DISTRICT COURT, LOGAN COUNTY, COLORADO Court Address: 110 N Riverview Rd. Sterling, CO 80751	DATE FILED: July 13, 2022 1:44 PM FILING ID: 9BA1B5DAF817F CASE NUMBER: 2021CV30049
Plaintiff: James Aranci, *et al.* v. **Defendant:** Lower South Platte Water Conservancy District, *et al.*	
Attorneys: Name: Daniel E. Burrows Address: Advance Colorado 1312 17th St. Unit 2029 Denver, CO 80202 Phone Number: (720) 588-2008 E-mail: dan@advancecolorado.org Atty. Reg. #: 40284 Name: Joseph D. Henchman Address: National Taxpayers Union Foundation 122 C St., NW #650 Washington, DC 20001 Phone Number: (202) 766-5019 E-mail: jbh@ntu.org Atty. Reg. #: 21PHV6802	▲ **COURT USE ONLY** ▲ Case Number: 2021CV030049 Div.: D Ctrm.:

REPLY IN SUPPORT OF MOTION FOR DETERMINATION OF A QUESTION OF LAW AND RESPONSE TO COUNTER-MOTION

The Lower South Platte Water Conservancy District (LSPWCD) must abide by at least three rules in setting its property tax rate: First, any rate increases must be

approved by voters. Second, excess revenue must be returned unless waived by voters. And, third, the rate may never exceed one mill. LSPWCD has violated the first of these restrictions. The District's response establishes that the District abided by the second and third rules. But Plaintiffs—both in their motion and elsewhere—have only ever argued that the District violated the first rule. Because neither Referred Measure 4D nor any other ballot question authorized the LSPWCD to increase its mill levy, its decision to increase the levy in 2019 and the following years was unlawful.

1. The Response Cites the Wrong Legal Standards.

Before addressing the substance of the District's response, a few brief comments on the proper legal standards are in order.

As far as this suit requires the Court to construe The Taxpayer's Bill of Rights (TABOR),[1] this is a straightforward matter of constitutional interpretation: the court "consider[s] the terms of the constitutional provision itself and appli[es] the constitutional provision according to its clear terms." *Nicholl v. E-470 Highway Auth.*, 896 P.2d 859 (citations omitted). It "give[s] effect, if possible, to every word, and consider[s] the object to be accomplished and the mischief to be avoided by the provision at issue." *Id.* (citations and internal quotes omitted).

The District cites more standards, but they are inapplicable here. First, the

[1] Plaintiffs do not believe this case requires much in the way of constitutional interpretation. The constitutional language at issue is clear and the parties seem to agree on what TABOR requires. (*See* Mot. ¶ 2; Resp. 6–7.) The dispute here is about the effect of Referred Measure 4D. But because the District spends three pages discussing TABOR interpretation standards—to shoehorn seemingly government-friendly language stripped of context into its argument (Resp. 4–6)—Plaintiffs address that discussion here.

"substantial compliance" standard from *Bickel v. City of Boulder*, 885 P.2d 215, 227 (Colo. 1994) is irrelevant. (*Contra* Resp. 3, 6; LSPWCD Proposed Order ¶ 5.) The *Bickel* standard only applies in assessing challenges to the validity of election procedures, such as a challenge to the notice, ballot title, or results. *See Colorow Health Care, LLC v. Fisher*, 2018 CO 52M, ¶ 38; *Bruce v. City of Colo. Springs*, 129 P.3d 988, 992 (Colo. 2006). It does not apply to assessing the later impact of a ballot issue that was validly approved by the voters. *See Mesa Cty. Bd. of Cty. Comm'rs v. State*, 203 P.3d 519, 533 (Colo. 2009); *Bruce v. Pikes Peak Library Dist.*, 155 P.3d 630, 633–34 (Colo. App. 2007). In this case no one has challenged the validity of any particular election—the 1996 election where the voters considered Referred Measure 4D is well outside the statute of limitations, and the parties have stipulated that there is no other vote that could be relevant to this case (Stipulations ¶ 8). So *Bickel* is irrelevant.

