12-1-1970

Breternitz v. City of Arvada

NO. 24977

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

CONNIE and BILL BRETERNITZ and JOYCE and RON TODD, Plaintiffs-Appellees, v. THE CITY OF ARVADA, a municipal corporation, Defendant-Appellant.	Error to the District Court of the County of Jefferson State of Colorado
CITY OF WESTMINSTER, a municipal corporation, Plaintiff-Intervenor-Appellee, v. THE CITY OF ARVADA, a municipal corporation, Defendant-Appellant.	HONORABLE RICHARD E. CONOUR Judge

ANSWER BRIEF OF APPELLEE CITY OF WESTMINSTER

HOLLAND & HART
Warren L. Tomlinson
Edwin S. Kahn

500 Equitable Building
Denver, Colorado 80202

STITT, WITTENBRINK & ROAN
James R. Stitt

2325 West 72nd Avenue
Denver, Colorado 80221

Attorneys for Appellee
City of Westminster

December 1970

I N D E X

Page

TABLE OF CASES CITED

Page

Page

STATUTES AND OTHER AUTHORITIES CITED

No. 24977

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

CONNIE AND BILL BRETERNITZ and JOYCE and RON TODD, Plaintiffs-Appellees, v. THE CITY OF ARVADA, a municipal corporation, Defendant-Appellant.	Error to the District Court of the County of Jefferson State of Colorado
CITY OF WESTMINSTER, a municipal corporation, Plaintiff-Intervenor-Appellee, v. THE CITY OF ARVADA, a municipal corporation, Defendant-Appellant.	HONORABLE RICHARD E. CONOUR Judge

ANSWER BRIEF OF APPELLEE CITY OF WESTMINSTER

STATEMENT OF THE ISSUES

I. Whether the trial court erred in finding the annexation invalid because of insufficient evidence to support the following findings made by the Arvada city council and required by the Act to be made:

1. A finding that the petition for an annexation election was knowingly signed by persons eligible to do so.

2. A finding that there was a community of interest between Arvada and the land being annexed.

3. Findings that the Jones land had an assessed valuation of less than $200,000 and that school district boundaries were not affected by the annexation.

II. Whether the trial court erred in finding that the annexation was not invalid regardless of the following defects and irregularities in the annexation proceedings:

1. Annexation of some but not all of the Jones-Witkin land without written consent to the division.

2. Amending the legal description on the petition after it had been signed by the petitioners and filed with the city clerk.

3. Commencement of the annexation proceedings by one city council and completion of those proceedings by a newly-elected city

council.

III. Whether the trial court erred in holding that the Act requires that a petition for an annexation election be signed by the owners of more than 50% of the land being annexed.

IV. Whether the trial court erred in permitting Westminster to intervene and, if the intervention was an error, whether it was prejudicial to Arvada.

V. Whether the trial court erred in holding the $200,000 assessed valuation requirement of Section 4(3) of the Act unconstitutional, and whether the unconstitutional provision is severable.

STATEMENT OF THE CASE

In this brief Defendant-Appellant City of Arvada, a municipal corporation, will be referred to as "Arvada." Plaintiffs-Appellees Connie and Bill Breternitz and Joyce and Ron Todd will be referred to as "plaintiffs." Plaintiff-Intervenor-Appellee City of Westminster, a municipal corporation, will be referred to as "Westminster." John J. and Lo Rene H. Jones, the selling owners of a parcel of about 720 acres within the annexation area, will be referred to collectively as "Jones." Witkin VII, Inc., a Colorado corporation, the purchaser of the Jones land, will be referred to as "Witkin." The Municipal Annexation Act of 1965, §§ 139-21-1 through 139-21-23, as amended, 1963 C.R.S., will be called the "Act," and sections therein will be cited as "Section

_____." References to the record on appeal will be by folio number: (f. _____). References to the unfolioed and unnumbered record of proceedings of Arvada and certified to the trial court for review will identify the document by description, e.g. (Resolution of City Council of June 16, 1969), except that the transcript of the June 16, 1969, public hearing before the Arvada city council and contained in the unfolioed record will be to the page of said transcript: (Tr. _____). References to Arvada's opening brief herein will be to the page of the brief: (Arvada Br. _____).

Westminster feels that some additions to Arvada's statement of the case and statement of facts are appropriate.

On May 4, 1969, Jones and Witkin, as the large and equitable owners of approximately three-fourths of the territory involved in this annexation, signed an agreement to annex their land to Westminster and a second agreement wherein Westminster agreed to furnish water service to the land. (See Tr. 33-34; ff. 109, 125-126; exhibits to the June 16, 1969, public hearing listed as item 17 in the unfolioed record.) A memorandum of the annexation contract was recorded pursuant to Section 20 of the Act on May 5 and the members of the Arvada city council had actual knowledge of the existence of these contracts on the evening of May 5, 1969, when the Arvada council accepted the petition for an annexation election and adopted a resolution finding the petition to be in substantial compliance with the Act. (Page 2 of Summary of City Council Minutes of May 5, 196 meeting in the unfolioed record.) At the public

hearing on June 16, 1969, these contracts and the memorandum of the contract to annex were introduced into evidence (Tr. 33-34).

The annexation area encompasses slightly over 1,000 acres. The Jones-Witkin land consists of about 720 acres and was when the Arvada annexation was commenced wholly undeveloped. Most of the remainder of the land is the Far Horizons area, consisting primarily of single-family dwellings. The Jones-Witkin land is contiguous to both Arvada and Westminster; the Far Horizons area is contiguous to Westminster but not to Arvada. (See maps of the annexation area listed as items 3 and 4 in the unfolioed record.) Hence, none of the persons who signed the petition for an annexation election and who voted for annexation to Arvada owned land contiguous to Arvada or resided contiguous to Arvada.

This annexation fathered multiple litigation. The four cases filed in the District Court in Jefferson County (Civil Action Nos. 33183, 33272, 34090 and 34330) were ordered consolidated on December 5, 1969, by the Chief Judge of the First Judicial District and he requested that the Chief Justice of the State of Colorado appoint an outside judge to hear all of the cases (ff. 53-56). Pursuant to that request, the Honorable Richard E. Conour was appointed and thereafter presided in these actions. Two of the above cases are no longer pending. Civil Action No. 33272 involved the appointment of election commissioners to conduct the annexation election and that phase of the proceedings is over. Civil Action No. 33183 involved an

attempted challenge by Witkin, Jones, Westminster and Westminster Sanitation District to the proceedings by Arvada prior to the passage by Arvada of its annexation ordinance. That suit was dismissed on the ground of prematurity and the dismissal became final. Civil Action No. 34330 is the within action. Civil Action No. 34090 is an action by Witkin, with all appellees herein as plaintiffs-intervenors therein, against Arvada. That case involves, among other issues, the validity of the water and sewer contracts between Witkin, Jones, Westminster and Westminster Sanitation District. Evidence resulting in a 207-page transcript was heard on March 25, 1970, in Civil Action No. 34090, and that case is pending for decision before Judge Conour at this time. If this Court's decision in this appeal affirms the trial court's holding that Arvada's annexation is invalid, some if not all of the issues in Civil Action No. 34090 will become moot.

