

DISTRICT COURT, EL PASO COUNTY, COLORADO	
Court Address: Post Office Box 2980 Colorado Springs, CO 80901	
Plaintiff(s): M.B. ANDERSON, et al., v.	▲ COURT USE ONLY ▲
Defendant(s): THE CIMARRON HILLS FIRE PROTECTION DISTRICT, et al.	
	Case Number: 10CV7256 Div.: 2
ORDER AND JUDGMENT	

THIS MATTER came before the Court for bench trial starting on October 4, 2011.

Following closing argument, the Court took the matter under advisement on October 13, 2011.

Introduction

The Plaintiffs are taxpayers residing within the boundaries of Defendant, The Cimarron Hills Fire Protection District, (the “District”). Plaintiffs filed this action alleging that the District has raised its tax rate, known as the mill levy, without complying with the requirements of Article X, Section 20 of the Colorado Constitution, commonly known as TABOR for the Taxpayer Bill of Rights. While TABOR addresses a number of issues, specific to this case, TABOR prohibits a governmental entity such as the District from raising tax rates without voter authorization. The District agrees that it raised its tax rate. However, the District asserts that the voters authorized the tax rate increases at issue. The dispute revolves around the parties’ competing interpretations of a ballot question approved by the voters in 1996.

The Court concludes that it must afford the 1996 ballot language its literal meaning under standard rules of construction and English usage. The 1996 ballot question authorized the District to set mill levy rates within a cap that started at 7.598 in 1997 and was to be adjusted each year thereafter for “inflation” and “local growth” as those terms are defined by TABOR. The Court rejects the alternative interpretation of the language proposed by Plaintiffs as it is contrary to the literal meaning of the language approved by the voters. The District has not violated the authority granted it by the voters.

Factual Background

The relevant tax rate history for the District is as follows:

Collection Year	Rate/Mill Levy
1996	4.667
1997	7.598
1998	6.788
1999	6.780
2000	7.598
2001	7.598
2002	7.598
2003	7.598
2004	7.598
2005	9.870
2006	10.314
2007	10.780
2008	11.110
2009	11.082 (11.110 with a .028 credit)
2010	11.110
2011	11.110

In 1995, the District’s voters were presented with a ballot question asking whether the existing mill levy of 4.667 should be raised starting in 1996. The voters rejected the proposal.

In 1996, the District’s voters were presented with a modified version of the 1995 ballot question. Again, the voters were asked if the District’s mill levy should be raised starting in

1997. The voters approved the ballot question. As of the date of this trial, the voters of the District have not approved any other ballot question asking to increase the District's tax rate.

The Plaintiffs assert that the 1996 ballot question authorized the District to raise the mill levy to 7.598. The Plaintiffs contend, therefore, that the mill levy rates set by the District above 7.598 for tax years 2004 to the present were not authorized. Consequently, the Plaintiffs argue, the District's certification of these tax rates violated TABOR.

The District argues that the 1996 ballot question granted the District discretionary authority to set the tax rate within a rate cap, the rate cap being set by a formula and varying from year to year. According to the District, the cap was set at 7.598 only for the first tax year, 1997, and varied thereafter.

Issues Presented

The parties pursued considerable discussions to define the scope of issues being disputed and presented to the Court for resolution. In light of the degree of discussion in this case and the potential for ambiguity in some pre-trial phrasings, a brief review of the scope of the issues as presented by the parties at trial is warranted.

The core issue presented to the Court is the meaning of the 1996 ballot question. As noted, the parties agree on the tax rates actually imposed. The parties further agree that if the 1996 ballot question authorized only a 7.598 mill levy, the District violated TABOR by imposing a mill levy in excess of 7.598. The Plaintiffs agree that the tax rates set by the District in excess of 7.598 are within the cap set by the formula urged by the District. Plaintiffs also agreed at trial that the formula urged by the District would not violate TABOR if it had been approved by the voters. Instead, the Plaintiffs' argument is that the formula urged by the District was not

authorized by the voters. Thus, the dispositive issue presented to the Court is whether the 1996 ballot question approved by the voters authorized a fixed mill levy rate of 7.598 or a discretionary rate limited by a cap floating according to a formula.

The parties also discussed an apparent ballot title violation with respect to the 1996 ballot question. The Plaintiffs confirmed that a challenge to the ballot measure for a title violation would be time barred. The Plaintiffs clarified that they have raised the issue as a point of interpretation, not as an independent challenge.

Similarly, the parties have also presented arguments regarding what taxation formulations have or have not been approved under TABOR. The parties have confirmed that these arguments are presented as points of interpretation. As noted above, Plaintiffs do not argue that TABOR would be violated by the rate cap formula urged by the District *if* actually approved by the voters.

