DISTRICT COURT, ARAPAHOE COUNTY, COLORADO Arapahoe County Justice Center 7325 S. Potomac Street Englewood, Colorado 80112	▲COURT USE ONLY▲
Petitioners: THE CITY COUNCIL OF THE CITY OF CHERRY HILLS VILLAGE, COLORADO; and THE CITY OF CHERRY HILLS VILLAGE, COLORADO 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 Number: 03CV0762 Courtroom 206
Attorneys for Appellant The City of Cherry Hills Village: Malcolm M. Murray, #7249 Thad W. Renaud, #23359 Murray Dahl Kuechenmeister & Renaud LLP 2401 15th Street, Suite 200 Denver, Colorado 80202 Phone: 303-493-6670 Fax: 303-477-0965 E-mail: mmurray@mdkrlaw.com , trenaud@mdkrlaw.com	

CITY OF CHERRY HILLS VILLAGE'S REPLY BRIEF ON REMAND

Petitioners, the City of Cherry Hills Village, Colorado and the City Council of Cherry Hills Village, Colorado ("Village"), submit this Reply to South Suburban Park and Recreation District's ("SSPRD") opening brief on Remand.

INTRODUCTION

To comply with the Remand Order this Court must – if any monetary award is to be made against the Village – prepare new *findings* explaining the nature and extent of any alleged burden or expense to SSPRD residents when title to the Parks was transferred to the Village. Any monetary award against the Village must be supported by express findings of the nature and extent of any additional burden or expense to SSRPD residents resulting from the transfer of the Parks to the Village.

The course suggested by SSPRD's Opening Brief on Remand to "clarify" that the $9,660,838 amount is "economic impact" and not "fair market value" is a transparent dodge of the appellate mandate. Moreover, the "economic impact" for which SSPRD argues it is entitled to compensation – the loss of the ability to levy property taxes against Village residents – ***is expressly prohibited by § 32-1-503, C.R.S.*** SSPRD's Brief is an invitation to compound the past error of awarding fair market value with the new error of ordering Village residents to pay a portion of the operating costs of SSPRD *after* the Village withdrew from SSPRD.

Trial in this matter preceded on SSPRD's interpretation of the municipal exclusion provisions of the Special District Act ("Exclusion Statute") that was simple and

wrong.[1] SSPRD's effort to resuscitate the vacated judgment is again predicated upon a simple but ***wrong*** reading of the Exclusion Statute. Contrary to SSPRD's contentions, the Exclusion Statute prohibits SSPRD's effort to subject Village residents to property taxes that might have been imposed after November 12, 2004 but for the exclusion.

Accordingly, new findings should be made confirming that there was ***no*** evidence at trial that the transfer of the Parks to the Village caused any burden or expense to SSPRD residents, and an amended judgment[2] entered against SSPRD in favor of the Village consistent with the terms and conditions stated in the Village's Opening Brief on Remand.

ARGUMENT

SSPRD argues that "the Court of Appeals misinterpreted the Trial Court Order." Not so. Judges Webb, Taubman, and Roman understood that SSPRD led this Court into reversible err by arguing from start to the end of trial that the statute required the Village to pay SSPRD fair market value for the Parks. Having concluded that awarding fair market value under the circumstances of this case was error, Judge Webb

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[1] For example, in SSPRD's Notice for Plan of Disposition of Assets, SSPRD represented to this Court that "***as required by the Act, City must pay District fair market value*** for the assets transferred by the District" (quoted in the attached Exhibit A, Village Combined Reply and Answer Brief at 3). That fundamental misreading of the Exclusion Statute was the basis for the appellate reversal.

