3-28-1979

Colorado Land Use Commission v. Board of County Com'rs of Larimer County

NO. 79SA47

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

COLORADO LAND USE COMMISSION, Appellant, v. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LARIMER, and in their official capacity, WILLIAM LOPEZ, Chairman, DAVID WEITZEL, and NONA THAYER, the individual members of said Board, and THE CITY OF FT. COLLINS, THE CITY OF LOVELAND, THE CITY OF LONGMONT, THE TOWN OF ESTES PARK, and THE PLATTE RIVER POWER AUTHORITY, a political corporation and a political subdivision of the State of Colorado Appellees.	Appeal from the District Court of Larimer County Honorable CONRAD J. BALL Judge

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APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF

INTRODUCTION

This brief is submitted on behalf of the Colorado Land Use Commission in support of their position that the decision of the district court in and for the County of Larimer, issued on August 29, 1978, in the above-captioned matter, incorrectly held that de novo review of administrative decisions is unconstitutional, that article V, section 35 of the Colorado Constitution prohibits the Colorado Land Use Commission from requesting that counties designate a matter of state interest, and that the intergovernmental agree-

ment is not void (ff. 175-191). On September 6, 1978, Colorado Land Use Commission, plaintiff below, filed a motion to alter or amend the judgment which was denied by the district court on December 14, 1978 (ff. 210-212).

In this brief, the parties will be referred to as follows: the appellant, Colorado Land Use Commission, as "commission"; appellees, Board of County Commissioners and the individual members thereof, collectively as "county"; appellees, the four cities, collectively as "the municipalities"; and appellee, Platte River Power Authority, as "PRPA."

STATEMENT OF THE CASE AND FACTS

The facts of the case were stipulated by the parties (ff. 163-169), and are summarized here. On August 26, 1977, by unanimous vote, the commission adopted resolutions formally requesting the county, pursuant to C.R.S. 1973, 24-65.1-407(1)(a), to designate as activities of statewide interest, the site selection and construction of major facilities of a public utility, site selection and development of solid waste disposal sites, and efficient utilization of municipal and industrial water projects in Larimer County. The resolutions are attached as exhibits A, B and C to the complaint (ff. 12, 13 and 14). The area proposed for designation encompasses all of the unincorporated area of Larimer County.

The formal request was made in accordance with section 1-4-202, Colorado Land Use Commission procedures, after consideration of a staff report dated May 20, 1977, and consideration of recommendations, comments, and materials submitted by local governments involved and by interested persons at public meetings conducted on May 27, 1977, and August 26, 1977, pursuant to proper notice.

The county published notice of a hearing to consider

the commission's formal request, and on October 25, 1977 held a public hearing in response to the formal request. At the conclusion of said hearing, the county issued orders failing to designate the three matters of state interest and failing to adopt guidelines or regulations therefor under the provisions of C.R.S. 1973, 24-65.1-101, et seq. The county's orders, including minority reports from one county commissioner, are attached as exhibits D, E, F, and G to the complaint (ff. 15, 18, 21 and 24).

At its regularly scheduled monthly meeting held December 16, 1977, the commission considered oral and written statements, recommendations and comments, including requests from the Boards of County Commissioners in Weld and Grand Counties that the siting of power plants in Larimer County be designated a matter of state interest. By an unanimous vote of the commission members present, the commission voted to seek judicial review of the county's failure to designate or adopt guidelines or regulations for the three matters of state interest.

Particularly subject to the formal designation request is the Rawhide Energy Project of the Platte River Power Authority (PRPA). PRPA was established by the municipalities for the purpose of constructing, and operating electric generating plants and transmission systems.

PRPA is a power authority and an electrical utility established as a separate governmental entity by the municipalities pursuant to the provisions of C.R.S. 1973, 29-1-204 (as amended), to supply their wholesale power and energy requirements. A copy of the Organic Contract dated June 17, 1975, establishing PRPA, together with amendments thereto and municipal proceedings in connection therewith, are attached as exhibit AA to the PRPA motion for summary judgment (f. 83-147).

The board of PRPA authorized preliminary and developmental work to determine the feasibility of the Rawhide Energy Project (Rawnide Project). The Rawhide Project is proposed to be located on an approximately 2000-acre site in an unincorporated area of Larimer County, with a potential ultimate generating capacity of 750 megawatts of power. Related transmission facilities are also being planned.

