confusion is further evidenced by its belief that the Trial Court Order lacked consistency." (3:582.) The District accused this Court of indulging in inconsistent reasoning itself, asserting that "the Court of Appeals ... departed from its own rationale,

finding inconsistency where none exists and failing to afford [the trial court] the deference to which it is entitled." (3:583.)

F. The Trial Court's Second Order.

Accepting the District's arguments, the court entered its Order on Remand (the "Second Order"), which once again awarded the $9.6 million FMV of the Parks. (3:742 ¶33, 746 ¶3.) The court refused to comply with this Court's direction that the trial court delete its finding that the statutory "fair and equitable" requirement alone required Cherry Hills to pay FMV. Instead, after reciting some of the factors that the statute requires the court to consider, the trial court found as a fact:

> With these criteria in mind, in order *for the exclusion to be fair and equitable, the City should pay to the District the FMV [of] the transferred facilities*. These monies can be used by the District to purchase replacement facilities, and to the extent such monies are not expended for that purpose, they can be utilized to help offset the increased fees and mitigate the reduction [of] services that will be the probable result of the exclusion.

(3:742 ¶33; emphasis added.)

The only other relevant findings in the order reflect that the court viewed its award of FMV as a way to offset the District's loss of future tax revenues. The court found (1) that exclusion of Cherry Hills had cost the District "almost 13 percent of its tax base" (3:741-42 ¶31), resulting in a tax loss of "over one million

dollars per year, or 10.4 million dollars through the year 2014" (3:741 ¶27), and (2) that this "loss of revenue from the exclusion will result in a reduction of services, an increase in fees, or both." (3:741 ¶28.)

SUMMARY OF ARGUMENT

This Court's mandate was simple and clear. The trial court was to delete its finding that the statute's "fair and equitable" standard alone required Cherry Hills to pay FMV to the District. If the court again ordered Cherry Hills to pay FMV, then the trial court was to explain its rationale further. However, the trial court did neither:

First, the court closely paraphrased its original finding that, due to the "fair and equitable" standard in the statute, Cherry Hills was to pay FMV to the District. The court's only substantive alteration to this sentence was to change "must pay" to "should pay," a cosmetic change that does not comply with this Court's directions.

Second, the trial court provided no meaningful explanation of its rationale. The court added a single sentence suggesting that the District could use the FMV payment to purchase replacement parks. But the District does not need and does not intend to purchase replacement parks,

because the Parks remain just as accessible to residents of the District as before exclusion.

The trial court's only other rationale for again ordering the payment of FMV was to compensate for the District's loss of property tax revenues from residents of Cherry Hills. But this rationale is barred by the governing statute, which provides that a special district cannot levy property taxes on residents of an excluded city for the district's operating costs. An order that the city make payments in lieu of the forbidden taxes is impermissible because it would evade the purpose of the statute.

While the Second Order must be reversed or vacated insofar as it directs Cherry Hills to pay FMV, this Court should not remand, yet again, for further consideration of this issue. Based on the evidentiary facts as found by the trial court, this Court is in just as good a position as the trial court to apply the criteria listed in the statute. None of those criteria suggests that Cherry Hills should pay the District for the FMV of the Parks. Accordingly, this Court should direct the trial court to enter an amended final order granting the petition for exclusion, but deleting the requirement to pay FMV.

ARGUMENT

I. THE TRIAL COURT'S SECOND ORDER MUST BE VACATED BECAUSE IT FAILED TO COMPLY WITH THIS COURT'S MANDATE.

The Standard of Review Is De Novo. Evaluation of whether the trial court has complied with this Court's mandate on remand involves only the analysis of this Court's first decision and the trial court's Second Order. Interpretation of written documents is a question of law, which this Court reviews de novo. *See Goettman v. N. Fork Valley Rest.*, 176 P.3d 60, 68 (Colo. 2007) ("We review the documentary evidence before us de novo."). In those cases where Colorado appellate courts have considered whether a trial court complied with the law of the case as established by an earlier appellate ruling, it is apparent that the courts applied de novo review. *See, e.g., Super Valu Stores, Inc. v. Dist. Ct.*, 906 P.2d 72, 78-79 (Colo. 1995); *Rodgers v. Colo. Dep't of Human Servs.*, 39 P.3d 1232, 1235-36 (Colo. App. 2001).

