THE TAXPAYER'S BILL OF RIGHTS[1]

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TABOR is a tax, spending, revenue, and debt limitation provision of the Colorado Constitution that applies to the State and all local governments. TABOR generally became effective December 31, 1992.[2] "The principal purpose of TABOR is to limit the spending and taxing power of State and local governments by providing taxpayers with greater direct control over government growth."[3] TABOR is complex in terms of which governments it covers, what the tax, spending, revenue, and debt limitations are, what procedures are necessary for elections under TABOR, and what procedures are necessary for emergency taxes. "Its preferred interpretation shall reasonably restrain most of the growth of government."[4] Most of the interpretations of TABOR come from Colorado courts and the General Assembly. This is in part because the Colorado Supreme Court determined that the opinions of TABOR's author, Douglas Bruce, regarding interpretations of TABOR after its adoption, carry no weight.[5] However, the Colorado Supreme Court said that the legislative council's analysis of TABOR could provide important insight into voter intent.[6] Nonetheless, TABOR's many undefined terms and complexities make it a difficult amendment to interpret and follow. This article provides some guidelines for TABOR's complex areas based upon current Colorado case law and also highlights the questions that Colorado courts have yet to answer.

TABOR Includes Governments & Excludes Enterprises

In general, TABOR requires districts to receive voter approval prior to increasing taxes, spending, revenue, or debt above TABOR's limitations. The first question, then, is what constitutes a "district" such that TABOR's limitations apply.

"DISTRICT" MEANS THE STATE OR ANY LOCAL GOVERNMENT.[7]

Almost from TABOR's inception, Colorado courts repeatedly have had to address what constitutes a "district" under TABOR, in part because the term "local government" is not defined in TABOR or in any other Constitutional provision. If an entity is not a "local government," then it is not a "district" and does not have to comply with TABOR's requirements.

In determining whether an entity is a "district," the Colorado Supreme Court has taken two approaches. The first approach was determining whether the entity was essentially governmental. In 1993, the Court refused to decide whether Great Outdoors Colorado ("GOCO") was a district, stating

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1 COLO. CONST. art X, § 20 [hereinafter, "TABOR"]. All § references are to Article X § 20 of the Colorado Constitution.
2 § (1).
3 *Boulder County Board of County Comm'rs v. City of Broomfield*, 7 P.3d 1033, 1037 (Colo. App. 1999).
4 § (1).
5 *Submission of Interrogatories on Senate Bill 93-74*, 852 P.2d 1, 7-8 n.7 (Colo. 1993).
6 *Zaner v. City of Brighton*, 899 P.2d 263, 270 (Colo. App. 1994), aff'd. 917 P.2d 280 (Colo. 1996).
7 § (2)(b).

that that categorization did not determine TABOR's application in that instance.[8] The Court stated that GOCO was not a private entity or enterprise. Nor was GOCO a local government because its activities and authority were not confined to a specific geographical area within the State, because it addressed matters of statewide concern, and because it was created by a statewide vote. Still, TABOR was intended to exclude only non-governmental entities; therefore, TABOR governed GOCO because, though it was not a local government, it was essentially governmental.[9]

Later, the Court used a second approach in defining "district," focusing this time on an entity's ability to create and levy taxes. In 1998, the Court compared local governments and irrigation districts when asked whether an irrigation district was a "district" for the purposes of TABOR.[10] The Court compared the taxing abilities and voting requirements of a local government with those of an irrigation district.[11] The Court noted that general taxes and an irrigation district's special assessment are different in that the former exacts revenue from the public at large for general governmental purposes while the latter benefits specific landowners. Additionally, all registered voters may vote on taxing and spending increases in a local government, whereas nonresident, unregistered voters who own irrigated land—and may or may not be natural persons—are eligible to vote in irrigation district elections. Based on these differences, the Court held that an irrigation district is essentially a private entity and not a local government within the meaning of TABOR.[12]

The Colorado Court of Appeals has also used this second approach to define "district" for TABOR purposes. In 2002, that Court ruled that an urban renewal authority is not a local government and therefore not a "district" under TABOR.[13] The Court focused on the ability to levy taxes or assessments and the ability to conduct elections as hallmarks of a local government, yet the urban renewal authority was unable to engage in either of these activities. In addition, the Urban Renewal Law defines an urban renewal authority as a "corporate body," not a local government or political subdivision. Therefore, the urban renewal authority was not subject to the provisions of TABOR.[14]

An entity, then, is probably a "district" if it performs essentially governmental functions, holds elections as a government, and has the ability to tax the public at large for general governmental purposes. Entities with these characteristics need to comply with TABOR before increasing taxes, spending, revenue, or debt.

"DISTRICT" EXCLUDES ENTERPRISES.[15]

Enterprises are not subject to TABOR. There are three separate tests to determine if an entity is an "enterprise."[16] TABOR defines an "enterprise" as a government-owned business authorized to issue its own revenue bonds and receiving under ten percent of annual revenue in grants from all Colorado

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8 *Submission of Interrogatories on Senate Bill 93-74*, 852 P.2d 1, 10 (Colo. 1993).
9 *Id.*
10 *Campbell v. Orchard Mesa Irrigation District*, 972 P.2d 1037 (Colo. 1998).
11 *Id.* at 1040.
12 *Id.* at 1041.
13 *Olson v. City of Golden,* 53 P.3d 747 (Colo. App. 2002).
14 *Id.*
15 § (2)(b).
16 Dee P. Wisor, *Government by Plebiscite*, 22 COLO. LAW. 293, 293 (1993).

State and local governments combined. The determination whether a business is an enterprise is made annually.

