

**I. Background:**

The City of Salida (the “City”) has evaluated whether the traditional lender financing mechanism used by the Salida Natural Resource Center Development Corporation (the “SNRCDC”) complies with TABOR, the debt limitation provisions in the Colorado Constitution, Colorado law and the City’s risk management goals. The City subsequently adopted Resolutions 2016-81, 2016-88 and 2016-97 with respect to the SNRCDC.

**II. The Underlying Transaction:**

**The City’s Vandaveer Ranch Purchase**

- a. The City purchased the Vandaveer Ranch on July 7, 2004 through an owner-carry secured Promissory Note mechanism. In particular, the City put \$450,000.00 down to purchase approximately 190 acres and 300 acre feet of senior water rights and also became a borrower on an owner-carry Note in the approximate amount of \$2.75M to be paid over twenty years. The Note included limitations on the City’s ability to sell the land. (Mountain Mail Articles (4/5/04; 7/8/04).)
- b. The total cost for the City in 2004 of the Vandaveer Ranch including its water rights was \$3,250,010.00. (Warranty Deed (6/30/04); Special Warranty Deed - Water (6/30/04).)
- c. The City had only wanted the water rights associated with the Vandaveer Ranch, but the Ranch owner would not sell the water rights without the land. (Citizen Comments, Former Mayor Chuck Rose, SNRCDC Mtg (10/25/16).)
- d. The City therefore purchased the water rights to the Vandaveer Ranch through a separate Special Warranty Deed that included an Exhibit that described the water rights with particularity. (Special Warranty Deed – Water Rights (6/30/04).)
- e. At the same time, the City also purchased the rest of the real property rights associated with the Vandaveer Ranch through a separate Warranty Deed. (Warranty Deed (6/30/04).)
- f. The City decided to carve off the related water rights, convert those water rights from agricultural to municipal uses, and then sell the land for higher density residential development and as a gateway to the City for additional commercial development. (Mountain Mail Articles (4/5/04; 7/8/04).)

- g. In December of 2004, the City therefore filed an application in Division 2 Water Court Case No. 04CW125 to change the use of the Tensassee Ditch water rights previously used to irrigate the Vandaveer Ranch to allow the City to use the water rights within its augmentation plan and municipal supply. (Application, Case No. 04CW125 (12/29/04).)
- h. The City Attorney at the time of the 2004 Vandaveer purchase was Jerry Devitt. (Mountain Mail Article (4/5/04).)
- i. The Water Court eventually approved the City’s requested change and entered a final decree on June 30, 2009 allowing the conversion. (Decree, Case No. 04CW125 (6/30/09).) The Decree allowed the City to cease using Tensassee Ditch water rights for irrigation of the Vandaveer Ranch and to use them instead for augmentation and municipal purposes. (*Id.* at ¶¶8.1, 8.1.) The Decree specifically provides that the Vandaveer Ranch “will not be irrigated by the [Tensassee Ditch water rights] in the future.” (*Id.* at ¶9.5)
- j. Water rights may be transferred separately from the land they are or have been used on. (*Estate of Palizzi*, 854 P.2d 1256, 1260 (Colo. 1993).)
- k. The City drastically reduced the amount of water diverted into the Tensassee Ditch as early as 2007, and by 2010 had slashed the number of acres irrigated by the Tensassee Ditch and had made full use of the Tensassee Ditch water within the City’s augmentation plan and municipal supply. (Division of Water Resources Records Report (12/19/16); City Tensassee Ditch Accounting Records.)
- l. After securing the water rights, the City still needed to sell portions of the property to recoup its down payment and make finance payments on the Note. (Mountain Mail Article (4/15/09).)

### **The City’s 2009 TABOR Problem**

- m. In early 2009, a master developer terminated a Purchase Agreement with the City for the entire Vandaveer Ranch. The master developer planned on developing hundreds of homes, a commercial center and a golf course. “The developer cited inability to secure financial backing amid the current credit crunch and financial downturn.” (Mountain Mail Article (4/15/09).)
- n. By April 15, 2009, the City had determined that the owner-carry Note mechanism utilized for the purchase violated TABOR as a multi-year debt obligation that was not approved by the voters or funded with sufficient set aside reserves. (Mountain Mail Article (4/15/09).)

- o. The City subsequently paid off the owner-carry Note to avoid TABOR debt-limitation compliance problems. (Mountain Mail Article (4/15/09).)
- p. To do so, the City exhausted a significant portion of its cash reserves. In particular, the City used \$760,000.00 from its water reserve fund and \$1,671,999.00 from its general reserve fund. (Mountain Mail Article (10/11/16).)
- q. In the process, the City reduced its general fund reserve account to about \$300,000.00 and its water fund reserve account to approximately \$200,000.00. (Mountain Mail Article (4/15/09).)
- r. The total cost of the initial transaction for the Ranch including principal and interest as of the 2009 payoff ultimately amounted to \$3,651,358.00. (Mountain Mail Article (10/11/16).)
- s. At the time the City concluded that the owner-carry Note violated TABOR in 2009, the City’s Finance Director was Jan Schmidt and the City’s Director of Community Development was Dara MacDonald. (Mountain Mail Article (4/15/09).)
- t. Karl Hanlon became the City Attorney no later than June of 2009. (SNRCDC AOI, Section 11 and Footer; 2009 City Council Meeting Minutes (6/16/09).) Mr. Hanlon’s Engagement Agreement is dated April 7, 2010, however. (KNH Engagement Agreement (4/7/10).)

**III. SNRCDC Entity Organization:**

**The SNRCDC Articles of Incorporation**

- a. The City Attorney acting as an Incorporator created the Articles of Incorporation (“AOI”) for the Natural Resource Center Development Corporation (“SNRCDC”) on or about October 30, 2009. (SNRCDC AOI, Section 11 and Footer.)
- b. The SNRCDC AOI provides that the initial principal office of the SNRCDC shall be “City of Salida, 124 E. Street, P.O. Box 417, Salida, Colorado 81201.” (AOI Section 2.)
- c. The SNRCDC AOI provides that the initial registered office of the SNRCDC shall be “City of Salida, 124 E. Street, P.O. Box 417, Salida, Colorado 81201.” (AOI Section 5.)

- d. The SNRCDC AOI provides that the SNRCDC “is organized and shall be operated exclusively on behalf of and for the benefit and in furtherance of the purposes of the City of Salida, Colorado, and the inhabitants thereof.” (AOI Section 4(a); see also SNRCDC Minutes (1/21/10).)
- e. The SNRCDC AOI provides that any monies realized by the SNRCDC “shall be used exclusively for the acquisition, construction, operation and maintenance of public improvements . . . .” (AOI Section 4(a).)
- f. The SNRCDC AOI provides that any such public improvements “shall be located within the City of Salida, Colorado, or shall have a substantial connection therewith or impact thereon.” (AOI Section 4(a).)
- g. The SNRCDC AOI provides that “[i]f the Corporation shall exercise its authority to issue its own bonds or other obligations, said bonds or other obligations shall not constitute a direct or indirect debt or financial obligation whatsoever of the City of Salida, Colorado, or the State of Colorado.” (AOI Section 4(b).)
- h. The SNRCDC AOI provides that “[a]ll property of the Corporation shall be owned for the benefit of the City of Salida, Colorado, and subject to the condition that upon dissolution of the Corporation, all of the Corporation’s assets remaining after payment of or provision for all of its liabilities shall be paid over or transferred to the City of Salida, Colorado.” (AOI Section 4(c)(3).)
- i. The SNRCDC AOI provides that “[n]otwithstanding anything contained herein, the Corporation shall be an independent entity and not an agent of the City of Salida (except as may be expressly agreed to by the City of Salida in writing) and the Corporation shall have no authority to obligate or otherwise bind the City of Salida.” (AOI Section 4(c)(4).)
- j. The SNRCDC AOI provides that “[u]pon dissolution of the Corporation’s affairs, or upon the abandonment of the Corporation’s activities due to its impracticable or inexpedient nature, the assets of the Corporation then remaining in the hands of the Corporation shall be distributed, transferred, conveyed, delivered, and paid over to the City of Salida in accordance with the Internal Revenue Service regulations governing 6320 corporations.” (AOI Section 9.)
- k. The SNRCDC AOI provides the City of Salida with a prior consent right with respect to any amendments to the SNRCDC AOI or Bylaws. (AOI Section 10.)

### **The SNRCDC Bylaws**

- l. The SNRCDC Bylaws provide for control by a majority of the Board of Directors. (2016 Bylaws Section 3.8.)
- m. The SNRCDC Bylaws were amended in 2013 to provide that “[t]he City Administrator for the City of Salida will serve as an ex-officio, non-voting member of the Board.” (SNRCDC Resolution 2013-2 (3/19/13); 2013 Bylaws Section 3.2; 2016 Bylaws Section 3.2.)
- n. The SNRCDC Bylaws provide that the Salida City Council will appoint any SNRCDC Board Directors. (SNRCDC Resolution 2013-2 (3/19/13); 2013 Bylaws Section 3.2; 2016 Bylaws Section 3.2.)
- o. The SNRCDC Bylaws allow the Salida City Council to fill any Director vacancies in the SNRCDC Board. (2016 Bylaws Section 3.3.)
- p. The SNRCDC Bylaws originally provided that “[a]ny Director may be removed at any time by the Salida City Council.” (2010 Bylaws Section 3.2.)
- q. The SNRCDC Bylaws were amended in 2013 to strengthen City control over the SNRCDC Board and now provide that “[a]ny Director may be removed at any time by the Salida City Council with or without cause.” (SNRCDC Resolution 2013-2 (3/19/13); 2013 Bylaws Section 3.2; 2016 Bylaws Section 3.2.)
- r. The 2013 amendments to the SNRCDC Bylaws providing for greater City control over the SNRCDC Board were signed by Dara MacDonald, Tom Yerkey and Keith Baker in their capacities as SNRCDC Board Members and signed again and approved by Dara MacDonald in her capacity as the City Administrator. (SNRCDC Resolution 2013-2 (3/19/13).)
- s. The 2013 amendments to the SNRCDC Bylaws providing for greater City control over the SNRCDC Board also was signed by Tim Glenn in his capacity as an SNRCDC Board Member. (SNRCDC Resolution 2013-2 (3/19/13).) Mr. Glenn was a Board Member of the SNRCDC’s current lender at the time.
- t. The SNRCDC Bylaws originally provided for actions without meetings based on written Director consent. (2010 Bylaws Section 3.12.)
- u. The SNRCDC Bylaws regarding meetings were amended in 2013 to eliminate any action without meeting based on consent rights and now provide instead that “[m]eetings of the Board of Directors shall be treated as if the Board is a ‘local public body’ as defined in C.R.S. 24-6-402 and the Board shall abide by

those provisions of said statute which apply to local public bodies.” (2013 Bylaws Section 3.12; 2016 Bylaws Section 3.12.)

- v. Colorado Revised Statutes Section 24-6-402 defines a “local public body” as “any board, committee, commission, authority, or other advisory, policy-making, rule-making, or formally constituted body of any political subdivision, or an official thereof, has delegated a governmental decision-making function . . .” (C.R.S. §24-6-402(1)(a).)
- w. The SNRCDC Bylaws were amended again in 2016, to allow the City Council to waive any SNRCDC external audit requirements. (Resolution 2016-14 (2/2/16).)

### **SNRCDC Entity Organization Implementation**

- x. Shortly after the passage of TABOR, one set of commentators suggested that a District could avoid some of the limitations in TABOR by forming a private non-profit corporation to act as an independent supporting 501(c)(3) foundation. (*Peter C. Guthery, Kerrie A. Boesse and Lisa J. Lambert, “Use of the Nonprofit Supporting Foundation to Assist Governmental Districts After Amendment 1,”* at 685, 22 Colo. Law. No. 4 (April 1993).)
- y. These same commentators also suggested that a District could avoid some of the limitations in TABOR by forming an exempt private 501(c)(3) non-profit corporation to act as an independent supporting foundation exempt from TABOR, while maintaining the non-profit corporation’s status as a public charity pursuant to 509(a). (*Peter C. Guthery, Kerrie A. Boesse and Lisa J. Lambert, “Use of the Nonprofit Supporting Foundation to Assist Governmental Districts After Amendment 1,”* at 685, 22 Colo. Law. No. 4 (April 1993).)
- z. If a private non-profit corporation is established and controlled by a District or is not sufficiently divested from a District, however, it cannot serve as an independent supporting 501(c)(3) foundation exempt from TABOR. (*Peter C. Guthery, Kerrie A. Boesse and Lisa J. Lambert, “Use of the Nonprofit Supporting Foundation to Assist Governmental Districts After Amendment 1,”* at 689, 22 Colo. Law. No. 4 (April 1993) (citing Colorado Ass’n of Public Employees v. Theof the University of Colorado, 804 P.2d 138 (Colo. 1990).)
- aa. To receive treatment as a truly independent non-profit corporate entity, the entity should be privately founded and maintained with “a state or municipality having no voice in the management or control of its property or the formation of rules for its government.” (Colorado Ass’n of Public Employees v. The Board of Regents of the University of Colorado, 804 P.2d 138, 143-44 (Colo. 1990) (quoting Woodard v. Porter Hosp., Inc., 217 A.2d 37,

39 (Vermont 1966) and citing Green v. Board of Directors of Lutheran Medical Center, 739 P.2d 872, 874 (Colo. App. 1987); Even v. Longmont United Hosp. Ass’n, 629 P.2d 1100, 1102 (Colo. App. 1981.)

- bb. The fact that a non-profit corporation “is operated for the benefit of the public and not for profit, does not detract from its character as a private institution, if it is established and maintained by a private corporation or individual with authority to elect or appoint its own officers and directors.” (Colorado Ass’n of Public Employees v. The Board of Regents of the University of Colorado, 804 P.2d 138, 143 (Colo. 1990).)
- cc. Whether a non-profit corporation is private “depends upon whether 1) it is founded and maintained by private individuals or a private corporation and 2) the state is involved in the management or control of its property or internal operations.” (Colorado Ass’n of Public Employees v. The Board of Regents of the University of Colorado, 804 P.2d 138, 143 (Colo. 1990); accord Colorado Special Districts Property and Liability Pool v. Lyons, 277 P.3d 874, 881 (Colo. App. 2012).)
- dd. A non-profit corporation is not private just because its entity organization documents provide that the corporation is not an agent of the government; provide that the corporation is not subject to laws related to governmental entities; provide that the corporation can borrow money or issue bonds; or, provide for the assumption of governmental assets subject to a reversionary or residual governmental interest. (Colorado Ass’n of Public Employees v. The Board of Regents of the University of Colorado, 804 P.2d 138, 141 (Colo. 1990).)
- ee. A non-profit corporation is not private just because it was formed and designed to remove the corporation from the scope of State constitutional or statutory requirements otherwise applicable to governmental entities. (Colorado Ass’n of Public Employees v. The Board of Regents of the University of Colorado, 804 P.2d 138, 145 (Colo. 1990) (“[A] mere change in the nomenclature . . . does not change the essence.”); accord Bardsley v. Colo. Dept. of Public Safety, 870 P.2d 641, 647-48 (Colo. App. 1994).)
- ff. A non-profit corporation is not private and independent if it was founded by government officials; the non-profit corporation’s Board of Directors is appointed and can be removed by the sponsoring government; and, the sponsoring government actually or effectively controls the non-profit corporation’s operations. (Colorado Ass’n of Public Employees v. The Board of Regents of the University of Colorado, 804 P.2d 138 (Colo. 1990) (“In view of the Regents’ creation of the corporate hospital and their continuing control over the internal operations of the reorganized hospital, it is evident that the Regents have not sufficiently divested themselves of power over the hospital

to enable the new corporation to operate independently as a private corporation.”.)

- gg. A private corporation effectively is a public entity if it is an “instrumentality” of a municipality for development purposes. (Denver Post Corp. v. Stapleton Development Corp., 19 P.3d 36, 40 (Colo. App. 2000) (“[I]t would be inappropriate to insulate the decision-making process from public scrutiny merely because control of the development was given to a non-governmental entity” controlled by governmental entities.)
- hh. One factor to consider in evaluating whether an entity is “private” or “public” irrespective of the entity form, is “whether the entity had availed itself of the public entity’s resources and facilities.” (Denver Post Corp. v. Stapleton Development Corp., 19 P.3d 36, 40 (Colo. App. 2000).)
- ii. Another factor to consider in evaluating whether an entity effectively operates as an instrumentality of a public municipal entity is whether “principally if not exclusively, it affects only those persons residing within the boundaries of the governmental unit in question and whether the political processes make those who perform the function responsive to the electorate within the affected area.” (RTD v. Colo. Dept. of Labor and Employment, 830 P.2d 942, 946 (Colo. 1992).)
- jj. When an existing governmental entity is reformulated as a private non-profit corporation but operations remain unchanged; those who operate the entity serve at the discretion of the sponsoring government; and, the sponsoring entity continues to control the entity – the governmental entity’s reorganization as a non-profit corporation amount to “changes of form, not substance.” (Colorado Ass’n of Public Employees v. The Board of Regents of the University of Colorado, 804 P.2d 138, 146 (Colo. 1990); accord Bardsley v. Colo. Dept. of Public Safety, 870 P.2d 641, 647-48 (Colo. App. 1994).)
- kk. “[T]he significant distinction between a public corporation and a private one is whether the corporation was created as an instrument of the state to increase governmental efficiency, to supply public wants, or to promote the public welfare.” Farina v. City and County of Denver, 940 P.2d 1004 1008 (Colo. App. 1996) (citing Colorado Ass’n of Public Employees v. The Board of Regents of the University of Colorado, 804 P.2d 138 (Colo. 1990).)
- ll. A private non-profit corporation designed to act as an independent supporting 501(c)(3) foundation subject to classification as a 509(a) public charity would have to apply for an exemption with the IRS and file annual informational returns with the IRS in most instances. (*Peter C. Guthery, Kerrie A. Boesse and Lisa J. Lambert*, “Use of the Nonprofit Supporting Foundation to Assist Governmental Districts After Amendment 1,” at 692, 22 Colo. Law. No. 4 (April 1993).)