Analysis. When an appellate court remands with directions, those directions become the mandate and must be strictly obeyed:

> ... [W]hen a given cause has received the consideration of this court, its merits determined, and then remanded with specific directions, *the court to which such mandate is directed has no power to do anything but to obey the mandate*; otherwise, litigation would never be ended, and the supreme tribunal of the state would be shorn of that authority over inferior tribunals with which it is invested by our fundamental law.

Galbreath v. Wallrich, 109 P. 417, 418 (Colo. 1910) (emphasis added).

More recently, Colorado appellate courts have analyzed these issues in terms of law of the case, but the result is the same. "The pronouncement of an appellate court on an issue in a case presented to it becomes the law of the case." *People v. Roybal*, 672 P.2d 1003, 1005 (Colo. 1983). "The law of the case as established by an appellate court *must be followed on remand* in subsequent proceedings." *Rodgers*, 39 P.3d at 1235 (emphasis added); *see also Super Valu*, 906 P.2d at 78-79 ("Of course, proposed amendments to pleadings on remand cannot contravene the law of the case as established by the appellate court."); *Huffman v. Saul Holdings Ltd. P'shp,* 262 F.3d 1128, 1132 (10th Cir. 2001) ("An important corollary to the law of the case doctrine, known as the 'mandate rule,' provides that a district court must comply strictly with the mandate rendered by the reviewing court.") (citation omitted).

This Court's holding and its mandate on remand were simple and clear. The panel concluded that the trial court erroneously believed that the statute

required a withdrawing municipality to pay FMV to the special district. *City Council*, 160 P.3d at 381. This Court held that the statute contains no such requirement (*id.*) and issued two directions for the trial court to follow on remand. *First*, "the trial court shall delete its finding that the 'fair and equitable' criterion alone requires Cherry Hills to reimburse the District for the FMV of the facilities, and may revise its other findings and conclusions consistently with this opinion." *Id.* at 383. *Second*, "we conclude that remand is necessary to allow the court to reconsider this award [of FMV] and further explain its rationale if it again awards the District FMV." *Id.* at 381-82.

Pursuant to these instructions, the trial court was to reconsider whether, in light of this Court's interpretation of the statute, Cherry Hills should be required to pay FMV at all. If the trial court still believed that it should, then the court was to explain why, without simply relying on the statutory phrase "fair and equitable." At the District's urging, however, the trial court complied with neither prong of the mandate.

A. The Trial Court Failed to Delete Its Finding that the "Fair and Equitable" Criterion Alone Required Payment of FMV.

In determining what provisions would be fair and equitable, the statute directs the court to consider various considerations set forth in section 32-1-502(2)(d), as well as eight criteria set forth in section 502(2)(c). The Second

Order lists three of those eight criteria, and then finds: "[w]ith these criteria in mind, in order for the exclusion to be fair and equitable, the City should pay to the District the FMV [of] the transferred facilities." (3:762 ¶33.) But this statement is just what the trial court was directed to delete. Perhaps heeding the District's insistence that "no provisions of the Trial Court Order ... can be deleted" (3:558), the Second Order simply reasserts its original finding, with the word "must" changed to "should":

First Order	Second Order
"In order for the exclusion of the subject territory to be fair and equitable, the City *must pay* to the District the fair market value of the facilities to be transferred to the City." (1:244 ¶22; emphasis added.)	"With these criteria in mind, in order for the exclusion to be fair and equitable, the City *should pay* to the District the FMV [of] the transferred facilities." (3:762 ¶33; emphasis added.)

The trial court's cosmetic changes to this sentence are not responsive to this Court's mandate. The trial court's original error was that the "fair and equitable" criterion, without more, led the court to order payment of FMV. Regardless of the small change in verbiage, the court committed exactly the same error in the Second Order.

B. The Trial Court Failed to Set Forth a Valid Rationale for Ordering Cherry Hills to Pay FMV.

This Court anticipated that on remand, the trial court might again order Cherry Hills to pay FMV. *See* 160 P.3d at 381-82. If it did so, this Court left no doubt that it would be insufficient simply to state in conclusory terms that the "fair and equitable" criterion required payment of FMV. Instead, the trial court was directed to set forth its "rationale" for requiring Cherry Hills to pay FMV. Inherent in that direction, of course, is that the trial court's rationale must comport with the statute and must be a rational, sufficient reason for ordering payment of FMV. However, the Second Order contains no such rationale.

