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COLORADO COURT OF APPEALS
2 East 14th Avenue
Denver, Colorado 80203

Appeal from District Court, Logan County, Colorado
Hon. Robert C. James
Case No. 2021 CV 030049

James Aranci, *et al.*,

Plaintiffs-Appellants,

v.

Lower South Platte Water Conservancy District, *et al.*,

Defendants-Appellees.

▲ COURT USE ONLY ▲

Case No.: 2023 CA 138

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OPENING BRIEF

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☑ It contains 5485 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

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I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Tyler Martinez
Tyler Martinez (Atty. No. 42305)

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STATEMENT OF ISSUE

The Taxpayer's Bill of Rights requires "voter approval in advance for… any… mill levy above that for the prior year." Colo. Const. art. X, § 20(4)(a). In December 2019, however, the Board of the Lower South Platte Water Conservancy District ("Water District") decided to double its mill levy. That decision was not referred to voters before it went into effect. Did the Water District act unconstitutionally under the Taxpayer Bill of Rights?

STATEMENT OF THE CASE

James Aranci, Jack Darnell, Charles Miller, William Lauck, and Curtis Werner ("Residents")[1] saw their property taxes to the local Water District[2] double. But they never voted on the tax increase. Instead, the

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[1] All Residents have owned property in jurisdiction of the Water District and are electors within the Water District. CF, 290 ¶¶13-14. Additionally, Mr. Werner is the sole member of Werner Angus Ranch, LLC, which is also a property owner in the jurisdiction. CF, 290 ¶13.

[2] "Water District" means all Defendants-Appellees: the Lower South Platte Water Conservancy District, Patricia Bartlett in her official capacity as Logan Country Treasurer, Robert A. Sagel in his official capacity as Morgan Country Treasurer, Wanda K. Trennepohl in her official capacity as Sedgwick Country Treasurer, and Debra Cooper in

decision to double the rate—from 0.5 mill to 1 mill[3]—was made by the Board of the Lower South Platte Water Conservancy District. CF, 289 ¶10. The relevant county commissioners ratified the change and the country treasurers started collecting at the higher rate in 2020. CF, 289 ¶12. (Each country commission later refused to certify the higher rates for subsequent years. CF, 289 ¶12.)

The Taxpayer's Bill of Rights ("TABOR") requires "voter approval in advance for… any… mill levy above that for the prior year." Colo. Const. art. X, § 20(4)(a). Without such a TABOR vote on their increased property taxes, the Residents filed a Class Action Complaint alleging violations of TABOR. CF, 4-5 ¶¶10-24. The named Residents sought class certification under Colorado Rule of Civil Procedure 23 because this issue

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her official capacity as Washington County Treasurer. The Water District covers portions of Logan, Morgan, Sedgwick, and Washington Counties. CF, 288 ¶3. The country treasurers collect taxes on behalf of the Water District. CF, 288 ¶4 (Findings of Fact recognizing relationship under C.R.S. § 37-45-128).

[3] "[E]ach mill represents $1 of tax assessment per $1,000 of the property's assessed value." Mill Rate, Black's Law Dictionary (abridged 10th ed. 2014).

touches all who won or have owned taxable property within the Water District (making joinder impracticable) and increasing the danger of piecemeal litigation leading to inconsistent results. CF, 5 ¶26; CF, 6 ¶¶31 and 39. For relief, the Residents asked the District Court to enjoin collection at the higher mill levy rate and refund the difference that was illegally collected. CF, 7 ¶¶45(a) and 45(b).

Given that this violation of TABOR was novel, the parties stipulated that discovery and other trial preparations should be stayed until the District Court ruled a Determination of a Question of Law under Colorado Rule of Civil Procedure Rule 56(h). CF, 105 ¶3. The Residents filed a 56(h) motion, CF, 115-21, and the parties stipulated facts, CF, 126-29.

The Water District filed a cross-motion for determination of question of law on the same question. CF, 174-91. The Water District relied on arguing that Measure 4D, a 1996 TABOR spending limit waiver, qualified as voter approval for future rate increases. *See, e.g.*, CF, 184 ¶c ("The use of the words "WITHOUT LIMITATION··· NOTWITHSTANDING ANY LIMITATION OF [TABOR]" indicates an

intent to waive all revenue limitations of TABOR."). The District Court's order reproduced the ballot question language in full:

> 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, NOT WITHSTANDING 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?