The trial court's comprehensive opinion (ff. 96-210) held the annexation in the within proceeding invalid on several separate and independent grounds. If the trial court was correct on any of its holdings of invalidity, the annexation should be vacated and set aside.

SUMMARY OF THE ARGUMENT

The trial court correctly found that Arvada's attempted annexation was invalid by reason of a lack of evidence to support numerous findings made by the Arvada city council and required to be made by the provisions of the Act. The court found that there was either no evidence

or insufficient evidence to support the following findings: (a) that the petition for an annexation election was knowingly signed by persons eligible to do so, (b) that there was a community of interest between Arvada and the area being annexed, (c) that the Jones-Witkin land had an assessed valuation of less than $200,000, and (d) that school district boundaries were not affected by the annexation.

Other substantial defects in Arvada's proceedings should invalidate the annexation. Westminster contends that, although the trial court did not missapprehend the facts concerning these defects, it reached erroneous conclusions of law. These defects are: (a) annexation of some but not all of the Jones-Witkin land without written consent from either of them, the division occurring along a railroad right-of-way line, (b) amending the legal description of the petition after it had been signed by the petitioners and filed with the city clerk, and (c) commencement of the annexation proceedings by one city council and completion of those proceedings by a newly-elected city council.

The trial court correctly interpreted the Act as requiring that a petition for an annexation election must be signed by the owners of more than 50% of the land being annexed. The literal language of the Act, the apparent legislative intent and a consideration of the Act's objects and purposes all support the trial court's statutory interpretation. In addition, Arvada's interpretation would sanction improper non-contiguous annexations,

which the purported annexation in this proceeding was.

The trial court correctly permitted Westminster to intervene. Westminster was entitled to intervene as of right, but if the right to intervene is deemed permissive only, it cannot be said that the trial court abused its discretion in permitting the intervention. Even assuming arguendo that the intervention was improper, Arvada was not prejudiced thereby.

The trial court correctly held that the $200,000 assessed valuation requirement of Section 4(3) of the Act was unconstitutional. The unconstitutional requirement is severable and therefore the rest of the Act is not voided. However, if the requirement is not deemed severable, it is the whole Act which must fall, not just the unconstitutional portion and the acreage exemption provision.

ARGUMENT

I. THE LACK OF EVIDENCE TO SUPPORT REQUIRED FINDINGS AND OTHER DEFECTS IN THE PROCEEDINGS RENDERS THIS ANNEXATION INVALID.

1. Introduction.

Arvada's failure to comply with and follow the requirements and conditions of the Act renders this annexation void.

It is well settled in Colorado that the conditions upon which annexations may occur are within the exclusive control of the

legislature. Rogers v. City and County of Denver, 161 Colo. 72, 419 P.2d 648 (1966). The annexation law prescribes the manner in which annexations may be accomplished and that law must be followed. City of Littleton v. Wagenblast, 139 Colo. 346, 338 P.2d 1025 (1959); City of Englewood v. Daily, 158 Colo. 356, 407 P.2d 325 (1965). Colorado municipalities have no inherent or common law annexation powers and a failure to comply strictly with the annexation law voids the annexation proceedings. Gavend v. City of Thornton, 165 Colo. 182, 437 P.2d 778 (1968); County Commissioners v. City and County of Denver, 150 Colo. 198, 372 P.2d 152 (1962). Measured against these well-established rules, Arvada's proceedings were defective in several separate and independent respects.

Section 7(1) of the Act provides that when an annexation is commenced, the city council of the annexing municipality will "hold a hearing to determine if the proposed annexation complies with sections 139-21-3 and 139-21-4 or such parts thereof as may be required to establish eligibility under the terms of this article." Arvada argues that, even though the hearing must establish that the requirements of 139-21-3 are met, the hearing need not concern itself with the requirements of 139-21-4 (Arvada Br. 20-22). The short answer to this argument is that this is not what Section 7 says. Section 7 says that the hearing will be held to determine compliance with 139-21-3 and 139-21-4. Arvada also argues that, since Sections 7(1) and 9(1)(b) require only that the hearing establish compliance with the

applicable parts of Sections 3 and 4, the hearing need not establish that the Section 4 requirements have been met (Arvada Br. 22). This does not follow. All of the Section 4 requirements are applicable to all annexations, whether commenced by resolution, petition or petition for annexation election. It is the two Section 3 requirements which are not applicable to all annexations. The one-sixth contiguity requirement is replaced by a two-thirds contiguity requirement for unilateral annexations and the community of interest requirements likewise do not apply to unilateral annexations (Section 5). Hence, the reference to the applicable parts of Sections 3 and 4 only makes it more certain that the hearing must establish that the Section 4 requirements have been met.

In a further effort to excuse the lack of essential evidence to support its findings, Arvada argues that an administrative decision can be based on evidence not in the record "so long as such evidence is made known to the parties" (Arvada Br. 19). No such evidence was made known to Westminster. Arvada states that there is "little Colorado law on the subject," and cites cases from other jurisdictions (Arvada Br. 19). The cases cited are not in point. However, of more significance, there is Colorado law; and it establishes that administrative agencies, when acting in a quasi-judicial capacity, must make appropriate findings and must base their findings on evidence in the record. Schoenberg Farms, Inc., v. People ex rel. Swisher, 166 Colo. 199, 212; 444 P.2d 277, 283 (1968). See also Morgan v. United States, 298 U.S. 468 (1936); United States v. Abilene

& Southern Railroad, 265 U.S. 274 (1924).

We will now turn to a discussion of the findings of the Arvada city council not supported by evidence and other defects and irregularities in the annexation proceedings.

2. There Was No Evidence to Support the Finding that the Petition Was Knowingly Signed by Persons Eligible to do so.

The resolution of the Arvada city council adopted immediately following the June 16, 1969, public hearing and found in the unfolioed record contains the following finding of fact:

> "3. That the petition is signed by at least seventy-five persons who are qualified electors and who are resident in and landowners of the area proposed to be annexed."