As part of the Rawhide Project, PRPA plans to construct water facilities designed to deliver and utilize up to 4,500 acre feet of water per year for use in the generation of electric power when the generating capacity of the Rawhide Project is 230 megawatts.

Site selection and development by PRPA already planned for in conjunction with and as part of the Rawhide Project are solid waste disposal sites necessary for the disposal of fly ash and other solid wastes from the generation of electric power by the Rawhide facility.

In connection with the site location and construction of the Rawhide Project, PRPA and the county entered into the "Intergovernmental Agreement" attached as exhibit H to the complaint (f. 58).

For several months prior to August 25, 1977, the commission discussed and considered on an informal basis numerous issues related to the proposed Rawhide Project in Larimer County. Included among the issues under consideration and discussion at that time was the proposed "Intergovernmental Agreement" between PRPA and the county.

During its meeting of August 26, 1977, the commission received and thoroughly considered various statements and other evidence concerning the "Intergovernmental Agreement" entered into between PRPA and the county on August 25, 1977. At this same meeting, the commission accepted legal advice from its counsel that the "Intergovernmental Agreement" was not legally valid. This advice and the other evidence about

the agreement were part of the basis upon which the commission decided to issue a formal request to Larimer County to designate the three matters of state interest involved. The Rawhide Project is one of the types of facilities encompassed within the commission's formal designation request.

Paragraphs 13 through 22 of the first amended complaint set forth some of the reasons why the proposed matters are of state interest, why the designations will be beneficial and the dangers of not making the designations (ff. 31-35).

The commission is not seeking a stay at this time but will do so pursuant to section 407(1)(c) of the act whenever necessary to prevent any person from engaging in development or conducting an activity which would interfere with the consideration of designating and regulating the matters of statewide interest as proposed by the commission.

SUMMARY OF THE ARGUMENT

1. The statutory requirement for a trial de novo of the county commissioners' decision not to designate matters of state interest is constitutional.

2. Article V, section 35 of the Colorado Constitution is not violated by the statutory provision allowing a state agency to request a county to hold a hearing.

3. The actions of the Land Use Commission do not violate its Organic Act, C.R.S. 1973, 24-65-101, et seq.

4. The intergovernmental agreement between the Platte River Power Authority and the Board of County Commissioners of Larimer County is an unconstitutional delegation of zoning authority, and is contrary to article XIV, section 18(2)(a) of the Colorado Constitution, C.R.S. 1973, 29-1-203(1), and C.R.S. 1973, 30-28-116.

ARGUMENT

I.

THE STATUTORY REQUIREMENT FOR A TRIAL DE NOVO OF THE COUNTY COMMISSIONERS' DECISION NOT TO DESIGNATE MATTERS OF STATE INTEREST IS CONSTITUTIONAL.

A. The role of counties, the land use commission and the courts in determining whether to designate matters of state interest.

Under the land use statute, C.R.S. 1973, 24-65.1-101, et seq. (hereinafter referred to as the "Act"), counties may, on their own initiative, or shall, pursuant to a request by the commission, hold a designation hearing and then may designate matters of state interest, pursuant to sections 301 and 407(1)(a) of the Act. The activities or areas which may be designated as matters of state interest are identified in the Act. While the commission, in the trial court, urged that counties had a duty to designate after formal request by the commission, the commission now is persuaded that such an interpretation of the Act is not appropriate. The commission agrees that the decision of whether or not to designate after formal request by the commission is discretionary so long as that decision is supported by the record developed in the county designation hearing. Thus, the county may be compelled to hold a hearing to consider designation if the commission makes a formal request pursuant to section 407(1)(a) of the Act, but the county is not compelled to make the designation unless the weight of the evidence requires such a decision.

If a county does not designate a matter upon which the commission has requested a hearing, the commission may seek judicial review which shall be by a trial de novo pursuant to section 407(1)(c).

B. Section 407(1)(c) of the Act is presumed to be constitutional.

It is well-settled in Colorado that statutes are presumed to be constitutional. Johnson v. Division of Employment, ___ Colo. ___, 550 P.2d 334 (1976). Also, the court's duty is to construe the statute so as to be constitutional. Meyer v. Putnam, 186 Colo. 132, 526 P.2d 139 (1974).

To overcome this presumption of constitutional validity, the county must prove that section 407(1)(c) of the Act is unconstitutional "beyond a reasonable doubt," Harris v. Heckers, 185 Colo. 39, 521 P.2d 766 (1974), with "clear and convincing evidence." Sundance Hills v. Board of County Commissioners, 188 Colo. 32, 329, 534 P.2d 1212 (1975).

