

The Colorado
Downtown Development
Authority (DDA)

**BOARD
MEMBER
MANUAL**



PREAMBLE

Welcome to the First Edition of the Astonishing Colorado DDA 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 Downtown Development Authority 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 The passage of time, new court decisions, and future legislation will cause portions of this manual to become outdated.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 DDA'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 LLP in early 2015 and then modified for DDAs in early 2017. Jim Collins graciously consented to allowing the use of the SDA Manual as a basis for the BID Manual. Thanks, Jim. Carolynne White of Brownstein Hyatt Farber Schreck, LLP artfully reviewed the DDA Manual prior to its release, corrected errors and follies and made vital additions. Thanks, Carolynne

The general intent of the Manual is to give quick answers to some of the questions that face DDA Board Members, Staff, Consultants, and friends in the management and operation of an interesting 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 area – and more importantly, hopefully you have a desire to make the area work as a clean, safe and vibrant force in the community.

DDAs are different than any other form of government or business organization in Colorado. They can have the power to do almost anything within the power of local government and to develop and implement any type of plan of development, whether economic or physical. Therefore, if the power for the DDA to undertake an activity is included in the approved plan of development, the DDA can provide diverse economic development and redevelopment activities that could include festivals, security, marketing and advocacy – plus any physical capital improvements, and their operation and maintenance. A DDA in Colorado can exercise a wide and unique range of financial powers to further its mission.

What is that mission? My view is that "the sky is the limit" - the statute literally says that a DDA has the power to implement "ANY PLAN OF DEVELOPMENT." (See 31-25-807(2)(e), C.R.S.) Therefore, the limits are primarily creativity, money, and political will. The jobs undertaken by a DDA can be as varied as the downtown area that it serves. The Colorado DDA Act allows a DDA to provide "public facilities and other improvements to public or private property of all kinds" (See: 31-25-807(2)(d), C.R.S.) and an economic plan could, with municipal approval, provide for a very broad range of business related services. DDAs can, and could, with municipal approval,

- Replace all the utilities and pave Main Street
- Provide lights for safety on a highway, sidewalk, or alley
- Plant flowers and maintain them
- Plant and trim trees, including privately-owned trees
- Do market research
- Install signs
- Build and operate a parking garage
- Provide public art
- Run area-wide business promotions
- Support programs for the homeless
- Provide motorcycles for police

- Provide off-duty officers or private contractors for security
- Sponsor festivals and events, including holiday lighting
- Facilitate permitting for private developers
- Provide ambassadors or concierge services
- Clean sidewalks
- Remove snow
- Install 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 DDA should consult knowledgeable legal counsel. I expect that there will be future editions of the Manual to keep up with new law, add or expand some topics, and remove others. Have fun.

Rick Kron,

Member of the Board of Directors of
Downtown Colorado, Inc.

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I. INTRODUCTION

This general manual applies to *Downtown Development Authorities* in Colorado and emphasizes state law and general practices.

For a particular DDA, at a minimum, every Board member should be familiar with the ordinance that created the DDA and the DDA's Plan of Development. Those documents explain the particular DDA's powers and limitations.

As a Board Member, you have become part of the governing body of the DDA. The DDA is a unit of local government¹. That local government has the powers and limitations that are set out in state statutes, the ordinance that your municipality passed to create the DDA, the Plan or Plans of Development, the budget of the DDA, and the state and federal constitutions.

The annual budget is written by the DDA Board (usually through staff and consultants). It is to be reviewed and approved by the municipal governing body. One of the DDA Board member's major tasks is the approval and implementation of that annual budget. The budget and any supporting documents explain what the DDA would like to do in the coming year to implement its plan of development 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 DDA is located.

In addition to the general procedures in this Manual, a Board member or the DDA staff and consultants should also be aware of any local ordinances or rules relating to DDAs. A particular city may have additional rules, not discussed in this manual, such as requirements for the DDA to file reports, to provide the city's staff with notice of DDA Board meetings, or to pay city fees. Maintaining good relations between the DDA and the City is extremely important to the success of both. For example, the DDA Act expressly puts the administrative procedure for budget review and approval in the City's control, C.R.S. 31-25-816(1), so disagreements between the DDA and the City are unlikely to end well for the DDA.

II. SUMMARY OF THE DOWNTOWN DEVELOPMENT AUTHORITY ACT

This Chapter II is intended to be an Executive Summary outlining the essential features of a DDA.

1. What are the basic features of a DDA? (§ 31-25-801, C.R.S.)

¹ Unfortunately, it's a little hard to say, legally speaking, exactly what a DDA is. For the vast majority of Colorado local government entities, the law quite clearly states how the entity is classified, and the classification then has consequences concerning what the entity can or cannot do. For example, a business improvement district is clearly "a quasi-municipal corporation and political subdivision of the state with all the powers and responsibilities thereof," C.R.S. 31-25-1207(5), a general improvement district is "a taxing unit," C.R.S. 31-25-602(1) and "a public or quasi-municipal subdivision of this state and a body corporate with the limited proprietary powers set forth in [the GID Act]," C.R.S. 31-25-607(4)(d). But the DDA has no similar definitive statement of what it is. Probably as close as it gets is in C.R.S. 31-25-802(1): "Authority means a downtown development authority created pursuant to [the DDA Act] in any municipality in this state and any successor to its functions, authority, rights, and obligations," which is not especially helpful, and C.R.S. 31-25-803, which says in part that a DDA is "a body corporate and capable of being a party to suits, proceedings, and contracts, the same as municipalities in this state." Another hint on what it is, is found in C.R.S. 31-25-807(3)(a)(II) that authorizes the DDA, among other things, to "enter into an intergovernmental agreement with [the municipality that established the DDA]. . . ." Because only governments enter intergovernmental agreements, see C.R.S. 29-1-203, the DDA must be a government or it would not be able to enter into an intergovernmental agreement.

The primary purpose of this footnote is to prove that the author actually read the DDA statute, but you will also see that this nonsense comes into play from time to time in the Manual.