First, the enterprise must be a government-owned business.[17] TABOR, however, does not define "business" or "government-owned." Generally, water, sewer and electric utilities, golf courses and airports should be considered businesses.[18] However, the Colorado Supreme Court has addressed what constitutes a "business" only once.[19] In *Nicholl v. E-470 Public Highway Authority*, the issue was whether the Highway Authority was a "business." The Court said that the term "business" is "generally understood to mean an activity which is conducted in the pursuit of benefit, gain or livelihood."[20] The Colorado Court of Appeals applied this standard and held that the Colorado Bridge Enterprise is a business because it pursues a benefit and charges fees to service users.[21] The fee imposed is a bridge safety surcharge imposed upon any vehicle for which a registration fee is imposed. The Court decided that a fee does not need to be a market exchange taking place in a competitive, arms-length manner.[22]

Additionally, the *Nicholl* Court determined that the public highway authority was not an enterprise because, although it was government-owned and business-like, it had the power to levy sales or use taxes.[23] This characteristic was not typical of a business, and including a taxing authority within TABOR's definition of "enterprise" was, in the Court's view, inconsistent with the terms of the definition as a whole.[24] The Court reached this conclusion even though the public highway authority had never exercised its taxing powers.

The business must also be "government-owned." This raises the question of whether a single purpose entity, such as a water district, can be a government-owned business. One possible answer is that the special district is the government that owns the business, such as a water utility, which is operated by the district.[25]

Second, the government-owned business must be authorized to issue its own revenue bonds.[26] In *Board of County Commissioners v. Fixed Base Operators, Inc.*,[27] the Colorado Court of Appeals held that a government-owned fixed base operator at an airport was an enterprise. The Federal Aviation Administration treated the operator as a governmental entity, yet this did not influence the Court's analysis. The entity was authorized to issue its own revenue bonds, and, therefore, was an enterprise.[28] The second enterprise test is probably met if the business's governing body is authorized to issue revenue bonds payable solely from the business's revenue.[29]

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17 *Id.*
18 *Id.*
19 *Nicholl v. E-470 Public Highway Authority*, 896 P.2d 859, 868 (Colo. 1995).
20 *Id.*
21 *TABOR Foundation v. Colorado Bridge Enterprise*, 2014 COA 106, 13CA1621 (Colo. App. 2014).
22 *Id.*
23 *Nicholl v. E-470 Public Highway Authority*, 896 P.2d at 868.
24 *Id.*
25 Wisor, *supra* note 16, at 293.
26 *Id*.
27 939 P.2d 464, 468 (Colo. App. 1997).
28 *Id.*
29 Wisor, *supra* note 16, at 294.

Third, not more than ten percent of the business's annual revenue can be from all Colorado State and local government grants, combined.[30] Neither TABOR nor Colorado courts have defined what constitutes a "grant" in calculating the ten-percent limitation, though *Nicholl* suggests that the independent power to levy taxes may factor into the calculation. If so, the ten-percent limitation may include the revenue a government uses to subsidize a government-owned business. The statutes enacted to implement TABOR define "grant" to include only cash transactions, but because courts remain free to adopt their own definitions when interpreting TABOR, they may not accept the statutory definition.[31] To maintain "enterprise" status, an enterprise would be well advised to reduce the amount of government grants to keep the enterprise under the ten-percent limit.[32]

In conclusion, if a government-owned business is authorized to issue its own revenue bonds and complies with the ten-percent limitation annually, it should maintain its "enterprise" status, exempting it from TABOR.

Tax Limitation

BEGINNING NOVEMBER 4, 1992, DISTRICTS MUST HAVE VOTER APPROVAL IN ADVANCE FOR 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 TAX POLICY CHANGE DIRECTLY CAUSING A NEW TAX REVENUE GAIN.[33]

This section of TABOR requires districts to receive voter approval prior to taking any of these listed actions. Of the listed actions, the limit on the mill levy is a local government's most immediate concern.[34] If the assessed value within a government area declines, the government needs a vote before it may increase the mill levy to generate the same revenues as the previous year. The voter approval requirement does not apply, however, to a mill levy when annual district revenue is less than annual payments on general obligation bonds, pensions, final court judgments[35] or in an emergency.[36]

The voter approval requirement also does not apply to tax levies for tax abatements, refunds, and credits, or to tax levies to pay bonds issued pursuant to a pre-TABOR election. The Colorado Supreme Court addressed this latter situation in *Bolt v. Arapahoe County School District Number 6*.[37] In May of 1984, the voters had approved the school district's bonds, and the ballot issue had "provided an open-ended mechanism for the school district to repay its bonded debt."[38] Because the voters approved the bonded debt with the understanding that the school district would be able to raise revenues to meet the bond obligations, the Court held that the school district had voter approval in advance for its bond redemption mill levy increases.[39] The Court also held that the Board of County

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30 *Id.*
31 Amy Kennedy and Dee P. Wisor, Enterprises Under Article X, § 20 of the Colorado Constitution – Part 1, 27 COLO. LAW. 55 (1998).
32 *Id.*
33 § (4).
34 Wisor, *supra* note 16, at 294.
35 § (1).
36 § (4)(a).
37 898 P.2d 525 (Colo. 1995).
38 *Id.* at 534.
39 *Id.* at 536.

Commissioners had no authority to refuse to impose a levy certified by the school district because it violated TABOR. In the Court's view, TABOR does not limit the amount of the levy the school board may impose; rather it prescribes the procedures by which the levy may be increased.[40]

A frequently litigated question under TABOR's tax-limiting section is whether an action is a "tax policy change." In *Board of Commissioners of County of Boulder v. City of Broomfield*,[41] the Board of County Commissioners ("BOCC") argued that a new or extended tax increment plan was a "tax policy change." The Broomfield City Council had determined that an area of the city was blighted and approved an urban renewal plan for the area. The BOCC claimed that the increased value in the renewal area under the tax increment plan for financing the renewal would be attributable in part to an increase in property values in general, and that the resultant increase in tax revenues ordinarily would be paid to the county. However, because of the presumption that the renewal plan generates increases in property values, the renewal authority would receive the increased tax revenues. Thus, the BOCC argued that the renewal plan would deprive the county of income that it would otherwise receive. According to the BOCC, this constituted a tax policy change that required voter approval.[42]

The Colorado Court of Appeals disagreed, based upon a Colorado Supreme Court decision. That decision held that the urban renewal statute is carefully drafted to provide a direct relationship between an increase in the valuation of property within the renewal area and amounts paid the renewal authority. Therefore, the increase in revenues that would be paid to the urban renewal authority would not result in a county's loss of property tax revenues. Thus, the BOCC lacked standing to sue because it was not adversely affected by the tax increment plan.[43]

The application of TABOR's "tax policy change" language was at issue again before the Colorado Court of Appeals in *Olson v. City of Golden*.[44] There, the plaintiff taxpayer argued that the Golden Urban Renewal Authority (GURA) conveyed property to a limited liability company for less than fair market value, resulting in a reduction of GURA's revenue.[45] The plaintiff argued that this reduced revenue would cause GURA to spend a greater amount of tax revenue to pay its obligations, depriving taxpayers of tax revenue.[46] The Court disagreed because the tax allocation plan did not result in the creation of any new taxes. Additionally, the plan did not authorize GURA to levy, assess or collect taxes; therefore, GURA was not a "district." Thus, TABOR's "tax policy change" language did not apply to GURA.[47] However, the *Olson* decision suggests, that the "tax policy change" language may have applied if GURA had been a "district."

