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<p>COLORADO SUPREME COURT Colorado State Judicial Building 2 East 14th Avenue Denver, CO 80203</p>	
<p>Colorado Court of Appeals Case No. 08 CA 1232 Opinion by Judge Casebolt Judges Roy and Connelly concur</p> <p>Trial Court: District Court, Arapahoe County, Colorado Honorable J. Mark Hannen Case No. 03 CV 0762</p>	<p>▽ COURT USE ONLY ▽</p> <hr/> <p>Case No. 09 SC 592</p>
<p>Petitioners: CITY COUNCIL OF THE CITY OF CHERRY HILLS VILLAGE, COLORADO; and CITY OF CHERRY HILLS VILLAGE, COLORADO,</p> <p>v.</p> <p>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.</p>	
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<p>OPPOSITION TO PETITION FOR CERTIORARI</p>	

I. STATEMENT OF THE CASE

Petitioner, City of Cherry Hills Village (“City”) uses the Statement of the Case from its Petition for Certiorari to couch its arguments as to why it seeks certiorari review from this Court. Beginning with its Issue Presented for Review, the City mischaracterizes the nature of the proceedings in both the trial court and the Court of Appeals. Contrary to the City’s assertions, this case is not about the lower courts ordering the City to pay District an award that substitutes for the loss of tax revenue resulting from the City’s exclusion from District. The case is about the trial court’s exercise of its statutorily required discretion to fashion a “fair and equitable” means of authorizing the municipal exclusion from a special district.

Pursuant to Section 32-1-502, C.R.S., City petitioned District for exclusion. After the submittal of plans for exclusion by both City and District, a joint plan for exclusion could not be reached. As such, the matter proceeded to hearing before the Honorable Judge Hannon of the Arapahoe County District Court. After a 5-day hearing, the trial court issued an Order granting exclusion subject to certain conditions necessary for exclusion to be fair and equitable. Among those conditions was the payment, by City to District, of the fair market value of the assets transferred as a result of exclusion. After a subsequent hearing, the trial court further found that it

was fair and equitable for City's payments to be made in annual payments over a 15 year period.

City appealed and District cross-appealed. In the case of City of Cherry Hills Village v. South Suburban Park and Recreation District, 160 P.3d 376 (Colo. App. 2007) ("Cherry Hills I"), the Court of Appeals remanded the case back to the trial court. The Court of Appeals ruled that it interpreted the trial court's initial order as reflecting an understanding that the trial court was required by statute to award the District fair market value of the assets transferred. The Court of Appeals directed the trial court to delete any finding that reflected such a requirement. If the trial court again determined to award the District fair market value, it was directed to set forth the rationale behind such an award. Id., at 383.

On remand, the trial court again awarded the District fair market value for the assets transferred as a result of exclusion. The trial court made clear that it did not interpret the statutes as requiring an award, and fully explained its rationale. Contrary to City's arguments, but consistent with its quotations of the trial court's Order on Remand, the trial court never stated that the award was "in lieu of taxes," or made as a "substitute" for lost tax revenue. What the trial court did find was that the exclusion would "result in a reduction of services, and increase in fees, or both." (Vol. 3, p. 741, paras.

27-28). As part of its requirement to consider the economic impacts that exclusion would have on the District's ability to serve its constituents, and noting the fundamental loss of tax revenue that would result from exclusion, the trial court further found that the award "can be utilized to help offset the increased fees and mitigate the reduction of services that will be the probable result of the exclusion." (Vol. 3, p. 742, para. 33).

The City again appealed, arguing to the Court of Appeals the essential arguments made within its Petition for Certiorari. After briefing and oral argument, the Court of Appeals affirmed the trial court decision in the case of City of Cherry Hills Village v. South Suburban Park and Recreation District, 2009 CO 0529.081 (Colo. App. 2009) ("Cherry Hills II"). The Court of Appeals examined the trial court's Order on Remand and found that the trial court found that the financial impact of the exclusion would exceed \$1 million per year, and that:

Exclusion would impair the District's ability to maintain some of its programs and activities, and that the exclusion would result in a reduction in services, or an increase in fees, or both. Id., at 7 (page 6 of Opinion attached to City's Petition).

