IN THE

SUPREME COURT

OF THE STATE OF COLORADO

No. 79SA517

BETTY L. CESARIO, EARNEST E. CLEMONS, DONALD H. GOEDE, ALDEN L. MARVEL, A.W. MULLAN, JR., and LAWRENCE STROM, JR., Plaintiffs-Appellees and Cross-Appellants -vs- THE CITY OF COLORADO SPRINGS, a municipal corporation, THE CITY COUNCIL OF THE CITY OF COLORADO SPRINGS, and as members of the City Council of Colorado Springs, ROBERT ISAAC, THOMAS I. ANDERSON, MICHAEL C. BIRD, LEON YOUNG, PETER M. SUSEMIHL, KATHERINE N. LOO, GEORGE JAMES, MARGARET VASQUEZ and MARY KYER, Defendants-Appellants and Cross-Appellees	Appeal from the District Court In and for the County of El Paso, State of Colorado. No. 79CV0013 Honorable BERNARD R. BAKER, Judge

BRIEF OF AMICUS CURIAE COLORADO MUNICIPAL LEAGUE

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INTEREST OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

The Colorado Municipal League (League) is a non-profit association of two hundred twenty-seven Colorado municipalities. The primary objective of the League is to aid in the improvement of municipal government to the benefit of Colorado municipalities and their citizens.

The procedures controlling municipal annexations are matters of great concern to communities wishing to provide well-planned, efficient governmental services. Annexation procedures are the machinery whereby the cost of municipal services may be fairly and equitably distributed among those who benefit therefrom. They provide for the extension of municipal government, services and facilities to areas which form a part of the whole community, simplify governmental structure and allow municipalities to give citizens the services they need and desire.

Municipalities throughout Colorado are vitally interested in and concerned with any action or decision which could adversely affect their ability to annex under the Municipal Annexation Act of 1965. The issues presented by the above-entitled case fall within that area of concern. Insofar as the District Court ruled that Colorado Springs was powerless to make a minor amendment of an annexation ordinance, municipalities may be forced to repeat costly and time-consuming procedures which serve no purpose. Insofar as the Plaintiffs, as cross-appellants, argue that annexation election petitions can be utilized to halt unilateral annexation proceedings, the power to annex unilaterally could be rendered ineffectual.

Because of these interests, the League appears as Amicus Curiae in this case on behalf of Colorado Springs and all other Colorado municipalities.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The Colorado Municipal League adopts the statement of the case and statement of the facts as set forth in Colorado Springs' brief on pages two through seven.

ISSUES PRESENTED

I. Under the provisions of the Municipal Annexation Act of 1965, is an annexation election required where a petition for such election is filed after annexation proceedings are commenced pursuant to §31-12-106(2), C.R.S. 1973? Are the various methods for the annexation of territory alternative to each other under the Act?

II. In order to harmonize §31-12-118(2), C.R.S. 1973 with the remainder of the Municipal Annexation Act of 1965, is it necessary to disregard the phrase "annexation or", found in the first sentence? Was the inclusion of this phrase a mistake?

III. Did the trial court err in concluding that the amendment of the annexation ordinance by the City Council was invalid? Does an amendment to an annexation ordinance which affects only municipally-owned property require a new resolution of intent, publication of another notice, the holding of another hearing, the making of new findings of fact and the adoption of another ordinance?

IV. Did the trial court err in ruling that the Plaintiffs have standing to question the sufficiency of the Broadmoor's consent? Can the Plaintiffs challenge the sufficiency of that consent where the Broadmoor has not done so and is not a party to the suit?

V. Did the trial court err in concluding that the City's method of computing boundary contiguity did not comport with the requirements of the Municipal Annexation Act of 1965?

VI. Are the various sections of the Municipal Annexation Act of 1965 violative of the State or Federal Constitutions?

I. UNDER THE PROVISIONS OF THE ANNEXATION ACT, AN ANNEXATION ELECTION IS NOT REQUIRED WHERE A PETITION FOR SUCH ELECTION IS FILED AFTER ANNEXATION PROCEEDINGS ARE COMMENCED PURSUANT TO §31-12-106(2), C.R.S. 1973.

On December 11, 1978, nearly two months after unilateral annexation proceedings under §106(2)[1] had begun, Plaintiffs filed a §107(2) petition for an annexation election with the City Clerk. The petition purports to cover some of the same area included in the annexation ordinance adopted by the City Council pursuant to §106(2).

Because of this similarity, Plaintiffs contend that upon filing the petition, the unilateral annexation proceedings initiated two months earlier should have been abandoned. This argument is based upon Plaintiffs' interpretation of §118, which states that when a governing body receives a petition for an annexation election, "no other proceedings shall be commenced or prosecuted for the annexation or incorporation of the same area or any part thereof...."