Arguably the biggest problem with determining that a DDA is a "local government" is that it means the DDA is subject to the TABOR Amendment, Colo. Const. Art. X, Sec. 20(2)(b), which makes some aspects of a DDA much more cumbersome than its nearest relative, the Urban Renewal Authority. By the grace of the Colorado Court of Appeals in *Olson v. City of Golden*, 53 P.3d 747 (Colo. App. 2002), an urban renewal authority is not a "local government" or "district" for TABOR purposes. DDAs, which can have a small property tax with voter approval and have statutory provisions for elections, are likely to be "districts" that are subject to TABOR, although no court has said that yet.

a. Purpose, according to the DDA Act: The organization of downtown development authorities will serve a public use; will promote the health, safety, prosperity, security and general welfare of the inhabitants thereof and the people of Colorado; will halt or prevent deterioration of property values or structures; will halt or prevent the growth of blighted areas, and will assist municipalities in their downtown development, redevelopment, overall planning, and will be of especial benefit to the property within the boundaries of the authority. (§ 31-25-801(1), C.R.S.)

b. A DDA is a “body corporate and capable of being a party to suits, proceedings, and contracts, the same as municipalities in this state” (§ 31-25-803, C.R.S.).

c. The Board of Directors has 5 to 11 members, including at least one City Council (or Town Board) member. A majority of the Board Members shall reside or own property in the DDA. Except for the Council Member(s), the Board Members must be DDA residents, business lessees, owners of real property, or a manager, agent, or employee of an entity with a place of business in the DDA. The Board Members are appointed by City Council and after initial “staggered terms,” each Board Member would have a 4-year term (§ 31-25-805, C.R.S.).

d. The Board can have “all the powers customarily vested in the board of directors of a corporation.” It can perform studies. The Board’s primary power is to plan (and with City approval) implement “*any plan of development, whether economic or physical*” (§ 31-25-807(2)(d)(e), C.R.S.).

e. If a plan of development is approved by the City that includes use of Tax Increment Financing (“TIF”), the implementation of a development project can be financed using incremental property and/or sales tax revenues generated within the boundaries of the DDA. These revenues can be used to reimburse a developer for improvements deemed eligible by the DDA; used by the DDA to construct improvements to benefit the project; or pledged to a third party to secure debt in the form of traditional bank loans, tax exempt municipal bonds, taxable municipal bonds, or other types of debt instruments.

f. If approved by the DDA’s voters and the City Council, the DDA may also receive revenue from a property tax of up to 5 mills imposed by the City on behalf of the DDA.

2. TIF or Tax Increment Financing (§ 31-25-807(3)(a), C.R.S.). Here is a summary of how it works:

a. The assessed value of taxable property in the DDA and/or sales tax is determined for the “base year” (i.e., the year that the plan of development is approved by the City that includes TIF as a revenue source).

b. If the assessed value within the boundaries of the DDA increases during the authorized TIF period, which in turn generates more tax revenue, then the DDA receives the amount of increased tax revenue based on the increased value, instead of the taxing entity that levied the tax (except for property tax increases due to general reassessments). This increased revenue is called the “increment.” In the case of sales taxes, only municipal sales taxes can create increment subject to sharing through a plan of development. But sales tax increment works similarly. The amount of sales tax revenues generated within the DDA boundary in the year prior to the adoption of the plan is considered the “base,” and continues to be paid to the municipality. Any additional sales tax revenue generated in excess of that base amount during the TIF period is “increment” which may be shared by the municipality with the DDA to implement the plan of development. Depending on the terms of the plan of development, the duration of the TIF can be up to 30 years, but it can be extended as described below.

i. A DDA’s property tax TIF can be extended for 20 more years if the city council, by ordinance adopted in the final 10 years of the original 30 years, approves the extension. If the extension is approved, the base year is advanced 10 years. After the first 10 years of the extension, the base year is extended by one year for each

additional year through the 20 year extension.

ii. With an extension implemented under (i) above the DDA would receive 50% of the TIF, or a greater amount if the municipality and taxing entities agree, and the taxing entities get the remainder.

iii. The state property tax administrator is to develop procedures on how to determine the allocation of the TIF revenues.

c. If the plan of development authorizes it, the DDA may receive Sales Tax TIF. As with the property tax increment, the DDA can receive the incremental increase in the City's sales tax in excess of the base City sales tax revenues generated in the base year. The term can be up to 30 years. A sales tax TIF may be extended for 20 years without changing the base year, if the municipality agrees.

d. After the time period authorized in the plan of development, and any extensions, have expired, the various taxing entities levying the tax receive all of the future revenue generated by such taxes, both base and increment, and the DDA no longer receives any increment.

e. Revenue pledged to DDA bonds does not include revenue which may be set aside by the County treasurer for a reserve fund set up to pay the County for refunds of overpayments of property taxes by taxpayers.

3. Other DDA Revenue Sources beyond the TIF:

a. The Board may impose rates, fees, tolls, rents, or charges for use of DDA property (or property under its control) (§ 31-25-808(1)(f), C.R.S.).

b. The Board may receive revenue from other governments.

c. The Board may borrow money (and can pledge TIF and revenues from its facilities to repay the money).

d. If approved by DDA voters, the City may levy an additional property tax of up to 5 mills for the benefit of the DDA (§ 31-24-817, C.R.S.).

4. DDA Organizational Process:

a. Decide the DDA is appropriate for downtown or part of downtown.

b. Draft an ordinance for the City to submit the question of organization and financing to the DDA's qualified electors, including decisions on:

- i. boundaries
- ii. powers and limits on powers
- iii. financing package/revenue sources
- iv. election date, administration of election

c. Submit draft ordinance to City staff for recommendations

d. Obtain staff comments, revise ordinance

e. Submit ordinance for City Council consideration

f. The City furnishes public notice, holds a public hearing and (hopefully) adopts the ordinance per City policy to submit the DDA organizing question to an election. The DDA's "qualified electors" vote in the election (§ 31-25-804, C.R.S.) (the "qualified electors" are the DDA residents, landowners, lessees, and each person designated by a corporate entity that leases or owns property to vote on behalf of the entity (§ 31-25-802(9), C.R.S.))

g. The DDA proponents or the City Clerk perform the election. To save money, if possible, the organizational election usually includes any financial questions which are required to be approved by voters pursuant to the Constitutional amendment known as the Taxpayer's Bill of Rights ("TABOR"). (Section 20 of Article X of the Colorado Constitution.) The election must be held on the City's regular election date or in November for TABOR compliance purposes and must use the procedures in the Uniform Election Code or Municipal Election Code. Unless otherwise provided by the City Charter, the election could be held by mail ballot.

h. Election Day, ballots are counted

i. Election results are certified

j. If the ordinance in "4f" above does not provide for the organization of the DDA contingent on the election results, after a successful election, the City Council would adopt an organizing ordinance.

k. Record a notice of organization with the county clerk and recorder.

5. The next major step would be approval of a Plan of Development:

a. The DDA cannot undertake a project unless the City Council has approved a plan of development.

b. A plan of development may be proposed during the DDA organizational process, but it may not be approved until after organization. Alternatively, the DDA can theoretically be approved without a plan of development, but it could be difficult to obtain under approval.

c. The DDA Board may propose any plan of development, whether economic or physical, § 31-25-807(2)(d), C.R.S.

d. The plan of development sets forth whether the use of TIF is authorized, § 31-25-807(3)(a), C.R.S.

e. If TIF is to be included, school districts in the area shall be permitted to advise on the inclusion of TIF in the plan, § 31-25-807(3)(d), C.R.S.

f. Prior to City Council approval of a plan of development, the Council must submit the plan to the city planning board, which shall make written recommendations.

g. With or without the above recommendations, after thirty days and after public notice, the City Council must hold a public hearing on the plan and may approve the plan if the Council finds a need to halt or prevent deterioration of property values or structures or a need to halt or prevent the growth of blight and if the plan will afford maximum opportunity for development by the DDA and private enterprise, § 31-25-807(4), C.R.S. This last phrase "by the DDA and private enterprise" is important, because it acknowledges that, unlike some other types of governmental entities, the DDA is empowered to undertake development.

