District Court, Boulder County, Colorado Court Address: Boulder County Justice Center 1777 6th Street Boulder, CO 80302 Plaintiffs: **Charles Wibby, et al.** v. Defendant: **Boulder County Board of County Commissioners.**	DATE FILED: July 27, 2014 1:50 PM CASE NUMBER: 2013CV31685 **COURT USE ONLY**
	Case Number: 13 CV 31685 Division Courtroom

ORDER RE: RULE 106(a)(4) COMPLAINT
(AUTHORITY ISSUE)

This matter comes on for ruling on the Plaintiffs' Rule 106(a)(4) Complaint. Specifically, the court has ordered and the parties have agreed that the court should first address the issue of whether there is statutory authority for the action the Defendant Board of County Commissioners (Hereinafter, "the Board") took beginning on September 10, 2013 with the passage of Resolution 2013-84, establishing the Subdivision Local Improvement District (Hereinafter "LID") for the purpose of "rehabilitating" public paved roads. The court and the parties agree that a conclusion that the Board was without authority will be dispositive and will result in a final judgment. Should it be determined that statutory authority exists to establish the LID under CRS § 30-20-603(1)(a), the court will, after the parties have had a chance to brief the remaining issues, address the remaining issues presented in a full review under C.R.C.P. 106(a)(4).

The court has now reviewed the file, the record and the arguments of counsel and makes the following findings and order:

I. STATEMENT OF FACTS

For the purposes of the limited issues addressed in this order, the following Statement of Facts sufficiently outlines the facts necessary to determine the issue of the Board's authority to take the action which it took.

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. (Department of Transportation [Hereinafter "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.

3. Paved roads need to be maintained, or they deteriorate. In order to prevent or retard 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)

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)

5. 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) In 1995, the Comprehensive Plan identified the County's policy determination in this area: "Priority shall be given to the rehabilitation of the county's arterial and collector roadways through the use of the Road and Bridge Fund revenues. Local access roadways within developed areas … shall be rehabilitated through special assessments or other funding mechanisms. Primary funding responsibilities shall be assigned to the users benefitting from these improvements." (R. at 2131).

6. Subdivision roads deteriorated over time. (Property Owner Testimony, R. 1772, l.25-1774, l.12; 1775, l6-10, 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)

7. In 2009 Boulder County began to address the fact that fifteen years of 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, l.11-14)

8. 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. 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)

9. Since 2009 the Board has struggled with this issue in a planned and inclusive manner. A study group was established and numerous public hearings were held throughout the decision-making process.

10. 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. Nevertheless, the county planned that either district would assess the costs on 10,900 properties in subdivisions in the unincorporated county. (Transportation PowerPoint R. 178-186; Hearing Transcript R. 1968-1983)

11. On September 10, 2013 Boulder County 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" was implemented with the approval of resolution No. 2013-84. (Resolution R. 142-151)

12. 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)

13. 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." (Resolution and supporting documents, R. 149-228)

14. On November 5, 2013, electors in the unincorporated county voted down the public improvement district and on November 18, 2013, the Board 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. (Resolution and supporting documents, R. 229-457)

15. The Resolution provided that the LID 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, l.18-1832, l.17)

16. On November 21, 2013 the Board approved final apportionment of the cost of improvements in the LID. The apportionment 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)

II. STANDARD OF REVIEW

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).

The standard of review for matters of statutory interpretation is *de novo* review. *M.T. v. People*, 269 P.3d 1219 (Colo. 2012); *Town of Erie v. Eason*, 18 P.3d 1271, 1274 (Colo. 2001) ("[I]nterpretation of a municipal ordinance involves a question of law . . . . [Such an interpretation] is subject to our *de novo* review; *Woods v. City & County of Denver*, 122 P.3d 1050 (Colo. Ct. App. 2005); *Robles v. People*, 811 P.2d 804, 806 (Colo. 1991). 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).

In construing the meaning of a statute the court's responsibility is to ascertain and give

effect to the purpose and intent of the general assembly in enacting it. CRS § 2-4-101 *et seq.*, sets forth rules for the construction of statutes. CRS § 2-4-101 provides that "words or phrases shall be read in context and construed according to the rules of grammar and common usage. Words or phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." As such, 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)].

III. ANALYSIS

A good portion of the argument presented by counsel for the Board consists of a discussion of the history leading up to the passage of the LID, the public policy supporting action on the serious problem with deterioration of subdivision roads, the lack of other resources to address the problem, the efficacy of the chosen solution as well as the support in the record for that path. These arguments are relevant to the issue of whether the Board acted within its

authority as a government or administrative body in choosing a particular remedy for the problem to be address but are not particularly helpful in determining whether the Board had the legal authority to use the LID statutory mechanism embodied in CRS § 30-20-601 *et seq.* The authority issue that is being addressed in this phase of the litigation will not be decided on the basis of evidence received by the Board, since the interpretation of the terms "maintenance" and "public improvement" within the statute is a *de novo* determination and must be based upon not the Board's, but the court's interpretation of the legislature's intent in enacting the relevant statute.

