

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO 7325 South Potomac Street Centennial, Colorado 80112	FILED Document CO Arapahoe County District Court 18th JD Filing Date: May 14 2008 6:21PM MDT Filing ID: 19840383 Review Clerk: N/A
<hr/> 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	<hr/> <p style="text-align: center;">σ COURT USE ONLY σ</p> <hr/> 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.

The Court of Appeals affirmed this Court's findings and conclusions with the exception of the finding that in order for the exclusion to be fair and equitable, the City would be required to pay to the District the FMV of the parks, open space, and improvements conveyed to the City. The Court of Appeals was concerned that this Court had concluded erroneously that section 32-1-502(2)(c), C.R.S. (2007) required the City to pay the District the FMV of the parks, open space, and improvements.

The Court now makes findings of fact, reaches conclusions of law, and orders as follows:

Findings of Fact

1. Within ten days of the filing of this petition, the City notified its city council and the board of directors of the District of this exclusion proceeding.
2. The City also caused to be published a notice of the exclusion proceedings and the filing of this petition in the City's official newspaper.
3. The City is a home rule municipal corporation, and is located within Arapahoe County, Colorado.
4. The District is a special district operating pursuant to the provisions of Title 32, C.R.S.
5. The municipal boundaries of the City are wholly within the boundaries of the District.
6. The property described in the petition for exclusion does not constitute the entire territory of the District.
7. The City has been within the District since 1959.

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.

16. The City has established a parks division within its public works department. The division will be staffed with three full-time employees and four seasonal employees. The annual budget for parks and recreation will be \$430,254. The cost of the reimbursement program will be about \$125,000 per year.

17. The City's reimbursement program will provide adequate recreation programs and activities for the residents of the City.

18. The District owned or controlled a total of 33.37 acres of parks and open space within the City. These parks and open spaces were developed for passive forms of recreation and were not utilized by the District for active recreation services or programs.

19. These parks and open-space areas include Blackmer Common, 14.58 acres; Dahlia Hollow Park, 2.46 acres; John Meade Park, 6.78 acres; and Three Pond Park, 10 acres.

20. District improvements existed both within the parks and other areas of the City, including bridges, boardwalks, trails, fences, a shelter, an equestrian-arena surface, and certain leasehold interests, hereinafter collectively referred to as the "improvements."

21. The parks and improvements are hereinafter collectively referred to as "the facilities."

22. The FMV of the facilities is \$9,660,838.

23. Section 32-1-502(2)(d), C.R.S. (2007) provides in relevant part:

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 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.

27. A reasonable estimate of the financial impact of the exclusion on the District is over one million dollars per year, or 10.4 million dollars through the year 2014. Ex. Y; Ex. Z; Tr. Vol. V 106:23-25, 107:1-11; Vol. VII 18:7 – 19:6, 19: 20-22.

28. The loss of revenue from the exclusion will result in a reduction of services, an increase in fees, or both. Tr. Vol. V 170:16-22; Vol. VI 53:24-25, 54-56, 57:1, 98:3 – 99:17; Vol. VII 23:17- 25, 32:20 – 33:13, 33:25-34:6.

29. Further, exclusion will impair the District's ability to maintain its fee-based subsidized programs and facilities. Tr. Vol. V 173:15-21; Vol. VI 57:13 – 59:6, 89:4 – 91:18, 92:24 – 93:25; Vol. VII 12:9 – 15:22; Ex. AA.

30. The City has requested that the Court reexamine its conclusion that compensation to the District is necessary in order to make the exclusion fair and equitable. The City argues that the facilities are currently open for use by the general public, including District residents, and the City has adopted an ordinance providing that the facilities are to be held in public trust and maintained in perpetuity for the use and benefit of the public. City Brief on Remand, p. 6, n. 3. In addition, the City suggests entry of a permanent injunction requiring that the facilities be held in trust and remain open for use by District residents and the general public in perpetuity. City Brief on Remand, p. 8.

31. In its previous Order, the Court required that the City pay to the District the FMV of the facilities to be conveyed to the City. This requirement was based on two considerations. First, these facilities, which had been integral components of the District's parks and recreation program, were no longer to be part of that program. The District could no longer improve, manage, regulate, lease, encumber, trade, or sell this

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.

Conclusions of Law

1. This Court has jurisdiction with respect to this petition, and venue is proper in Arapahoe County.
2. The exclusion of property within a municipality from a special district is governed by the provisions of section 32-1-502, C.R.S. (2007).
3. That section provides that the governing body of a municipality wherein 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 of the filing of a petition, the governing body of a municipality and the board of directors of the special district shall be notified of the exclusion proceedings. The taxpaying electors within the area proposed to be excluded shall be notified of the exclusion proceedings by publication. §32-1-502(1)(a), C.R.S. (2007). This provision of the statute has been satisfied.
4. Section, 32-1-502(2), C.R.S. (2007), provides that a court shall order the territory described in the petition, or any portion thereof, excluded from the special district, if the following conditions are met:
 - a. First, the governing body of the municipality must agree 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. The service to be provided by the municipality need not be the same quality as that provided by the special district. This condition has been met.

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.

In the orders to follow, the Court has made such allocation of facilities, has imposed such responsibilities for the discharge of indebtedness of the District, and has imposed such other conditions and obligations on the City and the District which the Court has finds necessary to permit a fair and equitable exclusion of the territory within the City from the District and the transfer of facilities which are necessary to serve the territory excluded. Accordingly, the fourth condition for exclusion has been met.

5. After exclusion from a special district, the excluded territory remains subject to the annual mill levy imposed by the district on the excluded territory and the remaining territory of the district in an amount and in a proportion sufficient to pay the district's outstanding general obligation bonded indebtedness.

6. The term "indebtedness" as used in section 32-1-502, C.R.S. (2007), does not include revenue bonds, leases, certificates of participation, lease purchase agreements, or other contractual obligations assumed by a special district without voter approval.

7. All of the conditions for exclusion of the subject territory from the District have been satisfied.

8. The allocation of facilities, responsibilities for the discharge of indebtedness, and other conditions and obligations necessary to permit the exclusion of the subject territory from the District are set out in the following Order.

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.

9. The District shall also identify and assign or otherwise transfer to the City any easements, licenses, agreements, or contracts related to the use of the facilities.

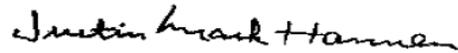
10. Prior to the effective date of the exclusion, the District shall not include all or any portion of the territory to be excluded in any ballot question or issue that would obligate all or any property within said territory to pay any new debt.

11. Property within the City shall be subject to an annual mill levy imposed by the District on the excluded territory and the remaining territory of the District in an amount and in a proportion sufficient to pay the District's outstanding general obligation bonded indebtedness as of November 12, 2004.

SO ORDERED.

Entered this 15th day of May, 2008.

BY THE COURT:



J. Mark Hannen
District Court Judge