

<p>District Court, Boulder County, Colorado Court Address: Boulder County Justice Center 1777 6th Street Boulder, CO 80302</p> <p>Plaintiffs:</p> <p>Charles Wibby, et al. v.</p> <p>Defendant:</p> <p>Boulder County Board of County Commissioners.</p>	<p>COURT USE ONLY</p>
<p>Attorneys for Plaintiffs Madeline Meacham, #13361 HALPERN MEACHAM 1790 30th Street, Suite 280 Boulder, Colorado 80301 Phone Number: (303) 449-6180 mmeacham@halpernllc.com</p>	<p>Case Number: 13 CV 31685</p> <p>Division Courtroom</p>
<p>BRIEF IN SUPPORT OF RULE 106(a)(4) COMPLAINT</p>	

Plaintiffs, Charles Wibby, et al. (“Plaintiffs”), request that the court find, pursuant to C.R.C.P. Rule 106(a)(4), that the Boulder County Board of County Commissioners exceeded its jurisdiction and abused its discretion, and invalidate the authorization and formation of the Subdivision Paving Local Improvement District for the purpose of rehabilitating public paved roads, as reflected in Resolutions 2013-84, 2013-97, and 2013-106, and order the return of assessments and installments that have been paid, with interest, and removal of liens based on assessments imposed. In support of their motion, Plaintiffs state and allege as follows:

STATEMENT OF FACTS

1. There are 150 miles of paved county roads that serve 120 subdivisions, as well as providing access for other public uses, (“subdivision roads”) in unincorporated Boulder County. They constitute 38% of paved county roads. (Transportation PowerPoint, R. 38)

2. Boulder County approves subdivisions and requires developers or property owners to pay to bring those roads up to county standards, prior to dedication and acceptance by the county. All of these roads were accepted as county roads. In many cases they were expressly accepted for maintenance or Boulder County assured residents that the county would maintain the roads. C.R.S. 30-28-133; (Public Comments, R. 334; 344; 440; 449; 1346; 1501; 1530-1532; 1560; 1732; 1755; Property Owner Testimony, R. 1801, 1.18-1802, 1.21; 1804, 1.9-1805, 1.7; 1883, 1.8-1884, 1.24; 1900, 1.20-1901, 1.15; 1904, 1.10-1905, 1.1

3. Paved roads need to be maintained, or they deteriorate. In order to prevent deterioration of the road surface, chip sealing and overlay must be performed over time. If deterioration goes beyond a certain point, the road must be repaired or reconstructed to return it to operable condition. (Transportation PowerPoint, R. 173-174; 176; 511) The Boulder County Transportation Department, which includes the Road and Bridge Fund, receives millions of dollars annually from various sources, including state gas tax, specific ownership tax, state FASTER funds, federal funds, sales tax and the county Road and Bridge property tax mill levy. (Transportation PowerPoint, 469; 492; 553; 556 and supporting Transportation budget documents, R. 2316-2407)

4. Transportation has used the Road and Bridge fund for ongoing maintenance and operations, and for long term maintenance. Long term maintenance since 1995 includes the overlay of arterial and collector highways. It also includes acquiring and maintaining road

maintenance equipment. (Budget documents, R. 2226-2228; 2236; 2238-2239; 2244-2245; 2248-2253; 2266-2269; 2271-2277; 2283-2288; 2295-2300) Overlay projects have included adding shoulders to county roads for “multi-use shoulders” (bicycles) (Budget documents R. 2230-2234; 2279-2281; 2302-2305) These budget documents reflect that the county is spending millions of dollars annually on maintenance of collector and arterial roads and expanding shoulders for bike users. They also reflect that the county has millions of dollars in revenue available for other projects, such as trails and transit.

