SUMMARY
March 21, 2024

2024COA28

No. 23CA0138, *Aranci v. Lower S. Platte* — Taxation — TABOR; Water and Irrigation — Water Conservancy Act — Classification of Taxes and Assessments — Levy and Collection Under Class A

A division of the court of appeals addresses for the first time the application of Colorado's Taxpayer's Bill of Rights (TABOR), article 10, section 20 of the Colorado Constitution, to a water conservancy district's increasing its mill levy under the Water Conservancy Act (Act), sections 37-45-101 to -153, C.R.S. 2023. A district court entered judgment determining that the water conservancy district's increase of its rate of levy from 0.5 mill to 1.0 mill for 2019 and subsequent years, without voter approval in advance, was constitutional under TABOR. But the division concludes that TABOR requires a water conservancy district to

obtain voter approval in advance to increase its rate of levy under the Act. Accordingly, the division reverses the court's judgment.

COLORADO COURT OF APPEALS **2024COA28**

Court of Appeals No. 23CA0138
Logan County District Court No. 21CV30049
Honorable Robert C. James, Judge

James Aranci, Jack Darnell, Charles Miller, William Lauck, and Curtis Werner,

Plaintiffs-Appellants,

v.

Lower South Platte Water Conservancy District,

Defendant-Appellee.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE HAWTHORNE*
Pawar and Taubman*, JJ., concur

Announced March 21, 2024

Tyler Martinez, Washington, District of Columbia, for Plaintiffs-Appellants

MacDougall & Woldridge, P.C., Julianne M. Woldridge, Woodland Park, Colorado, for Defendant-Appellee

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2023.

¶ 1 This is a dispute between a water conservancy district — defendant, the Lower South Platte Water Conservancy District (District) — and a group of property owners within the District — plaintiffs, James Aranci, Jack Darnell, Charles Miller, William Lauck, and Curtis Werner — over the District's increase of its mill levy from 0.5 mill to 1.0 mill for 2020 to 2022. The property owners contend that this increase violated Colorado's Taxpayer's Bill of Rights (TABOR), article 10, section 20 of the Colorado Constitution; the District contends it does not.[1] We agree with the property owners and therefore reverse the district court's judgment.

I. The District's Mill Levy

¶ 2 The District was formed under the Water Conservancy Act (Act), sections 37-45-101 to -153, C.R.S. 2023, in 1964, and it covers portions of Logan, Morgan, Sedgwick, and Washington Counties. The District imposes and collects a mill levy on all property within its boundaries under sections 37-45-121 and 37-45-122(2)(a)(III), C.R.S. 2023. (The board of county commissioners

[1] This case presents the narrow issue of whether the mill levy may be increased from 0.5 to 1.0 mill without voter approval. The parties agree that increasing the mill levy over 1.0 mill would require voter approval under TABOR.

of each respective county levies — and the treasurer for each respective county collects — the mill levy on behalf of the District pursuant to section 37-45-128, C.R.S. 2023.)

¶ 3 Colorado voters adopted TABOR in 1992. TABOR amended the Colorado Constitution to, among other things, limit the ability of governmental entities to impose new taxes or increase their tax revenue absent voter approval. *See In re Interrogatory on House Bill 21-1164*, 2021 CO 34, ¶ 6. Section 20(4)(a) of TABOR provides, in pertinent part, that "districts must have voter approval in advance for . . . any . . . tax rate increase, mill levy above that for the prior year, . . . or a tax policy change directly causing a net tax revenue gain to any district." Colo. Const. art. X, § 20(4)(a). And section 20(7) of TABOR imposes spending limits on districts and requires a district to refund revenue exceeding those limits unless the district's retention of the excess revenue is approved by the voters. Colo. Const. art. X, § 20(7); *see Huber v. Colo. Mining Ass'n*, 264 P.3d 884, 890 (Colo. 2011).