- mm. The City ultimately adopted the SNRCDC AOI and Bylaws and created the SNRCDC “for the benefit of the City of Salida” pursuant to Internal Revenue Service Ruling 63-20 in November 2009 through Resolution 2009-56. (Resolution 2009-56.)
- nn. In doing so, the SNRCDC appears to have tried to adopt many of the characteristics of a private non-profit corporation designed to act as an independent supporting foundation pursuant to 501(c)(3) and 509(a). (*Peter C. Guthery, Kerrie A. Boesse and Lisa J. Lambert, “Use of the Nonprofit Supporting Foundation to Assist Governmental Districts After Amendment 1,”* at 689-92, 22 Colo. Law. No. 4 (April 1993).)
- oo. The SNRCDC filed its Articles of Incorporation with the Colorado Secretary of State on December 18, 2009 as a Colorado not-for profit corporation. (Colorado Secretary of State Filings.)
- pp. The Secretary of the SNRCDC certified that the SNRCDC had properly adopted Bylaws upon formation. (2010 Bylaws Signature Block.)
- qq. The Secretary of the SNRCDC upon formation and as of January 12, 2010 was Dara MacDonald. (2010 Bylaws Signature Block; SNRCDC Organizational Minutes.)
- rr. The President of the SNRCDC upon formation and as of January 12, 2010 was Jack Lewis. (SNRCDC Organizational Minutes.)
- ss. The Treasurer of the SNRCDC upon formation and as of January 12, 2010 was Jan Schmidt. (SNRCDC Organizational Minutes.)
- tt. The Director of Community Development for the City as of January 12, 2010 was SNRCDC Secretary Dara MacDonald.
- uu. The City Administrator for the City as of January 12, 2010 was SNRCDC President Jack Lewis.
- vv. The Director of Finance for the City as of January 12, 2010 was SNRCDC Treasurer Jan Schmidt.
- ww. Two of the three original SNRCDC Board Directors were the City Administrator Jack Lewis and the City Director of Community Development Dara MacDonald, with notice addresses of “City of Salida, 124 E. Street, P.O. Box 417, Salida, Colorado 81201.” (AOI Section 7(c); SNRCDC Organizational Minutes.)

- xx. The City appointed City Councilmembers Tom Yerkey and Keith Baker as SNRCDC Board Directors on July 25, 2011.  
(<http://cityofsalida.com/projects/natural-resource-center/>)
- yy. Mr. Lewis resigned from the SNRCDC Board in 2012 after his tenure as the City Administrator ended.
- zz. The City appointed Dara MacDonald as the City Administrator for the City in May of 2012. (Resolution 2012-33.)
- aaa. The City approved an amendment to the SNRCDC Bylaws on May 7, 2013, 2013 through Resolution 2013-31. (Resolution 2013-31.)
- bbb. The Secretary of the SNRCDC certified that the SNRCDC had properly adopted amended Bylaws on May 7, 2013. (2013 Bylaws Signature Block.)
- ccc. The Secretary of the SNRCDC as of May 7, 2013 was Dara MacDonald. (2013 Bylaws Signature Block.)
- ddd. The City Administrator as of May 7, 2013 also was Dara MacDonald.
- eee. The City Attorney served as the SNRCDC’s attorney from formation through February of 2014. (City Council Meeting Minutes (2/18/14).)
- fff. The City approved another amendment to the SNRCDC Bylaws on February 16, 2016 through Resolution 2016-14. (Resolution 2016-14.)
- ggg. The Secretary of the SNRCDC certified that the SNRCDC had properly adopted amended its Bylaws in February of 2016. (2016 Bylaws Signature Block.)
- hhh. The Secretary of the SNRCDC in February of 2016 was Dara MacDonald. (2016 Bylaws Signature Block.)
- iii. The City Administrator in February 2016 also was Dara MacDonald.
- jjj. The SNRCDC does not have a separate website, and is part of the City’s website. (See [www.cityofsalida.com](http://www.cityofsalida.com).) The City maintains and operates the SNRCDC portion of the City’s website.
- kkk. In a recent proposed SNRCDC sale transaction, the City and the SNRCDC agreed to sacrifice no less than \$105,000.00 of the City’s potential residual equity to allow Belmont Development Company, LLC (“Belmont”) to purchase Ranch land for an affordable housing project. (Belmont Development Company, LLC, CHFA Application, “9% lihtc application narrative,” at 283 Paradise at Vandaveer Ranch Project (2016).)

- lll. In Belmont’s affordable housing CHFA Application, Belmont acknowledged that it had negotiated directly with the City as the actual or effective owner of the Ranch and admitted that the proposed acquisition required the City to sacrifice six figures in equity:

The City of Salida has also shown their support to our Paradise at Vandaveer Ranch application by providing a significant discount on the purchase of the land. An independent third-party appraisal was secured (sent to CHFA under separate cover) that shows the site (5.35 acres m/l) for this much needed development has an appraised value of \$280,000. However, as evidenced in Tab 17 – Site Control Documentation, the City has offered to sell the land for only \$175,000. The additional market value of \$105,000 is being foregone by the City of Salida as a contribution to the development. . . . Quite frankly, without the support and backing by the City it would be nearly impossible to find a site that could potentially offer so much in close proximity and still be priced at a point that is financially feasible for an affordable housing development.

(Belmont CHFA Application at 286, 290.)

- mmm. Belmont left no doubt in its CHFA Application that it viewed the City as the actual party in interest and decision-maker with respect to the Ranch:

We have experienced unprecedented support from the City of Salida. We consider the city leaders to be partners in our effort to provide safe, clean and affordable housing to their working families. The City of Salida has been involved every step of the way and will be a constant voice in support of this project. . . . We are eager to work hand in hand with the City in making Paradise at Vandaveer Ranch one of the focal points of the transformation planned for the area.

(Belmont CHFA Application at 283, 290-91.)

- nnn. Belmont ignored the SNRCDC entirely in its CHFA Application, as the Belmont CHFA Application does not even reference the SNRCDC. (Belmont CHFA Application at 283-291.)

- ooo. The City has similarly described the relationship as one between the City and Belmont, without any mention of the SNRCDC (2016 Budget at 18(3) (12/1/15).)

- ppp. From formation until the tenant left the premises in 2016, the City collected rent from a tenant occupying premises within the Ranch. (Mountain Mail articles (July 2016).)
- qqq. The City has conceded that “[a]spects of the City’s economic development efforts are taking place through the [SNRCDC].” (2016 Budget at 18(4) (12/1/15).)
- rrr. An SNRCDC Board Director has described the SNRCDC as “the perfect marriage between the private and public sector . . . .” (City Council Meeting Minutes at VI(2) (1/8/13).)

### **The Development Agreement**

- sss. The City adopted Ordinance 2006-19 on or about December 18, 2006, and originally adopted a Vandaveer Ranch Planned Development District Overall Development Plan pursuant to Salida Municipal Code 16-13-100. (Ordinance 2006-19 (12/18/06); Vandaveer Ranch Planned Development District Overall Development Plan (12/18/06).)
- ttt. The City Administrator signed the Vandaveer Ranch Planned Development District Overall Development Plan in his capacity as the City Administrator but on behalf of the applicant in the following capacity: “The Vandaveer Ranch co City Administrator City of Salida.” (Vandaveer Ranch Planned Development District Overall Development Plan at 25 (12/18/06).)
- uuu. After formation of the SNRCDC, the City and the SNRCDC then entered into a Development Agreement on July 7, 2010 via Resolution 2010-38. (Resolution 2010-38; Development Agreement (7/7/10).)
- vvv. The Development Agreement provided that the SNRCDC would issue bonds to finance a natural resources center on a portion of the Vandaveer Ranch. (Dev. Agreement, Whereas Provisions.)
- www. The Development Agreement provided that the City owned the Vandaveer Ranch and that the City was authorizing the SNRCDC “to use the property for all purposes described herein” but only “pursuant to this Agreement.” (Dev. Agreement, Section 3.)
- xxx. The Development Agreement provided that “[t]he Corporation covenants and agrees that all activities of the Corporation in owning and operating the Projects shall be undertaken for the benefit of the City.” (Dev. Agreement, Section 4.)

- yyy. The Development Agreement provided that the SNRCDC would indemnify the City for anything resulting from the operation of the SNRCDC. (Dev. Agreement, Section 15.)
- zzz. The Development Agreement provided that “[u]pon termination of this Agreement, the City shall be entitled to acquire all of the Corporation’s right, title and interest in and to the Projects without cost, as provided herein and in the Indenture or Alternate Financing.” (Dev. Agreement, Section 4.)
- aaaa. The “Indenture” and “Alternate Financing” are defined terms in the Development Agreement that relate to financing forms and mechanisms that the SNRCDC never pursued and ultimately abandoned. (Dev. Agreement, Whereas Recitals and Section 4.)
- bbbb. The Development Agreement provided that if the City exercised its termination rights, “the Corporation shall immediately cancel all encumbrances on such property, including all leases and management and management agreements on the Projects or portions thereof being acquired by the City (subject to the Permitted encumbrances as foresaid).” (Dev. Agreement, Section 6 (parenthetical in original).) The Development Agreement also provided that the “permitted encumbrances . . . will be defined in the Indenture or Alternate Financing.” (Dev. Agreement, Section 5.)
- cccc. The Development Agreement provided the City with a Right to Acquire all of the SNRCDC’s interest in the Vandaveer Ranch subject only to permitted encumbrances that would be defined in subsequent bond indenture and financing materials. (Dev. Agreement, Whereas Provisions and Sections 5, 9.)
- dddd. The Development Agreement provided the City with a right to cure any SNRCDC default associated with the Indenture or Alternate Financing. (Dev. Agreement, Whereas Provisions and Section 7.)
- eeee. The Development Agreement provided the City with an exclusive option to purchase any property subject to acceleration, foreclosure or any other enforcement action related to the Indenture or Alternate Financing. (Dev. Agreement, Section 7.)
- ffff. The Development Agreement provided that “[u]ncumbered fee title (subject to certain permitted encumbrances as aforesaid) to the Projects and any additions thereto and exclusive possession and use thereof, and all related rights or interests of the Corporation necessary for the possession and quiet enjoyment of such property, will vest in the City without demand or further action on its part when all obligations issued under the Indenture or Alternate Financing (including the Bonds) are discharged.” (Dev. Agreement, Section 9 (parenthetical in original).)

gggg. The Development Agreement provided that “[t]his Agreement is a burden upon and runs with the property . . . and this Agreement shall be binding upon the Corporation and upon all persons or entities with any right, title or interest to such property or any part thereof, subject to release by the City.” (Dev. Agreement, Section 13.)

hhhh. The City Administrator signed the Development Agreement on behalf of the SNRCDC in his capacity as a Board Member and Officer of the SNRCDC. (Dev. Agreement, Signatories.)

iiii. “The [SNRCDC] Board acts largely to implement the policy direction set forth by the City Council under the confines of the Article[s] of Incorporation and the amended Development Agreement adopted by the Council.” (City Administrator Memorandum (1/22/13).)

jjjj. The City adopted Ordinance 2011-16 on or about October 18, 2012, and adopted an Amendment to the Vandaveer Ranch Planned Development District Overall Development Plan pursuant to Salida Municipal Code 16-3-100. (Ordinance 2011-16 (10/18/12); Amended Vandaveer Ranch Planned Development District Overall Development Plan (10/18/12).)

kkkk. The City Administrator was a signatory on the Amended Vandaveer Ranch Planned Development District Overall Development Plan on behalf of the SNRCDC in his capacity as the SNRCDC President. (Amended Vandaveer Ranch Planned Development District Overall Development Plan, Signature Block (10/18/12).)

llll. The Amended Vandaveer Ranch Planned Development District Overall Development Plan is not a Final Development Plan. (Amended Vandaveer Ranch Planned Development District Overall Development Plan at 1 (Amendment 2) (10/18/12); Salida Municipal Code 16-3-§90(g).)

#### **IV. The Possibility of SNRCDC Bond Financing:**

##### **IRS Revenue Ruling 63-20 and Revenue Proclamation 82-26**

- a. The Internal Revenue Service issued Revenue Ruling 63-20 on or about January 11, 1963. (Revenue Ruling 63-20 (Technical Information Release 442).)

- b. Revenue Ruling 63-20 allows a nonprofit formed on behalf of a political subdivision to issue tax-free revenue bond obligations for the purpose of stimulating industrial development. (Rev. Rul. 63-20.)
- c. To comply with Revenue Ruling 63-20, the nonprofit must engage in public activities; corporate income cannot inure to a private person; the political subdivision must have a beneficial interest in the corporation during any period of indebtedness and obtain full legal title to the property of the corporation once the indebtedness is retired; and, the political subdivision must have approved of the corporation and its obligations. (Rev. Rul. 63-20.)
- d. The Internal Revenue Service provided political subdivisions with specific guidance regarding complying with the beneficial interest component of Revenue Ruling 63-20 on or about January 1, 1982. (Revenue Proclamation 82-26 (1982-1 CB 476).)
- e. The Internal Revenue Service will provide political subdivisions with an advance ruling upon request regarding whether a nonprofit complies with Revenue Ruling 63-20. (Rev. Proc. 82-26.)
- f. In providing guidance to political subdivisions regarding Revenue Ruling 63-20, the Internal Revenue Service referenced an example in which (1) the nonprofit issued “interest bearing revenue bonds” based on the total rental income stream associated with the underlying property; and (2) the issuer had a foreclosure interest in the property in the event of default. (Rev. Rul. 63-20.)

#### **SNRCDC Bond Finance Efforts**

- g. With respect to the SNRCDC, “[t]he plan for funding development of the site was consistently based on the idea that the debt issued to fund construction would be repaid through lease payments . . . .” (City Administrator Memorandum (1/22/13); City Administrator Memorandum (2/5/13).)
- h. The SNRCDC obtained a conditional commitment on July 29, 2010 from D. A. Davidson & Co. to underwrite and place \$5M in lease-revenue bonds to finance a building that would be leased to the United States Forest Service (“USFS”). (DA Davidson Ltr. (7/29/10).)
- i. The SNRCDC bond commitment contained a number of conditions, including customary counsel opinion letters acceptable to the bond issuer. (DA Davidson Ltr. at No. 11 (7/29/10).)

- j. The SNRCDC did not accept the 2010 lease-revenue bond commitment. (DA Davidson Ltr. (7/29/10).)
- k. According to a former Director of the SNRCDC and a Board Member of the lender that ultimately financed the SNRCDC long-term debt, “[a]s it turned out, interest rates went to an all-time low. Moody’s had just downgraded the U.S. credit rating, and the credit rating of the bond agency that was to secure the lease went down. A whole host of things made the bond financing thing less attractive, so it just made more sense with the low interest rate to do the local financing. To enter the bond market and float those bonds, to have the bond broker, was a more expensive process and the rates would have been higher.” (Mountain Mail Article (10/21/16) (quoting Tim Glenn).)
- l. The City Attorney advised the City on March 1, 2012 that IRS regulations required the SNRCDC “to convey back to the City all properties that are part of the natural resource project identified in the development agreement between the City and the SNRCDC when all obligations have been discharged including all monies borrowed having been paid back by the SNRCDC. To fully comply with the IRS regulations, the City of Salida also needs to acknowledge that it will accept title to the NRC project once those obligations have been discharged.” (City Attorney Memorandum (3/1/12).)
- m. The City Council therefore adopted Resolution 2012-20, and agreed to “(a) to accept title to the Project once all obligations including all monies borrowed for its construction have been discharged and (b) otherwise follow the regulations set forth in Internal Revenue Service Revenue Ruling 63-20 to the extent the Project is intended by the City to be treated as a 63-20 project financing.” (Resolution 2012-20 (3/6/12).)
- n. A Board Director and President of the SNRCDC has described the SNRCDC’s 63-20 efforts as part of an effort to avoid a citizen vote on any SNRCDC debt financing. (Green, Cynda “The Salida SNRCDC Chronicles: Big Plans for Vandaveer Ranch”, Salida Daily Post (9/25/14) (quoting Ron Mazzeo).) Two other SNRCDC Board Directors have agreed with that assessment. (Id.)

