COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue, Denver, Colorado 80203	
Plaintiff-Appellate and Cross-Appellant: BOARD OF COMMISSIONERS OF THE COUNTY OF DOUGLAS Defendants-Appellants and Cross-Appellees: CITY OF AURORA, a Colorado municipal corporation and GARTRELL INVESTMENT COMPANY, LLC, a Colorado Limited liability company	**▲COURT USE ONLY▲**
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REPLY BRIEF OF AMICUS CURIAE COLORADO MUNICIPAL LEAGUE IN SUPPORT OF THE CITY OF AURORA	

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INTRODUCTION

At issue in this appeal is whether a County may bring public roads within the "county-owned open space" clause of Section 31-12-104(1)(a), C.R.S., simply by declaring such roads to be "open space." The legislative intent of the "county-owned open space" clause does not permit this result. The County may well decide to classify certain county roads as open space. Similarly, the County could act to classify the county jail or courthouse as open space. Each of these three kinds of property possesses the same number of "open space" characteristics. Such actions would have no bearing upon the actual nature of those properties. It is their actual nature – here, the actual nature of the county roads as roads – which is significant for purposes of the Annexation Act, Section 31-12-101, et seq., C.R.S. The County has no power to alter the actual nature of the county roads as roads merely by adopting a resolution (unless that resolution is to vacate the roads and dedicate them to actual open space purposes).

The Court is bound to ascertain, and to honor, the legislative intent of the Legislature in enacting the entire legislative scheme of which Section 31-12-104(1)(a), C.R.S., is a part. The "presumption of validity" with which the County resolution is clothed is insufficient to enable the roads in question to be treated under the Annexation Act as other than what they still remain – county roads – for purposes of annexation contiguity.

ARGUMENT

A. **The legislative intent of the "county-owned open space" clause of Section 31-12-104(1)(a), C.R.S., does not permit its application to County roads, regardless of how classified by the County.**

Annexation of unincorporated lands into a municipality in Colorado must include one-sixth contiguity between the land annexed and the municipal boundary. Public lands, rights-of-way and water features are ignored for purposes of annexation contiguity under Section 31-12-104(1)(a), C.R.S.:

> Contiguity shall not be affected by the existence of a platted street or alley, a public or private right-of-way, a public or private transportation right-of-way or area, public lands, whether owned by the state, the United States, or an agency thereof, *except county-owned open space*, or a lake, reservoir, stream, or other natural or artificial waterway between the annexing municipality and the land proposed to be annexed. (*emphasis supplied*)

The Douglas County Board of County Commissioners ("the Board") maintains in its answer brief that its last-minute adoption of Resolution 000-091, classifying the two county roads at issue (the "County Roads") as open space transforms those roads into open space for purposes of the annexation statute. The legislative history and intent of the "county-owned open space" clause do not permit this result.

The Court must first look to the plain meaning of the statutory language. Section 2-4-101, C.R.S. provides that "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage." Board of County Commissioners v. IBM Credit Corp., 888 P.2d 250, at 252 (Colo. App. 1995); Walker v. People, 932 P.2d 303 (Colo. App. 1997) . The plain meaning of "county-owned open space"

clearly and plainly does not include active county roads. Unless there is some ambiguity in the statute, the inquiry ends there, and legislative intent and history are not required. In this case, the intention of the Legislature, as expressed by the representative who offered the amendment, also supports the reasonable construction that county roads are not open space for purposes of the Annexation Act.

The phrase "...except county-owned open space," was added to Section 31-12-104(1)(a), C.R.S., by Senate Bill 45 in 1987 [Laws, 87, p. 1218, sec. 1.], as a floor amendment by Representative Bud Hover, R-Douglas County. Representative Hover's expressed interest in offering the amendment was to protect County open space programs. As described in the League's Opening Amicus Brief, the legislative history supports the plain meaning of the phrase "county-owned open space," as land in legitimate open space programs. The Court must consider this legislative history. Section 2-4-203(1)(c), C.R.S. The legislative intention, as expressed by the sponsor of the floor amendment, is that "badly needed county open space land" not be eroded by "leapfrogging annexation." The Board and Amicus Colorado Counties, Inc. simply ignore this legislative history, making no mention whatever of the floor statement by Representative Hover in support of his amendment. Significantly, this is the only contemporaneous statement by any legislator concerning the "county-owned open space" clause, upon which the Board so heavily relied in fashioning its Resolution 000-091. Representative Hover's statement is a basic resource for the Court in determining legislative intent. People in Interest of G.W.R., 943 P.2d 466 (Colo. App. 1992).