¶ 4 In 1996, the District fixed the rate of levy at 0.5 mill. That same year, the District's voters affirmatively approved the following ballot question, Referred Measure 4D:

> Shall the Lower South Platte Water Conservancy District be authorized and permitted to retain and expend an additional sum of $13,025, resulting from property tax revenues of $5,982 and other revenues of $7,043 collected in 1995; and to retain, appropriate, and utilize, by retention or reserve, carryover fund balance, or expenditure, the full proceeds and revenues received from every source whatever, without limitation, in 1996 and all subsequent years, notwithstanding any limitation of article X, section 20 of the Colorado Constitution, provided, however, that no local tax rate or property mill levy shall be increased at any time without the prior approval of the voters of the Lower South Platte Water Conservancy District?

¶ 5 The District continued to levy taxes based on the 0.5 mill rate of levy each year through 2018.

¶ 6 But in 2019, the District increased the rate of levy to 1.0 mill and continued to do so in 2020, 2021, and 2022.

¶ 7 The property owners filed a complaint in the district court against the District, including a class certification request. In that complaint, the property owners alleged that the District's increase of its rate of levy from 0.5 mill to 1.0 mill in 2019 and subsequent years without voter approval was unconstitutional under TABOR.

The property owners thus sought an injunction against the District, a refund to class members, and attorney fees and costs.

¶ 8 In response, the District asserted a counterclaim for a declaratory judgment that the rate of levy of 1.0 mill, levied in 2019 through 2022 and any tax years thereafter, was constitutional under TABOR.

¶ 9 The parties then filed cross-motions for a determination of a question of law under C.R.C.P. 56(h), asking the district court to determine whether the District's increase of its rate of levy to 1.0 mill in 2019 and subsequent years was constitutional under TABOR.

¶ 10 In a written order on these cross-motions, the court determined, primarily relying on our supreme court's opinion in *Huber*, that the District's increase of its rate of levy to 1.0 mill in 2019 and subsequent years without voter approval was constitutional under TABOR because section 37-45-122(2)(a)(III) — the statute that controls how water conservancy districts fix their rates of levy — "pre-dates TABOR" and requires the District to fix the rate of levy based on a "mandatory," "non-discretionary formula." The court found that the General Assembly "anticipated

that water conservancy district budgets would fluctuate from year to year and built in a set formula within the statute to allow for some flexibility, within limits, for such fluctuation." The court thus found that because the District had no discretion under the statute and had to fix the rate of levy according to the "mandatory formula," TABOR's voter approval requirement in section 20(4)(a) did not apply.

¶ 11 The court also stated, citing *In re Interrogatory on HB 21-1164*, ¶ 41, that "[w]hen voters approve the retention of revenue" under section 20(7) of TABOR, "that vote is presumed to be predicated on the continuation of the mill levy rates in effect at the time." The court then found that, according to its interpretation of section 37-45-122(2)(a)(III), the "mill levy rate[] in place" in 1996 for water conservancy districts "was a range between" 0.0 mill and 1.0 mill. The court thus found that the voters' approval of Referred Measure 4D in 1996 was predicated on the continuation of a mill levy "range" of between 0.0 mill and 1.0 mill. And it found that the "District is entitled to collect the levy as established notwithstanding the limitations imposed by TABOR or Referred Measure 4D" because "the 2019 increase from 0.5 mill to 1.0 mill is

within the statutory limits and no allegations were made that the budget for that year or any subsequent year was excessive or otherwise illegal."

¶ 12 So the district court ultimately found that the District's rate of levies "from 2019, 2020, 2021 and 2022 do not violate the Colorado Constitution."

¶ 13 In a separate order, based on its prior determination under C.R.C.P. 56(h), the court denied the property owners' request for class certification under C.R.C.P. 23(a), finding that they could not "show that 'there are questions of law or fact common to the class' and that 'the claims or defenses of the representative parties are typical of the claims or defenses of the class,'" and entered final judgment in the District's favor.

II. Constitutionality of District's Rate of Levy Increase

¶ 14 On appeal, the property owners contend that the district court erred by determining under C.R.C.P. 56(h) that the District's increase of its rate of levy from 0.5 mill to 1.0 mill for 2019 and subsequent years was constitutional under TABOR. Specifically, they argue that TABOR required voter approval before the District could fix a rate of levy above the prior year's 0.5 mill rate of levy and

the District did not obtain such approval.[2] Because we agree with the property owners, we reverse the district court's judgment and remand the case to the district court for further proceedings.

