

SUPREME COURT, STATE OF COLORADO

Case No. 93SA68

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BRIEF OF INTERESTED PARTIES: COLORADO MUNICIPAL LEAGUE, COLORADO COUNTIES, INC., AND SPECIAL DISTRICT ASSOCIATION OF COLORADO

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IN RE: SUBMISSION OF INTERROGATORIES ON SENATE BILL 93-74

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Upon submission and acceptance of interrogatories from the General Assembly pursuant to Article VI, Section 3 of the Constitution of the State of Colorado.

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## I. Interest of the Parties

The Colorado Municipal League, Colorado Counties, Inc., and the Special District Association of Colorado submit this brief as persons interested in the Court's response to interrogatory number 2 regarding net lottery proceeds. Municipalities, counties and special districts are, like the State, lawfully entitled to a portion of net lottery proceeds in accordance with Article XXVII of the Colorado Constitution ("GO Colorado") and, like the State, are subject to certain spending limitations as set forth in Section 20 of Article X of the Colorado Constitution ("TABOR"). Accordingly, the Court's determination of whether or not net lottery proceeds are subject to limitations on State fiscal year spending may set a significant precedent for determining whether similar limitations exist at the local level.

The Colorado Municipal League is a nonprofit voluntary association of 250 municipalities throughout the state of Colorado, including all Colorado municipalities above 2,000 population, and the vast majority of those having a population of 2,000 or less. The League's membership represents 99.9 per cent of the municipal population of Colorado. The League provides a variety of services to Colorado municipalities, including advocacy in the appellate courts and before the Colorado General Assembly.

Colorado Counties, Inc. is a Colorado non-profit corporation founded in 1907 that encourages the counties of the State to work together for the improved administration of county government and, through discussion and united action, works towards the solution of the many financial, administrative, legal, legislative, and other problems that exist in connection with the administration of county governments.

The Special District Association is a Colorado not for profit corporation formed to represent and serve special districts which are organized and operate pursuant to Colorado statutory authorization. The Association has 277 special district members including, of greatest relevance to this case, recreation districts and other districts which are authorized to provide park and recreation services. These members are typical of the approximately eleven hundred special districts which exist in Colorado.

Municipalities, counties, and special districts are expressly entitled to receive certain portions of net lottery proceeds pursuant to the following provisions of GO Colorado:

A. Pursuant to Sec. 3(1)(a)(I), local governments will continue to receive disbursements from the Conservation Trust Fund through the fourth quarter of the State's Fiscal Year 1997-1998 according to current statutory formulas set forth in CRS 24-35-210(4)(b)(I) and CRS 29-21-101.

B. Pursuant to Sec. 3(1)(b)(I), local governments will be entitled to receive forty percent of net lottery proceeds commencing with the first quarter of the State's Fiscal Year 1998-1999.

C. Pursuant to Sec. 5(1)(a)(III), local governments are entitled to receive competitive grants from the GO Colorado Trust Fund to identify, acquire and manage open space and natural areas of statewide significance.

D. Pursuant to Sec. 5(1)(a)(IV), local governments are entitled to receive competitive matching grants from the GO Colorado Trust Fund to acquire, develop or manage open lands and parks.

Fiscal year spending by municipalities, counties and special districts is presumably subject to the spending limitations set forth in TABOR. TABOR purports to apply to any "district" which is defined to include "the state or any local government, excluding enterprises". Article X, Section 20(2)(b). As with the State, TABOR makes it incumbent upon local governments to establish a fiscal year spending base and then live within certain limitations on annual increases in fiscal year spending. Article X, Section 20(7). For both the State and local governments, fiscal year spending is defined the same way at Article X, Section 20(2)(e).

Thus, it is critically important for local governments to understand whether the revenues and expenditures which were contemplated and authorized by the voters who approved GO Colorado are somehow restrained by TABOR. Although interrogatory number 2 specifically addresses only limitations on State fiscal year spending, the Court's answer to this question may significantly

affect the manner in which GO Colorado distributions are treated by local governments as well.

II. Statement of the Issue

Are any lottery proceeds dedicated pursuant to the provisions of Article XXVII of the state Constitution, which was also approved at the 1992 general election, subject to the limitation on state fiscal year spending set forth in Section 20(7)(a) of Article X of the state Constitution?

III. Statement of the Case

A. Nature of the Case

This is an original proceeding before the Supreme Court upon acceptance of interrogatories from the Colorado General Assembly based upon SB 93-74 in accordance with the Court's prerogative under Section 3 of Article VI of the Colorado Constitution.