Analysis

The 1996 ballot question stated as follows:

SHALL THE CIMARRON HILLS FIRE PROTECTION DISTRICT MILL LEVY FOR GENERAL OPERATING EXPENSES BE INCREASED BY 2.931 MILLS COMMENCING JANUARY 1, 1997 FOR A TOTAL MILL LEVY FOR GENERAL OPERATING EXPENSES NOT TO EXCEED 7.5980 AND THEREAFTER, AND THEREAFTER [sic] AS ADJUSTED FOR INFLATION PLUS ANNUAL GROWTH TO THE EXTENT PERMITTED BY ARTICLE X, SECTION 20 OF THE COLORADO CONSTITUTION FOR THE PURPOSE OF FIRE PROTECTION AND EMERGENCY MEDICAL ASSISTANCE; SUCH VOTER APPROVED REVENUE CHANGE TO BE AN EXCEPTION TO THE LIMITS WHICH WOULD OTHERWISE APPLY; AND SHALL THE CIMARRON HILLS FIRE PROTECTION DISTRICT BE ENTITLED TO COLLECT AND SPEND THE FULL REVENUES FROM SUCH TAX INCREASE IN ANY YEAR AFTER THE FIRST FULL YEAR IN WHICH IT IS IN EFFECT WITHOUT ANY OTHER LIMITATION OR CONDITION, AND WITHOUT LIMITING THE COLLECTION OR SPENDING OF ANY OTHER REVENUES OR FUNDS BY THE CIMARRON HILLS FIRE

PROTECTION DISTRICT, UNDER ARTICLE X, SECTION 20 OF THE
COLORADON CONSTITUTION OR ANY OTHER LAW.

The parties agree that principles of statutory interpretation generally apply to determining the meaning of the 1996 ballot question. As the Colorado Supreme Court explained in *Cacioppo v. Eagle County Sch. Dist. RE-50J*, 92 P.3d 453, 463 (Colo. 2004):

[W]e afford the language of ... statutes their ordinary and common meaning [and] construe statutory and constitutional provisions as a whole, giving effect to every word and term contained therein, whenever possible. (quotation marks and citation omitted)

The Colorado Supreme Court has further advised that when “interpreting a statute, we must give meaning to all portions of the statute, and avoid a construction rendering any language meaningless.” *Well Augmentation Subdist. v. City of Aurora*, 221 P.3d 399, 420 (Colo. 2009) (citation omitted). The Court should avoid a construction that would yield an unjust, absurd, or unreasonable result. *See Bickel v. City of Boulder*, 885 P.2d 215, 229 (Colo. 1994) (describing constitutional construction principles).

The Plaintiffs note that TABOR enacted a specific rule of construction as well. TABOR states that the “preferred interpretation” of TABOR “shall reasonably restrain most the growth of government.” Colo. Const. Art. X, Sec. 20 (1). This provision is of limited application in this case. The provision addresses a rule of construction of TABOR; the case at bar centers on interpretation of a local ballot question rather than TABOR. Nonetheless, the Court notes that expanding the application of this rule of construction for TABOR to include ballot questions that are TABOR related would not alter the Court’s analysis in this instance.

The 1996 ballot question is divided by semicolons into three clauses. The language at the center of the parties’ dispute is the latter portion of the first clause. The clause reads as follows,

with the disputed language emphasized:

SHALL THE CIMARRON HILLS FIRE PROTECTION DISTRICT MILL LEVY FOR GENERAL OPERATING EXPENSES BE INCREASED BY 2.931 MILLS COMMENCING JANUARY 1, 1997 FOR A TOTAL MILL LEVY FOR GENERAL OPERATING EXPENSES NOT TO EXCEED 7.5980 *AND THEREAFTER, AND THEREAFTER AS ADJUSTED FOR INFLATION PLUS ANNUAL GROWTH TO THE EXTENT PERMITTED BY ARTICLE X, SECTION 20 OF THE COLORADO CONSTITUTION FOR THE PURPOSE OF FIRE PROTECTION AND EMERGENCY MEDICAL ASSISTANCE;*

One may further focus for purposes of analysis on the phrase “AND THEREAFTER AS ADJUSTED FOR INFLATION PLUS ANNUAL GROWTH” as the pivot of the dispute.

The parties present three competing constructions of the meaning of the key phrase. Plaintiffs primarily argue that this language is “de-Brucing” language intended to relieve the District of limitations on revenue collection and spending contained in Sec. 7 of TABOR. While not their focus, Plaintiffs also note that the phrase may be a scrivener’s error with no meaning. In contrast, the District argues that the phrase establishes a formula for adjusting the cap on the District’s authority for setting the mill levy, an issue governed by Sec. 4 of TABOR. Another way of distinguishing the two primary competing constructions are that the Plaintiffs contend the language serves a TABOR Sec. 7 purpose while the District contends it serves a TABOR Sec. 4 purpose.

Plaintiffs’ Proposed Constructions—Scrivener’s Error

The Court will begin with Plaintiffs’ second construction, scrivener’s error. Plaintiffs are correct that a court may read language to have no meaning where the language is a result of a scrivener’s error or its equivalent. This rule of construction is related to the general direction to courts provide meaning to all portions of a statute unless to do so would cause absurd or unreasonable results. *See generally Owner-Operator Independent Drivers Assoc., Inc. v. Landar*

System, Inc., 622 F.3d 1307, 1327 (11th Cir. 2010) (permitting a court to revise a statute based on a scrivener's error only where a literal interpretation would lead to an absurd result).

While scrivener's errors are rarely considered, the argument unquestionably has some merit and application in this case. The operative language begins with "AND THEREAFTER, AND THEREAFTER." The parties agree that this repetition has no meaning and is the result of an editing error and is essentially a scrivener's error or the equivalent of a typographical error. Thus, the need to disregard some language in the ballot question due to a scrivener's error is established. The question then becomes the scope of the language to be disregarded as result of that error.

