Certification of word count: 3,734

COLORADO SUPREME COURT 2 East 14th Avenue Denver, Colorado 80203	FILED IN THE SUPREME COURT JUL 13 2009 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
Colorado Court of Appeals Case No. 08CA1232 Opinion by Judge Casebolt Judges Roy and Connelly concur	
Arapahoe County District Court Judge J. Mark Hannen Case No. 03CV762	▲ COURT USE ONLY ▲
Petitioners: THE CITY COUNCIL OF THE CITY OF CHERRY HILLS VILLAGE, COLORADO; and THE CITY OF CHERRY HILLS VILLAGE, COLORADO, v. **Respondents**: 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,	Case No. 09SC592

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PETITION FOR CERTIORARI

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ISSUE PRESENTED FOR REVIEW

Whether a municipality that has been excluded from a special district may be ordered to compensate the district for loss of future property tax revenue, when section 32-1-503(1), C.R.S. (2008) provides that the property of such a municipality "shall not be subject to any property tax levied by the board" of the district.

DECISION OF THE COURT OF APPEALS

The decision of the court of appeals will be published and is available at 2009 WL 1477710. A copy of the slip opinion is attached.

JURISDICTION

The court of appeals issued its decision on May 28, 2009, and this petition was filed within 46 days thereafter. No petition for rehearing was filed.

STATEMENT OF THE CASE

This case presents an important unresolved issue of municipal law: whether a city has the right to withdraw from a special district without compensating the district for years of lost future property taxes. In its published opinion, the court of appeals held that cities have no such right and that a district court has the power to order the withdrawing city to pay the district more than $9.6 million to offset the district's loss of future property taxes over the decade following withdrawal.

The Special District Act, section 32-1-101, *et seq.* (C.R.S. 2008), authorizes the creation of districts to provide a wide variety of services, such as fire protection, ambulance service, or, as in this case, recreation. In adopting the Act, the legislature recognized that circumstances might change over time and that the residents of a municipality initially included within a district someday might wish to withdraw. Part 5 of the Act, entitled "Exclusion of Territory," governs this withdrawal process.

When a municipality is excluded, it must replace the services that formerly were supplied by the district, by either providing the services itself or obtaining them from a different district. Either way, the municipality must tax its residents to pay for such replacement services. If the residents of the excluded municipality had to continue paying taxes to the special district as well, they would be subject to double taxation for duplicative services. Accordingly, the General Assembly provided in section 32-1-503(1) ("§ 503") that "[t]erritory 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 district] for the operating costs of the special district."[1] Copies of the relevant statutes are attached.

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[1] The sole exception is that the excluded territory remains responsible for paying its share of the district's bonded indebtedness incurred prior to exclusion.

Notwithstanding the clear statutory prohibition of § 503, the special district in this case — South Suburban Park and Recreation District (the "District") complained that its loss of future property taxes from the City of Cherry Hills Village ("Cherry Hills") would force the District to curtail its services or charge higher fees. The District demanded that Cherry Hills pay compensation for ten years of lost tax revenue. Over Cherry Hills' strenuous objections, the trial court agreed and ordered it to pay $9.6 million to the District. Cherry Hills appealed, arguing that because § 503 barred the District from continuing to levy taxes on property in the city, the court could not circumvent the statute by ordering Cherry Hills to make a payment *in lieu of* such taxes.

The court of appeals disagreed and approved the district court's order. The appellate court reasoned that the payment did not violate § 503 because it was "imposed by the trial court's order," and thus was not "levied by the board" of the District. (Slip op. 9.) Further, the court reasoned, a court-ordered payment is "not a 'property tax.'" (*Id.* 13.)

As shown below, the court of appeals' reasoning is wrong as a matter of law. More importantly, the court's published decision effectively nullifies part 5 of the Special District Act. No city will dare petition for exclusion if the court can order it to compensate the district for a decade's worth of property taxes. Because the

court of appeals' decision defeats the legislative purpose of part 5 of the Act and strips cities of an important statutory right, this Court should grant certiorari and reverse.

STATEMENT OF FACTS

A. Cherry Hills' reasons for exclusion.

The District currently encompasses a region in the southern suburbs of Denver, including the cities of Littleton, Columbine Valley, Centennial, Lone Tree, Englewood, and Sheridan. The City of Cherry Hills Village ("Cherry Hills") was also included when the District was first organized in 1959.

Over the years, the District built or acquired a variety of recreation facilities, including recreation centers, ice arenas, swimming pools, golf courses, and tennis courts. *See* http://www.ssprd.org/southsubnew/facilities.asp?tl=5 (visited July 13, 2009). The only facilities located within Cherry Hills were four parks and associated trails, totaling 33 acres (together, the "Parks"). The Parks were never access-controlled and were open to the public at all times. Because they generated no revenue and required regular maintenance, the Parks were, as a practical matter, liabilities to the District.

By the late 1990s, the residents of Cherry Hills had become increasingly dissatisfied with the District's services. Cherry Hills residents wanted the District

to improve maintenance of the Parks. (1:77-78.) The District, however, gave higher priority to its brick and mortar facilities, none of which were located in Cherry Hills. Another source of friction was that 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. (3:738 ¶¶9-10.) In short, Cherry Hills felt it was being overcharged and underserved.

