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COLORADO SUPREME COURT 2 East 14th Avenue Denver, Colorado 80203	FILED IN THE SUPREME COURT SEP 10 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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REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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C.A.R. 49(a)(1) 11

that the trial court "never stated" that its order to pay the $9.6 million transfer amount "was in lieu of taxes." (Opp. 2; internal quotation marks omitted.) Instead, quoting the trial court's order, the District contends that the purpose of the court's order was to compensate the District because exclusion "would 'result in a reduction of services, an[] increase in fees, or both." (*Id.*)

But the District quoted only the second half of the trial court's sentence. The court's complete sentence was: "*The loss of revenue from the exclusion* will result in a reduction of services, in increase in fees, or both.'" (3:741 ¶28; emphasis added.) Thus, the impact on services and fees, claimed to be the trial court's ground for ordering payment of the transfer amount, is simply the natural consequence of losing property tax revenues. For purposes of this case, therefore, impact on services and fees is the same thing as loss of tax revenue.

While the District is correct that the trial court "never stated" (opp. 2) that the purpose of its order was to offset the District's loss of property tax revenue, its meaning was clear enough. Reading paragraphs 27 through 33 of the trial court's order (copy attached as Appendix A) leaves no doubt that the court was attempting to compel Cherry Hills to replace the property tax revenue its residents otherwise would have paid to the District over the ten years following exclusion. The court found that "[a] reasonable estimate of the financial impact of the exclusion on the

B. Payment of the Transfer Amount Would Lead to Double Taxation.

As the court of appeals acknowledges (slip op. 11), the purpose of the exclusion statutes is to "facilitate the elimination of the overlapping of services provided by local governments and the double taxation which may occur" when territory is included within "both a municipality and a special district." § 32-1-102(3), C.R.S. (2008). Cherry Hills showed in the petition (at 12-14) that the court of appeals' attempt to explain away the obvious double taxation in this case is based on a false premise: that double taxation of a city is acceptable so long as one set of taxes is for services performed outside the city, from which municipal taxpayers derive no benefit.

The District proposes two additional explanations — also without merit — of why the district court's order supposedly would not lead to double taxation:

- First, the District argues there is no double taxation because both sets of taxes — to maintain the Parks and to pay the transfer amount — would be levied by Cherry Hills, which is a single taxing entity. (Opp. 8-9.) That is no answer, however, because the *amount* of taxes that Cherry Hills would be forced to levy would be more than twice what its taxpayers would pay for supporting only the Parks. Double

Thus, forcing Cherry Hills taxpayers to continue paying the District while they also pay to maintain the Parks imposes two taxes, when Cherry Hills needs only one service. The court of appeals' decision will result in double taxation, contravening the intent of the General Assembly.

C. Nothing in § 502(2)(d) Authorizes a Court to Disregard § 503.

To read the opposition brief, one would never know that the petition is based on § 503. The District mentions § 503 only twice (opp. 6,7), and both times the District is merely quoting the court of appeals' opinion. One of the quotations repeats a typographical error (opp. 6), where the court of appeals actually meant to cite section 32-1-502(2)(d) ("§ 502(2)(d)"). (*See* slip op. 11.) Thus, the District mentions § 503 only once (opp. 7), and that sentence contains no substantive response to the central point in Cherry Hills' petition.

The District does, however, cite and rely on § 502(2)(d). That section empowers a court to, among other things, "make such other provisions as the court finds fair and equitable." The District relies on that power as though it authorized a court to disregard § 503. (Opp. 1,7.) In interpreting a comprehensive legislative scheme, however, a court "must give meaning to all portions thereof" so as to "further legislative intent." *Martin v. Montezuma-Cortez Sch. Dist. RE-1*, 841 P.2d 237, 245-46 (Colo. 1992); *see also* § 2-4-201(1)(b), C.R.S. (2008) (it is presumed

tax revenue from an excluded city, the General Assembly did not list that loss as a factor for the court to consider.

Despite that telling omission, the District and the court of appeals point to the eighth factor, which is: "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." *Id.* (*See* opp. 6-7.) The District apparently contends that a court's consideration of this factor authorizes the court to order a withdrawing city to compensate the special district for lost future property tax revenue. (*See* opp. 3-4, 6.) But such an interpretation would bring § 502(2)(c) into conflict with § 503, violating the rule that "a provision existing as part of a comprehensive statutory scheme must be understood, when possible, to harmonize the whole." *Frank M. Hall & Co. v. Newsom*, 125 P.3d 444, 448 (Colo. 2005).

