

Citizen Participation

0:11:30

Mayor: All right. Next will be... Ah...Oh... Mr. Feeley.

Mr. Feeley: Good evening, Mr. Mayor, Members of Council, my name is Mike Feeley. I'm an attorney from the Brownstein, Hyatt, Farber, Schreck of Denver. I'm here on behalf of High Country Bank. Uh, we wanted to address some issues I know the council has been dealing with. I have been representing the High Country Bank for a very limited purpose, which was to review .. uh .. a specific question as to **whether there was a necessity for voter approval under TABOR prior to an August 29, 2013 transaction**. My firm has fairly extensive experience in terms of these public financing transactions, and I was asked to take a look and see if there was any unique aspect to this that would have required a prior vote before the transaction took place. Our opinion was .. uh .. that there was no need for a TABOR vote at that time. That the transaction was a typical public financing transaction referred to as a 6320 transaction. Um, that individuals involved in the establishment of the NRCDC at the time, both on behalf of the City, on behalf of counsel who looked at it, did a very good and competent job. Now what's transpired since August 29, 2013, is really no concern of the Bank, other than insuring that you regularly monitor and protect their assets and insure that the security is not impaired. And um I know there's been a difference of opinion among some folks in town here, I just wanted to state here that the Bank's interest is a very narrow interest, and that is to protect its existing assets. And moreover, we know that the council has some decisions to make as to how they want to interface with NRCDC into the future, and High Country Bank stands ready, willing and able to sit down and to discuss whatever the council decides because I'm certain that, in this context, we can reach a mutually acceptable solution. We look forward to any further work with the city as it moves forward as the creditor. Uh. We just want to protect the Bank with their interest and to be sure the objectives of the city are met. And look forward to any further discussions so that we find that mutually acceptable solution. Thank you all very much.

Mayor: Thank you very much.

0:14:01

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1:54:13 to 2:50:30

Mayor: Uh, next on the agenda is the Natural Resource Center presentation. Uh ... you guys ready for a meeting yet? Uh. I want ... All right. All right. So a couple things I want to say. Uh ... just to kinda preface this. Uh .. Uh .. this _____ will be confidential, uh, is confidential , and now this presentation will be public, now that we present it, will be public information, so, uh, well, just so we all understand that. Ah, again, ah, Mr. Kahn has sent us this information prior, that uh .. uh, we will not address compliance options, or, uh, next steps set apart, we will do something at the joint work session. The

joint work session will be tomorrow. And I'll .. I'll talk about this at the executive session so that's the day we schedule it. Uh, we have an issue. I think we all understand that. And we're looking toward a solution. Uh .. [Ms. Rogers drops name plate. Kahn moves to pick it up.]

Ms. Rogers: Thank you.

Mayor: We will, as we always have, during these presentations, allow the council to ask questions. Ah .. we want to make sure the questions are now on task and are concerning the historical and the nature of the legal problem. And so, I want to keep that focus on that. Um gonna rely on Mr. Kahn if he gets a question from one of us to ____ and let us know. I want to be sure our questions, uh, while Mr. Kahn's presentation will be uninterrupted. So he's gonna go through it. We will ask the questions at the end of the presentation. So take notes. Uh .. I don't want .. uh .. I'll make sure that we .. uh .. stay on point .. uh .. I don't want to hear .. uh .. dissertations .. uh .. recited. I wanna make sure we get to the point. And there'll be more discussion coming as we move forward. So we'll uh .. I guess we'll .. I think it's big issue. And I know it's a big issue to the community. But on the same token, it's something that we want ... I want everyone to understand that we will adhere to the law. We will adhere to the law. And um, that's um, we wanna make sure.. ta .. to be focused in that direction. So, Mr. Kahn?

1:56:49

Mr. Kahn: Thank you Mr. Mayor, Council. I'm here to tell you today that the City of Salida has concluded that the traditional lender financing mechanism used by the natural resource center development corporation does not comply with TABOR and the debt limitation provision in the Colorado Constitution. Accordingly, the City and the NRCDC will have to formulate an appropriate compliance plan for submission to the State. Hopefully, that's clear to everyone. That's what we are going to be talking about today. So, we're going to talk about how we got here. We're going to talk about what the issue is. What our problem is. And then we'll talk about next steps and we'll get any questions from the elected officials. Um, we first started looking into this issue in early March of 2016. Um, a local citizen named James Miller gave questions about the legality of the NRCDC and whether it was properly applying its entity organization documents. Um, the mayor, in response to that request, requested that I undertake a top down review of both the entity organization of the NRCDC and the financing mechanism it had utilized. Um, in order to get there we spent a good deal of time, first, consulting with a variety of outside counsel . We made an effort to retain a series of firms on a pro-bono basis to avoid the cost and fees associated with doing a thorough analysis. In that process, we learned a great deal from those who were generous enough with their time to consult with us. And it became clear they would need us to prepare a very comprehensive outline of the relevant facts and law, even if they were to, um, assist us. And the mayor asked me to do that.