¶ 15 The property owners also request an award of attorney fees and costs on appeal under section 20(1) of TABOR. We also remand to the district court to determine whether the property owners may recover their reasonable attorney fees and costs on appeal under section 20(1) of TABOR.

A. Preservation and Standard of Review

¶ 16 The parties dispute whether the property owners preserved for appeal the issue of whether "the District's tax levies were not supported by its budget and were, therefore, discretionary." We conclude that the issue was preserved.

¶ 17 We review de novo a district court's order deciding a question of law under C.R.C.P. 56(h). *See Coffman v. Williamson*, 2015 CO 35, ¶ 12; *see also* C.R.C.P. 56(h) ("If there is no genuine issue of any

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[2] Although Referred Measure 4D allowed the District to keep any revenues it received, its last sentence expressly required voters to approve any rate increase. Thus, this language requires us to assess the validity of the mill levy increase in light of TABOR's requirements.

material fact necessary for the determination of the question of law, the court may enter an order deciding the question.").

¶ 18 We also review the interpretation of a constitutional provision de novo. *See Patterson Recall Comm., Inc. v. Patterson*, 209 P.3d 1210, 1214 (Colo. App. 2009). And in "construing a constitutional provision like TABOR, our goal is to determine and effectuate the will of the people in adopting the measure." *In re Interrogatory*, ¶ 31. We will give the provision's language its "ordinary and plain" meaning and will "endeavor to avoid constructions that would produce unreasonable or absurd results." *Id.*; *see Patterson*, 209 P.3d at 1214 ("We seek to ascertain intent, starting with the plain language of the provision and giving the words their ordinary meaning."). We will also "favor a construction that harmonizes different constitutional provisions over one that creates conflict between the provisions." *In re Interrogatory*, ¶ 31.

¶ 19 If TABOR's language is susceptible of more than one construction, then TABOR instructs that the "preferred interpretation shall reasonably restrain most the growth of government." Colo. Const. art. X, § 20(1); *In re Interrogatory*, ¶ 31. But we avoid construing TABOR in a manner that "would hinder

basic government functions or cripple the government's ability to provide services." *Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008).

¶ 20 Although ballot questions "are not subject to the same drafting processes as statutes," we interpret them by applying "generally accepted principles" of statutory construction, "such as according words their plain or common meaning." *Bruce v. City of Colorado Springs*, 129 P.3d 988, 993 (Colo. 2006). Similarly, as with statutes, we review the interpretation of ballot questions de novo. *See OXY USA Inc. v. Mesa Cnty. Bd. of Comm'rs*, 2017 CO 104, ¶ 12.

¶ 21 In construing a statute, "our primary task is to ascertain and give effect to legislative intent." *Id.* at ¶ 16. "We begin with the plain language of the statute, giving words and phrases their commonly accepted and understood meanings," and, if "the meaning of the statute is clear from the language alone, our analysis is complete, and we apply the statute as written." *Id.*

B. TABOR

¶ 22 TABOR's "purpose is to 'protect citizens from unwarranted tax increases' and to allow citizens to approve or disapprove the imposition of new tax burdens." *Huber*, 264 P.3d at 890 (quoting *Submission of Interrogatories on Senate Bill 93-74*, 852 P.2d 1, 4

(Colo. 1993)); *Campbell v. Orchard Mesa Irrigation Dist.*, 972 P.2d 1037, 1039 (Colo. 1998) (TABOR's "objective is to prevent governmental entities from enacting taxing and spending increases above [TABOR's] limits without voter approval."). To accomplish this purpose, section 20(4)(a) of TABOR "vest[s] with the voters the authority to approve or disapprove" the actions of state and local government that "enact new taxes, tax rate increases or tax policy changes directly causing a net tax revenue gain." *Huber*, 264 P.3d at 891; *see Bickel v. City of Boulder*, 885 P.2d 215, 225 (Colo. 1994) (The provisions of TABOR "impos[e] limitations on the spending and taxing powers of state and local government.").