Second, the District's reliance on the statement in *Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008), that the Court should avoid interpretations of TABOR that "would hinder basic government functions or cripple the government's ability to provide services" is a red herring. One must understand the context in which the *Barber* Court was speaking. Barber cited three other cases for this warning: *In re Interrogatories on House Bill 99-1825*, 979 P.2d 549 (Colo. 1999); *Havens v. Board of County Commissioners*, 924 P.2d 517 (Colo. 1996); and *Bolt v. Arapahoe County School District No. Six*, 898 P.2d 525 (Colo. 1995). In the *House Bill 99-1825* case, the Court rejected an interpretation of TABOR that could have required an election every time the government wanted to buy a copy machine or computer, even if "the cost of the election could exceed the cost of the item purchased." 979 P.2d at 557. In *Havens*, the plaintiff was arguing that if voters approved a municipality

retaining excess revenues in one year, the municipality had to make deep cuts to revenue in future years. 924 P.2d at 521. And in *Bolt* the Court turned down an interpretation of TABOR that would have prevented districts funded by property taxes from ever meeting their budgets, resulting in "a shortfall in tax revenues . . . every year." 898 P.2d at 537. Nothing like that is at stake here. All Plaintiffs ask is that if the District wishes to double its mill levy, it get permission from the voters first, just as the Constitution requires.

2. The Water Conservancy Act and TABOR's Revenue Limits Are Immaterial to This Case.

Moving on to the substance of the response, the District conflates three distinct restrictions on its financial operations. First, the TABOR provisions of the Colorado Constitution require voter approval for new taxes and tax rate increases. Colo. Const. art. X, § 20(4). Second, those provisions limit the amount of revenue that state and local governments may collect (unless voters waive the limit). *Id.* § 20(7). Third, the Water Conservancy Act places a cap on the mill levy for water conservancy districts. *See* Colo. Rev. Stat. §§ 37-45-122(2), (4) (2021).

These three separate restrictions on LSPWCD's power—no mill levy increase without voter approval, adhere to the revenue limit unless waived, and no exceeding the cap from the Water Conservancy Act—*each* must be adhered to by LSPWCD in setting its annual mill levy. Put succinctly, absent an exception applying, the LSPWCD mill levy in a given year may not be increased without voter approval, any excess revenue must be returned (unless voters have waived the revenue limit), and—regardless of the first two conditions—the levy may never exceed one mill. Evaluating whether the District's action is lawful requires separately evaluating each of these three conditions. *See Mesa Cty.*, 203 P.3d at

533 (distinguishing between "mill levy increases" without a public vote and "the removal of a revenue limit" by a waiver election).

Plaintiffs argue that the District violated the first restriction by increasing the tax rate without voter approval. (Mot. ¶ 12.) LSPWCD's mill levy was 0.5 mill for 2019 and became one mill for 2020. (*See* Stipulations ¶¶ 9-12; Response ¶ 9.) No election was held to secure voter approval for this tax rate increase. (Cmpl. ¶ 4; *accord* Stipulations ¶¶ 8, 10.)

The District spends a good deal of its time arguing that it has not violated the second and third restrictions, but this is irrelevant because Plaintiffs are challenging a violation of the first restriction. For example, on the second restriction, the District points to the 1996 District vote to waive the revenue limit and a 2018 letter from the Colorado Department of Local Affairs acknowledging that voters waived the revenue limit. *See* Response ¶¶ 10, 11. But waiver votes such as the 1996 vote waive *the revenue limit*, not the requirement that tax increases receive voter approval. The *Mesa County* case cited repeatedly by the District demonstrates this, treating votes to waive the revenue limit as permissible exercises by districts that do not remove or alter the separate requirement that tax rate increases be submitted to public vote. *See, e.g.*, *Mesa Cty.*, 203 P.3d at 536 ("[T]he local school district elections validly waived *the revenue limit*… SB 07-199 does not establish a new tax or increase tax rates." (emphasis added)); *id.* at 528 (analyzing each of three separate TABOR requirements separately to conclude the districts violated "none of these limits").