CF, 288 ¶6 (Finding of Fact reproducing the ballot question).

On October 10, 2022, the District Court issued an Amended Order, interpreting TABOR and the applicable tax statutes at issue and finding no constitutional violation. *See* CF, 295-96. The District Court correctly rejected the Water District's reliance on the ballot language, but then relied upon other cases that *did* contain express tax rate waivers in rejecting application of TABOR's plain language to this case. *Compare*

CF, 294 (rejecting Water District's interpretation) *with* CF, 295 (relying on, *inter alia*, *Bruce v. Pikes Peak Library Dist.*, 155 P.3d 630, 632 (Colo. App. 2007)).

On October 18, the Residents sought a status conference because the parties were "at an impasse regarding the consequences of [the Rule 56(h)] order." CF, 315 ¶3. The Residents "disagree[d] with the Court's ruling," to not apply TABOR's plain language, but as "it constitute[d] the law of the case," all that was left was a motion for summary judgment from the Water District. CF, 315 ¶4. Yet the Water District disagreed, waiting for a decision on class certification and mandating that Residents again seek class certification. CF, 316 ¶¶6-7. The District Court ordered a status conference for November 16, 2022. CF, 319.

On December 8, 2022, the District Court issued and Order and Judgment. CF, 332-34. This Order disposed of all claims by the Residents. CF, 334 ¶8. The Residents timely appealed this pure question of law. CF, 335-39. This Court has jurisdiction on this under C.R.S. § 13-4-102(1).

SUMMARY OF THE ARGUMENT

Passage of the Taxpayer Bill of Rights ("TABOR") into the Colorado Constitution was a watershed moment in Colorado legal doctrine. By its plain and unambiguous language, mill levy increases must be ratified by the vote of the people in the jurisdiction. Colo. Const. art. X, § 20(4)(a). It should therefore be an easy decision that when a water conservation district *doubles* its mill levy rate without a vote of the people, that higher rate is unconstitutional. And yet the District Court held that Water District's unratified rate increase did not violate TABOR. This was error.

TABOR's default rule is that tax increases must go to a vote of the people, as outlined in detail by the Constitutional amendment. Colo. Const. art. X, § 20(3). But the Colorado Supreme Court and this Court have recognized very narrow exceptions to that requirement. A TABOR vote is unnecessary if the rate increase is the result of a purely ministerial or corrective act, such as when the relevant statute adjusts the rate based on inflation. Likewise, if the voters have approved, even in the pre-TABOR era, the rates or rate flexibility, then future TABOR ratification is not required. None of these narrow exceptions apply here.

The District Court, ostensibly applying the ministerial exception, instead created a new exception: when the "varying budgetary needs" of the district mandate more money, then TABOR does not apply. CF, 295. But that exception will swallow the whole of TABOR. A better understanding of the ministerial exception is when there is a pre-existing formula or trigger that mandates a tax increase. Water Districts, with plenary power to choose how they are operated—varying mill levies, debt, or budget cuts—are not mere ministers applying a formula, but quasi-legislative entities performing their functions in regulating water in their district.

Nor is there any corrective act to take to resolve improper calculations of either the mill levy rate or the amount collected. There is no emergency. This is ordinary budget work. For years the budget operated on the 0.5 mill rate. The decision to double that rate may well be an important step for the Water District—but TABOR only mandates they ask the voters first.

Indeed, there is no such voter ratification of *any* such rate increase. All agree that the only vote on the matter happened in 1996, and the

ballot expressly said it was not authorizing rate increases: that "NO LOCAL TAX RATE OR PROPERTY MILL LEVY SHALL BE INCREASED AT ANY TIME WITHOUT THE PRIOR APPROVAL OF THE VOTERS." CF, 289 ¶6. The District Court recognized that this language cannot support the Water District's actions.

Yet, the District Court relied upon inapposite cases to say that nonetheless, yes, the Water District may keep the money and charge the higher rates. The cases the District Court relied upon had in their histories express voter approval for rate increases—either as a range of mill levy rates, or unrestricted. Because no such vote took place here, the Water District's actions were *ultra vires*.

The District Court's decision was incorrect and warrants reversal. If a standard of "varying budgetary needs" is left in place, then not only the Water District, but *any* governmental entity can sidestep TABOR's ratification mandate. On the reverse side, all the Water District need do is ask the voters if the rate increase is approved. Governments routinely win these elections and there is no indication why that would not happen here. But the protections of TABOR must remain in place.