The investments that we made in evaluating the facts and the law associated with the financing mechanism that the NRCDC has used, um, was money well spent based on what we learned and the types of costs and problems that we will avoid here.

Alright. How did we get into this. The City purchased the Vandaveer Ranch on July 7th, 2004, twelve years ago, through an owner-carried, secured promissory note mechanism. In particular, the City put

\$450,000 down to purchase approximately 190 acres and 300 acre feet of senior water rights, and also became a borrower on an owner carrying note of 2.75 million dollars to be paid over 20 years. The original plan was to carve off the related water rights, convert those water rights from an agricultural to a municipal use, and sell the land for higher density residential development and as a gateway to the city for additional commercial development. The city, however, needed to sell portions of the property to recoup its down payment and make finance payments on the note.

2:00:12

That brings us to the [first slide](#). [Slides not in packet.] You look at the date here and you can find, um, uh, we'll have this information available for the public if they want it, but you can get this off The Mountain Mail's web site as well. April 15th of 2009. Here's what this article tells us. It's gonna sound like ...

Mayor: Mr. Kahn, can you get a little close? Cause we can't ...

Mr. Kahn: This article is a remarkable dose of déjà vu. If you take a look at, um, this article, it tells us that in 2009, a master developer terminated a purchase agreement with the city for the entire Vandaveer Ranch. The master developer planned on developing hundreds of homes, a commercial center and a golf course. But by April 15th, 2009, the City had determined that the owner carrying note mechanism utilized for the purchase violated TABOR, and the multi-year debt obligation that was not approved by the voters or funded with sufficient set-aside reserves. The city subsequently paid off the owner-carrying note to avoid TABOR's debt limitation compliance problems. In the process, they exhausted significant portions of their reserves. In particular, the city reduced its general fund reserve account to about \$300,000, and it's water fund reserve account to about \$200,000. So, the ranch was purchased in about 2004, and the owner-carrying note, it's a flip transaction. It falls through. We're holding an owner-carrying note. It violates TABOR as a multi-year debt. We pay it off to solve the problem. Okay? That was done years ago. If you look here, um, in detail on here, you'll see they talk about affordable housing and green space, a master development. So we've actually played through this cycle once before.

2:02:22

All right. Let's go to [slide 2](#). Well what's the problem? Colorado Constitution, Article X, Section 20. Now there's a lot of provisions that relate to TABOR. We're only concerned with the debt limitation provisions in TABOR. Most people talk about spending and revenue restrictions. That .. that's not what we're concerned with. We take a look at the Constitution. It's really very straight-forward. "Except for refinancing district bonded debt" ... and a few other exceptions ... "creation of any multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever without adequate present cash reserves pledged irrevocably and held for payments in all future fiscal years." Said "districts must have voter approval in advance..." So, we know that the municipality is a district.

Let's go to [slide number 3](#). Okay. District is a state or local government excluding enterprise, where municipalities certainly fall within the definition of a local government. Okay, what is an excluded

enterprise? It's a government owned business, authorized to issue its own revenue bonds, receiving under 10% annual revenue in grants from all Colorado state and municipal governments combined. That's a typo. All right. Let's to put the enterprise debate to rest right here. Um, the entity, the NRDC is not an excluded enterprise under the TABOR provisions of the Constitution. In order to be an enterprise, you have to be audited and qualified by on an annual basis. Make sure that you're meeting the 10% qualification. There might be some debate over what .. what that word "grants" means. Whether it includes in-kind contributions. But I think you'd find that the NRDC would be hard pressed to be a self-sufficient enterprise that had no more than 10% of its funding from state and local governments. All right. So, we had a TABOR problem. We solved it, the TABOR problem, by paying off the debt. At that moment, our problem was solved. But we had a new problem, which was, we were cash poor. We had no money. Okay. That's where we got creative. Okay, and what I'm here to tell you is, and I'm very biased in this regard, but unless you're in a defensive posture, creativity in the law leads to trouble. Okay. You usually make mistakes. You do something tricky and it comes back to bite you.