Section 6(2)(b)(ii) of the Act requires that the facts be as stated in the above finding. However, as the trial court found:

> "This finding is not supported by any competent evidence." (f. 120)

The petition was signed at a mass meeting in the Far Horizons area on Wednesday, April 30, 1969 (Tr. 23, 30-31). After the meeting, those in attendance filed by a table in the hallway and signed the signature pages (Tr. 32). No map of the area to be annexed was at the meeting (Tr. 26, 33). In fact, the annexation map was not even prepared until no sooner than May 1,

after all of the signatures had been placed on the petition (Tr. 13; f. 112). Under these circumstances, it is doubtful that anyone who signed knew exactly what area he was petitioning to have annexed. The official circulator of the petition and the person who signed the affidavit of circulation (Tr. 23) insisted that no map was necessary because she could read legal descriptions. However, when asked to read the west boundary line of the area to be annexed from the legal description on the petition, she left off the northerly portion of the west boundary line and added most of the south boundary (Tr. 27). It is submitted that a petition is not valid when it appears that the signers did not know what territory they were petitioning to have annexed.

The evidence likewise shows an absence of verification of the eligibility to sign of the persons who did so. The Act requires that persons who sign a petition for an annexation election be both qualified electors and landowners in the area to be annexed (Section 6 (2)(b)). A check apparently was made by Arvada to determine how many of the 141 signers were electors and it was found that 20 or 21 of them were not (Tr. 9, 20). However, no check of the records was made to determine whether the signers were landowners as defined in the Act (Tr. 20). Since the Act requires one to have been liable for property taxes in "the last preceding calendar year" to be a landowner (Section 21(8)), it is possible if not probable that many of the persons who signed were not landowners. Hence, the absence of evidence on this point cannot be deemed to be a formality.

The evidence might have disclosed that a substantial additional number of the signers were not eligible to sign, and there might or might not have been seventy-five eligible signers.

3. Additional Required Findings Were Not Supported by the Evidence.

The trial court found that several other findings contained in the Arvada Resolution of June 16, 1969, and required by the Act were not supported by evidence. Section 3(3) contains "community of interest" requirements, which may be presumed from the one-sixth contiguity unless evidence shows that at least two of three conditions set forth therein exist. The Arvada Resolution contained the required finding in the statutory language. However, in the words of the trial court, there was "very little evidence" in the record to support that finding (f. 119). In fact, a review of the transcript discloses a complete lack of such evidence, either to show community of interest affirmatively or to show that it could be presumed because of the facts relative to the three presumption conditions set forth in Section 3(3). The petition circulator was questioned on community of interest standards and professed no knowledge as to them (Tr. 28-29). The only other references to these standards was in the argument to the council by the attorney for the opponents that community of interest facts had not been shown (Tr. 39-40), and in the request by the attorney for the proponents that the council take judicial notice of the community of interest facts, although the attorney making the request "couldn't even hazard a guess" as

to the percentage of annexation area residents who used Arvada facilities (Tr. 45-46).

The June 16 Resolution also contained a finding in the language of Section 4(3) that no land of over 20 acres and with an assessed valuation of over $200,000 was being included without the consent of the landowner. The evidence did show that the Jones-Witkin land was over 20 acres, Jones' attorney appeared at the hearing to note specifically Jones' objection to his land being annexed (Tr. 41-42), and Witkin's objection to the annexation was evidenced prior to, at and after the hearing in numerous ways. There was no evidence concerning the assessed valuation of the Jones land. Likewise, there was no evidence to support the required finding that the annexation was not changing school district boundaries. Candor requires Westminster to state that it is advised and believes that the assessed valuation of the Jones land was in fact less than $200,000 and that the annexation did not in fact change school district boundaries. However, the question is whether these findings could be made without evidence in the record. It is submitted that this question is particularly important when other findings are not supported by the evidence and may or may not be correct. As was noted by the trial court, it would appear that Arvada's council "intended to make [the required] findings 'come hell or high water,' and with or without evidence" (f. 127).

4. <u>The Jones-Witkin Land Was Improperly Divided Without Their Written Consent</u>.

The Act requires that no land owned by one

landowner be divided by an annexation without the consent of the landowner unless such land is "separated by a dedicated street, road or other public way" (Section 4(2)). The Resolution of June 16, 1969, found that no such division had occurred. The trial court correctly summarized the facts as follows:

> "This finding is not supported by the evidence, and in fact, is contrary to the evidence in that a small tract owned by John J. Jones lying north of the right-of-way of the Colorado and Southern Railroad was excluded from the area proposed to be annexed without the written consent of Jones and is not separated from the remainder of the Jones land by dedicated street, road or other public way, unless the railroad right-of-way can be considered a public way or land in private ownership." (f. 121)

The trial court then concluded as a matter of law that the railroad right-of-way is "separate property as long as its use as a railroad continues" and that the Jones land was not split (ff. 175-176). It is respectfully urged that the trial court's legal conclusion was incorrect.

A railroad right-of-way is not a dedicated street, road or other public way. It is not dedicated to the use of the public; it is held for private railroad use. It is not a public way; it is a private way. No citizen has the right to use the railroad right-of-way for any purpose without the consent of the railroad.

The doctrine of ejusdem generis is helpful in determining the meaning of the phrase "other public way." The doctrine provides that, when general words follow specific words, the general words apply only to things of the same general kind or class as those specifically mentioned. Thus, "other public way" must be construed to be similar to or of the same general class as dedicated streets and roads--in essence, a public thoroughfare or highway.

The distinction between public and private rights-of-way appears in the Act itself. Section 3(2) provides that contiguity will not be affected by the existence of "a public or private right-of-way." Hence, if the legislature had intended to permit land to be divided along a private right-of-way such as a railroad, it would have known what language to use in Section 4(2). A private right-of-way simply does not constitute an intervening parcel or tract of land, as those words are normally used and as they are used in the Act.

5. Amending the Petition After it Was Signed and Filed with the Clerk Rendered it Invalid.

The petition for an annexation election was filed with the Arvada city clerk on May 1, 1969 (Tr. 9, 18). No map was attached to that petition and the clerk did not even see a map before she attended the council meeting on May 5, 1969 (Tr. 18-20). The petition as filed was not the one acted upon by the council at its May 5 meeting. The city council amended the legal description in the petition and apparently added a map to it (Tr. 18-20;

Summary of Minutes of the May 5, 1969, council meeting, listed as item 6 in the unfolioed record). The Act specifically requires that the city clerk refer the petition to council and council must then "take appropriate steps to determine if the petition so filed is substantially in compliance with this section." [emphasis supplied] (Section 6(2)(e), incorporating Section 6(1)(g)). Council did not deal with the petition "so filed" but proceeded to amend its legal description and add a map to it.

