

STAFF REPORT
Review Hearing before Board of County Commissioners
September 18, 2018

Appeal from Denial of Petition for Exclusion from Special Districts

Petitioner: Phoenix, LLC

Respondents: Eagle Shadow Metropolitan District No. 1; Todd Creek Village Park & Recreation District

BACKGROUND AND PROCEDURAL HISTORY

This is an appeal of a denial of a petitioner's request to be excluded from two separate, but geographically contiguous, special districts. The BoCC has statutory authority to hear this appeal pursuant to C.R.S. § 32-1-501(5)(b)(I).

Phoenix, LLC ("Petitioner") owns certain real property (approximately 97 acres) that lies within the boundaries of Eagle Shadow Metropolitan District No.1, and Todd Creek Village Park and Recreation District (collectively, the "Districts").

Eagle Shadow Metropolitan District No.1 Service Plan was approved on September 20, 1999. Todd Creek Village Park and Recreation District Service Plan was approved on September 23, 2002. Phoenix, LLC purchased the property in question on April 9, 2018.

On June 19, 2018, in a joint meeting of the boards of directors of both Districts, Petitioner petitioned to have its real property excluded from the Districts. The Districts denied the petitions for exclusion. Each District issued its own written resolution denying the petitions for exclusion. In these resolutions, the Districts set forth their findings on each of the statutory factors, as required by C.R.S. § 32-1-501(3).

BOARD OF COUNTY COMMISSIONERS INTERMEDIATE APPELLATE FUNCTIONS

The BOCC is the first step in a statutory appeals process for decisions involving exclusion of property from special districts. The BOCC must evaluate the statutory factors for exclusion of property from the districts and ultimately determine whether the property should be excluded.

The BOCC is limited by statute to considering only the record that was developed at the hearing before the special district board. Each party has provided written arguments and supporting materials. Each party should be provided an opportunity to present comments and argument at the hearing. But, pursuant to statute, no new evidence beyond that presented at the hearing of the districts should be permitted.

The BOCC is conducting intermediate appellate review for this hearing. Section 32-1-501(5)(c)(I) provides that, “Any decision of the Board of County Commissioners may be appealed for review to the district court of the county which has jurisdiction of the special district...” Any party may appeal to the district court and the court will perform a review of the record at the special districts’ hearing. The district court does not review the decision of the BOCC.

The following factors, set forth in C.R.S. § 32-1-501(3), should be considered when determining whether to allow the property to be excluded:

- a. The best interests of all of the following:
 - i. The property to be excluded;
 - ii. The special district from which the exclusion is proposed;
 - iii. The county or counties in which the special district is located;
- b. The relative cost and benefit to the property to be excluded from the provision of the special district’s services;
- c. The ability of the special district to provide economical and sufficient service to both the property to be excluded and all of the properties within the special district’s boundaries;
- d. Whether the special district is able to provide services at a reasonable cost compared with the cost that would be imposed by other entities in the surrounding area to provide similar services in the surrounding area or by the fire protection district or county fire improvement district that has agreed to include the property to be excluded from the special district;
- e. The effect of denying the petition on employment and other economic conditions in the special district and surrounding area;
- f. The economic impact on the region and on the special district, surrounding area, and state as a whole if the petition is denied or the resolution is finally adopted;
- g. Whether an economically feasible alternative service may be available; and
- h. The additional cost to be levied on other property within the special district if the exclusion is granted.

RECORD DEVELOPED AT THE HEARING BEFORE THE SPECIAL DISTRICT BOARD

The parties agree that the service plans for the special districts, the board meeting minutes, the petitions for exclusion, and the resolutions denying said petitions are all part of the record developed at the hearing before the special district board.

There are no official transcripts of the board meetings at issue. However, Petitioner has provided in its materials a document entitled, “TRANSCRIPT OF EAGLE SHADOWS METROPOLITAN DISTRICT NO. 1 AND TODD CREEK VILLAGE PARK AND RECREATION DISTRICT EXCLUSION HEARINGS TAKING PLACE ON JUNE 19, 2018.” (Hereinafter, “Transcript”) Petitioner represents that this document is a transcript generated from an audio recording of the board meetings. This document contains a “Transcriber’s Certificate” and is dated August 8, 2018. Petitioner suggests that this transcript is a part of the official record.

The Districts indicate that they were not aware of, nor did they authorize, said recording. The Districts have various objections to the transcript, and do not concede that it is a part of the official record. However, they do cite to the transcript in their argument.