Likewise, on the third restriction, the District notes that its levy does not exceed the one-mill cap set by the Water Conservancy Act. (Resp. 7–9.) This is true but irrelevant. The LSPWCD's actual tax rate is not the same thing as the Water

Conservancy Act's maximum tax rate. A tax ceiling is not a tax floor. The Water Conservancy Act uses language making it clear that it is establishing a maximum tax rate by directing that each district "shall fix a rate of levy . . ., except that said rate shall not exceed" one mill. This language delineates a difference between each district's rate and the Act's one-mill cap. § 37-45-122(2). Districts may choose to go up to that rate but are not required to do so. Until 2019, the LSPWCD tax rate was 0.5 mill while the Water Conservancy Act tax cap was one mill, revealing that the LSPWCD understood that the two are not the same thing. Just as in *Mesa County*, where school districts were limited to the least of (1) their previous year's tax rate unless the voters approved a tax rate increase, (2) the amount of revenue collected in the preceding year unless a waiver election has occurred, or (3) a tax cap of twenty-seven mills established by state law, 203 P.3d at 524-26, LSPWCD in 2019 was limited to the least of (1) their previous year's tax rate unless the voters approved a tax rate increase, (2) the amount of revenue collected in the preceding year unless a waiver election has occurred, or (3) a tax cap of one mill established by state law.

Thus, the Court can set aside these arguments. This case is about the first restriction mentioned above: whether the District had prior authorization from voters to increase its mill levy. Nothing more, and nothing less. Because the 2018 tax rate was 0.5 mill and no voter approval of an increase occurred, the increase to one mill is ultra vires irrespective of the revenue waiver or the state tax cap.

3. Referred Measure 4D Did Not Exempt the District from Every Taxpayer Protection in TABOR.

When it does get around to the relevant issue, the District's defense hinges on Referred Measure 4D. Essentially, the District argues that Referred Measure 4D

simply waived TABOR's application to the district forevermore.

This is a radical position. No prior decision by any court in Colorado has held that a district's voters can simply vote to exclude the district from TABOR as a whole. *Revenue waiver* votes are expressly permitted by TABOR itself, but there is no constitutional authorization to simply waive the rest of TABOR's taxpayer protections. The District does rely on a few cases to support its argument: mainly *Mesa County*, *In re Interrogatory on House Bill 21-1164*, 2021 CO 34, 487 P.3d 636, and *Huber v. Colorado Mining Ass'n*, 264 P.3d 884 (Colo. 2011). But its arguments from these cases rely on selective quotations and a misunderstanding of the issues before the Supreme Court in each instance.

Starting with *Mesa County* and its years-later follow-on, *House Bill 21-1164*, the response misapprehends what was at stake. Some history is necessary. After TABOR passed, the legislature amended the School Finance Act to adopt TABOR's revenue limits as a statutory matter. The Department of Education, however, misinterpreted the statute as adopting the limits, but not the availability of the voter waiver of those limits. This had the effect of mandating mill levy reductions in many districts—including districts whose voters had waived TABOR's revenue limitations and so did not need to reduce their mill levies. *Mesa Cty.*, 203 P.3d at 525. In 2007, the legislature realized that the Department of Education had been misinterpreting the law and put a halt to the mill-levy-reduction orders. But it did so without increasing any mill levy. *Id.* at 526. Rather, it simply froze the mill rate in most jurisdictions. *See id.* In the ensuing *Mesa County* case, the Supreme Court upheld the legislature's action.

Later, in 2020 and 2021, the legislature passed a series of laws intended to restore the status quo ante—i.e., to put every school district's mill rate back where

it was before the Department of Education started misinterpreting the law. That led to the *House Bill 21-1164* case, where the Supreme Court held that the previous waiver votes in the relevant districts were "predicated on the continuation of the mill levy rates then in effect." 2021 CO 34, ¶ 41, 487 P.3d at 645, and that "the voters who authorized those waivers necessarily approved the mill levies in effect at the time they voted," *id.* ¶ 42.

