SUPREME COURT, STATE OF COLORADO

Case No. 95-SC-687

Certiorari to the Colorado Court of Appeals, No. 94-CA-2023

OPENING BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

THE TOWN OF SUPERIOR, COLORADO; THE BOARD OF TRUSTEES OF THE TOWN OF SUPERIOR, COLORADO; TED T. ASTI, in his official capacity as Mayor; DELLA GIBSON, DON HOOPER, RICK KUPFNER, JERRY ECELROY, LIDIA HOLL, and KAREN KLASSEN, all in their official capacity as members of the Board of Trustees,

Petitioners,

v.

THE MID-CITIES COMPANY, a Colorado General Partnership

Respondent.

COLORADO MUNICIPAL LEAGUE
David W. Broadwell, #12177
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Denver, CO 80264
(303) 831-6411

July 1, 1996

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CONSTITUTION AND STATUTES

Comes now the Colorado Municipal League (the "League") as an amicus curiae and submits this brief in support of the position of the Petitioners, Town of Superior, et al.

I. Interests of the League

The League is a voluntary non-profit association representing 258 of the 269 municipalities in Colorado, including all municipalities with a population in excess of 1000 people. The League has for many years appeared before the courts as an amicus curiae to present the perspectives of Colorado municipalities.

All Colorado municipalities, both statutory and home rule, are subject to the Municipal Annexation Act of 1965, Secs. 31-12-101, et seq., C.R.S., and Colo. Const. Art. II, Sec. 30 which, in combination, provide the guiding law on municipal annexation throughout Colorado. The instant case is of particular interest to municipalities because it marks the first time since 1982 that this court has accepted a case on the important subject of municipal annexation.

In particular, this case is of substantial importance to municipalities as the court will address for the first time key issues related to "annexation agreements" and the role that such agreements play in the annexation process. As more fully described below, there is a tremendous variety of practice in Colorado

municipalities in the area of "annexation agreements" given the fact that such agreements, although often useful for municipalities and petitioners alike, are not required by the Municipal Annexation Act or any prior ruling by the courts. The instant case is also of keen municipal interest because the court will inevitably address the standard of review and the grounds upon which the annexation that is at issue in this case or any other municipal annexation may be challenged.

II. Issues Presented for Review

Did the court of appeals err in holding that Superior's annexation of MidCities Company's property without an annexation agreement was void?

Did the court of appeals err in not remanding this case to the district court for a trial on the factual issues presented?

III. Statement of the Case

The League hereby adopts by reference the statement of the case and statement of facts as contained in the Town of Superior's Opening Brief.

IV. Summary of Argument

The League will confine its arguments almost exclusively to the first issue announced for review as the League will discuss the role that "annexation agreements" have historically played in the annexation process in municipalities throughout Colorado.

At the outset, however, the court of appeals must be called to task for failing to properly apply the standard of review for municipal annexations. The role of the courts in reviewing municipal annexations in Colorado is strictly circumscribed by several important and well-established principles, including: the express limitations set forth in the Municipal Annexation Act itself; the fact that municipal annexation is a special statutory procedure to which the normal scope of review under C.R.C.P. 106(a)(4) does not apply; the fact that municipal annexation is a legislative act to which the courts have traditionally granted great deference; the fact that general declaratory relief is a remedy that is not available to challenge a municipal annexation; and the fact that the Municipal Annexation Act is supposed to be liberally construed in favor of municipal annexation authority. In light of these principles, it is not surprising that the courts have overturned municipal annexations only when there is a substantial and clearly established violation of the Municipal Annexation Act itself. The instant case will mark a dramatic departure from this tradition if the decision of the court of

appeals is affirmed.

The trial court's and the court of appeals' reliance on City of Colorado Springs v. Kitty Hawk Development, 154 Colo. 535, 392 P.2d 467 (1964) is misplaced. That case does not and never did stand for the proposition that, in the words of the court of appeals, "annexation can take place only when the town and owners of the contiguous land agree not only that the property shall be annexed but also upon the terms upon which such annexation can be accomplished." Slip op., p. 5. While the League does not dispute the principle that most (but not all) annexations in Colorado are essentially consensual, such consent on behalf of the landowner is manifested by the annexation petition itself, not by a separate instrument denominated an "annexation agreement." As illustrated by prior cases, the Municipal Annexation Act, and actual practice in Colorado municipalities, special terms and conditions may be sought by a landowner or imposed by a municipality in a variety of ways, many of which do not involve a separate "agreement" per se.