It is submitted that the change by the city council in the legal description of the territory to be annexed after the petition had been signed and filed with the clerk renders the petition invalid. In People v. South Platte Water Conservancy District, 139 Colo. 503, 343 P.2d 812 (1959), this Court found that a statutory water conservancy district had been improperly formed, basing its holding in part upon a change in the boundaries of the district after the petitions for its formation had been signed. In South Platte, numerous cases from other jurisdictions with similar holdings were cited. In Taylor v. Pile, 154 Colo. 516, 391 P.2d 670 (1964), this Court held that an amendment of a legal description in a petition relating to municipal boundaries after the petition was signed rendered it fatally defective. To the extent that Arvada contends that the amendment is immaterial because it involved only a portion of Wadsworth Boulevard and did not add to or subtract from the privately owned property in the annexation area, the language in Taylor v. Pile is instructive:

> "The statute requires that the description of lands to be included and the maps appended to the petition shall be 'accurate.' The most that can be said for these instruments as filed in the instant controversy is that they were almost accurate. This does not suffice." 154 Colo. at 524.

Finally, the amended petition as such was not filed with the Arvada city clerk prior to the May 5 council meeting at which the amended petition was acted upon (Tr. 19), even though the Act requires that the petition be filed with the clerk (Section 6(2)(c)), who then is to refer it to council as a communication (Section 6(2)(e), incorporating Section 6(1)(g)). The failure to file the amended petition with the city clerk as required by the Act before it was acted upon by council is a jurisdictional defect. Cowie v. Means, 39 Colo. 1, 10-11; 88 Pac. 485 (1906). See also Daniels v. Cavner, 404 Ill. 372, 88 N.E.2d 823 (1949).

6. Commencement of the Annexation Proceedings by One Council and Completion by a New Council Invalidates the Proceedings.

As is set forth in the trial court's findings of fact (ff. 178-180), there was a substantial change in the membership of the Arvada city council between November 3 and 17, 1969. Only two of the seven councilmen were members of both the old and new council. Nevertheless, the old council conducted all proceedings up to and including passing the annexation ordinance on first reading on November 3, 1969, and the new council passed it on final reading on

November 17, 1969 (see excerpts of minutes of the council meetings of November 3 and 17, listed as items 24 and 26 in the unfolioed record). The five new councilmen who passed the ordinance on final reading had not participated in any other portion of the annexation proceedings, such as the June 16, 1969, public hearing to determine whether the legal and factual requirements for annexation were present. Such action by a body exercising quasi-judicial functions does not satisfy even the basic elements of due process. In Marshall v. City of Golden, 147 Colo. 521, 363 P.2d 650 (1961), this Court struck down an ordinance passed on first reading by one council and on final reading by its successor council. In one sense, the facts in the instant case are even stronger than they were in Marshall. In Marshall, a majority of the councilmen were members of both councils; in the instant case over two-thirds of the members were different.

The trial court distinguished Marshall v. Golden, found the two councils' question to be one of first impression in Colorado, cited cases from other jurisdictions holding that a city council is a continuing body, and concluded that the action partly by each of the two councils was not improper. Westminster agrees that Marshall v. Golden is not directly in point because this Court's holding could have been and may have been based upon the new council purporting to act before it was lawfully in office, rather than upon the impropriety of one council finishing what another started. Also, Westminster agrees with the trial court that some jurisdictions hold that a city council is a continuing legislative body. However,

it is submitted that the trial court's ruling fails to recognize the distinction between a city council acting in a legislative capacity and in a quasi-judicial capacity. Regardless of what position other states take or this Court might take on the continuing nature of a city council for legislative purposes, it has been held in Colorado that a body exercising quasi-judicial powers cannot change "judges" in midstream. In Colorado State Board of Nurse Examiners v. Hohu, 129 Colo. 195, 268 P.2d 401 (1954), the five-man board unanimously revoked a nurse's license after a hearing. Only three of the five members attended the hearing, the other two voting for revocation at later board meetings. In striking down the board's action, this Court said:

> "If due process is to obtain, as it should in these hearings, then obviously it is violated if members of a board are permitted to vote in a revocation matter when they have not attended a hearing, and the respondent thus is denied the right of a full and fair hearing on the charges presented. Such hearings, involving a valued right of a respondent, cannot be conducted on a correspondence school pattern, therefore the trial court properly held the action of the Board in revoking respondent's license was void and of no effect, because of failure to strictly comply with the statutory requirements." 129 Colo. at 200.

Even though the final step in annexation is the passing of an annexation ordinance, the council's primary function is quasi-judicial, not legis-

lative. The council hearing is the only opportunity an opponent has to present evidence in opposition to the annexation. Here, more than two-thirds of the "judges" who handed down the annexation "order" by enacting the ordinance on November 17, 1969, heard none of the evidence upon which the annexation was based. There is not the slightest indication they even read the transcript of the June 16, 1969, hearing. See Big Top, Inc. v. Hoffman, 156 Colo. 362, 399 P.2d 249 (1965). Due process is not satisfied by such action.

7. Conclusion.

Arvada attempts to escape the effects of the foregoing defects in its actions by arguing that persons must make their objections known to the administrative body (Arvada Br. 23) and urging that the Act be given a liberal interpretation (Arvada Br. 25-26).

As to the timely presentation of objections, most of the objections discussed herein were presented by the opponents at the public hearing on June 16, 1969. Jones' objection to being annexed was clearly stated (Tr. 41-42). The facts surrounding the signing of the petition and the verification of the eligibility of the signers was inquired into and the legal sufficiency argued (Tr. 20, 39). The impropriety of proceeding without the signatures of the owners of over 50% of the land was argued (Tr. 35-36). The legal defect arising from the amendment of the legal description on the petition was noted and argued (Tr. 36-37). The lack of community of interest evidence was pointed out and argued (Tr. 39-40). In

short, Arvada had early and ample warning that the opponents of the annexation thought there were serious defects and the lack of required evidence in its proceedings. Further, the nature of certiorari review by a court is a review of the record. It would seem that any defects could be pointed out to the trial court or, indeed, that the court could note defects on its own. All defects urged here were urged in the trial court (see complaint of the plaintiffs and complaint in intervention of Westminster, ff. 4-24, 37-49). Finally, as stated by the trial court, it was incumbent upon the proponents to present evidence to sustain the required findings, rather than the opponents having the burden of showing that the requirements were not met (f. 195). New Jersey Fidelity & P.G. Ins. Co. v. Patterson, 86 Colo. 580, 284 Pac. 334 (1929), relied on by Arvada (Arvada Br. 18), is not in point. That case held that evidence did not have to be introduced at an administrative agency hearing with the same formality required by a court. It did not hold that the findings of an administrative agency need not be supported by evidence in the record.