In the remainder of the paragraph ordering Cherry Hills to pay FMV, the court suggested two justifications for its order:

> These monies can be used by the District to **[1]** purchase replacement facilities, and to the extent such monies are not expended for that purpose, they can be utilized to **[2]** help offset the increased fees and mitigate the reduction [of] services that will be the probable result of the exclusion.

(3:762 ¶33; numbering added.)

Neither of these two reasons is even arguably valid. *First*, the Parks continue to be available to the residents of the District after exclusion, so the District has no need of replacement parks. As a result, the District never claimed

that it needed money from Cherry Hills to purchase replacement parks and never promised that if it received money from Cherry Hills, it would use the money to buy replacement parks.

Second, "to the extent such monies are not expended for that purpose" — suggesting that the trial court understood that the District had no intention of purchasing replacement parks — the court proposed that payment of FMV would offset increased fees and mitigate an anticipated reduction of services. But the court had explained earlier in the Second Order that any "reduction of services" or "increase in fees" would be the result of "loss of revenue from the exclusion." (3:761 ¶28.) As shown in Point II below, and as Cherry Hills had fully presented to the trial court (3:672-78), the statute forbids a special district to continue assessing property taxes for its operating expenses against the residents of an excluded city. Because such taxes are forbidden, a court is barred from circumventing the statute by requiring a payment that is explicitly intended to substitute for the lost tax revenue. After exclusion, a city must pay for the services formerly provided by the district, and requiring it to continue tax-like payments to the district would amount to double taxation.

Thus, neither of the two reasons suggested by the trial court could be legally valid reasons for ordering Cherry Hills to pay FMV to the District. The

Second Order contains no other rationale or explanation. Accordingly, the court failed to comply with this Court's mandate that, if the trial court again ordered Cherry Hills to pay FMV, the court "further explain its rationale" for doing so. 160 P.3d at 382.

II. THE TRIAL COURT'S SECOND ORDER MUST BE VACATED BECAUSE THE COURT EXPLICITLY INTENDED ITS AWARD OF FMV AS A MEANS OF EVADING THE STATUTORY BAN ON CONTINUED TAXATION OF AN EXCLUDED CITY.

The Standard of Review Is De Novo. In the Second Order the trial court misinterpreted and failed to comply with sections 32-1-502 and 503, C.R.S. (2008). A trial court's interpretation of a statute is a question of law that is reviewed de novo. *Ryals v. St. Mary-Corwin Reg'l Med. Ctr.*, 10 P.3d 654, 659 (Colo. 2000).

Analysis. The trial court candidly admitted in the Second Order that one of the court's two reasons for awarding FMV in the First Order was the District's loss of tax revenue:

> 31. In its previous Order, the Court required that the City pay to the District the FMV of the facilities to be conveyed to the City. This requirement was based on two considerations.... Second, *as a result of the exclusion order, the District has lost almost 13 percent of its tax base*; its long- and short-term operational plans have been disrupted, and it is probable that the District will be required to reduce services and increase fees.

(3:761-62 ¶31; emphasis added.)

The Second Order reiterates the court's concern about the District's impending loss of tax revenue:

> 27. A reasonable estimate of the financial impact of the exclusion on the District is over one million dollars per year, or 10.4 million dollars through the year 2014.[1]
>
> 28. The loss of revenue from the exclusion will result in a reduction of services, an increase in fees, or both.
>
> 29. Further, exclusion will impair the District's ability to maintain its fee-based subsidized programs and facilities.

(3:761 ¶¶27-29; record citations omitted.) The court then stated explicitly that the monies it awarded "can be utilized to help offset the increased fees and mitigate the reduction [of] services that will be the probable result of the exclusion." (3:762 ¶33.)

This rationale, however, is forbidden by statute. It is self-evident that when a municipality is excluded from a special district, the district loses the property tax revenues from the departing city. The exclusion statutes address this situation

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[1] The trial court could have made the apparent revenue loss as large or as small as it chose by selecting a different year. The District suggested the year 2014, based solely on its unsupported assertion that it would take about ten years to compensate for the loss of tax revenue. (*See* 1:21.)

directly, barring a special district from continuing to tax a city for operating expenses after the city is excluded from the district:

> Territory excluded from a special district pursuant to the provisions of this part 5 *shall not be subject to any property tax* levied by the board [of the special district] for the operating costs of the special district.