Based upon those findings of the trial court as well as the trial court's consideration of the fair market value of the assets to be transferred, all of which were required considerations under Sections 32-1-502(2)(c), C.R.S.,

the Court of Appeals affirmed the award of fair market value to District.

The Court of Appeals' decision was limited to a narrow issue. Because of the City's emphasis on its argument that the trial court had substituted its award for lost tax revenue, the Court of Appeals, "for purposes of [its] analysis only," considered the loss of tax revenue as the sole reason that the trial court awarded fair market value to District. This limitation came despite the Court of Appeals' recognition that "the trial court considered statutorily permissible factors in crafting its order." Because the Court of Appeals affirmed the trial court's Order with its limitations, the Court of Appeals concluded that it "need not address the remaining contentions of the parties." Cherry Hills II, at 10 (page 9 of Opinion attached to City's Petition).

II. STATEMENT OF FACTS

Aside from the mischaracterizations of the case, the City also makes several misstatements of fact. While none of the incorrect assertions bear particular significance to this Court's considerations, they are indicative of the City's arguments, which are not founded in accurate interpretations of fact or law. The following corrections from the City's Statement of Facts are offered:

- District's boundaries include the cities of Littleton, Columbine Valley and Sheridan. The City omitted the city of Bow Mar, which is also within District boundaries. The cities of Centennial and Lone Tree are only partially within District boundaries, with the portions of those cities east of I-25 not within the District. The City of Englewood is not within the District.
- The City states that the parks and trails within its boundaries were "liabilities" to the District. To the contrary, the facilities and improvements transferred upon exclusion were valuable assets of the District. At the hearing before the trial court, both District and City presented evidence of the fair market value of those assets being in the millions of dollars. In neither appeal to the Court of Appeals did the City challenge the trial court's finding as to the fair market value of the assets.
- District worked diligently over the years to respond to requests from the City, forming committees and designating representatives to address all identified concerns.
- District presented documentary evidence, factual and expert testimony regarding the reduction of service and financial impacts that would

result from exclusion. That evidence was considered by the trial court and recognized by the Court of Appeals.

III. ARGUMENT

A. The Court of Appeals' Decision is Consistent with the Colorado Supreme Court's decisions.

Statutes are to be interpreted in accordance with their plain meaning, and strained constructions should be avoided. Golden Animal Hosp. v. Horton, 897 P.2d 833, 836 (Colo. 1995), West v. Roberts, 143 P.3d 1037 (Colo. 2006).

Here, Section 32-1-502(2)(c), C.R.S. requires that a trial court consider, among other factors, the fair market value of facilities located within the territory proposed for exclusion, the facilities to be transferred, 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.

“The statute thus protects the interests of citizens who continue to use a district’s services after a portion of its original territory has been excluded.” Cherry Hills I, at 11 (page 10 of the Opinion attached to City’s Petition). “The trial court was statutorily required to consider the impact of exclusion on the District’s services and expenses. See § 32-1-503(2)(d). In doing so, it found that the District was likely to lose over \$1 million per year

following exclusion and that as a result either services would be reduced, or fees would be increased, or both.” Id., at 12 (page 11 of the Opinion attached to City’s Petition).

In ruling upon exclusion, the trial court was obligated to “make such other provisions as the court finds fair and equitable.” Section 32-1-502(2)(d), C.R.S. In reaching a fair and equitable determination, the trial court had to consider the fair market value of the assets transferred, and the impairment of service or additional economic burden on the property remaining within the District. Sections 32-1-502(c) and (d), C.R.S.

“Accepting [the City’s] argument would require adopting an interpretation of section 32-1-503 that effectively prohibits trial courts from ordering monetary transfers upon exclusion.” Cherry Hills II, at 13 (page 12 of Opinion attached to City’s Petition).

City contends that it has a “right” to exclude from District “without compensating” the District. See: Petition, page 1. Under the City’s contention, no trial court could award a special district any fair and equitable monetary compensation, regardless of the evidence presented relevant to the considerations required by law. Such a contention is strained, at best. The Court of Appeals understood that and ruled consistently with the rulings of this Court.

