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District Court, Arapahoe County, Colorado  
Honorable J. Mark Hannen  
Case No. 03 CV 0762

**Appellant/Cross-Appellee/Petitioner**

CITY COUNCIL OF THE CITY OF CHERRY HILLS VILLAGE, COLORADO; and CITY OF CHERRY HILLS VILLAGE, COLORADO,

v.

**Appellee/Cross-Appellant/Respondent**

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.

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Case No. 08 CA 1232

**ANSWER BRIEF OF  
SOUTH SUBURBAN PARK & RECREATION DISTRICT**

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## I. STATEMENT OF THE CASE

Appellee, South Suburban Park & Recreation District (“District”), believes that while generally presenting an accurate Statement of the Case in its Opening Brief, Appellant, City of Cherry Hills Village (“City”) strayed from a recitation of facts and process, and instead interjected its arguments. District briefly notes such instances below.

### A. Course of Proceedings

This case proceeded in the trial court pursuant to Section 32-1-502, C.R.S. after City filed a Petition for Exclusion with District (Tr. Vol. I, pp. 4-12) and the parties each submitted a plan for the distribution of assets and continuation of services to all areas of the District (Tr. Vol. I, pp. 14-22; Tr. Vol. I, pp. 58-81). Because the parties were unable to agree on a single plan, the trial court proceeded under Section 32-1-502(2)(d), C.R.S.

In its Opening Brief, City paraphrases selected portions of the parties’ respective plans for distribution of assets and continuation of services as part of its arguments to this Court. Such selective characterization of the plans is inappropriate, because the plans were not drafted to represent arguments of the parties, but rather to present a plan for exclusion that was acceptable to each party. Because the parties did not agree on those plans, the trial court

conducted a hearing, during which the arguments of the parties were fully considered.

During a 5-day hearing to the trial court, both City and District presented their arguments, supported by numerous exhibits and comprehensive testimony. After the close of the hearing, and in full consideration of the evidence presented, the trial court issued its first Findings of Fact, Conclusions of Law and Order, dated November 12, 2004 (“First Order”) (Tr. Vol. I, pp. 242-251). City states in its Opening Brief that, “The First Order did not explain why Cherry Hills should pay that amount [the fair market value of assets transferred as a result of exclusion].” That statement is neither an accurate recitation of the trial court’s findings, nor of fact (as City attempts to present it). The First Order sets forth a comprehensive set of factual findings, conclusions of law and orders of the trial court. Included within the First Order was an explanation of the trial court’s order for City to pay \$9,660,838 to District (Tr. Vol. I, pp. 244, 247, paras. 22, 27-31).

The ruling of this Court on the issues presented by the parties during the first appeal of this case are contained in the published case of, City Council of City of Cherry Hills Village v. South Suburban Park and Recreation District, 160 P.3d 376 (Colo. App. 2007). Both City and District

make their respective arguments based largely on the holdings of that case. District disputes City's paraphrasing of such holdings in City's Statement of the Case from its Opening Brief. District relies on its arguments related to this Court's prior holding as set forth in this Answer Brief.

In discussing the proceedings on remand to the trial court, City attempts to somehow inflame this Court by using words such as "sharply criticized" and "accused" regarding District's arguments to the trial court related to the City Council v. South Suburban case. While advocating its position, District neither criticized this Court nor levied any accusations about the Court. The parties' interpretations of this Court's order in City Council v. South Suburban differ. Each party advocated its position to the trial court on remand. To the extent those differing arguments are relevant to this appeal, they are appropriate for argument, not as a recitation of the Statement of the Case.

District disagrees with City's characterization of the trial court's Order on Remand, dated May 15, 2008 ("Second Order") (Tr. Vol. III, pp. 736-747). Because the parties' differing readings, interpretations and citations to the Second Order are at the crux of the present appeal, District leaves its arguments to the remaining portions of this Answer Brief.

**B. Statement of Facts**

City's Statement of Facts set forth in its Opening Brief is really a recitation of the course of proceedings. District's disagreement with portions of City's statements is set forth above. The underlying facts surrounding City's exclusion from District remain unchanged from the facts identified to this Court in the earlier appeal (part of the briefing in the City Council v. South Suburban case). To the extent those facts are relevant to the appeal at hand, District will cite to the appellate record regarding evidence presented to the trial court.