The District cites these cases for the proposition that voters may "exempt districts from and waive the limitations of TABOR for all future actions with broadly worded ballot questions." (Resp. 6.) That is simply not the lesson of those cases. Rather, both cases were about the effect of revenue-limit waivers, and revenue-limit waivers alone. Indeed, the LSPWCD must ignore several references to "revenue limits" in the cited language to reach its novel conclusion. *See House Bill 21-1164*, 2021 CO 34, ¶¶ 9–10, 487 P.3d at 639 ("As a result of TABOR's above-referenced *revenue limits* . . . voters in many local school districts began to exempt their districts from *these* limitations through waiver election . . . . TABOR's *revenue limits* had been waived . . . after each of these elections." (emphasis added)). The full quotation of that cited section makes clear that *House Bill 21-1164* and *Mesa County* are describing revenue-waiver elections, not elections to waive voter approval of future tax increases.

Nor was the approval of tax increases even before the Court in either case. No one's taxes increased in *Mesa County*. Indeed, the Court repeatedly emphasized this point. 203 P.3d at 41, 46–47, 52. And, properly understood, they didn't increase in *House Bill 21-1164* either—they were merely restored to the level that the voters had already implicitly approved. Nowhere in either case did the Court say that a waiver of the revenue limit also eliminates the requirement for

prior approval of a mill levy increase or that a revenue-limit waiver allows a district to increase its mill levy beyond the rate in existence at the time of the waiver vote.

Furthermore, one would expect that if the *House Bill 21-1164* Court was broadly repealing all TABOR restrictions on local districts, including the requirement that water districts obtain voter approval for tax rate increases, it would have said so. Yet the Court gingerly described the case instead as "unique circumstances" "to correct an error" where the state erroneously forced certain districts to reduce tax rates each year and instead "return to the rates in effect when the voters authorized the retention of all revenues." *See id.* at 646-47. The Court described the result as "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…[since] voters have already approved [these rates and state law] does not permit mill levies above that level." *Id.* at 646. Nothing in that case endorses the permissibility of a rate higher than that prevailing at the time of a waiver election. It was about fixing a "unique" situation.

There is nothing comparably "unique" about the LSPWCD's mill-levy increase, and even if LSPWCD's mill levy were returned to the rate in effect at the time of the waiver election, it would return to 0.5 mill. While LSPWCD voters in 1996 waived all revenue limits, they did not and could not waive the constitutional requirement that voter approval would be needed for a future mill levy increase.

Thus, the LSPWCD's repeated claim that its mill-levy increase was authorized by *Mesa County* and *House Bill 21-1164* (*see* Resp. 8–14) is just another manifestation of the District's inability to understand the two distinct TABOR issues at play. Insofar as the District is claiming that a broadly worded revenue-

limit waiver gives it free rein to ignore TABOR, there is no support for that position in the cited sources.

The District also misconstrues *Huber*. In that case, there was a pre-TABOR statute that set a fixed-dollar-amount severance tax but increased it by a non-discretionary annual inflation adjustment. When the state applied the inflation adjustment post TABOR, the mining association sued claiming this was an unapproved tax increase. *See* 264 P.3d at 887–88. The Supreme Court, however, noted that the tax formula predated TABOR and the annual "non-discretionary, ministerial" inflation adjustment "involved no legislative or governmental act beyond that specified in the statute." *Id.* at 892. Properly understood, then, the tax rate included the inflation adjustment; there was not any change to the rate for TABOR to be concerned with. *See id.* at 892 & n.6.

