

**MEMORANDUM**

To: Mayor and Members of City Council, City of Castle Pines  
From: Paul Wisor  
Date: December 28, 2010  
Re: Castle Pines North Metropolitan District TABOR Violations

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As part of the ongoing due diligence being performed by the City of Castle Pines (the “City”) related to the City’s anticipated assumption of the services currently being provided by the Castle Pines North Metropolitan District (the “District”), we were requested to perform an analysis of the District’s Operation and Maintenance mill levy imposed and collected by the from 1991 to present. This analysis has been performed in order to ascertain whether certain changes in the District’s mill levy rate (from 1991 to present) may constitute a violation of the Taxpayer’s Bill of Rights (“TABOR”) provision of the Colorado Constitution, in order to assist the City with analyzing potential contingent liabilities associated with the District dissolution.

Specifically, this memo examines 1) whether in 2003 the District violated TABOR by increasing the Operation and Maintenance mill levy from 18 mills to 19 mills without voter authorization; 2) what is the proper mill levy to be imposed by the District in light of various elections and mill levy changes; and 3) whether the City is entitled to increase property taxes by one (1) mill pursuant to the City’s 2007 question approved by the voters.

**FACTS**

Over the course of the last two decades the District has held various elections relating to its mill levy and debt and has imposed various mill levies at a variety of different levels. We have been advised that since 1992 the District has held three elections that impact whether or not the District has violated TABOR.

In 1992 the qualified electors of the District approved a question seeking to increase the operating mill levy to 32 mills “for purpose of meeting general fund operating and other approved expenditures of the District during the 1993 budget year” (attached as Exhibit “A”).

In 1994 the qualified electors approved three separate questions (attached as Exhibit “B”). The first two questions sought voter approval to increase taxes to pay debt service on bonds as well as approval to issue new bonds to replace preexisting debt. The third question

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sought voter approval to increase District spending by \$15,000,000 in any given fiscal year. The summary to this question provided, in part, that approval of the question “would permit the District to collect Operations and Maintenance taxes so that the District could function.”

Finally, in 1996, the qualified electors of the District exempted the District from certain TABOR provisions and allowed the District to retain and spend all revenues it collected (attached as Exhibit “C”). Nothing in this question allowed the District to increase its mill levy without voter approval.

While such elections were occurring, the District was also changing its operating mill levy rate on a frequent basis (the full mill levy history can be seen in the table below). Beginning in 1991, the District imposed an operating mill levy of 10.690 mills to be collected in 1992. In 1992, pursuant to the 1992 ballot question discussed above, the District certified an operating mill levy of 32 mills to be collected in 1993. In 1993, without holding an election, the District certified an operating mill levy of 19 mills to be collected in 1994. The following year the District certified an operating mill levy of 18 mills to be collected in 1995. The operating mill levy remained at 18 mills until 2003 when the District, without holding an election, certified an operating mill levy of 19 mills to be collected in 2004. The District’s operating mill levy has since remained at 19 mills.

Certification Year	Collection Year	Operating Mill Levy	Debt Service Mill Levy	Total Mill Levy
1991	1992	10.690	14.644	25.334
1992	1993	32.000	0.000	32.000
1993	1994	19.000	80.000	99.000
1994	1995	18.000	41.200	59.200
1995	1996	18.000	48.562	66.562
1996	1997	18.000	48.562	66.562
1997	1998	18.000	51.440	69.440
1998	1999	18.000	51.440	69.440
1999	2000	18.000	46.000	64.000
2000	2001	18.000	46.000	64.000
2001	2002	18.000	30.000	48.000
2002	2003	18.000	25.000	43.000
2003	2004	19.000	24.000	43.000
2004	2005	19.000	24.000	43.000
2005	2006	19.000	24.000	43.000
2006	2007	19.000	24.000	43.000
2007	2008	19.000	24.000	43.000
2008	2009	19.000	24.000	43.000
2009	2010	19.000	22.000	41.000

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During this time, the City also placed a question before its qualified electors that involved the District and the District's operating mill levy. In 2007 the City sought authorization to impose a property tax of up to 19 mills for the purpose of providing water and sanitation services (attached as Exhibit "D"). However, the tax could only be imposed if the District reduced its mill levy, then at 19 mills, and the City could only impose a mill levy equal to the amount the District reduced its own operating mill levy.

## ANALYSIS

An analysis of various TABOR requirements and the District's election and mill levy history indicate the District violated TABOR when it increased its 2003 mill levy from 18 mills to 19 mills without voter approval. Such violation could result in the District repaying the revenue it illegally collected and spent and a court will likely order the District to reduce its mill levy to 18 mills. If such a reduction in the District's mill levy occurs, the City likely will be able to impose a tax up to 1 mill for purposes of providing water and sanitation services.<sup>1</sup>

### 1. 2003 Mill Levy Increase

As noted above, TABOR provides, as relevant here, the District must receive voter approval for "any new tax, tax rate increase, *mill levy above that for the prior year*, valuation for assessment ration increase for a property class, or extension of an expiring tax, or a tax policy change directly causing a net tax revenue gain to any district." Colo. Const. Art. X, Sec. 20(4)(a) (emphasis added). TABOR further provides any "revenue collected, kept or spent illegally since four full fiscal years before a suit is filed shall be refunded with 10% annual simple interest from the initial conduct." Colo. Const. Art. X, Sec. 20(1). In addition, any prevailing plaintiff is entitled to costs and reasonable attorney fees. *Id.*

In 2002 the District certified an operating mill levy of 18 mills to be collected in 2003. The following year the District certified an operating mill levy of 19 mills to be collected in 2004. However, the District failed to conduct an election seeking voter approval to raise the 2004 operating mill levy one mill above the 2003 operating mill levy. Due to the fact the mill levy is above that for the prior year, the increase in the mill levy without an election is a violation of the plain meaning of the requirements of TABOR. If a taxpayer were to sue the District for this violation, the District would be required to return to the taxpayers the excess mill collected for the last four years plus 10% simple interest and be responsible for paying the prevailing plaintiff's costs and attorney fees.