C. Trial de novo review of agency decisions may be conducted in a constitutional manner.

The trial court in this case ruled that the statutory provision in section 407(1)(c) providing for trial de novo review is unconstitutional, apparently on the theory that courts are only allowed to review the record of administrative actions. To do otherwise would overtax the court's facilities, in the trial court's view. By not identifying the key factors that can make judicial review of an administrative or legislative action unconstitutional, the court did not apply the correct analysis in evaluating the constitutionality of the statute. The real question is what type of decision is the court required to make.

One of the salient checks and balances built into the relationship between the judicial and executive branches of government is judicial review of administrative agency decisions. Such review has long been upheld as a constitutionally proper exercise of judicial authority. See, e.g., Denver & Salt Lake Railroad Company v. Chicago, Burlington

& Quincy Railroad Company, 64 Colo. 229, at 232-234, 171 P. 74 (1918); Stark v. Wickard, 321 U.S. 288, at 309-310, 64 S. Ct. 571, 88 L. Ed. 733 (1944); and Garvey v. Freeman, 397 F.2d 600 (10th Cir. 1968).

The trial de novo authorized in section 407(1)(c) of the Act only goes to the source of facts upon which the court bases its review of the county's orders. When providing a specific statutory appeal from an agency decision, the legislature may limit the facts for judicial review to the record before the agency; or the court may be authorized to engage in limited additional fact-finding; or the court may be authorized to conduct a new hearing. The purpose is still the same -- to provide facts for the court's decision. However, the source of facts does not determine the nature of the court's decision, which is the key to the constitutional issue.

If the court is required to substitute its judgment for the agency's, there may be a violation of the constitutional requirement of separation of powers. As long as the evidence upon which the court bases its decision was before the agency, the court will not be substituting its judgment for the agency. If the court relies on evidence which was not presented to the agency, the court should remand the issue to the agency for its consideration of the new evidence.

The trial court did not cite any authorities for the proposition that trial de novo review of administrative agency decisions is inherently unconstitutional. Trial de novo review has been upheld in many occasions, particularly where the legislature has specifically provided for de novo review by statute. See, e.g., Thompson v. Colorado Groundwater Commission, ___ Colo. ___, 575 P.2d 372 (1978); Fundingsland v. Colorado Groundwater Commission, 171 Colo. 487, 468 P.2d 835 (1970). See also United States v. First City National

Bank, 386 U.S. 361, 368-369, 87 S. Ct. 1088, 18 L. Ed. 2d 151 (1967); Wilson-Sinclair v. Griggs, 211 N.W.2d 133, 138-139 (Iowa, 1973); and Stehl v. Department of Motor Vehicles, 229 Or. 543, 368 P.2d 386 (1962). Moreover, other Colorado statutes provide for de novo judicial review of agency decisions. See C.R.S. 1973, 10-3-413(1)(a) and 813(1) (Insurance Commissioner); 34-60-113 (Oil and Gas Commission); and 37-90-115(4) (Ground Water Commission).

While some decisions upholding the constitutionality of de novo review limit the application to review of quasi-judicial decisions, that is not constitutionally necessary. Colorado courts have directly applied statutory requirements for de novo trial to review of other types of discretionary actions. In Kuiper v. Well Owners Conservation Association, 176 Colo. 119, 490 P.2d 268 (1971), this court reviewed a trial de novo conducted by the water court of a challenge to groundwater regulations as applied to the South Platte River. C.R.S. 1973, 37-90-115(4) provides for a de novo review of the regulation. A review was conducted, apparently without question as to its constitutionality. However, the court made it clear that the regulations being reviewed were presumed to be valid until shown otherwise by a preponderance of the evidence. 176 Colo. at 138.

In a review under this Act, the trial court should conduct a trial de novo to determine if the decision made by the county commission not to designate is shown to be invalid by a preponderance of the evidence. It should remand the issue to the county if the evidence demonstrating the invalidity was not presented to the county.

Thus, the statutory provision for a trial de novo can and should be interpreted as being constitutional. It will be helpful if this court will set forth the standard of review and procedures which a trial court should apply in situations such as this which call for a de novo review of

administrative actions.

II.

ARTICLE V, SECTION 35 OF THE COLORADO CONSTITUTION IS NOT VIOLATED BY THE STATUTORY PROVISION ALLOWING A STATE AGENCY TO REQUEST A COUNTY TO HOLD A HEARING.