**II. SUMMARY OF ARGUMENT**

The trial court fully understood the mandate of this Court issued in City Council v. South Suburban. Contrary to the arguments of City, that mandate was not limited to the directive of deleting language from the trial court's First Order. This Court held that the trial court was required to consider all the factors of Section 32-1-502(2), C.R.S., including the fair market value of the Parks transferred. After the briefing by the parties, the trial court issued its Second Order, which reflected its understanding of this Court's mandate and its compliance with that mandate. The Second Order sets forth the trial court's complete rationale for reaffirming its award of FMV to District.

Upon this review, this Court should search the record for evidence supporting the trial court's decision. Absent manifest error due to a lack of any support in the record, the trial court's findings of fact should be affirmed. The trial court correctly applied the law as determined by this Court in City Council v. South Suburban. All the criteria of Section 32-1-502(2), C.R.S. must be considered in determining what is "fair and equitable" regarding the exclusion of territory from District. The trial court ordered certain conditions associated with the exclusion that it determined were fair and equitable. The record on appeal fully supports the trial court's decision. As such, this Court should affirm the trial court's decision, including the award of FMV paid by City to District.

Section 32-1-502(2), C.R.S. supports the trial court's decision. The statute sets forth certain criteria that must be considered in structuring what conditions may be attached to an order granting the exclusion of property. Among the criteria are the considerations of fair market value of the assets to be transferred, as well as the financial and service related impacts that the exclusion will have on District. The trial court's Second Order reflects those considerations. The statute does not prohibit a trial court from awarding compensation to the District. The trial court's order is not double taxation,

nor is it an award in lieu of taxation. The trial court's Second Order is consistent with the law and should be affirmed.

### III. ARGUMENT

#### A. The Trial Court acted pursuant to this Court's mandate on remand.

The crux of City's appeal is the erroneous argument that the trial court either misunderstood or overtly ignored the mandate of this Court in the City Council v. South Suburban case. City captions many of its arguments with this error; and within those arguments not captioned as such, City references the trial court's supposed failure to follow the mandate of this Court. In making that argument, City misquotes the trial court's Second Order or simply fails to mention many substantive provisions of the Second Order. The trial court fully understood the mandate of this Court and expressly and explicitly followed that mandate.

##### 1. The trial court understood this Court's mandate.

While the City characterizes this Court's mandate as "simple and clear," it fails to fully identify such mandate. City only discussed the Conclusion of the Court's holding in City Council v. South Suburban, and even then did not fully discuss that Conclusion.

A federal case cited by City in its Opening Brief establishes the flaw in City's abbreviated analysis. "The 'mandate rule' provides that a district court must comply strictly with the mandate rendered by the reviewing court." Huffman v. Saul Holdings Limited Partnership, 262 F.3d 1128, 1132 (10<sup>th</sup> Cir. 2001)(citations omitted). The Huffman court also discussed the related "law of the case doctrine" in the context of appeals and remands to the lower court. "The law of the case doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Id., at 1132. Huffman specifically dealt with the court's review of the statutory interpretation that provided the basis for a monetary award. Id., at 1131.

Unlike City, the trial court understood the full breadth of the Court's mandate from City Council v. South Suburban. The trial court expressly set forth the direction provided by this Court and also followed the full scope of the holdings.

The trial court introduced its Second Order with the following statement:

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(c), C.R.S. (2007) required the City to pay the District the FMV of the parks, open space, and improvements. (Tr. Vol. III, p. 737, para. 1)

City would have this Court believe that despite the trial court's express acknowledgment of this directive, it then continued by ignoring that very directive. The substance of the trial court's Second Order not only followed the directive of this Court, but it adhered to the entire mandate of the Court. This Court concluded in City Council v. South Suburban that, "On remand, the trial court shall delete its finding that the 'fair and equitable' criterion alone requires Cherry Hills to reimburse the District for the FMV of the facilities, and may revise its other findings and conclusions consistently with this opinion." City Council v. South Suburban, 160 P.3d 376, 383 (Colo. App. 2007).