### **The SNRCDC’s 63-20 Abandonment**

- o. From July 2010 through April 2011, there were significant shifts in the lending market that caused the [SNRCDC] Board to reevaluate the financing for the project, including a downgrade in the credit rating of the federal government.” (City Administrator Memorandum (2/5/13).)
- p. The City Administrator and Secretary of the SNRCDC described the situation as follows on March 19, 2013: “I know we talked at the last meeting [on March 5] about the possibility of issuing bonds, and that does not seem like a



viable option for this project. With sequestration and going over the fiscal cliff, the federal government is not regarded with the same security as it once was, and with the 10 plus 5 plus 5 [lease] – to issue a 20-year bond, our initial take is, the cost of issuance is just overwhelming and not worth it.” (Green, Cynda “NRDC....Facing Its Own Fiscal Cliff”, Salida Daily Post (3/26/13).)

- q. The City Attorney and counsel for the SNRCDC echoed the sentiments of the former City Administrator and former Secretary of the SNRCDC on March 19, 2013: “Normally, starting this project at 10 plus 5 plus 5, it would not have been a problem . . . but issuing a bond, a revenue bond? . . . You can get a rating, but it might be at a higher interest rate than we currently have.” (Green, Cynda “NRDC....Facing Its Own Fiscal Cliff”, Salida Daily Post (3/26/13).)
- r. The SNRCDC nevertheless hired Michael Scott as counsel in or about February 2014 in part “because of his knowledge of 63-20 nonprofit corporations from his close ties to the Attorney General’s Office.” (Mountain Mail Article (2/19/14) (quoting SNRCDC President).)
- s. The 63-20 model proved unworkable for the City and the SNRCDC. As described by SNRCDC Board Member Walt Harder in August 2014, the “63-20 is untenable from a development stance . . . . If we’re in the business of developing this property, there will be a lot of inconveniences and ultimately a big impediment to doing business.” (SNRCDC Board Meeting (8/5/14); Green, Cynda “The Salida SNRCDC Chronicles: Big Plans for Vandaveer Ranch”, Salida Daily Post (9/25/14).)
- t. SNRCDC Board Member and eventual President Ron Mazzeo similarly proclaimed in August 2014 that “[t]he 63-20 hinders development and we’d be better off without it.” (Green, Cynda “The Salida SNRCDC Chronicles: Big Plans for Vandaveer Ranch”, Salida Daily Post (9/25/14).)
- u. The City Attorney therefore received direction on “removing” SNRCDC 63-20 designation in September 2014 from outside counsel. (Kutak Rock Letter (9/12/14).) Outside counsel recommended that any SNRCDC 63-20 designation could be “formally eliminated with a supplemental resolution to the initial loan resolution . . . .” (Id.)
- v. The 63-20 opinion from outside counsel in September 2014 was prepared for the SNRCDC but requested by the City and presented “c/o” the City Attorney. (Kutak Rock Invoice No. 1993443 (10/2/14).) The Invoice was approved by the City Administrator and SNRCDC Secretary acting in her capacity as the City Administrator. (Id.) The City paid for the SNRCDC’s legal work through both a “Legal – General Services” account (10-15-5211-0) and an “NRC Operating Costs” account (10-56-5565-1). (Id.)

- w. The City Attorney then recommended abandoning any SNRCDC 63-20 status. As noted in a public Memorandum to the City Council included in the October 18, 2014 City Council Work Packet:

“One of the restrictions that the 63-20 regulations imposes on the Corporation is that titles to financed properties must be transferred back to the City unencumbered when the debt is paid off. This would apply to partial releases of the current loan [on] the U.S. Forest Service building as that debt is paid down. If the 63-20 regulations are no longer utilized to govern the Corporation, separate provisions in the Development Agreement related to transfers of property from the Corporation be approved by the Corporation as well as the City Council of the City of Salida.

The second change is mechanical, simply acknowledging that the use of 63-20 regulations are no longer required by the City of the Corporation [sic]. As Council is aware from numerous discussions it was originally intended that the use of the 63-20 regulations would allow for the issuance of tax-exempt bonds to finance the project. Unfortunately, due to a variety of factors when the project came to fruition this was not the case. Fortunately, we have had great success working with local lenders on the project. . . . As a result the Corporation Board has recommended setting aside the 63-20 regulations and utilizing the transfer restriction to ensure City goals are met.”

(City/SNRCDC Attorney Memorandum (10/16/14) (citing to the proposed Fourth Amendment to the Development Agreement).)

- x. The SNRCDC never issued tax-free revenue or other bond obligation financing. (Fourth Amen. Dev. Agreement, Section 2.) Indeed, “[i]t is no longer anticipated that tax-exempt bond financing will be utilized either now or in the future by the Corporation, and as such the [City and the SNRCDC] agree that the Corporation no longer needs to adhere to IRS Rev Ruling 63-20 regulations.” (Fourth Amen. Dev. Agreement, Section 2.)
- y. After abandoning its ability to issue revenue bonds in 2014, the SNRCDC no longer qualified as a 63-20 entity. (Rev. Rul. 63-20; Kutak Rock Letter (9/12/14).)

## **V. SNRCDC Lender Financing Efforts**

### **The Initial SNRCDC Lender Finance Effort**

- a. The City and the SNRCDC amended the Development Agreement on July 5, 2011, in relevant part to facilitate financing for a United States Forest Service (“USFS”) Building and related project management by transferring title to a portion of the Vandaveer Ranch from the City to the SNRCDC. (Ordinance 2011-14; Resolution 2011-50; First Amendment to Development Agreement, Whereas Provisions and Section 1 (7/5/11).)

- b. In amending the Development Agreement, the City Council provided:

[T]he City Council will consider the future conveyance of a portion or the balance of the Vandaveer Ranch property to the [SNRCDC] as necessary to provide additional collateralization for development of the Property; provided, however, that such conveyance shall be conditioned upon the City Council’s review and approval of a release schedule for the balance of the Vandaveer Ranch property as debt is paid off.

(Resolution 2011-50, Section 2.)

- c. The City Administrator signed the First Amendment to the Development Agreement on behalf of the SNRCDC in his capacity as the SNRCDC President. (First Amen. Dev. Agreement, Signature Block.)
- d. The City then transferred partial title to portions of the underlying Vandaveer real estate to the SNRCDC “to collateralize development of the Property.” (Ordinance 2011-14 (8/16/11).)
- e. In doing so, the City only executed “a special warranty deed transferring the property pursuant to the terms of the Development Agreement.” (Ordinance 2011-14 (8/16/11).)
- f. The Development Agreement provides that it is a burden on the title of the property and binds any SNRCDC successors or assigns: “Burden on Property. This Agreement is a burden upon and runs with the property described in Exhibit A hereto, as amended or supplemented pursuant to Section 10 hereof, and this Agreement shall be binding upon the Corporation and all persons or entities with any right, title or interest to such property or any part thereof, subject to release by the City.” (Development Agreement at §13.)
- g. Although the Ordinance only authorized “a special warranty deed transferring the property pursuant to the terms of the Development Agreement,” the Special Warranty Deeds from the City to the SNRCDC attached to the Ordinance do not reference or attach the Development Agreement. (Ordinance 2011-14 (8/16/11).) The attached Deeds pre-date or in the alternative post-date the City’s adoption of Ordinance 2011-14. (Id.)

- h. Although the Ordinance only authorized “a special warranty deed transferring the property pursuant to the terms of the Development Agreement,” one or more of the Special Warranty Deeds from the City to the SNRCDC attached to the Ordinance were executed prior to or long after passage of the Ordinance. (Ordinance 2011-14 (8/16/11).)
- i. The Parties did not record any type of deed instrument evidencing a transfer of title from the City to the SNRCDC with respect to the “Outlot” that the SNRCDC claims ownership over. (Chaffee County Clerk & Assessor Parcel Nos. 38070910068
- j. The Parties did not record the Development Agreement with the Chaffee County Clerk and Recorder separately, or record the Ordinance or Development Agreement separately with respect to the nine title interests transferred from the City to the SNRCDC. (Chaffee County Clerk & Assessor Parcel Nos. 380708100001, 38705400078, 380709200041, 380705400100, 380709200051, 380709100069, 380709100067, 380709100065, 38070910068 at Sale Information.)
- k. The City did record Ordinance 2011-14 separately with the Chaffee County Clerk and Recorder at Reception No. 398472. (Recorded Ordinance 2011-14 (2/7/12).)
- l. The Parties never executed any type of subsequent warranty deed, the City never relinquished its ownership interests in Vandaveer pursuant to the Development Agreement, the City never executed another Ordinance transferring its title interests to the SNRCDC, and the only other Resolution that the City passed related to its transfer of title to the SNRCDC reaffirmed the City’s ownership interest in Vandaveer. (Resolution 2011-59; Second Amendment to Development Agreement.)
- m. The City and the SNRCDC amended the Development Agreement again on September 13, 2011, in relevant part to transfer title to “the balance of the Vandaveer Ranch to the SNRCDC for the sole purpose of securing financing for the development of the U.S.F.S. facility” and related infrastructure and to acquire, construct, operate and maintain public improvements. (Resolution 2011-59; Second Amendment to Development Agreement, Whereas Provisions and Section 1 (9/13/11).)
- n. In amending the Development Agreement a second time, the City and the SNRCDC provided that the SNRCDC would have to maintain certain loan to value ratios and comply with certain principal payment obligations with respect to the Conditions for Approval associated with financing the U.S.F.S. facility. (Sec. Amen. Dev. Agreement, Section 1(c).)

- o. In amending the Development Agreement a second time, the City affirmed its continued ownership and control interests with respect to Vandaveer. (Sec. Amen. Dev. Agreement, Section 1.)
- p. The City Administrator signed the Second Amendment to the Development Agreement on behalf of the SNRCDC in his capacity as the SNRCDC President. (Sec. Amen. Dev. Agreement, Signature Block.)
- q. The SNRCDC and the USFS soon signed a Lease on February 1, 2012. (U.S. Government Lease for Real Property (2/1/12).)
- r. As part of the Lease, the SNRCDC certified for Taxpayer Identification Purposes that it was a tax-exempt corporate entity. (Lease at Representations and Certifications.)
- s. The Lease binds the successors or assigns of the SNRCDC during the Lease term. (Lease, Section 12, Exhibit 1: Required Forms, General Clauses, Clause 3.)
- t. The Parties did not record Ordinance 2011-14 or the Special Warranty Deeds memorializing the SNRCDC’s ownership interests until February 23, 2012 however. (Ordinance 2011-14 & Special Warranty Deed Exs.)
- u. The attorney for both the SNRCDC and the City at the time the Special Warranty Deeds were prepared and recorded was Karl Hanlon. (Ordinance 2011-14, Special Warranty Deed Exs.)
- v. The City Finance Director then wrote off the transfer of title to the Vandaveer Ranch from the City to the SNRCDC in 2012 as a \$1.8M “loss on the disposal of land” included in a \$2,231,253.00 “loss on disposal of capital assets.” (2012 City of Salida Independent Auditor’s Report and Compiled Financial Statements at Management Discussion and Analysis and page 7 (3/27/13).)
- w. The SNRCDC valued the Vandaveer Ranch property in 2012 as a fixed asset worth \$2,047,400.00 and also provided that the SNRCDC had banking accounts worth \$295,471.00, for financial accounting purposes. (2012 SNRCDC Independent Auditors Report and Compiled Financial Statements (3/26/13).)
- x. In taking title to the Vandaveer Ranch, the SNRCDC left the City with significant contingent or actual liabilities associated with the acquisition. (Indemnity Demand, Section III (6/10/16).)
- y. The City Attorney sought confirmation of a property tax exemption for the entire Vandaveer Ranch held by the City and/or the SNRCDC on January 23, 2012 and described the SNRCDC at that time as “a financing tool fully

- controlled by the City of Salida and is required to transfer the property back to the City once the debt on the property is held by it for the City is paid off.” (City Attorney Ltr. to Chaffee County Assessor (1/23/12).)
- z. In seeking confirmation of a property tax exemption, the City Attorney provided that “I recognize this is an unusual entity form and financing tool used by the City of Salida.” (1/23/12 City Attorney Ltr.)
- aa. Eventually, the SNRCDC “solicited proposals for funding from a variety of providers and settled on a traditional loan structure with Collegiate Peaks Bank.” (City Administrator Memorandum (1/22/13); City Administrator Memorandum (2/5/13).)
- bb. On March 6, 2012, the SNRCDC approved a Resolution allowing it to enter into a traditional secured loan transaction with Collegiate Peaks Bank. (Hanlon Ltr. (3/7/12); SNRCDC Resolution (3/6/12).)
- cc. For financing purposes, the City Attorney provided an opinion letter regarding the validity of the provision in Ordinance 2011-14 and the Second Amendment to the Development Agreement transferring “the Vandaveer Ranch” from the City to the SNRCDC in March of 2012. (Hanlon Ltr. (3/7/12).)
- dd. For financing purposes, the City Attorney also provided an opinion letter regarding the validity of the SNRCDC Resolution approving the loan “[a]ssuming the legal validity and sufficiency of the documents prepared by bond counsel or as to which bond counsel is expressing an opinion . . . .” (Hanlon Ltr. (3/7/12).)
- ee. The SNRCDC sold Lot 1 comprised of 16 acres to provide “initial funding” for the Collegiate Peaks Loan. (City Administrator Memorandum (2/5/13).)
- ff. The SNRCDC then obtained private lender financing for the construction of the USFS facility in the amount of \$4,344,000.00 in March 2012, with title subsequently encumbered by the lender’s interest in both the related USFS revenue stream and the SNRCDC’s underlying title interest in the USFS facility. (Third Amendment to Development Agreement, Whereas Provisions (3/4/14); City Administrator Memorandum (1/22/13).)
- gg. Once the SNRCDC committed to a \$4,344,000.00 loan in March of 2012 the cost of the Ranch asset for the SNRCDC and the City increased to no less than \$7,995,358.00 without accounting for carrying, opportunity and/or interest costs that followed the 2009 payoff (\$4,344,000.00 (2012) + \$3,651,358.00 (2009)). (Compare Third Amendment to Development Agreement, Whereas Provisions (3/4/14); City Administrator Memorandum (1/22/13) with Mountain Mail Article (10/11/16).)

- hh. At the time, a local developer publicly complained that the SNRCDC was taking advantage of municipal property tax exemptions while simultaneously leveraging the property as collateral for a risky private loan. (City Council Minutes, Citizen Participation, Harder-Dieslin Comments (3/6/12).)
- ii. On January 28, 2013, the City Administrator and Secretary of the SNRCDC acknowledged that the City’s investment in developing Vandaveer Ranch had involved significant mistakes: “[T]his has been a bit of a rocky road. The City of Salida, most likely . . . [p]robably not best that we’re in the development business. There probably was a better way. There have been mistakes made along the way. . . . Could we have offered the land itself, to a private developer to pursue exactly this vision? Absolutely, but we’re here now. . . . So I’m not going to try and defend the way we got to where we are. I’m certainly happy to talk about and explain it. But I know that mistakes have been made in this process.” (Green, Cynda “NRCDC....Mistakes Have Been Made”, Salida Daily Post (3/27/13).)
- jj. During her January 28, 2013 presentation, a Board Director of the SNRCDC who simultaneously served as a Director of High Country Bank (“HCB”) accompanied the City Administrator at the podium. (Green, Cynda “NRCDC....Mistakes Have Been Made”, Salida Daily Post (3/27/13) (photo of Tim Glenn).)
- kk. During the January 28, 2013 presentation, the participating SNRCDC and HCB Director predicted that the proposed SNRCDC development would add \$1.7M a year to the local economy based on a 2006 feasibility study. (Hudson, bill “NRCDC Public Presentation at the Steamplant”, Salida Daily Post (1/30/13).) The City Administrator and Secretary of the SNRCDC added that “I do buy in to the NRC and the commitment that’s been made by . . . commissioner [Tim] Glenn to further this mission. I do think it will bring economic benefit to this community.” (Id.)

### **The Second SNRCDC Lender Finance Effort**

- ll. The SNRCDC subsequently refinanced its loan with High Country Bank in the amount of \$4,722,000.00 in August 2013, with title encumbered by the lender’s interest in both the related USFS revenue stream and the SNRCDC’s underlying title interest in the Vandaveer Ranch. (SNRCDC 2013 Independent Auditors Report; HCB Loan Docs (8/29/13).)
- mm. A title search by third party of SNRCDC property would not necessarily reveal that the SNRCDC’s title interest is limited through Ordinance 2011-14 by the terms of the Development Agreement and that the City had retained an

ownership interest in Vandaveer. To be on actual notice of the City's reserved title interest, a party would need to have reviewed the Development Agreement as amended and Ordinance 2011-14. (Ordinance 2011-14.)