6. Composition of the DDA Board:

The DDA Board of Directors consists of 5 to 11 members appointed by City, at least one from the City Council. A majority of the directors must reside or own property in the DDA (§ 31-25-805, C.R.S.). Note that the qualifications to be a voter within the DDA district boundary are different than the qualifications to be a board member.

7. Major DDA Powers:

A DDA may:

- a. Hire staff, complete studies, make plans, and implement plans (§ 31-25-807(2), C.R.S.)
- b. Use tax increment financing for the duration noted above (§ 31-25-807(3), C.R.S.)
- c. Following notice and hearing, City Council must approve a plan of development prior to the implementation of a development project by the DDA (§ 31-25-807(4), C.R.S.). The DDA can implement “any plan of development, whether economic or physical,” (§ 31-25-807(2)(d)(e), C.R.S.)
- d. *City can issue bonds for the DDA* if the power to issue bonds is approved by the DDA’s qualified electors (the electoral approval can be at the organizing election or in a later election, with the decision of whether to hold the later election to be approved by both the DDA Board and the City Council) (§ 31-25-807(3)(b) and § 31-25-809 to 814, C.R.S.) To be clear, the DDA does not have the power to issue bonds, but the City may issue bonds on its behalf, if authorized by the electors.
- e. If approved by the DDA voters, the *City Council can impose a property tax* of up to 5 mills for the DDA (§ 31-25-816, C.R.S.) Some practitioners view the revenue generated by this tax as being limited only for use on DDA operations, but the statute authorizing the tax is broad, authorizing its use for essentially all purposes under the DDA statute. Whether to reserve these revenues for operations, or to allow them to be used for development projects to implement the plan of development, or some combination of both, is a policy decision for the DDA Board.

8. How to include additional property into an existing DDA (§ 31-25-822, C.R.S.):

- a. 100% of the landowners in the area to be included must sign a petition to the DDA requesting the inclusion (and the owners must have proof of ownership).
- b. Property must be “adjacent to the existing district.”
- c. If the DDA Board approves, the DDA sends the request to the City.
- d. If the City Council approves, it amends the organizing ordinance.
- e. Upon the effective date of the amendment, the included property is subject to the taxes imposed by the City for DDA use.²

9. A few general comments and reminders:

- a. The DDA has no tax power (it may receive the revenues from the 5 mills the City can impose on its behalf, but does not have its own independent power to tax).
- b. The DDA has no eminent domain power.

² “The governing body may impose and levy an ad valorem tax on all real and personal property in the downtown development district not exceeding five mills on the valuation for assessment of such property for the purposes set forth in section 31-25-807,” which in turn refers to all of the powers a DDA may exercise, including implementation of a plan of development.

- c. The DDA may not issue bonds; but the City may issue bonds on its behalf.
- d. The DDA Plan of Development and Budget are approved by the City.

10. Other potential governmental entities that may exist in downtown:

A DDA Board should be aware of whether these other governments also exist in the downtown, and whether or not their boundaries overlap with those of the DDA.

a. Urban renewal authority (“URA”). (A URA also uses TIF, but does not have the potential to receive revenues from an additional mill levy as does a DDA. If an urban renewal plan area overlaps the boundaries of the DDA, then it is recommended, if not imperative, that the DDA and the URA enter into an intergovernmental agreement (“IGA”) to establish how TIF revenues will be allocated).

b. Business improvement district (“BID”) (the board can be the city council, appointed by council, elected by BID voters, or be a URA board. A BID has no TIF powers. The BID can use property tax and/or special assessments, and can build, operate and maintain facilities, but the BID’s emphasis is on business services).

c. Metropolitan district (the board is independently elected, no TIF, there is usually an upper limit on added metro district property tax that is decided by the city-approved service plan and district voters, the metro district’s powers are focused on infrastructure financing, development, and operation).

d. General improvement district (“GID”) (the board is City Council, no TIF, added property tax as in metro district, may use fees and special assessments. Focus is on infrastructure).

e. Special improvement district (“SID”) (board is City Council, no TIF, uses special assessments as revenue source, focus is on construction of infrastructure).

f. Some city charters and ordinances allow the creation of assessment districts. Whether these local districts are allowed and their characteristics depend upon the charter and ordinances of the particular municipality.

III. SOME PRELIMINARY DDA QUESTIONS AND ANSWERS

This section summarizes some of the questions that come up concerning DDAs and their creation.

A. Where can a DDA be located?

A DDA must be located in the “central business district” (“CBD”) of any municipality in Colorado. The CBD is the area “which is and traditionally has been the location of the principal business, commercial, financial, service, and governmental center, zoned and used accordingly.” The statute does not address how this requirement should be interpreted in communities which are more recently incorporated, which may not have an area that is “historically” or “traditionally” the location of such activities. “Downtown” is an area in the CBD, as identified by City Council. Within the CBD, the DDA can implement one or more “Development Projects” for development or redevelopment within an area defined in one or more “Plans of Development.” A Plan of Development area is an area designated by the DDA Board and City Council as appropriate for one or more Development Projects.

After reading these definitions, (all of them are in C.R.S. 31-25-802), the conclusions are that the City Council has the power to decide where the CBD is located, and, it is my position that unless the decision of City Council is entirely unsupported, a Court is unlikely to reverse a decision made by the City Council about (1) where

the City's own CBD is located, (2) where a DDA may be located, (3) where a DDA may be located within the CBD, and (4) where an area for implementation of a Plan of Development is located in the DDA.

B. Is the existence of "blight" necessary to create a DDA or a DDA Plan of Development Area?

No. Unlike an urban renewal authority, a DDA may be created without a finding that blight exists, and without the conduct of a condition survey.

The City Council, however, must make a determination (a) that there is a need to take corrective measures to halt or prevent deterioration of property values or structures or halt or prevent blight, and (b) that the plan of development "will afford the maximum opportunity, consistent with the sound needs of the municipality as a whole, for the development or redevelopment of the plan of development area by the authority and by private enterprise." C.R.S. 31-25-807(4)(d). So, while some information for the City Council to make findings is needed in the record of the Council's public hearing on the DDA creation ordinance, no fancy blight study or condition survey is needed.

C. Do the boundaries of a DDA have to be contiguous?

There is no contiguity requirement in the statute. Thus it would appear that the initial approval of a DDA could define one or more areas for Plans of Development that are not contiguous. After initial formation, however, any property included into a DDA must be "adjacent to the existing district." C.R.S. 31-25-822. At this point, we don't know if that means adjacent to the CBD, the DDA, or a Plan of Development Area. We also don't know whether the City could approve a "flag pole" inclusion in a DDA by use of a City street, as has been done in the past for municipal annexations, as this issue has not been tested in the courts.

