

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO Arapahoe County Justice Center 7325 S. Potomac Street Centennial, Colorado 80112	<p style="text-align: center;"><b>COURT USE ONLY</b></p>
<p><b>Petitioners:</b></p> <p>THE CITY OF CHERRY HILLS VILLAGE, COLORADO, <i>et al.</i></p> <p><b>Respondents:</b></p> <p>SOUTH SUBURBAN PARK AND RECREATION DISTRICT, <i>et al.</i></p>	
Attorney for Respondent, South Suburban Park and Recreation District Paul C. Rufien, #19948 Paul C. Rufien, P.C. 3600 South Yosemite Street, Suite 500 Denver, Colorado 80237 Phone Number: 303-779-0200 Fax Number: 303-779-3662 E-mail: <a href="mailto:PaulRufien@aol.com">PaulRufien@aol.com</a>	Case Number: 03CV0762  Courtroom: 206
<b>RESPONDENT'S OPENING BRIEF ON REMAND</b>	

Respondent, South Suburban Park and Recreation District (“District”), a quasi-municipal corporation and political subdivision of the State of Colorado, through its counsel, Paul C. Rufien, P.C., submits its Opening Brief on Remand.

**I. INTRODUCTION**

On November 12, 2004, after a 5-day hearing on Petitioner’s (Petitioner, City of Cherry Hills Village shall be referred to either as “Petitioner” or “City”) petition for exclusion from District pursuant to Section 32-1-502, C.R.S., this Court entered its Findings of Fact, Conclusions

of Law, and Order. This Court's November 12, 2004 Findings of Fact, Conclusions of Law and Order ("Trial Court Order") is attached as Exhibit A and incorporated by this reference. The Trial Court Order ordered that the property subject to City's Petition for Exclusion was excluded from the District, effective January 1, 2005. Further, the Trial Court Order imposed certain conditions and obligations on the exclusion of property, including the obligation of City to pay District \$9,660,838 for the conveyance and transfer of District's property and facilities within the property to be excluded.

City and District each appealed certain rulings from the Trial Court Order. After briefing and oral argument, the Court of Appeals issued its Order on March 22, 2007. The Court of Appeals' March 22, 2007 Order ("Remand Order") affirmed the Trial Court Order on all issues except one. The Court of Appeals remanded the matter to the Trial Court, stating that, "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." A copy of the Remand Order is attached as Exhibit B and incorporated by this reference.

District believes that the Court of Appeals misinterpreted the Trial Court Order. This Court never entered any finding that City was "required" by statute to pay District fair market value for the property and facilities transferred. To the contrary, this Court properly concluded that it should "consider" the fair market value of the property and facilities as one criterion in establishing the conditions and obligations necessary to make exclusion fair and equitable. The Trial Court Order is unambiguous in stating just that. Nonetheless, the Court of Appeals interpreted the Trial Court Order differently and, therefore, clarification on remand is necessary.

## II. ARGUMENT

The Conclusion (page 19) of the Remand Order states:

**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.**

This Court will seek in vain to find anything within the Trial Court Order that should be deleted pursuant to the direction of the Court of Appeals. The Trial Court Order does not contain a finding that the statutory criteria of Section 32-1-502, C.R.S. requires it to award District the fair market value of the property and facilities transferred.

Despite that, it is possible to determine the basis of the Court of Appeals’ interpretation of the Trial Court Order and the resultant need for clarification. On Page 12 of the Remand Order, the Court of Appeals quotes Page 3, Paragraph 22 of the Trial Court Order, which states:

**In order for the exclusion of the subject territory to be fair and equitable, the City must pay to the District the fair market value of the facilities to be transferred to the City.**

The “fair and equitable” reference of both the Trial Court Order and the Remand Order relates to the provisions of Section 32-1-502(2)(d), C.R.S., which states:

**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 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. (emphasis added)**

The Court of Appeals misinterpreted this Court's proper application of the "fair and equitable" criterion. Nowhere does the Trial Court Order state or infer that the "fair and equitable" criterion requires an award of fair market value for assets transferred.