The Supreme Court considered the "tax policy change" issue in *Mesa County v. Ritter*[48]. The Court determined that a "tax policy change resulting in a net tax revenue gain" only requires voter approval when the gain exceeds one of TABOR's revenue limits. So, a government which has had an election

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40 *Id.* at 539.
41 7 P.3d 1033, 1034 (Colo. App. 1999).
42 *Id.* at 1035-1036.
43 *Id.* at 1036.
44 2002 Colo. App. 165, 53 P.3d 747.
45 *Id.*
46 *Id.*
47 *Id.* The Court also determined that because GURA did not have the authority to tax, it was not a district under TABOR. This aspect of the case is discussed above under the heading "I. GOVERNMENTS INCLUDED & ENTERPRISES EXCLUDED."
48 203 P.3d 519 (Colo. 2009)

exempting it from TABOR's revenue limits apparently does not need voter approval for a tax policy change which results in a net revenue gain. See **"De-Brucing" Elections** below.

There has also been litigation over what constitutes a "tax." In *Campbell v. Orchard Mesa Irrigation District*,[49] the Colorado Supreme Court held that an irrigation district's special assessments are not "taxes." The Court reasoned that while "general taxes exact revenue from the public at large for general governmental purposes, an irrigation district's special assessment benefits specific landowners whose land the district supplies with water."[50] Under *Orchard Mesa*, special assessments collected from a finite group that benefit only that affected group are not "taxes" under TABOR.

The Colorado Court of Appeals held that a street light charge billed by a city to property owners to pay for operation and maintenance is not a tax requiring voter approval under TABOR.[51] In the same case, the Court held that a charge collected by a cable television provider pursuant to a franchise agreement with the city was also not a tax. And the Colorado Court of Appeals has held that a bridge safety surcharge imposed on all vehicles which must be registered is not a tax.[52]

A number of governments have received voter approval for a tax increase that terminates on a specific date. Any extension of such an increase must have voter approval. However, the election does not have to comply with TABOR election-question and tax-increase notice provisions because the Colorado Supreme Court has held that an extension of an expiring tax is not a tax increase for TABOR purposes.[53]

Property Tax Revenue Limitation

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 THE VOTERS AFTER 1991 AND CERTAIN PERMITTED REDUCTIONS.[54]

This section of TABOR limits the maximum annual percentage increase in property tax revenue to inflation in the prior calendar year plus annual local growth. The calculation involves two definitions and three adjustments. To begin with, TABOR defines "inflation" as the percentage change in the United States Bureau of Labor Statistics Consumer Price Index for Denver/Boulder.[55] This information is published in August of the succeeding year, and, because property tax must be certified by December 15, districts must estimate the percentage change.

The definition of "local growth" for a non-school district, simply put, is a fraction.[56] The numerator of the fraction is the 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

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49 972 P.2d 1037, 1040 (Colo. 1998).
50 *Id.*
51 131 P.3d 1187 (Colo. App. 2005).
52 *TABOR Foundation v. Colorado Bridge Enterprise*, 2014 COA 106, 13CA1621 (Colo. App. 2014).
53 *Bruce v. Colorado Springs*, 129 P.3d 988 (Colo. 2006).
54 §(7)(c).
55 § (2)(f).
56 *See* Wisor, *supra* note 16, at 295.

from, taxable real property.[57] The denominator of the fraction is the actual value of all real property in the district.[58] "Local growth" does not include growth in actual valuation from inflation or the addition of personal property. For a school district, "local growth" is the percentage change in the school district's student enrollment.[59]

There are three adjustments to the calculation for the property tax increase limitation. First, the calculation is adjusted by any property tax revenue changes approved by voters after 1991. Second, the calculation is adjusted by reductions for exemptions or credits to reduce or end business personal property taxes that the district might enact. Third, the calculation is adjusted by reductions as a result of reducing or ending subsidies to state-mandated programs.[60]

Additionally, to the extent this limitation permits a district to increase property tax, voters must approve any related increase in the mill levy under the limitations of § (4) of TABOR. In other words, the growth limitation allows a government to increase property tax revenues without a vote only if the mill levy does not increase. Finally, debt service is added to property tax revenues and never becomes part of the base.[61]

Spending Limitation

THE MAXIMUM ANNUAL PERCENTAGE CHANGE IN EACH STATE AND LOCAL DISTRICT'S FISCAL YEAR SPENDING EQUALS INFLATION IN THE PRIOR CALENDAR YEAR PLUS ANNUAL LOCAL GROWTH, ADJUSTED FOR REVENUE CHANGES APPROVED BY THE VOTERS AFTER 1991 AND CERTAIN PERMITTED REDUCTIONS.[62]

This section of TABOR, which applies to the State and, separately, to all local governments, limits spending. The maximum annual percentage change in the State's fiscal year spending is inflation plus the percentage change in the State's population. The maximum annual percentage change in each local district's fiscal year spending, like the maximum property tax revenue increase, equals inflation in the prior calendar year plus annual local growth. The definitions of "inflation" and "local growth" are the same for this section as for the tax revenue increase limitation, resulting in the same calculations under both sections.[63]

The definition of "fiscal year spending" is important in understanding this section's application.[64] "Fiscal year spending," means a government's expenditures and reserve increases, with the exceptions discussed below.[65] This definition allows a government to transfer some of the money it receives in a year to a reserve for future years' expenses. If a government does increase its reserve in a given year, the total of expenditures and reserve increases together cannot exceed the total fiscal year spending limitation for the year.[66]

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57 § (2)(g).
58 S (2)(g).
59 § (2)(g).
60 Wisor, *supra* note 16, at 295.
61 § (7)(d).
62 §§ (7)(a), (b).
63 §§ (2)(f), (2)(g), discussed *supra*.
64 Wisor, *supra* note 16, at 295.
65 § (2)(e).
66 Wisor, *supra* note 16, at 295.

