COLORADO COURT OF APPEALS 2 East 14th Avenue, Suite 300 Denver, Colorado 80203	▲ COURT USE ONLY ▲
District Court, El Paso County, Colorado The Honorable Robert L. Lowrey Case No. 03CV9350	FILED JAN 11 2005 Clerk, Court of Appeals
Appellants: CITY OF COLORADO SPRINGS AND KATHRYN YOUNG, City Clerk in her official capacity as election officer for the City, v. **Appellee:** DOUGLAS BRUCE	**Case Number 2004-CA-001741**
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BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS *AMICUS CURIAE*

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COMES NOW the Colorado Municipal League (the "League") by its undersigned counsel, pursuant to Rule 29, Colo. App. R., and files this Brief as *amicus curiae* in support of Appellants, the City of Colorado Springs, et. al., (the "City").

STATEMENT OF ISSUES ON APPEAL

The League hereby adopts and incorporates by reference the statement of issues on appeal in the Opening Brief of the City.

STATEMENT OF FACTS AND OF THE CASE

The League hereby adopts and incorporates by reference the statement of facts and of the case in the Opening Brief of the City.

SUMMARY OF ARGUMENT

The TABOR amendment to the Colorado Constitution (Colo. Const. Article X, Section 20) requires that ballot issues proposing a "tax increase" be expressly titled as such, and that ballot issue notices distributed to voters in connection with such issues include specific information. However, TABOR does not define "tax increase." This appeal involves whether the ballot titling and notice requirements of TABOR applicable to a "tax increase" apply to a ballot proposal to extend an expiring tax. A proposal to merely extend an existing tax, without increasing its rate or expanding its base, would not be commonly understood as a "tax increase." As the term "increase" should be accorded its common and ordinary meaning under well established rules of statutory construction, the decision of the trial court was error and should be reversed. The election of the City of Colorado Springs overwhelmingly approving ballot issue 1A on April 1, 2003 should be reinstated.

ARGUMENT

The League incorporates herein by reference the argument in the opening brief of the City, and submits the following additional argument.

(a) Introduction

Article X, §20 of the Colorado Constitution, commonly referred to as the TABOR amendment (hereafter TABOR; a copy of TABOR is attached as Appendix A), requires voter approval before the state or a local government may implement "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." TABOR, §(4)(a). Additionally, TABOR requires voter approval (with certain exceptions) for "creation of any multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever." TABOR, §(4)(b).

TABOR also requires that the government provide a notice, commonly known as a "ballot issue notice" (see: §1-7-901-907, C.R.S.; §31-10-501.5 C.R.S.), "to 'ALL REGISTERED VOTERS' at each address of one or more active registered electors" within the jurisdiction. TABOR §(3)(b). Notices particularly concerning ballot proposals to increase taxes or debt must be titled as such, and the title on the notice must also specify whether the measure reached the ballot by petition or was referred to the ballot by a legislative body. Ibid.

Ballot issue notices for *all* types of TABOR ballot issues must include the "election date, hours, ballot title, text, and local election office address and telephone

number," together with summaries of written comments filed in support of or in opposition to the proposal. TABOR, §§(3)(b)(i) and (v). Beyond these general requirements, TABOR requires that notices contain particular additional information if the ballot issue involves a bonded debt increase (TABOR, §(3)(b)(iv)), particular information if the ballot issue concerns a "tax increase" (TABOR, §(3)(b)(iii)), and further specific information with respect to proposals to either increase taxes or bonded debt (TABOR, §(30)(b)(ii)).

Pursuant to its TABOR obligation, the City submitted to its voters the question of whether a tax levy set to expire in 2009 should be extended until 2025. Neither the rate of tax nor the purposes to which tax proceeds would be put were to change, under the City's proposal. At an election held on April 1, 2003, City voters overwhelming approved extension of this expiring tax.

The City did not consider this extension of an expiring tax to be a "tax increase," and did not label it as such in the ballot title. The City didn't title its ballot issue notice as concerning a "tax increase" either, and did not include in the notice the particular information required in connection with "tax increase" ballot proposals.

The trial court concluded that the City should have treated its extension of an expiring tax question as a "tax increase," for purposes of the ballot title and the ballot issue notice, and threw out the election results on this basis. This appeal followed.

(b) The trial court erred in concluding that an "extension of an expiring tax" is subject to the TABOR titling and notice requirements applicable to a tax "increase."

TABOR does not define an extension of an expiring tax as a tax increase. Indeed, TABOR does not define the important term "tax increase" at all. Nor has any Colorado appellate court yet had occasion to address whether an extension of an expiring tax is a tax increase. Thus, this appeal presents a question of first impression, and the City lacked clear legal direction as to how it must characterize its tax extension question for titling and notice purposes.

The trial court looked to §(4)(a) of TABOR for direction as to what constitutes a "tax increase." Order of the El Paso County District Court, August 20, 2004 (Order) at p.4 (attached as Appendix B). Section (4)(a), as noted above, does not deal with ballot titling or notice requirements, and does not use the term "tax increase" (as does §3(b) of TABOR, compliance with which is at issue in this appeal). Instead, §(4)(a) requires voter approval before the government may increase taxes or extend an expiring tax. The City's compliance with the requirements of §4(a) of TABOR is patant, and not at issue in this appeal.

It is true that the actions set forth in §(4)(a), with the notable exception of an extension of an expiring tax, appear appropriate for treatment as "tax increases" under §(3)(b) of TABOR. But the trial court went too far by lumping an extension of expiring tax into the "tax increase" category, simply because of the company such extensions keep in §(4)(a). The fact that §(4)(a) of TABOR requires an election to extend an expiring tax does not compel the conclusion that a separate section of TABOR requires such ballot

questions to be titled on the ballot and described in the ballot issue notice as a "tax increase."

For purposes of applying TABOR's ballot titling and notice mandates in §(3)(b), it is important to recognize that there is a substantial category of government actions for which TABOR requires prior approval at an election, but to which the titling and notice mandates appropriate for a "tax increase" or debt question simply do not apply. This category includes, for example:

- elections in which permission of voters is sought to retain revenue above TABOR's revenue retention limits, under §(7)(d) of TABOR (commonly known as "de-Brucing," in tribute to TABOR's author),
- elections in which voter approval of an up to four year delay in voting on TABOR ballot issues is sought, under §(3)(a) of TABOR,
- elections in which voters are asked to weaken statutory or "other limits on district revenue, spending and debt" (such as the aggregate sales tax rate cap found at §29-2-108(1) C.R.S.), which elections are required by §(1) of TABOR, and
- elections in which voter approval is sought for addition of information to TABOR ballot issue notices, as authorized in §(3)(b) of TABOR.

The League respectfully urges that an extension of an expiring tax should be included in the category of issues for which TABOR requires an election but which are not titled on the ballot or described in the ballot issue notice under §(3) of TABOR as "tax increases."

There are important differences between an extension of an expiring tax and the other tax related actions set forth in §(4)(a), which, as noted above, include any new tax, a tax rate increase, a mill levy above that for the prior year, a valuation for assessment ratio increase for a property class, or a tax policy change directly causing a net tax revenue gain to the jurisdiction.

As noted above, all of these other actions may fairly be viewed as involving a tax increase. If approved by voters, these actions result in taxpayers paying more taxes after the election than they did before the election and result in the jurisdiction raising more tax revenue than it did prior to the election. This is an "increase" in taxes, as that term is commonly understood.

An extension of an expiring tax, on the other hand, does not result in taxpayers paying more tax than they did prior to the election, and does not result in the government receiving more tax revenue than it did prior to the election. To label such a question a tax "increase" is counter-intuitive and thus presents the very real possibility of misleading voters. This is not a proposal to increase the tax *base* or the tax *rate*; rather, this is a proposal to simply continue an *existing* tax.

TABOR directs a construction of its terms that "shall reasonably restrain most the growth of government." TABOR, §(1). With the exception of an extension of an expiring tax, the other tax actions set forth in §(4)(a) result in the government receiving more tax revenue after the election than it did before the election, and so may be viewed as permitting "growth" in government. If it were ever part of the justification for labeling these measures "tax increases" that this would make such measures less palatable to

voters, thereby "restraining" the growth of government, this logic does not strengthen the case for labeling an extension of an expiring tax as a "tax increase." Simply continuing an existing tax does not result in "growth" of government. To be sure, continuation of an expiring tax does not cause shrinkage of the government either, but nothing in TABOR requires that measures be aggressively labeled as "tax increases" simply to make them less appealing to voters, in hopes that this will make government smaller.

The principle argument suggested for viewing an extension of an expiring tax as actually a tax "increase" is that, because the effective tax rate would go to zero if the tax is not continued, its continuation must therefore be a tax "increase."