§ 32-1-503(1) (emphasis added). The statute further provides that a withdrawing municipality's only continuing liability is to pay its share of the district's indebtedness existing at the time the municipality withdraws:

> For the purpose of retiring the special district's outstanding indebtedness and the interest thereon existing at the effective date of the exclusion order, the special district shall remain intact, and the excluded territory shall be obligated to the same extent as all other property within the special district *but only for* that proportion of such outstanding indebtedness and the interest thereon existing immediately prior to the effective date of the exclusion order.

Id. (emphasis added). Further, the withdrawing municipality is not liable at all for any new debt that the district incurs after the municipality is excluded:

> In no event shall excluded territory of a special district become obligated for the payment of any bonded indebtedness created after the date of the court's exclusion order.

Id. In sum, following exclusion from a special district, a municipality is not subject to taxation by the district, except to pay the municipality's share of pre-existing indebtedness.

As the legislature declared, the purpose of the provisions relating to exclusion (part 5 of the Special District Act) is "to facilitate the elimination of ... double taxation ...." § 32-1-102(3), C.R.S. (2008). Upon exclusion, the city assumes financial responsibility for providing services for its residents that formerly were provided by the district. The city's residents pay for those services through taxes levied by the city. If the district could continue to levy taxes on the excluded property, the city's residents would have to pay twice, in direct contradiction to the legislative purpose.

Because a withdrawing city cannot be compelled to continue paying property taxes to the district, it follows necessarily that a court cannot require the city to make annual payments to the district *in lieu of* continued property taxes. Section 32-1-502(2)(d) provides that in determining what provisions are "fair and equitable" in connection with an exclusion order, a court must consider a non-exclusive list of eight factors set forth in section 502(2)(c). Although the statutory ban on continued taxation (section 503(1)) shows that the General Assembly knew that a special district necessarily would lose revenue when a city withdraws,

the legislature *did not include loss of tax revenue as one of the eight factors* that a court is to consider. If the legislature had intended to allow a court to order payments to a special district to compensate for the inevitable loss of tax revenue, the legislature would have specified that the court should at least *consider* the district's loss of tax revenue. But the General Assembly omitted this consideration entirely. The conclusion is inescapable that the legislature did not intend to allow a court to order a withdrawing city to make years of payments to the district for the purpose of replacing lost tax revenue.

Any other interpretation would nullify the statute's ban on continued taxation. Allowing the trial court to order Cherry Hills to pay FMV, for the avowed purpose of offsetting the District's loss of future Cherry Hills tax revenues, would circumvent section 503(1) simply by changing the label of the payments from "taxes" to "compensation for fair market value." Such an interpretation would defeat the purpose of the statute and must be rejected. *See O'Donnell v. State Farm Mut. Auto. Ins. Co.*, 186 P.3d 46, 52 (Colo. 2008) (rejecting interpretation that would have the effect of "negating the legislature's intent in passing" the statute). Further, a statute must be interpreted so as "to effectuate the intent of the General Assembly." *Steedle v. Sereff*, 167 P.3d 135, 140 (Colo. 2007). Because the Second Order defeats the purpose of section

503(1) by taxing Cherry Hills residents for future District services, the order must be reversed or vacated.

III. THIS COURT SHOULD HOLD THAT CHERRY HILLS IS TO MAKE NO PAYMENT TO THE DISTRICT.

The Standard of Review Is De Novo. Application of the law to undisputed facts is a question of law and is reviewed de novo. *Hicks v. Londre*, 125 P.3d 452, 455 (Colo. 2005).

Analysis. The trial court has now had two opportunities to apply the statute correctly, including one opportunity with the guidance of this Court's prior decision. On remand, Cherry Hills presented a thorough discussion of section 503(1)'s prohibition of post-exclusion taxation for the District's operating expenses, and the resulting conclusion that Cherry Hills cannot be ordered to make payments for the purpose of replacing the lost tax revenue. (3:672-78.) Yet, the trial court once again ordered Cherry Hills to pay FMV and made no secret that its purpose in doing so was to offset the District's lost tax revenue. Significantly, the trial court did not discuss the effect of section 503(1) or even acknowledge Cherry Hills' argument based on that statute.

Under these circumstances, it would be futile to remand yet again. The only logical procedure is for this Court to apply the statute to the facts as found by the trial court. *See Romer v. Colo. Gen. Assembly*, 810 P.2d 215, 225 (Colo.