¶ 23 The provisions of TABOR "supersede conflicting state constitutional, state statutory, charter, or other state or local provisions." Colo. Const. art. X, § 20(1); *see Huber*, 264 P.3d at 890 ("Exercise of the General Assembly's discretionary taxing power is subject to limits prescribed by the Colorado Constitution.").

¶ 24 But TABOR is prospective in effect, and TABOR's "voter-approval requirements of section 4(a) apply only to new taxes, tax rate increases, and tax policy changes adopted" by state and local government after TABOR's effective date of November 4, 1992.

Huber, 264 P.3d at 891 (TABOR's "prospective effect is intended 'to limit the discretion of government officials to take certain taxing, revenue and spending actions in the absence of voter approval.'" (quoting *Havens v. Bd. of Cnty. Comm'rs,* 924 P.2d 517, 522 (Colo. 1996))) (emphasis omitted).

¶ 25 And TABOR "did not change the types or kinds of taxing statutes allowable under our constitution." *Id.* Instead, TABOR "altered who ultimately must approve imposition of new taxes, tax rate increases, and tax policy changes by requiring voter approval before they can go into effect, leaving in place previously enacted legislative measures unless superseded by [TABOR's] provisions." *Id.*

¶ 26 *Huber* is instructive on this point. In *Huber*, the supreme court considered whether an increase of the tax rate on the severance of coal from fifty-four cents per ton to seventy-six cents per ton, which the Colorado Department of Revenue (CDOR) implemented in 2007 without voter approval, was constitutional under TABOR. *Id.* at 886-89.

¶ 27 In resolving this question, the supreme court noted that CDOR "has a ministerial, non-discretionary duty to administer taxing

statutes in accordance with the directives of the General Assembly." *Id.* at 890.

¶ 28 The supreme court also noted that although CDOR had implemented the tax rate of seventy-six cents in 2007, it did so under section 39-29-106, C.R.S. 2023, which set the applicable tax rate on its passage in 1988, before TABOR's effective date. *See Huber*, 264 P.3d at 886-87. This

> statute establishe[d] a tax with a tax rate that ha[d] two components to calculate the amount of tax owed: (1) a base rate of thirty-six cents per ton of coal extracted and (2) a quarterly one percent increase or decrease to the base rate based on changes to the index of producers' prices prepared by the United States Department of Labor.

Id. at 886. Thus, "[t]he amount of tax due [wa]s simply a function of the statute's tax rate," which the General Assembly adopted in 1988. *Id.* at 892. And the General Assembly expressed the statute's tax rate as "a mathematical formula with pre-set objective components for calculating the amount of tax due"; this formula anticipated "periodically adjusting the amount of tax due" to "track[] inflation." *Id.* Accordingly, the supreme court concluded that section 39-29-106 "directs [CDOR] to collect increased or decreased

amounts whenever the [producer price index] fluctuates by a full one and one-half percent," and it "leaves no room for a discretionary decision by the Department." *Id.* at 891-92.

¶ 29 Based on the foregoing, the supreme court concluded that CDOR's "adjustments to the coal severance tax rate," including implementing the seventy-six cents per ton tax rate in 2007, were "a non-discretionary, ministerial duty of [CDOR], and involve no legislative or governmental act beyond that specified in the statute." *Id.* at 892. Indeed, as mentioned, the court concluded that the "amount of tax due" was "simply a function of the statute's tax rate." *Id.*

¶ 30 The supreme court recognized that such a "ministerial, non-discretionary implementation of a tax law passed in the exercise of legislative authority" prior to TABOR's effective date did not "require voter approval, even if such implementation occur[red] after [TABOR's] effective date." *Id.* at 891. So it concluded that the "requirement of voter approval set forth" in section 20(4)(a) of TABOR did not "conflict with or supersede the coal severance tax provisions of section 39-29-106." *Id.* at 892.