Here we're talking about the concept of creating a 6320 seven years ago, and here we are today, we don't have a single housing unit built, and we have another TABOR problem. All right. Well what happens? How do we try to initially deal with the problem? We formed the NRDC. So the city created articles of incorporation for the NRDC on or about October 30, 2009 – almost immediately after paying off the debt. The articles of incorporation provide that the NRDC is organized and shall be operated exclusively, and on behalf of, for the benefit of, and in furtherance of, the purposes of the City of Salida and its inhabitants thereof. Sounds like a lot of overlap. Okay. AOI also provides that all property of the corporation shall be owned for the benefit of the City of Salida, Colorado, and subject to the condition that upon dissolution of the corporation, all of the corporation's remaining after payment of or provision for all of its liabilities, shall be paid over or transferred to the City of Salida, Colorado. The bylaws, uh, similarly show a very close and incestuous relationship between the NRDC and the City. Um, the council can appoint the board members. Any directors can be removed at any time by the city council. In 2013, those bylaws were amended to read even stronger, that any director can be removed at any time with our without cause. The resolution creating the NRDC created the NRDC for the benefit of Salida pursuant to Internal Revenue Service Rule 6320. The AOI provides that, upon dissolution, the assets will be transferred back to the city in accordance with regulations governing 6320 corporations. Now, this overlap between your 6320 and your municipality is perfectly fine when your goal is to utilize that 6320 as effectively an arm of the city for financing purposes. If you want to issue tax-free revenue bonds, for example, you have to somehow be connected to an entity that has the legal right to issue such tax-free bonds. So, the overlap between these entities, and the notion that all the assets will transfer back, is all part and parcel of the requirements that you have a proper 6320 organization.

Let's go to [slide 4](#).

2:08:22

All right. So. Is the NRDC operating pursuant to IRS Revenue Ruling 6320? The answer is no. There have been four amendments to the development agreement. The city and the NRDC entered into a

development agreement initially on July 7, 2010, by a resolution 2010-38. The development agreement is similar to the documents we've looked at consistent with 6320. The corporation covenants and agrees, for example, that all activities of the corporation in owning and operating the projects shall be undertaken for the benefit of the City. Upon termination of the agreement, the City shall be entitled to acquire all the corporation's right, title and interest in and to the projects without cost. Um, there's a variety of other, um, indicators here in the development agreement that, um, at the time, the notion was, 6320 connected to municipality, able to issue tax free bonds, on the right track at that point. Okay?

I had a little problem with this conveyance back - of the title - to the property - to the city prior to a sale. Cause the city acquired a residual interest in all the assets after encumbrances are paid. If you want to sell the land, you're going to have to transfer it back to the mother ship, and the mother ship will go through the process of selling it. That creates complications for developers who want certainty in whether or not they have acquired a parcel and don't like the idea that the parcel, however assured they may be, is going to go back to the city for a waiting period before it's conveyed to them.

All right. So let's pull this up a little bit. There's been some confusion in the community as to whether or not we are .. have a 6320 .. um .. company or not. An opinion letter that the city received from the lender read that the organization and operation of NRCDC is entirely consistent with the common and long standing practice that Colorado cities have used to finance capital projects through the years through the use of a non-profit independent entity organized pursuant to IRS Revenue Ruling 6320. I think we've learned here today from lender's counsel that this was an opinion that was restricted to the origination time frame for the loan, and is not applicable to our current situation. Well what .. what's really going on with 6320? Oh. Here's what a board director named Walt Harder had to say: "6320 is untenable from a development stance. If we're in the business of developing this property, there will be a lot of inconveniences and ultimately a big impediment to doing business." Mr. Harder is the one who really started the debate about dropping the 6320 status, which is what has proven in respects failed to the financing mechanism.

You scroll down, you're gonna be able to read from a memorandum that the attorney for both the city and the NRCDC put out in October 16th of 2014, which was in advance of a vote on the proposed fourth amendment to the development agreement. Let's go up a little bit. The uh so we can see the first paragraph right there. This is where, um, dropping 6320 is presented as an advantage that will allow .. um .. that will allow you to avoid the cumbersome process of transferring title back. And I'm gonna read from that. "6320 regulations are no longer required by the city. Council is aware from the discussion it was originally intended that the use of the 6320 regulations was to allow for the issuance of tax-exempt bonds to finance the project. Unfortunately, due to a variety of factors, when the project came to fruition, this was not the case. Fortunately, we have had success working with local lenders on the project. As a result, the corporation board has recommended setting aside the 6320 reg .. regulations and utilizing the transfer restrictions to insure city goals are met. The transfer restriction was an amendment that was made so that the city would have to approve any sales of land. Again, there's something where there's confusion where the folks are looking at the applicable case law. The

organization of the NRCDC does not have the ability to sell land without involvement of the local government municipality and approval.