The District Court rejected Plaintiffs' interpretation of §118 on the grounds that it was inconsistent with other sections of the Municipal Annexation Act of 1965 (Annexation Act). In so deciding, the District Court applied the fundamental rule of statutory construction which states that if separate sections of the same statutory scheme may be harmonized by one construction, but would be antagonistic under a different construction, the construction resulting in harmony should be adopted. Mooney v. Kuiper, 573 P.2d 538 (Colo. 1978).

The Annexation Act provides several different methods for the annexation of territory. §107(1) and §107(2) set forth procedures dealing with a petition for annexation and a petition for an annexation election, respectively. §106(2) sets forth a procedure for the unilateral annexation of land which has had a two-thirds boundary contiguity with the annexing municipality for three years. Plaintiffs contend that upon filing a §107(2) petition for an

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[1] Inasmuch as all statutory citations are, unless otherwise indicated, to article 12, title 31, C.R.S. 1973, statutes will be cited by their part numbers only.

annexation election, any unilateral annexation proceedings initiated under §106(2) must be abandoned.

That this result was not intended by the General Assembly is made clear by an examination of §107(3). This statute states in part:

> (3) Procedures alternative. The procedures set forth in subsections (1) and (2) of this section are alternative to each other and to any procedure set forth in Section 31-12-106;

This statute plainly states that the §107(2) annexation election procedure is alternative to the §106(2) unilateral annexation procedure, and this Court has so held. Breternitz v. City of Arvada, 174 Colo. 256, 482 P.2d 955 (1971). The traditional definition of "alternative" is given in Goethal v. Bd. Supervisors of Kent County, 361 Mich. 104, 104 N.W.2d 794 (1960) as follows:

> An opportunity for choice between two things, courses, or propositions, either of which may be chosen, but not both. Id. at 111, 104 N.W.2d at 797 (Emphasis added.)

This same definition was adopted by the courts in Abernathy v. Rylee, 209 Ga. 317, 72 S.E.2d 300 (1952) and Malone v. Meres, 91 Fla. 709, 109 So. 677 (1926). It comes originally from the second edition of Webster's New International Dictonary.

Given this definition, §107(3) plainly requires that once annexation proceedings have begun, one of the alternatives has been chosen, and all others are foreclosed. Indeed, that is the only conceivable reason for specifically labeling the various procedures "alternative".

That this result was the intent of the General Assembly is made even clearer by the second part of §107(3), which provides an exception to the rule. After stating that the annexation procedures given in §107 and §106 are alternative to each other, §107(3) goes on to provide:

> [E]xcept that a petition for annexation election filed pursuant to subsection (2) of this statute shall take precedence over an annexation petition involving the same territory and filed pursuant to subsection (1)...

Under this section, petitions for an election are given precedence over petitions for annexation, even where the latter petition was filed first. It is clear that such an exception is necessary only if §107(3) is interpreted as foreclosing all alternative annexation procedures after the initiation of one of the procedures. To hold otherwise would render meaningless the statement that the procedures are alternative.

It is significant that §107(3) contains only one exception. It can reasonably be presumed that if the General Assembly intended to give petitions for elections precedence over not only petitions for annexation but also unilateral proceedings under §106(2), it would have said so in §107(3). Applying the doctrine of expressio unius est exclusio alterius (expression of one thing is the exclusion of another) it is only reasonable to conclude that the General Assembly did not intend to give such petitions precedence over unilateral proceedings.

Indeed, the General Assembly has evidenced just the opposite intention in §107(5). This statute states in part:

> If a petition is filed pursuant to subsection (1) or (2) of this section and the territory sought to be annexed meets the specifications of section 31-12-106(1) or (2), the governing body of the municipality with which the petition is filed shall thereupon initiate annexation proceedings pursuant to the appropriate provisions of section 31-12-106 (1) or (2). In the event that any governing body fails to initiate such annexation proceedings within a period of one year from the time that such petition is filed, annexation may be effected by an action in the nature of mandamus....

This statute plainly requires that where a §107(2) petition is filed as to territory meeting the test of §106(2), the municipality must annex the area pursuant to the §106(2) unilateral procedure. If it fails to do so, it can be forced to annex by an action in the nature of mandamus. No election is required, in spite of the petition; in fact, no election is permitted. Instead, the statute requires the municipality to annex the land solely under the §106(2) procedure.

