



KAPLAN KIRSCH ROCKWELL

## REFERENCE GUIDE

ENTITIES THAT CONSTRUCT, FUND  
AND OPERATE SELECTED PUBLIC  
FACILITIES AND PROJECTS IN THE  
DENVER METROPOLITAN AREA



University of  
Colorado Hospital  
UNIVERSITY OF COLORADO HEALTH





# REFERENCE GUIDE

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# I. INTRODUCTION

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This guide is intended as a reference to the legal structure, governance, financing capabilities, and other characteristics of the entities that construct, fund, and operate a number of public facilities and public-private projects in the Denver metropolitan area. These entities can provide useful models for developing or modifying the legal structure of an operating entity once the goals of the proposed or existing project and desired capabilities of the operating entity have been identified. Entities, facilities, and projects described include the following:

1. RED ROCKS PARK AND AMPHITHEATRE
2. DENVER SCIENTIFIC AND CULTURAL FACILITIES DISTRICT
3. DENVER METROPOLITAN MAJOR LEAGUE BASEBALL STADIUM DISTRICT
4. DENVER METROPOLITAN FOOTBALL STADIUM DISTRICT
5. UNIVERSITY OF COLORADO HOSPITAL AUTHORITY
6. WINTER PARK
7. DENVER MUSEUM OF NATURE AND SCIENCE
8. DENVER BOTANIC GARDENS
9. DENVER ART MUSEUM
10. DENVER ZOO
11. DENVER UNION STATION PROJECT AUTHORITY
12. DENVER CONVENTION CENTER HOTEL AUTHORITY
13. LOWRY ECONOMIC REDEVELOPMENT AUTHORITY (FORMER LOWRY AIR FORCE BASE REDEVELOPMENT)
14. FITZSIMONS REDEVELOPMENT AUTHORITY (FORMER FITZSIMONS ARMY MEDICAL CENTER REDEVELOPMENT)
15. STAPLETON DEVELOPMENT CORPORATION (FORMER STAPLETON INTERNATIONAL AIRPORT REDEVELOPMENT)

An important aspect of any discussion of powers and characteristics of entities responsible for financing public facilities and public-private projects in Colorado is the extent to which these entities (i) are subject to certain constitutional debt and tax revenue limitations under the Colorado Constitutional provision known as the Taxpayer Bill of Rights (“TABOR”), (ii) have the authority to issue tax-exempt bonds, and (iii) are subject to state and local property, sales, and use taxes. These entities typically are structured with the intent to address constitutional debt and spending limitations and to take advantage of cost savings associated with tax-exempt financing options and tax-exempt status. Appendix A to this reference guide outlines these requirements of federal tax law and TABOR in more detail. However, for purposes of better understanding the discussion of these financing entities without consulting the appendix, the following are a few basic principles and requirements to keep in mind:

- Among other requirements, TABOR requires voter approval for “districts” to issue debt and to levy taxes. TABOR defines “districts” as “state and local governments, excluding enterprises.” So, if an entity is considered a “district” under TABOR, any bonds it may issue must be voter approved, while “enterprises” and other entities that do not qualify as “districts,” do not face that constitutional requirement.

- Federal tax-exempt bonding authority is available to political subdivisions, “constituted authorities,” “63-20 entities” or other qualifying entities. Generally, under federal law, a political subdivision is “any division of state or local government which is a municipal corporation or which has been delegated the right to exercise part of the sovereign power of the unit.” “Constituted authorities” and “63-20 corporations” are entities formed by state or local governments that, if they meet certain federal structural requirements may issue tax-exempt bonds “on behalf of” state or local governments.
- This reference guide only addresses whether the entities discussed pay sales and use taxes on purchases or are subject to property tax on property they own. Many of these entities receive revenue from sales to third parties. Unless those third parties are also tax exempt, sales to third parties are subject to sales and use tax. Likewise, even if the entity itself does not pay property tax, lessees and other types of individuals and entities that have rights to use tax-exempt property may be subject to property tax on their possessory interest.

Related to and including these important financing authorities and limitations, this reference guide details the following powers and characteristics of each of the entities described:

- Organizational form
- Method of entity formation
- Qualifications of governing board and procedures for board appointment
- Ownership of property and operation of facilities
- Power to condemn property
- Power to levy taxes (including TABOR status)
- Power to issue tax-exempt bonds
- Other revenue sources
- Sales, use, and property tax-exempt status

Appendix B provides a summary of the information presented in this reference guide in chart form.

While each of the entities and facilities described in this reference guide displays a unique mix of these powers and characteristics, they can be roughly categorized as (i) City-owned and operated facilities, (ii) special statutory districts, (iii) City-owned/nonprofit operated facilities, and (iv) development authorities.



## II. DESCRIPTION OF THE ENTITIES AND FACILITIES

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### CITY-OWNED AND OPERATED

#### 1. RED ROCKS PARK AND AMPHITHEATRE

Red Rocks Park (“the Park”) is an 868-acre<sup>1</sup> Denver Mountain Park owned and operated by the City and County of Denver (the “City” or “Denver”).<sup>2</sup> The Park facilities include Red Rocks Amphitheatre, a popular venue for concerts together with a trading post and parking lots (collectively the “Amphitheatre”). The Amphitheatre also is owned by the City. The Amphitheatre is managed by Arts and Venues Denver, a division within the City’s Department of General Services. The rest of the natural area of the Park is under the jurisdiction of the Denver Mountain Parks Division of the Denver Department of Parks and Recreation.<sup>3</sup> Together, the Park and the Amphitheatre are referred to in this memorandum as “Red Rocks.”

##### A | ORGANIZATIONAL FORM

Red Rocks is owned and operated entirely by the City.<sup>4</sup> However, the City does contract out operational functions such as vending, promotion, construction, and maintenance to private contractors.<sup>5</sup>

##### B | METHOD OF ENTITY FORMATION

The City established and controlled the development and expansion of Red Rocks. It originally purchased the Park in 1928.<sup>6</sup> The Amphitheatre is a product of the Great Depression-era work programs; the Civilian Conservation Corps and the Work Projects Administration began construction of the Amphitheatre in 1936 and completed the project in 1941.<sup>7</sup> About ten years ago, Arts and Venues Denver acquired some additional property adjoining and near the Park to the east and north. That property is not designated park property.<sup>8</sup>

##### C | QUALIFICATIONS OF GOVERNING BOARD AND PROCEDURES FOR BOARD APPOINTMENT

The City has controlled the operation of Red Rocks through various departments over time. Red Rocks does not have a board of directors. Red Rocks initially was managed by Denver Parks and Recreation.<sup>9</sup> In the 1950s, management of the Amphitheatre shifted to the City’s division of Theatres and Arenas.<sup>10</sup> In 2011, Theatres and Arenas merged with the Denver Office of Cultural Affairs to become Arts and Venues Denver, a division of Denver’s Department of General Services.<sup>11</sup> Arts and Venues Denver manages the day-to-day

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<sup>1</sup> Accounts of the Park’s size vary. The most recent count seems to be 868 acres. *See, e.g.*, Denver Parks and Recreation, *Mountain Park Attractions*, <http://www.denvergov.org/dpr/DenverParksandRecreation/Parks/MountainParks/MountainParkAttractions/tabid/443631/Default.aspx> (last visited Aug. 7, 2013).

<sup>2</sup> The City and County of Denver is referred to throughout this memo as “City” or “Denver.”

<sup>3</sup> E-mail from Patrick Wheeler, Assistant City Attorney, City and County of Denver, to Polly Jessen, Partner, Kaplan Kirsch & Rockwell LLP (Nov. 25, 2013 5:15 p.m.) [hereinafter Wheeler Red Rocks E-mail].

<sup>4</sup> *Id.*

<sup>5</sup> *See, e.g.*, DENVER, COLO., ORD. 2009-0388 (2009) (approving Amphitheatre promotion contract); DENVER, COLO., ORD. 1996-0435 (1995) (approving construction contract for Park trails); DENVER, COLO., COUNCIL BILL 2003-0263 (2003) (approving Amphitheatre concessions contract).

<sup>6</sup> DENVER MOUNTAIN PARKS, MASTER PLAN 83 (2008) [hereinafter MASTER PLAN].

<sup>7</sup> *Id.* at 84.

<sup>8</sup> Wheeler Red Rocks E-mail, *supra* note 3.

<sup>9</sup> MASTER PLAN, *supra* note 6, at 27.

<sup>10</sup> *Id.*

<sup>11</sup> Peyton Jeter, *Denver Office of Cultural Affairs and Division of Theatres and Arenas Officially Merge to Become Arts & Venues Denver*, DENVER PERFORMING ARTS COMPLEX (May 24, 2011), available at <http://www.artscomplex.com/tabs/tabid/134/default.aspx?id=96>.

affairs of the Amphitheatre.<sup>12</sup> The rest of the natural area of the Park is under the jurisdiction of Denver Mountain Parks.<sup>13</sup>

#### D | OWNERSHIP OF PROPERTY AND OPERATION OF FACILITIES

Colorado statute recognizes and affirms the City's power to acquire and operate parks and roads outside of the City's boundaries, and it further provides that the City "has full police power and jurisdiction and full municipal control and full power and authority in the management, control, improvement, and maintenance of and over any such lands so acquired . . ."<sup>14</sup> Denver Mountain Parks constructs and maintains most of the trails in the Park, except trails from the Matthew Winters Open Space, which are constructed under an Intergovernmental Agreement that allows Jefferson County to extend trails into the Park.<sup>15</sup>

Under its Charter, the City also has general authority to lease or sell property.<sup>16</sup> However, 80 of the Park's 868 acres were acquired from the U.S. Forest Service. Those 80 acres are subject to a "reverter" clause that requires, *inter alia*, that: (1) the City not sell or convey the land, (2) the land be used only for "public park purposes," and (3) the land revert to the United States if used for any other purpose.<sup>17</sup> In addition, the Park is a designated park under the City's Charter, which prohibits the sale of a designated park without a vote of the people of the City.<sup>18</sup>

As noted above, the City contracts out various operations at Red Rocks, such as vending, promotion, construction, and maintenance.<sup>19</sup> Under the Denver City Charter, the City Council must approve contracts worth \$500,000 or more.<sup>20</sup>

#### E | POWER TO CONDEMN PROPERTY

The City has the power of eminent domain.<sup>21</sup>

#### F | POWER TO LEVY TAXES (INCLUDING TABOR STATUS)

The City is a "district" subject to TABOR limitations. Therefore, any taxes imposed by the City are subject to voter approval. The City charges a ten percent Facility Development Admission Tax (or "Seat Tax") on ticket purchases for events at the Amphitheatre. The Seat Tax is allocated to a special revenue fund of Denver Parks for operation and maintenance of Red Rocks.<sup>22</sup> The City also has general taxing authority.<sup>23</sup>

#### G | POWER TO ISSUE TAX-EXEMPT BONDS

The City has the power to issue tax-exempt bonds. The City has used general obligation bond proceeds at Red Rocks.<sup>24</sup>

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<sup>12</sup> CITY AND COUNTY OF DENVER OFFICE OF THE AUDITOR, THEATRES AND ARENAS' MANAGEMENT AND OPERATIONS PERFORMANCE AUDIT 4 (2010) ("The Theatres and Arenas Division [now Arts and Venues Denver] manages and is responsible for the renovations, construction, maintenance, repair, management and operations for . . . Red Rocks Amphitheatre").

<sup>13</sup> See Wheeler Red Rocks E-mail, *supra* note 3.

<sup>14</sup> COLO. REV. STAT. § 31-25-216 (2013).

<sup>15</sup> See Wheeler Red Rocks E-mail, *supra* note 3.

<sup>16</sup> DENVER, COLO., CHARTER §§ 3.2.6(B) and (C) (2013) [hereinafter CHARTER].

<sup>17</sup> See MASTER PLAN, *supra* note 6, at c-3.

<sup>18</sup> CHARTER, *supra* note 16, at § 2.4.5.

<sup>19</sup> See, e.g., *supra* note 5.

<sup>20</sup> CHARTER, *supra* note 16, at § 3.2.6(E).

<sup>21</sup> See, e.g., *id.* at § 3.2.5.

<sup>22</sup> Wheeler Red Rocks E-mail, *supra* note 3.

<sup>23</sup> COLO. REV. STAT. § 31-15-302(1)(c).

<sup>24</sup> Telephone conversation with Karen Aviles, Assistant City Attorney (Aug. 28, 2013).

## H | OTHER REVENUE SOURCES

Red Rocks receives funding from a number of sources. Most of the funding for operation of Red Rocks comes from the Arts and Venues Denver Special Revenue Fund.<sup>25</sup> As noted above, a portion also comes from the Seat Tax on ticket purchases for events at the Amphitheatre.<sup>26</sup>

In addition, the City maintains the Preserve the Rocks fund.<sup>27</sup> This fund was established in 2002 for the purpose of preserving Red Rocks.<sup>28</sup> It holds private donations, contributions, project income, and other private receipts.<sup>29</sup> Finally, the City has received private and federal grants related to Red Rocks<sup>30</sup> and solicits private sponsorships.<sup>31</sup>

## I | SALES, USE, AND PROPERTY TAX-EXEMPT STATUS

The City does not pay property taxes on real and personal property it owns, nor does it pay sales or use taxes.<sup>32</sup>

# SPECIAL STATUTORY DISTRICTS - STATUTORY ENTITIES

The four entities described in this section were formed by or pursuant to special state legislation. Of these four statutory entities, one was formed solely to provide financial support to other organizations. The remaining entities are part taxing district and part operational organization; in addition to collecting tax revenues, these entities oversee construction or operations of large public facilities.

## 2. DENVER SCIENTIFIC AND CULTURAL FACILITIES DISTRICT

The Denver Scientific and Cultural Facilities District (“SCFD”) funds nonprofit cultural and scientific organizations in the Front Range with a sales tax levy on “all of the area within the boundaries of the counties of Adams, Arapahoe, Boulder, and Jefferson, all of the area within the boundaries of the city and county of Broomfield and the city and county of Denver, and all of the area within the county of Douglas; except that area within the boundaries of the town of Castle Rock and the area within the boundaries of the town of Larkspur.”<sup>33</sup> SCFD was created to support Denver’s “Big Four” city-supported cultural institutions — the Denver Art Museum, the Denver Zoological Gardens, the Museum of Natural History (now the Denver Museum of Nature

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<sup>25</sup> See CITY AND COUNTY OF DENVER, MAYOR’S 2013 BUDGET, VOL. II, 188 (2013) [hereinafter MAYOR’S 2013 BUDGET].

<sup>26</sup> Wheeler Red Rocks E-Mail, *supra* note 3.

<sup>27</sup> MAYOR’S 2013 BUDGET, VOL. I, *supra* note 25, at 128.

<sup>28</sup> See DENVER, COLO., ORD. 2002-0425 (2002) (establishing the Preserve the Rocks program).

<sup>29</sup> MAYOR’S 2013 BUDGET, VOL. I, *supra* note 25, at 128.

<sup>30</sup> See, e.g., DENVER, COLO., ORD. 2006-0782 (2006) (approving use of \$48,000 EPA grant to evaluate the waste stream at the Amphitheatre); DENVER, COLO., ORD. 1997-0658 (1997) (accepting a \$48,750 grant from the Colorado State Historical Society to restore the Red Rocks Trading Post Concession Building).

<sup>31</sup> See, e.g., DENVER, COLO., ORD. 2006-0448 (2006) (approving a three-year sponsorship agreement with Southwest Airlines).

<sup>32</sup> COLO. CONST., ART. X, § 4. See also MAYOR’S 2013 BUDGET, VOL. I, *supra* note 25, at 44 (showing \$0 spent on sales and property taxes for the City of Denver Arts and Venues Department). This reference guide only addresses whether or not the entity itself must pay sales and use taxes on its purchases or property tax. Many of these entities receive revenue from sales to third parties, which sales are subject to sales and use tax. Likewise, even if the entity itself does not pay property tax, lessees and other types of individuals and entities that use tax-exempt property may be subject to property tax on their possessory interest in the leased property. See *Mesa Verde Co. v. Montezuma Cnty. Bd. of Equalization*, 898 P.2d 1, 5 (Colo. 1995); COLO. REV. STAT. §§ 39-26-104 (authorizing sales tax) and 39-206-202(1)(a) (authorizing use tax). See also Wheeler Red Rocks E-mail, *supra* note 3.

<sup>33</sup> COLO. REV. STAT. § 32-13-104; SCIENTIFIC AND CULTURAL FACILITIES DISTRICT, 2011 ANNUAL REPORT 3 (2012) [hereinafter SCFD 2011 ANNUAL REPORT].

and Science), and the Denver Botanic Gardens — amidst City budget cuts in the 1980s.<sup>34</sup> Today, SCFD supports three “tiers” of institutions, with the Big Four (and one more) receiving the majority of funds. In 2012, SCFD distributed just over \$45 million.<sup>35</sup>

#### A | ORGANIZATIONAL FORM

SCFD is a special statutory district.<sup>36</sup>

#### B | METHOD OF ENTITY FORMATION

SCFD was created by referred measure.<sup>37</sup> Budget cuts in 1982 spurred the Big Four, which had been largely supported by the City, to push for another funding source.<sup>38</sup> After a failed attempt in 1986,<sup>39</sup> the bill creating SCFD (HB 1138) became law in 1987 and was referred to the voters for approval.<sup>40</sup> Voters in the taxing district approved the measure (Amendment 9) on November 9, 1988.<sup>41</sup>

#### C | QUALIFICATIONS OF GOVERNING BOARD AND PROCEDURES FOR BOARD APPOINTMENT

The SCFD board has 11 members: one appointed by each of the seven counties in the District and four appointed by the Governor of Colorado.<sup>42</sup> Board members serve three-year terms and are limited to two consecutive terms.<sup>43</sup>

#### D | OWNERSHIP OF PROPERTY AND OPERATION OF FACILITIES

SCFD’s sole purpose is to administer and distribute revenues derived from its special district sales tax. SCFD administers and distributes tax revenues which are collected on behalf of SCFD by the Regional Transportation District (“RTD”).<sup>44</sup> SCFD distributes funds among three tiers of recipients: Tier I receives roughly 65 percent of all SCFD funds; Tier II receives roughly twenty-two percent; and the remainder (minus 0.75 percent for SCFD administration<sup>45</sup>) goes to Tier III organizations.<sup>46</sup>

Tier I includes the Denver Art Museum, the Denver Botanic Gardens, the Denver Center for the Performing Arts, the Denver Museum of Nature and Science, and the Denver Zoological Gardens.<sup>47</sup> In 2011, Tier I organizations received a total of \$27 million from SCFD.<sup>48</sup>

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<sup>34</sup> DINAH ZEIGER, WESTERN STATES ART FEDERATION, *THE SCFD STORY: A HISTORY OF THE SCIENTIFIC AND CULTURAL FACILITIES DISTRICT 1* (2008) [hereinafter ZEIGER].

<sup>35</sup> SCIENTIFIC AND CULTURAL FACILITIES DISTRICT, 2012 ANNUAL REPORT 3 (2013) [hereinafter SCFD 2012 ANNUAL REPORT].

<sup>36</sup> COLO. REV. STAT. § 32-13-104; Arvada Center, *Understanding Scientific and Cultural Facilities District (SCFD)*, <http://arvada.org/pages/understanding-scfid> (last visited Aug. 7, 2014).

<sup>37</sup> See ZEIGER, *supra* note 34, at 12.

<sup>38</sup> For a full historical account, see ZEIGER, *supra* note 34, at 5-10. See also Jane Hansberry, *Denver’s Scientific and Cultural Facilities District: A Case Study in Regionalism*, GOV’T FIN. REV. 13 (Dec. 2000).

<sup>39</sup> ZEIGER, *supra* note 34, at 9.

<sup>40</sup> *Id.* at 11.

<sup>41</sup> *Id.* at 13-14.

<sup>42</sup> See SCIENTIFIC AND CULTURAL FACILITIES DISTRICT, AMENDED AND RESTATED BYLAWS Art. I, § 2 (June 24, 2010) [hereinafter SCFD BYLAWS]; Scientific & Cultural Facilities District, *Board of Directors*, <http://scfd.org/p/governance.html> (last visited Aug. 7, 2014); COLO. REV. STAT. § 32-13-106.

<sup>43</sup> SCFD BYLAWS, *supra* note 42 at Art. I, § 3; COLO. REV. STAT. § 32-13-106.

<sup>44</sup> SCFD BYLAWS, *supra* note 42, at Art. I, § 7(i); COLO. REV. STAT. §§ 32-13-106 and 32-13-107.

<sup>45</sup> SCFD 2012 ANNUAL REPORT, *supra* note 35, at 3.

<sup>46</sup> *Id.* at 6-8.

<sup>47</sup> COLO. REV. STAT. § 32-13-107(3)(a); SCFD 2011 ANNUAL REPORT, *supra* note 33, at 6.

<sup>48</sup> SCFD 2011 ANNUAL REPORT, *supra* note 33, at 6.

Tier II recipients must be: (1) nonprofit organizations or government agencies, (2) dedicated to art and science, (3) with principal offices in the SCFD district, (4) that perform the majority of their work in Colorado, (5) with annual operating incomes of more than \$250,000, (6) operating for at least five years, and (7) selected by SCFD for funding.<sup>49</sup> In 2011, Tier II included twenty-five organizations: for example, the Butterfly Pavilion & Insect Center, Colorado Mountain Club, eTown, and Opera Colorado.<sup>50</sup> That year, Tier II organizations received a total of roughly \$9 million in SCFD funding.<sup>51</sup>

Tier III recipients must be: (1) nonprofit organizations or government agencies, (2) dedicated to art and science, (3) with principal offices in the SCFD district, (4) that perform the majority of their work in Colorado, (5) operating for at least three years, and (6) selected by SCFD and its partners for funding.<sup>52</sup> In 2011, Tier III distributions consisted of 492 grants to 270 organizations.<sup>53</sup> That year, Tier III organizations received a total of roughly \$6 million in SCFD funds.<sup>54</sup> Tier III funds are distributed in coordination with SCFD County Cultural Councils.<sup>55</sup>

Over ninety-nine percent of the revenue collected by SCFD is distributed to eligible organizations.<sup>56</sup>

#### E | POWER TO CONDEMN PROPERTY

SCFD has no powers of eminent domain.<sup>57</sup>

#### F | POWER TO LEVY TAXES (INCLUDING TABOR STATUS)

For TABOR purposes, the SCFD is a “district” subject to TABOR. SCFD levies a one-tenth of one percent sales tax within the area of the district,<sup>58</sup> which includes all of Adams, Arapahoe, Boulder, Broomfield, Denver, and Jefferson Counties and all of Douglas County except for those areas within the boundaries of the towns of Castle Rock and Larkspur.<sup>59</sup> RTD collects SCFD’s sales tax revenues on behalf of SCFD.<sup>60</sup>

#### G | POWER TO ISSUE TAX-EXEMPT BONDS

SCFD cannot issue tax-exempt bonds.<sup>61</sup>

#### H | OTHER REVENUE SOURCES

SCFD receives revenue from small grants and private donations.<sup>62</sup>

#### I | SALES, USE, AND PROPERTY TAX-EXEMPT STATUS

SCFD does not pay property taxes on real and personal property it owns, nor does it pay sales or use taxes.<sup>63</sup>

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<sup>49</sup> COLO. REV. STAT. § 32-13-107(3)(b).

<sup>50</sup> For a full list, *see* SCFD 2011 ANNUAL REPORT, *supra* note 33, at 7.

<sup>51</sup> *Id.*

<sup>52</sup> COLO. REV. STAT. § 32-13-107(3)(c).

<sup>53</sup> SCFD 2011 ANNUAL REPORT, *supra* note 33, at 8.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 9.

<sup>56</sup> *Id.* at 3.

<sup>57</sup> *See* COLO. REV. STAT. §§ 38-1-201 (“it is necessary, appropriate, and in the best interests of the state to list in this part 2 all of the governmental entities, corporations, and persons that may exercise the power of eminent domain pursuant to provisions of state law”) and 38-1-202 (listing “governmental entities, corporations, and persons authorized to use eminent domain,” not listing SCFD).

<sup>58</sup> ZEIGER, *supra* note 34, at 7, 11. Pursuant to statutory requirements, the sales tax was approved by the registered electors within the geophysical boundaries of the district. COLO. REV. STAT. § 32-13-105(1)(c) and 32-13-105 (editor’s note).

<sup>59</sup> COLO. REV. STAT. § 32-13-104; SCFD 2011 ANNUAL REPORT, *supra* note 33, at 2 (listing counties).

<sup>60</sup> ZEIGER, *supra* note 34, at 14.

<sup>61</sup> *See generally* SCFD BYLAWS, *supra* note 42.

<sup>62</sup> SCFD 2011 ANNUAL REPORT, *supra* note 33, at 14-15 (showing \$7,000 in grants and \$1,820 in private donations).

### 3. DENVER METROPOLITAN MAJOR LEAGUE BASEBALL STADIUM DISTRICT

The Denver Metropolitan Major League Baseball Stadium District (“Baseball Stadium District” or “District”) is a special statutory district created in 1989 to “select and acquire a site for a major league baseball stadium and to finance, construct, and own the stadium upon the grant of a major league baseball franchise.”<sup>64</sup> The Baseball Stadium District exists in the footprint of the RTD taxing district,<sup>65</sup> and it originally covered part or all of the six counties in the Denver metropolitan area.<sup>66</sup> With the creation of Broomfield County,<sup>67</sup> the Baseball Stadium District now covers seven counties.<sup>68</sup> Coors Field, the product of the Baseball Stadium District’s efforts, opened for the 1995 baseball season.<sup>69</sup> The Baseball Stadium District still owns the stadium,<sup>70</sup> which it leases to the Colorado Rockies Baseball Club.<sup>71</sup>

#### A | ORGANIZATIONAL FORM

The Baseball Stadium District is “a body corporate and politic and a political subdivision of the state.”<sup>72</sup> The Colorado State Auditor has the right to audit the Baseball Stadium District.<sup>73</sup>

#### B | METHOD OF ENTITY FORMATION

The Baseball Stadium District was created in 1989 by an act of the Colorado General Assembly.<sup>74</sup> The Denver Metropolitan Major League Baseball Stadium Act (“Baseball Stadium Act”) empowered the newly created Baseball Stadium District Board to perform the key functions of planning, funding, building, and operating the baseball stadium. The Baseball Stadium Act also created the Colorado Baseball Commission, which is charged with promoting the sport of baseball in Colorado.<sup>75</sup>

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<sup>63</sup> See COLO. REV. STAT. §§ 39-3-105 (general property tax exemption for real and personal property owned by the state and/or its political subdivisions) and 39-26-704(1) (general sales and use tax exemption for the state and/or its political subdivisions acting in their governmental capacities).

<sup>64</sup> CITY AND COUNTY OF DENVER, COLO., 2001 DISCLOSURE STATEMENT 18 (2001) [hereinafter 2001 DISCLOSURE STATEMENT].

<sup>65</sup> COLO. REV. STAT. §§ 32-14-104(1)(a)-(b).

<sup>66</sup> Specifically, the City and County of Denver, Boulder County, Jefferson County, the western portions of Adams and Arapahoe Counties, and the northeastern and Highlands Ranch areas of Douglas County were within the district. *Id.* As a result of the creation of the City and County of Broomfield, the District now covers the City and County of Denver, Boulder County, Jefferson County, most of the City and County of Broomfield, and the urbanized portions of Adams, Arapahoe, and Douglas Counties, but its footprint has not changed. CITY AND COUNTY OF DENVER, COLO., 2012 DISCLOSURE STATEMENT 26 (2012) [hereinafter 2012 DISCLOSURE STATEMENT].

<sup>67</sup> Broomfield became a Colorado County in 2001. See COLO. CONST. Art. XX, §§ 10-12.

<sup>68</sup> Denver Metropolitan Major League Baseball Stadium District, *About the Denver Metropolitan Major League Baseball Stadium District*, <http://www.dmmlbsd.com/About-Us.html> (last visited Aug. 7, 2014) [hereinafter *About the Baseball Stadium District*].

<sup>69</sup> *Lewis v. Colorado Rockies Baseball Club, Ltd.*, 941 P.2d 266, 269 (Colo. 1997). The Rockies franchise began regular season games in 1993, playing its first two years at Mile High Stadium. See MLB, *Rockies Timeline*, <http://colorado.rockies.mlb.com/col/history/timeline2.jsp> (last visited Aug. 7, 2014).

<sup>70</sup> See COLO. REV. STAT. § 32-14-133 (editor’s note).

<sup>71</sup> *Lewis*, 941 P.2d at 269; see also Formal Opinion of Gale A. Norton, Colorado Attorney General, 92-01 AG Alpha No. LE HR AGASW (Jan. 31, 1992) (discussing the enforceability of the baseball stadium lease).

<sup>72</sup> COLO. REV. STAT. § 32-14-104; see also *Lewis*, 941 P.2d at 269 (quoting the same language).

<sup>73</sup> COLO. REV. STAT. § 32-14-109(2).

<sup>74</sup> Denver Metro. Major League Stadium Act, H.B. 1341, 57th Gen. Assembly, 1st Reg. Sess. (Colo. 1989), amended by H.B. 90-1172, 57th Gen. Assembly, 2d Sess. (Colo. 1990) (codified at COLO. REV. STAT. § 32-14-101 *et seq.*); COLO. REV. STAT. § 32-14-104.

<sup>75</sup> See COLO. REV. STAT. §§ 32-14-131 and 32-14-132.

## C | QUALIFICATIONS OF GOVERNING BOARD AND PROCEDURES FOR BOARD APPOINTMENT

The Baseball Stadium District’s board of directors consists of seven directors;<sup>76</sup> none may be an elected official.<sup>77</sup> Directors must have “expertise in . . . areas which are relevant to the performance of the powers of the board[.]”<sup>78</sup> and must reside in the Baseball Stadium District.<sup>79</sup>

Directors are appointed by the Governor with the consent of the Senate.<sup>80</sup> They serve four-year terms.<sup>81</sup> Directors may be removed at the pleasure of the Governor.<sup>82</sup>

## D | OWNERSHIP OF PROPERTY AND OPERATION OF FACILITIES

The Board possesses (and has used) the powers needed to take the stadium project from planning to completion. Many of those powers are specific to the completion of the stadium, including, *inter alia*: (1) evaluating<sup>83</sup> and (2) selecting a stadium site,<sup>84</sup> (3) zoning a site with the local governments,<sup>85</sup> (4) acquiring a site,<sup>86</sup> (5) contracting for the construction of the stadium,<sup>87</sup> (6) securing a management agreement for the stadium,<sup>88</sup> (7) leasing the stadium to a baseball franchise,<sup>89</sup> (8) insuring the property,<sup>90</sup> and (9) charging for stadium use.<sup>91</sup> Other powers are more general, including: (1) power to enter into contracts,<sup>92</sup> (2) power to deal in real and personal property,<sup>93</sup> and (3) power to administer and invest money.<sup>94</sup> Operating revenues generated from the District are to be used for enumerated purposes involving the stadium and its financing.<sup>95</sup> The Baseball Stadium District still owns the stadium,<sup>96</sup> which it leases to the Colorado Rockies Baseball Club.<sup>97</sup>

## E | POWER TO CONDEMN PROPERTY

The Baseball Stadium District Board briefly enjoyed narrow power of eminent domain. That power could only be used to acquire real property within a small geographic area of lower downtown Denver for a stadium site; only if the property acquired was not sold or leased, except in conjunction with the entire stadium as part

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<sup>76</sup> *Id.* at § 32-14-106(1).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at § 32-14-106(3).

<sup>79</sup> *Id.* at § 32-14-106(4).

<sup>80</sup> *Id.* at § 32-14-106(2).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at § 32-14-106(5).

<sup>83</sup> *Id.* at §§ 32-14-107(1)(j)-(k).

<sup>84</sup> *Id.* at §§ 32-14-107(1)(l) and 32-14-111 (selection criteria).

<sup>85</sup> *Id.* at § 32-14-107(1)(p).

<sup>86</sup> *Id.* at § 32-14-107(1)(m).

<sup>87</sup> *Id.* at § 32-14-107(1)(g).

<sup>88</sup> *Id.* at § 32-14-125.

<sup>89</sup> *Id.* at §§ 32-14-107(1)(h) and 32-14-126.

<sup>90</sup> *Id.* at §§ 32-14-107(1)(s)-(t).

<sup>91</sup> *Id.* at § 32-14-107(1)(w).

<sup>92</sup> *Id.* at § 32-14-107(1)(h).

<sup>93</sup> *Id.* at § 32-14-107(1)(v).

<sup>94</sup> *Id.* at §§ 32-14-107(1)(y), (z), (bb).

<sup>95</sup> *Id.* at § 32-14-116.

<sup>96</sup> *See id.* at § 32-14-133 (editor’s note).

<sup>97</sup> *See Lewis v. Colorado Rockies Baseball Club, Ltd.*, 941 P.2d 266 (Colo. 1997).

of a Major League Baseball franchise agreement; and only before April 30, 1995.<sup>98</sup> The Baseball Stadium District Board is no longer authorized to use eminent domain.<sup>99</sup>

## F | POWER TO LEVY TAXES (INCLUDING TABOR STATUS)

For TABOR purposes, the Baseball Stadium District is a “district” subject to TABOR.<sup>100</sup> The Baseball Stadium Act authorized the Baseball Stadium District Board to seek approval of the registered electors within the geographical boundaries of the Baseball Stadium District for a sales tax to fund the stadium.<sup>101</sup> If approved, that tax was only to be levied for the period of time needed to generate sufficient project funds, and could not last more than twenty years.<sup>102</sup> The stadium sales tax was to be levied on the same goods as the state sales tax, with a handful of exceptions.<sup>103</sup> Revenues from the sales tax were to be used only for various enumerated purposes involving the stadium.<sup>104</sup> Once the stadium was paid off, revenues from the sales tax, which were “in the sole discretion of the board, deemed not to be necessary for the anticipated expenses and reserves of the district,” were to be credited to local governments within the Baseball Stadium District.<sup>105</sup>

The Board submitted and voters approved a sales tax levy of one-tenth of one percent on August 14, 1990.<sup>106</sup> The levy took effect on August 1, 1991; it was discontinued on January 1, 2001.<sup>107</sup> Having discontinued the sales tax, the Baseball Stadium District may not renew its taxing authority.<sup>108</sup>

## G | POWER TO ISSUE TAX-EXEMPT BONDS

For tax-exempt bonding purposes, the Baseball Stadium District is a political subdivision and, as noted above, a “district” subject to TABOR. The Baseball Stadium District Board had the power to issue special obligation bonds, secured by anticipated sales-tax and stadium-operation revenues, in order to fund the Baseball Stadium.<sup>109</sup> It could not use proceeds from those bonds until a baseball franchise was located within the Baseball Stadium District.<sup>110</sup> The Baseball Stadium District was allowed to use sales tax revenues to secure those bonds.<sup>111</sup>

The Baseball Stadium District issued a series of sales tax revenue bonds.<sup>112</sup> Those bonds were tax exempt.<sup>113</sup> The Baseball Stadium District repaid the bonds in 2000 and began returning sales tax revenues to constituent counties.<sup>114</sup> The sales tax supporting the revenue stream was retired in 2001.<sup>115</sup>

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<sup>98</sup> See COLO. REV. STAT. § 32-14-107(m).

<sup>99</sup> *Id.* at §§ 38-1-201 (“it is necessary, appropriate, and in the best interests of the state to list in this part 2 all of the governmental entities, corporations, and persons that may exercise the power of eminent domain pursuant to provisions of state law”) and 38-1-202 (listing “governmental entities, corporations, and persons authorized to use eminent domain” and not listing the Stadium District).

<sup>100</sup> However, because the Baseball Stadium District does not receive tax revenues for any purpose at this point, it probably now would be considered an “enterprise” for TABOR purposes.

<sup>101</sup> COLO. REV. STAT. §§ 32-14-104; 32-14-105; 32-14-114.

<sup>102</sup> *Id.* at § 32-14-113.

<sup>103</sup> For a full list of exceptions, *see id.* at § 32-14-114(1).

<sup>104</sup> For a full list of authorized uses, *see id.* at § 32-14-115.

<sup>105</sup> *Id.* at § 32-14-126.5.

<sup>106</sup> *Id.* at § 32-14-105 (editor’s note); Formal Opinion of Duane Woodward, Colorado Attorney General, No. 90-12 AG Alpha No. EX AD AGARV (Oct. 29, 1990) at 2.

<sup>107</sup> *About the Baseball Stadium District*, *supra* note 68.

<sup>108</sup> COLO. REV. STAT. § 32-14-114(4).

<sup>109</sup> *Id.* at §§ 32-14-117(1) and 32-14-118.

<sup>110</sup> *Id.* at § 32-14-117(1).

<sup>111</sup> *Id.* at § 32-14-107(x).

<sup>112</sup> *See* Amended and Restated Lease and Management Agreement by and between Denver Metropolitan Major League Baseball Stadium District and Colorado Rockies Baseball Club, Ltd. 1-2 (Mar. 30, 1995) (noting that the Baseball Stadium District issued two series of sales tax revenue bonds: Series 1991A and Series 1994).