If faced with the prospect of lowering the mill levy and refunding excess revenues due to its failure to seek voter approval to raise the mill levy to 19 mills, the District may argue the 1992 ballot question provides the District with authorization to impose a mill levy of up to 32 mills. However, a reading of the plain language of the ballot question indicates a court would likely not agree with such an interpretation.

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<sup>1</sup> Provided that the District does not seek and receive voter approval to impose an operating mill levy of 19.000 mills.

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As relevant here, the 1992 ballot question sought voter authorization for the District “to levy a tax not to exceed 32 mills for its general fund upon each dollar of the total valuation for assessment of all taxable property within the District, which is anticipated to result in revenue not to exceed \$525,734 . . . for purpose of meeting general fund operating and other approved expenditures of the District during the 1993 budget year . . .” The plain language of the 1992 ballot question clearly indicates the authorization to levy a tax of 32 mills was only for the purpose of meeting the 1993 budget year operating costs. Nothing in the 1992 ballot question indicates the voters provided the District with authorization to impose a mill levy up to 32 mills beyond 1993. As such, it is unlikely a court would find the 1992 ballot question provided the District the authority to increase the mill levy from 18 mills to 19 mills in 2003 without seeking voter approval.

### **2. Proper Mill Rate Under TABOR After 1993**

In light of the fact the District failed to obtain voter approval in raising the mill levy in 2003 from 18 mills to 19 mills, it is necessary to further determine what is the proper mill levy to be imposed by the District.

At the very least, the proper District mill levy is 18 mills. As noted above, TABOR provides the District is required to obtain voter approval to impose a mill levy above that for the prior year, but under TABOR the District may impose a lower mill levy without additional approval. Therefore, the District was not required to obtain voter approval to lower the mill levy of 32 mills to 19 mills in 1993 for collection in 1994 or to lower the mill levy from 19 mills to 18 mills in 1994 for collection in 1995.

However, based upon the language of the 1992 ballot question, it can be argued the District was required to obtain voter approval to impose a mill levy of 19 mills in 1993 for collection in 1994 and the proper operating mill levy is 10.690 mills.<sup>2</sup> The 1992 ballot question provided the District with the authority to impose a mill levy of 32 mills “for purpose of meeting general fund operating and other approved expenditures during the 1993 budget year.” A court could interpret such language to mean the voters only approved a one year time out from the 10.690 levy limit and the District was required to obtain voter approval to impose a mill levy above that limit after the time out expired. This will be a matter for a court to interpret the express words of the 1992 ballot question.

### **3. City’s 2007 Election Question**

Assuming a court orders the District to reduce its mill levy to 18 mills, the City is entitled to impose a property tax of up to 1 mill as a result of the ballot question approved by the voters in 2007.

In 2007 the qualified electors of the City authorized the City, beginning in 2008, to impose a new property tax on all taxable property at a rate not to exceed 19 mills. However, the 2007 ballot question provided the City was only authorized to impose such a tax “in the event

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<sup>2</sup> The District’s pre-Tabor operating mill levy was 10.690 mills.

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that the [the District] reduces or eliminates its current mill levy of 19 mills for operation purposes, then the City may impose a mill levy equal to the amount of the reduction for purposes of providing water and sanitation service.” Due to the fact the District has maintained its mill levy at 19 mills since the 2007 ballot question was approved, the City has never had the authority to impose the tax.

In the event a court finds the District violated TABOR in failing to seek voter approval to increase its operating mill levy from 18 mills to 19 mills (or in failing to seek voter approval to increase impose a new tax of 8.31 mills in 1994) it is likely a court would issue an order compelling the District to reduce its mill levy to 18 mills (or to 10.69 mills). If this is the case, the precondition to the City imposing a property tax contained in the plain language of the 2007 ballot question will be met and the City would be entitled to impose a property tax at a rate of 1 mill (or at a rate of 8.31 mills). Based on the current assessed valuation of taxable property located within the boundaries of the City, a mill levy of one (1) mill would provide the City with approximately \$145,000 in estimated first year tax revenues to provide water and sanitation services.<sup>3</sup>

### **Conclusion**

In light of the plain language of TABOR and the District’s election and mill levy history it is clear the District violated TABOR when it increased its 2003 mill levy to be collected in 2004 from 18 mills to 19 mills without voter approval. It is also arguable that the District’s mill levy for the 1994 collection year (and each year thereafter) should have been 10.690. The District may argue no such violation took place because the 1992 ballot question authorized the District to impose a mill levy of 32 mills in 1993 and in every year after. However, a reading of the plain language of the 1992 ballot question makes clear the District only had authority to impose 32 mills in the 1993 collection year.

If a TABOR challenge is ultimately filed against the District and the court orders the District to reduce its mill levy, the resulting reduction in the District’s mill levy would allow the City to be able to impose a tax equal to the amount of reduction in the District levy (up to 19 mills) for purposes of providing water and sanitation services under the City’s 2007 ballot question.

If a TABOR enforcement action is brought against the District and is successful it may well be City Council (sitting as the Board of Directors of the District) that will be responsible to ensure that any refund of the District’s operating and maintenance mill levy is properly refunded to District taxpayers. As bond counsel to the City, we will remain available to advise the City on this and other issues related to the City’s dissolution plan.

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<sup>3</sup> A mill levy of 8.31 mills would provide the City with approximately \$1.2M in estimated first year tax revenues to provide water and sanitation services.