Of course, it is an inescapable fact that if the tax is continued by the voters (as was the case here) the tax rate never actually drops to zero. The tax is simply continued. It does not expire. It is not increased; it stays the same. Neither the tax rate nor the tax base are increased. The fact that voters chose not to reduce or eliminate a tax does not mean that they voted for a "tax increase." Voters instead voted for *status quo ante*. Most people would understand that by this act taxes have neither been increased nor decreased.

Numerous examples come to mind to illustrate the counter-intuitive nature of the "extension equals increase" argument.

For instance, it is common to provide in both state statutes and municipal ordinances for expiration or "sunsetting" of the enactment. This causes the legislative body to periodically revisit the law and decide whether the program or practice associated with it merits continuation.

If a dog control ordinance is scheduled to expire, no one would seriously argue

that its extension is an "increase" in dog regulation, even though the regulations would "go to zero" if the ordinance was not extended. If the ordinance provides for a dog licensing fee, and that fee is simply continued as part of the extension, most ordinary citizens would similarly not view this as an "increase" in their dog licensing fees.

During its 2003 session, the General Assembly adopted a schedule of fees to help fund the state's drinking water regulatory program. SB 03-276; 2003 Colo. Laws 1502, Ch. 216; codified (in pertinent part) at §25-1.5 - 209 C.R.S. The statute provides that these fees will be repealed as of July 1, 2005. §25-1.5 - 209(4) C.R.S. If, as is expected, the General Assembly acts during its 2005 session to amend the repealer, thereby extending the current fees, it is reasonable to assume that most people would be startled by the suggestion that in holding fees constant, the General Assembly has actually increased them.

Should a landlord wish to induce a tenant to not purchase his own building, and instead continue his lease of the landlord's property, and thus offers to extend the current lease without altering its terms, it is doubtful that either the landlord or the tenant (or just about anyone else, for that matter) would view this as a rent "increase," notwithstanding that the landlord's revenue and the tenant's payment would have "gone to zero," had the lease not been extended.

Countless additional examples might be presented. In the end, however, they would all illustrate the common understanding and plain meaning of the word "increase."

The *Mirriam Webster Collegiate Dictionary* (10th ed. 1994), defines an "increase" as " **1**: The act or process of increasing: as addition or enlargement in size, extent or

quantity. **2**: Something that is added to an original stock or amount by augmentation or growth (as offspring, produce, profit)." The *American Heritage Dictionary of the English Language* (4th ed. 2000) similarly defines an "increase" as "**1**. The act of increasing: *a steady increase in temperature.* **2**. The amount or rate by which something is increased: *a tax increase of 15 percent.*" (emphasis in original.) The verb form is defined as "**1**. To become greater or larger."

The League respectfully urges this Court to apply in this appeal the well-established rule of construction, long included in Colorado statute and cited in numerous reported Colorado decisions, that "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage." §2-4-101 C.R.S.; *Pierson v. District Court, 18th Judicial District,* 924 P.2d 512, 516 (Colo. 1996) (words and phrases to be accorded their plain and ordinary meaning); *People v. J.J.H.*, 17 P.3d 159, 162 (Colo. 2001) (same); *Harding v. Industrial Commission*, 183 Colo. 52, 59, 515 P.2d 95, 98 (1973) (forced, subtle, strained or unusual interpretation should never be resorted to where language is plain). See also: *Singer, 2A Statutes and Statutory Construction* (6th ed.; 2000 revision) §46: 01 (words used will be given their common, ordinary and accepted meaning).

Applying these rules, the League respectfully urges this Court to hold that an extension of an expiring tax (that is, extension prior to its expiration), without change in the tax rate or tax base, is simply not what is commonly understood to be a tax "increase," and, consequently, such ballot issues need not to be treated as a "tax increase" under §3(b) of TABOR.

CONCLUSION

WHEREFORE, for the reasons stated above and in the briefs of the City, the League respectfully urges that the decision of the trial court be reversed and that the election at which the citizens of the City of Colorado Springs approved issue 1A be reinstated.

Dated this 11th day of January 2005.

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CERTIFICATE OF MAILING

I hereby certify that on this 11th day of January 2005, I deposited a true and complete copy of the foregoing **Brief of the Colorado Municipal League as *Amicus Curiae*** in the U.S. Mail, postage prepaid, addressed as follows:

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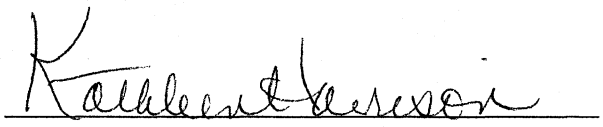

ANNOTATION

Am. Jur.2d. See 51 Am. Jur.2d, Licenses and Permits, §§ 11, 12; 71 Am. Jur.2d, State and Local Taxation, §§ 14, 25, 550, 551.

The roads of the state are, in effect, made the producers of a special fund, for the gasoline tax is a tax on motor fuel used in propelling vehicles along the highways. It amounts to an indirect tax for the use of the highway by motor vehicles. See Johnson v. McDonald, 97 Colo. 324, 49 P.2d 1017 (1935).

This special fund is not available for general purposes. See Johnson v. McDonald, 97 Colo. 324, 49 P.2d 1017 (1935).

This section removes excise taxes on motor fuel from availability for general state purposes. City of Trinidad v. Haxby, 136 Colo. 168, 315 P.2d 204 (1957).

No appropriation for road purposes necessary. Since this section sets aside and fixes the amount—the whole of the revenues from the taxes mentioned— as applicable to road purposes, no appropriation by the general assembly is necessary. Johnson v. McDonald, 97 Colo. 324, 49 P.2d 1017 (1935).

General assembly's power over funds realized is limited to authorizing their expenditure, and determining the policy of road construction, maintenance and supervision, within the constitutional limitations as to the use of such funds. Johnson v. McDonald, 97 Colo. 324, 49 P.2d 1017 (1935).

Privilege and access fees based upon access to an airport and charged to a car rental company do not violate this section. Thrifty Rent-A-Car v. Denver, 833 P.2d 852 (Colo. App. 1992).

Applied in Watrous v. Golden Chamber of Commerce, 121 Colo. 521, 218 P.2d 498 (1950).

Section 19. State income tax laws by reference to United States tax laws. The general assembly may by law define the income upon which income taxes may be levied under section 17 of this article by reference to provisions of the laws of the United States in effect from time to time, whether retrospective or prospective in their operation, and shall in any such law provide the dollar amount of personal exemptions to be allowed to the taxpayer as a deduction. The general assembly may in any such law provide for other exceptions or modifications to any of such provisions of the laws of the United States and for retrospective exceptions or modifications to those provisions which are retrospective.

Source: L. 62: Entire section added, see **L. 63,** p. 1061.

ANNOTATION

Am. Jur.2d. See 71 Am. Jur.2d, State and Local Taxation, §§ 389, 390.

Section 20. The Taxpayer's Bill of Rights. (1) General provisions. This section takes effect December 31, 1992 or as stated. Its preferred interpretation shall reasonably restrain most the growth of government. All provisions are self-executing and severable and supersede conflicting state constitutional, state statutory, charter, or other state or local provisions. Other limits on district revenue, spending, and debt may be weakened only by future voter approval. Individual or class action enforcement suits may be filed and shall have the highest civil priority of resolution. Successful plaintiffs are allowed costs and reasonable attorney fees, but a district is not unless a suit against it be ruled frivolous. Revenue collected, kept, or spent illegally since four full fiscal years before a suit is filed shall be refunded with 10% annual simple interest from the initial conduct. Subject to judicial review, districts may use any reasonable method for refunds under this section, including temporary tax credits or rate reductions. Refunds need not be proportional when prior payments are impractical to identify or return. 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.

(2) Term definitions. Within this section:

(a) "Ballot issue" means a non-recall petition or referred measure in an election.

(b) "District" means the state or any local government, excluding enterprises.

(c) "Emergency" excludes economic conditions, revenue shortfalls, or district salary or fringe benefit increases.

(d) "Enterprise" means a government-owned business authorized to issue its own revenue bonds and receiving under 10% of annual revenue in grants from all Colorado state and local governments combined.

(e) "Fiscal year spending" means all district expenditures and reserve increases except, as to both, those for refunds made in the current or next fiscal year or those from gifts, federal funds, collections for another government, pension contributions by employees and pension fund earnings, reserve transfers or expenditures, damage awards, or property sales.

(f) "Inflation" means the percentage change in the United States Bureau of Labor Statistics Consumer Price Index for Denver-Boulder, all items, all urban consumers, or its successor index.

(g) "Local growth" for a non-school district means a net percentage change in actual value of all real property in a district from construction of taxable real property improvements, minus destruction of similar improvements, and additions to, minus deletions from, taxable real property. For a school district, it means the percentage change in its student enrollment.

(3) Election provisions.

(a) Ballot issues shall be decided in a state general election, biennial local district election, or on the first Tuesday in November of odd-numbered years. Except for petitions, bonded debt, or charter or constitutional provisions, districts may consolidate ballot issues and voters may approve a delay of up to four years in voting on ballot issues. District actions taken during such a delay shall not extend beyond that period.

