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DISTRICT COURT, ARAPAHOE COUNTY, COLORADO Arapahoe County Justice Center 7325 S. Potomac Street Centennial, Colorado 80112		<b>COURT USE ONLY</b>
<b>Petitioners:</b>  THE CITY OF CHERRY HILLS VILLAGE, COLORADO, <i>et al.</i>  <b>Respondents:</b>  SOUTH SUBURBAN PARK AND RECREATION DISTRICT, <i>et al.</i>		
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>		
<b>RESPONDENT'S RESPONSIVE 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 Responsive Brief on Remand.

**I. INTRODUCTION**

The City of Cherry Hills Village's Brief on Remand ("City Opening Brief") sets forth a single argument to support the City's position that exclusion should be granted without any payment obligation to District. City argues that because the transferred "Parks" are available for

use by the public, including District residents, this Court could not order the payment of fair market value for the transfer of the Parks from District to City.

City's argument is flawed for several reasons: 1) It fails to follow the direction of the Court of Appeals on remand; 2) It fails to recognize that its arguments were made to this Court during the exclusion hearing, and were addressed in the "Trial Court Order;" 3) It equates the exclusion of property to the transfer of Parks, ignoring the many other factors and considerations associated with exclusion and key provisions of Section 32-1-502, C.R.S.

The arguments made by District in its Opening Brief on Remand are undisturbed by the City Opening Brief. District will not fully repeat those arguments in this Responsive Brief. District's arguments will be highlighted in the context of its response to the City Opening Brief.

## II. ARGUMENT

### A. City fails to follow the direction of the Court of Appeals on remand.

The Conclusion (page 19) of the Remand Order (City Counsel of City of Cherry Hills Village v. South Suburban Park & Recreation District, 160 P.3d 376, 383 (Colo. App. 2007)) 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.**

The City Opening Brief does not contend that any findings from the Trial Court Order should be deleted. The City Opening Brief also does not devote any argument or discussion to whether this Court found that it was "required" to obligate City to pay District fair market value for the Facilities transferred. As expressed in District's Opening Brief on Remand, this is because there are no such findings. This Court properly interpreted the entirety of Section 32-1-502, C.R.S., and those full interpretations are set forth in the Trial Court Order.

In making its determinations regarding what conditions and obligations would be “fair and equitable” in association with the municipal exclusion, this Court properly concluded that the criteria set out in Sections 32-1-502(2)(b), (c) and (d) *shall be considered*. (Pages 7-8, Paragraph 4.d of the Trial Court Order). Section 32-1-502(2)(c), C.R.S. states that the fair market value of the facilities of the District within the exclusion area shall be considered.

Page 3, Paragraph 22 of the Trial Court Order 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.**

This is not a conclusion of law by this Court regarding a mandate or requirement for the payment of fair market value. Rather, this Court properly applied the “fair and equitable” standard and imposed the condition of payment of fair market value to the exclusion of the property from District. Paragraphs 28-30 of the Trial Court Order further explain this finding:

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)



The Court of Appeals' discussion regarding this issue came as part of a section of its opinion that affirmed the decision of the trial court. City's sole argument raised in its Opening Brief was not the subject of remand to this Court.

City's self-serving 2007 Ordinance (Exhibit A to the City Opening Brief), adopted subsequent to the Remand Order, does not affect this Court's prior considerations or determinations. This Court offered no finding or conclusion indicating that the lack of an ordinance in 2004 indicating that the Parks would be held by City in "public trust" had any bearing on its decision. To the contrary, the Trial Court Order makes the affirmative finding that the Parks would remain open to the public, including District residents. With that express finding, this Court continued to find that in order for the proposed exclusion to be "fair and equitable" the City would be obligated to pay District fair market value of the Facilities transferred.

City argued during the exclusion hearing and to the Court of Appeals its position that the Parks existed in "public trust" and that payment of fair market value was inappropriate. Despite that argument on appeal, the Court of Appeals affirmed the Trial Court's decision regarding that issue.