The trial court not only expressly addressed this Court's concern that the First Order appeared to identify a requirement for the award of FMV, but it followed the Court's directive by revising its other findings and conclusions. Important within the revisions contained in the Second Order is the further relevant mandate of the Court.

This Court determined that the statutory criteria of Section 32-1-502(2)(d), C.R.S. "shall be considered." City Council v. South Suburban, 160 P.3d 376, 380. "The term 'shall' in a statute generally 'indicates that

this term is mandatory.” Id., at 380 (citing Pearson v. District Court, 924 P.2d 512, 516 (Colo. 1996); see also DiMarco v. Department of Revenue, 857 P.2d 1349, 1352 (Colo. App. 1993)).

This Court mandated that the trial court consider the fair market value of the subject “Parks.” That is precisely what the trial court did by further complying with this Court’s mandate to “correct its erroneous conclusion that ‘fair and equitable’ requires Cherry Hills to reimburse the District for the FMV of the facilities, and it should articulate the effect, if any, of this correction on its other findings and conclusions.” City Council v. South Suburban, 160 P.3d 376 at 382. “Hence, we conclude that remand is necessary to allow the court to reconsider this award and further explain its rationale if it again awards the District FMV.” Id., at 381-382.

2. **The Second Order of the trial court followed the mandate of this Court.**

City contends that this Court’s holding that the trial court should “further explain its rationale if it again awards the District FMV” was somehow this Court’s prediction that the trial court might circumvent or ignore the mandate of City Council v. South Suburban. To the contrary, that language was vital to the meaning of this Court’s mandate. This Court determined that Section 32-1-502(2), C.R.S. did not require a trial court to

award FMV as part of exclusion. This Court also found that the trial court must consider the FMV in determining the terms and conditions of exclusion. In properly considering FMV, this Court recognized that the trial court could award FMV to District as being “fair and equitable.” If the trial court were to make such an award, its rationale should be contained in its order. City Council v. South Suburban, 160 P.3d 376, 381-383.

In arguing that the trial court failed to comply with this Court’s mandate, City theorized that the trial court was “perhaps heeding the District’s insistence that ‘no provisions of the Trial Court Order... can be deleted.’” This perceived “heeding of the District” is the same “sharp criticism” of this Court that City believes exists.

It is correct that District argued to the trial court that it was not necessary to delete any provisions of the First Order in order to comply with this Court’s directive to eliminate any conclusions that Section 32-1-502(2), C.R.S. required the award of FMV. District did not interpret the First Order as yielding to a requirement to award FMV. District’s briefs on remand speak for themselves and detailed its interpretation of the First Order (Tr. Vol. III, pp. 580-621, 641-666). It is not necessary to detail that interpretation here. In summary, the trial court’s determination that the City “must pay” (Tr. Vol. I, p. 244, para. 22) District was not an articulation of a

statutory requirement, but rather the expression of the trial court's ultimate order to City, which included compensation to District. Because the trial court ordered it, payment was mandatory-- City "must pay." The paragraphs following the trial court's statement that City must pay set forth the trial court's rationale and did not contradict other terms and conditions of the First Order.

In the First Order, the trial court articulated its finding that the City must pay to the District the fair market value of the facilities to be transferred to the City (Tr. Vol. I, p. 244, para. 22). With that finding determined, and relying upon the payment by City to District, the trial court continued by finding that the exclusion would not impose an additional burden or expense on the remaining territory of the District. No additional burden was found, because District would be receiving compensation from City. (Tr. Vol. I, p. 247, paras. 28, 29). The trial court also found that District's services would not be impaired. Similarly, that finding was also expressly qualified by the understanding that compensation would be awarded. The impacts of the exclusion were considered "in accordance with the terms and conditions imposed by the [trial] court" (Tr. Vol. I, p. 247, paras. 25, 30, 31).

Regardless of District's interpretation, the trial court fully reassessed its First Order. The trial court's compliance with this Court's mandate is expressed throughout the Second Order.

City makes the incredulous statement that the trial court made only one "cosmetic" change to the First Order. City even presents its arguments in table format, as if to compare the changes between the First Order and the Second Order side by side. City concludes that because the trial court made only a "small change in verbiage," it committed exactly the same error in the Second Order.