According to the Plaintiffs' interpretation of §118, the filing of a §107(2) petition requires the abandonment of any §106(2) unilateral proceedings, and the holding of an election. However, §107(5) plainly requires the municipality to unilaterally annex property the subject of such a petition, without an election. Consequently, Plaintiffs' interpretation of §118 would nullify the procedure mandated by §107(5).

Another section of the Annexation Act which would be effectively nullified by the Plaintiffs' interpretation is §106(2), the statute providing for unilateral annexation of areas which have had two-thirds boundary contiguity for three years. If the filing of a §107(2) petition requires the abandonment of §106(2) proceedings previously begun, then unilateral annexation proceedings can be delayed indefinitely. All that needs to be done is for a petition for an annexation

election to be filed every 12 months. This will force an abandonment of any unilateral proceedings begun under §106(2), and an election will have to be held at the expense of the municipality. After the election, the rule of §107(6) will prevent any further annexation proceedings until the expiration of 12 months. Thus, if a petition is filed every 12 months, no §106(2) proceedings will ever be possible and the procedure carefully set forth in the statute is rendered meaningless.

This sequence of events, which will be an inevitable result should the Court adopt the Plaintiffs' interpretation, hardly comports with the decision in Pomponio v. City of Westminster, 178 Colo. 80, 496 P.2d 999 (1972), wherein it is stated:

> The policy of the [Annexation Act] is '[t]o encourage the natural and well-ordered development of municipalities', not to discourage it by providing for last minute maneuvers designed only to defeat annexation. Id. at 84, 496 P.2d at 1001.

It can be seen that the Plaintiffs' interpretation of §118 effectively nullifies numerous other provisions of the Annexation Act. Such an interpretation violates the established rule of statutory construction which prefers a construction harmonizing all provisions of statutory enactment. Mooney v. Kuiper, supra. The District Court's decision on this issue upheld that rule, and thus should be affirmed.

II. IN ORDER TO HARMONIZE §31-12-118(2) C.R.S. 1973 WITH THE REMAINDER OF THE ANNEXATION ACT, IT IS NECESSARY TO DISREGARD THE PHRASE "ANNEXATION OR", FOUND IN THE FIRST SENTENCE.

Numerous inconsistencies between the Plaintiffs' interpretation of §118 and other provisions of the Annexation Act have been pointed out in Section One above. Since the Plaintiffs' interpretation does not comport with the Act, it is necessary to offer an alternative explanation of the statute's language.

§31-12-118, C.R.S. 1973 provides as follows:

> Priority of annexation proceedings. (1) The purpose of this section is to give a first priority to annexation proceedings.
> (2) When a governing body receives a petition for annexation pursuant to section 31-12-107(1) or a petition for an election on the question of annexation pursuant to section 31-12-107(2), no other proceedings shall be commenced or prosecuted for the annexation or incorporation of the same area or any part thereof, and no other proceedings shall be commenced or prosecuted for the creation of any quasi-municipal corporation in the same area or any part thereof until the question of annexing such area pursuant to any such petition has been finally determined. Nothing in this subsection (2) shall prevent a duly established special service district lawfully organized under part 5 or 6 of article 25 of this title, article 8 of title 29, part 2 of article 20 of title 30, or title 32 (except part 1 of article 5 and article 8), C.R.S. 1973, from receiving and prosecuting a petition for the inclusion of the same area or any part thereof within the boundaries of any such special service district during any pending annexation proceeding.
> (3) The fact that proceedings for the incorporation of an area have been commenced prior to the filing of a petition for annexation under section 31-12-107(1) or prior to the filing of a petition for an election on the question of annexation under section 31-12-107(2) shall in no way affect such proceedings for the annexation of all or part of the same area, and any such incorporation proceedings shall be held in abeyance until the question of annexation has been finally determined. Similarly the fact that proceedings for the creation of a quasi-municipal corporation have been commenced prior to the filing of a petition for annexation under section 31-12-107(1) or the filing of a petition for an election on the question of annexation under section 31-12-107(2) shall in no way affect such proceedings for the annexation of all or part of the same area, and any such proceedings for the creation of quasi-municipal corporations shall be held in abeyance until the question of annexation has been finally determined.
> (4) This section shall not apply if the petition for annexation under said section 31-12-107(1) or the petition for an election on the question of annexation under said section 31-12-107(2) is first filed with the governing body within the ten days next preceding the date set for an election on the question of incorporation or an election on the question of the creation of a quasi-municipal corporation in part or all of the same area, nor shall this section apply to any incorporation petition involving an area which contains more than ten thousand inhabitants.
> (5) In the event of any lawsuit challenging the provisions

> of this section or their applicability to any situation, such legal proceedings shall be advanced on the docket as a matter of immediate public interest and concern and shall be heard at the earliest practical moment.

