NO. 23833

IN THE SUPREME COURT OF THE STATE OF COLORADO

FORT COLLINS-LOVELAND WATER DISTRICT, EAST LARIMER COUNTY WATER DISTRICT, BERRY N. DUFF, and JOHN E. WEITZEL, Plaintiffs in Error, v. CITY OF FORT COLLINS, POUDRE SCHOOL DISTRICT NO. R1, in the County of Larimer and State of Colorado, and the Board of COUNTY COMMISSIONERS of the County of Larimer, Defendants in Error.	Error to the District Court of the County of Larimer State of Colorado HONORABLE J. ROBERT MILLER Judge

BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

KENNETH G. BUECHE

2040 14th Street, Suite 125
Boulder, Colorado 80302

General Counsel for the
Colorado Municipal League

NO. 23833

IN THE SUPREME COURT OF THE STATE OF COLORADO

FORT COLLINS-LOVELAND WATER DISTRICT, EAST LARIMER COUNTY WATER DISTRICT, BERRY N. DUFF, and JOHN E. WEITZEL, Plaintiffs in Error, v. CITY OF FORT COLLINS, POUDRE SCHOOL DISTRICT NO. R1, in the County of Larimer and State of Colorado, and the Board of COUNTY COMMISSIONERS of the County of Larimer, Defendants in Error.	Error to the District Court of the County of Larimer State of Colorado HONORABLE J. ROBERT MILLER Judge

BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

KENNETH G. BUECHE

2040 14th Street, Suite 125
Boulder, Colorado 80302

General Counsel for the
Colorado Municipal League

INDEX

TABLE OF CASES CITED

Page

STATUTES

Page

OTHER AUTHORITIES

NO. 23833

IN THE SUPREME COURT OF THE STATE OF COLORADO

FORT COLLINS-LOVELAND WATER DISTRICT, et al.,	)	Error to the District Court of the
Plaintiffs in Error,	)	County of Larimer State of Colorado
v.	)	
CITY OF FORT COLLINS, POUDRE SCHOOL DISTRICT NO. R1, et al.,	)	HONORABLE J. ROBERT MILLER Judge
Defendants in Error.	)	

BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

INTRODUCTION

The undersigned attorney, representing the Colorado Municipal League as Amicus Curiae, appears in support of Defendant in Error, the City of Fort Collins. The Colorado Municipal League represents 214 Colorado cities and towns, most of which have or will annex territory pursuant to the Municipal Annexation Act of 1965 and may therefore be affected by this proceeding.

This Court is respectfully requested to apply the clear legislative intent regarding the limitation of parties which may contest annexation proceedings and the procedure for review thereof as provided in the Municipal Annexation Act of 1965. Amicus Curiae seeks a judicial interpretation that the parties with standing to sue and the remedies available, as enumerated in the Municipal Annexation Act of 1965, are exclusive. (Except where otherwise indicated, all references to C.R.S. are to C.R.S. 1963 (1965 Supp.).)

STATEMENT OF THE CASE

This case arises on writ of error from a judgment of the District Court dismissing the action on motion of Defendant in Error, the City of Fort Collins. Two of the Plaintiffs in Error in the above-captioned proceeding are statutory water districts. Of the remaining two Plaintiffs in Error, one is a resident, citizen and taxpayer of the City of Fort Collins and the other is a resident and citizen of Larimer County. The District Court dismissed the action on the grounds that (1) none of the Plaintiffs were proper parties with standing to contest the annexation, and (2) the declaratory judgment relief sought by Plaintiffs was not available. The basic issues before this Court are, therefore, (1) whether Plaintiffs have standing

to bring this action, and (2) whether the statutory procedure for review in the nature of certiorari is exclusive.

SUMMARY OF THE ARGUMENT

I. PARTIES FALLING WITHIN THE PROVISIONS OF C.R.S. 139-21-15(1)(a) ARE THE ONLY PARTIES WITH STANDING TO CHALLENGE AN ANNEXATION PROCEEDING.