Here, the two statutes easily can be harmonized by reading the eighth factor to apply where the district loses the use of facilities due to an exclusion. For example, if an ambulance district has two ambulance dispatch centers, and one is located within the excluded city and is no longer available to the district, then ambulance service to the remainder of the district will be impaired. The district may have to build a new dispatch center, and it may be fair and equitable for the withdrawing city to contribute to the cost of that new facility. The District's

the district. The exact percentage to be paid by the city would depend on evaluation of the factors listed in § 502(2)(c) and on the size and financial condition of the city and the district. Such a payment would not run afoul of § 503 because it is for a capital item, not for the district's day-to-day operating expenses.

Here, in contrast, neither the District nor the trial court was able to identify any adverse impact on the District, other than a reduction in property tax revenue. The Parks remain open to residents of the District, just as before. As a result, the District does not need replacement parks and has never said it wishes to purchase any. Thus, the only explanation for the $9.6 million transfer amount is, as both courts below reluctantly acknowledged (3:742 ¶33; slip op. 9), to replace the District's lost future property tax revenue. That rationale violates § 503. In this petition Cherry Hills seeks only to block district courts from ordering excluded cities to make large cash payments for the *invalid* purpose of compensating special districts for loss of property tax revenue. This Court's eventual holding would not limit in any way the court's power to order payments for any *valid* purpose.[2]

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[2] The District also accuses Cherry Hills of arguing "that it has a 'right' to exclude from District 'without compensating' the District." (Opp. 7.) The District fails to quote the remainder of Cherry Hills' sentence, which clearly expresses its much more limited contention: "[t]his 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*." (Pet. 1; emphasis added.)

Regardless of past history, therefore, this case is now a hot-button issue in special-district and municipal law.

The court of appeals' decision may have the greatest impact in *deterring* smaller cities from filing a petition for exclusion. If not reversed, the court of appeals decision authorizes courts to order an excluded city to pay millions of dollars to a special district, *in addition to* paying to provide the service formerly provided by that district. Elected leaders of smaller cities with limited budgets would be most unlikely to subject their voters to such a risk. With exclusion no longer a viable option, smaller cities will be left with no bargaining power and no effective remedy if they receive inadequate service from a district.

The exclusion procedure has been invoked many times. The statutory headnotes cite eight published opinions. In addition, counsel for Cherry Hills are informally aware of two other exclusion cases that were not appealed. *See City of Dacono v. Bd. of Dirs. of Tri-County Ambulance Dist.* (Weld County Dist. Ct. No. 84-CV-1137) (2004 order of exclusion attached as Appendix B); *In re North Jeffco Park & Rec. Dist.* (Jefferson County Dist. Ct. No. 1956 CV 10806) (2000 order of exclusion attached as Appendix C). No doubt there have been many others. Thus, exclusion proceedings have been relatively common. And, because of the large

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 10, 2009, a copy of the foregoing **REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI** was served by first-class mail on:

Paul C. Rufien, Esq.
Paul C. Rufien PC
3600 South Yosemite Street, Suite 500
Denver, CO 80237

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO 7325 South Potomac Street Centennial, Colorado 80112	
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	**σ COURT USE ONLY σ** Case Number: 03CV762 Div.: 401
ORDER ON REMAND	

In this action, the City of Cherry Hills Village and its City Council (collectively, "the City") petitioned for exclusion of the real property located within its boundaries from South Suburban Park and Recreation District ("the District"). The matter came on for hearing commencing August 9, 2004, and concluding on August 16, 2004.

In an Order entered November 12, 2004, this Court ordered the exclusion of the territory within the boundaries of the City from the District subject to certain terms and conditions.

The City appealed that portion of the Court's order that required the City to pay the District the fair market value ("FMV") of the parks, open space, and improvements of the District within the excluded territory. The District cross-appealed arguing that exclusion should not have been ordered because the City would be unable to provide the services that had been furnished by the District.

8. The City encompasses an area of about 6.5 square miles and has a population of about 6,000 persons.

9. The City's population is about 4.2 percent of the population of the District.

10. The City's assessed valuation is almost 13 percent of the 2002 assessed valuation of the District.

11. The City has expressed its intent to provide the services made available by the District to the area described in the exclusion petition on and after the effective date of the exclusion. See Resolution no. 1, series of 2003.