5. However, the percentage of county property taxes used for roads, as a percentage of the county budget, has decreased from 8.6% in 1995 to .8% in 2012. (Analysis of property tax revenue, reserves and property tax allocated to the road fund, R. 1232)

6. Prior to the mid-nineties, Boulder County included resurfacing and chip sealing of subdivision roads in its maintenance responsibilities. (Public Comments, R. 82; 347; 426; 1714) Other counties include chip sealing, overlay and asphalt reconstruction in their maintenance responsibilities toward subdivision roads. (Subdivision Services Survey, prepared by Boulder County, R. 830) (Public Comment, R. 39; 144; 173; 926, Transportation PowerPoint R. 509-510)

7. Boulder County decided to eliminate resurfacing, chip sealing and reconstruction of roads that primarily serve subdivision, as determined by the county (“subdivision roads”) at some point in the mid-nineties. (Staff comments, R. 288, Commissioner Jones comments, R. 1823, 1.1-3) Boulder County claims that this major change of policy was expressed in a change to the Comprehensive Plan in 1999, but that change did not reference county

subdivisions. It only stated that “priority shall be given to the rehabilitation of the county’s arterial and collector roadways through the use of Road and Bridge Fund revenues. Local access roadways that serve special interests such as industrial developments, shall be rehabilitated through special assessments or other funding mechanisms. Primary funding responsibilities shall be assigned to the users benefiting from these improvements.” (TR 5.02, Transportation Element 1999 Comprehensive Plan R. 2131; Frequently asked questions R. 473))

8. Subdivision roads were simply allowed to deteriorate. (Property Owner Testimony, R. 1772, 1.25-1774, 1.12; 1775, 16-10, Public Comment, R. 39; 144; 173; 926, Transportation PowerPoint R. 509-510) Pothole filling and patching and snow plowing became more difficult and expensive and public safety became a concern due to increases in potholes, deteriorating drainage, and inability to clear snow. Costs of deferred maintenance reached \$22 million. (Transportation PowerPoint, R. 31; 45; 543; 758; 817-825)

9. In 2009 Boulder County decided to address the fact that fifteen years of county neglect had resulted in severe deterioration of subdivision roads. To address this issue, which the County now considered urgent, Transportation started studying some mechanism to impose the majority of the cost of maintenance of subdivision roads on property owners. (R. 29; 178; Gerstle Testimony, R. 1775, 1.11-14)

10. Also in 2009, the County amended the Comprehensive Plan to provide some underpinning for their plan. The amendment stated that the County would “give priority to improving mobility in, and the maintenance and rehabilitation of, the County’s arterial and collector transportation corridors.” TR 3.01, Transportation Element (2009 Comprehensive Plan R. 2123, Transportation Presentation, R. 558). The amendment also defined maintenance and

rehabilitation for the first time. Maintenance was defined as snow removal, sweeping, asphalt patching, crack filling, road grading, cleaning of culverts and roadside drainage and repair or replacement of traffic signs and pavement markings. Rehabilitation was defined as reconstruction, asphalt overlay and surface treatments. (2009 Comprehensive Plan, R. 2128)

11. In 2012, the County proceeded with a plan to fund resurfacing, chip sealing and reconstruction of roads by placing a Public Improvement District ("PID") on the November 2013 ballot and establishing a Local Improvement District ("LID"), if the PID was rejected by the voters. From the outset, property owners were informed that, even if the PID was not approved, the Commissioners would approve the formation of an LID to fund maintenance of subdivision roads. Although the PID statute expressly authorizes maintenance, and LID statute does not, unless the maintenance is funded by a sales tax. Nevertheless, the county planned that either district would assess the costs of maintenance on 10,900 properties in subdivisions in the unincorporated county. (Transportation PowerPoint R. 178-186; Hearing Transcript R. 1968-1983)

12. On September 10, 2013 Boulder County, in anticipation of the possible defeat of the proposed PID declared "the creation of the subdivision paving local improvement district for the purpose of rehabilitating public paved roads; a preliminary order for those improvements and ordering publication and mailing of notice of hearing" in resolution No. 2013-84. (Resolution R. 142-151)

13. C.R.S. 30-20-603(5) requires a preliminary order adopting preliminary plans and specifications for the improvements authorized, definitely describing the materials to be used or

stating that one of several specified materials shall be chosen. The resolution declares that it is in compliance with C.R.S. 30-20-603(5) and shall constitute the preliminary order and that preliminary plans and specifications prepared by the county engineer are approved and adopted. However, no preliminary plans and specifications were submitted to the Board at this hearing or made an attachment to the resolution.