The Court concludes that under the principles of statutory construction, it should be reluctant to conclude that language is the result of a scrivener's error. Where a scrivener's error is found to be present, the Court concludes it should construe the error as narrowly as reasonably possible. The constructing court's touchstone and guiding principle should remain the direction to accord each word its ordinary meaning and give meaning to each word in a ballot question, disregarding a word as a scrivener's error only when a literal interpretation would lead to an absurd result. The Court concludes in this case that the repetition of the phrase "and thereafter" was a scrivener's error but declines to attribute the remainder of the phrase to a scrivener's error. The remaining 30 words of the phrase appear to be terms of art with no indication of having been included solely due to error. Also, looking at the language used, that the repetition of a two word phrase is an error is patently obvious. However, no support is provided for expanding that assumed error to include the following 30 unique words that are rationally ordered and otherwise appear to be an intentional inclusion. More importantly, the language appeared on its face to

have meaning, was presented to the voters as having meaning, and surely was given meaning by the voters when they approved the ballot measure. Thus, the Court declines to render it meaningless.

Plaintiffs' Proposed Construction—Addressing The Revenue Limits

The Court now turns its attention to the remaining two interpretations urged by the parties, Plaintiffs' revenue Sec. 7 construction and Defendant's rate formula Sec. 4 construction. To evaluate these competing constructions, one must first place the ballot question in its legal context.

The ballot question is prompted by TABOR. In general, TABOR placed the authority to raise tax rates with the voter, a change from the prior practice that had given substantial discretion to governmental entities to set tax rates. While TABOR addresses a number of issues, it primarily establishes the process for taxation. TABOR also establishes default limits of authority on three phases of the taxation process relevant to the current case.

The three phases of taxation relevant to this case begin with setting the tax formula. Initially, a tax rate is set. The tax rate is applied to the item to be taxed, in this case, the assessed value of real property within the District. The application of the rate to the value establishes a mathematical product, the proceeds of the selected rate of taxation. The second step of the taxation process relevant to this case is the collection of actual tax dollars, called "tax revenues." The third step is the spending of those tax revenues. TABOR addresses each of these three phases of the taxation process.

With respect to the first stage of the taxation process, TABOR prohibits a governmental entity from raising the tax rate without voter approval. This restriction is found in Sec. (4) of

TABOR.

As noted, the application of rate to value establishes a mathematical product. This product is the theoretical amount of taxes to be produced by the selected tax rate—actual collection of taxes being the second step in the taxation process. However, TABOR limits the dollar amount of taxes that a governmental entity may collect regardless of rate. This limit is commonly called the tax revenue limit and is found in Sec. (7)(c) of TABOR. The formula used by TABOR to restrict tax revenues in Sec. 7(c) is independent of TABOR’s Sec. 4 restrictions on the authority to set tax rates. The tax revenue limitation is based on a formula that applies “interest” and “local growth” figures to the relevant prior budget. “Interest” and “local growth” are terms defined by TABOR. Thus, TABOR imposes a limit on revenues that is a mathematical function of prior spending, “interest,” and “local growth” and is wholly independent of its regulation of rate setting.

In addition to governing the establishment of tax rates and setting limits on the dollar amount of taxes that may be collected, TABOR also limits the dollar amount that a governmental entity may spend. This limitation is commonly called the spending limit and is found in Sec. 7(b) of TABOR. Once again, TABOR uses a formula to limit spending and this Sec. 7(b) limit is independent of the restriction in Sec. 4 on the authority to set tax rates. Also once again, TABOR’s formula restricting tax dollar spending is based on a formula applying the defined terms of “inflation” and “local growth” to the prior year of spending.

Plaintiffs’ argument rests largely on the use of the terms “inflation” and “local growth” in the disputed phrase. Plaintiffs accurately assert that these terms are terms of art defined by TABOR. *See* Colo. Const. Art. X, Sec. 20(2)(f) and (g). Plaintiffs further note that TABOR

only uses these defined terms in Sec. (7) when addressing the independent limitations on tax revenues and spending.

Plaintiffs further note that the disputed 1996 ballot phrase is commonly used language to seek voter authority to eliminate the independent limitations on revenues and spending placed on a governmental entity by Sec. 7 of TABOR, a process frequently called “de-Brucing.” While a full discussion of de-Brucing is unnecessary in this Order, the District agrees that Plaintiffs are correct that the disputed language is a representative example of a portion of the language that can be language that eliminates the revenue and spending limits of Sec. 7. However, if intended to de-Bruce, the language used in the 1996 ballot question is materially incomplete.

The disputed language is language of modification—it states that something will be adjusted for inflation and local growth. The dispute is what object is modified by the language—what is to be adjusted? The Court will simplify the relevant language components to facilitate discussion. The phrase at issue can be paraphrased accurately to state “as adjusted for inflation and local growth.” To give the “de-Brucing” effect urged by Plaintiffs, this language would have to modify the term “revenue” or “spending” or both. In other words, “revenue” or “spending” would have to be what is adjusted. Both parties argue that if the disputed language modifies “revenue” or “spending” or both, it is de-Brucing language that affects only the Sec. 7 restrictions of TABOR and does not affect rate setting under Sec. 4.

However, in the 1996 ballot question, the disputed language does not grammatically modify “revenue” or “spending.” The operative language immediately follows the setting of the taxation rate, 7.598 mills. Again, simplified for illustration, the language of the first clause asks if the tax rate may be set at 7.598 and thereafter adjusted for inflation and interest. A reading of

this phrasing structure under traditional rules and usage customs of the English language result in the disputed phrase modifying the tax rate; the tax rate is being adjusted, not the unmentioned “revenue” or “spending.”