It is the League's contention that the inclusion of the phrase "annexation or" in the first sentence of subsection (2) was a mistake, and that in order to harmonize §118 with the rest of the Annexation Act, it is necessary to disregard this phrase as surplusage. This contention is based upon the provisions of the rest of the statute, the source of the particular language used, and the effect the words have on other provisions of the Act.

It is a traditional rule of statutory construction that, where it is necessary to avoid inconsistencies and harmonize various provisions of an act, a court may eliminate or disregard superfluous language in a statute. Wright v. People, 116 Colo. 306, 181 P.2d 447 (1947); Bank of Belton v. State Banking Board, 554 S.W.2d 451 (Mo.App. 1977); 110-112 Van Wagenen Ave. Co. v. Julian, 101 N.J. Super. 230, 244 A.2d 123 (1968); Baltimore Lumber Co. v. Marcus, 208 F.Supp. 852 (D.Md. 1962); Pressman v. State Tax Comm'n, 204 Md. 78, 102 A.2d 821 (1954); Burnette v. Commonwealth, 194 Va. 785, 75 S.E.2d 482 (1953); People ex rel. Gress v. Hilliard, 85 App.Div. 507, 83 N.Y.S. 204 (1903); 73 Am. Jur.2d, Statutes, §200 (1974); Sands, Sutherland Statutory Construction, 4th ed., §47.37, pg. 167 (1973); 82 C.J.S. Statutes §343, pg. 687-688 (1953). This rule is stated by the court in 110-112 Van Wagenen Ave. Co. v. Julian, supra as follows:

> While, as a general rule, every word in a statute is to be given force and effect, unnecessary words or clauses, words inadvertently or mistakenly used, words to which no meaning at all can be attached, or words having no meaning in harmony with the legislative intent as collected from the entire act will be treated as surplusage, and will be wholly disregarded in the construction of the act in order to effectuate the legislative intent. Id. at 235, 244 A.2d at 126, quoting from 82 C.J.S. Statutes §343 (1953).

Thus, in Wright v. People, supra, this Court held that the word "etc." in a criminal statute was surplusage, and could be disregarded.

It has been demonstrated in Section One above that a literal interpretation of the phrase in §118(2) creates irreconcilable inconsistencies with §107(3) and (5) and §106(2). These inconsistencies exist within the context of the particular facts presented, and any decision rendered could, of course, be similarly limited. However, unless the words "annexation or" are disregarded, there is no interpretation of §118(2) which will be consistent with §114.

§114 provides in part:

> Conflicting annexation claims of two or more municipalities. (1) At any time during a period of notice given by a municipality pursuant to section 31-12-108, any other municipality may adopt a resolution of intent pursuant to section 31-12-106 or receive a petition for annexation or a petition for an annexation election pursuant to section 31-12-107 with the area partly or wholly overlapping the area proposed for annexation by the first municipality. If this occurs, the respective rights of the several municipalities shall be determined in accordance with an election as provided in this section.

Thus, under §114, one or more municipalities may begin annexation proceedings as to territory which another municipality has previously started to annex. The statute provides a detailed procedure for an election to determine the issue of which municipality may annex the disputed area.

However, if §118(2) is read literally, once a petition for annexation or for an election is received, no other proceedings may be commenced or prosecuted "for the annexation or incorporation of the same area or any part thereof," until the petition received has been acted upon. This clearly contradicts §114, which provides a procedure controlling just that eventuality. Consequently, unless the phrase "annexation or" is disregarded, §118(2) completely nullifies the procedure carefully set out in §114. This fact, added to the inconsistencies noted in Section One, provides ample justification for disregarding the phrase.

An examination of the source of this statute makes it clear that the inclusion of the words "annexation or" was a mistake. The sentence in question can be traced back to §139-10-9, C.R.S. 1963, as it existed prior to the 1965 codification. This statute read as follows:

> Proceedings prosecuted diligently. The proceedings before both the municipal officers and the county court shall be conducted without unnecessary delay. After the filing of a petition or consent with the governing body of a city, city and county, or incorporated town, as provided for in section 139-10-4, no other proceedings shall be commenced or prosecuted for the annexation or incorporation of the same territory or any part thereof until the question of annexing such territory in pursuance of such petition or consent shall have been finally disposed of. Unless action to approve or disapprove has been taken by the governing body with which it has been filed, it shall become void and of no effect on the ninetieth day after its filing, and the court may dismiss the petition before the ninetieth day if it is not prosecuted with reasonable diligence. (Emphasis added.)