The gross mischaracterization contained within City's argument is astounding. This Court is fully capable of comparing the First Order and the Second Order side by side. The differences are obvious. The first 21 paragraphs of the two orders dealt with subject matter not the subject of remand. As such, they are substantively the same, although the trial court did acknowledge the passage of time since the First Order by changing the tense of the paragraphs. As of paragraph no. 22 of the two orders, however, the substantive similarity ends, specifically due to the trial court's compliance with this Court's mandates.

Paragraph No. 22 of the First Order contains the language that was of concern to this Court in City Council v. South Suburban. The trial court

found that the City “must” pay FMV. The corresponding language in the Second Order that City “should” pay FMV (which is a very meaningful change, not one of mere semantics) is not found until Paragraph No. 33, and then it constitutes well under half of the content of the paragraph. The 10 intervening paragraphs of the Second Order set forth the “rationale” of the trial court in affirming the award of FMV. Those 10 paragraphs are either substantively different from the First Order, or there is no comparable provision within the First Order.

Paragraph No. 23 of the Second Order details the requirements of Section 32-1-502(2)(d), C.R.S., and sets forth the requirement confirmed by this Court in City Council v. South Suburban that the trial court consider the factors of Sections 32-1-502(2)(b), (c) and (d), C.R.S. (Tr. Vol. III, p. 739). Paragraph No. 24 sets forth the considerations of Section 32-1-502(2)(c), C.R.S., including the mandatory consideration of FMV (Tr. Vol. III, p. 740).

Paragraph Nos. 25 and 26 of the Second Order confirm that the trial court made the requisite considerations (Tr. Vol. III, p. 740).

Paragraph Nos. 27-29 of the Second Order set forth critical factual findings and provide the rationale for the trial court’s ultimate orders (Tr. Vol. III, p. 741).

Paragraph No. 30 of the Second Order expressly acknowledges the arguments that City made on remand. This is directly contrary to City's argument from its Opening Brief that the trial court did not mention its arguments on remand (Tr. Vol. III, p. 741).

Paragraph No. 31 clarified the provisions of the First Order that required City to pay to District the FMV of the Parks (Tr. Vol. III, pp. 741-42). This clarification was consistent with the District's interpretation of the First Order, as detailed in the District's briefs on remand. As such, the trial court expressly clarified that it did not ever consider Section 32-1-502(2), C.R.S. to contain a requirement to award FMV. The trial court's reasoning was that: 1) the transferred Parks were an integral component of the District's parks and recreation programs and would no longer be part of those programs; and 2) District would lose a substantial portion of its tax revenue base, which would disrupt the District's operational plans, require it to reduce its services and increase fees (Tr. Vol. III, pp. 741-42).

Paragraph No. 32 again acknowledges City's arguments regarding the public use of the Parks (Tr. Vol. III, p. 742).

Finally, Paragraph No. 33 (the final paragraph of the trial court's Findings) reaffirmed the relevant considerations under Sections 32-1-502(2)(c) and (d), C.R.S. Then, "with these criteria in mind," the trial court

found that City “should” pay to District the FMV. The trial court continued to articulate its rationale for the award, tying its final Finding to the many paragraphs that preceded it (Tr. Vol. III, p. 742).

**B. The trial court’s findings and conclusions, including the award of \$9,660,838, should be affirmed because they are supported by the record on appeal.**

City argues that the trial court’s stated rationale for the award of FMV is not valid. City cites no legal authority for this contention, however. City instead resorts to attempting to take its fourth bite from the apple that is its arguments that have been rejected by the trial court (twice) and by this Court (in City Council v. South Suburban). City’s arguments are not proper for this appeal.

The law of the case doctrine is specifically intended to prevent the continued re-argument of issues already decided. Huffman v. Saul Holdings Limited Partnership, 262 F.3d 1128 at 1132. The doctrine has particular relevance to the case at hand. “When a case is appealed and remanded the decision of the appellate court establishes the law of the case and ordinarily will be followed by both the trial court on remand and the appellate court in any subsequent appeal.” Id., at 1132.

The mandate of this Court in City Council v. South Suburban, coupled with the findings, conclusions of law and orders of the trial court in both the First Order and the Second Order negate City's contentions.

