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## BACK TO THE FUTURE: A TABOR TUNE UP

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### TABOR Passed November 3, 1992



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### TABOR Passed November 3, 1992

- "You can't handle the truth!" - Jack Nicholson, in A Few Good Men
- "There's no crying in baseball!" - Tom Hanks, in A League of Their Own
- "Friends don't let friends drive drunk"- US Dept. of Transportation
- "It's the economy, stupid" and "I didn't inhale." - Candidate for President Bill Clinton
- "Giant sucking sound"- Candidate for President Ross Perot
- "Made from the best stuff on Earth"-Snapple ad
- The Catholic Church didn't pardon Galileo until 1992 when Pope John Paul II admitted Galileo was right, 349 years after the condemnation
- President George H.W. Bush vomited on the Japanese Prime Minister during a state dinner

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### TABOR Passed November 3, 1992

- TABOR changed the governmental landscape
- Its impact has not been as significant because
  - For much of the time Colorado had a very good economy
  - The courts have construed TABOR in favor of the government
  - Voters have approved local election questions

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### TABOR Requires Elections On

- Any new tax, tax rate increase, mill levy above that for the prior year, valuation for assessment ratio increase for a property class, or extension of an expiring tax, or a tax policy change directly causing a net tax revenue gain to any district

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### TABOR Requires Elections On

- Except for refinancing district bonded debt at a lower interest rate or adding new employees to existing district pension plans, creation of any multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever without adequate present cash reserves pledged irrevocably and held for payments in all future fiscal years

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**TABOR Requires Elections On**

- Keeping revenues which exceed TABOR limits

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**TABOR Limits Government Revenue**

- TABOR limits the amount of revenue which a government may receive in any year even though it is phrased as a limit on fiscal year spending
- The limit for most local governments is the amount of revenue collected in the prior year adjusted for inflation plus local growth
  - Inflation is the percentage change in the Denver-Boulder CPI
  - Local growth is the net change in the actual value of real property from construction of taxable real property minus destruction of similar improvements and additions to, minus deletions from, taxable real property
    - For schools, percentage change in student enrollment

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**TABOR Revenue Exceptions**

- Enterprises
- Voter Approved Revenue Changes
- Emergency Tax Revenues
- Refunds
- Gifts/Donations
- Federal Funds
- Pension Contributions and Earnings
- Reserve Transfers or Expenditures
- Damage Awards
- Property Sales
- Lottery Receipts
- Collections For Another Government

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**TABOR Limits Property Tax Revenue**

- TABOR also limits the amount of property tax revenue which a government may receive in any year
- The limit for most local governments is the amount of revenue collected in the prior year adjusted for inflation plus local growth
  - Same formula as the revenue limit

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**Ratchet Effect**

Because TABOR looks at last year's revenues if revenues decline due to a recession the government cannot return to the pre-recession expenditures without voter approval

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**Property Tax Mill Levy**

- If property values increase, the mill levy may have to be reduced due to TABOR's property tax revenue limit
  - Because growth in property values exceeds growth in CPI and local growth
- If property values decrease, the mill levy cannot be increased to produce the same revenues without a vote

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### Can Vote Out of Revenue Limits

- TABOR allows a government to ask voters if it may keep excess revenue
  - It does not allow voters to exempt the government from all of TABOR's provisions
    - voters may approve a delay of up to four years in voting on ballot issues

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### TABOR Prohibits Certain Taxes

- Real Estate Transfer Tax
- State Property Tax
- Local Income Tax

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### TABOR Requires a Vote on New Debt

- Excluded from voting are:
  - Refundings at a lower rate
  - Lease-Purchase Agreements subject to annual appropriation (This is not in TABOR, but a judicial interpretation)
  - Enterprise debt
    - Government Owned Business
    - With Power to Issue Revenue Bonds
    - Which receives less than 10% of its annual revenues from State and Local Government Grants
  - Requires vote on debt which previously could be issued without a vote
    - Assessment bonds
    - Excise tax revenue bonds

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**TABOR Limits Financial Elections to November**

- Government may have an election in an odd year or even year
  - Even year means financial election in conjunction with statewide or federal races

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**TABOR Requires the Maintenance of an Emergency Reserve Equal to 3% of Fiscal Year Spending (Excluding Debt Service)**