In urging a liberal interpretation of the Act, Arvada cites City of Aspen v. Howell, 459 P.2d 764 (Colo. 1969). Westminster does not object to a liberal interpretation of the Act to accomplish its objectives and purposes better. However, we feel that the requirements of the Act cannot be ignored and that they were ignored here. Aspen v. Howell is of little assistance in resolving the issues in the instant case. In Aspen v. Howell there was no question that the petitions were properly

filed and valid in form. Moreover, there was a strict compliance with the Act, because the Act contemplates a hearing only on the petition for annexation election although a hearing date may have been set on the petition for annexation, so long as the Section 6(2) petition is filed at least ten days before the hearing date (Section 6(3)).

It is submitted that a more relevant case is Gavend v. City of Thornton, 165 Colo. 182, 437 P.2d 778 (1968). This Court held that the trial court should have granted plaintiff's motion for summary judgment because, although the superintendent of schools signed the annexation petition and the school board thereafter adopted a resolution approving the annexation and ratifying the action of the superintendent, the school board had failed to give its prior written consent to the annexation, as required by the annexation statute there involved. The procedural failures and defects here rise far above those in Gavend. And, in Gavend, this Court also held that a procedural defect need not prejudice directly the objector for it to void the annexation. Id. at 186

II. THE TRIAL COURT CORRECTLY HELD THAT THE ACT REQUIRES A PETITION FOR AN ANNEXATION ELECTION TO BE SIGNED BY THE OWNERS OF MORE THAN 50% OF THE LAND BEING ANNEXED.

1. Introduction.

This case involves a statutory construction question of great significance to the relationship between all incorporated and unincorporated

areas of Colorado. Stated generally, the question is whether the law permits an annexation over the objections of the owners of more than 50% of the territory being annexed. If the law does not permit this, and Westminster submits that it does not (except with respect to "enclaves" and "peninsulas" not here relevant), this annexation must fall, since it is conceded that the owners of about three-fourths of the annexation area have consistently objected to being annexed by Arvada.

Prior to the passage of the Act, it was the law in Colorado that no territory (except enclaves) could be annexed without the consent of the owners of more than 50% of the territory involved. Rice v. Englewood, 147 Colo. 33, 362 P.2d 557 (1961). This has apparently been the annexation law of Colorado for nearly 100 years. See, e.g., Article 10 of Chapter 139, 1963 C.R.S.; Article 11 of Chapter 139, 1953 C.R.S.; Article 15 (§§ 291-321) of Chapter 163, 1935 C.S.A.; Section 9213 of Chapter 173, 1921 Colo. Comp. Laws; and Section 6707 of Chapter 147, 1912 C.S.A. (which sets forth the annexation law as passed in 1877 and amended in 1887).

The issue is whether this long-standing requirement was abandoned by the Municipal Annexation Act of 1965. We submit that neither the literal language of the Act, nor the apparent legislative intent nor a consideration of the objects and purposes of the Act support the proposition that such a radical and fundamental departure from existing law occurred.

2. The Literal Language of the Act.

The area in question has more than one-sixth but less than two-thirds contiguity with Arvada. As such, it must be annexed in accordance with the procedures outlined in Section 6 of the Act.

Section 6 provides for two alternative methods of annexation. Under Subsection 6(1), a city may annex land upon the petition of the owners of more than 50% of the land. The city council must hold hearings in compliance with Sections 7, 8 and 9, but if the statutory requirements are satisfied an election is not required. Alternatively, annexation may be accomplished by the petition for an annexation election process of Subsection 6(2). The petition for an election under 6(2) must satisfy the requirements of a 6(1) petition, and must be signed by the lesser of seventy-five or 10% of the qualified electors who are resident landowners of the territory to be annexed.

Arvada annexed under the Subsection 6(2) procedure. The petition for the election purportedly had the signatures of seventy-five qualified electors, but it admittedly lacked the signatures of the owners of more than 50% of the land. Without the latter signatures, Arvada was without authority or jurisdiction to proceed.

The relevant portion of Subsection 6(2) provides:

> "6(2)(d)(i) The petition for annexation election shall comply with the provisions of subsection (1)(d) of this section, except that:

> "(ii) It shall contain an allegation that the signers of the petition are qualified electors resident in and landowners of the area proposed to be annexed, and
>
> "(iii) The petition shall request the annexing municipality to commence proceedings for the holding of an annexation election." [emphasis added]

The provisions of (1)(d) require, among other things, that the petition be signed by the owners of more than 50% of the land. The above language does not state that the 50% landowner requirement or any of the other requirements of (1)(d) may be ignored. It does not say that the (2)(d) requirements are "in lieu of" or "instead of" any of the (1)(d) requirements, as Arvada argues (Arvada Br. 13). Rather, it merely adds the two additional requirements of (2)(d).

A consideration of Section 6 in its entirety is of assistance in interpreting the language of Subsection 6(2)(d)(i), which is admittedly not a model of clear and concise legislative language. Reading all of Section 6, it is clear that one of the purposes, if not the primary purpose, of Section 6(2) is <u>defensive</u>--the counterpart of the "counterpetition" procedure under Section 139-10-4 of the prior annexation law. The defensive function of 6(2) is shown by Subsection 6(3), which provides that a 6(2) petition for election takes precedence over a prior petition for annexation of the same territory under 6(1). Thus, if the owners of over 50% of the land <u>first</u> request annexation

under 6(1), the less of either seventy-five or 10% of the qualified resident landowners may block the petition and force an election.

The possible ambiguity of 6(2) that did not exist under the prior law arises from the fact that 6(2) was designed to have a second function; it may also be used offensively to avoid the procedure that would otherwise be necessary where an election is desired. But, as under prior law, the electors may not force an annexation over the objections of the owners of over 50% of the land.