B. The petition for exclusion.

When the District failed to respond to its pleas for better service, Cherry Hills filed a petition for exclusion from the District. (1:78.) As required by section 32-1-502(2)(c), Cherry Hills and the District each filed plans for the disposition of assets and continuation of services. (1:14, 61.) Cherry Hills' plan called for the Parks to be transferred to Cherry Hills, which thereafter would assume all responsibility for maintaining them. Residents of the District would continue to have the same access to the Parks that they had enjoyed before. The only difference would be that the District no longer would be required to pay to maintain the Parks. Because the transfer of the Parks 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.

The District opposed Cherry Hills' petition for exclusion. If the petition were to be granted, however, the District demanded financial compensation. The trial court held a five-day evidentiary hearing, at which the District presented evidence of (1) the fair market value ("FMV") of the Parks and (2) the District's anticipated loss of property taxes from Cherry Hills over the ten years following exclusion. Other than the reduction of future tax revenue, the District presented no evidence of any cost or other detriment attributable to the proposed exclusion. In particular, because the Parks would remain open to the public just as before, the District did not propose purchasing replacement parks.

C. The trial court's first order.

When the parties cannot agree on a plan for exclusion, the statute directs the district court to make such provisions as the court finds fair and equitable, after considering eight specific factors, including the FMV of the facilities to be transferred and the effect of that transfer on the service provided by the district. *Not* included in the list of factors is the district's loss of property tax revenue from the excluded area, which is an inevitable feature of every exclusion. *See* §§ 32-1-502(2)(c), (d), C.R.S. (2008).

Following the hearing, the trial court granted Cherry Hills' petition for exclusion, but ordered it to pay a "transfer amount" equal to the FMV of the Parks,

which the court found to be $9,660,838. (1:244-47 ¶23; 250 ¶3; 2:264.) The court did not explain why it was ordering Cherry Hills to pay the transfer amount, stating only: "[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." (1:244 ¶22.)

D. The first appeal and remand.

Cherry Hills appealed, and the court of appeals reversed. The panel held that the district court had misinterpreted the statute to require payment of FMV. The case was remanded to the trial court with directions to delete the offending statement and to reconsider the court's ruling. If the district court again ordered Cherry Hills to pay FMV, it was directed to explain its rationale.

On remand, the District urged the trial court to order Cherry Hills, once again, to pay the $9.6 million transfer amount. The District candidly explained that the reason it desired payment of the transfer amount was to offset its anticipated loss of tax revenue. Over Cherry Hills' objection that ordering such a payment would violate § 503, the court agreed with the District and again ordered Cherry Hills to pay the $9.6 million.

E. This appeal.

Cherry Hills again appealed, but this time the court of appeals affirmed. The court assumed for purposes of its analysis "that lost tax revenue was the sole reason the trial court ordered Cherry Hills to pay FMV." (Slip op. 9.) Nonetheless, the panel held that such a payment would not violate § 503's ban on continued taxation. (Slip op. 8-14.)

ARGUMENT

I. THIS CASE PRESENTS AN IMPORTANT ISSUE AFFECTING MOST COLORADO MUNICIPALITIES.

As of 2007, there were 1,220 special districts in Colorado, including 119 fire districts, 96 water and sanitation districts, and 37 park and recreation districts. *See* http://www.sdaco.org/publications_annual_report.htm (last visited July 7, 2009) (2007 annual report at 1). Most Colorado municipalities are located either wholly or partially within at least one district, and sometimes within many. The same issues that impelled Cherry Hills to leave the District — high cost and poor service — could affect almost any municipality in the state.

As Cherry Hills discovered, small municipalities may have little say about the quality of service provided by large districts. A city or town's only effective option may be to secede from the district by filing a petition for exclusion. Even if a municipality does not actually petition for exclusion, its right to do so carries

with it significant bargaining power because, under § 503, the district would lose all property tax revenues from the excluded territory.

The court of appeals' interpretation of § 503, however, effectively deprives municipalities of this right. When a city receives inadequate service from a district, it may be compelled to provide and pay for its own service. If the municipality remained a member of the district, its residents would be subject to double taxation — once by the municipality and once by the district. The General Assembly adopted the exclusion procedure to address this problem and "to facilitate the elimination of ... double taxation ...." § 32-1-102(3), C.R.S. (2008).

The court of appeals' opinion frustrates that legislative intent. It approves a court order under which Cherry Hills residents must pay property taxes to maintain the Parks, *plus* additional property taxes for Cherry Hills to pay the $9.6 million "transfer amount" — bringing about exactly the double taxation that the General Assembly sought to avoid. No municipality will dare to petition for exclusion if the district court can impose such onerous terms.

Further, the court of appeals' decision destroys whatever bargaining power that municipalities formerly held by virtue of their right to petition for exclusion. Secure in the knowledge that exclusion is no longer a realistic option, a district's leadership can ignore a municipality's complaints about poor service. As a result,

any city or town that finds itself in the position of Cherry Hills — a political minority of a district, paying hefty property taxes but receiving poor service — will have no effective recourse.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT'S ORDER DOES NOT VIOLATE § 503.

The trial court left no doubt that its purpose in ordering Cherry Hills to pay $9.6 million was to compensate the District for its expected loss of property tax revenue during the ten years following exclusion. The court recited in its order that, "as a result of the exclusion order, the District has lost almost 13 percent of its tax base." (3:741-42 ¶31; emphasis added.) That loss, the court found, is "over one million dollars per year, or 10.4 million dollars through the year 2014,"[2] which "will result in a reduction of services, an increase in fees, or both." (3:741 ¶¶27-28.) 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." (3:742 ¶33.) Thus, as the court of appeals recognized, the trial court's order was "based primarily upon the likelihood of

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[2] The apparent revenue loss can be made to appear larger or smaller depending on the end date chosen. 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.)

economic hardship to the District caused by lost tax revenue following Cherry Hills' exclusion."[3] (Slip op. 2; *see also id.* 11.)