V. Argument

A. The court of appeals failed to apply the proper standard of review for a municipal annexation.

If affirmed, the decision of the court of appeals in this case will make all municipal annexations considerably more susceptible

to a successful legal challenge since the court dramatically expanded the grounds upon which such a challenge may be mounted.

The court of appeals overturned Superior's annexation on the grounds that Town boardmembers had "abused their discretion" by annexing the subject property without consummating an annexation agreement. Slip op., p. 6. In so doing, the court apparently treated this case as a garden variety review under C.R.C.P. 106(a)(4), citing as authority for its decision a prior case, Ross v. Denver Department of Health & Hospitals, 883 P.2d 516 (Colo. App. 1994), which had nothing to do with a municipal annexation but instead addressed the more generic standard applicable to judicial review of administrative actions.

First, to restate the obvious, the court of appeals erred in failing to acknowledge the way judicial review of a municipal annexation is expressly limited by the Municipal Annexation Act itself, Sec. 31-12-116 (3) and (4):

> "(3) Review proceedings instituted under this section shall not be extended further than to determine whether the governing body has exceeded its jurisdiction or abused its discretion under the provisions of this Part 1.
>
> "(4) Any annexation accomplished in accordance with this

Part 1 shall not be directly or collaterally questioned in any suit, action or proceeding, except as expressly authorized in this section." (Emphasis supplied.)

The General Assembly could not have been any more explicit about the limited role of the judiciary in reviewing municipal annexations. The foregoing language was included in the original Municipal Annexation Act of 1965 and has been the law of the land since that time, as illustrated in case after case. However, it is significant to note that even under prior annexation statutes (which contained no special language on the scope of judicial review)[1] this court had already acknowledged that the role of the judiciary in reviewing annexations is quite limited, i.e. "to insure first, that the area is eligible and, secondly, that the procedural requirements of the statute have been fully complied with." City of Littleton v. Wagenblast, 139 Colo. 346, 352; 338 P.2d 1025 (1959). Accord: City of Englewood v. Daily, 158 Colo. 356, 407 P.2d 325 (1965). In Wagenblast, this court went on to acknowledge that there is no inherent authority in the court to order the disconnection of property once annexed,[2] and, perhaps

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[1] For the court's convenience, the League has attached a copy of state annexation statutes, C.R.S. 139-10-1, et seq., as amended, as they existed prior to the adoption of the Municipal Annexation Act of 1965 (Appendix A), as well as a copy of the 1965 Act itself (Appendix B) for comparative purposes.

[2] For purposes of the instant case, the League assumes that the territory in dispute must be considered a part of the Town of Superior unless and until the court decides otherwise. Sec. 31-12-117, C.R.S.; City of Westminster v. District Court, 167 Colo. 263, 447 P.2d 537 (1968); City Council of the City of Greenwood Village

most germane to the instant case, the court declined the landowners invitation to insert a "justice and equity" component into its review of a municipal annexation. Instead, acknowledging that annexation is a "special statutory procedure," the court rigorously confined itself to applying the annexation statutes as written, thus setting the tone for every other reported decision on municipal annexation that followed, at least until the decision of the court of appeals in the present case.

The League would submit that the principles articulated in Wagenblast and Daily were effectively incorporated in the annexation statutes in 1965. In light of the formal codification of these principles, it would be nothing short of ironic to now reverse course and hold that the courts can go beyond the four corners of the annexation statute itself in overturning municipal annexations.

For the record, it is worth noting the remarkable consistency of the courts in applying the statutory standard of review since 1965. Every reported decision overturning a municipal annexation has been based squarely on a clearly demonstrated violation of a specific statutory or constitutional requirement. The ten reported cases on point are:

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v. Board of Directors of the South Suburban Metropolitan Recreation and Park District, 181 Colo. 334, 509 P.2d 317 (1973); City and County of Denver v. Board of Directors of the Bancroft Fire Protection District, 38 Colo. App. 53, 554 P.2d 714.

