11-29-1968

Board of County Com'rs of Arapahoe County v. City and County of Denver

3

NO. 23614

IN THE
SUPREME COURT
OF THE
STATE OF COLORADO

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF ARAPAHOE, STATE OF COLORADO; SHERIDAN SCHOOL DISTRICT NO. 2, ARAPAHOE COUNTY, COLORADO, AND BOB D. McAFEE, EDNA JEANNE McAFEE, JAMES E. JACKSON, DENMER A. WELLS, JR., DOROTHY M. WELLS, JACK O. BANKS, DOROTHY BANKS, JOHN L. DORLAC, JR., AND JUANITA J. DORLAC, Plaintiffs in Error, v. THE CITY AND COUNTY OF DENVER, A MUNICIPAL CORPORATION; THE CITY COUNCIL OF THE CITY AND COUNTY OF DENVER; ROBERT B. KEATING, JOHN F. KELLY, IRVING S. HOOK, PAUL A. HENTZELL, KENNETH M. MacINTOSH, CARL N. DeTEMPLE, EDWARD F. BURKE, JR., ELVIN R. CALDWELL, AND ERNEST P. MARRANZINO, IN THEIR CAPACITIES AS AND BEING AND CONSTITUTING THE MEMBERS OF THE CITY COUNCIL OF THE CITY AND COUNTY OF DENVER; AND EARL WANKE, AS ASSESSOR OF THE COUNTY OF ARAPAHOE; AND PAUL W. WOLF, AS THE TREASURER OF THE COUNTY OF ARAPAHOE, AND LAWRENCE BAULER, DOUGLAS TUCK, JOHN H. McLAUGHLIN, JOHN E. CARON, CHARLES J. MACKET, GLEN H. ADAMS, DAVID R. MILEK, DONALD R. OLSON, AND JOSEPH DeLIO, Defendants in Error.	Error to the District Court of the County of Arapahoe State of Colorado HONORABLE WILLIAM GOBIN Judge

ANSWER BRIEF OF INDIVIDUAL DEFENDANTS IN ERROR,
BAULER, TUCK, McLAUGHLIN, CARON, MACKET, ADAMS,
MILEK, OLSON, AND DeLIO

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Individual Defendants in Error,
Bauler, Tuck, McLaughlin, Caron,
Macket, Adams, Milek, Olson,
and DeLio

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NO. 23614

IN THE SUPREME COURT OF THE STATE OF COLORADO

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Plaintiffs in Error,	)	
v.	)	
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Defendants in Error.	)	

ANSWER BRIEF OF
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BAULER, TUCK, McLAUGHLIN, CARON,
MACKET, ADAMS, MILEK, OLSON, AND DeLIO

I. INTRODUCTION

A portion of the area annexed to Denver in the within cause was the subject of annexation proceedings in 1961. An optionee of certain lands within the area then to be annexed signed a petition for annexation. The validity of the optionee's standing as a petitioner was necessary in order to meet the statutory qualification that eligible

landowners of more than 50% of the area sought to be annexed petition in favor of annexation. The Supreme Court of Colorado voided the annexation on the sole ground that the optionee was not a landowner within the meaning of the annexation statutes and, therefore ". . . the owners of more than 50% of the area proposed to be annexed had not joined in seeking the annexation." Elkins v. City and County of Denver, 157 Colo. 252, 402 P.2d 617 (1965).

The portion of land involved in the Elkins case was essentially undeveloped and unpopulated at the time of the attempted annexation in 1961. During the period between the passage of the Denver City Council annexation ordinance of 1961 and the Elkins case decision of May, 1965, hundreds of families built homes and moved into the area described in the Elkins case. Since the trial court in the Elkins case had affirmed the validity of that annexation, the families moving into the area believed they were Denver residents until the announcement of the May, 1965, decision by this Court.

As soon as this Court's decision was made final in the Elkins case, residents of the area involved in that decision joined with neighboring Arapahoe County areas to petition for annexation to Denver. The annexing ordinance was

passed by the Denver City Council in September, 1965 (Exh. 1-C, f. 454).

The total area involved in the within cause, consisting of much of the original Elkins area and some additional Arapahoe County lands, presently comprises 907 acres, 745 family dwellings, 2,913 persons (including 1,041 school age children). With rare exception, these families have always received Denver services and utilized Denver school facilities. They did receive limited Arapahoe County services from May of 1965 through September of 1965, during the time they were following the preliminary steps leading to the Denver annexation ordinance of September, 1965.

In the summer of 1965, 1,282 persons were eligible to petition for or against annexation. Of these eligible landowners, 1,153 petitioned for annexation. Thus, approximately 90% of the eligible landowners petitioned for annexation to Denver (Exh. 1-A, f. 452).

No person living in the presently annexed area, which is before this Court, has joined as a plaintiff to contest the validity of the subject annexation (ff. 167, 253, 271, 393).

No person living in the presently annexed area signed a counter-petition opposing the annexation. In fact, there was no such counter-petition.

II. SUPPLEMENTAL STATEMENT OF FACTS

The intervenor-defendants in the trial court, who submit this brief, shall refer to the parties in their trial court capacities. Therefore, the plaintiffs in error shall be referred to as the plaintiffs. Those original trial court defendants, who constitute some of the defendants in error, shall be referred to as defendants. The trial court intervenors, who intervened on a class action basis for all petitioners in the annexed area, shall be referred to as defendants or intervenor-defendants.

The plaintiffs have devoted much of the space of their brief to matters which they allege not to be in evidence. Intervenor-defendants feel they can clarify the present posture of this case by a supplemental statement of the case with emphasis on matters in evidence and with emphasis on the issue of "one-sixth contiguity," which was the one purported factual issue to be contested at trial.

Aside from the purported factual issue of contiguity, all other issues in the case were and are matters of law which will be explored in the "Arguments" of intervenor-defendants.

The following is a time table of events, listing of statutory references, and references to key documents admitted into evidence at trial.