[2] The Court of Appeals Opinion Vacated that portion of this Court's judgment requiring payment of fair market value to SSPRD. The payment that would have been due December 1, 2007 to satisfy a portion of the vacated judgment is being held by the Village pending resolution of the issues remanded by the Court of Appeals and further orders from this Court.

was confronted with the question of whether there was *any* statutory support for *any* money award against the Village, based upon the evidence admitted at trial

At that point the issue in the Court of Appeals turned to the argument advanced by SSPRD at trial, that the exclusion would result in a loss of ***future*** taxes. But the November 12, 2004 Order, while implying that there would be a burden caused by the exclusion, had never adopted SSPRD's theory that compensable burden or expense arose from the loss of property tax revenue from the excluded territory, a theory as discussed below that is expressly prohibited by § 32-1-503, C.R.S. Nor does this Court's Order contain any other findings supporting the conclusion that the transfer of the Parks to the Village placed any burden or expense upon SSPRD residents. Thus, instead of reversing the judgment in its entirety, the Court of Appeals remanded to allow SSPRD the opportunity to point to evidence from the trial in this Court that the transfer of the Parks to the Village placed some heretofore unarticulated burden or expense on SSPRD residents in addition to the continuing obligation to provide recreational services in the remaining territory.

The Village eagerly anticipated SSPRD's Opening Brief on Remand, which was to have fulfilled the expectation of an explanation (for the first time) of what burden SSPRD residents assumed when the Parks were transferred to the Village. But the anticipation was not followed by any revelation. In the eleven pages of SSPRD's brief, there is ***not a single word*** explaining the nature or extent of any burden or expense

caused to SSPRD residents by the transfer of the Parks to the Village. Instead, SSPRD proposes to add to the November 12, 2004 Order one or two additional words of *conclusion* that there was some burden, ***without pointing to any evidence showing what that burden was***. SSPRD's proposal for proceeding after remand is an invitation for another appeal and reversal.

The Court of Appeals intended for this Court to make express findings supporting any monetary award entered against the Village. The findings this court should make are contained in the Village's Brief on Remand: The transfer of the Parks to the Village ***did not*** caused any burden or expense to SSPRD residents. ***None.*** And the Village is entitled to be repaid all amounts it was forced to pay on the now vacated judgment.

SSPRD's Opening Brief on Remand and its opening and closing arguments at trial suggests that only two possible reasons exist to support the $9.7 million judgment entered against the Village. Fair market value, which the Court of Appeals reversed, and reduction in future district tax revenues after the Exclusion. Both reasons for ordering the Village to pay SSPRD money are, under the circumstances of this case, expressly prohibited by the plain language of Colorado's Special District Act.

1. Fair Market Value Is Not A Relevant Consideration

SSPRD's Opening Brief on Remand concedes that it was wrong at the trial in this case, and now agrees that the Exclusion Statute does ***not*** require payment of fair

market value for the Parks. But SSPRD's brief is completely bereft of any discussion of the obvious next question -- if payment of fair market value is not required, then how is fair market value even a relevant consideration where the transferred facilities remain available for use by SSPRD residents after November 12, 2004? Nowhere does SSPRD explain how fair market value might be a relevant consideration where the General Assembly has commanded this court to consider "the availability of the facilities transferred to the municipality for use, in whole or in part, in the remaining territory of the special district." § 32-1-502(2)(c) and (d), C.R.S. SSPRD residents have and will continue to enjoy the same recreational benefit from the Village Parks after November 12, 2004 as before. And the ability of SSPRD residents to enjoy the recreational benefit of the Village Parks will continue *in perpetuity*, for the reasons indicated in the Village's Brief on Remand.

There is no reason or logic whatsoever to consider fair market value where the Parks will remain available to meet the needs of SSPRD residents after November 12, 2004, just as they were before November 12, 2004. That part of this Court's order awarding SSPRD anything for "fair market value" of the Parks must be "deleted," as expressly instructed by the mandate from the Colorado Court of appeals.