¶ 31 The supreme court ultimately concluded that CDOR's implementing the increased tax rate in 2007 without voter approval was constitutional under TABOR because implementing the statute was "not a 'tax rate increase,' but a non-discretionary duty required by a pre-[TABOR] taxing statute which [did] not require voter approval" under TABOR. *Id.* at 887 (quoting Colo. Const. art. X, § 20(4)(a)).

C. The Water Conservancy Act

¶ 32 Under the Act, water conservancy districts are "political subdivision[s] of the state of Colorado and [bodies] corporate with all the powers of . . . public or municipal corporation[s]." § 37-45-112(7), C.R.S. 2023; *see People ex rel. Rogers v. Letford*, 102 Colo. 284, 297, 79 P.2d 274, 281 (1938) (concluding that water conservancy districts "are state agencies and public corporations" that have some "powers which have come to be associated with true municipal corporations, including the power of taxation to further [their] purpose"). And one purpose of water conservancy districts is "to provide for the conservation of the water resources of the state of Colorado and for the greatest beneficial use of water within this state." § 37-45-102(1), C.R.S. 2023. So the Act gives each water

conservancy district broad powers necessary to fulfill this purpose. *See* § 37-45-118(1)(b)(I)(A), (1)(c), (1)(j), (1)(q)(I), C.R.S. 2023. The Act also provides for several sources of revenue for water conservancy districts. *See* § 37-45-118(1)(b)(I)(B), (1)(*l*), (1)(n), (1)(q)(III), (2), (3); §§ 37-45-123, -124, -125, C.R.S. 2023.

¶ 33 A water conservancy district also has the power to fix a rate of levy. *See* § 37-45-121(1)(a). And section 37-45-122(2)(a)(II) directs a water conservancy district to fix its rate of levy as follows:

> [T]o levy and collect taxes . . . in each year, the board [of a district] shall determine the amount of money necessary to be raised by taxation, taking into consideration other sources of revenue of the district, and shall fix a rate of levy which, when levied on every dollar of valuation for assessment of property within the district and with other revenues, will raise the amount required by the district to supply funds for paying expenses of organization, for surveys and plans, and for paying the costs of construction of and operating and maintaining the works of the district; except that said rate shall not exceed:
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> . . . .
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> . . . one mill on each dollar of valuation for assessment of the property within the district . . . .

¶ 34 Section 37-45-122(4)(a) provides that a water conservancy district may increase a mill levy, "but any such increase . . . shall be made in accordance with the election procedure provided in this subsection (4)." Section 37-45-122(4)(a) also provides that districts described in section 37-45-122(2)(a)(III), such as the District in this case, may increase its maximum mill levy to no more than three mills, but any such increase shall be made in accordance with the election procedure provided in subsection (4).

D. Analysis

¶ 35 We conclude that the district court erred by determining under C.R.C.P. 56(h) that the District's increase of its mill levy from 0.5 mill to 1.0 mill in 2019 and subsequent years was constitutional under TABOR. *See* Colo. Const. art. X, § 20(4)(a); *Coffman*, ¶ 12; *Patterson*, 209 P.3d at 1214. We reach this conclusion for five reasons.

¶ 36 First, section 20(4)(a) of TABOR clearly requires any tax policy change of a district that results or would result in a net tax revenue gain to "have voter approval in advance." Colo. Const. art. X, § 20(4)(a); *see Patterson*, 209 P.3d at 1214 ("We seek to ascertain intent, starting with the plain language of the provision and giving

the words their ordinary meaning."). But the District did not obtain voter approval before it increased its mill levy from 0.5 mill to 1.0 mill in 2019. And the District does not dispute that its increase from 0.5 mill to 1.0 mill has resulted or will result in a net tax revenue gain to the District.

¶ 37 Second, contrary to the District's assertion that its tax levies were "ministerial and non-discretionary," the increase of its mill levy from 0.5 mill to 1.0 mill in 2019 and subsequent years was a discretionary act to which TABOR applies. *See Huber*, 264 P.3d at 891-92 ("[T]he limitations of [TABOR] apply only to discretionary action taken by" state and local government.); *Bickel*, 885 P.2d at 226; *see also Bruce W. Higley Defined Benefit Annuity Plan v. Kidder, Peabody & Co.*, 920 P.2d 884, 891 (Colo. App. 1996) (noting that "discretion" means "the power to choose between two or more courses of action").