A. Article V, section 35 of the Colorado Constitution does not prohibit the legislature from delegating to a state agency authority with respect to municipally owned facilities which are located entirely outside the territorial limits and jurisdiction of the municipalities.

The trial court found, in essence, that state agencies (except the Public Utilities Commission when regulating electricity sold to users living outside a municipality) are prohibited, by article 5, section 35 of the Colorado Constitution, from asserting authority over municipal facilities or functions. This is so even if the facility or function is operated outside the municipal boundaries and, consequently, the customers will not have any method for protecting their rights since they will not be electing the officials responsible for the regulatory decisions.

This decision by the trial court is directly contrary to the reasoning behind City of Loveland v. Public Utilities Commission, ___ Colo. ___, 580 P.2d 381 (1978) where this court ruled that article V, section 35 of the constitution does not prohibit the Public Utilities Commission from exercising jurisdiction over municipally-owned utilities which are located outside municipal boundaries. The same rationale was applied to municipally-owned transportation systems. City and County of Denver v. Public Utilities Commission, 181 Colo. 38, 507 P.2d 871 (1973).

The following language from Loveland v. Public Utilities Commission is instructive:

> In Holyoke, this court in construing article V, section 35 of the Colorado Constitution, considered its historical background and the mischiefs against it which it was intended to guard. There we stated that the intention of the framers of the constitution had been to prevent legislative interference in "municipal matters," which "properly fall within the domain of local self-government." After noting that the fixing of rates to be charged by a lighting plant owned and operated by a municipality is a municipal function, the court observed that supervision of municipally-owned utilities is unnecessary since the customers are citizens of the municipality and can protest oppressive rates or poor management by recalling city officials or voting them out of office at an election.
>
> In City of Lamar, the court used this observation to distinguish the case of non-resident customers of municipally-owned utilities, who have no more voice in the management of the utility than have customers of privately owned and operated utilities. Consumers without an opportunity to control the utility need the protection of the PUC to prevent oppressive rates.

580 P.2d at 384.

This court has consistently applied sound reasoning in determining that regulation of municipal matters conducted outside of the municipal territorial limits is not prohibited by article V, section 35. This reasoning is essential in order to provide a mechanism for conflict resolution between customers who are not residents of the municipality and the municipally-controlled entity. To decide that such reasoning is sound as applied to PUC electricity rate decisions but not to any other similar action by a state agency would be ludicrous.

B. The actions of the Land Use Commission do not violate article V, section 35 of the Colorado Constitution.

First, it is important to note that the commission agrees with the arguments made below that counties have dis-

cretion in deciding whether to designate matters of state interest. The commission's action pursuant to section 407(1)(a) of the Act can only require that a designation hearing be held and that the record set forth the basis for the county's decision. Thus, all that occurs under this Act is that the Land Use Commission identifies certain areas or activities and requires the county to hold a hearing to consider designation of those areas or activities as matters of state interest. Merely requiring a county to hold a hearing cannot possibly result in the commission having the "power to make, supervise or interfere with any municipal improvement, money, property or effects ... or perform any municipal function whatever." Article 5, section 35, Colorado Constitution. Such a ruling would defy all reasoning.

However, the broad scope of the court's ruling also may have a disastrous effect on the ability of counties to operate under this Act because counties also constitute special commissions in relation to municipal property. The trial court attempted to distinguish counties from the commission on the grounds that counties are created by the constitution and, therefore, cannot constitute a "special commission". However, the Public Utilities Commission is created in the constitution, yet this court has found it to be a "special commission" subject to this constitutional prohibition in certain instances.

III.

THE ACTIONS OF THE LAND USE COMMISSION DO NOT VIOLATE ITS ORGANIC ACT, C.R.S. 1973, 24-65-101, ET SEQ.

The lower court found that the commission violated section 105 of the Act by making a designation request. The commission's request that the county hold a hearing to consider the designation of certain matters as being of

statewide interest does not enhance or diminish the power and authority of municipalities, counties or the PUC with regard to public utilities. Holding such a hearing also will not be inconsistent with any order, rule or directive issued by the PUC with respect to public convenience or necessity. Clearly, the Act contemplated that there could be some county regulation of major facilities of a public utility as it is identified as an activity of state interest. Moreover, section 407 of the Act authorizes the commission to make this designation request. Surely this request, which clearly follows the procedures established by the Act, does not violate the Act.

IV.

