

SUPREME COURT, STATE OF COLORADO

2 E. 14th Ave., Denver, CO 80203

Phone Number: (303) 861-1111

Certiorari to Court of Appeals, Case No. 2009CA0425

Division. IV: The Honorable Sean Connelly, John R. Webb, and Diana Terry

Appeal from: District Court, Jefferson County, the Honorable Tamara S. Russell presiding, Case No. 88CV482 (Consolidated with Case Nos. 04CV126 and 04CV375)

Petitioner: PLAINS METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado

Respondents: KEN-CARYL RANCH METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado; JAN ROUSSELOT, RUTH SUNDBERG, and PATRICIA LYNCH, individual taxpayers,

Attorneys for Amicus Curiae Special District Association of Colorado:

Ann A. Terry #25691

Mary G. Zuchegno #021048

225 East 16th Avenue, Suite 1000

Denver, CO 80203

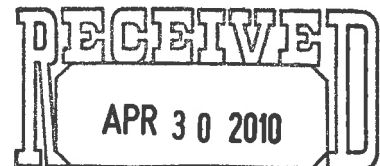
Telephone: 303-863-1733

Email: ann.terry@SDAco.org and mary@SDAco.org

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Case Number: 10SC 282

**BRIEF IN SUPPORT OF PETITION FOR CERTIORI BY AMICUS CURIAE
SPECIAL DISTRICT ASSOCIATION OF COLORADO**



Pursuant to C.A.R. 29 and 49, the Special District Association of Colorado (“Special District Association” or “Association”) respectfully moves this Court to accept Plains Metropolitan District’s (“Plains”) Petition for Writ of Certiorari. In support of this Motion, the Special District Association states as follows.

I. Certification of Compliance

Counsel certifies that this petition complies with all the requirements of C.A.R. 32 and C.A.R. 53. *See* Appendix C for pertinent statutes.

II. Advisory Listing of Issues

- a. Did the Court of Appeals commit reversible error in holding that Plains’ 1985 Service Plan contained mandatory language obligating it to build additional recreational facilities?

- b. Did the Court of Appeals commit reversible error in holding that the otherwise untimely counterclaims filed by appellants below, the Ken Caryl Ranch Metropolitan District and the intervener taxpayers, were revived by the application of the counterclaim revival statute, C.R.S. § 13-80-109?

III. Reference to the Opinion of the Court

The Court of Appeals entered an Opinion on March 18, 2010, reversing and remanding the case to the District Court with directions. *See* Appendix A, hereto.

IV. Jurisdictional Grounds

The jurisdiction of the Supreme Court is invoked by Plains pursuant to C.A.R. 49, *et seq.*, and C.R.S. §§ 13-2-127 and 13-4-108. The date of the decree to be reviewed is March 18, 2010. A petition for rehearing was not sought.

V. Statement of the Case

The Plains Metropolitan District (“Plains”) is seeking reversal of the Court of Appeal’s opinion either (1) as a case of first impression, or (2) because the opinion is not in accord with other divisions of the Court of Appeals. The Special District Association supports the position of Plains as stated in Plains’ Petition for Writ of Certiorari.

Plains was created in January 1986 pursuant to the Special District Act, C.R.S. § 32-1-101 *et seq.* Plains operated for approximately three years before the Ken Caryl Ranch Metropolitan District (“KC” or “Ken Caryl District”) was formed in 1988.

In 1985, when the Plains' service plan was written ("1985 Service Plan"), there was no development in the district of any kind. The 1985 Service Plan outlined plans for financing and construction of traffic signals, streets/roads, and recreational facilities. Over the ensuing twenty-five years, many of the improvements were built; many were not.

In 2004, without first obtaining the statutorily required consent of Plains' Board of Directors, without holding the statutorily required election, and during an *ex parte* proceeding to which Plains was not party, KC obtained an unlawful inclusion order from the Jefferson County District Court causing portions of the Plains district to be subsumed into the boundaries and taxing authority of the Ken Caryl District. Plains sued KC to void the unlawful inclusion order.