(b) At least 30 days before a ballot issue election, districts shall mail at the least cost, and as a package where districts with ballot issues overlap, a titled notice or set of notices addressed to "All Registered Voters" at each address of one or more active registered electors. The districts may coordinate the mailing required by this paragraph (b) with the distribution of the ballot information booklet required by section 1 (7.5) of article V of this constitution in order to save mailing costs. Titles shall have this order of preference: **"NOTICE OF ELECTION TO INCREASE TAXES/TO INCREASE DEBT/ON A CITIZEN PETITION/ON A REFERRED MEASURE."** Except for district voter-approved additions, notices shall include only:

(i) The election date, hours, ballot title, text, and local election office address and telephone number.

(ii) For proposed district tax or bonded debt increases, the estimated or actual total of district fiscal year spending for the current year and each of the past four years, and the overall percentage and dollar change.

(iii) For the first full fiscal year of each proposed district tax increase, district estimates of the maximum dollar amount of each increase and of district fiscal year spending without the increase.

(iv) For proposed district bonded debt, its principal amount and maximum annual and total district repayment cost, and the principal balance of total current district bonded debt and its maximum annual and remaining total district repayment cost.

(v) Two summaries, up to 500 words each, one for and one against the proposal, of written comments filed with the election officer by 45 days before the election. No summary shall mention names of persons or private groups, nor any endorsements of or resolutions against the proposal. Petition representatives following these rules shall write this summary for their petition. The election officer shall maintain and accurately summarize all other relevant written comments. The provisions of this subparagraph (v) do not apply to a statewide ballot issue, which is subject to the provisions of section 1 (7.5) of article V of this constitution.

(c) 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. District bonded debt shall not issue on terms that could exceed its share of its maximum repayment costs in (b) (iv). Ballot titles for tax or bonded debt increases shall begin, **"SHALL (DISTRICT) TAXES BE INCREASED (first, or if phased in, final, full fiscal year dollar increase) ANNUALLY...?" or "SHALL (DISTRICT) DEBT**

BE INCREASED (principal amount), WITH A REPAYMENT COST OF (maximum total district cost), ...?"

(4) Required elections. Starting November 4, 1992, districts must have voter approval in advance for:

(a) Unless (1) or (6) applies, 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.

(b) 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.

(5) Emergency reserves. To use for declared emergencies only, each district shall reserve for 1993 1% or more, for 1994 2% or more, and for all later years 3% or more of its fiscal year spending excluding bonded debt service. Unused reserves apply to the next year's reserve.

(6) Emergency taxes. This subsection grants no new taxing power. Emergency property taxes are prohibited. Emergency tax revenue is excluded for purposes of (3) (c) and (7), even if later ratified by voters. Emergency taxes shall also meet all of the following conditions:

(a) A 2/3 majority of the members of each house of the general assembly or of a local district board declares the emergency and imposes the tax by separate recorded roll call votes.

(b) Emergency tax revenue shall be spent only after emergency reserves are depleted, and shall be refunded within 180 days after the emergency ends if not spent on the emergency.

(c) A tax not approved on the next election date 60 days or more after the declaration shall end with that election month.

(7) Spending limits. (a) The maximum annual percentage change in state fiscal year spending equals inflation plus the percentage change in state population in the prior calendar year, adjusted for revenue changes approved by voters after 1991. Population shall be determined by annual federal census estimates and such number shall be adjusted every decade to match the federal census.

(b) The maximum annual percentage change in each local district's fiscal year spending equals inflation in the prior calendar year plus annual local growth, adjusted for revenue changes approved by voters after 1991 and (8) (b) and (9) reductions.

(c) The maximum annual percentage change in each district's property tax revenue equals inflation in the prior calendar year plus annual local growth, adjusted for property tax revenue changes approved by voters after 1991 and (8) (b) and (9) reductions.

(d) If revenue from sources not excluded from fiscal year spending exceeds these limits in dollars for that fiscal year, the excess shall be refunded in the next fiscal year unless voters approve a revenue change as an offset. Initial district bases are current fiscal year spending and 1991 property tax collected in 1992. Qualification or disqualification as an enterprise shall change district bases and future year limits. 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. Voter-approved revenue changes do not require a tax rate change.

(8) Revenue limits. (a) New or increased transfer tax rates on real property are prohibited. No new state real property tax or local district income tax shall be imposed. Neither an income tax rate increase nor a new state definition of taxable income shall apply before the next tax year. Any income tax law change after July 1, 1992 shall also require all taxable net income to be taxed at one rate, excluding refund tax credits or voter-approved tax credits, with no added tax or surcharge.

(b) Each district may enact cumulative uniform exemptions and credits to reduce or end business personal property taxes.

(c) Regardless of reassessment frequency, valuation notices shall be mailed annually and may be appealed annually, with no presumption in favor of any pending valuation. Past or future sales by a lender or government shall also be considered as comparable market sales and their sales prices kept as public records. Actual value shall be stated on all property tax bills and valuation notices and, for residential real property, determined solely by the market approach to appraisal.

(9) State mandates. Except for public education through grade 12 or as required of a local district by federal law, a local district may reduce or end its subsidy to any program delegated to it by the general assembly for administration. For current programs, the state may require 90 days notice and that the adjustment occur in a maximum of three equal annual installments.

Source: Initiated 92: Entire section added, effective December 31, 1992, see **L. 93,** p. 2165. **L. 94:** (3)(b)(v) amended, p. 2851, effective upon proclamation of the Governor, **L. 95,** p. 1430, January 19, 1995. **L. 96:** IP(3)(b) and (3)(b)(v) amended, p. 1425, effective upon proclamation of the Governor, **L. 97,** p. 2393, December 26, 1996.

Editor's note: (1) Subsection (4) of this section provides that the provisions of this section apply to required elections of state and local governments conducted on or after November 4, 1992.

(2) This section was originally enacted in 1972 and contained provisions relating to the 1976 winter olympics. Those provisions were repealed, effective January 3, 1989, see page 1657 of the 1989 session laws.

Cross references: For statutory provisions implementing this section, see article 77 of title 24 (state fiscal policies); sections 1-1-102, 1-40-125, 1-41-101 to 1-41-103, 29-2-102, and 32-1-802 (elections); sections 29-1-304.7 and 29-1-304.8 (turnback of programs delegated to local governments by the general assembly); sections 43-1-112.5, 43-1-113, and 43-10-109 (department of transportation revenue and spending limits); sections 23-1-103.5, 23-1-104, and 23-1-105 (higher education revenue and spending limits); sections 24-30-202, 24-82-703, 24-82-705, and 24-82-801 (multiple fiscal-year obligations); sections 8-46-101, 8-46-202, 8-77-101, 24-75-302, and 43-4-201 (provisions relating to individual funds and programs); and section 39-5-121 (property tax valuation notices); and, concerning the establishment of enterprises, sections 23-1-106, 23-3.1-103.5, 23-3.1-104.5, 23-5-101.5, 23-5-102, 23-5-103, 23-70-104, 23-70-107, 23-70-108, and 23-70-112 (higher education, auxiliary facilities), part 2 of article 35 of title 24 (state lottery), part 3 of article 3 of title 25 (county hospitals), sections 26-12-109 and 26-12-111 (state nursing homes), article 45.1 of title 37 (water activities), and section 43-4-502 (public highway authorities).

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Amendment One: Government by Plebiscite", see 22 Colo. Law. 293 (1993). For article, "Use of the Nonprofit Supporting Foundation to Assist Governmental Districts After Amendment 1", see 22 Colo. Law. 685 (1993). For article, "Enterprises Under Article X, § 20 of the Colorado Constitution - Part I", see 27 Colo. Law. 55 (April 1998). For article, "Enterprises Under Article X, § 20 of the Colorado Constitution - Part II", see 27 Colo. Law. 65 (May 1998). For article, "Taming TABOR by Working from Within", see 32 Colo. Law. 101 (July 2003).

Interpretation of a constitutional provision is a question of law and an appellate court is not required to accord deference to a trial court's ruling in that regard. Cerveny v. City of Wheat Ridge, 888 P.2d 339 (Colo. App. 1994), rev'd on other grounds, 913 P.2d 1110 (Colo. 1996).

In interpreting a constitutional amendment that was adopted by popular vote, courts must determine what the people believed the language of the amendment meant when they voted it into law. To do so, courts must give the language the natural and popular meaning usually understood by the voters. Cerveny v. City of Wheat Ridge, 888 P.2d 339 (Colo. App. 1994), rev'd on other grounds, 913 P.2d 1110 (Colo. 1996); Havens v. Board of County Comm'rs, 924 P.2d 517 (Colo. 1996).