14. The only specification of materials consists of this language in the notice of hearing: "All persons are further notified that the kind of improvements proposed and the materials to be used are as follows: Rehabilitating of the public paved roads within the District, including but not limited to the placement of hot bituminous pavement, drainage and shoulder improvements."

15. The resolution of September 10, 2013, directed that notice be published and mailed, and notice was published on September 13, 2013; and mailed on September 23, 2013. (R. 150-151; 158)

16. On October 21, 2013 Boulder County held a hearing "authorizing the construction of certain improvements within the subdivision paving local improvement district, describing the improvement and the location of the district and setting forth the costs of the improvements and method of payment of the improvements" by Resolution 2013-97. The resolution provided that "should the electors in the District approve formation of the Subdivision Paving Public Improvement District at the November General Election, the Subdivision Paving Local Improvement District shall be dissolved and be of no further force and effect." No additional specifications or plans were submitted. (Resolution and supporting documents, R. 149-228)

17. On November 5, 2013, electors in the unincorporated county voted down the public improvement district and on November 18, 2013, the Boulder County Commissioners held a hearing on proposed Resolution 2013-106, assessing and apportioning the cost of public improvements upon each lot or tract of land within the subdivision paving local improvement district. No additional specifications or plans were submitted. (Resolution and supporting documents, R. 229-457) Numerous property owners objected to their inclusion in the district, on various grounds. (Property owner emails, R. 280-295; 334; 339; 343; 347; 359; 399; 426; 436; 439-440; 447; 449 are illustrative; there are hundreds of objections in the Record).

18. The Resolution provided that the Subdivision Paving Local Improvement District consists of 10,900 noncontiguous and disparate subdivisions throughout the county. Essentially “all parcels located in unincorporated Boulder County with drivable access on or to a Boulder County owned paved road that is located within any of the subdivisions that have paved roads owned by Boulder County” are included in the district, “even if they are located outside the listed subdivisions as they use those roads for access...even if another access to the parcel exists” (Gerstle Testimony, R. 1831, 1.18-1832, 1.17) These property owners would be forced to pay a special assessment within thirty days or face an encumbrance on their property due to its inclusion in the special district. The assessment formula is 1) 25% based on a property's value and 2) 75% based on length of road in the subdivision where the property is located. No adjustments are made for individual circumstances. The formula does not factor in the current condition of the roads. (Gerstle Testimony, R. 1834, 1.15-1835, 1.17, Resolution R. 238-240; 459-461)

19. On November 21, 2013 The Board approved final apportionment of the cost of improvements in the LID. This added exceptions to the previous Apportionment Formula as expressed in Resolution 2013-106. It excludes from assessment: vacant land, out lots, and severed mineral interests, until such time as they are developed. It excluded Legend Ridge subdivision, based on the subdivisions request to make their roads private. It excluded from assessment 107 properties in the Bow Mountain subdivision and Carriage Hills subdivision that utilize Wagon Wheel Road [sic] for access due to flood reconstruction that may be paid from other sources. (Resolution R. 459-461)

20. Since no plans or specifications exist, the only source for description of the work is various screen shots and presentations made by Transportation. (Gerstle Testimony, R. 1778 1.15-21) An undated fact sheet states “Specific details for how the PID or LID ultimately will be structured are still being worked out.” It does state assumptions, that all roads will receive a chip seal surface treatment and either be reconstructed or repaved (overlaid). (County Fact Sheet, R. 480) A strategy of reconstructing poor roads as soon as possible and chip sealing fair roads closest to the poor category during reconstruction of the poor roads is proposed. Overlaying fair roads that can no longer be effectively chip sealed will be done after reconstruction of poor roads. (Transportation PowerPoint, R. 500) With an LID there is no mechanism for funding the ongoing costs of chip sealing and resurfacing. This shortcoming of LIDs was discussed early on, but appears to have dropped out of the discussion after the PID was voted down. (Transportation Department 2012 handout, R. 32-33; Transportation PowerPoint, R. 46-47) As discussed above, chip sealing and resurfacing will continue to be required to keep subdivision roads in functional condition. This is demonstrated by the deterioration that took place on county roads from 2009 to