02:13:50

Let's scroll down to here. You get to the actual fourth amendment. "The parties acknowledge that, when it was formed, the corporation was anticipated to utilize tax-exempt bond financing for the project to be developed. Due to changes in the economy and the goals of the city and the corporation, it is no longer contemplated that tax-exempt bond financing will be utilized either now or in the future by the corporation, and as such the parties agree that the corporation no longer needs to resort to IRS Revenue Ruling 6320 regulations." This should put to rest any debate over whether this is a 6320 organization. It is not. The NRCDC never issued tax-free bond obligation financing, and it no longer qualifies as a 6320 entity. So instead what happened is they pursued traditional lender financing. They amended the development agreement to transfer title, and then the city wrote off transfer of title to the ranch from the city to the NRCDC as a 1.8 million dollar loss on the disposal of land, and a 2.231 million dollar loss on disposal of capital assets. The city simultaneously retained its reversionary residual interest in the land. So the transfer of title, while withholding the ability to transfer that title, from the NRCDC and maintaining control over it along with the residual interest, so left the city squarely in control of the property notwithstanding the capital write-off. In taking title to the Vandaveer Ranch, the NRCDC also left the city with very significant contingent or actual liabilities associated with the acquisition that were carved off from the assets.

2:15:53

Let's go ahead and turn to [slide 5](#). **If the NRCDC is not a 6320 organization, then what is it?** **So let's take a look at what some folks have told us.** The city attorney, the NRCDC attorney, in 2012, in seeking a property tax exemption, which still applies to the land, described the NRCDC as a financing tool, fully controlled by the City of Salida, required to transfer the property back to the city, once the debt on the property held by it for the city is paid off. So what is the NRCDC? It's a financing tool. Okay? Let's see what the city administrator and the NRCDC secretary had to call it .. to say about what type of, um, entity this is. It's a hybrid creature. It's a stand-alone corporation for purposes of financing and debt obligations, but remains under the control of the city council for the development agreement and appointment of the board. It's a hybrid creature. Okay? It's a stand-alone corporation when we want to borrow money, and it's not a stand-alone corporation when we want to control it and direct what it does. All right. So .. so far we have a financing tool, we have a hybrid creature. The NRCDC's own audited financial statements describe it as an instrumentality of the city, and the NRCDC president, Ray Kitson, described the NRCDC on September 15th, 2015, as a conduit for the city that owns the property. Our own website described it blandly as a public-private partnership. So when you ask folks what's the NRCDC if it's not a 6320, these are the responses you hear. It's a financing tool. It's a hybrid creature. It's an instrumentality of the city. It's a conduit for the city. It's a public-private partnership. Now I'm not sure what all these things are, but I can tell you one thing: They're not an exempt enterprise under TABOR, nor are they an arguably exempt 6320 organization. That's why you have this big question mark. These are the kinds of red flags a lawyer sees when you're describing about ... describing an entity that

should be described with precision. When the city attorney sought confirmation of a property tax exemption, he told the Chaffee County Assessor, quote, "I recognize this is an unusual entity form and financing tool used by the City of Salida." So we have one more to add to the list, which is an unusual entity form.

Go ahead and turn to [slide 6](#). This is a Latin phrase that no one but the lawyers here may know. [*Nunquam Fictio Sine Lege*] What it translates to is "there is no fiction without law." All right. So then ___ the NRCDC solicited proposals for funding, and from a variety of providers, and then settled on a traditional loan structure with a local bank called Collegiate Peaks. They obtained private lender financing in the amount of 4.3 million dollars in March of 2012, and then refinanced the loan in August, 2013, with High Country Bank for 4.72 million dollars. The promissory note associated with the loan characterizes the NRCDC's obligation as a promise to pay and a loan. We talked about how the city subsequently, after the time of origination, amended the development agreement in 2014, and in doing so, ___ made sure that the NRCDC could never sell land without city council's approval, and second of all, eliminated the 6320 status.

So what is the NRCDC really? It's not a 6320. If it's not an unusual entity or a conduit or instrumentality, what is it? Well, fortunately we received an opinion from the office of the state auditor on July 19th of 2016. And go ahead and turn to [slide 7](#). This is what they said. "The NRCDC is a component unit of a local government that must be reported as part of the city's audited financial statements." Similarly, our own outside auditor who issued findings relating to the 2015 fiscal year concluded that the NRCDC is a blended component unit of the city for financial reporting purposes. One of the reasons that the auditor concluded that the NRCDC would have to be treated as component unit of a local government for accounting purposes .. um .. is the conclusion that the city is able to impose its will on the NRCDC. The OSA also specifically concluded that the NRCDC status as a legally separate, non-profit entity is insufficient rational, standing alone, to exclude the NRCDC as a component unit of the city for accounting and auditing purposes. One, NRCDC is a component of a local government.

Let's go back to [slide 3](#). The debt is on our books. Okay. State conclusion: component of a local government. What are the TABOR districts? The state or any local government, excluding enterprises. We're not an enterprise. We're not an excluded enterprise. We're not an excluded 6320. The state has concluded that we're a component of a local government.