In interpreting a constitutional provision, the court should ascertain and give effect to the intent of those who adopted it. In the case of this section, it is the court's responsibility to ensure that it gives effect to what the voters

believed the amendment to mean when they accepted it as their fundamental law, considering the natural and popular meaning of the words used. City of Wheat Ridge v. Cerveny, 913 P.2d 1110 (Colo. 1996).

Where multiple interpretations of a provision of this section are equally supported by the text of that section, a court should choose that interpretation which it concludes would create the greatest restraint on the growth of government; however, the proponent of an interpretation has the burden of establishing that its proposed construction of this section would reasonably restrain the growth of government more than any other competing interpretation. Bickel v. City of Boulder, 885 P.2d 215 (Colo. 1994); Nicholl v. E-470 Public Hwy. Auth., 896 P.2d 859 (Colo. 1995).

Amendment's objective is to prevent governmental entities from enacting taxing and spending increases above its limits without voter approval. Campbell v. Orchard Mesa Irr. Dist., 972 P.2d 1037 (Colo. 1998).

This section requires voter approval for certain state and local government tax increases and restricts property, income, and other taxes. Submission of Interrogatories on Senate Bill 93-74, 852 P.2d 1 (Colo. 1993).

And acts to limit the discretion of government officials to take certain actions pertaining to taxing, revenue, and spending in the absence of voter approval. Property Tax Adjustment Specialists, Inc. v. Mesa County Board of Comm'rs, 956 P.2d 1277 (Colo. App. 1998).

This section operates to impose a limitation on the power of the people's elected representatives, and while this section circumscribes the revenue, spending, and debt powers of state and local governments, creating a series of procedural requirements, it does not create any fundamental rights. Havens v. Board of County Comm'rs, 924 P.2d 517 (Colo. 1996).

Districts may seek present authorization for future tax rate increases where such rate increases may be necessary to repay a specific, voter-approved debt. Any rate change ultimately implemented by a district pursuant to the "without limitation as to rate" clause in the ballot title must be consistent with the district's state estimate of the final fiscal year dollar amount of the increase. Bickel v. City of Boulder, 885 P.2d 215 (Colo. 1994).

This section and article XXVII of the Colorado Constitution are not in irreconcilable, material, and direct conflict, since this section does not authorize what article XXVII forbids or forbid what article XXVII authorizes. Submission of Interrogatories on Senate Bill 93-74, 852 P.2d 1 (Colo. 1993).

Since the inclusion of all net lottery proceeds in the calculation of state fiscal year spending creates an implicit conflict between this section and article XXVII, legislation exempting net lottery proceeds dedicated by article XXVII to great outdoors Colorado purposes from this section and subjecting such proceeds dedicated to the capital construction fund and the excess that spill over into the general fund to this section represented a reasonable resolution of that implicit conflict. Submission of Interrogatories on Senate Bill 93-74, 852 P.2d 1 (Colo. 1993).

This section and § 9 of article XVIII of the Colorado Constitution are not in direct conflict. Submission of Interrogatories on Senate Bill 93-74, 852 P.2d 1 (Colo. 1993).

This section and § 3 of this article reconciled. In order to reconcile the requirement of subsection (8)(c) of this section that residential property be valued "solely by the market approach to appraisal" with the equalization requirement of article X, § 3, the actual value of residential property must be determined using means and methods applied impartially to all the members of each class. Podoll v. Arapahoe County Bd. of Equaliz., 920 P.2d 861 (Colo. App. 1995), rev'd on other grounds, 935 P.2d 14 (Colo. 1997).

Amendment relates back. Although under art. V, § 1(4), this section took effect January 14, 1993, once effective, its terms could and did relate back to conduct occurring the day after the 1992 election. Bolt v. Arapahoe County School Dist. No. 6, 898 P.2d 525 (Colo. 1995).

Dispute under election provisions reviewed under a "substantial compliance" standard. City of Aurora v. Acosta, 892 P.2d 264 (Colo. 1995).

Substantial compliance found. District in mail ballot election found to have substantially complied with section when purposes of the ballot disclosure provisions are not undermined and all required information was in the election notices if not the ballot title. City of Aurora v. Acosta, 892 P.2d 264 (Colo. 1995).

Voter approval of dollar amounts not required. This section does not require voter approval of a dollar amount when the revenue change is not a district tax increase. City of Aurora v. Acosta, 892 P.2d 264 (Colo. 1995).

The Taxpayer's Bill of Rights does not grant governmental entities the right to file enforcement suits or class action suits. Boulder County Bd. of Comm'rs v. City of Broomfield, 7 P.3d 1033 (Colo. App. 1999).

Plaintiff had standing, as expressly provided under this section, to bring action as an individual taxpayer to determine whether E-470 authority was subject to this section's regulation. Nicholl v. E-470 Public Hwy. Auth., 896 P.2d 859 (Colo. 1995).

The four-year time limitation for individual or class action suits under this section applies to enforcement of the specific requirements of this constitutional provision, but does not affect the statute of limitations set forth in the statutory provisions regarding taxes that were levied erroneously or illegally. Property Tax Adjustment Specialists, Inc. v. Mesa County Board of Comm'rs, 956 P.2d 1277 (Colo. App. 1998).

Provisions for collecting and spending revenues entered into by the E-470 public highway authority were not subject to the election provisions of this section where bond contracts entered into prior to passage of this section required that the revenues would be received and spent by the highway authority for the purpose of operating the highway and repaying the indebtedness. Board of County Comm'rs v. E-470 Public Hwy., 881 P.2d 412 (Colo. App. 1994).

The phrase "multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever" in § 20 of article X is necessarily broader than the phrase "debt by loan in any form" as defined by this section. Submission of Interrogatories on House Bill 99-1325, 979 P.2d 549 (Colo. 1999) (overruling Boulder v. Dougherty, Dawkins, 890 P.2d 199 (Colo. App. 1994)).

However, the scope of the phrase is not without bounds. The voters could not have intended an absurd result such as requiring voter approval for a multiple year lease-purchase agreement for equipment such as copy machines or computers. Submission of Interrogatories on House Bill 99-1325, 979 P.2d 549 (Colo. 1999).

County's equipment lease-purchase agreement did not create any multiple-fiscal year direct or indirect district debt or other financial obligation under this section where the county was free to terminate the agreement without penalty by failing to appropriate funds to pay the rent in any lease year. Boulder v. Dougherty, Dawkins, 890 P.2d 199 (Colo. App. 1994).

This section does not supersede prior case authority permitting lease purchase agreements. This section is analyzed in light of the existing well-established constitutional law in existence at the time of this section's adoption. Boulder v. Dougherty, Dawkins, 890 P.2d 199 (Colo. App. 1994).

Tax status. Whether the interest income derived from a county's equipment lease agreement or any similar transaction is tax free has no impact on the court's interpretation of the Colorado constitution. Boulder v. Dougherty, Dawkins, 890 P.2d 199 (Colo. App. 1994).

This section creates a series of procedural requirements and nothing more. This section circumscribes the revenue, spending, and debt powers of state and local governments, it does not create any fundamental rights. With respect to the attorney fee provision of subsection (1), a holding that a victorious plaintiff must recover attorney fees as of right is antithetical to the overarching goal of the section to limit government spending. City of Wheat Ridge v. Cerveny, 913 P.2d 1110 (Colo. 1996).

This section does not provide an exemption from any obligation under the Colorado Open Records Act. Whether an institution is an "enterprise" does not have a bearing on whether it is free from the requirements of the Act. Freedom Newspapers, Inc. v. Tollefson, 961 P.2d 1150 (Colo. App. 1998).

II. DEFINITIONS.

E-470 authority is a district subject to the voter approval provisions of this section since the power to unilaterally impose taxes, with no direct relation to services provided, is inconsistent with the characteristics of a business as the term is commonly used, nor is it consistent with the definition of "enterprise" read as a whole. Nicholl v. E-470 Public Hwy. Auth., 896 P.2d 859 (Colo. 1995).

The attorney fee provisions of this section authorize an award of fees but do not require such an award. The fee-shifting phrase "successful plaintiffs are allowed costs and reasonable attorney fees" set forth in subsection (1) is plain and unambiguous. It allows a court to make an award of attorney fees but does not require the court to do so. City of Wheat Ridge v. Cerveny, 913 P.2d 1110 (Colo. 1996).

In assessing whether to award attorney fees under this section, the court must consider a number of factors and reach its conclusion based on the totality of the circumstances. Most importantly, the court must evaluate the significance of the litigation, and its outcome, in furthering the goals of this section. This evaluation must also include the nature of the claims raised, the significance of the issues on which the plaintiff prevailed in comparison to the litigation as a whole, the quantum of financial risk undertaken by the plaintiff, and the factors the court would weigh in determining what "reasonable" attorney fees would be. The court may also consider the nature of the fee agreement between the plaintiff and plaintiff's attorney. Where the plaintiff has had only partial success, the court must exclude the time and effort expended on losing issues if it chooses to award attorney fees. City of Wheat Ridge v. Cerveny, 913 P.2d 1110 (Colo. 1996).