ARGUMENT

I. TABOR MANDATES VOTER RATIFICATION OF MILL LEVY INCREASES BY THE WATER DISTRICT

A. Standard of Review and Preservation of the Issue

This appeal arises from the District Court's decision on cross-motions for determination on a question of law pursuant to Colorado Rule of Civil Procedure 56(h). Specifically, the District Court held that the Water Districts mill levy increase did not violate TABOR. CF, 298. A District "[C]ourt's order deciding a question of law under Rule 56(h) is subject to de novo review." *Coffman v. Williamson*, 2015 CO 35, ¶ 12.

Furthermore, this case presents an issue of constitutional interpretation, and this Court must "'give effect to the electorate's intent in enacting the amendment.'" *Chronos Builders, LLC v. Dep't of Labor & Employment, Div. of Family & Med. Leave Ins.*, 2022 CO 29, ¶ 13 (quoting *Davidson v. Sandstrom,* 83 P.3d 648, 654 (Colo. 2004)). Therefore, this Court must "review the trial court's assessment of the constitutionality" de novo. *E-470 Pub. Highway Auth. v. Revenig*, 91 P.3d 1038, 1041 (Colo. 2004).

The Residents preserved this issue, as it is the heart of the case. The Class Action Complaint raised this issue as its core basis for relief. CF, 4-5 ¶¶10-24. Specifically, the Complaint asked that the District Court enjoin collection at the higher mill levy rate and refund what was illegally collected. CF, 7 ¶¶45(a) and 45(b). The parties stipulated that discovery and other trial preparations should be stayed until the court ruled on the Rule 56(h) motion. CF, 105 ¶3. The Residents filed the 56(h) motion, CF, 115-21, and the parties stipulated facts, CF, 126-29. The Water District responded and cross-moved on the same question of law, CF, 174-91, and the Residents filed a reply, CF, 245-59.

On September 27, 2022, the District Court ruled on the 56(h) motion by interpreting TABOR and the applicable tax statutes at issue. CF, 275-86. Specifically, the Court below ruled that the mill levy increase was "not a new tax," not a "tax policy change resulting in an increase of tax revenue," and "not an increased tax rate." CF, 283-84. On October 10, 2022, the District Court amended its Order, but left this analysis intact. *See* CF, 295-96.

On October 18, the Residents sought a status conference because the parties were "at an impasse regarding the consequences of the [Rule 56(h)] order." CF, 315 ¶3. The Residents "disagree[d] with the Court's ruling," but as "it constitute[d] the law of the case," all that was left was a motion for summary judgment from the Water District. CF, 315 ¶4. Yet the Water District disagreed, waiting for a decision on class certification and mandating that Residents again move for class certification. CF, 316 ¶¶6-7.

The District Court ordered a status conference for November 16, 2022. CF, 318. On December 8, 2022, the court issued an Order and Judgment, disposing of all claims. CF, 332-34; CF, 334 ¶8. The Residents timely appealed. CF, 335-39.

B. A TABOR Ratification Vote was Required Here.

The effect of the District Court's ruling is to put in place a tax increase without a vote of the people, as required by TABOR, and enshrine that "varying budgetary needs" is a worthwhile reason to ignore the TABOR mandate. CF, 295. Both are error.

The Taxpayer's Bill of Rights requires "voter approval in advance for… any… mill levy above that for the prior year." Colo. Const. art. X, § 20(4)(a). "The overriding scheme of [TABOR] with respect to taxes evidences an intent on the part of the voters to limit tax *increases* that do not receive prior voter approval." *Bolt v. Arapahoe Cnty. Sch. Dist. No. Six*, 898 P.2d 525, 537 (Colo. 1995) (emphasis in original). And the goal of TABOR was to "reasonably restrain most the growth of government." Colo. Const. art. X, § 20(1).

To accomplish TABOR's goals, this court must "give the provision's terms their ordinary and plain meanings," and "endeavor to avoid constructions that would produce unreasonable or absurd results" in that context. *In Re Interrogatory on House Bill 21-1164 Submitted by Colorado Gen. Assembly*, 2021 CO 34, ¶31 ("*In Re House Bill 21-1164*"). And of course "[c]ourts should not engage in a narrow or technical reading of language contained in an initiated constitutional amendment if to do [so] would defeat the intent of the people." *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996).

