

# SHERMAN & HOWARD L.L.C.

ATTORNEYS & COUNSELORS AT LAW

## MEMORANDUM

**TO:** Linda Michow & Marcus McAskin

**FROM:** Dee Wisor and Paul Wisor

**DATE:** May 9, 2011

**SUBJECT:** Castle Pines North Metropolitan District TABOR Violation

Pursuant to your request, this supplements our Memorandum of October 25, 2010, regarding a TABOR violation by the Castle Pines North Metropolitan District (the "District"). Specifically, we are responding to the letter of January 19, 2011, from Matt Dalton of Grimshaw & Haring who is acting as special counsel to the District. While we know and respect Mr. Dalton and his firm, we disagree with him and stand by our conclusion in our prior Memorandum that the District has increased its mill levy in violation of TABOR.

This turns on the interpretation of the District's 1992 ballot issue, the complete text of which is as follows (with spacing provided after each semicolon which spacing was not in the question on the ballot):

Shall Castle Pines North Metropolitan District be authorized 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 (which is in excess of the amount of tax limited by Section 29-1-301.1(1), C.R.S. and by Section 20 of Article X of the State Constitution) for purpose of meeting general fund operating and other approved expenditures of the District during the 1993 budget year, and to certify said levy to the Board of County Commissioners of Douglas County, Colorado, on or before December 15, 1992, said levy to be in addition to any mill levy certified for payment of debt, if any;

AND as a result of the increased mill levy, shall Castle Pines North Metropolitan District property tax revenues for the general fund be increased by an amount not to exceed \$157,463 over the revenue collected from property taxes in 1992 totalling \$368,271, which consisted of \$154,339 for the general fund and \$213,932 for the debt service fund, raising the total amount of property tax revenues to be collected in 1993 for the general fund to an amount not to exceed \$525,734 (deemed to be approved for fiscal year 1993 and to remain approved

at that level in subsequent fiscal years, except as increases to that amount are otherwise permitted by law);

AND shall Castle Pines North Metropolitan District be authorized to spend such additional property tax revenues and all such property tax revenues for the purpose of general fund operating and other approved expenditures of the District during the 1993 fiscal year and each fiscal year thereafter?

The 1992 ballot issue contains three separate clauses separated by semicolons which are summarized as authorization for:

1. *A mill levy of not to exceed 32 mills for the District's "general fund operating and other approved expenditures of the District during the 1993 budget year."* This language could be interpreted in one of two ways: (a) a mill levy increase for only 1993<sup>1</sup>; or (b) a mill levy increase in 1993 which could be continued until it is reduced. Even assuming it is interpreted to be the latter, this clause of the question does not authorize the District to levy whatever mill levy it wants so long as it does not exceed 32 mills. It authorizes 32 mills in 1993 and if the District reduces the levy as it did in 1994 and 1995, it may not later increase the levy (as it did in 2004) without another vote pursuant to TABOR. This is distinguishable from the ballot issue considered by the Court of Appeals in Bruce v. Pikes Peak Library Dist., 155 P.3d 630 (Colo. App. 2007). There the library district received voter approval to increase the maximum tax levy from two mills to no more than four mills. There was no limit in that question on the year in which the increase could occur, so the Court of Appeals concluded that the library district could set its levy each year at whatever rate it chose so long as it did not exceed four mills. If the first clause of the District's 1992 question did not say "during the 1993 budget year", then the District would have had the same ability to set its mill levy at varying levels not exceeding the 32 mill cap as the library district did in the Bruce case.

2. *An increase in the amount of property tax revenue which may be collected for the general fund to an amount not to exceed \$525,734 for 1993 and other years.* Although this clause authorizes an increase in property tax revenues which can be collected, it does not authorize an increase in the mill levy to accomplish that. Mr. Dalton places reliance on the phrase "deemed to be approved for fiscal year 1993 and to remain approved at that level in subsequent fiscal years." But this appears in the clause about collecting property tax revenues not in the clause about the mill levy rate. Property tax revenues are determined by applying the mill levy rate to the assessed valuation. As a result, increases in assessed valuation without an increase in mill levy

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<sup>1</sup> Property taxes levies are set in one year and collected in the next. For purposes of this memorandum we will refer to the year of collection.

rate will still result in increased revenues and increases in assessed valuation with a decrease in mill levy rate may still result in increased revenues. For a District which was relatively undeveloped and trying to work out financial issues with its bondholders, it makes sense that the District may want to receive increased property tax revenues as assessed valuation increases. However, this clause does not authorize a mill levy rate increase. That was dealt with in clause (1) of the 1992 question which clearly states that the mill levy increase is for 1993.