KC and the intervener taxpayers responded with counterclaims addressing new issues unrelated to Plains' complaint, which are the subject of this appeal. Before trial, however, the parties agreed to submit a joint motion to the Jefferson County District Court resulting in an order which (1) voided the unlawful inclusion order *ab initio*, and (2) dismissed Plains' original complaint. Thus, the only issues at trial centered on KC's counterclaims.

KC filed three sets of counterclaims. The first counterclaims raised promissory estoppel claims and alleged that the 1985 Service Plan was a contract obligating Plains to build additional recreational facilities. The second set of counterclaims alleged that a draft intergovernmental agreement (“1988 Draft IGA”) constituted a contract obligating Plains to build the additional recreational facilities. The third set of counterclaims alleged that Plains, in 2005, had improperly amended the 1985 Service Plan.

After trial, the District Court denied the counterclaims ruling that: (1) contract and promissory estoppels claims were not available to force Plains to build the additional facilities; (2) the 1985 Service Plan is not a contract and does not contain mandatory language obligating Plains to build additional recreational facilities; (3) even if one assumed that the 1985 Service Plan were a contract, the statute of limitations had expired; (4) the 1988 Draft IGA is not valid or binding; there was no meeting of the minds between the parties; there was no finalized document signed by the parties; and (5) the 2005 changes contained in Plains’ Amended and Restated service plan did not contain changes of a “basic or essential nature.”

In reversing and remanding the case to the District Court for additional findings and conclusions, the Court of Appeals held that (1) a service plan providing that Plains “will” build recreational facilities obligates Plains to build those additional facilities, unless Plains can demonstrate that construction is no longer “practicable;” and (2) even though KC’s counterclaims were otherwise untimely, KC’s right to assert them as compulsory counterclaims was revived by C.R.S. § 13-80-109.

Plains is seeking a ruling that, (1) consistent with earlier appellate rulings in Colorado, the Special District Act is “permissive” in nature, not mandatory, and that the 1985 Service Plan does not contain language obligating Plains to build the additional recreational facilities, and (2) KC’s counterclaims were untimely and not revived by the counterclaim revival statute, C.R.S. § 13-80-109.

The Special District Association supports Plains’ position in full.

VI. Argument in Support of Accepting Certiorari.

The Special District Association’s primary mission is to preserve and enhance the legal and political environment for the existence and successful operation of the special district form of government and to assist special districts to operate appropriately and in the most efficient and economical manner possible.

Consistency and certainty in the law is integral to the continued success and efficiency of Colorado special districts.

The Court of Appeals' opinion for which Plains seeks review is in direct conflict with prior binding Colorado authority, thereby creating the very legal uncertainty the Special District Association strives to prevent. *Compare, e.g., Durnford v. City of Thornton*, 438 P.2d 977, 979 (Colo. App. 1971) (finding that the Special District Act is permissive and therefore did not require a fire district to provide fire hydrants and a supporting water system) *with Plains Metropolitan District v. Ken-Caryl Ranch Metropolitan Dist.*, 2010 Colo. App. LEXIS 357, *1 (Case No. 09CA0425, March 18, 2010) (holding that the service plan obligated Plains to build facilities referenced therein); *compare Duell v. United Bank*, 892 P.2d 336, 340-41 (Colo. App. 1994) (holding that the purpose of Counterclaim Revival Statute is to “allow a party against whom a claim has been initially asserted to plead a stale claim *only in response to* the claim asserted against the party”) (emphasis added) *with Plains Metropolitan District v. Ken-Caryl Ranch Metropolitan Dist.*, 2010 Colo. App. LEXIS 357, *15-16 (Case No. 09CA0425, March 18, 2010) (holding that counterclaims remained revived despite voluntary dismissal of the original complaint).

The Special District Association respectfully requests that this Court accept certiorari in this matter to rectify untenable discrepancies in Colorado appellate law created by the Court of Appeals ruling in the Plains' matter.

The Special District Association supports Plains' positions on the Court of Appeals' opinion as presented in Plains' Petition for Writ of Certiorari and incorporates the same herein by this reference. Specifically, the Special District Association supports Plains' position with regard to the Court of Appeals' error regarding the mandatory nature of Plains' service plan and its position regarding the erroneous revival of Ken-Caryl Ranch Metropolitan District's stale counterclaims.