3. Arvada's Position.

Generally, Arvada makes two arguments in support of its position on the proper construction of Subsection 6(2)(d)(i). First, Arvada argues that to reject its construction would mean that "the election process contained in the Act would never be utilized" and "Section 6(2) need not have been included in the Act at all" (Arvada Br. 12-13). This argument overstates the case. First, under the construction which all appellees urge, Section 6(2)'s critically important defensive use would remain--the residents could block an annexation desired by the dominant landowners. The offensive use of 6(2) would also remain. It is conceded that if the owners of over 50% of the land desire annexation, they will often start by petition rather than by petition for election. But it is nearly as obvious that they would instead often start the proceedings by petition for election. For instance, this would be done if the owners of the majority of the land wanted to annex only if their

neighbors also wanted to annex. It would also be done if the landowners, knowing that the residents could always block annexation, decided that starting under 6(2) offered more hope of success than starting under 6(1) and running the risk of a defensive use of 6(2), with an attitude on the part of the residents that they had been bypassed on the annexation question but would have their say at the ballot box. It would also be done if the landowners thought that having an election would increase the chance of the city permitting the annexation. Cities are not required to permit any annexation (with the Section 6(5) exceptions relating to enclaves and peninsulas, not here relevant), and a city might accept a particular annexation approved at the ballot box by the area residents, but not otherwise.

Hence, it is clear that requiring a 6(2) petition to be signed by the owners of 50% of the land in no way reads 6(2) out of the Act or destroys its usefulness. The converse is not true. Arvada's construction would render 6(1) essentially meaningless. The landowners would be stripped of the right they have always had to participate meaningfully in the annexation process. The owners of as much as 99% of the land could neither achieve nor prevent annexation of their land without the consent and cooperation of the resident majority. As Arvada's proceedings in this case show, a landowner <u>opposed</u> to annexation could not stop it. And the law clearly provides that landowners <u>for</u> annexation can be blocked by the vote of the residents. If the legislature had intended to put the annexation decision solely in the hands of the resident majority,

it would have had little reason to enact 6(1) in its present form.

Arvada's second argument is that recent cases support its statutory construction, citing City of Aspen v. Howell, 459 P.2d 764 (Colo. 1969) and Adams v. City of Colorado Springs, 308 F. Supp. 1397 (D. Colo. 1970) (Arvada Br. 10-12). These cases do not support Arvada's construction. They do refer to the alternate or different procedures for commencing annexations under 6(1) and 6(2), but it is conceded that 6(1) and 6(2) prescribe alternate or different methods of commencing an annexation. The question is who must sign a 6(2) petition for election. Adams did not even involve a Section 6 annexation; it involved a unilateral annexation of an area with over two-thirds boundary contiguity. Nothing the Court said in Adams is of assistance with respect to the question presented here. Likewise, Howell is not in point. The main holding of Howell is that absentee voting should be permitted in an annexation election. This Court in Howell also said that the Act should be construed liberally so that its purposes would be accomplished, but no party here takes issue with that statement and we submit that it is of no assistance in resolving the question here.

In fact, there is not one Colorado case that we have found, at either the trial or appellate level, upholding a one-sixth contiguity annexation contrary to the wishes of the owners of over 50% of the land. The Act became effective on January 1, 1966. During the five years since then, many Colorado cities have been

eager to extend their boundaries, at least in an orderly fashion. However, so far as we can determine, no other Colorado municipality has completed an annexation of a one-sixth contiguous area over the objections of the dominant landowners. Hence, there has apparently been little support at the municipality level for the interpretation of the Act held by Arvada.

4. Apparent Legislative Intent and the Act's Objects and Purposes.

Section 6 of the Act is complex and its language not completely clear. In this situation, legislative intent is determined in part by an examination of the purposes of the Act and the language of the Act in its entirety. Kirschwing v. O'Donnell, 120 Colo. 125, 207 P.2d 819 (1949). Also, statutes should be construed as a whole, giving meaning and effect to each provision if possible and rejecting constructions that render provisions conflicting or nugatory. Martin v. District Court, 129 Colo. 27, 272 P.2d 648 (1954); People v. Rapini, 107 Colo. 363, 112 P.2d 551 (1941). And it is equally well established that statutory constructions that are unjust or absurd in result should be rejected. Blanchard v. Griswold, 121 Colo. 29, 214 P.2d 362 (1949). To avoid such results, the spirit and intent of the statute must prevail over the letter. Heitzman v. First National Bank of Steamboat Springs, 83 Colo. 476, 266 Pac. 213 (1928).

Viewing the Act as a whole, it would seem that the legislature has attempted throughout to balance the interests of two groups: (1)

the dominant landowners and (2) the resident majority. Under the construction we urge, that balance is achieved. Neither group can accomplish annexation without the direct or indirect approval of the other. Such mutual consent has always been the law in Colorado and we see no indication that the legislature intended to completely change, by one obscure subsection, the entire relationship between the incorporated and unincorporated areas of Colorado.

It takes little imagination to envision the absurd and illogical results which could follow if Arvada's interpretation is adopted. Small pockets of residents could bring vast areas into a town or city. For instance, 15 or 16 non-contiguous residents owning about 5 acres could force annexation of the over 28 square miles of the Rocky Mountain Arsenal to Denver. The one vote of the landowner of the arsenal property would have little affect on the election. If the question were only "incorporated vs. unincorporated," the result might be arguably tolerable. But annexation wars between cities will be the inevitable result. If one city knows that a neighboring city can annex vast quantities of land over the objections of the landowners, the first city might feel compelled to move first. The result could easily be annexations that neither of the two cities nor the landowners want or are prepared for, merely because no one dares wait for the natural and orderly growth sought by the Act. Section 2(1)(b).

5. The Annexation in this Case was an Impermissible Annexation of Non-Contiguous Territory.

Arvada is in effect attempting to annex a non-contiguous area. Not one of the persons who signed the petition owns land which adjoins Arvada. The personswho signed the petition and voted to annex live in the Far Horizons area, which is separated from Arvada by a substantial mass of undeveloped land whose owners objected to being annexed. (See maps of the annexation area listed as items 3 and 4 in the unfolioed record.)

We are not aware of any state which permits a city to annex non-contiguous land. It is the law in Colorado that even the legislature does not have the constitutional power to permit a city to annex non-contiguous areas. In City of Denver v. Coulehan, 20 Colo. 471, 39 Pac. 425 (1894), the legislature passed a law purporting to include within Denver a non-contiguous strip of land in Jefferson County. Relying upon several provisions of the Colorado Constitution, this Court held that non-contiguous land could not constitutionally be made a part of Denver. If such land could not be added to Denver even by an act of the legislature, it would seem even more clear that Arvada by ordinance cannot add such land.