The following materials have been provided for the BOCC’s review:

1. Petitioner Position Statement and Accompanying Materials
2. Districts Position Statement and Accompanying Materials
3. Petitioner Reply Brief
4. Districts Reply Brief

STAFF EVALUATION OF STATUTORY FACTORS DEVELOPED IN THE RECORD:

Staff has performed an evaluation of the statutory factors to be considered and provides the following brief summary of information in the record that supports the statutory factors.

Factor 1 Best Interests of The Property to be Excluded.

Factor 1 was addressed by the Districts in the Denial Resolutions, each of which states, “Exclusion is not in the best interests of the property to be excluded.”

Discussion relevant to Factor 1 included Petitioner’s argument that its properties were not receiving any benefit from the Districts, and the Districts’ reply that there were several parks and other improvements benefitting the property:

SPEAKER 3: Why do you want to be excluded?

MR. DICKHONER: The property owners are looking at forming a metro district, and they’d like to not be subject to the current operations and maintenance mill levy. Obviously they’ll remain subject to the debt-service levy, but they’d like to form a district that they can use and not be subject to and are not really getting any benefit from.

SPEAKER 3: Why do they believe they’re not getting any benefit from it?

MR. DICKHONER: It’s my understanding that there aren’t really improvements serving the area, so...

SPEAKER 3: Can you be more specific?

MR. DICKHONER: Well are there improvements that are serving that property that have been financed by district debt?

SPEAKER 4: Yes, we have several parks throughout the area.

SPEAKER 3: Serving the metro district but not that specific property.

MR. DICKHONER: Right. I'm sure they're serving the metro district, but I don't think they're benefitting the property, and they'd like to move forward with development of an adjacent property that's not in the district, and so they're trying to get...

(Transcript, 1)

SPEAKER 1: And just to clarify for the record when you say there's no benefit. The district paid for this whole interchange and all the lights, everything else. That definitely is a benefit to that property. They paid for parts of Havana, improvements along the upper drainage and everything else that directly benefitted that property, they put in parks and rec, that whole benefit especially if you know the park and rec amenities. Park and rec maintains all of the fencing and prepping along that property as well.

(Transcript, 10)

Factor 2 Best Interests of the Special District From Which the Exclusion is Proposed.

Factor 2 was addressed by the Districts in the Denial Resolutions, each of which states, "Exclusion is not in the best interests of the District as it would result in a substantial reduction in revenue due to the loss of fees and operation and maintenance mill levy the District would realize if the property is excluded from the District. In addition, the District has incurred expenses to build infrastructure that serves the property in anticipation of receiving revenues from the property to reimburse such expenses and bonds."

There was extensive discussion relevant to Factor 2 focusing on the negative financial impact to the Districts if the Petitioner's property was excluded:

SPEAKER 2: So that'd be over \$120,000 that we'd be losing then, and that's for us to use for whatever.

(Transcript, 7)

SPEAKER 2: \$4000 (development fee) x 32 (lots on Petitioner's property) would be \$128,000 we would not realize, so...

(U.T.8)

SPEAKER 1: Rough, rough numbers. You're probably giving up \$300,000 to \$400,000 over the remaining duration of the bond. That's a significant amount.
(U.T.9)

SPEAKER 3: Okay. So we're still down to, what you're saying is, we'd lose the \$300,000 to \$400,000 for the development fees?
(Transcript, 12)

Factor 3 Best Interests Of The County Or Counties In Which The Special District Is Located.

Factor 3 was addressed by the Districts in the Denial Resolutions, each of which states, "Exclusion is not in the best interests of Adams County."

There was limited discussion relevant to Factor 3 that included County requirements regarding parks:

SPEAKER 1: Is there gonna be a park in the new development?

MR. DICKHONER: I don't think so.

SPEAKER 2: It looked like a detention pond.

MR. DICKHONER: I think there's detention, yeah.

SPEAKER 2: I thought Adams County required a certain percentage of ground be dedicated towards a park.

MR. DICKHONER: I'm not sure. I haven't seen the development plans for it.
(Transcript, 4)

Factor 4 The Relative Cost And Benefit To The Property To Be Excluded From The Provision Of The Special District's Services.

Factor 4 was addressed by the Districts in the Denial Resolutions, each of which states, "the relative cost from the District's services to the property to be excluded is negligible and the benefit from the District's services to the property to be excluded is significant."