However, Plaintiffs note that the operative language is followed by a phrase explicitly addressing revenue, the second clause of the ballot question. The second clause in the ballot question reads as follows: SUCH VOTER APPROVED REVENUE CHANGE TO BE AN EXCEPTION TO THE LIMITS WHICH WOULD OTHERWISE APPLY. Plaintiffs urge the Court to conclude that the operative language in the first clause modifies the word “revenue” found in the second clause. To do so, however, violates basic rules of grammar.¹

The two phrases on which Plaintiff relies are found in clauses separated by a semicolon. Basic rules of grammar provide that a semicolon used in this fashion separates independent clauses. *See* B. Garner, *The Redbook: A Manual on Legal Style* ¶ 1.15(d) (2002); E. Good, *Whose Grammar Book Is This Anyway?* 378 (MJF Books 2002). To read the disputed phrase in the first independent clause as modifying the word “revenue” in the second independent clause would require the Court to disregard the semicolon separating the phrases. Such a construction would not be a literal reading of the language nor would it be the understood ordinary meaning of the language used. In short, Plaintiffs’ proposed construction violates basic, ordinary rules of sentence construction. Thus, the Court is not persuaded by the construction proposed by Plaintiffs.

Paraphrasing the first clause for discussion, the ballot question asked whether the tax rate should be set at 7.598 mills starting in 1997 and adjusted thereafter for inflation and local

¹ See the “bat and ball” illustration discussed in the Extrinsic Evidence section of this Order.

growth. The first clause contains no reference to revenue or spending. The first clause addresses only the rate (measured in mills) and makes no mention of revenues or spending (both of which are measured in dollars). As discussed above, in the context of TABOR, each of these three topics (rates, revenues, and spending) are separate and distinct topics subject to separate and distinct limitations found in separate and distinct subsections of TABOR. Ordinary rules of sentence construction and grammar provide that the item to be “adjusted” in the disputed first clause is the referenced tax rate. The clause cannot be reasonably read to call for “adjusting” revenue or spending, two subjects distinctly different under TABOR, neither of which is mentioned in the first independent clause. Given the silence of the first clause regarding revenue, the only way to achieve Plaintiffs result is to imply a phantom object, revenue, into the first clause.

Plaintiffs disagree, however, that the first clause fails to mention spending or revenue. Plaintiffs note that the terms “interest” and “local growth” used are terms that TABOR does not use with respect to the Sec. 4 restriction on tax rates. Instead, these terms are used by TABOR in Sec. 7 with respect to limits on spending and revenue. Plaintiffs additionally point to the last phrase in the disputed language. By way of reminder, the first clause reads in full as follows, with the disputed language emphasized:

SHALL THE CIMARRON HILLS FIRE PROTECTION DISTRICT MILL LEVY FOR GENERAL OPERATING EXPENSES BE INCREASED BY 2.931 MILLS COMMENCING JANUARY 1, 1997 FOR A TOTAL MILL LEVY FOR GENERAL OPERATING EXPENSES NOT TO EXCEED 7.5980 AND THEREAFTER, AND THEREAFTER AS ADJUSTED FOR INFLATION PLUS ANNUAL GROWTH TO THE EXTENT PERMITTED BY ARTICLE X, SECTION 20 OF THE COLORADO CONSTITUTION FOR THE PURPOSE OF FIRE PROTECTION AND EMERGENCY MEDICAL ASSISTANCE;

Plaintiffs note that the final phrase that begins ‘to the extent permitted by Art. X, Sec. 20’ is a

direct reference to the limitations imposed by Sec. 7 of TABOR. Plaintiffs argue that this reference, combined with the use of the words “inflation” and “local growth” that are traditionally associated with Sec. 7, result in the disputed language having a Sec. 7 meaning, a de-Brucing meaning. In other words, Plaintiffs argue that these references give substance and form to revenue so that it is no longer a phantom in the first clause.

Plaintiffs’ construction is not persuasive. As noted, TABOR defines both “inflation” and “local growth.” The terms are defined in Sec. 2 of TABOR. Contrary to Plaintiffs’ contention, the terms are not defined as components of spending or revenue limits; the definitions in no way restrict the terms to describing revenue and/or spending limits. Instead, they are given definitions that make them terms of art that are available for use in connection with TABOR. For example, the term “hybrid” has a definition in any modern dictionary. The term is particularly popular in the auto industry these days. Nonetheless, the definition of the term does not restrict it to meaning cars with gasoline and electric motors. The popularity of the term with the auto industry does not restrict or prohibit its use in other fields, such as describing new species of plants.

Plaintiffs’ reliance on the reference to the “the extent permitted” by Art. 20, Sec. 20, the formal citation to TABOR, is equally unpersuasive. As discussed above, TABOR contains provisions governing tax rate setting (Sec. 4), revenues (Sec. 7(c)), and spending (Sec. 7(d)). The reference to TABOR in the 1996 ballot question refers to TABOR as a whole without identifying any specific subsection. Thus, a general reference to TABOR and what it permits cannot be read, as Plaintiffs propose, as excluding the TABOR provisions addressing tax rate setting, Sec. 4.