The appropriateness of awarding attorney fees is diminished where the named plaintiff bears no risk and the benefit of an award of attorney fees will accrue to others. In addition, deficiencies in the attorney fee agreement, including deviation from rule requirements or professional standards, may adversely impact the quality of the representation or cause the court to find that the attorney's conduct does not merit an award regardless of a successful outcome. City of Wheat Ridge v. Cerveny, 913 P.2d 1110 (Colo. 1996).

The fact that the plaintiffs are not the real parties in interest does not necessarily preclude an award of attorney fees under this section. The fact that the real parties in interest were not parties to the litigation does not disqualify nominal plaintiffs from being considered successful plaintiffs who are eligible for attorney fees under this section. City of Wheat Ridge v. Cerveny, 913 P.2d 1110 (Colo. 1996).

The amendment's provision for attorney fees and costs in favor of successful plaintiffs does not contravene the constitutional requirement for equal protection by denying similar treatment to successful governmental defendants. The scheme set out in the amendment bears a rational relationship to a permissible governmental purpose; the facilitation of taxpayer suits to enforce compliance with the purpose of restraining governmental growth. Cerveny v. City of Wheat Ridge, 888 P.2d 339 (Colo. App. 1994), rev'd on other grounds, 913 P.2d 1110 (Colo. 1996).

The sale of lottery tickets does not constitute a "property sale" under this section. Submission of Interrogatories on Senate Bill 93-74, 852 P.2d 1 (Colo. 1993).

This section does not use the terms "gift" and "grant" synonymously. "Gifts" are exempt from fiscal year spending; however, if an entity receives more than ten percent of its revenues in "grants," the entity is disqualified as an enterprise. Submission of Interrogatories on Senate Bill 93-74, 852 P.2d 1 (Colo. 1993).

Net lottery proceeds are not to be excluded from state fiscal year spending as "gifts". Submission of Interrogatories on Senate Bill 93-74, 852 P.2d 1 (Colo. 1993).

It is erroneous to exclude net lottery proceeds from the purview of this section on the basis of a characterization of the great outdoors Colorado trust fund board created under article XXVII of the Colorado Constitution as a "district" or "non-district". Submission of Interrogatories on Senate Bill 93-74, 852 P.2d 1 (Colo. 1993).

By its terms, this section also limits the growth of state revenues, usually met by tax increases, by restricting the increase of fiscal year spending to the rate of inflation plus population increase, unless voter approval for an increase in spending is obtained. Submission of Interrogatories on Senate Bill 93-74, 852 P.2d 1 (Colo. 1993).

If the revenues of the state or a local government increase beyond the allowed limits on fiscal year spending, any excess above the allowed limit or voter-approved increase must be refunded to the taxpayers. Submission of Interrogatories on Senate Bill 93-74, 852 P.2d 1 (Colo. 1993).

The E-470 public highway authority meets the definition of an "enterprise" under this section because it has authority to issue bonds, it receives less than ten percent of its annual revenues in grants, it acts as a business by providing a service for a fee in the form of tolls, and it is government-owned. The authority is therefore not subject to the election requirements of this section. Board of County Comm'rs v. E-470 Public Hwy., 881 P.2d 412 (Colo. App. 1994).

Board of county commissioners was acting pursuant to express grants of constitutional and statutory authority in creating the Eagle county air terminal corporation as an enterprise and empowering it to act on county's behalf in constructing and operating a new commercial passenger terminal. Board of Comm'rs v. Fixed Base Operators, 939 P.2d 464 (Colo. App. 1997).

Trial court properly determined that the Eagle county air terminal corporation was an enterprise rather than a district. Corporation was a government-owned and controlled nonprofit corporation authorized to issue its own revenue bonds and it received no revenue in the form of grants from state and local governments. Board of Comm'rs v. Fixed Base Operators, 939 P.2d 464 (Colo. App. 1997).

An irrigation district is not a local government within the meaning of the amendment's taxing and spending election requirements. The private character of a 1921 Act irrigation district differs in essential respects from that of a public governmental entity exercising taxing authority contemplated by the amendment. An irrigation district exists to serve the interests of landowners not the general public. Rather than being a local government agency, a 1921 Act irrigation district is a public corporation endowed by the state with the powers necessary to perform its predominately private objective. Campbell v. Orchard Mesa Irr. Dist., 972 P.2d 1037 (Colo. 1998).

Trial court properly concluded that urban renewal authority is not subject to the requirements of this section. Urban renewal authority at issue has no authority to levy taxes or assessments of any kind and there is no provision for authority to conduct elections of any kind. Based upon these factors, urban renewal authority is not a "local government" and, therefore, not a "district" within the meaning of this section. Olson v. City of Golden, 53 P.3d 747 (Colo. App. 2002).

III. REQUIREMENT OF ADVANCE VOTER APPROVAL.

Definition of "ballot issue," for purposes of subsection (3)(a) regarding scheduling of elections, is limited to fiscal matters. Zaner v. City of Brighton, 899 P.2d 263 (Colo. App. 1994), aff'd, 917 P.2d 280 (Colo. 1996).

Language in subsection (3)(a) that allows voters to "approve a delay of up to four years in voting on ballot issues" does not mean that voters' waiver of revenue and spending limits must be limited in duration to four years. Havens v. Bd. of County Comm'rs, 58 P.3d 1165 (Colo. App. 2002).

A substantial compliance standard is the proper measure when reviewing claims brought to enforce the election provisions of this section. In determining whether a district has substantially complied with a particular provision of this section, courts should consider factors, including: (1) The extent of the district's noncompliance; (2) the purpose of the provision violated and whether the purpose is substantially achieved despite the district's noncompliance; and (3) whether it can reasonably be inferred that the district made a good faith effort to comply or whether the district's noncompliance is more properly viewed as the product of an intent to mislead the electorate. Bickel v. City of Boulder, 885 P.2d 215 (Colo. 1994).

A plaintiff suing under this section's enforcement clause need not set forth in the complaint facts showing that the claimed violations affected the election results. A requirement that a plaintiff allege facts that the election results would have been different had the claimed violations not occurred would make enforcement of the provisions of this section effectively impossible in most elections. Bickel v. City of Boulder, 885 P.2d 215 (Colo. 1994).

The incurrence of a debt and the adoption of taxes as the means with which to repay that debt are properly viewed as a single subject when presented together in one ballot issue. Bickel v. City of Boulder, 885 P.2d 215 (Colo. 1994).

Ballot title is not a ballot title for tax or bonded debt increases and the city is not required to begin the measure with the language "Shall city taxes be increased by up to 8 million dollars?". The primary purpose and effect of the measure is to grant a franchise to a public utility to furnish gas and electricity to the city and its residents, although the ballot title also seeks authorization for a contingent tax increase of up to $8,000,000 to be implemented only in the highly unlikely event that the city were unable to collect from the public utility. Bickel v. City of Boulder, 885 P.2d 215 (Colo. 1994).

Ballot title violates subsection (3)(c) by failing to include an estimate of the full fiscal year dollar increase in ad valorem property taxes. All that is required is a good faith estimate of the dollar increase. To create an exemption from the requirements of subsection (3)(c) any time a district has difficulties estimating its proposed tax increases would undermine the primary purpose of the disclosure provisions of this section. Bickel v. City of Boulder, 885 P.2d 215 (Colo. 1994).

The purpose of the disclosure requirements regarding the dollar estimate of a tax increase is to permit the voters to make informed choices at the ballot. That purpose was not substantially achieved in the case of the proposed ad valorem property tax increase because the ballot title failed to give any indication of the potential magnitude of the tax increase. Bickel v. City of Boulder, 885 P.2d 215 (Colo. 1994).

The only portion of the ballot measure that should be invalidated for failure to provide estimate of the tax increase is the authorization for the city to increase ad valorem property taxes "in an amount sufficient to pay the principal and interest on" the open space bonds. The first portion of the measure, which authorizes the city to issue bonds, does not violate this section and need not be stricken from the measure. Bickel v. City of Boulder, 885 P.2d 215 (Colo. 1994).

The calculation method employed to calculate fiscal year spending is not prohibited by the plain language of this section. It is entirely unclear whether the city's cash reserves are properly viewed as a reserve increase, a reserve transfer, or a reserve expenditure for purposes of subsection (2)(e). Plaintiffs' claim that the city's calculation of its fiscal year spending data may have misled the voters is without foundation because the city clearly disclosed in its election notice that fiscal year spending included the accrual of the cash reserves. Bickel v. City of Boulder, 885 P.2d 215 (Colo. 1994).