Johnston v. City Council of the City of Greenwood Village, 177 Colo. 223, 493 P.2d 651 (1972): failure to satisfy statutory contiguity requirements.

Board of County Commissioners of the County of Jefferson v. City and County of Denver, 35 Colo. App. 295, 533 P.2d 521 (1975); reversed, 191 Colo. 104, 550 P.2d 862 (1976): failure to comply with statutory requirement for obtaining consent from board of education or school district from which property is being detached.

Johnston v. City Council of the City of Greenwood Village, 189 Colo. 345, 540 P.2d 1081 (1975): failure to satisfy statutory contiguity requirements.

Board of County Commissioners of the County of Jefferson v. City and County of Denver, 190 Colo. 8, 543 P.2d 521 (1975): failure to comply with statutory notice and hearing requirements; improperly invoking statutory procedures for unilateral annexation of city-owned land without a hearing where city was not the sole owner of the territory annexed.

Board of County Commissioners of the County of Jefferson v. City and County of Denver, 193 Colo. 321, 566 P.2d 340 (1977): failure to comply with statutory requirements

related to the description and identification of the ownership of the territory to be annexed.

Val d'Gore, Inc. v. Town of Vail, 193 Colo. 311, 566 P.2d 343 (1977): failure to comply with statutory requirements related to the description of the territory to be annexed.

Cesario v. City of Colorado Springs, 200 Colo. 459, 616 P.2d 113 (1980): failure to satisfy statutory contiguity requirements.

Caroselli v. Town of Vail, 706 P.2d 1 (Colo. App. 1985): failure to satisfy statutory contiguity requirements; dividing a parcel of property to be annexed contrary to the statute.

Board of County Commissioners of the County of Jefferson v. City and County of Denver, 714 P.2d 1352 (Colo. App. 1986): non-applicability of statutory annexation procedures to Denver in light of the extraordinary constitutional restrictions on annexation to that particular city, art. XX, sec. 1 and art. XIV, sec. 3, Colo. Const.

Board of County Commissioners of the County of Jefferson

v. City of Lakewood, 813 P.2d 793 (Colo. App. 1991): failure to satisfy statutory contiguity requirements.

The Municipal Annexation Act of 1965 contains an extensive litany of specific procedural and substantive requirements, including some fairly rigorous standards for establishing the eligibility of territory to be annexed through the requisite contiguity with the annexing municipality. As demonstrated by the foregoing cases, if a municipality runs afoul of any of these, it is susceptible to being reversed.[3] But conspicuously absent from the statute is any requirement that, beyond the basic petition for annexation, there be a separate "annexation agreement" evidencing the landowners consent to be annexed or the terms and conditions of the annexation. The court of appeals seemed to acknowledge this critical fact but then shrugged it off, citing language in the statute indicating that annexation agreements may be a component of an annexation impact report under sec. 31-12-108.5 (1)(b), and translating this somewhat oblique reference into the remarkable conclusion that the statute "contemplates annexation agreements as a routine step in the annexation process." Slip op., p. 5.

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[3] Notwithstanding these setbacks, however, it should be noted that municipal annexations have been upheld in the vast majority of cases as the courts have acknowledged the purpose of the Municipal Annexation Act "to encourage natural and well-ordered municipal development" and have liberally construed annexation powers in favor of municipalities. Pomponino v. City of Westminster, 178 Colo. 80, 496 P.2d 999 (Colo. 1972); City and County of Denver v. Board of County Commissioners of the County of Jefferson, 191 Colo. 104, 550 P.2d 862 (1976).

However, the court of appeals stopped short of saying that annexation agreements were definitely required under the statute, as indeed the court could not have held. Thus the court set sail in uncharted waters having, for the first time under the Municipal Annexation Act of 1965, overturned a municipal annexation for reasons that are not explicitly grounded in the Act itself.

