ARTICLE X, SECTION 20
- THE TAXPAYER'S BILL OF RIGHTS (TABOR) -
1992 AMENDMENT #1

I. INTRODUCTION.

The passage of section 20 of article X of the Colorado constitution (also called "The Taxpayer's Bill of Rights," "TABOR," and "Amendment #1") at the 1992 general election required significant changes in the operations of state and local governments in Colorado. While accomplishing its principal purpose of protecting citizens from unwarranted tax increases,[1] this constitutional provision also affects a broad range of government operations, such as budgeting, elections, and contracting.

As a drafter, it is important to understand the purposes and provisions of TABOR to recognize how it may affect bills concerning state or local government operations. Since the meaning of some of its provisions is unclear, it is also important for drafters to be aware of relevant legislative and judicial interpretations of TABOR. By recognizing issues arising from this constitutional provision, drafters can inform sponsors of potential issues relating to their bills and of possible alternatives for addressing these issues. This function is important because any successful legal challenge under TABOR may result in the refund of any revenues collected, kept, or spent illegally with 10% annual interest from the time of the initial violation.[2]

This section provides an overview of the major provisions of TABOR that are likely to affect bills. For a more detailed analysis of a particular TABOR issue, drafters should consult the Office of Legislative Legal Services research database. The database can be searched and documents accessed through the CLICS system.

II. APPLICABILITY TO THE STATE AND TO LOCAL GOVERNMENTS.

TABOR applies to "districts," which are defined as "the state or any local government, excluding enterprises."[3] This definition raises several interpretive issues. Some of these issues arise because TABOR does not define the terms "the state" and "local government." Others arise from the constitutional definition of the term "enterprise."

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[1] *Matter of Title, Ballot Title and Submission Clause, and Summary with Regard to a Proposed Petition for an Amendment to Constitution of State of Colo. Adding Subsection (10) to Sec. 20 of Art. X (Amend Tabor 25)*, 900 P.2d 121 (Colo. 1995); *In Re Interrogatories on Senate Bill 93-74*, 852 P.2d 1 (Colo. 1993).

[2] Colo. Const. art. X, §20 (1)

[3] Colo. Const. art. X, §20 (2) (b).

A. The state and local governments.

While TABOR does not define the terms "the state" and "local government", the focus of this constitutional provision appears to be the imposition of certain limits on the state government and on local governments.[4] This intent can be discerned from the preferred interpretation stated in article X, section 20 (1) to "reasonably restrain most the growth of *government*." (Emphasis added.)

1. The state.

Article 77 of title 24, C.R.S., which sets forth state fiscal policies relating to TABOR, provides a statutory definition for the term "the state". "State" is defined as the central civil government of the state of Colorado, consisting of: 1) The legislative, executive, and judicial branches of government; 2) all organs of the three branches of government (including the departments of the executive branch, the legislative houses and agencies, and the appellate and trial courts and court personnel); and 3) state institutions of higher education.[5] This definition of "state" specifically excludes enterprises and special purpose authorities.

While the exclusion of enterprises from state government is constitutionally based, the question exists whether it is constitutionally permissible to exclude special purpose authorities from the definition of "the state". A special purpose authority is an entity created pursuant to state law to serve a valid public purpose. A special purpose authority is either a political subdivision of the state or an instrumentality of the state; however, a special purpose authority is not an agency of the state and is not subject to administrative direction by any department, commission, bureau, or agency of the state. Examples of special purpose authorities include the Colorado housing and finance authority, the Colorado water resource and power development authority, the Colorado compensation insurance authority, and the public employees' retirement association.[6]

Before the adoption of TABOR, the General Assembly and the Colorado Supreme Court did not view special purpose authorities as part of state government.[7] One recognized purpose of special purpose authorities is to allow certain traditional governmental functions to be performed outside the constraints of state government thought to hamper the ability to perform these functions in a "business-like" fashion.

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[4] *Havens v. Bd of County Commr's*, 924 P.2d 517, 520 (Colo. 1996).

[5] Section 24-77-102 (16) (a), C.R.S.

[6] See section 24-77-102 (15), C.R.S.

[7] See, for example, *In re Interrogatories by the Colorado Senate (Senate Resolution No. 13) concerning House Bill No. 1247 Fifty-first General Assembly*, 193 Colo. 298, 566 P.2d 350 (1977); *Colorado Association of Public Employees v. Board of Regents*, 804 P.2d 138 (Colo. 1990).

Excluding special purposes authorities from the state for purposes of TABOR raises additional questions about whether special purpose authorities are local governments or whether they are entirely outside the scope of this constitutional provision. While not involving a special purpose authority, the Colorado Supreme Court's decision in *Submission of Interrogatories on Senate Bill 93-74,* 852 P.2d 1 (Colo. 1993), may indicate how the court would rule if presented with this issue.

One argument made in the *Senate Bill 93-74* case was that the board of the Great Outdoors Colorado Trust Fund created by article XXVII, section 6 of the Colorado constitution (also approved at the 1992 general election) was not a "district" for purposes of TABOR. Article XXVII, section 6 states that the board is a political subdivision of the state but is not an agency of state government. While finding that the board is not a local government, a private entity, or an enterprise, the court concluded that "the best reading of Amendment 1 is to exclude from state fiscal year spending limits only those entities that are non-governmental, and the board is essentially governmental in nature. This interpretation of Amendment 1 is the interpretation that 'reasonably restrain[s] most the growth of government.'"

Since special purpose authorities also seem essentially governmental, the court's interpretation may cause a reevaluation of the statutory exclusion of special purpose authorities from the definition of the term "the state." The uncertainty surrounding this issue is further evidenced by the fact that many special purpose authorities have taken action to be declared enterprises to ensure that these entities do not fall within the scope of TABOR.

2. Local governments.

In giving the term "local government" its commonly accepted meaning, as well as by applying dictionary, statutory, and case law definitions, there is a consensus that TABOR applies to counties, municipalities, special districts, and school districts. This interpretation similarly appears to include home rule counties and municipalities, since article X, section 20 (1) specifies that it supersedes any conflicting constitutional provisions (such as article XX), charter provisions, or other local provisions.

Whether special purpose authorities are local governments for purposes of TABOR is not known at this time. Although they are political subdivisions of the state, special purpose authorities generally serve a statewide interest rather than purely a local interest and do not have some of the same characteristics of local governments, such as identifiable geographical boundaries.