Such an order, however, is forbidden by § 503, which provides in relevant part:

> 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.

(Emphasis added.)

Cherry Hills argued in both courts below that if the District cannot levy property taxes on Cherry Hills, the trial court cannot order Cherry Hills to make a payment *in lieu of* property taxes. Such an order is transparently an attempt to evade the statutory ban by recharacterizing the payment as a "transfer amount" based on FMV. A statutory ban cannot be evaded through the use of creative nomenclature.

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[3] Loss of tax revenue was not just "primarily" the trial court's reason for ordering Cherry Hills to pay the transfer amount; it was the sole reason. The only other possible reasons mentioned in the trial court's order were: (1) the meaningless observation that the Parks "had been integral components of the District's parks and recreation program, [and] were no longer to be part of that program" (3:741 ¶31) and (2) the observation that the payment from Cherry Hills can be used "to purchase replacement facilities" (3:742 ¶33), which is meaningless because the District does not need and will not spend the money to acquire replacement parks.

The analysis is straightforward. Because § 503 does not expressly state whether its ban on continued taxation applies to a court order intended to replace the lost taxes, the statute is ambiguous as applied to the current situation. *See City of Westminster v. Dogan Constr. Co.*, 930 P.2d 585, 590 (Colo. 1997) (Open Records Act is ambiguous because it does not expressly state whether statutory term "letters of reference" includes notes of telephone calls with references). To resolve the ambiguity, a court considers indicia of legislative intent such as "[t]he object sought to be attained," § 2-4-203(1)(a), C.R.S. (2008), and "[t]he consequences of a particular construction." § 2-4-203(1)(e); *see also State Eng'r v. Castle Meadows, Inc.*, 856 P.2d 496, 504 (Colo. 1993).

Here, the General Assembly formally stated that its purpose in adopting part 5 of the Special District Act, which sets forth the procedures for exclusion, was:

> ... to facilitate the *elimination of the overlapping of services* provided by local governments *and the double taxation which may occur* because of annexation or otherwise when all or part of the taxable property of an area lies within the boundaries of both a municipality and a special district.

§ 32-1-102(3), C.R.S. (2008) (emphasis added).

Ruling on grounds that the District never raised — and that Cherry Hills consequently had no opportunity to rebut — the court of appeals read this statute to mean that the exclusion process is designed "to prevent double taxation for the

same government service." (Slip op. 11.) The court reasoned that taxes imposed by Cherry Hills pay for park maintenance *inside* Cherry Hills, while the transfer amount "was intended to support facilities *outside* of Cherry Hills" that belong to the District. (Slip op. 12; emphasis in original.) Therefore, the court concluded, there is no "double taxation for the same government function." (*Id.*)

The court has misread section 102(3), however, to preclude double taxation only if it is for "the same government service." (Slip op. 11.) In fact, the statute seeks to eliminate double taxation arising from "overlapping" services provided by "both a municipality and a special district." § 32-1-102(3). Thus, the legislature was not seeking to avoid taxation by two different governmental entities for the "same government service" (slip op. 11) — a situation that is difficult to envision ever arising. Rather, the legislature was concerned about double taxation for overlapping and duplicative services provided by two different governmental entities.

That is the situation here. Cherry Hills provides its residents with park and recreation services that formerly were provided by the District. But for their exclusion from the District, Cherry Hills residents would be paying twice — once for service by Cherry Hills and once for service by the District. Following exclusion, Cherry Hills no longer receives the District's services, *but is being*

forced to continue paying for them via the transfer amount. Imposing the transfer amount as a replacement for the District's property taxes creates double taxation for overlapping services — exactly what the General Assembly declared in section 102(3) it was trying to avoid. *See Org. of N. Chaffee County Fire Prot. Dist. v. N. Chaffee County Fire Prot. Dist.*, 544 P.2d 637, 638 (Colo. 1975) ("The entire purpose of the exclusion provisions" is "to eliminate the overlapping of services and double taxation ....") The only difference is that the District will reap a windfall profit because it will collect Cherry Hills' annual payments of the transfer amount *and will not have to provide any service* in return. The court of appeals' misreading of section 102(3) led the court to permit double taxation, thereby frustrating legislative intent. *See O'Donnell v. State Farm Mut. Auto. Ins. Co.*, 186 P.3d 46, 52 (Colo. 2008) (rejecting interpretation of statute that would have the effect of "negating the legislature's intent").

The legislature knew, of course, that exclusion of a city from a district causes the district to lose property tax revenue from the city. That is the express command of § 503. If the General Assembly had been concerned about the burden on a district of such a loss of revenue, it would have either: (1) not enacted § 503; or (2) specifically provided that the district court is to consider loss of property tax revenue in determining what conditions for exclusion would be fair and equitable.

But the legislature did neither. The conclusion is inescapable that the General Assembly did not intend a district court to be able to enter an order like this one, which completely frustrates § 503's ban on continuing taxation.

None of the court of appeals' other points — all made *sua sponte* and without any input from Cherry Hills — can support its conclusions. The court first reasoned that the transfer amount did not violate § 503 because it:

> was not "levied by the board." Instead, it was imposed by the trial court's order.... Courts have no power to impose taxes, a function reserved for the legislative branch of government.