In considering the legislative intent in the LID statute as it relates to road maintenance, the court will consider the entire legislative scheme that relates to road maintenance. The terms "maintenance" and "public improvement" are not defined within CRS § 30-20-601 *et seq.* or for that matter within CRS § 30-20-501 *et seq.* However, public improvements are specifically authorized by the LID statute, whereas, "maintenance" or "rehabilitation" are not. Thus, distilled to its essence, the question is whether the legislature in enacting the LID statute intended to allow counties to use the LID mechanism to make assessments on property owners for the purpose of "maintaining" or "rehabilitating" county roads. In answering this question the court must also decide whether the legislature intended "maintenance" or "rehabilitation" to be included within the term "public improvement." Based on the analysis set forth below, the court concludes that the legislature did not so intend, that the County has an independent duty to maintain county roads, and that the relief requested by the Plaintiffs' should be granted.

Although the Board does not contest that it is responsible for maintenance of County roads, the court will review the statutory basis of this obligation. 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 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 deals specifically with construction bidding for state funded local projects.

All roads accepted by the county are, by statute, either primary or secondary county roads. CRS § 43-2-108; 43-2-110; 43-2-201. Primary and secondary roads are assigned to the county for construction and maintenance**.** CRS § 43-2-111(1). 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(2)(b). The county is authorized to establish a county road and bridge fund for construction, maintenance and administration, C.R.S. 43-2-202(1).

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 that 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 as well as additions to existing development as a condition of approval of new development. CRS § 30-28-133 – CRS § 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. CRS § 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. G*eneral Ins. Co. v. Colorado Springs*, 638 P.2d 752, 758 (Colo. 1981)

Counties have limited powers. 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. *Board of County Comm'rs v. Bowen/Edwards Assocs.*, 830 P.2d 1045, 1055 (Colo. 1992). Counties are limited to powers that have been expressly authorized. For example, 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 *Bowen/Edwards Assocs.*, 830 P.2d at 1055.

Within this framework the court must analyze the provisions of CRS § 30-20-603. CRS § 30-20-601 authorizes counties to "construct any of the local improvements mentioned in this part 6 and fund such improvements by assessing the cost thereof, wholly or in part, upon the property especially benefited by such improvements . . ." CRS § 30-20-603 describes the various purposes for which a LID may be formed. Included within this section are provisions related to public improvements for streets, street lighting, drainage facilities, or service improvements, water distribution, collection or transmission of sewage, safety measures related to the sounding of locomotive horns at railroad crossings, as well as renewable energy improvements or energy efficiency improvements.

CRS § 30-20-603(1)(a) authorizes improvements with the following language:

> A district may be formed in accordance with the requirements of this Part 6 for the purpose of *constructing, installing, acquiring, or funding*, in whole or in part, any *public improvement*, so long as the county that forms the district is authorized to provide such improvement . . . [emphasis added]

This subsection goes on to state:

> . . . the improvements authorized by this Part 6 may consist, *without limitation*, of constructing, grading, paving, pouring, curbing, guttering, lining or otherwise improving the whole or any part of any street . . ." [emphasis added]

Maintenance and/or rehabilitation are not specifically mentioned as permissible activities under the statute, nor are chip sealing or overlaying. There are other sections of CRS § 30-20-603 that affirmatively list maintenance as a permissible activity. CRS § 30-20-603(1)(c), states that where any improvement or transportation services are "funded by sales tax, the tax may also be used for the *operation and maintenance* of such improvement or services . . ." [Emphasis added] Further, where the improvements are for safety measures necessary to restrict the sounding of locomotive horns, CRS § 30-20-603(1)(d), specifically allows the county to use the funds for "construction, *maintenance*, and operation." [Emphasis added]

These sections would seem to imply that the legislature made these specific exceptions to distinguish their circumstances from other provisions of the act that do not allow the funds to be used for maintaining public improvements. 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). While this supports the construction set forth above, the Board asserts that the words "without limitation" as a prefatory phrase to permissible uses listed in CRS § 30-20-603(1)(a) necessarily indicates intent to include maintenance or rehabilitation of roads. The court disagrees.

The Board argues the phrase "without limitation" indicates that the Legislature intended the description of road work in § 30-20-603(1)(a), C.R.S. to be a broad grant of authority rather than a restriction. *Extreme Const. Co. v. RCG Glenwood*, LLC, 310 P.3d 246, 252 (Colo. App. 2012), *cert. denied*, 2013 WL 4714399 (Colo. Sept. 3, 2013) (the phrase "without limitation" means that the language immediately following is merely illustrative, not comprehensive). Although this is clearly true, this fact does not eliminate the court's responsibility to determine the legislative intent of other activities that may fall broadly within the term "improvements".