- nn. If a lender understood that the Borrowers' title interest in the property was limited in nature and could be lost upon termination or completion of projects envisioned by a development agreement, the lender typically would require a guaranty on the loan from the party with the reserved title interest. Otherwise, the lender's secured interest would be limited to the borrower's limited interest and could be lost entirely to a non-contracting party. If the City had guaranteed the SNRCDC's loan, however, doing so would have violated constitutional debt limitations. (Colorado Constitution, Article X, Section 20.)
- oo. Once the SNRCDC committed to a \$4,722,000.00 loan in August of 2013 the cost of the Ranch asset for the SNRCDC and the City increased to no less than \$8,373,358.00 without accounting for interest costs related to the 2012 financing (\$4,722,000.00 (2013) + \$3,651,358.00 (2009)). (Compare SNRCDC 2013 Independent Auditors Report; HCB Loan Docs (8/29/13) with Mountain Mail Article (10/11/16).)
- pp. Sitting City Councilmember Keith Baker signed the HCB loan documents in his capacity as the President of the SNRCDC. (HCB Loan Docs at Statement of Authority, Corporate Resolution to Borrow/Grant Collateral, Loan Application, Agreement to Provide Insurance, Promissory Note (8/29/13).)
- qq. In signing the HCB loan documents, the SNRCDC President attested that "[t]he Corporation has full power and authority to own its properties and to transact the business in which it is presently engaged or presently proposes to engage." (HCB Loan Docs at Corporate Resolution to Borrow/Grant Collateral (8/29/13).)
- rr. In signing the HCB loan documents, the SNRCDC President attested that he was "authorized, empowered and directed to do the following for and on behalf of the Corporation: Borrow Money. To borrow, as a cosignor or otherwise, from time to time from Lender, on such terms as may be agreed upon between the Corporation and Lender, such sum or sums of money as in his or her judgment should be borrowed, without limitation." The SNRCDC President also claimed he was empowered on behalf of the Corporation to execute promissory notes, grant security, execute security documents, and seek credit advances. (HCB Loan Docs at Corporate Resolution to Borrow/Grant Collateral (8/29/13).)
- ss. In signing the HCB loan documents, the SNRCDC President attested that the SNRCDC would promptly notify the lender in writing of any "conversion of the



Corporation to a new or different type of business entity.” (HCB Loan Docs at Corporate Resolution to Borrow/Grant Collateral (8/29/13).)

- tt. In applying for the HCB loan, the SNRCDC President submitted a W-9 Request for Taxpayer Identification Number and Certification and in doing so characterized the SNRCDC as a “S Corporation.” (Form W-9 (8/29/13).)
- uu. The Corporate Resolution to Borrow/Grant Collateral in the HCB loan documents also was certified to and attested by City Councilmember Tom Yerkey in his capacity as the SNRCDC President and Director of Community Development Dara MacDonald in her capacity as the SNRCDC Secretary. (HCB Loan Docs at Corporate Resolution to Borrow/Grant Collateral (8/29/13).)
- vv. The HCB Promissory Note characterizes the SNRCDC’s obligation as a “Promise to Pay” and as a “loan.” (HCB Loan Docs at Promissory Note, Promise to Pay and Payment (8/29/13).)
- ww. The HCB Promissory Note characterizes the lender’s remedies as “[u]pon default, Lender may declare the entire unpaid principal balance under this Note and all accrued unpaid interest immediately due, and then [the SNRCDC] will pay that amount.” (HCB Loan Docs at Promissory Note, Lender’s Rights (8/29/13).)
- xx. The HCB Promissory Note provides that its terms “shall be binding upon Borrower, and upon Borrower’s heirs, personal representatives, successors and assigns . . .” (HCB Loan Docs at Promissory Note, Successor Interests (8/29/13).)The HCB Promissory Note provides that the collateral for the SNRCDC’s payment obligations consists of a Deed of Trust for the USFS facility and the Vandaveer Ranch; an assignment of all USFS rents; any commercial fixtures; and, certain deposit accounts. (HCB Loan Docs at Promissory Note at Collateral, Deed of Trust, Assignment of Rents, UCC Financing Statement, Commercial Security Agreement (8/29/13).)
- yy. The HCB Deed of Trust, Assignment of Rents, Commercial Security Agreement and Assignment of Deposit Account outline the lender’s rights and remedies in the event of a default, and allows the lender to accelerate the indebtedness, institute foreclosure, execute UCC remedies, collect rents, appoint a receiver, convert the SNRCDC into a tenant, sell the USFS facility or the Vandaveer Ranch, and pursue other legal enforcement options. (HCB Loan Docs at Deed of Trust, Assignment of Rents, Commercial Security Agreement, Assignment of Deposit Account, Control Agreement - Rights and Remedies (8/29/13).)
- zz. The HCB Deed of Trust, Assignment of Rents, Commercial Security Agreement and Assignment of Deposit Account is binding upon the SNRCDC’s successors or assigns. (HCB Loan Docs at Deed of Trust, Assignment of Rents,

Commercial Security Agreement, Assignment of Deposit Account - Successors and Assigns (8/29/13).)

- aaa. The SNRCDC used the same address as the City of Salida throughout the HCB loan documents for notice and identification purposes. (See generally HCB Loan Docs (8/29/13).)
- bbb. The SNRCDC’s multi-year fiscal obligations under the HCB loan documents are not optional or subject to annual appropriation, and the lender has recourse rights against the SNRCDC – including all of the assets that the City holds a residual and reversionary interest in. (HCB Loan Docs at Promissory Note, Deed of Trust, Assignment of Rents, Commercial Security Agreement, Assignment of Deposit Account, Control Agreement - Rights and Remedies (8/29/13).)
- ccc. The City and the SNRCDC subsequently amended the Development Agreement again on March 4, 2014, in relevant part to expand the scope of the project given that the balance of the SNRCDC’s interest in the Vandaveer Ranch had been utilized for the purpose of securing financing for the development of the USFS facility. (Third Amen. Dev. Agreement, Whereas Provisions and Section 1.)
- ddd. In amending the Development Agreement a third time, the City and the SNRCDC provided that the SNRCDC could pursue development opportunities “on behalf of the City provided, however, that the Corporation may not enter into any agreement which would commit, encumber or dispose of all or any portion of the Vandaveer Ranch property without specific written authority from the City Council.” (Third Amen. Dev. Agreement, Section 1.)
- eee. In a recent sale transaction, for example, the Purchase and Sale Agreement between the SNRCDC and the Buyer included contractual contingencies requiring “[a]pproval of the City Council of the City of Salida” and a Right of First Refusal for the City of Salida in the event of any subsequent sale. (SNRCDC/HRRMC PSA at §30, Additional Provisions Nos. 1, 5 (3/15/16).)
- fff. A sitting City Councilmember signed the Third Amendment to the Development Agreement on behalf of the SNRCDC in his capacity as the SNRCDC President. (Third Amen. Dev. Agreement, Signature Block.)
- ggg. Shortly after executing the Third Amendment to the Development Agreement, the SNRCDC and the City began to explore abandoning any SNRCDC claim to 63-20 status. (Mountain Mail Article (9/17/14).)

- hhh. The SNRCDC issued a request for qualifications with respect to affordable housing in 2014. In doing so, the NRCDC identified itself and the City as the “owners” of the Ranch. (Mountain Mail Article (9/7/14).)
- iii. The City and the SNRCDC amended their Development Agreement yet again on November 4, 2014 in relevant part to clarify any “need for maintaining Internal Revenue Service ruling 63-20.” (Fourth Amendment to Development Agreement, Whereas Provisions (11/4/14).)
- jjj. The City and the SNRCDC’s Development Agreement as amended in 2014 provides in relevant part:

The Parties acknowledge that when it was formed the Corporation was anticipated to utilize tax-exempt bond financing for the projects to be developed. Due to changes in the economy and the goals of the City and the Corporation it is no longer anticipated that tax-exempt bond financing will be utilized either now or in the future by the Corporation, and as such the Parties agree that the Corporation no longer needs to adhere to IRS Rev Ruling 63-20 regulations.

(Fourth Amen. Dev. Agreement, Section 2.)

- kkk. When the SNRCDC President resisted seeking City approval for the SNRCDC’s use of City staff and resources in 2015, he stated that “[t]he city owns the damn property; we’re a conduit for the city that owns the property.” (Summerlin, “SNRCDC Board Explores Recreation,” Mountain Mail (9/15/15).)
- lll. The License Agreement for the solar panels on the USFS building within the Ranch is between the vendor and “CITY OF SALIDA, a political subdivision of the State of Colorado, the Salida Natural Resource Center Development Corporation (collectively “Owner”).” (License Agreement (5/19/15) (boldface omitted and parenthetical in original).) Both the City and the signed the License Agreement as “Owner” parties. (Id.)
- mmm. The License Agreement also provides that the City owns the USFS building on the Ranch. (License Agreement at Whereas clauses (5/19/15).)
- nnn. Notices pursuant to the License Agreement were to be sent by the vendor to the “City of Salida” as the “Owner” to the attention of Dara MacDonald in her capacity as the City Administrator. (License Agreement at 1(l) (5/19/15).) There is no mention of the SNRCDC with respect to the vendor’s notice requirements to the “Owner” as defined in the License Agreement. (Id.)

## **VI. The Maintenance Agreement**

- a. After completing the USFS facility, the City and the SNRCDC entered into a Maintenance Agreement with respect to the USFS building on March 21, 2013. (Resolution 2013-20; Property Management and Financial Services Agreement (3/21/13) (“Maintenance Agreement”).)
- b. The Maintenance Agreement was for an initial term of twelve months, and renewed automatically absent termination. (Maintenance Agreement Section 3.)
- c. Pursuant to the Maintenance Agreement and in return for a fixed fee, the City provides any financial and property management services associated with the USFS building pursuant to the Lease between the SNRCDC and the USFS. (Maintenance Agreement Section 1.)
- d. The Maintenance Agreement includes a mutual indemnification provision. (Maintenance Agreement Section 4.)
- e. The Notice provision in the Maintenance Agreement provides that notices to either the City or the SNRCDC should be sent to the same address, *i.e.*, City of Salida, 448 E. 1<sup>st</sup> Street, Suite 112, Salida, Colorado 81201. (Maintenance Agreement Section 12.)
- f. Dara MacDonald executed the Maintenance Agreement on behalf of the City in her capacity as its City Administrator, but did not execute the document on behalf of the SNRCDC in her capacity as its Secretary. (Maintenance Agreement, Signatories.)
- g. Keith Baker executed the Maintenance Agreement on behalf of the SNRCDC in his capacity as its President, but did not execute the document on behalf of the City in his capacity as a City Councilmember. (Maintenance Agreement, Signatories.)
- h. The City has routinely provided staff time and City resources to the SNRCDC for matters that are outside of the scope of the Maintenance Agreement. (Indemnification Demand Section III (6/10/16); Indemnification Demand II Sections I, II; Stipulated List of SNRCDC Secretary Duties (2016); Stipulated List of City Maintenance Agreement Obligations (2016).)

## VII. The SNRCDC and TABOR

- a. TABOR is embodied in Article X, Section 20 of the Colorado Constitution and is the culmination of and consistent with more than a century of restraints on public indebtedness in Colorado. (Colorado Constitution, Article X, Section 20; Board of County Commissioners v. Dougherty, 890 P.2d 199, 202-203 (Colo. App. 1994), overruled on other grounds, In re Submission of Interrogatories on House Bill 99-1325, 979 P. 2d 549 (Colo. 1999).)
- b. Section 4(b) of TABOR requires voter approval for creation of any multiple-fiscal year direct or indirect debt or other financial obligations without present cash reserves pledged irrevocably and held for payments in all implicated fiscal years. (Colorado Constitution, Article X, Section 20; Hartman and Walker, University of Colorado – Boulder, The Effect of TABOR on Colorado Municipalities at 12 (12/11/15) (<https://www.cml.org/cu-tabor/>).)
- c. TABOR reflects “an intent to include anything which is a ‘debt’ or ‘financial obligation’ regardless of form” in its limitations. (Dougherty, 890 P.2d at 207.)
- d. A “debt” for TABOR purposes includes anything that might require future performance by a district, or that provides for remedies against the district. (Dougherty, 890 P.2d at 208.)
- e. If the district has to pledge its credit for the financial obligation or has a security interest for the financial obligation that extends beyond one year, it is a “debt” subject to TABOR. (City of Golden v. Parker, 138 P.3d 285, 294-95 (Colo. 2006); (In re Interrogatories on House Bill 99-1325, 979 P.2d 549, 558 (Colo. 1999).)
- f. A traditional lender secured loan therefore constitutes a “debt” under TABOR and the Colorado Constitution. . (City of Golden, 138 P.3d at 294-95.) “[S]uch a financial relationship comes within the scope of ‘other financial obligation whatsoever’ and, thus, activates the election requirement of the amendment if the financial relationship extends beyond one year.” (In re Interrogatories on House Bill 99-1325, 979 P.2d at 558.)
- g. Article XI, Section 6(1) of the Colorado Constitution also contains prohibitions on local government debt. (Colorado Constitution, Article XI, Section 6(1), Colorado Constitution (“No political subdivision of the state shall contract any general obligation debt by loan in any form . . . no such debt shall be created unless the question of incurring the same be submitted to and approved by a majority of the qualified taxpaying electors voting thereon . . .” ).)

- h. If an entity is a “district” it is subject to TABOR. A “district” is defined in TABOR to include local government. (Article X, Section 20 of the Colorado Constitution (the “Taxpayer’s Bill of Rights” or “TABOR”).)
- i. If ownership and control of an entity are vested in the local government, it is not independent, and it is government-owned – it qualifies as a “district” subject to TABOR. (Nichols v. E-470 Public Highway Authority, 896 P.2d 859, 870 (Colo. 1995).)
- j. An allegedly private non-profit corporation formed and effectively controlled by a sponsoring government is still subject to constitutional debt limitation provisions. (Colorado Ass’n of Public Employees v. The Board of Regents of the University of Colorado, 804 P.2d 138, 146 (Colo. 1990).)
- k. In contrast if an entity has the ability to sell real property, controls its own corporate affairs, does not impact the taxpaying burden of the public, and does not exist to serve the interests of the general public --then it may fall outside of the “district” definition in TABOR as an exempt “enterprise”. Campbell v. Orchard Mesa Irrigation District, 972 P.2d 1037, (Colo. 1998); Olson v. City of Golden, 53 P.3d 747, 753-54 (Colo. App. 2002); Board of County Commissioners County of Eagle v. Fixed Base Operators, No. 96CA1042 (Colo. App. 1997); Roe v. Housing Authority of City of Boulder, 909 F. Supp. 814, 818-19 (D. Colo. 1995) (indicia of independence for duty purposes includes whether an entity can sell land; the level of control exercised by a political subdivision over the entity; and, whether the entity indirectly controls the actions of the entity).
- l. The City Administrator and SNRCDC Secretary described the SNRCDC to an elected official of the City on March 13, 2014 as follows: “The [SNRCDC] is a hybrid creature. It is a stand-alone corporation for purposes of financing and debt obligation, but remains under the control of the City Council through the Development Agreement and appointment of the Board.” (Email from Dara MacDonald to Hal Brown and Karl Hanlon (3/13/14).)
- m. The City Administrator and SNRCDC Secretary confirmed that the SNRCDC is covered under the City’s municipal insurance policy with CIRSA on March 13, 2014, based on Salida Municipal Code Section 2-7-70. (Email from Dara MacDonald to Hal Brown and Karl Hanlon (3/13/14).)
- n. Salida Municipal Code Section 2-7-70 provides that “[c]ommittees shall be considered parts of the City government. As such, the members shall be entitled to coverage by the City’s liability insurance, and the committees and the members thereof shall be entitled to the benefits and protection granted by the Colorado Governmental Immunity Act as the same exists on the effective date hereof and as the same may be amended from time to time.” (Salida Municipal Code §2-7-70.)

- o. The City’s aggregate insurance liability policy in relevant part provides coverage for the City and “[a]ny governing body, board, commission, authority, or similar unit operated by or under the jurisdiction of [the City].” (CIRSA Liability Lines Aggregate Coverage Policy at General Provisions 1(A) (2015).)
- p. As recently as September of 2016, the SNRCDC Secretary suggested that the SNRCDC could receive liability insurance coverage as “a name entity on the city’s parks policy.” (Mountain Mail Article (9/145/16).)
- q. The City Administrator and SNRCDC Secretary took the position that the SNRCDC was subject to the Colorado Governmental Immunity Act on March 13, 2014. (Email from Dara MacDonald to Hal Brown and Karl Hanlon (3/13/14).)
- r. The Colorado Governmental Immunity Act applies to a “Public Entity” as defined in Colorado Revised Statutes Section 24-10-103(5): “Public Entity’ means the state, county, city and county, municipality, school district, special improvement district, and every other kind of district, agency, instrumentality, or political subdivision thereof organized pursuant to law and any separate entity created by intergovernmental contract or cooperation only between or among the state, county, city and county, municipality, school district, special improvement district, and every other kind of district, agency, instrumentality, or political subdivision thereof.” (C.R.S. §24-10-103(5).)
- s. A 2014 Independent Auditor’s Report for the SNRCDC described the entity as a tax-exempt “instrumentality of the City.” (SNRCDC 2014 Audited Financial Statements.)
- t. The example referenced by the Internal Revenue Service in Revenue Ruling 63-20 did not involve Colorado law or the spending limitations outlined in TABOR and was restricted to the issuance of revenue bonds.
- u. Revenue bonds differ from general obligation bonds in significant respects, including issuer recourse options and applicable legal requirements. Prior to TABOR, the issuance of revenue bonds without voter approval was still consistent with the debt limitations in the Colorado Constitution. (Shields v. City of Loveland, 218 P. 913 (Colo. 1923) (“The public can never be overburdened by that which it is under no obligation to discharge, nor can the city become bankrupt by what it does not have to pay.”); Allardice v. Adams County, 476 P.2d 982, 985 (Colo. 1970).)
- v. Revenue bonds are backed by the revenues of a specific project and the only repayment recourse for associated bondholders relate to the involved

revenue stream or title interest in the encumbered property. (Allardice, 476 P.2d at 985.)