## H | OTHER REVENUE SOURCES

The Baseball Stadium District receives revenue and financing from a number of sources. Under the Baseball Stadium Act, the Baseball Stadium District Board was subject to a non-mandatory target of 50 percent funding from sources other than sales tax.<sup>116</sup> Those revenues could include, but were not limited to: (1) private donations, (2) operating revenues, and (3) proceeds from privatization.<sup>117</sup> Operating revenues generated from the Baseball Stadium District must be used for enumerated purposes involving the stadium and its financing.<sup>118</sup>

## I | SALES, USE, AND PROPERTY TAX-EXEMPT STATUS

The Baseball Stadium District does not pay property taxes on real and personal property it owns, nor does it pay sales or use taxes.<sup>119</sup> Construction materials used to build the stadium were exempted from state sales and use tax.<sup>120</sup>

# 4. DENVER METROPOLITAN FOOTBALL STADIUM DISTRICT

The Denver Metropolitan Football Stadium District (“Football Stadium District”) planned, funded, constructed, and owns what is now called Sports Authority Field at Mile High. The Football Stadium District is a near-replica of the Baseball Stadium District. Created seven years after the Baseball Stadium District and one year after successful construction of Coors Field, the Football Stadium covers the same footprint as the RTD taxing district, and it originally covered part or all of the six counties in the Denver metropolitan area.<sup>121</sup> Like the Baseball Stadium District, the Football Stadium District used its sales-tax revenues to fund a new stadium. The Denver Broncos began playing at the new stadium in 2001.<sup>122</sup>

## A | ORGANIZATIONAL FORM

The Football Stadium District is “a body corporate and politic and a political subdivision of the state.”<sup>123</sup> The Colorado State Auditor has the right to audit the District.<sup>124</sup>

## B | METHOD OF ENTITY FORMATION

The Football Stadium District was created in 1996 by an act of the Colorado General Assembly.<sup>125</sup> The Metropolitan Football Stadium District Act (“Football Stadium Act”) empowered the newly created Football

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<sup>113</sup> See, e.g., Official Statement, \$90,390,000 Denver Metropolitan Major League Baseball Stadium District Sales Tax Refunding Revenue Bonds Series 1994 37 (1994).

<sup>114</sup> 2001 DISCLOSURE STATEMENT, *supra* note 64, at 18.

<sup>115</sup> See *About the Baseball Stadium District*, *supra* note 68.

<sup>116</sup> COLO. REV. STAT. § 32-14-113.

<sup>117</sup> *Id.* (establishing the fifty-percent target) and *id.* at § 32-14-110(b) (listing ideas for privatization: e.g. sales (or leases) of seats, suites, parking, concession, advertising, etc.).

<sup>118</sup> *Id.* at § 32-14-116.

<sup>119</sup> See *id.* at §§ 39-3-105 (general property tax exemption for real and personal property owned by the state and/or its political subdivisions) and 39-26-704(1) (general sales and use tax exemption for the state and/or its political subdivisions acting in their governmental capacities).

<sup>120</sup> *Id.* at § 39-26-708 (exempting from sales and use tax “all sales of construction and building materials to contractors and subcontractors for use in the building, erection, alteration, or repair of structures, highways, roads, streets, and other public works owned and used by . . . the United States Government, the state of Colorado, its departments and institutions, and the political subdivisions thereof in their governmental capacities only”).

<sup>121</sup> *Id.* at § 32-15-104. In addition to the footprint of the RTD taxing district, the Football Stadium District includes portions of the City of Lone Tree and portions of unincorporated Douglas County. *Id.*

<sup>122</sup> CITY AND COUNTY OF DENVER, COLO., 2006 DISCLOSURE STATEMENT 19 (2006).

<sup>123</sup> COLO. REV. STAT. § 32-15-104.

<sup>124</sup> *Id.* at § 32-15-109.

<sup>125</sup> H.B. 96-1374, 61st Gen. Assembly, 1st Sess. (1996) (codified at COLO. REV. STAT. § 32-15-101 *et seq.*).

Stadium District Board to decide whether to build a new stadium, to acquire a site for a football stadium, to finance and construct that stadium, and to own it and arrange for its operation.<sup>126</sup> It also created the Football Stadium Site Selection Commission, charged with selecting a stadium site.<sup>127</sup>

#### C | QUALIFICATIONS OF GOVERNING BOARD AND PROCEDURES FOR BOARD APPOINTMENT

The Football Stadium District Board has nine directors. Six are appointed by each of the Football Stadium District's constituent counties (at the time of formation).<sup>128</sup> Two are appointed by the Governor.<sup>129</sup> One sits *ex officio* as chairperson of the Baseball Stadium District Board.<sup>130</sup> All county-appointed directors must reside within the District.<sup>131</sup> All must have "expertise in one or more areas that are relevant to the performance of the powers and duties of the board."<sup>132</sup>

#### D | OWNERSHIP OF PROPERTY AND OPERATION OF FACILITIES

The Football Stadium District possesses (and has used) the powers needed to take the proposed stadium project from planning to operation,<sup>133</sup> including power to: (1) decide whether or not to pursue the project,<sup>134</sup> (2) evaluate a site,<sup>135</sup> (3) acquire and zone an appropriate site,<sup>136</sup> (4) plan and construct the new stadium and related transit,<sup>137</sup> (5) consider a retractable roof,<sup>138</sup> (6) insure the project,<sup>139</sup> (7) enter into a stadium management agreement,<sup>140</sup> (8) impose fees on stadium operation,<sup>141</sup> (9) lease or sell the stadium and related property,<sup>142</sup> and (10) consider privatization.<sup>143</sup> The Football Stadium District also enjoys more general powers, including power to deal in real and personal property<sup>144</sup> and invest and administer funds.<sup>145</sup> Operating revenues must be applied back to the stadium.<sup>146</sup>

Having successfully completed construction, the Football Stadium District leases substantially the entire stadium to the Denver Broncos' property management entity. The Denver Broncos are the primary tenant and enjoy all game-day revenue from ticket and merchandise sales, concessions, parking, game-time advertising

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<sup>126</sup> 2012 DISCLOSURE STATEMENT, *supra* note 66, at 26.

<sup>127</sup> See COLO. REV. STAT. §§ 32-15-128 (site selection board membership), 32-15-129 (powers and duties), 32-15-130 (conflicts of interest), and 32-15-131 (stadium site selection criteria).

<sup>128</sup> There is one director from Adams County, one from Arapahoe County, one from Boulder County, one from Douglas County, one from Jefferson County, and one from the City and County of Denver. *Id.* at § 32-15-105(1)(a). The statute has not been updated to add a representative from the City and County of Broomfield.

<sup>129</sup> *Id.* at § 32-15-105(1)(b).

<sup>130</sup> *Id.* at § 32-15-105(1)(c).

<sup>131</sup> *Id.* at § 32-15-105(3).

<sup>132</sup> *Id.* at § 32-15-105(4).

<sup>133</sup> See generally *id.* at § 32-15-106.

<sup>134</sup> *Id.* at §§ 32-15-106(1)(a), (f), and (2)(e).

<sup>135</sup> The Football Stadium Site Selection Commission performed this evaluation.

<sup>136</sup> COLO. REV. STAT. §§ 32-15-105(2)(f)-(g).

<sup>137</sup> *Id.* at §§ 32-15-105(1)(g) and (2)(b).

<sup>138</sup> *Id.* at § 32-15-106(7). There was and continues to be controversy on this point. See, e.g., Electra Draper, *Would a Retractable Lid Boost Denver's Bid for a Super Bowl?*, DENVER POST (Dec. 24, 2012).

<sup>139</sup> COLO. REV. STAT. § 32-15-106(2)(j).

<sup>140</sup> *Id.* at § 32-15-121.

<sup>141</sup> *Id.* at § 32-15-106(2)(m).

<sup>142</sup> *Id.* at §§ 32-15-106(2)(d), 32-15-106(3), and 32-15-122.

<sup>143</sup> *Id.* at § 32-15-106(6)(a).

<sup>144</sup> *Id.* at § 32-15-106(2)(l).

<sup>145</sup> *Id.* at §§ 32-15-106(2)(o), (p), and (r).

<sup>146</sup> *Id.* at § 32-15-112.

inside the stadium, and a large portion of box-seat revenues.<sup>147</sup> The Denver Broncos also sublease to other tenants. Certain revenue sharing arrangements apply with respect to non-game day events.<sup>148</sup>

The Football Stadium District also licenses the naming rights of the stadium. In 2001, Invesco Funds Group, Inc., signed a twenty-year, \$60 million lease for the stadium's naming rights.<sup>149</sup> In 2011, Sports Authority, Inc., assumed the remaining nine years of Invesco's naming rights for approximately \$36 million.<sup>150</sup>

#### E | POWER TO CONDEMN PROPERTY

Unlike the Baseball Stadium District, the Football Stadium District has never had the power of eminent domain.<sup>151</sup>

#### F | POWER TO LEVY TAXES (INCLUDING TABOR STATUS)

For TABOR purposes, the Football Stadium District is a "district" subject to TABOR.<sup>152</sup> Although the Football Stadium District had the power to levy a sales tax and an admission tax,<sup>153</sup> it only used the sales tax. Pursuant to the requirements of TABOR, the Football Stadium Act authorized the Football Stadium District Board to seek the approval of the registered electors within the geographical boundaries of the Football Stadium District to replace the baseball stadium sales tax with a football stadium sales tax.<sup>154</sup> On November 3, 1998, voters approved the replacement.<sup>155</sup> The transition was seamless: the football sales tax took effect January 1, 2001 (the day the baseball tax ended).<sup>156</sup>

The Football Stadium Act imposed additional limitations on the sales tax levy; the football stadium sales tax could last only as long as needed to finance the stadium, and it was required to expire before 2012.<sup>157</sup> Furthermore, the tax could only be used to fund the planning, construction, and financing of the stadium.<sup>158</sup> The tax expired on December 31, 2011.<sup>159</sup>

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<sup>147</sup> The Broncos' lease runs for thirty years. Paula Moore, *After Years in the Making, It's Kickoff Time!*, DENVER BUS. J. \*3 (Aug. 26, 2001) available at <http://www.bizjournals.com/denver/stories/2001/08/27/focus1.html?page=all>.

<sup>148</sup> See Lease and Management Agreement by and between Metropolitan Football Stadium District and PDB Sports, Ltd. and Stadium Management Company, LLC (Sept. 3, 1998).

<sup>149</sup> Paula Moore, *A Controversial Deal in 2001: Invesco Buys Naming Rights*, DENVER BUS. J. (Mar. 3, 2002) available at <http://www.bizjournals.com/denver/stories/2002/03/04/focus10.html?page=all>.

<sup>150</sup> Jeffrey Wolf, *No More INVESCO: Sports Authority Field at Mile High*, 9NEWS (Aug 16, 2011) available at <http://www.9news.com/news/article/213839/71/Deal-OKd-to-change-name-of-INVESCO-field-to-Sports-Authority-Field-at-Mile-High>. This package included a larger package of rights licensed to the Denver Broncos.

<sup>151</sup> See COLO. REV. STAT. § 32-15-101 *et seq.*; see also *id.* at §§ 38-1-201 ("it is necessary, appropriate, and in the best interests of the state to list in this part 2 all of the governmental entities, corporations, and persons that may exercise the power of eminent domain pursuant to provisions of state law") and 38-1-202 (listing "governmental entities, corporations, and persons authorized to use eminent domain" and not listing the Stadium District).

<sup>152</sup> See *id.* at § 32-15-107 (mandating TABOR procedures that the District must follow). The District has received voter approval to exceed the spending limitations of TABOR by ballot measure, however. See *id.* (editor's note) (noting that the creation of the District and the concomitant sales tax increase were approved by the voters at the general election held November 3, 1998).

<sup>153</sup> See *id.* at §§ 32-15-107 and 32-15-110.5. The admissions tax was to be used if debt-service coverage fell below a certain level. Moore, *supra* note 149, at \*4.

<sup>154</sup> COLO. REV. STAT. § 32-15-107(1)(a).

<sup>155</sup> *Id.* at § 32-15-107 (editor's note).

<sup>156</sup> Colorado Department of Revenue Division of Taxation, *Football Stadium District Sales Tax Expires Dec. 31*, <http://www.colorado.gov/cs/Satellite/Revenue/REVMX/1251610080214> (last visited Aug. 7, 2014).

<sup>157</sup> COLO. REV. STAT. §§ 32-15-110(5)-(6).

<sup>158</sup> *Id.* at § 32-15-111.

<sup>159</sup> *Id.*

## G | POWER TO ISSUE TAX-EXEMPT BONDS

For tax-exempt bonding purposes, the Football Stadium District is a political subdivision and, as noted above, a “district” subject to TABOR. The Football Stadium District was authorized to issue tax-exempt bonds to pay for the stadium.<sup>160</sup> Those bonds could be secured by sales tax and operations revenues.<sup>161</sup> They were not to be secured by a pledge of Football Stadium District property.<sup>162</sup> In the summer of 2000, the Football Stadium District issued \$245 million in sales tax revenue bonds.<sup>163</sup> In 2002, the Football Stadium District issued an additional \$15 million in revenue bonds, hitting the \$260 million maximum authorized by statute.<sup>164</sup> The Football Stadium District completed paying off all bonds on January 1, 2012.<sup>165</sup>

## H | OTHER REVENUE SOURCES

The Football Stadium District has received revenue and financing from a number of sources. The Football Stadium District could “accept from any source aid or contributions of money, property, labor, or other things” toward its purpose.<sup>166</sup> In practice, the Football Stadium District’s private funding for stadium construction came from the Denver Broncos franchise, which was required to cover twenty-five percent of construction costs, including cost overruns.<sup>167</sup> In the end, the stadium cost \$395.5 million, of which the Denver Broncos franchise contributed \$158 million.<sup>168</sup> Currently, the Football Stadium District generates revenues from lease and revenue sharing arrangements and from licensing, as discussed above.

## I | SALES, USE, AND PROPERTY TAX-EXEMPT STATUS

The Football Stadium District does not pay property taxes on real and personal property it owns, nor does it pay sales or use taxes.<sup>169</sup> Construction materials used to build the stadium were exempted from state sales and use tax.<sup>170</sup>

# 5. UNIVERSITY OF COLORADO HOSPITAL AUTHORITY

The University of Colorado Hospital (“UCH”) was founded in 1921 by an act of the Colorado General Assembly.<sup>171</sup> Originally, UCH was a part of the University of Colorado, governed by the University of Colorado Board of Regents (“Regents”). In 1989, the General Assembly privatized the hospital by transferring its assets and operations to a private nonprofit corporation.<sup>172</sup> Soon thereafter, the Colorado Supreme Court struck down the privatization and ruled that the resulting private nonprofit corporation was in effect a public entity.<sup>173</sup> The Court reasoned that, because the new nonprofit was still a public entity, the reorganization constituted an illegal

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<sup>160</sup> *Id.* at § 32-15-113(1).

<sup>161</sup> *Id.* at § 32-15-114.

<sup>162</sup> *Id.* at § 32-15-117.

<sup>163</sup> 2001 DISCLOSURE STATEMENT, *supra* note 64, at 19.

<sup>164</sup> CITY AND COUNTY OF DENVER, COLO., 2003 DISCLOSURE STATEMENT 23 (2003).

<sup>165</sup> 2012 DISCLOSURE STATEMENT, *supra* note 66, at 26.

<sup>166</sup> COLO. REV. STAT. § 32-15-106(1)(p).

<sup>167</sup> Moore, *supra* note 147, at \*3; COLO. REV. STAT. § 32-15-106(1)(c).

<sup>168</sup> The Broncos received \$43 million from the National Football League. Moore, *supra* note 147, at \*4.

<sup>169</sup> *See* COLO. REV. STAT. §§ 39-3-105 (general property tax exemption for real and personal property owned by the state and/or its political subdivisions) and 39-26-704(1) (general sales and use tax exemption for the state and/or its political subdivisions acting in their governmental capacities).

<sup>170</sup> *See id.* at § 39-26-708.

<sup>171</sup> University of Colorado Hospital, *University of Colorado Hospital History and Timeline*, [www.uch.edu/about/organization/history/](http://www.uch.edu/about/organization/history/) (last visited Aug. 7, 2014) [hereinafter *UCH History and Timeline*].

<sup>172</sup> *See* H.B. 1143, 57th Gen. Assembly, 1st Reg. Sess. (Colo. 1989) *passed without Governor’s signature, invalidated by* Colo. Ass’n. of Pub. Emp. v. Bd. of Regents of the Univ. of Colo., 804 P.2d 138, 147 (Colo. 1990).

<sup>173</sup> *See* Colo. Ass’n. of Pub. Emp., 804 P.2d at 142.

termination of public employees under the Colorado State Civil Service Amendment and an illegal authorization of public indebtedness under Article XI of the Colorado Constitution.<sup>174</sup>

In response, in 1991, the Colorado General Assembly created the University of Colorado Hospital Authority (“UCHA”).<sup>175</sup> Unlike the failed nonprofit, UCHA is a body corporate and a political subdivision of the state of Colorado.<sup>176</sup> The mission of UCHA is “the operation of [UCH] as a state of the art teaching and research hospital providing comprehensive medical care.”<sup>177</sup> UCHA received all assets and operating obligations of UCH, which include the Anschutz Medical Center and subsidiary medical facilities, five outlying outpatient primary care clinics, seven outlying specialty clinics, and the University of Colorado Hospital Foundation (“UCHF”) — all of which UCHA owns and operates to this day.<sup>178</sup>

#### A | ORGANIZATIONAL FORM

UCHA is a “body corporate and a political subdivision” of the state of Colorado.<sup>179</sup> Those “are well established terms that denote entities such as counties and municipalities that are not arms of the state.”<sup>180</sup> Specifically, UCHA is “not . . . an agency of state government, and . . . [is] not subject to administrative direction or control by the regents or by any department, commission, board, bureau, or agency of the state.”<sup>181</sup> Nor is UCHA financially accountable to the Regents.<sup>182</sup> Instead, UCHA is a “quasi-governmental and corporate entity” with separate assets, liabilities, and legal personality.<sup>183</sup>

#### B | METHOD OF ENTITY FORMATION

UCHA was created by an act of the Colorado General Assembly.<sup>184</sup>

#### C | QUALIFICATIONS OF GOVERNING BOARD AND PROCEDURES FOR BOARD APPOINTMENT

UCHA is governed by an eleven-member board of directors.<sup>185</sup> Directors are appointed by the Regents.<sup>186</sup> The board must include a director from each of Colorado’s seven congressional districts and not more than four employees of the University of Colorado or UCHA.<sup>187</sup> One director must reside west of the Continental Divide.<sup>188</sup> The appointment of directors from Colorado congressional districts is subject to the advice and consent of the state Senate.<sup>189</sup> Directors are limited to two terms.<sup>190</sup>

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<sup>174</sup> *Id.* at 146–47.

<sup>175</sup> See S.B. 91-225, 58th Gen. Assembly, 1st Reg. Sess. (Colo. 1991) (codified at COLO. REV. STAT. § 23-21-501 *et seq.*).

<sup>176</sup> COLO. REV. STAT. § 23-21-503(1).

<sup>177</sup> *Id.* at § 23-21-504.

<sup>178</sup> *Id.* at § 23-21-501(1)(f). For a full list of UCHA operations, see also UNIV. OF COLO. HOSP. AUTH., BASIC FINANCIAL STATEMENTS FOR THE YEARS ENDED JUNE 30, 2013 AND 2012 18 (2013) (listing UCHA operations) [hereinafter UCHA 2013 FINANCIALS].

<sup>179</sup> COLO. REV. STAT. § 23-21-503(1).

<sup>180</sup> *Simon v. State Comp. Ins. Auth.*, 946 P.2d 1298, 1308 (Colo. 1997).

<sup>181</sup> COLO. REV. STAT. § 23-21-503(1).

<sup>182</sup> UCHA 2013 FINANCIALS, *supra* note 178, at 18.

<sup>183</sup> COLO. REV. STAT. § 23-1-501(3). By contract, UCHA must assume responsibility for, defend, indemnify, and hold harmless the Regents and the state with respect to: (1) all UCH contractual liabilities, (2) employment claims, (3) tort liability, and other liabilities. *Id.* at § 23-21-505(2).

<sup>184</sup> See *UCH History and Timeline*, *supra* note 171.

<sup>185</sup> COLO. REV. STAT. § 23-21-503(2).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at § 23-21-503(3).

Although the state of Colorado has pledged by statute not to impair UCHA bonds,<sup>191</sup> it reserves “plenary legislative authority relating to [UCHA].”<sup>192</sup> UCHA is not an agency of state government and is not subject to administrative direction or control by the Regents or any department, commission, board, bureau, or agency of the state.<sup>193</sup>

#### D | OWNERSHIP OF PROPERTY AND OPERATION OF FACILITIES

UCHA has “the duties, privileges, immunities, rights, liabilities, and disabilities of a body corporate and political subdivision of the state.”<sup>194</sup> These include, *inter alia*: (1) power to sue and be sued, (2) power to enter into contracts, (3) power to borrow money and issue bonds, (4) power to deal in personal and real property, and (5) power to receive federal aid.<sup>195</sup> All business activities of UCHA must be primarily in furtherance of its mission.<sup>196</sup>

#### E | POWER TO CONDEMN PROPERTY

UCHA is not authorized to condemn property using eminent domain.<sup>197</sup>

#### F | POWER TO LEVY TAXES (INCLUDING TABOR STATUS)

For TABOR purposes, UCHA currently considers itself an enterprise.<sup>198</sup> UCHA may levy a sales tax, but it has never done so.<sup>199</sup> To do so, UCHA must hold a TABOR election among eligible electors in its taxing areas.<sup>200</sup> UCHA’s taxing area includes “the counties of Adams, Arapahoe, Boulder, Douglas, and Jefferson, and the city and county of Broomfield.”<sup>201</sup> If approved, revenues from that sales tax may be used for any purpose permitted by law.<sup>202</sup>

#### G | POWER TO ISSUE TAX-EXEMPT BONDS

For tax-exempt bonding purposes, UCHA is a political subdivision — it is specifically authorized by legislative act to issue tax-exempt bonds.<sup>203</sup> These bonds may be general obligation bonds, bonds secured by UCHA revenues, or bonds secured by UCHA assets.<sup>204</sup> UCHA may have outstanding no more than \$60 million in non-revenue bonds at any one time.<sup>205</sup> Interest on UCHA bonds is exempt from any state or

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<sup>191</sup> *Id.* at § 23-21-523.

<sup>192</sup> *Id.* at § 23-21-527.

<sup>193</sup> *Id.* at § 23-21-503(1).

<sup>194</sup> *Id.* at § 23-21-513.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at § 23-21-504(5).

<sup>197</sup> *See id.* at §§ 38-1-201 (“it is necessary, appropriate, and in the best interests of the state to list in this part 2 all of the governmental entities, corporations, and persons that may exercise the power of eminent domain pursuant to provisions of state law”) and 38-1-202 (listing “governmental entities, corporations, and persons authorized to use eminent domain” and not listing UCHA).

<sup>198</sup> *See, e.g.*, Prospectus, \$51,795,000 University of Colorado Hospital Authority Refunding Revenue Bonds Series 2009A 35 (“The Authority believes that it currently constitutes an ‘enterprise’ for purposes of, and therefore is not a ‘district’ and is not subject to, TABOR”).

<sup>199</sup> The Taxing Authority of Unit of Government Hospital Care Providers provisions of the Colorado Revised Code grant UCHA the authority to ask affected voters for a sales tax. COLO. REV. STAT. §§ 25-42-103 (“Grant of taxing authority”) and 25-42-102(4)(d) (listing UCHA as an eligible “unit of government hospital care provider”). The UCHA’s taxing authority is inconsistent with its self-identified status as an enterprise for purposes of TABOR.

<sup>200</sup> *Id.* at § 25-42-103(a).

<sup>201</sup> *Id.* at § 25-42-102(3)(d).

<sup>202</sup> *Id.* at § 25-42-104.

<sup>203</sup> *Id.* at § 23-21-514.

<sup>204</sup> *Id.* at § 23-21-514(1)(d).

<sup>205</sup> *Id.* at § 23-21-514(9).

local taxes in Colorado.<sup>206</sup> Interest may or may not be exempt from federal taxation.<sup>207</sup> Neither the state of Colorado nor the Regents are liable for UCHA bonds.<sup>208</sup> As of 2013, UCHA had approximately \$1 billion in outstanding revenue bonds.<sup>209</sup>

## H | OTHER REVENUE SOURCES

UCHA receives revenue and financing from a number of sources. UCHA can and does invest funds in property or securities.<sup>210</sup> UCHA also operates the UCHF. UCHF is a 501(c)(3) tax-exempt<sup>211</sup> Colorado nonprofit corporation,<sup>212</sup> which is controlled by UCHA.<sup>213</sup> UCHF's sole purpose is to support UCHA's "charitable, scientific, or educational purposes" by collecting tax-deductible charitable contributions on UCHA's behalf.<sup>214</sup> UCHF is considered a "blended component unit"<sup>215</sup> of the UCHA and is UCHA's primary fundraising arm.<sup>216</sup>

## I | SALES, USE, AND PROPERTY TAX-EXEMPT STATUS

UCHA does not pay property taxes on real and personal property it owns, nor does it pay sales or use taxes.<sup>217</sup>

# DENVER OWNED/NONPROFIT OPERATED

Winter Park and the four cultural facilities described in this section are organizations with a long history in Denver. These cultural facilities all received substantial support from the City from the beginning. All have had to formalize, and later, most of them have had to restructure their relationships with the City to maintain that support. In the end, with some variations in the specific structures of each, the City generally owns the facilities, the original nonprofit organizations manage operations, and, with respect to the cultural facilities, subsidiary nonprofits manage endowments with private donations.

## 6. WINTER PARK

Winter Park Ski Resort ("Winter Park Resort" or "Resort") is a Denver Mountain Park. A portion of the Resort is owned by the Winter Park Recreational Association ("WPRA") on behalf of the City, which retains a residual interest in the Resort. WPRA holds special use permits from the U.S. Forest Service for the portion of the Resort it does not own. The Winter Park Resort is leased by the WPRA, acting on behalf of the City, to Intrawest Corporation, and overseen by WPRA. Over its history, the Winter Park Resort has evolved through three phases:

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<sup>206</sup> *Id.* at § 23-21-514(11).

<sup>207</sup> *Id.* at § 23-21-514(10).

<sup>208</sup> *Id.* at § 23-21-519.

<sup>209</sup> UCHA 2013 FINANCIALS, *supra* note 178, at 10 (listing all outstanding long-term debt).

<sup>210</sup> COLO. REV. STAT. § 23-21-522; UCHA 2013 FINANCIALS, *supra* note 178, at 26–32 ("Deposits and Investments").

<sup>211</sup> *See* UNIV. OF COLO. HOSP. FOUND., FORM 990-EZ, SHORT FORM RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX (2008).

<sup>212</sup> *See* UNIV. OF COLO. HOSP. FOUND., ARTICLES OF INCORPORATION I (2006).

<sup>213</sup> *See id.* at § IX (granting UCHA the power to appoint and remove UCHF directors).

<sup>214</sup> *See id.* at § V.

<sup>215</sup> "Blended component unit" is a generally accepted accounting principle. "A blended component unit is considered so closely related to the legal entity that the [blended component unit] funds appear as if the funds are integral parts of the primary government." Randall L. Kinnorsley and G. Robert Smith, Jr. *Component Unit Reporting in the New Reporting Model*, THE CPA JOURNAL \*1 (2009) available at <http://www.nysscpa.org/cpajournal/2001/1000/features/f104001.htm>.

<sup>216</sup> UCHA 2013 FINANCIALS, *supra* note 178, at 18.

<sup>217</sup> *See* COLO. REV. STAT. §§ 23-21-525 (specific property tax exemption), 39-3-105 (general property tax exemption for real and personal property owned by the state and/or its political subdivisions), and 39-26-704(1) (general sales and use tax exemption for the state and/or its political subdivisions acting in their governmental capacities).

(1) public ownership and operation; (2) public ownership and nonprofit operation; and finally, (3) public ownership, private operation, and nonprofit oversight.

In its first phase, the Winter Park Resort was created under the leadership of George Cranmer, Denver's Manager of Parks and Improvements and was owned and operated by the City.<sup>218</sup> In the 1930s, the City obtained U.S. Forest Service special use permits for the slopes of the Winter Park Resort.<sup>219</sup> The City purchased land at the base of the Winter Park Resort and built a single rope tow in the late 1930s.<sup>220</sup> The Winter Park Resort opened in 1939,<sup>221</sup> and the City operated the Winter Park Resort until 1950.<sup>222</sup>

In its second phase, in 1950, the WPRA, a nonprofit, was created, and it entered into an agency agreement with the City to manage and develop the resort.<sup>223</sup> In 1994, WPRA and the City significantly amended the Supplemental Agreement by introducing annual payments from WPRA to the City, expanding the WPRA board, and vesting WPRA with authority to acquire and sell land for the development of a base village.<sup>224</sup> In 1999, WPRA informed the City that it would not be able to deliver its 1999/2000 payment to the City.<sup>225</sup> In early 2000, WPRA undertook an analysis of its long-term financial needs and determined that it needed significant additional capital to meet its needs.<sup>226</sup> The City then undertook several of its own financial analyses of the Resort and created two separate task forces to examine the problems and possible solutions.<sup>227</sup> The City ultimately determined to solicit proposals for the operational lease and private development of the Resort and began soliciting proposals in mid-2001.<sup>228</sup> In January of 2002, Intrawest was selected for contract negotiations.<sup>229</sup>

The Winter Park Resort's third phase began on December 23, 2002, when the Intrawest transaction became effective. Intrawest (and its several corporate subsidiaries) assumed management responsibilities for the Winter Park Resort, pursuant to a long-term Lease and Operating Agreement and private development rights under an Option Agreement.<sup>230</sup> Both agreements expire in 2078.<sup>231</sup> As part of the transition, WPRA was reorganized under an amended agency agreement with the City.<sup>232</sup>

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<sup>218</sup> WINTER PARK RECREATIONAL ASS'N, WPRA 2012 BOARD MATERIALS, *Winter Park Resort: Brief History* 1 (2012) [hereinafter *Winter Park Resort: Brief History*].

<sup>219</sup> *Id.*

<sup>220</sup> MASTER PLAN, *supra* note 6, at 103.

<sup>221</sup> *Winter Park Resort: Brief History*, *supra* note 218, at 1.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 2.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> Technically, Intrawest/Winter Park Operations Corporation is the lessee. WINTER PARK RECREATIONAL ASS'N, WPRA 2014 BOARD MATERIALS, *Executive Summary, Lease and Operating Agreement between WPRA and Intrawest/Winter Park Operations Corporation* (2014) [hereinafter *Executive Summary, Lease and Operating Agreement*]; WINTER PARK RECREATIONAL ASS'N, WPRA 2014 BOARD MATERIALS, *Executive Summary, Amended and Restated Option Agreement between WPRA and Intrawest/Winter Park Development Corporation (As Further Amended)* (2014) [hereinafter *Executive Summary, Amended and Restated Option Agreement*].

<sup>231</sup> *Executive Summary, Lease and Operating Agreement*, *supra* note 230, at 1; *Executive Summary, Amended and Restated Option Agreement*, *supra* note 230, at 1.

<sup>232</sup> See WINTER PARK RECREATIONAL ASS'N, WPRA 2014 BOARD MATERIALS, *Executive Summary, Supplemental Agreement No. VII to Agreement between Winter Park Recreational Association and the City and County of Denver*, at 1 (2014) [hereinafter *Executive Summary, Supplemental Agreement No. VII*].



## A | ORGANIZATIONAL FORM

WPRA is a Colorado nonprofit corporation.<sup>233</sup> Under its 2002 amended and restated articles, WPRA will expire as a nonprofit corporation on June 30, 2079 — shortly after Intrawest’s lease expires.<sup>234</sup> However, the City may terminate its agency agreement with WPRA without cause upon 90 days’ prior written notice.<sup>235</sup>

Today, Intrawest is a publicly traded portfolio company, but a majority of the ownership interest is held by private equity funds.<sup>236</sup> The company was founded in 1976 and is currently headquartered in Denver, Colorado.<sup>237</sup> Intrawest includes over 40 corporate components, all registered in Delaware.<sup>238</sup> The main Intrawest entities involved with the Winter Park Resort include, *inter alia*: (1) Intrawest/Winter Park Development Corporation, (2) Intrawest/Winter Park Holdings Corporation, (3) Intrawest/Winter Park Operations Corporation, and (4) Intrawest/Winter Park Restaurant Corporation.<sup>239</sup> All of these subsidiaries were created in 2002 as part of the new management structure for the Winter Park Resort.<sup>240</sup> Because the Intrawest parent corporations have guaranteed payment by all its subsidiaries involved in various aspects of the Winter Park Resort arrangement,<sup>241</sup> this section will generally refer to Intrawest as the private party to all agreements discussed.

## B | METHOD OF ENTITY FORMATION

WPRA was formed on July 27, 1950, pursuant to a filing with the Colorado Secretary of State by the City.<sup>242</sup> In 1994, the Board was expanded and WPRA was given the authority to acquire and sell land for development of a Resort Village.<sup>243</sup> In 2002, WPRA was totally restructured as part of the Intrawest deal: WPRA’s articles of incorporation and its agency agreement with the City were both amended and restated.<sup>244</sup>

## C | QUALIFICATIONS OF GOVERNING BOARD AND PROCEDURES FOR BOARD APPOINTMENT

The WPRA board has five directors.<sup>245</sup> The first directors were appointed by the Mayor, two from the City, and three from the private sector, and served staggered terms.<sup>246</sup> The Mayor continues to appoint two of the directors from the City (individuals who hold senior-level policymaking positions).<sup>247</sup> The three private

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<sup>233</sup> See Colorado Secretary of State, *Summary: Winter Park Recreational Association*, <http://www.sos.state.co.us/biz/BusinessEntityCriteriaExt.do> (search for “Winter Park Recreational Association”) (last visited Aug. 7, 2014).

<sup>234</sup> WINTER PARK RECREATIONAL ASSOCIATION, AMENDED AND RESTATED ARTICLES OF INCORPORATION ¶ 7 (2002) [hereinafter WPRA ARTICLES].

<sup>235</sup> See *Executive Summary, Supplemental Agreement No. VII*, *supra* note 232, at 2.

<sup>236</sup> Most prominently, Fortress Investment Group, LLC. Intrawest’s initial public offering was held in January, 2014. After the IPO, Fortress’ stake in the company fell to approximately 65 percent. Neha Dimri, *Shares of debt-heavy Intrawest Resorts fall in debut*, REUTERS (Jan. 31, 2014), <http://www.reuters.com/article/2014/01/31/us-intrawestresorts-ipo-idUSBREA0U1EM20140131>.

<sup>237</sup> Intrawest, *Who We Are*, <http://www.intrawest.com/about/who-we-are/> (last visited Aug. 7, 2014).

<sup>238</sup> Delaware Secretary of State, *General Information Name Search*, <https://delecorp.delaware.gov/tin/GINameSearch.jsp> (search for “Intrawest”) (last visited Aug. 7, 2014).

<sup>239</sup> See WINTER PARK RECREATIONAL ASS’N, WPRA 2014 BOARD MATERIALS (2014).

<sup>240</sup> *Id.*

<sup>241</sup> See WINTER PARK RECREATIONAL ASS’N, WPRA 2014 BOARD MATERIALS, *Executive Summary, Guaranty by Intrawest Holdings S.AR.L and Intrawest U.S. Holdings to WPRA 1* (2014) [hereinafter *Executive Summary, Guaranty by Intrawest Holdings*].

<sup>242</sup> See *Winter Park Resort: Brief History*, *supra* note 218, at 1.

<sup>243</sup> *Id.*

<sup>244</sup> See *id.* at 2; *Executive Summary, Supplemental Agreement No. VII*, *supra* note 232, at 1.

<sup>245</sup> *Executive Summary, Supplemental Agreement No. VII*, *supra* note 232, at 2.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*; see also *Supplemental Agreement No. VII to Agreement between Winter Park Recreational Association and the City and County of Denver 3* (Oct. 4, 2002).

sector directors are elected by existing directors and they must reside or have a principal place of business in Denver.<sup>248</sup> All directors serve five-year terms.<sup>249</sup> The private sector directors may not serve more than one term.<sup>250</sup>

## D | OWNERSHIP OF PROPERTY AND OPERATION OF FACILITIES

WPROA owns the Winter Park Resort on behalf of the City, which retains a residual interest in the Resort.<sup>251</sup> WPROA leases the Resort, acting on behalf of the City, to Intrawest, and Intrawest operates the Resort.<sup>252</sup> Two key documents dictate the relationship between the three parties: (1) the Lease and Operating Agreement between WPROA and Intrawest and (2) the agency agreement between WPROA and the City. An option agreement between WPROA and Intrawest Development Corporation (an Intrawest subsidiary) also shapes the relationship.