The League would submit that the seeds of the erroneous standard of review applied by the court of appeals in this case were sown by the dubious manner in which Midcities' framed its claims in the first instance, and the failure of the lower courts to "separate the wheat from the chaff" early on. As noted by the court of appeals, Midcities sued under both the annexation statutes, sec. 31-12-116, C.R.S. and C.R.C.P. 106(a)(4) and, among other things, sought a declaratory judgment based in part on promissory estoppel. Slip op. p.2.

Somehow, a couple of important principles got lost in this mix.

First, in City of Westminster v. District Court, 167 Colo. 263, 447 P.2d 537 (Colo. 1968) this court acknowledged that in enacting the Municipal Annexation Act of 1965, "the legislature did not adopt Colorado Rules of Civil Procedure In toto, but specifically by C.R.S.1963, 139-21-16(1) (now 31-12-116) modified their application." 167 Colo. at 267, 447 P.2d at 540. The court

of appeals has previously observed that the Municipal Annexation Act "creates a substantive legal status for review of annexation proceedings and preempts the Rules of Civil Procedure insofar as they are inconsistent with the statute." Berry Properties v. City of Commerce City, 667 P.2d 247 (Colo. App. 1983). Thus the general standard of review applicable to any C.R.C.P. 106(a)(4) proceeding (i.e. "exceeded its jurisdiction or abused its discretion") must be read as being modified or superseded by the limiting language in sec. 31-12-116 (3) itself (i.e. "under this Part 1"). Midcities has merely confused the issue by purporting to sue under both the rule and the statute because the more specific requirements of the latter necessarily supersede the more general language of the former in this "special statutory proceeding."

At this juncture, it is also important to note the rigorous manner in which the courts have applied other specific requirements of sec. 31-12-116, C.R.S., even in the face of what would often otherwise be cognizable legal or equitable claims. For example, the court has narrowly construed the statute's restrictions on standing as codified at subsection (1)(a). Fort Collins-Loveland Water District v. City of Fort Collins, 174 Colo. 79, 482 P.2d 986 (1971); City of Westminster v. City of Northglenn, 178 Colo. 334, 498 P.2d 343 (1972); Snyder v. City and County of Denver, 35 Colo. App. 32, 531 P.2d 643 (1974); Richter v. City of Greenwood Village, 40 Colo.App. 310, 577 P.2d 776 (1978); Berry Properties v. City of Commerce City, supra. The courts have also strictly enforced the

statutory time limits for challenging municipal annexations at subsection (2)(a)(I), indeed calling compliance with these limits jurisdictional. Fort Collins-Loveland Water District, supra; City and County of Denver v. District Court, 181 Colo. 386, 509 P.2d 1246 (1973); Board of County Commissioners of the County of Jefferson v. City and County of Denver, 190 Colo. 300, 546 P.2d 497 (1976). Should the courts be any less strict in applying the statutorily limited scope of review than they are in enforcing the statutory time limits and restrictions on standing?

Midcities claim for a declaratory judgment based on equitable or promissory estoppel has also apparently confused the issues in this case, at least insofar as the various alleged representations by the town's staff in regards to an annexation agreement served as the implicit basis for the court of appeals' decision. Previously in Berry Properties v. City of Commerce City, supra, the court of appeals definitively held that plaintiffs may not seek declaratory relief under C.R.C.P. 57 when they would otherwise be precluded from doing so by the annexation statutes.[4]

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[4] The League would acknowledge that this court has recently held that a promissory estoppel claim can be asserted against a Colorado local government in Board of County Commissioners v. Delozier, 20 B.T.R. 819 (May 28, 1996). The League also recognizes that the Town of Superior indicated in its petition for certiorari that a remand to the trial court for a determination of the promissory estoppel claims in this case may be appropriate. However, the League would assert that a municipal annexation may never be "directly or collaterally challenged" on a promissory estoppel claim under the plain language of sec 31-12-116 (3) and (4), C.R.S.