The Court of Appeals' confusion is further evidenced by its belief that the Trial Court Order lacked consistency. On Pages 12-13 of the Remand Order, the Court of Appeals references Page 6, Paragraphs 29 and 31 of the Trial Court Order. The Court of Appeals found that portions of those paragraphs were inconsistent, because this Court found that "with the moneys received from the City...the exclusion will not impose an additional burden or expense on the remaining territory of the District," and also found that "the exclusion of the territory...will not impair the quality of services provided by the District nor impose an additional burden or expense on the remaining territory of the District."

Those portions of Paragraphs 29 and 31 of the Trial Court Order are not inconsistent with one another. To the contrary, they are wholly supportive of each other. Each paragraph states that exclusion will not impose an additional burden or expense on the remaining territory of the District. What Paragraph 29 does is explain why there is no additional burden or expense-- The direct result of "the moneys received from the City."

The Court of Appeals properly states the law regarding statutory construction. Statutes should be interpreted to effect the General Assembly's intent, giving words in the statute their plain and ordinary meaning. Golden Animal Hospital v. Horton, 897 P.2d 833, 835 (Colo. 1995). A statute should be interpreted as a whole, giving effect to all its parts. Zab, Inc. v. Berenergy Corp., 136 P.3d 252, 255 (Colo. 2006). Conflict between statutory provisions should be avoided. West v. Roberts, 143 P.3d 1037, 1044 (Colo. 2006).

The Court of Appeals held that, “the trial court did not err in considering the statutory criteria- including FMV- to ascertain whether it was acting in a ‘fair and equitable’ manner.” (Page 9 of Remand Order). Despite concluding that this Court properly considered all the statutory criteria, the Court of Appeals then departed from its own rationale, finding inconsistency where none exists and failing to afford this Court the deference to which it is entitled.

Any confusion in interpreting the Trial Court Order and in following the logical sequence of the Trial Court Order should be clarified by reading and interpreting its provisions so as to give effect to all its parts and to avoid conflict between its provisions. By beginning first with the ultimate orders of this Court, and by then examining the law and facts that led to those orders, this Court’s considerations and conclusions are apparent.

The relevant portions of this Court’s “Order,” contained on Page 9 of the Trial Court Order, are as follows:

**Order**

**The Court therefore 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.**

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**3. The City shall pay to the District the sum of \$9,660,838 for the conveyance and transfer of the facilities...**

*Why did this Court Order that City must pay the District \$9,660,838 (which represents the fair market value of the facilities transferred)?* The Conclusions of Law and Findings of Fact explain this Court’s rationale.

The “Conclusions of Law” are of particular importance in the context of the remand from the Court of Appeals. The Remand Order incorrectly states that this Court interpreted Section 32-1-502(2)(d), C.R.S. to require an award of fair market value. If that were the case, any such

holding would be found within this Court's Conclusions of Law. Statutory construction is a matter of law, not fact. The "Conclusions of Law" of the Trial Court Order unambiguously contradict the Court of Appeals' interpretation on this issue.

Pages 7-8, Paragraph 4.d of the Trial Court Order first accurately states the criteria of Section 32-1-502(2)(d), C.R.S.

**Section 32-1-502(2), C.R.S., provides that the court shall order the territory described in the petition, or any portion thereof, excluded from the special district, if the following conditions are met:**

**\*\*\***

**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, 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. (emphasis added)**

This Court expressly made the conclusion of law that no criteria of Sections 32-1-502(2)(b), (c) and (d), C.R.S. created a mandatory obligation upon the Court. Instead, this Court correctly concluded, as a matter of law, that those criteria shall be considered. While this Court did not expressly use the "fair and equitable" language from Section 32-1-502(2)(d), C.R.S. in this particular conclusion, both this Court (in other portions of the Trial Court Order) and the Court of Appeals (in the Remand Order) have recognized that the "other conditions and obligations" referred to in Section 32-1-502(2)(d), C.R.S. are subject to the "fair and equitable" criterion. That criterion was property considered by this Court.