The Court must also presume that the entire statute is intended to be effective. Section 2-4-201(1)(b), C.R.S. The Court must construe the statute to further the entire statutory scheme, Bynum v. Kautzky, 784 P.2d 735, at 737 (Colo. 1989), giving meaning to all of its portions and to every word of the enactment, if possible. Blue River Defense Comm. v. Town of Silverthorne, 516 P.2d 452, at 454 (Colo. App. 1973). As pointed out in the League's Opening Amicus Brief, there are several references in the Annexation Act to streets and transportation rights-of-way:

1. Section 31-12-105(1)(a), C.R.S.: landowner consent is not required where the parcels "...are separated by a dedicated street, road, or other public way."

2. Section 31-12-105(1)(b), C.R.S.: "...contiguity shall not be affected by a dedicated street, road, or other public way...."

3. Section 31-12-105(1)(e), C.R.S.: "...contiguity may be achieved by annexing a platted street or alley, a public or private right-of-way, a public or private transportation right-of-way or area...."

The Annexation Act contains a comprehensive legislative scheme, which treats streets, roads, and water features as either neutral or positive for purposes of annexation. The interpretation urged by the Board is that the County Roads, while still retaining all of their characteristics as roads, should also be treated as "county-owned open space," and thus a barrier to annexation. Such an interpretation would reverse the express legislative scheme. The Board's interpretation ignores the only recorded statement of legislative intent on the subject: Representative Hover's 1987 floor amendment was concerned with "county-owned open space." The phrase cannot, under any stretch of the imagination, be extended to apply to

County roads which are classified as open space, yet retain all of their characteristics as traveled roads.

B. **The presumption of validity of the County's resolution does not extend further than to classify the County roads for internal County purposes.**

The Board and Amicus Colorado Counties, Inc. both stress the power of the Board to govern and control the County Roads, as for all County property. Section 30-11-107(1)(a), C.R.S. It is true that the Board has the power to classify the County Roads as "open space" for internal County purposes, however questionable those purposes may be. Such a classification, however, is binding only on the County. To the extent each of the County Roads is still a "platted street or alley, a public or private right-of-way, a public or private transportation right of way or area," they must be ignored for purposes of contiguity under Section 31-12-104(1)(a), C.R.S.

The Board's power to rename or reclassify its property ends with internal County record keeping. For example, the Board could declare a county-owned office building to be "county-owned open space." This action would be of significance internally, but would have no effect on the operation of state law. The designation would not render the office building eligible for state lottery funds reserved for parks and open space, just as it would not make the building "open space" for purposes of the Annexation Act. Similarly, simply calling the county jail or courthouse "open space" does not render those properties open space in fact. The Board resolution doing so, while clothed with a presumption of validity, cannot create open space in Section 31-12-104(1)(a), C.R.S. terms simply by so declaring.

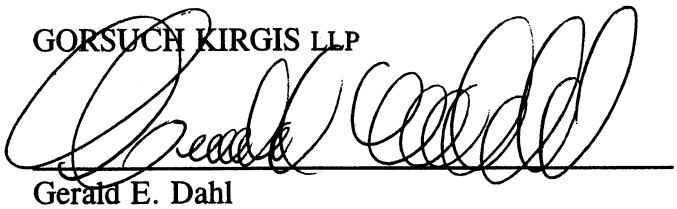
In its Answer Brief, the Board repeatedly asserts that Resolution 000-091 is "clothed with a presumption of validity" which can only be overcome by proof beyond a reasonable doubt. The validity of the Resolution, as a resolution regularly adopted, is not at issue in this appeal; instead, it is the effect of the Resolution upon facts, parties, and statutes outside of the Board's jurisdiction which is in question. A regularly adopted Board resolution declaring a county road, gravel pit, office building or jail to be open space simply does not require the state, or any other entity, to engage in the same fiction unless those properties actually are open space as described.

CONCLUSION

In this case, the adoption of Resolution 000-091, just in time to position the Board for its argument that the County Roads had become "county-owned open space," is worthy of the plaintiff in Pomponio v. City of Westminster, 496 P.2d 999 (Colo. 1972). The description of the Pomponio case by Amicus Colorado Counties, Inc. in its reply brief as "a last minute maneuver" to defeat annexation, is applicable here. The "county-owned open space" exception to the general rule permitting annexation across roads and public property was enacted to protect legitimate county open space programs, containing actual open space. The Board's adoption of Resolution 000-091 merely classifies the County Roads for internal county record keeping. The Resolution cannot change the actual nature of the roads, nor can it characterize them for purposes of the Annexation Act. The decision of the district court should be reversed.

Respectfully submitted, this 15th day of May, 2002.

GORSUCH KIRGIS LLP



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CERTIFICATE OF SERVICE

I certify that on May 15, 2002, I caused a true and correct copy of the REPLY BRIEF OF AMICUS CURIAE COLORADO MUNICIPAL LEAGUE IN SUPPORT OF THE CITY OF AURORA to be placed in the United States Mail, postage prepaid, addressed as follows:

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