- The reserve must be replenished in the next year

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**TABOR Allows Local Governments to End Subsidies for State Mandates**

- This is one area where the courts have not interpreted TABOR in favor of local governments

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**TABOR Enforcement**

- Revenue collected, kept or spent illegally for four years must be refunded with 10% simple interest
- Governments may use any reasonable method of refunds
- Subject to judicial review, districts may use any reasonable method for refunds under this section, including temporary tax credits or rate reductions

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**TABOR Enforcement**

- Successful plaintiffs are allowed costs and attorney's fees
  - City of Wheat Ridge v. Cerveney, 913 P.2d 1110 (Colo. 1996)

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**Unresolved or Recurring Questions**

- Why this provision of TABOR might mean that a refund is due to taxpayers even for a government which is debruced:
  - “Except by later voter approval, if a tax increase or fiscal year spending exceeds any estimate in (b) (iii) for the same fiscal year, the tax increase is thereafter reduced up to 100% in proportion to the combined dollar excess, and the combined excess revenue refunded in the next fiscal year.”

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### Unresolved or Recurring Questions

- Repeal of an exemption from tax: is it a Tax Policy Change or New Tax?
  - Mesa County Bd. of County Com'rs v. State, 203 P.3d 519 (Colo. 2009)
  - HCA-Healthone, LLC v. City of Lone Tree, 197 P.3d 236 (Colo.App.Div. 5 2008)
  - TABOR Foundation case against RTD and SCFD

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### Unresolved or Recurring Questions

- Can the mill levy be increased?
  - Generally no, without voter approval
  - Bolt v. Arapahoe County School Dist. No. Six, 898 P.2d 525 (Colo. 1995)
  - Bruce v. Pikes Peak Library Dist., 155 P.3d 630 (Colo.App. Div. 4 2007)

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### Unresolved or Recurring Questions

- May a tax be levied to pay a judgment without a vote?
  - 13-60-101 and 24-10-113, C.R.S.
  - “When annual district revenue is less than annual payments on general obligation bonds, pensions and final court judgments, (4)(a) and (7) shall be suspended to provide for the deficiency.”
  - Huber v. Colorado Mining Ass'n, 264 P.3d 884 (Colo. 2011)

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### Unresolved or Recurring Questions

- Can a subsequent election rectify a tax which was imposed improperly?
  - Section 4(a) requires voter approval in advance
  - HCA-Healthone, LLC v. City of Lone Tree, 197 P.3d 236 (Colo.App.Div. 5 2008)

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### Unresolved or Recurring Questions

- If a tax was approved by voters prior to 1992 are the revenues exempt from the TABOR revenue limits?
  - Nicholl v. E-470 Public Highway Authority, 896 P.2d 859 (Colo. 1995): "...we must assume that, when the voters authorized the Authority to ...they also authorized the Authority to spend for that purpose whatever revenues it collected."

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### Unresolved or Recurring Questions

- Can an emergency reserve be funded with buildings or a letter of credit?
  - State of Colorado uses buildings
    - District Court held that this is permitted
  - See 22-44-105 for authorization for school districts

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**Unresolved or Recurring Questions**

- Emergency
  - What is an emergency?
  - Use of emergency reserve.
  - Emergency taxes.

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**Unresolved or Recurring Questions**

- What is an enterprise
  - Tabor Foundation v. Colorado Bridge Enterprise, 353 P.3d 896 (Colo. App. 2014)
  - Hospital Provider Fee Memo from Legislative Legal Services
- What is a grant?
- Can the enterprise make a loan or otherwise transfer money to the general fund?

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**Unresolved or Recurring Questions**

- Is it a fee or a tax?
  - Bloom v. City of Fort Collins, 784 P.2d 304 (Colo. 1989)
  - Barber v. Ritter, 196 P.3d 238 (Colo. 2008)
  - Tabor Foundation v. Colorado Bridge Enterprise, 353 P.3d 896 (Colo. App. 2014)
  - Colorado Union of Taxpayers Foundation v. City of Aspen, 2015COA162 (Colo. App. 2015)
  - NFIB suit against Secretary of State

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**Unresolved or Recurring Questions**