Now, if you look at the case law you can certainly make a case that the factor that you look at for accounting purposes differ in some way from factors that you would look at for legal purposes. But, I feel comfortable here that the state reviewed a wide variety of factors, and that we would reach the same conclusion going through the legal analysis that we would go through on the accounting side. And more importantly, the debt is part of our books as mandated by the state auditor. It's going to be pretty hard to say, from an accounting purposes this is our debt, and from a legal perspective it somehow isn't. The real problem that you have here -- uh .. um .. Let's go back to [slide 2](#). -- is that you created a platform to issue revenue bonds or other debt financing that inherently involved lending into your municipality. And that was okay in that context because you wanted it to be an extension of the municipality so you could take advantage of what was available in the debt market. When you get to

TABOR and you are not within an enterprise of 6320 structure that overlap between the municipality and the entity becomes fatal to excluding them as excepted. They're not stand-alone; they're controlled. They're effectively you. And therefore, while that may be an appropriate .. um .. structure in certain contexts, it's not an appropriate structure. It's simply a non-profit held by the city.

The day after we received **the OSA .. um .. conclusion we felt was dispositive of the analysis .. um .. and on the direction of the mayor, we voluntarily reported this problem to the Department of Local Affairs and the Division of Local Government of the State of Colorado**. They were very helpful in .. um .. in walking through with us the types of compliance options and timeline that they felt was appropriate. And on August 9th we agreed voluntarily to submit a proposed compliance plan to the State with respect to this problem sometime in the near future. On September 6th, at the first opportunity that we had I advised the mayor and this council regarding the TABOR issue and the related compliance needs that we had in executive session. And then on September 15th, we published notice that we would be providing this information to the public.

Tomorrow we will be having a joint work session. Um, the purpose of today .. um .. is to identify the problem for the public and help them understand why we have this problem. The purpose of this ___ today is not to talk about what we're gonna do to fix the problem or how we're going to comply with TABOR. That's something we will do tomorrow with the NRDC. I want to .. um .. make a point to thank this client constituent group for the confidence they have shown in my work and the commitment they have shown to the law. There is a wide variety of different opinions on this council with respect to the type of development opportunities that could be pursued on the Vandaveer Ranch and how to go about that. **But in my experience, there has never been any difference amongst you in your commitment following the law and doing what's right.**

We can go ahead to [slide 8](#).

Mr. Rabe: I don't have slide 8. Oh there it is.

Mr. Kahn: **The Salida Municipal Code contains an oath that .. um .. each elected official will support the constitution and laws of the United States and the State and the ordinances of the city.** I also wanted to read to you **another oath**, which doesn't apply to you. But by analogy to me really reflects the tenor and tone that you as a governing body have presented to me as your humble servant in pursuing .. um .. this issue and researching it. And .. um .. I think we have .. uh **.. great value in having a member of law enforcement on this council who has that type of steadfast commitment to the law.** He's been very clear throughout the years about that. And I couldn't help thinking of him when I saw this oath and thinking of each one of you , and it's very consistent with the direction you have given me. **"On my honor, I will never betray my profession, my integrity, my character, or the public trust. I will always have the courage to hold myself and others accountable for our actions. I will always uphold the constitution my community and the institution that I serve."**

The ___ of the things that I have felt that I have received from you, and I believe we have completed our duty with respect to this issue on that. Um .. so tomorrow I'm going to spell out for the NRDC and the council and the public, the various options we have for compliance, and then it will be time for me to

take a back seat in this process. Um, it's important for the lawyers to be involved when you're identifying a problem, but once you understand how to fix that problem, that's going to be a decision you make from a policy perspective as .. as the elected officials of our community in conjunction with the NRDCDC whom you have appointed. I believe that at that point, a lot of our steps will be self executing, or ones that can be executed cleanly by NRDCDC counsel who would be the appropriate one to handle land sales that involve the NRDCDC, or other avenues of compliance.

Okay. Are there any questions from the group with respect to the historic facts that I've discussed today or conclusion that we reached?

2:29:36

Mayor: Ms. Brown-Kovacic

Dr. Brown-Kovacic: I have questions.

Mayor: Go ahead.

Dr. Brown-Kovacic: **If the NRDCDC is an illegal body and they have managed to develop Vandaveer, ..**

Mr. Kahn: Let me interrupt you there. I'm sorry. I think you might have misinterpreted my presentation. Um .. I've never suggested that the NRDCDC is an illegal entity, or even that it's formed in a way that's inappropriate. It's perfectly fine for the City of Salida to form a non-profit, to own and control a non-profit, and to do things through that non-profit. Okay? That's not the problem. The problem is the financing mechanism that the NRDCDC has utilized or that any local government might utilize without having voter approval or sufficient set-aside reserve. If you don't have the debt, there's no problem with the NRDCDC.

