Attachment B

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LEGAL MEMORANDUM

TO: Members of the General Assembly

FROM: Office of Legislative Legal Services

DATE: November 12, 2009

SUBJECT: Test to be applied to determine whether prior voter approval is required for a tax policy change directly causing a net tax revenue gain to any district[1]

Section 20 of article X of the state constitution (TABOR) requires prior voter approval in advance for a "tax policy change directly causing a net tax revenue gain to any district."[2] This phrase is an undefined catch-all that encompasses any district[3] taxing action that is not covered by any of the more specific tax actions set forth in TABOR.[4] Based upon an analysis of the cases decided by Colorado courts, most notably the Colorado Supreme Court decision in *Mesa County Bd. of Comm'rs v. State*, 203 P.3d 519 (Colo. 2009), we have formulated the following test that can be used to determine whether a change in tax policy set forth in the Colorado Revised Statutes requires prior voter

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[1] This legal memorandum results from a request made to the Office of Legislative Legal Services (OLLS), a staff agency of the General Assembly. OLLS legal memoranda do not represent an official legal position of the General Assembly or the State of Colorado and do not bind the members of the General Assembly. They are intended for use in the legislative process and as information to assist the members in the performance of their legislative duties. Consistent with the OLLS' position as a staff agency of the General Assembly, OLLS legal memoranda generally resolve doubts about whether the General Assembly has authority to enact a particular piece of legislation in favor of the General Assembly's plenary power.

[2] TABOR (4) (a).

[3] TABOR (2) (b) defines "district" as "the state or any local government, excluding enterprises."

[4] For purposes of this memorandum, it is assumed that any tax action being analyzed has already been determined not to be "a 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" and thus does not otherwise require prior voter approval pursuant to TABOR (4) (a).

approval pursuant to this catch-all phrase:[5]

STEP 1: Determine if any statute is being changed in a manner that modifies or affects tax policy.

> Is a statute relating to the imposition of a tax[6] being created, repealed, or amended in a manner that results in a modification of the standards or rules governing the imposition of the tax?[7]
>
> If the answer to this question is "NO", prior voter approval is not required pursuant to TABOR. If the answer is "YES", the analysis should proceed to Step 2.

STEP 2: Determine whether the tax policy change directly causes a net tax revenue gain to the state or a local government.[8]

A. Does the tax policy change result in increased tax revenue for the state or a local government?

B. Is any increase in tax revenue for the state or a local government greater than any decrease in tax revenue for each of the respective governments caused by the tax policy change?

C. Would the net increase in tax revenue not have been collected

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[5] For an earlier version of this test, which did not account for the steps required pursuant to *Mesa County Bd. of Comm'rs v. State*, 203 P.3d 519 (Colo. 2009), see the January 15, 1996, memorandum of the Office of Legislative Legal Services entitled "Test to be applied in determining what is a tax policy change directly causing a net tax revenue gain to any district under article X, section 20 (4) (a) of the Colorado Constitution".

[6] The test applied in this memorandum assumes that a change is made to a tax, as opposed to a charge that constitutes a fee, special assessment, or fine, all of which are not subject to the prior voter approval requirement of TABOR (4) (a). For more information about what is a tax, see the January 6, 1993, memorandum of the Office of Legislative Legal Services entitled "Test to be applied in determining what is a tax under Amendment #1".

[7] Such a modification includes a change in what the tax is imposed on, when the tax is imposed, or how tax liability is determined. The following are examples of what this office considers to be a tax policy change: Creation, modification, or elimination of a tax credit; creation, modification, or elimination of a tax exemption; or a modification to Colorado taxable income.

[8] The analysis related to this and other questions about revenue set forth in this memorandum is based on the best information available to the General Assembly at the time that it enacts legislation, which information is generally in the fiscal note prepared by Legislative Council Staff and usually includes the fiscal impact over the next two state fiscal years.

without the tax policy change?[9]

If the answer to any of these questions is "NO", prior voter approval is not required pursuant to TABOR. If the answer to all of these questions is "YES", the analysis should proceed to Step 3.

STEP 3: Determine whether the net tax revenue gain is a de minimis amount.

Is the net tax revenue gain more than the cost to the state or local government, as applicable, to conduct an election to obtain voter approval?

If the answer to this question is "NO", prior voter approval is not required pursuant to TABOR. If the answer is "YES", the analysis should proceed to Step 4.

STEP 4: Determine whether the net tax revenue gain exceeds a spending limitation in TABOR (7).[10]

Is the sum of total revenues of the state or local government(s), as applicable, and the net tax revenue gain resulting from the tax policy change greater than:

1. The limitation on state fiscal year spending if a state tax policy change?

2. The limitation on a local government's fiscal year spending if a local government tax policy change?

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[9] It is assumed that all other factors affecting tax revenues remain constant, such as the number of taxpayers and the number of taxable occurrences, unless there is reliable information to the contrary.

[10] *See* **Section 20. The Taxpayer's Bill of Rights. (7) Spending limits.** (a) The maximum annual percentage change in state fiscal year spending equals inflation plus the percentage change in state population in the prior calendar year, adjusted for revenue changes approved by voters after 1991. Population shall be determined by annual federal census estimates and such number shall be adjusted every decade to match the federal census.

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

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

3. The limitation on a local government's property tax revenue if a local government property tax policy change?

If the answer to the applicable question or questions is "NO", prior voter approval is not required pursuant to TABOR. If the answer to any question is "YES", prior voter approval is required pursuant to TABOR. If it is a state tax policy change, voter approval would need to be sought at a statewide election. If it is a local government tax policy change, voter approval would need to be sought by each local government for which the "NO" answer applies.