EXCLUSIONS FROM FISCAL YEAR SPENDING

"Fiscal year spending" excludes refunds made in the current or next fiscal year; gifts; federal refunds; collections for another government; pension contributions by employees and pension fund earnings; reserve fund transfer expenditures; damage awards; and property sales.[67] A number of these exclusions create ambiguities and are discussed in turn below. Additionally, the Colorado Supreme Court has held that bonded debt increases annual fiscal spending under TABOR only by the amount of the debt service, not by the amount of the borrowed funds expended.[68]

Gifts & Collections for Another Government. Amounts a government collects for another government are excluded as "collections for another government." For example, property taxes collected by a county for other taxing entities are excluded from the county's fiscal year spending. Additionally, in *Bishop v. Regional Transportation District*, the Denver District Court held that "pass through" monies from one government to another to fund a joint construction project are not subject to the receiving government's revenue and spending limits. However, whether lottery monies, cigarette tax, specific ownership tax and State aid payments to school districts fall under this exclusion is unclear.[69]

Alternatively, perhaps these revenues are excluded as "gifts." If so, they are subject to the State, but not the local, government spending limitation. Yet, if these revenues are gifts, it is unclear why federal funds are expressly excluded under the definition of "fiscal year spending" and these revenues are not. If these revenues are neither "gifts" nor "collections for another government," they are included in the fiscal year spending limitation for both the State and local governments.[70]

Reserve Fund Transfers. Excluding reserve fund transfer expenditures gives governments a method of handling revenue increases for multiple-year projects. A government can implement a revenue increase for the project in the first year and allocate a portion of that revenue to a reserve fund for future years. In the first year, the entire revenue increase is subject to the fiscal year spending limit. In the succeeding years, the reserve fund expenditures for the project do not constitute spending.[71]

Damage Awards. This exclusion applies to awards paid *to* a government. However, it is unclear whether the damage awards exclusion applies to awards paid *by* a government.[72] The confusion stems from the language of § (1), which suspends various limits when annual revenue is insufficient to make payments on final court judgments and other specified payments. TABOR's suspension of limits because of insufficient funds for final court judgments implies that fiscal year spending includes these judgment amounts.

Property Sales. The application of this exclusion remains unclear. The Colorado Supreme Court has held that the sale of lottery tickets is not the sale of property because repetitive sales of lottery tickets do not fulfill either of the purposes of the property sales exclusion.[73] According to the Court,

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67 § (2)(e).
68 *Nicholl v. E-470 Public Highway Authority*, 896 P.2d 859, 872 (Colo. 1995).
69 Wisor, *supra* note 16, at 295.
70 *Id*.
71 *Id.*
72 *Id*.
73 *Submission of Interrogatories on Senate Bill 93-74*, 852 P.2d 1, 11 (Colo. 1993). The Court concluded, however, that State lottery proceeds dedicated by constitutional amendment to park and wildlife preservation are not subject to limitations on fiscal year spending. *Id.*

those purposes are to eliminate spending restrictions on the occasional sale of State property, and to encourage the State "to permanently divest itself of tangible assets, thereby returning property to the property tax rolls and promoting private economic activity."[74]

Whether tap fees are property sales was the question presented but not decided in *Romer v. Fountain Sanitation District*[75] because the sanitation district lacked standing to bring suit. Likewise, whether confiscated property falls into this exclusion remains unclear.

Revenue Limitation

If the revenue from sources not excluded exceeds the permitted fiscal year spending, the excess must be refunded in the next fiscal year unless the voters approve a change.[76]

This section of TABOR requires districts to refund excess revenues. A district may use any reasonable method for refunds, including temporary tax credits or rate reductions. Refunds do not have to be proportional to prior payments when prior payments are impracticable to identify or return. Finally, revenue collected, kept, or spent illegally since four full fiscal years before a suit is filed must be refunded with ten percent annual simple interest.[77]

The revenue limitation does allow revenue changes to the extent voters approve them. Districts are not required to present proposed revenue changes in dollar amounts, unless voters are asked to approve a district tax increase.[78] In *City of Aurora v. Acosta*, taxpayers brought suit alleging that certain ballot proposals violated TABOR. Specifically, the taxpayer claimed a proposal seeking an increase in the sales and use tax rate for law enforcement purposes violated TABOR because it failed to state the proposed spending increase as a dollar amount.[79] TABOR requires voter approval for a revenue change "where the revenues generated by a specific tax increase exceed the estimated maximum dollar amount included in the election notice and the ballot title under which voters approved the tax increase."[80] Here, the City attempted to obtain voter approval to retain any excess future revenues from the proposed .25% increase in the city's sales and use tax. TABOR does not require proposed revenue changes of this type to be presented for voter approval as a dollar amount.[81]

"De-Brucing" Elections

These elections allow a district to collect, retain or expend excess revenues without further voter approval. In 1994, Archuleta County voters approved a ballot question allowing the County to "collect, retain and expend all excess revenues" for a four-year period.[82] With some exceptions, TABOR's election provisions allow voters to approve a delay of up to four years in voting on ballot issues.[83] The Colorado Supreme Court noted five reasons for upholding the question. First, the

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74 *Id* at 9.
75 898 P.2d 37 (Colo. 1995).
76 § (7)(d).
77 § (1).
78 *City of Aurora v. Acosta*, 892 P.2d 264, 268 (Colo. 1994).
79 *Id.* at 265-266.
80 *Id.* at 268.
81 *Id.*
82 *Havens v. Board of County Comm'rs of the County of Archuleta*, 924 P.2d 517, 519 (Colo. 1996).
83 § (3)(a). The exceptions are petitions, bonded debt, or charter or constitutional provisions. *Id.*

evident purpose of TABOR is to limit the discretion of governmental officials to take certain taxing, revenue, and spending actions in the *absence* of voter approval. The question presented to the voters clearly stated the County's objective, and the voters approved. Second, voters expected that TABOR would defer to voter approval or disapproval of proposed tax, revenue, and spending measures that varied from TABOR limitations. Third, the General Assembly has construed TABOR as including the approval of revenue changes by local government proposals to voters.[84] Fourth, there is a clear pattern of TABOR deferring to voter choice in the waiver of otherwise applicable limitations. Fifth, a rigid interpretation of TABOR would have the effect of working a reduction in government services.[85] This decision implies that courts will take a liberal look at "de-Brucing" elections.

