

<p>DISTRICT COURT, ARAPAHOE COUNTY, COLORADO  Arapahoe County Justice Center  7325 S. Potomac Street  Englewood, Colorado 80112</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <p>Case Number: 03CV0762  Courtroom 206</p>
<p>Petitioners:</p> <p>THE CITY COUNCIL OF THE CITY OF CHERRY HILLS VILLAGE, COLORADO; and THE CITY OF CHERRY HILLS VILLAGE, COLORADO</p> <p>Respondents:</p> <p>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</p>	
<p>Attorneys for Appellant The City of Cherry Hills Village:  Malcolm M. Murray, #7249  Thad W. Renaud, #23359  Murray Dahl Kuechenmeister &amp; 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</p>	
<p><b>CITY OF CHERRY HILLS VILLAGE'S BRIEF ON REMAND</b></p>	

Petitioners, the City of Cherry Hills Village, Colorado and the City Council of Cherry Hills Village, Colorado (collectively, the "Village"), submit this Brief on Remand as directed by the Court in its Order, dated August 20, 2007.

## INTRODUCTION

The Court of Appeal's Opinion reversing and vacating this Court's judgment focused on that part of the judgment requiring the Village to pay fair market value for the Parks.<sup>1</sup> The guiding principle in applying the exclusion statute, the Court of Appeals instructed, is to assure that the public interest is served by making certain that the needs of both "user groups" – residents of South Suburban Park and Recreation District "SSPRD" and the Village citizens – are met after the exclusion. Here because the SSPRD user group enjoys *identical* access to and enjoyment of the Village Parks after November 2004 as before, the recreational needs of the SSPRD user group can be fully satisfied with an order from this Court under § 32-1-502, C.R.S., requiring the Parks to be held in public trust and to remain open to the general public in perpetuity.

This is an unusual statutory exclusion proceeding because the facilities to be transferred to the Village will remain available and unchanged for use by the residents of SSPRD. The SSPRD was quite wrong to have argued at trial in this case that payment of fair market value for transferred facilities is a *sine qua non* for any exclusion proceeding. Payment of fair market value is only one factor that *might* be relevant in some exclusion proceedings if for example, and unlike here, the remaining territory will be required to purchase replacement facilities to meet the needs of its users.

To comply with the Court of Appeals' instruction to make findings in accordance with the Opinion, a new order and judgment should be entered (1) affirming

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<sup>1</sup> "Parks" as used here means the "Facilities" defined in Section 21 of this Court's November 12, 2004 Order.

the exclusion of the Village from the SSPRD; (2) ordering the Village to pay its “proportion of such outstanding indebtedness” that existed immediately prior to the effective date of the exclusion order; (3) imposing as a condition of exclusion a permanent injunction directing all of the Village Parks be held in public trust and remain open for use by the general public in perpetuity; and (4) ordering the reimbursement of the Village, with interest, for payments previously made by the Village for the transfer of the Parks.

#### ARGUMENT

This Court’s November 12, 2004 order approved the exclusion of the City of Cherry Hills Village from the South Suburban Park and Recreation District, and required the Village to pay fair market value of the Parks. The Colorado Court of Appeals on review affirmed that part of the order granting the exclusion, but concluded that that “the trial court misinterpreted the statute as requiring payment of fair market value.” *Council of City of Cherry Hills Village v. South Suburban Park and Recreation Dist.*, 160 P.3<sup>rd</sup> 376 (Colo. App. 2007) (the “Opinion”). The Court of Appeals directed this Court to delete its finding that the “fair and equitable” criterion requires payment of the fair market value of the facilities to the SSPRD and to revise its findings and conclusions to be consistent with the Opinion.

The Court of Appeals held that § 32-1-502(2)(d), C.R.S., applied because the Village and SSPRD agreed on some but not all terms for a plan of exclusion. Thus because there was not a meeting of the minds on all terms of the plan, this Court was

authorized by the General Assembly to impose "such other provisions" necessary to serve the public interest:

This language addresses the scenario in which – as occurred here – a municipality and a special district agree on some but not all terms of a plan for exclusion, leaving the court to establish "such other provisions," that is, additional terms binding on both parties. According to the plain language, those terms must be fair and equitable. Further, "such other provisions" may have to address (1) allocation of facilities, (2) discharge of district indebtedness, and (3) the parties' "other conditions and obligations," as necessary to serve the territory excluded."

*Id.* at 379. The issue, as the Court instructs, is what "other provisions" are necessary to complete a fair and equitable plan for exclusion. The polestar for this analysis, according to the Court, is the *public interest*, which is served when "*both the excluded territory and the remaining territory meet the needs of the different user groups after exclusion.*" *Id.* at 380. If the recreational needs of the SSPRD residents are not affected by the transfer of the Parks, then plainly there are no grounds to support an additional provision requiring additional payment to the SSPRD user group.

To enter findings consistent with the Opinion, this Court must consider how the needs of the two user groups are met after the exclusion, in light of the provisions set forth in § 502(c) that are relevant to the facts in a particular exclusion proceeding. The defining and distinguishing factor in this proceeding is that this is statutory exclusion from a *park and recreation district*. Thus, it is necessary to determine, on the existing record, how the park and recreational needs of the two user groups are affected by the exclusion order.

*1. Allocation of Facilities.*

This Court's Order conveyed title to the Parks from SSPRD to the Village. But conveying title to the Parks in these particular circumstances means nothing more than the Village assuming responsibility for all future maintenance. After the Order, SSPRD has been relieved of all obligation to maintain the Parks. And consistent with this Court's orders, the Village has been maintaining the Parks ever since November 2004.<sup>2</sup>

The Opinion instructs that the critical question is this: how have the user groups in the remaining territory and the excluded territory been affected? Before 2004 SSPRD residents could use the Parks for recreational purposes. After November 2004, residents of SSPRD have continued to use the Parks for the *identical recreational purposes*. The transfer of title to the facilities has not affected SSPRD residents *at all*.