3. *An authorization to spend such property tax revenues in 1993 and each year thereafter.* This clause authorizes the expenditure of the property tax revenues which are collected by the District. The concepts in clauses (2) and (3) of the 1992 ballot issue could have been combined into one by the drafter, but TABOR deals with both collection of revenues and the expenditure of revenues, so it is possible that the drafter wanted to separately deal with these concepts.

This interpretation of the 1992 ballot question is consistent with District Resolution 11/92-1 which submitted the 1992 ballot question to the voters. Specifically, a recital in the resolution said:

WHEREAS, on November 4, 1992, a new section was added to the Constitution of the State of Colorado, specifically, Article X, Section 20, which requires voter approval for each of the following: (1) any increase in mill levies above the mill levy for the prior year, (2) any increase in property taxes collected by the District above the amount collected in 1992, adjusted by an inflation and growth factor; and (3) any increase in fiscal year spending by the District above the amount spent in 1992, adjusted by an inflation and growth factor; and

TABOR requires voter approval in advance for any "mill levy increase above that for the prior year." It is clear that the 1992 ballot question approved such increase from 1992 to 1993. But since that authorization did not continue, the District could not increase its levy from 18 mills to 19 mills in 2004 without further voter approval.

Mr. Dalton argues that there is no distinction in TABOR between the mill levy for the general fund and that for debt service. So he suggests that in 2004 there was no increase in the mill levy since the District decreased its debt service mill levy by one mill and increased its operational levy by one mill. State law requires the two levies to be separately calculated and certified. See 32-1-1603, C.R.S. and 29-11-301, C.R.S. Also, see the attached Division of Local Government form for certifying levies which requires the general fund levy to be separate for the debt service levy. This makes sense because when the voters authorize a debt service levy, that levy may only be used for debt service and not for operating expenses. To accept Mr. Dalton's argument would

mean that when bonds are paid off, the District could increase the general fund levy by the amount of the debt service levy without further voter approval. Also, the Supreme Court in Bolt v. Arapahoe School District Number 6, 898 P.2d 525 (Colo. 1995) said that in order to determine what portions of a school district's mill levy required voter approval under TABOR "it is necessary to separately analyze the validity of the component parts of the levy." The Bolt decision did not deal with transferring a debt levy to a general fund levy.

Mr. Dalton also asserts that a mill levy may be increased above the rate for the prior year so long as it does not result in a net revenue gain to the taxing entity. He focuses on the following phrase from Section(4)(a) of TABOR: "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." (emphasis added). Mr. Dalton argues that the phrase "directly causing a net tax revenue gain to any district" modifies all of the items which go before it including "mill levy above that for the prior year" and he cites the Bolt decision to support this. It is true that the district court in the Bolt case reached the conclusion which Mr. Dalton asserts. But this was not the expressed reason for the Supreme Court's decision.

Mr. Dalton's argument is also inconsistent with the legislative history of TABOR. The General Assembly's Analysis of 1992 Ballot Proposals (commonly referred to as the Blue Book) in summarizing TABOR for the voters said: "Voters would also be required to approve mill levy increases over the prior year even though the increase may only be required to raise the same amount of money because of a decrease in local assessed value." (The Blue Book may be used by a court in interpreting a constitutional amendment. See Lobato v. State, 218 P.3d 358 (Colo. 2009)). Also, at the constitutionally mandated hearing before legislative staff on May 15, 1991, the proponent of TABOR answered in the affirmative when asked if he intended that voter approval be required for an increase in the mill levy when it does not result in a net revenue gain.

In conclusion, we stand by our original opinion that the District should have obtained voter approval for the mill levy increase from 18 to 19 mills in 2004 and that the 1992 ballot question was not sufficient for that purpose.