B. Statement of Facts

The General Assembly is considering the adoption SB 93-74, a bill which purports to interpret TABOR and facilitate compliance with the State fiscal year spending limitations contained therein. Included within the conference committee report which has been



approved by both the House and the Senate is the following provision to be included in Section 1 of the bill:

**24-77-102. Definitions.** AS USED IN THIS ARTICLE, UNLESS THE CONTEXT OTHERWISE REQUIRES:

. . . .

(17) (a) "STATE FISCAL YEAR SPENDING" MEANS ALL STATE EXPENDITURES AND RESERVE INCREASES OCCURRING DURING ANY GIVEN FISCAL YEAR AS ESTABLISHED BY SECTION 24-30-204, INCLUDING BUT NOT LIMITED TO, STATE EXPENDITURES OR RESERVE INCREASES FROM:

. . . .

(III) NET LOTTERY PROCEEDS DISTRIBUTED TO THE CAPITAL CONSTRUCTION FUND FOR PAYMENT OF DEBT SERVICE ON THE OBLIGATIONS DESCRIBED IN SECTION 3 (1) (c) OF ARTICLE XXVII OF THE STATE CONSTITUTION FOR THE PERIOD THROUGH THE FOURTH QUARTER OF THE STATE'S FISCAL YEAR 1997-1998; AND

(IV) NET LOTTERY PROCEEDS ALLOCATED TO THE GENERAL FUND PURSUANT TO SECTION 3 (1) (b) (III) OF ARTICLE XXVII OF THE STATE CONSTITUTION FOR THE PERIOD BEGINNING WITH THE FIRST QUARTER OF THE STATE'S FISCAL YEAR 1998-1999.

(b) "STATE FISCAL YEAR SPENDING" DOES NOT INCLUDE RESERVE TRANSFERS OR EXPENDITURES OR ANY STATE EXPENDITURES OR RESERVE INCREASES:

. . . .

(IX) FROM NET PROCEEDS FROM STATE SUPERVISED LOTTERY GAMES, AS DEFINED IN SECTION 3 (1) OF ARTICLE XXVII OF THE STATE CONSTITUTION; EXCEPT THAT THOSE PORTIONS OF SUCH PROCEEDS WHICH ARE SPECIFIED IN SUBPARAGRAPHS (III) AND (IV) OF PARAGRAPH (a) OF THIS SUBSECTION (17) ARE INCLUDED IN STATE FISCAL YEAR SPENDING.

The TABOR amendment was adopted as a citizens' initiated constitutional amendment at the state general election on November 3, 1992 by a margin of 808,910 votes for and 698,775 votes against.

TABOR contains general provisions for restricting taxation, revenue, spending and indebtedness of both the state and local governments and provides that "its preferred interpretation shall reasonably restrain most the growth of government." Section 2(e) defines "fiscal year spending" for all governments and section 7 requires all governments to determine a fiscal year spending base and then restricts the rate at which fiscal year spending can grow. TABOR purports to supersede conflicting state constitutional provisions. TABOR does not expressly mention net lottery proceeds.

The GO Colorado amendment was also adopted as a citizens' initiated constitutional amendment at the state general election on November 3, 1992 but by a larger margin: 871,641 votes for and 629,370 votes against. GO Colorado relates specifically to how proceeds from the state supervised lottery (as authorized since 1980 pursuant to Section 2(7) of Article XVIII of the State Constitution) shall be spent. GO Colorado is precise in terms of defining both the percentages in which lottery proceeds shall be allocated to particular government entities and the purposes for which the money shall be spent. Section 3(1) provides that all net lottery proceeds are "set aside, allocated, allotted, and continuously appropriated" for the purposes set forth therein. A substantial portion of the money is distributed through the Great Outdoors Colorado Trust Fund by an autonomous Board which is defined by Section 6(3) to be a "political subdivision of the state". Section 4 provides, "All moneys deposited in the Trust

Fund shall remain in trust for the purposes set forth in this article, and no part thereof shall be used or appropriated for any other purpose, nor made subject to any other tax, charge, fee or restriction." As with TABOR, GO Colorado purports to supersede any other law which may be in conflict with it. Article XXVII, Section 11.

#### IV. Summary of Argument

The Court should answer the interrogatory in the negative and, in so doing, rule that net lottery proceeds are not to be included within the State's fiscal year spending base and are therefore not subject to the spending limitations set forth in TABOR. To rule otherwise would create an absurd, unjust and unreasonable result and would frustrate the manifest will of the voters as expressed in both TABOR and GO Colorado. The two amendments can be reconciled if and only if the Court finds that net lottery proceeds stand separate and apart from State fiscal year spending. To the extent the court deems there to be conflict between the two, GO Colorado should control because it received more votes at the same election and because its specific spending provisions supersede the more general spending provisions contained in TABOR.

