

**RESOLUTION OF HIGH PLAINS UTILITY ASSISTANCE
CORPORATION REGARDING THE DISSOLUTION OF THE
ORGANIZATION**

WHEREAS the creation of the High Plains Utility Assistance (here after referred to as HPUA) Corporation, a 501(c)(3) public charity was started by Elizabeth A. Moulton in January 2010 with the stated purpose of assisting residents of Woodmen Hills who experience financial difficulty with monetary help in paying their Woodmen Hill Metropolitan District water bill.

WHEREAS the HPUA Corporation was created on the assumption that HPUA would operate solely on charitable contribution from the Woodmen Hills community and other entities.

WHEREAS the HPUA Corporation ultimately experienced additional request for financial assistance from Woodmen Hills residents.

WHEREAS the HPUA Corporation bank balance has dwindled to approximately three hundred and seventy three dollars.

WHEREAS the HPUA Corporation finds the current state of monetary contributions and expenditures to assist Woodmen Hills Metropolitan District customers untenable.

NOW, THEREFORE, it is hereby resolved by the Board Of Directors of the High Plains Utility Assistance Corporation as follows:

1. The HPUA Corporation Board of Director met on October 23, 2012 with all three members present and voted to dissolve HPUA contingent on completion of all paper work required by the State of Colorado and Federal laws.

2. The HPUA Corporation Board of Directors further voted to donate all remaining monies and assets in the HPUA account to Pikes Peak Community Assistance Association (PPCAA), a 501(c)(3) public charity.

RESOLVED THIS 22 Day Of May 2013.

HIGH PLAINS UTILITY ASSISTANCE
CORPORATION

By: Elizabeth Walton

Its: President

ATTEST:

Frank J. Goryaly

Secretary

Michelle Frouk

Treasurer

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MEMORANDUM

June 18, 2012

**CONFIDENTIAL
ATTORNEY/CLIENT PRIVILEGED**

VIA E-MAIL

TO: Board of Directors
Gene Cozzolino, Operations Manager
Woodmen Hills Metropolitan District

FROM: Evan D. Ela and Kathryn L. Garner 

RE: Donations to High Plains Utility Assistance

INTRODUCTION

We understand that the District has been asked to consider different options for including donations to the High Plains Utility Association ("High Plains") on the District's customer water and sewer utility bills. We understand High Plains to be a 501(c)(3) nonprofit organization that provides financial assistance to low-income members of the Woodmen Hills community to assist in paying their water and sewer bills, and that the District currently includes an option on its water and sewer bills that allows customers to choose to include a donation to High Plains with their utility payment ("Opt-In Donation"). The District has been requested to automatically round up monthly utility charges to the next whole dollar amount, with the round-up amount donated to High Plains ("Automatic Donation"). While recognizing that both of these funding mechanisms are highly effective and would benefit the community, they also place the District at some legal risk. This memo will explain the risks involved as well as the steps that the Board should take to minimize those risks.

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DISCUSSION

1. Low-Income Assistance for Utility Bills.

Many people are familiar with being able to donate to a low-income assistance fund through their electric or gas utility provider. The Colorado legislature has established a fund for providing low-income financial assistance to Colorado residents for electric and gas utility bills. §40-8.7-104, C.R.S. In fact, gas and electric utility providers in Colorado are required to notify customers of the fund and provide an opportunity to donate to the fund as part of their monthly bill. The Public Utilities Commission regulates the requirements for gas and electric utilities to solicit donations to such assistance fund. PUC Rules 3411 and 3412. However, no such legislative directive or financial assistance fund exists for water and sewer utilities.

2. Legal Risks in Collecting Donations for High Plains.

Governmental entities are forbidden from contributing funds or in-kind services to private organizations, including nonprofits such as High Plains. Article V, Section 34 of the Colorado Constitution forbids the State legislature from appropriating any funds for charitable or benevolent purposes to any person, corporation or community not under the absolute control of the State. The District is a quasi-municipal legal subdivision of the State, and therefore this prohibition extends to the District. Similarly, Article XI, Section 2 of the Colorado Constitution prohibits the District from making any donation or grant to, or in aid of, any corporation or company. By facilitating donations through the use of its billing statements, the District is expending public resources (staff time, computers, legal review, etc.) to benefit this private organization. Even if the District is not directly donating to High Plains, the District's collection and routing of donations to this private organization is a contribution of in-kind services by the District, in violation of the Colorado Constitution.