Under the Supplemental Agreement between the City and WPROA, WPROA manages the relationship with Intrawest and has legal and financial powers and responsibilities to that end, including the power to lease the Winter Park Resort to Intrawest on behalf of the City.<sup>253</sup> However, as a residual owner of the Winter Park Resort and a third-party beneficiary to the agreements with Intrawest,<sup>254</sup> the City must approve certain major actions, including: (1) any issue that may affect the City's residual interest in Winter Park Resort property, (2) any issue that may impact payments due to the City, (3) sale or mortgaging of Winter Park Resort assets, and (4) modification or termination of agreements with Intrawest.<sup>255</sup>

Under the lease between WPROA and Intrawest,<sup>256</sup> WPROA leases the Winter Park Resort (including its real property, water rights, and personal property) to Intrawest for fifty years, expiring on June 30, 2052, with three extensions, two ten-year and one six-year, which will automatically take effect unless Intrawest notifies WPROA of its intent to terminate the lease.<sup>257</sup>

Under the lease, Intrawest did not begin paying rent to the City until October 1, 2012. From October 1, 2002 to July 1, 2012, Intrawest paid WPROA \$500,000 every quarter (\$2 million annually) as consideration for not charging rent for that decade.<sup>258</sup> Starting on October 1, 2012, Intrawest began paying rent to WPROA, acting as agent of the City, in the amount of an annual payment of \$2 million, and on October 1, 2013, Intrawest began paying an additional three percent of annual revenues over \$33 million.<sup>259</sup>

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<sup>248</sup> *Id.*

<sup>249</sup> *Id.*; Denver Boards and Commissions *Winter Park Recreational Association Board of Directors*, <http://www.denvergov.org/BoardsandCommissions/BoardsandCommissions90/tabid/379033/Default.aspx> (last visited Aug. 7, 2014).

<sup>250</sup> *Executive Summary, Supplemental Agreement No. VII, supra* note 232, at 2.

<sup>251</sup> WINTER PARK RECREATIONAL ASS'N, WPROA 2014 BOARD MATERIALS, *Excerpt-Supplement VII, WPROA and City Responsibilities* 1 (2014) [hereinafter *Excerpt-Supplement VII, WPROA and City Responsibilities*].

<sup>252</sup> *Executive Summary, Supplemental Agreement No. VII, supra* note 232, at 1.

<sup>253</sup> *Id.* at 1. *See also* WINTER PARK RECREATIONAL ASS'N, WPROA 2014 BOARD MATERIALS, *WPROA Administrative Task Examples* (2014).

<sup>254</sup> *Excerpt-Supplement VII, WPROA and City Responsibilities, supra* note 251, at 1.

<sup>255</sup> *Id.* at 1-2 (listing nine WPROA actions requiring City approval); *Executive Summary, Supplemental Agreement No. VII, supra* note 232, at 2.

<sup>256</sup> Technically, Intrawest/Winter Park Operations Corporation.

<sup>257</sup> *Executive Summary, Lease and Operating Agreement between WPROA and Intrawest/Winter Park Operations Corporation, supra* note 230, at 1.

<sup>258</sup> Technically Intrawest/Winter Park Holdings Corporation. WINTER PARK RECREATIONAL ASS'N, WPROA 2014 BOARD MATERIALS, *Executive Summary, Additional Consideration Agreement between WPROA and Intrawest/Winter Park Holdings Corporation (Now Expired)* 1 (2014).

<sup>259</sup> *Executive Summary, Lease and Operating Agreement between WPROA and Intrawest/Winter Park Operations Corporation, supra* note 230, at 1. Although these commitments are undertaken by various subsidiaries of Intrawest, the

The lease grants Intrawest operational control of the Winter Park Resort and stipulates that WPRA will apply to have Intrawest added to the U.S. Forest Service Permits.<sup>260</sup> As the lessee of the Winter Park Resort, Intrawest is responsible for operational expenses and some capital expenditures.<sup>261</sup> Intrawest also assumes all of WPRA's obligations (incurred when WPRA operated the Winter Park Resort).<sup>262</sup>

Under an Option Agreement between WPRA and Intrawest, Intrawest holds the option to purchase certain parcels of land at the Winter Park Resort for private development.<sup>263</sup> Ninety percent of the proceeds from land sales under the option agreement must go toward the repayment of WPRA's debt (otherwise funded by Intrawest).<sup>264</sup> The remaining ten percent goes to WPRA for operational expenses.<sup>265</sup>

#### E | POWER TO CONDEMN PROPERTY

WPRA has no powers of eminent domain.<sup>266</sup>

#### F | POWER TO LEVY TAXES (INCLUDING TABOR STATUS)

WPRA has no taxing authority and is not a "district" subject to TABOR.<sup>267</sup>

#### G | POWER TO ISSUE TAX-EXEMPT BONDS

WPRA has no power to issue tax-exempt bonds.<sup>268</sup> Since 2002, the City and County of Denver has not issued tax-exempt bonds for the Resort.<sup>269</sup>

#### H | OTHER REVENUE SOURCES

Winter Park Resort receives revenue and financing from a number of sources. First, Intrawest pays \$2 million per year in rent to WPRA, acting as agent for the City.<sup>270</sup> WPRA is required to transmit these payments to the City. Beginning in 2013, Intrawest pays WPRA the \$2 million plus three percent of gross revenues over \$33 million.<sup>271</sup> The three-percent payments are revenue sharing payments.<sup>272</sup> WPRA is also required to remit these payments to the City, minus a portion for WPRA's administrative expenses (when needed), under an agreed-upon formula between WPRA and the City. The City has restricted the use of these funds for the

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parent corporation guarantees all payments. *See Executive Summary, Guaranty by Intrawest Holdings, supra* note 241, at 1.

<sup>260</sup> *Executive Summary, Lease and Operating Agreement between WPRA and Intrawest/Winter Park Operations Corporation, supra* note 230, at 1.

<sup>261</sup> *See id.* at 1-2.

<sup>262</sup> *See id.* at 2.

<sup>263</sup> Technically, Intrawest/Winter Park Development Corporation. *Executive Summary, Amended and Restated Option Agreement, supra* note 230, at 1.

<sup>264</sup> *Id.* at 2; WINTER PARK RECREATIONAL ASS'N, FINANCIAL STATEMENTS WITH AUDITOR'S REPORT 10 (2012) [hereinafter WPRA FINANCIAL STATEMENTS].

<sup>265</sup> *Executive Summary, Amended and Restated Option Agreement, supra* note 230, at 1-2; WPRA FINANCIAL STATEMENTS, *supra* note 264, at 11.

<sup>266</sup> *See* COLO. REV. STAT. §§ 38-1-201 ("it is necessary, appropriate, and in the best interests of the state to list in this part 2 all of the governmental entities, corporations, and persons that may exercise the power of eminent domain pursuant to provisions of state law") and 38-1-202 (listing "governmental entities, corporations, and persons authorized to use eminent domain" and not listing WPRA).

<sup>267</sup> *See generally* WPRA ARTICLES, *supra* note 234; *Executive Summary, Supplemental Agreement No. VII, supra* note 232. *See also* Memorandum from Denver Legislative Services Staff to Denver City Council President Chris Nevitt re: Governance Structure Comparison 7 (Aug. 23, 2011) [hereinafter Memorandum from Denver Legislative Services Staff].

<sup>268</sup> *See generally* WPRA ARTICLES, *supra* note 234. *See also* Memorandum from Denver Legislative Services Staff, *supra* note 267, at 7.

<sup>269</sup> Statement based on a review of the Denver budget, WPRA financial statements, and municipal bond listings.

<sup>270</sup> *Executive Summary, Lease and Operating Agreement, supra* note 230, at 1.

<sup>271</sup> *Id.*

<sup>272</sup> WPRA FINANCIAL STATEMENTS, *supra* note 264, at 8, 10.

capital maintenance of existing parks and recreation facilities.<sup>273</sup> Intrawest also paid \$3 million to the City for parks and recreation projects upon signing of the 2002 transaction documents.<sup>274</sup>

Second, under the Lease and Operating Agreement, WPRA could borrow up to \$33 million for deferred capital maintenance, transition, and transaction costs.<sup>275</sup> Intrawest is responsible for all interest and principal payments on this debt, which is referred to as Agreed-Upon Indebtedness.<sup>276</sup>

Third, Intrawest is required to reserve or spend six percent of gross revenues each year on capital maintenance at the Resort.<sup>277</sup>

Fourth, Intrawest was required to spend \$50 million in capital at the resort during the first ten years of the transaction. These funds included both two and three above.

Fifth, Intrawest may spend an unrestricted amount of its own dollars on capital at the Resort.

Sixth, at the inception of the 2002 arrangement, Intrawest provided \$150,000 to WPRA for its initial operating expenses.<sup>278</sup> WPRA may also retain ten percent of revenues from land sales under the Option Agreement for operational expenses.<sup>279</sup> The remaining ninety percent pays down the Agreed-Upon Indebtedness.<sup>280</sup>

Seventh, WPRA levies a real estate transfer fee of twenty-five percent on all land sale transactions, which it may use for its administrative expenses.<sup>281</sup>

## I | SALES, USE, AND PROPERTY TAX-EXEMPT STATUS

The City does not pay property tax on real and personal property it owns, nor does it pay sales or use taxes.<sup>282</sup> WPRA does not pay property tax on real and personal property it owns and uses, nor does it pay sales or use taxes.<sup>283</sup> WPRA is, however, required to remit sales tax on the deemed value of “lease equipment” leased to for-profit entities.<sup>284</sup>

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<sup>273</sup> MAYOR’S 2013 BUDGET, VOL. I, *supra* note 25, at 196.

<sup>274</sup> *Executive Summary, Lease and Operating Agreement, supra* note 230, at 1.

<sup>275</sup> *See id.* at 2.

<sup>276</sup> *See id.*; WPRA FINANCIAL STATEMENTS, *supra* note 264, at 8.

<sup>277</sup> *Executive Summary, Lease and Operating Agreement, supra* note 230, at 1.

<sup>278</sup> *Id.*; WPRA FINANCIAL STATEMENTS, *supra* note 264, at 11.

<sup>279</sup> WPRA FINANCIAL STATEMENTS, *supra* note 264, at 11.

<sup>280</sup> *Executive Summary, Amended and Restated Option Agreement, supra* note 230, at 2.

<sup>281</sup> *Id.* at 3.

<sup>282</sup> COLO. CONST., Art. X, § 4.

<sup>283</sup> E-mail from Ron Warren, Chief Financial Officer, Triton Investment Co., to Sarah Rockwell, Partner, Kaplan Kirsch & Rockwell LLP (Mar. 10, 2014 10:34 a.m.) [hereinafter E-mail from Ron Warren] (stating that WPRA is not responsible for any sales, use, or property tax). Kaplan Kirsch & Rockwell LLP has not independently verified and offers no opinion regarding the tax exempt status of the WPRA. Generally, the determination as to whether an entity is exempt from property, sales, and use taxes is made according to guiding law contained in various state statutes and local regulations, including: COLO. REV. STAT. §§ 39-26-102(2.5) (defining “charitable organization” as any entity formed for religious, charitable, scientific, testing for public safety, literary, educational, or amateur sports competition purposes); 39-26-718 (general state sales and use tax exemption for charitable organizations); 39-26-713(1)(d)(d) (general state sales and use tax exemption for tangible personal property); 39-3-101 (presumption of charitable purpose for determining general property tax exemption for charitable organizations); 39-3-108 (general property tax exemption for non-residential property used “solely and exclusively for strictly charitable purposes”); 39-2-17 (state-level property tax exemption determinations issued to county assessor); DENVER REV. MUNI. CODE Art. II § 53-26(2) (local religious or charitable corporations exemption from city retail sales tax); DENVER REV. MUNI. CODE Art. II § 53-97(2) (local religious or charitable corporations exemption from city use tax).

<sup>284</sup> *See* E-mail from Ron Warren, *supra*, note 283; *see also* Interview with Elizabeth Orr, Chief Administrative Officer, Winter Park Recreational Association (Sept. 26, 2013).

## 7. DENVER MUSEUM OF NATURE AND SCIENCE

The Denver Museum of Nature and Science (“DMNS” or “Museum”) was known by the name “Colorado Museum of Natural History” (“CMNH”) until 1999, and the DMNS is operated by a nonprofit of that name.<sup>285</sup> CMNH is a Colorado nonprofit corporation that has existed since 1900.<sup>286</sup> The Museum has been intertwined with the City since its inception; in 1900, the City helped fund the construction of the main building of the Museum and retained ownership of the building.<sup>287</sup> CMNH operates in conjunction with a separate nonprofit organization, called the DMNS Foundation, which manages CMNH’s endowment and investments.

### A | ORGANIZATIONAL FORM

CMNH and the DMNS Foundation are both Colorado nonprofit corporations.<sup>288</sup> The CMNH’s relationship with the City is governed by a 1933 contractual agreement.<sup>289</sup> Under that contract, CMNH transferred ownership of its collections to the City and assumed the role of the “Natural History Agency of the City” in exchange for a pledge of annual appropriations.<sup>290</sup> That arrangement continues today.

### B | METHOD OF ENTITY FORMATION

CMNH was created in 1900 by a group of citizens who filed articles of incorporation with the Colorado Secretary of State. The CMNH filed articles of incorporation for the DMNS Foundation with the Colorado Secretary of State in 1986.<sup>291</sup> The public-private structure of the DMNS was formalized in a March 22, 1933, agreement between CMNH and the City.<sup>292</sup> That agreement formalized a “tacit understanding” that the City would make annual contributions to support the Museum.<sup>293</sup> On the City side, approval of those agreements required ordinances by the City Council and approval by the Mayor.<sup>294</sup>

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<sup>285</sup> “Denver Museum of Nature and Science” is a trade name owned by the Colorado Museum of Natural History, which owns and operates the Museum. See Certificate of Assumed or Trade Name filed by The Colorado Museum of Natural History with the Colorado Secretary of State (Nov. 23, 1999).

<sup>286</sup> See Colorado Secretary of State, *Summary: Colorado Museum of Natural History*, <http://www.sos.state.co.us/biz/BusinessEntityCriteriaExt.do> (search for “Colorado Museum of Natural History”) (last visited Aug. 7, 2014) [hereinafter *Summary: Colorado Museum of Natural History*].

<sup>287</sup> See Agreement between the Colorado Museum of Natural History and the City and County of Denver 1 (Mar. 22, 1933) [hereinafter 1933 Agreement].

<sup>288</sup> *Summary: Colorado Museum of Natural History*, *supra* note 286; Colorado Secretary of State, *Summary: DMNS Foundation*, <http://www.sos.state.co.us/biz/BusinessEntityCriteriaExt.do> (search for “DMNS Foundation”) (last visited Aug. 7, 2014).

<sup>289</sup> See 1933 Agreement, *supra* note 287.

<sup>290</sup> See *id.* at §§ II(1) (donating all CMNH collections to the City) and II(2) (CMNH assumes role of “the Natural History Agency of the ‘City’”).

<sup>291</sup> DMNS FOUNDATION, ARTICLES OF INCORPORATION (Aug. 22, 1986); DENVER MUSEUM OF NATURAL HISTORY, ANNUAL REPORT 12 (1980).

<sup>292</sup> See 1933 Agreement, *supra* note 287.

<sup>293</sup> *Id.* at 2 (“WHEREAS, it has been the tacit understanding and agreement between the [CMNH] and all of the Mayors of the ‘City’ from the beginning of [CMNH] that the ‘City’ would contribute annually to the care, maintenance and development of the ‘Museum’ . . . for the use and benefit of the People of the ‘City.’”).

<sup>294</sup> See *id.*; see also CHARTER, *supra* note 16, at § 3.2.6(B) (authorizing Mayoral approval of and requiring City Council authorization by ordinance or resolution for all agreements, permits, contracts, licenses, easements, or other instruments whereby the City grants the exclusive use of all or a portion of real property for an indefinite period of time in excess of thirty days).

## C | QUALIFICATIONS OF GOVERNING BOARD AND PROCEDURES FOR BOARD APPOINTMENT

CMNH is controlled by a Board of Trustees.<sup>295</sup> In 2012, CMNH had twenty-seven trustees.<sup>296</sup> None are appointed by the City; a nominating committee of the board selects its new members.<sup>297</sup>

DMNS Foundation is controlled by a seven-member board of directors, three of whom also must be trustees of CMNH.<sup>298</sup> The three CMNH trustee-members are elected by the Museum Board at their annual meeting.<sup>299</sup> The four remaining members are elected by the existing members of the Foundation Board as openings occur.<sup>300</sup>

## D | OWNERSHIP OF PROPERTY AND OPERATION OF FACILITIES

CMNH and the DMNS Foundation enjoy all powers of Colorado nonprofit corporations, to the extent that such powers are exercised for the exempt purposes of the corporations, with one crucial exception: they may not receive, maintain, or in any way “maintain[] and deal[] with . . . real or personal property.”<sup>301</sup> The City owns all of CMNH’s property, including the Museum buildings and holdings.<sup>302</sup> The Museum is located in City Park. Unlike the other cultural facilities located in parks, however, the Museum is treated as an independent agency.<sup>303</sup> Nevertheless, the CMNH is obligated to coordinate with the Parks Department on a variety of matters that impact City Park, including construction, road access, parking, utilities, and events.<sup>304</sup>

Under the 1933 agreement, CMNH assumed the role of the “Natural History Agency of the City.”<sup>305</sup> In that role, CMNH manages and controls the Museum.<sup>306</sup> CMNH has full administrative control over the Museum and “full responsibility and discretion” to accept or reject gifts to the Museum.<sup>307</sup> CMNH also hires and has full control over all Museum employees.<sup>308</sup> In exchange, the City provides funding for Museum operations.<sup>309</sup> The City also provides telephone service and certain types of insurance to the Museum.<sup>310</sup>

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<sup>295</sup> COLORADO MUSEUM OF NATURAL HISTORY, RESTATED ARTICLES OF INCORPORATION WITH AMENDMENTS § IV (Mar. 12, 2004) [hereinafter CMNH RESTATED ARTICLES OF INCORPORATION].

<sup>296</sup> See DENVER MUSEUM OF NATURE AND SCIENCE, 2012 ANNUAL REPORT 14 (2013) (listing trustees).

<sup>297</sup> Memorandum from Denver Legislative Services Staff, *supra* note 267, at 4; Interview with Edward Scholz, Vice President of Finance and Business Operations, Denver Museum of Nature and Science (Oct. 7, 2013).

<sup>298</sup> DMNS FOUNDATION, RESTATED ARTICLES OF INCORPORATION § IV (Oct. 28, 2003) [hereinafter DMNS RESTATED ARTICLES OF INCORPORATION].

<sup>299</sup> E-mail from Edward Scholz, Vice President of Finance and Business Operations, Denver Museum of Nature and Science, to W. Cory Haller, Attorney Fellow, Kaplan Kirsch & Rockwell LLP (May 8, 2014 7:03 a.m.).

<sup>300</sup> *Id.*

<sup>301</sup> CMNH RESTATED ARTICLES OF INCORPORATION, *supra* note 295, at § III.B; DMNS RESTATED ARTICLES OF INCORPORATION, *supra* note 298, at § III.B. For a general discussion of the powers held by Colorado nonprofit corporations, see *infra* notes 374-78.

<sup>302</sup> See, e.g., DENVER MUSEUM OF NATURE AND SCIENCE, FINANCIAL STATEMENTS AND SUPPLEMENTARY INFORMATION 7 (2014) [hereinafter FINANCIAL STATEMENTS AND SUPPLEMENTARY INFORMATION]; see also 1933 Agreement, *supra* note 287, at 1 (“WHEREAS, the Buildings now constituting the ‘Museum’ are owned by and are the property of the ‘City’”).

<sup>303</sup> E-mail from Patrick Wheeler, Assistant City Attorney, City and County of Denver, to Polly Jessen, Partner, Kaplan Kirsch & Rockwell LLP (Nov. 27, 2013 2:43 p.m.) [hereinafter Wheeler Museum E-mail].

<sup>304</sup> *Id.*

<sup>305</sup> See 1933 Agreement, *supra* note 287, at § I.2.

<sup>306</sup> FINANCIAL STATEMENTS AND SUPPLEMENTARY INFORMATION, *supra* note 302, at 7.

<sup>307</sup> *Id.* See also 1933 Agreement, *supra* note 287, at § I(2).

<sup>308</sup> See 1933 Agreement, *supra* note 287, at § II(3).

<sup>309</sup> FINANCIAL STATEMENTS AND SUPPLEMENTARY INFORMATION, *supra* note 302, at 7.

<sup>310</sup> *Id.*

## E | POWER TO CONDEMN PROPERTY

CMNH has no powers of eminent domain.<sup>311</sup>

## F | POWER TO LEVY TAXES (INCLUDING TABOR STATUS)

CMNH has no taxing power and does not qualify as a “district” subject to TABOR.<sup>312</sup> However, CMNH does receive tax revenues from the SCFD.<sup>313</sup> CMNH also receives appropriations from the City, which are derived from taxes.<sup>314</sup>

## G | POWER TO ISSUE TAX-EXEMPT BONDS

CMNH does not satisfy requirements to issue tax-exempt bonds. CMNH has received tax-exempt bond proceeds from the City in connection with the Morgridge Family Exploration Center and Rocky Mountain Science Collection Center (the “Centers”). In 2008, City voters approved issuance of general obligation bonds to support the Museum and the Centers.<sup>315</sup> CMNH uses proceeds of those general obligation bonds to finance deferred maintenance of the Museum and partially finance the construction of the Centers.<sup>316</sup>

Private fundraising provides the balance of funding for the Centers.<sup>317</sup> To finance the gap between fundraising pledges and actual cash receipts on those pledges, CMNH also has issued tax-exempt bonds with the help of a state authority.<sup>318</sup> In 2010, CMNH issued \$25 million in bonds through the Colorado Educational and Cultural Facilities Authority (“CECFA”).<sup>319</sup> CECFA is a statutory entity that helps cultural and educational institutions issue tax-exempt bonds.<sup>320</sup> CMNH’s bonds are tax exempt, and solely the responsibility of CMNH.<sup>321</sup>

## H | OTHER REVENUE SOURCES

CMNH receives funding from a number of sources, including: (1) operational revenue, (2) private donations, (3) SCFD funds, (4) discretionary appropriations from the City, and (5) lease revenues from City certificates of participation (“COPs”).<sup>322</sup> Specifically, CMNH collects revenues from gift shop and food service operations, ticket sales, membership dues, and special events.<sup>323</sup> CMNH also receives private contributions<sup>324</sup> and SCFD funds. In 2011, SCFD revenues totaled \$6.7 million.<sup>325</sup> To fund CMNH’s role as “the Natural History Agency of the City,” the City appropriates operating revenue to CMNH. In 2013, appropriations totaled \$1.5 million.<sup>326</sup> Finally, as part of a cooperative arrangement between the City, the Denver Zoological

<sup>311</sup> COLO. REV. STAT. §§ 38-1-201 (“it is necessary, appropriate, and in the best interests of the state to list in this part 2 all of the governmental entities, corporations, and persons that may exercise the power of eminent domain pursuant to provisions of state law”) and 38-1-202 (listing “governmental entities, corporations, and persons authorized to use eminent domain” and not listing the Colorado Museum of Natural History).

<sup>312</sup> Memorandum from Denver Legislative Services Staff, *supra* note 267, at 4.

<sup>313</sup> See FINANCIAL STATEMENTS AND SUPPLEMENTARY INFORMATION, *supra* note 302, at 4, 18.

<sup>314</sup> See *id.* at 4, 7.

<sup>315</sup> See *id.* at 18 (describing Referred Questions 1G and 1H).

<sup>316</sup> *Id.* The majority of the cost of the Center is being paid for with private fundraising dollars, however.

<sup>317</sup> *Id.* at 15.

<sup>318</sup> *Id.* at 18.

<sup>319</sup> CECFA operates pursuant to COLO. REV. STAT. § 23-15-101 *et seq.*

<sup>320</sup> Colorado Educational and Cultural Facilities Authority, *Frequently Asked Questions*, <http://www.cecfa.org/faqs.html> (last visited Aug. 7, 2014).

<sup>321</sup> See Colorado Educational and Cultural Facilities Authority, *What We Do*, <http://www.cecfa.org/about.html> (last visited Aug. 7, 2014) (stating that CECFA bonds are tax exempt, and are solely the responsibility of the borrowing entity).

<sup>322</sup> FINANCIAL STATEMENTS AND SUPPLEMENTARY INFORMATION, *supra* note 302, at 4.

<sup>323</sup> See *id.* (listing revenues for all of the above in 2013).

<sup>324</sup> *Id.* at 4.

<sup>325</sup> *Id.* at 4, 18.

<sup>326</sup> *Id.* at 7.

Foundation, and the Museum, the City financed two new parking structures at City Park using COPs.<sup>327</sup> While the City is solely liable for those COPs, CMNH raised \$2.5 million for the project, and contributes a portion of admission ticket revenues to retire the COPs pursuant to agreements with the City.<sup>328</sup>

## I | SALES, USE, AND PROPERTY TAX-EXEMPT STATUS

The City does not pay property tax on real and personal property it owns.<sup>329</sup> Neither CMNH nor the DMNS Foundation pay sales or use taxes.<sup>330</sup>

## 8. DENVER BOTANIC GARDENS

The Denver Botanic Gardens (“Gardens”) were first established in 1951 as a public-private venture between a nonprofit corporation and the City.<sup>331</sup> This partnership continues today, albeit in a somewhat more complex and privatized form. Today, Denver Botanic Gardens, Inc. (“DBG”), the original nonprofit, operates the Gardens; Denver Botanic Gardens Endowment, Inc. (“DBGE”), a subsidiary nonprofit, holds DBG’s private funds; the City owns and supports certain Gardens facilities.

The primary Gardens location is in Cheesman Park; two satellite locations include an arboretum in Chatfield, Colorado, and Mt. Goliath, a mountain peak trail in the Mt. Evans region.<sup>332</sup> The mission of the Gardens is “to connect people with plants, especially plants from the Rocky Mountain region.”<sup>333</sup>

### A | ORGANIZATIONAL FORM

DBG is the entity at the core of the Gardens. DBG is a Colorado nonprofit corporation.<sup>334</sup> It was formed by members of the Colorado Forestry and Horticulture Association in 1951 “to promote the establishment of and establish and maintain botanical gardens and arboreta in cooperation with the City and County of Denver.”<sup>335</sup>

Shortly after its formation, DBG entered into a cooperative agreement with the City that established a public-private framework for the Gardens.<sup>336</sup> Under that agreement, DBG assumed the role of the City’s agent,

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<sup>327</sup> *Id.* at 17.

<sup>328</sup> *Id.*

<sup>329</sup> COLO. CONST., Art. X, § 4.

<sup>330</sup> FINANCIAL STATEMENTS AND SUPPLEMENTARY INFORMATION, *supra* note 302, at 18 (stating that both the Museum and DMNS Foundation are tax-exempt nonprofit organizations). Kaplan Kirsch & Rockwell, LLP has not independently verified and offers no opinion regarding the tax exempt status of the CMNH or the DMNS Foundation. Generally, the determination as to whether an entity is exempt from property, sales, and use taxes is made according to guiding law contained in various state statutes and local regulations, including: COLO. REV. STAT. §§ 39-26-102(2.5) (defining “charitable organization” as any entity formed for religious, charitable, scientific, testing for public safety, literary, educational, or amateur sports competition purposes); 39-26-718 (general state sales and use tax exemption for charitable organizations); 39-26-713(1)(d)(d) (general state sales and use tax exemption for tangible personal property); 39-3-101 (presumption of charitable purpose for determining general property tax exemption for charitable organizations); 39-3-108 (general property tax exemption for non-residential property used “solely and exclusively for strictly charitable purposes”); 39-2-17 (state-level property tax exemption determinations issued to county assessor); DENVER REV. MUNI. CODE Art. II § 53-26(2) (local religious or charitable corporations exemption from city retail sales tax); DENVER REV. MUNI. CODE Art. II § 53-97(2) (local religious or charitable corporations exemption from city use tax).

<sup>331</sup> Bernice E. Peterson, *A Jubilee History of Denver Botanic Gardens*, in CEMETERY TO CONSERVATORY: A HISTORY OF THE LAND AROUND DENVER BOTANIC GARDENS, 1859-1978 54 (Louisa Ward Arps ed., 1980).

<sup>332</sup> Denver Botanic Gardens, *Our Gardens*, <http://www.botanicgardens.org/our-gardens/> (last visited Aug. 7, 2014).

<sup>333</sup> Denver Botanic Gardens, *Mission and Core Values*, <http://www.botanicgardens.org/our-gardens/about-us/mission-core-values> (last visited Aug. 7, 2014).

<sup>334</sup> At the time, DBG’s legal name was “the Botanical Gardens Foundation of Denver, Inc.”

<sup>335</sup> BOTANICAL GARDEN FOUNDATION OF DENVER, CERTIFICATE OF INCORPORATION § II (Jan. 31, 1951) [hereinafter DBG ARTICLES].

<sup>336</sup> *See* Agreement between the City and County of Denver and the Botanical Gardens Foundation of Denver, Inc. (Feb. 28, 1951).



responsible for planning and operating a garden open to the public in Cheesman Park.<sup>337</sup> In addition: (1) DBG employees became City employees;<sup>338</sup> (2) the City agreed to appropriate funds and provide water for the Gardens' operation;<sup>339</sup> (3) DBG donated its property to the City;<sup>340</sup> (4) the City set aside a portion of Cheesman Park for the Gardens;<sup>341</sup> and (5) DBG agreed to substantial City oversight<sup>342</sup> and to cooperate with area educational institutions.<sup>343</sup>

In 1991, the parties reshaped their partnership with an amended and restated cooperative agreement (“1991 Cooperative Agreement”).<sup>344</sup> The City entered into the agreement under City Charter authority, which gives the Department of Parks and Recreation the authority to negotiate and enter into cooperative agreements for the development of park and recreational facilities.<sup>345</sup> The new agreement continued the public-private venture and the agency relationship between the City and DBG, but it altered the relationship in some ways. In particular, the new agreement transitioned Gardens employees from public employment by the City to private employment by DBG.<sup>346</sup> However, the new agreement continued the basic structure of the partnership: under the 1991 agreement, the City still appropriates operating revenue for the Gardens,<sup>347</sup> provides utilities and other support services,<sup>348</sup> retains all of DBG’s present and future property interests,<sup>349</sup> and maintains a variety of controls over the Gardens. The 1991 Cooperative Agreement remains in effect today, but it has been amended three times.<sup>350</sup>

As part of the 1991 Cooperative Agreement renegotiation, the parties also created DBGE, a separate nonprofit corporation.<sup>351</sup> DBGE is effectively a subsidiary nonprofit corporation created solely to manage DBG’s private endowment.<sup>352</sup> DBGE “provides oversight of endowment funds for the short and long-term benefit of [DBG].”<sup>353</sup> Upon formation of DBGE, the parties transferred the majority of DBG’s endowment funds to DBGE.<sup>354</sup>

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<sup>337</sup> *See id.* at §§ 1-2.

<sup>338</sup> *See id.* at § 6.

<sup>339</sup> *See id.*

<sup>340</sup> *See id.* at § 7.

<sup>341</sup> *See id.* at § 4.

<sup>342</sup> *See, e.g., id.* at §§ 2 (requiring City approval of plans) and 9 (requiring access to Gardens by City Council and Mayor).

<sup>343</sup> *See id.* at § 11.

<sup>344</sup> Cooperative Agreement between the City and County of Denver and Denver Botanic Gardens, Inc. (Apr. 5, 1991) [hereinafter 1991 Cooperative Agreement].

<sup>345</sup> CHARTER, *supra* note 16, at § 2.4.4(F).

<sup>346</sup> *See id.* at § 3. In 2003, the Career Service provision of the City Charter was amended to remove employees working at the Gardens and the Zoo from Career Service. As a consequence, the DBG and DBGE have been replacing City employees working in those facilities through attrition. Wheeler Museum E-mail, *supra* note 303.

<sup>347</sup> 1991 Cooperative Agreement, *supra* note 344, at § 9(a).

<sup>348</sup> *Id.* at § 25.

<sup>349</sup> *Id.* at § 13.

<sup>350</sup> The 1991 agreement has been amended three times: once to create a Neighborhood Advisory Committee (June 26, 1995), once to allow for increased fees (July 26, 2005), and once to accommodate plans for a new parking structure (Nov. 12, 2008).

<sup>351</sup> DENVER BOTANIC GARDENS, INC., COMBINED FINANCIAL STATEMENTS AND INDEPENDENT AUDITORS’ REPORT DECEMBER 31, 2012 7 (2013) [hereinafter DBG FINANCIAL STATEMENTS].

<sup>352</sup> DENVER BOTANICAL GARDENS ENDOWMENT, INC., ARTICLES OF INCORPORATION § 3 (Dec. 10, 1991) (“[DBGE] shall be operated exclusively for the benefit of, to perform the functions of, and to carry out the purposes of [DBG]”) [hereinafter DBGE ARTICLES]. *See also* DENVER BOTANIC GARDENS, 2012 ANNUAL REPORT 19 (2013) [hereinafter DBG 2012 ANNUAL REPORT].

<sup>353</sup> DENVER BOTANIC GARDENS ENDOWMENT, INC., FORM 990, RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX Part III (2011) [hereinafter DBGE FORM 990].

<sup>354</sup> DBG FINANCIAL STATEMENTS, *supra* note 351, at 7.

## B | METHOD OF ENTITY FORMATION

DBG and DBGE were formed by filings submitted by members of the Colorado Forestry and Horticulture Association to the Colorado Secretary of State.<sup>355</sup> The public-private structure of the Gardens was created by the 1951 and 1991 long-term cooperative agreements between DBG and the City. On the City side, approval of those agreements required ordinances by the City Council and approval by the Mayor.<sup>356</sup>

## C | QUALIFICATIONS OF GOVERNING BOARD AND PROCEDURES FOR BOARD APPOINTMENT

DBG is governed by a Board of Trustees. Currently, DBG has thirty-nine voting trustees;<sup>357</sup> it may have up to 50.<sup>358</sup> Term trustees make up the bulk of the DBG board — up to thirty-nine members. They serve for three-year terms, are limited to two consecutive terms, are divided into three staggered classes, and are appointed by trustees in those two classes not up for election in any given year.<sup>359</sup> The DBG board also has up to five “trustees emeriti.”<sup>360</sup> These board members are elected in the same manner as term trustees and have already served as term trustees.<sup>361</sup> Finally, the board has six *ex officio* trustees. *Ex officio* trustees include five representatives from related organizations,<sup>362</sup> and either the Mayor or, if appointed by the Mayor, the City Manager of Parks and Recreation.<sup>363</sup> All trustees must be at least eighteen years old and, as a group, should have “skills and experience in finance, planning, horticulture, legal, development, marketing, management, administration, education and public relations.”<sup>364</sup>

DBGE is controlled by a board of nine directors and one voting member — DBG.<sup>365</sup> DBG, acting through its Board of Trustees, has the right to elect and remove DBGE board members.<sup>366</sup>

## D | OWNERSHIP OF PROPERTY AND OPERATION OF FACILITIES

The City holds title to the Gardens and also leases the property in Chatfield, Colorado, from the United States Army Corps of Engineers.<sup>367</sup> Under the 1991 Cooperative Agreement between DBG and the City, DBG operates and occupies those facilities, but DBG does not pay rent for use of the properties.<sup>368</sup> The City provides water, utilities, insurance, and other services to the Gardens.<sup>369</sup> In addition, the City appropriates operating revenues for the Gardens and grants some access to proceeds from City-issued bonds and COPs.<sup>370</sup>

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<sup>355</sup> See DBG ARTICLES, *supra* note 335; DBGE ARTICLES, *supra* note 352.

<sup>356</sup> See CHARTER, *supra* note 16, at § 3.2.6(B) (authorizing Mayoral approval of and requiring City Council authorization by ordinance or resolution for all agreements, permits, contracts, licenses, easements, or other instruments whereby the City grants the exclusive use of all or a portion of real property for an indefinite period of time in excess of thirty days).

<sup>357</sup> Denver Botanic Gardens, *2013 Board of Trustees*, <http://www.botanicgardens.org/our-gardens/about-us/2011-board-trustees> (last visited Aug. 7, 2014) [hereinafter *2013 Board of Trustees*].

<sup>358</sup> DENVER BOTANIC GARDENS, INC. BYLAWS § 3.2 (as amended Nov. 28, 2006) [hereinafter DBG BYLAWS].

<sup>359</sup> *Id.*

<sup>360</sup> The current board has three trustees emeriti. See *2013 Board of Trustees*, *supra* note 357.

<sup>361</sup> DBG BYLAWS, *supra* note 358, at § 3.2(c).

<sup>362</sup> Associates of Denver Botanic Gardens, Colorado Federation of Garden Clubs, DBGE, Denver Botanic Gardens Guild, and the Garden Club of Denver. *Id.* at § 3.2(d).

<sup>363</sup> *Id.*

<sup>364</sup> *Id.* at § 3.2(f).