C. R. S. 1963, 139-10-3, provided that:

"(1) Proceedings for annexation of territory eligible as defined in section 139-10-2 shall be initiated by a written petition presented to the legislative body of the city, city and county or incorporated town to which it is proposed to annex such territory, signed by the owners of more than fifty per cent of the area of such territory who shall also comprise a majority of the landowners residing in the territory at the time the petition is filed."

Residents of the area then sought to be annexed filed sufficient petitions in favor of the annexation, as above required, on July 19, 1965 (Exh. 1-A and 1-B, ff. 452-453, and see stipulations conceding compliance with this requirement, together with the finding of the trial court in such regard at ff. 169, 242-243, 395-396).

C. R. S. 1963, 139-10-3, provided that:

". . . The petition shall be accompanied by four copies of a

> map, or plat, of such territory showing, with reasonable certainty, the territory to be annexed, the boundaries thereof, and its relationship to the established corporate limits of the municipality to which said territory is proposed to be annexed and upon material and of a suitable size for recording or filing in the various offices required under this section. . . ."

Appropriate maps were filed as required on July 19, 1965 (Exh. 1-B, f. 453).

C. R. S. 1963, 139-10-3, provided that:

> ". . . Said petition shall also contain a description of the property to be included within the area proposed to be annexed which is owned by each person signing said petition. . . ."

Landowning petitioners listed the only known and existing descriptions for their respective properties in accordance with the mandate of the statute (Exh. 1-A, f. 452).

C. R. S. 1963, 139-10-3, provided that:

> ". . . If such legislative body shall find that the petition and

> the documents attached thereto meet the requirements of this section, the annexation of such territory to such city, city and county, or incorporated town shall be accomplished . . . by the following procedure: The legislative body shall by resolution accept or reject the petition and if it accepts same, not sooner than thirty days after the first publication of notice of petition as provided in section 139-10-4, it shall approve the annexation by ordinance, . . ."

The Denver City Council found that the petitions and attached documents met the qualifying conditions for annexation and so stated in its required and published resolution on August 3, 1965, as follows:

> "WHEREAS, the Council of the City and County of Denver has carefully considered and examined said petition for annexation, said map or plat, and said report of the Planning Office of the City and County of Denver and is of the opinion that the mutual interests of the City and County of Denver and the territory proposed to be annexed will be best served by such annexation;

NOW, THEREFORE,

BE IT RESOLVED BY THE COUNCIL OF THE CITY AND COUNTY OF DENVER:

"Section 1. That the Council of the City and County of Denver hereby finds and determines that said petition for annexation and the documents accompanying the same meet the requirements of Colorado Revised Statutes 1963, Section 139-10-3 and comply with the Statutes of the State of Colorado, and that the territory described in said petition for annexation to and by the City and County of Denver is eligible for annexation to and by the City and County of Denver under the terms and provision of Colorado Revised Statutes 1963, Sections 139-10-1 and 139-10-2. . . ." (Exh. 7, f. 466)

The Denver City Council thereafter approved the annexation by ordinance on September 20, 1965, as, likewise, required by statute (Exh. 1-C, f. 454).

All other procedural requirements of C. R. S. 1963, 139, such as publication, circulators' affidavits, and necessary filings were met and were never in issue in this case.

The plaintiffs filed their complaint seeking to avoid the annexation on

December 21, 1965 (f. 9). The plaintiffs' complaint (ff. 22-27) and pretrial statement (ff. 185-198) affirmatively and unequivocally alleged that the annexed area did not meet the statutory requirements of C. R. S. 1963, 139-10-2, and specifically alleged that the area sought to be annexed lacked the necessary "one-sixth contiguity." The defendants and defendant-intervenors denied the plaintiffs' allegations, in such regard (ff. 69, 104, 204).

Neither the plaintiffs' complaint, nor the plaintiffs' pretrial statement asserted a failure of Denver's City Council to hear evidence or to make adequate findings of fact as a part of its annexation proceedings and records.

The pretrial order of the Court clearly stated that the issues to be tried were those created by the pleadings and pretrial statements of the parties (f. 168).

The trial court, in its pretrial order, noted that " . . . there are factual questions relative to perimeter and contiguity to be resolved." (f. 169) (Emphasis added) The trial court's observation was an obvious reference to plaintiffs' allegations that contiguity was, in fact, lacking and defendants' and intervenor-defendants' denials of such allegations.

The plaintiffs' evidence at trial consisted entirely of documentary evidence used by defendants and petitioners for annexation in support of the annexation.

The plaintiffs did not present a single shred of evidence to demonstrate their affirmative allegations that the qualifying factual conditions for annexation, including necessary contiguity, were lacking in the present case.

The defendants declined to go forward with a presentation of evidence in light of the plaintiffs' total lack of evidence in support of their contention that the qualifying conditions for annexation, including contiguity, in fact, failed to exist.

The trial court in its "Findings of Fact, Conclusions of Law, and Judgment" repeatedly found a total failure of plaintiffs to present evidence in support of their affirmative, factual allegations as above referred to (ff. 246-254).

The trial court concluded that the annexing ordinances of a city council are presumed lawful and that "the plaintiffs failed to sustain the burden of proof on all material allegations of the complaint by any evidence offered at the trial." (f. 255) (Emphasis added)

Thereafter, plaintiffs asserted in their post-trial motion, that the subject annexation was void--not because needed contiguity, in fact, failed to exist--but rather that Denver City Council had allegedly failed to make sufficient findings of record in support of the qualifying conditions of annexation, including the necessary contiguity (ff. 283-285, but cf. Exh. 7).

The trial court denied plaintiffs' new contentions in its ruling on plaintiffs' post-trial motion (ff. 359-362).

III. SUMMARY OF THE ARGUMENT

The individual defendants in error will attempt to answer the arguments of the plaintiffs in error in the order in which they were argued in the plaintiffs in error's opening brief.

A. The Denver City Council did make adequate and recorded findings that the area seeking to be annexed met all statutory qualifying conditions. In any event, the plaintiffs, who challenged the validity of the annexation, had the burden of coming forward with some evidence to demonstrate that the qualifying conditions for annexation, including necessary contiguity, did not exist and plaintiffs wholly failed to produce any such evidence.