12. The City has established a program to enable all City residents continued access to the same and comparable programs and services as those currently offered by the District to residents of the City.

13. The City has created and operated a recreation service and reimbursement program, which entitles City residents to access any recreation program, activity, class, or event offered by any municipal or special district recreation department in the seven-county Denver metro area.

14. The City's program is designed to provide reimbursement to City residents for the differential cost of recreational activities available to City residents prior to the exclusion at resident rates through the District.

15. The amount of reimbursement is 50 percent of the cost incurred by a City resident. However, the reimbursement cannot exceed a maximum of $50 per single activity per resident. The total annual maximum reimbursement for all recreation activities is $500 per household.

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 shall be considered.

Here, the City and the District have not been able to agree on a plan of exclusion. Thus, if the Court is to authorize exclusion, it must do so with provisions that make the exclusion fair and equitable without impairing the quality of service nor imposing an additional burden on the remaining territory of the District. In doing so, the Court must consider the criteria set forth in section 32-1-502(b), (c), and (d).

24. Section 32-1-502(2)(c) provides in relevant part:

> 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 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.

25. Here, the Court has considered the amount of the District's outstanding bonds including the discharge of that portion of the District's indebtedness incurred to serve the territory to be excluded.

26. The Court has also considered the fair market value and source of District facilities located within the territory to be excluded and which are to be transferred in order to serve the territory to be excluded. ¶ 22 above; Tr. Vol. VI 100:22 - 101: 22.

property. 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.

32. The District's facilities within the City are parks, open space, trails, and related improvements. As a practical matter, it would be difficult to preclude general public use of these facilities. Further, as mentioned above, the City has adopted an ordinance providing that the facilities are to be maintained in perpetuity for the use and benefit of the public. At least for the time being, residents of the District will be able to continue to use the transferred facilities.

33. The Court must consider the adequacy of the facilities retained by the District to serve its remaining territory, the effect that the transfer of facilities will have on the service provided by the district, and the extent to which the exclusion will reduce services or facilities or increase costs to users in the remaining territory of the District. See § 32-1-502 (2)(c), C.R.S. (2007). With these criteria in mind, in order for the exclusion to be fair and equitable, the City should pay to the District the FMV 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 services that will be the probable result of the exclusion.

b. Second, the service to be provided by the municipality must be the service provided by the special district in the territory described in the petition for exclusion. This condition has been met.

c. Third, the governing body of the municipality and the board of directors of the district must each submit a plan for the disposition of assets and the continuation of services to all areas of the district. Such a plan 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. This condition has been met.

d. Fourth, if the municipality and the special district are unable to agree upon a single plan for the disposition of assets and continuation of services to all areas of the district, the court 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 this determination, the criteria set out in section 32-1-502(2)(b), (c), and (d) shall be considered.

Order

The Court orders, adjudges, and decrees as follows:

1. The territory described in the petition for exclusion shall be excluded from the District effective January 1, 2005.

2. The City shall establish and operate the recreation services and reimbursement program described in its plan for exclusion.

3. The City shall pay to the District the sum of $9,660,838 as provided in this Court's Order entered December 28, 2004.

4. The District shall maintain and repair the facilities until the date of their transfer to the City. Thereafter, the City shall be solely responsible for maintaining the facilities.

5. The District was obligated to perform maintenance obligations for the facilities in accordance with certain agreements. The City and the District shall either enter into an agreement providing for the termination of these agreements, or the Court will provide for their termination by supplemental order.

6. All of the facilities shall be conveyed by the District to the City on or before December 31, 2004.

7. The facilities shall be transferred to the City in an as-is condition existing as of the date of the conveyance, inclusive of all water, water rights, and mineral interests associated with each park or improvement.

8. The District shall execute and deliver conveyance and related instruments in such form and content as the City may reasonably require to convey merchantable fee title via special warranty deed.

APPENDIX B

1. All notice requirements of C.R.S. § 32-1-502 have been duly, completely and properly complied with. No objection to the exclusion has been made by any taxpaying elector, individually or on behalf of the class designated as Taxpaying Electors.