The Colorado Court of Appeals has held that "de-Brucing" ballot questions are not limited to a four-year time period.[86] The voters of Archuleta County approved a ballot issue allowing the voters to waive permanently the revenue and spending limits of §7. The plaintiff argued that the voters may only waive these limitations for four years, relying on the language of §3 that states, "voters may approve a delay of up to four years," but the Court disagreed.

Debt Limitation

WITH TWO EXCEPTIONS, DISTRICTS MUST HAVE VOTER APPROVAL IN ADVANCE FOR 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.[87]

This section of TABOR requires a vote on any multiple-fiscal year debt or other financial obligation. TABOR does not define what constitutes multiple-fiscal year debt. This section appears to require voter approval for revenue bonds payable from governmental revenues (except those issued by an enterprise), general obligation bonds and special assessment bonds.[88]

The Colorado Supreme Court has held that the remarketing of pre-TABOR bonds at a higher interest rate does not require voter approval if doing so was authorized at the time of the initial issuance of the bonds.[89] In *Nicholl v. E-470 Public Highway Authority,* the Highway Authority attempted to remarket the bonds pursuant to its 1985 agreement with three Colorado counties.[90] An Arapahoe County Commissioner objected on the ground that to do so required voter approval under TABOR. The Court disagreed, holding that the remarketing did not create a new obligation, but merely remarketed debt that was authorized before TABOR. Additionally, the terms under which refinancing would occur were specified in the original bond agreements and were also issued before TABOR.[91] The

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84 *Havens v. Board of County Comm'rs of the County of Archuleta*, 924 P.2d at 522.
85 *Id.* at 522-523.
86 *Havens v. Board of County Comm'rs of the County of Archuleta*, 58 P.3d 1165 (Colo. App. 2002).
87 § (4)(b). The two exceptions are adding new employees to existing pension plans and refinancing the pension plans at lower interest rates. *Id.*
88 Wisor, *supra* note 16, at 296.
89 *Nicholl v. E-470 Public Highway Authority*, 896 P.2d 859, 870-871 (Colo. 1995).
90 *Id.* at 864.
91 *Id*. at 870.

Nicholl case shows that districts can remarket pre-TABOR bonds without voter approval if the refinancing terms were established before TABOR.

EXISTING CONSTITUTIONAL RESTRICTIONS

There is a question whether courts will interpret the debt limitation differently from existing constitutional restrictions regarding excise tax bonds, special assessment bonds, industrial development bonds and lease purchase agreements. Pre-TABOR case law held that any agreement subject to annual appropriation does not require voter approval.[92] Accordingly, the Colorado Court of Appeals held that lease purchase agreements subject to annual appropriation are not subject to TABOR's election requirement.[93] In that case, the County entered into an equipment lease-purchase agreement with a bank without holding an election. Under the terms of the agreement, the bank purchased the equipment and leased it to the County for an initial period of eight months with four one-year renewal terms.[94]

The Court determined that the agreement did not create a debt or other financial obligation in future years because it did not require funds to be appropriated for that purpose.[95] The agreement also did not obligate future commissioners to tax in order to fulfill the County's obligations. The County was not required to pay for the use of the equipment until the year in which it was used, making the agreement more like a series of one-year contracts than multiple-fiscal year debt.[96] The agreement was not a pledge to commit future funds to its performance, nor was it a commitment to tax citizens to assure the availability of funds to perform the agreement.[97]

In 1999, the Colorado Supreme Court held that State-issued notes used to fund highway improvements were a multiple-fiscal year obligation requiring an election even though the notes were subject to annual appropriation.[98] The revenue anticipation notes were different from an equipment lease agreement because in the case of the notes it was evident that the State was receiving money in the form of loans from investors.[99] This holding creates doubt that courts will follow pre-TABOR precedent regarding debt limitations generally.

In 2005 and again in 2010, the Colorado Court of Appeals again held that a lease purchase agreement which could be terminated annually does not create a debt or other multiple fiscal year financial obligation that requires an election under TABOR.[100]

The Colorado Supreme Court has also held that an economic development agreement between a city and a developer did not require voter approval under TABOR.[101] The agreement provided for reimbursement of certain taxes to the developer subject to annual appropriation by the city council.

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92 *See e.g., Gude v. City of Lakewood*, 636 P.2d 691 (Colo. 1981); *Denver Urban Renewal Authority v. Byrne*, 618 P.2d 1374 (Colo. 1980); and *Allardice v. Adams County*, 476 P.2d 982 (Colo. 1970).

93 *Boulder County v. Dougherty, Dawkins, Strand & Bigelow, Inc.*, 890 P.2d 199 (Colo. App. 1994).

94 *Id.* at 201.

95 *Id.* at 207.

96 *Id.*

97 *Id.* at 208.

98 *Submission of Interrogatories on House Bill 99-1325*, 979 P.2d 549, 557 (Colo. 1999).

99 *Id.*

100 *Colorado Criminal Justice Reform Coalition v. Ortiz*, 121 P.3d 288 (Colo. App. 2005) and *Fischer v. City of Colorado Springs,* 260 P.3d 331 (Colo.App. 2010).

101 *Golden v. Parker*, 138 P.3d 285 (Colo. 2006).

The Supreme Court distinguished this agreement from the state-issued notes in the 1999 *Interrogatories* case and held that the agreement did not create a debt or other financial obligation.