(Slip op. 9.) This reasoning is specious, however, because it would authorize a court simply to order an excluded city to continue paying, in perpetuity, an annual amount equal to the property tax that would have been levied by the board of the district. Such an order, which obviously would violate § 503, is no different in effect from the trial court's order in this case to pay the $9.6 million transfer amount, where the court made clear that the purpose of that payment is to substitute for a decade of property taxes.

The court of appeals next suggested that the transfer amount did not violate § 503 because it was "not a 'property tax.'" (Slip op. 13.) The transfer amount, the court reasoned, was based on "the FMV of the facilities to be transferred" and thus "was not a tax levied on the owners of property based on the properties'

value." (*Id.*) This reasoning is unsound, however, because the trial court made clear, and the court of appeals accepted, that the purpose of the transfer amount was to replace the property taxes that the District otherwise would have levied on Cherry Hills. A court-ordered payment amount ostensibly could be based on anything under the sun, but as long as it serves the purpose of substituting for lost future property taxes, it is effectively a property tax.

This Court has cited the advice of Judge Learned Hand that a court should not allow an overly literal application of statutory language to lead to a result contrary to the legislative purpose:

> [I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

City of Westminster, 930 P.2d at 592 (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945)). Applying this principle here, the term "property tax" should not be applied so literally that the statutory purpose is frustrated. *See Frey v. Adams County Sch. Dist. No. 14*, 804 P.2d 851, 854 (Colo. 1991) ("[I]f the statute is to be read literally, a board of education could deprive a person of status as a teacher by terminating that person's employment," and "[s]uch a fundamentally unfair result could not have been intended by the

legislature."). Likewise here, although § 503 literally applies only to a tax imposed by a special district, the legislature could not have intended to authorize a district court to circumvent the statutory bar simply by ordering an equivalent payment and calling it something other than a tax.

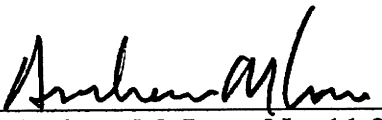
CONCLUSION

This Court should grant certiorari and reverse the decision of the court of appeals.

Dated: July 13, 2009

Respectfully submitted,

DAVIS GRAHAM & STUBBS LLP



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 13, 2009, a copy of the foregoing **PETITION FOR CERTIORARI** was served by first-class mail on:

Paul C. Rufien, Esq.
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Judy Terranova

C
West's Colorado Revised Statutes Annotated Currentness
Title 32. Special Districts
Special District Act
Article 1. Special District Provisions (Refs & Annos)
Part 1. General Provisions (Refs & Annos)
§ 32-1-102. Legislative declaration

(1) The general assembly hereby declares that the organization of special districts providing the services and having the purposes, powers, and authority provided in this article will serve a public use and will promote the health, safety, prosperity, security, and general welfare of the inhabitants of such districts and of the people of the state of Colorado.

(2) The general assembly further declares that the procedures contained in part 2 of this article are necessary for the coordinated and orderly creation of special districts and for the logical extension of special district services throughout the state. It is the purpose of part 2 of this article to prevent unnecessary proliferation and fragmentation of local government and to avoid excessive diffusion of local tax sources.

(3) The general assembly further declares that the purpose of part 5 of this article is to facilitate the elimination of the overlapping of services provided by local governments and the double taxation which may occur because of annexation or otherwise when all or part of the taxable property of an area lies within the boundaries of both a municipality and a special district.

(4) The general assembly further declares that it is the policy of this state to provide for and encourage the consolidation of special districts and to provide the means therefor by simple procedures in order to prevent or reduce duplication, overlapping, and fragmentation of the functions and facilities of special districts; that such consolidation will better serve the people of this state; and that consolidated districts will result in reduced costs and increased efficiency of operation.

(5) The general assembly further declares that the purpose of part 7 of this article is to facilitate dissolution of special districts in order to reduce the proliferation, fragmentation, and overlapping of local governments and to encourage assumption of services by other governmental entities.

CREDIT(S)

Repealed and reenacted by Laws 1981, H.B.1320, § 1, eff. July 1, 1981.

Current through laws effective April 9, 2009, see scope for further details

C
West's Colorado Revised Statutes Annotated Currentness
Title 32. Special Districts
Special District Act
Article 1. Special District Provisions (Refs & Annos)
Part 5. Exclusion of Territory
§ 32-1-502. Exclusion of property within municipality--procedure

(1)(a) The governing body of any municipality wherein territory within a special district is located, the board of any special district with territory within the boundaries of any municipality, or fifty percent of the fee owners of real property in an area of any municipality in which territory within a special district is located may petition the court for exclusion of the territory described in the petition from the special district. Within ten days after the filing of any petition for exclusion, the governing body of the municipality and the board shall be notified of the exclusion proceedings. The taxpaying electors shall be notified of the exclusion proceedings by publication. The governing body of the municipality, the board, and the taxpaying electors, as a class, shall be parties to the exclusion proceedings.

(b) The provisions of this section shall not apply to health service districts.

(c) The provisions of this section shall not apply in the event that the territory described in the petition for exclusion constitutes the entire territory of the special district.

(2) Subject to the provisions of subsection (5) of this section, the court shall hold a hearing on the petition and order the territory described in the petition or any portion thereof excluded from the special district if the following conditions are met:

(a) The governing body of the municipality agrees, by resolution, to provide the service provided by the special district to the area described in the petition on and after the effective date of the exclusion order.