The Special District Association is additionally concerned with the far reaching future effects of the Court of Appeals' opinion. By ruling that the terms of special district service plans can create binding obligations, rather than agreeing with the trial court's determination that service plans are "charters" which guide the general direction of a district but do not contain obligations for specific performance, the Court of Appeals has abrogated the underlying assumptions made by districts across the state when drafting special district service plans.

At the time of drafting, most, if not all, special districts presumed that such plans were and are permissive grants of authority, not binding statements of future

obligations. Indeed, one needs to look no further than Ken Caryl's former general manager, Dave Peak, for evidence to support this assumption. Mr. Peak testified at the trial of the Plains' case. In response to a question from a Ken-Caryl resident in 1995 asking why Plains had not built the additional recreational facilities, he responded that the Plains' Service Plan:

is just a guide and nothing more. It outlines future plans of the district. . . . The [Plains] Service Plan merely indicates the specific services which may be provided rather than those services which must be provided. In a sense, a service plan acts to limit those services a district may perform rather than those services a district is required to perform – limited document vs. mandating.

District Court *Findings of Fact, Conclusions of Law and Order of Judgment* at p.11 (emphasis in original).

By its ruling, the Court of Appeals will dramatically upset the status quo and general understanding of special districts across the state, thus inhibiting their continued growth and vitality. The Special District Association therefore respectfully requests that this Court accept Plains' Petition for Writ of Certiorari to rectify the Court of Appeals' harmful and erroneous ruling.

Likewise, the Court of Appeals' ruling on the Counterclaim Revival Statute will have a heightened effect on special districts throughout Colorado. Many special districts operate from service plans drafted in the last several decades.

Given the breadth of issues typically covered by service plans, numerous issues may be considered “logically related” (or, “at least potentially relevant,” in the Court of Appeals’ verbiage) to a service plan. Thus, if a special district seeks to litigate any issue which is “potentially relevant” to its service plan, it thereby exposes itself to long-stale claims alleging a failure to comply with what the Court of Appeals in the Plains’ matter now deems to be mandatory service plans. The age of many special districts coupled with both the breadth of service plans’ typical coverage and the exceedingly broad new standard established in the Plains’ case by the Court of Appeals causes special concern and consternation for special districts, above and beyond that of the general public.

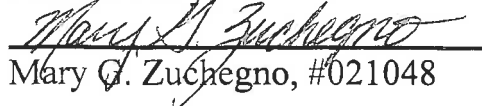
WHEREFORE, the Special District Association of Colorado respectfully requests that this Court accept Plains Metropolitan District’s Petition for Certiorari in order to rectify an untenable discrepancy in the appellate law of Colorado.

Respectfully submitted this 30th day of April, 2010.

SPECIAL DISTRICT ASSOCIATION OF
COLORADO



Ann A. Terry, #25691



Mary G. Zuchegno, #021048

225 East 16th Avenue, Suite 1000
Denver, CO 80203

*Counsel for Amicus Curiae Special
District Association of Colorado*

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of April, 2010, I caused a true and correct copy of the foregoing **BRIEF IN SUPPORT OF PETITION FOR CERTIORI BY AMICUS CURIAE SPECIAL DISTRICT ASSOCIATION OF COLORADO** to be served via the U.S. mail, postage prepaid, addressed to the following:

The Honorable Sean Connelly,
John R. Webb, and Diana Terry
Colorado Court of Appeals, Division IV
2 East 14th Avenue, Third Floor
Denver, CO 80203

The Honorable Tamara S. Russell
Jefferson County District Court
Division 4
100 Jefferson County Parkway
Golden, CO 80401

Richard L. Shearer, Esq.
J. Alan Call, Esq.
Shearer & Call, P.C.
1625 Broadway, Suite 1450
Denver, CO 80202

Eric T. Butler, Esq.
Jefferson County Attorney's Office
100 Jefferson County Parkway
Golden, CO 80419

John Watson
Todd R. Scardina
Berenbaum Weinshienk PC
370 17th St., Suite 4800
Denver, CO 80202