B. The annexed area has the required contiguity with Denver. The annexation statute did not prohibit tax-exempt lands from comprising part of the area forming the contiguity with the annexing jurisdiction.

C. The petitions for annexation contained "a description of the property to be included within the area proposed to be annexed which is owned by each person signing said petition" and said petitions "substantially comply," if not fully with the above quoted provisions of the appropriate annexation statute.

D. The subject annexation conformed to all requirements of the then effective and controlling statute. An amended annexation statute which had an effective date subsequent to the subject annexation and even subsequent to the filing of plaintiffs' complaint is absolutely immaterial to any issue in the case.

E. The apportionment decisions of the United States Supreme Court have no bearing on the subject annexation. The individual plaintiffs had no lawful standing as plaintiffs in the within cause since they were not residents of the area sought to be annexed.

IV. ARGUMENT

A. ANSWER TO PLAINTIFFS' ARGUMENT I.

THE DENVER CITY COUNCIL DID MAKE ADEQUATE AND RECORDED FINDINGS THAT THE AREA SEEKING TO BE ANNEXED MET ALL STATUTORY QUALIFYING CONDITIONS. IN ANY EVENT, THE PLAINTIFFS, WHO CHALLENGED THE VALIDITY OF THE ANNEXATION, HAD THE BURDEN OF COMING FORWARD WITH SOME EVIDENCE TO DEMONSTRATE THAT THE QUALIFYING CONDITIONS FOR ANNEXATION, INCLUDING NECESSARY CONTIGUITY, DID NOT EXIST AND PLAINTIFFS WHOLLY FAILED TO PRODUCE ANY SUCH EVIDENCE.

The plaintiffs seek to avoid the annexation to Denver of the area involved in the within cause, but the plaintiffs produced no evidence before the trial court in support of their allegations that the qualifying conditions for annexation, including necessary contiguity, had not been met by those seeking or approving the annexation (ff. 246-254); nor do the plaintiffs even contend that they submitted any affirmative evidence in such regard.

The plaintiffs do contend that the Denver City Council record should have demonstrated the review of evidence and finding of the qualifying conditions for annexation, including the necessary contiguity. The plaintiffs further now contend that such record and findings are absent and that

plaintiffs, therefore, had no burden of proof at trial to demonstrate the failure of any qualifying condition.

The intervening-defendants believe the record and findings of the Denver City Council are clear:

> "WHEREAS, the Council of the City and County of Denver has carefully considered and examined said petition for annexation, said map or plat, and said report of the Planning Office of the City and County of Denver and is of the opinion that the mutual interests of the City and County of Denver and the territory proposed to be annexed will be best served by such annexation;
>
> NOW, THEREFORE,
>
> BE IT RESOLVED BY THE COUNCIL OF THE CITY AND COUNTY OF DENVER:
>
> "Section 1. That the Council of the City and County of Denver hereby finds and determines that said petition for annexation and the documents accompanying the same meet the requirements of Colorado Revised Statutes 1963, Section 139-10-3 and comply with the Statutes of the State of Colorado, and that the territory described in said petition for annexation to and by the City and County of Denver is eligible for annexation to and by the City and County of Denver under the terms and provision of Colorado Revised Statutes 1963, Sections 139-10-1 and 139-10-2. . . ." (Exh. 7, f. 466)

The intervening-defendants, however, assert that even if this Court found council proceedings to be lacking with respect to its findings in support of the existence of the qualifying conditions for annexation, including contiguity; nevertheless, the council annexation ordinance is presumed to be valid. The plaintiffs, therefore, had the obligation before the trial court to present some evidence to rebut the presumption of validity and to shift the burden of going forward with evidence to the defendants.

The black letter law is clear:

". . . presumptions exist in favor of the validity of [annexation] ordinances and resolutions, as that they were preceded by the essential preliminary requirements of the law and adopted in compliance therewith. The ordinance, it is often said, makes out a prima facie case, and places the burden of proving the contrary upon the one who objects. Evidence to overthrow the ordinance or resolution, it is quite generally held, must be clear, unequivocal, and wholly satisfactory." 2 McQuillin, Mun. Corp. (3d Ed.) § 7.34, pp. 458-459. (Emphasis added)

> "It will be presumed in favor of the annexation, that the authorities properly performed their duties [and] that the existence of the required jurisdictional facts was found . . ." 2 McQuillin, Mun. Corp. (3d Ed.) § 7.44, p. 514. (Emphasis added)

Cases are legion in support of the rule of law that legislative acts are presumed valid, as in the instance of annexation ordinances. The presumption gives judicial recognition to the constitutional doctrine of "separation of powers" among our three great branches of government.

To avoid unnecessary redundancy, we cite only a few illustrative cases supporting the above stated rule of law.

In Missouri-Kansas-Texas R. Co. v. Maltsberger, 189 Okla. 363, 116 P.2d 977 (1941), those seeking to avoid annexation contended that:

> "The claim is that the ordinance is void because the petition for the annexation of the property, upon which the ordinance was based, was not signed by three fourths of the legal voters residing within the area and by the owners of three-fourths in value of the

property in the territory sought to be annexed; because no legal notice of said proceedings was given nor was any opportunity given to be heard, and the jurisdictional facts were not determined; and because no copy of the ordinance nor map or plat of the territory annexed was filed in the office of the Register of Deeds (County Clerk), as required by law." 116 P.2d at p. 979.

The issue of burden of proof became critical to the disposition of the case. The Supreme Court of Oklahoma in affirming the annexation said:

"The petition itself was lost and could not be produced. But the notice published recited that the petition was signed by more than three-fourths of the legal voters, and by the owners of more than three-fourths in value of the property described and sought to be annexed. This was prima facie evidence and apparently the best evidence available, that the petition was signed by the owners of more than three-fourths in value of the

> property sought to be annexed, and sufficient to cast the burden upon plaintiff to prove the contrary, assuming that it did not have the burden in the first instance. In either event it failed to sustain the burden." 116 P.2d at p. 981.