Plaintiffs’ proposed interpretation of the 1996 ballot question is untenable. Plaintiffs’ proposed interpretation would require the Court to override and disregard the literal meaning of the language approved by the voters. The Plaintiffs’ interpretation requires the reader to violate basic rules of grammar and sentence construction at each step. Plaintiffs present no viable authority for the interpretation they urge.

The Defendants’ Proposed Construction—Addressing Rate Setting Authority

The construction of the language urged by the District asserts that the disputed language modifies the tax rate language and creates a formula for setting an authority cap on the tax rate into the future. By way of reminder, the first clause of the 1996 ballot question reads as follows with the disputed language emphasized:

SHALL THE CIMARRON HILLS FIRE PROTECTION DISTRICT MILL LEVY FOR GENERAL OPERATING EXPENSES BE INCREASED BY 2.931 MILLS COMMENCING JANUARY 1, 1997 FOR A TOTAL MILL LEVY FOR GENERAL OPERATING EXPENSES NOT TO EXCEED 7.5980 *AND THEREAFTER, AND THEREAFTER AS ADJUSTED FOR INFLATION PLUS ANNUAL GROWTH TO THE EXTENT PERMITTED BY ARTICLE X, SECTION 20 OF THE COLORADO CONSTITUTION FOR THE PURPOSE OF FIRE PROTECTION AND EMERGENCY MEDICAL ASSISTANCE;*

While the language is densely worded, it may be paraphrased as asking if ‘the tax rate should be set at 7.5980 starting January 1, 1997 and adjusted thereafter for inflation and local growth.’ The District asserts the phrase “AND ADJUSTED THEREAFTER ...” modifies the tax rate such that after 1997, the tax rate was to be modified for inflation and growth. The District’s construction is fully consistent with the rules of the English language as well as common usage. The District’s proposal is the literal meaning of the language of the ballot question and, therefore, is the construction the Court is required to adopt unless it would lead to an absurd or unreasonable result.

Plaintiffs respond by arguing that the operative language cannot be read to modify the tax rate. To do so, they argue, would lead to an absurd result.

Plaintiffs absurd result argument primarily rests on what it calls the “double dip” result of the District’s construction. A review of Plaintiffs’ argument again requires consideration of the context of the taxation process and the three listed restrictive components of TABOR.

As noted, the basic tax formula applied a given rate to a value with a resulting product.² The rate is expressed as a percentage or as a mill levy which is simply another form of expressing a percentage. The value and the resulting product are expressed as dollar figures.

Plaintiffs note that the value to which the tax rate applied in this case is the “assessed value” of the taxable real property located within the District. This “assessed value” is a defined term and is derived from a formula defined by statute. The “assessed value” is the value at a given time of the real property. This gross dollar value varies annually, influenced by market forces and periodic statutory changes to the formula. Plaintiffs assert that the “assessed value” moves with inflation and local growth. Inflation (whether negative or positive) will cause “assessed value” to rise or fall accordingly. Moreover, growth (whether negative or positive) will cause the total “assessed value” to rise or fall accordingly as well. Therefore, Plaintiffs argue, applying a fixed rate of taxation (e.g., 7.598 mills which is 0.7598%) to “assessed value” accounts for inflation and local growth. Plaintiffs further argue that if the ballot question is read to adjust the percentage rate for inflation and growth and then apply that adjusted rate to an equally adjusted “assessed value” figure, the inflation and growth components are duplicated in

² Expressed as a mathematical formula: $R \times AV = RP$ where R is the rate, AV is assessed value and RP is the resulting product.

the formula. Plaintiffs argue that this would result in a “double counting” of each dollar of inflation and each dollar of growth and would give the taxing authority a “double dip” into the pockets of taxpayers. This, Plaintiffs argue, is an absurd and unreasonable reading of the ballot question.

Plaintiffs’ argument proceeds from a flawed premise. Plaintiffs’ premise is that “assessed value” is adjusted for what TABOR defines as “inflation” and “local growth.” However, “assessed value” does not vary as a function of “inflation” and “local growth.”

The term “assessed value” is the result of a formula defined by statute. The parties report that this value is a historical value calculated as of 18 months prior to the date of taxation. The parties further report that “assessed value” is derived from a percentage of actual value for a given parcel of property. For example, the “assessed value” might be set at 50% of the actual value from 18 months ago for a given piece of property.

The percentage of the actual value of a property used for “assessed value” varies depending on the type of property at issue. As an illustrative example, residential property may have an assessed value based on 50% of actual value while industrial property may have an assessed value based on 10% of actual value.

To reach Plaintiffs’ conclusion that the literal meaning of the 1996 ballot question approved by the voters results in a barred absurd result, the Court would have to conclude, at a minimum, that the literal construction results in an inescapable duplication in the proposed formula.³

³ As the Court concludes the formula is not duplicative, the Court need not address whether voter approval of a duplicative formula would qualify as absurd.

With respect to inflation, a connection exists between inflation and “assessed value” but it is a loose relationship and the two are not definitionally linked. The term “inflation” is defined by TABOR as follows:

the percentage change in the United States Bureau of Labor Statistics Consumer Price Index for Denver-Boulder, all items, all urban consumers, or its successor index.”

TABOR at Sec. (2)(f). While the parties did not present evidence on the components of the consumer price index for the Denver-Boulder area, the parties agreed that no direct link exists between the referenced index and the “assessed value” of real property in the District located in El Paso County, Colorado. Moreover, the Court may draw on its common sense and knowledge to confirm the parties’ conclusion.