Failure of election notice to include the overall percentage change in fiscal year spending over a five-year period is not significant. All of the information relevant to calculating the overall percentage change was provided by the city in its chart. On the whole, the election notice substantially complies with the disclosure requirements set forth in subsection (3)(b). Bickel v. City of Boulder, 885 P.2d 215 (Colo. 1994).

Where there is a discrepancy between the total debt repayment cost stated in the election notice and the amount stated in the ballot title, the district should be bound by the lower figure. The electorate did not receive any advance warning of the higher debt repayment cost stated in the ballot title. Bickel v. City of Boulder, 885 P.2d 215 (Colo. 1994).

The absence of the district's submission resolution from the election notice did not make the election notice insufficient or misleading in any way. This section does not require districts to include in their election notices the ministerial acts, orders, or directions of the governing body authorizing submission of a particular initiative to the electorate where to do so would be duplicative and potentially confusing and would not add any substantive information to the election notice that was not already disclosed in the ballot title. Bickel v. City of Boulder, 885 P.2d 215 (Colo. 1994).

Transportation revenue anticipation notes issued in accordance with § 43-4-705, constitute a "multiple fiscal year direct or indirect district debt or other financial obligation whatsoever" that requires voter approval. It is evident that the state is receiving money in the form of a loan from investors. Because the notes are negotiable instruments, it can be implied that the notes contain an unconditional promise of payment. It is apparent that the payment obligations are likely to extend into multiple years because the state must make a pledge of its credit for the notes to be marketable. Given the amount of notes issued in comparison to the annual budget of the department of transportation, it is reasonable for the voters to have expected that the notes would be submitted to them for their consideration. Submission of Interrogatories on House Bill 99-1325, 979 P.2d 549 (Colo. 1999).

Subsection (4)(a) does not require a school district to obtain voter approval for every tax or mill levy, but only for those taxes that are either new or represent increases from the previous year. To the extent that the school district's 1992 mill levy was the same as the previous year, subsection (4)(a) did not apply. Bolt v. Arapahoe County School Dist. No. 6, 898 P.2d 525 (Colo. 1995).

Advance voter approval requirement held satisfied by 1984 approval of issuance of general obligation bonds. The incurment of debt and the repayment of that debt are issues that are so intertwined that they may properly be submitted to the voters as a single subject. Bolt v. Arapahoe County School Dist. No. 6, 898 P.2d 525 (Colo. 1995).

Voters may give present approval for future increases in taxes under this section when the increase might be necessary to repay a specific, voter-approved debt. Bolt v. Arapahoe County School Dist. No. 6, 898 P.2d 525 (Colo. 1995).

Abatements and refunds levy, designed to recoup tax revenue lost because of an error in assessment, is not subject to subsection (4)(a). But for the error, such revenue would have been collected, and the total dollar amount of taxes imposed does not increase although the mill levy rate may change. Bolt v. Arapahoe County School Dist. No. 6, 898 P.2d 525 (Colo. 1995).

District levy for purposes of meeting federal requirements predated this section, hence was exempt, in view of statutory budgeting process that gives no discretion to board of county commissioners to alter budget fixed earlier in the year. Bolt v. Arapahoe County School Dist. No. 6, 898 P.2d 525 (Colo. 1995).

While authority's bonds constituted a financial obligation under this section, the remarketing of the bonds nevertheless was not subject to subsection (4)(b), since the bond remarketing scheme does not create any new obligation, it merely remarketed debt that was authorized before the enactment of this section under the terms of a financing plan adopted at the time the debt was issued. Board of County Comm'rs v. E-470 Public Hwy. Auth., 881 P.2d 412 (Colo. App. 1994); Nicholl v. E-470 Public Hwy. Auth., 896 P.2d 859 (Colo. 1995).

Intergovernmental loan repayment was a new multi-year fiscal obligation to which subsection (4)(b) applied and Authority must obtain voter approval before incurring this debt. Nicholl v. E-470 Public Hwy. Auth., 896 P.2d 859 (Colo. 1995).

IV. SPENDING AND REVENUE LIMITS.

The electorate of a governmental entity may authorize retention and expenditure of the excess collection without forcing a corresponding revenue reduction. Havens v. Board of County Comm'rs, 924 P.2d 517 (Colo. 1996).

Although the great outdoors Colorado trust fund board is not a local government, private entity, agency of the state, or enterprise under this section, it is essentially governmental in nature and the best reading of this section is to exclude from state fiscal year spending limits only those entities that are nongovernmental since this interpretation is the interpretation that reasonably restrains most the growth of government. Submission of Interrogatories on Senate Bill 93-74, 852 P.2d 1 (Colo. 1993).

Section 9 of article XVIII of the Colorado Constitution prohibits the general assembly from enacting limitations on revenues collected by the Colorado limited gaming commission in order to comply with this section, and insofar as revenues generated by limited gaming might tend in a given year to violate the spending limits imposed by this section, the general assembly may comply with this section by decreasing revenues collected elsewhere, or if that is impossible after the fact, the general assembly may comply with this section by refunding the surplus to taxpayers. Submission of Interrogatories on Senate Bill 93-74, 852 P.2d 1 (Colo. 1993).

The party seeking to invoke the "preferred interpretation" has the burden of establishing that its proposed construction of this section would reasonably restrain the growth of government more than any other competing interpretation. The mere assertion by a party that its interpretation would "reasonably restrain most the growth of government" is not dispositive. Bickel v. City of Boulder, 885 P.2d 215 (Colo. 1994).

"Offset" is not a term of art defined by this section or utilized in a compensatory financial sense in the applicable provision; rather, read in context, the reasonable meaning of the operating phrase "revenue change as an offset" in subsection (7)(d) is that voter approval for the excess revenue retention constitutes the required offset to the refund requirement which otherwise would apply. Havens v. Board of County Comm'rs, 924 P.2d 517 (Colo. 1996).

The electorate's approval for retention of the excess revenues as a "revenue change" is the required "offset" to the governmental entity's otherwise applicable refund obligation: "[T]he excess shall be refunded in the next fiscal year unless voters approve a revenue change as an offset." Havens v. Board of County Comm'rs, 924 P.2d 517 (Colo. 1996).

Remarketing of revenue bonds does not constitute creation of debt requiring voter approval under this section because the remarketing does not create any new debt, impose any tax, or expose taxpayers to any new liability or obligation. Board of County Comm'rs v. E-470 Public Hwy., 881 P.2d 412 (Colo. App. 1994).

Under this section, bonded debt increases annual fiscal spending only by the amount of the debt service, not by the amount of the borrowed funds expended; thus, the expenditure of the escrowed bond proceeds for further construction and the operation of E-470 highway does not impact annual fiscal spending, and is not subject to the voter approval requirements of subsection (7)(d). Board of County Comm'rs v. E-470 Public Hwy. Auth., 881 P.2d 412 (Colo. App. 1994); Nicholl v. E-470 Public Hwy. Auth., 896 P.2d 859 (Colo. 1995).

The collection and expenditure of Authority revenues for service on bonds are "changes in debt service," to which the provisions of subsection (7)(b) do not apply under the plain language of this section. Board of County Comm'rs v. E-470 Public Hwy. Auth., 881 P.2d 412 (Colo. App. 1994); Nicholl v. E-470 Public Hwy. Auth., 896 P.2d 859 (Colo. 1995).

It is incorrect to interpret the phrase "revenue change as an offset" in subsection (7)(d) to require that offsetting revenue reductions must be paired with the retained excess revenues for the following reasons: (1) Such a construction would restrict the electorate's franchise in a manner inconsistent with the evident purpose of this section, which is to limit the discretion of governmental officials to take certain taxing, revenue, and spending actions in the absence of voter approval; (2) such a construction does not accord with legitimate voter expectations that this section, if adopted, would defer to citizen approval or disapproval certain proposed tax, revenue, and spending measures that varied from this section's limitations; (3) the general assembly has construed this section as including the approval of revenue changes, under subsection (7) by means of measures referred to the voters by local government; (4) such a construction conflicts with the clear pattern of this section deferring to voter choice in the waiver of otherwise applicable limitations; and (5) the court has declined to adopt a rigid interpretation of this section which would have the effect of working a reduction in government services. Havens v. Board of County Comm'rs, 924 P.2d 517 (Colo. 1996).

V. STATE MANDATES.

"Subsidy" of state by county is legally impossible. Attempted turnback by county of its responsibilities under human services code pursuant to subsection (9) was invalid because when a county (itself a political subdivision of the state) attempts to subsidize the state, the state, through the county, contributes to itself. Therefore, county's contribution to cost of social services program is not a "subsidy" and subsection (9) does not apply. Romer v. Board of County Comm'rs, Weld County, 897 P.2d 779 (Colo. 1995).

This section did not change the mixed state and local character of social services. Romer v. Board of County Comm'rs, Weld County, 897 P.2d 779 (Colo. 1995).

A county's duties to the state court system, including security, may not be reduced or ended pursuant to subsection (9). State v. Board of County Comm'rs, Mesa County, 897 P.2d 788 (Colo. 1995).