In Boise City v. Better Homes, 72 Idaho 441, 243 P.2d 303 (1952), those attacking the annexation alleged that:

> ". . . that the procedure provided by the charter for the annexation of territory to the city was not complied with. Specifically it is urged that there was no determination by the council that the petition was signed by 'at least fifteen per cent of the qualified voters' of the territory to be annexed 'voting at the last preceding general election'; or that the council made a determination as to whether the annexation should be submitted to the voters; that the mayor did not join in a call for an election; and that no call for the election was ever made. All of these steps are required by the charter provisions governing annexation." 243 P.2d at p. 305.

The Supreme Court of Idaho determined that:

". . . The resolution and ordinances here in question were authenticated as required and were properly admitted in evidence. . . .

"[7] Ordinances and resolutions of a municipal corporation are presumed valid until the contrary is shown. The burden is on the party who attacks such an act to show the illegality thereof. . . .

"[8] It is further presumed that the city officials complied with the requirements of the charter. . . ." 243 P.2d at p. 306.

In State v. Monona, 11 Wis. 2d 93, 104 N.W.2d 158 (1960), those attacking the annexation alleged that: ". . . [the annexation ordinance] is voidable because the petition lacked sufficient signatures of electors and property owners at the time of adoption of the ordinance." 104 N.W.2d at p. 159.

The Supreme Court of Wisconsin observed that:

> ". . . However, there is a common law presumption of validity which attaches to an annexation ordinance that remains until overcome by proof produced by the party attacking it." 104 N.W.2d at p. 160.

In People ex rel. Strong v. City of Whittier, ___ Cal. ___, 24 P.2d 219 (1933), those attacking the annexation alleged that:

> ". . . the city council of Whittier ordered the election after the presentation of the petition, and determined certain facts stated in the petition without taking any evidence thereon. . . ." 24 P.2d at pp. 221-222.

The California appellate court found that:

> ". . . The ordinance calling the election (Exhibit C) includes a number of inducement paragraphs or 'whereases.' The first one refers to the reception of the petition by the council; the second one states that the petition contains a description of the terriroty in words and figures which would show it to be in one single body and contiguous to the city; the next one states

> that the petition was signed by not less than one-fourth of the qualified electors residing in the territory described; and the next one, that the territory described does not form a part of any other municipal corporation, and that it appears that the territory is inhabited. We think it sufficiently appears from these paragraphs that the council 'took evidence' upon the jurisdictional requirements. In the petition for annexation the council had evidence before it. This petition was signed by a number of persons whose statements the council was evidently willing to take. One of the inducement paragraphs states as a finding of fact that the registration of voters of the county (when compared with the petition) shows that one-fourth of the qualified electors residing in the territory described had signed the petition. Certainly we cannot assume that the council decreed these facts without any basis therefor. Rather the presumption is the other way, that officials in performing their duties performed them with all legal requirements. . . ."
> 24 P.2d at p. 222.

The Colorado Supreme Court has, likewise, recognized the presumptive validity of annexation ordinances in

applicable circumstances. In City and County of Denver v. County Court of Arapahoe, 137 Colo. 436, 326 P.2d 372 (1958), this Court ruled that the presumption of validity of annexation ordinances did not extend to and affect the selection of the forum for hearing attacks on the annexation, where the forum was clearly identified by statute, but this Court stated that:

> ". . . [the presumption of the validity of ordinances] is . . . a defense which shifts the burden of proof to the challenger in the pleadings and trial." 137 Colo. at p. 439.

Additionally, in plaintiffs' Argument I, they complain that the record of annexation proceedings fails to contain a numerical measurement of perimeter or contiguity (plaintiffs' opening brief, pp. 20-21).

C. R. S. 1963, 139-10-3, provided that:

> ". . . The petition shall be accompanied by four copies of a map, or plat, of such territory showing, with reasonable certainty, the territory to be annexed, the boundaries thereof, and its relationship to the established corporate limits of the municipality to which said territory is proposed

> to be annexed and upon material and of a suitable size for recording or filing in the various offices required under this section."

The statute does not require numerical measurements of perimeter or contiguity to appear on the maps or elsewhere. The maps were scaled, the territory to be annexed was clearly outlined, and the contiguous annexing territory was clearly outlined (Exh. 1-B, f. 453). As the trial court observed in its "Findings of Fact, Conclusions of Law, and Judgment," ". . . the fact that the 'Annexation plat' does not contain dimensions is immaterial." (f. 252)

Further, the plaintiffs make great complaint about a "missing call" which was inadvertently omitted from the description found on the maps which accompanied the petitions favoring annexation (plaintiffs' opening brief, p. 22).

Again, C. R. S. 1963, 139-10-3, merely required that:

> ". . . The petition shall be accompanied by four copies of a map, or plat, of such territory showing, with reasonable certainty, the territory to be annexed, the boundaries thereof, and its relationship to the established corporate

> limits of the municipality to which said territory is proposed to be annexed and upon material and of a suitable size for recording or filing in the various offices required under this section."

There is no legislative requirement that a legal description of the perimeter of the area to be annexed be included at any stage of the annexation proceedings. The description accompanying the maps was absolute surplusage.

Nevertheless, the descriptions contained on the petitions (Exh. 1-A, f. 452), in the resolution (Exh. 7, f. 466) and in the ordinance (Exh. 1-C, f. 454) are identical and do create a complete "closed" perimeter to the annexed area (and see f. 253 [paragraph 14 of trial court's Findings of Fact and Conclusions of Law]).

Even if a legal description were required by statute to accompany and be part of the maps, the law is unequivocal that the rule of "reasonable construction" is to be applied in situations where the obvious and intended description is discernible from an analysis of all annexation materials and where interested parties could not have been reasonably deceived or confused.

The rule appears universal and oft-repeated:

> "[the] description [in the petition] should conform substantially to the provisions of the statutes . . . The description should be sufficient so that the affected territory may be ascertained; however, slight errors or discrepancies in a description of a territory in the petition ordinarily will not render the petition ineffectual, especially where the irregularity may be regarded as trivial, or as merely surplusage." 2 McQuillin, Mun. Corp. (3d Ed.) § 7.31, pp. 432-433; and accord: 2 McQuillin, Mun. Corp. (3d Ed.) § 7.29, pp. 421-422.