2012 without chip sealing and resurfacing being done, and by Transportation's life cycle exhibit. (Transportation PowerPoint R. 174; 176; 511)

21. The roads in question often provide access for non-subdivision traffic and also provide access to regional destinations such as schools, trailheads and places of worship. (R. 29) The county proposed to pay \$14.4 million, or 20% of the "present estimated costs of the proposed improvements" to address this public use. No calculations in support of the 20% were provided. (Transportation PowerPoint, R. 253)

22. Assessments average \$5,756.00 per property. The County's estimates of the total cost of improvements increased from \$48 million in 2012 (Transportation 2012 PowerPoint, R. 41) to \$72 million. (Resolution, R. 146; Gerstle Testimony, R. 1833, 1.7-11) Additional assessments can be imposed if costs exceed \$72 million. (Gerstle Q & A, R. 1840, 1. 15-1841, 1.1)

23. The overwhelming majority of property owners who spoke at the hearings held on the LID were opposed to its formation. (Public Testimony, R. 1787, 1.9-1815, 1.10; 1849, 1.20-1927, 1.7)

SUMMARY OF THE ARGUMENT

The Local Improvement District statute does not authorize counties to create local improvement districts and impose assessments on property within the district to fund ongoing maintenance of county roads. The LID statute only authorizes counties to use an LID to fund maintenance and operations of roads when the district is funded by a sales tax. Counties are authorized to create an LID for specific purposes. Maintenance is not included in this general

authorization. C.R.S. 30-20-603(1)(a). The court must seek to determine the intent of the legislature as expressed in the language it selected and omitted in the LID statute and elsewhere. Statutes are to be construed as a whole to give a consistent, harmonious, and sensible effect to all of their parts. The LID statutes must be construed in harmony with the statutes that establish county responsibilities for road construction and maintenance in Title 43 of the Colorado Revised Statutes, land use statutes that prohibit counties from imposing the costs of public benefits on property owners, and budget statutes that define maintenance. When these statutes are construed in harmony, it is clear that the maintenance of county roads is a public benefit, and the omission of maintenance from the authorization to impose special assessments through an LID is intentional. The LID statute is intended to provide for construction of improvements that specially benefit existing properties because other mechanisms exist to fund maintenance and improvements that benefit new development.

When the legislature wanted to authorize maintenance in addition to construction, it did so. When a word is included in one section of a statute and omitted in another section, it should not be implied in the section where it has been omitted. Where maintenance is not expressly authorized, it cannot be implied. The court need not go any further in analyzing the statute; when the language is plain and its meaning clear, it must be applied as written.

The county is trying to avoid the clear intent of the legislature by saying that the subdivision paving project which contemplates overlay or resurfacing and chip sealing roads, is not maintenance but something it calls rehabilitation. This is word play. A court will not be bound by the county's narrow definition of maintenance versus rehabilitation for the purpose of

interpreting the LID statutes; it will look at legislative intent and common usage. The dictionary definition of maintenance, the definition of the term maintenance in other statutes and in Boulder County Transportation documents, the County's practices, other county's practices, precedent, and the understanding of the public all establish that road maintenance, in common usage, includes overlay or resurfacing, chip sealing and reconstruction.

ARGUMENT

Under C.R.C.P. 106(a)(4), a trial court's review of an agency's judicial or quasi-judicial decision is "limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion." C.R.C.P. 106(a)(4)(1). Abuse of discretion has occurred if a decision is not reasonably supported by any competent evidence in the record, or if the agency has misconstrued or misapplied applicable law. *Huspeni. v. El Paso County Sheriff's Dep't*, 196 P.3d 892, 900 (Colo. 2008). A court is not bound by the agency's construction because the court's review of the applicable law is de novo. In reviewing the agency's construction, the court relies on the basic rules of statutory construction, affording the language of the provisions at issue their ordinary and common sense meaning. *City of Commerce City v. Enclave West, Inc.*, 185 P.3d 174 (Colo. 2008); *Sheep Mt. Alliance v. Bd. of County Comm'rs*, 271 P.3d 597 (Colo. Ct. App. 2011).