The District seems to think that just because the Water Conservancy Act's tax cap predated TABOR as well, *Huber* authorizes it to raise tax rates up to the Water Conservancy Act cap without violating the requirement that tax rate increases be subject to a public vote. (*See* Resp. 6.) *Huber* does not support this proposition. The key in *Huber* was that the inflation adjustment was non-discretionary. *See id.* at 893. Here, though, LSPWCD's action to increase the mill levy was not "non-discretionary" or required according to a state adjustment formula, but entirely a discretionary action. *See* § 37-45-122(2) (directing water conservancy district boards to set mill levy at whatever rate the board believes is "necessary to . . . raise the amount required" to fund activities it chooses to undertake).

Huber also dealt with interpreting the phrase "tax rate" in TABOR. *Id.* at 892. But TABOR contains a much more obviously applicable triggering event for voter approval in this case: a "mill levy above that for the prior year." Art. X, § 20(4). It's

unclear, then, that *Huber* has any relevance to this case.[2]

Thus, the District misunderstands the relevant caselaw around revenue-limit waivers. No case that it has cited supports its claim that Referred Measure 4D could exempt it from its relevant constitutional duties.

4. Referred Measure 4D Did Not Authorize the Mill-Levy Increase Here.

Of course, Referred Measure 4D needn't have exempted the District from TABOR entirely to have approved the mill-levy increase here. That said, the District's tortured analysis of Referred Measure 4D's text is unnatural and, as a functional matter, reads the final proviso out of the measure entirely.

Everything that Referred Measure 4D did related to *revenue limits*. It did not approve any mill-levy increase. The measure itself is very clear about this. It says, in unambiguous language, that "no local tax rate or property mill levy shall be increased at any time, nor shall any new tax be imposed without the prior approval of the voters." (Stipulations ¶ 6.)

The District unsuccessfully spends six pages trying to explain how this clear statement means the exact opposite of what it says. According to the District, this

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[2] The District's other claim, that Plaintiffs are making a specific argument about the phrase "raising tax rates" (Resp. 7; *accord* LSPWCD Proposed Order ¶ 8), misses the forest for the trees. A mill levy is certainly a type of tax, and the mill-levy rate may be fairly described as a "tax rate," but the only TABOR requirement that Plaintiffs quoted directly, and the one on which they have based their arguments, is the requirement that "governmental taxing authorities have 'voter approval in advance for any mill levy above that for the prior year'" (Mot. ¶ 2 (quoting art. X, § 20(4))). Later language in their motion referring to "tax rates" should not be read formalistically.

If the District is also raising *Huber* as a way to interpret the phrase "tax rate" in Referred Measure 4D, Plaintiffs only note that the measure expressly stated, "no . . . property mill levy shall be increased at any time" as well.

is only talking about the Water Conservancy Act's one-mill cap. But it takes a strong argument to make "no . . . mill levy shall be increased at any time" mean "we can double the mill levy at any time," and the District does not adequately make its case. At best, it introduces some ambiguity about the phrase "provided, however" that precedes the proviso.

But even if the language is truly ambiguous (and Plaintiffs do not think it is), all that does is authorize the use of outside interpretive aids like the Blue Book statements Plaintiffs mentioned in their original motion. *See Sanger v. Dennis*, 148 P.3d 404, 412–13 (Colo. 2006). And those voter-information books plainly stated that Referred Measure 4D "does not allow for any mill levy increase." (Mot. ¶¶ 19–20.)

The District has objected to the Court considering the Blue Book. This is curious since the LSPWCD is the party that introduced ambiguity into a seemingly unambiguous ballot measure. But, at any rate, the Court may properly consider them. Citing *Mesa County*, the District claims that the Blue Book is "hearsay, and extrinsic evidence that is irrelevant to the Court's inquiry." (Resp. 14.) Once again, the District misunderstands *Mesa County*. The evidence the *Mesa County* Court rejected was years-later testimony "from individuals who participated in the drafting of the ballot questions at issue or were otherwise interested in the election." 203 P.3d at 533. No such evidence is in the record now. Blue Books—which are sent to every voter and are part of the election notice package for the relevant ballot issue—have been repeatedly recognized as a reliable guide for interpreting allegedly ambiguous language. *See, e.g., Chronos Builders, LLC v. Dep't of Labor & Empl.*, 2022 CO 29, ¶¶ 17, 21; *In re Independent Congressional Redistricting Comm'n*, 2021 CO 73 ¶ 66, 497 P.3d 493, 511; *In re Interrogatory on*