> "False calls may be rejected or lines supplied by intendment in the description of the boundaries." 2 McQuillin, Mun. Corp. (3d Ed.) § 7.06, p. 294.

In the case before the bar, the intended area to be annexed was clearly portrayed on the required maps. The plaintiffs do not claim otherwise; they do not claim a lack of real understanding on their part of the perimeter of the area to be annexed.

State v. Hughesville, 319 Mo. 1246, 6 S.W.2d 594 (1928), is an illustrative

case in point. Appropriate persons petitioned for the creation of a special road district in accordance with steps provided by the Missouri statute. The petitions contained a lengthy and full legal description of the perimeter of the requested road district (6 S.W.2d at p. 595). The county clerk omitted the words "west 1 mile" from the published notice of the description of the proposed district (6 S.W.2d at p. 596).

The Supreme Court of Missouri, in affirming the rule of reasonable construction, determined as follows:

> "With reference to the description of land in a deed or will, the rule is well settled that where it is obvious from the words used and the general tenor and context of the instrument that certain words or their equivalents have been omitted, such words may be supplied by construction. [citing cases] And this rule is applicable not only where private boundaries are in question, but in cases involving the boundaries of counties and other political subdivisions as well. [citing cases] Taking the description contained in the notices, with a map spread out before us, we find no difficulty in following the calls from the point of beginning to the northwest corner of section 33, township 47, range 22. But the

next call, 'thence north two miles to the northwest corner of section 20,' is an impossible one; in order to come to the northwest corner of section 20 by going north two miles, it is necessary to start one mile west of the northwest corner of section 33. If we next go back to the point of beginning and reverse the calls, we easily follow the boundary to the southwest corner of section 29; the next call thereafter is from the northwest corner of section 33, a mile east. But for this gap between the northwest corner of section 33 and the southwest corner of section 29 the boundary would close and the district so inclosed would contain 22,380 acres as called for. The omission is so palpable that the mind readily supplies it.

"The proceedings had for the incorporation of the special road district constituted, in their totality, an exercise of legislative and not judicial power. . . . The purpose intended to be subserved by the notice, as the statute points out, was to notify all owners of land in the proposed district who might desire to oppose the formation thereof. It was clearly sufficient for that purpose." 6 S.W.2d at pp. 596-597.

Similarly, the trial court in the case before the bar found and concluded:

> "13. Although the evidence indicated that one call was omitted on the 'annexation plat' of the subject territory, the map or plat is in conformance with the statute which requires that the territory be shown with 'reasonable certainty.' Exhibits 2-I through 2-Q, inclusive, which were offered in evidence, complement and supplement the certainty of the 'annexation plat.' The fact that the 'annexation plat' does not contain dimensions is immaterial." (f. 252)

We believe the trial court's finding and conclusion, applying the rule of "reasonable construction" to this particular issue was correct in every regard.

B. ANSWER TO PLAINTIFFS' ARGUMENT II.

THE ANNEXED AREA HAS THE REQUIRED CONTIGUITY WITH DENVER. THE ANNEXATION STATUTE DID NOT PROHIBIT TAX-EXEMPT LANDS FROM COMPRISING PART OF THE AREA FORMING THE CONTIGUITY WITH THE ANNEXING JURISDICTION.

C. R. S. 1963, 139-10-2, provided that:

"(1) (a) Territory shall be eligible for annexation if such territory:

. . .

"(c) Abuts upon or is contiguous to the city, city and county, or incorporated town to which it is proposed to be annexed in a manner which will afford reasonable ingress and egress thereto, provided that not less than one sixth of the aggregate external boundaries of the territory proposed to be annexed must coincide with existing boundaries of the annexing municipality; . . ."

C. R. S. 1963, 139-10-3, provided that:

"(1) Proceedings for annexation of territory eligible as defined in section 139-10-2 shall be initiated by a written petition presented to the legislative body of the city, city and county or incorporated town to which it is proposed to annex such territory, signed by the owners of more than fifty per cent of the area of such territory who shall also comprise a majority of the landowners residing in the territory at the time the petition is filed. . . ."

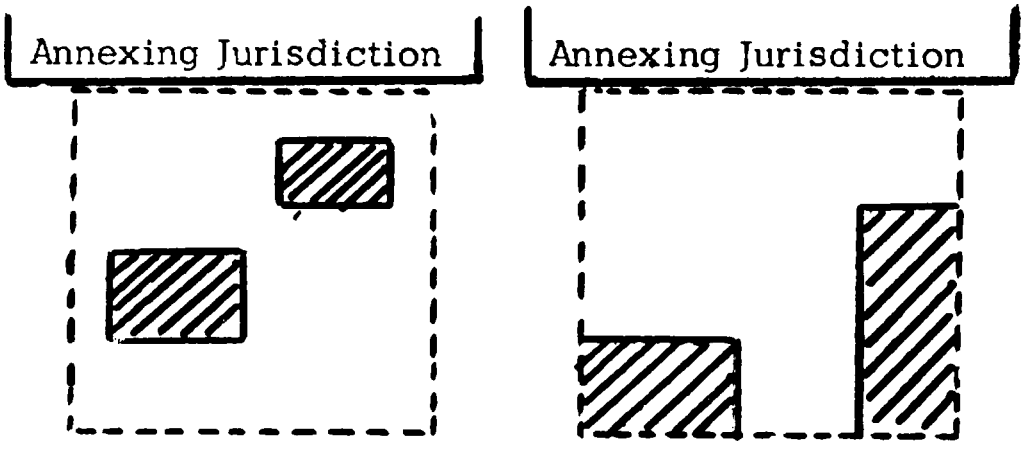
C. R. S. 1963, 139-10-8, provided that:

> "For the purposes of this article 'landowners,' as used in section 139-10-3, shall mean owners in fee of real property in the territory proposed to be annexed who have in the next preceding calendar year become liable for a property tax thereon; and also, when there are no residents in the territory proposed to be annexed, owners in fee of real property in the territory whose property is exempt from any property tax, including cities, cities and counties, incorporated towns, school districts, and any other municipalities or political subdivisions of the state of Colorado."