Boulder County abused its discretion when it misapplied the LID statute to authorize imposition of assessments for maintenance of subdivision roads. The LID statute is clear on its face. The County Local Improvement District Act authorizes counties to construct improvements, and to organize public improvement districts and/or local improvement districts

for the purposes and powers provided in the Act. Specifically, C.R.S. 30-20-603(1)(a) authorizes organization of local improvement districts to make tangible improvements to property, including constructing, grading, paving, pouring, curbing guttering, lining or otherwise improving the whole or any part of any street. Local Improvement Districts may be funded by a sales tax or an assessment. C.R.S. 30-20-603; C.R.S. 30-20-604.5. An assessment is only permitted if the property subject to an assessment receives a special benefit. C.R.S. 30-20-604. The Act expressly authorizes using an LID to pay for maintenance paid for with a sales tax C.R.S.30-20-603(1)(c) and maintenance of railroad crossing safety equipment C.R.S.30-20-603(1)(c). The legislature authorized the formation of PID's for maintenance. In the Public Improvement District statute, authority is given for acquisition, construction, installation, operation or **maintenance** of improvements. C.R.S. 30-20-504(1)(a). A Public Improvement District ("PID") requires voter approval, and is funded with ad valorem taxes. C.R.S. 30-20.514.

A court's fundamental responsibility in construing a statute is to ascertain and give effect to the purpose and intent of the general assembly in enacting it. In doing so, the court reads applicable statutory provisions as a whole in order to accord consistent, harmonious, and sensible effect to all their parts. The court looks to the plain meaning of the language the general assembly employed and gives it effect if possible. If the plain meaning is clear, there is no need to resort to interpretive rules and statutory construction. [*People v. Voth*, 312 P3d 144 \(Colo. 2013\)](#). When interpreting a comprehensive legislative scheme, the court construes each provision to further the overarching legislative intent. [*Shaw v. 17 W. Mill St., LLC*, 307 P3d 1046 \(Colo. 2013\)](#). Words and phrases should be given effect according to their plain and ordinary meaning, and 'we must choose a construction that serves the purpose of the legislative scheme,

and must not strain to give language other than its plain meaning, unless the result is absurd.'" *City of Westminster v. Dogan Constr. Co.*, 930 P.2d 585, 590 (Colo. 1997) [quoting *Colorado Dep't of Social Services. v. Board of Comm'rs*, 697 P.2d 1, 18 (Colo. 1985)].

In order to determine legislative intent in the LID statute as it relates to road maintenance, the court should consider the entire legislative scheme that relates to road maintenance. There are three other titles that establish county responsibilities for road construction and maintenance. Title 43 of the Colorado Revised Statutes establishes that construction and maintenance of county roads is a county responsibility, and provides funding for that responsibility. The county land use statutes establish that counties have limited authority to require new development to pay for construction of roads that benefit the development. Title 29 deals with local government budget and services, and Part 7 of Article 1 of deals specifically with construction bidding for state funded local projects. C.R.S. 29-1-703(4) includes a broad definition of maintenance that applies to roads and includes resurfacing and chip sealing.