- w. In contrast general obligation bonds are backed by the full credit and taxing power of a political subdivision or other entity, are not restricted to the anticipated revenue stream from a particular project, and are subject to TABOR under any analysis. (Nichols, 896 P.2d at 870)
- x. General obligation bonds issued by political subdivisions are limited by assessed valuation ratio and voter approval requirements associated with the spending limitations outlined in TABOR. (See Colorado Constitution, Article X, Section 20; Nichols, 896 P.2d at 870)
  - a. After the passage of TABOR, revenue bonds issued by a political subdivision fell within the prohibition on multi-year financial obligations outlined in TABOR absent voter approval. (Nichols v. E-470 Public Highway Authority, 896 P.2d 859, 870 (Colo. 1995); The Effect of TABOR on Colorado Municipalities at 12 (citing Wilson and Broadwell, Colorado Municipal League, "TABOR: A Guide to the Taxpayer's Bill of Rights" at 37) (12/11/15)); Oesterle and Collins, "The Colorado State Constitution" at 284.)
  - y. The debt limitation restrictions in TABOR "apply to direct and indirect debt and any 'other financial obligation whatsoever' without distinction among the possible methods of securing and repaying that debt." After the passage of TABOR, local government constitutional debt limitations were no longer restricted to general obligation bonds. (Nichols, 896 P.2d at 870.)
  - z. Because revenue bonds do constitute a multi-year fiscal obligation by a political subdivision, revenue bonds now require voter approval under TABOR if they are issued by a "district" and not by a TABOR exempt "enterprise." (Nichols, 896 P.2d at 868-69.)
  - aa. If a non-profit corporation effectively operates as a public entity, TABOR restricts the non-profit corporation's ability to engage in debt financing. (Colorado Ass'n of Public Employees v. The Board of Regents of the University of Colorado, 804 P.2d 138, 147 (Colo. 1990) "In our view, the debt financing provisions of the statute are inextricably intertwined with the legislative purpose to create a reorganized hospital as a private, non-profit corporation. Since that effort has failed and we have found that the reorganized hospital is a public entity, the debt financing provisions of the statute which are dependent on the existence of the reorganized hospital as a private, nonprofit entity also must fail.").)
  - bb. The preferred interpretation of TABOR "shall reasonably restrain most the growth of government." (Colo. Const. Art. X, §20(1); see also, e.g., HCA-Healthone v. City of Lone Tree, 197 P.3d 236, 241 (Colo. App. 2008).)



- cc. If there are multiple interpretations of the text of TABOR available, courts therefore must adopt the interpretation that would “create the greatest restraint” on governmental growth. HCA-Healthone, 197 P.3d at 241 (citing Bickel v. City of Boulder, 885 P.2d 215, 226 (Colo. 1994); Tabor Foundation v. CO Bridge Enterprise, 353 P.3d 896, 901 (Colo. App. 2014).)
- dd. The proponent of an interpretation in any TABOR enforcement action has the burden of establishing that its proposed construction of TABOR would reasonably restrain the growth of government more than any other competing interpretation. (Tabor Foundation, 353 P.3d at 901.)

### **The TABOR “Enterprise” Exception**

- ee. TABOR applies to “districts” such as local governments but specifically excludes from that definition legal “enterprises.” (TABOR Section 2(d); (Nichols, 896 P.2d at 868-69).)
- ff. On October 3, 2016, Salida citizen Alison Brown took the position that the SNRCDC “constitutes an exempt Enterprise under TABOR” and that the SNRCDC’s “debt is not the debt of the City” based on a legal opinion she had secured. (A. Brown Email & Letter (10/3/16) (citing HPWC Letter (10/3/16).) Ms. Brown also threatened the City with a lawsuit over the issues. (Id.)
- gg. The legal opinion solicited by Ms. Brown was prepared without any opportunity for the involved lawyers to review all of the pertinent documents; interview the City or SNRCDC representatives; confer with the Office of the State Auditor; complete a study of the City’s in-kind donations and other subsidies to the SNRCDC; or, fully evaluate the City’s 2015 certified reporting regarding its business and general finances. (HWPC Letter at 2, 6, 8 (10/3/16).)
- hh. The legal opinion solicited by Ms. Brown nevertheless concluded that the SNRCDC is an “Enterprise” for TABOR purposes and that “an enterprise amounts to a TABOR-exempt affiliate of a district.” (HWPC Letter at 2.)
- ii. On October 11, 2016, a Director of the SNRCDC publicly stated at a SNRCDC Board Meeting that the SNRCDC is an “enterprise” for legal purposes. (SNRCDC Board Meeting (10/11/16); City SNRCDC Email (10/14/16).)
- jj. On November 22, 2016, a Director of the SNRCDC publicly reiterated in a Letter to the Editor that the SNRCDC is an “enterprise” for legal purposes. (SNRCDC Email (11/22/16).)

- kk. The definition of an “enterprise” in TABOR differs from the definition of an “enterprise” under GAAP accounting principles, and a qualifying TABOR “enterprise” cannot simply be a separate fund in a governmental accounting system. (C.R.S. Section 24-77-102(3); Nichols, 896 P.2d at 868-69.)
- ll. Instead, to qualify as a distinct “enterprise” for TABOR purposes an entity must meet a three-part test. To qualify as an “enterprise” exempt from TABOR, the entity must: (1) be a government owned business; (2) be authorized to issue its own revenue bonds; and (3) receive less than 10% of its annual revenue in grants from Colorado state and local governments combined. (C.R.S. Section 24-77-102(3); Nichols, 896 P.2d at 868-69; see also generally Wisor, “Enterprises under Article X, Section 20 of the Colorado Constitution Part I,” Colorado Lawyer (April 1998); Wisor, “Enterprises under Article X, Section 20 of the Colorado Constitution Part II,” Colorado Lawyer (May 1998).)
- mm. A “grant” is defined in this context as a “direct cash subsidy or other direct contribution of money” from the City to the SNRCDC under State law. (C.R.S. Section 24-77-102(7)(a).) A “grant” in this context does not include any “indirect benefit conferred.” (C.R.S. Section 24-77-102(7)(a); Nichols, 896 P.2d at 868-69.)
- nn. At all relevant times, the City carefully worded its commitment to the SNRCDC on its website as follows: “The intention of the City Council has been to accomplish the creation of a natural resource center without direct expense to the citizens of Salida through the outlay of cash.” (<http://cityofsalida.com/projects/natural-resource-center/>)
- oo. According to one TABOR scholar, “the Act defines ‘grants’ to mean cash payments by a state or local government. Read literally, the Act’s definition would exclude all contributions to an enterprise of equipment, services, or any other non-cash subsidy. If such a literal interpretation were applied to TABOR, there would be no substance left to the 10 percent grant criteria. If an enterprise ever needed more than 10 percent annual revenue to meet operational needs, the shortfall could be converted away from cash into equipment, services, or other in-kind contributions. Such a result does not afford full meaning to the TABOR criteria. Contributions of equipment, provision of services (such as administration), and similar in-kind contributions all should be regarded as ‘grants’ if given by a state or local government.” (Rufien, “Taming TABOR by Working from Within” at 104, The Colorado Lawyer, Vol. 32, No. 7 (July 2003).)
- pp. This same scholar expanded that “[t]he provision of personnel services presents a unique administrative dilemma. As a ‘business,’ the enterprise should pay the personnel required for its operations. The dilemma arises

when administrative personnel (and related costs of supplies) are shared by the government and its enterprise. It can be extremely difficult to determine which personnel or administrative costs are attributable to the enterprise and which are attributable to the governmental function. The solution is that such administrative costs should be accounted for between the government and the enterprise based on the reality of the division between the functions. Such determinations should be left to the reasonable discretion of the governing body. An appropriate allocation of revenues and expenses should be prepared during the government’s annual budget process.” (Rufien, “Taming TABOR by Working from Within” at 104, *The Colorado Lawyer*, Vol. 32, No. 7 (July 2003).)

- qq. According to the Special District Association of Colorado, “[t]he lack of any definition of the term “grant” leaves open the possibility that non-cash subsidies or in-kind contributions by the parent government could be included to reach the 10% threshold [limitation on enterprise status]. This could become an issue when service providers or consultants, and their associated costs, are shared (as they frequently are) by both the parent government and the enterprise. In this instance, careful apportionment of the costs of the services should be undertaken to avoid exceeding the 10% threshold. It could also become an issue in connection with the ownership or transfer of ownership of property (real or personal) between the district and the enterprise.” (Seaver, *Special District Association of Colorado*, “TABOR Enterprises a Closer Look” (January 2011).)
- rr. Article XI, Section 2 of the Colorado Constitution prohibits local government involvement in corporations in a variety of respects. (Colorado Constitution, Article XI, Section 2.)
- ss. Enterprises “must be able to support themselves much like private businesses, by providing goods or services in exchange for monetary compensation.” (Sobetski, “State Enterprises”, Colorado Legislative Council Staff Issue Brief (May 6, 2015).)
- tt. “To satisfy the definition of an ‘enterprise’ under TABOR, the enterprise must be an independent, self-supporting government-owned business that receives income, fees and revenue in return for the provision of goods or services. The very concept of an enterprise under TABOR envisions an entity that is owned by a government institution, but is financially distinct from it.” (Attorney General’s Office Opinion No. 97-1 (3/11/97); accord, e.g., Colorado Office of the State Auditor, Memorandum re: University of Colorado Enterprise Designation at 2 (8/12/04).)
- uu. An entity must be “financially distinct” from its governmental patron to qualify as an “enterprise” for TABOR purposes. (Attorney General Formal Opinion No. 16-01 at 7, 9 (2/29/16).) Relevant considerations include

whether the District and the entity have separate financial accounting and reporting systems; whether the District and the entity have applied for or controlled funds together; and, whether the entity is serving general government functions. (Id. at 9-10.)

- vv. Governmental Accounting Standards Statements provide that an entity such as the SNRCDC is a component unit of the primary governmental entity for auditing purposes. (Governmental Accounting Standards Board, GAAP Standards Nos. 14, 61.)
- ww. The Office of the State Auditor makes final determinations regarding “enterprise” status for TABOR exemption purposes at the end of each fiscal year as part of the annual financial audit process to ensure that the enterprise entity does not exceed the TABOR limitations on the amount of actual support received from state and local governments. (State Auditor Memorandum at 5.)
- xx. The validity of an “enterprise” stems from the scope of its enabling legislation. (E.g., C.R.S. §37-45.1-101, *et seq.* (water activity enterprises); Tabor Foundation, 353 P.3d at 901.)
- yy. “[E]ach municipality can and should take some formal action to designate which of its activities it intends to recognize as enterprises (and to disqualify any activity that ceases to be an enterprise in the future).” (Wilson and Broadwell, Colorado Municipal League, “TABOR: A Guide to the Taxpayer’s Bill of Rights” at 35 (2011 Revision).)
- zz. “Formal action by the governing body indicating that the municipality has consciously considered the question and has found that the activity qualifies under the TABOR definition will serve the municipality well if it is ever challenged in court over the question.” (Wilson and Broadwell, Colorado Municipal League, “TABOR: A Guide to the Taxpayer’s Bill of Rights” at 39 (2011 Revision).)
- aaa. “[I]t can be useful and is advisable for the governing body to adopt a resolution or ordinance creating an enterprise or multiple enterprises. Such a formal expression of the governing body’s intent can be a persuasive underlying resource in the event of any challenge as to an enterprise’s validity.” (Rufien, “Taming TABOR by Working from Within” at 102, The Colorado Lawyer, Vol. 32, No. 7 (July 2003).)
- bbb. The Salida Water and Wastewater Enterprise, for example, is the product of a legislative enactment in the Salida Municipal Code. (S.M.C. §13-1-20, -70.) In relevant part, the Salida Municipal Code specifically addresses the use of debt by the Water and Wastewater Enterprise. (S.M.C. §13-1- 60.)

- ccc. Likewise, the urban renewal authority at issue in Olson v. City of Golden was the product of specific enabling legislation pursuant to State statutory authority. (City of Golden, 138 P.3d 285; City of Golden Resolution No. 343 at §3 (6/26/89); C.R.S. §§ 31-25-1, *et seq.*) In creating the urban renewal authority, the City of Golden certified its incorporation with the State. (City of Golden Resolution No. 343 at §5 (6/26/89).)
- ddd. Similarly, the irrigation district at issue in Campbell v. Orchard Mesa Irrigation District attempted to form an “Enterprise” for operational purposes. Campbell, 972 P.2d at 1039. In doing so, the irrigation district certified itself as an “Enterprise” with the State. (Id. at 1039 & n.4.)
- eee. The Colorado Supreme Court in Campbell specifically provided that “[o]ur holding is limited to irrigation districts operating under the provisions of the Irrigation District Law of 1921, §§ 37-42-101 to -141, 10 C.R.S. (1997).” (Campbell at 1038 & n.2.)
- fff. Irrigation districts are authorized and regulated pursuant to a complex series of State legislative enactments that address everything from irrigation district formation and entity organization to irrigation operational norms, Board duties, title to property, tax assessments and financing options. (Campbell at 1038 & n.2; C.R.S. §§37-41-101 to -105, -p113, 115, -121 to -122.)
- ggg. The SNRCDC does not meet any of the requirements of an urban renewal authority pursuant to State statute. (C.R.S. §31-25-104.) To qualify as an urban renewal authority, the involved entity has to file a certification with the State. (C.R.S. §31-25-104(b), -(d).)
- hhh. The SNRCDC does not meet any of the requirements of an irrigation district pursuant to State statute either. (C.R.S. §§37-41-101 to -105.) To qualify as an irrigation district, the involved entity has to file a certification with the local county clerk and recorder. (C.R.S. §37-41-105(1).)
- iii. In the recent debate over hospital provider fees, every party involved agreed that converting the fee function of the State’s Department of Health Care Policy and Financing into an enterprise would require enacting legislation. (E.g., Office of Legislative Services Legal Memorandum at 1, 3 (12/31/15); Attorney General Formal Opinion No. 16-01 at 4, 12-14 (2/29/16); Proposed House Bill 15-1389 (citing C.R.S. §24-1-105).)
- jjj. The City has never characterized the SNRCDC as an “enterprise” in its Budgets. (See, e.g., 2016 Budget at 3, 15-16 (12/1/15).)
- kkk. The City also has never characterized the SNRCDC as an “enterprise” under Colorado law for financial reporting purposes. (E.g., City of Salida Certified Financial Report at 37 and Note 7 (12/31/15).) Indeed, the City separately

reports “Business-Type Activities” that include its enterprise(s). (Id.) The City has not treated the SNRCDC as an “enterprise” for certified financial reporting purposes to the State. (Id.)

lll. The SNRCDC also has not submitted an application for “enterprise” status certification with the Office of the State Auditor.

mmm. The SNRCDC effectively abandoned its ability to issue revenue bonds as configured when it encumbered the only income producing asset that it owned, *i.e.*, the USFS facility. (Resolution 2011-59; Ordinance 2011-14; Second Amendment to Development Agreement.)

nnn. The SNRCDC eliminated its ability to issue municipal revenue bonds when it discarded any 63-20 entity status. (Fourth Amen. Dev. Agreement, Section 2.)

ooo. The SNRCDC is not currently an “enterprise” subject to exception under TABOR as a factual matter, and does not appear to be otherwise exempt from the debt limitation restrictions in the Colorado Constitution applicable to the City. (TABOR Section 2(d); C.R.S. Section 24-77-102(3); Nichols, 896 P.2d at 868-69.)

ppp. The City Attorney recently put the SNRCDC on notice that “[i]f for some reason the NRCDC is now going to claim for the first time that it is an ‘Enterprise’ over the objections and financial reporting efforts of the City please let me know as there are significant legal and financial consequences.” (City NRCDC Email (10/6/16).)

qqq. By early 2014, the City had transferred its entire legal interest in the USFS facility and the Vandaveer Ranch to the SNRCDC subject to complete Board composition control and City reversionary and residual rights in the underlying asset – and then the SNRCDC had obtained traditional lender financing secured by the SNRCDC’s entire revenue and title interest in the USFS facility and the Vandaveer Ranch without complying with any debt limitations outlined in TABOR. (Third Amen. Dev. Agreement; HCB Loan Docs.)

rrr.If the City had retained its legal interest in the USFS facility and the Vandaveer Ranch and then sought traditional lender financing encumbered by the USFS revenue stream and the City’s interest in the Vandaveer Ranch – the City would have had to comply with the debt limitations outlined in TABOR. (Colorado Constitution, Article X, Section 20.)

