DISTRICT COURT, CITY AND COUNTY OF DENVER COLORADO **Address: City and County Building** **1437 Bannock Street** **Denver, CO 80202**	
MESA COUNTY BOARD OF COUNTY COMISSIONERS; MAIN STREET CAFÉ; EVAN GLUCKMAN; DONALD SHONKWILER; JOHN BOZEK; SHARON JOHNSON; RICK NEVIN; and SIMILARLY SITUATED COLORADO TAXPAYERS AND REGISTERED VOTERS; **Plaintiffs,** **vs.** **COLORADO DEPARTMENT OF EDUCATION,** **Defendant,** **and** **STATE OF COLORADO; and BILL RITTER, JR., in his official capacity as the Governor of the State of Colorado;** **Intervenors.**	**COURT USE ONLY** **Case No. 07CV12064** **Courtroom: 1**

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND JUDGMENT

THIS MATTER comes before the Court for a court trial, commencing on May 5, 2008. The Court took testimony, received exhibits, and heard argument from all parties. The evidence was closed, subject to this Court's additional rulings on deposition designations, on May 7, 2008. The Court has reviewed the exhibits, the Proposed Findings of Fact, Conclusions of Law and Orders submitted by each party, the Brief of the Attorney General pursuant to C.R.C.P. 57(j), as well as relevant portions of the Court's file and applicable authority. The Court is fully advised.

PROCEDURAL AND LEGAL HISTORY

This case was brought by Plaintiffs as representatives of Colorado Taxpayers and Registered Voters by way of the filing of a Class Action Complaint on December 13, 2007 seeking to enforce certain provisions of the Colorado Taxpayer Bill of Rights

(hereinafter "TABOR") found at Colo. Const. art. X, § 20. Plaintiffs requested that this case be expedited on the Court's calendar pursuant to TABOR § (1), which mandates that these enforcement actions "shall have the highest civil priority of resolution." The Court granted that request, scheduling the matter for trial less than six months after the case was commenced.

Plaintiffs claim jurisdiction in this enforcement suit pursuant to TABOR § (1), and request both declaratory and injunctive relief under C.R.C.P. 57 and 65, and C.R.S. §§ 13-51-101 through 115. (Plaintiffs' Class Action Complaint, ¶¶ 16, 17). Jurisdiction and venue are not contested.

Specifically, Plaintiffs request the Court enter Declaratory Judgment finding that there was a failure to obtain required voter approval to justify the amendment to the School Finance Act by Senate Bill 07-199 (hereinafter "SB-199"); that SB-199 required state-wide voter approval; that individual school district's ballot measures seeking to "de-Bruce" were not in compliance with TABOR §§ 3(b) and (c); that SB-199 violates the "other limits" provision of TABOR § 1; and seeking a permanent injunction against future mill levy certifications occurring pursuant to the authority of SB-199. Plaintiffs seek to have this Court declare SB-199 unconstitutional.

The originally named Defendant, the Colorado Department of Education (hereinafter "CDE"), filed a Motion to Dismiss on January 25, 2008. That Motion was denied by this Court by Order dated February 21, 2008.

On February 1, 2008, the State of Colorado and Governor Ritter in his official capacity (hereinafter "the State") filed a Motion to Intervene, which was granted by the Court on February 6, 2008.

At the time of the Pretrial Conference held on April 28, 2008, this Court conditionally certified a class pursuant to C.R.C.P. 23(b)(2) as "affected property taxpayers impacted by the Amendment to the School Finance Act created by SB-199."

The case proceeded to a trial to the court commencing May 5, 2008 through May 7, 2008, and the parties presented arguments to the Court on May 9, 2008. At the request of the parties, the Court extended the time for them to submit their respective Proposed Orders until May 15, 2008. Each party timely filed those Proposed Orders.

2. Relevant Constitutional and Statutory Provisions

Article X, section 20 of the Colorado Constitution reads, in relevant part:

> **Section 20. The Taxpayer's Bill of Rights. (1) General provisions.** This section takes effect December 31, 1992 or as stated. Its preferred interpretation shall reasonably restrain most the growth of government. All provisions are self-executing and severable and supersede conflicting state constitutional, state statutory, charter, or other state or

local provisions. Other limits on district revenue, spending, and debt may be weakened only by future voter approval. Individual or class action enforcement suits may be filed and shall have the highest civil priority of resolution. . . .

* * *

(2) Term definitions. Within this section:

* * *

(b) "District" means the state or any local government, excluding enterprises.