B. Enterprises.

Since "enterprises" are specifically excluded from the definition of "district," qualified enterprises are not subject to the provisions of TABOR. However, the definition of

"enterprise" presents many difficult interpretation questions. An "enterprise" is defined as "a government-owned business authorized to issue its own revenue bonds and receiving under 10% of its annual revenue in grants from all Colorado state and local governments combined."[8] Whether something qualifies as an "enterprise" under TABOR is solely dependent upon whether the constitutional definition is satisfied.

Yearly fluctuations in grants to enterprises will be the most likely reason enterprises qualify or disqualify from year to year. In designating enterprises or granting authority to designate enterprises, a drafter should exercise caution in making broad interpretations of the constitutional criteria without discussing the possible implications of such interpretations with the bill sponsor.

1. <u>Government-owned business</u>.

Uncertainty exists as to the meaning of the term "government-owned business," since TABOR does not define the term. In determining whether an entity is a government-owned business, a court will make this determination based upon whether an entity is both "government-owned" and a "business" given the ordinary meaning and understanding of these terms.[9] It seems that such businesses would not perform typical governmental functions and instead would perform activities that have some counterpart in the private sector, such as utilities, airports, and recreational facilities. Since an enterprise must receive less than 10% of its annual revenue from Colorado state and local governments combined, it also appears that an enterprise is a self-supporting operation, similar to a private business.

It is unclear whether a government-owned business can only be an activity or can be an entire governmental entity. Based upon the position that an enterprise can be a governmental entity, some state entities (i.e., the state lottery division, the Colorado lottery commission, the division of correctional industries) have been statutorily designated as enterprises if they meet the constitutional criteria. In addition, some local governmental entities have been statutorily authorized to declare themselves as enterprises (i.e., county hospitals and water, sewer, and drainage operations).

The few court decisions involving enterprise status do not give a consistent position on whether an entire entity can be an article X, section 20 enterprise. In *Regional Transportation District v. Romer, Denver District Court,* 93 CV 3069, the court refused to declare the Regional Transportation District an enterprise under TABOR. Noting that the RTD itself levies a sales tax and receives almost 60% of its revenue from tax moneys, the court concluded that RTD is a government, not a government-owned business. This decision

[8] Colo. Const. art. X, §20 (2) (d).

[9] *Nicholl v. E-470 Public Highway Authority,* 896 P.2d 859 (Colo. 1995).

was not appealed.[10]

The Colorado Supreme Court has held that the E-470 highway authority was not an enterprise for purposes of TABOR.[11] The court found that the authority did not constitute a "government-owned business" due to the authority's ability to impose several different types of taxes. After the court issued this decision, the taxing authority of the E-470 highway authority was repealed. The authority subsequently filed a declaratory judgment action, and the Arapahoe County district court declared that the authority qualified as an enterprise.[12]

2. <u>Authority to issue its own revenue bonds</u>.

The requirement that an enterprise has "authority to issue its own revenue bonds" raises three issues. First, only the *authority* to issue revenue bonds is required to qualify as an enterprise. The actual issuance of revenue bonds is not required. Second, there is precedent for statutorily imposing conditions on the authority to issue revenue bonds, including prior approval by another body. For example, the issuance of revenue bonds by a board of public hospital trustees of a county hospital is not effective for up to 30 days to give the board of county commissioners an opportunity to review the bond issue and to make an objection that would prevent the issuance of the revenue bonds.[13] Similarly, the revenue-bonding authority of the Colorado lottery commission is limited to a maximum amount of $10 million and may be exercised only upon the approval of both houses of the General Assembly and the Governor.[14]

The third issue, involving who has the authority to issue revenue bonds, arises from the phrase "its own revenue bonds." It is not known whether the revenue bonds must be issued by the government-owned business itself or whether the bonds can be issued by the governing board of the government-owned business or by the government owning the business. Some approaches taken so far give the governing board of the business the authority to issue revenue bonds for the business.[15]

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[10]In another unpublished decision, a trial court ruled that an urban renewal authority is an enterprise because it is a "government-appointed authority" that can issue bonds. The opinion, which was not appealed, did not provide a basis for this finding, nor did it explain how a "government-appointed authority" satisfies the constitutional requirement that an enterprise must be a "government-owned business." *Bd. of County Comm'rs v. City of Broomfield*, 95 CV 1430-3, Boulder County District Court, ruling and order re: declaratory judgment claim dated January 17, 1997.

[11]*Nicholl v. E-470 Public Highway Authority*, 896 P.2d 859 (Colo. 1995).

[12]*In re the Petition of the E-470 Highway Authority*, 96 CV 946, Arapahoe County District Court, order dated June 26, 1996. The decision was not appealed.

[13]Section 25-3-304 (4) (b), C.R.S.

[14]Section 24-35-221 (1) (a), C.R.S.

[15]For example, the governing body of an institution of higher education has authority to issue bonds for auxiliary facilities, such as bookstores, student unions, and parking garages, section 23-5-101.5, C.R.S.; the Colorado lottery commission has authority to issue revenue bonds for the state lottery division, section 24-35-221, C.R.S.

It is not known whether any of these approaches to granting revenue bonding authority would survive a constitutional challenge. Exercise caution in deciding who should have authority to issue revenue bonds for purposes of obtaining enterprise status and what authority is being granted.

3. Receives less than 10% of annual revenue in grants.

Another question in determining whether an operation qualifies as an enterprise under TABOR relates to what may or may not be considered a "grant" for purposes of the 10% limitation. The fact that TABOR does not define "grant" has led to different interpretations of the term. One interpretation is that grants include any kind of support, tangible or intangible, cash or in kind, that a government may give to an enterprise, such as property and sales tax exemptions or infrastructure. Another interpretation would include only grants received through formal grant programs.

For state enterprises, "grant" is defined to mean "any direct cash subsidy or other direct contribution of money from the state or any local government in Colorado that is not required to be repaid."[16] The definition also specifically excludes: 1) Any indirect benefits conferred by the state or local governments; 2) any revenues resulting from rates, fees, assessments, or other charges imposed for goods or services provided by an enterprise; and 3) any federal funds, no matter whether these funds pass through the state or local governments to an enterprise.[17] Statutes governing certain state enterprises that were enacted before section 24-77-102, C.R.S., also include similar definitions of "grant." For purposes of designating new state enterprises, it is necessary only to cross-reference the definition of "grant" in section 24-77-102 (7), C.R.S.