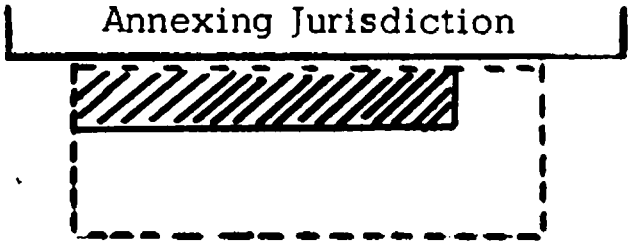
It is obvious that the annexation statutes applicable in 1965, when read as a whole, contemplated the potential inclusion of tax-exempt property within the "territory . . . eligible for annexation . . ." so long as the tax-exempt property comprised no more than 50% of the entire area sought to be annexed.

Plaintiffs apparently contend that all of the required contiguity must be made up of property owned by eligible taxpaying petitioners favoring annexation.

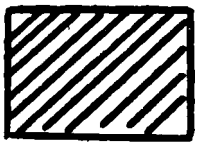
In graphic terms, plaintiffs apparently say that the following illustrations are permissible;



But the plaintiffs allege that the following is not permissible:



Perimeter of area sought to be annexed including eligible taxpaying and non-eligible tax-exempt properties



Non-eligible, tax-exempt properties within the area sought to be annexed

Plaintiffs' contention finds no support in the express language of the statute, nor in the case law. By statute, when a majority of eligible landowners, who own more than 50% of the area to be annexed, petition for such annexation, the whole area is annexed--and such area includes the tax-exempt lands of those ineligible to petition for or against annexation.

The statute does not limit the location of tax-exempt property within the area to be annexed. Plaintiffs have literally dreamed up a claim that tax-exempt property, which forms a portion of the area to be annexed, cannot be located on the contiguous perimeter.

In the case before the bar, it is admitted that the Fort Logan Cemetery, Mullen High School, and a Denver city park were located in Arapahoe County before annexation to Denver. It is admitted that the owners of the above listed properties were not eligible to petition for annexation and were not "landowners" within the meaning of C. R. S. 1963, 139-10-8, since their properties were tax-exempt and since "residents" were living in portions of the area to be annexed. It is admitted that these properties formed a portion of the contiguous perimeter of the territory to be annexed.

Eligible petitioners' property also forms part of the contiguous perimeter (The Terrace Club and Universal Utilities, Inc., Exh. 1-A [37-1 and 39-1] and cf. with Exh. 1-D). Thus, the repeated allegations that all of the contiguous perimeter was made up of tax-exempt property is not true; nor is such allegation supported by any evidence. In any event, the balance between exempt and non-exempt property which makes up the contiguous perimeter simply does not affect the validity of the subject annexation.

The two cases cited by plaintiffs do not even support the theory propounded by plaintiffs.

In City of Pueblo v. Stanton, 45 Colo. 523, 102 Pac. 512 (1909)

> ". . . The facts necessary for a determination of the question involved [were] as follows: A tract of land known as the Stanton and Chilcott tract lies in what may be termed the heart of the city of Pueblo, but it has never been platted into lots and blocks, and the city has not, by ordinance or otherwise, defined the boundaries of the city so as to include this tract within the boundaries; that is, the tract is not surrounded by the boundary lines of the city. The purpose of the ordinance was to annex this tract to the city. The accompanying plat, filed with appellant's brief,

> shows the tract in question and lands adjacent, and is sufficiently accurate for the purposes of a discussion of the questions presented. The land lying north of this tract, and designated on the plat as Park Property, is owned by the city, and was acquired by the city for park purposes; but no act of the city expressly annexing the property has been taken. The property, at the time it was acquired, was without the limits of the city. . . ." 45 Colo. at p. 524. (Emphasis supplied)

The applicable enclave annexation statute then provided that:

> "That . . . whenever any tract or parcel of land is included or embraced within the corporate limits, but has not been made a part of such city, the council of such city may, by ordinance, declare such tract or tracts adjoining to such city annexed thereto." 45 Colo. at p. 526.

Unlike the present case, where Denver has annexed adjacent but not enclaved property under the separate statute covering non-enclave annexations, Pueblo was attempting to annex allegedly enclaved property. In the attempt to come within the above cited statute

relating to annexation of enclaved property, Pueblo tried to use its city park, located outside the city of Pueblo, to surround the enclave. The Court ruled as follows:

> ". . . We find no authority in support of the proposition that the purchase by the city of contiguous property [the park] makes the property a part of the city, or extends the boundary lines to include the property purchased. Authority is given for the purchase of property for park purposes without the city limits, and such property, when purchased, although the city has jurisdiction over it, for certain purposes, and to that extent it becomes a part of the city, is not included within the boundary lines of the city unless the proper procedure is taken for annexation." 45 Colo. at p. 527.

> ". . . The boundary line [to surround the enclave] must be an unbroken line, and should, at each and every point, separate property within from property without the city limits. The words 'included' and 'embraced,' we regard as synonymous, as used in the statute, and when property is, by the boundary lines of a city, excluded from the limits thereof, such property cannot be regarded as 'included' or 'embraced' therein.

> "It follows, from what we have said, that if the city desires to annex the property of the appellees, it must proceed under the statute providing for the annexation of property contiguous to cities and towns." 45 Colo. at p. 428.

Thus, the Supreme Court held that Pueblo would have to proceed under the statute involved in the present case relating to non-enclave annexations and the Supreme Court voided Pueblo's use of the statute relating to enclave annexations.

In the case before the bar, Denver did not treat its city park, which was located in Arapahoe County before annexation, as a part of Denver for annexation purposes. In complete contrast to the position of the city of Pueblo in the Stanton case and in accordance with the rule of that case, Denver rightfully treated its park as part of the area to be annexed and recognized that it was a part of Arapahoe County before annexation.