* * *

(3) Election provisions. * * *

(b) At least 30 days before a ballot issue election, districts shall mail . . . a title notice or set of notices . . . Titles shall have this order of preference: **"NOTICE OF ELECTION TO INCREASE TAXES/TO INCREASE DEBT/ON A CITIZEN PETITION/ON A REFERRED MEASURE."** Except for district voter-approved additions, notices shall include only:

* * *

(iii) For the first full fiscal year of each proposed district tax increase, district estimates of the maximum dollar amount of each increase and of district fiscal year spending without the increase.

* * *

(c) Except by later voter approval, if a tax increase or fiscal year spending exceeds any estimate in (b)(iii) for the same fiscal year, the tax increase is thereafter reduced up to 100% in proportion to the combined dollar excess, and the combined excess revenue refunded in the next fiscal year. * * * Ballot titles for tax or bonded debt increases shall begin, **"SHALL (DISTRICT) TAXES BE INCREASED (first, or if phased in, final, full fiscal year dollar increase) ANNUALLY. . .?" or 'SHALL (DISTRICT) DEBT BE INCREASED (principal amount), WITH A REPAYMENT COST OF (maximum total district cost), …?"**

* * *

> **(4) Required elections.** Starting November 4, 1992, districts must have voter approval in advance for:
>
> (a) Unless (1) or (6) applies, any new tax, tax rate increase, mill levy above that for the prior year, valuation for assessment ration increase for a property class, or extension of an expiring tax, or a tax policy change directly causing a net tax revenue gain to any district.
>
> * * *
>
> **(7) Spending limits.** (a) The maximum annual percentage change in state fiscal year spending equals inflation plus the percentage change in state population in the prior calendar year, adjusted for revenue changes approved by voters after 1991. . . .
>
> (b) The maximum annual percentage change in each local district's fiscal year spending equals inflation in the prior calendar year plus annual local growth, adjusted for revenue changes approved by voters after 1991 . . . .
>
> (c) The maximum annual percentage change in each district's property tax revenue equals inflation in the prior calendar year plus annual local growth, adjusted for property tax revenue changes approved by voters after 1991 . . . .
>
> (d) If revenue from sources not excluded from fiscal year spending exceeds these limits in dollars for that fiscal year, the excess shall be refunded in the next fiscal year unless voters approve a revenue change as an offset.
> * * *

The School Finance Act is found at C.R.S. §§ 22-54-101, *et seq.* Before the passage of Senate Bill 07-199 (hereinafter "SB-199"), that Act read, in relevant part, as follows:

> (2)(a) * * * [E]ach district shall levy the lesser of:
>
> (I) The number of mills levied by the district for the immediately preceding property tax year;
>
> (II) The number of mills that will generate property tax revenue in an amount equal to the district's total program for the applicable budget year minus the district's minimum state aid and minus the amount of specific ownership tax revenue paid to the district;

> (III) The number of mills that may be levied by the district under the property tax revenue limitation imposed on the district by section 20 of article X of the state constitution. * * *

SB-199 amended subsection (III) to read as follows:

> (III) FOR A DISTRICT THAT HAS NOT OBTAINED VOTER APPROVAL TO RETAIN AND SPEND REVENUES IN EXCESS OF THE PROPERTY TAX REVENUE LIMITATION IMPOSED ON THE DISTRICT BY SECTION 20 OF ARTICLE X OF THE STATE CONSTITUTION, the number of mills that may be levied by the district under the property tax revenue limitation imposed on the district by section 20 of article X of the state constitution.

(Amending language in all caps). In addition, SB-199 added a subsection (V) that set "[t]wenty-seven mills" as the final choice for a levy within any given school district. This legislation was adopted by the Colorado General Assembly during its 2007 session, and signed into law by the Governor on May 9, 2007. (Exh. A; Stipulated Fact No. 2, TMO).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The evidence in this case does not lend itself to a simple recitation of evidentiary facts separate and distinct from legal conclusions. In fact, it has long been the position of the State and CDE that this case squarely presents only issues of law, and that there is no factual dispute. While the Court essentially agrees that there are few, if any, purely factual disputes, the facts themselves provide a necessary context to the legal issues involved in the case, and as such, are not easily severable from the legal authority applicable to the case. Accordingly, the Court has chosen to combine its Findings of Fact with its Conclusions of Law.

Each party has essentially argued to this Court that the issues raised in this case require only a simple analysis. This Court must respectfully disagree. Untangling the various provisions of TABOR, especially as its provisions relate to calculation of limits on collection of revenue, voting requirements, and allocation of revenue among various school districts consistent with the School Finance Act, presents a difficult task indeed.

In resolving the issues raised in this case, the Court first notes that TABOR does not itself create "rights" vested in Colorado taxpayers, but instead imposes limitations on the spending and taxing powers of state and local government. Bickel v. City of Boulder, 885 P.2d 215, 225 (Colo. 1994) *cert. denied* by Wright v. Boulder Valley School Dist. RE-2, 513 U.S. 1115, 115 S.Ct. 1112, 130 L.Ed.2d 1076 (1995). It also provides for specific requirements to obtain "voter approval" in certain circumstances. Resolution of Plaintiffs' claims requires the Court to review the question of whether SB-199 complies with the "voter approval" requirements under TABOR, either because SB-199 did not

require voter approval, or sufficient prior voter approval had been given by virtue of certain "de-Brucing" elections held in local school districts.

1. Relationship between TABOR and School Finance Act

There are 178 School Districts in the State of Colorado. (Stipulated Fact No. 3, TMO). As to all those districts for grades K through 12, the Public School Finance Act determines the amount of each district's "Total Program" funding. The Act also determines how much of the funding comes through local school district revenues (hereinafter "local share") and how much is funded through the State's revenues (hereinafter "state share"). C.R.S. §§ 22-54-104 and 106. The local share comes from property tax revenues and ownership taxes on motor vehicles, with the great majority coming from property tax revenues. (Transcript, Herrmann, pp. 434-39). The state share is appropriated by the General Assembly and distributed to each local school district by CDE, and includes state tax revenues from the state general fund and the state education fund. (Transcript, Herrmann, pp. 435-36).

After the local share for each school district is determined, the state pays any remaining amounts of the Total Program funding, thus providing a minimum amount of aid to all school districts to guarantee that each pupil gets his or her proportionate share. That share is in a dollar amount set by the legislature. (Transcript, Herrmann, pp. 432-33, 440, 497-98). The Total Program funding is calculated by multiplying the official pupil count by per-pupil funding, which is determined by many factors including base funding, inflation and cost of living. (Transcript, Herrmann, pp. 430-431).

The Colorado Department of Education's Public School Finance Unit (hereinafter "Unit") is the office responsible for administering the School Finance Act. (Exhs. 6 and C). Each year, the Unit calculates the School Finance Act portion of a school district's mill levy, and submits a form containing those calculations. (Exhs. 10 and Q). The Unit transmits these forms to the school district in November of each year, and the forms are returned to the Unit no later than December 20. Information to complete the form is provided by the district to the county government, which in turn certifies the school finance mill levies. (Exh. 10). The appropriately certified amount of property tax is then collected by the county treasurer for each respective county. (Colo. Const. art. 9, § 4; C.R.S. § 39-10-101). The county is therefore the collecting agent for the school district, and the treasurer then pays the collected property taxes to the school district. (Transcript, Herrmann, pp. 472, 492). It is undisputed that no local school district collects taxes, or provides a property tax bill to any property owner. (Ibid.).

The School Finance Act provision contained within each district's mill levy certification determines the amount that property taxpayers within that district will pay for the local district's share of the district's Total Program. The School Finance Act requires that, for every *additional* dollar collected by each school district above the previous year's benchmark, the State then pays one dollar less in equalization funding.

The testimony was undisputed that in the 1980's, Total Program funding for all school districts in Colorado was approximately $2 billion. (Transcript, Herrmann, pp. 438-39). The local share at that time was approximately 60% of Total Program. (Ibid.). However, by 2007, the Total Program had more than doubled, equaling approximately $5 billion, with the local share decreasing to approximately 37% of the Total Program. (Transcript, Herrmann, pp. 431, 437-38). Ms. Herrmann testified that there was some concern expressed that, as the state provided a larger and larger percentage of Total Program funding, that the state might be perceived as trying to exert more control over how local school districts should operate. (Transcript, Herrmann, pp. 484-85). This concern was expressed by the Office of the State Planning and Budgeting in March, 2007. (Exh. 79, p. 3).

2. Efforts by local school districts to "de-Bruce"

The undisputed evidence at trial established that school districts found themselves, because of TABOR, unable to keep all revenue due them under the School Finance Act and/or other sources including concessions or non-federal grants. The Unit thereafter provided guidance to individual school districts as to how to word a ballot measure to relieve themselves from the TABOR imposed revenue limit. These measures are collectively referred to throughout this Order as "de-Brucing" elections. This included a form letter sent to various districts from the Unit advising that a de-Brucing election would allow the school district to retain revenue "in excess of that amount which otherwise is allowed by the TABOR-imposed 'growth plus inflation' limit." (Emphasis in original). (Exh. 22). The Unit also provided assistance to districts relating to potential wording of de-Brucing ballot measures. (Exh. 21). Following the individual de-Brucing elections, the Unit required the districts to report the results of the election. (Exh. 20). The Unit then retained this information. (Exh. F).

Beginning in 1995, 175 of the 178 Colorado School Districts held successful de-Brucing elections. Only the Cherry Creek, Harrison and Colorado Springs School Districts did not hold successful de-Brucing elections. Exhibit 38 includes the text of each district's ballot measures. The great majority of these occurred between 1996 and 1998, and the last of these occurred in 2006. (Exh. 38). Language for these various measures closely mirrors the language suggested by the Unit. Although not all districts successfully passed the de-Brucing measures, by 2006 every voter in Colorado had the opportunity to vote on a ballot question relating to the issue. (Exhs. 38, N).

The evidence was undisputed at trial that, following acceptance of these de-Brucing measures, each district would then calculate a reduction in the mill levy to offset the increased amount of property taxes to be collected due to increases in value of property within the district. Through fiscal year 2005, school district property tax mill levies experienced a "stair step" effect, based upon the fact that property values were assessed every other year. During those years of assessment, mill levies would drop as property values increased, but the mill levies remained constant in years where no assessments were made. (Transcript, Herrmann, pp. 453-55; Exh. 13). Ms. Vody Herrmann (the current Director of Public School Finance Unit) testified that the School

Finance Mill Levy provision set forth in C.R.S. § 22-54-106(2)(a)(iii) meant that a school district's property taxes could not "grow by more than the rate of inflation plus the percentage of growth in student population." Exh. 46. For this reason, Ms. Herrmann observed, "the mill levies of school districts are ratcheting down dramatically." Id. Consistent with this view, Ms. Herrmann has stated that "[i]f the assessed valuation increases substantially, the mill levy must drop to only provide the allowable increase in property taxes . . . ." (Exh. 47). Ms. Herrmann directly responded to an inquiry from the Creede School District as to whether the property tax revenue limit remained in effect despite a successful de-Brucing election in that district by stating that subsection 2(a)(iii) of the School Finance Act remained as a TABOR limit. (Exh. 48). Finally, Ms. Herrmann noted that the de-Brucing ballot measures "were not asked in a way to allow a change in tax policy." (Exh. 49, pp. 1-2).

In the Court's view, Ms. Herrmann's analysis of the impact of the de-Brucing measures is extremely important to a determination of whether there was substantial compliance with TABOR. The exhibits referred to in the immediately preceding paragraph were prepared by Ms. Herrmann while she held the title of Director of the School Finance Unit, and were sent in 2004 and 2005. While Ms. Herrmann was not the Director of the Unit until 2000, well after the great majority of de-Brucing elections were held, her analysis is important to the context of this case.

Ms. Herrmann's predecessor, Byron Pendley, provided the following information to the fiscal officer of the Steamboat Springs School District about the de-Brucing measures:

> As you know, currently over 100 districts have passed such measures. While each of these questions is unique to its individual district, they generally follow a broad pattern. That is, the question posed seeks voter authorization for a district to accept and spend revenues from any and all sources and specifically prohibits property tax mill levies from being affected. * * *
>
> Though your school board annually sets the district's mill levy, it does so within the confines of existing state statute. In reality it is state law which determines your district's annual school finance (Total Program) general fund mill levy. Pursuant to state law, this levy may remain constant or may decrease, depending upon property value in the district, the rate of inflation, and pupil enrollment. In recent years, this mill levy has decreased, primarily as a result of increasing assessed valuations; future assessed valuation increases likely would continue to decrease this mill levy, regardless of any de-Bruce election.
>
> Since your voters are NOT voting to change state law, the de-Bruce election outcome regardless of whether it remains as written or is changed to look more like the county version will have NO effect on your district's school finance mill levy. (Emphasis included in original). (Exh. 23).

Ironically, the Steamboat Springs School District RE-2 utilized de-Brucing ballot language that uniquely referred to "non-property tax revenues". (Exh. 38, p. 32). While this language was unique among all de-Brucing elections, and it is only indicative of the information given to one local school district, this information is nonetheless important to an understanding of how the School Finance Unit itself viewed the de-Brucing measures, and the Unit's view that those measures did not have any effect on the limits set forth in TABOR § 7(c).

This view was also held by the General Assembly's Legislative Council. Josh Harwood, whose deposition was accepted by the Court *in lieu* of his live testimony at trial (Court Order dated 5/30/08) was an economist with the Colorado Legislative Council Staff (hereinafter "Legislative Council") from 2000 to 2007. As late as 2005, Mr. Harwood authored a Memorandum to Members of the Interim Committee on School Finance of the General Assembly, entitled, "School District Mill Levies". (Exh. 13). In that Memorandum, Mr. Harwood stated:

> The local property tax revenue limit in TABOR states that property tax revenue for an individual school district cannot exceed the previous year's collections plus enrollment growth and inflation. The manner in which this limitation is enacted is through a decrease in the mill levy applied to the property in the district. TABOR also restricts increases in mill levies without voter approval, thus the effect of lowering the mill levy is permanent, even if property values decrease. Furthermore, state statutes covering school finance do not allow a mill levy to be larger than it was the previous year. (Exh. 13, at 3-4).

The undisputed evidence at trial was that until SB-199 amended the School Finance Mill Levy Provision in 2007, all of Colorado's local school districts followed the provisions of the School Finance Act requiring the mill levy to be adjusted downward in the event property values rose, in order to make the local property tax portion of "Total Program Funding" TABOR compliant.

Treasurer Kennedy testified that SB-199 was created in order to enact a stabilization of mill levies by allowing the recapture of increases in property taxes due to increased property values, without a corresponding offset by reduction in the mill levy. As a result of SB-199, the mill levy was reduced to 27 mills in 30 school districts (Transcript, Herrmann, pp. 132, 456; Exh. 3); 33 school districts' mill levies were unaffected (Transcript, Herrmann, pp. 132, 456; Exh. 3); and in 115 school districts, the mill levies stayed the same as the previous year (Transcript, Herrmann, pp. 133, 456; Exh. 3). Further, no school district's mill levy increased. (Transcript, Herrmann, pp. 133-134).

It was further undisputed, through Treasurer Kennedy's testimony, that the direct fiscal impact of SB-199 was the collection of $117,838,000.00 for Fiscal Year 2007-2008. (Transcript, Kennedy, pp. 320-23; Exh. 37). A breakout of these additional

amounts among the various school districts were provided to the Court (Exh. 37). For example, Denver collected an additional $28,982,350.00; Boulder an additional $6,627,459.00; Mesa Valley collected an additional $8,017,030.00. Treasurer Kennedy, in what the Court considers to be extremely candid testimony, also testified that SB-199 altered the policy of how mill levies had been calculated, and how a property taxpayer's liability would be determined. (Transcript, 5/6/08 at 274-82). While SB-199 had no direct impact on state revenues (Exh. 29, p. 3), it resulted in allowing a greater portion of the School Finance Act funding to be paid from the local share, where the school district de-Bruced. (Exh. 29, p. 3; Transcript, Herrmann, p. 510).

Thus, the practical impact of SB-199 was to free up funds that were previously paid to local districts as part of the state share, allowing the State to allocate them to other uses. The evidence at trial established that SB-199 allowed the State to "shore up" the State Education Fund, protecting it from bankruptcy by reducing the state share of Total Program funding. (Transcript, Herrmann, pp. 148-49). As one example of the use of this revenue, the State added 5,500 new slots for preschool children in Colorado. (Exh. 19, pp. 1, 3, fiscal note).

The impact on individual taxpayers is, of course, dependent upon the county of residence, and the assessed property values of each county. At trial, the Court was given the range of property tax impact of SB-199 from $0.00 to $70.00/each $100,000.00 assessed value of property. (Transcript, Murphy). By way of example, one of the named Plaintiffs in the case, Evan Gluckman (owner of Plaintiff Main Street Café) who lives in Mesa County testified that he will pay approximately $500.00 more this year for the assessed value of his business than he did previously. (Transcript, Murphy, pp. 379-80).

The Court specifically notes that Plaintiff characterizes Treasurer Kennedy's view relating to SB-199 as a "revisionist view". (Plaintiffs' Proposed Findings, p. 18). The Court disagrees with this characterization insofar as it infers a nefarious or dishonest motive. To the contrary, the Court concludes that there is no element of bad faith or intent to mislead in the positions taken by the State and CDE. Instead, the disagreements in this case reflect instead differing views of a very difficult and complicated analysis that continues in many areas of government post-TABOR.

3. Compliance with the voter approval provisions of TABOR

TABOR § 4 requires that "districts . . . have voter approval in advance for . . . a tax policy change directly causing a net tax revenue gain to *any* district." (Emphasis supplied). The Court concludes that the increase of revenue through the mechanism of SB-199 resulted in a "tax policy change". This is because previous to its passage, the individual districts offset the increase in property tax collected by a reduction in the mill levy.

There is no authority as to the meaning to be afforded these TABOR provisions. However, given the guidance from Bickel, *supra.*, City of Aurora v. Acosta, 892 P.2d 264 (Colo. 264 (Colo. 1995), and Bolt v. Arapahoe County School Dist. No. Six, 898

P.2d 525 (Colo. 1995), these phrases are to be given their plain and ordinary meaning, giving effect to every word, and applying the constitutional provision according to its terms. Further, TABOR itself includes the provision requiring that "[i]ts preferred interpretation shall reasonably restrain most the growth of government." TABOR § 1.

Inclusion of this interpretation expressly in TABOR removes this case, in the Court's view, from the generally accepted standard of review requiring that those advancing the unconstitutionality of a given statute must prove its unconstitutionality "beyond a reasonable doubt." People v. Hickman, 988 P.2d 628, 634 (Colo. 1999); Board of Educ. v. Booth, 984 P.2d 639, 650 (Colo. 1995). However, as the Colorado Supreme Court has noted that while "ordinarily" a party challenging a statute as unconstitutional bears the burden of establishing the unconstitutionality beyond a reasonable doubt, the "type of constitutional challenge, the nature of the challenged statute, and the standing of the parties determine how we approach judicial review in a particular case, such as the one before us." City of Greenwood Village v. Petitioners for the Proposed City of Centennial, 3 P.3d 427, 440 (Colo. 2000). Accordingly, this Court concludes that the relevant standard of review requires the Court to give preference to interpretations of TABOR that "restrain most the growth of government."

The Court concludes that the plain and ordinary meaning of these phrases supports its conclusion that the direct impact of SB-199 was to change "tax policy". The question remains whether this change in tax policy "directly caus[ed] a net tax revenue gain to any district." The State argues that there was no "net tax revenue gain to any district" as a result of SB-199, as the impact of SB-199 was only to reduce the State's liabilities as part of Total Program funding. (State Proposed Findings, p. 24). The State also argues that SB-199 merely resulted in a "redistribution" of state funds from one program to another. The State argues that "budgetary flexibility" is not a change in revenue. At trial, Plaintiffs submitted the testimony of Dick Murphy who explained that because SB-199 transferred a portion of the Total Program funding to local school districts, this resulted in a tax increase to the State.

The Court concludes that the collection of an additional $117,838,000.00 in property taxes as compared to the previous year constitutes a net tax revenue gain to the State of Colorado. TABOR defines "district" as the "state" as well as individual, local entities. In short, this additional collection of property taxes reflected a growth in state tax revenue. Even though the individual school districts did not themselves enjoy the increase in this revenue, the State of Colorado was able to do so by freeing up that same amount of state funds for other uses. This conclusion is further supported by the view taken by all Defendants that the local school district de-Brucing elections were required in order to allow a change in the way mill levies were calculated, and correspondingly how a property taxpayer's liability was determined. (Transcript, Kennedy, pp. 274-82). Accordingly, the Court concludes that the fiscal impact of SB-199 was to cause a net tax revenue gain as defined by TABOR. This is consistent with the preferred interpretation of TABOR to "reasonably restrain most the growth of government." TABOR § 1.

Both the State and CDE argue that the de-Brucing measures were sufficient in themselves to justify passage of SB-199. They argue that the individual de-Brucing measures all, in some manner, referenced the words "collect, retain and expend" and "all revenue", and that this was sufficient to comply with the voter approval requirements of TABOR. Specifically, they argue that SB-199 is a "revenue retention" issue under TABOR § 7(d), and the de-Brucing measures successfully approved retention of "all revenue", thus complying with the "voter approval" requirements of TABOR.

Toward this end, the State argues that setting aside SB-199 as unconstitutional would result in also setting aside the individual school district's de-Brucing measures, and in order to do so, this Court must find that the ballot measures were "clearly misleading". *See* State's Proposed Findings, p. 6; *also see* Havens v. Board of County Comm'rs of County of Archuleta, 924 P.2d 517, 524 (Colo. 1996) and Bolt v. Arapahoe County School Dist. No. Six, 898 P.2d 525, 536 (Colo. 1995) cited therein. This argument is inapposite, in the Court's view. Bolt expressly did not involve a claim of unconstitutionality under TABOR § 7(c) because that particular claim was dismissed by the district court. *See* Bolt, at 530, n. 12. Havens related to an analysis of TABOR § 7(d) as "revenue" measures, as opposed to the more specific and particular analysis under TABOR § 7(c) involved here.

Plaintiffs argue that TABOR §§ 7(c) and (d) treat changes in "revenue" differently than changes in "property tax revenue". TABOR § 7(c) addresses changes in property tax revenue limits, while TABOR § 7(d) addresses changes in revenue other than property taxes. If, as Plaintiffs suggest, SB-199 results in a growth in property tax revenue for each district beyond the "inflation plus annual growth" limits found at TABOR § 7(c), then such a measure must be "approved by voters". As such, any voter approval of that growth must comply with the language provisions of TABOR § 3(c).