A consumer price index is, as its name implies, an index of prices for consumer goods. Assuming for the sake of argument that the index includes real estate prices⁴, it also includes other goods such as durable goods, household goods, and energy. Thus, real estate values would represent only one portion of the index. Moreover, the real property at issue is located in El Paso County, Colorado. El Paso County, Colorado’s real estate market is separate and distinct from both the real estate and consumer markets for the Denver-Boulder area. Thus, the assessed value of real property in the District does not, by definition, vary by and account for the Denver-Boulder area Consumer Price Index (“inflation” as defined by TABOR).

Assessed value also does not, by definition, vary by “local growth” as that term is defined

⁴ As noted, the parties provided no evidence on the components of the consumer price index. The Court’s lay understanding is that the index does not include real estate prices (other than rent). Nonetheless, the Court assumes inclusion of real estate, a fact favorable to Plaintiffs, for purposes of analysis.

in TABOR. Under TABOR, “local growth” is the

net percentage change in actual value of all real property in a district from construction of taxable real property improvements, minus destruction of similar improvements, and additions to, minus deletions from, taxable real property.

TABOR at Sec. 1(g). Like the term “assessed value,” “local growth” also begins its calculation with actual value. The similarities end at that starting point. First, as noted, “assessed value” looks backward and uses a value 18 months prior to the date of taxation. “Local growth” uses the current actual value rather than the past actual value. Given that the crux of Plaintiffs’ argument is whether the formula is addressing changes in value over time, this time difference between the two measuring points is material.

Next, “assessed value” reduces the starting actual value by varying percentages depending on the type of property at issue. Thus, a district with a single gross market value for its total property may have a number of different total “assessed values” depending on the mix of types of properties.⁵ By contrast, “local growth” starts with actual value and then simply raises or lowers that gross value for the actual value of land/improvements either added to or removed from the district. The two definitions of value have some overlap but are dramatically different in scope and operation. Given the varying categories of land present in any one district, a 10% change in “local growth” (current actual value adjusted for additions or deletions) is highly

⁵ For example, assume residential property has an assessed value of 50% of market value while industrial property has an assessed value of 10% of market value. District A has 100% of its land categorized as residential while District B has 100% of its land categorized as industrial. If both districts have a total actual market value of \$100 million, District A will have an assessed value of \$50 million while District B will have an assessed value of \$10 million.

unlikely to be accompanied by a 10% change in “assessed value.”⁶

As a matter of simple math, “assessed value” does not change as a function of “local growth.” Neither does “assessed value” change as a function of “inflation.” The concepts are related but each is calculated by a dramatically different formula. Therefore, the “assessed value” component of the standard taxation formula does not directly account for “inflation” and/or “local growth” as those terms are defined by TABOR. Moreover, adjustment of the tax rate for “inflation” and/or “local growth” does not result in the “double counting” or the “double dip” that is the basis of Plaintiffs’ first absurd result argument.

Plaintiffs’ second argument that the Court must override the literal meaning of the language approved by the voters as absurd asserts that the literal meaning gives the district unrestrained discretion to raise tax rates without additional voter approval. Plaintiffs argue that, given the context and purposes of TABOR, interpreting a ballot question to give unrestrained tax rate setting authority to a governmental entity is an absurd and impermissible interpretation.

For purposes of this analysis, the Court accepts Plaintiffs’ principle of construction that an unlimited rate authorization would be absurd under TABOR.⁷ However, the literal meaning

⁶ For example, assume the same treatment of property by “assessed value” as in the preceding footnote. Assume that 50% of District A’s real property is residential and 50% is industrial. Assume the District privatizes a parcel of property worth \$10 million. Application of TABOR’s local growth definition will result in a 10% change in the total value to \$110 million. Initially, assessed value will show no change because of the time lag. However, assume for simplicity that the time lag does not apply. If the parcel privatized is industrial land, assessed value will change from \$30 million to \$31 million, for a change of 3%. If the parcel privatized is residential land, assessed value will change from \$30 million to \$35 million, for a change of 16.7%.

⁷ The Court notes that this principle would not apply to the bond obligation cases discussed by the parties. While the specific rates may not be identified in those cases, the rate is still limited by the total dollar figure authorized to be raised.

of the 1996 ballot language does not grant the District unlimited discretion to raise rates of taxation. Thus, even under the legal standard proposed by Plaintiffs, the ordinary meaning of the language approved is not absurd.