Elections

TABOR'S ELECTION PROVISION

Section (3) contains TABOR's election provisions. Required elections may only be held in the State general election, the first Tuesday after the first Monday in November, or the regular biennial election of the local government. Voters can approve a four-year delay in deciding ballot issues, but district actions taken during that time cannot extend beyond that period. TABOR's election provisions require specific notice of ballot issues to be mailed to all registered voters at least 30 days prior to the election. This notice must include fiscal year spending calculations for the current and previous four years, and the overall percentage and dollar change. The notice must also include the estimate of the maximum dollar amount of any tax increase and a fiscal year spending calculation without the increase. If the actual receipts from the tax increase exceed this estimate, the tax increase must be reduced, and the excess refunded. For debt, the election notice must include the principal amount and maximum annual and total repayment cost and the principal balance of current debt and its maximum annual and remaining total repayment costs. Debt cannot be issued on terms that exceed these estimates.

Finally, TABOR outlines certain ballot issue language requirements. Titled notices must be addressed to "All Registered Voters." Titles must state, in this order, "NOTICE OF ELECTION TO INCREASE TAXES/TO INCREASE DEBT/ON A CITIZEN PETITION/ON A REFERRED MEASURE."[102] Ballot titles for tax or bonded debt increases must 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 costs),…?"

APPLYING TABOR'S ELECTION PROVISIONS

The TABOR election provisions only apply to financial elections. In *Zaner v. City of Brighton*,[103] the Colorado Court of Appeals held that TABOR is limited to fiscal issues such as tax, revenue, and spending. Therefore, the City of Brighton's election concerning the transfer of a utility franchise was not a fiscal ballot issue and therefore need not have complied with TABOR.[104]

Districts should comply with TABOR's election provisions as much as possible. However, violations of the election provision occur, and, in *Bickel v. City of Boulder*,[105] the Colorado Supreme Court determined that "substantial compliance" is sufficient to defeat election challenges brought under TABOR's election provisions. That is, when an election is challenged under TABOR, a court will look at whether the district substantially complied with the applicable provisions instead of demanding strict adherence to every detail.[106] The Court held that certain omissions in the election notice were not significant because the City provided all of the relevant information for calculating percentage changes in the notice's chart, and the omissions appeared to be the result of the City's mere oversight

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102 § (3)(b).
103 899 P.2d 263, 266 (Colo. App. 1994), aff'd. 917 P.2d 280 (Colo. 1996).
104 *Id.*
105 885 P.2d 215, 227 (Colo. 1994), cert. denied 513 U.S. 1155 (1995).
106 *Id.*

in preparing the notice.[107] The Court also held that a plaintiff's complaint under TABOR's enforcement clause does not have to set forth facts showing that the claimed violations of TABOR affected the election results.[108]

The Court in *Bickel* also determined that a ballot issue presenting both the incurrence of debt and the adoption of taxes as a means to repay that debt presents a single subject for voter approval.[109] Additionally, districts may seek present authorization for future tax increases where the increases may be necessary to repay a specific, voter-approved debt.[110] Finally, in *Bickel*, the Court held that TABOR does not require districts to publish the entire text of the ordinance or resolution authorizing the election, provided the ballot issue contains the entire substance of the question presented to the voters.[111]

By statute, any challenge to the form or content of a ballot question must be brought within five days after the ballot title is set.[112] The Colorado Supreme Court has held that this statute of limitations is constitutional.[113]

TABOR requires that an election notice contain 500-word summaries of "pro" and "con" comments submitted by voters. In a recent case, the Court of Appeals was confronted with a situation where a person supporting a ballot issue also submitted comments against the measure.[114] Apparently, the voter was attempting to dilute and weaken the "con" comments. The Court held that the designated election official is not required to determine the motives of the person submitting a comment, and therefore refused to declare that a TABOR violation had occurred.

Emergencies, Revenue Limits & State Mandates

Emergencies. Section (6) governs emergency taxes and does not create a new taxing power. Emergency taxes can be levied by a two-thirds vote of the governing body of a district. The tax ends if it is not approved on the next election date more than 60 days after the emergency. Emergency tax revenue may only be expended after emergency reserves are depleted.[115] Each district must reserve 3% of its fiscal year spending, excluding bonded debt service, for use in declared emergencies. Emergency property taxes are prohibited. The increase in reserve requirements is subject to the spending limitation. "Emergency" excludes economic conditions, revenue shortfalls and salary or fringe benefit increases.[116] It is unclear whether a government may substitute a surety or insurance for the emergency reserve.

Miscellaneous Limits. Section (8) absolutely prohibits certain actions unless a future constitutional amendment approves them. TABOR prohibits new or increased real estate transfer taxes and any new State property tax or local income tax. Section (8) absolutely prohibits certain actions. No income

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107 *Id.* at 238.
108 *Id.* at 228.
109 *Id.* at 231.
110 *Id.* at 234.
111 *Id.* at 239.
112 C.R.S. §1-11-203.5
113 *Cacioppo v. Eagle County School District RE50-J*, 92 P.3d 453 (Colo. 2004).
114 *Gresh v. Balink*, No. 05CA0375, 2006 WL 2828857 (Colo. App., Oct. 5, 2006).
115 § (6).
116 § (2)(c).

tax increase or new definition of taxable income may apply before the next tax year. Any income tax change after July 1, 1992, must tax all income at one rate. Valuation notices must be sent annually. The actual value of residential real property must be determined solely by a market approach and must be stated on all property tax bills and valuations notices. Sales by a government or lender are to be considered as comparable sales, and the sales prices must be kept as public records.

State Mandates. Section (9) mandates that a local government may end or reduce any subsidy for any program delegated to it by the State, except for public education through twelfth grade. The Colorado Supreme Court held that a county's obligation to pay twenty percent of the State-mandated welfare program was not a "subsidy" the county could reject.[117] The Court held that a county is a political subdivision of the State, and because a State cannot subsidize itself, the county's payment to the State was not a "subsidy."[118]

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[117] *Romer v. Weld County,* 897 P.2d 779, 783 (Colo. 1995).
[118] *Id.* at 782-783.