D. Can there be more than one DDA or Plan of Development Area in a CBD?

Yes. Although the singular word "authority" is the term used throughout the DDA Act to refer to the DDA, the general principle of statutory construction found in C.R.S. 2-4-102, which provides that the singular includes the plural, would allow the creation of multiple DDAs, much in the same manner as there can be multiple metropolitan districts or multiple business improvement districts. As of this writing, however, the authors are not aware of any municipalities which have formed more than one DDA.

E. Can DDAs overlap?

Probably, but why? Incremental tax revenues can only be spent once.

F. Can a DDA and BID overlap?

Yes. The keys to success of such an arrangement would be to define what each is supposed to do to avoid overlapping responsibilities and to ensure coordination between them to avoid excessive burdens on the taxpayers. While a BID cannot receive TIF like a URA, the BID may impose its own mill levy. To avoid a scenario where all the revenues generated by the BID's mill levy are considered increment, and are therefore received by the DDA, it is desirable that the BID and the DDA enter into an IGA which specifies how incremental revenues generated by the BID's mill levy will be handled. If downtown has both a BID and DDA in the same territory, the municipality may also consider designating common or overlapping staff or common management to avoid duplication. Joint board meetings may also increase operational efficiency.

G. What's the difference between a DDA and a BID?

There are many. The DDA is somewhat easier to organize because of the lack of a petition process. The

DDA's principal funding source is TIF; the BID's principal funding source is either new property tax revenues or special assessments or both. The DDA TIF has a limited time period, the BID property tax or special assessments time period can be limited or unlimited. The DDA's Plan of Development will probably be rarely amended while the BID's Operating Plan will likely change every year. The qualifications for voters authorized to vote in these elections are slightly different. The qualifications for board membership are somewhat different. Overlapping both would appear to work optimally when the DDA is set up to provide capital improvements and the BID will provide business related services, but it is possible for each to do some of the other's job.

H. Which one is better, DDA or BID?

Either may be suitable, depending on the goals at hand. Ultimately, the one for which political support for creation and TABOR approval can be obtained is the better one for a given situation.

CHAPTER I - BOARD MEMBERSHIP

A. "The affairs of the authority shall be under the direct supervision and control of a board consisting of not less than five nor more than eleven members appointed by the [City Council]." C.R.S. 31-25-805(1).

B. Qualifications:

A majority of the board members shall reside or own property in the DDA. At least one member shall be a member of City Council, who serves at the pleasure of Council.

Each appointed member of the Board, except the City Council members, shall reside, be a business lessee, or own real property in the DDA. A manager, agent, or employee of an entity with a place of business in the DDA is also eligible for appointment to the Board.

Other than the City Council member(s), no officer or employee of the City is eligible for appointment.

After notice to the Board Member and a chance to be heard (this means the Board Member is informed and can appear at a hearing), a Board Member may be removed for cause by City Council.

C. Mandatory Acts of Office:

1. Oath:

Each Director shall take an oath of office as is required of City officials. Colo. Const. Art. XII, Sec. 8 and C.R.S. 31-25-806(2).

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

2. Bond:

No bond is legally required, but the DDA may obtain a public officials' bond, at the DDA's cost, for its 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.

D. Rules:

State law provides surprisingly little guidance to a DDA Board on how to run its affairs.

The Board is required to create its own rules. C.R.S. 31-25-806(3) and file them with the City Clerk. The few things that must be covered in Rules are:

1. Election of officers;
2. The manner of holding regular meetings, and
3. The manner of calling special meetings.

Meetings must be open to the public except when dealing with land acquisition or sales, personnel matters, or legal matters (more on this later).

Board Members cannot be compensated, “but may be reimbursed for actual and necessary expenses.”

E. Vacancies:

There is nothing in state law concerning vacancies, so a Rule might be good to say 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 removal for cause after notice and hearing);
4. Death;
5. Expiration of term and following the qualification of a successor; or
6. Loss of the qualification to hold office. (For example, if a property owner who is a natural person sells all of his or her property in the DDA, then the person will no longer be qualified to be on the Board. As another example, if the entity that designates an agent or employee who is a Board member replaces its designated person, the Board member will no longer be qualified to be on the Board.

Appointments to vacancies shall be for the remainder of the unexpired term.

If the City Charter gives “appointive authority” to the Mayor, the Mayor makes the appointments to the Board.

A question that sometimes comes up due to a vacancy on the Board is whether the entity (such as a corporation or LLC) that appointed the prior Board member is entitled to name someone to fill the vacancy. For example, if Company X had its manager appointed to the DDA Board, but then Company X fired the manager, thereby disqualifying the manager and creating a vacancy on the Board, can Company X designate its new manager as its representative and automatically have the new manager appointed to be on the DDA Board? The answer is no. The City might decide to appoint the new manager, but it is not required to do so.

F. Term:

After the first Board takes office (the first terms are staggered per C.R.S. 31-25-805), the regular length of the term of office for Board member is four years. Term limits do not apply to Board members unless the City Council puts limits in the organizational ordinance or imposes limits by Council motion, resolution or ordinance. The Council can choose whether to require term limits.

G. Statutory responsibilities:

Policy note: As mentioned in Footnote 1 above, the legal classification of a DDA is not entirely clear. This Section of the Manual is based on the author’s opinion that a DDA is body corporate that is a local government, and therefore, a DDA is required to follow general state law on local government administrative matters.

State statutes require the completion of the following actions.

ACTION	FILE IN OFFICE	DEADLINE
Adopt a Resolution designating where the DDA’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	Will depend on the City’s procedures, probably City Clerk, recommend sending copy to City Attorney	Local rules may set the date.
City approval of “Operating Plan” and Budget.	None	According to City Policy C.R.S. 31-25-816
Adopt the budget. §29-1-108, C.R.S.	See below.	By December 31 of each year, but if the City has adopted a mill levy on behalf of the DDA, then the date for City approval is December 15.
Adopt and file certification of mill levy (if applicable) by the City for the DDA, see C.R.S. 31-25-817.	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 DDA 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 local governments §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. Since the DDA Board is appointed by the City, and the budget is approved by the City, a DDA is a “component unit” of the City for auditing purposes and the DDA audit would be reported as part of the City audit.

H. Fiduciary Obligations:

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

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

1. To act as a director on behalf of the DDA 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 DDA 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.

It is important to note that the DDA conflict of interest statute is slightly different than that for other elected bodies, such as special districts and city councils, and for Urban Renewal Authority Board Members. Board Members and DDA employees should read, understand, and follow the guidance set forth in the statute, quoted below. Seek counsel of the DDA attorney for guidance in specific situations.

31-25-819. Conflict of interest

No board member nor any employee of the board shall vote or otherwise participate in any matter in which he has a specific financial interest, defined as a matter in which the member or employee would receive a benefit or incur a cost substantially greater than other property owners within the district. When such interest appears, it is the duty of the board member or employee to make such interest known, and he shall thenceforth refrain from voting on or otherwise participating in the particular transaction involving such interest. Willful violation of the provisions of this section constitutes malfeasance on the part of a member of the board and is grounds for instant dismissal of any employee. The governing body may by ordinance provide for automatic forfeiture of office by a board member for violation of this section.