The courts have established a longstanding and consistent tradition of recognizing municipal annexation as a legislative act to which considerable judicial deference must be afforded, City of Littleton v. Wagenblast, supra; City of Louisville v. District Court, 543 P.2d 67 (Colo. 1975); Board of County Commissioners of the County of Adams v. City and County of Denver, 37 Colo. App. 548 P.2d 922 (1976). This court has also assiduously refused to substitute its judgment for that of the general assembly to the extent the legislature has set forth various distinctions, restrictions and limitations in the annexation statutes. See, e.g., Breternitz v. City of Arvada, 174 Colo. 56, 482 P.2d 955 (1971). In sum, as this court said in a slightly different context related to a similar special statutory proceeding, "The role of the courts is not to pass upon the substantive merits of the local government's determination, but rather to ensure that the statutory scheme has been appropriately carried out." Colorado Land Use Commission v. Board of County Commissioners, 604 P.2d 32, at 35 (Colo. 1979).

In the instant case, the League is merely urging the court to apply the Municipal Annexation Act as written. Since the Act contains no express requirement for an "annexation agreement," Superior did not err under the Act by proceeding to annex without one. As more fully discussed below, under Colorado's statutory scheme, a landowner manifests his or her assent to an annexation in Colorado when the petition has been filed and, to a large extent,

the landowner proceeds at his or her own risk unless the landowner first secures a preannexation agreement, tenders the petition conditionally, or reserves the right to withdraw the petition. Since Midcities did not reserve the right to withdraw its signature from the annexation petition, then the company had no right to do so under the clear provisions of sec. 31-12-107 (1)(e).

B. Neither Kitty Hawk nor the Municipal Annexation Act of 1965 require a formal "annexation agreement" as a component of the annexation process.

In basing its decision in part upon this court's decision in City of Colorado Springs v. Kitty Hawk Development Co., the court of appeals was presumably relying upon the following language in that case:

> "We find nothing in the general law of this state or in the Constitution prohibiting the imposition of conditions by a municipality upon one seeking annexation. A municipality is under no legal obligation in the first instance to annex contiguous territory, and may reject a petition for annexation for no reason at all. It follows then that if the municipality elects to accept such territory solely as a matter of its discretion, it may impose such conditions by way of agreement as it sees fit. If the party seeking annexation does not wish to

annex under the conditions imposed, he is free to withdraw his petition to annex and remain without the city. Annexation can take place only when the minds of the city and the owners of the land contiguous to the city agree that the property shall be annexed and upon the terms upon which such annexation can be accomplished." 145 Colo. at 544-545, 392 P.2d at 472.

The facts in Kitty Hawk can be succinctly stated as follows: The city refused to extend extraterritorial utility service unless the landowner consented to be annexed. In annexing, the landowner was then incidentally subject to the payment of a fee in lieu of public land dedication that was required by a city ordinance of general applicability. Years later, the landowner sued on the theory that this fee could not have been imposed as a "condition" of the annexation.

For present purposes, perhaps the most significant fact in Kitty Hawk was the absence of any separate instrument denominated as an "annexation agreement." Instead, as Justice Moore highlighted in his dissent, "In the instant case there is no evidence whatsoever of any express agreement between the Company and the City. . . .There are no 'documents' establishing any such agreement." 154 Colo. at 563-564, 392 P.2d 481-482. The only "agreement" at issue in Kitty Hawk was the landowner's implicit acquiescence to the city's ordinances when the landowner submitted

his annexation petition in the first instance.

Ironically, in recent years Kitty Hawk is most often cited by commentators as an aid, not a deterrent, to municipal annexation authority. "A city is under no obligation to annex contiguous territory and may reject a petition for annexation for no reason at all. The city council may impose conditions upon its acceptance of land for annexation." Banks, John C., Colorado Law of Cities and Counties, (1978), citing Kitty Hawk. "Since a city is under no legal obligation to annex land, it may impose conditions as it sees fit. If the conditions become too onerous, the petitioning landowners may simply refuse to annex by withdrawing their signatures from the petition, as long as such right of withdrawal was set forth in the petition filed with the City." Deutsch, Breggin and Reutzel, "Annexation: Today's Gamble for Tomorrow's Gain," 17 Colo. Law. 809 (May, 1988), citing Kitty Hawk. See also: Conrad, "Annexation: Municipal Discretion in Approving or Denying the Petition," 22 Colo. Law. 1929 (Sept. 1993).