Because of the language in C.R.S. § 37-45-122(2)(a), the District Court held that the tax at issue was "not a new tax," relying on *HCA-Healthone, LLC v. City of Lone Tree*, 197 P.3d 236. (Colo. App. 2008). CF, 295. But that case dealt only with the continuation of same tax rates when statutory city reorganized as a home rule jurisdiction. *Lone Tree*, 197 P.3d at 241. The Residents here complain of the tax increase, not that the tax was created. CF, 7 ¶¶45(a) and 45(b).

The District Court interpreted C.R.S. § 37-45-122(2)(a) as *mandating* the Water District make increased rate increases to meet its budget. CF, 291. That legal theory has not been recognized by this nor the Supreme Court as a justification for avoiding a TABOR vote. Indeed, it guts TABOR because all state entities need to balance their budgets and keep their doors open, yet TABOR mandates generally tax rate increases be voted upon by the people.

The appellate courts of the state have interpreted TABOR to provide two exceptions to the plain meaning of TABOR. First, when a pre-TABOR tax statute creates adjustments based on ministerial or corrective purposes (such as inflation adjustments), a TABOR ratification

need not happen. *See*, *e.g.*, *Griswold v. Nat'l Fed'n of Indep. Bus.*, 2019 CO 79, ¶37; *Huber v. Colo. Mining Ass'n,* 264 P.3d 884 (Colo.2011).[4] Second, when voters approved revenue increases (such as to pay bonds issued prior to TABOR), then a TABOR election is not warranted. *See*, *e.g.*, *Bickel v. City of Boulder*, 885 P.2d 215, 236 (Colo. 1994), *as modified on denial of reh'g* (Oct. 11, 1994). Neither the ministerial nor the voter-approved exceptions apply to the Water District's rate increase here.

1. The Water District's Rate Increase was Neither Ministerial nor Corrective.

Existing case law differentiates between ministerial or corrective tax rate adjustments (such as for inflation) and legislative choices to increase rates to pay for more programs. Neither are based on the when "varying budgetary needs," CF, 295, of the government. Ministerial and "corrective" actions do not generate a need for a TABOR election. *See*, *e.g.*, *In Re House Bill 21-1164*, 2021 CO 34, ¶48. But fundamental

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[4] There is also a "de minimis" exception in the ministerial line of cases when a change results in "an incidental and de minimis increase in government revenue." *See*, *e.g.*, *Griswold*, 2019 CO 79 ¶ 37. A doubled rate is hardly de minimis.

changes to the tax rates do require a vote of the electorate because TABOR's "purpose of requiring a district to gain approval from persons who own property within a district before it imposes a new tax is to allow the people who will have to pay the tax to decide whether the tax should be levied." *Landmark Towers Ass'n, Inc. v. UMB Bank, N.A.*, 2016 COA 61, ¶60, *rev'd on other grounds* 2017 CO 107, ¶40-42.

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. It is only when something is routine, set by formula, and handled by an agency with no discretion that the ministerial exception to TABOR applies.

Huber is the perfect example of a ministerial tax rate adjustment. In that case, the coal mining severance tax statute had two tiers: a base rate and an adjustment for inflation. *Huber*, 264 P.3d at 891. The statute there directed the Executive Director of the Department of Revenue to adjust the tax rate based on the Producer Price Index. *Id.* at 887 (discussing C.R.S. § 39–29–106); C.R.S. § 39–29–106(5) ("For every full one and one-half percent change in the index of producers' prices for all

commodities prepared by the bureau of labor statistics of the United States department of labor, the tax rate provided in subsection (1) of this section shall be increased or decreased one percent."). There the statutory formula left "no room for a discretionary decision by the Department." *Huber,* 264 P.3d at 891.

The lack of discretion was dispositive in *Huber* because "the limitations of [TABOR] apply only to *discretionary* action taken by legislative bodies." *Id*. at 892 (emphasis added). The Department of Revenue had "no tax making or tax policy change authority" and had no choice to "modify the coal severance tax statutory mechanism or refuse to implement it." *Id*. Indeed, there was "no legislative or governmental act beyond that specified in the statute." *Id*. This reading of *Huber* was confirmed in 2021 by the Supreme Court. *In Re House Bill 21-1164*, 2021 CO 34, ¶ 46 (discussing and applying *Huber*).