Similarly, before November 2004, the citizens of the Village used Parks for recreational purposes. After November 2005, the citizens of the Village continue to use the Parks for recreational purposes. The only change resulting from the transfer of title to the Parks is that that the financial obligation for maintenance now rests solely and squarely with the Village.

SSPRD never argued at trial that it would have to purchase "replacement" parks within the boundaries of the Village. The notion would be absurd, because SSPRD residents continue to have full use and enjoyment of the Parks. Thus, the relevant

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<sup>2</sup> Also consistent with this Court's November 12, 2004 Order (and the Supplemental and Final Order of Exclusion dated December 28, 2004), the Village has, to date, paid SSPRD the sum of \$1,200,047.36 (principal and interest) for the transfer of the Parks.

§ 502(c) criteria for our circumstances is not fair market value, but “*the availability of the facilities transferred to the municipality for use, in whole or part, in the remaining territory of the special district.*” Here *all of the Parks* transferred to the Village remain available for use by the SSPRD residents. This distinguishes municipal exclusion from a park district from municipal exclusion from other districts, such as water or fire, where the facilities transferred may not continue to be available for use by the remaining territory.

Because the Parks transferred to the Village will be available in whole for use by the remaining territory under § 502(c), the fair market value § 502(c) criteria is irrelevant. Fair market value presumes (1) that the property is transferable and (2) that the owner may exclude others from its use. Neither of those conditions is present here.<sup>3</sup> The Parks may never be transferred, and must always be maintained for use by SSPRD residents and the general public.

Similarly, the § 502(c) criteria of “the effect which the transfer of the facilities . . . will have upon the service provided by the special district” is answered by the facts presented at trial that the transfer of the Parks relieve SSPRD of perpetual maintenance obligations. The transfer of the Parks had no effect, *none*, on the services provided by SSPRD to its residents. And finally, the § 502(c) criteria of “the extent to

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<sup>3</sup> On June 19, 2007, the Village adopted Ordinance No. 10, Series 2007, (a copy of which is attached as Exhibit 1) ordaining that the facilities transferred to the Village by SSPRD are to be held in public trust and maintained in perpetuity for the use and benefit of the public. Under § 11-3-15 of the Cherry Hills Village Municipal Code, “[a]ll parks currently held or acquired by the City shall be held, protected, and regulated as park and recreational property and shall be maintained in perpetuity in public trust for the use and benefit of the public.”

which the exclusion reduces the services or facilities or increases the costs to users in the remaining territory” is answered again, by the fact that that SSPRD residents have continued to enjoy full use of the Parks, without maintenance obligations, after November 2004.

## ***2. The Discharge of District Indebtedness***

The issue of how to fairly and equitably account for the loss to the remaining territory of revenue from the excluded territory is specifically addressed by the General Assembly in the exclusion statute:

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

Section 32-1-503, C.R.S. The General Assembly's intent is clear. The Village shall not be liable for any SSPRD assessments after the exclusion, except for the proportionate share of the outstanding indebtedness and interest thereon existing immediately prior to the effective date. The new judgment entered by this Court should, consistent with the Opinion of the Court of Appeals, impose this obligation upon the Village. The Village, of course, cannot be liable either directly or indirectly for any other or additional assessments made by the board of the SSPRD.

### ***3. Other Conditions and Obligations***

The General Assembly granted this Court authority to impose other conditions and obligations to assure that the allocation of facilities is fair and reasonable. The key condition for this exclusion order, as discussed above, is to assure the continuation of the fact that the residents of SSPRD will continue to enjoy the same use of the Parks after 2004 as before. The Village agrees and will stipulate that an appropriate condition is a permanent injunction added to the November 2004 Order, requiring the Parks to be held in public trust and to remain available for use by the general public in perpetuity.

### **CONCLUSION**

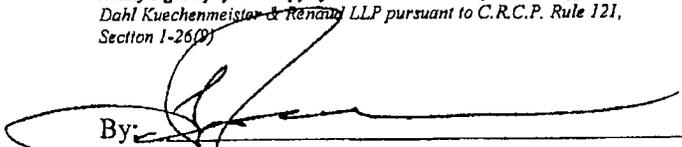
For these reasons, the new judgment should be entered as directed by the Court of Appeals: (1) affirming the exclusion of the Village from the SSPRD; (2) ordering the Village to pay its "proportion of such outstanding indebtedness" that existed immediately prior to the effective date of the exclusion order; (3) imposing as a condition of exclusion a permanent injunction requiring all of the Village Parks be held in public trust and remain open for use by SSPRD members and the general public, in perpetuity; and (4) ordering the reimbursement of the Village, with interest, for payments previously made by the Village for the transfer of the Parks.

Dated: October 22, 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: 

Malcolm M. Murray  
Thad W. Renaud

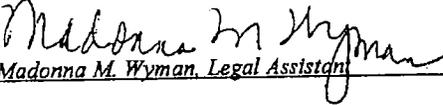
ATTORNEYS FOR CITY COUNCIL OF THE  
CITY OF CHERRY HILLS VILLAGE,  
COLORADO; and THE CITY OF CHERRY  
HILLS VILLAGE, COLORADO, APPELLANT

**CERTIFICATE OF SERVICE**

I certify that on October 22, 2007, I caused a true and correct copy of the **CITY OF CHERRY HILLS VILLAGE'S BRIEF ON REMAND** to be served via JusticeLink© on:

Paul C. Rufien  
Paul C. Rufien, P.C.  
4600 South Ulster, Suite 1111  
Denver, Colorado 80237

*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