In the alternative, if the Court determines that net lottery proceeds should somehow be included within State fiscal year spending, the Court should nevertheless find that certain major

portions of net lottery proceeds are exceptions to "fiscal year spending" as the term is defined in TABOR, namely any monies which are merely "collections for another government" and any disbursements from the GO Colorado trust fund which may be construed as "gifts".

#### V. Argument

A. To Include Net Lottery Proceeds in the State's Fiscal Year Spending Base and Thereby Subject Them to TABOR's Spending Limitations Would Create Absurd, Unreasonable and Unjust Results and Would Frustrate the Purposes of GO Colorado.

Any argument must start from the premise that the Court intends to consider "the object to be accomplished and the mischief to be avoided" by both GO Colorado and TABOR. People v. Y.D.M., 593 P.2d 1356 (Colo. 1979). In so doing, the court must seek to determine what the people believed each amendment to mean when they accepted it as their fundamental law and, to this end, "words used in the Constitution are to be given the natural and popular meaning usually understood by the people who adopted them." Urbish v. Lamm, 761 P.2d 756 (Colo. 1988); Carrara Place v. Board of Equalization, 761 P.2d 197 (Colo. 1988). Finally, and perhaps most germane to this case, "Each provision of the constitution, both original and amended, should be construed if possible to avoid any conflict between the different parts of the constitution." Colorado Common Cause v. Bledsoe, 810 P.2d 201 (Colo. 1991).

"If language of a constitutional provision conveys a clear and definite meaning involving no absurdity or internal contradiction, any construction of such language must give full effect to that meaning." Dempsey v. Romer, 825 P.2d 44 (Colo. 1992) (emphasis added). It is axiomatic that, in construing any law, the court will do so in a manner which will not lead to an absurd, unreasonable or unjust result. Petition of S.O., 795 P.2d 254 (Colo 1990). On the contrary, the court must presume that those adopting the laws (in this case the people) intended the two amendments to work together in a way which would make sense.

The application of TABOR's revenue and spending limitations to net lottery proceeds would lead to absurd results for both the State and local governments.

At the outset, it is important to recognize how TABOR's spending limitations work. TABOR does not limit revenue and spending on a fund-by-fund, on a department-by-department, or on a line-item-by-line-item basis. Rather, Section 7(a) restricts spending by the state as a whole. Growth in the State's entire aggregate stream of revenues and expenditures is limited annually by the rate of inflation and population growth. Thus, as reflected in numerous provisions of SB 93-74, the General Assembly has recognized the need to establish an aggregate state spending base, to carefully determine all revenue and spending that can fairly be

characterized as being "of the state", and to apply the spending limitation to this gross amount.

One important consequence of the aggregate spending limitation is that, if one particular slice of the fiscal pie grows faster than the permissible rate of growth for the pie as a whole, then other pieces of the pie must suffer by being cut back (unless the government chooses to refund or obtain voter approval to keep and spend the "excess" revenue under Section 7(d) of TABOR).

GO Colorado evinces a detailed, comprehensive scheme for how the voters expect virtually all net lottery proceeds to be spent. (The only exception, as set forth in Section 3(1)(b)(III) is that, beginning in FY 1997-1998, annual receipts in the GO Colorado Trust Fund in excess of \$35 million adjusted for inflation merely goes to the State general fund.) Significantly, the earmarked purposes for net lottery proceeds are expressed as percentages dedicated to the Division of Parks and Outdoor Recreation and to the Conservation Trust Fund, with absolutely no gross limitation whatsoever on how much money may ultimately accrue and be spent for these purposes. A reasonable inference which can be drawn from this approach is that the hundreds of thousands of voters who supported GO Colorado would be happy to see the lottery grow by leaps and bounds, with a concomitant increase in spending for the various recreational and conservation purposes so carefully laid out in GO Colorado.

However, inclusion of net lottery proceeds in the State's fiscal year spending would, ironically, lead to an absurd Hobson's choice for the state in the event of robust increases in lottery revenue. If the rate of growth of lottery proceeds exceeded or was expected to exceed the State's overall permitted rate of growth under TABOR, the State would either have to:

A. Curtail the entire lottery program in order to check the "excess" revenue resulting therefrom. (A move which would be clearly contrary to the manifest will of the voters who approved GO Colorado.)