- 1. This Court mandated that the trial court "shall consider" the fair market value of the assets transferred.**

As set forth above, Sections 32-1-502(2)(c) and (d), C.R.S. combine to state that the trial court "shall consider" the fair market value of the subject Parks that would be transferred. In addition, the trial court shall consider the adequacy of the facilities retained by 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. Section 32-1-502(2)(c) and (d), C.R.S. (see also Tr. Vol. III, p. 742, para. 33).

After considering the factors required by law, and affirmed by this Court, the trial court reached its factual findings. Those Findings are set forth in detail through the Second Order, culminating with the Findings of Paragraph No. 33 of the Second Order (Tr. Vol. III, p. 742).

With these criteria in mind, in order for the exclusion to be fair and equitable, the City should pay to the District the FMV (of) 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 (of) services that will be the probable result of the exclusion.

The trial court's rationale is valid and should be undisturbed by this Court. Mulhern v. Hederich, 430 P.2d 469 (Colo. 1967)

2. **The trial court's factual findings, after consideration of all factors required by Sections 32-1-502(1)(c) and (d), C.R.S., should not be disturbed unless there is no support in the record.**

Contrary to City's arguments, the proper standard of review by the Court of Appeals is to determine whether the trial court's findings of fact are so clearly erroneous as to not find any support in the record. Page v. Clark, 592 P.2d 792 (Colo. 1979), Parr v. Triple L & J Corp., 107 P.3d 1104 (Colo. App. 2004).

City Council v. South Suburban, established that the trial court must consider the factors of Section 32-1-502(2)(c) and (d), C.R.S. Id., at 380-381. ("The statute clearly directs the trial court to make provisions in the exclusion plan 'as the court finds fair and equitable' and references FMV as *one* factor the court should consider.") After making the requisite considerations, the factual determinations as to what is "fair and equitable"

is the sole prerogative and responsibility of the trial court. Peterson v. Colorado Potato Flake & Mfg. Co., 435 P.2d 237 (Colo. 1967).

The trial court considered fair market value along with the extent to which the exclusion will reduce services or facilities or increase costs to users in the remaining territory of the District (Tr. Vol. III, p. 742, para. 33). Those considerations were proper. There is no law that precludes the trial court from determining that an award of fair market value was “fair and equitable.” Had the legislature wished to preclude such an award, it would have specifically so stated. *See* City Council v. South Suburban, 160 P.3d at 381, *citing* Colorado Department of Revenue v. Hibbs, 122 P.3d 999, 1004 (Colo. 2005).

The Colorado Courts have analyzed the appropriate standard of review in these situations. For such analysis, the trial court’s award of FMV is analogous to an award of damages. In Peterson, the Colorado Supreme Court considered uncertain damages awarded by a trial court under the considerations of “fair and equitable.”

The trial court, being the trier of the facts, under the circumstances and evidence of this case, had the sole prerogative and responsibility of making a reasonable finding which would provide for a fair, equitable, and adequate award of damages... [T]he trier of facts... must, by utilizing all the evidence and the reasonable inferences emanating therefrom, devise a fair method for assessing such damages.

Peterson, 435 P.2d at 240.

In the case at hand, there was no law available for the trial court to determine with mathematical certainty the amount of compensation owing to District to make the exclusion fair and equitable. Such determination was left to the sole prerogative of the trial court, as the trier of fact having reviewed all relevant evidence. Interbank Investments, LLC v. Vail Valley Consolidated Water District, 12 P.3d 1224 (Colo. App. 2000), *appeal after remand* Interbank Investments, LLC v. Eagle River Water and Sanitation District, 77 P.3d 814 (Colo. 2003), *certiorari denied*. So long as the District introduced some evidence sufficient to allow a reasonable determination of damages, it was incumbent on the trial court to determine the monetary award that will adequately compensate District. See Great West Food Packers v. Longmont Foods Co., 636 P.2d 1331, 1333 (Colo. App. 1981).