**We reject this contention for two reasons. First, Cherry Hills cites no Colorado case, and we have found none, adopting this [public trust] doctrine. Second, arguably the supreme court disapproved of it in Welch v. City & County of Denver, 141 Colo. 587, 594, 349 P.2d 352, 355 (1960) ("There is no merit to the argument advanced by counsel for Welch that the park land in question was held by the City under a common law trust.").**

City Council v. South Suburban, 160 P.3d 376, 382.

City mistakenly contends that the Parks' availability for public use somehow negates a finding of fair market value associated with the Parks. The argument is contrary to Colorado law. It is not the "public trust" use of the property by the transferee (City) that would impact

value; it is the use of the property by the transferor (District). District used the Parks for recreational purposes, but it was not restricted to do so. Pursuant to Section 32-1-1001(1)(f), C.R.S., the District may dispose of its real property. In addition to the rejection of the public trust theory by the Colorado Supreme Court (as acknowledged by the Court of Appeals), the 2007 Ordinance is inapplicable to City's own argument.

Fair market value is not determined by City's contended analysis ("Fair market value presumes (1) that the property is transferable and (2) that the owner may exclude others from its use." See: City Opening Brief, page 6). During the exclusion hearing, this Court heard testimony from two appraisers, one retained by District and one retained by City, that defined fair market value. City's own appraiser testified to the definition of fair market value, a definition that was taken directly from his appraisal.

**Market Value is defined as:**

**"Reasonable market value" means the fair, actual cash market value of the property. It is the price the property could have been sold for on the open market under the usual and ordinary circumstances, that is, under those circumstances where the owner was willing to sell and the purchaser was willing to buy, but neither was under an obligation to do so.**

**Source: Colorado Jury Instruction 36:3**

The first 11 pages of the Appraisal Report of City's expert appraiser are attached as Exhibit A to this Responsive Brief. This Appraisal Report was a deposition exhibit in the exclusion hearing, and was read from during the testimony of the appraiser. The tenth page (page no. 4) of the report confirms the definition of fair market value as testified by the appraiser and as set forth in the jury instruction.

Based upon that proper definition, both City's and District's expert appraisers found that the Parks and Improvements had fair market value. This Court's determination of \$9,660,838 as

the fair market value to be paid by City to District was derived from a thorough consideration of the appraisal evidence presented by each party.

This Court's findings and conclusions regarding the value of the Parks in the context of their use for public recreational purposes were undisturbed on remand. City's repetition of these arguments in an attempt to convince this Court to reverse its position are contrary to law.

Determinations based on competent evidence and fair deductions therefrom will not be disturbed on review. Underhill v. Deterf, 381 P.2d 265 (Colo. 1963). Unless manifestly erroneous or actuated by passion or prejudice, inferences and conclusions to be drawn from the evidence are within the province of the trial court and will not be disturbed on review. Winter Park Ranch, Inc. v. Richards, 545 P.2d 1367 (Colo. App. 1975). The trial court, as trier of facts, had sole prerogative and responsibility of making reasonable findings which would provide fair, equitable and adequate award of damages. Peterson v. Colorado Potato Flake & Mfg. Co., 435 P.2d 237 (Colo. 1967).

The Court of Appeals affirmed this Court's findings and conclusions regarding the appropriateness of its fair market value considerations. This Court should not disturb or reconsider those findings and conclusions now.

**C. City's arguments ignore key provisions of Section 32-1-502, C.R.S.**

City argues that exclusion in this case equates to the transfer of the "Parks" and the resulting use of those Parks by residents of City and District. That exclusive focus is a fundamental misunderstanding of Section 32-1-502, C.R.S. and the criteria to be considered by this Court in ordering any such municipal exclusion.

If this Court were to accept City's current argument, it would find that because the subject Parks are open to use by District, then those Parks should be transferred, exclusion

should be granted, and no other finding or conclusion would be necessary. Of course, that argument ignores the many applicable provisions of Section 32-1-502(2), C.R.S. This Court understood the full considerations required to be made, undertook those considerations, and made a proper and fully supported determination based upon those considerations.