# CERTIFICATION OF TAX LEVIES for NON-SCHOOL Governments

**TO:** County Commissioners<sup>1</sup> of \_\_\_\_\_, Colorado.

**On** behalf of the \_\_\_\_\_,  
(taxing entity)<sup>A</sup>

the \_\_\_\_\_,  
(governing body)<sup>B</sup>

of the \_\_\_\_\_,  
(local government)<sup>C</sup>

**Hereby** officially certifies the following mills to be levied against the taxing entity's GROSS \$ \_\_\_\_\_ assessed valuation of: \_\_\_\_\_  
(GROSS<sup>D</sup> assessed valuation, Line 2 of the Certification of Valuation Form DLG 57<sup>E</sup>)

**Note:** If the assessor certified a NET assessed valuation (AV) different than the GROSS AV due to a Tax Increment Financing (TIF) Area<sup>F</sup> the tax levies must be calculated using the NET AV. The taxing entity's total property tax revenue will be derived from the mill levy multiplied against the NET assessed valuation of: \$ \_\_\_\_\_  
(NET<sup>G</sup> assessed valuation, Line 4 of the Certification of Valuation Form DLG 57)

**Submitted:** \_\_\_\_\_ for budget/fiscal year \_\_\_\_\_  
(not later than Dec. 15) (mm/dd/yyyy) (yyyy)

<b>PURPOSE</b> (see end notes for definitions and examples)	<b>LEVY<sup>2</sup></b>	<b>REVENUE<sup>2</sup></b>
1. General Operating Expenses <sup>H</sup>	_____ mills	\$ _____
2. <Minus> Temporary General Property Tax Credit/ Temporary Mill Levy Rate Reduction <sup>I</sup>	< _____ > mills	\$ < _____ >
<b>SUBTOTAL FOR GENERAL OPERATING:</b>	<input type="text"/> mills	\$ <input type="text"/>
3. General Obligation Bonds and Interest <sup>J</sup>	_____ mills	\$ _____
4. Contractual Obligations <sup>K</sup>	_____ mills	\$ _____
5. Capital Expenditures <sup>L</sup>	_____ mills	\$ _____
6. Refunds/Abatements <sup>M</sup>	_____ mills	\$ _____
7. Other <sup>N</sup> (specify): _____	_____ mills	\$ _____
_____	_____ mills	\$ _____
<b>TOTAL:</b> [ Sum of General Operating Subtotal and Lines 3 to 7 ]	<input type="text"/> mills	\$ <input type="text"/>

Contact person: \_\_\_\_\_ Daytime phone: ( ) \_\_\_\_\_  
(print)

Signed: \_\_\_\_\_ Title: \_\_\_\_\_

*Include one copy of this tax entity's completed form when filing the local government's budget by January 31st, per 29-1-113 C.R.S., with the Division of Local Government (DLG), Room 521, 1313 Sherman Street, Denver, CO 80203. Questions? Call DLG at (303) 866-2156.*

<sup>1</sup> If the taxing entity's boundaries include more than one county, you must certify the levies to each county. Use a separate form for each county and certify the same levies uniformly to each county per Article X, Section 3 of the Colorado Constitution.  
<sup>2</sup> Levies must be rounded to three decimal places and revenue must be calculated from the total NET assessed valuation (Line 4 of Form DLG57 on the County Assessor's final certification of valuation).

**CERTIFICATION OF TAX LEVIES, continued**

**THIS SECTION APPLIES TO TITLE 32, ARTICLE 1 SPECIAL DISTRICTS THAT LEVY TAXES FOR PAYMENT OF GENERAL OBLIGATION DEBT (32-1-1603 C.R.S.).** Taxing entities that are

Special Districts or Subdistricts of Special Districts must certify separate mill levies and revenues to the Board of County Commissioners, one each for the funding requirements of each debt (32-1-1603, C.R.S.) Use additional pages as necessary. The Special District's or Subdistrict's total levies for general obligation bonds and total levies for contractual obligations should be recorded on Page 1, Lines 3 and 4 respectively.