¶ 38 Under the Act, the District has numerous powers, both to acquire and manage property and to generate revenue, that it may, in its discretion, exercise to accomplish its purpose. *See* §§ 37-45-118 to -125, C.R.S. 2023; *Letford*, 102 Colo. at 297, 79 P.2d at 281.

¶ 39 And section 37-45-122(2)(a)(III) of the Act required the District to exercise its discretion in fixing the rate of levy. *See OXY USA*, ¶ 12. Indeed, section 37-45-122(2)(a)(III) required the District to (1) determine the amount of money it would need to raise through the mill levy and other sources of revenue; and (2) fix a rate of levy that, along with those other sources of revenue, would cover its expenses. *See id.* But, as noted, the District had discretion as to what other revenue sources it would use and, to a certain extent, how much money would be generated from these other sources. The District's exercise of this discretion would affect how much money it needed to generate by the mill levy and, thus, what the increase of the rate of levy would be. Similarly, the District had discretion as to some of the expenses it would incur. Its exercise of this discretion would also affect how much money it would need to generate by the mill levy and, thus, what the rate of levy would need to be. *See, e.g.*, *Bolt v. Arapahoe Cnty. Sch. Dist.*, 898 P.2d 525, 539 (Colo. 1995) (concluding that under a somewhat similar statutory scheme, "for all intents and purposes the district levy is imposed when the district budget is adopted"). So under section 37-45-122(2)(a)(III), the District's fixing the rate of levy at 1.0 mill in 2019

was an action requiring the District to exercise its discretion. *See Huber*, 264 P.3d at 891-92; *Bickel*, 885 P.2d at 226.

¶ 40 Although section 37-45-122(2)(a)(III)'s requirements may appear to constitute a pre-set formula requiring the District to consider its expenses and other revenue sources and then fix a rate of levy to meet its needs, that formula is devoid of any pre-set objective components. This is significantly different from CDOR's implementing the coal severance tax statute that the supreme court held to be constitutional in *Huber*. That statute required CDOR to calculate the tax rate for the severance of coal based on a mathematical formula with two pre-set, objective components: (1) the base rate determined by the General Assembly and (2) the index determined by the United States Department of Labor. *See Huber*, 264 P.3d at 886. These two components were external to CDOR. And it had no discretion to determine either of them. CDOR simply made the required calculation and implemented the tax. *See id.* at 890 (CDOR "has no power to impose a new tax or to set tax policy."). In contrast, section 37-45-122(2)(a)(III) does not provide a mathematical formula, with pre-set objective components, for fixing the rate of levy but, instead, required the District to fix the

rate in light of its other revenue sources and its expenses — both factors that involved the District exercising its discretion. *See id.* at 891-92; *Bickel*, 885 P.2d at 226.

¶ 41 Third, to the extent section 37-45-122(2)(a)(III) conflicts with TABOR, TABOR supersedes this statute. *See* Colo. Const. art. X, § 20(1); *Huber*, 264 P.3d at 889, 891. As noted, section 20(4)(a) of TABOR requires that a district must obtain the voters' approval before it increases a rate of levy above that for the prior year. But section 37-45-122(2)(a)(III) requires a water conservancy district to fix its rate of levy in light of its other revenue sources and its expenses, and it only requires voter approval before the water district may fix a rate of levy above 1.0 mill. Section 20(4)(a) of TABOR thus supersedes section 37-45-122(2)(a)(III) in requiring that a water conservancy district must obtain voter approval in advance any time it intends to fix a rate of levy above that for the prior year. *See* Colo. Const. art. X, § 20(4); *Huber*, 264 P.3d at 889, 891.

¶ 42 Fourth, Referred Measure 4D did not waive the requirement in section 20(4)(a) of TABOR that the District must obtain voter approval before it fixes a rate of levy above that for the prior year.