## **VIII. The City's Compliance Efforts**

### **The City's Pre-Origination Compliance Efforts**

- b. At all relevant times, the Job Description for the City Administrator has required “[e]xtensive and thorough knowledge of: . . . [f]iscal and other laws specific to Colorado, such as GASB [and] TABOR . . .” (2008 City Administrator Job Description.)
- c. On information and belief, at all relevant times the City Attorney held himself out as competent with respect to “TABOR compliance.” (<http://www.mountainlawfirm.com/practice-areas/municipal/>)
- d. The City Attorney provided a private lender with an opinion letter dated March 7, 2012 regarding entity formation, the Development Agreement, and the land transfer between the City and the SNRCDC which provided that the SNRCDC was “duly organized and operating under the constitution and laws of the State of Colorado.” (City Attorney Ltr. to Collegiate Peaks Bank re SNRCDC Entity (3/7/12).)
- e. The City Attorney also provided the private lender with an opinion letter dated March 7, 2012 regarding proposed lender financing which provided that the SNRCDC was “duly organized and operating under the constitution and laws of the State of Colorado.” (City Attorney Ltr. to Collegiate Peaks Bank re Loan (3/7/12).)

### **The City's Post-Origination Compliance Efforts**

- f. The City elected a new City Council and Mayor in November of 2015, and the City Council appointed a new City Attorney in March of 2016. (Resolution 2016-27.)
- g. The Mayor, the City Attorney, and the former City Administrator then addressed potential SNRCDC TABOR entity organization and financing mechanism TABOR compliance considerations on March 8, 2016 and April 10, 2016. (AC WP Transition Memorandum (3/8/16); AC WP Transition Memorandum II (4/10/16).)
- h. The City subsequently requested an opinion letter from SNRCDC counsel that the SNRCDC was compliant with TABOR on May 16, 2016. (Emails from Mayor to SNRCDC President Ray Kitson and SNRCDC Secretary and City

Administrator Dara MacDonald (5/16/16); City SNRCDC Email III (5/26/16.)

- i. The SNRCDC’s counsel produced an initial opinion letter on May 17, 2016 and opined that the SNRCDC was not required to comply with TABOR based on its formation as a non-profit and alleged corporate independence. (Email from SNRCDC Secretary and City Administrator Dara MacDonald to Elected Officials (5/17/16); SNRCDC Counsel Initial Opinion Letter (undated – 5/17/16).)
- j. The SNRCDC, however, has never filed a separate tax return as a non-profit corporation; a Form 1024 reporting and requesting exemption from income taxes based on the SNRCDC’s entity organization status; or, an informational return regarding its income as a non-profit and/or municipal affiliate pursuant to Form 990. (I.R.S. Form 1024 (OMB No. 1545-0057) (09/98); I.R.S. Form 990 (OMB No. 1545-0047).)
- k. Likewise, the SNRCDC has never qualified itself as a 501(c)(3) organization or as a public charity subject to 509(a).
- l. The City Attorney met with the SNRCDC’s counsel on May 17, 2016 regarding the SNRCDC, the adequacy of the initial SNRCDC opinion letter, and SNRCDC TABOR compliance issues. (City SNRCDC Email (5/18/16).)
- m. On May 19, 2016, the City Attorney provided the SNRCDC’s counsel with the 2016 SNRCDC Bylaw Amendments and highlighted the SNRCDC’s adoption of a public body meeting law standard. (City SNRCDC Email (5/19/16).)
- n. On May 26, 2016, the City Attorney requested a copy of the SNRCDC’s counsel’s revised or supplemental SNRCDC opinion letter and highlighted GASB 61 and the 2014 statements of the City Administrator and SNRCDC Secretary regarding the scope of the City’s municipal insurance coverage. (City SNRCDC Email (5/26/16); City SNRCDC Email IV (5/26/16).)
- o. On May 26, 2016, the SNRCDC directed the SNRCDC’s counsel to revise the initial SNRCDC opinion letter in a Special Meeting. (City SNRCDC Email II (5/26/16).)
- p. The SNRCDC’s counsel then produced a supplemental opinion letter on May 26, 2016, and again opined that the SNRCDC was not required to comply with TABOR based on its formation as a non-profit and alleged corporate independence. (SNRCDC Counsel Supplemental Opinion Letter (5/26/16).)
- q. On May 31, 2016, the current SNRCDC President accused the SNRCDC’s counsel of “great incompetence and bias” with respect to the SNRCDC opinion letters and stated “I believe this needs to go to the Salida City Attorney for review before the next council meeting.” (Mazzeo Email (5/31/16).)



- r. On May 31, 2016, the current SNRCDC President took the position that the corporate veil of the SNRCDC “can not only be pierced but can be completely shredded in a lawsuit.” (Mazzeo Email (5/31/16).)
- s. On May 31, 2016, the current SNRCDC President took the position that “[t]here are countless examples that prove that the NRCDC is absolutely associated with the City Council and [t]he City of Salida.” (Mazzeo Email (5/31/16).) In doing so, the current SNRCDC President provided no less than nine examples and concluded that “the two are undboubtedly [sic] linked” for the purpose of binding the SNRCDC to laws otherwise applicable to the City. (Id.)
- t. On May 31, 2016, the current SNRCDC President took the position that “the connection [between the City and the SNRCDC for legal purposes] can be proven by any competent law firm if a lawsuit is brought . . . . Is our City Council willing to take the risk of another lawsuit?” (Mazzeo Email (5/31/16).)
- u. On June 5, 2016, the City Attorney produced a privileged Memorandum for the City pursuant to the Mayor’s direction regarding TABOR considerations associated with the SNRCDC and the adequacy of SNRCDC’s opinion letter efforts. (AC/WP City Attorney Memorandum (6/5/16).)
- v. On June 7, 2016, the City Council directed the City Attorney to complete a legal review of whether the SNRCDC was compliant with TABOR and related risk management considerations. (Summary of City Council Actions (6/7/16); Indemnity Demand from City to SNRCDC (6/10/16).)
- w. On June 7, 2016, the City Council cancelled the contract of the City Administrator and SNRCDC Secretary and terminated her employment effective June 30, 2016. (Resolution 2016-59.)
- x. On June 10, 2016, the City presented the SNRCDC with an indemnity demand related to the Vandaveer property in relevant part “for the costs and fees associated with assessing and mitigating any TABOR or other SNRCDC entity organization legal compliance considerations.” (Indemnity Demand from City to SNRCDC (6/10/16); City SNRCDC Email Indemnity (6/10/16).)
- y. On June 10, 2016, the Mayor of Salida asked the City Administrator to resign as a Director of the SNRCDC and as the SNRCDC Secretary due to conflicts associated with the outstanding TABOR legal review and related indemnity demand. (Email and letter from Mayor LiVecchi to SNRCDC Secretary and City Administrator Dara MacDonald (6/10/16); Email from City Attorney to SNRCDC Counsel (6/10/16).)

- z. On June 14, 2016, the Mayor of Salida again asked the City Administrator to resign as a Director of the SNRCDC and as the SNRCDC Secretary due to conflicts associated with the outstanding TABOR legal review and indemnity demand. (Letter from Mayor LiVecchi to SNRCDC Secretary and City Administrator Dara MacDonald (6/14/16); Email from City Attorney to SNRCDC Counsel (6/15/16).)
- aa. On June 17, 2016, the City Attorney asked the SNRCDC to secure the resignation of the City Administrator from the SNRCDC Board to avoid a related City Council Resolution. (Email from City Attorney to SNRCDC Counsel (6/17/16).)
- bb. On June 21, 2016, the City Council removed the City Administrator from the SNRCDC Board of Directors effective June 30, 2016. (Resolution 2016-62; City Council Meeting Minutes (6/21/16).)
- cc. On June 21, 2016, the City Attorney told the City’s elected officials that the City’s initial goal was to get someone to analyze the SNRCDC and TABOR debt limitation considerations for free or for a nominal fee. (City Council Meeting Minutes (6/21/16).)
- dd. On June 22, 2016, the City’s outside auditor issued its Findings and Recommendations for the fiscal year ended December 31, 2015 and concluded that “the SNRCDC is a blended component unit of the City” for financial reporting purposes. (HintonBurdick Findings and Recommendations (6/22/16).)
- ee. On June 24, 2016, the City Attorney asked the SNRCDC to remove the former City Administrator from her role as the SNRCDC Secretary. (Email from City Attorney to SNRCDC Counsel (6/24/16).)
- ff. On June 30, 2016, the former City Administrator’s tenure with the City concluded pursuant to Resolution 2016-59. (Resolution 2016-59.)
- gg. On July 5, 2016, the City Attorney again asked the SNRCDC to remove the former City Administrator from her role as the SNRCDC Secretary. (Email from City Attorney to SNRCDC Counsel (7/5/16).)
- hh. On July 15, 2016, the City completed its certified Financial Report for the year ended December 31, 2015. (HintonBurdick 2015 Audit Correspondence (7/15/16).) The Financial Report included the SNRCDC as a component unit of the City and included a Note regarding the City’s Long-Term Debt. (City of Salida Certified Financial Report at 37 and Note 7 (12/31/15).) The City’s Long-Term Debt included the SNRCDC loan as part of the net balance of “Total governmental liability” and governmental “Long-term liabilities.” (Id.)

- ii. The legal opinion solicited by Salida citizen Alison Brown incorrectly presumes that “[e]ven as a component unit of the City, the [SNRCDC’s] debt would be reported in a separate column from the total debt amount of the City.” (Compare HWPC Letter at 8 with City of Salida Certified Financial Report at 37 and Note 7 (12/31/15).)
- jj. GASB 61 addresses the inclusion of component units for financial reporting purposes. The Statement took effect for financial statements for periods beginning after June 15, 2012. (GASB 61 at i-ii (November 2010).)
- kk. GASB 61 recognizes that component units of a primary governmental unit may be legally separate organizations and can take the form of a non-profit corporation. (GASB 61 at 2-3 & n.4 (November 2010).)
- ll. GASB 61 requires a legally separate entity to be treated as a component unit for financial reporting purposes if it is fiscally dependent on the primary government. (GASB 61 at 4 (November 2010).)
- mm. GASB 61 provides that the primary government is financially accountable for the legally separate entity if it appoints a majority of the organization’s governing board *and* it is able to impose its will on that organization *or* there is a potential for the organization to provide specific financial benefits to, or impose specific burdens on, the primary government. (GASB 61 at 4 (November 2010).)
- nn. GASB 61 provides that the primary government has a financial benefit or burden relationship with the legally separate entity if it is legally entitled to or can otherwise access the organization’s resources *or* it is legally obligated or has otherwise assumed the obligation to finance the deficits of or provide financial support for the organization *or* it is obligated in some manner for the debt of the organization. (GASB 61 at 5 (November 2010).)
- oo. On July 19, 2016, the Office of the State Auditor (the “OSA”) concluded that the City was and is obligated to report the SNRCDC as a component unit of the City’s municipal government in accordance with GAPP standards. (OSA Opinion Letter (7/19/16).)
- pp. In doing so, the OSA concluded in part that the City “is able to impose its will” on the SNRCDC. (OSA Opinion Letter (7/19/16).)
- qq. The OSA also concluded that the SNRCDC’s status as a legally separate non-profit entity was insufficient rationale to exclude the SNRCDC as a component unit of the City for accounting and auditing purposes. (OSA Opinion Letter (7/19/16).)

- rr. The legal opinion solicited by Salida citizen Alison Brown nevertheless opines that the OSA only advised the City that it “should” report the SNRCDC as a component unit of the City; that the OSA did not conclude that the SNRCDC’s “necessarily” should be considered debt of the City; that the OSA has no authority “to enforce TABOR compliance;” and, that the OSA has no authority “to require that debt obligations be transferred from a TABOR enterprise to a local government.” (HWPC Letter at 7 & n.3.)
- ss. The legal opinion solicited by Salida citizen Alison Brown depends on a conclusion that “[t]he accounting and financial reporting obligations suggested by the OSA have no bearing on the NRCDC’s status as a TABOR enterprise.” (HWPC Letter at 8.)
- tt. On July 19, 2016, the SNRCDC removed the former City Administrator from her role as the SNRCDC Secretary. (SNRCDC Meeting Minutes (7/19/16).)
- uu. On July 19, 2016, the City Council appointed an Interim City Administrator for the City. (Resolution 2016-66.)

### **The Roles of DOLA and DOLG**

- vv. According to DOLA, “TABOR is a provision of the state constitution, which every person who has taken an oath in Colorado has sworn to uphold.” (Mountain Mail Article (10/28/16) (quoting DOLA Director of Communications and Media Relations Denise Stepto).)
- ww. Each elected official takes an oath of office pursuant to the Salida Municipal Code to uphold in relevant part the Constitution of the State of Colorado. (Salida Municipal Code §2-3-20(a); City of Salida Oath of Office (11/19/2013).)
- xx. According to DOLA, “The state level does not enforce TABOR. That enforcement is expected to occur locally, and the enforcement device is the oath of local government officials to uphold the Constitution. Local governments work hard to ensure compliance.” (Mountain Mail Article (10/21/16) (quoting DOLA Director of Communications and Media Relations Denise Stepto).)
- a. “[T]he General Assembly has never assigned to DOLA any new duties as an agency that should somehow monitor or enforce TABOR compliance.” (Wilson and Broadwell, Colorado Municipal League, “TABOR: A Guide to the Taxpayer’s Bill of Rights” at 84 (2011 Revision).)

- yy. Indeed, a municipality or district cannot sue the State to seek a declaratory judgment regarding the meaning of State constitutional TABOR provisions. (Romer v. Fountain Sanitation Dist., 898 P.2d 37 (Colo. 1995).)
- zz. On July 20, 2016 and based on the direction of the Mayor, the City Attorney and Interim City Administrator voluntarily reported the City’s potential TABOR problem to the Department of Local Affairs (“DOLA”) and its Division of Local Government (“DOLG”) for review and potential referral to the Office of the State Auditor and/or the Office of the Colorado Attorney General. (City/DOLA/DOLG Telecon (7/20/16).)
- aaa. On July 22, 2016, the City Attorney provided the SNRCDC’s counsel with a copy of the OSA correspondence for SNRCDC opinion letter and SNRCDC TABOR debt limitation compliance purposes. (City NRCDC Email OSA (7/22/16).)
- bbb. On July 29, 2016, the City presented a summary of TABOR considerations associated with the SNRCDC to DOLA and DOLG. (City DOLA/DOLG Submission (7/29/16).)
- ccc. TABOR is a limitation on the power of elected representatives by the people, and vests enforcement in citizens. (Colorado Constitution, Article X, §20; Bickel, 885 P.2d at 226; HCA-Healthone, 197 P.3d at 240.)
- ddd. TABOR limits enforcement to citizens: “[i]ndividual or class action enforcement suits may be filed and shall have the highest civil priority of resolution. Successful plaintiffs are allowed costs and reasonable attorney fees, but a district is not unless a suit against it be ruled frivolous.” (Colorado Constitution, Article X, §20(1).)
- eee. On August 8, 2016, DOLA and DOLG provided the City with advisement regarding any TABOR compliance needs associated with the existing SNRCDC lender finance funding mechanism:

The City may move to recognize the SNRCDC as not only a component unit in the financial statements, but further a direct municipal operation - accepting the assets and obligations of the SNRCDC as a municipal general obligation. In this scenario, as we discussed on the 29th, the City may find need to reconcile the operations and the debt of the SNRCDC with the requirements of TABOR by holding an election to authorize the general obligation debt in place, or alternatively managing or paying off the debt.

Alternatively the City may further (or additionally) evaluate the activities of the SNRCDC to date to determine how the operation

has been recognized as an enterprise to this point (per definition in Article X, Sec. 20 (2)(d) of the Colorado Constitution) and where it may not; then resolve to correct any errors if found to ensure it meets the enterprise requirement to satisfy any existing TABOR concerns.

(DOLA Correspondence (8/8/16).)

- fff. TABOR requires advance voter approval, and does not envision *post-hoc* voter approval. Voter approval must operate “prospectively, not retroactively” and “before it is imposed, not afterward.” (HCA-Healthone 197 P.3d at 241-243.)
- ggg. Allowing an existing TABOR violation to continue until an election occurs “would allow government growth without an election, and thus, without the consent of the voters that is the axis around with TABOR spins.” (HCA-Healthone, 197 P.3d at 244.) In short, “TABOR does not permit retrospective approval . . .” (Id.)
- hhh. On August 9, 2016, the City Attorney affirmed the State’s compliance direction and agreed to prepare a proposed voluntary compliance plan on behalf of the City:

We also understand your direction with respect to ensuring that the SNRCDC is either treated as a municipal operation consistent with TABOR debt finance limitations, or in the alternative ensuring that the SNRCDC is properly structured as an excepted independent “enterprise” for finance purposes. Either way, the City will prepare a proposed compliance plan for review by the City Council and the SNRCDC and be in touch soon with our intended course of action and any general questions we might still have.

(DOLA Correspondence (8/9/16).)

### **The City’s Current Compliance Efforts**

- iii. On August 9, 2016, the Mayor directed the City Attorney to finalize the City’s summary of TABOR considerations associated with the SNRCDC and to prepare a privileged Memorandum regarding the City’s related compliance needs for consideration by the City Council, Interim City Administrator, and the City Treasurer.