THE INTERGOVERNMENTAL AGREEMENT BETWEEN THE PLATTE RIVER POWER AUTHORITY AND THE BOARD OF COUNTY COMMISSIONERS OF LARIMER COUNTY IS AN UNCONSTITUTIONAL DELEGATION OF ZONING AUTHORITY, AND IS CONTRARY TO ARTICLE XIV, SECTION 18(2)(A) OF THE COLORADO CONSTITUTION, C.R.S. 1973, 29-1-203(1), AND C.R.S. 1973, 30-28-116.

A. Why the commission challenged the "Intergovernmental Agreement."

Prior to August 25, 1977, the commission and the county engaged in informal discussions about the adequacy of the county's land use regulations to cover the impact of the proposed "Rawhide Project" of PRPA, as well as other future power plants. The county decided to utilize an "Intergovernmental Agreement" as the mechanism for regulating the "Rawhide Project," rather than apply regulations through either the county zoning authority or through the authority provided in the Act. Thus, on October 25, 1977, the county and PRPA signed an "Intergovernmental Agreement" (f. 58). The commission, however, believed that the "Intergovernmental Agreement" was not legally valid in this instance. Thus, the commission formally requested the county to designate matters

of state interest because the commission believed it to be the only legally valid alternative to zoning through which land use regulations could be applied to PRPA.

The county responded to the commission's formal request to designate the three matters of state interest by adopting three orders (one for each of the three matters of state interest involved) which failed to designate a matter of state interest (ff. 15, 18 and 21). In each of the orders, the county concluded that PRPA was the major, if not the sole project which was covered by the designation request. The county further concluded that they need not designate any of the three matters of state interest as they related to the "Rawhide Project" because the "Intergovernmental Agreement" provided adequate controls. The commission sought review of the "Intergovernmental Agreement" in this action because of its belief that it is an invalid contract and constitutes an impermissible basis for refusing to designate matters of state interest, as well as for the reasons noted above. PRPA, a party to the contract and a defendant to the action, moved for summary judgment on the issue of the validity of the contract.

The trial court incorrectly held that article XIV, section 18(2)(a) of the Colorado Constitution and C.R.S. 1973, 29-1-203(1) do not require that both parties to the "Intergovernmental Agreement" must have power to perform the functions or areas the contract addresses and that the agreement does not constitute illegal contract zoning.

B. The "Intergovernmental Agreement" constitutes an illegal surrender of the county's zoning authority.

The basic test for determining whether a local government has improperly surrendered its zoning power was stated by the Colorado Supreme Court in King's Mill Homeowners

Ass'n. v. City of Westminster, ___ Colo. ___, 557 P.2d 1186, at 1191 (n. 10) (1976):

> We recognize ... that municipalities may not by contract or otherwise surrender their governmental, legislative or police powers.

The court contrasted this type of illegal action from the "Power to impose conditions on rezoning /which/ is an exercise of the police power and /which/ are valid as long as they are reasonably conceived." 557 P.2d at 1191.

This holding is in line with the general rule that governmental entities "cannot confer public powers upon others, nor delegate legislative powers; nor can powers conferred upon, or which appertain, or properly belong, to any office or department be surrendered or transferred and be performed by others .... Hence, all contracts which interfere with the legislative or governmental functions of the municipality are absolutely void." 10 McQuillin, Municipal Corporations, sec. 29.07 (1977).

Applying the King's Mill rule to the "Intergovernmental Agreement," it is clear that the proposed contract represents the "surrendering" of Larimer County's zoning authority in several respects.

1. The focus of almost all of the "whereas clauses" in the contract is on county approval of PRPA's special use permit application and on land use considerations generally, indicating that the subject of the agreement is land use regulation, an exercise of the county's zoning authority (ff. 58-60).

2. The context in which the contract was entered also supports this conclusion, in that PRPA had applied for special use approval under the county's zoning regulation and this agreement is to guide and determine all further county decisions on that application. In this connection, two "whereas clauses" (the 6th and 11th; ff. 59 and 60)

recite that PRPA applied for a use by special review permit, sought conceptual or conditional approval of that application to justify further expenditures of funds, and the county conceptually approves the application "by the execution of this agreement." Such conceptual approval enables PRPA to "proceed with detailed studies necessary for final action on the Rawhide Project."

3. The final "whereas clause" says that the contract establishes a procedure for public review of the Rawhide Project, a procedure that would normally be found in the county land use regulations (f. 60).

4. The statutory authority of the county recited in the first "whereas clause" and the description of that authority are limited to land use enabling acts (f. 58).