I. Compensation:

1. No Compensation is Allowed – C.R.S. 31-25-806(3):

DDA directors DO NOT receive any compensation for their service on the Board beyond the good feelings that come from a job well done in helping their community.

2. Reimbursement:

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

3. Gifts to Board Members or others:

The DDA 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 DDA attorney before making the donation.

E. Bylaws, Rules and Regulations, and Policies:

The Board shall adopt Rules governing its procedures from time to time. Within the requirements of the law, the Board shall have all powers commonly vested in the board of directors of a corporation.

CHAPTER II – BOARD RESPONSIBILITIES

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

A. Legislative or Policymaking:

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

B. Planning and Evaluation:

The Board is responsible for acquiring reliable information from credible sources which will enable it to make the best possible decisions about the scope and nature of the DDA’s functions and in executing the Plan(s) of Development. The Board is responsible for requiring evaluation of the results.

C. Staffing and Appraisal:

The Board, possibly through the Director, is responsible for acquiring the staff, consultants, or volunteers necessary for carrying out the DDAs 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.

(You’ll love this part). By statute, the Board, with the approval of City Council, shall employ “A director, who shall be a person of good moral and character and possessed of a reputation for integrity, responsibility, and business ability.” C.R.S. 31-25-815(1)(a).

D. Financial Resources:

Although not specified in the statutes, the Board is responsible for presenting an annual “operating plan” and budget to the City for adoption and for adopting a budget that will provide the financial basis that will enable the DDA 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 DDA for proper use of, and accounting for, all DDA funds.

E. Facilities:

The Board is responsible for determining office and functional facilities needs and communicating these needs to the City and 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 plan of development.

F. Communication with the Public:

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

G. Meetings:

The Board may exercise the above powers and duties *only when convened in a legally constituted meeting*. Because all powers of the Board arise in its action as a group, individual Board members may exercise authority over DDA 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*.

H. Management and Staff:

1. The DDA statute outlines powers or authority of some of the management or staff; however, the scope of staff's powers or authority are determined by the Board.

C.R.S. 31-25-815 directs the Board to "employ and fix the compensation, subject to the approval of [City Council] of the following, who shall serve at the pleasure of the Board:"

- (a) The executive director,
- (b) A treasurer,
- (c) A secretary, and
- (d) Upon recommendation of the director, other staff as approved by the Board.

General duties for (a) through (c) are specified in the statute. However, the Board may, by resolution, approve other administrative provisions, C.R.S. 31-25-815(2).

2. The Board is authorized to hire management and staff. The Board is 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.

I. Policy versus Implementation:

Most Boards take the position that the Board develops Policy, and 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 the organizing ordinance, a mission statement, Plan of Development, annual or short term goals and objectives, and the annual 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.

J. Delegation to Executive Director-Manager:

Since the authority of the Executive Director as Chief Executive Officer derives from C.R.S. 31-25-815(1)(a) and is only that authority 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 Director-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 to the person(s) delegated to do it.
4. Delegation must include accountability.

CHAPTER III – BOARD MEETINGS

This section takes the position that the Board must follow the Colorado Open Meetings Act (a.k.a. “Colorado Sunshine Law,” C.R.S. §24-6-401 *et seq.*), and assumes that the City has not adopted local rules on meetings which deviate from this statute.

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 DDA 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 DDA 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 DDA. 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 can provide desirable order and efficiency, and may be included within the DDA 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 DDA may take any official action or vote.
2. A Director is required to devote his/her personal attention to matters of the DDA. 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 DDA’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. Please review C.R.S. 31-25-819, previously printed earlier in this manual.
2. Because of the specific terms of C.R.S. 31-25-819, any Director shall disqualify himself or herself from voting on any issue in which he/she has a conflict of interest, regardless of whether such Director has disclosed the conflict of interest under §24-18-101, et. seq., C.R.S. The person's presence may be considered in order to establish the quorum.
3. 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 DDA 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 DDA 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 DDA 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. Although C.R.S. 24-18-202 suggests that 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, the strong prohibition on voting specifically mentioned in the DDA Act in C.R.S. 31-25-819 should be followed. Seek legal advice!

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 DDA'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 indicate otherwise. 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 is discouraged from assisting or enabling members of their immediate family in obtaining employment, a gift of substantial value; or an economic benefit tantamount to a gift of substantial value from a person the local government official or employee is in a position to reward with an official action or has rewarded with official action in the past.

D. Effect of Existence of Potential Conflict of Interest:

1. Failing to disclose a potential conflict of interest is a 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 DDA's avoidance of the act or the contract being void.

E. Local Rules on Conflicts of Interest

Directors and DDA employees should be aware that several municipalities have adopted their own conflicts of interest rules that may apply to the DDA. The most restrictive of state law or the local ordinance would apply to require compliance with both. Prospective Board appointees should check with the DDA and City attorneys concerning local requirements.

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. Colorado Open Records Act, (“CORA”), §24-72-201 *et seq*, C.R.S.

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

The “custodian of records” (the DDA secretary or the 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 of public records is entitled to copies or printouts of the public records. If approved by resolution of the DDA 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 DDA may charge for “research and retrieval” time of up to \$30/hour with the first hour free, provided the DDA 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 DDA 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 the 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 DDA must apply to the court for an order permitting the DDA 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 a 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 DDA may be required 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 – DDA ELECTIONS

A. Is an election really necessary?

1. **Introductory Comment.** An election in a DDA 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 DDA has the support it needs for the election to be successful.

2. Free Advice.

- a. Rather than lengthening this manual, our recommendation is for the DDA Executive Director or the Board to consult with a knowledgeable County Clerk, City Clerk, special districts attorney, or district management firm, any of whom may be able to 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.
- b. We cannot emphasize enough the need to consult with a knowledgeable attorney before embarking on a DDA election. DDA elections are devilishly difficult due to the difficulty of identifying the people who are actually eligible to vote and due to the short time deadlines to complete public notices and administrative procedures. It is possible for a person to become eligible to vote on election day, making it impossible to tell how many voters might vote until the close of the polls on election day.

So, who is eligible to vote in a DDA election? The persons who can vote are called ‘qualified electors.’ C.R.S. 31-25-802(9). They are:

Residents, defined in subsection 802(10) as persons over 18 who makes his (or her) primary dwelling place in the DDA; and

Landowners, defined in subsection 802(6) as owning a fee interest in real property or any improvement permanently affixed thereto. Landowners include “contract purchasers” who are obligated to pay property taxes, including an heir and a devisee under a will admitted to probate; and

Lessees, defined in subsection 802(6.2) as a holder of a leasehold interest in real property, and

Any landowner or lessee that is not a natural person can designate a natural person to vote on its behalf.

One person only has one vote regardless of how many ways the person may be qualified.

The Election Codes also require that the person be registered to vote somewhere in Colorado.