- jjj. On August 12, 2016, the City Attorney spoke with Pete Cordova in his capacity as counsel for High Country Bank regarding the TABOR considerations associated with the SNRCDC and the City’s anticipated compliance needs.
- kkk. On August 19, 2016, the City Attorney reported his preliminary findings and conclusions regarding the TABOR considerations associated with the SNRCDC and related compliance needs to the Mayor, the Mayor Pro Tempore, and outside counsel retained by the City’s insurer.
- lll. On August 22, 2016, the Mayor directed the City Attorney to be prepared to report his preliminary findings and conclusions regarding the TABOR considerations associated with the SNRCDC and related compliance needs to the City Council, the Interim City Administrator and the City Treasurer during Executive Session on September 6, 2016 and to the public on September 20, 2016.
- mmm. On August 23, 2016, the Mayor directed the Deputy City Clerk to set an Executive Session for September 6, 2016 for the City Attorney and City Council to address TABOR considerations associated with the SNRCDC and related compliance needs.
- nnn. On August 24, 2016, the City Attorney produced a privileged Memorandum for the City pursuant to the Mayor’s direction regarding TABOR considerations associated with the SNRCDC and related compliance needs. (AC/WP City Attorney Memorandum (8/24/16).)
- ooo. On August 31, 2016, a third-party forensic investigator produced a privileged investigative report for the City related to citizen complaints pending against the former City Administrator concluded that “SNRCDC is a complex organization, with technically challenging structure and compliance standards. Based on the reviewed files, I don’t think that the Town (i.e. Mayor, Council, Administrator and Attorney) had sufficient understanding of this sophisticated economic development tool and how its formation and operations crated unique conflict of interest opportunities for the Town. While I am not an expert about Internal Revenue Code 103, 63-20 Corporation, I think Salida made errors with the structure and operation of the SNRCDC.” (AC/WP Reid Report (8/31/16).)
- ppp. On September 6, 2016, the City Attorney advised the City regarding TABOR considerations associated with the SNRCDC and related compliance needs during an Executive Session. (City Council Meeting Agenda (9/6/16).)
- qqq. On September 9, 2016, the City Attorney spoke with Michael Feeley in his capacity as counsel for High Country Bank and reported his preliminary findings and conclusions regarding the TABOR considerations associated with the SNRCDC and related compliance needs.

- rrr. On September 15, 2016, the City posted an agenda for the next City Council Meeting that included a presentation on the SNRCDC by the City Attorney. (City Council Meeting Agenda (9/20/16).)
- sss. On September 16, 2016, counsel for High Country Bank produced an opinion letter regarding the TABOR considerations associated with the SNRCDC and the applicability of IRS Revenue Ruling 63-20 based on the Development Agreement and the First and Second Amendments to the Development Agreement. (BHFS Opinion Letter (9/16/16).) The opinion letter provided “In sum, the organization and operation of SNRCDC is entirely consistent with the common and longstanding practice Colorado cities have used to finance capital projects through the use of an independent non-profit entity organized pursuant to IRS Revenue Ruling 63-20.” (Id.)
- ttt. On September 17, 2016, the City Attorney responded to the opinion letter produced by counsel for High Country Bank regarding the TABOR considerations associated with the SNRCDC, the conclusions of the Office of the State Auditor, and the applicability of IRS Revenue Ruling 63-20 based on the Development Agreement and the First, Second, Third and Fourth Amendments to the Development Agreement. (City Response to BHFS Opinion Letter (9/17/16).) In doing so, the City Attorney clarified for the lender that the SNRCDC no longer has claim to any 63-20 status pursuant to the Fourth Amendment to the Development Agreement. (Id.)
- uuu. On September 17, 2016, the City Attorney spoke with Pete Cordova in his capacity as counsel for High Country Bank regarding the TABOR considerations associated with the SNRCDC, the conclusions of the Office of the State Auditor, and the applicability of IRS Revenue Ruling 63-20 based on the Development Agreement and the First, Second, Third and Fourth Amendments to the Development Agreement.
- vvv. On September 20, 2016, the City Attorney spoke with Michael Scott in his capacity as counsel for the SNRCDC and in advance of the City’s public presentation regarding the TABOR considerations associated with the SNRCDC and related compliance needs.
- www. On September 20, 2016 the City Attorney made a presentation regarding the TABOR considerations associated with the SNRCDC and related compliance needs during the public City Council Meeting.
- xxx. On September 20, 2016, the Mayor issued a Press Release announcing the City’s conclusion that the traditional lender financing mechanism used by the SNRCDC does not comply with TABOR and the debt limitation provisions in the Colorado Constitution. (Office of Mayor Press Release, City of Salida (9/20/16).)



- yyy. The Mayor’s Press Release provided that the City would be preparing a voluntary compliance plan for submission to the State in conjunction with the SNRCDC through Joint Work Sessions. (Office of Mayor Press Release, City of Salida (9/20/16).)
- zzz. On September 21, 2016, the City Attorney participated with representatives of the City and the SNRCDC regarding the TABOR considerations associated with the SNRCDC and related compliance needs during a public Work Session. (Notice of Joint Work Session (9/21/16).)
- aaaa. In the September 21, 2016 Joint Work Session, the City Attorney distributed “NRCDC TABOR Compliance Options” and “NRCDC TABOR Compliance Option Considerations” handouts for discussion and implementation purposes. (NRCDC TABOR Compliance Options (9/21/16); NRCDC TABOR Compliance Option Considerations (9/21/16).)
- bbbb. A majority of the Salida City Council affirmed during the Joint Work Session on September 21, 2016 that the City intended on engaging in SNRCDC TABOR debt limitation compliance efforts consistent with the public advisement of the City Attorney and the Mayor’s exercise of authority. (Resolution 2016-81 (10/18/16).)
- cccc. On September 22, 2016, the City Attorney provided the SNRCDC’s counsel with copies of the handouts distributed at the Joint Work Session. (City NRCDC Email (9/22/16).)
- dddd. On September 28, 2016, counsel for the SNRCDC participated with representatives of the City and the SNRCDC in another public Work Session regarding the TABOR considerations associated with the SNRCDC and related compliance needs. (Notice of Joint Work Session (9/28/16).)
- eeee. The SNRCDC President represented to the Mayor and City Council on October 3, 2016 that “[t]he SNRCDC will continue to prepare a compliance program (requested by Mayor) if needed in the future.” (Resolution 2016-81 (10/18/16).)
- ffff. On October 3, 2016, Salida citizen Alison Brown solicited a legal opinion that the SNRCDC constitutes an exempt “enterprise” for TABOR debt limitation purposes. (A. Brown Email & Letter (10/3/16); HWPC Letter (10/3/16).)
- gggg. On October 6, 2016, the City Attorney and the SNRCDC’s counsel conferred regarding a threatened citizen enforcement action related to the SNRCDC and the debt limitation provisions in the Colorado Constitution. (City NRCDC Email (10/6/16).)

hhhh. In doing so, the City rejected the SNRCDC’s reliance on the “special funds doctrine” to exempt the SNRCDC from otherwise applicable TABOR debt limitations. (City NRCDC Email (10/6/16).)

iiii. The “special funds doctrine” was approved by the Colorado Supreme Court in 1933 as a way for governmental units to exempt revenue anticipation warrants and/or bonds from otherwise applicable constitutional debt limitations. (Oesterle and Collins, “The Colorado State Constitution” at 281-82 (citing In re Sen. Res. No. 2, 31 P.2d 325, 330-331 (Colo. 1933).)

jjjj. In approving special fund allocations, the Colorado Supreme Court actually rejected the financing allowance in the highway improvement legislation at issue. (In re Sen. Res. No. 2, 31 P.2d 325, 330-331 (Colo. 1933).) In considering whether the State could borrow highway improvement money from the federal government on an emergency basis to help ease unemployment caused by the Great Depression and then repay the loan out of a special fund financed by accrued and future fuel taxes, the Court concluded that the legislation violated constitutional debt limitations. (In re Sen., 31 P.2d at 327, 330.) The Court did so because the security for the loan had been funded in part with general revenue funds, and the security obligation would have to be paid out of assets that originated in part from general tax revenue. (In re Sen., 31 P.2d at 331.)

kkkk. The Colorado Supreme Court subsequently held that governmental units could also charter separate and distinct corporations to issue revenue bonds exempt from otherwise applicable constitutional debt limitations. (Oesterle and Collins, “The Colorado State Constitution” at 282 (citing In re Interrog. by Sen., 566 P.2d 350, 354 (Colo. 1977).) The State did not retain any ownership interest in the housing authority approved by the Court or the housing authority’s underlying assets. (See generally, In re Interrog. by Sen., 566 P.2d 350 (Colo. 1977).)

llll. Because TABOR strengthened the constitutional limitations on debt, the “special funds doctrine” and other historic exceptions to constitutional debt limitations are no longer applicable unless the involved entity is an exempt “enterprise”. (Oesterle and Collins, “The Colorado State Constitution” at 283-84.)

mmmm. The City also rejected the SNRCDC’s reliance on any type of “enterprise” exemption for the SNRCDC from otherwise applicable TABOR debt limitations on October 6, 2016. (City NRCDC Email (10/6/16).)

nnnn. With respect to the threatened citizen enforcement action, the City warned the NRCDC regarding “the related risks associated with fee-shifting and the possibility of an immediate liquidation remedy.” (City NRCDC Email (10/6/16).)

- oooo. On October 6, 2016, the City further requested a copy of the SNRCDC’s proposed compliance program on or before October 14, 2016 for consideration by the Mayor and the City Council at the Executive Session scheduled for October 18, 2016. (City SNRCDC Email (10/6/16).)
- pppp. Counsel for the SNRCDC subsequently notified the City on October 7, 2016 that “the SNRCDC is not preparing a separate compliance plan at this time.” (Resolution 2016-81 (10/18/16).)
- qqqq. On October 11, 2016, a SNRCDC Director publicly stated that the SNRCDC is an “enterprise” that is exempt from the City’s TABOR compliance obligations. (SNRCDC Board Meeting (10/11/16); City SNRCDC Email (10/14/16).)
- rrrr. On October 14, 2016, the City memorialized the SNRCDC’s failure to provide the City with any proposed compliance program for consideration by the Mayor and the City Council at the Executive Session scheduled for October 18, 2016. (City SNRCDC Email (10/14/16).)
- ssss. On October 14, 2016, the City also rejected again the SNRCDC’s reliance on any type of “enterprise” exemption for the SNRCDC from otherwise applicable TABOR debt limitations. (City NRCDC Email (10/14/16).)
- tttt. The Mayor and City Council addressed the City’s proposed compliance plan with respect to the SNRCDC and the TABOR debt limitation provisions in the Colorado Constitution during an Executive Session on October 18, 2016. (Resolution 2016-81 (10/18/16); Notice of City Council Meeting (10/18/16).)

### **The City’s Adoption of Resolution 2016-81**

- uuuu. On October 18, 2016, the City Council via SNRCDC Financing Resolution 2016-81 “concluded that the existing SNRCDC financing form and mechanism does not comply with the TABOR debt limitation provisions in the Colorado Constitution that are applicable to the City and/or is inconsistent with the TABOR debt limitation provisions in the Colorado Constitution that are applicable to the City.” (Resolution 2016-81 (10/18/16).)
- vvvv. On October 18, 2016, the City Council via SNRCDC Financing Resolution 2016-81 also “concluded that the existing SNRCDC financing form and mechanism presents the potential for unacceptable municipal exposure and/or other risks.” (Resolution 2016-81 (10/18/16).)

wwww. On October 18, 2016, the City Council via SNRCDC Financing Resolution 2016-81 further directed the City Attorney “to present the City’s good-faith compliance plan with respect to the SNRCDC’s existing financing to the SNRCDC and the State for implementation purposes on or before October 31, 2016.” (Resolution 2016-81 (10/18/16).)

xxxx. On October 19, 2016, the City Attorney addressed the passage of Resolution 2016-81, the SNRCDC Compliance Plan, the City’s actual and residual interest in the SNRCDC, and related implementation needs with SNRCDC counsel. (City Attorney SNRCDC Email (10/19/16).)

yyyy. On October 20, 2016, the Mayor publicly stated that “The city is out of compliance with TABOR. The only option available is to follow the state constitution. Many chose not to accept or are not willing to accept this position; I view it as cut-and-dry. The facts support council’s decision.” (Mountain Mail Article (10/20/16).)

zzzz. On October 25, 2016, the President of the SNRCDC took the position that the SNRCDC “is an independent corporation of the State of Colorado” with the right to control its own financial decisions and expenditures irrespective of the City’s annual budget. (City SNRCDC Email (10/25/16).)

aaaaa. On October 25, 2016, the SNRCDC adopted a Resolution authorizing the retention of independent counsel “to provide the NRCDC with a legal opinion regarding the applicability of TABOR to the NRCDC” which provided in part that the SNRCDC’s Board of Directors was entitled to manage the affairs of the SNRCDC and that “such management necessarily includes the spending of NRCDC’s own funds in a manner that is in the best interest of the NRCDC.” (SNRCDC Resolution 2016-06 (10/25/16).)

bbbbb. If the SNRCDC is a Colorado corporation that owns the Ranch independently of the City, the SNRCDC may be subject to assessments for past, present and future property taxes and any applicable interests and/or penalties. (Chaffee County Assessor Brenda Moseby Interview (10/12/16).)

ccccc. On October 25, 2016, the City’s local newspaper published an editorial which provided in part that “Nowhere in state statutes is a statutory municipality authorized to dodge elements of the state constitution – in this case TABOR restrictions requiring voter-approval for long-term debt – by creating a non-profit corporation, where it’s a ‘hybrid creature’ or otherwise.” (Mountain Mail Editorial (10/25/16).)

## **The City’s Adoption of Resolution 2016-88 and the Final SNRCDC Compliance Plan**

- dddd. On October 28, 2016, the City Attorney submitted the SNRCDC Compliance Plan to the State and the SNRCDC for implementation purposes pursuant to SNRCDC Financing Resolution 2016-81. (City Attorney - State Email (10/28/16); City Attorney – SNRCDC Email (10/28/16).)
- eeee. The City subsequently explained to DOLA and DOLG that “[s]ubmission of the SNRCDC Compliance Plan to the State reflects the City’s good-faith compliance efforts with State Auditor direction and the State Constitution . . . and should be a persuasive consideration for judicial remedy purposes in the event of any citizen enforcement action.” (City DOLA DOLG Email (10/31/16).)
- ffff. The City also notified the State that “[t]he City has taken this path due to the legal and risk management considerations involved, and as outlined in Resolution 2016-81 the City’s actions transcend the legal issues involved and encompass the City Council’s policy determinations regarding the SNRCDC and its existing debt structure.” (City DOLA DOLG Email (10/31/16).)
- ggggg. On November 1, 2016, counsel for High Country Bank nevertheless produced a revised or supplemental opinion letter regarding the TABOR considerations associated with the SNRCDC. (BHFS Revised Opinion Letter (11/1/16).)
- hhhhh. The revised lender opinion letter provided that “High County Bank strongly disagrees with the conclusion set forth in Resolution No. 2016-81 that the SNRCDC ‘financing form and mechanism’ does not comply with the constitutional debt limitations of TABOR” and omitted reference to the City’s policy and risk management conclusions in Resolution No. 2016-81. (Compare BHFS Revised Opinion Letter (11/1/16) with City Response Letter (11/2/16).)
- iiii. The revised lender opinion letter omitted reference to IRS Revenue Ruling 63-20 and otherwise parroted again that “the organization and operation of SNRCDC is entirely consistent with the common and longstanding practice Colorado cities have used to finance capital projects through the use of an independent non-profit entity.” (BHFS Revised Opinion Letter (11/1/16).)
- jjjj. The revised lender opinion letter threatened the SNRCDC and the City with the “Due on Sale” clause in the Deed of Trust and other lender recourse, remedies and rights under the governing loan documents. (BHFS Revised Opinion Letter (11/1/16).)

kkkkk. Under Colorado law, multi-year fiscal obligations that violate TABOR may be void and unenforceable as a legal matter. (See, e.g., HPHC Memo at §IV(B), (C) (6/3/12).)

lllll. The City responded to High Country Bank on November 2, 2016 with respect to Resolution 2016-81, the governing loan documents, and the SNRCDC Compliance Plan. (City Response Letter (11/2/16).)

mmmmm. The City Attorney circulated a revised version of the SNRCDC Compliance Plan to the SNRCDC’s counsel on November 2, 2016 that incorporated adjustments in response to lender comments. (City NRCDC Email II (11/2/16).)

nnnnn. On November 2, 2016, the Mayor set a Joint Work Session between the City and the SNRCDC Board with respect to the SNRCDC Compliance Plan and the related Resolution 2016-88 for November 14, 2016. (City SNRCDC Email (11/2/16).)

ooooo. On November 2, 2016, the Mayor requested any changes from the SNRCDC with respect to the SNRCDC Compliance Plan and the related Resolution 2016-88 on or before November 14, 2016. (City SNRCDC Email (11/2/16).)

ppppp. Counsel for High Country Bank conceded that the SNRCDC’s existing debt is effectively debt of the City on November 4, 2016. In particular, High Country Bank’s lawyer asserted that “these kinds of TABOR things don’t require elections, these are city financing arrangements.” (Mountain Mail Article (11/4/16).)

qqqqq. On November 7, 2016, the Mayor reiterated to the SNRCDC President that the Joint Work Session scheduled for November 14, 2016 would be the SNRCDC’s final opportunity to provide input with respect to the SNRCDC Compliance Plan and related Resolution 2016-88. (City SNRCDC Email (11/7/16).)

rrrrr. The City held a Work Session on November 14, 2016 to finalize the SNRCDC Compliance Plan in advance of the City Council’s consideration of Resolution 2016-88. (Joint Work Session Notice (11/14/16).)