II. REVIEW BY CERTIORARI IS THE ONLY PROCEDURE AVAILABLE FOR JUDICIAL REVIEW OF AN ANNEXATION PROCEEDING.

ARGUMENT

I. PARTIES FALLING WITHIN THE PROVISIONS OF C.R.S. 139-21-15(1)(a) ARE THE ONLY PARTIES WITH STANDING TO CHALLENGE AN ANNEXATION PROCEEDING.

C.R.S. 139-21-15 provides in part:

> (1)(a) If any landowner or any qualified elector in the territory proposed to be annexed, or the county commissioners of any county from which territory is being removed by such annexation, believes himself or itself to be aggrieved by the acts of the city council of the annexing municipality in annexing said territory to said municipality, then such acts or findings of the

> city council may be reviewed by certiorari in accordance with the Colorado rules of civil procedure.
>
> . . . .
>
> (3) Review proceedings instituted under this section shall not be extended further than to determine whether the city council has exceeded its jurisdiction or abused its discretion under the provisions of this article.
>
> (4) Any annexation accomplished in accordance with the provisions of this article shall not be directly or collaterally questioned in any suit, action or proceeding except as expressly authorized in this section. (Emphasis supplied.)

Except where Denver annexes as a City and County, these review provisions clearly confine the right to obtain judicial review of an annexation to persons who own land in or who are qualified electors of the territory annexed. Expressio unius est exclusio alterius. In contrast, the former annexation statute, C.R.S. 1963, 139-10-6 provided that "any person aggrieved" had standing to sue, leaving the designation of aggrieved parties to the courts. In the passage of the Municipal Annexation Act of 1965 (Chapter 139, Article 21, C.R.S. 1963 (1965 Supp.)), the general assembly

clearly and comprehensively designated the exclusive parties with standing to obtain review of annexations.

Having ascertained that none of the Plaintiffs fall within the class of parties designated in C.R.S. 139-21-15 with standing to litigate the validity of an annexation, the issue remains whether the statutory provisions limiting standing are valid and exclusive.

Before statutory authority was granted to designated parties to challenge municipal annexations, the only remedy available was quo warranto on relation to the state attorney general. Absent a statute to the contrary, the weight of authority is to the effect that a private party ordinarily does not have the capacity to attack changes in the municipality's corporate limits where such changes have been effected under a voidable authority. 13 A.L.R.2d 1279, 1281-82. This rule is apparently based upon the theory of the inviolability of the corporate charter to private attack. Viewed in the most unfavorable light, the annexation in question is merely voidable as contrasted with void as it was accomplished under color of the Municipal Annexation Act of 1965. 13 A.L.R.2d 1279, 1282, 1292.

The annexation of territory to a municipality is solely a legislative prerogative and a municipality has no

power to extend its boundaries other than as provided by legislative enactment or constitutional provision. 64 A.L.R. 1335, 1341.

In Rogers v. Denver, 161 Colo. 72, 419 P.2d 648 (1966), this Court dismissed a complaint challenging an annexation proceeding and reasserted the special legislative character of annexation proceedings. At page 74, the Court stated that the power of the state legislature over the boundaries of municipalities was plenary in the absence of express constitutional limitation. At page 75, citing Rhyne, Municipal Law, the Colorado Supreme Court stated:

> . . . it is said that, absent constitutional restrictions, the several state legislatures enjoy 'unlimited powers' over the annexation of territory by municipalities and may place 'any requirement or condition thereon.'

The parties having standing to sue under the Municipal Annexation Act of 1965 are obviously more inclusive than the rule of common law denying any private person standing to contest annexations. In passing on the former annexation law which permitted "any person aggrieved" to contest an annexation, this Court stated:

> It is basic law that when a statute creates a cause of action and designates those who may sue thereunder, none except the persons so designated may bring such an action. Denver v. Miller, 151 Colo. 444, 450, 379 P.2d 169, 173 (1963).

The legislative prerogative of designating which parties have standing to sue was also pronounced in Avery v. County Court, 126 Colo. 421, 424, 250 P.2d 122, 123 (1952):

> Where a statute specifically identifies the officers or persons who may invoke the jurisdiction of a court in a proceeding which is purely statutory, it is necessary and essential that the persons thus named shall institute the proceedings. The identification by the statute of those authorized to invoke the court's jurisdiction operates to exclude all persons not mentioned.