Section 32-1-502(2)(d), C.R.S. sets forth the full considerations of the trial court, and incorporates the criteria of subsections 32-1-502(2)(b) and (c) as well. This Court's thorough Trial Court Order fully analyzed and considered all of the applicable provisions of the statute. District need not repeat its recitation of the Findings of Fact, Conclusions of Law and Order directly relevant to the issue now before the Court on remand. District's Opening Brief fully addressed those many provisions from the Trial Court Order.

This Court was responsible for determining what conditions and obligations of exclusion were fair and equitable without impairing the quality of service or imposing an additional burden or expense on the remaining territory of the special district. Section 32-1-502(2)(d), C.R.S. The Trial Court Order, after considering all relevant facts and statutory criteria, determined that payment by City to District of \$9,660,838 was fair and equitable and necessary to preserve District's quality of service without an additional burden or expense.

City contends that the only relevant criterion before the Trial Court was the availability of the Parks to District residents (City Opening Brief, pages 5-6), because City contends that exclusion in this case amounts to nothing more than the transfer of park maintenance responsibilities from District to City (City Brief, pages 5 and 6).

The Trial Court has already rejected City's narrow argument by properly considering all the criteria of Section 32-1-502(2), C.R.S. and fashioning an exclusion order that was fair and equitable in light of all considerations.

City ignores the significant economic burden and impacts suffered by District due to the exclusion. District *permanently* loses a source of annual tax revenue upon which it had relied and budgeted in order to provide the litany of high level park and recreation services recognized by this Court. District had accounted for that tax revenue stream in its long-range planning. Evidence during the exclusion hearing was uncontroverted that City now reaps in excess of \$800,000 annual net tax revenue to be applied to its general fund that is above the funds needed for park maintenance (City collects over \$1.4 million in revenue, but budgeted only \$430,000 in park maintenance and an additional \$125,000 for its recreation “reimbursement” program). The loss of that annual revenue stream is an adverse economic impact upon District, as recognized by this Court (Paragraphs 28-30 of the Trial Court Order).

This Court fully understood the economic impacts and the fair and equitable reasoning for District’s receipt of payment from City:

**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.**

Had this Court not ordered payment of fair market value of the facilities, it had the discretion under Section 32-1-502, C.R.S. to impose other conditions or obligations of payment. This Court had expert testimony before it that would have justified the payment of \$10,446,792 (See: Exhibit Z from exclusion hearing, and expert testimony of Kathy Denson).

As this Court recognized, due to the District’s excellent management, “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.” (Paragraph 29 of the Trial Court Order). Without the payment of \$9,660,838 in fair

market value from City to District, the “additional burden or expense” prohibited by Section 32-1-502(2)(d), C.R.S. could not be averted with small adjustments to District’s operations. Without the payment (or the alternative payment of \$10,446,792, which this Court could readily impose as a condition or obligation of exclusion in order to make it fair and equitable), District could not operate without significant adverse burdens or an impairment of services. This Court would then be required by Section 32-1-502(2)(d), C.R.S. to deny exclusion.

### III. CONCLUSION

District reasserts its belief 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.

In order to fully abide by the Court of Appeals’ direction on remand, however, District proposes the following supplement and clarification to the Trial Court Order (District’s proposal was detailed in its Opening Brief on Remand).

#### ***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.*

If this Court does not affirm its own order that City pay fair market value of the facilities transferred to District, then it may apply its same rationale of "fair and equitable" and award District the sum of \$10,446,792 as opined by District's expert witness. If this Court were to not order the payment of the "fair and equitable" sum as previously analyzed, then it should reverse its order of exclusion based upon its expressed rationale that District would suffer additional economic burden, which is not permitted under Section 32-1-502(2)(d), C.R.S.

Respectfully submitted this 30<sup>th</sup> day of November, 2007

Paul C. Rufien, P.C.

*A duly signed physical copy of this Responsive 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 30<sup>th</sup> day of November, 2007, a true and correct copy of the above and foregoing RESPONDENTS' RESPONSIVE BRIEF ON REMAND was sent via Courtlink to:

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