sssss. The SNRCDC secured an opinion letter from outside counsel on or about November 15, 2016 regarding whether the SNRCDC’s existing financing form and mechanism violated constitutional debt limitations. (Gray Ltr. (11/15/16).) The SNRCDC’s outside counsel concluded that the SNRCDC’s existing financing form and mechanism did not violate constitutional debt limitations because the SNRCDC is a non-profit corporation. (*Id.*) The SNRCDC’s outside counsel relied on two cases involving an irrigation district

and an urban renewal authority and the City of Golden’s 2015 financial statements. (Id. (citing Campbell v. Orchard Mesa Irrigation District, 972 P.2d 1037 (Colo. 1998); Olson v. City of Golden, 53 P.3d 747 (Colo. App. 2008); City of Golden 2015 CAFR).) The SNRCDC’s outside counsel did not address whether the SNRCDC was or was not an “enterprise” exempt from constitutional debt limitations, however. (Id.)

ttttt. The Golden Urban Renewal Authority is a discrete component unit of the City of Golden, and is not a blended component unit of a municipality like the SNRCDC. (Compare City of Golden 2015 CAFR at ii & 17-18 “Component Units” with City of Salida 2015 CAFR.)

uuuuu. The SNRCDC’s Treasurer took the position in a public Letter to the Editor on November 22, 2016 that the position of the Mayor or the majority of the City Council with respect to the SNRCDC “are irrelevant.” (SNRCDC Email (11/22/16).)

vvvvv. The City published proposed Resolution 2016-88 as revised and the proposed Final SNRCDC Compliance Plan on November 23, 2016 in advance of a special City Council Meeting set for November 29, 2016 (City Council Meeting Packet (11/23/16).)

wwwww. The SNRCDC’s lender HCB put the SNRCDC on notice on November 29, 2016 of the lender’s rights and remedies pursuant to the applicable Deed of Trust, Assignment of Rents, and CD Assignment. (HCB Notice Ltr. (11/29/16).) In doing so, HCB took the position that an “Adverse Change” would constitute an Event of Default and that it could include “a change in the SNRCDC financial condition, a decision to liquidate SNRCDC or a change in the membership of the SNRCDC Board of Directors.” (Id.)

xxxxx. The SNRCDC’s Deed of Trust with HCB provides that an Event of Default includes an Adverse Change defined as “[a] material adverse change occurs in Grantor’s financial condition, or Lender believes the prospect of payment or performance of the indebtedness is impaired.” (HCB DOT (8/29/13).)

yyyyy. The SNRCDC Treasurer described the City as the effective sole shareholder of the SNRCDC during a public meeting on November 29, 2016. (SNRCDC Meeting (11/29/16).)

zzzzz. The City Council held a special City Council Meeting on November 29, 2016 to consider proposed Resolution 2016-88, including the proposed Final SNRCDC Compliance Plan. (City Council Meeting Agenda (11/29/16).)

aaaaa. The former President of the SNRCDC described the SNRCDC as an entity that “operates at the pleasure of the City” during the public comments

section of the City Council Meeting on November 29, 2016. (City Council Meeting (11/29/16).)

bbbbbb. In rejecting a financing mechanism designed to avoid constitutional debt limitations in 1933, the Colorado Supreme Court commented that “[w]e venture the assertion that no man, able to read and understand ordinary English, however otherwise educated or uneducated, wise or foolish, would question for a moment that this bill was a plain violation of the constitutional prohibition, or find any reason to the contrary, save by a resort to profound legal learning and a doubtful application of judicial precedents.” (In re Sen. Res. No. 2, 31 P.2d 325, 330 (Colo. 1933).)

cccccc. In construing financing legislation to be in violation of constitutional debt limitations in 1933, the Colorado Supreme Court also noted that “[i]f the people’s, ‘Thou shalt not,’ can be brushed aside by the simple ipse dixit of their servants thus bound, the mandate is impotent.” (In re Sen. Res. No. 2, 31 P.2d 325, 331 (Colo. 1933).)

dddddd. The City Council subsequently adopted Resolution 2016-88 and the Final SNRCDC Compliance Plan during the City Council Meeting on November 29, 2016. (Summary of City Council Actions (11/29/16); Resolution 2016-88 (11/29/16); Final SNRCDC Compliance Plan (11/22/16).)

eeeeee. The City Attorney provided Resolution 2016-88 and the Final SNRCDC Compliance Plan as adopted by the City to the SNRCDC for implementation purposes on November 30, 2016. (City NRCDC Email (11/30/16).) In doing so, the City asked the SNRCDC Board to confirm on or before December 2, 2016 whether it would implement the Final SNRCDC Compliance Plan in accordance with Resolution 2016-88. (Id.)

ffffff. The City Attorney provided Resolution 2016-88 and the Final SNRCDC Compliance Plan as adopted by the City to the State on November 30, 2016 as well. (City State Email (11/30/16).)

gggggg. The SNRCDC was unable to respond to the City on or before December 2, 2016 with respect to whether it would implement the Final SNRCDC Compliance Plan in accordance with Resolution 2016-88. (SNRCDC City Email (12/2/16).) Instead, the SNRCDC set a Meeting for December 6, 2016 to address the Resolution 2016-88 and the Final SNRCDC Compliance Plan. (SNRCDC City Email (12/2/16); SNRCDC Meeting Agenda (12/6/16).)

hhhhhh. On December 5, 2016, the City tendered a follow up demand letter to the SNRCDC pursuant to the Development Agreement and the Maintenance Agreement. (City Demand (12/5/16).)



**The City's Adoption of SNRCDC Divesture Resolution 2016-97**

- iiiiii. The City Council published a revised City Council Meeting Agenda on December 2, 2016 that included proposed Resolution Nos. 2016-93 removing the SNRCDC Board of Directors and 2016-94 appointing an interim SNRCDC Board of Directors. (City Council Agenda (12/6/16).)
- jjjjjj. The SNRCDC responded by filing a Complaint and Motion for Preliminary Injunction against the City on December 6, 2016 to prevent the City from removing the SNRCDC's Board of Directors and to address whether the SNRCDC is subject to the debt limitation provisions in the Colorado Constitution. (Complaint (12/6/16); Motion for Preliminary Injunction (12/6/16); Brief in Support of Temporary Restraining Order (12/6/16).)
- kkkkkk. In doing so, the SNRCDC certified twice to the Court that its counsel had served the City Attorney through the electronic filing system. (Motion for Preliminary Injunction at 3 (12/6/16); Brief in Support of Temporary Restraining Order at 7 (12/6/16).) The certification of the SNRCDC's counsel regarding service and notice to the City Attorney of the SNRCDC's claims was false. (Motion for Dissolution (12/10/16); Motion for Dissolution (12/14/16).)
- llllll. The SNRCDC then received an *ex parte* TRO at 4:55 pm on December 6, 2016 from the Chaffee County District Court without the City's involvement or any opportunity for the City to be heard, requiring the City to refrain from removing the SNRCDC Board of Directors during the pendency of the TRO. (TRO Order (12/6/16).) The TRO expired on its face at 5:10 pm on December 20, 2016 absent an extension. (TRO Order (12/6/16).)
- mmmmmm. The City objected to the SNRCDC's litigation filings and efforts on December 6, 2016 at 5:27 p.m. (City Attorney SNRCDC Email (12/6/16).)
- nnnnnn. The City also received notice from counsel representing a potential citizen enforcement claimant at 6:25 p.m. objecting to the placement of elected officials on the SNRCDC Board pursuant to proposed Resolution 2016-94 based on the ethical considerations outlined in C.R.S. 24-18-101, *et seq.* (Email from J. Auxier to Elected Officials (12/6/16).)
- oooooo. The City Council subsequently convened an Executive Session on December 6, 2016 to consider proposed Resolutions 2016-93 and 2016-94 but tabled the matters until the next City Council Meeting on December 20, 2016. (City Council Agenda (12/6/16); City Council Agenda (12/20/16).) City Resolution 2016-93 (12/6/16); City Resolution 2016-94 (12/6/16).)
- pppppp. On December 7, 2016, the City Council published on the City's official website a November 25, 2016 privileged and confidential iteration of this

statement of facts and relevant considerations. (City of Salida Website – Home (12/7/16); Response to Motion for Preliminary Injunction (12/16/16) at Ex. A (City Attorney AC/WP Draft Statement of Facts and Relevant Considerations (11/25/16)).)

qqqqqq. On December 8, 2016, the SNRCDC set a hearing on its pending Motion for Preliminary Injunction for December 20, 2016. (Notice of Hearing (12/8/16).)

rrrrrr. Within hours of setting its preliminary injunction hearing, the SNRCDC offered to settle the litigation in part by restructuring its current financing mechanism into an annual loan. (SNRCDC Scott R408 Email & Letter (12/8/16).)

ssssss. In offering to settle the litigation by restricting its current financing form and mechanism, the SNRCDC also demanded that the City agree “not to remove any existing NRCDC Board member” for a certain time period. (SNRCDC Scott R408 Email & Letter (12/8/16).)

tttttt. The City, in turn, objected to the SNRCDC’s inclusion of a Board composition condition in the settlement proposal and warned the SNRCDC about potential claims against the individual SNRCDC Board Directors. (City Attorney R408 Email (12/9/16).)

uuuuuu. The City Council convened an Executive Session on December 11, 2016 to consider the SNRCDC’s settlement proposal, open SNRCDC litigation defense needs, and the potential for SNRCDC divestiture. (City Council Meeting Agenda (12/11/16).)

vvvvvv. On December 16, 2016, the City filed a voluminous Response objecting to the SNRCDC’s Motion for Preliminary Injunction and memorializing the City’s position with respect to the SNRCDC’s financing form and mechanism. (Response to Motion for Preliminary Injunction (12/16/16).)

wwwwww. On December 16, 2016, the City also noticed a Special City Council Meeting for December 19, 2016 to consider proposed SNRCDC Divestiture Resolution 2016-97. (Notice of Special City Council Meeting (12/19/16).)

xxxxxx. On December 19, 2016 the City convened a City Council Special Meeting and adopted proposed SNRCDC Divestiture Resolution 2016-97. (SNRCDC Divestiture Resolution 2016-97.) In doing so, the City incorporated a number of relevant factual findings. (Id. at Whereas Recitals and Section 1.)

yyyyyy. In adopting Resolution 2016-97, the City disclaimed and divested the City of any “affiliation with the SNRCDC for contracting, financial reporting,

tax reporting or legal compliance purposes, including but not limited to any characterization of the SNRCDC as a blended or other component unit or enterprise of the City effective immediately.” (SNRCDC Divesture Resolution 2016-97, at Section 5.)

zzzzzz. In adopting Resolution 2016-97, the City terminated the Maintenance Agreement effective February 1, 2017 (SNRCDC Divesture Resolution 2016-97, at Section 6.)

aaaaaaa. In adopting Resolution 2016-97, the City terminated the Development Agreement effective immediately (SNRCDC Divesture Resolution 2016-97, at Section 7.)

bbbbbbb. In terminating the Development Agreement, the City provided that it did “not otherwise release or waive any City rights pursuant to the Development Agreement, including but not limited to any indemnity rights pursuant to the Development Agreement or rights reserved by the City in Ordinance 2011-14.” (SNRCDC Divesture Resolution 2016-97, at Section 7.)

cccccc. Once the City adopted SNRCDC Divesture Resolution 2016-97, no justiciable controversy remained with respect to the SNRCDC’s preliminary injunction and declaratory judgment litigation. Accordingly, the SNRCDC filed a Motion to Vacate its own preliminary injunction hearing on the evening of December 19, 2016. (Motion to Vacate (12/19/16).)

ddddddd. The City Attorney formally notified the SNRCDC on December 20, 2016 that the City had adopted SNRCDC Divesture Resolution 2016-97. (City Attorney SNRCDC Divesture Email (12/20/16).)

eeeeeee. The City Attorney notified the Chaffee County District Court on December 20, 2016 that the City had adopted SNRCDC Divesture Resolution 2016-97. (Notice of Adoption (12/20/16).)

ffffff. On motion by the parties, the Court then vacated the SNRCDC’s preliminary injunction hearing and dismissed the SNRCDC’s preliminary injunction and declaratory judgment claims. (Stipulated Motion to Dismiss (12/20/16); Dismissal Order (12/20/16).) Accordingly, the SNRCDC’s temporary restraining order expired on its terms. (TRO (12/6/16).)

ggggggg. The City Attorney notified the State on December 20, 2016 that the City had adopted SNRCDC Divesture Resolution 2016-97 and resolved any outstanding TABOR constitutional debt limitation compliance needs from the municipal perspective. (City Attorney State Divesture Notice Email (12/20/16).)

hhhhhhh. The City Attorney notified counsel for a potential citizen enforcement claimant on December 20, 2016 that the City had adopted SNRCDC Divestiture Resolution 2016-97 and resolved any outstanding TABOR constitutional debt limitation compliance needs from the municipal perspective. (City Attorney Email (12/20/16).)

iiiiiii. The City updated its municipal website with respect to the SNRCDC on December 20, 2016. The website now links to SNRCDC Divestiture Resolution 2016-97 and provides that “[t]he Salida Natural Resources Center Development Corporation (“SNRCDC”) is a private corporation that is no longer affiliated with the City of Salida.” (City of Salida Website (12/20/16).)

jjjjjjj. The City Attorney and counsel for the SNRCDC discussed any open divestiture and transition needs related to Resolution 2016-97 on December 22, 2016. (City SNRCDC Email Exchange (12/22/16).)

kkkkkkk. The City has divested the SNRCDC from the municipality and is not an actual or effective borrower, obligor or guarantor with respect to the SNRCDC’s current financing form and mechanism with HCB. (Resolution 2016-97.) In the process, the City absolved itself of liability or responsibility for more than two thirds of the City’s general municipal debt as reported in the City’s 2015 certified financial reports. (City of Salida Certified Financial Report at 37 and Note 7 (12/31/15).)

lllllll. HCBC stock was the subject of illegal end of year “window dressing” trading in 2009 by Donald L. Koch. (Zweig and McGinty, “Fund Managers Lift Results With Timely Trading Sprees,” Wall Street Journal (12/6/12); In re the Matter of Donald L. Koch and Koch Asset Management, LLC at 4-9, 15-17 (SEC Opinion Admin Proc. File No. 3-14355); In re the Matter of Huntleigh Securities Corporation and Jeffery S. Chrtistanell at 3-4 (SEC Opinion Admin Proc. File No. 3-14354).) In particular, Mr. Koch attempted to use the lack of liquidity in HCBC stock to “mark the close” and artificially inflate year-end HCBC stock price by purchasing 3,200 shares on the last day of 2009 trading. (Zweig and McGinty, “Fund Managers Lift Results With Timely Trading Sprees,” Wall Street Journal (12/6/12); In re the Matter of Donald L. Koch and Koch Asset Management, LLC at 4-9, 15-17 (SEC Opinion Admin Proc. File No. 3-14355); In re the Matter of Huntleigh Securities Corporation and Jeffery S. Chrtistanell at 3-4 (SEC Opinion Admin Proc. File No. 3-14354).) Doing so increased the bank’s market capitalization by more than \$4M for end of year purposes. (Zweig and McGinty, “Fund Managers Lift Results With Timely Trading Sprees,” Wall Street Journal (12/6/12); In re the Matter of Donald L. Koch and Koch Asset Management, LLC at 4-9, 15-17 (SEC Opinion Admin Proc. File No. 3-14355); In re the Matter of Huntleigh Securities Corporation and Jeffery S. Chrtistanell at 3-4 (SEC Opinion Admin Proc. File No. 3-14354).) The stock did not trade again until January 6, 2010 and then lost all of its “window dressing” share price gains immediately. (Zweig and McGinty, “Fund

Managers Lift Results With Timely Trading Sprees,” Wall Street Journal (12/6/12); In re the Matter of Donald L. Koch and Koch Asset Management, LLC at 4-9, 15-17 (SEC Opinion Admin Proc. File No. 3-14355); accord In re the Matter of Huntleigh Securities Corporation and Jeffery S. Chrtistanell at 2-3 (SEC Opinion Admin Proc. File No. 3-14354.)

mmmmmm. “Marking the close’ is the practice of attempting to influence the closing price of a stock by executing purchase or sale orders at or near the close of the market.” (In re the Matter of Donald L. Koch and Koch Asset Management, LLC at 14 (SEC Opinion Admin Proc. File No. 3-14355); In re the Matter of Huntleigh Securities Corporation and Jeffery S. Chrtistanell at 3-4 (SEC Opinion Admin Proc. File No. 3-14354).)

nnnnnn. Recently, HCBC stock declined approximately 10% and the bank lost approximately \$4M in market capitalization from the time of the City’s adoption of SNRCDC Divesture Resolution 2016-97 through the end of calendar year 2016, *i.e.*, December 20, 2016 through December 31, 2016. (HCBC NASDAQ Report.) During this timeframe, HCBC stock trading volume was significantly higher than normal trading volume – including a dump of 2,000 shares on December 30, 2016. (HCBC Trade Report.) Accordingly, HCBC stock appears to have been the subject of 2016 end of year shorting, hedging and/or sales activity by a significant shareholder of record. (Id.)