AMENDMENT ONE (TABOR) ISSUES

by
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Election Requirements and Procedures

I. Voter approval is required for a new mill levy, mill levy increase, expansion of an expiring tax, or a tax policy change causing a net revenue gain §(4)(a); creation of any multiple fiscal year debt or financial obligation §(4)(b); emergency tax §(6); or retention of excess revenue §(7)(d).

II. A county can seek voter approval on TABOR issues ("ballot issues") only at general elections in November of even-numbered years, and elections in November of odd-numbered years. Municipalities and special districts can also refer TABOR issues at their regular elections held at other times during the year.

III. Method of referral - board action appropriate.

A. Adopt a written resolution to refer a ballot issue at a general election in November of an even-numbered year, or to (i) call a special election for November of an odd-numbered year and (ii) refer the ballot issue to that election.

B. Odd-year November elections. (*See*, C.R.S. §1-41-101 et. seq.) TABOR ballot issues may be referred to election at this time; authority of board to refer other issues, e.g., recall, modify term limits, in accordance with any other provisions of law is not restricted. (*See* C.R.S. §1-41-103(5).)

IV. Notice issues.

A. First general notice to public of county's intent to refer a ballot issue is certification of the form and content of the ballot to Clerk and Recorder, not later than 55 days before election.

B. Ballot Issue Notice.

1. County Clerk and Recorder acts as Designated Election Official (DEO). Prepares the text of the county ballot issue notice. DEOs of other districts referring ballot issues prepare their own notices and send to Clerk and Recorder for inclusion in consolidated notice. This is a <u>very detailed and technical</u> task: must follow TABOR precisely—depends on what type of ballot issue, e.g., debt, new or increased tax, retain excess revenue; TABOR specifies what must be included and prohibits additional material.

2. In coordinated elections, preparation and mailing of ballot issue notice will be coordinated by Clerk and Recorder, incorporating the text prepared by each district DEO.

3. Clerk and Recorder should be prepared and equipped to handle telephone inquiries from electors following mailing of notice.

C. Ballot Issue Comments.

1. County and county commissioner spending on ballot issue campaigns is governed by Fair Campaign Practices Act, C.R.S. §1-45-101 et seq., especially C.R.S. §1-45-117. County should not expend public funds to prepare comment either for or against any ballot issue. Use resolution or other lawful means to express opinion and reasons for it.

2. DEO of each district referring a ballot issue, and Clerk and Recorder for county ballot issues must summarize and include comments filed by deadline, even those which contain outright falsehoods (advisability of soliciting reasoned and balanced comment both for and against the ballot issue to offset other comments containing falsehoods).

3. Only the comments of registered electors of the entity referring a ballot issue may be summarized as to that ballot issue.

Spending/Revenue Limits

I. This has been one of the most publicized features of TABOR. Although it is stated in §(7)(b) as a limitation on fiscal year spending, because the definition of fiscal year spending *includes savings* ("reserve increases"), its practical effect is to limit revenues. The election requirement in §(7)(d) is triggered by revenues, not spending ("If revenue from sources not excluded from fiscal year spending exceed these limits, . . .").

II. The limit on "fiscal year spending" is fiscal year spending from the prior year multiplied by the rate of local growth + the rate of inflation. §(7)(b). "Local growth" for a county is the percentage change in actual value of all (not just taxable) real property in the county from construction of taxable real property net of demolition of same, and additions to, net of deletions from, taxable real property. §(2)(g). "Inflation" is the percentage change in the Consumer Price Index for Denver-Boulder, all item, all consumers. §(2)(f).

III. All county revenues count toward the limit <u>except</u> gifts, federal funds, collections for other governments, pension contributions by employees and pension fund earnings, reserve transfers or expenditures, damage awards, and property sales. The amount of a refund of excess revenues is also excluded. §(2)(e).

Refund of Excess Revenues

I. County has until the end of the "next" fiscal year to refund excess revenues from prior fiscal year. §(1)

II. Subject to judicial review, county may use any reasonable method for refunds, including temporary tax credits or rate reductions; need not be proportional when prior payments are impractical to identify or return. §(1)

III. Colorado statute interpreting TABOR (C.R.S. §39-1-111.5) expressly authorizes temporary mill levy reductions as a refund method.

IV. Refunds may not be included in county base to calculate revenue limit for following year. §(7)(d)

Reserves

County is required to maintain an "emergency reserve" of at least 3% of its fiscal year spending for use for declared emergencies only. §(5)

Enterprises

I. Are exempt from TABOR. Need not comply with any of its requirements. §(2)(b)

II. Definition: Government-owned business—authorized to issue its own revenue bonds—receives less than 10% of all of its revenue from grants ("grants" probably includes any state or local government contribution made from tax proceeds) from Colorado state and local governments combined. §2(d)

III. Most common examples include water and sewer utilities of municipalities and special districts. Key is fee- or other non-tax, non-grant revenue-based income stream. Power to tax, even though not used, disqualifies an entity from enterprise treatment. *See*, *Nicholl* case discussed below.

IV. Not common for counties to have an enterprise, but not impossible, *e.g.*, airport, or county-owned water or sewer utility.

Decided Court Cases

I. Bickel v. City of Boulder, 885 P.2d (Colo. 1994 - 9/12/94), *cert. denied,* 115 S. Ct. 1112 (1995):

A. Interpretation Standards.

1. TABOR is not a grant of new powers or rights to the people but is more properly viewed as a limitation on the power of people's elected representatives.

2. Substantial compliance, rather than strict scrutiny, is the proper standard when reviewing claims to enforce constitutional election provisions.

3. Courts may rely on general rules of statutory construction when interpreting citizen-initiated measures.

4. Where no conflict exists between newly enacted law and prior law, courts should presume newly enacted law has been framed and adopted in light and understanding of prior law.

B. Ballot Issues - New Debt/New Taxes.

1. Voters in a post-TABOR election may approve new debt "without limitation as to rate" and may therefore give present authorization for future tax rate increases where such increases may be necessary to repay a specific voter-approved debt.

2. The incurrence of debt and the adoption of new taxes to pay it are a single subject and may be presented together in a single ballot issue.

3. The "text" which must be included in the election notice pursuant to §(3)(b)(i) is the ballot title, and not the authorizing ordinance or resolution, where the ballot issue contains the entire substance of the question before the voters.