The Coulehan case was cited with approval in Greenwood Village v. Heckendorf, 126 Colo. 180, 247 P.2d 678 (1952), wherein it was held that "no disconnection of land [from a town] can be upheld which divides the town into disconnected parts" because even "the legislature does not have the power to enlarge the territory included within a town by adding thereto areas entirely separated from the

municipality by intervening lands." 126 Colo. at 187. The Heckendorf case shows the impropriety of Arvada's contention that it can "leap frog" the Jones-Witkin land with an annexation. Suppose that Arvada refuses to supply municipal services to the Jones-Witkin area and that the owners of the land meet all of the statutory requirements to seek disconnection from Arvada. On the authority of the Heckendorf case disconnection would be denied because to do so would split Arvada into two disconnected areas: the main city and the Far Horizons area.

III. THE TRIAL COURT'S RULING PERMITTING WESTMINSTER TO INTERVENE WAS CORRECT.

The plaintiffs herein commenced this action to review Arvada's annexation on November 26, 1969 (f. 4). The standing of the plaintiffs to commence this action was stipulated (f. 341) and it was commenced within the time limits prescribed by Section 15 of the Act. On the same day the within action was commenced, Westminster filed its motion to intervene with complaint in intervention attached (ff. 32-49), and the court after hearing argument (ff. 345-357) permitted the intervention (f. 67). Thereafter, the trial court also permitted proponents of the annexation to appear as amici curiae and participate in the proceedings in support of the annexation (ff. 89-95, 335-340).

It should be noted that the issue is not whether Westminter could have commenced a review proceeding, which it could not. The issue is whether it was an abuse of the trail

court's discretion to permit Westminster to intervene when the action had been commenced by persons who had standing to do so. Both cases cited by Arvada dealt with the right of a party to commence a review action when he was not within the class described by the statute. Hence, these cases are not in point.

Westminster's intervention seems clearly permissible under the language of Rule 24, C.R.C.P. It is submitted that Westminster was entitled to intervene as of right under Rule 24 (a)(2), but certainly it cannot be found that the trial court abused its discretion if the intervention is measured by the permissive intervention standards of Rule 24(b)(2). This Court has consistently followed a rule of liberality with respect to intervention. In Senne v. Conley, 110 Colo. 270, 132 P.2d 381 (1943), it was said that the rules for intervention should be "liberally construed" in order that "all related controversies should, as far as possible, be settled in one action." 110 Colo. at 275. In North Poudre Irrigation Co. v. Hinderlider, 112 Colo. 467, 150 P.2d 304 (1944), in refusing to find that the trial court abused its discretion in permitting intervention this Court cited with approval a case

> ". . .wherein it was held that allowance of an intervention is not error although the rights of the parties might have been worked out without the presence of the intervener, where such participation did no harm and made a more compre-

hensive decree possible." 112 Colo. at 475

The trial court's allowance of intervention was likewise affirmed in Cache La Poudre Ditch Co. v. Hawley, 43 Colo 32, 95 P.2d 317 (1908). On the other hand, this Court has frequently held that the trial court abused its discretion when it denied intervention. Roosevelt v. Beau Monde Co., 152 Colo. 567, 384 P.2d 96 (1963); Mesa County Junior College District v. Donner, 150 Colo. 156, 371 P.2d 442 (1962); Wood v. Denver City Water Works, 20 Colo. 253, 38 Pac. 239 (1894).

Even assuming arguendo that the trial court abused its discretion in permitting Westminster's intervention, Arvada was not harmed. The plaintiffs herein had standing, they resisted Arvada's action in the trial court and they are appellees herein. A review proceeding is commenced to review the record, and Arvada is in no position to complain that it is being reviewed.

IV. THE TRIAL COURT CORRECTLY HELD THAT THE $200,000 ASSESSED VALUATION REQUIREMENT OF SECTION 4(3) OF THE ACT IS UNCONSTITUTIONAL AND IS SEVERABLE.

Stated generally, Section 4(3) of the Act prohibits the annexation of a parcel of at least 20 acres of land without the written consent of the owner if, but only if, the land has an assessed valuation of at least $200,000. The trial court found the assessed valuation requirement unconstitutional in the following language:

> "This exception the Court concludes is unconstitutional. It bears no reasonable relation to annexation of property by a municipality. The only thing that can be said for it is that it confers the right of preventing annexation upon the wealthy, while forcing it upon those who are poor or only moderately well-off with respect to the value of their twenty acres or more. It frees the owner of a large factory from annexation while subjecting the small owner to the increased tax burden of being forcibly taken into a municipality. It exempts the owner of any large or palatial improvement situated on twenty acres or more from the municipal burdens, while subjecting the modest improvement on a tract of like size. It is a vicious and discriminatory example of class legislation that cannot be justified on any just or reasonable theory. It denies equal protection of law, and is arbitrary, unreasonable, oppressive and unjust." (ff. 202-204)

Arvada argues that the classification is reasonable because properties with large assessed valuations are likely to be developed and not need municipal services, and properties with lower valuations are likely to be undeveloped and hence need the services (Arvada Br. 35-36). We submit that the reverse is at least as likely to be true. The owner of the undeveloped land may plan to keep it that way and hence have no need for municipal services. The developed land may already have sources of water and sewer, but may have a

great need for police protection, fire protection and adequate zoning and traffic control and regulation, at least in the eyes of the neighboring municipality. It seems to us that the answer of the trial court to Arvada's contention is particularly persuasive:

> "The assessed valuation of the land involved in an annexation has no reasonable relation to the object involved. This exception was obviously written into the law to protect some person, firm, or corporation. It clearly denies equal protection of law, and cannot be allowed to stand. There is no reasonable or material difference between tracts of in excess of twenty acres in area, so far as annexation is concerned, whether the assessed valuation is $2,000.00 or $200,000.00. The only ascertainable difference is that all others in the area annexed are subjected to higher tax burdens because the area having the large valuation is excluded and is not required to contribute its just share to the general welfare." (ff. 206-207)

This Court has dealt with exclusion provisions similar to the one in Section 4(3) in three recent cases. Mountain States Telephone and Telegraph Co. v. Animas Mosquito Control District, 152 Colo. 73, 380 P.2d 560 (1963); Colorado Interstate Gas Co. v. Sable Water District, 152 Colo. 89, 380 P.2d 569 (1963); District 50 Metropolitan Recreation District v. Burnside, 448 P.2d 788 (Colo. 1968). In the Mountain States case an acreage and

assessed valuation exclusion provision for a mosquito control district was found unconstitutional; in Sable an acreage exclusion from a water district was found unconstitutional; and in Burnside a recreation district exclusion provision was found constitutional. The exclusion in Burnside was not based on acreage; it was limited to property used for manufacturing, mining, railroad, industrial or agricultural purposes. As this Court said:

> "The classification adopted in C.R.S. 1963, 89-12-8 is not an arbitrary one. Its reasonableness is apparent in the statute itself from a consideration of the type of district involved and of the type of property excluded. This section is a legislative declaration of what is obvious--that the property excluded would not benefit from, or have any use for, playgrounds, golf courses and swimming pools. Therefore, the Legislature did not act in excess of its power by excluding the property from the district created exclusively for recreational purposes." 448 P.2d at 791.