Dr. Brown-Kovacic: **But it is illegal in terms of carrying the debt?**

Mr. Kahn: **Correct.**

Dr. Brown-Kovacic: Then it seems to me that it would have to be dissolved, and the debt does revert back to the city.

Mr. Kahn: Uh .. okay .. um, we aren't going to address compliance issues today. What you're going through is one scenario of compliance, which is to dissolve the corporation and to take over the debt. That is one way of compliance. But today is not the day ..

Dr. Brown-Kovacic: But let me ask my question. So if that is the case .. if it's .. if that is one possibility and it reverts to the city, then I know that statutes say that the city cannot sell property that they own – they do own this property – without a vote of the people. And so I'm wondering how that interfaces with all of this.

Mr. Kahn: And tonight is not the night we're going to address the compliance options. Tomorrow I will go through what your options are, and then you folks as a body will make a decision about what direction you want to go in.

Mayor: Is that

Dr. Brown-Kovacic: Yeah. I'm still frustrated that way this is .. I feel I'm being directed rather than the council .. the city council being made to direct what's going on here. My other question has to do with reserves. And I would like to know that doesn't TABOR say something about reserves and debt to be repaid if the reserves in the city to cover that?

Mr. Kahn: I'm not sure I understand your question. The debt limitation that you know that we're talking about here does not involve a question of reserves.

Dr. Brown-Kovacic: Um? I move to my third question then.

Mr. Kahn: And just .. just so you better understand. The reason that we are identifying the problem and the issues today and addressing compliance tomorrow is because .. um .. the city is presenting its position on the NRCDC financing mechanism today, and we're doing that for the public, and it's the city's conclusion, and a mandate that the city .. uh .. um .. has come up with. The question of what to do next is really a ..[voices in background] .. The question of what to do next is really a decision that has to be made with the NRCDC. This isn't a decision to make with the NRCDC. **The law is the law on this.** But the decision of what to do next is a decision to make with the NRCDC. So we don't want to address that tonight when we don't have the NRCDC board here to participate in the discussion.

Dr. Brown-Kovacic: Um, my ___ question is a process question. Um, I appreciate your opinion, and it is an opinion. **The council did request that you get an expert opinion or an opinion from the court. And I know that apparently you had difficulties with that, and what we got instead was your opinion.** And I believe that, process wise, **council's obligation is to get us an opinion, and we appreciate your opinion, but then it is the obligation and responsibility of this council to discuss that opinion and to take action on what they want to do.** And I feel that **that step is being left out**, and I feel that I .. I formally request that council be given an opportunity to discuss this. It is my understanding that we are not supposed to make decisions in executive session, so we did not do that, and I think that is the role. You .. you make a recommendation to this council and this council discusses it, and decides what its next steps will be and votes on that. And that step has not happened, and for this to be a legal good process, that that needs to happen.

Mr. Kahn: Again, I think you're misapprehending what's going on here. We have identified a problem for you. I haven't told you anything about what you have to do. That's a compliance question. Tomorrow, the very discussion that you want to have amongst elected officials, which is what are we going to do, is the subject that will be the discussion of the joint work session.

Dr. Brown-Kovacic: But you ..

Mr. Kahn: But you will have the opportunity tomorrow to discuss with these folks and the NRDC board anything you want about compliance. And one of them may be, we're going to ignore the city attorney's advice, and we're going to barrel forward. But here's the real danger that you have to be aware of, and that the state has been very, very vigilant with us, and that under the Colorado Constitution, Section 20 .. TABOR - okay – citizens can file lawsuits to enforce TABOR as .. as class action lawsuits, and they can recover their fees, and the district cannot recover their fees unless the action is frivolous. You have a huge hook there for citizens to file suit against you if you're in violation. Now, if you conclude that my legal analysis is not sound, then you would make the decision as an elected body to take on that risk moving forward. But if you determine that you have real concerns based on this, then you would want to do something else.

Mayor: And those further discussions will be held tomorrow.

Mr. Kahn: Correct.

Dr. Brown-Kovacic: I just want to make sure that step is not left out. That at some point, the council discusses this and that council makes the decision, as I believe that is the council's responsibility to do. And because we have had so many differences of opinion, and this is such an important decision for this community and impacts this in so many ways, I want to make sure that step is not left out. I think it is a legal step. And I think it is an important step.