<sup>365</sup> DBGE ARTICLES, *supra* note 352, at §§ 5-6.

<sup>366</sup> DBGE FORM 990, *supra* note 353, at Schedule O.

<sup>367</sup> See 1991 Cooperative Agreement, *supra* note 344, at 2.

<sup>368</sup> DBG FINANCIAL STATEMENTS, *supra* note 351, at 6.

<sup>369</sup> See *id.*

<sup>370</sup> See *infra*, discussion accompanying notes 414-18.

The DBG itself owns certain properties on York Street and Race Street in Denver and properties in Evergreen and Mt. Goliath, Colorado, which are not subject to the 1991 Cooperative Agreement.<sup>371</sup>

DBG “maintain[s], manage[s], operate[s] and control[s]” the Gardens.<sup>372</sup> In general, DBG has all the general powers of a Colorado nonprofit corporation.<sup>373</sup> Those powers include broad powers to act as a corporate entity,<sup>374</sup> including: (1) power to deal in real and personal property,<sup>375</sup> (2) make contracts,<sup>376</sup> (3) issue bonds,<sup>377</sup> and (4) transact business.<sup>378</sup> DBG has “full control” over Garden exhibits and maintenance.<sup>379</sup>

Notwithstanding plenary operational authority under its articles, DBG faces a number of contractual controls under its cooperative agreement with the City. First, with regard to planning, any master plan (for facility improvements or programmatic strategies) must be submitted to the City Manager of Parks and Recreation for review and comment.<sup>380</sup> Similarly, any new buildings or facilities must be approved by the Manager of Parks and Recreation.<sup>381</sup> Second, with regard to operations, DBG must keep the Gardens open to the public within reasonable hours.<sup>382</sup> DBG also must prepare rules and procedures for bidding and selection of concessionaires and submit these rules to the City Manager of Parks and Recreation for approval.<sup>383</sup> The City Manager of Parks and Recreation has the right of advance review of and comment on any concession contract.<sup>384</sup> Finally, with regard to mission, DBG must cooperate with area educational institutions<sup>385</sup> and must use its best efforts to promote public use and enjoyment of the Gardens.<sup>386</sup>

DBGE has all the powers of a Colorado nonprofit corporation.<sup>387</sup> It may only use those powers in furtherance of its purpose — to benefit, “perform the functions of, and to carry out the purposes of [DBG].”<sup>388</sup>

## E | POWER TO CONDEMN PROPERTY

DBG and DBGE have no powers of eminent domain.<sup>389</sup>

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<sup>371</sup> See 1991 Cooperative Agreement, *supra* note 344, at 2.

<sup>372</sup> *Id.* at § 1(b).

<sup>373</sup> DBG ARTICLES, *supra* note 335, at § II.

<sup>374</sup> See generally COLO. REV. STAT. § 7-123-102 (“General powers”).

<sup>375</sup> *Id.* at §§ 7-123-102(d) (establishing power “[t]o purchase, receive, lease, and otherwise acquire, and to own, hold, improve, use and otherwise deal with, real or personal property”), (e) (establishing power “[t]o sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of” property”), and (f) (establishing power to acquire shares). See also *id.* at § 7-132-101 (“Sale of property”).

<sup>376</sup> *Id.* at § 7-123-102(g) (establishing power “[t]o make contracts and guarantees, incur liabilities, borrow money, issue notes, bonds, and other obligations[.]” etc.).

<sup>377</sup> *Id.*

<sup>378</sup> *Id.* at §§ 7-123-102(g), (h) (establishing power to lend money and invest funds), (p) (establishing power “[t]o carry on a business”), and (e) (establishing power “[t]o sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of” property).

<sup>379</sup> 1991 Cooperative Agreement, *supra* note 344, at § 4.

<sup>380</sup> *Id.* at § 5(a).

<sup>381</sup> *Id.* at § 5(c).

<sup>382</sup> *Id.* at § 6.

<sup>383</sup> *Id.* at § 7.

<sup>384</sup> *Id.*

<sup>385</sup> *Id.* at § 8.

<sup>386</sup> *Id.* at § 12.

<sup>387</sup> DBGE ARTICLES, *supra* note 352, at § 3(b).

<sup>388</sup> *Id.* at § 3(a).

<sup>389</sup> COLO. REV. STAT. §§ 38-1-201 (“it is necessary, appropriate, and in the best interests of the state to list in this part 2 all of the governmental entities, corporations, and persons that may exercise the power of eminent domain pursuant to provisions of state law”) and 38-1-202 (listing “governmental entities, corporations, and persons authorized to use eminent domain” and not listing the Denver Botanic Gardens or the Denver Botanic Gardens Endowment).

## F | POWER TO LEVY TAXES (INCLUDING TABOR STATUS)

DBG and DBGE are not “districts” subject to TABOR.<sup>390</sup> DBG and DBGE have no power to levy taxes. However, DBG does receive tax revenues from entities subject to TABOR, including the SCFD.<sup>391</sup> DBG also receives appropriations from the City, which are derived from taxes.<sup>392</sup> Among these, the City also charges a ten percent Facility Development Admission Tax (or “Seat Tax”) on ticket purchases for events at the Gardens, which is allocated to a special revenue fund for operation and maintenance.<sup>393</sup>

## G | POWER TO ISSUE TAX-EXEMPT BONDS

DBG and DBGE cannot issue tax-exempt bonds. However, the DBG does receive proceeds from City tax-exempt bonds and City-issued COPs.<sup>394</sup>

## H | OTHER REVENUE SOURCES

DBG receives revenue and financing from a number of sources, including: (1) appropriations from the City, (2) admission fees, (3) concessions revenues, (4) SCFD tax revenues, (5) private gifts to be spent directly on a specified use, (6) investment income, and (7) bond proceeds from the City.<sup>395</sup> Neither the City nor DBG is obligated to provide a certain level of funding to the Gardens from any of the above categories.<sup>396</sup>

First, the City appropriates operating revenues for DBG.<sup>397</sup> In addition, the City may appropriate funds for capital improvement projects. In 2012, the City appropriated just under \$1 million for Gardens operations.<sup>398</sup> These funds are subject to a number of conditions, including an obligation to comply with all applicable laws concerning nondiscrimination and a prohibition on the use of the funds for political activities.<sup>399</sup>

Second, DBG may charge admissions and use fees. All such fees are subject to City Council approval.<sup>400</sup> These ordinance-prescribed fees are set forth in the Denver Revised Municipal Code.<sup>401</sup> These fees are further addressed under the Second Amendment to the 1991 Cooperative Agreement as follows:

Fees for admission to and use of the Facilities as approved by Denver City Council shall be collected and deposited by the Foundation in its accounts to be applied by the Foundation for management, operation, care, repair, and maintenance of the Facilities. Upon submittal by the Foundation of any proposed fee changes to the Manager, said proposal will be submitted, together with the Manager’s recommendation on the proposal, to the City Council for consideration and action. To the extent that such fees are not subject to ordinance approval, they may be established by the Foundation, subject to prior review and approval by the Manager.<sup>402</sup>

In 2008, DBG pledged increased fees toward repayment of the City’s COPs, which were used to finance a parking garage for the Gardens.<sup>403</sup>

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<sup>390</sup> See *infra* Appendix A, at pp. A-4 to A-5.

<sup>391</sup> See 1991 Cooperative Agreement, *supra* note 344, at § 9(e).

<sup>392</sup> See *infra* Section III.8.H.

<sup>393</sup> See Wheeler Museum E-mail, *supra* note 303 (citing Wheeler Red Rocks E-mail, *supra* note 3).

<sup>394</sup> See *infra* discussion accompanying notes 414-18.

<sup>395</sup> 1991 Cooperative Agreement, *supra* note 344, at §§ 9(a)-(g).

<sup>396</sup> *Id.* at § 9.

<sup>397</sup> *Id.* at § 9(a).

<sup>398</sup> DBG FINANCIAL STATEMENTS, *supra* note 351, at 6.

<sup>399</sup> 1991 Cooperative Agreement, *supra* note 344, at §§ 15, 22.

<sup>400</sup> CHARTER, *supra* note 16, at § 2.4.4(A).

<sup>401</sup> DENVER REV. MUNI. CODE § 39-121(6).

<sup>402</sup> Second Amendment to 1991 Cooperative Agreement (July 26, 2005).

<sup>403</sup> See Third Amendment to 1991 Cooperative Agreement § VII (Nov. 12, 2008).

Third, DBG may collect revenues from concessions.<sup>404</sup> In 2010, gross sales totaled roughly \$500,000.<sup>405</sup> Concessions regulations and contracts are subject to City review.<sup>406</sup>

Fourth, DBG receives a portion of the sales tax revenue collected by the SCFD.<sup>407</sup> In 2010, SCFD sales tax revenues contributed to the Gardens totaled nearly \$3.5 million.<sup>408</sup> SCFD funds may not be used for political activities.<sup>409</sup>

Fifth, DBG collects private gifts “directly to be expended in conformance with the terms of their receipt.”<sup>410</sup> DBGE holds and manages DBG’s endowment funds.<sup>411</sup> In 2012, endowment funds totaled over \$20 million.<sup>412</sup> Sixth, DBG may collect and use this investment income.<sup>413</sup>

Finally, DBG receives some bond proceeds from the City.<sup>414</sup> For instance, in 2008, the City agreed to contribute \$18.5 million in Better Denver Bonds proceeds to Gardens infrastructure projects.<sup>415</sup> “The bonds are an obligation of the City and will be repaid out of City funds.”<sup>416</sup> Similarly, also in 2008, the City entered into a \$17.7 million lease-purchase agreement, financed using COPs, to fund a parking garage.<sup>417</sup> Under that agreement, the City pays annual lease payments for the parking garage, and the Gardens reimburse the City for those payments using admission fees, membership fees, and concert ticket revenues.<sup>418</sup>

## I | SALES, USE, AND PROPERTY TAX-EXEMPT STATUS

The City does not pay property tax on real and personal property it owns.<sup>419</sup> DBG and DBGE do not pay property tax on real and personal property they own and use, nor do they pay sales or use taxes.<sup>420</sup> Further,

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<sup>404</sup> 1991 Cooperative Agreement, *supra* note 344, at § 9(d).

<sup>405</sup> DBG FINANCIAL STATEMENTS, *supra* note 351, at 4.

<sup>406</sup> *See supra* Section III.8.D.

<sup>407</sup> 1991 Cooperative Agreement, *supra* note 344, at § 9(e).

<sup>408</sup> DBG FINANCIAL STATEMENTS, *supra* note 351, at 4, 18.

<sup>409</sup> 1991 Cooperative Agreement, *supra* note 344, at § 22.

<sup>410</sup> *Id.* at § 9(f).

<sup>411</sup> DBG 2012 ANNUAL REPORT, *supra* note 352, at 19.

<sup>412</sup> DBG FINANCIAL STATEMENTS, *supra* note 351, at 20.

<sup>413</sup> 1991 Cooperative Agreement, *supra* note 344, at § 9(f).

<sup>414</sup> *Id.* at § 9(g).

<sup>415</sup> *See* DBG FINANCIAL STATEMENTS, *supra* note 351, at 11.

<sup>416</sup> *Id.*

<sup>417</sup> *Id.* at 12.

<sup>418</sup> *Id.*

<sup>419</sup> COLO. CONST., Art. X, § 4.

<sup>420</sup> *See* DBG FINANCIAL STATEMENTS, *supra* note 351, at 7 (stating that DBG is a tax-exempt entity). Kaplan Kirsch & Rockwell LLP has not independently verified and offers no opinion regarding the tax exempt status of the DBG and DBGE. Generally, the determination as to whether an entity is exempt from property, sales, and use taxes is made according to guiding law contained in various state statutes and local regulations, including: COLO. REV. STAT. §§ 39-26-102(2.5) (defining “charitable organization” as any entity formed for religious, charitable, scientific, testing for public safety, literary, educational, or amateur sports competition purposes); 39-26-718 (general state sales and use tax exemption for charitable organizations); 39-26-713(1)(d)(d) (general state sales and use tax exemption for tangible personal property); 39-3-101 (presumption of charitable purpose for determining general property tax exemption for charitable organizations); 39-3-108 (general property tax exemption for non-residential property used “solely and exclusively for strictly charitable purposes”); 39-2-17 (state-level property tax exemption determinations issued to county assessor); DENVER REV. MUNI. CODE Art. II § 53-26(2) (local religious or charitable corporations exemption from city retail sales tax); DENVER REV. MUNI. CODE Art. II § 53-97(2) (local religious or charitable corporations exemption from city use tax).

DBG does not pay property tax on the parking garage leased by the City pursuant to the lease-purchase agreement.<sup>421</sup>

## 9. DENVER ART MUSEUM

First formed in 1897, the Denver Art Museum (“DAM”) is operated by a nonprofit corporation with the purpose of “cultivat[ing] and promot[ing] a general interest in and appreciation of the Arts.”<sup>422</sup> The museum houses the largest collection of world art between Kansas City and the West, and it welcomes over 600,000 visitors annually.<sup>423</sup>

The Denver Art Museum Foundation (“DAM Foundation”) is a separate, tax-exempt nonprofit corporation formed to hold, manage, invest, and administer substantially all of the DAM’s endowment funds exclusively for the benefit of the DAM.<sup>424</sup>

### A | ORGANIZATIONAL FORM

The DAM operates as an independent nonprofit corporation. It has, however, entered into two framework agreements with the City for operation of the museum, dated December 17, 1932, and January 10, 1942, and a memorandum of understanding with the City dated December 29, 2010.<sup>425</sup> Those documents are the basis of the relationship between the DAM and the City.<sup>426</sup> In exchange for annual financial and in-kind support from the City, the DAM assumes the role of the City’s Agency for Art.<sup>427</sup>

### B | METHOD OF ENTITY FORMATION

Both the DAM and the DAM Foundation were formed by filing articles of incorporation with the Colorado Secretary of State.<sup>428</sup> The DAM was formed by the members of the Denver Art Association in 1941;<sup>429</sup> the DAM Foundation was formed by members of the DAM’s Board of Trustees in 1988.<sup>430</sup> Pursuant to a cooperative agreement between the DAM’s predecessor in interest<sup>431</sup> and the City in 1932, the DAM assumed the role of the City’s agent with respect to “all the matters connected with the acquisition, exhibition, and

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<sup>421</sup> *See id.* at § 39-3-124(1)(a) (general property tax exemption for real and personal property used by political subdivision pursuant to the provisions of a lease-purchase agreement).

<sup>422</sup> THE DENVER ART MUSEUM, CERTIFICATE OF INCORPORATION, SECTION II (July 8, 1941) [hereinafter DAM CERTIFICATE OF INCORPORATION]; DENVER ART MUSEUM, FINANCIAL STATEMENTS SEPTEMBER 30, 2012 6 (Feb. 12, 2013) [hereinafter DAM FINANCIAL STATEMENTS].

<sup>423</sup> DENVER ART MUSEUM, FORM 990: RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX, SCHEDULE D 5 (Mar. 14, 2013) [hereinafter DAM FORM 990].

<sup>424</sup> DAM FINANCIAL STATEMENTS, *supra* note 422, at 18.

<sup>425</sup> *Id.* at 6. *See* Agreement between the City and County of Denver and the Denver Art Museum 2 (Dec. 17, 1932) [hereinafter 1932 Agreement]; Agreement between the City, the DAM, the Trustees for the estate of Helen Dill, and the Trustees for the estate of Rachel M. Schleier (Jan. 10, 1942) [hereinafter 1942 Agreement]; Memorandum of Understanding between the City and County of Denver and the Denver Art Museum 2 (Dec. 29, 2010) [hereinafter Memorandum of Understanding].

<sup>426</sup> It is noteworthy that the bulk of the relationship between the DAM and the City is spelled out in the 1932 and 1942 agreements. Despite significant changes in the scope of the DAM’s operations in the intervening seventy years, the parties have not revisited the terms of their relationship. Telephone conversation with Laurie J. Heydman, Assistant City Attorney, Denver City Attorney’s Office (Dec. 10, 2013).

<sup>427</sup> DAM FINANCIAL STATEMENTS, *supra* note 422, at 6.

<sup>428</sup> DAM CERTIFICATE OF INCORPORATION, *supra* note 422; THE DENVER ART MUSEUM FOUNDATION, ARTICLES OF INCORPORATION (Jan. 22, 1988) [hereinafter DAM FOUNDATION ARTICLES].

<sup>429</sup> Memorandum of Understanding, *supra* note 425, at 1.

<sup>430</sup> DAM FOUNDATION ARTICLES, *supra* note 428, at 5.

<sup>431</sup> The current iteration of the DAM was preceded by a Colorado corporation of the same name. DAM CERTIFICATE OF INCORPORATION, *supra* note 422, at 2. The DAM “acquire[d], succeed[ed] to, maintain[ed], assume[d] and carr[ie]d on the property rights and privileges, duties, and obligations” of the previous Denver Art Museum corporation. *Id.*

exposition of works of art . . . and in regard to all Art Museum activities in general.”<sup>432</sup> Under that agreement, the DAM assumed full administrative control over the City’s art galleries and art collection.<sup>433</sup> The DAM also agreed to provide public access during reasonable hours, at least four days per week, and to submit annual reports of its operations and expenditures to the Mayor.<sup>434</sup> In exchange, the City agreed to provide the funding to the DAM in an amount that the City Council and Mayor determine is adequate and fair under the existing circumstances for the services provided.<sup>435</sup> On the City side, approval of those agreements required ordinances by the City Council and approval by the Mayor.<sup>436</sup>

## C | QUALIFICATIONS OF GOVERNING BOARD AND PROCEDURES FOR BOARD APPOINTMENT

The DAM is governed by a Board of Trustees.<sup>437</sup> Currently, the DAM has thirty-two voting trustees, but its bylaws allow for anywhere from ten to thirty-six trustees.<sup>438</sup> The DAM has procedures in place whereby it identifies prospective trustees, and those prospective trustees are elected at the DAM’s annual membership meeting by a vote of the DAM’s membership.<sup>439</sup> There are no *ex officio* trustees.<sup>440</sup> Once elected, trustees serve a three-year term.<sup>441</sup> It is not clear whether there are term limits.<sup>442</sup> Similarly, it is unclear whether there are any particular qualifications required of trustees.<sup>443</sup>

The DAM Foundation is governed by a Board of Directors. Currently, the DAM Foundation has ten directors; its bylaws require a minimum of five directors but do not set a maximum number.<sup>444</sup> The Chairman of the DAM Board of Trustees serves in an *ex officio* capacity.<sup>445</sup> The remaining directors are elected by the DAM Foundation Board of Directors; at least one of the elected directors must be a member of the DAM Board of Trustees.<sup>446</sup> Directors must be at least eighteen years of age, and a majority of the Board shall not be disqualified persons as defined in Internal Revenue Code § 4946.<sup>447</sup> The length of the terms and the existence of any term limits are not addressed in the bylaws, but officers are elected on a yearly basis.<sup>448</sup>

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<sup>432</sup> 1932 Agreement, *supra* note 425; Memorandum of Understanding, *supra* note 425.

<sup>433</sup> 1932 Agreement, *supra* note 425, at 3.

<sup>434</sup> *Id.*

<sup>435</sup> *Id.*

<sup>436</sup> See CHARTER, *supra* note 16, at § 3.2.6(B) (authorizing Mayoral approval of and requiring City Council authorization by ordinance or resolution for all agreements, permits, contracts, licenses, easements, or other instruments whereby the City grants the exclusive use of all or a portion of real property for an indefinite period of time in excess of thirty days).

<sup>437</sup> THE DENVER ART MUSEUM, AMENDED AND RESTATED CERTIFICATE OF INCORPORATION SECTION IV (Feb. 18, 1991) [hereinafter RESTATED DAM CERTIFICATE OF INCORPORATION].

<sup>438</sup> E-mail from Kristy Bassuener, Associate Director of Communications and Public Affairs, Denver Art Museum, and W. Cory Haller, Attorney Fellow, Kaplan Kirsch & Rockwell LLP (Dec. 11, 2013 5:23 p.m.) [hereinafter Kristy Bassuener E-mail]. The information provided by Ms. Bassuener was based on her review of the DAM’s bylaws. The DAM does not make its bylaws available to the public.

<sup>439</sup> *Id.*

<sup>440</sup> *Id.*

<sup>441</sup> *Id.*

<sup>442</sup> *Id.* Ms. Bassuener does, however, state that she does not believe there are term limits.

<sup>443</sup> *Id.* Ms. Bassuener does, however, state that she is not aware of any specific qualifications.

<sup>444</sup> See DENVER ART MUSEUM FOUNDATION, FORM 990: RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX, at Part VII (Jan. 24, 2013); DAM FORM 990, *supra* note 423, at Part VII; E-mail from Julie Reusser, Senior Manager, Kunding, Corder and Engle PC, to W. Cory Haller, Attorney Fellow, Kaplan Kirsch & Rockwell LLP (Dec. 18, 2013 11:18 a.m.) [hereinafter Julie Reusser E-mail]. The information provided by Ms. Reusser was based on her review of the DAM Foundation’s bylaws. The DAM does not make its bylaws available to the public.

<sup>445</sup> Julie Reusser E-mail, *supra* note 444.

<sup>446</sup> *Id.*

<sup>447</sup> *Id.*

<sup>448</sup> *Id.*

## D | OWNERSHIP OF PROPERTY AND OPERATION OF FACILITIES

The DAM owns the administration building and holds the North (Ponti) Building as the City’s Agency for Art.<sup>449</sup> The City owns the Frederic C. Hamilton Building (“Hamilton Building”). While the DAM is responsible for maintenance and operation of the Hamilton Building and the property where the building is located, it does not pay rent to the City.<sup>450</sup> The City provides telephone and certain types of insurance and other services to the DAM.<sup>451</sup>

The DAM is the legal and beneficial owner of its art collections.<sup>452</sup> The DAM acquires, holds, conserves, and exhibits its art collections for the benefit of the people of Denver as the City’s Agency for Art. In addition, the DAM exhibits art owned by the City. The DAM has all the general powers of a Colorado nonprofit corporation.<sup>453</sup> Those powers include broad powers to act as a corporate entity,<sup>454</sup> including: (1) power to deal in real and personal property, (2) make contracts, (3) issue bonds, and (4) transact business.<sup>455</sup>

The DAM Foundation has all the general powers of a Colorado nonprofit corporation; however, it may only exercise those powers in furtherance of its purposes and objectives.<sup>456</sup> Specifically, the DAM Foundation’s Articles of Incorporation stipulate that the DAM Foundation’s purpose is “establishing and maintaining an endowment fund exclusively for the benefit of the [DAM]” and “making distributions from such fund exclusively to the [DAM].”<sup>457</sup>

## E | POWER TO CONDEMN PROPERTY

Neither the DAM nor the DAM Foundation has any power of eminent domain.<sup>458</sup>

## F | POWER TO LEVY TAXES (INCLUDING TABOR STATUS)

Neither the DAM nor the DAM Foundation has the power to levy taxes or are “districts” subject to TABOR. However, the DAM does receive tax revenues from the SCFD.<sup>459</sup> The DAM also receives appropriations from the City of Denver, which are derived from taxes.<sup>460</sup>

## G | POWER TO ISSUE TAX-EXEMPT BONDS

Neither the DAM nor the DAM Foundation has the ability to issue tax-exempt bonds. However, in 1999, the City approved and issued tax-exempt general obligation bonds in the amount of \$62.5 million to fund the completion of the Hamilton Building and the construction of an aerial walkway between the Hamilton Building and the North Building.<sup>461</sup> The DAM also has borrowed money through the Colorado Housing and Financial Authority, which issued tax-exempt revenue bonds that were used to finance the cost of a security

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<sup>449</sup> DAM FINANCIAL STATEMENTS, *supra* note 422, at 6.

<sup>450</sup> *Id.*

<sup>451</sup> *Id.*

<sup>452</sup> *Id.*; Memorandum of Understanding, *supra* note 425, at 2.

<sup>453</sup> RESTATED DAM CERTIFICATE OF INCORPORATION, *supra* note 437, at 2-3.

<sup>454</sup> *See generally* COLO. REV. STAT. § 7-123-102 (“General powers”).

<sup>455</sup> *See supra* notes 374-78.

<sup>456</sup> DAM FOUNDATION ARTICLES, *supra* note 428, at 1.

<sup>457</sup> *Id.*

<sup>458</sup> COLO. REV. STAT. §§ 38-1-201 (“it is necessary, appropriate, and in the best interests of the state to list in this part 2 all of the governmental entities, corporations, and persons that may exercise the power of eminent domain pursuant to provisions of state law”) and 38-1-202 (listing “governmental entities, corporations, and persons authorized to use eminent domain” and not listing the DAM or the DAM Foundation).

<sup>459</sup> *See* DAM FINANCIAL STATEMENTS, *supra* note 422, at 3; DENVER ART MUSEUM, ANNUAL REPORT 2012-13 51 (2013).

<sup>460</sup> DAM FINANCIAL STATEMENTS, *supra* note 422, at 6.

<sup>461</sup> Memorandum of Understanding, *supra* note 425, at 2.



system and to pay certain costs of issuance related to the Colorado Housing and Financial Authority bonds.<sup>462</sup> This debt has been paid in full.<sup>463</sup>

## H | OTHER REVENUE SOURCES

The DAM receives funding from a number of sources, including: (1) appropriations from the City, (2) admissions and program fees, (3) gift shop revenues, (4) membership fees, (5) SCFD contributions, (6) private gifts to be spent directly on a specified use, (7) investment income, and (8) funds from the DAM Foundation.<sup>464</sup> Although the DAM receives significant financial support from the City and from the DAM Foundation, neither of those entities is obligated to provide any specific level of annual funding.

As evidenced by the 1942 Agreement between the City, the DAM, the Trustees for the estate of Helen Dill, and the Trustees for the estate of Rachel M. Schleier, in its early years, the DAM received significant funding from private bequests.<sup>465</sup> Pursuant to the 1942 Agreement, the Dill Estate and the Schleier Estate funded significant capital improvements, including construction of a new museum facility.<sup>466</sup>

## I | SALES, USE, AND PROPERTY TAX-EXEMPT STATUS

The City does not pay property tax on real and personal property it owns.<sup>467</sup> The DAM and the DAM Foundation do not pay property tax on real and personal property they own and use, nor do they pay sales or use taxes.<sup>468</sup>

## 10. DENVER ZOO

The Denver Zoological Foundation, Inc. (“Zoo Foundation”) is a nonprofit corporation with the purpose of “promot[ing] the maintenance and development of zoological gardens and exhibits in cooperation with the City.”<sup>469</sup> Founded in 1950, the Zoo Foundation has assumed the role of the City’s agent, responsible for the administration, management, and operation of the Denver Zoo, a 93-acre zoological garden that was founded in

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<sup>462</sup> DAM FINANCIAL STATEMENTS, *supra* note 422, at 17.

<sup>463</sup> *Id.*

<sup>464</sup> *Id.* at 3.

<sup>465</sup> 1942 Agreement, *supra* note 425.

<sup>466</sup> *Id.* at 6. For more information on the history of the buildings comprising the DAM, see Denver Art Museum, *The Buildings*, <http://www.denverartmuseum.org/about/the-buildings> (last visited Aug. 7, 2014).

<sup>467</sup> COLO. CONST., Art. X, § 4.

<sup>468</sup> See Kristy Bassuener E-mail, *supra* note 438 (stating that the Museum complies with state tax regulations). Kaplan Kirsch & Rockwell LLP has not independently verified and offers no opinion regarding the tax exempt status of the DAM. Generally, the determination as to whether an entity is exempt from property, sales, and use taxes is made according to guiding law contained in various state statutes and local regulations, including: COLO. REV. STAT. §§ 39-26-102(2.5) (defining “charitable organization” as any entity formed for religious, charitable, scientific, testing for public safety, literary, educational, or amateur sports competition purposes); 39-26-718 (general state sales and use tax exemption for charitable organizations); 39-26-713(1)(d)(d) (general state sales and use tax exemption for tangible personal property); 39-3-101 (presumption of charitable purpose for determining general property tax exemption for charitable organizations); 39-3-108 (general property tax exemption for non-residential property used “solely and exclusively for strictly charitable purposes”); 39-2-17 (state-level property tax exemption determinations issued to county assessor); DENVER REV. MUNI. CODE Art. II § 53-26(2) (local religious or charitable corporations exemption from city retail sales tax); DENVER REV. MUNI. CODE Art. II § 53-97(2) (local religious or charitable corporations exemption from city use tax).

<sup>469</sup> DENVER ZOOLOGICAL FOUNDATION, INC. AMENDED AND RESTATED ARTICLES OF INCORPORATION 1-2 (July 19, 1978) [hereinafter 1978 ARTICLES].

1896.<sup>470</sup> The Denver Zoo consistently ranks in the top ten of all public and not-for-profit zoos in the country in the size and diversity of its animal collection and in annual attendance.<sup>471</sup>

The Colorado Zoological Trust (“Zoo Trust”) is a separate nonprofit corporation formed to “act as a supporting organization to the [Zoo Foundation] to oversee and manage the acquisition and growth of, investment of assets of, and distribution of income from, the endowment funds intended to support the future operations and improvements to the Denver Zoo.”<sup>472</sup> The Zoo Trust was first established in 1997 to raise funds for the Zoo Foundation and manage the Zoo Foundation’s endowment funds for the Zoo Foundation’s exclusive benefit.<sup>473</sup>

## A | ORGANIZATIONAL FORM

Both the Zoo Foundation and the Zoo Trust operate as independent nonprofit corporations. The Zoo Foundation has entered into two cooperative agreements with the City, which define the relationship between the Zoo Foundation and the City. The first such agreement was dated July 27, 1956, but it has been replaced by an agreement dated November 4, 1998 (“the 1998 Cooperative Agreement”).<sup>474</sup>

## B | METHOD OF ENTITY FORMATION

Both the Zoo Foundation and the Zoo Trust were formed by interested private citizens who filed articles of incorporation with the Colorado Secretary of State.<sup>475</sup> In addition, as noted above, the Zoo Foundation and the City have entered into two cooperative agreements governing the terms of their relationship. Under the 1998 Cooperative Agreement, in exchange for annual financial and in-kind support from the City, the Zoo Foundation assumes the role of the City’s agent “to maintain, administer, manage, operate, and control the Denver Zoological Gardens and all buildings, grounds, living collections of fauna and flora, exhibits, programs, operations, and properties located therein or used in connection therewith.”<sup>476</sup> On the City side, approval of those agreements required ordinances by the City Council and approval by the Mayor.<sup>477</sup>

## C | QUALIFICATIONS OF GOVERNING BOARD AND PROCEDURES FOR BOARD APPOINTMENT

The Zoo Foundation is governed by a Board of Trustees.<sup>478</sup> Currently, the Zoo Foundation has forty-four voting trustees, but its bylaws allow for anywhere from twenty-nine to forty-six trustees.<sup>479</sup> Thirty-nine of the voting trustees are appointed by the Zoo Foundation, three trustees serve on an *ex officio* basis (the current chairman of the Denver Zoo Volunteer Council, the President of the Zoo Foundation, and the Manager of the Denver Department of Parks and Recreation), and four are appointed by the Mayor.<sup>480</sup> If the number of board

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<sup>470</sup> Summary History of Denver Zoo 1 (on file with author); Cooperative Agreement between the City and County of Denver and the Denver Zoological Foundation at 1 (Nov. 4, 1998) [hereinafter 1998 Cooperative Agreement].

<sup>471</sup> Summary History of Denver Zoo, *supra* note 470, at 1.

<sup>472</sup> E-mail from Andrew Rowan, Denver Zoological Foundation, to W. Cory Haller, Attorney Fellow, Kaplan Kirsch & Rockwell LLP (Nov. 25, 2013 2:24 p.m.) [hereinafter Andrew Rowan E-mail]. The information provided by Mr. Rowan was based on his review of the Zoo Foundation’s and the Zoo Trust’s bylaws. *See also* 1978 ARTICLES, *supra* note 469, at 2.

<sup>473</sup> Summary History of Denver Zoo, *supra* note 470, at 2; 1978 ARTICLES, *supra* note 469.

<sup>474</sup> Cooperative Agreement between the City and County of Denver and the Denver Zoological Foundation (July 27, 1956); 1998 Cooperative Agreement, *supra* note 470.

<sup>475</sup> 1978 ARTICLES, *supra* note 469. The original incorporators were Charles Bayly, Jr., Herman F. Feucht, and Frazer Arnold.

<sup>476</sup> 1998 Cooperative Agreement, *supra* note 470, at § 1(b).

<sup>477</sup> *See* CHARTER, *supra* note 16, at § 3.2.6(B) (authorizing Mayoral approval of and requiring City Council authorization by ordinance or resolution for all agreements, permits, contracts, licenses, easements, or other instruments whereby the City grants the exclusive use of all or a portion of real property for an indefinite period of time in excess of thirty days).

<sup>478</sup> 1978 ARTICLES, *supra* note 469.

<sup>479</sup> Andrew Rowan E-mail, *supra* note 472.

<sup>480</sup> *Id.*; 1998 Cooperative Agreement, *supra* note 470, at § 16(a).

members appointed by the Foundation is increased, the number of members appointed by the Mayor must be increased proportionately.<sup>481</sup> The Board of Trustees maintains a Recruitment and Development Committee, which recruits and screens potential Trustees.<sup>482</sup> Trustees are nominated and elected at an annual Board of Trustees retreat.<sup>483</sup> The Mayor and the City Council may also recommend potential Trustees, but the election of such Trustees is in the sole discretion of the Board.<sup>484</sup> Appointed Trustees are eligible to serve up to three consecutive, three-year terms; Trustees serving on an *ex officio* basis serve on the Board of Trustees as long as they hold their respective positions.<sup>485</sup>

In addition to the above-described members, the Board of Trustees also maintains a number of additional classes of Trustees. Advisory Trustees may be elected by the Board of Trustees to provide specific expertise.<sup>486</sup> They are not afforded any voting rights, and they serve one-year terms.<sup>487</sup> Trustees Emeriti are Trustees elected to an additional, single five-year term.<sup>488</sup> Although the Trustees Emeriti are not afforded any voting rights, they are “usually very experienced with the Zoo and hold a lot of influence.”<sup>489</sup> Finally, exemplary Trustees with a long history of service to the Zoo Foundation may be appointed as Honorary Life Trustees.<sup>490</sup> Honorary Life Trustees do not have voting rights, but they are provided the Board’s minutes and are permitted to attend all Board meetings.<sup>491</sup>

The Zoo Trust is governed by a Board of Directors. Currently, the Zoo Trust has seven directors, but its Articles of Incorporation allow for anywhere from seven to nine directors. A simple majority of the Board is appointed by the Zoo Foundation (one of which is the Zoo Foundation’s President/CEO), and the remaining Directors are appointed by the Zoo Trust.<sup>492</sup> Appointed Directors serve a maximum of two, three-year terms.<sup>493</sup> The Zoo Foundation President/CEO serves in an *ex officio* capacity.<sup>494</sup> All Directors must sign a document, in which they acknowledge the time and involvement expectations involved with service on the Board, and in which they affirm that they do not have a conflict of interest with the Zoo Trust.<sup>495</sup>

The Zoo Foundation exercises control of the Zoo Trust by way of two mechanisms. First, as discussed above, the Zoo Trust’s Amended Articles of Incorporation give the Zoo Foundation the power to appoint a simple majority of the Zoo Trust’s Board of Directors.<sup>496</sup> Second, the Zoo Trust’s Articles of Incorporation stipulate that the Zoo Trust “is organized . . . for the sole purpose of supporting the current and future mission of the Denver Zoological Foundation.”<sup>497</sup>

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<sup>481</sup> 1998 Cooperative Agreement, *supra* note 470, at § 16(a)(i).

<sup>482</sup> Andrew Rowan E-mail, *supra* note 472.

<sup>483</sup> *Id.*

<sup>484</sup> 1998 Cooperative Agreement, *supra* note 470, at § 16(b).

<sup>485</sup> Andrew Rowan E-mail, *supra* note 472.

<sup>486</sup> *Id.*

<sup>487</sup> *Id.*

<sup>488</sup> *Id.*

<sup>489</sup> *Id.*

<sup>490</sup> *Id.*

<sup>491</sup> *Id.*

<sup>492</sup> COLORADO ZOOLOGICAL TRUST, AMENDMENT TO THE RESTATED ARTICLES OF INCORPORATION VI.B (Dec. 1, 2004) [hereinafter AMENDED ZOO TRUST ARTICLES]; Andrew Rowan E-mail, *supra* note 472.

<sup>493</sup> Andrew Rowan E-mail, *supra* note 472.

<sup>494</sup> *Id.*

<sup>495</sup> *Id.*

<sup>496</sup> See *supra* discussion accompanying note 492.

<sup>497</sup> COLORADO ZOOLOGICAL TRUST, ARTICLES OF INCORPORATION Art. III (Nov. 19, 1997).