B. City's Dissatisfaction with the Law is an Argument for the Legislature.

City asks this Court for review and ultimately for a ruling that adds language to the relevant statutes that is not presently there. There is no prohibition in the law against a court's fair and equitable award of monetary compensation to a special district as the result of exclusion by a municipality.

The Court of Appeals properly interpreted the statutes involved. The City is dissatisfied with the law. The City's appropriate recourse is to take the matter up with the Legislature. Certiorari review is not appropriate under these circumstances.

C. There is no Double Taxation.

City is correct that the exclusion statutes are designed to eliminate overlapping services and double taxation. By its distortion of the facts and the Court of Appeals' rulings, however, City misstates the issue related to double taxation. In reality, as supported by undisputed facts, there is no double taxation present.

After exclusion, there is one tax being levied against residents of City for park and recreation services. That tax levy is from City, authorized by a prior election. Except for pre-existing debt, as authorized by Section 32-1-

502, C.R.S., District does not levy against property within City. There is no double taxation.

The Court of Appeals recognized this by emphasizing that City could “choose” to tax its residents to support the payment for the facilities transferred. Cherry Hills II, at 12-13 (pages 11-12 of the Opinion attached to City’s Petition). If the City does choose to tax its residents further, it must submit a ballot question to its electors for the authorization of that tax. Article X, Section 20, Colorado Constitution. If the City chooses and its electors approve an additional tax, it will be a tax of the City, not the District.

The Court of Appeals emphasize the lack of overlapping services by focusing on the statutory requirement on the trial court to consider both the area seeking exclusion as well as the area that would remain within the District. The fair and equitable payment ordered by the trial court and affirmed by the Court of Appeals would be used by District to provide services within its boundaries after exclusion. The City will be responsible for services, and will tax its residents for those services, within the City (now outside the District). There is no current overlap of services or double taxation.

City's argument that the Court of Appeals considered and analyzed these issues without input from City is inaccurate. The taxation issue was the core of City's appeal. If the Court of Appeals went beyond the arguments of the parties (a practice frequently employed by the Court of Appeals), the City had an opportunity to petition for rehearing. It did not avail itself of that opportunity.

D. The Facts of this Case are Unique and Unlikely to be Repeated.

City overstates the negative impact that the Court of Appeals decision may have on municipal and special district governance. Cherry Hills I and Cherry Hills II, were cases of first impression, despite decades of coexistence between municipalities and special districts. The facts of this case are unique, and not replicated statewide. Here, there is a large park and recreation district serving a broad area. The dispute between the District and City did not come about as a product of annexation (a typical scenario under which exclusion may be beneficial to all concerned), but rather through a self-imposed election of City. City's lack of foresight and planning does not create a matter of statewide concern.

The Court of Appeals decision in Cherry Hills II, makes clear the existing (and unchanged) state of the law-- that a trial court has the discretion to fashion a fair and equitable exclusion, which may include

payment from the municipality to the special district. Municipalities and special districts, in formulating their statutorily required plans for exclusion, will consider that possibility.

E. Granting of Certiorari and Ruling by this Court will not end the Case.

Because the Court of Appeals limited its decision to a sole issue and expressly did not address the other “statutorily permissible factors” addressed by the trial court and District, review of this Court cannot end the case between the parties. If this Court accepts certiorari review of the case and were to rule in favor of City, the case would be remanded to the Court of Appeals for affirmation of the other factors supporting payment from City to District.

IV. CONCLUSION

For the reasons stated above, District respectfully opposes the City’s Petition for Certiorari.

Respectfully submitted this 24th day of August, 2009.

Paul C. Rufien, P.C.



Paul C. Rufien

ATTORNEYS FOR APPELLEE,
SOUTH SUBURBAN PARK AND
RECREATION DISTRICT

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August, 2009, a true and correct copy of the above and foregoing OPPOSITION TO PETITION FOR CERTIORARI was sent via United States mail, postage prepaid, properly addressed as follows:

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A handwritten signature in black ink, appearing to be 'A. M. Low', is written over a horizontal line.