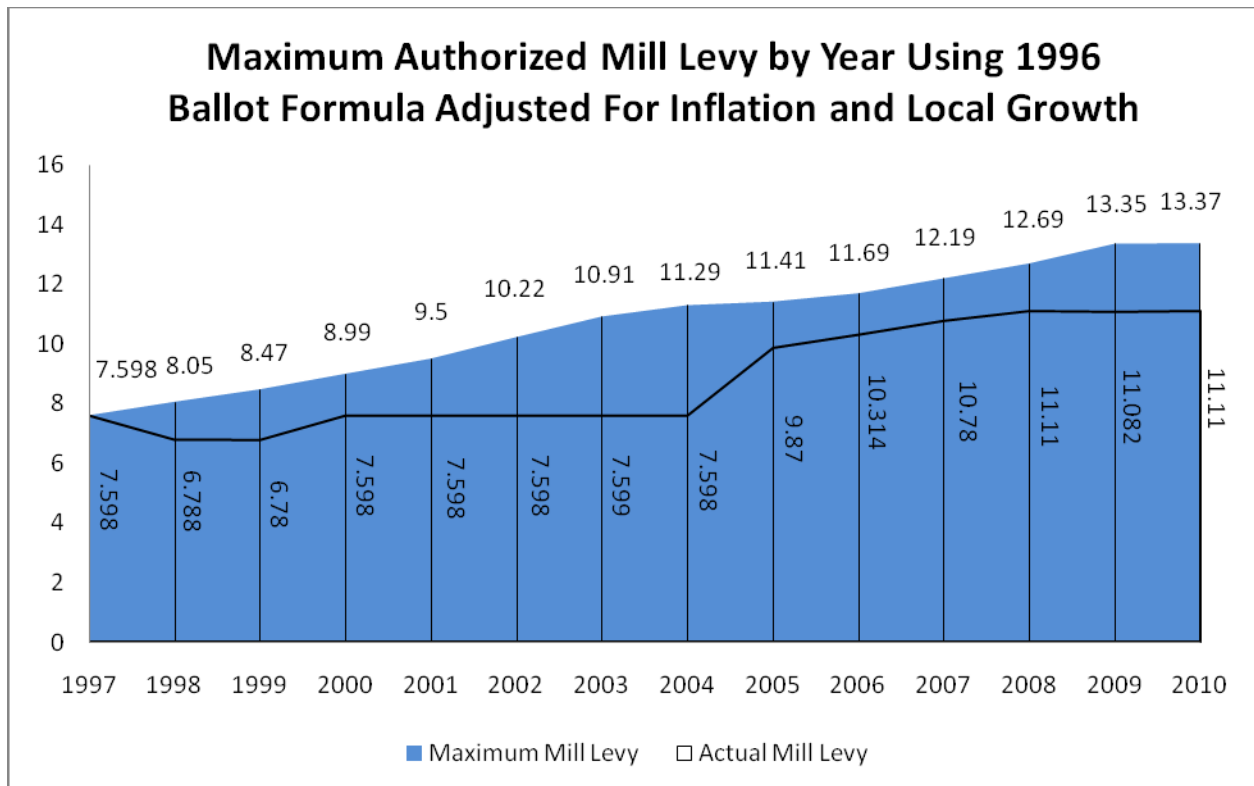
The ballot question asked whether the District would be authorized to increase the tax rate to an amount “NOT TO EXCEED” a specified mill rate in 1997 “AND THEREAFTER ADJUSTED FOR INFLATION PLUS LOCAL GROWTH.” The authority of the District is only to set the mill rate at 7.5980 in 1997. For the years following 1997, the language authorizes the District to set the tax rate only below a cap of 7.5980 as adjusted for “inflation” and “local growth” as those terms are defined in TABOR. Thus, the language set a cap that would be adjusted (increased or decreased) each year after 1997 for “inflation” and “local growth.”

The District’s authority is limited by these terms and the formula they reflect. The parties do not dispute the valuation, inflation, and local growth figures for the District. Using 1998 as an example, one can calculate the maximum mill levy authorized under a literal construction of the ballot language. The prior rate was 7.5980. That rate must then be adjusted for “inflation” plus “local growth.” As noted, “local growth” is the percentage change actual market value of the real property in the District, accounting for additions and deletions. That percentage change for 1998 was 2.6%. “Inflation,” the change in the Denver-Boulder area consumer price index, was 3.3%. Adjusting the starting cap of 7.5980 for “inflation” plus “local growth” yields a maximum authorized mill level of 8.050.⁸ As noted earlier in this Order, the District actually

⁸ The parties did not litigate the operation of the mathematical formula presented by the District, just whether a formula was authorized. Consequently, having concluded that the language authorized adjustment of the rate cap for “inflation” and “local growth,” the Court simply accepts the mathematical operation and product as presented by the District.

imposed a mill levy for 1998 of 6.788, well under the authorized cap.

Using the agreed upon annual figures for “inflation” and “local growth” in the District, the cap for each year since 1997 is reflected in the District’s Demonstrative Exhibit 1 and, rounded, are as follows:



Plaintiffs’ challenges that affording the ballot language its literal meaning would result in an absurd result are unpersuasive. The Court declines to override the meaning of the language approved by the voters and gives the 1996 ballot question approved by the voters its literal meaning as discussed above.

Extrinsic Evidence

Because of the procedural path selected by the parties, the Court did not address whether the 1996 ballot language was ambiguous prior to trial. Consequently, the Court heard

considerable extrinsic evidence offered by the parties at trial. The Court concludes the 1996 ballot language in dispute was not ambiguous under the law. While the language was densely worded and difficult, it was not susceptible to competing reasonable interpretations as demonstrated by the preceding analysis. *See generally Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996) (defining ambiguity).

As future proceedings following appeal are a possibility and the parties devoted considerable attention to the extrinsic evidence, the Court briefly addresses the extrinsic evidence presented. In general, the extrinsic evidence gave little insight into the intended meaning of the 1996 ballot language.

The bulk of the extrinsic evidence based debate centered on the opinions expressed by three lawyers that, at various times, represented the District. One lawyer apparently assumed the District had exceeded the authority granted by the 1996 ballot question. One lawyer apparently assumed the district had not. Whether the other lawyer actually had an opinion on this issue and whether it varied over time was not clear from the evidence. The Court found the opinions to be of no analytical or evidentiary value. The question posed to the Court was the meaning of the 1996 ballot measure. The state of mind of these lawyers is not relevant to that issue.