In Re House Bill 21-1164 clarified that corrective action that incidentally raises tax rates (via rescinding temporary tax credits) may not violate TABOR. 2021 CO 34, ¶ 3. At issue there was that the Colorado Department of Education mistakenly advised local school districts "to

calculate mill levies in accordance with TABOR's growth-plus-inflation limits, as if the districts' voters had not waived those limits." *Id.* at ¶10.[5] That is because there was some tension between TABOR waivers and a school funding statute passed shortly thereafter. *Id.* at ¶¶6-7. Eventually, the Supreme Court resolved the tension. *Id.* at ¶16 (discussing *Mesa Cnty. Bd. of Cnty. Comm'rs v. State,* 203 P.3d 519, 536 (Colo. 2009)). But in the meantime, the school districts had artificially kept mill levy rates low, per the state agency's instructions. *Id.* ¶17. To correct the loss of funding, the state legislature adopted a statute that gradually returned the rates. *Id.* at ¶35.

The Colorado Supreme Court found that this statute did not violate TABOR: "we are not persuaded that a new election is required when the government acts to correct an error (here, the CDE's incorrect guidance). *Id.* at ¶48. That is because the correction was simply to "implement a

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[5] Indeed, Justice Samour, concurring, went further saying "[t]he mill levy decreases that took place as a result of CDE's erroneous guidance weren't just unnecessary, 'perhaps mistaken,' or merely in tension with implied voter consent; they were downright *illegal*." *Id.* at ¶64 (footnote omitted). There is no such error correction here for the Water District: it is the un-voted upon rate increase itself that is illegal.

taxation mechanism that should have been in place all along." *Id*. So even though "the mill levies at issue will ultimately return to the rates in effect when the voters authorized the retention of all revenues in excess of TABOR limits." *Id*. at ¶49. Therefore, "no new vote is required because House Bill 21-1164 simply effectuates what the voters have already approved." *Id*.

The District Court concluded that the water conservation district statutory text created such a ministerial act, but that is not so because setting rates based on "varying budgetary needs" is a *legislative* function requiring discretionary balancing of various options. Of particular concern to the District Court was the use of "shall" in the statute, which provides:

> As to any district formed subsequent to April 22, 1957, to levy and collect taxes under class A, in each year, the board 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….

C.R.S. § 37-45-122(2)(a); CF, 291 (block quoting same). The District Court stated that "[a]bsent the mandatory language of [C.R.S. §] 37-45-122(2)(a), this Court would conclude that the increased mill levy from 2018 to 2019 by the [Water] District violated TABOR." CF, 293. The District Court called this a "mandatory formula," CF, 291, but there is no formula or way to apprise this by mathematics before the fact.

Assuming, *arguendo*, that the District Court is correct that "shall" in C.R.S. § 37-45-122(2)(a) created a sort of mandatory formula wherein the Water District adds up its costs and sets a mill levy to pay for it, without an objective standard the process of setting a budget is *discretionary* and therefore more of a legislative act. The Water District has general authority to levy taxes and make public works as part of the powers to "the comfort, safety, and welfare of the people of the state of Colorado." C.R.S. § 37-45-102(1)(g); *cf. Millis v. Bd. of Cnty. Comm'rs of Larimer Cnty.*, 626 P.2d 652, 659 (Colo. 1981) (distinguishing water districts from special districts who authority is limited and must directly benefit the land); *Bill Barrett Corp. v. Lembke*, 2018 COA 134, ¶46 (applying *Millis*). The Water District's powers are extensive. *See*, *e.g.*,

C.R.S. § 37-45-118 (providing the power of a water district for everything from eminent domain to creating parks and recreation areas). The Water District thus has legislative powers, not mere ministerial functionality.

The Water District's doubling of the rate was a discretionary choice—it might have also chosen 0.75 mils (50% increase) or 0.6 mills (a 20% increase). Unlike the Executive Director in *Huber*, the Water District used no mandatory formula based on a price index or other objective criterion. Indeed, the Water District might have also found ways to reduce expenses. All that needs to be done to make sure the Water District's activities can be carried out.

The Water District has a range of options—reducing spending, issuing bonds, or even other funding mechanisms beyond C.R.S. § 37-45-122(2)(a). Indeed, the use of Class A mill levy calculations is but one of many options the legislature gave to water conservancy districts. *See*, *e.g.*, *Pueblo W. Metro. Dist. v. Southeastern Colo. Water Conservancy Dist.*, 721 P.2d 1220, 1222 (Colo. App. 1986) (describing statutory scheme while upholding that water districts *may* choose to use only the system provided in C.R.S. § 37-45-122).