On Page 8, Paragraph 4.d of the Trial Court Order, this Court continued to set forth its conclusions of law:

**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 had found necessary to permit the exclusion of the territory within the City from the 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 District. Accordingly, the fourth condition for exclusion has been met. (emphasis added)**

Paragraph No. 3 of this Court's "Order" (which is set forth above) imposed the condition and obligation on the City to pay District the fair market value of the assets to be transferred 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 District. After properly considering the fair market value of the assets to be transferred, and what conditions and obligations were fair and equitable so as to exclude the territory without impairing the quality of service nor imposing an additional burden or expense on the remaining territory of the District, this Court ordered City to pay such fair market value.

*What is the factual basis and rationale for this Court's "Conclusions of Law" and "Order"?* This Court's "Factual Findings," which are wholly consistent with one another and the resulting Conclusions of Law, provide the rationale used by this Court.

As correctly concluded by this Court, Section 32-1-502(2)(d), C.R.S. makes it mandatory that the exclusion of property cannot impair the quality of service nor impose an additional burden or expense on District. As such, that conclusion of law must be preceded by factual findings that allow the conclusion to be reached. This Court's "Findings of Fact" did just that.

The Trial Court Order's Factual Findings (relevant to the issue on remand) begin with Paragraph 22.

**In order for the exclusion of the subject territory to be fair and equitable, the City must pay to the District the fair market value of the facilities to be transferred to the City.**

As discussed above, this paragraph provided the basis for the Court of Appeals' interpretation that this Court believed the payment of fair market value was "required" by statute. As discussed above, this Court's "Conclusion of Law" is directly contrary to the Court of Appeals' opinion. This Court correctly recognized that it must "consider" the fair market value of the assets in the context of whether there was an impairment of service or additional burden or expense on District. Reading the remainder of this Court's Findings of Fact, it becomes clear that Paragraph 22 was not referencing a statutory requirement that fair market value must be paid, but rather was laying the factual groundwork for the conditions and obligations that would be imposed in order to allow exclusion.

This Court first addressed any potential impairment of services:

**25. The exclusion of the subject territory from the District will not impair the adequacy of the facilities retained by the District to provide programs and services to the remaining territory of the District**

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**28. Exclusion will have an economic impact on the District, but it will not impair the quality of the service provided by the District. In addition, the District will continue to have adequate facilities to serve its residents.**

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**31. The exclusion of the territory that is the subject of this petition will not impair the quality of service provided by the District nor impose an additional burden or expense on the remaining territory of the District.**

Through its Findings of Fact, this Court was able to determine that the District's level of services to the remaining territory after exclusion would not be impaired, regardless of any payment from City. Paragraph 22 of the Findings of Fact did not impact this Court's findings regarding impairment of service. As for the criteria of additional burden or expense, the same was not the case:

28. **Exclusion will have an economic impact on the District, but it will not impair the quality of the service provided by the District. In addition, the District will continue to have adequate facilities to serve its residents. (emphasis added)**
29. **With the moneys received from the City for the transfer of Parks, open space, and other Improvements, and with small adjustments to the District's fees, operating expenses, and capital improvements program, the exclusion will not impose an additional burden or expense on the remaining territory of the District. (emphasis added)**
30. **The District has a very strong revenue base. It is very well-managed. The financial impact of the exclusion, in accordance with the terms and conditions imposed by the Court will not be significant. The District will remain in a strong financial condition. (emphasis added)**