In the few legislative enactments relating to local government enterprises, such as county hospitals and water, sewer, and drainage enterprises, statutory definitions of the term "grant" similar to the definition in section 24-77-102 (7), C.R.S., were used.

III. LIMITATION ON FISCAL YEAR SPENDING.

TABOR limits state fiscal year spending by providing, in part, that "(t)he 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 the voters after 1991".[18] A similar fiscal year spending limit is imposed on local governments by TABOR, which states that "(t)he maximum annual percentage change in each local district's fiscal year spending equals inflation in the prior calendar year plus annual

[16]Section 24-77-102 (7) (a), C.R.S.

[17]Section 24-77-102 (7) (b), C.R.S.

[18]Colo. Const. art. X, §20 (7) (a)

local growth, adjusted for revenue changes approved by the voters."[19]

TABOR limits the growth of fiscal year spending of state government and of local governments respectively by capping the amount by which spending can annually increase. The spending limits imposed by TABOR are much broader in scope than any limits previously imposed on the state or on local governments since these spending limits restrict the revenues that can be received annually.

Although the fiscal year spending limit of a government allows a certain amount of expenditures and reserve increases, the government can only spend the revenues it has collected. If actual revenues are less than the amount of allowable fiscal year spending, a government's spending limit becomes the amount of actual revenue and results in a "deflated" base for use in future years. This is commonly referred to as the "ratcheting down" effect. Where actual revenues exceed the spending limit, the government is required to refund the excess revenues in the next fiscal year unless the voters approve a revenue change to allow the excess revenues to be retained by the government.[20]

A. Fiscal year spending.

Although phrased in terms of "spending," the fiscal year spending limits imposed by TABOR are in reality limits on the revenues the state and each local government can raise each year. By defining "fiscal year spending" to include not only "all district expenditures" but also "reserve increases", spending includes all revenues collected by a government, whether the revenues are spent (in which case it is an "expenditure") or not (in which case it is saved as a "reserve increase").

The spending limits apply to all governmental revenues except those expressly excluded from "fiscal year spending." "Fiscal year spending" does not include reserve transfers or expenditures, or any expenditures or reserve increases: 1) For refunds of excess state revenues made in the current fiscal year or in the subsequent fiscal year; 2) from gifts; 3) from federal funds; 4) from collections for another government; 5) from pension contributions from employees; 6) from pension fund earnings; 7) from damage awards; and 8) from property sales.[21]

The statutory definition of "state fiscal year spending" in section 24-77-102 (17), C.R.S., contains the same exclusions as specified in the constitution. The statute also excludes net lottery proceeds from "state fiscal year spending," except for portions distributed to the capital construction fund for payment of debt service of specified obligations and for portions that spill over into the general fund. This additional exclusion results from the General Assembly harmonizing the provisions of TABOR and article XXVII

[19]Colo. Const. art. X, §20 (7) (b)

[20]Colo. Const. art. X, §20 (7) (d).

[21]Colo. Const. art. X, §20 (2) (e).

(the Great Outdoors Colorado Program) and was upheld by the Colorado Supreme Court in *Submission of Interrogatories on Senate Bill 93-74,* 852 P.2d 1 (Colo. 1993).

Since revenues within any of the specified classifications are not subject to the fiscal year spending limits imposed by TABOR, these classifications should be kept in mind while drafting as a possible manner by which expenditures relating to proposed legislation may not be subject to any fiscal year spending limit.

B. Calculation of fiscal year spending limits.

1. Allowable annual growth.

Under article X, section 20 (7) (a), the state spending limit (and with it, state revenues) may increase or decrease by the amount of annual change in inflation and in state population.[22] For a local government, the spending limit increases or decreases depending on the amount of change in inflation and in annual local growth.[23] Two definitions of "local growth" are set forth in article X, section 20 (2) (g) depending on whether a local government is a school district.

2. Fiscal year spending base.

In calculating a government's spending limit, the growth factors are not applied to all of its fiscal year spending for the previous year. Certain types of fiscal year spending, such as annual debt service payments, refunds made pursuant to TABOR, and voter-approved revenue changes, are excluded to arrive at a fiscal year spending base. Other adjustments are made to the spending base to reflect the qualification and disqualification of enterprises and any increases and decreases in bonded indebtedness.[24]

Once a government's fiscal year spending base is determined, the appropriate growth factors are applied only to the spending base. Once this calculation is made, the fiscal year spending excluded from the spending base is added back in which results in the maximum amount of fiscal year spending allowed in a given year. This calculation can result in a government's allowable fiscal year spending either increasing or decreasing from the previous year's level of fiscal year spending.

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[22]Colo. Const. art. X, §20 (7) (a).

[23]Colo. Const. art. X, §20 (7) (b).

[24]See Colo. Const. art. X, §20 (7) (d).

3. Voter-approved revenue changes.

Although revenue changes approved by the voters are not included in the fiscal year spending base for purposes of applying the growth factors, voter-approved revenues are included in the allowable amount of fiscal year spending so that a government may always spend or save these revenues. There are two basic types of voter-approved revenues changes under TABOR: 1) Those involving matters relating to taxes that require voter approval under article X, section 20 (4) (a) (new tax, tax rate increase, mill levy increase, etc.); and 2) those not involving matters relating to taxes (e.g., a number of cities, counties, and other districts have obtained voter approval to keep taxes and other revenues that exceed the amount of their spending limit). Obtaining voter approval to retain or spend revenues that exceed a spending limit is informally referred to as "de-Brucing"after a proponent of TABOR, Douglas Bruce. Drafters should keep in mind the option of referring proposed legislation for voter approval to ensure that revenues that would result from the proposed legislation are always included within the fiscal year spending limit as a voter-approved revenue change.

C. Special considerations when drafting tax reduction bills.

One of the issues that has arisen with bills to provide tax relief (i.e., create or modify a tax exemption or credit or reduce a tax rate) is whether the bill creates a temporary TABOR refund mechanism that is triggered only when state revenues exceed the constitutional spending limit or whether the bill creates a permanent tax cut that is allowed regardless of whether the state has excess revenues. Since both TABOR refund mechanisms and permanent tax reductions have the same impact on general fund revenues, the only difference between the two is whether the excess revenues that the General Assembly already has on hand can be used to replace the lost general fund revenues. For refund mechanisms, excess revenues are used to replace the lost general fund revenues and the amount of total state general fund revenues remains unchanged. For permanent tax reductions, lost general fund revenues are not replaced with excess state revenues. Clarifying this point allows the fiscal note division and the economists in the Legislative Council to track state revenues and analyze the fiscal impact of proposed bills. If the sponsor intends for a particular credit or tax reduction to be a temporary TABOR refund mechanism, language of legislative intent should be included in the bill that states "The general assembly finds and declares that the (tax credit, exemption, etc) is a reasonable method of refunding excess state revenues." This language helps avoid ambiguities regarding the effect of the bill.