Denver, as a tax-exempt landowner in Arapahoe County, had neither the right to petition in favor of nor against the subject annexation, but there was no statutory prohibition against the use of its property as part of the contiguous area sought to be annexed by eligible petitioners.

In City of Denver v. Coulehan, 20 Colo. 471, 39 Pac. 425 (1894), the trial court plaintiff correctly alleged that a number of incorporated townships still separated the city limits of Denver from Jefferson County after Denver's attempted annexation of Jefferson County property owned by the plaintiff. The plaintiff correctly alleged that there was a total absence of contiguity between Denver and the territory sought to be annexed after the alleged annexation. (20 Colo. at pp. 473-474)

> ". . . In fact, at the time of the passage of the act to revise and amend the Denver charter, no part of the territorial limits of the City of Denver was contiguous to any part of Jefferson county. Nevertheless, by the terms of said act it was attempted to enlarge or extend the limits of the city of Denver by adding thereto a strip of land, five and one half miles long by one and one half miles wide, lying along the eastern border and wholly within the county of Jefferson." 20 Colo. at p. 477.

The Supreme Court defined the issue as follows:

> ". . . But may the legislative arm be extended as a great pothook into any and all the counties of the

> state, there to encircle, as in this case, many square miles of the territory of such outside counties, and make the same part and parcel of the city of Denver? May the legislature do this, without annexing any intervening territory, and without providing even a street or an alley to connect such outlying municipal additions to the city proper?" 20 Colo. at p. 479. (Emphasis added)

The Court ruled on the above issue as follows:

> "From careful investigation and consideration it is evident that it was never contemplated by the law that the territorial limits of a town or city might include distinct, disjointed fragments or parcels of land, situate miles and miles distant from each other, and separated from the city proper by intervening territory. . . ." 20 Colo. at p. 481.

In the Coulehan case, the allegedly annexed territory, when viewed after annexation, was neither adjacent to, nor contiguous with, Denver as required by statute and case law.

In the case before the bar, the annexed territory, when viewed after annexation, is adjacent to and contiguous with Denver as required by statute and case law.

C. ANSWER TO PLAINTIFFS' ARGUMENT III.

THE PETITIONS FOR ANNEXATION CONTAINED "A DESCRIPTION OF THE PROPERTY TO BE INCLUDED WITHIN THE AREA PROPOSED TO BE ANNEXED WHICH IS OWNED BY EACH PERSON SIGNING SAID PETITION" AND SAID PETITIONS "SUBSTANTIALLY COMPLY," IF NOT FULLY, WITH THE ABOVE QUOTED PROVISIONS OF THE APPROPRIATE ANNEXATION STATUTE.

C. R. S. 1963, 139-10-3, provided that:

> ". . . Said petition shall also contain a description of the property to be included within the area proposed to be annexed which is owned by each person signing said petition.
>
> . . .
>
> ". . . All petitions which substantially comply with the above requirements shall be deemed sufficient."

The annexation statute contained no requirement that the only valid description to be set forth on an annexation petition was the description sanctioned by and in conformity with C. R. S. 1963, 106-2-9(3)-(5) (a planning commission statute).

The annexation statute used the phrase "a description"--a phrase that imports no single valid description to the exclusion of any other description.

The obvious and sole purpose of the above statutory requirement is to permit reasonable identification of the property owned by a petitioner to enable computation to determine whether or not a majority of the eligible petitioners owning more than 50% of the land area within the territory to be annexed had petitioned for annexation.

The Denver plats and descriptions, even if "void" and "illegal" for other purposes, clearly and accurately identify the lands of eligible petitioners by location and dimension and do permit precise computation of petition results in all categories required by statute (e.g., contiguity, land area petitioned in favor of annexation).

The petitioners used the only individual tract land descriptions by which their respective properties had or have ever been known or identified. The tract descriptions placed on the petitions are the same, identical descriptions which have always been used for tax and title purposes by the petitioners in their capacities

as taxpaying landowners. There are no other descriptions to these individual tracts; there never have been any other descriptions for these individual tracts.

The trial court found, and properly so, that:

> "11. The petition contained a 'reasonable' description of the property to be included within the area proposed to be annexed which is owned by each person signing said petition. A previous annexation of the subject territory and subsequent nullification of said annexation and recording of the plats of said subject territory in a different county does not affect the description of the property in the petition for annexation of the subject territory nor does the alleged defective filing of the plats affect the annexation procedure generally." (f. 250)

D. ANSWER TO PLAINTIFFS' ARGUMENT IV.

THE SUBJECT ANNEXATION CONFORMED TO ALL REQUIREMENTS OF THE THEN EFFECTIVE AND CONTROLLING STATUTE. AN AMENDED ANNEXATION STATUTE WHICH HAD AN EFFECTIVE DATE SUBSEQUENT TO THE SUBJECT ANNEXATION AND EVEN SUBSEQUENT TO THE FILING OF PLAINTIFFS' COMPLAINT

IS ABSOLUTELY IMMATERIAL TO ANY ISSUE IN THIS CASE.

Plaintiffs cite the new annexation statute in their brief:

> "By Laws of 1965, p. 1186, there was enacted a new statute, 'The Municipal Annexation Act of 1965.' That statute was approved by the Governor in May, 1965. Under its terms, and by Section 139-21-23, the article is to take effect January 1, 1966." Plaintiffs' Opening Brief, p. 51. (Emphasis added)

The subject annexation was completed in September, 1965, by ordinance of the Denver City Council (Exh. 1-C, f. 454). The subject annexation was completed before the effective date of the new annexation statute.

Needless to say, plaintiffs cite no case law to sustain their contention that a legislature can be held to have implemented a new public policy covering annexations before the effective date of its new statute on the very same subject. The old statute, which has been repeatedly cited and quoted in plaintiffs' opening brief and in this brief, was the only statute which controlled applicable annexations prior to January 1, 1966, and represented the public policy of the state until

January 1, 1966. Since the legislature passed the new annexation statute and received the approval of the governor by May, 1965, the legislature obviously could have selected an effective date for its new public policy prior to January 1, 1966, had it chosen to do so. The old statute expressed the only public policy covering the annexation now before the Court.