## D | OWNERSHIP OF PROPERTY AND OPERATION OF FACILITIES

The property, exhibits, improvements, and fixtures comprising the Denver Zoo are owned by the City.<sup>498</sup> Although the Zoo Foundation has the authority to repair, replace, and install fixtures, and to design, construct, reconstruct, expand, or remodel any wildlife exhibits or animal enclosures, to the extent such projects cost in excess of \$50,000 they must be first approved by the City Manager of Parks and Recreation.<sup>499</sup> In addition, any construction or modification by the Zoo of buildings on City property requires that the Mayor assign construction obligations to the Zoo Foundation.<sup>500</sup> As a condition precedent to any such assignment, the plans and specification for any projects assigned to the Zoo Foundation must be reviewed and approved by the City Manager of Parks and Recreation and the City Manager of Public Works.<sup>501</sup>

All equipment, supplies, animals, plants, vehicles, and other personal property acquired by the Zoo Foundation by gift or with funds are owned by the Zoo Foundation.<sup>502</sup> Furthermore, the Zoo Foundation is permitted to “modify, expand, or alter its zoological and botanical collections through sale, purchase, trade, or loan and may replace, by the same means, items of equipment, supplies, animals, plants, vehicles, or other personal property.”<sup>503</sup>

The Zoo Foundation has “exclusive control, responsibility, and discretion over the selection, development, arrangement, and naming of all exhibits and collections and the creation, naming, and placement of all acknowledgements, memorials, and works of art located in the zoological facilities.”<sup>504</sup> The Zoo Foundation also has all the general powers of a Colorado nonprofit corporation.<sup>505</sup> Those powers include broad powers to act as a corporate entity, including:

(1) the power to deal in real and personal property, (2) the power to make contracts, and (3) the power to borrow money.<sup>506</sup> However, it may only exercise those powers in furtherance of its purposes and objectives.<sup>507</sup>

The 1998 Cooperative Agreement limits the ability of the Zoo Foundation, subject to approval by the City Manager of Parks and Recreation, to: (1) expand or modify zoo facilities; (2) bind or impose any liability on the City; and (3) sell, lease, encumber, hypothecate, or otherwise create or assign a property interest in the zoological gardens.<sup>508</sup> The 1998 Cooperative Agreement also obligates the Zoo Foundation to give to the City all of its right, title, and interest in and to any fixtures or other permanent improvements to the zoological gardens; to maintain the facilities in good repair; to make every effort to cooperate with the educational institutions in the Denver metropolitan area; and to submit to the City annually a comprehensive report of its activities during the preceding year.<sup>509</sup> Pursuant to the 1998 Cooperative Agreement, the Zoo Foundation must also inform the City of any proposed changes to its articles of incorporation, bylaws, or other material policy documents.<sup>510</sup>

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<sup>498</sup> 1998 Cooperative Agreement, *supra* note 470, at §§ 1(b) (noting that the agreement does not convey any interest in the land) and 6(a) (requiring the Zoo Foundation to donate all of its right, title, and interest in and to any fixtures and permanent improvements to the City).

<sup>499</sup> *Id.* at § 9(a).

<sup>500</sup> *Id.* at § 9(b); CHARTER, *supra* note 16, at § 2.3.3(A).

<sup>501</sup> 1998 Cooperative Agreement, *supra* note 470, at § 9(b)(iii).

<sup>502</sup> *Id.* at § 6(c).

<sup>503</sup> *Id.*

<sup>504</sup> *Id.* at § 7(b).

<sup>505</sup> 1978 ARTICLES, *supra* note 469, at 2.

<sup>506</sup> *See supra* notes 374-78.

<sup>507</sup> 1978 ARTICLES, *supra* note 469, at 2.

<sup>508</sup> 1998 Cooperative Agreement, *supra* note 470, at §§ 3(b), 4(c), and 6(b).

<sup>509</sup> *Id.* at §§ 6(a), 7(a), 11, and 21.

<sup>510</sup> *Id.* at § 16(c).

The Zoo Trust has legal title to and controls the Zoo Foundation's endowment.<sup>511</sup> The Zoo Trust also has all the general powers of a Colorado nonprofit corporation, but it may only exercise those powers for the purpose of supporting the current and future mission of the Zoo Foundation.<sup>512</sup>

#### E | POWER TO CONDEMN PROPERTY

Neither the Zoo Foundation nor the Zoo Trust has any powers of eminent domain.<sup>513</sup>

#### F | POWER TO LEVY TAXES (INCLUDING TABOR STATUS)

Neither the Zoo Foundation nor the Zoo Trust has the power to levy taxes or are "districts" subject to TABOR. However, the Zoo Foundation receives tax revenues from the SCFD.<sup>514</sup> The Zoo Foundation also receives appropriations from the City, which are derived from taxes.<sup>515</sup>

#### G | POWER TO ISSUE TAX-EXEMPT BONDS

Neither the Zoo Foundation nor the Zoo Trust has the ability to issue tax-exempt bonds. However, the Zoo Foundation has received funding from "bond funds as authorized by the people and issued by the City."<sup>516</sup>

#### H | OTHER REVENUE SOURCES

The Zoo Foundation receives revenue and financing from a number of sources, including: (1) annual discretionary appropriations from the City; (2) admissions and program fees; (3) revenues from concessions operated at the zoological facilities; (4) SCFD funding; (5) private gifts to be spent directly on a specified use; (6) investment income derived from the Zoo Foundation's endowment; (7) operating net revenues; and (8) bond funds as authorized by the people of the City.<sup>517</sup>

Pursuant to the 1998 Cooperative Agreement, the City appropriates operating revenues for the Zoo.<sup>518</sup> Those discretionary appropriations pay costs and expenses for the management, operation, maintenance, modification, and improvement of the Denver Zoo.<sup>519</sup> The City also authorizes other appropriations in order to finance capital improvements, and it provides water, gas, electricity, sewer, and telephone service at no charge to the Zoo Foundation.<sup>520</sup>

The 1998 Cooperative Agreement stipulates the manner in which revenue and financing from these different sources may be used. Unless otherwise specified, appropriations from the City must be applied first to cover the costs of the City's provision of utilities and other services, then to cover the wages and benefits of City employees assigned to work at the zoological facilities. Any remaining funds may then be applied to other purposes consistent with the purposes of the Zoo Foundation.<sup>521</sup> Revenues derived from admissions and

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<sup>511</sup> Summary History of Denver Zoo, *supra* note 470, at 2.

<sup>512</sup> AMENDED ZOO TRUST ARTICLES, *supra* note 492, at III.A; 1978 ARTICLES, *supra* note 469, at 2-3.

<sup>513</sup> COLO. REV. STAT. §§ 38-1-201 ("it is necessary, appropriate, and in the best interests of the state to list in this part 2 all of the governmental entities, corporations, and persons that may exercise the power of eminent domain pursuant to provisions of state law") and 38-1-202 (listing "Governmental entities, corporations, and persons authorized to use eminent domain" and not listing the Denver Zoological Foundation or the Colorado Zoological Trust).

<sup>514</sup> 1998 Cooperative Agreement, *supra* note 470, at § 13(e).

<sup>515</sup> *Id.* at §§ 13(a), (b).

<sup>516</sup> *Id.* at § 13(h). *See also* Summary History of Denver Zoo, *supra* note 470, at 3 (noting that in 1999 Denver voters approved a \$62.5 million Zoo Improvement general obligation bond issue, with an agreement from the Zoo Foundation to match the amount with \$25 million); *id.* (noting that in 2000 the City used "Certificates of Participation" funding mechanism for funding costs of constructing an underground parking facility).

<sup>517</sup> 1998 Cooperative Agreement, *supra* note 470, at §§ 13(a)-(h).

<sup>518</sup> *Id.* at § 13(a).

<sup>519</sup> *Id.*

<sup>520</sup> *Id.* at §§ 13(b) and 15(a).

<sup>521</sup> *Id.* at §§ 13(a)-(b).

concessions must be used first to cover the wages and benefits of City Employees assigned to work at the zoological facilities, and then to other purposes consistent with the purposes of the Zoo Foundation.<sup>522</sup> Private gifts (either given directly to the Zoo Foundation or given to the City and deposited in the Zoo Foundation Fund established in the City Treasury), investment income, and operating net revenues may be used for any purposes consistent with the purposes of the Zoo Foundation.<sup>523</sup>

Neither the City nor the Zoo Foundation is obligated to provide any specific level of funding.<sup>524</sup> Nor is the Zoo Foundation obligated to cover any deficit resulting from inadequate funds to cover the wages and benefit expenses of City employees assigned to work at the zoological facilities.<sup>525</sup>

## I | SALES, USE, AND PROPERTY TAX-EXEMPT STATUS

The City does not pay property tax on real and personal property it owns.<sup>526</sup> The Zoo Foundation and the Zoo Trust do not pay property tax on real and personal property they own and use, nor do they pay sales or use taxes.<sup>527</sup>

# DEVELOPMENT AUTHORITIES

The five project development authorities described in this section were structured to finance, construct, and (at least temporarily) operate large projects in Denver. Four of these entities are structured to issue tax-exempt bonds and none are subject to TABOR. In addition, three of these projects have been structured to allow use of special district and tax increment financing.

## 11. DENVER UNION STATION PROJECT AUTHORITY

The Denver Union Station Redevelopment Project (“DUS Project”) is a “multi-model[sic] transportation hub project in Denver, Colorado which includes light rail, commuter rail and regional bus facility improvements and renovation of the Denver downtown train station . . . .”<sup>528</sup> The Project involves a number of public and private entities, including: (1) Denver Regional Council of Governments (“DRCOG”); (2) Colorado Department of Transportation (“CDOT”); (3) RTD; (4) the City (the Denver Union Station Metropolitan Districts (“DUSMD”))

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<sup>522</sup> *Id.* at §§ 13(c)-(d).

<sup>523</sup> *Id.* at §§ 13 (f)-(g).

<sup>524</sup> *Id.* at § 13.

<sup>525</sup> *Id.*

<sup>526</sup> COLO. CONST., Art. X, § 4.

<sup>527</sup> *See* 1998 Cooperative Agreement, *supra* note 470, at § 20(a) (stating that the Foundation will comply with federal, state, and local tax guidelines). Kaplan Kirsch & Rockwell LLP has not independently verified and offers no opinion regarding the tax exempt status of the Zoo. Generally, the determination as to whether an entity is exempt from property, sales, and use taxes is made according to guiding law contained in various state statutes and local regulations, including: COLO. REV. STAT. §§ 39-26-102(2.5) (defining “charitable organization” as any entity formed for religious, charitable, scientific, testing for public safety, literary, educational, or amateur sports competition purposes); 39-26-718 (general state sales and use tax exemption for charitable organizations); 39-26-713(1)(d)(d) (general state sales and use tax exemption for tangible personal property); 39-3-101 (presumption of charitable purpose for determining general property tax exemption for charitable organizations); 39-3-108 (general property tax exemption for non-residential property used “solely and exclusively for strictly charitable purposes”); 39-2-17 (state-level property tax exemption determinations issued to county assessor); DENVER REV. MUNI. CODE Art. II § 53-26(2) (local religious or charitable corporations exemption from city retail sales tax); DENVER REV. MUNI. CODE Art. II § 53-97(2) (local religious or charitable corporations exemption from city use tax).

<sup>528</sup> DENVER UNION STATION PROJECT AUTHORITY, 2011 ANNUAL FINANCIAL REPORT 6 (2012) [hereinafter DUSPA FINANCIAL REPORT].

and the Downtown Development Authority (“DDA”); (5) the Denver Union Station Project Authority (“DUSPA”); and (6) two private developers.<sup>529</sup> In total, it will cost approximately \$500 million.<sup>530</sup>

The DUS Project has a long history. In the 1980s, RTD and the City worked together to make improvements to the historic Union Station. Beginning with a 1994 intergovernmental agreement, RTD, the City, CDOT, and others began a feasibility study to determine options for using Union Station as a multimodal hub.<sup>531</sup> In 2001, RTD purchased the Union Station site in accordance with a jointly-funded intergovernmental agreement among RTD, the City, DRCOG, and CDOT.<sup>532</sup>

DUSPA, DDA, and the DUSMD were formed in 2008 to administer and make available a range of financing sources for the project. DUSPA was formed as the entity responsible for financing, acquiring, owning, equipping, designing, constructing, renovating, operating, and maintaining the DUS Project.<sup>533</sup> DDA was formed as a vehicle for providing tax increment financing to the DUS Project. The DUSMD also were formed “to help finance, acquire, construct and complete the [DUS Project and the Union Station Neighborhood Development]” in order to “assure the provision of requisite public infrastructure and attractive public amenities within and without the DUS Project and the Market Street Station site.”<sup>534</sup>

## A | ORGANIZATIONAL FORM

DUSPA is a Colorado nonprofit corporation. The DDA is a downtown development authority created pursuant to statute.<sup>535</sup> The DUSMD are quasi-municipal corporation and political subdivisions also organized pursuant to statute, specifically, the Special District Act.<sup>536</sup>

## B | METHOD OF ENTITY FORMATION

The City formed DUSPA in 2008 under the Colorado Revised Nonprofit Corporation Act.<sup>537</sup> To do so, the City Council authorized formation,<sup>538</sup> and the Mayor filed with the Secretary of State.<sup>539</sup> To safeguard DUSPA’s ability to issue “on behalf of bonds,” which requires a public purpose,<sup>540</sup> the City explicitly listed DUSPA’s public purposes in its formative documents. These public purposes include: (1) improving property values, (2) preserving the historical significance of the Union Station building, (3) increasing tax revenues, (4) developing additional public spaces, (5) reducing automobile dependence, (6) curbing

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<sup>529</sup> The private development partners are Continuum Partners and East West Partners, which combined to form the Union Station Neighborhood Company. *See* Diane S. Barrett, *Financing Denver Union Station* \*23 (June 8, 2011) available at [http://www.iscvt.org/where\\_we\\_work/usa/article/low\\_carbon\\_transportation/barrett\\_denver.pdf](http://www.iscvt.org/where_we_work/usa/article/low_carbon_transportation/barrett_denver.pdf). These developers were selected through an RFP process.

<sup>530</sup> DUSPA FINANCIAL REPORT, *supra* note 528, at 20.

<sup>531</sup> DENVER UNION STATION PROJECT AUTHORITY, MASTER PLAN 30 (2002).

<sup>532</sup> *Id.*

<sup>533</sup> DENVER, COLO., COUNCIL BILL 0319 (2008) (approving the creation of DUSPA) [hereinafter COUNCIL BILL 0319]; DENVER UNION STATION PROJECT AUTHORITY, ARTICLES OF INCORPORATION Art. VII, § 7.01(a) (Aug. 6, 2008) [hereinafter DUSPA ARTICLES].

<sup>534</sup> UNION STATION NEIGHBORHOOD CO., SERVICE PLAN FOR DUS METROPOLITAN DISTRICT NO. 1 2 (2008) [hereinafter SERVICE PLAN FOR DUS METROPOLITAN DISTRICT NO. 1].

<sup>535</sup> COLO. REV. STAT. §§ 31-25-801 to -822; DENVER, COLO., ORD. 400 (2008) (authorizing creation of the DDA) [hereinafter ORDINANCE 400].

<sup>536</sup> *See* COLO. REV. STAT. §§ 32-1-103(20); *see also* SERVICE PLAN FOR DUS METROPOLITAN DISTRICT NO. 1, *supra* note 534, at 1.

<sup>537</sup> *See* COUNCIL BILL 0319, *supra* note 533, at § 2.

<sup>538</sup> *See id.* (authorizing formation of DUSPA).

<sup>539</sup> DUSPA ARTICLES, *supra* note 533, at Art. III.

<sup>540</sup> *See* Bock v. Westminster Mall Co., 819 P.2d 55, 61 (Colo. 1991); *see also* NAT’L ASS’N OF BOND LAWYERS, FUNDAMENTALS OF MUNICIPAL BOND LAW 7, Ch. 1: General Law (William L. Behrig ed., 2005) (summarizing the public purpose doctrine) [hereinafter NAT’L ASS’N OF BOND LAWYERS].

transportation-related pollution and sprawl, (7) promoting economic development by creating mixed use space, and (8) lessening the burden on the City.<sup>541</sup>

Also in 2008, the City formed the DDA under the Downtown Development Authority Act.<sup>542</sup> To do so, the City Council adopted an ordinance establishing the DDA and submitted the authorization of the DDA to the qualified electors for approval.<sup>543</sup>

Finally, again in 2008, the City formed the DUSMD under the Special District Act.<sup>544</sup> To do so, the City Council passed an ordinance approving the DUSMD's proposed Service Plans,<sup>545</sup> and, as required by statute, the DUSMD submitted organizational petitions with the Denver District Court<sup>546</sup> and the court ordered an election to approve the organization of the DUSMD.<sup>547</sup>

TABOR elections were required to authorize debt and tax revenue collection by both the DDA and the DUSMD.<sup>548</sup>

## C | QUALIFICATIONS OF GOVERNING BOARD AND PROCEDURES FOR BOARD APPOINTMENT

DUSPA's board has a total of thirteen members,<sup>549</sup> including six directors appointed by the Mayor, two directors appointed by RTD, one director appointed by CDOT, one director appointed by DRCOG, one director appointed by the DUSMD, and two City employees.<sup>550</sup> The two City employees are non-voting and must be the City Manager of Finance and one additional Mayoral appointee.<sup>551</sup> No other directors may be City employees.<sup>552</sup>

The six voting directors appointed by the Mayor must be confirmed by the City Council.<sup>553</sup> The non-voting City directors are appointed by the Mayor and are not subject to Council approval.<sup>554</sup> All other directors serve at the discretion of the organizations they represent.<sup>555</sup> With the exception of the City Manager of Finance, who serves continuously in an *ex officio* capacity, all Directors serve at will for two-year terms.<sup>556</sup>

The design of the DUSPA board balances TABOR and tax-exempt bonding requirements. A majority of City directors creates the governmental control needed for DUSPA to be a constituted authority able to issue tax-exempt bonds on behalf of the City.<sup>557</sup> Preventing City employees from voting helps to preserve DUSPA's non-district status under TABOR.<sup>558</sup>

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<sup>541</sup> COUNCIL BILL 0319, *supra* note 533, at § 1(a).

<sup>542</sup> COLO. REV. STAT. § 31-25-801 *et seq.*

<sup>543</sup> ORDINANCE 400, *supra* note 535; DENVER, COLO., ORD. 401 (2008) (submitting the authorization and creation of the DDA to the qualified electors).

<sup>544</sup> COLO. REV. STAT. § 32-1-101 *et seq.*

<sup>545</sup> DENVER, COLO., ORD. 399 (2008); COLO. REV. STAT. §§ 32-1-204.5 and 32-1-205.

<sup>546</sup> *See* COLO. REV. STAT. § 32-1-205.

<sup>547</sup> COLO. REV. STAT. §§ 32-1-305.

<sup>548</sup> COLO. REV. STAT. § 31-25-804 (downtown development authority); COLO. REV. STAT. § 32-1-1101(1.5)(d) (special district).

<sup>549</sup> DUSPA ARTICLES, *supra* note 533, at § 6.01.

<sup>550</sup> *Id.* at § 6.02.

<sup>551</sup> *Id.*

<sup>552</sup> *Id.* at § 6.03.

<sup>553</sup> *Id.* at § 6.02.

<sup>554</sup> *Id.*

<sup>555</sup> *Id.*

<sup>556</sup> *Id.* at § 6.04.

<sup>557</sup> *See infra* Appendix A, at pp. A-2 to A-3.

<sup>558</sup> *See infra* Appendix A, at pp. A-4 to A-5.



DDA's board has a total of five members, including one member who is a resident, landowner, or business lessee within the DDA's boundaries and three members who are residents or landowners within the DDA's boundaries.<sup>559</sup> These four members are appointed by the Mayor and confirmed by a majority vote of the City Council.<sup>560</sup> The President of the City Council serves in an *ex officio* capacity.<sup>561</sup> The four appointed members serve staggered four-year terms.<sup>562</sup> The board's meetings are subject to the Colorado Open Meetings Law; its minutes are subject to the Colorado Open Records Act.<sup>563</sup>

The DUSMD Boards each have five directors.<sup>564</sup> Directors serve staggered terms, not to exceed four years in length.<sup>565</sup> Currently, each of the five DUSMD has the same five directors.<sup>566</sup> Board Members must be "eligible electors" of the district elected by "eligible electors" of the district; eligible electors must be registered voters in the state and either be resident in, own property in, or be obligated to pay taxes under a contract to purchase property in the district, or be the spouse or civil union partner of a person who owns taxable property or pays taxes under a contract to purchase property in the district.<sup>567</sup>

## D | OWNERSHIP OF PROPERTY AND OPERATION OF FACILITIES

Subject to a handful of limitations, DUSPA's Articles grant it all the "rights, powers, privileges and immunities that a Colorado nonprofit corporation may possess and exercise."<sup>568</sup> Those powers include broad powers to act as a corporate entity, including: (1) power to deal in real and personal property, (2) make contracts, (3) issue bonds, and (4) transact business.<sup>569</sup> However, DUSPA may only exercise its powers toward "the limited purpose of financing, acquiring, owning, equipping, designing, constructing, renovating, operating, [and] maintaining" the DUS Project.<sup>570</sup> Furthermore, DUSPA faces a number of specific limitations,<sup>571</sup> including: (1) a requirement of City approval for expenses in excess of revenues;<sup>572</sup> (2) a strict legal, financial, and operational separation from the City;<sup>573</sup> (3) an adequate capital requirement;<sup>574</sup> (4) a

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<sup>559</sup> ORDINANCE 400, *supra* note 535, at § 11(a). *See also* COLO. REV. STAT. § 31-25-805(1).

<sup>560</sup> ORDINANCE 400, *supra* note 535, at § 11(a).

<sup>561</sup> *Id.*

<sup>562</sup> *Id.* at § 11(c).

<sup>563</sup> *Id.* at §§ 7, 11(e).

<sup>564</sup> Colorado Department of Local Affairs, *Local Government Filings – Director Information, DUS Metropolitan District No. 1*, [https://dola.colorado.gov/dlg\\_portal/filings.jsf?id=66138&category=3&jfwid=176e2157359cb0a6e93e4a5bbef6%3A1](https://dola.colorado.gov/dlg_portal/filings.jsf?id=66138&category=3&jfwid=176e2157359cb0a6e93e4a5bbef6%3A1) (last visited Aug. 7, 2014).

<sup>565</sup> *Id.*

<sup>566</sup> *Id.*

<sup>567</sup> *See* COLO. REV. STAT. §§ 32-1-103(5) ("eligible elector"), 32-1-804.3 (candidate qualifications), and 32-1-805 (elections). The current board members represent the private developers of the DUS Project: two represent Continuum Partners and three represent East West Partners. Colorado Department of Local Affairs, *Local Government Filings – Director Information, DUS Metropolitan District No. 1*, [https://dola.colorado.gov/dlg\\_portal/filings.jsf?id=66138&category=3&jfwid=176e2157359cb0a6e93e4a5bbef6%3A1](https://dola.colorado.gov/dlg_portal/filings.jsf?id=66138&category=3&jfwid=176e2157359cb0a6e93e4a5bbef6%3A1) (last visited Aug. 7, 2014).

<sup>568</sup> DUSPA ARTICLES, *supra* note 533, at § 7.02.

<sup>569</sup> *See supra* notes 374-78.

<sup>570</sup> DUSPA ARTICLES, *supra* note 533, at §§ 7.01(a) (specifying Authority's purpose) and 7.03(a) (granting broad powers toward fulfilling purpose).

<sup>571</sup> *See id.* at §§ 7.03(a)-(u).

<sup>572</sup> *Id.* at § 7.03(i).

<sup>573</sup> *See id.* at §§ 7.03(e) (liability), (f) (bonding), (g) (debts), (k) (operations), (m) (finances), (n) (funds), and (o) (arm's length business deals with City).

<sup>574</sup> *Id.* at § 7.03(p).

limitation on political activities;<sup>575</sup> (5) limitations of bankruptcy proceedings;<sup>576</sup> and (6) a prohibition of bond non-payment.<sup>577</sup>

DUSPA exercises a narrower range of powers than it possesses under its Articles. DUSPA does not lease or own any physical facilities and has no employees.<sup>578</sup> Instead, the owner's representative for the project, Trammel Crow Companies, Inc., with the help of RTD, performs or coordinates all DUSPA administrative functions.<sup>579</sup>

Upon approval by the City Council of DDA's Plan of Development, DDA was authorized to collect and retain taxes, loans, and other sources of income as described by statute.<sup>580</sup> DDA also was authorized to adopt its Plan of Development, which, upon City Council approval, may provide for tax increment financing.<sup>581</sup> The DDA adopted a Plan of Development (as defined in the statute) for the redevelopment of DUS, and it designated an area for tax increment finance (TIF), established a tax base, and agreed to authorize the use of all eligible tax increment revenue for payment of the DUS project costs and debt service for the project, through the Authority, for a period of thirty years.<sup>582</sup>

The DUSMD are authorized to "manage, implement and coordinate the payment of the District Contribution and the operation and maintenance of certain DUS Project Improvements."<sup>583</sup> If necessary, the DUSMD are also authorized to finance, acquire, construct, complete, operate, and maintain the DUSMD improvements and to provide related services within and without the boundaries of the DUSMD.<sup>584</sup> DUSMD currently pledge property taxes generated within the DUS project area to repay certain project loans.<sup>585</sup>

## E | POWER TO CONDEMN PROPERTY

Neither DUSPA nor the DDA has the power to condemn property by eminent domain.<sup>586</sup> The DUSMD's Service Plans provide that they shall not exercise eminent domain authority without the prior approval of the City.<sup>587</sup>

## F | POWER TO LEVY TAXES (INCLUDING TABOR STATUS)

For TABOR purposes DUSPA is an enterprise<sup>588</sup> exempt from TABOR. DDA and the DUSMD are districts subject to TABOR. Neither DUSPA nor the DDA has the power to levy taxes or assessments of any kind.<sup>589</sup> The DUSMD have the authority to levy and collect ad valorem taxes on all taxable property within their boundaries,<sup>590</sup> subject to approval of the eligible electors of the district.

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<sup>575</sup> *Id.* at §§ 7.03(c) (propaganda and lobbying) and (d) (action organization activities).

<sup>576</sup> *Id.* at § 7.03(t).

<sup>577</sup> *Id.*

<sup>578</sup> DUSPA FINANCIAL REPORT, *supra* note 528, at 20.

<sup>579</sup> *Id.*

<sup>580</sup> COLO. REV. STAT. § 31-25-808; ORDINANCE 400, *supra* note 535, at § 5.

<sup>581</sup> *Id.* at § 6.

<sup>582</sup> Memorandum from Marla Lien to File re: The Redevelopment of Denver Union Station 1 2 (Apr. 29, 2008) (on file with author) [hereinafter File Memorandum]. *See generally* COLO. REV. STAT. § 31-25-801 *et seq.*

<sup>583</sup> SERVICE PLAN FOR DUS METROPOLITAN DISTRICT NO. 1, *supra* note 534, at 5.

<sup>584</sup> *Id.* at 6. For a more detailed discussion of the DUSMD's powers and authorities, see *id.* at 6-9.

<sup>585</sup> *See, e.g.*, DENVER UNION STATION PROJECT AUTHORITY, PLEDGED REVENUE REPORT 7 (2013) (discussing the various sources of revenue, including tax revenues from the DUSMD, available for DUSPA loan repayment) [hereinafter PLEDGED REVENUE REPORT].

<sup>586</sup> *See* DUSPA ARTICLES, *supra* note 533, at § 7.03(j); COUNCIL BILL 0319, *supra* note 533, at 2.

<sup>587</sup> *See* SERVICE PLAN FOR DUS METROPOLITAN DISTRICT NO. 1, *supra* note 534, at 10.

<sup>588</sup> Notes from Karen Aviles, Assistant City Attorney, City of Denver, titled "Denver Union Station Project Authority ('DUSPA'): Incorporation of DUSPA under Colorado Revised Nonprofit Corporation Act" (on file with author).

<sup>589</sup> *See* DUSPA ARTICLES, *supra* note 533, at § 7.03(j); COUNCIL BILL 0319, *supra* note 533, at 2.

<sup>590</sup> COLO. REV. STAT. § 32-1-1101(a) and (d).

## G | POWER TO ISSUE TAX-EXEMPT BONDS

For tax-exempt bonding purposes DUSPA is a constituted authority<sup>591</sup> and DDA and the DUSMD are governmental entities. Under its Articles, DUSPA may issue tax-exempt revenue bonds only to finance the DUS Project.<sup>592</sup> Those bonds are payable “solely out of the revenues derived from the financing, refinancing, sale, leasing or operation of the [DUS] Project or other property of [DUSPA].”<sup>593</sup> For federal income tax purposes, revenue bonds are deemed to be issued on behalf of the City, so that bond interest is exempted from federal income taxes.<sup>594</sup> However, DUSPA bonds are not debts or obligations of the City.<sup>595</sup> Although DUSPA has the power to issue bonds, it has not done so. Federal loans have eliminated the need for DUSPA bonds, thus far.<sup>596</sup>

While DUSPA has not issued bonds, other entities have issued bonds to fund the project. In particular, in July 2010, RTD issued a \$168 million bond “payable to [DUSPA] to provide partial funding for construction of the [DUS] Project in which RTD will assume ownership of certain assets during construction.”<sup>597</sup>

DDA may not issue tax-exempt bonds on its own behalf; the City must issue bonds to finance projects for the DDA.<sup>598</sup> The bonds must be approved by ordinance adopted by the City Council.<sup>599</sup> Because the City is a governmental entity, the bonds are payable from the tax increment or from any revenues received by the DDA from the sale or leasing of the projects.<sup>600</sup> The City has not issued any bonds secured by the DDA tax increment to date. The tax revenues generated within the DDA are pledged to repay, primarily, the RRIF (Railroad Rehabilitation and Improvement Financing) loan that provided funds used to finance a portion of the redevelopment.<sup>601</sup>

As governmental entities, the DUSMD are authorized to issue tax exempt revenue or general obligation indebtedness, including bonds, and to incur other multi-fiscal year financial obligations in the total principal amounts not to exceed \$300,000,000 for the DUSMD contribution to the DUS Project improvement costs and the DUSMD improvement costs.<sup>602</sup> The DUSMD have not issued any bonds to date. DUSMD currently pledge property taxes generated within the DUS project area to repay certain project loans.<sup>603</sup>

## H | OTHER REVENUE SOURCES

The DUS Project has received revenue and financing from a number of sources, including federal and state grants, property sale proceeds, and federal loans. Federal and state grants total approximately \$107 million.<sup>604</sup> They include Federal Highway Administration grant money (\$50 million), American Reinvestment and Recovery Act grant money (\$29 million), Federal Transit Administration grant money (\$10 million), Transit Improvement Project grant money (\$3 million), and funds from the state of Colorado (Senate Bill 1, \$19 million).<sup>605</sup> Local contributions total \$82 million.<sup>606</sup> Federal loan funds total \$301 million: \$145 million

<sup>591</sup> Telephone conversation with Karen Aviles, *supra* note 24; File Memorandum, *supra* note 582.

<sup>592</sup> DUSPA ARTICLES, *supra* note 533, at § 7.03(f).

<sup>593</sup> *Id.*

<sup>594</sup> COUNCIL BILL 0319, *supra* note 533, at § 2(d); DUSPA ARTICLES, *supra* note 533, at § 7.03(f).

<sup>595</sup> DUSPA ARTICLES, *supra* note 533, at § 7.03(g); *see also id.* at § 7.03(h) (mandating language in each issuance stating that DUSPA bonds are not debts of the City).

<sup>596</sup> Conversation with Steve Kaplan, Partner, Kaplan Kirsch & Rockwell LLP (July 19, 2013).

<sup>597</sup> DUSPA FINANCIAL REPORT, *supra* note 528, at 25.

<sup>598</sup> COLO. REV. STAT. § 31-25-810(1).

<sup>599</sup> *Id.* at § 31-25-809.

<sup>600</sup> *Id.* at § 31-25-807(3).

<sup>601</sup> PLEDGED REVENUE REPORT, *supra* note 585, at 2, 6.

<sup>602</sup> SERVICE PLAN FOR DUS METROPOLITAN DISTRICT NO. 1, *supra* note 534, at 15.

<sup>603</sup> PLEDGED REVENUE REPORT, *supra* note 585, at 7.

<sup>604</sup> SERVICE PLAN FOR DUS METROPOLITAN DISTRICT NO. 1, *supra* note 534, at 6.

<sup>605</sup> Numbers rounded. *See* Diane S. Barrett, *supra* note 529, at \*24 (“Federal and State Grants”).

<sup>606</sup> DUSPA FINANCIAL REPORT, *supra* note 528, at 6.

from a Transportation Infrastructure Finance and Innovation Act loan and \$155 million from a Railroad Rehabilitation and Improvement Financing loan.<sup>607</sup> Loans will be paid from a number of sources, including FasTracks funds, the RTD bonds payable to DUSPA, and thirty years of sales and property tax increment financing revenues from the DDA.<sup>608</sup>

## I | SALES, USE, AND PROPERTY TAX-EXEMPT STATUS

None of the City, DDA, the DUSMD, nor RTD pay property tax on real and personal property they own, nor do they pay sales or use taxes.<sup>609</sup> Construction materials used in construction of portions of the DUS project were not exempted from state or City sales and use tax, however.<sup>610</sup>

## 12. DENVER CONVENTION CENTER HOTEL AUTHORITY

The Denver Convention Center Hotel Authority (“DCCHA”) financed, constructed, and owns the Hyatt Regency Denver at Colorado Convention Center (“Hotel”). The Hotel was intended to support the Colorado Convention Center expansion; the approval of the Convention Center expansion was based, in part, on the assumption that the successful operation of the Convention Center would require construction of a headquarters hotel adjacent to the Convention Center.<sup>611</sup> Construction of the Hotel began in June 2003, and the Hotel opened on December 20, 2005.<sup>612</sup>

### A | ORGANIZATIONAL FORM

The City formed DCCHA as a private nonprofit corporation<sup>613</sup> under the Colorado Revised Nonprofit Corporation Act.<sup>614</sup> DCCHA was incorporated on March 11, 2003.<sup>615</sup>

### B | METHOD OF ENTITY FORMATION

In 2003, Denver City Council passed an ordinance authorizing the Mayor to form the DCCHA by filing articles of incorporation with the state.<sup>616</sup> The ordinance lists DCCHA’s public purposes, including: (1) maximizing the use of the Colorado Convention Center, (2) improving event booking at the Convention Center, (3) enhancing employment in the City, (4) improving surrounding property values, (5) increasing tax revenues, (6) increasing the City’s draw as a convention destination, and (7) accomplishing all of the above with a lesser burden on the City.<sup>617</sup> DCCHA’s Articles of Incorporation (“Articles”) also recite that it is a “government owned business, authorized to issue its own revenue bonds that does not receive 10% or more of

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<sup>607</sup> *Id.*

<sup>608</sup> See Diane S. Barrett, *supra* note 529, at \*27 (“Loan Repayment Sources”); DUSPA FINANCIAL REPORT, *supra* note 528, at 6.

<sup>609</sup> COLO. CONST., Art. X, § 4.

<sup>610</sup> E-mail from David Scott, Partner, Hogan Lovells US LLP, to Polly Jessen, Partner, Kaplan Kirsch & Rockwell LLP (Oct. 1, 2013 8:18 a.m.).

<sup>611</sup> See Denver Convention Center Hotel Economic Development Agreement by and between the Denver Convention Center Hotel Authority and the City and County of Denver (as amended June 1, 2003) [hereinafter Economic Development Agreement].

<sup>612</sup> GHP Horwath, *Denver Convention Center Hotel Authority Financial Audit Report 2004-2005* 12 (Mar. 17, 2006) [hereinafter GHP Horwath 2004-05 Audit].

<sup>613</sup> See DENVER, COLO., ORD. 150 (2003) [hereinafter ORDINANCE 150]; DENVER CONVENTION CENTER HOTEL AUTHORITY, ARTICLES OF INCORPORATION § 7.01(b) (Mar. 11, 2003) [hereinafter DCCHA ARTICLES].

<sup>614</sup> ORDINANCE 150, *supra* note 613, at § 5; DCCHA ARTICLES, *supra* note 613, at § 7.01(b).

<sup>615</sup> GHP Horwath, *Denver Convention Center Hotel Authority Financial Audit Report 2003-2004* 2 (Mar. 11, 2005) [hereinafter GHP Horwath 2003-04 Audit].

<sup>616</sup> See ORDINANCE 150, *supra* note 613, at § 5; DCCHA ARTICLES, *supra* note 613, at Preamble.