IV. VOTER APPROVAL REQUIREMENTS.

TABOR requires voter approval in advance for increases in taxes or debt, revenue changes, and weakening of any revenue, spending, or debt limit.

A. Tax increases.

TABOR requires prior voter approval 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 a tax policy change directly causing a net tax revenue gain to any district."[25] If a bill includes any of these actions involving taxes, voter approval is required before the action can take effect.

TABOR[26] provides two exceptions to this voter-approval requirement: 1) If annual government revenue falls below the amount needed for annual payments for bonds, pension, and final court judgments, TABOR allows the voter approval requirement to be suspended and revenues may be raised without voter approval to cover the shortfall;[27] and 2) if the emergency tax requirements specified in TABOR are met.[28] It is assumed that voter approval is not required to reinstate a tax rate temporarily reduced or to eliminate a tax credit temporarily granted when the original action was taken to effect a refund under TABOR.[29] Similarly, while a bill may not raise a tax rate that has been previously lowered by a separate bill, it may be possible for a single bill to lower a tax rate temporarily and provide for the rate to go back up to the existing rate at some point in the future. To date, a court has not resolved these issues.

1. Taxes vs. nontaxes.

The voter approval requirement of TABOR applies only to matters directly relating to taxes. If a particular charge is not a tax, imposing it or increasing it is not subject to voter approval under TABOR. The term "tax" is not defined by this constitutional provision and has not been defined by statute or case law for purposes of this requirement.

The manner in which the courts have distinguished between taxes and other types of governmental charges before the approval of TABOR may suggest how a court would define the term "tax" for purposes of this constitutional provision. It should be noted that the courts have generally distinguished between taxes and other charges based upon the nature of the particular charge involved rather than how the charge is designated (whether a charge is called a tax or a fee).

In distinguishing between taxes and other charges, the courts first determine whether the charge is a pecuniary charge imposed upon persons or property by legislative authority

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[25]Colo. Const. art. X, §20 (4) (a).

[26]*Id.*

[27]Colo. Const. art. X, §20 (1).

[28]Colo. Const. art. X, §20 (6).

[29]See Colo. Const. art. X, §20 (1).

to raise money for a public purpose. If so, the charge may be a tax unless it is a fee, fine, or special assessment.

Fees imposed to defray the cost of a particular governmental service have been held by the courts not to be taxes if the amount charged is reasonably related to the overall cost of the service, although mathematical exactitude is not required. But a fee may be a tax if the principal purpose of the fee is to raise revenues for general public purposes rather than to defray the expenses of the particular service provided.

Fines are charges imposed by a judicial or administrative tribunal as a penalty for an offense. Special assessments are charges imposed to finance a specific local improvement that confers a special benefit to the property assessed that is at least equal to the charge and directed to the users of that improvement. If a governmental charge is not a fine, fee, or special assessment, the charge is probably a tax.

If any doubt remains after applying this analysis, the following additional questions may be asked in order to reach a conclusion: 1) Is there any evidence that the people who voted for TABOR intended that this charge be subject to voter approval? 2) Will a vote on the charge "reasonably restrain most the growth of government"? 3) Is the charge commonly called a "tax"? 4) How broadly based is the charge?

This analysis for determining whether a charge is a tax has been set forth in a checklist which can be accessed in the research database.

2. Examples of tax increases requiring voter approval.

"New tax": Statewide tourism tax.

"Tax rate increase": Increase in sales or income tax rate.

"Mill levy above that for the prior year": Only local governments impose property tax mill levies since TABOR prohibits the state from imposing a property tax.[30] The Colorado Supreme Court ruled that a ballot issue approved before the adoption of TABOR may contain a mechanism to increase a mill levy to repay debt without seeking further voter approval.[31] The same decision specifies that voter approval would be required for "those taxes that are new or represent increases from the previous year." It appears, therefore, that any mill levy increase that is not related to a ballot issue approved before TABOR took effect requires voter approval.

"Valuation for assessment increase for a property class": Pursuant to article X, section

[30] Colo. Const. art. X, §20 (8).

[31] *Bolt v. Arapahoe County School District #6, a/k/a/ Littleton Public Schools,* 898 P.2d 525 (Colo. 1995).

3 (the "Gallagher" amendment), the General Assembly sets the valuation for assessment ratio for residential real property. Although the residential ratio decreased since the inception of the Gallagher amendment, it stayed the same for the 1999-2000 property tax cycle even though it should have increased under the Gallagher amendment. Because of TABOR, any increase in the ratio would require voter approval.

"Extension of an expiring tax": Extension of the sales and use tax imposed by the Denver metropolitan scientific and cultural facilities district. This tax was originally scheduled to expire July 1, 1996, but has been extended by voter approval until June 30, 2006.

"Tax policy change directly causing a net revenue gain to any district": This phrase is not defined and poses the most difficulty in trying to ascertain its meaning. Some tax policy changes subject to voter approval are easier to identify than others. For example, the creation of a sales tax exemption does not require voter approval since it does not result in a net revenue gain. However, the repeal of a sales tax exemption appears to require voter approval since such repeal would result in increased revenues. In other situations, a bill may contain several related tax policy changes - some that would cause a revenue gain and some that would cause a revenue reduction. The Colorado Attorney General has issued an opinion that, in such case, a good faith fiscal analysis of the changes is required and that voter approval would not be required if a revenue gain caused by a particular tax policy change is offset by a reduction due to another related change.[32] More difficult questions involve actions such as changes in property tax classifications and decreases in the vendor's fee for collecting sales taxes since it is more difficult to determine if such actions directly result in a net revenue gain.[33]

3. Mandatory ballot title language for tax increases.

TABOR specifies language that must be used to begin ballot questions for tax increases.[34] See the discussion under section V. B. of this chapter.

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[32]See Attorney General Opinion 96-1, dated February 27, 1996. This opinion analyzed whether proposed changes to the Urban and Rural Enterprise Zone Act constituted a tax policy change resulting in a net revenue gain. See also the OLLS memorandum, dated 01/15/1996, titled "Test to be applied in determining what is a tax policy change directly causing a net revenue gain to any district under article X, section 20 (4) (a) of the Colorado constitution".