This Court, in citing several earlier cases and in applying the Municipal Annexation Act of 1965, recently reaffirmed that annexation review is a special statutory proceeding. City of Westminster v. District Court, ___ Colo. ___, 447 P.2d 537, 540 (1968).

Two of the Plaintiffs in Error are statutory water districts. Nowhere in

the Municipal Annexation Act of 1965 is there any indication of legislative intent to permit statutory water districts to contest annexations. In an annexation case involving the standing of a special district to challenge an annexation in which "aggrieved" parties were given such standing, the Kansas Supreme Court held that a drainage district owning property, portions of which were included in an annexation, lacked standing to contest the validity of the annexation ordinance. Fairfax Drainage District v. Kansas City, 190 Kan. 308, 374 P.2d 35 (1962). In discussing the standing of Arapahoe County under the former annexation statute to contest an annexation, the Colorado Supreme Court noted that the Fourteenth Amendment to the Federal Constitution could afford no relief in that a county had no vested rights with respect to retention of its size and boundaries. Denver v. Miller, supra, at page 448.

None of the Plaintiffs in Error are landowners or qualified electors in the territory involved in the contested annexation. C.R.S. 139-21-15(1)(a) is explicit and exclusive. Annexations are strictly statutory proceedings, and, therefore, Plaintiffs in Error's assertion that the statute's denial of standing is unconstitutional is without merit.

II. REVIEW BY CERTIORARI IS THE ONLY PROCEDURE AVAILABLE FOR JUDICIAL REVIEW OF AN ANNEXATION PROCEEDING.

If Plaintiffs in Error lack standing to bring this action, this Court need not consider the within issue of whether a party may challenge an annexation in a declaratory judgment proceeding.

Plaintiffs in Error seek relief by declaratory judgment presumably in an effort to circumvent the provisions of C.R.S. 139-21-15(2) which require that any suit brought to contest an annexation be filed within 45 days after the effective date of the annexation ordinance. (The record indicates that this action was filed more than six months after the effective date of the annexation ordinance.)

The procedure for judicial review of an annexation is explicit. C.R.S. 139-21-15(1)(a) provides that an annexation "may be reviewed by certiorari in accordance with the Colorado rules of civil procedure." Subsection (3) provides that review proceedings are limited to determining whether the city council has exceeded its jurisdiction or abused its discretion. Finally, subsection (4) provides that:

> Any annexation accomplished in accordance with the provisions of

> this article shall not be directly or collaterally questioned in any suit, action, or proceeding except as expressly authorized in this section. (Emphasis supplied.)

These specific provisions and the absence of any provisions in the Municipal Annexation Act of 1965 relating to any other method of judicial review clearly show the legislative intent to limit judicial proceedings contesting annexations to proceedings in the nature of certiorari.

The general rule is that where a statute defines a proceeding and prescribes a remedy, the statutory remedy is exclusive. Hassel v. United States, 34 F.2d 34, 36 (3rd Cir. 1929), and numerous cases cited therein. This rule was recently reaffirmed in Schwantz v. Texas Department of Public Safety, 415 S.W.2d 12, 15 (C.C.A. Tex. 1967), where it is stated:

> 'The general rule is that where the cause of action and remedy for its enforcement are derived not from the common law but from the statute, the statutory provisions are mandatory and exclusive, and must be complied with in all respects or the action is not maintainable.'

Plaintiffs in Error seek to maintain a declaratory judgment action, relying

upon Rule 57 of the Colorado Rules of Civil Procedure. Rule 81(a) specifically provides, however, that the Rules of Civil Procedure "do not govern procedure and practice in any special statutory proceeding insofar as they are inconsistent or in conflict with the procedure and practice provided by the applicable statute." In City of Westminster v. District Court, supra, this Court specifically held that (1) review of annexation proceedings is a special statutory proceeding, (2) the general assembly did not adopt the Colorado Rules of Civil Procedure in toto, and (3) the general assembly by the adoption of C.R.S. 139-21-16(1) modified their application.

The specific language in C.R.S. 139-21-15 and this Court's interpretation of the review provisions in City of Westminster v. District Court, supra, preclude an annexation review by a declaratory judgment proceeding.