Mr. Kahn: Then again .. um .. I'm not sure where we're crossing paths here, but the purposes tonight is to identify the problem. Tomorrow, during the joint work session with the NRDC, I'm going to spell out to you a variety of compliance options that you have. I don't plan on telling you what compliance option to take. That's going to be a discussion that you have tomorrow with these folks. So, this opportunity that you think may have been left out, and that you're worried may not occur, is occurring tomorrow at 6 pm.

2:37:35

Ms. Rogers: Mr. Mayor

Mayor: Uh Ms. Rogers

Ms. Rogers: Um, I want to go on from where Cheryl began. Um, I heard you at least a .. at least four tonight say "the City of Salida has concluded". The city is set in its position. The city is set in its conclusions. And we haven't discussed this. We are the city. You are giving us an opinion, not representing the city. And I .. I'm very offended by being told that the city has been doing all these things, and we haven't. We haven't been part or parcel of it. Let me finish. I go on. Currently, we have three attorney's opinions: yours, attorney Scott's, and attorney Feeley's; and at least four opinions that were made years ago – 2010 – 2012 – that era. Now, that's seven opinions. And from everything that I understand, six of those opinions say that we are and were legal. Questions I have we need to discuss, I think, in public. Now, one of them is something I brought up while we were discussing whether or not we should maintain the 6320 in 2014. And the question was: whether we need it now or not, and

whether we can reapply for 6320. I want to lay those out there. Um, I am very concerned. How do we do this? Uh, we have been basically left out. In some ways, I feel like we have three people who are running the council, and that's you, you and you [pointing to Brown, the Mayor and Kahn]. The rest of us aren't getting information. If we are, we're getting it second or third or fourth level. I'm severely concerned about that. I'm hearing from people in the community who are saying the same thing. What's going on? And we say, we don't know.

Mayor: Um, let's get to the question, I mean ...

Ms. Rogers: Okay. I'm .. The first question would be: Does the NRCDC need to be designated a 6320 today?

Mr. Kahn: The NRCDC is not a 6320 ..

Ms. Rogers: And should it? Does it need to be?

Mr. Kahn: I don't think it can be. And I don't know what you mean by 'need to be'.

Ms. Rogers: But it was until 2014.

Mr. Kahn: It is not a 6320 today. You have abandoned it.

Ms. Rogers: I understand that. Can it be re set as a 6320?

Mr. Kahn: It's something you could look at. I'd put it in a larger basket. Which is, do you want to fix the entity, either by turning it into a 6320 or an enterprise or some other ..

Ms. Rogers: That would be ..

Mr. Kahn: .. entity.

Ms. Rogers: That would be discussed by the council.

Mr. Kahn: Of course.

Mayor: That's what we would discuss tomorrow. Correct?

Mr. Kahn: Let me just suggest a few of these things. First of all, you have received seven opinion letters. Six of them are qualified as being prior to a development agreement amendment in which you abandoned 6320. So don't hang your hat on six opinion letters that they somehow suggest that there's a 6320 organization, when they were issued prior to, or for a time frame prior to an amendment to the development agreement when a 6320 is abandoned, is disingenuous. They do not relate to 6320 status post fourth amendment to the development agreement. That leaves you with one opinion letter .. okay .. that relates to the status of the NRCDC after the fourth amendment. And it's the opinion letter issued by Mike Scott. It depends on an assumption that the NRCDC a component of the local government, and therefore is not a district. But Mike Scott's letter was followed by a Office of the State Auditor conclusion that the NRCDC is in fact a component of your local government. And that's a debt that's

held by the city on our books. That is a key factor that changes your analysis. Now, you folks are welcome to debate this as much as you want. But you haven't found a single lawyer who can come up with a cognizable explanation for why this entity that you own, control, and have a residual interest in, that's not a 6320, and that's not an enterprise, is somehow able to just go borrow money from a bank without voter approval, without set-aside reserves, in violation of TABOR. And it can't do it. If you want to take my analysis and the work I have done and put it out to any of these other folks, I welcome it.

Ms. Rogers: I ..

Mr. Kahn: If you want to go to the judiciary and have a law suit about, you're going to get to the same conclusion I reached today. It's just going to take you longer.

Ms. Rogers: I would like to take this opportunity to ask Mr. Feeley to respond to you.

???: That's not appropriate.

Ms. Rogers: We have no other opportunity for him to speak.

Mayor: I .. No .. this is not the time or place. We wanna discuss what we are going to talk about. I know you're not happy with it, but that's what it is. What other questions do you have?

Ms. Rogers: Okay. The final question I have is the decision you made tonight that I do not want any dissertations ... not want all of these things. Again, we are left out of the discussion. And I would like a discussion on, and hear from a person that I respect.

Mayor: We will have a discussion tomorrow with the NRC board.

Ms. Rogers: And Mr. Feeley would not be avail ..