(b) The service to be provided by the municipality will be the service provided by the special district in the territory described in the petition for exclusion.

(c) The governing body of the municipality and the board shall each submit a plan for the disposition of assets and continuation of services to all areas of the district. Said plans shall include, if applicable, provisions for the maintenance and continuity of facilities to be utilized by the territories both within and without the municipal boundaries and of services to all territories served or

previously served by the special district. If the municipality and the special district agree upon a single plan and enter into a contract incorporating its provisions, the court shall review such contract, and if it finds the contract to be fair and equitable, the court shall approve the contract and incorporate its provisions into its exclusion order. The court's review of the provisions of the contract shall include, but not be limited to, consideration of the amount of the special district's outstanding bonds, the discharge by the municipality or the territory excluded from the special district of that portion of the special district's indebtedness incurred to serve the territory proposed for exclusion, the fair market value and source of special district facilities located within the territory proposed for exclusion, the facilities to be transferred which are necessary to serve the territory proposed for exclusion, the adequacy of the facilities retained by the special district to serve the remaining territory of the special district, the availability of the facilities transferred to the municipality for use, in whole or in part, in the remaining territory of the special district, 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, and 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.

(d) If the municipality and the special district are unable to agree upon a single plan, the court shall review the plans of the municipality and the special district and direct each to carry out so much of their respective plans in which there is no disagreement and 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. For the purpose of making such determination, the criteria set forth in this paragraph (d) and paragraphs (b) and (c) of this subsection (2) shall be considered. The respective portions of the plans to be performed, the transfer of facilities, and the requirements for the discharge of indebtedness of the special district and other conditions and obligations imposed by the court shall be specifically set forth in the order excluding territory from the special district.

(3)(a) The following additional requirements shall be met before any court orders the exclusion of any area from any water, sanitation, or water and sanitation district or any metropolitan district providing water or sanitation services or both:

(I) Such district's outstanding bonds shall not exceed ten percent of the valuation for assessment of the taxable property in the remaining territory of the special district, or, as an alternative, the municipality or the territory excluded from the special district shall discharge that portion of the special district's indebtedness incurred to serve the territory proposed for exclusion or the municipality shall have entered into a contract to purchase the entire system or systems of such district

at a price at least sufficient to pay in full all of the outstanding indebtedness of such district and all of the interest thereon.

(II) Provision shall be made that all areas of such district receive the service or services for which such district was organized in substantial compliance and fulfillment of the service plan of the district, if one exists, or in accordance with the petition for organization of such district if no service plan was originally adopted and approved pursuant to part 2 of this article.

(b) If an election in a water, sanitation, or water and sanitation district or a metropolitan district providing water or sanitation services or both has been held pursuant to subsection (7) of this section and the majority of votes cast favor the municipality providing the service, the municipality and such district shall enter into a contract for the municipality to assume full responsibility for the operation and maintenance of the entire system or systems of such district and to integrate said system or systems with those of the municipality to the largest extent possible. The terms and conditions of service and the rates to be charged by the municipality for said service under the contract shall be uniform with the terms, conditions, and rates for similar service provided by said municipality to other users within the municipality.

(4) If no election has been held pursuant to subsection (5) of this section, the following additional requirement shall be met before any court orders the exclusion of any area from any fire protection district: The quality of service including, but not limited to, the fire insurance costs for the improvements within the excluded area will not be adversely affected by such exclusion.

(5)(a) After the filing of a petition for exclusion under subsection (1) of this section, ten percent or one hundred of the eligible electors of the special district territory proposed for exclusion, whichever number is less, may petition the court for a special election to be held within the special district territory proposed for exclusion on the question of exclusion of the territory described in the petition for exclusion. If a petition for a special election is filed with the court and complies with this subsection (5), the court shall order a special election to be held only after it finds the conditions of paragraphs (a), (c), and (d) of subsection (2) and, if applicable, of subsection (3) or (4) of this section are met. The election shall be held and conducted, and the results thereof determined, in the manner provided in articles 1 to 13 of title 1, C.R.S. The special district shall bear the costs of the election.

(b) If a majority of the electors voting at such election approve the question of exclusion, the court shall order the territory excluded from the special district in accordance with its findings on the conditions specified in subsection (2) and, if applicable, of subsection (3) or (4) of this section. If a majority of those voting do not approve the question, the court shall conclusively terminate the exclusion proceeding.

(6) Any order for exclusion of territory from a special district shall become effective on January 1

next following the date the order is entered by the court. The order for exclusion shall recite in the findings a description of any bonded indebtedness in existence immediately preceding the effective date of the order for which the excluded property is liable and the date that such bonded indebtedness is then scheduled to be retired. After July 1, 1993, failure of the order for exclusion to recite the existence and scheduled retirement date of such indebtedness, when due to error or omission by the special district, shall not constitute grounds for correction of the omission of a levy on the excluded property from the assessment roll pursuant to section 39-5-125, C.R.S.

(7)(a) After any exclusion of territory under this section, the court may order an election of the electors of the portion of the special district remaining to determine whether they desire the municipality to provide the service provided by the special district if either of the following conditions exists:

(I) More than fifty percent of the territory within the special district as it existed prior to such exclusion has been excluded; or

(II) The valuation for assessment of the area of the excluded territory is greater than the valuation for assessment of the area of the remaining territory in the special district.