In Palmer v. Perkins, 119 Colo. 533, 205 P.2d 785 (1949), declaratory judgment relief was held not to be available where another remedy was available. Assuming, arguendo, that plaintiffs were proper parties, plaintiffs had an appropriate remedy available in the nature of certiorari, had they chosen to exercise that remedy within the 45-day statute of limitations.

Burns v. District Court, 144 Colo. 259, 356 P.2d 245 (1960), sheds light on the exclusiveness of statutory review procedures. That case involved an attack by certiorari on the validity of the formation of a recreation district. The statute provided a single method for contesting formation of the district - namely, by a quo warranto proceeding brought within a 30-day period by the attorney general. Plaintiffs attempted to get the attorney general to bring the proceeding. Failing in this effort, a proceeding in the nature of certiorari was brought by the plaintiffs. The Colorado Supreme Court dismissed the proceeding holding that the statutory provision for quo warranto was exclusive.

There is an obvious legislative desire to limit the parties afforded standing to seek review of annexations and to limit the method of judicial review. In adopting the Municipal Annexation Act of 1965, the general assembly recognized the desirability of encouraging and facilitating the orderly annexation of urban areas. This legislative purpose was declared in C.R.S. 139-21-2 to be:

> (1)(a) The general assembly hereby declares that the policies and procedures contained in this article are necessary and desirable for the orderly growth of urban communities

in the state of Colorado. It is the purpose of this article:

(b) To encourage natural and well-ordered development of municipalities of the state;

(c) To distribute fairly and equitably the costs of municipal services among those persons who benefit therefrom;

(d) To extend municipal government, services, and facilities to eligible areas which form a part of the whole community;

(e) To simplify governmental structure in urban areas;

(f) To provide an orderly system for extending municipal regulations to newly annexed areas;

(g) To reduce friction among contiguous or neighboring municipalities; and

(h) To increase the likelihood of municipal corporations in urban areas being able to provide their citizens with the services they require; and to these ends, this article shall be liberally construed.

This legislative purpose prevailed in two additional major local government reform acts of 1965. By the adoption of Chapter 89, Article 16, C.R.S. 1963 (1965 Supp.), the general assembly provided for the exclusion from special districts of territory annexed to municipalities and declared in Section 9 that:

> . . . the purpose of this article is to facilitate the elimination of the overlapping of services provided by local governments and the double taxation which occurs when a municipality annexes territory which is within a special service district.

By adopting the Special District Control Act of 1965, Chapter 89, Article 18, C.R.S. 1963 (1965 Supp.), the general assembly further pursued this general policy of encouraging and facilitating the orderly annexation of urban areas.

If statutory special districts were able to contest municipal annexations, this policy would be thwarted. By limiting the parties with standing to sue and the procedure for review, the general assembly protects cities and towns from unwarranted and untimely litigation. Furthermore, if declaratory judgment proceedings as sought by the Plaintiffs in Error were permitted, substantial disruption of urban services would result. This is because of the

affirmative duty, recognized in City of Westminster v. District Court, supra, of the municipality to apply its ordinances and services to the newly annexed area. A municipality, under the interpretation of the statute sought by Plaintiffs in Error, would be obliged to extend services to and perhaps incur capital expenditures in newly annexed territory, only to be exposed to annexation suits at some late date in a declaratory judgment proceeding seeking to void the annexation. Such a result is clearly contrary to the underlying policies embodied in the Municipal Annexation Act of 1965 as well as contrary to the express language of C.R.S. 139-21-15(4) that any annexation pursuant to that Act "shall not be directly or collaterally questioned in any suit, action or proceeding except as expressly authorized" in the Act.

CONCLUSION

The undersigned attorney respectfully submits that the statutory provisions of the Municipal Annexation Act of 1965 clearly deny Plaintiffs in Error standing to bring this action and that the statutory review provisions preclude the granting of declaratory

judgment relief. Amicus Curiae urges this Court to affirm the judgment of the District Court dismissing this action.

Respectfully submitted,

KENNETH G. BUECHE

2040 14th Street, Suite 125
Boulder, Colorado 80302
443-0707

General Counsel for the
Colorado Municipal League