[33]See the OLLS memorandum, dated 03/26/1997, titled "Proposals to fund the Colorado travel and tourism authority from the sales tax vendor's fee of businesses affected by travel and tourism". In the memorandum, the OLLS took the position that a decrease in the vendor's fee was not a change in tax policy that directly resulted in a net revenue gain.

[34]Colo. Const. art. X, §20 (3) (c).

B. Multiple-fiscal year financial obligations.

TABOR requires prior voter approval for the "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."[35] Two exceptions to this voter approval requirement exist: 1) Refinancing bonded debt at a lower interest rate; and 2) adding new employees to existing government pension plans.

1. Debt.

The voter-approval requirement for "multiple-fiscal year . . . debt" is not an issue from the state's perspective since the state cannot incur debt. Article XI, section 3 expressly prohibits the incurrence of state debt, and article X, section 2 requires that the estimated annual expenses of state government be paid by annual taxes.

Prior voter approval of the incurrence of debt by a local government is not a new idea. Before the approval of TABOR, voter approval of local government indebtedness was generally required under various constitutional, statutory, and home rule charter provisions. Requiring voter approval of "multiple-fiscal year . . . debt" did not result in any significant change in procedures for issuance of debt by local governments.

See the discussion under section V. B. of this chapter relating to the ballot title language that must be used for ballot questions for bonded debt increases.

2. Multiple-fiscal year financial obligations other than debt.

Before the approval of TABOR, judicial determinations and legislative actions held that certain types of instruments were not "debt". These exceptions include revenue bonds, certificates of participation, lease-purchase agreements, water bonds, and other multi-year contracts that did not involve a pledge of the full faith and credit of the government or that are subject to annual appropriation.

While these instruments may not be "debt", they may now be subject to voter approval under TABOR, which requires prior voter approval for "any multiple-fiscal year . . . *financial obligation whatsoever*."[36] (Emphasis added.) This phrase raises the question whether every form of multi-year contract that involves the payment of money requires prior voter approval, no matter whether the contract is subject to annual appropriation and therefore terminable at will by the government at the end of each fiscal year. Under a broad interpretation, voter approval would be required for all leases, lease-purchase agreements, leases involving

[35]Colo. Const. art. X, §20 (4) (b).

[36]Colo. Const. art. X, §20 (4) (b).

certificates of participation, employment contracts, equipment maintenance agreements, intergovernmental agreements, major construction contracts, and any other type of contract operating for more than one year.

To date, there have been few interpretations of the phrase "multiple-fiscal year . . . financial obligation whatsoever." Section 24-30-202 (5.5), C.R.S., provides that, in general, state contracts that are subject to annual appropriation should not be considered multiple-fiscal year financial obligations for purposes of article X, section 20 (4) (b). However, the statutes continue to provide that the state is prohibited from entering into leases involving certificates of participation until there is a final court determination as to the constitutionality of the issuance of certificates of participation. See sections 24-82-703, 24-82-705, and 24-82-801, C.R.S.

In *Board of County Commissioners of Boulder County v. Dougherty, Dawkins, Strand, & Bigelow, Inc.*, 890 P.2d 199 (Colo. App. 1994), the Colorado Court of Appeals held that a lease-purchase agreement subject to annual renewal or appropriation was not a "multiple-fiscal year direct or indirect debt or other financial obligation" and therefore did not require voter approval. In its analysis, the court of appeals found the words "debt" and "obligation" to be virtually synonymous. This decision was not appealed; however, in a subsequent case the Colorado Supreme Court overruled *Dougherty Dawkins* to the extent that the phrases "multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever" and "debt by loan in any form" were held to be synonymous.[37]

In *Nicholl v. E-470 Public Highway Authority*, 896 P.2d 859 (Colo. 1995), the Colorado Supreme Court interpreted the phrase "other financial obligation whatsoever" to include obligations not commonly treated as "debt" and to indicate that TABOR was intended to encompass a broad scope of financial obligations not limited to general obligation bonds. Both revenue bonds and intergovernmental loans were held by the court to constitute financial obligations under TABOR.

In *Submission of Interrogatories on House Bill 99-1325*, 979 P.2d 549 (Colo. 1999), the Colorado Supreme Court considered whether revenue anticipation notes (known as "RANs")[38] would constitute a "multiple-fiscal year direct or indirect debt or other financial obligation whatsoever." The court held that, consistent with its decision in *Nicholl v. E-470*, the phrase "multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever" is broader than the phrase "debt by loan in any form", but that the phrase is not without bounds. The court confirmed that lease-purchase agreements for equipment, such as copy machines, computers, or road graders, do not constitute financial obligations requiring voter approval because they do not involve the borrowing of funds or pledge the credit of the state.

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

[38] As authorized by HB99-1325, the state could issue RANs to finance transportation projects throughout the state. The state would pledge future federal and state funds to be received by the state to repay the RANS.

In contrast, the court held that RANS are different from lease-purchase agreements for equipment because the state is receiving money in the form of a loan from investors and that there is an implied unconditional promise to repay the RANs. The fact that payment is discretionary beyond the first year is not controlling in determining whether an obligation is a multiple-year financial obligation. Rather, the entire obligation must be looked at as a whole. In addition, the court held that the fact that the amount of the RANs to be issued was substantial made it reasonable that voters would have expected the RANs to be submitted to them for their approval.

C. Voter-approved revenue changes not associated with tax increases.

While the phrase "voter-approved revenue changes", as used in the spending limits imposed by TABOR, includes tax increases that must receive prior voter approval, this phrase also allows ballot issues on revenue changes that do not involve tax rate increases. Furthermore, TABOR states that "(v)oter-approved revenues changes do not require a tax rate change."[39] It would appear that such a vote can occur in anticipation of excess revenues received by a government in a given year or after excess revenues are collected. Another type of "voter-approved revenue change" would be authorization to expend revenues resulting from a new revenue source that does not require voter approval. For example, authority to spend revenues resulting from a new or increased fee would ensure that the amount of estimated fee revenues could always be kept or spent.

D. Weakening of other revenue, spending, and debt limits.

TABOR states that "[o]ther limits on district revenue, spending, and debt may be weakened only by future voter approval."[40] Difficulties may occur in identifying other revenue, spending, and debt limits and also in determining whether a proposed action would "weaken" a limit. The issue is further complicated by the fact that TABOR also states that it supersedes "conflicting" provisions of state and local law.[41] Whether a proposed action would weaken a state or local limit on revenue, spending, or debt or whether such limit has been superseded by TABOR must be considered on a case-by-case basis.