ARTICLE XI

Public Indebtedness

Section 1. Pledging credit of state, county, city, town or school district forbidden. Neither the state, nor any county, city, town, township or school district shall lend or pledge the credit or faith thereof, directly or indirectly, in any manner to, or in aid of, any person, company or corporation, public or private, for any amount, or for any purpose whatever; or become responsible for any debt, contract or liability of any person, company or corporation, public or private, in or out of the state.

Source: Entire article added, effective August 1, 1876, see **L. 1877,** p. 60.

El Paso County, State of Colorado, District Court Court address: **20 East Vermijo Ave.** **Colorado Springs, CO 80903** Phone Number: **(719) 448-7544**	
DOUGLAS BRUCE et al Plaintiff Vs. CITY OF COLORADO SPRINGS Defendant	**Court Use Only**
Attorney or Party without Attorney(Name and Address):	Case Number: 2003CV935 Division 12 Courtroom 302
ORDER	

BACKGROUND

This matter came before this court upon Plaintiff's claim that an April 1, 2003, election held by the City of Colorado Springs was invalid as to one of the items, Issue 1A, a measure submitted to the electorate which proposed that an existing sales and use tax be extended from 2009 to 2025.

The City filed a Motion for Summary Judgment to which Plaintiff responded. The Court deemed Plaintiff's Response to be a Cross Motion for Summary Judgment and proceeded to determine the matter on Summary Judgment given that there was no dispute as to any facts which the Court deemed material to a determination on the merits. Oral argument was held on July 2, 2004, after which the Court advised the parties that it would enter its ruling as expeditiously as practicable.

FACTS

On December 10, 2002, by way of resolution number 213-02, the city council of the City of Colorado Springs determined to submit to the voters a ballot measure to extend the sales and use tax for Trails, Open Space, and Parks ("TOPS"), due to expire in 2009, to 2025. The ballot title was fixed as part of the resolution. At that time, and at subsequent council meetings during which the ballot measure was discussed, the city council was advised by the city attorney that no notice of election would be sent because such was not required by TABOR[1]; accordingly, no comments would be accepted from the public as would otherwise be required by TABOR to be included in notices of election.

On February 14, 2003, Plaintiff herein demanded the right to file comments regarding the ballot measure despite the city clerk's assertions that such would not be accepted. The city clerk acquiesced and accepted Plaintiff's comments. Following acceptance of these comments from Plaintiff, the city clerk again contacted the office of the city attorney and was advised by the city attorney that her opinion had changed and that a notice of election must be sent. The city clerk, being aware that this was the last day for accepting comments to be included in the "For" and "Against" section of the notice, contacted the vice mayor who was known to her to be a strong proponent of the measure. She advised the vice mayor that comments for the proposal had to be submitted by close of business that day to be included in the notice. She did not contact any other persons for the solicitation of comments. Comments by proponents and the comments by Plaintiff were included in the notice of election.

The notice of election was entitled "NOTICE OF ELECTION ON A REFERRED MEASURE." The notice of election did not include the information set forth in City TABOR 7-

[1] Throughout the text of this Order, the Court may refer to specific sections of City TABOR or State TABOR and may refer to both collectively as TABOR. The provisions of the respective amendments are virtually identical such that no distinction is necessary for purposes of this Order.

90(c)(2) or State TABOR 20(b)(3). The ballot title did not include the words "Shall City taxes be increased...".

ISSUES TO BE DETERMINED

I. WHETHER OR NOT THE BALLOT TITLE CONSTITUTED A TABOR VIOLATION, AND WHETHER OT NOT THE TITLE WAS PROPERLY CONTESTED BY THE PLAINTIFF.

II. WHETHER OR NOT THE FACTUAL SUMMARY MAILED PURSUANT TO RESOLUTION OF THE CITY COUNCIL CONSTITUTED A VIOLATION OF THE FAIR CAMPAIGN PRACTICES ACT SUCH THAT THE ELECTION SHOULD BE INVALIDATED.

III. WHETHER OR NOT THE TITLE OF THE NOTICE OF ELECTION CONSTITUTED A TABOR VIOLATION.

IV. WHETHER OR NOT THE NOTICE OF ELECTION CONTAINED THE NECESSARY INFORMATION AS REQUIRED BY TABOR.

V. WHETHER OR NOT THE ACTIONS OF THE CITY CLERK IN CONTACTING ONLY PROPONENTS OF THE MEASURE REGARDING SUBMISSION OF COMMENTS CONSTITUTED A VIOLATION OF TABOR.

VI. WHETHER OR NOT THERE WAS SUBSTANTIAL COMPLIANCE EVEN IF THERE WERE DEVIATIONS FROM THE SPECIFIC REQUIREMENTS OF TABOR.

FINDINGS AND CONCLUSIONS OF LAW

I.

WHETHER OR NOT THE BALLOT TITLE CONSTITUTED A TABOR VIOLATION, AND WHETHER OR NOT THE TITLE WAS PROPERLY CONTESTED BY THE PLAINTIFF.

State TABOR (3)(b) and (3)(c) reference order of preference for notice and ballot titles. If the election is one which involves an increase in taxes, the ballot title should begin, "SHALL CITY TAXES BE INCREASED...", as being the preferential title. The question then becomes whether this was just such an election. To make that determination, we must examine the various parts of TABOR as they logically relate to each other.

State TABOR (4)(a) specifically sets forth the categories of revenue increases for which an election is required [See Aurora v. Acosta, 892 P.2d 264 (Colo.1995)]. A review of this provision indicates that the various forms of revenue increases set forth therein would unquestionably constitute tax increases with the exception of "extension of an expiring tax." Indeed, the parties agreed during the course of oral argument that all other forms listed therein are tax increases. They disagreed as to "extension of an expiring tax." The City argues that if an extension of an expiring tax was deemed to be a tax increase, TABOR could have easily and explicitly said so. That argument disregards, however, that section (4)(a) does not specifically state that any of the forms listed therein are "tax increases." To interpret them otherwise, though, would attach no meaning whatsoever to (3)(b) which sets forth the types of information which must be included in election notices for issues involving "tax increases." Because "tax increases" are not otherwise defined in TABOR, this Court must interpret section (4)(a) as being just that definition [See Aurora v. Acosta, Supra, at p. 268]. This interpretation is bolstered by

the requirements of section (3)(c). Without (3)(b) information being included in notices of election held pursuant to section (4)(a), (3)(c) would have no meaning. In short, there would be no baseline from which (3)(c) calculations could be made and, if the (3)(b) "tax increase" information disclosure requirements did not apply to (4)(a) categories, then such would apply to nothing identified anywhere in TABOR. For these reasons, the Court FINDS that this election was an election proposing a "tax increase" and the ballot title should have reflected this determination. Because the ballot title began with the phrase "WITHOUT RAISING ADDITIONAL TAXES..." such constituted a TABOR violation.

Such finding does not end the inquiry, however. As set forth in Cacioppo v. Eagle County School District, 03SA336, June 14, 2004, C.R.S. 1-11-203.5 sets forth the exclusive method for contesting ballot titles. Because it is uncontested that Plaintiff did not timely follow the procedures set forth therein, his current claim in that regard is time barred. This determination does not, in this Court's view, prohibit the Court from considering the ballot title as it may impact the overall determination of substantial compliance with TABOR.

II.

WHETHER OR NOT THE FACTUAL SUMMARY AS MAILED PURSUANT TO RESOLUTION OF THE CITY COUNCIL VIOLATED THE FAIR CAMPAIGN PRACTICES ACT SUCH THAT THE ELECTION SHOULD BE INVALIDATED.

As set forth in the City's brief, the proper procedure for contesting an alleged violation of the Fair Campaign Practices Act is set forth at Colo. Const. Art. XXVIII, Sect. 9(2)(a). A hearing is required before an administrative law judge. The decision of the administrative law judge is subject to appeal. Plaintiff filed a Complaint with the Colorado Secretary of State in accordance with this procedure. A hearing was held and an opinion was issued by the

administrative law judge in which she found that the factual summary did not violate the FCPA. Plaintiff did not appeal.

This Court FINDS that the exclusive remedy for contesting an issue under the FCPA is that which the Plaintiff followed. That issue cannot be revisited in this case. Any claims of the Plaintiff in this regard are DISMISSED.

III.

WHETHER OR NOT THE TITLE OF THE NOTICE OF ELECTION CONSTITUTED A TABOR VIOLATION.

As set forth in TABOR sect. 20(3)(b), titles are to have a certain order of preference as follows: NOTICE OF ELECTION TO INCREASE TAXES/TO INCREASE DEBT/ON A CITIZEN PETITION/ON A REFERRED MEASURE. In this election, the City chose to use the last of the four choices after determining that the election did not involve a tax increase. Given the analysis set forth in Section I above, this Court FINDS that the election did involve a "tax increase." As such, the proper title of the notice of election should have been NOTICE OF ELECTION TO INCREASE TAXES. It follows then that the title of the notice of election did constitute a violation of TABOR because the mandated order of preference was not followed. It does not, however, follow that the election must be invalidated if there is otherwise substantial compliance with TABOR.