The Colorado courts have occasionally recognized an exception that allows governmental entities to make donations if a public benefit is received in exchange for the donation. There are no specific requirements or tests for what kind of public benefit the governmental entity must receive in order for a donation or appropriation to be valid under the State Constitution. Instead, it seems to be up to the judge's discretion. Actions by governmental entities that have been found to have been made for a "public purpose" include the following:

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- Canyon City was allowed to subsidize the cost of modernizing the Royal Gorge Bridge, which was owned by a private company and located on lands owned by the City. The public purpose served by the subsidy was improving and extending the life of the bridge, which was a valuable source of revenue for the City. *Witcher v. Canon City*, 716 P.2d 445 (Colo. 1986)
- Relocation benefits provided by the government to those displaced by an urban renewal project where such displaced individuals received no other net benefit from redevelopment of the property has been found to serve a public purpose. *Denver Urban Renewal Authority v. Byrne*, 618 P.2d 1374, 1383 (Colo. 1980).
- Similarly, we are aware that many municipalities often provide sales tax incentives to large retailers who locate stores within the town limits. We are not aware of any cases challenging these types of incentive programs as an illegal grant in aid of a private company.

The District has an argument that the assistance it provides to High Plains in collecting donations directly benefits the District by resulting in a higher percentage of District bills being paid. Thus, there is a direct monetary benefit to the District. Unfortunately, because the courts have not articulated a specific test, what qualifies as a “public purpose” is really at the discretion of the judge or judges hearing a specific case.

3. Opt-In Donations.

We understand that the District’s water and sewer bills currently allow customers to choose to include a donation to High Plains with their utility payment. If the Board chooses to continue promoting these Opt-In Donations, it is important for the Board establish a record of the public purpose for such program. We recommend that the Board adopt a Resolution setting forth the various public purposes that support the use of District resources to collect donations for High Plains.

4. Automatic Donations.

The District has been asked to take an additional step of automatically rounding up monthly utility charges to the next whole dollar amount, with the round-up amount donated to High Plains. This type of Automatic Donation is similar to a rate increase. Rates for sewer and water utilities are required to be rationally related to the cost of

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providing the services; however rounding up utility charges to the next dollar amount is not related to the actual cost of service. For example, Household A with a \$20.10 monthly water and sewer charge would be charged 90¢ for the donation to High Plains. Household B with a \$200.75 monthly water and sewer charge would be charged a lesser donation in the amount of 25¢, despite clearly having a higher sewer and water use than Household A.

We believe that a better approach is to establish a uniform automatic donation that is related to the amount of money needed by High Plains to assist District customers in paying their bills. High Plains would need to provide data on the amount of financial assistance that is needed by, and provided to, District customers on an annual basis. That number would then be divided by the total number of District customers to establish an amount per month per account to achieve the desired funding level. This calculation should also factor in a percentage of non-participants, say 30% for example, until a few months of operation can provide a more precise estimate of the level of non-participation.

The District should allow customers to opt-out of these automatic donations for a couple of reasons.

- a. Because of the constitutional prohibition of using appropriated funds for this type of purpose, by making the additional fee voluntary it arguably would not contribute to the District's annual revenues nor be allocated as appropriated funds. All funds would pass through to the High Plains, and none of the revenues pass through amount would be included in District budget calculations (it would however need to be accounted for and noted in the annual audit).
- b. Customer accounts that are receiving a benefit from High Plains should probably be opted out of the donation program avoid the use of assistance funds as a source of the assistance funds.

Because this type of donation program is similar to a rate increase, we recommend that the District hold a properly noticed public hearing to explain the workings of the program and the rational basis for the amount of the donation and the assumptions underlying the calculations. In addition, adoption of any program, including the voluntary one currently being operated, should be approved by the Board after such a hearing by Resolution and adoption of a policy governing the program.

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CONCLUSION

The Board should be fully aware of the political and legal risks it undertakes in collecting donations for High Plains. While you cannot eliminate all legal risks, the Board should take certain steps to minimize its exposure. If the District wishes to continue to include the Opt-In Donation on the District's customer monthly bills, the Board should adopt a Resolution that establishes the public purpose behind the program. We do not recommend moving to an Automatic Donation that would round up the monthly bills to the next dollar amount. Instead, a better approach would be to establish a uniform charge based on High Plain's anticipated annual need. Regardless if the Board chooses to continue the Opt-In Donation or move to an Automatic Donation, a public process adopting the program and policy should be initiated. We can assist in preparing the necessary Resolution and policy documents.

We hope this information is helpful. Please feel free to contact us with any questions or comments.

EDE/KLG:mjw