See Bruce, 129 P.3d at 993. Referred Measure 4D authorized the District to retain revenue exceeding the limits in section 20(7) of TABOR and, thus, was "predicated on the continuation of the mill levy rates then in effect." *In re Interrogatory*, ¶ 41. In 1996, when the voters approved Referred Measure 4D, the District's rate of levy was 0.5 mill; under section 20(4)(a) of TABOR, which predated Referred Measure 4D, the District could only increase this mill levy with the voters' approval. This is the mill levy rate on which Referred Measure 4D was predicated. And indeed, Referred Measure 4D specifically acknowledged the continuing requirement of section 20(4)(a) of TABOR "that no . . . mill levy shall be increased at any time without the prior approval of the voters of the [District]." *See Bruce*, 129 P.3d at 993.

¶ 43 Fifth, the District does not point us to anything in the record supporting its inference that construing section 20(4)(a) of TABOR as requiring water conservancy districts to obtain voter approval before increasing a rate of levy would "hinder basic government functions" or "cripple the government's ability to provide services." *Barber*, 196 P.3d at 248. To ensure their revenues meet their expenses, water conservancy districts retain the power to seek voter

approval to increase their mill levies, engage new sources of revenue, and adjust their budgets. *See* Colo. Const. art. X, § 20(4)(a); §§ 37-45-118 to -125. And TABOR contains mechanisms for districts to raise revenue for emergency situations. *See* Colo. Const. art. X, § 20(1), (5), (6).

¶ 44 So we conclude that the District's increasing its mill levy from 0.5 mill to 1.0 mill in 2019 and subsequent years without voter approval was unconstitutional under TABOR. And because the district court's judgment in the District's favor was based on its erroneous determination under C.R.C.P. 56(h) that the District's increase was constitutional under TABOR, we reverse its judgment and remand the case for further proceedings consistent with this opinion.

E. Attorney Fees and Costs

¶ 45 The property owners request an award of attorney fees and costs on appeal under section 20(1) of TABOR.

¶ 46 Section 20(1) of TABOR provides that "[s]uccessful plaintiffs are allowed costs and reasonable attorney fees." *See City of Wheat Ridge v. Cerveny*, 913 P.2d 1110, 1115 (Colo. 1996) (The language of section 20(1) of TABOR "means that courts 'are allowed' to award

attorney fees to successful plaintiffs."); *see also* C.A.R. 28(a)(9) (providing for fee awards on successful appeals).

¶ 47 But an award of attorney fees and costs under TABOR is not mandatory. *See Cerveny*, 913 P.2d at 1115. Instead, "the determination if a plaintiff should be allowed to recover attorney fees is discretionary with the trial court." *Id.*

> In assessing whether to award attorney fees, the trial court must consider a number of factors and reach its conclusion based on the totality of the circumstances. Most importantly, the trial court must evaluate the significance of the litigation, and its outcome, in furthering the goals of [TABOR]. This evaluation must include the nature of the claims raised and the significance of the issues on which the plaintiff prevailed in comparison to the litigation as a whole. Among others, it is also appropriate for the trial court to consider the factors it would weigh in adjudging what "reasonable" attorney fees would be if fees were awarded.

Id.

¶ 48 While the property owners have been successful on the only substantive issue in this appeal, it is more appropriate for the district court to determine whether, under the totality of the circumstances, including whether this case is certified as a class action, the property owners may recover their reasonable attorney

fees and costs on appeal under section 20(1) of TABOR. *See id.* On remand, the district court must determine whether the property owners may recover their reasonable attorney fees and costs on appeal under section 20(1) of TABOR.

III. Disposition

¶ 49 The judgment is reversed, including the denial of class certification under Rule 23, and the case is remanded to the district court for further proceedings consistent with this opinion, to include a determination by the district court as to whether the case shall be certified as a class action and whether the property owners may recover their reasonable attorney fees and costs on appeal under section 20(1) of TABOR.

JUDGE PAWAR and JUDGE TAUBMAN concur.