IV.

WHETHER OR NOT THE NOTICE OF ELECTION CONTAINED THE NECESSARY INFORMATION REQUIRED BY TABOR.

Once it is determined that the election was an election to increase taxes, the requirements of TABOR 20(3)(b)(ii) and (iii) must be met. None of the information required by those sections

was included in the notice of election. The only information included in the notice of election, other than the ballot title and text, were comments filed by the Plaintiff and the proponents of the measure. Though such comments may have included the opinion of the preparer as to certain data required by TABOR, it did not include any information prepared by the City and certainly did not include any estimates as required. It cannot be said, therefore, that the notice of election contained the informational disclosure required by TABOR.

V.

WHETHER OR NOT THE ACTIONS OF THE CITY CLERK IN CONTACTING ONLY THE PROPONENTS OF THE MEASURE RE SUBMISSION OF COMMENTS CONSTITUTED A VIOLATION OF TABOR.

It is undisputed that on at least two public occasions, i.e. city council sessions, the public was notified that the City would not accept comments regarding the proposed ballot measure because no notice of election would be sent. On the last day for submitting such comments, Plaintiff appeared at the city clerk's office and was again advised that no comments would be accepted. Plaintiff, by all indications, forcefully demanded that his comments be accepted. The city clerk's office allowed him to do so. This acceptance of Plaintiff's comments occurred at approximately 3:15 p.m. on the afternoon of February 14, 2003, admittedly the last day for submission of such comments. After accepting Plaintiff's comments, the city clerk again contacted the city attorney's office regarding its opinion that no notice of election should be sent. The city clerk was advised that the city attorney's office had changed its opinion and that a notice of election should be sent. The city clerk, being aware that the vice mayor was a strong supporter of TOPS, contacted him regarding the need to submit comments prior to the 5:00 p.m.

deadline. The TOPS committee, through one of its members, submitted the comments which were included in the notice of election.

The Court FINDS no bad faith on the part of the city clerk in the notifying of the vice mayor of the deadline for submitting comments. While there is arguably an appearance of impropriety in that the city clerk took no action to solicit comments from opponents of the measure, TABOR contains no proscription as to how such comments may be submitted to the city clerk's office.

The Court is more concerned, however, with the actions of the City in refusing to notify the public that any comments would be received. On at least two public occasions, the City notified the public that comments would not be received because no notice of election would be sent. Had it not been for the insistence of the Plaintiff, his comments would not have been accepted by the city clerk. It was only after the Plaintiff's comments were accepted that the city clerk was advised by the city attorney that the decision had been made to send a notice of election. After that decision was made, the city clerk then solicited comments favorable to the measure.

Both City and State TABOR clearly anticipate the participation of the public in preparing comments to be included in notices of election. If it were not so, deadlines for submission of such comments would not have been established (State TABOR 20(3)(b)(v); City TABOR 7-90(c)(2)(v)). State TABOR is a constitutional amendment while City TABOR is a City Charter Amendment. Actions by the City which effectively negate those provisions should not be approved. In this case, there is the appearance, at the very least, that such occurred. This Court cannot state that such did not occur. Until after 3:15 p.m. on the last day for submitting comments, the City refused such comments. When that opinion was changed, an employee of the City solicited comments from only proponents of the issue. If all others, save the Plaintiff,

who may have opposed the measure had taken the City at its word as expressed in public, no comments whatsoever would have been submitted. This is equally true of proponents of the measure who also had no reason to believe that the City would accept comments regarding this measure. Given that the City never reversed itself in a public sense, it cannot be said that the public had any reasonable opportunity to further the purposes of TABOR with the submission of comments.

The Court FINDS, then, that the City violated the provisions of TABOR by publicly refusing to accept comments to be included in the notice of election.

VI.

WHETHER OR NOT THERE WAS SUBSTANTIAL COMPLIANCE EVEN IF THERE WERE DEVIATIONS FROM THE LITERAL REQUIREMENTS OF TABOR.

In Bickel v. City of Boulder, 885 P.2d 215 (Colo. 1994), the Colorado Supreme Court has given guidance as to how a determination of substantial compliance is to be made. The Court noted in that opinion that "where multiple interpretations of an Amendment 1 provision are equally supported by the text of that amendment, a court should choose that interpretation which it concludes would create the greatest restraint on the growth of government" (See Bickel, at 229). The Court also set forth certain factors to be considered when making a substantial compliance determination. Those factors include: (1) the extent of the district's noncompliance with respect to the challenged ballot issue, that is, a court should distinguish between isolated examples of district oversight and what is more properly viewed as systemic disregard of Amendment 1 requirements; (2) the purpose of the provision violated and whether that purpose is substantially achieved despite the district's noncompliance; and (3) whether it can reasonably be inferred that the district make a good faith effort to comply or whether the district's

noncompliance is more properly viewed as the product of an intent to mislead the electorate.

As to the first factor to be considered, because this Court has found that the election involved a "tax increase," it follows that the extent of noncompliance is significant. The title of the notice of election was improper, the ballot title was improper, the ballot title did not contain the mandated information as to estimated tax revenue increase, the notice of election did not contain the required 20(3)(b) information, and the ballot title itself contained the opening phrase "WITHOUT RAISING ADDITIONAL TAXES," when the undisputed purpose of the measure was to raise between $100 million and $200 million in additional taxes over the term of the extension (as stated by the parties in oral argument). The Court FINDS, then, that the examples of noncompliance are not isolated and do represent a systematic disregard of the requirements of TABOR.

As to the second factor to be considered, the purpose of the provisions violated were to fully inform the electorate as to the nature of the measure, that is, what the measure was designed to do in terms of producing additional revenue. The Supreme Court held in Bickel that the primary purpose of TABOR's disclosure provisions was to provide the electorate with the information necessary to make an intelligent decision on ballot issues involving debt/tax increases. Because all of the required estimates of spending and revenue increases were missing from the notice of election and the ballot title, and because the ballot title itself could lead one to believe that there would be no increase in tax revenue, there was no information whatsoever from which a voter could glean the kinds of data which TABOR contemplates the voter receiving. It cannot be said, therefore, that the purpose of the provisions with which there was no compliance has been otherwise achieved.

The third factor to be considered is that of whether there was a good faith effort to comply on the part of the City. Because virtually all of the data which is required to be included

in either the notice of election or the ballot title was not included in the information provided to the voters in this election, there is no evidence of a good faith effort to comply. When these omissions are considered in conjunction with the ballot title's opening phrase "WITHOUT RAISING ADDITIONAL TAXES," which is clearly a misstatement of the intent of the measure, the lack of evidence of good faith is predominant.

The case law in Colorado is consistent in its advice that a court should not lightly set aside an election. Indeed, as the Colorado Supreme Court has pointed out in Bickel and Felzien v. School District RE-3 Frenchman, 380 P.2d 572 (Colo. 1963), as a matter of general public policy, courts should not invalidate the results of an election unless clear grounds for such action is shown. Though the cases do not state such in so many words, it is this Court's view that election results are to be accorded substantial deference and only reluctantly and upon "clear grounds" should an election's results be set aside. It is with this view in mind that this Court has examined all of the facts and arguments submitted to it and now finds itself compelled to conclude that, in furtherance of City Council Resolution 213-02 and in its submission to the voters of its proposal to extend the TOPS tax to 2025, the City of Colorado Springs did not substantially comply with the provisions of either State TABOR or City TABOR.[2]

[2] Upon appellate review, the question may arise as to whether or not the trial court would have found substantial compliance with TABOR if it had determined that "extension of an expiring tax" did not fall under the definition of a "tax increase," thereby triggering the informational disclosure requirements of sec. 20(3)(b). The trial court answers that question in the affirmative. It would have found substantial compliance despite the other TABOR infirmities. Relying upon the logic of Kelly v. Novey, 318 P.2d 214, 135 Colo.408 (1957), the Court would find that despite the "public comment" issue and the misleading ballot title, enough information had been provided to the voters through the ballot text, the factual summary, and the "For" and "Against" comments to allow an informed choice, therefore, the spirit and intention of TABOR had not been violated.

ORDER

IT IS , THEREFORE, ORDERED THAT THE RESULTS OF THE ELECTION HELD BY THE CITY OF COLORADO SPRINGS ON APRIL 1, 2003, ARE INVALID AS TO ISSUE 1A, AND , AS TO ISSUE 1A, THE ELECTION IS A NULLITY.

Done and Dated this 20 day of AUGUST 2004.

BY THE COURT:

ROBERT L. LOWREY
DISTRICT COURT JUDGE