B. Refund the "excess" lottery revenue. (Again frustrating the obvious intent of GO Colorado for the State to spend all lottery proceeds for the purposes enumerated therein.)

C. Obtain additional voter approval to keep the "excess" revenue. (An option which would undoubtedly strike the voters as absurd and redundant, in light of the fact that they approved the spending of all lottery proceeds on November 3, 1992.)

D. Cut spending for other State programs to accommodate the "excess" revenue and spending resulting from the lottery. (Nothing on the face of GO Colorado evinces a design for other State programs to suffer while recreation programs prosper.)

On the contrary, building upon the voter's original approval of the lottery in 1980, GO Colorado treats the lottery as a special source of funds which is supplemental to monies which the state may otherwise obtain and spend from conventional tax sources for the normal range of State programs. In both the original approval of the lottery and the detailed ratification of the purposes for net lottery proceeds as expressed in GO Colorado, the voters treat lottery monies as being cumulative to what the State and local governments are otherwise spending for government services from more conventional revenue ~~services~~ <sup>sources</sup> (i.e. taxes), and not in substitution therefor. (See Article XXVII, Section 8.)

Even if there were only modest growth in the lottery, it could "squeeze out" additional spending for other important state needs if net lottery proceeds are included in the State's base. In sum, inclusion of these funds in the base would inhibit the General Assembly from aggressively marketing lottery programs and otherwise nurturing growth in the lottery because to do so would detract from spending on other essential State services. Even more dramatically, the General Assembly may be motivated to eliminate lottery programs outright if the revenue and spending therefrom threatens other State programs.

Section 3 and Section 5 of GO Colorado mandate distribution of lottery proceeds in a variety of ways. Some are cast in stone



(e.g. under Section 3(1)(b)(I) and 3(1)(b)(II) definite percentages shall be distributed to local governments and the Division of Parks and Outdoor Recreation respectively). Others are more discretionary (e.g. under Section 5(1)(a)(III) and 5(1)(a)(IV) government entities compete for grants from the Trust Fund). The absurdity of including net lottery proceeds in fiscal year spending becomes even more obvious if the court consider the potential effect on the discretionary grant programs: If the State or a local government were at or approaching its spending limitation for a particular year, the government would either be unable to receive such a grant or would be compelled to obtain voter approval to do so. Either outcome would be patently ludicrous in light of the obvious intention of GO Colorado to make these monies freely available to government entities statewide in order to advance the purposes set forth in GO Colorado.

The voters expressed strong support for parks and conservation programs in GO Colorado and, by implication, for a vigorous and thriving lottery in support of these programs. In particular, the voters established grant programs through which all government entities are encouraged to aggressively compete to increase their share of lottery proceeds. What a paradox it would be for these purposes to be frustrated by subjecting net lottery proceeds to TABOR's spending limitations.

B. In the Event of Conflict Between GO Colorado and TABOR, the Former Should Control.

"(I)n case of adoption of conflicting provisions, the one which receives the greatest number of votes shall prevail in all particulars as to which there is a conflict." CRS 1-40-113; In re: Interrogatories Propounded by the Senate Concerning House Bill 1078, 536 P.2d 308 (Colo. 1975). "The test for the existence of a conflict is: Does one authorize what the other forbids or forbid what the other authorizes." Id. at 313.

In applying the foregoing test to the case at hand, one could simplistically argue that, since TABOR does not expressly forbid the expenditure of net lottery proceeds, per se, there is no conflict between TABOR and GO Colorado. However, this conclusion would ignore the obvious dilemma faced by the state as set forth above. GO Colorado authorizes full expenditure of net lottery proceeds for specified purposes in whatever amount generated. TABOR prohibits overall State spending from exceeding a certain rate of growth. In any number of scenarios (especially when net lottery proceeds are growing rapidly) the operation of TABOR will, in its practical effect, conflict with the purposes of GO Colorado if net lottery proceeds are included in State fiscal year spending. To reiterate, one possible consequence of this conflict would be the State limiting or foregoing lottery proceeds flowing into the State's budget, something the voters could have never intended.

In addition to this general conflict, GO Colorado contradicts and supersedes TABOR in at least one specific respect. TABOR purports to broadly "supersede conflicting state constitutional . . . provisions." Article X, Section 20(1). However, GO Colorado specifically provides that disbursements from the GO Colorado Trust Fund shall be used for the purposes set forth in that amendment and shall not be subject to any "restriction." Article XXVII, Section 5. This is in keeping with the remarkably autonomous nature of the Board which administers the Trust Fund as set forth in Section 6. Thus, it would be improper to apply TABOR's restrictions in any manner which directly or indirectly prohibits the receipt and expenditure of monies from the Trust Fund by any government entity.