**CERTIFY A SEPARATE MILL LEVY FOR EACH BOND OR CONTRACT:**

**BONDS<sup>J</sup>:**

1. Purpose of Issue: \_\_\_\_\_  
Series: \_\_\_\_\_  
Date of Issue: \_\_\_\_\_  
Coupon Rate: \_\_\_\_\_  
Maturity Date: \_\_\_\_\_  
Levy: \_\_\_\_\_  
Revenue: \_\_\_\_\_

2. Purpose of Issue: \_\_\_\_\_  
Series: \_\_\_\_\_  
Date of Issue: \_\_\_\_\_  
Coupon Rate: \_\_\_\_\_  
Maturity Date: \_\_\_\_\_  
Levy: \_\_\_\_\_  
Revenue: \_\_\_\_\_

**CONTRACTS<sup>K</sup>:**

3. Purpose of Contract: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_  
Principal Amount: \_\_\_\_\_  
Maturity Date: \_\_\_\_\_  
Levy: \_\_\_\_\_  
Revenue: \_\_\_\_\_

4. Purpose of Contract: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_  
Principal Amount: \_\_\_\_\_  
Maturity Date: \_\_\_\_\_  
Levy: \_\_\_\_\_  
Revenue: \_\_\_\_\_

Use multiple copies of this page as necessary to separately report all bond and contractual obligations per 32-1-1603, C.R.S.

Notes:

<sup>A</sup> **Taxing Entity**—A jurisdiction authorized by law to impose ad valorem property taxes on taxable property located within its territorial limits (please see notes B, C, and H below). For purposes of the DLG 70 only, a taxing entity is also a geographic area formerly located within a *taxing entity's* boundaries for which the county assessor certifies a valuation for assessment and which is responsible for payment of its share until retirement of financial obligations incurred by the *taxing entity* when the area was part of the *taxing entity*. For example: an area of excluded property formerly within a special district with outstanding general obligation debt at the time of the exclusion or the area located within the former boundaries of a dissolved district whose outstanding general obligation debt service is administered by another local government<sup>C</sup>.

<sup>B</sup> **Governing Body**—The board of county commissioners, the city council, the board of trustees, the board of directors, or the board of any other entity that is responsible for the certification of the *taxing entity's* mill levy. For example: the board of county commissioners is the governing board ex officio of a county public improvement district (PID); the board of a water and sanitation district constitutes ex officio the board of directors of the water subdistrict.

<sup>C</sup> **Local Government** - For purposes of this line on Page 1 of the DLG 70, the local government is the political subdivision under whose authority and within whose boundaries the *taxing entity* was created. The local government is authorized to levy property taxes on behalf of the *taxing entity*. For example, for the purposes of this form:

1. a municipality is both the local government and the *taxing entity* when levying its own levy for its entire jurisdiction;
2. a city is the local government when levying a tax on behalf of a business improvement district (BID) *taxing entity* which it created and whose city council is the BID board;
3. a fire district is the local government if it created a subdistrict, the *taxing entity*, on whose behalf the fire district levies property taxes.
4. a town is the local government when it provides the service for a dissolved water district and the town board serves as the board of a dissolved water district, the *taxing entity*, for the purpose of certifying a levy for the annual debt service on outstanding obligations.

<sup>D</sup> **GROSS Assessed Value** - There will be a difference between gross assessed valuation and net assessed valuation reported by the county assessor only if there is a “tax increment financing” entity (see below), such as a downtown development authority or an urban renewal authority, within the boundaries of the *taxing entity*. The board of county commissioners certifies each *taxing entity's* total mills upon the *taxing entity's* Gross Assessed Value found on Line 2 of Form DLG 57.

<sup>E</sup> **Certification of Valuation by County Assessor, Form DLG 57** - The county assessor(s) uses this form (or one similar) to provide valuation for assessment information to a *taxing entity*. The county assessor must provide this certification no later than August 25<sup>th</sup> each year and may amend it, one time, prior to December 10<sup>th</sup>.

<sup>F</sup> **TIF Area**—A downtown development authority (DDA) or urban renewal authority (URA), may form plan areas that use “tax increment financing” to derive revenue from increases in assessed valuation (gross minus net, Form DLG 57 Line 3) attributed to the activities/improvements within the plan area. The DDA or URA receives the differential revenue of each overlapping *taxing entity's* mill levy applied against the *taxing entity's* gross assessed value after subtracting the *taxing entity's* revenues derived from its mill levy applied against the net assessed value.