In one of the few interpretations of this requirement, the Attorney General issued an opinion that the statutory 5.5% property tax revenue limitation (section 29-1-301, C.R.S.) is an "other limit" that cannot be ignored or repealed without voter approval.[42] Under this interpretation, local governments must calculate property tax limits pursuant to both TABOR

[39]Colo. Const. art. X, §20 (7) (d).

[40]Colo. Const. art. X, §20 (1).

[41]Colo. Const. art. X, §20 (1).

[42]See Attorney General Opinion No. 93-8, dated August 27, 1993.

and section 29-1-301, C.R.S., and comply with the one that is more restrictive.

The Office of Legislative Legal Services has taken the position that a court would conclude that the limit on general fund appropriations, commonly called the "Arveschoug-Bird limit" or the "6% limit" (section 24-75-201.1, C.R.S.), is a limit on spending and that any action to "weaken" this limit would require voter approval. "To weaken" is to lessen the strength of something or to reduce it in intensity or effectiveness. The Attorney General has issued an opinion concluding that, since highway projects fall within the definition of capital construction projects, the transfer of general fund moneys to the capital construction fund for highway construction does not violate the Arveschoug-Bird limit and does not constitute a weakening of the limit under TABOR.[43]

To decide at what level voter approval is required, it is necessary to determine whether a proposed legislative action involves a revenue, spending, or debt limit of the state or of local government and whether a proposed legislative action weakens the limit. A statewide vote is not necessarily required just because a statutory limit is modified. For example, section 22-53-117, C.R.S., restricts the amount of additional property tax revenues that a school district can raise with voter approval. This is known as the "local override limit". It is the position of the Office of Legislative Legal Services that a statutory increase to the local override limit does not require statewide approval. Since the limit is a school district limit, only the approval by the voters of the district subject to the limit is required by TABOR.

These Office positions are set forth in memoranda found in the research database.

V. BALLOT ISSUES.

A. Ballot issues at November odd-numbered year elections.

TABOR states that "(b)allot issues shall be decided in a state general election, biennial local district election, or on the first Tuesday in November of odd-numbered years."[44] The phrase "ballot issue" is defined as "a non-recall petition or referred measure in an election."[45] These provisions raise the issue of whether the election provisions of TABOR apply only to taxing, revenue, and spending measures arising from TABOR itself or whether they apply to all elections and all ballot issues.

Ballot questions involving TABOR arise in part due to other constitutional provisions that relate to the rights of initiative and referendum and to the authority of the General Assembly to propose amendments to the state constitution. Article V, section 1 (1) and (4) and article XIX, section 2 provide for statewide initiatives and referendums as well as for

[43]See Attorney General Opinion 95-3, dated April 18, 1995.

[44]Colo. Const. art. X, §20 (3) (a).

[45]Colo. Const. art. X, §20 (2) (a).

constitutional amendments proposed by the General Assembly being submitted at the general election. In addition, current statutes and home rule city charters authorize or require certain questions to be submitted to local voters at special elections.

In *Zaner v. City of Brighton*, 917 P.2d 280 (Colo 1996), the Colorado Supreme Court concluded that the election provisions of TABOR apply only to issues of government financing, spending, and taxation arising under TABOR and that they have no bearing on the ability to schedule special elections on local measures not arising under TABOR. In *Zaner*, the court specifically held that because TABOR applies only to fiscal ballot issues, the city of Brighton's August special election to transfer a utility franchise did not violate TABOR's election provisions.

To clarify the scope of these election provisions, sections 1-41-102 and 1-41-103, C.R.S., specify that only ballot issues arising under TABOR, whether state or local issues, can be submitted at a November election in an odd-numbered year. The "Issues arising under ..." language should be construed to include only those matters that TABOR *requires* to be submitted, i.e., tax increases, debt increases, and the like.[46] State matters arising under TABOR must be in the form of: 1) State constitutional amendments submitted by the General Assembly; 2) state legislation and state constitutional amendments submitted by initiative petition; 3) measures referred to the people by the General Assembly; 4) measures referred to the people by referendum; 5) questions referred by the General Assembly; and 6) questions initiated by the people.[47]

Local matters arising under TABOR must be in the form of: 1) Home rule charter amendments submitted by initiative petition or referred by the governing body of the home rule entity; 2) ordinances, resolutions, or franchise proposals; 3) measures referred to the people by referendum; 4) questions referred by the governing body of the local government; and 5) questions initiated by the people.[48]

For purposes of both state and local matters arising under TABOR, a "question" is a proposition in the form of a question meeting TABOR requirements without reference to any specific state law or constitutional provision. For example, when a government collects more revenue than allowed under its spending limit, a ballot question asking permission for the government to exceed its spending limit by the amount of excess revenues is a question that could be submitted at a November odd-numbered year election.

When drafting bills, drafters should consider specifying at which elections: 1) A particular issue may be submitted to local voters; or 2) bills or concurrent resolutions may properly be referred to the voters by the General Assembly.

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[46] See sections 1-41-102 (4) and 1-41-103 (4), C.R.S.

[47] Section 1-41-102, C.R.S.

[48] Section 1-41-103, C.R.S.

To refer a constitutional amendment at the proper election, whether or not the proposed amendment arises from TABOR, the referral language should begin as follows:

> **SECTION 1.** At the next election at which such question may be submitted, . . .

For referred bills arising from TABOR, the referral section should begin:

> **SECTION 2. Refer to people under referendum.** Section 1 of this act shall be submitted to a vote of the registered electors of the state of Colorado at the next election for which it may be submitted, for their approval or rejection, under the provisions of the referendum as provided for in section 1 of article V and section 20 of article X of the state constitution, and in article 40 of title 1, Colorado Revised Statutes. . . .[49]

B. <u>Required ballot language for tax and bonded debt increases</u>.

Drafters must use the precise language specified in article X, section 20 (3) (c) to begin ballot questions for tax increases and for bonded debt increases. The specific language for each question is as follows:

> SHALL (DISTRICT) TAXES BE INCREASED (first, or if phased in, final, full fiscal year dollar increase) ANNUALLY...?"
>
> SHALL (DISTRICT) DEBT BE INCREASED (principal amount), WITH A REPAYMENT COST OF (maximum total district cost), . . .?