1991) ("we can apply the proper legal test to uncontroverted evidence in the record," and "we choose to settle that question rather than remand to the trial court") (citation omitted); *Bishop & Diocese of Colo. v. Mote*, 716 P.2d 85, 103 (Colo. 1986) ("Given this record, we can as easily apply the legal principles to the facts as could the trial court, and doing so will likely save further appeals ...."). As demonstrated below, nothing in the statute or the record indicates that Cherry Hills should make any payment to the District for the FMV of the Parks.

A. The District Has Identified No Added Expense That It Must Pay Due to the Exclusion of Cherry Hills.

Two of the criteria that the statute directs a court to consider are "the facilities to be transferred which are necessary to serve the territory proposed for exclusion" and "the adequacy of the facilities retained by the special district to serve the remaining territory of the special district." § 32-1-502(2)(c). These considerations indicate that the legislature was concerned about the possibility that, to maintain the same level of service, the district might have to replace important facilities located in the excluded territory. For example, if an ambulance district had only two ambulance dispatch facilities, and one of them was located within the city to be excluded and would no longer be available to the district, a new ambulance facility might need to be built within the district's

remaining territory. In such a case, it could well be appropriate for the court to consider ordering the withdrawing city to bear part of the cost of the new facility.

No such scenario applies here. The Parks' availability for use by residents of the District is exactly the same after the exclusion of Cherry Hills as it was before. As the trial court acknowledged, Cherry Hills has offered to stipulate to the entry of a permanent injunction requiring that the Parks be kept open to the public in perpetuity. (3:761 ¶30.) Accordingly, the District has no need to replace the Parks and therefore no need for money from Cherry Hills for that purpose.

Nor has the District been able to identify any other added expense that it would have to pay as a result of the exclusion of Cherry Hills. The District simply points to its desire for the Cherry Hills tax revenue, which, as shown above, is not a statutorily permitted basis for ordering payments by Cherry Hills. In any event, while the District will lose tax revenues from Cherry Hills, it no longer will be required to provide services to Cherry Hills residents — not just maintenance of the Parks, but also usage of District facilities like ice rinks and recreation centers. Such reduced demand for services necessarily must result in a cost saving for the District. To the extent that Cherry Hills residents desire to use

the District's facilities in the future, they will have to pay non-resident user fees, producing additional income for the District. (1:66 3rd full ¶; 3:758 ¶¶13-15.)

B. None of the Other Factors Listed in the Statute Suggests That Cherry Hills Should Make a Payment to the District.

The statute provides that, where the parties are unable to agree on a plan for exclusion, the court shall direct the parties to carry out the portion of their plans on which they agree and shall

> make such other provisions as the court finds fair and equitable, and shall make such allocation of facilities, impose such responsibilities for the discharge of indebtedness of the special district, and impose such other conditions and obligations on the special district and the municipality which the court finds necessary to permit the exclusion of territory from the special district and the transfer of facilities which are necessary to serve the territory excluded without impairing the quality of service nor imposing an additional burden or expense on the remaining territory of the special district.

§ 32-1-502(2)(d).

In deciding what conditions or obligations may be appropriate, the statute goes on to provide that the court is to consider "the criteria set forth in this paragraph (d) and paragraphs (b) and (c) of this subsection (2)." *Id.* Paragraph (b) provides only that the "service to be provided by the municipality will be the service provided by the special district" in the excluded territory. § 32-1-502(b).

Cherry Hills has met that requirement by continuing to maintain the Parks and to keep them open to residents of Cherry Hills (as well as residents of the District).

The only additional considerations are those set forth in paragraph (c): the two considerations discussed in Point III(A) immediately above, plus six more discussed in this point. *See* § 32-1-502(2)(c). None of these six considerations, either individually or collectively, indicates that Cherry Hills should make any payment to the District beyond its share of pre-exclusion debt.

1. The "amount of the special district's outstanding bonds."

This consideration is included in the statute because a withdrawing municipality is required to continue paying its share of the district's indebtedness existing on the date of exclusion. *See* § 32-1-503(1). The trial court has already ordered Cherry Hills to continue such payments (*see* 1:251 ¶11; 3:767 ¶11), and Cherry Hills does not disagree. Thus, this consideration is irrelevant to the issue of payment for FMV of the Parks.

2. The "discharge by the municipality ... of that portion of the special district's indebtedness incurred to serve the territory proposed for exclusion."