<sup>G</sup> **NET Assessed Value**—The total taxable assessed valuation from which the *taxing entity* will derive revenues for its uses. It is found on Line 4 of Form DLG 57.

<sup>H</sup> **General Operating Expenses (DLG 70 Page 1 Line 1)**—The levy and accompanying revenue reported on Line 1 is for general operations and includes, in aggregate, all levies for and revenues raised by a *taxing entity* for purposes not lawfully exempted and detailed in Lines 3 through 7 on Page 1 of the DLG 70. For example: a fire pension levy is included in general operating expenses, unless the pension is voter-approved, if voter-approved, use Line 7 (Other).

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**<sup>I</sup> Temporary Tax Credit for Operations (DLG 70 Page 1 Line 2)**—The Temporary General Property Tax Credit/ Temporary Mill Levy Rate Reduction of 39-1-111.5, C.R.S. may be applied to the *taxing entity's* levy for general operations to effect refunds. Temporary Tax Credits (TTCs) are not necessary for other types of levies (non-general operations) certified on this form because these levies are adjusted from year to year as specified by the provisions of any contract or schedule of payments established for the payment of any obligation incurred by the *taxing entity* per 29-1-301(1.7), C.R.S., or they are certified as authorized at election per 29-1-302(2)(b), C.R.S.

**<sup>J</sup> General Obligation Bonds and Interest (DLG 70 Page 1 Line 3)**—Enter on this line the total levy required to pay the annual debt service of all general obligation bonds. Per 29-1-301(1.7) C.R.S., the amount of revenue levied for this purpose cannot be greater than the amount of revenue required for such purpose as specified by the provisions of any contract or schedule of payments. Title 32, Article 1 Special districts and subdistricts must complete Page 2 of the DLG 70.

**<sup>K</sup> Contractual Obligation (DLG 70 Page 1 Line 4)**—If repayment of a contractual obligation with property tax has been approved at election and it is not a general obligation bond (shown on Line 3), the mill levy is entered on this line. Per 29-1-301(1.7) C.R.S., the amount of revenue levied for this purpose cannot be greater than the amount of revenue required for such purpose as specified by the provisions of any contract or schedule of payments.

**<sup>L</sup> Capital Expenditures (DLG 70 Page 1 Line 5)**—These revenues are not subject to the statutory property tax revenue limit if they are approved by counties and municipalities through public hearings pursuant to 29-1-301(1.2) C.R.S. and for special districts through approval from the Division of Local Government pursuant to 29-1-302(1.5) C.R.S. or for any *taxing entity* if approved at election. Only levies approved by these methods should be entered on Line 5.

**<sup>M</sup> Refunds/Abatements (DLG 70 Page 1 Line 6)**—The county assessor reports on the Certification of Valuation (DLG 57 Line 11) the amount of revenue from property tax that the local government did not receive in the prior year because taxpayers were given refunds for taxes they had paid or they were given abatements for taxes originally charged to them due to errors made in their property valuation. The local government was due the tax revenue and would have collected it through an adjusted mill levy if the valuation errors had not occurred. Since the government was due the revenue, it may levy, in the subsequent year, a mill to collect the refund/abatement revenue. An abatement/refund mill levy may generate revenues up to, but not exceeding, the refund/abatement amount from Form DLG 57 Line 11.

1. Please Note: If the *taxing entity* is in more than one county, as with all levies, the abatement levy must be uniform throughout the entity's boundaries and certified the same to each county. To calculate the abatement/refund levy for a *taxing entity* that is located in more than one county, first total the abatement/refund amounts reported by each county assessor, then divide by the *taxing entity's* total net assessed value, then multiply by 1,000 and round down to the nearest three decimals to prevent levying for more revenue than was abated/refunded. This results in an abatement/refund mill levy that will be uniformly certified to all of the counties in which the *taxing entity* is located even though the abatement/refund did not occur in all the counties.

**<sup>N</sup> Other (DLG 70 Page 1 Line 7)**—Report other levies and revenue not subject to 29-1-301 C.R.S. that were not reported above. For example: a levy for the purposes of television relay or translator facilities as specified in sections 29-7-101, 29-7-102, and 29-7-105 and 32-1-1005 (1) (a), C.R.S.; a voter-approved fire pension levy; a levy for special purposes such as developmental disabilities, open space, etc.