Several observations can be made about this constitutional ballot language:

1. The language specified in article X, section 20 (3) (c) applies only to ballot questions involving *tax increases* and *bonded debt increases*. Ballot issues other than tax increase and bonded debt questions are not required to begin with the language specified in article X, section 20 (3) (c). In *Bickel v. City of Boulder,* 885 P.2d 215 (Colo. 1994), one challenge involved a municipal ballot question to grant a gas and electricity franchise within the city. Although the Colorado Supreme Court recognized that the ballot issue also sought approval of a contingent tax increase, the court held that the city of Boulder was not required to begin the ballot question with the constitutional ballot language for tax increases since the primary purpose of the ballot question was to grant the franchise.

Although the ballot language for ballot questions not concerning tax or bonded debt increases is left to the discretion of the drafter, ballot language should always adequately

[49] See section B. 9., below, for an example of having the secretary of state refer a TABOR question directly to the voters.

express the true intent and meaning of the measure being submitted. Nothing prohibits such ballot questions from adopting a format similar to that constitutionally specified for tax and bonded debt increases (e.g., a ballot question for the extension of an expiring tax could include a dollar amount of how much revenue could be expended under a government's spending limit in the first fiscal year after extension and in each fiscal year thereafter). For example, see the ballot language in section 32-13-105, C.R.S., to extend the scientific and cultural facilities district tax.

2. Since article X, section 20 (3) specifies only the first few words of the ballot language for tax and bonded debt increases, discretion exists in completing the ballot language. For example, the ballot language for the reinstatement of the Colorado tourism promotion tax read as follows:

> Shall state taxes be increased by $13,100,000 annually in the first full fiscal year of implementation, and by $13,100,000 as adjusted for inflation plus the percentage change in state population for each fiscal year after the first full fiscal year of implementation, by reinstating the 0.2 percent sales tax on tourist-related items, including lodging services, restaurant food and drinks, ski lift admission, private tourist attraction admission, passenger automobile rental, and tour bus and sightseeing tickets for the purpose of funding statewide tourism marketing and promotional programs under the Colorado tourism board in order to assist future tourism growth and promote Colorado's continuing economic health?

3. Consolidated ballot issues involving bonded debt increases and tax increases to repay the debt are permissible under TABOR since both topics are naturally related and connected to one subject. The ballot title for a consolidated bonded debt and tax increase must include the ballot language in article X, section 20 (3) (c) for both the bonded debt and tax increases. *Bickel v. City of Boulder,* 885 P.2d 215 (Colo. 1994).

4. Ballot language for tax or bonded debt increases must contain a dollar estimate as required by article X, section 20 (3) (c). In *Bickel v. City of Boulder,* 885 P.2d 215 (Colo. 1994), a challenge was made to a combined bonded debt and tax ballot question that asked, in part, for approval of increased property taxes "in an amount sufficient to pay the principal of and interest on such bonds." Observing that the city was seeking approval of an open-ended tax increase, the Colorado Supreme Court held that this portion of the ballot question violated the requirements of TABOR by not including an estimate of the full fiscal year dollar increase in property tax.

5. The question exists whether the dollar amount of a tax increase, as required to be stated in the ballot question, can increase after the first fiscal year. While "voter-approved revenue changes" are specifically excluded from a government's spending base for purposes of calculating its fiscal year spending limit,[50] it is not clear whether voters can approve a tax

[50]Colo. Const. art. X, §20 (7) (d).

increase that allows tax revenues to increase in the future.

Proponents of TABOR argue that taxes can be increased only in fixed annual dollar amounts and the amount stated in the ballot question cannot be exceeded without additional voter approval. A different approach was taken in the ballot question for the Colorado tourism promotion tax set forth in section V. B. 2. above. In this ballot question, a set dollar amount was stated for the first fiscal year and, for future fiscal years, the same dollar amount as adjusted for inflation and changes in state population. This approach was challenged in *Campbell v. Meyer*, Denver District Court, 93 CV 4343. In its decision, the District Court upheld the ballot language but reserved judgment on the constitutionality of the revenue formula until after the election. The Court of Appeals dismissed this case on appeal on the ground of mootness since the voters defeated the proposal.

Some ballot questions approved by municipal voters allowing tax revenues to increase by the actual amount raised by the increased rate of tax have been upheld. In one of these cases, *City of Aurora v. Acosta*, 892 P.2d 264 (Colo. 1994), the Colorado Supreme Court upheld ballot question language for a municipal sales tax rate increase that expressed the increase as a dollar amount in the first year, but also allowed the city to keep and spend any and all revenue derived from the tax increase in future years without limitation as to amount.

6. It appears that a specific tax rate does not have to be stated in a combined bonded debt and tax increase ballot question where the proposed tax is to repay the indebtedness. In *Bickel v. City of Boulder*, 885 P.2d 215 (Colo. 1994), the Boulder County School District and the City of Boulder asked for voter approval of a specified amount of bonded indebtedness and of tax increases to pay the indebtedness "without limitation as to rate or amount." Noting that TABOR does not prohibit this type of authorization, the Colorado Supreme Court concluded that the voters authorized the local governments to adjust the tax rates as necessary to repay the debt incurred. The court held "districts may seek present authorization for future tax rate increases where such rate increases may be necessary to repay a specific, voter-approved debt" so long as any rate change is consistent with the stated estimate of the final fiscal year dollar amount of the tax increase.

7. In *Campbell v. Meyer*, Denver District Court, 93 CV 4343, which involved the ballot language for the reinstatement of the Colorado tourism promotion tax (see section V. B. 2. above), a District Court held that capital letters should be used as they appear in article X, section 20 (3) (c). Taking this one step further, the Secretary of State has adopted rules that require the entire ballot question to appear in capital letters.

8. While bills and concurrent resolutions referred by the General Assembly will set forth the ballot question to be submitted to the voters statewide, bills authorizing a particular TABOR issue to be submitted to local voters by initiative or referendum may or may not specify the ballot language. For an example of the ballot title being specified for a local government election, see section 32-13-105, C.R.S. If a bill is silent as to ballot language, it is the responsibility of the local government to formulate the ballot question in accordance with TABOR.

9. An alternative to referring an entire bill to the people for statewide voter approval can be found at section 43-4-703, C.R.S. This section addresses the need to obtain voter approval before the executive director of the department of transportation can issue revenue anticipation notes (RANs). Rather than refer the entire bill authorizing RANs to the voters, the bill was structured so that it would become law, but section 43-4-703, C.R.S., required the secretary of state to submit a question to the voters statewide before any RANs could be issued. Drafters should keep this in mind as a possible alternative method for seeking statewide voter approval under TABOR.