- Are annual appropriation leases subject to a vote?
  - Colo. Criminal Justice Reform Coal. v. Ortiz, 121 P.3d 288 (Colo.App.2005)
  - Board of County Com'rs of County of Boulder v. Dougherty, Dawkins, Strand & Bigelow Inc., 890 P.2d 199 (Colo.App. 1994)
  - Bruce v. Pikes Peak Library Dist., 155 P.3d 630 (Colo.App. 2007)
  - Fischer v. City of Colorado Springs, 260 P.3d 331 (Colo.App. 2010)

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**Unresolved or Recurring Questions**

- Are other types of appropriation obligations subject to the election requirement?
  - In re Submission of Interrogatories on House Bill 99-1325, 979 P.2d 549 (Colo. 1999)
  - City of Golden v. Parker, 138 P.3d 285 (Colo. 2006)

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**Unresolved or Recurring Questions**

- Is creation of a new pension plan a multiple fiscal year financial obligation subject to voter approval?
  - Adding new employees to an existing plan is expressly excluded from the Section 4 vote requirement

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**Unresolved or Recurring Questions**

- Can a government vote a multiple fiscal year financial obligation which is not evidenced by bonds without saying:
  - SHALL \_\_\_\_ DEBT BE INCREASED \$ \_\_\_\_ WITH A REPAYMENT COST OF \$ \_\_\_\_....
  - 5 day statute of limitation to challenge form and content. 1-11-203.5, C.R.S.

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**Unresolved or Recurring Questions**

- Is annexation of property a tax policy change or new tax?
  - District Court in City of Lone Tree v. Regional Transportation District, Case Number 03 CV 291 held that the inclusion of property into the Regional Transportation District is not a tax increase, new tax, or tax policy change which requires a vote under TABOR
  - District Court case-Upper Arkansas Water Conservancy District

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**Unresolved or Recurring Questions**

- How are intergovernmental revenues handled for the revenue limit?
  - In Bishop v. Regional Transportation District, Denver District Court, Case No. 95CV4701, the court ruled that money paid by the City and County of Denver to RTD to make improvements to Denver's streets while RTD was building a light rail project on such streets did not need to be included in RTD's TABOR limits

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### Unresolved or Recurring Questions

- What do these sentences mean:
  - Future creation of district bonded debt shall increase, and retiring or refinancing district bonded debt shall lower, fiscal year spending and property tax revenue by the annual debt service so funded. Debt service changes, reductions, (1) and (3) (c) refunds, and voter-approved revenue changes are dollar amounts that are exceptions to, and not part of, any district base.

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### Unresolved or Recurring Questions

- Is there any program which a government can turn back to the State under the mandate provision?
  - Romer v. Board of County Com'rs for County of Weld, State of Colo., 897 P.2d 779 (Colo. 1995)
  - State ex rel. Norton v. Board of County Com'rs of Mesa County, 897 P.2d 788 (Colo. 1995)
  - Gessler v. Doty, 272 P.3d 1131, 2012 COA 4 (Colo.App. 2012)

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### Unresolved or Recurring Questions

- Standing Issues
  - Any Colorado Taxpayer - Nicholl v. E-470 Public Highway Authority, 896 P.2d 859 (Colo. 1995)
  - Taxpayer who did not pay fees - Barber v. Ritter, 196 P.3d 238 (Colo. 2008)
  - But governments?
    - Romer v. Fountain Sanitation Dist., 898 P.2d 37 (Colo. 1995)
    - Bd. of Comm'n v. City of Broomfield, 7 P.3d 1033 (Colo.App. 1999)

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Unresolved or Recurring Questions

- Is an entity that does not have the power to tax subject to TABOR?
  - Campbell v. Orchard Mesa Irr. Dist., 972 P.2d 1037 (Colo. 1998)
  - Bd. of Comm'n v. City of Broomfield, 7 P.3d 1033 (Colo.App. 1999)
  - But see Submission of Interrogatories on Senate Bill 93-74, 852 P.2d 1 (Colo. 1993) regarding GOCO

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Unresolved or Recurring Questions

- Is compliance with TABOR required if the cost of an election would exceed the additional revenue?
  - Mesa County Bd. of County Com'rs v. State, 203 P.3d 519 (Colo. 2009)

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Unresolved or Recurring Questions

- Does TABOR violate the U.S. Constitution?
  - Kerr case is pending

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Bonus CPE Credits

- There was another Section 20 of Article X of the Constitution before TABOR
  - What was it?

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