The motivation for plaintiffs' argument is to suggest to this Court that Denver unjustly and inequitably removed "800" students from the Sheridan School District and uprooted $5,000,000.00 worth of tax property from the school district.

The students referred to never have and never did attend Sheridan District schools. The Elkins decision became final by a denial of a petition for rehearing in the summer of 1965. During the summer of 1965, re-annexation procedures were initiated which culminated in the September, 1965, Denver City Council ordinance. The school children left Denver schools in the summer of 1965 and returned to Denver schools in the fall of 1965. Likewise, and for the same reasons, the land which was involved in the Elkins decision, never functioned as part of the Sheridan School District during any regular school term.

The Sheridan School District began the fall term of school in 1965 with the same property and students that it had at the close of the spring term in 1965.

E. ANSWER TO PLAINTIFFS' ARGUMENT V.

THE APPORTIONMENT DECISIONS OF THE UNITED STATES SUPREME COURT HAVE NO BEARING ON THE SUBJECT ANNEXATION. THE INDIVIDUAL PLAINTIFFS HAD NO LAWFUL STANDING AS PLAINTIFFS IN THE WITHIN CAUSE SINCE THEY WERE NOT RESIDENTS OF THE AREA SOUGHT TO BE ANNEXED.

Plaintiffs' counsel limits the applicability of their constitutional argument to the individual plaintiffs and claim no applicability of such argument to the school district or the county commissioners in their representative capacities and in their standing as plaintiffs in this case.

Plaintiffs' counsel, therefore, acknowledge the rulings of this Court in County of Jefferson v. City & County of Denver, 150 Colo. 198, 372 P.2d 152 (1962) and City & County of Denver v. Miller, 151 Colo. 444, 379 P.2d 169 (1963), which hold that individuals alone--in contradistinction to governmental jurisdictions and districts--are protected by the "equal protection" clause of the United States Constitution.

This Court has also held that non-residents of the area sought to be annexed have no procedural standing to attack the validity of such annexation and are not "aggrieved" parties within the meaning of C. R. S. 1963, 139-10-6. This Court, in City & County of Denver v. Miller, supra, said that:

> "The problem here, however, is who is in fact a 'person aggrieved'? Does it include any person except those who reside on or own land in the area to be annexed or those taxpayers and citizens who allege they are directly affected and who reside in an incorporated area to which the land is being annexed?
>
> "[6] The general rule is that an individual who is a resident of an unincorporated area, but not of the particular tract to be detached therefrom by annexation proceedings, is not such a person. The reason is that such person does not suffer, by reason of the annexation, a detriment peculiar to himself as distinguished from the general detriment theoretically shared by all property owners in the governmental unit." 379 P.2d at p. 173.

The ruling in City & County of Denver v. Miller, supra, was reaffirmed in Smith v. City of Aurora, 153 Colo. 204, 206, 385 P.2d 129 (1963).

It has been conceded by the individual plaintiffs that they did not reside in the area sought to be annexed and that said area is unincorporated (ff. 167-253, 271, 393), and it was so held by the trial court in its "Findings of Fact, Conclusions of Law, and Judgment" (f. 241). The defendant-intervenors contested the standing of these individual plaintiffs in their answer to plaintiffs' complaint (f. 101, ¶ 7) and more fully set forth their position in such regard with appropriate legal citation in their pretrial statement (ff. 202-203).

We urge this Court to reaffirm its prior rulings in the above cited cases and to dismiss the individual plaintiffs for lack of procedural standing as "aggrieved persons."

In any event, the recent decisions of the United States Supreme Court, including Lucas v. General Assembly, 84 S.Ct. 1459, 377 U.S. 713 (1964), do not affect the incisiveness and validity of this Court's reasoning in County of Jefferson v. City & County of Denver, supra, wherein plaintiffs in that case made the same constitutional

claim for relief as described in plaintiffs' third claim for relief in the within cause. This Court said in the County of Jefferson case, supra, that:

> "[6] These contentions are based on the assumption that Section 1 of Article XX delegates to the City Council of Denver the power to alter at will the congressional, legislative, judicial and school district boundaries. However such assumption is erroneous. Annexations to Denver are the only time when this occurs and these acts are the product of the free choice of the majority of statutorily authorized persons in the district seeking annexation. The City Council of Denver does not initiate the annexation; it merely accepts or rejects the annexation petition presented, subject to other statutory requirements. We perceive no constitutional violation of the rights of the individual plaintiffs by this procedure."

The Lucas case does reaffirm the "one man-one vote" principle and prohibits any apportionment plan which unreasonably violates the "one man-one vote" principle, even though such plan be passed by a majority vote through popular referendum.

The Lucas case does not irrevocably freeze district boundaries. The Lucas case and its companion cases do require that substantial district population changes be met with apportionment changes in due and reasonable course to protect the "one man-one vote" principle. Population changes within a district may lawfully occur by voluntary migration of persons to or from a district or by the lawful change of the boundaries of a district through annexation.

Annexations are never void because they bring about population shifts between districts. However, the failure of a legislature to reasonably respond to substantial population shifts between districts, whether caused by voluntary population movement across district boundaries or by lawful annexations, could create a dilution of a person's right to an equally weighted vote. The legal propriety of an annexation is one matter; the legislature's response to annexations causing substantial population shifts between districts is another matter.

Even if the Court accepts the plaintiffs' theory, plaintiffs have totally failed to produce any evidence to support their contention that this annexation has created a "substantial" apportionment maladjustment within the meaning of the Lucas and predecessor cases (377 U.S. at p. 734).

V. CONCLUSION

In conclusion, the intervenor-defendants urge this Court to affirm the judgment of the trial court and to affirm the validity of this annexation which is supported by the petitions of approximately 90% of the qualified landowners living in the area involved.

Respectfully submitted,

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