These three paragraphs, each of which set forth critical findings of fact, provide the context of Paragraph 22 as to why City must pay District the fair market value of the facilities transferred. The Conclusions of Law and ultimate Order then establish the “conditions imposed” by the Court so that there would be no additional burden or expense on the District. This Court began with the finding that there would be an additional economic impact on the District (Paragraph 28). Unless there were mitigating findings or other conditions that the Court deemed fair and equitable, the factual finding of Paragraph 28 of the Trial Court Order would have required the denial of exclusion. This Court continued, however, to make the findings of fact that did mitigate the economic impacts. “With the moneys received from the City for the transfer...the exclusion will not impose an additional burden or expense on the remaining territory of the District.” (Paragraph 29) To further clarify those factual findings, this Court made it clear that the conditions it imposed (payment of fair market value by the City) would mitigate the burden and expense on District. “The financial impact of the exclusion, in accordance with the terms and conditions imposed by the Court will not be significant.” (Paragraph 30).

How could this Court's Findings of Fact, Conclusions of Law and Order more clearly express the Court's intended result? There are no provisions of the Trial Court Order that can be deleted pursuant to the Court of Appeals' direction, because no such provisions exist. Compliance with the Remand Order can be achieved, however, through revisions of the relevant provisions.

To that end, District offers the following proposed revisions, which do not change any of the substance of the Trial Court Order, but perhaps provide the clarification needed. The only language added to this Court's original language is shown below by underlining; the only other edits proposed are placing the Court's language in a different order and eliminating language that becomes redundant after such rearranging:

#### ***FINDINGS OF FACT***

***Exclusion will not impair the quality of the service provided by the District.***

***The exclusion of the subject territory from the District will not impair the adequacy of the facilities retained by the District to provide programs and services to the remaining territory of the District***

***Exclusion will have an economic impact on the District.***

***Due to the economic impact on the District, in order for the exclusion of the subject territory to be fair and equitable the Court has considered the fair market value of the facilities to be transferred to the City, and the City must pay to the District, as a condition of exclusion, the fair market value of the facilities to be transferred to the City.***

***With the moneys received from the City, as a condition of exclusion in order to make the exclusion fair and equitable, for the transfer of Parks, open space, and other Improvements, and with small adjustments to the District's fees, operating expenses, and capital improvements program, the exclusion will not impose an additional burden or expense on the remaining territory of the District.***

***The District has a very strong revenue base. It is very well-managed. The financial impact of the exclusion, in accordance with the terms and conditions***

*imposed by the Court will not be significant. The District will remain in a strong financial condition.*

*The exclusion of the territory that is the subject of this petition will not impair the quality of service provided by the District nor impose an additional burden or expense on the remaining territory of the District.*

### III. CONCLUSION

District believes that the Trial Court Order was unambiguous as originally written. This Court properly concluded that Section 32-1-502(2)(d), C.R.S. required it to consider certain criteria prior to granting or denying exclusion. It did not conclude that the statute required it to award District the fair market value of assets transferred. It did conclude, as indicated by the conditions expressly ordered, that it had the discretion to determine that it was fair and equitable to award District the fair market value of the assets transferred so that the District would not suffer impaired services or additional burden or expense.

The Court of Appeals, however, directed this Court to revise its Trial Court Order. This Court cannot delete provisions that do not exist, but it can provide clarification through revisions. Based upon the arguments set forth above, District respectfully requests that this Court modify the Trial Court Order consistent with the suggestions made by District as part of its argument.

Respectfully submitted this 22<sup>nd</sup> day of October, 2007.

Paul C. Rufien, P.C.

*A duly signed physical copy of this Opening Brief on Remand is on file at the office of Paul C. Rufien, P.C., pursuant to Rule 121, Section 1-26(9), C.R.C.P.*

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Paul C. Rufien

ATTORNEYS FOR SOUTH SUBURBAN PARK  
AND RECREATION DISTRICT

**CERTIFICATE OF SERVICE**

I hereby certify that on this 22<sup>nd</sup> day of October, 2007, a true and correct copy of the above and foregoing RESPONDENTS' OPENING BRIEF ON REMAND was sent via Courtlink to:

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