In this case, it cannot be said that all property with over $200,000 assessed valuation "would not benefit from, or have any use for" municipal services. Further, the Act does not purport to distinguish between "types of property." Any type may stay out if it is assessed high enough; any type must go in if it is not assessed high enough. Hence, we submit that Mountain States and Sable rather than Burnside are most instructive in the

instant proceeding.

These cases are relevant to other issues here. In Burnside, no evidence was taken but that was not deemed to preclude a resolution of the constitutional issues. Likewise, the plaintiffs in Burnside were not within the exclusion, but they were nevertheless permitted to raise and secure the judgment of this Court on the constitutionality of the exclusion provision. In fact, in Mountain States the constitutional issue was determined even though no one raised it in the trial court and all parties urged this Court not to reach it. In the instant proceeding, the constitutional issue was raised by the parties in the trial court, argued there and the decision of that court obtained. Finally, in Mountain States this Court used strong but apt language to condemn an assessed valuation exclusion when such exclusion does not bear a "reasonable relationship to the benefits sought to be obtained." 152 Colo. at 83.

In arguing the lack of standing of appellees to question the constitutionality of the assessed valuation portion of Section 4(3), Arvada cites and relies upon Cline v. City of Boulder, 450 P.2d 335 (Colo. 1969). This Court did refuse to permit Cline to challenge the acreage and assessed valuation exemption, noting that "no property involved in this annexation is subject to any of the exemptions" in the Act. Of course, that is not true in the instant case. Here Jones as the seller of the land and Witkin as its buyer made their opposition to annexation by Arvada known at

every opportunity. (This Brief, infra at 4-6, 14 and 21.) Finally, they were parties to and resisted Arvada's action in two of the related cases which were consolidated by order of court on December 5, 1969 (this Brief, infra at 5-6), and their attorneys were present in opposition when the within action was argued to the trial court (ff. 338-340).

Arvada argues that Section 4(3) cannot be found unconstitutional without taking evidence, but cites no cases for that proposition (Arvada Br. 30-31). As noted previously, the Court determined the constitutionality of an exclusion provision in Burnside without evidence having been taken. This Court has often passed upon constitutional issues without feeling that evidence was indispensible. See e.g., Swisher v. Brown, 157 Colo. 378, 402 P.2d 621 (1965); Leddy v. People, 59 Colo. 120, 147 Pac. 365 (1915). Finally, the trial court did hear evidence pertaining to this controversy, although it was in a related case (this Brief, infra, at 5-6).

This Court has on numerous occasions measured Colorado statutes against either the equal protection requirements of the Fourteenth Amendment to the U.S. Constitution or the special and class legislation prohibition contained in Article V, Section 25 of the Colorado Constitution. Cases finding legislation unconstitutional on one or both of these grounds and instructive herein include: Champlin Refining Company v. Cruse, 115 Colo. 329, 173 P.2d 213 (1946) (ruling authorizing shrinkage allowance for tax purposes on

gasoline received in Colorado from a refinery but not that received from a bulk station); Allen v. City of Colorado Springs, 101 Colo. 498, 75 P.2d 141 (1937); (ordinance requiring Sunday closing for certain types of stores but not for other types); City of Denver v. Schmid, 98 Colo. 32, 52 P.2d 388 (1935) (ordinance regulating hours of barber shops but not beauty shops); City of Denver v. Bach, 26 Colo. 530, 58 Pac. 1089 (1899) (ordinance prohibiting the Sunday sale of clothing but not other merchandise).

When measured against the standards in these cases, the assessed valuation requirement must fall. It is reasonably related to nothing, except possibly the political power of the owners of valuable property to defeat an annexation statute unless they are excluded from its operation, at the expense of their less affluent neighbors.

Finally, Arvada argues that if the assessed valuation requirement falls, all of Section 4(3) should be stricken, leaving the Act without an exemption based on acreage. It is difficult to see how this result could follow. No one has argued that the acreage exemption is unconstitutional. The trial court found that provision of the statute constitutional and it would appear that the acreage exemption is a reasonable classification. Hence, if the unconstitutional assessed valuation requirement is severable, just it should be stricken. (The Act contains a severability clause [Session Laws 1965 at 1209] which is persuasive but not

binding. People v. Morgan, 79 Colo. 504, 246 Pac. 1024 (1926); American Federation of Labor v. Reilly, 113 Colo. 90, 155 P.2d 145 (1944)). Conversely, if the assessed valuation requirement was an inducement to the passage of the Act and hence is not severable, the entire Act should fall. Four-County Metropolitan Capital Improvement District v. Board of County Commissioners, 149 Colo. 284, 369 P.2d 67 (1962); White v. Anderson,155 Colo. 291, 394 P.2d 333 (1964); City of Denver v. Lynch, 92 Colo. 102, 18 P.2d 907 (1932). We are not aware of any rule which would permit the finding that an unconstitutional portion of a statute (the assessed valuation requirement) renders void another portion of the statute otherwise constitutional (the acreage exemption), but leaves intact the rest of the statute. It is Westminster's position that the assessed valuation requirement is unconstitutional, but that the rest of the Act is severable and should be permitted to stand.

CONCLUSION

For the reasons stated above, it is respectfully requested that the judgment of the District Court vacating and setting aside the annexation proceedings involved herein be affirmed.

Respectfully submitted,

HOLLAND & HART
Warren L. Tomlinson
Edwin S. Kahn

500 Equitable Building
Denver, Colorado 80202
292-9200

STITT, WITTENBRINK & ROAN
James R. Stitt

2325 West 72nd Avenue
Denver, Colorado 80221
428-8526

Attorneys for Appellee
City of Westminster

December 1970