(b) If a majority of the electors voting at such election approve the question requiring the municipality to provide such service, the court shall request the governing body of the municipality and the board to enter into a contract which will govern the providing of the service. The terms and conditions of the contract shall be reviewed and approved by the court, but in no event shall the terms, rates, and conditions be less equitable than for services supplied by a municipality to any other users within the municipality. The court's review of the contract or, if the municipality and the special district after good faith negotiations are unable to agree upon a contract, the court's order shall be in accordance with the criteria set forth in paragraphs (b), (c), and (d) of subsection (2) of this section. The special district shall continue in existence for the purpose of fulfilling any obligation imposed upon it by the contract with the municipality or otherwise.

(c) Any election held pursuant to this subsection (7) shall be held and conducted, and the results thereof determined, in the manner provided in articles 1 to 13 of title 1, C.R.S.

CREDIT(S)

Repealed and reenacted by Laws 1981, H.B.1320, § 1, eff. July 1, 1981. Amended by Laws 1985, H.B.1021, § 1, eff. April 24, 1985; Laws 1992, H.B.92-1333, § 111, eff. Jan. 1, 1993; Laws 1993, H.B.93-1021, § 2, eff. March 29, 1993; Laws 1996, H.B.96-1275, § 14, eff. July 1, 1996.

Current through laws effective April 9, 2009, see scope for further details

C
West's Colorado Revised Statutes Annotated Currentness
Title 32. Special Districts
Special District Act
Article 1. Special District Provisions (Refs & Annos)
Part 5. Exclusion of Territory
§ 32-1-503. Effect of exclusion order

(1) 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 for the operating costs of the special district. 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. The board shall levy annually a property tax on all such excluded and remaining property sufficient, together with other funds and revenues of the special district, to pay such outstanding indebtedness and the interest thereon. The board is also empowered to establish, maintain, enforce, and, from time to time, modify such service charges, tap fees, and other rates, fees, tolls, and charges, upon residents or users in the area of the special district as it existed prior to the exclusion, as may in the discretion of the board be necessary to supplement the proceeds of said tax levies in the payment of the outstanding indebtedness and the interest thereon. 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.

(2) The change of boundaries of the special district shall not impair nor affect its organization, nor shall it affect, impair, or discharge any contract, obligation, lien, or charge on which it might be liable or chargeable had such change of boundaries not been made.

(3) Notice of the court order of any exclusion accomplished pursuant to this part 5 shall be given in accordance with the provisions of section 32-1-105.

CREDIT(S)

Repealed and reenacted by Laws 1981, H.B.1320, § 1, eff. July 1, 1981.

Current through laws effective April 9, 2009, see scope for further details

Cherry Hills v. South Suburban Park

COLORADO COURT OF APPEALS

Court of Appeals No.: 08CA1232
Arapahoe County District Court No.: 03CV762
Honorable J. Mark Hannen, Judge

The City Council of the City of Cherry Hills Village, Colorado; and the City of Cherry Hills Village, Colorado,

Petitioners-Appellants,

v.

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,

Respondents-Appellees.

ORDER AFFIRMED

Division II
Opinion by: JUDGE CASEBOLT
Roy and Connelly, JJ., concur

Announced: May 28, 2009

Davis Graham & Stubbs, LLP, Andrew Low, Terry Miller, Denver, Colorado; Kissinger & Fellman, PC, Kenneth Fellman, Denver, Colorado, for Petitioners-Appellants

Paul C. Rufien, PC, Paul Rufien, Highlands Ranch, Colorado, for Respondents-Appellees

In this case involving exclusion of a municipality from a special district, petitioners, the City of Cherry Hills Village, Colorado, and its City Council (collectively, Cherry Hills), appeal the order of the district court directing them to pay a "transfer amount" of $9,660,838 to respondent, the South Suburban Park and Recreation District (District), as a condition of the exclusion of Cherry Hills from the District. In a prior appeal addressing, among other things, the propriety of the transfer amount, a division of this court concluded that the trial court had misinterpreted one of the statutes governing exclusion of municipalities from special districts. *City Council v. S. Suburban Park & Recreation Dist.*, 160 P.3d 376, 381 (Colo. App. 2007) (discussing the application of § 32-1-502, C.R.S. 2008) (*Cherry Hills I*). The division therefore remanded the case for reconsideration of the award. Because the trial court has now properly reconsidered and explained the rationale for its decision to require Cherry Hills to make the transfer payment to the District, we affirm.

I. Facts and Procedural History

Cherry Hills residents voted to withdraw from the District and assume for themselves the responsibility of providing recreational

services and maintaining parks and recreational facilities (facilities) located within city boundaries. Accordingly, Cherry Hills submitted a statutorily required petition and exclusion plan to the court, *see* § 32-1-502, and requested that it no longer be a part of the District. Following a hearing, the trial court granted the petition and ordered the District to convey the facilities to Cherry Hills, but ordered Cherry Hills to pay the District a transfer amount of $9,660,838, which was the fair market value (FMV) of the facilities.

The trial court's original order indicated its understanding that Cherry Hills was required by statute to pay the District the FMV of the excluded facilities. On appeal, a division of this court held that understanding to be erroneous, and remanded the case so that the trial court could "reconsider this award and further explain its rationale if it again awards the District FMV." *Cherry Hills I*, 160 P.3d at 381-82.

On remand, the trial court again ordered Cherry Hills to pay the District the FMV of the facilities. Its reasons for doing so were based primarily upon the likelihood of economic hardship to the District caused by lost tax revenue following Cherry Hills' exclusion. This appeal ensued.