The League would submit that Kitty Hawk also stood (and to some degree still stands) for the proposition that the landowner must "agree" to annex in most cases. However, when viewed in some historical and legal context, it is clear that under the applicable statutes, both then and now, such "agreement" is manifested by the annexation petition itself, not by a separate document.

At the time Kitty Hawk was decided, the statutes basically provided only one avenue for municipal annexation--a petition signed by the owners of at least 50% of the territory to be annexed and at least 50% of the residents of that area. Sec. 139-10-3, C.R.S.1953. The former statutes did not expressly address annexation agreements, did not expressly allow municipalities to attach conditions to annexation, and did not allow petitioners to withdraw their signatures from annexation petitions once the petition was submitted.

The Municipal Annexation Act of 1965 wrought several important changes to these statutes while liberalizing the annexation process, making it more flexible, and enhancing municipal authority to annex. Many of these changes bore directly upon the issues decided the year before in Kitty Hawk and are directly or indirectly germane to the issues in the instant case, to wit:

1. For the first time, the statutes allowed unilateral annexation of certain properties without the consent of the landowners for lands having two-thirds contiguity with the annexing municipality. This section of the Act also substantially liberalized the procedures for municipalities to unilaterally annex "enclaves" without the landowners' consent. Sec. 31-12-106, C.R.S. See also, Adams v. City of Colorado Springs, 308 F.Supp. 1397 (D.Colo. 1970); Pomponio v. City of Westminster, supra.

2. Conversely, the Act allowed landowners to compel municipalities to annex such peninsulas and enclaves even if the municipality did not want to do so. Sec. 31-12-107 (5).

3. The Municipal Annexation Act included numerous references to municipal authority to impose "additional conditions" on annexations, but also indicated that such "additional conditions" would trigger a requirement to hold an annexation election. See: secs. 31-12-106 (4), 31-12-107 (1)(g) and (4), 31-12-110 (1)(b), 31-12-111, and 31-12-112 (1).

4. The Act for the first time acknowledged the authority of municipalities to enter into certain types of "annexation agreements" but did not mandate that they do so. Sec. 31-12-121, C.R.S. allows municipalities to require annexation as a condition of extending extraterritorial utility service, i.e. one of the central issues in Kitty Hawk. Sec. 31-12-112 (2) implicitly validates (without necessarily requiring) "any memorandum of agreement or escrow agreement voluntarily made by and between the annexing municipality and one or more landowners within the area proposed to be annexed."

5. As discussed above, the Municipal Annexation Act also

for the first time codified explicit requirement for any judicial review of municipal annexations, including a requirement that such a review be limited to matters arising under the Act itself. Sec. 31-12-116, C.R.S.

The most extensive amendments to the Municipal Annexation Act of 1965 occurred pursuant to SB 45 of 1987. Pertinent to this case, those amendments included for the first time the ability of a landowner to withdraw his signature from an annexation petition, if and only if he reserved this right when he originally submitted the petition, sec. 31-12-107 (1)(e). SB 45 also required for the first time that municipalities prepare "annexation impact reports" and that such reports include "A copy of any draft or final preannexation agreement, if available," sec. 31-12-108.5 (1)(b). Once again, like other language in the annexation statutes, this reference is a clear acknowledgement of the fact that annexation agreements <u>may</u> exist, but stops well short of indicating that they are required in every instance.

In the meantime, annexation law was effectively constitutionalized when state voters approved the inclusion of Art. II, Sec. 30 to the Colorado Constitution in 1980 (a.k.a. "Poundstone II"). This amendment reaffirmed the principle that most annexations in this state must be consented to by landowners in the affected territory. However, significantly, the amendment provided that such consent need be manifested only by a majority

petition or an election. It certainly did not require that landowners manifest their consent through a separate "annexation agreement" addressing all of the various terms and conditions under which their property would be annexed.

Throughout this period, the courts have more or less explicitly acknowledged the existence of "annexation agreements" in a variety of contexts but, until now, has stopped short of holding that such agreements would be deemed a condition precedent to a valid annexation. See: Tanner v. City of Boulder, 158 Colo. 173, 405 P.2d 939 (1965); City of Louisville v. District Court, supra; Cesario v. City of Colorado Springs, supra, 616 P.2d at n. 5; Lone Pine Corporation v. City of Fort Lupton, 653 P.2d 405 (Colo. App. 1982); Geralnes v. City of Greenwood Village, 583 F.Supp. 830 (D.Colo. 1984).