I’m sure you see the problem with all of this: while there are government lists of registered voters (from the Secretary of State or County Clerk) and property owners (from the County Assessor), there are no lists of landowners who have permanently affixed improvements, lessees, contract purchasers, heirs, devisees, or designated persons unless the DDA, city or proponents of the DDA create them. Identifying the DDA electorate is a major undertaking.

Also, elections must conform to certain statutory and local rule timelines, depending on the type of election. This is why it is important to consult with experts early in the calendar year in which it is desired to hold an election. Establishing an election timeline that allows sufficient time to perform all of the required actions can also be challenging, when combined with municipal meeting dates, holidays, and other limitations on the ability to take action,

3. Types of DDA Elections

- a. Organizational Election. The organizational election for a DDA is called by the City Council when it “determines it is necessary to establish” a DDA. To call the election, the City Council passes an ordinance to submit the question of organization and any TABOR questions (see below) at the next regular election (*i.e.*, City Council election) or special election (*i.e.*, in November if TABOR questions are on the ballot). C.R.S. 31-25-804. The organizational election and the first TABOR questions are almost always conducted at the same time to save money and time, although separate elections on organization and TABOR are possible and may be helpful to more fully refine the plan of development before going to the voters. The likely ballot issues in the organizational election would cover “shall the DDA be organized?” If so, “shall property taxes to benefit the DDA be increased (by X dollars) by a property tax of up to 5 mills [additional language would be added here]? Shall bonds be approved? Shall the DDA be “de-TABORed” for other revenues? Although painful, you will need to consult with attorneys with knowledge of TABOR and election law for assistance with writing the election questions, especially the questions to authorize bonds.

- b. Post-Organization Financial Elections. The TABOR Amendment, Colorado Constitution Article X, Section 20, mandates that a local government – (which probably includes DDAs) – hold elections to approve most major financial decisions. The most important of these decisions are:
 - whether to authorize the imposition of up to 5 mills in additional property taxes to be collected, and how much,
 - whether to allow debt to be incurred, how much, and what revenue sources may be used for repayment
 - whether to allow the collection and spending of other revenues in excess of the limits that would apply without approval in an election.³

These are commonly called “TABOR elections.” A TABOR election may be held in November of any year (and if City Council elections are held at a different time than in November, then also at the same time as the Council election).

For a DDA, TABOR elections may be administered using procedures that are in the TABOR Amendment and in the Uniform Election Code found in Parts 1 to 13 of Title 1, C.R.S. or the Municipal Election Code, Part 10 of Title 31, C.R.S.⁴

³ There are other types of TABOR elections, but these three categories cover nearly all of them.

⁴ Although it is possible to hold a DDA 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 DDA elections.

4. Eligible Voters.

Please see the discussion above.

5. Campaigning in DDA 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 DDA's ability to campaign on an election issue is very limited. Along with consulting a knowledgeable attorney, before undertaking any campaign or information program, the DDA should consult C.R.S. Section 1-45-117, which sets out the limited activities that the DDA is allowed to engage in.

6. Election Administration

An astonishing number of logistical steps must be completed in order to hold a DDA election. The DDA 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 with expertise in DDA, BID, or special district elections with voters who include property owners and lessees (tenants).

7. After the election.

If the organizational and TABOR election passes, and the proposed financial activities are within the scope of the plan of development and budget, the DDA Board with City Council is authorized to use the financial authority granted by the voters, but is not required to exercise that authority.

CHAPTER VII – FINANCIAL MATTERS

A. TIF or Tax Increment Financing “TIF”

1. The potential for using TIF is one of the primary reasons that municipalities create DDAs.
2. The term “TIF” is used as shorthand for the allocation of incremental property tax revenue (or sales tax revenue, see section A.5 below) generated from the growth in the value of property within an area. The reason the statute allows this incremental new revenue to be paid to the DDA instead of the taxing entity that imposes the property tax, is because it is assumed that the private investment that created the increased value would not have occurred absent the ability to capture incremental tax revenues. The DDA is the catalyst or cause for the increase in the value of the property.

This is similar to the theory underlying the Colorado Urban Renewal Law, and is frequently referred to as the “but for” test. The “but for” analysis is conducted to determine whether the increased value would have occurred anyway, due to general market forces and normal annual inflation, or is properly attributable to the activities of a URA or DDA in encouraging investment from the private sector.

Some experts believe that the “but for” analysis is not needed in a DDA context, because it has pre-determined that downtown needs help. In a DDA context, it is not necessary to demonstrate that an area is blighted, although the City Council must have some credible evidence to support a finding that a Plan of Development will halt deterioration and improve the situation in the area, see C.R.S. 31-25-807(4)(d). Each DDA Board must decide for itself how to approach its decision making regarding which projects it will support, and what criteria it will use to determine whether to allocate TIF revenues, and if so, how much to allocate. Each DDA also must decide what information it will require from developers and applicants before approving an agreement to share TIF revenues. These are Policy decisions for the Board.

The chart on the next page graphically illustrates how TIF works. There are also good explanations on the Denver Urban Renewal Authority website and the State of Colorado Assessor’s Reference Library. The Colorado Municipal League also has some helpful descriptions of TIF.

3. The only two types of local entities or governments (out of 75 or so in Colorado) that can use TIF are URAs and DDAs.
4. The use of Property Tax TIF is somewhat controversial because the use of TIF revenue by URAs (less so by DDAs) is perceived as giving revenue to the URA by taking revenue away from the county, school district, fire district, and other property taxing local governments.
5. Sales Tax TIF is also possible. A DDA may receive the incremental sales tax revenue from growth within a Plan of Development Area, but only from the City’s municipal sales tax.
6. Almost every year, the General Assembly considers various proposals to limit the use or amount or approval for TIF in URAs. So far, these efforts have not spread to DDAs, although it is likely that they will eventually. Therefore, any City that is considering authorizing TIF in a DDA Plan of Development should be sure to review the latest legislation.
7. A recurring problem for DDAs appears to be ‘triggering the TIF too early.’ The Plan of Development triggers the start of the time period for the collection of the TIF. The TIF lasts for a certain time period (up to 30 years with the possibility of an extension). If the TIF is started long before any significant new construction or redevelopment occurs within the Project Area, then little or no significant TIF revenue will be generated during

those early years, and the DDA tool is essentially wasted during this time. As a result, the total time period during which TIF can be received is shortened, and may not result in sufficient revenues to support desired projects. Before triggering the start of the TIF, the DDA and City should understand the market feasibility for investment and absorption within the downtown area, so that the TIF period can be initiated at the optimal time.

8. During the process of writing a Plan of Development with a TIF component, some DDAs enter into TIF sharing IGAs with one or more overlapping taxing entities. These IGAs may provide for a dollar amount or percentage of the TIF that the DDA will share back to the taxing entity to support the taxing entity's services. These agreements are usually entered into to avoid opposition (or gain support) of the DDA.

To simplify administration, and avoid potential confusion in the County Assessor and Treasurer's offices, these sharing agreements tend to have the full amount of the TIF revenue paid to the DDA and then the DDA pays the taxing entities, rather than asking the County to allocate the TIF revenues between them.