II. Compliance with This Court's Mandate

Cherry Hills first contends that the trial court failed to follow the division's mandate on remand. Specifically, it argues that the trial court failed to delete its finding that the statute's "fair and equitable" standard required Cherry Hills to pay FMV for the excluded facilities, and that the court failed to further explain its rationale for the award of FMV. We disagree.

A. Mandate Standards and Direction

An appellate court's pronouncement 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). Trial courts have no discretion to disregard binding appellate rulings. "[T]he law of the case as established by an appellate court must be followed in subsequent proceedings before the trial court." *Hardesty v. Pino*, ___ P.3d ___, ___ (Colo. App. No. 07CA1105, Feb. 5, 2009) (quoting *Roybal*, 672 P.2d at 1005) (emphasis omitted). Consequently, we review de novo whether a trial court has complied with a prior appellate ruling. *Id.*

When a municipality and a special district cannot agree on the terms of an exclusion plan, a trial court must create "such . . . 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 . . . 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), C.R.S. 2008. The trial court's exclusion provisions must be "fair and equitable." *Id.*

When creating a fair and equitable plan for exclusion, a trial court must consider a number of statutorily delineated factors. § 32-1-502(2)(b)-(d), C.R.S. 2008. Such mandatory considerations include the FMV of the property to be excluded, the effect the exclusion will have on the service provided by the special district in areas not part of the exclusion, and the increased costs to users in the remaining territory of the special district. § 32-1-502(2)(c).

In *Cherry Hills I*, the division concluded that the trial court erroneously interpreted the exclusion statutes to require that Cherry Hills reimburse the District for the FMV of the facilities. Thus, the division instructed 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." 160 P.3d at 383. It remanded the case "to allow the court to reconsider this

award and further explain its rationale if it again awards the District FMV." *Id.* at 381-82.

B. Compliance with Mandate Standards

1. Deletion of Finding

Cherry Hills contends that the trial court did not heed the division's mandate to delete its finding that the "fair and equitable" criterion requires Cherry Hills to pay the District FMV. We disagree.

The trial court's original order stated that "for the exclusion of the subject territory to be fair and equitable, the City *must* pay to the District the [FMV] of the facilities to be transferred to the City" (emphasis added). Its order following remand stated that "in order for the exclusion to be fair and equitable, the City *should* pay to the District the FMV of the transferred facilities" (emphasis added).

Cherry Hills argues that the change from "must" to "should" was merely "cosmetic" and did not respond to the division's mandate. However, the essential holding of the prior appeal was that the trial court was not required to award FMV — the division did not hold that the trial court was prohibited from doing so. *Cherry Hills I*, 160 P.3d at 381. Thus, the revised order adequately

reflects the trial court's understanding that it could, but was not required to, award the District the FMV of the excluded facilities.

2. Trial Court's Explanation of Its Rationale

Cherry Hills argues that the trial court failed to follow the division's mandate to reconsider and explain its order that Cherry Hills pay the District $9,660,838. We disagree.

The trial court found on remand that the financial impact of Cherry Hills' exclusion upon the District would exceed $1 million per year, resulting in lost revenues of over $10 million by the year 2014. The court also found that the loss of tax revenue to the District caused by the exclusion would impair the District's ability to maintain some of its programs and activities, and that the exclusion would result in a reduction in services, or an increase in fees, or both. The court required Cherry Hills to pay the District FMV for the facilities so that the District could either replace those facilities or use the money to compensate for lost tax revenue.

The trial court's reasons for granting the transfer amount are clear from its order. We thus perceive that the trial court adequately reconsidered the transfer amount and explained its

rationale, and that its rationale was based on proper statutory considerations. *See* § 32-1-502(2)(c).

III. Statutory Prohibition on Taxation

Cherry Hills contends that the trial court's second order must be vacated because the trial court intended the $9,660,838 transfer amount as a means of evading the statutory ban on continued taxation by a special district of property excluded from that district, contrary to section 32-1-503, C.R.S. 2008. We disagree.

A. Principles of Interpretation

The proper interpretation of a statute is a question of law that we review de novo. *Alvarado v. People*, 132 P.3d 1205, 1207 (Colo. 2006).

Statutes should be interpreted to effectuate the General Assembly's intent, giving the words in the statute their plain and ordinary meaning. *Golden Animal Hosp. v. Horton*, 897 P.2d 833, 836 (Colo. 1995). A statute should be interpreted as a whole, giving effect to all its parts. *Zab, Inc. v. Berenergy Corp.*, 136 P.3d 252, 255 (Colo. 2006). Conflict between statutory provisions should be avoided. *West v. Roberts*, 143 P.3d 1037, 1044 (Colo. 2006).

As the division in *Cherry Hills I* stated, if the language of a statute "is clear and the intent of the General Assembly may be discerned with certainty, we need not resort to other rules of statutory interpretation." 160 P.3d at 379 (quoting *W. Fire Truck, Inc. v. Emergency One, Inc.*, 134 P.3d 570, 573 (Colo. App. 2006)). But if the language is ambiguous, we look to "legislative history, prior law, the consequences of a given construction, and the goal of the statutory scheme to ascertain the correct meaning of a statute." *Bd. of County Comm'rs v. Costilla County Conservancy Dist.*, 88 P.3d 1188, 1193 (Colo. 2004) (quoting *People v. Luther*, 58 P.3d 1013, 1015 (Colo. 2002)).

