

Memo

Date: September 19, 2008
To: Mayor Pinkham and the Board of Trustees
From: Gregory A. White, Town Attorney
RE: Big Bear Estates Annexation

The petition for the annexation of Big Bear Estates Addition to the Town of Estes Park was executed by Carol Zahourek, Jerry Zahourek and Valeria Zahourek on May 14, 2008. The annexation petition was the standard annexation petition. Section 15 of the annexation petition states as follows:

“The undersigned and the Town may enter into an annexation agreement prior to or contemporaneously with the effective date of this annexation, which agreement shall be additional conditions as effective as if set forth in this petition.”

The annexation petition for the annexation of Big Bear Estates Addition was part of a larger development project that included the Big Bear Estates Addition and the Elkhorn Lodge Property. The development proposal including requests for rezoning, subdivision and a planned unit development application by the owners and the contract purchasers/developers of the property. After input from the Staff, I prepared a draft annexation agreement which addressed development issues on the Big Bear Estates annexation including, but not limited to, timing of development, responsibility for public improvements including what is known as the western bypass. The draft annexation agreement also included rights, restrictions and obligations with regard to the PUD development on the Elkhorn Lodge property. From the beginning of the review of the entire development proposal, it was always contemplated by the Town Staff, the developer and Zahourek’s, that an annexation agreement would be approved as part of the overall approval of the annexation of the Big Bear Estates Addition, and approval of the planned unit development on the Elkhorn Lodge property.

The proposed rezoning, preliminary and final subdivision plats and PUD proposal for the Elkhorn Lodge property and the Big Bear Estates Addition have been withdrawn by the applicant.

Section 31-12-107 (1)(e) C.R.S. provides that no person signing a petition for annexation shall be permitted to withdraw his signature from the petition after the petition has been filed with the Town Clerk except as such right of withdrawal is set forth in the petition. The annexation petition for Big Bear Estates Addition does not contain any right of withdrawal.

Due to the fact that the petition is in compliance with the terms and conditions of the Municipal Annexation Act, the Board of Trustees is required to make a determination whether or not to annex the property. The decision of the Town Board is solely within its discretion; and the Town Board is not required to annex the property.

Although the annexation petition does not contain a specific right to withdraw the petition, the annexation petition does contemplate that an annexation agreement acceptable to both the Town and the property owners would be approved as part of the annexation of the property. The Town Staff also advised the Estes Valley Planning Commission and the Town Board at previous public hearings on the rezoning, subdivision and planned unit development proposals concerning the entire development that an annexation agreement would be required and a part of the documents governing the development of the property.

The Colorado Supreme Court has ruled in the case of The Town of Superior vs. Midcities Company, 933 P. 2nd 596 (Colorado 1997) that although an annexation petition did not include a specific right for withdrawal, if it is understood by the parties that an annexation agreement will be approved, a municipality's efforts to affect the annexation without such agreement is clearly contrary to the understanding of the parties. The facts of that case are strikingly similar to this case with regard to the fact that an annexation agreement was always contemplated between the Town of Superior and the petitioning landowner. The annexation agreement would address development issues on the property following annexation. The Supreme Court went on to state as follows:

"The fact that Midcities Company's petition did not expressly require the annexation agreement as a condition precedent to annexation does not control the result here. The actions and statements of the town officials before the Board and in the record below support the trial court's findings that, in this annexation proceeding, the municipality and the landowner voluntarily agreed to such a condition. By subjecting the annexation to a condition that a development agreement would be entered into prior to the actual annexation, Superior limited its discretion.

If the parties fail to agree upon conditions to annexation, annexation cannot take place without the landowner's consent to annexation and the municipality's willingness to waive such conditions."

The Supreme Court went on to conclude as follows:

"In sum, we conclude that annexation is a consensual process which permits a municipality and a landowner to condition annexation upon the completion of a land development or annexation agreement before annexation may take place.

Unless the landowner consents to this annexation, it is my opinion that the Town Board would abuse its discretion and exceed its authority under the Municipal Annexation Act by annexing the property.