9. Using TIF to repay bonds is handled in Chapter 8 of this Manual.

B. Fees, Rates, Tolls, Rents and Charges:

1. The Board has the power to fix, and from time to time, increase or decrease fees, rates, tolls, rents or charges for use of any property of the DDA or under control of the DDA. C.R.S. § 31-25-808(1)(e).
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.
3. Although not required by state statute, some local government 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.

C. Donations: The DDA may accept gifts. The DDA may accept grants from other governments if the DDA has the authority under TABOR to do so.

D. A DDA may accept "such other revenue sources as are approved by [City Council]."

C.R.S. 31-25-816(2) contains this introductory portion: "The operations of the authority shall be principally financed by the following sources [donations and the 5 mill property tax discussed below] and such other sources as may be approved by [City Council]."

City Council could probably approve special assessments as revenue. Maybe even a sales tax, if approved by DDA voters. There appears to be creative opportunities in this area concerning special assessments and other revenue sources.

Special assessments are charges imposed against property in the DDA that are based on the value of the benefit that the property receives from the improvement or service.

The state law procedures to implement a special assessment are found in § 31-25-501, 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.

E. Mill Levy:

1. A DDA, through action by City Council, may have the power (in the organizing ordinance and vote of the DDA electors) to impose an “ad valorem mill levy” of up to 5 mills against taxable property in the DDA. This is a property tax. The rate of the tax, that is, the number of mills, must be uniform throughout the DDA. 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 in the DDA 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 DDA should consult a knowledgeable attorney to help with the process. After the first levy, the procedure rarely requires much, if any, attorney assistance.

F. Combinations of Revenue Sources:

A DDA can use any combination of the above revenue sources that are approved by City Council and in the organizing ordinance, voted authority, and annual budget.

G. Budget:

1. The DDA must adopt an annual budget §29-1-103, C.R.S. The DDA’s fiscal year is the calendar year. The DDA statute also requires that the City Council also approve the DDA budget C.R.S. 31-25-816(1).
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.

The DDA will want to consult its attorney; however, the statutes appear to be written for the DDA to file a planned budget with the City, have the City complete the approval process for the budget and mill levy, and have the DDA Board hold the required public hearing on the budget (see 3 and 4 below), and thereafter the DDA 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 and the final budget approved by the DDA 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 DDA to decide.

3. Upon receipt of the proposed budget, the DDA 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 DDA 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 both the DDA and the City 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.

H. Appropriation and Amended Budgets:

1. Expenditures of the DDA must be made in accordance with an annual appropriation of DDA 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.
3. It is not clear whether the City Council must approve budget amendments. It would be a good idea to ask them.

I. Public Funds and Investments:

1. Funds of the DDA are 'public funds' and are to be used for public purposes within the scope of the DDA's powers. However, development and redevelopment of property within the boundary area in furtherance of the Plan of Development is a legitimate public purpose for the DDA. Thus, contrary to popular belief, there is no statutory requirement that TIF revenues may only be spent on "public" improvements. A DDA Board or municipality may so require as a matter of public policy, or it may be required to comply with Internal Revenue Service regulations because TIF revenues will be monetized using tax exempt municipal bonds, but it is not a requirement of the statute.

2. Investments:

The DDA may invest public funds in investment vehicles allowed by the State. §24-75-601.1 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, such as COLOTRUST or CSAFE.

Refer to C.R.S. §24-75-601.1, 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 DDA'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 DDA 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.

J. 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 DDA is a local government (see footnote 1).
- 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 DDA operations may be 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 DDA if the enterprise revenues were subject to TABOR's rigid revenue limits.
- 4. TABOR is annoyingly complex. Please consult the DDA's attorney as questions arise.

CHAPTER VIII - DEBT

A. Authorization:

In its organizing ordinance, plan of development, and voted authority, the City, on behalf of the DDA may be authorized to borrow money and incur indebtedness in the form of bonds, notes, and contracts that are the financial obligation of the DDA (and not the City). 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. Tax Increment Financing (TIF Bonds)

TIF Bonds are bonds, notes, or other multiple fiscal year financial obligations that use the proceeds of the property or sales tax increment (or both) as a source of revenue to pay the debt service of the bonds.

For many years, URAs have issued TIF Bonds to finance their redevelopment projects. TIF Bonds have two significant risks for the bond buyer (or investor):

(a) the risk that growth in property value or sales tax revenue will not occur as quickly or as much as expected, and

(b) the risk that the TIF time period will expire before the bonds are fully repaid. As a result of the risks, interest rates may be high and the pool of investors may be small.

Our overall recommendation for any DDA that is considering asking the City to issue bonds is to consult with knowledgeable bond counsel and disclosure counsel as early in the process as possible. There are very few knowledgeable counsel in Colorado, however, bond counsel will be a tremendous help in guiding the DDA through the process and getting the deal done. In addition to those attorneys, a knowledgeable municipal financial advisor, banker, or underwriter will also be a huge help. Consult with them early and often.

Usually, but not always, bond counsel, disclosure counsel, and the financial advisors will work on what amounts to a contingent fee arrangement, and are not paid unless the bonds are sold.

2. Revenue Obligations:

Specifically identified non-tax revenues of the DDA may be 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, and generally have shorter terms.

3. General Obligations:

General obligation bonds are repaid, at least in part, with pledged 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.

4. Special Assessment Bonds:

Subject to an election in the DDA, it should be possible for City Council to approve a DDA's power to impose and collect special assessments against property in the DDA that is specially benefitted by an improvement and to authorize bonds can be issued that are repaid from the revenue from the assessments.

5. 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.

6. 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 DDA, with City approval, appropriating money each year, and are often secured by a lien (or mortgage) on the item being purchased. At times when the DDA 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 (890 P.2d 199 (1994))*.

7. 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.

8. Other:

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

C. Voter Approval Required:

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

D. Annual Appropriation Notes:

Occasionally, a DDA may have a short term cash flow problem and a "friend" who is willing to help the DDA get through the immediate problem. The friend may have an expectation of being repaid at some point in the future, but only "if and when" the DDA has the money to pay. Repayment, if any, is contingent on the DDA 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 DDA entering into an annual appropriation obligation.

E. Bankruptcy Protection:

If the DDA experiences severe financial distress, bankruptcy protection may be available under Chapter 9 of the United States Bankruptcy Code. But, maybe not.

CHAPTER IX – AUDITS

A. Exemption from Audit:

1. A DDA with less than \$750,000 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 an annual audit to be made of the financial statements of the DDA if the revenue or spending exceeds \$750,000 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 DDA §29-1-606, C.R.S. An extension of time to complete the audit may be available if requested from the State Auditor.

3. If bonds have been issued, the terms of the bonds may require the DDA to complete an audit regardless of the size of the DDA budget.

C. Coordination with City Audit:

Under governmental accounting standards, the City’s appointment of the DDA Board or approval of the annual budget are generally considered to make the DDA a “component unit” of the City. As a result, the DDA’s audit is usually (but perhaps not always) incorporated into the City’s audit. Thus, the City may request that the DDA 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 DDA. The DDA should contact the City finance director to check on the City’s expectations.