House Joint Resolution 20-1006, 2020 CO 23, ¶¶ 17–19, 44, 49, 52, 62, 500 P.3d 1053, 1060, 1065–67. Indeed, even the *Mesa County* decision itself quotes from the Blue Book that accompanied TABOR. 203 P.3d at 534 n.17. That would have been an odd thing to do if, as the District claims, *Mesa County* declared Blue Books verboten.

As for the LSPWCD's claim that the Blue Book is inadmissible hearsay, the District is incorrect. Rather, the Blue Book is a self-authenticating "ancient document." Colo. R. Evid. 803(16), 902(5).

Ultimately, then, if the language is truly as ambiguous and complicated as the District claims, the Court can use the 1996 Blue Book to guide its analysis. And that Blue Book matches Plaintiffs' position: Referred Measure 4D did "not allow for any mill levy increase" (Mot., Ex. 2 at 11, 12; *id.*, Ex. 3 at 9).

5. Plaintiffs' Motion States the Facts Accurately.

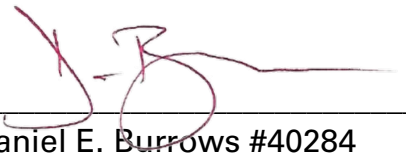
Finally, the District asks this Court to disregard several statements in Plaintiffs' motion. (*See* Resp. ¶ 13.) This objection is odd. All but one of the statements the District doesn't like cited stipulations between the parties and/or an affidavit that accompanied Plaintiffs' motion. The Court can evaluate for itself whether Plaintiffs' assertions are adequately supported. At any rate, the District asks the Court to disregard that LSPWCD did not refer the 2019, 2020, or 2021 levy increases to a public vote, even though stipulations unavoidably imply that no such elections occurred. (*See* Stipulations ¶¶ 8, 10.) It asks the Court to disregard that several county commissions objected to the District's mill levy in 2020, even though those objections are plain from the fact that three of the four relevant commissions refused to certify the District's proposed mill levy. (*See* Stipulations ¶ 12; *see also* Mot., Ex. 1 ¶ 4 (discussing citizen efforts to convince county

commissioners that LSPWCD's mill levies were unlawful).) The District also asks the Court to disregard that several county commissions have refused to certify the District's levies even though the parties stipulated that only one of the four relevant county commissions certified the 2020 levy and no commission certified the 2021 one. (*See* Stipulations ¶ 12.) Finally, the District asks this Court to disregard that it believes it can "raise the mill levy whenever it wish[es]" (Mot. ¶ 9). But that is what the District itself claims in its response. (*See* Resp. 2–3 ("[V]oter approval of the LSPWCD's 1996 ballot question waived any requirements and limitations of TABOR for LSPWCD after 1996 and substantially complied with TABOR.").)

In the end, all of these are relevant facts supported by the record and should be considered by the Court. If the District wishes to contest these facts, it is incumbent on it to submit contrary evidence. It cannot simply refuse to accede and then rest on its haunches. *City of Fort Collins v. Colo. Oil & Gas Ass'n*, 2016 CO 28, ¶ 8, 369 P.3d 586, 590.

6. Conclusion

Therefore, Plaintiffs renew their request that the Court rule the half-mill increase in the LSPWCD mill levy is unconstitutional. It was not approved by Referred Measure 4D or any other election.



Daniel E. Burrows #40284
Advance Colorado
Attorney for Plaintiffs

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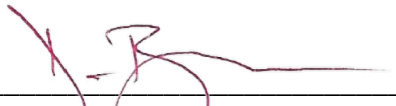

Daniel E. Burrows
Advance Colorado