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LEGAL MEMORANDUM

TO: Representative Sal Pace

FROM: Office of Legislative Legal Services

DATE: April 1, 2009

SUBJECT: Authority of the General Assembly with respect to the State Board of Land Commissioners' control of state lands [1]

I. Background

House Bill 09-1317 (hereinafter "HB09-1317"), currently pending in the first regular session of the 67th General Assembly, will, *inter alia*, prohibit the State Board of Land Commissioners (hereinafter "Board")[2] from selling or leasing state lands when such sale or lease would have the purpose or effect of expanding the Pinon Canyon Maneuver Site, a federal military training area.

In an e-mail dated March 18, 2009 (hereinafter "the e-mail"), a senior assistant attorney general in the state department of law asserted[3] that HB 09-1317 is constitutionally deficient. You have asked this office to render an opinion on the merits of the issues raised in the e-mail.

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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, in the course of its performance of bill drafting functions for the General Assembly. OLLS legal memorandums 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] The State Board of Land Commissioners was formerly known as the "State Land Board". