

THE AMAZING COLORADO BID
(BUSINESS IMPROVEMENT DISTRICT)
BOARD MEMBER MANUAL

PREAMBLE

Welcome to the First Edition of the Amazing Colorado BID Board Member Manual!

This manual is intended to be a general survey of statutory responsibilities and recommendations for members of the Board of Directors of a Business Improvement District in Colorado. This manual is neither designed nor intended to be a thorough legal analysis. The passage of time, new court decisions, and future legislation will cause portions of this manual to become outdated. Further, the answer to any particular legal question turns heavily on all of the facts specific to the issue. The reader is strongly encouraged to seek the advice and assistance of the BID's legal counsel as legal issues arise.

The basic framework for this document was the Special District Association Board Member Manual prepared as a public service by Collins Cockrel & Cole, a professional corporation. It was modified for BIDs by Rick Kron of Spencer Fane Britt and Browne, LLP in early 2015. Jim Collins graciously consented to allowing the use of the SDA Manual as a basis for this BID manual. Thanks, Jim.

The general intent of the Manual is to give quick answers to some of the questions that face BID Board Members, Staff, Consultants, and friends in the management and operation of the most dynamic form of local government in Colorado. If you're reading this Manual, you've either volunteered, been hired, or have a fascination with a downtown or other commercial area – and more importantly, hopefully you have a desire to make the area work as a clean, safe and vibrant force in the community.

BIDs are different than any other form of business organization in Colorado. They are like a local chamber of commerce “with wings.” They can do what a local chamber can do – such as festivals, marketing and advocacy – plus things or chamber ordinarily can't or traditionally does not do – such as capital improvements, security services, and maintenance of public improvements. If approved by the BID's voters, its operating plan and budget, and its Board of Directors, the BID can exercise a wide range of financial powers to further its mission.

What is that mission? The jobs undertaken by a BID can be as varied as the commercial area that it serves. The Colorado BID Act allows a BID to provide “any public improvement” and provide a very broad range of business related services. BIDs can, and have. . . .

- Replaced all the utilities and paved Main Street
- Provided lights for safety on a state highway
- Planted flowers and maintained them
- Planted and trimmed trees
- Done market research
- Installed signs
- Built and operated a parking garage
- Provided public art
- Run area-wide business promotions
- Supported programs for the homeless
- Provided motorcycles for police
- Provided off-duty officers for security
- Sponsored festivals
- Facilitated permitting
- Provided ambassadors
- Cleaned sidewalks
- Removed snow
- Installed street furniture
- And a lot more.

This Manual can help provide answers to some of the more common questions, but (here’s the disclaimer), for any particular situation, the BID should consult knowledgeable legal counsel.

I expect that these will be future additions of the Manual to keep up with new law, add or expand some topics, and remove others. Have fun.

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PREFACE

INTRODUCTION

This general manual applies to *Business Improvement Districts* in Colorado and emphasizes state law and general practices. For a particular BID, at a minimum, every Board member should be familiar with the ordinance that created the BID and the BID's annual operating plan and budget. These documents explain the particular BID's powers and limitations.

As a Board Member, you have become part of the governing body of the BID. The BID is a unit of local government. That local government has the powers and limitations that are set out in state statutes, the ordinance that your municipality passed to create the BID, the annual operating plan and budget of the BID, and the state and federal constitutions. The annual operating plan and budget is written by the BID Board (usually through staff and consultants). It is filed with the City by September 30 of each year, and then approved by the City Council, either "as submitted" or with changes that are requested or required by the City. One of the BID Board member's major tasks is the approval and implementation of that annual operating plan and budget. The operating plan and budget explain what the BID would like to do in the coming year and how it will pay for it.

For simplicity, the words "city" and "city council" are used throughout the manual and refer to the city, town, or city and county in which the BID is located.

In addition to the general procedures in this Manual, a Board member or the BID staff and consultants should also be aware of any local ordinances or rules relating to BIDs. A particular city may have additional rules, not discussed in this manual, such as for the BID to file reports, to provide the city's staff with notice of BID Board meetings, or to pay city fees. Maintaining good relations between the BID and the City is extremely important to the success of both.

CHAPTER I - BOARD MEMBERSHIP

A. Qualifications:

Except in the rare situation where the City Council or an urban renewal authority (URA) or general improvement district (GID) acts as the BID Board, to qualify as a director of a BID, a person must be qualified as an "elector" of the BID. An "elector" is a person who is registered to vote in Colorado, and as stated in Section 31-25-1203(4), Colorado Revised Statutes (C.R.S.):

(a) "Elector" means a *natural person* who is a citizen of the United States and a resident of the State of Colorado, who is eighteen years of age or older, and who:

- (I) Makes his primary dwelling place in the district; or
- (II) Owns taxable real or personal property within the boundaries of the district; or
- (III) Is the holder of a leasehold interest in taxable real or personal property within the boundaries of the district; or
- (IV) Is the natural person *designated* by an owner or lessee of taxable real or personal property in the district which is not a natural person to vote for such owner or lessee. Such designation must be in writing and filed with the secretary of the district. Only one such person may be designated by an owner or lessee.

(b) Nothing in this subsection (4) shall permit an elector to cast more than one vote.

(The italics were added above to emphasize important words). It is important to recognize that **ONLY** natural persons can be electors, which includes natural persons designated by corporate entities under section IV above.

In addition, except in the rare instance where the City Council or a URA or GID Board acts as the BID Board, a BID Board Member must be elected by the BID voters or be appointed by the City as required by the statutes and specified in the BID's governing documents.

B. Mandatory Acts of Office:

1. Oath:

Each Director shall take an oath of faithful performance. Colo. Const. Art. XII, Sec. 8 and C.R.S. 31-25-1209(1)(b).

The Oath must be administered by a qualified official (notary public or judge, usually a notary).

2. Bond:

No bond is legally required, but some BIDs routinely obtain a public officials' bond, at the BID's cost, for their directors.

3. Personal Attention Required:

Each Director is required to devote his or her personal attention to the duties of the office. Colo. Const. Art. XII, Sec. 2. This is usually

interpreted to prevent a director from sending a person to a meeting to act on his or her behalf or to vote by proxy.

C. Vacancies:

A Director's office shall be deemed vacant upon the occurrence of any one of the following:

1. Failure to satisfy the oath requirement;
2. Written resignation;
3. Removal by the municipal governing body (i.e., city council or town board);
4. Removal from office by recall (if the BID Board is elected rather than appointed);
5. Death;
6. Expiration of term and following the qualification of a successor; or
7. Loss of status as an "elector". In other words, loss of the qualification to hold office. (For example, if a property owner who is a natural person sells his or her property in the BID then the person will no longer be qualified. As another example, if the entity that designates an elector who is a Board member replaces its designated elector, the Board member will no longer be qualified to be on the Board.

D. Term:

The regular length of the term of office for an elected BID Board member is four years. Term limits apply to *elected* BID Board members unless the voters in the BID modify or eliminate term limits in an election.

BID Board members who are appointed by the municipality serve a term as set in the organizing ordinance or as determined by the City Council. The Council can choose not to require term limits.

BID Board members serve at the pleasure of the City Council.

E. Statutory responsibilities:

State statutes require the completion of the following actions.

ACTION	FILE IN OFFICE	DEADLINE
Adopt a Resolution designating where the District's posting place shall be for Board meeting notices and agendas. §24-6-402(2)(c), C.R.S.	None	First meeting of the Board of Directors of each year
Post Notices of meetings of a quorum or at least three members of the Board (Includes agenda items when possible) §24-6-402(2)(c), C.R.S.	None	24 hours prior to all Board meetings at the designated location, pursuant to above resolution.
Submit Annual Operating Plan and Budget to City	City Clerk, recommend sending copy to City Attorney	September 30. Local rules may apply that change the date.
City approval of Operating Plan and Budget.	None	Within 30 days of City's receipt of all required information from the BID but no later than December 5.
Adopt the budget. §29-1-108, C.R.S.	See below.	By December 31 of each year, but if the BID does have a mill levy, then the date is December 15.
Adopt certification of mill levy (if applicable)	Board of County Commissioners	December 15
Resolution Appropriating Sums of Money §29-1-108(2), C.R.S.	Recommended filing with Division of Local Government	Adopt prior to December 31 or for a BID using a mill levy, December 15. Often combined with the budget resolution.
File certified copy of adopted budget §29-1-113(1), C.R.S.	Division of Local Government	No later than January 30.
File list of all contracts in effect with other political subdivisions §29-1-205, C.R.S.	Division of Local Government	February 1
File report of outstanding <u>non-rated</u> public securities as of the end of the fiscal year §11-58-105, C.R.S., if applicable.	Division of Local Government	March 1
File audit exemption application, if applicable	State Auditor	March 31
File audit report. §29-1-606, C.R.S.	State Auditor	30 days after report is received, but not later than July 30. Time extensions are routinely available upon request. Local rules may apply to require an earlier filing.

E. Fiduciary Obligations:

A Director has a general, common-law fiduciary obligation to the BID, §24-18-109, C.R.S. This obligation does not extend to each individual resident, tenant, or property owner of the BID, but rather to the BID itself. As a fiduciary, the Director has the duty to exercise the utmost good faith, business sense and astuteness on behalf of the BID. A Director is prohibited from taking personal

advantage of a situation to benefit himself or to prejudice the BID.

The fiduciary duty to the BID may include the following tasks:

1. To act as a director on behalf of the BID without personal gain or self-dealing.
2. To exercise the standard of care that a reasonable person would exercise in the conduct of his or her own business.
3. To be reasonably informed in all BID decisions upon which the Director is expected to vote, and to participate and vote on all matters unless a conflict of interest exists or could exist.
4. To attend Board meetings unless excused.

F. Compensation:

1. General Practice:

Almost no BID directors receive any compensation for their service beyond the good feelings that come from a job well done in helping their community.

2. Limitations:

In the extremely rare case where the BID Board is compensated, (if approved by City Council), for those BID directors that follow special district guidelines, the Directors may receive compensation for service not in excess of \$1,600 per annum, payable not to exceed \$100 per meeting attended. Any “perks” received by a Director may be considered compensation and subject to the limitations.

The similarity to the compensation of special district directors suggests that this limit also applies: No director shall receive any compensation as an employee of the BID, §32-1-902(3)(b), C.R.S. Having a BID employee serve on the BID Board creates an obvious conflict of interest that is best avoided.

3. Reimbursement:

Reimbursements of actual expenses for Directors during BID service are not considered compensation. Actual expenses may include mileage and approved out-of-pocket expenses incurred in service as a Director.

4. Gifts:

The BID is not permitted by the Colorado Constitution to make any donation or grant to or in aid of a private individual or entity *Art. XI, Sec. 2, Colo. Const.* If a gift is contemplated, the Board should consult with the BID attorney before making the donation.

G. Bylaws, Rules and Regulations, and Policies:

The Board of Directors may adopt Rules and Regulations and “Bylaws” from time to time, but it is not required to do so.

CHAPTER II – BOARD RESPONSIBILITIES

This section deals more with “policy” matters than legal requirements. Many Boards consider that their most important functions fall into the following categories:

B. Legislative or Policymaking:

The Board is responsible for the development of policy. The Board may acquire and supervise an employed, consulting or volunteer Manager who will carry out its policy through the development and implementation of programs.

C. Planning and Evaluation:

The Board is responsible for acquiring reliable information from responsible sources which will enable it to make the best possible decisions about the scope and nature of the BID’s functions. The Board is responsible for requiring evaluation of the results.

D. Staffing and Appraisal:

The Board, possibly through the Manager, is responsible for acquiring the staff, consultants, or volunteers necessary for carrying out the BID’s functions and for establishing salaries and salary schedules and other terms and conditions of employment, consulting contracts, or volunteer work, as well as for general personnel policies, as applicable. The Board is responsible for appraising the effectiveness of its staff by providing for regular evaluation.

E. Financial Resources:

The Board is responsible for presenting an annual operating plan and budget to the City and for adopting a budget that will provide the financial basis that will enable the BID to carry out its functions. The Board may propose and adopt amendments to the operating plan and budget, with City approval, as needed. The Board is responsible for exercising control over the finances of the BID to insure

proper use of, and accounting for, all BID funds.

F. Facilities:

The Board is responsible for determining office and functional facilities needs and communicating these needs to the community, for purchasing or otherwise acquiring property, if needed, and for approving capital and other plans that will support and enhance the implementation of the operating plan.

G. Communication with the Public:

The Board is responsible for providing adequate and direct means for keeping the local citizenry informed about the BID and for keeping itself informed about the wishes of the BID constituency.

H. Meetings:

The Board may exercise the above powers and duties *only when convened in a legally constituted meeting*. Because all powers of the Board lie in its action as a group, individual Board members exercise authority over BID affairs only as votes are taken at a legal meeting of the Board. In other instances, *an individual Board member has power only when the Board has lawfully delegated authority to him or her*.

I. Management and Staff:

1. The BID statutes do not provide for powers or authority of management or staff, the scope of staff's powers or authority are decisions for the Board.
2. The Board is authorized to "hire employees or retain agents, engineers, consultants, attorneys and accountants." §31-25-1212(l)(n) C.R.S. This is the only statutory reference to management or staff. The Board is, however, authorized to delegate powers, but not its final authority.
3. The Board, in hiring or retaining management, must set the parameters of power and authority granted to that management.

J. Policy versus Implementation:

Most Boards take the position that the Board Develops Policy, Staff Implements the Policy. But what constitutes "Policy," and what constitutes "Implementation?" In general:

1. Policy:
 - a. If the matter has to do with the mission, goals, objectives,

direction, or long range planning of the organization, it probably falls into the “policy” category.

- b. Policy can be described or stated in a mission statement, strategic plan, long term plan, annual or short term goals and objectives, and the operating plan and budget.

2. Implementation:

- a. If the matter has to do with day to day operation, specific tasks, or how to get it done, it is probably implementation.
- b. Administration of programs, accounting, and the like would be implementation.

K. Delegation to Manager:

Since the authority of the Manager is only that which the Board gives, it is important that the Board give clearly defined direction. This may include:

- 1. When hiring or retaining a manager, the Board should truly delegate, not hold back needed authority and discretion with which to accomplish the job.
- 2. Defining the acceptable and unacceptable means of accomplishing the objectives. For instance, the Manager should clearly understand the legal, moral, and ethical framework within which he or she operates.
- 3. The Board must give the tools to do the job.
- 4. Delegation must include accountability.

CHAPTER III – BOARD MEETINGS

A. Calling the Meeting:

- 1. Designation of Time and Place:

The Board must designate and post the time and place for all Board meetings. The Board must pass a resolution at the first regular meeting of each year to identify the posting place for public notice of meetings §24-6-402(2)(c), C.R.S.

- 2. Notice to Directors:

All Directors must be notified of any regular or special meeting of the

Board.

3. Notice to the Public:

a. 24-Hour Notice:

Notice of all meetings of a quorum or of three or more members of the Board (whichever is fewer) at which any public business is discussed must be posted in a designated public place within the BID no less than 24 hours prior to said meeting. The 24-hour posted notice must include specific agenda information when possible §24-6-402(2)(c), C.R.S.

b. Requested Notice:

The BID must keep a list of all persons requesting notice of meetings, and provide reasonable advance notice to such persons. Once a person has requested individualized notice, they are to be included on the list for two years. What constitutes “reasonable” notice is left to the discretion of the BID. Inadvertent failure to provide notice to a listed person will not invalidate the meeting or actions taken at such meeting.

c. Special Notice:

Some activities require special notice, such as a requirement for additional postings or publication of a notice of the public hearing on the budget.

B. Meetings are to be Open to the Public:

All meetings of a quorum, or three or more members (whichever is fewer), of the Board of Directors for the purpose of discussing public business or taking a formal Board action must be open to the public §24-6-402(2)(b), C.R.S. Open meeting requirements do not apply to chance meetings or social gatherings at which discussion of public business is not the central purpose.

Open meetings requirements apply to formal meetings of the Board and study or work sessions. Such requirements do not apply to staff or consultant meetings where a quorum of the Board is not present.

Once the meeting must be open to the public, it must be open to all members of the public. This includes reporters, attorneys, and any other representatives.

The ability to hold an “executive session” and exclude the public is limited – see subsection G below.

C. Rules of Procedure:

The Board may adopt rules of procedure to govern how Board meetings are conducted. Such rules provide desirable order and efficiency, and may be included within the BID bylaws. We do not recommend adoption of “Roberts Rules of Order” because they are complex, not well suited to a smaller governing body, and often misrepresented.

D. Voting:

1. A quorum (simple majority) of the Board members in office at a lawfully called open meeting is necessary before the BID may take any official action or vote.
2. A Director is required to devote his/her personal attention to matters of the BID. Such attention requires a Director’s own, individual vote; proxy voting is not permissible. Colo. Const. Art. XII, Sec. 2.

E. Attendance:

A Director is required to attend Board meetings. Any absences should be noted and excused (where appropriate) in the minutes of the meeting. Attendance may be made via physical presence or telephone conference. So long as the Director is able to hear and be heard by the persons who are physically present at the meeting location, telephonic attendance satisfies the attendance requirement. (Not all attorneys agree with this position, so it is important to discuss telephone attendance with the BID’s attorney before the situation arises).

F. Minutes:

Minutes are required of all Board meetings. Copies of such minutes shall be open to public inspection upon request §24-6-402(1)(d)(II), C.R.S.

There are few statutory requirements for the contents of minutes, but because all Board actions can only be taken by resolution or motion, the minutes would have to show at least:

- a. The date, time, and place of the meeting;
- b. The names of the Board members who were present. If a Board member is absent, the absence is shown, and if the absence was excused, that fact must be in the minutes.
- c. Any motions or resolutions approved by the Board.
- d. If an executive session was held, the information listed in section “G” below concerning the executive session.

- e. If a public hearing was held (for approval of the budget), the opening and closing of the public hearing should be noted.

Some attorneys may recommend including additional detail in the minutes. Board members or the public may want more detail. There are infinite possibilities, with the amount of detail that may be in the minutes being up to the Board.

G. Executive Sessions:

1. An executive or “closed” session may only be called at a regular or special meeting of the Board by an affirmative vote of two-thirds of the quorum present §24-6-402(4), C.R.S.
2. The possibility that an executive session may be held should be noted on the agenda for all meetings whenever possible.
3. The Board (or the attorney or manager) must announce, and the minutes must reflect the statutory cite to § 24-6-402(4), C.R.S. and the cite to one of the following topics of discussion for a valid executive session.
 - a. Purchase, acquire, lease, transfer or sale of real, personal or other property interest, but not to conceal a conflict of interest;
 - b. Consult or receipt of advice from the attorney on specific legal questions (the attorney must be present, and mere ‘presence’ without actual consultation is insufficient);
 - c. Confidential items per federal or state law, rules or regs but the Board must cite the statute or rule before the session begins;
 - d. Security details - investigations - defenses against terrorism;
 - e. Develop negotiating positions, strategy, or instruct negotiators;
 - f. Personnel matters, except about directors, an elected official, prospective board appointees, general personnel policies, an individual employee if the employee requests an open meeting or if more than one employee is involved, then all of them request an open meeting, or a hearing covered by the Teacher Empl. Comp. and Dismissal Act of 1990;
 - g. Documents to be kept secret by the Open Records Act (medical data, confidential commercial data, etc.); or
 - h. Discussion of individual students.
4. If the topic of the executive session is confidential due to State or Federal

law, a specific citation to the applicable law must be announced. §24-6-402(4)(c), C.R.S.

5. Except for consultations with the attorney on attorney-client privileged matters, executive sessions are to be electronically recorded. The recording may be destroyed after at least 90 days unless it is required for court.
6. No formal action (vote) may be taken while in executive session. §24-6-402(4), C.R.S.

H. Resolutions and Motions:

The Board may act by resolution or motion. Either form of action has the same effectiveness.

CHAPTER IV – CONFLICT OF INTEREST

A. Disclosure Required:

1. Any Director shall disqualify himself or herself from voting on any issue in which he/she has a conflict of interest, unless such Director has disclosed the conflict of interest, §24-18-101, et. seq., C.R.S., and then only may vote if it is necessary to act. The person's presence may be considered in order to establish the quorum.
2. A Director is guilty of the crime of failing to disclose a conflict of interest if he or she exercises any substantial discretionary function in connection with a government contract with the Director, without having given 72 hours actual advance written notice to the Secretary of State and to the BID Board §18-8-308(1), C.R.S. Failure to disclose is a class 2 misdemeanor §18-8-308(3), C.R.S.

B. Proscribed Acts Constituting a Conflict of Interest:

1. A potential conflict of interest exists when the Director is an executive officer, or owns or controls directly or indirectly a substantial interest in any nongovernmental entity participating in the transaction.
2. District Board members, as local government officials (elected or appointed), or BID employees, shall not:
 - a. Disclose or use confidential information acquired in the course of their official duties in order to further their personal financial interests.

- b. Accept gifts of substantial value or of substantial economic benefit tantamount to a gift of substantial value, which would tend to improperly influence a “reasonable person” in their public position to depart from the faithful and impartial discharge of their public duties.
- c. Engage in a substantial financial transaction for his or her private business purposes with a person whom they inspect or supervise in the course of their official duties.
- d. Perform an official act directly and substantially affecting, to its economic benefit, a business or other undertaking in which they either have a substantial financial interest or are engaged as counsel, consultant, representative or agent.

§§24-18-104, 24-18-109, 24-18-201 and 24-18-202, C.R.S.

- 3. The following exceptions exist which are not considered to be conflicts of interest.
 - a. A Director holding a minority interest in a corporation contracting with the BID is not considered “interested” in such contract;
 - b. Contracts in which the Director has disclosed a personal interest and has not voted thereon; and
 - c. A Director may vote, notwithstanding any other prohibition, if participation is necessary to obtain a quorum or otherwise enable the Board to act, and if the Director complies with voluntary disclosure procedures.
- 4. Note: All of these exceptions must be very carefully scrutinized for legal compliance purposes. Perhaps no area offers greater potential exposure to liability than the area of conflicts of interest.
- 5. Before a Director takes any action which may involve a potential conflict of interest, all legal implications as well as the policy implications and appearance of impropriety should be considered.
- 6. If questions arise, the Director should call the BID’s attorney for advice.

C. Guides to Conduct Regarding Ethical Principles:

- 1. The following principles are intended as guides to conduct, they do not constitute violations of the public trust or employment in local government unless circumstances would otherwise so indicated. These are listed in

§24-18-105, C.R.S.

- a. A local government official or employee should not acquire or hold an interest in any business or undertaking which he has reason to believe may be directly and substantially affected to its economic benefit by official action to be taken by the local government agency over which he has substantial authority.
- b. A local government official or employee should not, within six (6) months following the termination of his office or employment, obtain employment in which he will take direct advantage, unavailable to others, of matters with which he was directly involved during his term of employment.
- c. A local government official or employee should not perform an official act directly and substantially affecting a business or other undertaking to its economic detriment when he has a substantial financial interest in a competing firm or undertaking.
- d. A local government official or employee discouraged from assisting as enabling members of their immediate family in obtaining employment, a gift of substantial value; as an economic benefit tantamount to a gift of substantial value from a person the local government official as employee is in a position to reward with and official action as has rewarded with official action in past.

D. Effect of Existence of Potential Conflict of Interest:

1. Failing to disclose a potential conflict of interest is criminal misdemeanor and could result in prosecution.
2. Any contract, vote or other official act in which a Director had a potential conflict, not cured by disclosure, may result in the BID's avoidance of the act or the contract being void.

CHAPTER V – PUBLIC RECORDS

A. Public Right of Access:

Colorado statutes have established as public policy that all public records should be open for inspection by any person at reasonable times §24-72-201, C.R.S.

“Public records” is broadly defined to include most documentation maintained by the BID §24-72-202(6), C.R.S.

The “official custodian” (the BID officer, employee or consultant responsible for

the maintenance, care and keeping of public records) may establish rules and regulations regarding the inspection procedures for public records. Having rules and regulations is a good idea to protect the records and allow orderly inspection.

The person requesting inspection is entitled to copies or printouts of the public records. If approved by resolution of the BID Board, a fee not to exceed \$.25 per page, unless actual costs exceed that amount, may be assessed §24-72-205, C.R.S. and the BID may charge for “research and retrieval” time of up to \$30/hour with the first hour free, provided the BID has approved making the charge by a resolution before the request for records is made.

B. Denial of Access:

The state statutes permit the custodian of records to deny public access and disallow inspection of the following documents or under the following limited circumstances §24-72-204(2)(a), C.R.S.

1. If inspection would be contrary to any State statute;
2. If inspection would be contrary to Federal statute or regulation;
3. If inspection is prohibited by rules promulgated by the Supreme Court or by the order of any court;
4. Examinations for employment (except as made available for inspection by the party in interest);
5. Real estate appraisals, until the subject property has been transferred;
6. Medical, psychological, sociological, and scholastic achievement data (except as made available for inspection by the party in interest);
7. Personnel files (except as made available for inspection by the party in interest and the BID official or employee who has direct supervisory capacity);
8. Trade secrets, privileged information, and confidential information or data; or
9. Where disclosure or public access would do substantial injury to public interest.

The determination of whether a document falls within an enumerated exception can be a difficult task. If denial of access is based upon injury to the public interest, the BID must apply to the court for an order permitting the BID to restrict disclosure §24-72-204(6), C.R.S.

Any person denied access may request a written statement of the grounds for denial §24-72-204(4), C.R.S. Such person may also apply to the court for an order compelling inspection §24-72-204(5), C.R.S.

C. Violations:

Willful or knowing violation of the public right of access is possible criminal misdemeanor, carrying a possible \$100 fine or 90 days' imprisonment, or both §24-72-206, C.R.S.

If a person denied access successfully obtains a court order compelling inspection, the BID may be subject to pay court costs and attorney fees if the denial was found to be arbitrary and capricious §24-72-204(5), C.R.S.

D. Executive Session Recordings:

Electronic recordings are to be made of all executive sessions (except if attorney-client privileged) and kept confidential unless suit is filed, a court reviews the recordings, and the court concludes (1) that the executive session was called for an improper purpose; (2) that the executive session strayed off of the declared topic (and then only the off-topic discussion would become public); or (3) a final action was taken during the executive session.

CHAPTER VI – BID ELECTIONS

A. Is an election really necessary?

1. **Introductory Comment** An election in a BID is complicated and surprisingly expensive. An election can be successful or politically decisive and unsuccessful. Therefore, well before embarking on an election journey, the Board must examine whether the election is really necessary and whether the BID has the support it needs for the election to be successful.

2. **Types of BID Elections**

- a. **Board Elections.** A BID that has an elected Board is required to call an election to elect members of the Board whose terms are expiring. These elections are held in May of even numbered years. Except for the qualifications of the electors who can vote in the election, BID Board elections are conducted in substantially the same manner as special district board elections. The election can be cancelled if there are not more candidates running than the number of positions to be filled. Since so few BID Boards are elected in Colorado (the vast majority are appointed), rather than lengthening this manual, our recommendation is to consult with a

knowledgeable attorney or district management firm, either of which can help with administration of the election. The best time for the consultation is in January of the year in which the election is to be held.

If the BID has an elected Board, the voters can also approve the elimination or modification of term limits. Without a modification, elected BID Board members cannot serve more than two consecutive terms.

b. Financial Elections. The TABOR Amendment, Colorado Constitution Article X, Section 20, mandates that local governments – which include BIDs – hold elections to approve most major financial decisions. The most important of these decisions are:

- whether to allow taxes to be collected, and how much,
- whether to allow debt to be incurred, how much, and what revenue source to use for repayment
- whether to allow the collection and spending of other revenues over the limits that would apply without approval in an election.¹

These are commonly called “TABOR elections”. A TABOR election may be held in November of any year (and if the BID Board is elected, also in May of an even-numbered year).

For a BID, TABOR elections are administered using procedures that are in the TABOR Amendment and in the “Local Government Election Code” found at Part 13.5 of Title 1, C.R.S.²

3. Persons who are Eligible to Vote in a BID election.

By far, the biggest challenge in administering a BID election is identifying the electors with the right to vote. The statute that defines the BID’s electors is deceptively simple to read but very difficult to grasp in practice. The people who can vote in a BID are “electors” of the BID, and here is the definition:

C.R.S. 31-25-1203(4)

(a) “Elector” means a *natural person* who is a citizen of the United States and a resident of the State of Colorado, who is eighteen years of age or older, and who:

(V) Makes his primary dwelling place in the district; or

(VI) Owns taxable real or personal property within the boundaries of the

¹ There are other types of TABOR elections, but these three categories cover nearly all of them.

² Although it is possible to hold a BID election as a “coordinated election” using the Uniform Election Code, we don’t know of anyone who has done it due to the small size and logistical difficulties involved in BID elections.

- district; or
- (VII) Is the holder of a leasehold interest in taxable real or personal property within the boundaries of the district; or
- (VIII) Is the natural person *designated* by an owner or lessee of taxable real or personal property in the district which is not a natural person to vote for such owner or lessee. Such designation must be in writing and filed with the secretary of the district. Only one such person may be designated by an owner or lessee.

(b) Nothing in this subsection (4) shall permit an elector to cast more than one vote.

(The italics were added above to emphasize important words). It is important to recognize that ONLY natural persons can be electors, which includes natural persons designated by corporate entities under section IV above.

The Election Code also requires voters to be registered to vote in Colorado.

4. Campaigning in BID elections.

In Colorado, spending on political campaigns is regulated by the Fair Campaign Practices Act, provisions of the State Constitution, and Rules of the Secretary of State. These laws and regulations are beyond the scope of this manual. You are encouraged to consult with a knowledgeable attorney and the Secretary of State's website on campaign spending questions.

A BID's activities to campaign on an election issue are very limited. Along with consulting a knowledgeable attorney, before undertaking any campaign or information program, the BID should consult C.R.S. Section 1-45-117, which sets out the limited activities that the District can do.

5. Election Administration

There are an astonishing number of logistical steps that must be completed to hold a BID election. The BID should obtain professional assistance to handle the election administration, with the most likely sources of help being a knowledgeable law firm or district management firm with experience in local government elections, particularly in BID or special district elections with voters who include property owners.

6. After the election.

If the TABOR election passes, and the proposed financial activities are within the scope of the BID's operational plan and budget, the BID Board is authorized to use the authority granted by the voters, but is not required to exercise that authority.

CHAPTER VII – FINANCIAL MATTERS

A. Rates, Tolls and Charges:

1. The Board has the power to fix, and from time to time, increase or decrease rates, tolls, or charges for services or improvements furnished by the BID. C.R.S. § 31-25-1212(1)(k).
2. A limited charge may be assessed against all delinquencies in payment, together with the assessment of interest not to exceed one percent per month. Services may be discontinued against any property whose owner is delinquent in the payment of charges.
3. Although not required by state statute, some Boards set, provide public notice, and hold a public hearing on, proposed increases on rates and charges in a manner similar to the procedure for holding a public hearing and adopting the annual budget.

B. Special Assessments:

1. Some BIDs have the power (in their organizing ordinance, operating plan, and vote of their electors) to impose “special assessments” to pay for improvements and/or services. Special assessments are charges imposed against property in the BID that are based on the value of the benefit that the property receives from the improvement or service.
2. The procedures to implement a special assessment are found in § 31-25-1219, C.R.S. The Board should have the assistance of legal counsel and possibly other consultants when working to put a special assessment in place. Implementing a special assessment requires specific public notice and public hearing procedures.

C. Mill Levy:

1. Some BIDs have the power (in the organizing ordinance, operating plan, and vote of their electors) to impose an “ad valorem mill levy” against taxable property in the BID. This a property tax. The rate of the tax, that is, the number of mills, must be uniform throughout the BID. Unlike a special assessment, there is no requirement that the use of the tax revenue correspond with benefits conferred on a particular property.
2. An election is required before a mill levy may be imposed. The procedures for approval for mill levy for the first time are fairly complex, and the BID should consult a knowledgeable attorney to help with the process. After the first levy, the procedure rarely requires much, if any, attorney assistance.

D. Combinations of Revenue Sources:

A BID can use any combination of the above revenue sources that are approved in the organizing ordinance, operating plan, voted authority, and annual budget.

The BID may accept gifts. The BID may accept grants from other governments if the BID has the authority under TABOR to do so.

E. Budget:

1. The BID must adopt an annual budget §29-1-103, C.R.S. The BID's fiscal year is the calendar year.
2. The Board must designate a qualified person to prepare the budget. The designated person shall prepare and submit the budget to the Board on or before October 15 of each year §29-1-108, C.R.S.

Unfortunately, the statutory deadline for the BID to file its annual operating plan and budget with the City is September 30 (and may be earlier in some cities), while the deadline for budget preparation is October 15. The BID will want to consult its attorney; however, the statutes appear to be written for the BID to file a planned budget by September 30, have a more complete budget furnished to the BID Board by October 15, have the City complete the approval process for the operating plan and budget, and have the BID Board hold the required public hearing on the budget (see 3 and 4 below), and thereafter the BID Board formally adopts the budget following the hearing. Because a public hearing implies public listening and possible changes to the budget, there may be some variation between the budget submitted to the City by September 30 and the final budget approved by the BID Board in November or December. Whether any changes are material, or worth of review by the City, is a matter for the City and the BID to decide.

3. Upon receipt of the proposed budget, the BID shall publish notice one time, of the following: (1) the date, time, and place of a budget hearing; (2) that the budget is open for public inspection and location where the budget can be reviewed; and (3) that interested parties may file objections any time prior to adoption §29-1-106(3), C.R.S. or, for a budget of less than \$50,000, the notice may be posted in three public places in the BID in lieu of publication.
4. Adoption of the budget must be considered at a public hearing §29-1-108(1), C.R.S. If the budget includes a mill levy, it must be approved by December 15 and the mill levy must also be certified to the County Commissioners by December 15. If no mill levy is involved, the budget can be approved by December 31.

F. Appropriation:

1. Expenditures of the BID must be made in accordance with an annual appropriation of BID funds §29-1-108(2), C.R.S. Any action or expenditure made beyond the appropriated sum is considered invalid and void §29-1-110, C.R.S.
2. The amount of appropriated funds may be supplemented or adjusted during the year (or after the close of the year), through a budget amendment. A budget amendment requires the adoption of a Resolution amending the budget at a public hearing, after publication one-time of a notice of such public hearing. The Resolution must then be filed with the Division of Local Government §29-1-109, C.R.S.

G. Public Funds and Investments:

1. Funds of the BID are ‘public funds’ and are to be used for public purposes within the scope of the BID’s powers.
2. Investments:

The BID may invest public funds in investment vehicles allowed by the State §24-75-601, C.R.S. The state encourages safety over yield. Types of available investments include:

- a. United States Treasury obligations;
- b. Certain United States Agency obligations;
- c. Certificates of deposit in Colorado banks or savings and loans;
- d. Repurchase agreements collateralized by appropriate United States Treasury or Agency obligations; and
- e. Colorado investment pools.

Refer to C.R.S. §24-75-601, et seq. for other available legal investments. The investments that are allowed are VERY conservative, as the fiduciary duty to protect the principal is considered primary over return on investment.

3. Public Deposit Protection Act (“PDPA”):

The PDPA, §11-10.5-101, et seq., C.R.S. requires that the BID’s deposits of public funds in banks or savings and loan associations may only be

made in “eligible public depositories” that have been designated by the State.

The “official custodian” (whoever has authority or control of public funds) must do the following:

- a. Inform the depository that BID funds are subject to the PDPA and deposit funds in a PDPA-qualified depository if the amount deposited is above the FDIC insurance limit;
- b. Maintain documents or other verification necessary to identify public funds which are subject to the PDPA; and
- c. Apply to the State for assignment of an account number for all accounts established with an eligible public depository. It is a misdemeanor for an official custodian or bank official to violate the provisions of the PDPA, with a mandatory fine of not less than \$200 nor more than \$500. Upon conviction, the court may cause the official custodian to be removed from public office.

H. TABOR:

1. Article X, Section 20 of the Colorado Constitution, the “Taxpayer’s Bill of Rights” (“TABOR”), is an initiated constitutional amendment that was approved in November, 1992. It limits the revenue, spending, taxes, and debt of the state and all local governments, except “enterprises.” The BID is a local government §31-25-1207(5).
2. TABOR defines an "enterprise" as a government owned business that can issue its own revenue bonds and that receives less than 10% of its revenues from grants from all state and local governments combined. Some BID operations are run as enterprises (but not many). Examples include parking garages and other revenue producing facilities. For those enterprises, maintaining enterprise status is important because the enterprise revenue can vary from year to year in an amount that would cause financial disruptions for the BID if the enterprise revenues were subject to TABOR’s rigid revenue limits.
4. TABOR is annoyingly complex. Please consult the BID’s attorney as questions arise.

CHAPTER VIII - DEBT

A. Authorization:

In its organizing ordinance, operating plan, and voted authority, the BID may be

authorized to borrow money and incur indebtedness in the form of bonds, notes, and contracts. To simplify the discussion in the Manual, all forms of borrowing are often referred to as “bonds,” even when the debt is in another form, such as a note, bank loan, or multiple-year contract.

B. Types of Obligations:

1. Revenue Obligations:

Specifically identified non-tax revenues of the BID are pledged (or promised) as the source of repayment of revenue bonds. If the revenues do not materialize, then the bonds may not be paid. Because of the higher risk of non-payment, revenue bonds typically have a higher interest rate than general obligation bonds.

2. General Obligations:

General obligation bonds are repaid, at least in part, with pledged property tax revenues. Details are beyond the scope of this manual. Legal counsel and a financial advisor or underwriter should be consulted early, and even before holding the TABOR election that will be required to authorize the bonds.

3. Special Assessment Bonds:

If approved, a BID may have the power to impose and collect special assessments against property in the BID and bonds can be issued that are repaid from the revenue from the assessments.

4. Refunding Obligations:

Refunding bonds are used to restructure the payment of an existing obligation, usually to decrease the annual payments. Refunding obligations may sometimes be combined with new obligations.

5. Lease/Purchase:

A lease/purchase agreement provides that portions of lease payments are applied to the ultimate purchase of the property. These obligations are dependent upon the BID appropriating money each year, and are often secured by a lien (or mortgage) on the item being purchased. At times when the BID has lease/purchase obligations, it must comply with audit law reporting requirements.

Properly structured lease/purchase agreements have been held by the Courts to be valid under TABOR without an election being needed to

approve them, Board of County Commissioners of Boulder County v. Dougherty.

6. Bond Anticipation Note:

A bond anticipation note is a short-term obligation issued with the expectation that it will be quickly repaid through the issuance of long-term bonds.

7. Other:

There are other financing options occasionally used, but they generally fit into some variation or combination of the above categories.

C. Bankruptcy Protection:

If the BID experiences severe financial distress, bankruptcy protection may be available under Chapter 9 of the United States Bankruptcy Code.

D. Voter Approval Required:

With few exceptions, bonds and debt require voter approval in an election.

E. Annual Appropriation Notes:

Occasionally, a BID will have a short term cash flow problem and a “friend” who is willing to help the BID get through the immediate problem. The friend may have an expectation of being repaid at some point in the future “if and when” the BID has the money to pay. Repayment, if any, is contingent on the BID having the money to repay, which could be never. The contract that is used for these advances and potential repayments are sometimes called “annual appropriation” notes or obligations, and like a lease/purchase, if properly written, they are not ‘debt’ that requires approval in an election. A knowledgeable attorney must be consulted prior to the BID entering into an annual appropriation obligation.

CHAPTER IX – AUDITS

A. Exemption from Audit:

1. A BID with less than \$500,000 in revenue or spending may be eligible to obtain an exemption from the State’s mandate to prepare an audit. An application for an exemption must be filed with the state. The Board should consult a knowledgeable accountant or attorney concerning the preparation and filing for an

exemption. The application for an exemption must be filed by March 31.

B. Mandatory Financial Audit:

1. The Board shall cause to be made an annual audit of the financial statements of the BID if the revenue or spending exceeds \$500,000 or if no exemption is obtained. Such audit shall be made as of the end of each fiscal calendar year, or more frequently if some special reason exists §§29-1-603 and 605, C.R.S.
2. The audit report must be completed by June 30, and filed with the State Auditor not later than 30 days after the report is received by the BID §29-1-606, C.R.S. An extension of time to complete the audit may be available if requested from the State Auditor.

C. Coordination with City Audit:

Under governmental accounting standards, the City's appointment of the BID Board or approval of the annual operating plan and budget are generally considered to make the BID a "component unit" of the City. As a result, the BID's audit is usually (but not always) incorporated into the City's audit. Thus, the City may request that the BID complete its audit earlier than would otherwise be required by state law or may want the City's auditor to also be the auditor for the BID. The BID should contact the City finance director to check on the City's expectations.

CHAPTER X- CONTRACTING

A. Construction Contracts:

1. Bidding:

There is no legal requirement prior to entering into a contract in either State or Federal law that a BID receive bids. The BID may, however, adopt its own bidding rules that must be followed. Nothing prohibits putting a contract out for bids, but bidding is often not considered to be practical for smaller projects.

2. Bonds and Retainage:

If the BID decides to request bids for a project, a requirement for bid bonds, usually in the amount of five percent of the amount of the bid, is sometimes recommended to avoid withdrawal of low bids. Bid bonds are not, however, required by law.

The law does require every contractor awarded a construction contract for more than \$50,000 to execute an adequate Labor and Materials Payment Bond, as well as a Performance Bond, usually in the amount of 100% of the contract amount §§38-26-105 and 106, C.R.S.

Although not required by any statutory provision, a Maintenance Bond guaranteeing the warranty provision of the contract, (usually one year) is also sometimes recommended and can be folded into the one performance, payment, and warranty bond.

The law also requires that construction contracts over \$150,000 contain certain statutory retainage provisions – essentially requiring a five percent retainage until the contract is complete. The retainage must be held until final payment procedures are followed §24-91-103, C.R.S.

3. Appropriation Clause:

The BID may not contract for a public works project in an amount in excess of the amount appropriated by the BID for the project. All construction contracts must contain clauses which state that money has been appropriated and that any change order increase will be accompanied by further written assurance that appropriations are sufficient §24-91-103.6, C.R.S.

4. Final Payment and Claims:

Upon completion of a project over \$150,000 – usually identified by receipt of a Certificate of Completion from the BID's engineer or architect – a notice of final payment must be published twice. This notice announces that final payment will be made to the contractor on a designated settlement date, which is more than ten days after the second publication, provided no claims are made (by a subcontractor or material supplier) on or before the settlement date §38-26-107(1), C.R.S.

If a claim is properly made by a subcontractor or supplier, then the BID must withhold sufficient funds to ensure satisfaction of that claim or until the claim is withdrawn, paid, or 90 days have passed. If within 90 days, the claimant has not brought a lawsuit, then the retainage must be remitted to the contractor. If a lawsuit is commenced, the BID may be able to interplead the claims (deposit the money with the court), to avoid becoming embroiled in the litigation §38-26-107(2), C.R.S.

B. Other Contracts:

1. Bidding:

No publication or bid process is required for BID contracts. Contracts for the purchase of vehicles, equipment, materials, real and other personal property, leases, advisory and professional services are not subject to legal bidding requirements, although some comparative review is advisable.

2. Contract Drafting or Review:

Someone in the BID (not necessarily always the attorney) should review each contract and should usually recommend changes, because contracts are normally tendered by the vendors and therefore slanted to their favor until requested to make changes. Assigning an experienced, capable person to review each contract will pay off over time.

C. Intergovernmental Agreements:

1. General Intergovernmental Cooperation:

Colorado local governments may cooperate or contract with one another to provide any function, service, or facility lawfully authorized to each of the parties §29-1-203, C.R.S. Such contracts must set forth the purposes, powers, rights, obligations, and responsibilities of the contracting parties. Examples are: the joint purchase of equipment; construction of jointly owned buildings; jointly owned water and sewage treatment facilities; the provision of management, bookkeeping, billing, and maintenance services; joint training facilities and programs; joint ownership of hazardous materials handling equipment; joint funding of bus service; and joint funding and operation of a visitors and convention bureau.

2. Creating a Separate Legal Entity:

A BID may contract with another local government, such as the City, to create a "separate legal entity" to perform services or provide facilities.

CHAPTER XI – PROPERTY ISSUES

The following is an outline of potential property issues which a BID may confront:

A. Acquisition Issues:

The BID may acquire and hold property relating to its public purposes. C.R.S. 31-25-1212(1)(g).

1. Title Insurance and Title Documents:

While not required, the purchase of adequate title insurance is usually recommended for the BID's protection in its acquisitions of real property.

Further, a complete legal review of the effect of Title Documents (easements, leases, covenants, restrictions, etc.) should be made.

2. Payoff of Taxes:

As a governmental entity, the BID is exempt from property taxes. There are a variety of means to effectuate this exemption, including an initial payoff of all outstanding taxes upon acquiring the real property, based on the previous year's rate of levy.

3. Financing:

The BID may have has various means of financing an acquisition of real property. The lease/purchase agreement and revenue bonds are commonly used means of financing.

4. Environmental Audits:

While not required, an environmental audit is strongly recommended before the purchase or sale of any real property. Potential environmental liability can be quite expansive and potentially burdensome. A regulatory compliance oriented review of historical operations on the property is a valuable tool in limiting present and future environmental liability.

B. Condemnation:

A BID has no power of condemnation (A.K.A. eminent domain) whatsoever.

C. Easements, Leases, and Other Property Interests:

Easements may be acquired by gift, purchase, adverse possession, or agreement.

The BID may enter into leases, but multiple-year leases may be limited by TABOR.

Licenses are sometimes used to give a temporary, revocable right to use property.

D. Encroachment onto Public Property:

A private entity cannot obtain an interest in government property (including BID property) by adverse possession.

E. Relationship to Municipal Powers:

The BID is subject to the regulatory controls of the municipality within which the BID lies. The following are the primary areas of municipal control:

1. Zoning:

The BID is subject to the applicable zoning plan. However, if a proposed project is denied by the municipality, the BID may be able to overrule the decision of the municipality after first submitting to the location and extent review (sometimes referred to as “site review”) process §§30-28-110(1) and 31-23-209, C.R.S. As a practical matter, this ability to overrule a municipal decision is unlikely to be available to a BID due to its close relationship with the municipality.

2. Subdivisions:

The BID is subject to the applicable subdivision regulations. The BID’s power to overrule municipal zoning regulations may be extended into the area of subdivision control (again, as noted above, unlikely).

3. Building Codes and Permits:

The BID is subject to the requirements imposed by the municipality relating to building codes and permits.

CHAPTER XII – LIABILITY ISSUES

A. Potential Sources of Liability:

1. State Tort Actions:

“Torts” are actions (other than in contract) such as negligence, trespass, and conversion, involving damage to person or property. These actions are covered by the Colorado Governmental Immunity Act (see below).

2. Federal Actions:

a. Federal lawsuits are beyond the scope of the Colorado Governmental Immunity Act, although an argument does exist that the Act could offer protection from Federal claims brought in the State courts.

b. The most common Federal actions are in the areas of deprivation of constitutional or statutory rights (Section 1983 cases), antitrust, securities violations, labor and wage actions, and environmental cases.

3. Contract:

- a. Claims for a breach of contract are not protected by the Governmental Immunity Act §§24-10-105 and 106, C.R.S.
- b. Public officials, however, are generally not personally liable for the contracts of the governmental entity.

4. Criminal:

- a. The Governmental Immunity Act offers no protection from criminal actions.
- b. Common potential areas of criminal exposure include the following:
 - i. Entering into a prohibited transaction (involving a conflict of interest);
 - ii. Failing to disclose conflicts of interest;
 - iii. Misuse of official information;
 - iv. Malfeasance; or
 - v. Issuing a false certificate or document.

B. Colorado Governmental Immunity Act:

- 1. The Colorado Governmental Immunity Act limits the circumstances under which a public entity or public employee may be liable in state tort actions.
- 2. The Act creates immunity for all tortious actions committed by a governmental entity or its employees, except for the following (§24-10-106(3), C.R.S.):
 - a. The operation of a public hospital, correctional facility, or jail;
 - b. The operation of a publicly owned motor vehicle, except emergency vehicles;
 - c. A dangerous condition of a public building;
 - d. A dangerous condition of a public highway, road, street, or sidewalk;
 - e. A dangerous condition of any public water, gas, sanitation,

electrical, power or swimming facility; and

- f. The operation and maintenance by a public entity of any public water, gas, sanitation, electrical, power or swimming facility.
 - g. A dangerous condition caused by failure to realign a stop or yield sign or failure to repair a traffic control signal.
 - h. A dangerous condition caused by accumulation of snow and ice when failed to remove it or had notice or reasonable time to act.
- 3. Even for those actions where liability may attach, liability is limited by the Act to \$350,000 per person, and \$990,000 per occurrence §24-10-114, C.R.S.
 - 4. The Act also imposes procedural requirements on any claimant against the BID, its Directors or employees. If those procedures are not followed, a claim may be dismissed §24-10-109, C.R.S.

C. Indemnification Resolution:

- 1. The BID has certain duties to indemnify its directors and employees. That indemnification is codified in the Governmental Immunity Act §24-10-101, et seq. , C.R.S.
- 2. An Indemnification Resolution can provide for indemnification of BID Directors and employees beyond the protections of the Act. Federal, contract, and punitive damages may all be indemnified.
- 3. A well-drafted Indemnification Resolution should be upheld by the courts for civil claims that are covered by the Resolution.
- 4. Many BID Boards adopt an Indemnification Resolution at an early meeting of the Board. Some attorneys recommend adopting such a resolution as soon as possible, and before a problem arises.

D. Releases and Waivers:

- 1. Releases and waivers may be used to limit potential liability against the BID, its Directors, employees and also third parties in applicable situations.
- 2. For a release or waiver to be valid, there must be an express, knowledgeable assent to such release or waiver. The BID must exercise great caution regarding the validity or adequacy of the release or waiver.

E. Insurance:

1. Insurance is a primary and essential means of protecting the BID, its directors and employees. The primary types of insurance are: liability, property, and errors and omissions.

2. The following methods of insurance could be considered:

a. Private Insurance Company:

A qualified insurance person who understands governmental liability should be contacted.

b. Self-Insurance (not recommended):

The Governmental Immunity Act permits the BID to adopt a policy of self-insurance §24-10-115(2)(a), C.R.S. The Act imposes procedural requirements and compliance is mandatory. The fund established for the purposes of self-insurance shall be kept separate from all other BID funds, and may only be used to pay operating expenses of the fund and claims made against the BID §24-10-115, C.R.S.

c. Insurance Pool:

An insurance pool can be a cost efficient means by which to obtain insurance coverage. The Special District Association of Colorado offers such an insurance pool.

F. Constitutional Liability Issues:

Whenever dealing in the public realm, a sensitivity to Constitutional issues must be maintained. All Constitutional issues should be discussed with a qualified attorney. Potential areas of Constitutional issues most commonly encountered include the First Amendment rights of free speech and assembly, Fourteenth Amendment rights of Equal Protection, and Fifth and Fourteenth Amendment rights of Due Process, and issues involving the “taking” of private property.

CHAPTER XIII – PERSONNEL MATTERS

A. Legislation:

The areas of labor, employment and personnel issues are heavily regulated by the State and Federal governments. The laws include, but are not limited to:

1. The Federal Fair Labor Standards Act (“FLSA”) regulating minimum

wage, overtime pay, equal pay, record keeping, and child labor standards.

2. The Federal Occupational Safety and Health Act (“OSHA”) which regulates dangerous conditions in the work place.
3. The Federal Americans with Disabilities Act (“ADA”) which prohibits discrimination based on a person’s disability in employment and the provision of public services and accommodations.
4. Age Discrimination in Employment Act (“ADEA”) prohibiting discrimination based on age in employment practices against persons over the age of 40 years.
5. Title VII of the Federal Civil Rights Act, which prohibits discrimination in employment, based on race or color, religion, sex, national origin, or opposition to discriminatory practices.
6. Section 1981 of the Federal Civil Rights Act that prohibits discrimination based on race or lineage.
7. Section 1983 of the Federal Civil Rights Act that prohibits any person, under the color of statute, ordinance or regulation from depriving another person of the privileges and immunities of the United States Constitution and laws.
8. The Federal Equal Pay Act that prohibits wage discrimination on the basis of sex for jobs performed under similar working conditions.
9. The Consolidated Omnibus Budget Reconciliation Act (“COBRA”) which generally requires employers to give departing employees the opportunity to continue their health coverage for 18 months at the employee’s cost.
10. The Federal Family and Medical Leave Act of 1993, which imposes certain affirmative acts regarding employee leave on all employers, including public entities 50 or more persons.
11. The Colorado Health Care Coverage Act (*Title 10, Article 16, C.R.S.*), which is the State counterpart to COBRA, giving extended health insurance coverage of 180 days to terminated employees.
12. The Colorado Civil Rights Act (*Title 24, Article 34, Parts 3 through 8, C.R.S.*), prohibiting discrimination based on handicap, race, creed, color, sex, age, marital status, national origin, or ancestry in employment, housing, public accommodations, and advertising.
13. The Colorado Youth Employment Opportunity Act of 1971 (*Title 8,*

Article 12, C.R.S.) providing child labor standards.

14. Colorado laws regarding wages and hours (*Title 8, Articles 4 through 6, and 13, C.R.S.*).
15. The Workers' Compensation Act of Colorado (*Title 8, Articles 40 through 47, C.R.S.*) regulating disability and medical benefits of injured workers.
16. The Colorado Employment Security Act (*Title 8, Articles 70 through 82,, C.R.S.*) providing for unemployment benefits.

B. Personnel Policy Manual:

If the BID has employees, it should consider adoption of a personnel policy manual to inform its employees of benefits, rules, and policies.

C. Drug and Alcohol Testing:

The Federal Highway Administration adopted regulations requiring mandatory drug and alcohol testing for employed drivers with commercial drivers' licenses. Qualified legal counsel or consultants should be contacted in formulating such testing policies, if needed.

D. Federal and State Employment Posting Requirements:

Both Federal and State law require the posting of certain informational posters for employees (if any) at a prominent location in the BID's business office. Failure to make the requisite postings could subject the BID to significant financial penalties. The following postings must be made:

1. Federal Equal Employment Opportunity (EEOC);
2. Federal Minimum Wage (Dept. of Labor);
3. Federal Employee Polygraph Protection (Dept. of Labor);
4. State Fair Employment (Dept. of Labor); and
5. State Minimum Wage (Dept. of Labor).

*The Federal Job Safety and Health Protection (OSHA) does not currently apply to local governments, although Congress is considering this issue. Also, OSHA standards may constitute reasonable guidelines.

E. Independent Contractors.

Many Colorado BIDs (in fact, most of them) do not have enough work to justify a full-time staff. Instead, these smaller BIDs are managed by volunteers (usually Board members) or by “independent contractors.”

There are essentially four types of independent contractors who can provide management services for a BID: (1) district management firms; (2) individuals under contract, (3) another unit of government, or (4) a nonprofit corporation.

1. There are perhaps ten prominent district management firms in Colorado. Many of these firms provide both management and accounting services ranging from assistance with organizing board meetings, budgeting, accounting, and check preparation through and including administration of construction and services contracts, maintaining public records, a permanent office, receptionist duties, and undertaking nearly any other tasks that the Board delegates to them. The management firms typically operate under an annual contract, approved by the Board, with a defined ‘scope of work.’ It is important for the Board to review the ‘scope of work’ to be sure that the management firm will be providing the services the Board needs.
2. Smaller BIDs without employees will sometimes enter into a contract with an experienced individual, who will then manage the BID. The scope of work for the manager is extremely important. The Board should obtain the advice of the attorney before entering into an “independent contractor” agreement with an individual because Colorado law requires specific terms for the contract, see C.R.S. §8-40-202(2), for the contractor to be truly independent, rather than treated as an employee (which would require tax withholding and many other requirements). A knowledgeable attorney can help avoid mistakes in the independent contractor agreement that could come back to haunt the BID in the future.
3. One local government (such as a city) can provide management services for another (such as a BID) by an intergovernmental agreement between the two. The scope of work and payment provisions can be very flexible.
4. A number of larger BIDs (Downtown Denver and Boulder among them) contract with a nonprofit business association operating in Downtown for management. In Downtown Denver, the BID contracts with the Downtown Denver Partnership, a 501(c)(6) nonprofit business association, for DDP to manage the BID. This has the advantage of avoiding duplication, providing economies of scale, and building on the strengths of both.

Important concerns include the scope of work, and payment provisions, and the need for the contractor to maintain records to separate its ‘public work’ for the BID from its ‘private work’ as a business association or

local chamber of commerce.

CHAPTER XIV - CONCLUSION

The care and operation of a BID take hard work and determination. The Board has to be visionary, open to the public, willing to listen, and willing to authorize action. Management has to accept decisions of the Board, and be open to new ideas, sensitive to the public, mindful of being in the public eye, and respectful to the concerns of the municipality. Making a BID work is a challenge, but the reward is a better community: cleaner, safer, prettier, funner, and amazing.