The Attorney General takes the position first that SB-199 itself required not only voter approval, but that such approval must have been state-wide. (AG Brief, pp. 12-13). Specifically, the Attorney General argues that TABOR § 4 requires that "districts . . . have voter approval in advance for . . . a tax policy change directly causing a net tax revenue gain to *any* district." (Emphasis supplied). Because the State is included in the definition of "district" under TABOR, and because SB-199 resulted in more than $117,838,000.00 growth in revenue to the State, the Attorney General suggests that this forms a change in *state* tax policy requiring approval of voters of the *state*. (AG Brief, p. 12). Thus, the Attorney General suggests that it is unnecessary for this Court to review the individual de-Brucing measures to determine if they comply with TABOR, because the only way to give effect to the clear language of TABOR is to require a state-wide vote when there is a change in state-wide tax policy, and it is undisputed that no state-wide vote occurred to approve SB-199.

While the Attorney General's position is entitled to some consideration by this Court, and while this suggested analysis is tempting in its simplicity, the Court believes that this analysis is not correct. Because by its terms SB-199 does not apply to all school districts within Colorado, but only those districts conducting successful de-Brucing

elections, the Court cannot conclude, as a matter of law, that SB-199 reflects a change to *state* tax policy, thus requiring a state-wide vote.

The Attorney General's brief recognizes that, "as a matter of policy, one might prefer to require the approval only of those who would be subject to increased tax burdens". (AG Brief, p. 12). Because the language of SB-199 is limited to only certain school districts throughout the State, this Court concludes that the proper analysis is to review each de-Brucing measure to determine whether it complies with TABOR. This is not nearly as onerous a task as suggested by the Attorney General.

A summary of all 175 de-Brucing measures was presented in Exh. 38. Nearly all of those measures included language addressing authority to "collect", "retain" and/or "expend . . . *all revenues*. . . ." (Emphasis supplied). None of these ballot measures included any language in either the title of the measure, or within the body of the measure, indicating that a "yes" vote would result in an increase of collected property *taxes*.

The CDE argues that "all revenue" is a clear and unambiguous phrase that includes revenue from any source whatsoever. (CDE Proposed Findings, p. 31). CDE argues that because "all" means that there are no exceptions, a reading of "all revenue" reflects a clear voter approval to retain revenue from any source whatsoever. However, in the Court's view, this ignores the distinction included in TABOR itself between "revenue" in general (§ 7(d)) and "property tax revenue" (§ 7(c)).

The "first step" in reviewing any violation of the state constitution is to look at the terms of the constitutional provision "according to its clear terms". City of Aurora v. Acosta, 892 P.2d 264, 267 (Colo. 1995). In giving effect to a statute or constitutional provision, a Court must give effect to "every word", if possible. Ibid. Further, where there are multiple interpretations of a TABOR provision, "a court should choose that interpretation which it concludes would create the greatest restraint on the growth of government." Bickel, *supra.* at 229. Because the undisputed fiscal impact of SB-199 was to increase the size of state government, in this Court's view this requires compliance with the "voter approval" requirements of TABOR § 7(c).

In an action to enforce TABOR's election provisions, the Court must use a "substantial compliance" standard. Id. at 226. Factors to be reviewed include: (1) the extent of the noncompliance (distinguishing between an isolated oversight or a systematic disregard of requirements); (2) the purpose of the provision violated and whether the purpose is substantially achieved despite the noncompliance; and (3) whether it can reasonably be inferred that the district made a good faith effort to comply, or whether it reflected an intent to mislead the electorate. Ibid.

There is absolutely no argument advanced by Plaintiffs, nor any evidence submitted to the Court, that supports a conclusion that the individual de-Brucing ballot measures were worded in such a way as to mislead the electorate. Further, because the de-Brucing measures upon which the State and CDE rely occurred many years before

SB-199, it is difficult for this Court to conclude that there was either an "oversight" or a "systematic disregard" for the TABOR voting requirements. Instead, this Court's analysis of compliance with TABOR rests on the particular use of those ballot measures that both the State and CDE advance. The central issue here is whether, in light of the fiscal impact of SB-199 (namely an increase in property tax revenue collected), the purpose of the TABOR voter approval requirements were met.