Finally, to the extent both TABOR and GO Colorado may be viewed as addressing the subject of government "spending", the former addresses the subject generally (while focusing special attention on taxes) and the latter does so by focusing on one particular type of spending (from a non-tax revenue source). Specific constitutional provisions control over general provisions. Colorado Common Cause v. Bledsoe, 810 P.2d 201 (Colo. 1991); deSha v. Reed, 572 P.2d 821 (Colo. 1977). Yes, the voters laid down a general regime for controlling state and local government spending in TABOR, but at the same time they carved out a specific niche for lottery proceeds. The State and local governments should be permitted to recognize the special mandate which has been given for the lottery and keep this money separate and apart from other

fiscal year spending in order to more effectively carry out the will of the voters.

C. All Net Lottery Proceeds Constitute Revenue From "Property Sales" within the Meaning of TABOR

In the alternative, we hereby adopt and fully incorporate by reference the arguments presented in the brief submitted by Citizens for Great Outdoors Colorado, Inc. to the effect that net lottery proceeds are not to be included in the State's fiscal year spending base because all such revenue results from "property sales" within the meaning of Article X, Section 20(2)(e).

D. GO Colorado Constitutes a "Voter Approved Revenue Change" Within the Meaning of TABOR

In the alternative, we hereby adopt and fully incorporate by reference the arguments presented in the brief submitted by Citizens for Great Outdoors Colorado, Inc. to the effect that net lottery proceeds are not to be included in the State's fiscal year spending base because they represent a "revenue change approved by the voters after 1991" within the meaning of Article X, Section 20(7)(a).

E. Disbursements from the GO Colorado Trust Fund Constitute "Gifts" within the Meaning of TABOR

In the alternative, we hereby adopt and fully incorporate by reference the arguments presented in the brief submitted by Citizens for Great Outdoors Colorado, Inc. to the effect that disbursements from the GO Colorado Trust Fund to the State are not to be included in the State's fiscal year spending base because they represent "gifts" within the meaning of Article X, Section 20(2)(e).

F. Certain Net Lottery Proceeds Are Merely "Collections for Another Government" Within the Meaning of TABOR and Therefore Should Not Be Included Within the State's Fiscal Year Spending

TABOR excepts from the definition of fiscal year spending "collections for another government". Article X, Section 20(2)(e). The term "collections for another government" is not defined in TABOR; however, this exception was arguably included out of a common sense recognition that some monies may happen to flow through a particular government's coffers, but the government is merely a conduit for transmitting that money to another government and never really "spends" the money for its own purposes. The exception may also derive from the absurdity of double counting spending and, in effect, subjecting it to spending limitations twice.

GO Colorado unequivocally mandates that a major share of net lottery proceeds which the State collects must go to local governments. For example, under Section 3(1)(b)(I), forty per cent

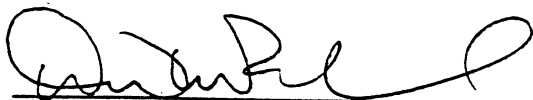
of net lottery proceeds must be distributed to local governments through the Conservation Trust Fund. This is a constitutional requirement. The State has no discretion whatsoever in this regard and is serving merely as a conduit for the money. If ever the words in TABOR are to have any meaning and if ever the Court is to recognize a "collection for another government", this would certainly be it.

Even if the court rejects all of the other arguments in this brief, the court should nevertheless find that any lottery monies collected by one governmental entity and passed on to another governmental entity pursuant to GO Colorado or any similar legal mandate should not be included in the fiscal year spending base of the government which merely acts as a conduit for the money.

#### VI. Conclusion

The Colorado Municipal League, Colorado Counties, Inc. and the Special Districts Association of Colorado, Inc. respectfully request that the Court answer Interrogatory number 2 in the negative, rule that net lottery proceeds are not subject to the spending limitations set forth in Article X, Section 20(7)(a) of the constitution, and thereby effectuate the intent of the 871,641 voters who approved GO Colorado.

Respectfully submitted this 5th day of April, 1993.



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**CERTIFICATE OF MAILING**

I hereby certify that a true and correct copy of the foregoing BRIEF OF INTERESTED PARTIES: COLORADO MUNICIPAL LEAGUE, COLORADO COUNTIES, INC., AND SPECIAL DISTRICTS ASSOCIATION OF COLORADO was served on this date, in the manner described below, addressed to the following:

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