As used in §139-10-9, C.R.S. 1963, the emphasized sentence precluded the initiation of new annexation proceedings or incorporation proceedings regarding territory which was already in the process of being annexed. Before the

1965 recodification, there was no statute similar to §114, which deals with conflicting annexation claims. This sentence avoided any problem of conflicting annexation claims by providing that the first proceedings begun take precedence. This served the purpose stated in the statute of assuring that annexation proceedings are prosecuted diligently.

When the Annexation Act was recodified in 1965, the first-in-time approach of §139-10-9, C.R.S. 1963, was rejected in favor of an election, as prescribed by what is now §114.

However, some provision for the priority of annexation proceedings vis-a-vis incorporation proceedings and the creation of quasi-municipal corporations still had to be made. Since §139-10-9, C.R.S. 1963 also included a provision dealing with incorporation proceedings, its phraseology was taken for use in what is now §118(2). However, in so transplanting the phraseology, the drafters neglected to omit the reference to annexations. This created an irreconcilable conflict with the provisions of §114, which provides a procedure for what is ostensibly precluded by §118(2).

An examination of all the provisions of §118 supports the conclusion that the retention of this phrase was a mistake. Subsection (1) states that the purpose of §118 is to "give a first priority to annexation proceedings." The absence of any further qualifications of this statement indicates that the subject of §118 is the relationship of annexation proceeds to <u>other</u> proceedings, i.e., incorporation proceedings and proceedings creating quasi-municipal corporations.

Subsection (2) states that petitions for annexation or for an election will prevent the initiation of incorporation proceedings and proceedings creating quasi-municipal corporations in the same area. In contravention of the procedure in §114, it also mistakenly includes annexation procedures.

This mistake is not carried over into subsections (3) and (4). Subsection (3) gives annexation petitions priority over previously initiated incorporation proceedings and proceedings creating quasi-municipal corporations, further delineating the priority granted in subsection (2). However, there is no comparable provision dealing with other annexation proceedings in this subsection.

Subsection (4) places limits on the priorities delineated in (3) and

(2) by providing that the statute does not apply where the annexation petition is filed "within the ten days next preceding the date set for an election on the question of incorporation or...the creation of a quasi-municipal corporation...". As in subsection (3), there is no comparable provision for annexation proceedings.

It is easy to see why the mistake made in subsection (2) was not carried over into subsections (3) and (4), which deal with the same subjects. The phraseology for subsection (2) was taken from the second sentence of §139-10-9, C.R.S. 1963, as indicated above. However, there were no provisions in the 1963 statutes comparable to §118(3) and (4). These provisions had to be drafted anew. Since the wording was not taken from another statute, there was no chance that superfluous language would be left in.

It can be seen that the inclusion of the phrase "annexation or" in §118(2) was a mistake. Unless the phrase is disregarded, §118 is inconsistent with §114, which provides for conflicting annexation claims, and with other provisions of the Annexation Act discussed in Section One above. This being the case, the District Court's ruling on this issue is correct, and should be affirmed.

III. THE TRIAL COURT ERRED IN CONCLUDING THAT THE AMENDMENT OF THE ANNEXATION ORDINANCE BY THE CITY COUNCIL WAS INVALID.

On November 9, 1978, the City Council conducted an annexation hearing pursuant to §109. The requisite notice was given pursuant to §108, and all affected parties were given an opportunity to be heard. At the November 9 hearing, the annexation ordinance in question was adopted, to be effective December 31, 1978.

On November 22, 1978, the City Council amended this ordinance by reducing the boundary of the area to be annexed. The amendment changed the boundary of the annexation as it passed through North Cheyenne Park to include a lesser portion of the park. North Cheyenne Park is wholly-owned by the City of Colorado Springs. The amendment affected no other property in any way.

However, the trial court held that to accomplish this simple change, the City would have had to draft a new resolution of intent, publish another notice, hold another hearing, make new findings of fact and adopt another ordinance. It is the League's contention that the Annexation Act does not require a repetition of the entire annexation process where the change made is as minor as it was here.

In Colorado, it is well-settled that "the power of the state legislature over boundaries in municipalities of this state is plenary." Rogers v. City & County of Denver, 161 Colo. 72, 74, 419 P.2d 648, 649 (1966). Consequently, "the legislature may give to municipalities the power to annex upon any condition it chooses to impose." Adams v. City of Colorado Springs, 178 Colo. 241, 244, 496 P.2d 1005, 1007 (1972). If it sees fit to do so, a legislature may permit annexations without notice or a hearing. Bookout v. Local Agcy. Formation Comm'n. of Tulare County, 49 C.A.3d 383, 122 Cal.Rptr. 668 (1975); 62 C.J.S. Municipal Corporations §55, p. 157. Indeed, the Colorado legislature has done just this in §106(3), which provides that municipally-owned territory may be annexed without notice and hearing. §107(1)(g) makes the same provision with respect to an annexation petition signed by the owners of 100% of the area being annexed.