<sup>617</sup> See Economic Development Agreement, *supra* note 611, at 1; ORDINANCE 150, *supra* note 613, at §§ 1(b) and (c).

its annual revenue in grants from the state of Colorado or Colorado local governments and, accordingly, is an enterprise within the meaning of Subsection 2(b) of TABOR.”<sup>618</sup>

## C | QUALIFICATIONS OF GOVERNING BOARD AND PROCEDURES FOR BOARD APPOINTMENT

DCCHA’s board has seven directors.<sup>619</sup> All are appointed by the Mayor and confirmed by ordinance of the City Council.<sup>620</sup> A maximum of two directors may be officers or employees of the City at any one time, and those City directors cannot vote.<sup>621</sup> DCCHA directors serve for staggered three-year terms.<sup>622</sup> The structure of the DCCHA board balances TABOR and tax-exempt bonding requirements. City appointment of members creates the governmental control needed for DCCHA to be a constituted authority,<sup>623</sup> and, while DCCHA is not a TABOR district in its own right, making City officers and employees non-voting members preserves DCCHA’s enterprise status under TABOR.<sup>624</sup>

## D | OWNERSHIP OF PROPERTY AND OPERATION OF FACILITIES

DCCHA’s Articles provide that it has “all the rights, powers, privileges and immunities that a Colorado nonprofit corporation may possess and exercise,”<sup>625</sup> provided that those powers are used only for “the limited purpose of owning, acquiring, constructing, equipping, operating, [and] financing” the Hotel.<sup>626</sup> Colorado nonprofit corporations enjoy broad powers to act as corporate entities, including: (1) power to deal in real and personal property, (2) make contracts, (3) issue bonds, and (4) transact business.<sup>627</sup> DCCHA’s Articles impose a number of specific restrictions:<sup>628</sup> a requirement that the Mayor approve any expenses in excess of the sum of expected revenues and other legally available moneys,<sup>629</sup> a minimum capital requirement,<sup>630</sup> a dissolution approval requirement,<sup>631</sup> and an operational separation between DCCHA and the City.<sup>632</sup> DCCHA owns the Hotel, but contracts for its operation with the Hyatt Corporation.<sup>633</sup>

The City enjoys a number of contractually-granted controls over DCCHA, including the right to approve the hotel operator selected by DCCHA and requirements that the DCCHA comply with open records and open meetings laws, prevailing wage, and other similar obligations.<sup>634</sup> The City also retains an option to purchase the Hotel, and receives all excess revenues of DCCHA.<sup>635</sup> That right addresses the requirement that a sponsoring government have a beneficial interest in DCCHA as a constituted authority.

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<sup>618</sup> See DCCHA ARTICLES, *supra* note 613, at § 7.01(b).

<sup>619</sup> *Id.* at § 6.01.

<sup>620</sup> *Id.* at § 6.02.

<sup>621</sup> *Id.* at § 6.03.

<sup>622</sup> DENVER CONVENTION CENTER HOTEL AUTHORITY, ARTICLES OF AMENDMENT TO ARTICLES OF INCORPORATION ART. II (Mar. 19, 2009) (amending § 6.04).

<sup>623</sup> See *infra* Appendix A, at pp. A-2 to A-3.

<sup>624</sup> See *infra* Appendix A, at pp. A-4 to A-5.

<sup>625</sup> DCCHA ARTICLES, *supra* note 613, at § 7.02.

<sup>626</sup> *Id.* at §§ 7.01 and 7.03(a).

<sup>627</sup> See *supra* notes 375-79.

<sup>628</sup> DCCHA ARTICLES, *supra* note 613, at §§ 7.03(a)-(u).

<sup>629</sup> *Id.* at § 7.03(i) (requiring approval by the City’s mayor for all expenses exceeding available moneys).

<sup>630</sup> *Id.* at § 7.03(p) (requiring “adequate capital in light of . . . contemplated business operations”).

<sup>631</sup> *Id.* at § 7.03(s) (requiring mayoral and City Council approval of dissolution).

<sup>632</sup> See *id.* at §§ 7.03(e) (segregating DCCHA costs), (g) (segregating DCCHA obligations), and (k) (segregating DCCHA operations).

<sup>633</sup> See, e.g., Denver Convention Center Hotel Authority, Minutes from the Board of Directors Meeting (Feb. 25, 2013) (discussing the ongoing operation of the Hotel).

<sup>634</sup> See, e.g., Economic Development Agreement, *supra* note 611, at §§ 3.03 (option to purchase), 3.05 (public records and meetings), 3.08 (repayment of costs), and 3.09 (approval of hotel operator).

<sup>635</sup> DCCHA ARTICLES, *supra* note 613, at § 8.03; Economic Development Agreement, *supra* note 608, at § 3.06.

## E | POWER TO CONDEMN PROPERTY

DCCHA has no power to condemn property by eminent domain and no police power.<sup>636</sup>

## F | POWER TO LEVY TAXES (INCLUDING TABOR STATUS)

For TABOR purposes, DCCHA is an enterprise.<sup>637</sup> DCCHA is explicitly prohibited from levying “taxes of any kind.”<sup>638</sup>

## G | POWER TO ISSUE TAX-EXEMPT BONDS

For tax-exempt bonding purposes, DCCHA is a constituted authority. By its articles and authorizing ordinance, DCCHA is permitted to issue up to \$375 million in tax-exempt revenue bonds to finance Hotel construction and operations.<sup>639</sup> Those bonds are secured by the Hotel’s revenues and property.<sup>640</sup> The bonds do not represent any form of debt or financial obligation to the City.<sup>641</sup> On June 25, 2003, DCCHA issued over \$354 million of such bonds, which were used to finance the purchase of the Hotel site, construct and furnish the Hotel, pay fees and other expenses, and establish a number of working funds for the Hotel.<sup>642</sup> DCCHA refinanced its 2003 revenue bonds in 2006.<sup>643</sup>

## H | OTHER REVENUE SOURCES

DCCHA receives revenue from two sources, operating revenue from the Hotel and “economic development payments” from the City. The City makes economic development payments under an Economic Development Agreement with the DCCHA. These payments started at \$2.5 million in 2006 (the first year of operation), increase to \$11 million by 2018, and continue at \$11 million per year until 2041 at the latest.<sup>644</sup> These payments are made in consideration for the economic benefits that the Hotel generates, as well as for payments-in-lieu-of-taxes (“PILTs”), DCCHA compliance with City open records and hiring standards, the City’s purchase option, and various other terms set forth in the Economic Development Agreement.<sup>645</sup> Economic development payments are subject to annual appropriations of the City.<sup>646</sup> Both sources of revenue are pledged and payable to a trustee for payment of debt service on the DCCHA bonds and certain reserves, with the exception of certain funds released to the Authority when the Hotel meets specified revenue targets, and revenues remaining after payment of debt service and reserve requirements, which are released to the City.<sup>647</sup>

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<sup>636</sup> DCCHA ARTICLES, *supra* note 613, at § 7.03(j).

<sup>637</sup> *See id.* at § 7.01(b).

<sup>638</sup> *Id.*

<sup>639</sup> *Id.* at § 7.03(f).

<sup>640</sup> *Id.*

<sup>641</sup> *See, e.g.*, Prospectus, \$356,155,000 Denver Convention Center Hotel Authority Convention Center Hotel Senior Revenue Refunding Bonds Series 2006 (2006).

<sup>642</sup> *See* GHP Horwath 2003-04 Audit, *supra* note 615, at 16-19 (discussing the bonds in detail).

<sup>643</sup> *See* GHP Horwath, *Denver Convention Center Hotel Authority Financial Audit Report 2005-2006: Management’s Discussion and Analysis* 3, 20-25 (May 9, 2007) (noting that the 2003 revenue bonds were refinanced for \$356,155,000 in “refunding bonds” on May 2, 2006, and discussing the 2006 bonds in detail).

<sup>644</sup> *See* Economic Development Agreement, *supra* note 611, at § 4.01 (stipulating the length of the Agreement); *id.* at A-1 (“Schedule of Economic Development Payments”); *see also* GHP Horwath 2003-04 Audit, *supra* note 615, at 20-21 (recording payments in annual amounts).

<sup>645</sup> Economic Development Agreement, *supra* note 611, at 3.

<sup>646</sup> *Id.* at § 5.01.

<sup>647</sup> *See* Amended and Restated Indenture of Trust between Denver Convention Center Hotel Authority and J.P. Morgan Trust Company, National Association, First Granting Clause and Second Granting Clause (as amended Apr. 1, 2006); Economic Development Agreement, *supra* note 611, at § 3.06.

## I | SALES, USE, AND PROPERTY TAX-EXEMPT STATUS

DCCHA was structured with the intent that its income be excluded from gross income for federal tax purposes and be exempt from property taxation.<sup>648</sup> However, by contract, DCCHA pays the City PILTs equivalent to the property tax a non-exempt entity would pay.<sup>649</sup> Construction materials and furnishings, fixtures, and equipment for the Hotel were not exempted from state or City sales and use tax.<sup>650</sup>

### 13. LOWRY ECONOMIC REDEVELOPMENT AUTHORITY (FORMER LOWRY AIR FORCE BASE REDEVELOPMENT)

The Lowry Economic Redevelopment Authority (“LRA”) is an “independent, legal entity” created by Denver and the City of Aurora.<sup>651</sup> The purpose of LRA is to transition the former Lowry Air Force Base into a successful private economic redevelopment project;<sup>652</sup> LRA serves as the master developer of the site.

The former Lowry Air Force Base covered 1,866 acres, located both in Denver and Aurora. Operations on the Lowry Air Force Base began in 1937.<sup>653</sup> In its nearly sixty years of operation, the base supported Air Force bomber training, missile operations, and other military activities.<sup>654</sup> Military operations on the base produced environmental contamination that had to be addressed upon transfer of the base to LRA.<sup>655</sup> The U.S. Air Force scheduled the closure of Lowry Air Force Base in 1991.<sup>656</sup>

In 1995, LRA took title to the Lowry site under the federal Base Realignment and Closure Act of 1990 (“BRAC”).<sup>657</sup> In 1991, Denver and Aurora created the Lowry Economic Redevelopment Project to serve as the

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<sup>648</sup> 26 U.S.C. § 115 (excluding from “gross income” “income derived from . . . the exercise of any essential governmental function and accruing to a State or any political subdivision thereof”); DCCHA ARTICLES, *supra* note 613, at § 7.01(c); Economic Development Agreement, *supra* note 611, at § 3.02.

<sup>649</sup> See Economic Development Agreement, *supra* note 611, at § 3.02; see also GHP Horwath 2004-05 Audit, *supra* note 612, at 21 (noting that PILT payments began in 2006, the first year of operation). These payments are designed to protect funding to Denver Public Schools (DPS), which relies on property tax revenues. Special Projects/DIA Committee, Denver City Council, Meeting Summary 2 (Feb. 5, 2003) (expressing an intent to “keep[] DPS whole”).

<sup>650</sup> See Colorado Department of Revenue, *Notice of Deficiency* (Mar. 31, 2010).

<sup>651</sup> Intergovernmental Agreement by and between the City and County of Denver and the City of Aurora Establishing the Lowry Redevelopment Authority 4 (Aug. 1, 1994) [hereinafter LRA IGA].

<sup>652</sup> *Id.*

<sup>653</sup> The site became a U.S. Air Force Base in 1948. DENVER URBAN RENEWAL AUTHORITY, LOWRY URBAN REDEVELOPMENT PLAN 1-2 (1995) [hereinafter DENVER URBAN RENEWAL AUTHORITY].

<sup>654</sup> Colorado Department of Public Health and Environment, *Lowry Air Force Base, Background*, <http://www.colorado.gov/cs/Satellite/CDPHE-HM/CBON/1251616142313#> (last visited Aug. 7, 2014) [hereinafter *Lowry Air Force Base, Background*].

<sup>655</sup> See generally Colorado Department of Public Health and Environment, *Lowry Air Force Base, Environmental Concerns*, <http://www.colorado.gov/cs/Satellite/CDPHE-HM/CBON/1251616142313#> (last visited Aug. 7, 2014) [hereinafter *Lowry Air Force Base, Environmental Concerns*]; Consent Decree between Colorado Department of Public Health and Environment and Lowry Economic Redevelopment Authority, No. 01-08-07-02, 4 (Aug. 12, 2002) (setting forth U.S. and LRA obligations for environmental remediation of Lowry) [hereinafter CDPHE 2002 Consent Decree].

<sup>656</sup> Lowry, *History of Redevelopment*, <http://www.lowrydenver.com/ourhometown/art-and-history/history-of-redevelopment> (last visited Aug. 7, 2014) [hereinafter *History of Redevelopment*]; see also DEFENSE BASE CLOSURE AND REALIGNMENT COMM., REPORT TO THE PRESIDENT 5-37 to 5-38 (1991).

<sup>657</sup> DENVER URBAN RENEWAL AUTHORITY, *supra* note 653, at 2; Defense Base Closure and Realignment Act of 1990, Pub. L. No. 100-526, 102 Stat. 2623 (1988). Under BRAC, the Department of Defense may transfer retired military bases to a “Local Redevelopment Authority.” R. CHUCK MASON, CONG. RESEARCH SERV., BASE REALIGNMENT AND CLOSURE (BRAC): TRANSFER AND DISPOSAL OF MILITARY PROPERTY 3 (2013). BRAC provides for many different means of conveyance, but most relevant for purposes of the instant discussion, a Local Redevelopment Authority may take title by way of an Economic Development Conveyance at less than fair market value after it has submitted a redevelopment plan outlining a comprehensive plan for reuse and economic development of the base. *Id.* at 3, 8-9.

Local Redevelopment Authority for Lowry.<sup>658</sup> The Lowry Economic Redevelopment Project submitted disposition and reuse plans for Lowry to the U.S. Department of Defense in 1993.<sup>659</sup> The federal government approved the plans and formally closed the base in 1994.<sup>660</sup> That same year, Denver and Aurora created LRA to take title to the site and manage redevelopment.<sup>661</sup> In 1995, the federal government transferred a portion of the base to LRA by economic development conveyance.<sup>662</sup> Today, the original Lowry redevelopment is largely complete. However, LRA recently began work on the Buckley Annex, now referred to as Boulevard One — the last remaining parcel of the Air Force base to be developed by LRA.<sup>663</sup> The Buckley Annex property was transferred to the LRA in 2012.<sup>664</sup>

## A | ORGANIZATIONAL FORM

LRA is a quasi-governmental entity formed by, but separate and distinct from, Denver and Aurora.<sup>665</sup> It also is a “public entity” for purposes of the Colorado Governmental Immunity Act, Colorado Revised Statutes § 24-10-101 *et seq.*<sup>666</sup>

## B | METHOD OF ENTITY FORMATION

Denver and Aurora created LRA in 1994 by intergovernmental agreement, pursuant to the Colorado Constitution and state statute, which authorizes “political subdivisions to establish, by contract, a separate legal entity to provide any function, service, or facility lawfully authorized to each.”<sup>667</sup>

## C | QUALIFICATIONS OF GOVERNING BOARD AND PROCEDURES FOR BOARD APPOINTMENT

LRA is governed by a nine-member board of directors.<sup>668</sup> Denver appoints seven members; Aurora appoints two.<sup>669</sup> This division of power reflects the Lowry site’s location within the two cities — 1,631 acres in Denver and 229 acres in Aurora.<sup>670</sup> Denver appointees are selected by the Mayor of Denver and confirmed by the Denver City Council and Aurora appointees are selected by the Mayor of Aurora.<sup>671</sup> Denver may appoint no more than two City officials to the board; Aurora may appoint no more than one.<sup>672</sup> Elected officials appointed to the board lose their positions on the board upon loss of office.<sup>673</sup> No LRA employees may be board members.<sup>674</sup> The executive director of LRA sits as a non-voting *ex officio* member of the board.<sup>675</sup>

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<sup>658</sup> LRA IGA, *supra* note 651, at 3; *History of Redevelopment*, *supra* note 656.

<sup>659</sup> LRA IGA, *supra* note 651, at 3.

<sup>660</sup> *Lowry Air Force Base, Background*, *supra* note 654.

<sup>661</sup> *See* LRA IGA *supra* note 651, at § 1.1.

<sup>662</sup> DENVER URBAN RENEWAL AUTHORITY, *supra* note 653, at 2.

<sup>663</sup> Lowry Redevelopment Authority, *Boulevard One Construction Notice*, <http://lowryredevelopment.org/boulevard-one-construction-notice/> (last visited Aug. 7, 2014) (the Buckley Annex development project is named “Boulevard One”).

<sup>664</sup> Lowry Redevelopment Authority, *Buckley Annex Update*, <http://lowryredevelopment.org/buckley-annex-update/> (last visited Aug. 7, 2014).

<sup>665</sup> *See* LRA IGA, *supra* note 651, § 1.1.

<sup>666</sup> LRA IGA, *supra* note 651, at § 1.5.

<sup>667</sup> *Id.* at 1-2 (citing COLO. CONST. ART. XIV, 18(2)(a), (b) and COLO. REV. STAT. § 29-1-203(4)).

<sup>668</sup> *Id.* at § 2.1.

<sup>669</sup> *Id.*

<sup>670</sup> *Id.* at 2. *See also id.* at § 8.1 (noting that Denver owns eighty-nine percent of Lowry, Aurora eleven percent).

<sup>671</sup> *Id.* at § 2.1; Lowry Redevelopment Authority, *About Us*, <http://lowryredevelopment.org/about-us/> (last visited Aug. 8, 2014).

<sup>672</sup> *Id.*

<sup>673</sup> *Id.*

<sup>674</sup> *Id.*

<sup>675</sup> *Id.* at § 2.2.



Board members serve for three-year terms.<sup>676</sup> Board meetings are subject to the Colorado Open Meetings Law;<sup>677</sup> minutes and other records are subject to the Colorado Open Records Act.<sup>678</sup>

The board works with two advisory committees. The Community Advisory Committee contributes “information, technical support, and recommendations from the communities most affected by the base closure.” It is comprised of twenty-one members: fourteen appointed by the Mayor of Denver and seven appointed by Aurora.<sup>679</sup> The Denver/Aurora Coordinating Committee resolves “matters of joint interest” between Denver and Aurora.<sup>680</sup> It consists of six members — three appointed by the Mayor of Denver and three appointed by Aurora.<sup>681</sup> The LRA board may not take action on matters of joint interest without an affirmative vote by at least four of the six Coordinating Committee members. Such matters include: (1) grant applications; (2) coordination, phasing, and funding of site improvements; and (3) a Lowry golf course, among others.<sup>682</sup>

## D | OWNERSHIP OF PROPERTY AND OPERATION OF FACILITIES

LRA is the master developer for the Lowry site.<sup>683</sup> LRA enjoys a range of powers delegated by Denver and Aurora for the furtherance of its purposes.<sup>684</sup> Those powers include, *inter alia*, power to: (1) construct, operate, lease, or otherwise deal in real and personal property;<sup>685</sup> (2) make a variety of contracts;<sup>686</sup> (3) hire agents and employees;<sup>687</sup> (4) work with Denver and Aurora to zone Lowry;<sup>688</sup> (5) provide infrastructure for Lowry;<sup>689</sup> (6) charge fees;<sup>690</sup> and (7) finance the project.<sup>691</sup>

While the Air Force transferred ownership of the primary Lowry parcel to LRA in 1995, the federal government retained liability for environmental contamination after that transfer.<sup>692</sup> In 2002, the Air Force transferred environmental management to LRA and its contractor, Lowry Assumption Corporation.<sup>693</sup> However, “[U]ltimate liability for clean-up remains with the Air Force pursuant to CERCLA, section 120(h)(3)(A)(ii) and the Enforceable Agreement between the Air Force and CDPHE dated August 7, 2002.”<sup>694</sup>

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<sup>676</sup> *Id.* at § 2.3.

<sup>677</sup> *Id.* at § 2.8(B).

<sup>678</sup> *Id.* at § 2.8(C).

<sup>679</sup> *Id.* at § 2.9.

<sup>680</sup> *Id.* at § 2.10.

<sup>681</sup> *Id.*

<sup>682</sup> *Id.* at § 2.10(2).

<sup>683</sup> *Id.* at 3-4; *see also* Lowry Redevelopment Authority, *About Us*, <http://lowryredevelopment.org/about-us/> (last visited Aug. 8, 2014).

<sup>684</sup> LRA IGA, *supra* note 651, at § 3.2.

<sup>685</sup> *Id.* at §§ 3.2(A) (power to “hold, acquire, operate, manage, lease, (as lessee or lessor), sell, construct, reconstruct or repair, or dispose of” property), (K) (power to “acquire, construct, manage, maintain, operate, lease” etc. real property, buildings, and facilities), (P) (audit), and (Q) (master redevelopment plan).

<sup>686</sup> *Id.* at §§ 3.2(B) (all contracts), (C) (contracts subject to payment by federal government), (F) (contracts for caretaker services), (L) (compensation plans), and (T) (goods and services).

<sup>687</sup> *Id.* at §§ 3.2(G) (agents, employees, consultants) and (O) (professional, administrative, and support services).

<sup>688</sup> *Id.* at § 3.2(H).

<sup>689</sup> *Id.* at § 3.2(I) (public works, utilities, and facilities).

<sup>690</sup> *Id.* at § 3.1(J) (fees, rents, rates).

<sup>691</sup> *See infra* Sections III.13.G and III.13.H; LRA IGA, *supra* note 651, at §§ 3.2(R) (private and public financing), (S) (investments), (U) (revenue bonds), and (V) (lease-purchase agreements and COPs).

<sup>692</sup> CDPHE 2002 Consent Decree, *supra* note 655, at ¶ 12.

<sup>693</sup> Lowry Air Force Base, Environmental Concerns, *supra* note 655.

<sup>694</sup> CDPHE 2002 Consent Decree, *supra* note 655, at ¶ 12.

## E | POWER TO CONDEMN PROPERTY

LRA has no powers of eminent domain.<sup>695</sup>

## F | POWER TO LEVY TAXES (INCLUDING TABOR STATUS)

LRA has no powers of taxation,<sup>696</sup> and no power to levy special assessments.<sup>697</sup> For TABOR purposes, LRA is an enterprise<sup>698</sup> and therefore not subject to TABOR's requirements.

## G | POWER TO ISSUE TAX-EXEMPT BONDS

For tax-exempt bonding purposes, LRA is a government entity.<sup>699</sup> Therefore, LRA may issue tax-exempt revenue bonds for any of its corporate purposes.<sup>700</sup> It may not issue general obligation bonds.<sup>701</sup> LRA issued a number of tax-exempt revenue bonds<sup>702</sup> in cooperation with the Denver Urban Renewal Authority (“DURA”) and Denver.<sup>703</sup> Those bonds were secured by DURA property tax increment revenues derived from the portion of the Lowry site within Denver (the “Lowry Tax Increment Area”).<sup>704</sup> The bonds also were secured by appropriations by the City, to the extent DURA Tax Increment Financing (“TIF”) funds proved insufficient.<sup>705</sup> Despite being secured by City and DURA appropriations, none of LRA's bonds were obligations of the City or of DURA.<sup>706</sup> DURA designated the Lowry Tax Increment Area in 1996 pursuant to an urban renewal plan for the Lowry site<sup>707</sup> and a cooperative agreement between DURA and the City.<sup>708</sup> Before the Buckley Annex Boulevard One project began, LRA had issued a total of \$72.6 million in revenue bonds secured by tax increment revenue.<sup>709</sup> In 2012, LRA refinanced its revenue bonds with a direct, fixed interest bank loan, which refunded the remaining bonds. The new loan is secured by the LRA's TIF revenue.

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<sup>695</sup> LRA IGA, *supra* note 651, at § 3.3(C).

<sup>696</sup> LRA IGA, *supra* note 651, at § 3.3(A).

<sup>697</sup> *Id.* at § 3.3(B).

<sup>698</sup> *Id.* at § 1.5; LOWRY REDEVELOPMENT AUTHORITY, FINANCIAL STATEMENTS FOR THE YEARS ENDED DECEMBER 31, 2012 AND 2011 WITH AUDITOR'S REPORT 29 (2013) [hereinafter LRA FINANCIAL STATEMENTS] (“[LRA] is classified as an enterprise under [TABOR] and is exempt from its provisions.”); *see also* LRA IGA, *supra* note 651, at § 3.5 (requiring spending to anticipated revenues and limiting government grants to ten percent of Authority's revenue); COLO. REV. STAT. § 29-1-203(4); COLO. CONST. Art. XIV, §§ 18(2)(a) and (b).

<sup>699</sup> Lowry Redevelopment Authority, *Lowry Redevelopment Authority Audit Report 2005-2006* 21 (Mar. 22, 2007).

<sup>700</sup> LRA IGA, *supra* note 651, at § 5.4.

<sup>701</sup> *Id.* at § 3.3(D).

<sup>702</sup> *See, e.g.*, Official Statement, \$14,500,000 Lowry Economic Redevelopment Authority Adjustable Rate Revenue Bonds Series 1998B 53 (1998) [hereinafter 1998B Bond Statement].

<sup>703</sup> *See, e.g., id.* at ii.

<sup>704</sup> Second Amended and Restated Cooperation Agreement between City and County of Denver and the Denver Urban Renewal Authority, Art. 5 (Oct. 1, 2008) [hereinafter Second Amended and Restated Cooperation Agreement]; *see also* Official Statement, \$65,000,000 Lowry Economic Redevelopment Authority Adjustable Rate Revenue Bonds Series 2008A iv (2008) (“The anticipated source of [bond] payments from DURA is property tax increment revenue expected to be derived by DURA from a portion of Lowry lying within Denver.”) [hereinafter 2008A Bond Statement]; Second Amended and Restated Cooperation Agreement, at Exhibit A (defining the geographic limits of the Lowry Tax Increment Area).

<sup>705</sup> 1998B Bond Statement, *supra* note 702, at 2.

<sup>706</sup> *See, e.g.*, 2008A Bond Statement, *supra* note 704, at i.

<sup>707</sup> *See* DENVER URBAN RENEWAL AUTHORITY, *supra* note 654.

<sup>708</sup> *See* Second Amended and Restated Cooperation Agreement, *supra* note 704. Note that designation of a DURA tax increment area requires a designation of “blight” and City Council approval. COLO. REV. STAT. § 31-25-104(1)(b). *See also* Denver Urban Renewal Authority, *Redevelopment and DURA*, <http://www.renewdenver.org/about-dura/citizens-guide-to-urban-renewal/section-1-redevelopment-and-dura.html> (last visited Aug. 8, 2014).

<sup>709</sup> Denver Urban Renewal Authority, *Lowry*, <http://www.renewdenver.org/redevelopment/dura-redevelopment-projects/denver-county/lowry.html> (last visited Aug. 8, 2014) [hereinafter *Lowry*].

The LRA also acquired a smaller loan to be used for demolition on the newly acquired Boulevard One property. This loan also is secured by TIF revenue.<sup>710</sup>

## H | OTHER REVENUE SOURCES

LRA has the authority to receive revenue from a number of sources. LRA has the power to enter into lease-purchase agreements and issue COPs.<sup>711</sup> It also has the power to “accept contributions, grants, or loans from any public or private agency, individual, or the United States or any department, instrumentality, or agency thereof, for the purpose of financing its activities.”<sup>712</sup>

LRA’s principal non-tax increment revenue sources include: (1) proceeds from land sales; (2) fee payments from purchasers, developers, and nonprofits; (3) equity sharing agreements with residential builders; and (4) a Community Economic Adjustment Assistance for Establishment, Expansion, Realignment, or Closure of a Military Installation grant for environmental cleanup.<sup>713</sup>

## I | SALES, USE, AND PROPERTY TAX-EXEMPT STATUS

LRA does not pay income tax.<sup>714</sup> Nor does LRA pay property tax on real and personal property it owns; nor does it pay state or City sales or use taxes.<sup>715</sup> Notably, LRA reimburses DPS a portion of its DURA TIF revenues, which would otherwise go directly to DPS.<sup>716</sup>

# 14. FITZSIMONS REDEVELOPMENT AUTHORITY (FORMER FITZSIMONS ARMY MEDICAL CENTER REDEVELOPMENT)

The Fitzsimons Army Medical Center redevelopment is the largest medically-related redevelopment project in the United States, and it is the first of its kind west of the Mississippi River.<sup>717</sup> Located entirely within the City of Aurora, the area was formerly the site of the Fitzsimons Army Medical Center.<sup>718</sup> After the U.S. Army scheduled the closure of Fitzsimons Army Medical Center in 1995,<sup>719</sup> the Fitzsimons Redevelopment Authority (“FRA”) took title to the Fitzsimons site under BRAC.<sup>720</sup>

The development of Fitzsimons involves a number of public and private entities. FRA was created by the City of Aurora and the University of Colorado to serve as the Local Redevelopment Authority for Fitzsimons.<sup>721</sup> FRA is an “independent, legal entity” with the stated purpose of “providing necessary and incidental ownership, management, maintenance, and economic redevelopment services and improvements at the former Fitzsimons

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<sup>710</sup> LRA FINANCIAL STATEMENTS, *supra* note 698, at Audit Report.

<sup>711</sup> LRA IGA, *supra* note 651, at § 3.2(V).

<sup>712</sup> *Id.* at § 3.2(R).

<sup>713</sup> LRA FINANCIAL STATEMENTS, *supra* note 698, at ii, 38, and 46; *Lowry*, *supra* note 709.

<sup>714</sup> 26 U.S.C. § 115 (excluding from “gross income” “income derived from . . . the exercise of any essential governmental function and accruing to a State or any political subdivision thereof”).

<sup>715</sup> COLO. CONST., Art. X, § 4; *See* Telephone conversation with Karen Aviles, *supra* note 24.

<sup>716</sup> *See* LRA FINANCIAL STATEMENTS, *supra* note 698, at 28.

<sup>717</sup> CITY OF AURORA, 2009 COMPREHENSIVE PLAN, Ch. V.A. Fitzsimons 1 (2010) [hereinafter 2009 COMPREHENSIVE PLAN].

<sup>718</sup> Intergovernmental Agreement Establishing the Fitzsimons Redevelopment Authority between the City of Aurora and the Regents of the University of Colorado § 8.1 (Jan. 1, 1998) [hereinafter Fitzsimons IGA].

<sup>719</sup> *Id.* at 1.

<sup>720</sup> Defense Base Closure and Realignment Act of 1990, Pub. L. No. 100-526, 102 Stat. 2623 (1988). For more general background on the BRAC process, see *supra* discussion accompanying note 657.

<sup>721</sup> Fitzsimons IGA, *supra* note 718, at 2. Notably, the Fitzsimons IGA indicates it “is not intended to apply to that property within Fitzsimons which is owned by the [University of Colorado] unless and until the Regents sell, lease, or otherwise dispose of such property to the [FRA] or to a third party.” Therefore, this discussion focuses on development of the Colorado Science and Technology Park. *Id.*

Army Medical Center . . . and elsewhere within the Fitzsimons Redevelopment Area.<sup>722</sup> FRA took title to and serves as the master developer of the site.<sup>723</sup> Development on the site consists of the Anschutz Medical Campus, The Children’s Hospital and Research Center, the Colorado State Veteran’s Home, The Veteran’s Administration Hospital, and the affiliated 160-acre Colorado Science and Technology Park (“CSTP”).<sup>724</sup> The FRA contracted with a private developer for development of the CSTP.<sup>725</sup>

Infrastructure is funded by tax increment financing.<sup>726</sup> In addition, certain public infrastructure associated with the CSTP is funded by metropolitan districts and tax increment collected from the CSTP Urban Renewal Area.<sup>727</sup> The CSTP Urban Renewal Area allows for the creation of up to seven tax increment financing areas over a fifty-year period to provide the infrastructure necessary for the development of the CSTP.<sup>728</sup>

#### A| ORGANIZATIONAL FORM

FRA is a quasi-governmental entity formed by, but separate and distinct from, the City of Aurora and University of Colorado.<sup>729</sup> It also is a “public entity” for purposes of the Colorado Governmental Immunity Act.<sup>730</sup>

The CSTP metropolitan districts are quasi-municipal entities and political subdivisions of the state of Colorado.<sup>731</sup>

#### B| METHOD OF ENTITY FORMATION

The City of Aurora and the University of Colorado created FRA in 1998 by intergovernmental agreement, pursuant to the Colorado Constitution and state statute, which authorizes “political subdivisions to establish, by contract, a separate legal entity to provide any function, service, or facility lawfully authorized to each.”<sup>732</sup>

The CSTP metropolitan districts were formed under the Special District Act.<sup>733</sup> Colorado Science and Technology Park Metropolitan District No. 1 was organized by order and decree of the District Court for the County of Adams on November 30, 2007, concurrently with two other districts, Colorado Science and

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<sup>722</sup> FITZSIMONS REDEVELOPMENT AUTHORITY, BASIC FINANCIAL STATEMENTS DECEMBER 31, 2013 AND 2012 WITH AUDITOR’S REPORT 17 (Apr. 16, 2013) [hereinafter FITZSIMONS FINANCIAL STATEMENTS].

<sup>723</sup> See Memorandum of Agreement between the Department of the Army and the Fitzsimons Redevelopment Authority for the Transfer of U.S. Army Garrison, Fitzsimons, Colorado (Formerly Fitzsimons Army Medical Center) § 3.01 (Mar. 23, 1999); see also, e.g., Quitclaim Deed, Parcel S, U.S. Army Garrison – Fitzsimons, Economic Development Conveyance (Mar. 25, 1999) (on file with author, along with other Quitclaim Deeds conveying the Fitzsimons Army Medical Center to the FRA).

<sup>724</sup> See 2009 COMPREHENSIVE PLAN, *supra* note 717, at 1.

<sup>725</sup> See Development Agreement by and between the Fitzsimons Redevelopment Authority and Forest City Commercial Group, Inc. (Oct. 26, 2006) (as assigned by Forest City Commercial Group, Inc. to Forest City Fitzsimons, Inc.) [hereinafter Development Agreement].

<sup>726</sup> See 2009 COMPREHENSIVE PLAN, *supra* note 717, at 4-5.

<sup>727</sup> See CITY OF AURORA, SERVICE PLAN FOR THE COLORADO SCIENCE AND TECHNOLOGY PARK METROPOLITAN DISTRICT NO. 1 § VII.A (2007) [hereinafter CSTP NO. 1 SERVICE PLAN].

<sup>728</sup> See 2009 COMPREHENSIVE PLAN, *supra* note 717, at 4.

<sup>729</sup> See Fitzsimons IGA, *supra* note 718, at § 1.1.

<sup>730</sup> *Id.*; COLO. REV. STAT. § 24-10-101 *et seq.*

<sup>731</sup> See First Amended and Restated Intergovernmental Agreement between the City of Aurora and Colorado Science and Technology Metropolitan District No. 1 (Sept. 8, 2008).

<sup>732</sup> See Fitzsimons IGA, *supra* note 718, at 1 (citing COLO. REV. STAT. § 29-1-203(4) and COLO. CONST. Art. XIV, §§ 18(2)(a) and 18(2)(b)).

<sup>733</sup> COLO. REV. STAT. § 32-1-101 *et seq.*

Technology Park Metropolitan District Nos. 2 and 3.<sup>734</sup> The Districts operate under Service Plans approved by the City of Aurora on July 16, 2007.<sup>735</sup>

## C | QUALIFICATIONS OF GOVERNING BOARD AND PROCEDURES FOR BOARD APPOINTMENT

FRA is governed by a twelve-member board of directors.<sup>736</sup> Aurora appoints three members; the Regents of the University of Colorado appoint two; the Board of Directors of the UCHA appoints one; the Board of Directors of The Children’s Hospital appoints one; and five members are appointed by the FRA Board of Directors.<sup>737</sup> Aurora’s appointees are appointed by the Aurora City Council.<sup>738</sup> If any party appoints an elected official to the Board of the FRA that person will lose her position on the board upon loss of office.<sup>739</sup> No FRA employees may be board members.<sup>740</sup> The executive director of FRA sits as a non-voting *ex officio* member of the board.<sup>741</sup> Board members serve for three-year terms.<sup>742</sup> At a minimum, the board holds at least four meetings annually, and those meetings are subject to the Colorado Open Meetings Act;<sup>743</sup> the minutes of the board’s meetings are subject to the Colorado Open Records Act.<sup>744</sup>

The board works with an Executive Committee, which is authorized to exercise such powers as are delegated by the board.<sup>745</sup> The Executive Committee is composed of the Chairperson of the Board, the Chair-Elect of the Board, the Secretary/Treasurer of the Board, the executive officer of FRA, and such other members of the board as the board deems appropriate.<sup>746</sup> At a minimum, the Executive Committee must include at least one board member appointed by Aurora and one appointed by the Regents of the University of Colorado.<sup>747</sup>

The districts each have a five-member board of directors.<sup>748</sup> The same five directors serve on each of the three district boards. Board members must be “eligible electors” of the district and elected by “eligible electors” of the district; eligible electors must be registered voters in the state and either be resident in, own property in, or be obligated to pay taxes under a contract to purchase property in the district, or be the spouse

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<sup>734</sup> COLORADO SCIENCE AND TECHNOLOGY PARK METROPOLITAN DISTRICT NO. 1, 2014 BUDGET 7 (2013) [hereinafter CSTP NO. 1 2014 BUDGET] *available at* [https://dola.colorado.gov/dlg\\_portal/filings.jsf?id=65905&category=1&jfwid=a2e5cf774acc50e0b5ca0caa7488%3A1](https://dola.colorado.gov/dlg_portal/filings.jsf?id=65905&category=1&jfwid=a2e5cf774acc50e0b5ca0caa7488%3A1) (last visited Aug. 8, 2014).