Mayor: He will not be available tomorrow either. We do not have ... It's a work session. We do not have the public comments. If you wanna ... If people wanna take to a different local and do whatever they want to do, that's ..

Ms. Rogers: Okay ...

Mayor: .. that's strictly up to them.

Ms. Rogers: And I'm going to request one other thing. I would like Mr. Feeley's letter to Mr. Smith in our minutes of this meeting tonight. Is that permissible, Mr. Feeley?

Mr. Feeley: Yes.

Ms. Rogers: Thank you.

Mr. Kahn: I think I'd like to include the city's responses. And I'm not sure that behooves anyone. But if we did we have two official responses that would have to be included. I personally would caution you

against publishing those publically. I don't think it reflects well on the .. on the lender, um, or anyone else involved, but ..

Ms. Rogers: From what I saw in the email that was sent to me, there was no restriction in terms of confidentiality. Is that correct?

??

Ms. Rogers: Thank you.

Dr. Brown-Kovacic: I have a question. It has to do with the component unit. Um, I'm wondering why our audit committee and, um, our auditors told us at the time that we made this ... that we made the NRCDC a component unit, that this was only for financial reporting purposes, so it did not in any way affect the status of the NRCDC. **And we were very, very clearly told that over and over again that that was just for financial reporting purposes.** And now you are indicating that there was much more impact than that, that we were not told that by the auditors or the auditing committee.

Mr. Kahn: I don't think your outside auditors or your auditing committee controls the Office of the state Auditor. And that's where your confusing this. The Office of the State Auditor is going to reach their own conclusion. If your local auditor got it wrong, then you may have a claim against your auditor, but you don't have a claim against the state if they're wrong. **What the state said is, you have to account for it as a component of your local government.** And it also said we were supposed to do it for the past four years. So, I think you folks are trying to ... um ... This is an upsetting moment. People have put a lot of time and energy into this project. **But to be in denial I don't think is going to help you or help anyone in our community.** **You have a state conclusion that the NRCDC is a component of your local government. The debt of the NRCDC is on the city's books. Okay? This is a factor that has occurred in the past few months and affirms what many people believed before that. At this point, you have this finding from the Office of the State Auditor. You won't be able to come up with a cognizable legal argument that you can take a component of a local government to find in TABOR, that is not an excluded enterprise or other organization, and you can just get around TABOR.** Because then every municipality would just form a non-profit, and turn title of the property over to the non-profit, keep a residual interest over all of the property, keep total control over sales of the property and the asset, and they'd just go and borrow money. Then there's no way there'd be any TABOR. So, as difficult as this is for .. um .. the two of you in particular to come to terms with, um, I encourage you to do whatever due diligence you want, and spend whatever money you want looking into it, **you won't come to any different conclusions.**

[02:47:24]

With respect to Councilmember Rogers' concerns about the full council's involvement, again, I think, you have to understand our form of government. The city council represents the city by a majority, and so does your mayor. **Your mayor is the chief executive officer of this city under our municipal form of government. He has just as good a right as you do as a body to make certain decisions and to assign certain tasks, and that includes supervising the city attorney,** which is spelled out in the Scope of Work you've adopted by resolution. So, nothing has been done, um, on behalf of the city that wasn't

authorized. And, I really hope to go back to my last slide. Prior to this evening, what I always sensed from everyone on this council was a steadfast commitment to the law, even when that commitment makes you uncomfortable or causes problems. We all face situations in our life where it would be easier to avoid, ignore, or break the law to get what we want. But we can't do that. And if the financing mechanism violative of TABOR, and I assure you that it is, then we need to take steps to comply with the constitution.

Ms. Rogers: Do not accuse me of attempting to break the law. Because that is not my intent whatsoever.

Mr. Bowers: Point of order, Mr. Mayor.

Mayor: Let's get back on focus here.

Mr. Kahn: You have a real problem in understanding the issue that we're facing here, and what we have to do to overcome it. And what we have to do is we have to confront the debt that is illegal. So I encourage all of you to start thinking about that, because you're going to have a lot of options tomorrow to talk about in terms of compliance. You really need to ___ to be prepared for that. If you spend all our time arguing and rehashing whether or not a 6320 organization exists, when it doesn't, okay, or whether this is a component of our local government when we know it is from the state, we are going to be wasting our time. It needs to be productive. It needs to be committed to the solution and committed to following the law. We're committed to following the law. The financing mechanism that you have in place is not consistent with the law. I'm sure you share my commitment, and I know that you do as well, and that members of council do, and a look forward to getting out from under this very serious constitutional problem.

Mayor: Any other questions? Thank you Mr. Kahn.

Mr. Kahn: Thank you Mr. Mayor.

2:50:20