**3. The record on appeal fully supports the trial court's determinations.**

City repeatedly states that the trial court failed to provide its rationale for the award of FMV. As stated above, the trial court's findings expressly set forth its rationale. In compliance with this Court's mandate, however, the trial court did not rely merely on its own narrative. The trial court expressly cited portions of the record upon which it relied. It is incumbent

upon this Court to search the record on appeal for support of the trial court's findings, and to presume that the findings were entered after due consideration of all the evidence admitted. City Council v. South Suburban, 160 P.3d at 380 (citing Bockstiegel v. Board of County Commissioners, 97 P.3d 324, 328 (Colo. App. 2004); Colorado Municipal League v. Mountain States Tel. & Tel. Co., 759 P.2d 40, 45 (Colo. 1988); Howard v. Lester, 385 P.2d 121, 122 (Colo. 1963)).

Here, the trial court, in its Second Order, made this Court's task of establishing support in the record an easy one. It provided its own citations to the record (*District notes that the citations used by the trial court do not correspond to District's own review of the record, for consistency, however, District will refer to the trial court's citations as presented in the Second Order*).

The trial court found that 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 (Tr. Vol. III, p. 741, para. 27). City contends that the trial court's finding of "\$10.4 million dollars through the year 2014" was based on an unsupported assertion of District. That contention ignores the trial court's citations. The trial court cited Ex. Y, Ex. Z, Tr. Vol. V 106:23-25, 107: 1-11, Vol. VII 18:7 – 19:6, 19: 20-22.

Exhibits Y and Z are spreadsheets that were prepared by District's expert witness in governmental accounting. They project the financial impacts that exclusion would have upon District through 2014, accounting for lost revenue, saved expenses, capital outlay, and mitigation of those impacts through sound management. The findings of the exhibits were confirmed, explained and expounded upon by the testimony of District's expert witness, District's Executive Director and District's Manager of Finance. *The testimony of District's Finance Manager is found in Vol. VI, pp. 50-149; the testimony of District's Executive Director is found in Vol. VII, pp. 63-130; and the testimony of District expert in governmental accounting is found in Vol. VIII, pp. 4-40.*

Where evidence in the form of expert opinion substantiates the award of the trial court, the findings of the trial court should not be disturbed on review. Stone v. Caroselli, 653 P.2d 754 (Colo. App. 1982).

The trial court also found that the loss of revenue from the exclusion will result in a reduction of services, an increase in fees, or both (Tr. Vol. III, p. 742, para. 28). City argued that District failed to show any economic impacts resulting from exclusion. Again, the trial court provided its citations to the record. The trial court relied on the expert testimony of the District's expert in recreational services, the District's Executive Director, and the

District's Manager of Finance (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). *The testimony of District's Finance Manager is found in Vol. VI, pp. 50-149; the testimony of District's Executive Director is found in Vol. VII, pp. 63-130; and the testimony of District in recreation services is found in Vol. VI, p. 150- Vol. VII, p. 61.*

The trial court also found that the exclusion will impair the District's ability to maintain its fee-based subsidized programs and facilities (Tr. Vol. III, p. 742, para. 29). Yet again, the trial court provided its citations to the record, again relying on the testimony of District's experts, the District's Executive Director, and the District's Manager of Finance (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). *The testimony of District's Finance Manager is found in Vol. VI, pp. 50-149; the testimony of District's Executive Director is found in Vol. VII, pp. 63-130; and the testimony of District in recreation services is found in Vol. VI, p. 150 - Vol. VII, p. 61; and the testimony of District expert in governmental accounting is found in Vol. VIII, pp. 4-40.*

This Court expressly recognized that the appropriate standard for this appeal is to determine whether there is support in the record. As part of its remand to the trial court, which called for amended findings, this Court

stated: “Without knowing the extent of such amended findings, we cannot now determine whether the record otherwise supports an award of FMV.”

City Council v. South Suburban, 160 P.3d at 383.

There is ample support within the appellate record for the trial court’s finding that it was fair and equitable for District to be awarded FMV for the subject Parks. As a result, this Court should not substitute its judgment for that of the trial court and should not disturb the findings of the trial court.

Peterson, 435 P.2d 237; Underhill v. Detert, 381 P.2d 265 (Colo. 1963);

Winter Park Ranch, Inc. v. Richards, 545 P.2d 1367 (Colo. App. 1975).