<sup>735</sup> CSTP NO. 1 SERVICE PLAN, *supra* note 727; CITY OF AURORA, SERVICE PLAN FOR THE COLORADO SCIENCE AND TECHNOLOGY PARK METROPOLITAN DISTRICT NO. 2 (2007) [hereinafter CSTP NO. 2 SERVICE PLAN]; CITY OF AURORA, SERVICE PLAN FOR THE COLORADO SCIENCE AND TECHNOLOGY PARK METROPOLITAN DISTRICT NO. 3 (2007) [hereinafter CSTP NO. 3 SERVICE PLAN].

<sup>736</sup> Fitzsimons IGA, *supra* note 718, at § 2.1.

<sup>737</sup> *Id.*

<sup>738</sup> *Id.*

<sup>739</sup> *Id.*

<sup>740</sup> *Id.*

<sup>741</sup> *Id.* at § 2.2.

<sup>742</sup> *Id.* at § 2.3.

<sup>743</sup> *Id.* at §§ 2.8(A) and (B).

<sup>744</sup> *Id.* at § 2.8(C) (although the IGA indicates the minutes are subject to public inspection under the Colorado Open Meetings Act, the Colorado Open Records Act actually governs the availability of such documents).

<sup>745</sup> *Id.* at § 2.9.

<sup>746</sup> *Id.*

<sup>747</sup> *Id.*

<sup>748</sup> *See* Transparency Notices for the Colorado Science and Technology Park Metropolitan District Nos. 1, 2, and 3, *available at* Special District Association of Colorado, *Special District Transparency and CORA Information*, <http://www.sdaco.org/transparency> (last visited Aug. 8, 2014).

or civil union partner of a person who owns taxable property or pays taxes under a contract to purchase property in the district.<sup>749</sup>

## D | OWNERSHIP OF PROPERTY AND OPERATION OF FACILITIES

FRA enjoys broad powers delegated by the City of Aurora and the University of Colorado.<sup>750</sup> Those powers include, *inter alia*, power to: (1) acquire, construct, operate, lease, or otherwise deal in real and personal property;<sup>751</sup> (2) make a variety of contracts;<sup>752</sup> (3) hire agents and employees;<sup>753</sup> (4) work with Aurora to zone Fitzsimons;<sup>754</sup> (5) provide infrastructure for Fitzsimons;<sup>755</sup> (6) charge fees;<sup>756</sup> and (7) finance the project.<sup>757</sup>

To facilitate the redevelopment of the CSTP, the FRA entered into a development agreement with a private developer.<sup>758</sup> Under the terms of the development agreement, the FRA agreed to enter into long-term ground leases with the developer for redevelopment of the site on a phased schedule and, in exchange, share with the developer portions of the proceeds of redevelopment.<sup>759</sup> The development agreement also allows the parties to agree on sales of a specified total average within the site to third parties.<sup>760</sup>

In addition, the parties agreed to cooperatively implement mechanisms for funding of demolition, environmental remediation and construction, and operation and maintenance of the public infrastructure required for the redevelopment.<sup>761</sup> These mechanisms included formation of the CSTP metropolitan districts, which have authority to provide the construction, operation, and maintenance of the public improvements within and outside the district boundaries and to dedicate the public improvements to Aurora in accordance with a FRA and city-approved development plan, subject to certain limitations.<sup>762</sup> These limitations restrict the CSTP metropolitan districts from providing fire protection facilities, golf courses, and television relay and translation services, except pursuant to separate intergovernmental agreement.<sup>763</sup> The CSTP metropolitan districts also have authority to levy of property tax to construct certain regional infrastructure in cooperation with the City of Aurora.<sup>764</sup>

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<sup>749</sup> See COLO. REV. STAT. §§ 32-1-103(5) (“eligible elector”), 32-1-804.3 (candidate qualifications), and 32-1-805 (elections). The current board members represent the private developer and the FRA: one represents FRA and four represent the private developer. Colorado Department of Local Affairs, *Local Government Filings – Director Information, DUS Metropolitan District No. 1*, [https://dola.colorado.gov/dlg\\_portal/filings.jsf?id=66138&category=3&jfwid=176e2157359cb0a6e93e4a5bbef6%3A1](https://dola.colorado.gov/dlg_portal/filings.jsf?id=66138&category=3&jfwid=176e2157359cb0a6e93e4a5bbef6%3A1) (last visited Aug. 8, 2014).

<sup>750</sup> Fitzsimons IGA, *supra* note 718, at § 3.2.

<sup>751</sup> *Id.* at §§ 3.2(A) (power to “acquire, hold, operate, manage, lease, sell, convey, or otherwise dispose of” property), (K) (power to “acquire, construct, reconstruct, repair, maintain, manage, operate, lease, sell, convey, or otherwise dispose of” real property, buildings, facilities, etc.), (P) (audit), and (Q) (master redevelopment plan).

<sup>752</sup> *Id.* at §§ 3.2(B) (all contracts), (C) (contracts subject to payment by federal government), (F) (contracts for caretaker services), and (L) (compensation plans).

<sup>753</sup> *Id.* at §§ 3.2(G) (agents, employees, consultants) and (O) (professional, administrative, and support services).

<sup>754</sup> *Id.* at § 3.2(H).

<sup>755</sup> *Id.* at § 3.2(I) (public works, utilities, and facilities).

<sup>756</sup> *Id.* at § 3.1(J) (fees, rents, rates).

<sup>757</sup> See *infra* Sections III.14.G, III.14.H; Fitzsimons IGA, *supra* note 718, at §§ 3.2(R) (private and public financing), (S) (investments), (T) (revenue bonds), (U) (notes, warrants, and certificates of indebtedness); and (V) (lease-purchase agreements and COPs).

<sup>758</sup> Development Agreement, *supra* note 725.

<sup>759</sup> See *generally id.* at Art. IV-VII (discussing general assignment of rights, duties, liabilities, and revenues).

<sup>760</sup> *Id.* at Art. IV, § 4.02.

<sup>761</sup> *Id.* at Art. VI.

<sup>762</sup> See CSTP NO. 1 SERVICE PLAN, *supra* note 727, at Art. V.

<sup>763</sup> *Id.*

<sup>764</sup> See *id.* at Art. VI.

CSTP Metropolitan District No. 1 consists of an area of approximately 1,800 square feet<sup>765</sup> which is owned by or under contract for purchase by representatives of the private developer and FRA. CSTP Metropolitan Districts Nos. 2 and 3 consist of the entire 184 acres of the CSTP.<sup>766</sup> By intergovernmental agreement among the districts, CSTP Metropolitan District No. 1 is the “control district” that plans, constructs, manages, and funds the public infrastructure, while the other two districts are considered “financing districts” that provide funding for the overall administrative and operating costs and costs of the public infrastructure.<sup>767</sup> The private developer has contracted to serve as the project manager for the planning, design, and construction of the public improvements on behalf of the CSTP Metropolitan District No. 1 and collects a fee for its services.<sup>768</sup>

When the property was conveyed to FRA, the federal government retained liability for environmental contamination discovered after that transfer.<sup>769</sup> However, by contract with FRA, the private developer assumed responsibility for conducting any environmental remediation and took assignment of FRA’s claims against the federal government.<sup>770</sup> The private developer in turn entered into certain agreements with the CSTP Metropolitan District No. 1 to share certain costs of environmental remediation.<sup>771</sup>

## E | POWER TO CONDEMN PROPERTY

FRA has no powers of eminent domain.<sup>772</sup> Under their Service Plans, the CSTP metropolitan districts have the “power and authority to provide the Public Improvements . . . as such power and authority is described in the Special District Act, and other applicable statutes, common law and the Constitution, subject to the limitations [of the Service Plan].”<sup>773</sup> The Special District Act provides metropolitan districts with the power of eminent domain,<sup>774</sup> which is not limited by the Service Plans. However, by statute such powers may not be used for “business recruitment, management, and development within the district.”<sup>775</sup> The CSTP metropolitan districts have not exercised this power.

## F | POWER TO LEVY TAXES (INCLUDING TABOR STATUS)

FRA has no powers of taxation,<sup>776</sup> and no power to levy special assessments.<sup>777</sup> For TABOR purposes, FRA is an enterprise,<sup>778</sup> and is therefore not subject to TABOR’s requirements.

The CSTP metropolitan districts are considered “districts” subject to TABOR.<sup>779</sup> The CSTP metropolitan districts have the power to levy and collect ad valorem taxes on and against all taxable property within the special district,<sup>780</sup> subject to approval of the eligible electors of the district under TABOR.<sup>781</sup>

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<sup>765</sup> See *id.* at Art. III.

<sup>766</sup> See CSTP NO. 2 SERVICE PLAN, *supra* note 735, at Art. III; CSTP NO. 3 SERVICE PLAN, *supra* note 735, at Art. III.

<sup>767</sup> See Facilities Funding, Construction, and Operations Agreement between and among Colorado Science and Technology Metropolitan District Nos. 1, 2, and 3 Art. 1, § 1.2 and Art. 7 (Dec. 3, 2007). Because the electors of “control district” are generally representatives of the private developer, this structure assures that the private developer maintains control over the planning and funding of infrastructure until the development is completed.

<sup>768</sup> See Project Management Services Agreement by and between Colorado Science and Technology Metropolitan District No. 1 and Fitzsimons Construction Management, LLC § 2 (July 3, 2008).

<sup>769</sup> CDPHE 2002 Consent Decree, *supra* note 655, at ¶ 12.

<sup>770</sup> See Development Agreement, *supra* note 725, at Art. IV, § 4.08.

<sup>771</sup> See Environmental Responsibilities and Cost Sharing Agreement by and between Fitzsimons Developer, LLC and Colorado Science and Technology Metropolitan District No. 1 § 1 (Dec. 3, 2007).

<sup>772</sup> Fitzsimons IGA, *supra* note 718, at § 3.3(C).

<sup>773</sup> CSTP NO. 1 SERVICE PLAN, *supra* note 727, at Art. V; CSTP NO. 2 SERVICE PLAN, *supra* note 735, at Art. V; CSTP NO. 3 SERVICE PLAN, *supra* note 735, at Art. V.

<sup>774</sup> COLO. REV. STAT. § 32-1-1004(4).

<sup>775</sup> *Id.* at § 32-1-1004(9).

<sup>776</sup> Fitzsimons IGA, *supra* note 718, at § 3.3(A).

<sup>777</sup> *Id.* at § 3.3(B).

<sup>778</sup> *Id.* at § 1.5.

<sup>779</sup> See CSTP NO. 1 SERVICE PLAN, *supra* note 727, at § VII.H.

## G | POWER TO ISSUE TAX-EXEMPT BONDS

FRA has the power to issue tax-exempt revenue bonds for any of its corporate purposes.<sup>782</sup> It may not issue general obligation bonds.<sup>783</sup> The CSTP metropolitan districts have the power to issue tax-exempt revenue and, subject to certain limitations, general obligation bonds,<sup>784</sup> subject to approval of the eligible electors of the district under TABOR.<sup>785</sup>

## H | OTHER REVENUE SOURCES

FRA receives revenue from a number of sources. FRA has the power to enter into lease-purchase agreements and issue COPs.<sup>786</sup> It also has the power to “accept advances, grants, loans or contributions from any natural person, public or private corporation or organization, or the federal, state or any local government, or any department, instrumentality, or agency thereof, for the purpose of financing its activities.”<sup>787</sup>

FRA’s principal non-tax increment revenue sources include: (1) tenant operating income, which includes rents, common area maintenance, and phone/internet income; (2) operating grants from the federal, state, and local government; (3) other operating income (including the annual payment from the Fitzsimons Golf Course, the developer option payment, Design Review Board fees, parking fee income, and a loan modification fee); and (4) non-operating revenue (including interest on investments and the recovery of bad debt, and a local grant from the Aurora Urban Renewal Authority).<sup>788</sup>

The CSTP metropolitan districts receive revenue from property taxes levied on property within the districts, from certain specific ownership taxes on vehicle licensing, and from a tax increment, which is paid to the Aurora Urban Renewal Authority on property within the CSTP Urban Renewal Area and remitted back to CSTP Metropolitan District No. 1 by intergovernmental agreement.<sup>789</sup> CSTP Metropolitan District Nos. 2 and 3 are considered finance districts that by intergovernmental agreement make payments from property tax revenue to CSTP Metropolitan District No. 1.<sup>790</sup> Finally, the CSTP Metropolitan District No. 1 receives (and agrees to reimburse with interest) certain advances of capital to construct the public improvements to the private developer.<sup>791</sup> Such “developer advances” are reimbursable out of the proceeds of bonds issued by CSTP Metropolitan District No. 1.

To date, CSTP Metropolitan District No. 1 has issued two notes in the total amount of approximately \$17,000,000 to repay developer advances and construct capital improvements and infrastructure.<sup>792</sup> The notes

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<sup>780</sup> COLO. REV. STAT. § 32-1-1101(1)(a).

<sup>781</sup> *Id.* at § 32-1-1101(1.5)(d).

<sup>782</sup> Fitzsimons IGA, *supra* note 718, at 11-12, n.12.

<sup>783</sup> *Id.* at § 3.3(D).

<sup>784</sup> COLO. REV. STAT. § 32-1-1101(1)(c)-(d), (2) and (6).

<sup>785</sup> *Id.* at § 32-1-1001(1.5)(d).

<sup>786</sup> Fitzsimons IGA, *supra* note 718, at § 3.2(V).

<sup>787</sup> *Id.* at § 3.2(R).

<sup>788</sup> FITZSIMONS FINANCIAL STATEMENTS, *supra* note 722, at 6.

<sup>789</sup> CSTP NO. 1 2014 BUDGET, *supra* note 734, at 8; *see* Public Finance and Redevelopment Agreement by and between Aurora Urban Renewal Authority and Colorado Science and Technology Metropolitan District No. 1 1 (Aug. 25, 2008).

<sup>790</sup> *See* COLORADO SCIENCE AND TECHNOLOGY PARK METROPOLITAN DISTRICT NO. 2, 2014 BUDGET 7 (2013) *available at* [https://dola.colorado.gov/dlg\\_portal/filings.jsf?id=65906&category=1&jfwid=c16e15d16fdde3a75454c8232d9b%3A0](https://dola.colorado.gov/dlg_portal/filings.jsf?id=65906&category=1&jfwid=c16e15d16fdde3a75454c8232d9b%3A0) (last visited Aug. 8, 2014); COLORADO SCIENCE AND TECHNOLOGY PARK METROPOLITAN DISTRICT NO. 2, 2014 BUDGET 6 (2013) *available at* [https://dola.colorado.gov/dlg\\_portal/filings.jsf?id=65907&category=1&jfwid=c16e15d16fdde3a75454c8232d9b%3A2](https://dola.colorado.gov/dlg_portal/filings.jsf?id=65907&category=1&jfwid=c16e15d16fdde3a75454c8232d9b%3A2) (last visited Aug. 8, 2014); *see generally* Capital Pledge Agreement by and among Colorado Science and Technology Metropolitan District Nos. 1, 2, and 3 Art. II (Dec. 10, 2010).

<sup>791</sup> *See* Capital Funding and Reimbursement Agreement by and between Colorado Science and Technology Park Metropolitan District No. 1 and Fitzsimons Developer, LLC §§ 2 and 3 (Jan. 1, 2008).

<sup>792</sup> CSTP NO. 1 2014 BUDGET, *supra* note 734, at 8-9.



are payable in any particular year to the extent that there are pledged revenues available to make such payments.<sup>793</sup>

## I| SALES, USE, AND PROPERTY TAX-EXEMPT STATUS

FRA does not pay taxes on income generated in the exercise of its essential government functions.<sup>794</sup> Neither the FRA nor the CSTP metropolitan districts pay property tax on real and personal property they own, nor do they pay state or local sales or use taxes.<sup>795</sup>

## 15. STAPLETON DEVELOPMENT CORPORATION (FORMER STAPLETON INTERNATIONAL AIRPORT REDEVELOPMENT)

Located in northeast Denver, the Stapleton redevelopment site covers 4,700 acres of land formerly occupied by Stapleton International Airport.<sup>796</sup> In anticipation of the end of aviation operations at the site, the City began planning for the redevelopment of the former Stapleton International Airport in 1989. In 1990, two groups began planning efforts to shape the development of the Stapleton site: Stapleton Tomorrow (a group of 35 citizens) and the Stapleton Foundation (a group of civic and business leaders). In 1991, Stapleton Tomorrow created and the City adopted the Stapleton Tomorrow concept plan, and in 1995 the Stapleton Foundation released the Stapleton Development Plan, or “Green Book.” The Green Book was approved by the Denver City Council in 1995 and incorporated into the 1996 Denver Comprehensive Plan.<sup>797</sup>

Stapleton Development Corporation (“SDC”) was originally created to serve as the master developer for the Stapleton site.<sup>798</sup> However, in 1998, by competitive process SDC selected a private master developer to bring expertise and a comprehensive development approach to the entire site.<sup>799</sup>

Public infrastructure is funded by a combination of tax increment collected by DURA, used to fund so-called “trunk” (or regional) infrastructure, and two metropolitan districts formed for purposes of funding and managing the construction, operation and maintenance of both trunk and so-called “in-tract” (or local) infrastructure.<sup>800</sup> Additional funds come from system development fees originally paid by the private developer to finance the cost of regional parks and open space.<sup>801</sup>

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<sup>793</sup> *Id.*

<sup>794</sup> 26 U.S.C. § 115 (excluding from “gross income” “income derived from . . . the exercise of any essential governmental function and accruing to a State or any political subdivision thereof”); FITZSIMONS FINANCIAL STATEMENTS, *supra* note 722, at 18.

<sup>795</sup> COLO. CONST., Art. X, § 4. *See* COLORADO DEPARTMENT OF REVENUE, CERTIFICATE OF EXEMPTION FOR COLORADO STATE SALES/USE TAX (Jan. 13, 2004); CITY AND COUNTY OF DENVER DEPARTMENT OF REVENUE, CERTIFICATE OF EXEMPTION FROM DENVER SALES TAX (Nov. 23, 2004).

<sup>796</sup> Denver Urban Renewal Authority, *Stapleton*, <http://www.renewdenver.org/redevelopment/dura-redevelopment-projects/denver-county/stapleton.html> (last visited Aug. 8, 2014) [hereinafter *Stapleton*].

<sup>797</sup> *See* STAPLETON DEVELOPMENT CORPORATION AND FOREST CITY STAPLETON, INC., BRIEFING PAPER FOR MAYOR WELLINGTON WEBB: STAPLETON: DENVER’S NEXT GREAT NEIGHBORHOODS 4-5 (Feb. 2000) [hereinafter STAPLETON BRIEFING PAPER]; STAPLETON FOUNDATION FOR SUSTAINABLE URBAN COMMUNITIES, STAPLETON RESOURCE DIRECTORY 7 (2007).

<sup>798</sup> *See* Stapleton Development Corporation, *About SDC*, <http://www.sdcdenver.org/about-sdc/index.htm> (last visited Aug. 8, 2014).

<sup>799</sup> STAPLETON BRIEFING PAPER, *supra* note 797, at 6.

<sup>800</sup> *Id.* at 20-22; *see also* Intergovernmental Financing and Construction Agreement between Park Creek Metropolitan District and Westerly Creek Metropolitan District 1 (Apr. 30, 2001) (stating that the “[d]istricts were organized to facilitate the development of the Stapleton Service Area by providing for . . . In-Tract infrastructure and Trunk Infrastructure.”) [hereinafter Financing and Construction IGA].

<sup>801</sup> STAPLETON BRIEFING PAPER, *supra* note 797, at 22-23.

## A | ORGANIZATIONAL FORM

Pursuant to the 1995 Cooperative Agreement between the City and DURA, DURA formed SDC as a private, nonprofit corporation<sup>802</sup> under the Colorado Revised Nonprofit Corporation Act.<sup>803</sup> SDC was incorporated on July 5, 1995.<sup>804</sup>

Both of the metropolitan districts are quasi-municipal corporations and political subdivisions of the state of Colorado.<sup>805</sup>

## B | METHOD OF ENTITY FORMATION

Shortly after the City approved the Green Book, the City and DURA signed a cooperative agreement to create the SDC.<sup>806</sup> SDC is a Colorado nonprofit corporation.<sup>807</sup> The Park Creek Metropolitan District (“PCMD”) and the Westerly Creek Metropolitan District (“WCMD”) were created pursuant to the Special District Act after approval of voters in the district.<sup>808</sup> The metropolitan districts operate under Service Plans approved by the City.<sup>809</sup>

## C | QUALIFICATIONS OF GOVERNING BOARD AND PROCEDURES FOR BOARD APPOINTMENT

The SDC board has eleven voting members and five non-voting members.<sup>810</sup> Nine of the voting members are appointed by the Mayor, and two are appointed by DURA.<sup>811</sup> All voting members are confirmed by the City Council.<sup>812</sup> Two voting members must come from communities surrounding the Stapleton site.<sup>813</sup> All voting members serve five-year terms.<sup>814</sup>

The five non-voting members include: (1) the City’s Manager of Aviation or designee, (2) the City Council member from District 11, (3) one representative of Commerce City, (4) one representative of the City of Aurora, and (5) one member of the Advisory Board.<sup>815</sup> All Board members must have relevant experience and skills.<sup>816</sup>

The PCMD and the WCMD each have a five-member board of directors.<sup>817</sup> Board members must be “eligible electors” of the district and elected by “eligible electors” of the district; eligible electors must be registered voters in the state and either be resident in or own property in, or be obligated to pay taxes under a

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<sup>802</sup> *See id.*

<sup>803</sup> *Id.*

<sup>804</sup> *Id.*

<sup>805</sup> Official Statement, \$200,000,000 Denver Urban Renewal Authority Stapleton Senior Subordinate Tax Increment Revenue Bonds Series 2004B-1 5 (2004) [hereinafter Bonds Series 2004B-1].

<sup>806</sup> STAPLETON BRIEFING PAPER, *supra* note 797, at 5.

<sup>807</sup> *See* STAPLETON DEVELOPMENT CORPORATION, ARTICLES OF INCORPORATION Preamble (July 5, 1995) [hereinafter SDC ARTICLES].

<sup>808</sup> COLO. REV. STAT. § 32-1-101 *et seq.*; (PARK CREEK METROPOLITAN DISTRICT, FINANCIAL STATEMENTS WITH INDEPENDENT AUDITOR’S REPORT FISCAL YEAR 2012 8 (2013) [hereinafter 2012 PCMD FINANCIAL STATEMENTS].

<sup>809</sup> Financing and Construction IGA, *supra* note 800, at 2.

<sup>810</sup> STAPLETON DEVELOPMENT CORPORATION, BYLAWS Art. III, § 3.3 (Sept. 29, 1995).

<sup>811</sup> *Id.*

<sup>812</sup> *Id.*

<sup>813</sup> *Id.*

<sup>814</sup> *Id.* at Art. III, § 3.4.

<sup>815</sup> *Id.* at Art. III, § 3.3.

<sup>816</sup> *Id.* at Art. III, § 3.2.

<sup>817</sup> *See* Transparency Notices for the Park Creek Metropolitan District and the Westerly Creek Metropolitan Districts, *available at* <http://www.sdaco.org/transparency> (last visited Aug. 8, 2014).

contract to purchase property in the district, or be the spouse or civil union partner of a person who owns taxable property or pays taxes under a contract to purchase property in the district.<sup>818</sup>

## D | OWNERSHIP OF PROPERTY AND OPERATION OF FACILITIES

SDC has all the powers of a Colorado nonprofit corporation.<sup>819</sup> Those powers include broad powers to act as a corporate entity, including: (1) power to deal in real and personal property, (2) make contracts, (3) issue bonds, and (4) transact business.<sup>820</sup> However, the net earnings of SDC may not benefit any private person and upon dissolution, SDC's assets revert to the City.<sup>821 822</sup>

After DURA incorporated SDC, SDC entered into a variety of formative agreements in order to fulfill its purpose. In 1998, SDC entered into a Master Lease and Disposition Agreement (“Master Lease”) with the City.<sup>823</sup> Under the Master Lease between SDC and the City, SDC leases the site with a rolling option to takedown the land over fifteen years.<sup>824</sup> The Master Lease also stipulates the terms of transfer, including a requirement that DIA remediate environmental contamination before transfer.<sup>825</sup>

In 2000, SDC contracted with Forest City as the master developer of the site.<sup>826</sup> Under the Stapleton Purchase Agreement between Forest City and SDC, Forest City agrees to purchase and SDC agrees to sell, 2,935 acres at a set price, with minimum purchase acreage each five years.<sup>827</sup> The Stapleton Purchase Agreement establishes development fees used to fund Stapleton infrastructure and mandates compliance with the Green Book.<sup>828</sup>

Under the Purchase Agreement, SDC agreed to sponsor the creation of two metropolitan districts, the PCMD and the WCMD, to fund project infrastructure.<sup>829</sup> The PCMD consists of an area of approximately sixteen acres of open space land owned by property owners representing SDC and the district.<sup>830</sup> WCMD consists of the entire approximately 4,000<sup>831</sup> acres of property within the Stapleton Service Area<sup>832</sup> that SDC has

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<sup>818</sup> See COLO. REV. STAT. §§ 32-1-103(5) (“eligible elector”), 32-1-804.3 (candidate qualifications), and 32-1-805 (elections). Under the Stapleton Purchase Agreement, SDC and the private developer agreed that SDC would maintain three property owners and the developer would maintain two property owners who will be eligible electors of the PCMD. See Amended and Restated Stapleton Purchase Agreement between the Stapleton Development Corporation and Forest City Enterprises, Inc. at § 5.5 (Feb. 15, 2000) [hereinafter Stapleton Purchase Agreement].

<sup>819</sup> SDC ARTICLES, *supra* note 807, at § 3(b).

<sup>820</sup> See *supra* notes 374-78.

<sup>821</sup> SDC ARTICLES, *supra* note 807, at §§ 3(c)(1), (3).

<sup>822</sup> Intentionally deleted.

<sup>823</sup> See Master Lease and Disposition Agreement for Stapleton International Airport between the City and County of Denver and Stapleton Development Corp. 1 (July 21, 1998).

<sup>824</sup> *Id.* at § 4.01.

<sup>825</sup> Second Amendment to Master Lease and Disposition Agreement § 11.01 (Apr. 20, 2000).

<sup>826</sup> See Stapleton Purchase Agreement, *supra* note 818, at § 5.5.

<sup>827</sup> *Id.* at Art. II, § 2.2(A).

<sup>828</sup> *Id.* at Art. 2, §§ 2.7 (establishing and requiring payment of development fees) and § 5.1 (mandating adherence to the Stapleton Development Plan principles).

<sup>829</sup> Stapleton Purchase Agreement, *supra* note 818, at § 5.5.

<sup>830</sup> STAPLETON DEVELOPMENT CORPORATION, SERVICE PLAN FOR STAPLETON METROPOLITAN DISTRICT Art. IV (2000) (the Stapleton Metropolitan District was subsequently renamed the Park City Metropolitan District) [hereinafter PCMD SERVICE PLAN]; STAPLETON DEVELOPMENT CORPORATION, SERVICE PLAN FOR WESTERLY CREEK METROPOLITAN DISTRICT Art. IV (2000) [hereinafter WCMD SERVICE PLAN]; see also Park Creek Metropolitan District, Open Space Parcel 7B-East Boundary Legal Description (2000) available at [https://dola.colorado.gov/dlg\\_portal/filings.jsf?id=16032&category=6&jfwid=541684515f2b20e5484980f26db8%3A1](https://dola.colorado.gov/dlg_portal/filings.jsf?id=16032&category=6&jfwid=541684515f2b20e5484980f26db8%3A1) (last visited Aug. 8, 2014).

<sup>831</sup> WCMD SERVICE PLAN, *supra* note 830, at Art. IV.

<sup>832</sup> Intergovernmental Agreement by and among the City and County of Denver, the City of Aurora, and the Park Creek Metropolitan District 1 (Apr. 4, 2006).

conveyed over time to the private developer to further redevelopment activities.<sup>833</sup> By intergovernmental agreement, the PCMD is the “control district” responsible for financing, designing, planning, constructing, acquisitioning, and installing infrastructure in the Stapleton Service Area.<sup>834</sup> The WCMD is considered a “financing district” that provides funding for the costs of in-tract and trunk infrastructure development.<sup>835</sup> The private developer provides management services relating to the coordination, implementation, and completion of the infrastructure developments on behalf of the PCMD, as an independent contractor.<sup>836</sup>

Finally, a development agreement between Denver and Forest City establishes zoning uses and densities for the site and mandates development of affordable housing.<sup>837</sup>

## E | POWER TO CONDEMN PROPERTY

SDC is not authorized to condemn using eminent domain.<sup>838</sup> The Special District Act provides metropolitan districts with the power of eminent domain,<sup>839</sup> which is not limited by the Service Plans. Such powers may not be used for “business recruitment, management, and development within the district,”<sup>840</sup> however. Under the Service Plans, the PCMD and the WCMD have the enumerated powers to provide for the financing and construction of “water, sanitation, street, safety protection, mosquito control, television relay and translation, fire protection, transportation, and park and recreation” and other listed powers to make service plan amendments or phase and defer construction and financing.<sup>841</sup> Neither Service Plan provides for the authority to exercise powers of eminent domain.

## F | POWER TO LEVY TAXES (INCLUDING TABOR STATUS)

For TABOR purposes, SDC is not a district or an enterprise. SDC has no powers of taxation.<sup>842</sup> However, the PCMD and WCMD are “districts” subject to TABOR.<sup>843</sup> PCMD and WCMD have the power to levy taxes, subject to approval by the eligible electors of the district under TABOR. The WCMD levies a property tax on Stapleton and is considered a taxing district.<sup>844</sup> The WCMD pays property tax revenues to the PCMD, which builds infrastructure (and issues debt to do so) as the “master” development district.<sup>845</sup>

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<sup>833</sup> Stapleton Purchase Agreement, *supra* note 818, at Art. II, § 2.2(A).

<sup>834</sup> Master Facilities Development Agreement between Park Creek Metropolitan District, the City and County of Denver, and Forest City Enterprises, Inc. 1 (Feb. 12, 2001).

<sup>835</sup> PARK CREEK METROPOLITAN DISTRICT, FINANCIAL STATEMENTS WITH INDEPENDENT AUDITOR’S REPORT FISCAL YEAR 2012 8 (2013) [hereinafter 2012 PCMD FINANCIAL STATEMENTS]; Financing and Construction IGA, *supra* note 800, at 1-3.

<sup>836</sup> See Management Services Agreement by and between Park Creek Metropolitan District and Forest City Stapleton, Inc. § 2.2 (Apr. 30, 2001).

<sup>837</sup> See Development Agreement between Forest City Enterprises, Inc., and City and County of Denver Art. II(E) (Mar. 2, 2001).

<sup>838</sup> See COLO. REV. STAT. §§ 38-1-201(2)(d) (“it is necessary, appropriate, and in the best interests of the state to list in this part 2 all of the governmental entities, corporations, and persons that may exercise the power of eminent domain pursuant to provisions of state law”) and 38-1-202 (listing “governmental entities, corporations, and persons authorized to use eminent domain” and not listing SDC).

<sup>839</sup> COLO. REV. STAT. § 32-1-1004(4).

<sup>840</sup> *Id.* at § 32-1-1004(9).

<sup>841</sup> PCMD SERVICE PLAN, *supra* note 830, at Art. VI(A)-(E); WCMD SERVICE PLAN, *supra* note 830, at Art. VI(A)-(E).

<sup>842</sup> Memorandum from Denver Legislative Services Staff, *supra* note 267, at 7.

<sup>843</sup> COLO. REV. STAT. § 32-1-1101(1)(a).

<sup>844</sup> Bonds Series 2004B-1, *supra* note 805, at 2 (2001).

<sup>845</sup> *Id.*; see also Joe Phillips, *An Explanation of Property Taxes in Stapleton*, STAPLETON SCOOP (Aug. 8, 2013) available at <http://stapletonscoop.com/2013/08/08/an-explanation-of-property-taxes-in-stapleton/#>.

## G | POWER TO ISSUE TAX-EXEMPT BONDS

SDC has no tax-exempt bonding authority. Under its articles, SDC has the power to issue revenue bonds,<sup>846</sup> but it has never done so.<sup>847</sup>

The Stapleton development project's infrastructure is financed in part using DURA and metropolitan district tax-exempt bonds. In 1997, DURA designated (and the Denver City Council approved) Stapleton as an urban renewal area.<sup>848</sup> Designation of the Stapleton Urban Renewal Area created a sales and property tax increment area on the Stapleton site. Sales and property taxes collected above the baseline years support DURA revenue bonds. To date, DURA has issued \$286 million in tax-exempt bonds for the Stapleton redevelopment.<sup>849</sup>

## H | OTHER REVENUE SOURCES

SDC receives revenue and financing from a number of sources, including: (1) PCMD and WCMD, (2) payments from Forest City pursuant to the Purchase Agreement, and (3) DURA TIF funds.<sup>850</sup>

PCMD receives revenue from property taxes levied on property within the WCMD.<sup>851</sup> WCMD is considered a taxing district and by intergovernmental agreement makes payments of all tax revenues to PCMD.<sup>852</sup> WCMD receives revenue from a general obligation property tax, an ownership and maintenance property tax, and a specific ownership tax.<sup>853</sup> PCMD receives and agrees to reimburse certain advances of capital funding construction and operating costs and debt service payments on issued bonds.<sup>854</sup> Such "developer advances" are reimbursable out of available pledged revenues, the proceeds of bonds issued by PCMD, or from funds otherwise available.<sup>855</sup>

Approximately \$18,000,000 in U.S. government-sponsored Build America Bond notes issued by PCMD are outstanding and held by an affiliate of the private developer.<sup>856</sup> Also outstanding are approximately \$8,000,000 in other notes, payable to affiliates or partners of the private developer. The notes are payable in any particular year to the extent that there are pledged revenues, proceeds from future bond issues, or funds otherwise available to make such payments.<sup>857</sup>

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<sup>846</sup> SDC ARTICLES, *supra* note 807, at § 3(b).

<sup>847</sup> Telephone conversation with Karen Aviles, *supra* note 24.

<sup>848</sup> See Stapleton Development Corporation, *The Stapleton Story*, <http://www.sdcdenver.org/stapleton-story> (last visited Aug. 8, 2014). See also COLO. REV. STAT. § 31-25-107(1)(a) (requiring City Council designation of an area as "a slum, blighted area, or a combination thereof" and "as appropriate for an urban renewal project").

<sup>849</sup> *Stapleton*, *supra* note 796; Bonds Series 2004B-1, *supra* note 805, at 11 (indicating that DURA TIF revenue bonds for Stapleton are tax-exempt).

<sup>850</sup> Memorandum from Denver Legislative Services Staff, *supra* note 267, at 3.

<sup>851</sup> PARK CREEK METROPOLITAN DISTRICT, 2014 BUDGET GENERAL FUND (2013) *available at* [https://dola.colorado.gov/dlg\\_portal/filings.jsf?id=16032&category=1&jfwid=06d8e76bd4ab20f9b390eab34a76%3A0](https://dola.colorado.gov/dlg_portal/filings.jsf?id=16032&category=1&jfwid=06d8e76bd4ab20f9b390eab34a76%3A0) (last visited Aug. 8, 2014).

<sup>852</sup> Financing and Construction IGA, *supra* note 800, at 2.

<sup>853</sup> WESTERLY CREEK METROPOLITAN DISTRICT, 2014 BUDGET GENERAL FUND (2013), *available at* [https://dola.colorado.gov/dlg\\_portal/filings.jsf?id=16033&category=1&jfwid=06d8e76bd4ab20f9b390eab34a76%3A1](https://dola.colorado.gov/dlg_portal/filings.jsf?id=16033&category=1&jfwid=06d8e76bd4ab20f9b390eab34a76%3A1) (last visited Aug. 8, 2014).

<sup>854</sup> 2012 PCMD FINANCIAL STATEMENTS, *supra* note 835, at 21-23; Second Amended and Restated Reimbursement Agreement for In-Tract Infrastructure by and between Park Creek Metropolitan District and Stapleton Land, LLC Art. II, III (June 22, 2006).

<sup>855</sup> 2012 PCMD FINANCIAL STATEMENTS, *supra* note 835, at 22.

<sup>856</sup> *Id.*

<sup>857</sup> *Id.*

## I | SALES, USE, AND PROPERTY TAX-EXEMPT STATUS

All public infrastructure is constructed by the metropolitan districts. The districts do not pay property tax on real and personal property they own, nor do they pay state or local sales or use taxes.<sup>858</sup>

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<sup>858</sup> COLO. CONST., Art. X, § 4.

## APPENDIX A: TAX-EXEMPT BONDING AND TABOR

Development entities must satisfy certain requirements under federal tax law to issue tax-exempt bonds; they must satisfy other state law requirements in order to comply with (or avoid) limitations under the Colorado Constitution, including Colorado’s Taxpayer Bill of Rights (“TABOR”). Entities seeking to issue tax-exempt debt and comply with TABOR face an array of structural requirements. While a detailed analysis of tax and TABOR law is beyond the scope of this discussion, a brief summary will help explain many key features of the entities described in the *Reference Guide to Entities that Construct, Fund, and Operate Selected Public Facilities and Projects in the Denver Metropolitan Area*.