The referenced legal opinions could only have been useful to the Court based on the persuasive strength of their analysis of the language. Nonetheless, none of the legal opinions referenced showed any analysis of the language. The opinions most extensively explored simply assumed as a premise one or another interpretation. The opinions then provided only an analysis of specific consequences of the assumed interpretation. Even if the opinions held by these lawyers years after the election were relevant, the opinion letters presented simply do not address

the actual question in this case—the construction and meaning of the actual language of the 1996 ballot question.

The parties also dispute the meaning of the “course of conduct” of the “parties” following approval of the 1996 ballot question. In the fact discussion of this Order, the Court listed the tax rates charged for each tax year for the relevant period. The District kept the tax rate below 7.598 for several years and then raised the rate above that amount for several years before the current dispute arose. Plaintiffs argue that the District’s initial setting of rates below 7.598 indicates its understanding that it was subject to a fixed cap of 7.598. The District argues that because it set the rate above 7.598 for several years and received no objections from voters or from the plaintiffs and the board members were not voted out of office, this demonstrates that the voters understood the 1996 language to set a variable cap.

Neither argument is persuasive. The Court considers the logic of drawing a conclusion on the meaning of ballot language from the actions of a taxing entity or its voters years after the language was approved to be highly questionable. If either a government’s own actions or the inaction of a majority of voters are evidence of the meaning of the boundaries of the laws limiting governmental actions, one is hard pressed to imagine a circumstance in which a government action could be found to be improper. However, even if one accepts the validity of the analysis, the record here is mixed and points clearly in neither direction.

The parties also presented evidence on the facts leading to the 1996 ballot language. The Court found this evidence informative, though it did not ultimately factor into the Court’s analysis.

The 1996 ballot question emerged from a nearly identical 1995 ballot question that was

defeated. The dispute in this case essentially flows from the edits made by the District to the 1995 ballot question. The 1995 ballot question included a total dollar amount of revenue to be generated by the mill levy increase. In 1995, this figure was found between the two “and thereafter” phrases in the 1996 ballot question. The parties agreed that, had the original 1995 language remained with the revenue dollar figure listed, the language in dispute here would have modified that revenue figure and not the rate.

The Court found this history helpful analytically as it suggests analogous language that brings clarity to the question of sentence construction. Assume the original language was “John had a bat and a ball that was orange.” Continuing our analogy, both sides in this case agree that the final adjective, orange, modifies the second listed object, the ball. If we change the sentence by removing the second object and collapse the sentence to read “John had a bat that was orange,” the literal meaning seems clear that the modifier now modifies the remaining object, the bat. Essentially, that was the edit applied here. While the Court doubts the relevance of the intent of the scrivener, the scrivener’s intent appears clear from this sequence of events—to remove the second object so that the modifier would apply to the first object.

By contrast, Plaintiffs’ proposed construction would require reading the clause “John had a bat that was orange” as intended to communicate that a ball is orange. This construction defies basic rules of sentence structure and the literal meaning of the words. Plaintiffs’ proposal would require the adjective orange to modify an object not present or mentioned in the sentence, a ball. Plaintiffs would require the Court to imply a phantom ball into the sentence. The law does not permit a court to impose such a tortured construction on language approved by voters. The law requires a court to give the words approved by the voters their ordinary and literal meaning; the

bat is orange.

The parties were unable to locate the TABOR notice issued with the 1996 ballot measure. However, the parties were able to locate the draft of the notice. The notice gave no information directly on the meaning of the disputed language. Instead, the draft notice describes the declining tax revenues for the District over the preceding years and the increasing growth in the District. While not clear, the notice implies that tax revenues were declining significantly during a time of growth even though a constant tax rate had been maintained. Again, the Court did not find the extrinsic evidence to be necessary or relevant. However, the notice suggests actual facts in contrast to the Plaintiffs' argument of a double dip. Plaintiffs argued that positive "inflation" and "local growth" would necessarily cause a commensurate rise in tax revenues. The history provided in the draft notice suggests not only a lack of a commensurate rise, but a contrarian decrease.

Regardless, the Court ascribes no analytical weight to the extrinsic evidence.

Conclusion

While densely worded, the 1996 ballot language at issue is not ambiguous. The language has a straightforward literal meaning under TABOR and under standard rules of the English language. The Court is directed to give to ballot questions approved by voters their literal meaning unless to do so would lead to an absurd result. The Court finds no absurdity in the literal meaning of the language approved by the voters and, therefore, declines to depart from that literal meaning. The Court grants the request for a declaratory judgment and declares the 1996 ballot question authorized the District to set the mill levy at 7.598 in 1997 and to adjust or set the rate thereafter within a cap adjusted each year for "inflation" and "local growth" as those

terms are defined in TABOR. The District has not set a mill levy in violation of this authority.

In light of the ruling, the Court vacates the case management conference set to address proceedings on damages. The Court also vacates the preliminary injunction entered by stipulation of the parties *pendente lite*.

All parties represented by counsel are directed to serve a copy of this Order on pro se litigants without delay.

DONE and ORDERED October 21, 2011.

BY THE COURT

A handwritten signature in black ink, appearing to read 'D. S. Prince', written over a horizontal line.

David S. Prince
DISTRICT COURT JUDGE