4. A ballot title which did not include an estimate of "the first, or if phase-in, final, full fiscal year dollar increase" in property taxes did not substantially comply with this section because it did not specify the amount of increased property taxes—the question said only "in an amount sufficient." Boulder said the amount could not reasonably be estimated and court said you have to try; good faith estimate will suffice.

II. Board of County Commissioners of Boulder County v. Dougherty, Dawkins, Strand & Bigelow Inc., 890 P.2d 199 (Colo. App. 1994 - 11/3/94):

A. New Debt:

1. Terms "debt" and "financial obligation" in §(4)(b) are virtually synonymous.

2. Lease-purchase agreements subject to annual appropriation are not multiple fiscal year debt or financial obligation within the meaning of TABOR.

III. City of Aurora v. Acosta, 892 P.2d 264 (Colo. 1995 - 2/6/95)

A. Ballot Issues - Content:

1. City sought approval for sales tax increase for more police protection. Ballot title did not include an estimate of the full fiscal year dollar increase in property taxes but substantial compliance with TABOR was achieved because the notice of election stated the dollar amount and was included in a mail ballot package for a mail ballot election.

2. Section (7)(d) does not require that voters approve a specific dollar amount for future revenues generated by a specific, voter-approved tax.

IV. Nicholl v. E-470 Public Highway Authority, 896 P.2d 859 (Colo. 1995 - 5/15/95)

Any Colorado taxpayer has standing to determine whether any district in Colorado is subject to TABOR, even if the taxpayer was not harmed.

A. Enterprises.

1. Construction and operation of a public highway as a fee-for-service toll way fits the definition of "business."

2. An entity, which is owned and controlled by one or more governments, is "government-owned" within the meaning of TABOR.

3. Authority's power to levy general taxes is inconsistent with the characteristics of a business and precludes the Authority from being considered an enterprise. (Followed by district court in Forest View Acres Water Dist. v. Forest View Co., El Paso County, No. 95-CV-246 - 8/9/95.)

B. Fiscal Year Spending/Revenue Limits.

1. Newly created debt service is included in fiscal year spending, but expenditure of bond proceeds collected before the effective date of TABOR is not.

2. Debt service that existed at the time TABOR took effect is already included in the District's base and does not reflect an increase in fiscal year spending.

3. Revenues collected from changing sources pursuant to the remarketing of valid pre-TABOR debt are changes in debt service and are not included in the district's base.

C. New Debt.

1. TABOR requires prior voter approval for revenue bonds that extend more than one fiscal year.

2. Public Highway Authority's plan to finance construction by releasing bond proceeds out of escrow and remarketing bonds did not create a new financial obligation so as to require prior voter approval.

3. Public Highway Authority's plan to finance construction of a portion of highway by using intergovernmental loans constituted a new multi-year fiscal obligation.

V. Romer v. Fountain Sanitation Dist., 898 P.2d 37 (Colo. 1995 - 6/19/95)

A special district does not have standing to file a declaratory judgment action against the State to determine whether tap fee revenues are subject to TABOR.

VI. Bolt v. Arapahoe County School District No. 6, a/k/a Littleton Public Schools, 898 P.2d 525 (Colo. 1995)

A. Interpretation Standards.

1. Terms of constitutional amendment should be given their ordinary and popular meanings.

2. Interpretation, which results in unreasonable or absurd result, is avoided.

3. Construction of constitutional amendment which harmonizes different constitutional provisions is favored over one that creates conflict between them.

B. Mill Levies.

1. A district mill levy is divisible into its component parts, and only those portions of the mill levy which are subject to TABOR's elections requirements must be voted.

2. Pre-TABOR elections which authorized general obligation debt and a mill levy to pay it without limit as to rate or amount are sufficient authorization for mill levy increases to pay the debt without further voter approval after the effective date of TABOR.

3. A mill levy imposed to recover lost revenue from the previous year to recoup property tax abatements and refunds need not be voted, because it is not an increase in tax revenue.

4. Mill levies for asbestos removal and ADA compliance imposed on June 16, 1992, need not be voted because TABOR did not become effective until November 4, 1992.

C. New Debt.

1. A refunding bond pays off a previously issued bond but does not create new debt. NOTE: If refunding bond is issued at a higher rate of interest, an election is required, See §(4)(b).

VII. City of Wheat Ridge v. Cerveny, 913 P.2d 1110 (Colo. 1996).

A. Attorney Fees.

1. Amendment does not require an award of attorney fees to a prevailing plaintiff under TABOR.

2. Plaintiffs who bring an enforcement action under TABOR may be entitled to attorney fees, even though they do not personally incur an obligation to pay them. The lack of financial risk to such plaintiffs, however, is a factor that a court may consider in determining whether to award attorney fees.

3. Another factor, which may be considered by the Court, is the extent to which the attorney representing the plaintiffs may have deviated from Court rules or professional standards applicable to his or her conduct.

VIII. Havens v. Board of County Commissioners of the County of Archuleta, 924 P2d. 517 (Colo., 1996)

Supreme Court ruled in favor of counties' authority to "de-Bruce." De-Brucing measure approved by voters complied with §(7)(d), even though it did not offset excess revenues by lowering future revenues.

IX. Zaner v. City of Brighton, 917 P.2d 280 (Colo. 1996).

A. TABOR election provisions do not govern city referral of issues not relating to financing, spending or taxes. (Brighton referred a question to approve the transfer of an electric utility franchise to its voters at a time other than those permitted by TABOR.)

B. The statutes codified at C.R.S. §1-41-101 et seq., which clarify procedural and other matters relating to November elections in odd-numbered years do not conflict with "self-executing" provisions of TABOR and are constitutional.

X. Board of Commissioners of Boulder County v. City of Broomfield, 7 P.3d 1033 (Colo. App., 1999), cert. **granted** September 11, 2000.

TABOR confers standing, or right to sue, upon individual taxpayers to challenge a city's policies with respect to taxation, but this standing does not extend to a county allegedly acting on behalf of its taxpayers. (Boulder County challenged Broomfield Urban Renewal Authority's action as a "tax policy change" which should have been voted.)

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