### STRUCTURAL TAX-EXEMPT BONDING REQUIREMENTS<sup>1</sup>

State and local governmental entities may issue tax-exempt bonds — that is, interest earned on the bonds can be exempt from federal income taxation.<sup>2</sup> Tax-exempt bonds are a popular financing tool for development projects.<sup>3</sup> States,<sup>4</sup> tribes,<sup>5</sup> the District of Columbia,<sup>6</sup> and political subdivisions<sup>7</sup> of those entities may issue tax-exempt bonds.<sup>8</sup>

In addition to issuing such bonds for their own benefit, government entities may also issue tax-exempt bonds for the benefit of another entity. These types of bonds are sometimes referred to as “qualified private activity bonds.” Interest on these types of bonds is usually tax exempt if ninety-five percent or more of the net proceeds of the bonds is used for one of the several qualified purposes described in the tax code.<sup>9</sup>

Furthermore, some entities may issue tax-exempt bonds “on behalf of” state or local governments as “constituted authorities” or “63-20” corporations.<sup>10</sup> Project proponents seeking tax-exempt bonding capability often structure development entities to meet requirements to qualify as political subdivisions, constituted authorities, or 63-20 corporations.

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- <sup>1</sup> This discussion addresses only the structure and other characteristics of entities authorized to issue tax-exempt bonds. Other requirements of federal tax law also apply, including, for example, the “private business use test,” “private payment test,” or the “private loan financing test.” See 26 U.S.C. § 141 (2012); see also NAT’L ASS’N OF BOND LAWYERS, *supra* note 540, at Ch. 2: Federal Tax Aspects of Municipal Bonds 110. Issuers and their securities must also comply with securities law. See generally Securities Act of 1933, 15 U.S.C. § 77a *et seq.*; NAT’L ASS’N OF BOND LAWYERS, *supra* note 540, at Ch. 3: Securities Laws. These topics are beyond the scope of this discussion.
  - <sup>2</sup> 26 U.S.C. § 103(a) (2012). The use of the term “bonds” herein is intended to include not only bonds but also other types of obligations that may be incurred by governmental entities, including but not limited to note, loan, installment sale, or lease obligations.
  - <sup>3</sup> The primary benefit of tax-exempt financing is lower cost of capital — investors demand lower interest rates because they view public debt as less risky, and because they need not pay taxes on returns.
  - <sup>4</sup> 26 U.S.C. § 103(c)(2) (2012).
  - <sup>5</sup> *Id.* at § 7871(a)(4) (2012).
  - <sup>6</sup> See Rev. Rul. 76-202, 1976-1 C.B. 26.
  - <sup>7</sup> 26 C.F.R. § 1.103-1(b) (2013).
  - <sup>8</sup> See generally *id.* at § 1.103-1 (2013), NAT’L ASS’N OF BOND LAWYERS, *supra* note 540, at Ch. 2: Federal Tax Aspects of Municipal Bonds 11-14.
  - <sup>9</sup> See INTERNAL REV. SERV., TAX-EXEMPT PRIVATE ACTIVITY BONDS: COMPLIANCE GUIDE 2 (2005) available at <http://www.irs.gov/pub/irs-pdf/p4078.pdf>. The qualified purposes are listed at 26 U.S.C. §§ 142-145, 1394. An in-depth discussion of “qualified private activity bonds” is beyond the scope of the memorandum, but a more fulsome discussion of the rules governing the issuance of such bonds is available in the cited Internal Revenue Service guidance.
  - <sup>10</sup> Debra Kaweck & Marvin Friedlander, 501(c)(3) BONDS – A Mini-Text 267–68, reprinted in INTERNAL REV. SERV., CONTINUING PROFESSIONAL EDUCATION EXEMPT ORGANIZATIONS TECHNICAL INSTRUCTION PROGRAM FOR FY 1993 TRAINING 4277-043 (1993).

# 1. POLITICAL SUBDIVISIONS

A political subdivision is “any division of any state or local government unit which is a municipal corporation or which has been delegated the right to exercise part of the sovereign power of the unit.”<sup>11</sup> Generally, entities meet that definition if they enjoy at least one of three sovereign powers:

- the power of eminent domain;
- the power to tax; or
- the police power.<sup>12</sup>

It is important to note that a recent Technical Advice Memorandum issued by the Internal Revenue Service has cast doubt as to the precise requirements for an entity to qualify as a political subdivision for tax-exempt bonding purposes. The ruling suggests that, in addition to possessing one or more of the above-listed sovereign powers, to qualify as a political subdivision for tax-exempt bonding purposes, there should be an expectation that the entity’s governing board could be elected by and responsible to a “public electorate.”<sup>13</sup> Although it is unclear what constitutes a “public electorate,” the Internal Revenue Service believes that an entity “organized and operated in a manner intended to perpetuate private control” may not be a political subdivision for tax-exempt bonding purposes.<sup>14</sup>

# 2. CONSTITUTED AUTHORITIES

Constituted authorities can be distinguished from 63-20 corporations because they enjoy specific legislative authorization to issue tax-exempt bonds.<sup>15</sup> An entity must meet six criteria to be considered a constituted entity authorized to issue “on behalf of” bonds:

- a specific state statute must authorize bond issuance by the constituted authority;
- the issuance must have a public purpose;
- the sponsoring government authority must control the authority’s governing body;
- the authority must have the power to deal in property and issue bonds;
- the authority’s earnings must not benefit private persons; and
- upon dissolution, all bond-financed property must go to the sponsoring government.<sup>16</sup>

# 3. 63-20 CORPORATIONS

63-20 corporations are nonprofit corporations organized under the general nonprofit law of the state that meet the requirements first articulated in IRS Revenue Ruling 63-20.<sup>17</sup> They need not have authority to issue bonds under a specific legislative authority. Hence, the term “63-20 corporation” is simply a label applied to a nonprofit

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<sup>11</sup> 26 C.F.R. § 1.103-1(b) (2013).

<sup>12</sup> *Comm’r v. Shamberg’s Estate*, 144 F.2d 998, 1004-05 (2d Cir. 1944), *cert denied*, 323 U.S. 792 (1945); *see also* NAT’L ASS’N OF BOND LAWYERS, *supra* note 540, at Ch. 2: Federal Tax Aspects of Municipal Bonds 14-15 (summarizing Private Letter Rulings on Revenue Rulings addressing sovereign powers).

<sup>13</sup> Internal Revenue Service, National Office Technical Advice Memorandum No. 103.02-01 10 (May 9, 2013).

<sup>14</sup> *Id.*

<sup>15</sup> Rev. Rul. 57-187, 1957-1 C.B. 65; *see also*, NAT’L ASS’N OF BOND LAWYERS, *supra* note 540, at Ch. 2: Federal Tax Aspects of Municipal Bonds 16 (summarizing constituted authorities).

<sup>16</sup> *See generally* NAT’L ASS’N OF BOND LAWYERS, *supra* note 540, at Ch. 2: Federal Tax Aspects of Municipal Bonds 16 (summarizing the criteria for constituted authorities and citing a host of IRS Revenue Rulings and Private Letter Rulings).

<sup>17</sup> Rev. Rul. 63-20, 1963-1 C.B. 24.



corporation when discussing its tax-exempt bonding authority. The requirements for 63-20 corporations are as follows:

- the corporation must engage in activities essentially public in nature;
- the corporation must not be organized for profit;
- corporate income must not benefit private persons;
- the sponsoring public entity must have a beneficial interest in the corporation while bonds are outstanding, and must own all bond-sponsored property once bonds are retired; and
- the sponsoring government entity must approve formation of the corporation and the issuance of its bonds.<sup>18</sup>

In general, these structural federal tax requirements for “on behalf of” bonding authority link development entities more closely to sponsoring governments, to ensure entities do not use special public tax-exempt bonding power for private purposes.

## COLORADO CONSTITUTIONAL LIMITATIONS AND REQUIREMENTS

### 1. LIMITATION ON PUBLIC INDEBTEDNESS

The Colorado Constitution contains a prohibition against the lending of credit to any person, company, or corporation, public or private, for any amount, or for any purposes whatsoever by any county, city, town, township, or school district.<sup>19</sup> Although this prohibition is broadly worded, it has been narrowed by a series of judicial opinions. Most relevant for purposes of this reference guide, the prohibition does not apply where: (1) a city’s obligations are incurred for a public purpose;<sup>20</sup> (2) there is no pledge of public property as security for public revenue bonds;<sup>21</sup> and/or (3) the contractual obligation is that of a private company and not the city.<sup>22</sup>

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<sup>18</sup> *Id.* (“The Internal Revenue Service holds that obligations of a nonprofit corporation organized pursuant to the general nonprofit corporation law of a state will be considered issued ‘on behalf of’ the state or a political subdivision thereof for the purposes of section 1.103-1 of the Income Tax Regulations, provided each of the following requirements is met: (1) the corporation must engage in activities which are essentially public in nature; (2) the corporation must be one which is not organized for profit (except to the extent of retiring indebtedness); (3) the corporate income must not inure to any private person; (4) the state or a political subdivision thereof must have a beneficial interest in the corporation while the indebtedness remains outstanding and it must obtain full legal title to the property of the corporation with respect to which the indebtedness was incurred upon the retirement of such indebtedness; and (5) the corporation must have been approved by the state or a political subdivision thereof, either of which must also have approved the specific obligations issued by the corporation.”); *see also* Rev. Proc. 82-26, 1982-1 C.B. 476 (summarizing and adding more detail to the five-part test set forth in Revenue Ruling 63-20).

<sup>19</sup> COLO. CONST. Art. XI § 1.

<sup>20</sup> *Colo. Ass’n of Pub. Emp. v. Regents of Univ. of Colo.*, 804 P.2d 138, 160 (Colo. 1990) (Erickson, J. dissenting) (citing *Witcher v. Cañon City*, 716 P.2d 445, 455 (Colo. 1986); *Gude v. City of Lakewood*, 636 P.2d 691, 695 n.2 (Colo. 1981)); *In re Interrogatories by the Colorado State Senate*, 566 P.2d 350, 356 (Colo. 1977); *McNichols v. City and County of Denver*, 280 P.2d 1096 (1955)).

<sup>21</sup> *Allardice v. Adams Cnty.*, 476 P.2d 982, 985 (Colo. 1970) (citing *Davis v. Pueblo*, 406 P.2d 671 (Colo. 1965); *Ginsberg v. City and County of Denver*, 436 P.2d 685 (Colo. 1968)).

<sup>22</sup> *Witcher v. Cañon City*, 716 P.2d 445, 454 (Colo. 1986).

## 2. TABOR EXEMPTION REQUIREMENTS

TABOR is a state constitutional amendment that imposes tax, debt, and spending restrictions on state and local governments.<sup>23</sup> The most relevant TABOR restriction for purposes of the discussion in this reference guide is a prohibition on the creation of any multi-year debt or financial obligation absent voter approval.<sup>24</sup> TABOR restrictions apply only to “districts,” defined as “state and local governments, excluding enterprises.”<sup>25</sup> Hence, in order to avoid TABOR restrictions, sponsors often design project entities to qualify as “enterprises” or as “non-districts.”

### A | ENTERPRISES

“Enterprise” is a defined term in TABOR. Functionally speaking, an enterprise is not a separate legal entity; rather, “enterprise” is an accounting treatment and formality applied to parts of state or local government for TABOR analysis.<sup>26</sup> To qualify as an enterprise under TABOR, a governmental unit must:

- be government-owned;
- be a business;
- possess revenue-bonding authority; and
- receive less than ten percent of its revenue from Colorado governments.<sup>27</sup>

Case law indicates that enterprises must be controlled by the local government and cannot exercise taxing power unrelated to services provided.<sup>28</sup>

### B | NON-DISTRICTS

Non-governmental entities exempt from TABOR must fall outside the definition of “district” (“state and local government”) and outside the definition of “enterprise.” For simplicity, this memorandum refers to such non-governmental entities as “non-districts.” TABOR does not define “state and local government.” However, Colorado courts have considered several non-exclusive factors to determine whether an entity qualifies as a non-district outside TABOR’s scope, asking:

- does the entity have the power to levy taxes or assessments;
- does the entity hold elections; and
- is the entity a “body corporate”?<sup>29</sup>

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<sup>23</sup> See COLO. CONST. Art. X §§ 20(4)(a) (new taxes), (4)(b) (new debt), and (7) (spending limits).

<sup>24</sup> *Id.* at Art. X § 20(4)(b) (requiring advance voter approval for “creation of any multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever without adequate present cash reserves pledged irrevocably and held for payments in all future fiscal years”).

<sup>25</sup> *Id.* at Art. X § 20(2)(b).

<sup>26</sup> See Paul C. Rufien, *Taming TABOR by Working from Within*, 32 COLO. LAW. 101, 103 (July 2003).

<sup>27</sup> COLO. CONST. ART. X § 20(2)(d) (defining “enterprise” as a “government-owned business authorized to issue its own revenue bonds and receiving under ten percent of annual revenue in grants from all Colorado state and local governments combined.”). For a thorough analysis of each prong, see Amy Kennedy & Dee P. Wisor, *Enterprises Under Article X, § 20 of the Colorado Constitution—Part I*, 27 COLO. LAW. 55 (Apr. 1998). See also Rufien, *supra* note 26, at 101-04.

<sup>28</sup> *Nicholl v. E-470 Pub. Highway Auth.*, 896 P.2d 859, 867-68 (Colo. 1995); see also Kennedy & Wisor, *supra* note 27, at 55-56.

<sup>29</sup> See *Olson v. City of Golden*, 53 P.3d 747, 754 (Colo. Ct. App. 2002) (holding that Golden Urban Renewal Authority is not a “district” subject to TABOR) *cert. denied*, No. 02SC203 (Colo. Sept. 3, 2002); *Campbell v. Orchard Mesa Irrigation Dist.*, 972 P.2d 1037, 1040 (Colo. 1998) (ruling, on a certified question, that an irrigation district that levied taxes and held elections was nonetheless not a “district” subject to TABOR, because: (1) the district served private

If none of these factors apply, then an entity is not a “district” for TABOR purposes.

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interests, (2) its elections strayed from “one person one vote” and (3) its special assessments benefitted only those in the district).



## APPENDIX B: SUMMARY CHART

SUMMARY CHART OF ENTITIES THAT CONSTRUCT, FUND, AND OPERATE SELECTED PUBLIC FACILITIES AND PROJECTS IN THE DENVER METROPOLITAN AREA <sup>1</sup>									
Name	Form	Formation	Board Qualifications & Appointment	Property Ownership & Operations	Power to Condemn Property	Taxing Power	Tax-Exempt Bonding Power	Other Revenue Sources	Sales, Use & Property Tax Exemption <sup>2</sup>
<b>City-Owned and Operated</b>									
Red Rocks Park and Amphitheatre	City and County of Denver (“Denver”) owned and operated	Denver purchased the property in 1928	Not applicable; the amphitheatre is operated by Arts and Venues Denver, a division of the Department of General Services; the park is operated by Denver Mountain Parks	Denver has statutory and charter authority to acquire, sell, and lease property and to manage and maintain that land; Denver owns the Park and Amphitheatre and through its administrative departments manages day-to-day affairs of the Amphitheatre (Arts and Venues Denver) and the Park (Denver Mountain Parks)	Denver has eminent domain powers	Denver has general taxing authority as well as a specific “seat tax” that it imposes on events at the amphitheatre, which is used for operation and maintenance of Red Rocks	Denver has the power to issue tax-exempt bonds and funds Red Rocks with general obligation bond proceeds	Denver Arts and Venues Special Revenue Fund; Preserve the Rocks Fund, which receives private donations and project income; private and federal grants	Denver does not pay sales or use taxes or property taxes associated with Red Rocks
<b>Statutory Districts – Statutory Entities</b>									
Denver Scientific and Cultural Facilities District	Special statutory taxing district	By special legislation and referred ballot measure approved in 1988	Board of Directors; 11 directors total; 4 appointed by the Governor; 7 appointed by the several	No property ownership or operation	None	Yes; 1/10% sales tax within the RTD taxing district, collected by RTD	None	Small grants and some private donations	Yes

<sup>1</sup> This chart presents a summary of the more detailed discussion of the structure, powers, and other characteristics of these entities and facilities set forth in the *Reference Guide: Entities that Construct, Fund, and Operate Selected Facilities and Projects in the Denver Metropolitan Area* prepared by Kaplan Kirsch & Rockwell LLP (2014).

<sup>2</sup> The response in this column indicates whether or not the entity itself must pay state and local sales and use taxes on its purchases or property tax. Many of these entities receive revenue from sales to third parties, which sales may be subject to sales and use tax. Likewise, even if the entity itself does not pay property tax, lessees and other types of individuals and entities that use tax-exempt property may be subject to property tax on their possessory interest in the leased property.

**SUMMARY CHART OF ENTITIES THAT CONSTRUCT, FUND, AND OPERATE SELECTED PUBLIC FACILITIES AND PROJECTS IN THE DENVER METROPOLITAN AREA<sup>1</sup>**

<b>Name</b>	<b>Form</b>	<b>Formation</b>	<b>Board Qualifications &amp; Appointment</b>	<b>Property Ownership &amp; Operations</b>	<b>Power to Condemn Property</b>	<b>Taxing Power</b>	<b>Tax-Exempt Bonding Power</b>	<b>Other Revenue Sources</b>	<b>Sales, Use &amp; Property Tax Exemption<sup>2</sup></b>
			participating counties in the district						
Denver Metropolitan Major League Baseball Stadium District	Body corporate and political subdivision of the state	By Denver Metropolitan Major League Baseball Stadium Act enacted in 1989	Board of Directors; 7 directors appointed by the Governor and approved by the state Senate; must reside in the district; directors may be removed by the Governor	The District owns and has all powers to acquire, construct, own and lease the baseball stadium; the District owns and leases the stadium to the Colorado Rockies Baseball Club	Limited eminent domain power to acquire property within LoDo for the stadium site; power expired April 30, 1995	Yes; authority to impose sales tax with district voter approval; the tax was approved in 1990, discontinued in 2000, and may not be renewed	Yes; statutory authority to issue special obligation bonds secured by sales tax and stadium revenue	Rent and other operating revenues; proceeds from privatization of seats, suites, concession, etc.; private donations	Yes
Denver Metropolitan Football Stadium District	Body corporate and politic and political subdivision of the state	By Metropolitan Football Stadium Act enacted in 1996	Board of Directors; 9 directors total; 6 appointed by the constituent counties of the district and must reside in the district; 2 appointed by the Governor; chairperson of the Baseball Stadium District Board sits <i>ex officio</i>	The District owns and has all powers to acquire, construct, own and lease the football stadium; the District owns and leases the stadium to the Denver Broncos' property management entity	None	Yes, authority to impose sales tax and admission tax with district voter approval; sales tax was approved in 1998 and expired in 2011; admission tax has never been imposed	Yes; statutory authority to issue special revenue bonds secured by sales tax and operating revenue, but not by real property	Rent and revenue sharing with Denver Broncos; licensing fee for stadium naming rights; the District also is specifically authorized to accept from any source contributions of money, property, labor, or other things	Yes
University of Colorado Hospital Authority	Body corporate and political subdivision of the state	By state statute enacted in 1991	Board of Directors; 11 directors total appointed by the Regents of the University of Colorado; 7 from each of Colorado's congressional districts subject to the advice and consent of the	The Authority has all powers of a body corporate and political subdivision, including power to deal in personal and real property; it owns and operates the Anschutz Medical Center and subsidiary	None	Yes; authority to impose sales tax with voter approval (Adams, Arapahoe, Boulder, Douglas, and Jefferson Counties and the City and County of Broomfield)	Yes; statutory authority to issue general obligation, revenue, and asset-secured bonds with cap on non-revenue bonds	Investments in property and securities; charitable donations raised by the University of Colorado Hospital Foundation	Yes

**SUMMARY CHART OF ENTITIES THAT CONSTRUCT, FUND, AND OPERATE SELECTED PUBLIC FACILITIES AND PROJECTS IN THE DENVER METROPOLITAN AREA<sup>1</sup>**

Name	Form	Formation	Board Qualifications & Appointment	Property Ownership & Operations	Power to Condemn Property	Taxing Power	Tax-Exempt Bonding Power	Other Revenue Sources	Sales, Use & Property Tax Exemption <sup>2</sup>
			state Senate; not more than 4 employees of the University or the Authority	medical facilities, 6 outlying specialty clinics; it controls the University of Colorado Foundation					
<b>Denver Owned/Nonprofit Operated</b>									
Winter Park	Denver owned; nonprofit operated (Winter Park Recreational Association or “WPR”)”)	Denver acquired the land under special use permits from the U.S. Forest Service and purchase of the base in the 1930s; Denver formed WPR as a nonprofit corporation in 1950 and the DMNS Foundation in 1986 by filings with the Colorado Secretary of State	Board of Directors; WPR has 5 directors initially appointed by the Mayor; subsequently 3 directors are appointed and elected by existing directors and may only serve one term; 2 directors are appointed and removed by the Mayor; all must reside or have a principal place of business in Denver	Denver owns the resort property; WPR, by contract, acts as the City’s agent and leases the resort to Intrawest Corporation, which operates the resort and holds an option to purchase certain real property	Denver has eminent domain powers; WPR does not	Denver has taxing authority; WPR does not	Denver has the power to issue tax-exempt bonds; WPR does not; Denver has not issued bonds to support Winter Park	Intrawest pays rent to WPR and a share of operating revenue; WPR has loans of \$41 million; WPR receives 10% of land sales and a 25% real estate transfer fee	Yes; the City and WPR are tax-exempt
Denver Museum of Nature and Science	Denver owned (buildings and collections); nonprofit operated (Colorado Museum of Nature and Science or “CMNS”) with a separate nonprofit which manages CMNS endowment (DMNS Foundation)	A group of citizens formed CMNS as a nonprofit corporation in 1900 by filing with the Colorado Secretary of State; the DMNS Foundation was formed as a nonprofit corporation by separate filing in	Boards of Trustees; CMNS has 27 Trustees selected by a nominating committee of the Board; DMNS Foundation has 7 directors, 3 of whom are trustees of CMNS	Denver owns all of the museum’s property and collections; CMNS manages and controls the museum as an “agency of the City” under a 1993 agreement; Denver provides funding through annual appropriations,	None	None; however, CMNS receives funding from tax revenue through the SCFD and Denver	None; Denver has the power to issue tax-exempt bonds; CMNS has received bond proceeds from Denver and issued tax-exempt bonds through the Colorado Cultural Facilities Authority	Operating revenue; private donations; SDFD funds; appropriations from Denver; revenue from Denver certificates of participation	Yes

**SUMMARY CHART OF ENTITIES THAT CONSTRUCT, FUND, AND OPERATE SELECTED PUBLIC FACILITIES AND PROJECTS IN THE DENVER METROPOLITAN AREA<sup>1</sup>**

Name	Form	Formation	Board Qualifications & Appointment	Property Ownership & Operations	Power to Condemn Property	Taxing Power	Tax-Exempt Bonding Power	Other Revenue Sources	Sales, Use & Property Tax Exemption <sup>2</sup>
		1986		telephone service, and certain types of insurance and imposes certain operational controls					
Denver Botanic Gardens	Denver owned (the Botanic Gardens location in Cheesman Park and the lease for the arboretum in Chatfield); nonprofit operated (Denver Botanic Gardens, Inc. or "DBG") with a separate nonprofit which manages DBG endowment (Denver Botanic Gardens Endowment, Inc. or "DBGE")	Members of the Colorado Forestry and Horticulture Association formed DBG in 1951 as a nonprofit corporation by filing with the Colorado Secretary of state; Denver formed DBGE as a nonprofit corporation by separate filing in 1991	Board of Trustees; DBG has 39 voting Trustees in 3 classes with staggered terms, 5 trustees emeriti, and 6 <i>ex officio</i> trustees from other organizations, 1 of whom is the Mayor or the City Manager of Parks and Recreation; voting Trustees are selected by the 2 classes not up for election; DBGE is governed by a Board of Directors; 9 directors and 1 voting member (DBG); DBG trustees select the board members	Denver owns the Botanic Gardens location in Cheesman Park and the lease for the arboretum in Chatfield; the DBG owns other properties; DBG operates Denver-owned properties under a cooperative agreement; Denver appropriates funding for operations, provides certain other services and financing, and imposes certain operational controls	None	None; however, DBG receives funding from tax revenue through the SCFD and from Denver through appropriations and Seat Tax revenue	None; however, Denver has the power to issue tax-exempt bonds; DBG has received bond proceeds from Denver	Admission fees; concession revenues; private donations; SDFD funds; investment income; appropriations from Denver; revenue from Denver bond proceeds	Yes
Denver Art Museum	Denver and nonprofit owned and nonprofit operated (Denver Art Museum or "DAM") with a separate nonprofit which manages DAM endowment	Members of the Denver Art Association formed the DAM as a nonprofit corporation by filing with the Colorado Secretary of state	DAM is governed by a Board of Trustees consisting of 32 voting trustees elected by DAM membership; DAM Foundation is governed by a	DAM owns the administration building and holds the North Building as the City's Agency for Art and it the legal and beneficial owner	None	None; however DAM receives funding from tax revenue through the SDFD and from Denver appropriations	None; however, DAM has received funding from Denver-issued tax-exempt bonds including funds to construct the	Appropriations from the City; admissions and program fees; gift shop revenues; investment income; membership fees; SCFD	Yes



**SUMMARY CHART OF ENTITIES THAT CONSTRUCT, FUND, AND OPERATE SELECTED PUBLIC FACILITIES AND PROJECTS IN THE DENVER METROPOLITAN AREA<sup>1</sup>**

Name	Form	Formation	Board Qualifications & Appointment	Property Ownership & Operations	Power to Condemn Property	Taxing Power	Tax-Exempt Bonding Power	Other Revenue Sources	Sales, Use & Property Tax Exemption <sup>2</sup>
	(Denver Art Museum Foundation or "DAM Foundation")	in 1941; the DAM Foundation was formed as a nonprofit corporation by separate filing in 1988	Board of Directors; 10 directors, 9 elected by the current board, chairman of the DAM Board of Trustees is an <i>ex officio</i> member; 1 director must be a DAM trustee	of its art collections; Denver owns the Fredric C. Hamilton Building; DAM has full administrative control over the galleries and collection under cooperative agreements with Denver in exchange for City appropriations and use of the Hamilton building			Hamilton Building and has borrowed tax-exempt funds from the Colorado Housing and Financial Authority	contributions; private gifts; DAM Foundation	
Denver Zoo	Denver owned and nonprofit operated (Denver Zoological Foundation or "Zoo") with a separate nonprofit which manages the Zoo the Zoo endowment (Colorado Zoological Trust or "Zoo Trust")	Interested citizens formed the Zoo as a nonprofit corporation by filing with the Colorado Secretary of state in 1950; the Zoo Trust was formed as a nonprofit corporation by separate filing in 1997	Board of Trustees; 44 voting trustees, 39 appointed by the existing trustees, 3 are <i>ex officio</i> members from Denver Zoo Volunteer Council, Zoo Trust, and the Manager of Parks and Recreation, 4 are appointed by the Mayor, other nonvoting classes also are elected by the voting trustees; Zoo Trust is governed by a Board of Directors; 7 directors, 4 appointed by the	Denver owns the property, exhibits, improvements, and fixtures; Zoo administers the zoo operations; the Zoo Trust has title to the Zoo endowment	None	None; however the Zoo receives funding from tax revenue through the SDFD and from Denver appropriations	None; however the Zoo has received funding from Denver issued tax-exempt bonds	Appropriations from Denver; admissions and program fees; concession revenues; SCFD funding; private gifts; Zoo Trust; operating revenues; funding from different sources is earmarked for specified purposes	Yes

**SUMMARY CHART OF ENTITIES THAT CONSTRUCT, FUND, AND OPERATE SELECTED PUBLIC FACILITIES AND PROJECTS IN THE DENVER METROPOLITAN AREA<sup>1</sup>**

Name	Form	Formation	Board Qualifications & Appointment	Property Ownership & Operations	Power to Condemn Property	Taxing Power	Tax-Exempt Bonding Power	Other Revenue Sources	Sales, Use & Property Tax Exemption <sup>2</sup>
			Zoo; three elected by the existing Board, Zoo President serves <i>ex officio</i>						
<b>Development Authorities</b>									
Denver Union Station	Nonprofit corporation/master developer/urban renewal authority/special districts	Denver formed the Denver Union Station Project Authority (“DUSPA”) as a nonprofit corporation by filing with the Colorado Secretary of State in 2008; Denver also formed the Downtown Development Authority (“DDA”) pursuant to the Downtown Development Authority Act; the Denver Union Station Metropolitan Districts (“DUSMD”) were sponsored by the master developer and formed under the Special District Act; the master developer was selected through a RFP process	DUSPA has a Board of Directors; 13 directors, 6 directors appointed by the Mayor, 2 directors appointed by RTD, 1 director appointed by the Colorado Department of Transportation, 1 directed appointed by Denver Regional Council of Governments, 1 director appointed by Denver Union Station Metropolitan District No. 1, and two Denver employees, who are non-voting and 1 of whom is the Manager of Finance and the other of whom is appointed by the Mayor. The DDA has a Board of Directors; 5	RTD owns Union Station; DUSPA has all powers granted to a Colorado nonprofit corporation to own real and personal property and to transact business and is responsible for executing the redevelopment of Union Station; however, DUSPA does not own property, has no employees, and contracts with an outside consultant for administrative services; DUSPA constructed the project; the DDA and the DUSMD pledge funds to repay DUSPA project loans	DUSPA and DDA cannot condemn property; DUSMD can, with prior approval from Denver, but have not	DUSPA has no taxing power; the DUSMD have the power to levy ad valorem property taxes; the DDA has the power to collect tax increment	DUSPA may, but has not issued bonds; RTD has issued tax-exempt bonds for project purposes; DDA cannot issue bonds; the DUSMD may but have not issued bonds	Federal Highway Administration grant; American Reinvestment and Recovery Act grant; Federal Transit Administration grant; Transit Improvement Project grant; state of Colorado funding; local contributions; Transportation Infrastructure Finance and Innovation Act loan; Railroad Rehabilitation and Improvement Financing loan; DDA tax increment and DUSMD property taxes (pledged to repay loans)	Yes; but project construction costs were not exempted from Denver and state sales and use taxes

**SUMMARY CHART OF ENTITIES THAT CONSTRUCT, FUND, AND OPERATE SELECTED PUBLIC FACILITIES AND PROJECTS IN THE DENVER METROPOLITAN AREA<sup>1</sup>**

Name	Form	Formation	Board Qualifications & Appointment	Property Ownership & Operations	Power to Condemn Property	Taxing Power	Tax-Exempt Bonding Power	Other Revenue Sources	Sales, Use & Property Tax Exemption <sup>2</sup>
			directors, 4 appointed by the Mayor, 1 is the President of City Council who sit <i>ex officio</i> . The DUSMD have a 5 member Board of Directors elected in accordance with the Special District Act who must be either resident in or property owners in the district						
Denver Convention Center Hotel Authority (“DCCHA”)	Nonprofit corporation	Denver formed the DCCHA as a nonprofit corporation by filing with the Secretary of State in 2003	Board of Directors; 7 directors, all are appointed by the Mayor, a maximum of 2 directors may be employees of Denver and cannot vote	DCCHA owns the Hyatt Regency at Colorado Convention Center hotel; DCCHA contracts with the Hyatt Corporation to manage the hotel in exchange for a management fee; DCCHA has all powers granted to a Colorado nonprofit corporation to own real and personal property and to transact business; DCCHA has no employees and contracts with outside consultants for	None	None	Yes; the DCCHA issued tax-exempt bonds to purchase the hotel site and construct the hotel in 2003 and refinanced those bonds in 2006	Hotel operating revenues fund the DCCHA annual budget; Denver makes an annual Economic Development Payment to secure the bond repayment and receives all excess revenue remaining after payment of debt services, hotel operating expenses, and management fees	No sales tax exemption; property tax exemption applies, but, by contract with Denver, the DCCHA makes a payment in lieu of property taxes

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				administrative services, owner asset management services, and accounting and audit services					
Former Lowry Air Force Base Redevelopment	Quasi-municipal entity/urban renewal authority	Lowry Economic Redevelopment Authority ("LRA") was formed pursuant to general state constitutional statutory authority by intergovernmental agreement between Denver and the City of Aurora in 1994	Board of Directors; 9 directors, 7 appointed by the Mayor of Denver; 2 appointed by the Mayor of the City of Aurora; no more than 2 Denver officials and 1 City of Aurora official may serve; no LRA officials may serve, but the Executive Director of the LRA sits <i>ex officio</i> ; the Board works with two advisory committees, the Community Advisory Committee of 21 members (14 appointed by Denver and 7 appointed by Aurora); and Denver/Aurora Coordinating Committee (3 appointed by Denver, 3 appointed by Aurora), which	LRA took title to the former Lowry Air Force Base and the Buckley Annex site; LRA has acted as the master developer responsible for the redevelopment and sale of the property	None	LRA has no taxing power, Denver Urban Renewal Authority receives tax increment	Yes; tax-exempt revenue bonds in cooperation with DURA	Proceeds from land sales; fee payments; equity sharing agreements with homebuilders; federal grants for environmental cleanup; tax increment revenue from DURA	Yes; but LRA reimburses Denver Public Schools a portion of its tax increment revenues

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			must approve specified matters of joint interest						
Former Fitzsimmons Army Medical Center Redevelopment	Quasi-municipal entity/private developer/urban renewal authority/special districts	Fitzsimmons Redevelopment Authority ("FRA") was formed pursuant to general state constitutional statutory authority by intergovernmental agreement between the City of Aurora and the University of Colorado in 1998; the Colorado Science and Technology Park Metropolitan Districts ("CSTPMDs") were sponsored by the private developer and formed in 2007 under the Special District Act	FRA has a Board of Directors; 12 directors, 3 appointed by the City of Aurora, 2 appointed by the Regents of the University of Colorado, 1 appointed by the Board of Directors of the University of Colorado Hospital Authority, 1 appointed by the Board of Directors of the Children's Hospital, and 5 by the FRA Board of Directors; no FRA employees may be Board members but the executive director sits <i>ex officio</i> as a nonvoting member. The CSTPMDs each have a 5 member Board of Directors elected in accordance with the Special District Act who must be either resident in or	FRA took title to the former Fitzsimmons Army Medical Center; FRA has acted as the master developer responsible for the redevelopment and sale of the property; FRA entered into a development agreement with a private developer for the CSTP. The CSTPMDs construct, fund and operate the public infrastructure to support the development; the private developer serves as the project manager for the CSTPMDs and collects a fee	FRA has no power to condemn property; the CSTPMDs may condemn property but have not done so	FRA has no taxing power; the CSTPMDs have the power to levy ad valorem property taxes; Aurora Urban Renewal Authority receives tax increment	Yes; FRA may issue tax-exempt revenue bonds only; the CSTPMDs may issue tax-exempt revenue and, in certain circumstances, general obligation bonds	FRA receives rent payments from tenants; grants; annual payments from Fitzsimmons golf course; parking fee income; interest. The CSTPMDs receive revenue from property taxes, ownership taxes on vehicle licensing; bond revenue; developer advances; tax increment collected by the Aurora Urban Renewal Authority	Yes

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			property owners in the district						
Former Stapleton International Airport Redevelopment	Nonprofit corporation/master developer/special districts	The Stapleton Development Corporation (“SDC”) is a nonprofit corporation formed by Denver in 1995 pursuant to Cooperative Agreement between Denver and DURA; SDC selected the master developer in 1998; the metropolitan districts were formed under the Special District Act	SDC’s Board of Directors consists of 11 voting directors: 9 appointed by the City, 2 appointed by DURA; 5 non-voting members (various City employees). The metropolitan districts each have a five-member board of directors elected in accordance with the Special District Act who must be registered voters and either resident in or property owners in the district	Denver, through Denver International Airport, owns the site; pursuant to a Master Lease and Disposition Agreement, SDC is responsible for managing remaining leases on the site and purchasing it in phased takedowns for resale under a separate purchase agreement with the master developer; the purchase agreement provides for phased takedowns and a minimum takedown acreage every five years; SDC was responsible for forming metropolitan districts for financing, construction, and operation of public infrastructure; DURA provides tax increment financing by contract with the metropolitan	SDC has no power to condemn property; the metropolitan districts may condemn property but have not done so	SDC has no taxing power; the metropolitan districts have the power to levy ad valorem property taxes; DURA receives tax increment	SDC does not qualify to issue; the metropolitan districts and DURA may issue tax-exempt revenue bonds	Master Developer pays development fees on a per/acre basis to the districts to help fund infrastructure	Yes

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				districts; Denver approval of infrastructure plans and phasing is required as a condition of releasing TIF and special district bond proceeds for construction under a Master Facilities Development Agreement among the City, the District, and the Master Developer					