All roads accepted by the county are, by statute, either primary or secondary county roads. C.R.S. 43-2-108; 43-2-110; 43-2-201. Primary and secondary roads are assigned to the county for construction **and maintenance**. C.R.S. 43-2-111. The county is required to report to the state highway operations and maintenance division on expenditures for construction, **maintenance**, acquisition of equipment and administration. C.R.S. 43-2-120. The county is authorized to establish a county road and bridge fund for construction, **maintenance** and administration, C.R.S. 43-2-202, and to levy a property tax for road and bridge fund expenditures. C.R.S. 43-2-203. In addition to property taxes, the road and bridge funds receive money from state funds. The highway users fund is provided for construction, engineering,

reconstruction, maintenance, repair, equipment, improvement and administration of county roads. C.R.S. 43-4-207(1). Other available funds are federal funds, grants, and in the case of Boulder County, a sales tax. The Road and Bridge fund is for road and bridge purposes only. *Greeley v. Board of County Comm'rs*, 644 P.2d 76, 76-77 (Colo. Ct. App. 1981) (The legislature wisely provided for a specific fund annually for road and bridge building and maintenance purposes, which fund is as specific and sacred for the purposes of its creation as the common school fund, and can no more be diverted and otherwise appropriated by county authorities); *McDonald v. Glenwood Springs*, 267 P.2d 1111, 1113 (Colo. 1954) (the County Road and Bridge Fund for each respective county was created to receive the numerous tax moneys to be expended by a county for road and bridge construction, maintenance and administration).

The respective responsibilities of property owners and the county for construction and maintenance of county roads are also addressed in the County Planning and Building Codes which include statutes governing subdivision approval. The legislature granted counties the authority to approve subdivisions in the unincorporated county, and to require construction of improvements to serve new development and additions to existing development as a condition of approval of new development. C.R.S. 30-28-133 -C.R.S.30-28-137. Street improvements may be required. C.R.S. 30-28-133(3)(b)(VII). Negotiation of a public improvements agreement is the context for assessing, agreeing upon and implementing, if agreement can be reached, the infrastructure design of the **new community or the proposed addition to an existing community**. C.R.S. 30-28-137. One of the main purposes of the enabling act and county regulations is to require a subdivider to lay out and construct streets and other improvements in accordance with the state and county standards **before the maintenance is taken over by a**

public agency and to relieve the public to this extent of the burden that would otherwise exist.

General Ins. Co. v. Colorado Springs, 638 P.2d 752, 758 (Colo. 1981)

This authority is strictly limited. Apportionment of road improvement costs must be made among various parties **who would be benefited** and it must be equitable. C.R.S. 30-28-133(12); *Beaver Meadows v. Board of County Comm'rs*, 709 P.2d 928, 938 (Colo. 1985). This is in keeping with Supreme Court cases that limit exactions to what is necessary to cover the cost of improvement that are made necessary by new development. Local government is not allowed to use the occasion of a property owner applying for development approval to require contributions that are really for the benefit of the general public. The Supreme Court in *Dolan v. City of Tigard*, 512 U.S. 374 (U.S. 1994) observed that one of the principal purposes of the takings clause of the Federal Constitution's Fifth Amendment, in prohibiting the taking of private property for public use without just compensation, is to bar a government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Counties are also limited to exactions which have been expressly authorized. In *Board of County Comm'rs v. Bainbridge, Inc.*, 929 P.2d 691 (Colo. 1996) the court held that where a specific statutory provision controls the maximum school related fee that can be exacted and prescribes when and how it shall be paid, county commissioners have no implied power to require additional monetary exactions after subdivision approval. The court noted that a county is not an "independent governmental entity existing by reason of any inherent sovereign authority of its residents; rather, it is a political subdivision of the state, existing only for the convenient administration of the state government, created to carry out the will of the state,"

quoting *Board of County Comm'rs v. Love*, 470 P.2d 861, 862 (1970); accord *Board of County Comm'rs v. Bowen/Edwards Assocs.*, 830 P.2d 1045, 1055 (Colo. 1992).

As political subdivisions of the state, counties have only those powers that are expressly granted to them by the Colorado Constitution or by the General Assembly. *Bowen/Edwards*, 830 P.2d at 1055. This limitation on county authority has been applied in many contexts. *Bd. of County Comm'rs of Adams v. Colo. Dep't of Pub. Health & Env't.*, 218 P.3d 336, 344 (Colo. 2009); *Colo. Mining Ass'n v. Bd. of County Comm'rs*, 199 P.3d 718, 723 (Colo. 2009); *Droste v. Bd. of County Comm'rs of the County of Pitkin*, 159 P.3d 601, 606 (Colo. 2007); *Skidmore v. O'Rourke*, 383 P.2d 473, 475 (Colo. 1963).