2. SSPRD's Alleged "Loss" Caused by § 32-1-503, C.R.S. Is Not Compensable

SSPRD's Opening Brief on Remand contains no hint to the nature or magnitude of any "economic impact" on SSPRD residents caused by the transfer of the

Parks to the Village. At trial, however, SSPRD advanced an argument that it was injured by the application of § 32-1-503, C.R.S., which prohibits the SSPRD board from levying any property tax against the Village after November 12, 2004. SSPRD argued that the loss of its ability to subject the Village to property taxes should be compensated by an award of present-value damages:

> In its most fundamental analysis, if City is excluded from District, District will receive a net of approximately $1,100,000 less in annual tax revenue. ***That loss of revenue will continue in perpetuity. A shortfall in excess of one million dollars must be made up somewhere within the Districts budget.***

Hearing Brief of South Suburban Park and Recreation District, dated August 3, 2004; Respondent's Exhibit Notebook II, Exhibit X, "Net reduction in Revenues Without CHV"; Opening argument of Mr. Rufien, Tr. 8/9/04, pp.31-35. This plea for an award in present value of tax dollars that SSPRD would have been received in the future***, is expressly prohibited by the Exclusion Statute***.

A reduction of future tax revenue is emphatically not a burden that is not compensable under the statute. To the contrary, the General Assembly expressly prohibited special districts from subjecting municipalities to property taxes after the entry of an exclusion order:

> 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.***

Section 32-1-503, C.R.S. This court cannot, when making "other provisions" to competing exclusion plans, ignore § 32-1-503, C.R.S., and permit a special district to continue to subject excluded territory to property taxes to pay district operating costs. The Village ***cannot*** consistent with the Exclusion Statute be subject to any property tax levied through a money judgment representing a present value calculation of "lost" future tax revenues.

Other sections of the Exclusion Statute demonstrate the General Assembly's clear intent to prohibit any payment by the municipality to a special district for the loss of future tax revenue. For example, the purpose of the Exclusion Statute is primarily to "facilitate the elimination of . . . double taxation that may occur because of annexation or otherwise. . ." Section 32-1-102(3), C.R.S. SSPRD's request for the present value of lost future tax revenue would result in a situation where Village residents would be double taxed for Parks and Recreation services – by SSPRD *and* the Village. Indeed, under SSPRD's interpretation, Village residents would be paying the same portion of SSPRD's operating costs after the exclusion as before, while receiving none of the benefits enjoyed by SSPRD residents.

The Exclusion Statute is also careful to draw a distinction that is obfuscated by SSPRD's brief. The only burden compensable and subject to equitable adjustment under the statute is a burden arising ***from the transfer of facilities***. Thus § 32-1-501(2)(B)(vii), C.R.S. expressly directs this court to consider

> the effect which ***the transfer of the facilities*** and assumption of indebtedness will have upon the service provided by the special district which is not part of the exclusion

The carefully worded statute nowhere authorizes a trial court to consider the "*economic impact of the* ***exclusion***" as SSPRD's Brief blithely asserts. There may be general intangible impacts when a municipality withdraws from a special district. But reduced district tax revenue, loss of district prestige, and loss of district political influence, are ***not*** compensable under the Exclusion Statute.

When the General Assembly intended to make the Village liable for future reduction in district revenue, it knew how to do so. Contrast, for example, how the General Assembly instructed courts to allocate, between SSPRD and the Village, outstanding indebtedness existing at the time of the Exclusion. For that very specific type of "economic impact," the Village is to remain liable for its proportion until the debt is retired:

> 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 interest***

> ***thereon existing immediately prior to the effective date of the exclusion order***.

Section 32-1-503, C.R.S. Thus the General Assembly has drawn a very bright line – the Village remains liable ***only*** for its proportionate share of district indebtedness incurred before the Exclusion, but ***may not be subject to any tax levied or used for operating expenses after the Exclusion***.