CHAPTER X- CONTRACTING

A. Construction Contracts:

1. DDA bidding:

Neither state nor federal law imposes any requirement that a DDA receive bids or conduct other competitive processes prior to entering into a contract. The DDA may, however, adopt its own public 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 DDA 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 requires 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. Sometimes, other surety such as a letter of credit or cash deposit is used rather than a bond.

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 DDA may not contract for a public works project in an amount in excess of the amount appropriated by the DDA 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 DDA'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 DDA 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 DDA 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 bidding process is required for DDA 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 DDA (not necessarily always the attorney) should review each contract before it is signed and should usually recommend changes, because contracts are normally tendered by the vendors and therefore slanted to their favor until they are 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 DDA 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 DDA may confront:

A. Acquisition Issues:

The DDA may acquire and hold property relating to its public purposes.

1. Title Insurance and Title Documents:

While not required, the purchase of adequate title insurance is usually recommended for the DDA'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 DDA 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 DDA may have 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 expensive 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 DDA has no power of condemnation (A.K.A. eminent domain).

C. Easements, Leases, and Other Property Interests:

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

The DDA 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 DDA property) by adverse possession.

E. Disposition of Property

A DDA may dispose of or lease property, but must do so at “not less than fair value (as determined by the authority and the governing body).” C.R.S. §31-25-808(2). Note that this requirement is not for “fair market value,” a commonly used term in this context. Nor is an appraisal required. Rather, the statute provides that, “in determining the fair value of real property for such uses, an authority shall take into account and give consideration to the uses provided in such plan; the restrictions upon and the covenants, conditions, and obligations assumed by the purchaser or lessee; and the objectives of such plan.” in other words, the DDA can include in calculating the value any obligations that a developer is obliged to undertake to improve, rehabilitate, or develop property pursuant to an agreement, in deciding what constitutes “fair value.”

F. Relationship to Municipal Powers:

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

1. Zoning:

The DDA is subject to the applicable zoning plan. However, if a proposed project is denied by the municipality, the DDA 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 DDA due to its close relationship with the municipality.

2. Subdivisions:

The DDA is subject to the applicable subdivision regulations. The DDA’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 DDA 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 Claims:

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 Prosecution:

a. The Governmental Immunity Act offers no protection from criminal actions.

b. Common potential areas of criminal exposure of directors and employees 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. (the amounts increase by inflation every few years).
 4. The Act also imposes procedural requirements on any claimant against the DDA, 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 DDA 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 DDA 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. DDA Boards may 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 DDA, 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 DDA 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 DDA, 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 DDA 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 DDA funds, and may only be used to pay operating expenses of the fund and claims made against the DDA §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. CIRSA is another pool that may provide coverage.

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.

G. Litigation :

State law provides that a DDA may sue and be sued.

If the DDA is sued, the first step is supposed to be a consultation between the plaintiff's attorney and the defendant's attorney. But, these consultations do not always happen, and a "pro se" litigant (a person representing himself or herself) might skip the consultation step. In that case, a director may be given (or mailed) a summons and complaint against the DDA. If that happens, the Director must contact the DDA's attorney immediately, who will hopefully "take it from there," which may include contacting the attorney on the other side, the DDA's insurance carrier, the City, other Board members, and whoever, and possibly asking for a Board meeting and mounting a defense.

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 DDA 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 DDA's business office. Failure to make the requisite postings could subject the DDA 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 local governments (in fact, most of them) do not have enough work to justify a full-time staff. Instead, these smaller governments are managed by volunteers (usually Board members) or by "independent contractors."

Most independent contractors who provide services to DDAs can be grouped into four basic categories: (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 districts without employees will sometimes enter into a contract with an experienced individual, who will then manage the district. 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 DDA in the future.
3. One local government (such as a city) can provide management services for another (such as a DDA) by an intergovernmental agreement between the two. The scope of work and payment provisions can be very flexible.
4. A DDA may contract with a nonprofit business association operating in Downtown for management. 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 DDA from its 'private work' as a business association or local chamber of commerce.

CHAPTER XIV – POTENTIAL DDA LEGISLATION

A. URA Issues, DDA Issues

The use of TIF by Urban Renewal Authorities has generated concerns from Counties, School Districts, Fire Districts, and other property taxing entities who believe that TIF improperly diverts property tax increment for projects that some feel do not fit the goal of fixing “blight” or urban redevelopment, or that they believe would have occurred anyway. As a result, there has been recent legislation that limits URA tax increment powers by limiting the ability to use a URA on “greenfield” sites and by requiring consultation, consent and TIF revenue sharing between the URA and taxing entities.

DDAs so far have not been included in these legislative limitations, but at least one draft bill may be introduced into the 2017 legislative session. Who knows?

Downtowns in general struggle to compete with outlying office and retail parks due to downtown’s older buildings, dated infrastructure, energy inefficiency and other factors. Loss of TIF as an tool to catalyze investment in these downtown areas will make matters worse.

CHAPTER XV - CONCLUSION

The care and operation of a DDA take hard work and determination. The Board and the City have 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 DDA work is a challenge, but the reward is a better community: cleaner, safer, prettier, funner, and astonishing.

DOWNTOWN DEVELOPMENT AUTHORITIES

MENU OF SERVICES



Membership

DDAs may join DCI as a Public or Nonprofit Partner Organization that allows all employees of your organization to use DCI membership benefits for a single payment. As a member, receive discounts on our educational events and take advantage of our networking and professional development opportunities.

Guide to Downtown Redevelopment Financing Mechanisms

Learn and understand the differences between Business Improvement Districts, Downtown Development Authorities, and Urban Renewal Authorities as well as the projects and tools that other districts have successfully implemented in their area.

District Quarterly Meetings

At DCI's quarterly meetings for Downtown Development Authorities, leaders and board members from DDAs across the state join in discussion of their latest projects, successes, and challenges and share the methods that have led to successful implementation.

Development & Improvement Districts Forums

The monthly DIDs Forums feature engaging discussions led by area specialists to provide special districts information and a space to ask questions about topics such as financing mechanisms, engagement, and communications. Forum topics are released with the events calendar each year.

Annual IN THE GAME Downtown Conference

DCI's annual four-day conference is the premier space to gain resources, training, and ideas in all areas related to economic development and community viability in Colorado. Take advantage of our Challenge Studios workshops where participants worked side-by-side with leading industry experts and local peer networks to craft problem-solving plans that connect communities to supporting networks and resources, helping them to get the job done.

City Builder Forum

DCI hosts large and mid-sized communities and districts to help foster dialogue around innovation and problem solving for community and economic development in an urban setting. Through interactive dialogue and sharing, participants identify areas of collaboration, programming and creative solutions.

Technical Assistance

DCI will gather a team of specialists who will visit your community and outline a comprehensive plan of action to jumpstart your community's development projects. Participate in our year-long Downtown Sustainability Partnership program and receive a discount on DCI's trainings and events.