Other principles of statutory construction support this analysis. It is a well-established canon of statutory construction that when a word is included in one section of a statute and omitted in another section, it should not be implied in the section where it has been omitted. *Sall v. G.H. Miller & Amp Co.*, 612 F. Supp. 1499, 1503 (D. Colo. 1985). Words omitted by the Legislature may not be supplied as a means of interpreting a statute. *Miller v. City & County of Denver*, 315 P.3d 1274, 1278 (Colo. Ct. App. 2013). Courts are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. *Regions Hosp. v. Shalala*, 522 U.S. 448, 467 (U.S. 1998); *United States v. Hasan*, 609 F.3d 1121, 1128 (10th Cir. Okla. 2010). The court cannot read maintenance into C.R.S.30-20-603(1)(a). When the legislature wanted to authorize maintenance, it did so. The court need not go any further in analyzing the statute; when the language is plain and its meaning clear, it must be applied as written.

The fact that the LID statute authorizes maintenance when it is funded by a sales tax also supports this intention. Maintenance is authorized for Local Improvement Districts in C.R.S. 30-20-603(1)(c), which provides that "If any improvement...authorized by this subsection (1) are funded by sales tax, the tax may also be used for the operation and maintenance of such improvement or services..." A tax is the appropriate mechanism for funding a public benefit. *People ex rel. Rogers v. Letford*, 79 P.2d 274 (Colo. 1938). A sales tax requires voter approval. C.R.S. 30-20-604.5. The PID statute is also consistent with the special benefit/public benefit distinction. It authorizes maintenance, but PIDs are funded by levying ad valorem taxes. C.R.S. 30-20-514. A hallmark of [ad valorem] taxes is that they are intended to raise revenue to defray the general expenses of the taxing entity. *Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008); *Zelinger v. City and County of Denver*, 724 P.2d 1356, 1358 (Colo. 1986). The legislature sees maintenance and operation of improvements as a public benefit and function of government.

Boulder County tries to justify the use of an LID for road maintenance on the theory that subdivision roads are primarily used by residents of the subdivisions. The principles that exactions can be imposed on new development that creates the need for additional services, or that construction of improvements that specially benefit property can be funded with assessments do not justify this leap. Not every benefit that is used by a subset of the public justifies an assessment over a tax. Schools benefit households with children, but are funded by property taxes. Boulder funds improvements for bicycles out of the Road and Bridge fund, in spite of the fact that the majority of people in the county don't ride bikes on county roads. Open space is funded by taxes, in spite of the fact that not everyone in Boulder County uses open space. Use of

county roads, like school attendance, or bikeways, or trails, or open space, is something that all citizens of Boulder County have a right to, without being targeted for special assessments.

Boulder County has argued that the maintenance argument is a “red herring” because the county defines resurfacing, chip sealing and reconstruction as “rehabilitation.” Boulder County cannot redefine maintenance to frustrate the intent of the legislature. Plain meaning and common usage of the term maintenance is clear from the dictionary definition, county practice before 1995 and on collector and arterial roads, county use of the term maintenance for arterial and collector roads, the practice in other counties, the understanding of the average person, and the use of the word in other contexts. Chip sealing, resurfacing, and reconstruction are included in the word maintenance, as used or omitted by the legislature in the LID statute.

Although Title 43 and the LID statute do not expressly define maintenance, maintenance has been broadly defined for the purpose of regulating construction bidding for state funded local projects. In C.R.S. 29-1-703(4) a "Defined maintenance project" means any project that involves a significant reconstruction, alteration, or improvement of any existing road, highway, bridge, structure, facility, or other public improvement, including but not limited to repairing or seal coating of roads or highways or major internal or external reconstruction or alteration of existing structures.” "Defined maintenance project" does not include routine maintenance activities such as snow removal, minor surface repair of roads or highways, cleaning of ditches, regrading of unsurfaced roads, repainting, replacement of floor coverings, or minor reconstruction or alteration of existing structures. The distinction that the county makes between “ongoing maintenance (snow removal, minor surface repair, etc.) and long term maintenance (reconstructing and repairing, etc.) has validity, but they are both maintenance.