B. Statutory Language

Territories excluded from a special district must not be "subject to any *property tax* levied *by the board* for the operating costs of the special district." § 32-1-503(1), C.R.S. 2008 (emphasis added). "The board" refers to the special district's board of directors. § 32-1-103(1.5), C.R.S. 2008. This statutory provision exists, in part, to prevent double taxation for government services. § 32-1-102(3), C.R.S. 2008.

C. Application

Here, although the trial court considered statutorily permissible factors in crafting its order, most of those factors were ultimately related to lost tax revenue to the District. We may assume — for purposes of our analysis only — that lost tax revenue was the sole reason the trial court ordered Cherry Hills to pay FMV. Our inquiry is thus confined to whether the transfer amount was a statutorily impermissible "property tax levied by the board for the operating costs of the special district." *See* § 32-1-503(1). For the following reasons, we conclude that it was not.

1. The Transfer Amount Was Not Levied by the Board

First, the $9,660,838 payment was not "levied by the board." Instead, it was imposed by the trial court's order. The award was effectuated by the trial court's power to shape fair and equitable provisions of an exclusion order, *see* § 32-1-502(2)(d), not the power of the District's board of directors to levy taxes. *See* § 32-1-1201, C.R.S. 2008. Courts have no power to impose taxes, a function reserved for the legislative branch of government. *See* Colo. Const. art. X, § 2. That the District argued in support of the monetary award does not mean that the award was levied by the District's

board of directors. The trial court made the ultimate decision to order payment.

2. The Transfer Amount Was Not a Tax

Second, the purpose and structure of the statutes governing special districts indicate that the transfer amount was not a "tax" forbidden by section 32-1-503(1).

The exclusion statutes are structured to balance the needs of both "the territory to be excluded" and "the remaining territory." *Cherry Hills I*, 160 P.3d at 380. Section 32-1-502 ensures that trial courts address the needs of territories remaining within special districts after exclusion occurs. When a municipality and a district cannot agree on the terms of an exclusion plan, a trial court must create exclusion provisions ensuring that the district's services will not be impacted and no additional burdens or expenses will be imposed upon the remaining territory of the district. § 32-1-502(2)(d). The statute thus protects the interests of citizens who continue to use a district's services after a portion of its original territory has been excluded.

Section 32-1-503(1) protects the interests of taxpayers who live within the excluded territory. That section prevents special

districts from continuing to tax the residents of excluded territories after exclusion occurs, thereby ensuring districts cannot preclude or penalize exclusion. *See* § 32-1-503(1). The underlying statutory goal of this provision is to prevent double taxation for the same government service. § 32-1-102(3).

Here, the transfer amount ordered by the trial court is consistent with the balance these statutes attempt to maintain. The trial court was statutorily required to consider the impact of exclusion on the District's services and expenses. *See* § 32-1-503(2)(d). In doing so, it found that the District was likely to lose over $1 million per year following exclusion and that as a result, either services would be reduced, or fees would be increased, or both. The court thus awarded the transfer amount largely so that the District could be compensated for its financial loss, thereby protecting the interests of those who will continue to use the District's services.

The interests of the residents of Cherry Hills — protected by the prohibition on further taxation in section 32-1-503(1) — were not unlawfully disturbed. The transfer amount is not a form of double taxation for the same government service. Cherry Hills may

choose to tax its citizens to support the facilities at issue once those facilities are transferred to its control. The transfer amount, however, was intended to support facilities *outside* of Cherry Hills that will remain in the District. Thus, any taxes collected and used to pay the transfer amount will serve a different purpose from taxes used to support facilities within the excluded territory. Accordingly, we conclude that they do not amount to double taxation for the same government function.

Cherry Hills argues that if a special district cannot impose ongoing taxes on excluded property, then a court cannot require a city to make a payment in lieu of such taxes. However, *any* payment of money to a special district as a condition of a city's exclusion could be viewed as being in lieu of lost tax revenue. Thus, accepting Cherry Hills' argument would require adopting an interpretation of section 32-1-503 that effectively prohibits trial courts from ordering monetary transfers upon exclusion. Such an interpretation would be contrary to the exclusion statutes' call for trial courts to resolve exclusion disputes in a manner they find fair and equitable. *See* § 32-1-502(2)(d).

Courts are required to consider economic factors when evaluating exclusion plans. *See* § 32-1-502(2)(c) (requiring consideration of outstanding bonds, fair market value, and increased costs). Requiring consideration of such factors, yet disallowing monetary awards to compensate for their effects, would negate the equitable powers the statutes grant to the trial court. We avoid interpretations that result in conflicts between statutory provisions, *see Roberts*, 143 P.3d at 1044, and decline to adopt one here.

3. The Transfer Amount Was Not a Property Tax

We also conclude that the transfer amount was not a "property tax" within the standard definition of the term. A property tax is a "tax levied on the owner of property ([especially] real property), [usually] based on the property's value." *Black's Law Dictionary* 1498 (8th ed. 2004). Here, however, the trial court based the transfer amount on the FMV of the facilities to be transferred from the District's control to Cherry Hills, not upon the assessed valuation of property within Cherry Hills. Thus, it was not a tax levied on the owners of property based on the properties' value. *See id.*

Accordingly, the $9,660,838 transfer amount was not prohibited by section 32-1-503.

In light of our determination, we need not address the remaining contentions of the parties.

The order is affirmed.

JUDGE ROY and JUDGE CONNELLY concur.