The inevitable conclusion from this is that there is nothing sacrosanct

about the notice and hearing required before annexations. The requirement exists only to the extent, and only for the purposes provided for by the statutes.

The annexation here in issue was begun under §106(2). To annex territory under §106(2), the statute requires the city council to first "[a]dopt a resolution setting forth the intent of the governing body to annex the area described in said resolution....". This was accomplished by Colorado Springs on September 12, 1978.

Note that the statute does not require that all the area described in the original resolution ultimately be included in the annexation ordinance. The purpose of the resolution, which is required to be published under §108, is to provide notice to affected landowners of the proposed annexation of their property. The resolution published by Colorado Springs was entirely sufficient for that purpose. As to property owned by anyone other than the City, the area described in the September 12 resolution was precisely the same area encompassed by the annexation ordinance passed on final reading December 12, 1978.

This Court has held that, in a §106(2) annexation, if the published resolution of intent describes all the area eventually annexed by the ordinance, thus providing all affected parties with notice, the fact that the ordinance annexes a smaller area than that described in the resolution is immaterial. In Adams v. City of Colorado Springs, 178 Colo. 241, 496 P.2d 1005 (1972), the plaintiffs argued that an annexation was invalid where the annexing ordinance deleted certain land that was described in the resolution of intent. In response, the Court stated:

> All of the area annexed by the ordinance was described in the published notice. All of the persons affected were on notice and were represented at the hearing. In Miller v. City of Mercedes, 361 S.W.2d 464 (Tex. Court of Civ.App. 1962), the court...stated:
>
> > The annexation of additional territory and the extension of the city limits of a municipality must be in compliance with whatever requirements are imposed by the city charter or the statutory authority under which the municipality operates. However, an immaterial variation from such requirements is not fatal and does not render void an ordinance of annexation. 62 C.J.S. Municipal Corporations §55, pp. 157, 158. (Emphasis added.)
>
> (Omitting citation.) The variance in the descriptions deleting some territory was immaterial as to the area remaining, and the statute was complied with. Id. at 245, 496 P.2d at 1007 (Emphasis by the Court.)

The same statements can be made as to the annexation proceedings here in issue. All the area annexed by the ordinance was described in the published notice. Amending the ordinance to annex less of the City-owned North Cheyenne Park was immaterial as to the area remaining. If the City had adopted a new resolution and ordinance instead of amending the first one, as the trial court thought necessary, the landowners thereby put on notice would be the same as those put on notice by the first resolution. This being the case, abandonment of the first proceedings and publication of a new resolution would serve no purpose but to waste time and public money.

The second requirement of §106(2) is that "after notice and hearing", the governing body must find "that the proposed annexation complies with the provisions of section 31-12-105." According to §108(1), the purpose of the hearing is:

> ...[T]o determine if the proposed annexation complies with sections 31-12-104 and 31-12-105 or such part thereof as may be required to establish eligibility under the terms of this part 1.

§106(2) specifically provides that §104 has no application to annexations under that section. Thus, in the context of a §106(2) annexation, the only purpose of a hearing is to determine compliance with §105.

§105 sets out four limitations which apply to all annexations. These limitations are: (1) no land held in identical ownership may be divided into separate parcels without the consent of the landowner; (2) no land held in identical ownership, comprising 20 acres or more, with a valuation in excess of $200,000, may be annexed without the owner's consent; (3) no annexation proceedings shall be valid when another municipality has commenced annexation proceedings as to the same territory, except pursuant to §114, and; (4) any annexation which will detach an area from a school district and place it in another district must be consented to by the board of directors of the new district.

At the hearing of November 9, the City Council determined that the proposed annexation complied with the limitations of §105. The ordinance adopted at that hearing was amended on November 22 to annex less of the City-owned North Cheyenne Park.

It can be seen that this amendment did not and could not have had any effect on the finding of compliance under §105. None of the limitations of that statute were implicated by such a minor change. No parcels were divided

by the change, no 20 acre areas were included, no other municipality had begun annexation proceedings, and no land was detached from a school district. Another hearing would have presented the same issues under §105, and would have ended with the same result. Since an amendment affecting only City-owned land could have no effect on the issues presented under §105, another hearing would serve no purpose whatsoever.

Again, the rationale of the decision in Adams v. City of Colorado Springs, supra, is relevant. In that case, the facts of which are outlined above, the Court quoted from a Texas decision thus:

> ...[T]he extension of the city limits of a municipality must be in compliance with whatever requirements are imposed by the city charter or the statutory authority under which the municipality operates. However, an immaterial variation from such requirements is not fatal and does not render void an ordinance of annexation. Id. at 245, 496 P.2d at 1007. (Emphasis by the Court.)