VI. EMERGENCIES.

A. Emergencies.

Although the term "emergency" is defined by TABOR, it is defined in terms of what cannot be an emergency, rather than what is an emergency. An "emergency" cannot be "economic conditions, revenue shortfalls, or district salary or fringe benefit increases."[51] Governments are left to determine and declare emergencies on a case-by-case basis since "emergency" has not been further defined by statute or case law.

B. Emergency reserves.

Beginning in 1993, the state and local governments are required to set aside an emergency reserve.[52] The amount of moneys required to be reserved for emergencies for 1993 was 1% of fiscal year spending, for 1994 2% of fiscal year spending, and for 1995 and years thereafter 3% of fiscal year spending. Unused moneys in the emergency reserve are carried forward from year to year.

Emergency reserves can be expended only for "declared emergencies". However, TABOR does not specify a procedure for the declaration of an emergency to spend emergency reserve moneys. Section 24-77-104 (3), C.R.S., provides that a declaration of a state emergency for purposes of expending the state emergency reserve must be made: 1) By the passage of a joint resolution which is approved by a two-thirds majority of both houses of the General Assembly and by the Governor; or 2) by the Governor pursuant to section 24-32-2104 (4), C.R.S.

While ensuring that moneys are available for emergencies, TABOR creates a significant disincentive to spending any emergency reserves. Once emergency reserve moneys are expended, the required replenishment of the emergency reserve constitutes a reserve increase that counts as "fiscal year spending". Since the replenishment of the

[51]Colo. Const. art. X, §20 (2) (c).

[52]Colo. Const. art. X, §20 (5).

emergency reserve must fit within a government's fiscal year spending limit, the amount of moneys available for other government services and programs will likely be reduced.

C. Emergency taxes.

While TABOR authorizes governments to impose emergency taxes without prior voter approval, this authority is severely limited.[53] First, emergency taxes can only be imposed after the emergency reserve is depleted. Secondly, this provision does not grant "any new taxing authority" so a government cannot levy any tax that it is otherwise not legally authorized to levy. Thirdly, emergency property taxes are specifically prohibited. In addition, separate two-thirds majority votes of the governing body of a government are necessary to declare an emergency and to impose an emergency tax. Section 24-77-105, C.R.S., sets forth the procedures for the state to impose an emergency tax.

An emergency tax can only be imposed until the next election occurring more than 60 days after the emergency declaration, and the tax will lapse unless ratified by the voters. Even if ratified by the voters, emergency taxes are not included in fiscal year spending for purposes of calculating the government's spending limit. Finally, any emergency tax revenues not expended on the emergency must be refunded within 180 days after the end of the emergency.

VII. MISCELLANEOUS REQUIREMENTS AND PROHIBITIONS.

A. Property taxes.

1. Local government property tax revenue limitation.

Besides the spending limitation and the voter approval requirements of TABOR, local governments are subject to a property tax revenue limitation. According to article X, section 20 (7) (c), a local government's property tax revenues cannot increase any faster than the rate of "inflation" plus "local growth" unless the voters approve a property tax revenue change. The terms "inflation" and "local growth" are defined in article X, section 20 (2) (f) and (2) (g), respectively. It is possible for a local government to be within its spending limit while exceeding its property tax revenue limit. Excess property tax revenues must be refunded unless voters authorize the local government to retain the excess revenues.

2. Prohibitions.

TABOR expressly prohibits several types of taxes relating to property. Section 20 (8) (a) prohibits any "new or increased transfer taxes on real property". Real estate transfer taxes

[53] Colo. Const. art. X, §20 (6).

existing at the time TABOR was approved were not abolished. However, article X, section (4) (a) would require voter approval for any extension of an existing real estate transfer tax. Article X, section 20 (8) (a) also prohibits the state from imposing a new real property tax. In addition, the imposition of emergency property taxes is prohibited by article X, section 20 (6).

3. Business personal property exemptions.

Article X, section 20 (8) (b) allows the state and local governments to enact "cumulative uniform exceptions and credits to reduce or end business personal property taxes." This language appears to allow individual governments to establish business personal property tax exemptions or credits for specific classes or to abolish business personal property taxation completely.[54] The uniformity requirement seems to prevent the granting of such exemptions or credits on an individual business-by-business basis.

4. Property tax assessment procedures.

Article X, section 20 (8) (c) contains several changes to the procedures governing the assessment of property for taxation purposes. Specifically, this provision: 1) Eliminates the legal presumption in favor of the accuracy of the assessor's valuation of property; 2) requires valuation notices to be mailed annually regardless of whether any change in valuation occurred (this allows property owners to appeal annually); 3) requires the value of residential real property to be determined solely by the market approach to appraisal; and 4) requires assessors to consider foreclosure sales and government property sales as comparable market sales for property valuation purposes.

B. Income taxes.

Article X, section 20 (8) (a) contains several provisions relating to income tax. The imposition of any local government income tax is expressly prohibited, although the courts have already interpreted article X, section 17 to prohibit the imposition of income taxes by local governments. In addition, any income tax rate increase or new state definition of taxable income can only take effect for the next taxable year. Before TABOR, such income tax changes could be made in the current tax year without violating the article II, section 11 prohibition against retrospective laws.

Article X, section 20 (8) (a) also requires that any income tax law change after July 1, 1992, must "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." Since a flat rate state

[54] For example, section 39-3-118.5, C.R.S., exempts business personal property from the levy and collection of the property tax until such business personal property is first used in the business after acquisition.

income tax is currently imposed, this provision prevents the flat rate from being replaced by a graduated income tax. This flat rate requirement is being interpreted by some to disallow new income tax credits, except for refund or voter-approved tax credits. Since income tax credits are taken after the flat rate is applied to taxable income, the Office of legislative Legal Services has taken the position that income tax credits do not violate the flat rate requirement and are still allowed. See the memorandum on this issue in the TABOR memorandum directory.[55]

[55]Among the income tax credits that have been established since TABOR's enactment are: Section 39-22-119, C.R.S., (child care expenses); section 39-22-122, C.R.S., (purchase of long-term care insurance); section 39-22-520, C.R.S., investment in school-to-career programs; and section 39-22-522, C.R.S., (donation of conservation easement).