5. The operative paragraphs of the contract particularly relate to land use regulations:

a. PRPA agrees to "supplement its application for use by Special Review" to qualify for, in essence, a one-stop permit application procedure for all further county land use approvals. This "procedure" in effect amends the county zoning regulations for PRPA (ff. 60 and 61).

b. PRPA also agrees to pay a fee to the county, obtain other government permits for the plant, and submit additional environmental information. Again, this amounts to an amendment to the county zoning regulations by contract (f. 61).

c. PRPA agrees to "comply with and abide by reasonable land use conditions and actions of Larimer County in reviewing the Rawhide Project" (f. 62).

6. These agreements by PRPA would not be particularly troublesome if it were not for the following contractual commitments made by Larimer County: The county agrees to "grant Approval or Conditional Approval of Platte River's Supplemented Application" if the county "determine/s/ whether

the standards set forth herein and the evaluation criteria set forth in attachment 'B' hereto have been met" (emphasis added) (f. 62).

This arrangement unquestionably constitutes illegal contract zoning. The county, by contract, has agreed to approve a land use proposal on the basis of standards set out in the contract, not according to the standards or procedure in the county's land use regulations, standards and procedures with which the land use proponent otherwise would have to comply, outside the scope of its statutory authority. Moreover, the "Intergovernmental Agreement" modifies the county zoning resolution for PRPA, in violation of C.R.S. 1973, 30-28-116. Thus, the "Intergovernmental Agreement" is ultra vires and is void and unenforceable. See 10 McQuillin, op. cit., sec. 29.10, at N. 66, pp. 252-253 (1966 Rev. Vol.); City of Englewood v. Ripple & Howe, 150 Colo. 434, 374 P.2d 360 (1962); Swedlund v. Denver Joint Stock Land Bank, 108 Colo. 400, 407-408, 118 P.2d 460 (1941).

It was this conclusion which led the commission to request designation by the county. The commission feared that a land use regulation premised on an illegal "Intergovernmental Agreement" would leave county and state residents unprotected. The commission otherwise has no disagreement with the terms of the agreement.

C. The trial court erred in its interpretation of article XIV, section 18(2)(a) of the Colorado Constitution and C.R.S. 1973, 29-1-203.

The "Intergovernmental Agreement" is purportedly based on C.R.S. 1973, 29-1-201, et seq., and 29-10-101, et seq. and section 18, article XIV of the Colorado Constitution. See page 3, agreement, exhibit H; f. 60.

Without reciting the full text of each provision, the critical requirement in each is that the intergovernmental

contract may extend only to matters which are "lawfully authorized to each of the cooperating or contracting units." Article XIV, section 18(2)(a), Colo. Const. and C.R.S. 1973, 29-1-203(1). The provisions of C.R.S. 1973, 29-20-105, specifically addressing intergovernmental contracts for land use matters, is similarly subject to this constitutional and statutory limitation. While this contract authority permits governmental entities to share responsibilities, it does not permit governmental bodies to expand upon their authority by contract.

Both the constitution and statutory provisions provide that intergovernmental entities may agree "to provide any function, service or facility lawfully authorized to each of the cooperating or contracting units" (emphasis added). The trial court found that each does not mean both, therefore, the "Intergovernmental Agreement" is valid. However, the definition of "each", and case law application and common usage of the word "each" demonstrate that the intended meaning of "each" is that all entities signing the contract must be lawfully authorized to conduct all of the matters covered in the contract. United States v. Rosenwasser, 323 U.S. 360, 363, 65 S. Ct. 295, 296, 89 L. Ed. 301 (1945); and Black's Law Dictionary, fourth edition, "each", at 597.

If the "Intergovernmental Agreement" does constitute illegal contract zoning and is an "ultra vires" contract, it should be found to be void and unenforceable by this court.

CONCLUSION

The issues before this court are complex, and of extreme importance. The commission believes that the applicable law clearly requires this court to rule as follows:

1. Find that trial de novo review of the county's

failure to designate after formal request by the commission is not unconstitutional and the review should be to determine whether the preponderance of the evidence supports the county's decision.

2. Find that the commission's action and the statutory provisions under which the commission is acting do not violate article V, section 35 of the Colorado Constitution to the extent that they affect municipally-owned facilities located outside the boundaries of the municipalities.

3. Find that the intergovernmental agreement between the county and PRPA is legally invalid, void and unenforceable.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within APPELLANT'S OPENING BRIEF upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado this 28th day of March 1979, addressed as follows:

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