The sentence cited by the Board begins with the following words: "The *improvements* authorized by this part 6 may consist, without limitation . . ." [Emphasis added] Based on this language, a significant question remains whether in interpreting the word "improvement," (a word that the court concludes has acquired a technical or particular meaning) maintenance can be considered within its definition. Other questions include whether a county is authorized to use the LID financing mechanism where it has deferred routine maintenance to such an extent and over such a period of time that its roads deteriorate so that they must be "rehabilitated" and whether this language in question more logically implies that every aspect of construction of a public improvement is included, whether listed or not.

In their answer, the Board also asserts that there is appellate precedent for the inclusion of rehabilitation in special assessment districts. The Board cites *Orchard Court Development Co. v. City of Boulder*, 513 P.2d 199, 200 (Colo. 1973); *Satter v. City of Littleton*, 522 P.2d 95, 96 (Colo. 1974); and *Cline v. City of Boulder*, 532 P.2d 770, 771 (Colo. App. 1975) for this proposition. Each of these cases involves cities, not counties. Cities are much different legal entities than are counties. Unlike counties whose powers are expressly limited as subdivisions of the state, home rule cities possess all authority expressly granted or implied unless it is limited by the legislature. *Londoner v. Denver*, 52 Colo. 15 (Colo. 1911)

Further, the cited cases are not helpful because they do not discuss or reach the issue of the *authority* to form an LID for road maintenance or discuss the definition of maintenance. In *Orchard, id.,* the improvements did not involve repaving; the city created an LID for installation of new facilities, including storm sewers, storm sewer drainage facilities, road-widening, including left-turn bays at various intersections, new road surfacing, curbs, gutters, setback sidewalks, driveways and traffic devices. In *Satter v. City of Littleton*, 522 P.2d 95 (Colo. 1974), and in *Cline v. City of Boulder*, 532 P.2d 770 (Colo. App. 1975) the improvements included repaving, however; the property owners in these cases made no challenge to the *authority* of the cities to form LID for those purposes. Whether the improvements conferred a special benefit on the Plaintiffs property was the issue in both cases and thus that issue was not addressed by the courts. Thus, this court concludes these cases are not helpful in addressing the issues presented in this case.

More persuasive is the case of *Swieckowski by Swieckowski v. City of Ft. Collins*, 934 P.2d 1380, 1382 (Colo.,1997). In that case the Supreme Court was called upon to interpret the meaning of the word "maintenance" as contained in the Governmental Immunity Act, CRS § 24-

10-103(1). As with the LID statute, that act does not define the word "maintain." In *Swieckowski,* the court concluded that "maintain" is the "keeping of a constructed edifice, structure, or improvement in the same general state of being, repair, or efficiency as *initially* constructed", citing Webster's Third New International Dictionary 1362 (1986). [Emphasis in original] The court concluded that the "failure to 'maintain' a roadway is not a failure to keep a roadway in existence, but a failure to *restore* a roadway to the state in which it was originally constructed." *Id,* 1385. [Emphasis added]

The Merriam Webster Dictionary defines rehabilitation as follows:

> "*a* : to restore to a former state (as of efficiency, good management, or solvency) <*rehabilitate* slum areas>
> *b* **:** to restore or bring to a condition of health or useful and constructive activity. http://www.merriam-webster.com/dictionary/rehabilitation

"Maintain" is defined in the same source as follows:

> 1: to keep in an existing state (as of repair, efficiency, or validity): preserve from failure or decline <maintain machinery> 2: to sustain against opposition or danger : uphold and defend <maintain a position> http://www.merriam-webster.com/dictionary/maintain

The court cannot read maintenance into C.R.S.30-20-603(1)(a). When the legislature wanted to authorize maintenance in the LID statute, it did so. This court concludes that the plain and common meaning of the words must prevail. Whether described as "maintenance" or "rehabilitation", the activities the County intends to conduct using the LID funding mechanism are not "improvements" as envisioned by the statute.

It is clear that the County faced difficult financial issues that caused the neglect of its dedicated subdivision roads. Roads that are not chip sealed and resurfaced will deteriorate. If deterioration is severe enough, the road will have to be reconstructed. These maintenance activities are necessary to the upkeep of the roads and to keep them operative, and are included

in the term "maintenance."[1] Property owners whose roads were accepted for maintenance understood that term to include all activities necessary for upkeep of roads. While it clearly had the duty to maintain those roads, the County did not perform that duty. Had the County abandoned any of the roadways in question, the rebuilding of the road would likely constitute an "improvement." However, none of that occurred.

The court concludes that the technical meaning of an "improvement" as set forth in the statute does not consist of restoring some item of public property to its former usefulness but rather it means the building of something that is either entirely new or constitutes an appendage or addition to an existing item of public property. None of the intended uses of the funds to be raised by the LID fall into this category.

IV. ORDER

Based on the foregoing, the Court ORDERS AS FOLLOWS:

A. 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. The authorization and formation of the Subdivision Paving Local Improvement District and imposition of assessments on properties within the District are invalidated.

[1] Although not dispositive, CRS § 29-1-703(4) includes a broad definition of maintenance in the construction bidding context. For the purposes of that statute, maintenance includes resurfacing and chip sealing.

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

Dated: July 25, 2014

J. Robert Lowenbach
Senior District Court Judge