Words in statutes are used with common and everyday meaning which are understandable to the average reader. C.R.S. 2-2-801. The statutory definition of C.R.S. 29-1-703(4) is consistent with common usage. Black's Law Dictionary, 9th Edition, defines maintenance broadly as: "the care and work put into property to keep it operating and productive; general repair and upkeep." Webster-Merriam defines maintenance as: the upkeep of property or equipment. Roads which are not chip sealed and resurfaced will deteriorate. If deterioration is severe enough, the road will have to be reconstructed. Those activities are necessary to the upkeep of the roads and to keep them operative, and are included in the term "maintenance."

Case law supports a broad definition of road maintenance. In [*Bloom v. Ft. Collins*, 784 P.2d 304 \(Colo. 1989\)](#), the city council in Fort Collins defined road maintenance to include, without limitation, the following activities: patching, crack sealing, seal coating, overlaying and other activities as are necessary in order that local streets and related facilities may be properly maintained and that the health, safety, and welfare of the city and its inhabitants may be safeguarded." See, also, *Glencoe Paving Co. v. Graves*, 94 So. 2d. 872 (Ala. 1957) (holding that repaving is maintenance, not improvement, and citing numerous cases from other jurisdictions in support).

County practice and public understanding support a broad definition of maintenance. Prior to the mid-nineties, Boulder County included resurfacing and chip sealing of subdivision roads in its maintenance responsibilities. Boulder County continues to perform resurfacing and chip sealing of collector and arterial county roads and it refers to those activities as long term maintenance. Other counties include resurfacing and chip sealing in their subdivision road

maintenance programs. Property owners whose roads were accepted for maintenance understood that to include all activities necessary for upkeep of roads.

The LID statute gives counties tremendous power-the ability to impose the costs of some improvements on a specific group of property owners, whether they want them or not. That kind of power can only be justified when that group of property owners generating the need for new improvements is getting a special benefit in the form of construction of new improvements. To extend that power to allow the county to shift its ongoing responsibilities to provide public services would expand the use of an LID far beyond the purposes of the authorizing statute, and it would be a terrible precedent. The temptation is too great. It is too easy to target a minority and burden them with responsibilities that the majority may be unwilling to pay for with increased taxes. It is the same temptation that the Supreme Court has warned of in the land use exaction context. The legislature understood this when it drafted the statute, and the court should apply the statute as written, and reject the county's attempt to expand its authority.

WHEREFORE, the Plaintiffs respectfully request that the Court enter judgment as follows:

- A. Finding that the Boulder County Board of County Commissioners exceeded its jurisdiction and abused its discretion in authorizing and forming the Subdivision Paving Local Improvement District and imposing assessments on properties within the District, for the purpose of rehabilitating public paved roads, as reflected in Resolutions 2013-84, 2013-97, and 2013-106,
- B. Invalidating the authorization and formation of the Subdivision Paving Local Improvement District and imposition of assessments on properties within the District.

C. Ordering that Boulder County promptly return the assessments and/or installments collected, with interest, and remove all liens imposed pursuant to Resolutions 2013-84, 2013-97, and 2013-106.

D. Award Plaintiffs their costs, expenses of litigation, and attorney fees to the full extent allowed under Colorado law, with pre-judgment and post-judgment interest as allowed by law.

Respectfully submitted this 3rd day of April, 2014.

HALPERN MEACHAM

s/ Madeline Meacham

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies that on the 3rd day of April, 2014, a true and correct copy of the foregoing **BRIEF IN SUPPORT OF RULE 106(a)(4) COMPLAINT** was filed and served electronically via ICCES, upon:

David Hughes
Leslie Wright Lacey
Boulder County Attorney
P.O. Box 471
Boulder, CO 80306

s/ Jaana H. Bowers

Jaana H. Bowers