While the individual de-Brucing measures certainly met the purpose as originally stated (to retain "revenue" in general), this Court concludes that the purpose of the TABOR voter approval requirements advising voters of potential changes in property tax revenue amounts were not met by those de-Brucing measures. Specifically, this Court concludes that the specific voter approval language requirements of TABOR § 7(c) applies if the State and CDE wish to utilize those measures as advance voter approval of the fiscal impact of SB-199.

Significant time was spent at trial providing a factual backdrop of election notice information submitted to voters during the de-Brucing elections. Defendants maintained a continuing objection as to the relevance of that evidence, because they argued that there is no ambiguity in the word "all" as used in those measures. However, because this Court concludes that the specific requirements of TABOR § 7(c) govern this analysis, and because the Colorado Supreme Court has included such information in the "substantial compliance" analysis (*see* City of Aurora v. Acosta, 892 P.2d 264, 270 (Colo. 1995) concluding that inclusion of the dollar amount of a given tax increase in the "election notice that accompanied the ballot" vitiated against a finding of an attempt to mislead the electorate), the Court finds that this evidence is relevant. However, because this Court concludes that the de-Brucing measures were insufficient on their face to comply with the voter approval requirements of TABOR, this Court need not rely exclusively on the language of the election notice accompanying these ballot measures introduced at trial. Coincidentally, however, the election notice language further supports the conclusion that TABOR voter approval requirements were not met sufficiently to justify an increase in property taxes. Those materials, as well as the undisputed testimony at trial, strongly support the conclusion that these de-Brucing measures were not intended to support a change in the amount of property taxes collected within each individual district.

CONCLUSION AND ORDER

For the reasons set forth above, the Court concludes that SB-199 is unconstitutional, as measured by the standards of TABOR. Accordingly, the Court GRANTS Plaintiffs' request for Declaratory Judgment on this issue, and enters this Order finding that SB-199 is unconstitutional.

Plaintiffs suggest that the remedy in this case includes an Order for an appropriate refund of property tax through either a tax credit and/or temporary mill levy rate reduction in the next fiscal year pursuant to C.R.S. sec. 39-1-111.5 (Plaintiff's Proposed Findings, p. 29) or to use the contingency reserve set forth at C.R.S. sec. 22-54-117 (Ibid.) This Court expressed serious concerns at argument about whether this Court has

the jurisdiction under the Separation of Powers article to the Colorado Constitution (Art. III) to make such an Order of the Executive or Legislative branches of government.

Because this Court continues to entertain serious concerns about whether it has the authority to impose the remedy sought by Plaintiffs, and because the Court does not believe that all parties have had sufficient opportunity to address the issue of remedy, the Court declines at this time to enter an Order beyond the finding of unconstitutionality today. The Court considers the Order entered today as a Declaratory Judgment pursuant to C.R.C.P. 57, and hereby enters JUDGMENT pursuant to C.R.C.P. 54(a) as to the Claims for Relief seeking Declaratory Judgment.

Further, due in large part to the express statement contained in TABOR § (1), which mandates that these enforcement actions "shall have the highest civil priority of resolution", this Court hereby determines that there is no just reason for delay of entry of Judgment and directs entry of JUDGMENT as to the Declaratory Judgment claims pursuant to C.R.C.P. 54(b). In the event no appeal is taken from this Judgment, the parties may request that this Court conduct further proceedings to consider the determination of potential remedies available, or the Court may Order same upon notice to the parties. Further, the Court may conduct further proceedings on those issues in the event of any remand from an appellate court for that purpose.

Given the historical impact of TABOR on certain governmental programs, the additional property tax revenue collected as a result of SB-199 undoubtedly provides valuable assistance throughout the State of Colorado for important programs, especially in education. Specifically, SB-199 allowed the State to provide an additional 5,500 new slots for pre-school children in the State of Colorado. The benefits of that investment are impossible to quantify. On the other side of this argument, in the event refunds result from this Court's finding that SB-199 is unconstitutional would, at best, provide a potential refund amount from none to $70.00/each $100,000.00 of assessed property value. At argument, this Court expressly questioned Plaintiffs about whether the amount at issue for any individual taxpayer justified the potentially destructive impact on providing education services to the children of the State of Colorado. Despite the assurances presented by Plaintiffs' counsel, this Court is not convinced that its conclusion today will have no significant and negative impact on those citizens who benefit from educational programs in this State. However well-intentioned and commendable the purpose and consequences of SB-199, this Court must be concerned only with enforcement of the Colorado Constitution. While this Court candidly expresses its concern as to the resulting consequences of this decision, it must nonetheless perform its duties in a manner consistent with its oath to uphold the Constitution.

DATED: Friday, May 30, 2008.

BY THE COURT:

Christina M. Habas
District Court Judge