More commonly, the courts have not addressed the validity or role of separate instruments labeled as "annexation agreements" per se, but instead other mechanisms whereby either the landowner or the municipality may seek to obtain or impose conditions on a particular annexation. These "conditions" may be manifested in the annexation petition itself, in the annexation ordinance, or in ordinances of general applicability throughout the municipality as was the situation in Kitty Hawk. These cases have broadly supported the authority of municipalities to annex property conditionally, Aurora v. Andrew Land Company, 176 Colo. 246, 490

P.2d 246, 490 P.2d 67 (1971); Adams v. City of Colorado Springs, 178 Colo. 241, 496 P.2d 1005 (1972); Board of County Commissioners of the County of Jefferson v. City and County of Denver, 193 Colo. 211, 565 P.2d 212 (1977); Board of County Commissioners of the County of Jefferson v. City and County of Denver, 193 Colo. 325, 566 P.2d 335 (1977). However, a municipality's power to impose conditions on an annexation is not absolute, and a condition cannot abrogate an express requirement of the Municipal Annexation Act itself, Morgan v. Town of Palmer Lake, 44 Colo.App. 134, 608 P.2d 852 (1980).

In light of the somewhat nebulous references to "annexation agreements" in the Municipal Annexation Act itself, and considering the broad authority of municipalities to impose conditions on annexation through ordinances of general applicability, as affirmed by Kitty Hawk and its progeny, there is a tremendous variety of practice in Colorado municipalities in this area.

A review of the municipal codes in the ten largest Colorado cities (excluding Denver) reveals the following: Only four of the ten include any reference whatsoever to "annexation agreements" in their ordinances. This is not to say the others never enter into annexation agreements, as they may simply negotiate them on a case by case basis as the need arises to clarify special terms and conditions deemed necessary for a particular annexation. Of those who have seen fit to address annexation agreements in their

ordinances, we see a myriad of different approaches to the subject. (See Appendix C.)

In Arvada and Boulder, annexation agreements are explicitly required as a part of every annexation to those cities. In one case the agreement must be consummated "at the time of annexation" and in the other "prior to the first reading of the annexation ordinance." However, the Arvada ordinance is quite explicit about the particulars to be included in all of its annexation agreements while the Boulder ordinance merely states that the agreement must state "any terms and conditions" to be imposed on the territory to be annexed. In Colorado Springs, the ordinance indicates that the city council may, but need not, require an annexation agreement. In Lakewood, the subject is addressed by ordinance only to the extent that certain annexors must agree to participate in a special "annexation improvement fund" prior to joining that city.

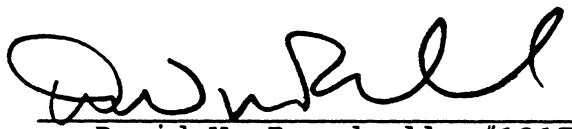
Suffice it to say that if the decision by the court of appeals in the instant case stands, and this court explicitly or implicitly holds that municipalities must have a meeting of the minds on all annexations as manifested by a separate "annexation agreement," it will force all 279 municipalities in the state to reassess their annexation practices. Since the contents, the parameters, and the timing for the adoption of such agreements is not addressed in the Municipal Annexation Act itself, all municipalities will undoubtedly be compelled to adopt local ordinance to address this

subject in some detail.

VI. Conclusion

The League respectfully urges this court to reverse the decision of the court of appeals, to hold that "annexation agreements" are not explicitly required by the Municipal Annexation Act, and, applying the proper standard of review as discussed above, to hold that Midcities has failed to show that the Town of Superior has violated any provision of the Act and therefore the town's annexation must stand.

Respectfully submitted this 1st day of July, 1996.



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Certificate of Mailing

I hereby certify that a true and correct copy of the foregoing Brief of the Colorado Municipal League as Amicus Curiae was placed in the U.S. Postal System by first class mail, postage prepaid, on the 1st day of July, 1996, addressed to the following:

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