In conclusion, it should be pointed out that the course of action taken in the Colorado Springs annexation contravenes neither the spirit nor the letter of the Annexation Act. All the area annexed by the ordinance was described in the published notice, and all the persons affected were on notice. The amendment affected no property other than North Cheyenne Park, which is wholly-owned by the City. Similarly, the amendment had no effect upon the issues which are the subject of a §106(2) annexation hearing, i.e., compliance with §105.

Further, the publication of a new resolution and the holding of another hearing would serve no purpose whatsoever. The landowners put on notice would be the same as those put on notice by the first resolution. The issues presented by a new hearing would be the same as those presented at the first hearing, and perforce would be decided the same. These facts, added to the statutory mandate in §102 that the Annexation Act "shall be liberally construed", lead to the inevitable conclusion that the trial court erred in holding that the City exceeded its power in amending the annexation ordinance.

IV. THE TRIAL COURT ERRED IN RULING THAT PLAINTIFFS HAVE STANDING TO QUESTION THE SUFFICIENCY OF THE BROADMOOR'S CONSENT.

The annexation here in issue included property owned by the Broadmoor Hotel, Inc. (hereinafter, Broadmoor). This property fit within the classification of §105(1)(b), which provides that no land held in identical ownership, comprising 20 acres or more, with a valuation in excess of $200,000, may be annexed without the owner's written consent. In the case of the Broadmoor, this consent was obtained, and the City Council so found at the November 9, 1978 hearing. The owners of the Broadmoor have not objected to this finding. They are not parties to this lawsuit.

However, the Plaintiffs contend that the consent obtained from the Broadmoor was insufficient. In spite of the fact that only the Broadmoor property was concerned, and in spite of the fact that the owners have not challenged the finding of consent, the trial court allowed the Plaintiffs to question the sufficiency of the consent. It is the League's contention that the limited standing under §116 requires reversal of this ruling.

§116(1)(a) limits the class of persons who may challenge an annexation. Thus, a landowner in the area being annexed may challenge the annexation only if he has been "aggrieved by the acts of the governing body...."

It is clear that the word "aggrieved" is not synonomous with the word "affected". City of East Point v. Crosby & Stephens, Inc., 112 Ga.App. 359, 160 S.E.2d 839 (1968). According to the accepted definition, a person aggrieved is one whose personal legal rights have been infringed. In re Ray's Estate, 68 Nev. 355, 233 P.2d 393 (1951); Circle Lounge & Grill v. Bd. Appeal of Boston, 324 Mass. 427, 86 N.E.2d 920 (1949), and cases cited therein. A person is not "aggrieved" by an action or decision relating only to the rights of another. As stated in 59 Am.Jur.2d, Parties, §26, pg. 374 (1971):

> [A] court may and properly should refuse to entertain an action at the instance of one whose rights have not been invaded or infringed, as where he seeks to invoke a remedy in behalf of another who seeks no redress. (Emphasis added.)

The "act of the governing body" which is being challenged here is the finding that the Broadmoor consented to annexation under §105(1)(b). It is clear that the only persons who could possibly be "aggrieved" by such an act are the owners of

the subject property. The requirement of consent is for the benefit of the owners of property fitting within the 20 acre/$200,000 definition. As a matter of policy, the legislature determined that the owners of large and valuable tracts of land are so directly affected by an annexation that their property should not be included without consent. The limitation benefits only those owners, and has no effect on any other property. Since the owners in the present case have not challenged the sufficiency of their consent, there is no policy reason to allow a third party to do so.

The absurdity of allowing the Plaintiffs to challenge the sufficiency of the consent can be more clearly seen if one postulates a situation where the consenting owner wants his property annexed. Assuming that the owners of the Broadmoor desired annexation to Colorado Springs, under the ruling of the trial court they would be forced to enter the case as a defendant and argue that they did indeed consent. Even so, the fact that the Plaintiffs had independent standing to challenge the consent could lead to the even more absurd result that the consent was found insufficient. Consequently, the annexation would be invalid, the owners would have to convince the City to begin the annexation process again, and a more sufficient consent would have to be carefully drafted.

Clearly the policy behind the §105(1)(b) limitation is not served by such a bizarre chain of events. The very individuals who are intended to be benefited by the limitation would be harmed. To avoid such a result, only those truly "aggrieved" by an action should be able to challenge it, and the Annexation Act so provides.