Finally, while the Exclusion Statute lists many criteria that courts should consider in reviewing exclusion plans, one criteria that is not listed is the effect of reduction of revenue (or in SSPRD's parlance "economic impact") to the district caused by the departure of a municipality. The criteria contained in § 502(2)(b) and (c) are:

> (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) (i) consideration of the amount of the special district's outstanding bonds;
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> (ii) 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;
>
> (iii) the fair market value and source of the special district facilities located within the territory proposed for exclusion;
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> (iv) the facilities to be transferred which are necessary to serve the territory proposed for exclusion;
>
> (v) the adequacy of the facilities retained by the special district to serve the remaining territory of the special district;

> (vi) the availability of the facilities transferred to the municipality for use, in whole or in part, in the remaining territory of the special district;
>
> (vii) the effect which the transfer of the facilities and assumption of indebtedness will have upon the service provided by the special district in the territory which is not a part of the exclusion; and
>
> (viii) 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. These considerations are the ***only*** factors that the General Assembly authorized trial courts to consider when determining whether exclusion would impose any additional burden or expense on the remaining territory in the District. Accordingly, "loss" of future tax revenue resulting from the operation of §32-1-503, C.R.S. may not be considered by trial courts while making equitable adjustment of competing plans for exclusion.

SSPRD prepared and tried this case on a theory that is expressly prohibited by the Exclusion Statute. Although SSPRD may have abandoned in its Opening Brief on Remand the argument that it was injured by operation of § 32-1-503, C.R.S., there was no evidence offered at trial of ***any*** burden or expense caused to the remaining territory of the district from the transfer of the Parks to the Village.

In striking the balance between the excluded and remaining territory, the General Assembly knew that while the remaining territory would lose revenue from the excluded territory, the district would simultaneously be relieved of obligations to the excluded territory. The statutory scheme presumes that the loss of revenues from the

excluded territory would be offset by the reduction in expenditures necessary for the remaining territory. In addition, the General Assembly knowing that the district likely pledged its full faith and credit in support of general obligation bonds, required the excluded territory to continue to pay its portion of the District's existing indebtedness on the date of exclusion. § 32-1-503, C.R.S.

If the Exclusion Statute were amended to require the excluded territory to compensate the remaining territory in the district for "general economic impact" based on "loss of revenue," few cities could ever opt to provide services to their own residents. Exclusion would require citizens of a municipality to pay twice – first to maintain the replacement services in its jurisdiction, then again to compensate the remaining territory for future "loss of revenue." Conversely, the remaining territory would receive a windfall by continuing to receive tax revenues from a territory that is no longer part of the district and for which no services are provided. That result upsets the careful balance intended by the General Assembly in the Exclusion Statute.

CONCLUSION

The SSPRD's Opening Remand Brief could not point to ***any*** evidence in the record that SSPRD residents incurred any burden or expense as a result of the transfer of the Parks to the Village. This Court's findings must be revised to reflect that fact. Because the award of fair market value for the Parks was reversed by the Court of Appeals and not appropriate under the circumstances, judgment should be entered in

favor of the Village affirming the Exclusion and ordering SSPRD to return to the Village all amounts paid under the original judgment, as stated in the Village's Brief on Remand.

Dated: November , 2007

Respectfully submitted:

MURRAY DAHL KUECHENMEISTER & RENAUD LLP

A duly signed physical copy of this document is on file at the office of Murray Dahl Kuechenmeister & Renaud LLP pursuant to C.R.C.P. Rule 121, Section 1-26(9)

By:_____
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ATTORNEYS FOR CITY COUNCIL OF THE CITY OF CHERRY HILLS VILLAGE, COLORADO; and THE CITY OF CHERRY HILLS VILLAGE, COLORADO

CERTIFICATE OF SERVICE

I CERTIFY THAT ON OCTOBER ____, 2007, I CAUSED A TRUE AND CORRECT COPY OF **THE CITY OF CHERRY HILLS VILLAGE'S REPLY BRIEF ON REMAND**
to be served via JusticeLink on:

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A duly signed physical copy of this document is on file at the office of Murray Dahl Kuechenmeister & Renaud LLP pursuant to C.R.C.P. Rule 121, Section 1-26(9)

/s/ Madonna M. Wyman, Legal Assistant