2. This Court has jurisdiction over all necessary parties and the subject matter of this action.

3. The Court FINDS:

a. The City of Dacono, through an Intergovernmental Agreement with the Mountain View Fire Protection District, will provide on and after the effective date of the exclusion essentially the same ambulance and emergency medical services which the District provides to the territory proposed for exclusion and more particularly described on Exhibits A through O attached to this Order (the "Territory").

b. The governing body of the City of Dacono agrees, and has agreed by resolution, to provide to the Territory the services provided by the Tri-Area Ambulance District upon entry of the Exclusion Order.

c. The quality of ambulance and emergency medical service to be provided by the City of Dacono will be at least equal to the service now provided by the Tri-Area Ambulance District.

d. The District owns no real property or improvements within the Territory and the City does not seek ownership of any such assets located in any other part of the District; therefore, no disposition of assets is necessary.

e. The District has no outstanding bonded indebtedness; therefore, no provision for the retirement of indebtedness is necessary.

f. Upon the effective date of exclusion, the City shall be solely responsible for the provision of ambulance and emergency medical services to the Territory.

g. Primary responsibility for ambulance and emergency medical services in all territory of the District not proposed for exclusion shall remain with the District.

4. The Court ORDERS:

a. That the Territory described in Exhibits A through O, attached hereto, be and hereby is excluded from the Tri-Area Ambulance District effective January 1, 2005.

b. The City of Dacono shall assume ambulance and emergency medical service

APPENDIX C

DISTRICT COURT, COUNTY OF JEFFERSON, COLORADO

Civil Action No. 1956 CV 10806

CERTIFIED FINDINGS AND ORDER

IN THE MATTER OF NORTH JEFFCO PARK AND RECREATION DISTRICT (Petition for Exclusion – Fritzler Property)

COMES NOW, Lawrence R. McGinley, the President of the North Jeffco Park & Recreation District, and certifies that at a regularly scheduled meeting of the Board of Directors of the District, held November 9, 2000, at 6:30 p.m., at The Apex Center, 13150 West 72nd Avenue, Arvada, Colorado, the following Findings and Order were adopted:

1. Myron G. and Kathleen J. Fritzler have petitioned the District for the exclusion from said District of the real property described on Exhibit "A" attached (the "Property").

2. Pursuant to section 32-1-501(2), C.R.S., notice was given and a public hearing held concerning said Petition.

3. The Property has recently been annexed to the City of Westminster and the exclusion of the Property from the District would prevent possible confusion concerning responsibility for providing recreational services to the Property.

4. The District has considered the factors required by section 32-1-501(3), C.R.S., and finds as follows:

a. The exclusion of the Property from the District would be in the best interests of the Property, although not in the best interests of the District. The District has insufficient information to determine whether the exclusion would be in the best interests of Jefferson County.

b. Exclusion would not change the current relative cost and benefit to the Property as to the provision of services by the City of Westminster compared to the provision of such services by the District.

c. The respective abilities of the District and the City to provide economic and sufficient service to the Property are substantially the same and the exclusion of the Property will not affect the ability of the District to provide economic and sufficient service to all the properties within the District's boundaries following the exclusion.

d. The exclusion of the Property will not substantially adversely affect the District's ability to provide services at a reasonable cost compared with the cost which would be imposed by other entities in the surrounding area to provide similar services in the surrounding area.

e. The effect of denying the Petition and the overlapping jurisdiction that would result could adversely affect employment and other economic conditions in the District and the surrounding area.

FRITZLER:

4

A parcel of land situated in the NE ¼ of Section 23, Township 2 South, Range 69 West of the 6th P.M., County of Jefferson, State of Colorado, more particularly described as follows:

Commencing at the East one-quarter corner of said Section 23, thence N 00°14'21" W, along the east line of said NE ¼ of Section 23, a distance of 1667.36 feet, thence S 89°24'35" W a distance of 1353.64 feet to the northeast corner of Block 21, Greenlawn Acres being the Point of Beginning of the parcel described herein;

1) Thence S 00°00'00" E, along the east line of said Block 21, a distance of 326.71 feet to the southeast corner of said Block 21;
2) Thence S 89°42'42" W, along the south line of Block 21, a distance of 150.00 feet;
3) Thence N 00°00'00" E a distance of 371.31 feet to the north right-of-way line of West 94th Place;
4) Thence N 89°33'28" E a distance of 150.00 feet;
5) Thence S 00°00'02" E, a distance of 45.00 feet to the Point of Beginning, containing 1.279 acres, more or less.

Exhibit A