In ruling on this issue, the trial court relied upon the school-consent cases such as Gavend v. City of Thornton, 165 Colo. 182, 437 P.2d 778 (1968). Under §105(1)(b), any annexation detaching property from one school district and attaching it to another must be consented to by the latter district. The school-district cases allowed third parties to question the sufficiency of this consent.

However, the school-consent cases are readily distinguishable from the type of consent here in issue. The purpose of the limitation of §105(1)(b) is to prevent unexpected influxes of students into a district which is unprepared to handle the new load. School districts are, of course, public entities supported by the property owners of a particular district. Accordingly, the residents of a district are vitally interested in that district's ability to adequately provide for all its students. The Court in Gavend recognized that fact when it stated that

"[p]laintiffs, as residents and property owners in the annexed area and in the school district, are aggrieved persons...." Id. at 186, 437 P.2d at 779 (Emphasis added.)[2] Consequently, it is good practice to allow a landowner whose property taxes support a district to safeguard that district's interest.

The same cannot be said of the 20 acre/$200,000 exclusion in §105(1)(b). This limit is not intended to benefit public entities. It does not aid the smooth functioning of the public school system or any other public untertaking. Rather, it is intended to benefit the private landowner. Consequently, the public is not vitally concerned with the sufficiency of such a landowner's consent. It could not be seriously contended that the Plaintiffs are making this argument because they are concerned for the well-being of the Broadmoor.

Allowing the Plaintiffs to challenge the sufficiency of the Broadmoor's consent where the Broadmoor makes no such challenge serves no purpose or policy of the Annexation Act. The trial court's ruling could force future consenting landowners into court to defend their consents. Accordingly, the League urges this Court to reverse the District Court, and hold that the Plaintiffs have no standing to question the sufficiency of the Broadmoor's consent.

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[2]Although Gavend was decided under an earlier version of the Annexation Act, which required a school district's consent before inclusion of that district's property in an annexation, it is still relevant to show a property owner's special interest in the proper functioning of his school district.

V. THE TRIAL COURT ERRED IN CONCLUDING THAT THE CITY'S METHOD OF COMPUTING BOUNDARY CONTIGUITY DID NOT COMPORT WITH THE REQUIREMENTS OF THE ANNEXATION ACT.

The District Court ruled that the method of computing boundary contiguity used by the City did not comport with the requirements of the Annexation Act. As pointed out in the City's brief, affirmance of the trial court's ruling on this issue will prevent municipalities from accepting voluntary annexations in an area adjacent to that which the City desired to unilaterally annex for a period of three years. Further, it would give municipalities a legal avenue to avoid mandated annexations under §107(5), and would result in a situation where municipalities could not annex sequentially an area that could be annexed at one time.

In light of the compelling arguments put forth by the City, and in light of the legislative declaration in §102 that the Annexation Act "shall be liberally construed...", the League urges the Court to hold that the method of boundary contiguity computation used by the City comports with the requirements of the Annexation Act.

VI. THE VARIOUS SECTIONS OF THE ANNEXATION ACT AT ISSUE ARE NOT VIOLATIVE OF EITHER THE STATE OR FEDERAL CONSTITUTIONS.

The Plaintiffs have argued that parts of the Annexation Act violate provisions of the Colorado and United States Constitution. The briefs submitted by Colorado Springs and the Attorney General's Office completely cover the constitutional principles questioned by the Plaintiffs. The analysis presented therein is the one consonant with established constitutional precedent. Accordingly, the League urges the Court to adopt that position and hold the provisions of the Annexation Act constitutional.

CONCLUSION

On the basis of the foregoing arguments, the Colorado Municipal League respectfully requests this Court to:

(1) Affirm the trial court's ruling that an annexation election is not required where a petition for such election is filed after annexation proceedings are commenced pursuant to §31-12-106(2), C.R.S. 1973;

(2) Reverse the trial court's ruling that the amendment of the annexation ordinance by the City Council was invalid, and hold the amendment valid;

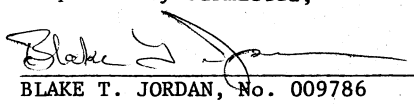
(3) Reverse the trial court's ruling that Plaintiffs have standing to question the sufficiency of the Broadmoor's consent, and hold that only the Broadmoor has standing to make such a challenge.

(4) Reverse the trial court's ruling that the City's method of computing boundary contiguity did not comport with the requirements of the Annexation Act, and hold the City's method valid;

(5) Hold that the various sections of the Annexation Act at issue are not violative of either the State or Federal Constitutions;

(6) Reverse the trial court's ruling that the annexation ordinance adopted by the City was invalid, and hold that ordinance valid.

Respectfully submitted,



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