Indeed, such legislative "*discretion* is apparent in the language of § 37–45–121(1), C.R.S., stating that the board may levy taxes 'by any one or more of the methods or combinations thereof" specified in the statute.'" *Id*. C.R.S. § 37-45-122(1) itself gives water conservancy districts the power to "tak[e] into consideration other sources of revenue of the district."[6] Hardly mere application of a formula, the Water District has legislative flexibility to fund itself and its activities. The Water District's determination of the mill levy rate was not driven by a mandatory formula but by its own spending choices.

Nor was there some mistake in rate to be corrected. It is not as if the Water District was collecting at the wrong rate for years, as had happened to school funding across the state, which was the issue in *Mesa County* and *In Re House Bill 21-1164*. By all accounts, the Water District operated just fine on its existing 0.5 mill levy rate until the Water District decided the need to double it arose in 2019. That is perfectly reasonable

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[6] Nor is there any fear of imminent harm to government operations on bonds. If default or deficiencies are near, C.R.S. § 37-45-126 provides for how a water conservancy district may raise funds until the debt is paid.

to ask in a TABOR election, just as the General Assembly need do or a local library district. It is what the constitution requires. Colo. Const. art. X, § 20(4)(a).

2. There is No Prior Voter Approval of the Rate Increase.

"A pre-TABOR election can serve as 'voter approval in advance' for a post-TABOR mill levy increase." *Pikes Peak Library*, 155 P.3d at 632. But there must be a vote for that retroactive application to apply. None exists here.

The District Court correctly surmised that there was no voter approval for future tax rate increases in the Water District's waiver of the TABOR spending limits ("DeBrucing"[7]) measure, CF, 294, but in upholding the Water District's mill levy relied upon cases where there *had been* such voter approval for future tax rate approvals. CF, 295-96 (relying on, *inter alia*, *Pikes Peak Library*, 155 P.3d 630 (voter-approved mill levy rate range)). Since there has been no voter ratification—either

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[7] The term is named after the well-known proponent of TABOR, Douglas Bruce. *See*, *e.g.*, Peter J. Whitmore, *The Taxpayers Bill of Rights-Twenty Years of Litigation*, Colo. Law. (Sep. 2013) at 35, 41 n.79.

past or present—of the 2019 tax increase, then the Water District's action violates TABOR.

It is important to note that, while TABOR specifies exact language for tax rate increases and the taking on of new public debt, there is no specified format to a measure aimed at ending TABOR's spending limits outlined in Colorado Constitution article X, § 20(7). *See, e.g.*, Anna-Liisa Mullis, *Dismantling the Trojan Horse: Mesa County Board of County Commissioners v. State*, 82 U. Colo. L. Rev. 259, 269 (2011) (discussing lack of format in the constitution for keeping excess funds); *cf.* Colo. Const. art. X § 20(3)(c) (required ballot language to increase taxes or take on new debt). Therefore, the exact language of what voters approved of in a DeBrucing election matters greatly as exemption from the spending limits of § 20(7) is materially different than exempting future rate increases regulated by Colo. Const. art. X, § 20(4).

Here, the Water District's suspension of the spending limits specifically disclaimed that "NO LOCAL TAX RATE OR PROPERTY MILL LEVY SHALL BE INCREASED AT ANY TIME WITHOUT THE PRIOR APPROVAL OF THE VOTERS." CF, 289 ¶6 (Finding of Fact

reproducing the ballot question). This is in stark contrast to the measures that both remove the spending limits and also the rate increases. *See*, *e.g.*, *Bickel*, 885 P.2d at 236 ("By using the phrase 'in an amount sufficient to pay the principal of and interest on such bonds,' the City sought approval of an open-ended tax increase.").[8]

Not only was there no voter approval, the last ballot question on the matter expressly disclaimed there would be a tax increase. That should have been the end of the District Court's analysis since there was no prior approval for the 2019 mill levy increase.

Nonetheless, the District Court concluded that because the mill levy fell in the same *range* as what was possible at the time of the DeBrucing measure in 1996, that meant any increases within that range is not a new tax. CF, 296. That's not quite right, as the proper question is if it is a *tax increase*.[9] Absent any constitutional or statutory limits, a

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[8] Even then, even broad phrasing like a "'without limitation as to rate' clause must be consistent with the district's stated estimate of the final fiscal year dollar amount of the tax increase." *Id*. at 234.