This consideration would be relevant if the District had incurred indebtedness for the particular purpose of constructing improvements within Cherry Hills. However, none of the District's brick-and-mortar improvements

were located within Cherry Hills, and the District never claimed that any of its indebtedness had been incurred for the purpose of purchasing any of the Parks. Accordingly, this consideration is irrelevant as well.

3. The "fair market value and source of special district facilities located within the territory proposed for exclusion."

The fair market value of the special district's facilities located within the withdrawing city would be relevant if the district needed to replace the lost facilities, as in the ambulance district example. Here, however, the District has not lost access to the Parks. As the trial court found, the Parks remain available to residents of the District just as before. (3:762 ¶32.) The only change is that the District no longer must pay to maintain the Parks. Accordingly, it makes no sense for the District to be compensated for their value.

The other side of the same coin is that Cherry Hills residents have paid the District more than $20 million in property taxes — money that the District has used to pay for a portion of the District's facilities outside of Cherry Hills. Appropriately, the District has not offered to compensate Cherry Hills for the portion of the District's facilities paid for by Cherry Hills taxpayers. It is equally appropriate that Cherry Hills not compensate the District for the FMV of the Parks.

As to the "source" of the facilities, it is undisputed that the District did not pay the full cost of acquiring the Parks. Federal funds were used in the purchase of John Meade Park and Dahlia Hollow Park. (7:100[22]-101[10].) A .63-acre portion of Dahlia Hollow Park resulted from a dedication by a developer. (9:7[1-15].) Even if it were appropriate to compensate the District for the value of the Parks, therefore, the District would not be entitled to the full FMV of all the Parks.

4. The "availability of the facilities transferred to the municipality for use, in whole or in part, in the remaining territory of the special district."

This consideration strongly supports Cherry Hills' position that it should not make any payment beyond its share of the District's pre-exclusion indebtedness. If residents of the special district were to be excluded from facilities located within the withdrawing city, the court would want to consider whether some condition or obligation should be imposed to offset that loss of facilities. No such loss has occurred here. All the facilities available to residents of the District before exclusion remain available after exclusion, and the District accordingly is not entitled to compensation.

5. The "effect which the transfer of the facilities and assumption of indebtedness will have upon the service provided by the special district in territory which is not part of the exclusion."

The exclusion of Cherry Hills will have a *positive* effect on the District's service in its remaining territory. First, the exclusion relieves the District of responsibility for maintaining the Parks, which is a cost saving. Second, Cherry Hills residents who use the District's fee-based facilities, like ice rinks and recreation centers, will have to pay higher fees applicable to non-residents — providing the District with additional income. While the District will lose Cherry Hills' property tax revenues, that effect is inherent in the exclusion of any territory and, as shown above, cannot be the basis of an order to make payments for the purpose of replacing the former tax revenues.

6. The "extent to which the exclusion reduces the services or facilities or increases the costs to users in the remaining territory of the special district."

This consideration does not support the District's request for compensation. The exclusion of Cherry Hills does not reduce service because the Parks remain available to residents of the District. Further, the exclusion decreases, not increases, the District's costs because Cherry Hills has assumed the cost of maintaining the Parks.

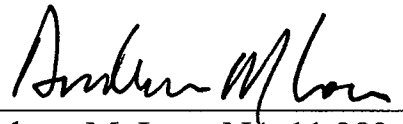
In sum, when applied to the facts as found by the trial court, none of the criteria listed in the statute supports a conclusion that Cherry Hills should pay compensation to the District. Accordingly, this Court should now hold that Cherry Hills need not pay the District for the FMV of the Parks.

CONCLUSION

The trial court's Second Order should be reversed insofar as it orders Cherry Hills to pay the District for the FMV of the Parks. This Court should direct the trial court to enter an amended final order in which the order to pay FMV is deleted.

Dated: November 19, 2008

DAVIS GRAHAM & STUBBS LLP



Andrew M. Low, No. 11,393
Terry R. Miller, No. 39,007

KISSINGER & FELLMAN PC
Kenneth S. Fellman, No. 11,233

CERTIFICATE OF SERVICE

The undersigned certifies that on November 19, 2008, a copy of the foregoing **OPENING BRIEF** was served by first-class mail, postage prepaid, addressed to:

Paul C. Rufien, Esq.
Paul C. Rufien, P.C.
3600 South Yosemite St., Suite 500
Denver, CO 80237

Judy Terranova