**C. Sections 32-1-502(1)(c) and (d), C.R.S. support the trial court’s determination.**

City concludes its arguments by making yet another presentation of arguments that have been rejected by the trial court and this Court. Such arguments are not appropriate for consideration as part of this appeal, because they are contrary to the appropriate standard of review and the law of the case. Regardless, City’s arguments fail as being without merit.

- 1. The full and plain meaning of Sections 32-1-502(1)(c) and (d), C.R.S. allows the trial court to award the District compensation necessary to be “fair and equitable” to the parties after exclusion of territory.**

City makes numerous citations to the municipal exclusion statutes in arguing that the trial court did not have the legal authority to make *any* award to District. In doing so, however, City avoids or ignores the subsection directly applicable to the situation at hand, subject of the remand to the trial court, and now subject of this appeal. City's argument does not address the mandate of Section 32-1-502(2)(c), C.R.S. that the trial court was to impose such "other conditions" that would make the exclusion "fair and equitable." There is no restriction or limitation within Section 32-1-502(2)(c), C.R.S. that would preclude an award of FMV as being fair and equitable.

The trial court properly considered all of the factors and considerations of Sections 32-1-502(2)(c) and (d), C.R.S. It applied the evidence presented during the hearing, considered the applicable facts in context of the law, and rendered its Findings, Conclusions of Law and Orders. The trial court was correct in considering the statutory criteria – including FMV – to ascertain whether it was acting in a "fair and equitable" manner. City Council v. South Suburban, 160 P.3d at 380.

**2. The trial court's award is not "double taxation."**

City's last argument is that the trial court's award is impermissible double taxation. It is not. City presents no legal argument or citation to the

record to support its contention that the trial court was awarding FMV in lieu of awarding District taxes from the excluded property owners. Instead, City relies only on its repeated conclusory statements.

The trial court's award is not a tax. District's lost tax revenue as a result of the exclusion is perpetual. The award of FMV is a one-time payment that does not approximate the District's permanent lost tax revenue. Further, the award of FMV is to be paid by City, not by the taxpayers within the excluded area. After exclusion, the taxpayers will pay one tax-- to City.

The trial court's award was not to circumvent double taxation. City's argument suffers from the same fatal flaw discussed above. It fails to recognize the substantial support in the record for the award. District's expert in governmental accounting did not solely identify the lost property taxes and project that loss into the future. The expert's determination evaluated nine specific line items of District revenue and nine specific line items of District expenditures impacted by exclusion. Importantly, the analysis then limited its projections to a period of 10 years, a time period within which the District's management would be able to mitigate the financial impacts through sound long-range planning practices. Lastly, the expert applied a discount factor and determined a new present value of the

impact (Ex. Y; Tr. Vol. VIII, p. 16). The trial court expressly relied, in part, on the evidence presented by District. *See Stone v. Caroselli*, 653 P.2d 754.

#### IV. CONCLUSION

The trial court understood and followed the mandate of the trial court issued in City Council v. South Suburban. The Second Order to the trial court fully sets forth the rationale of the trial court for awarding District fair market value of the assets transferred. The record on appeal amply supports that rationale. The trial court has the sole prerogative to determine what compensation is to be paid by City to District. Peterson, 435 P.2d at 240; Interbank Investments, 12 P.3d 1224. As such, this Court should not substitute its judgment for that of the trial court. Howard v. Lester, 385 P.2d 121, 122 (Colo. 1963); Muhe v. Mitchell, 442 P.2d 418 (Colo. 1968); Mulhern, 430 P.2d 469 (Colo. 1967).

For the reasons stated above, the Second Order of the trial court should be affirmed.

Respectfully submitted this 23<sup>rd</sup> day of December, 2008.

Paul C. Rufien, P.C.

  

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Paul C. Rufien

ATTORNEYS FOR APPELLEE,  
SOUTH SUBURBAN PARK AND  
RECREATION DISTRICT

CERTIFICATE OF SERVICE

I hereby certify that on this 23<sup>rd</sup> day of December, 2008, a true and correct copy of the above and foregoing ANSWER BRIEF was sent via United States mail, postage prepaid, properly addressed as follows:

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