[9] The District Courts relied on *Barber v. Ritter*, 196 P.3d 238 (Colo. 2008), for the point that the Water District's action was not a "tax policy change resulting in an increase in tax revenue." CF, 295-96. But *Barber*

range of possible tax rates imposed could be from zero to infinity; state law cabined water districts' tax rates to a certain range, and TABOR when adopted limited future upward movements within that range. Mathematics and state law may have allowed the water district to set a variety of tax rates but they had picked 0.5 mill when TABOR was adopted. Prior voter approval outside a formal TABOR vote (*i.e.* from time before TABOR was in effect) must examine what the *rate was at the time of the vote*. The rate at the time of the 1996 vote was 0.5 mill. The voters never approved a range.

Pikes Peak Library is not to the contrary, and it was error for the District Court to rely upon it. There, the library district "received *voter approval* in 1986 to increase the maximum tax levy from two mills to no more than four mills." *Pikes Peak Library*, 155 P.3d at 632 (emphasis

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examined a program to transfer unclaimed cash and special fees into the state's general fund. *Barber*, 196 P.3d at 248, 252. Water District mill levies have long been held to be taxes and their increase is a tax rate increase. *See*, *e.g.*, *People ex rel. Rogers v. Letford*, 79 P.2d 274, 281 (Colo. 1938) (recognizing that the General Assembly "vest[ed] in [water conservancy districts] powers which have come to be associated with true municipal corporations, including the power of taxation to further its purpose.")

added). Unlike the case at bar, that mill levy in Colorado Springs "increased and decreased several times" over the years. *Id*. The voter-approved range was effective for a district with variable needs. But the Water District here has remained stable in its needs until it unilaterally changed its rates.

Nor is *Bolt v. Arapahoe County School District No. Six*, 898 P.2d 525 (Colo. 1995), helpful here. *Bolt*'s circumstances were unique and cannot be repeated: Arapahoe County approved a mill levy increase in between the voter approval of TABOR in November 1992 and its effective date. *Id*. at 527. Unlike here, there was a voter approval of the mill levy increase in *Bolt*. *See id*. at 534 (rejecting argument that "that the school district failed to secure that voter approval").

Without voter ratification, the Water District's mill levy rate doubling is unconstitutional. Neither the District Court nor the Water District can point to such an approval—prior to TABOR or after the constitutional amendment's effective date. The District Court erred in its determination of the question of law.

CONCLUSION

For the foregoing reasons, the District Court's determination of a question of law under Colorado Rule of Civil Procedure 56(h) should be reversed and the case remanded for class certification and trial.

REQUEST FOR ATTORNEY FEES

TABOR provides that "[s]uccessful plaintiffs are allowed costs and reasonable attorney fees." Colo. Const. art. X, § 20(1); *cf.* C.A.R. 28(a)(9) (providing for fee awards on successful appeals). TABOR's fee award is not automatic. *City of Wheat Ridge v. Cerveny*, 913 P.2d 1110, 1115 (Colo. 1996). Whether to grant attorney fees depends on an evaluation on "the significance of the litigation, and its outcome, in furthering the goals of" TABOR. *Id*. at 1115. The Court should examine "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." *Id*. Success on the central claim can yield an award of attorney fees in total. *See*, *e.g.*, *Stuart v. N. Shore Water & Sanitation Dist.*, 211 P.3d 59, 63 (Colo. App. 2009) (distinguishing *Cerveny* because plaintiffs were only partially successful versus the Stuart litigant's success on the central claim of the case).

Here, presuming the landowners are successful in this appeal, it will have been victorious on the substantive issue in the case. The claims are ones of vital importance—how to apply TABOR when a statute allows for a range of tax rates—in a specialized area of the law, with experienced and reputable counsel. Success here provides statewide clarity of the law. These factors support a fee award when the landowners successfully defended their rights under the Colorado Constitution.

Respectfully submitted,

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Dated: May 15, 2023

CERTIFICATE OF SERVICE

I certify that the foregoing document was delivered to the Clerk of the Court on May 15, 2023, via electronic filing. Consistent with C.A.R 30, service on Defendants will be accomplished by the Court's E-fling System.

/s/ Tyler Martinez
Tyler Martinez