Discussion relevant to Factor 4 focused on the mill levies that Petitioner's property would be subject to, and the debt service mill levy that Petitioner would still have to pay after exclusion:

MR. DICKHONER: Yeah. So they'd like to have uniform mill levy across the two and obviously, we can't get away from the debt service levy, but we've talked about a sub-district to balance out the mill levy so that residents in Wiegant (a neighboring property that Petitioner wishes to develop uniformly with the property at issue) have the same total mill levy as those in Shook. So in order to have control of that, they would like to exclude this property.

SPEAKER 3: So now that you've explained it, what does that mean "we can't get out of the debt service?" Does that mean they'll still pay the...

SPEAKER 4: They'll still have to pay the rest of the debt service mill levy, yes.

SPEAKER 1: The debt on the mill levy service stays in place until the bonds are paid.

SPEAKER 3: So all of the property owners would be subject to that plus...

SPEAKER 2: Plus whatever mill levies they set.

SPEAKER 4: Right.

MR. DICKHONER: So you still get the benefit to repay your debt from whatever development occurs there. They're trying to develop it uniformly.
(Transcript, 2-3)

Factor 5 The Ability of the Special District to Provide Economical and Sufficient Service to Both the Property to be Excluded and all of the Properties Within the Special District's Boundaries.

Factor 5 was addressed by the Districts in the Denial Resolutions, each of which states, "The ability of the District to provide economical and sufficient service to both the property to be excluded and all of the properties within the District's boundaries will be affected and there will be an increased financial impact to the customers of the District."

There was discussion relevant to Factor 5 concerning early retirement of debt, and overall negative financial impact to the Districts:

SPEAKER 2: Do we do development fees from that, from Shook? How much per home, like when they pop a house up? How much then?

SPEAKER 4: They were \$4000.

SPEAKER 2: So that'd be over \$120,000 that we'd be losing then, and that's for us to use for whatever.

SPEAKER 3: And there is trans-participation of early retirement of your debt.

SPEAKER 2: Right.

SPEAKER 1: So, you know, if you don't collect those ... potentially, or you do, those would go towards, most likely toward early retirement of your debt service.

SPEAKER 3: Okay. I see what you're saying. So we use the \$4000 towards the debt service.

SPEAKER 4: Wait, now it's not placed in the debt but...

SPEAKER 2: But it could be.
(Transcript, 7)

SPEAKER 2: For Eagle Shadow, petitioner has not presented and asked for this district to provide any improvements on that property, so as far as the record in the district is concerned, no one else is providing those improvements because we haven't been asked to do it either. So you can only do what you've been asked to do. You haven't received such request. For Park and Rec, it's a different discussion because we're not looking backwards, we're looking forwards. We're looking backwards to an extent that, yes, you've invested in parks and trails and everything else that are gonna benefit these residents, but you also are providing ongoing services such as maintaining all of the fences throughout the entire community that provide the image that benefits their property. You're gonna keep maintaining those properties. You're maintaining regional drainage. You're doing a lot of things that benefit that property as well. So for those purposes, again, no one else can provide those services because you're the only one having jurisdiction to do that at this point, and we haven't, again, heard anything saying, "We've got X,Y,Z, who's willing to come in and provide Park and Rec services to this property in lieu of your district doing it?"
(Transcript, 10-11)

Factor 6 Whether the Special District is Able to Provide Services at a Reasonable Cost Compared with the Cost that Would be imposed by Other Entities in the Surrounding Area to Provide Similar Services in the Surrounding Area or by the Fire Protection District or County Fire Improvement District that has Agreed to Include the Property to be Excluded from the Special District.

Factor 6 was addressed by the Districts in the Denial Resolutions, each of which states, "The exclusion will affect the District's ability to fund services and improvements at a reasonable cost compared with the cost that would be imposed by other entities in the surrounding area to provide similar services and improvements. The loss of revenue will lead to

increased costs to the customers of the District, both current and present. No other districts have agreed to provide the services.”

There was discussion relevant to Factor 6 regarding how water would be provided to Petitioner’s property, if it was excluded:

SPEAKER 2: Are they gonna have curb and gutter, sewer? Are they cozying up to Highland Acres and getting their water from them?

MR. DICKHONER: They’ll be getting their water from Todd Creek Village.

SPEAKER 2: Or from the metro district?

MR. DICKHONER: Yeah, from the metro district. That’s the metro district service area.

SPEAKER 2: The amount of culverting and all that that’s going on over there, I was like, it almost like curb and gutter was ... and, you know, hooking up with Highland Acres. I was just curious.

MR. DICKHONER: They’re in the Todd Creek service area.
(Transcript, 5)

Factor 7 The Effect of Denying the Petition on Employment and Other Economic Conditions in the Special District and Surrounding Area.

Factor 7 was addressed by the Districts in the Denial Resolutions, each of which states, “The effect of denying the petition on employment and other economic conditions in the District and surrounding area is negligible.”

There was no discussion regarding impact on employment. And the discussion regarding economic impact was specific to the special districts and Petitioner property at issue.

Factor 8 The Economic Impact on the Region and on the Special District, Surrounding Area, and State as a Whole if the Petition is Denied or the Resolution is Finally Adopted.

Factor 8 was addressed by the Districts in the Denial Resolutions, each of which states, “The Board’s decision to deny the petition will not have an impact on the region or on the District, surrounding area, or state as a whole, except to the extent the District will be impacted from the retained revenue.”

Here, again, the discussion regarding economic impact was primarily focused on the interests of the parties hereto, and did not include regional or statewide considerations.

Factor 9 Whether an Economically Feasible Alternative Service May be Available.

Factor 9 was addressed by the Districts in the Denial Resolutions, each of which states, “An economically feasible alternative service is not available.”

Discussion relevant to Factor 9, which occurred after the Districts had voted to deny exclusion, consisted of Mr. Dykstra suggesting a possible alternative to Mr. Dickhoner:

MR. DYKSTRA: Before you go, FYI, for your information, we have very similar requests from Baseline Lakes over here. Instead of the exclusion, because of the reasons and findings of the board to deny that exclusion, we instead did a sub-district with them, so you might want to discuss with your clients if that’s something of interest. That way, they have control over it. This board just blesses the issuance of the bonds, that’s it.
(Transcript, 17)

Factor 10 The Additional Cost to be Levied on Other Property Within the Special District if the Exclusion is Granted.

Factor 10 was addressed by the Districts in the Denial Resolutions, each of which states, “There will be additional costs levied on the property remaining in the District if the Board grants the petition.”

Discussion relevant to Factor 10 has been set forth above. The focus was primarily on the revenue that the Districts would lose if Petitioner’s property was excluded. And on the collateral negative financial impacts that would flow to the property owners that remained in the Districts.

All 10 Factors Stated for the Record Prior to the Districts’ Denial of Exclusion

Shortly before the Districts’ board members voted on Petitioner’s request for exclusion, Mr. Dykstra stated the following:

MR. DYKSTRA: Yes, I just want to run them through the criteria so that if there’s any additional discussion—I know the board has all seen this before, but the criteria of exclusion: It is not in the best interests of the property to be excluded. Exclusion is not in the best interests of the district as it would result in a substantial reduction of revenue due to loss of fees and operation and maintenance ability the district would realize if the property is excluded from the district. Exclusion is not in the best interest of Adams County. The relative cost from the district services to the property to be excluded and the benefit from the district services to the property is significant. The ability of the district to provide economical and sufficient service to both the property to be excluded and all of

the properties within the districts properties will be affected, and there will be an increased financial impact on their taxpayers and residents of the district. The exclusion will affect the district's ability to fund services and improvements. The effect of denying the petition on employment and other economic conditions in the district and other surrounding areas is negligible. The board's decision to deny the petition will not have an impact on the region or on the district, surrounding area, or state as a whole, except to the extent the district will be impacted from the lost revenue. If an economically feasible alternative service is not available, there will be additional cost levied on the property remaining in the district if the board grants the petition for exclusion.

So those are the statutory criteria findings. By voting in favor of this (denying exclusion), you are making those findings. If there is any discussion you would like to have regarding the backing of those findings, now's the time to do it, or you can...

(Transcript, 16)

STAFF RECOMMENDATION

Based on the record of the hearing before the special districts (including the unofficial transcript), it appears that there is sufficient information to find that the statutory factors favor the District's decision to deny Petitioner's request for exclusion. The Districts are in the best position to evaluate most of the statutory factors to the extent that they involve potential impacts to the Districts. The BOCC would have sufficient information in the record to uphold the decision of the Districts and deny the request to exclude the property.

In the alternative, the BOCC could conclude that the record before it does not support the decision of the Districts and that the property does in fact meet the criteria for exclusion. In that case, the BOCC should overturn the decision of the Districts and grant the petition to exclude the property.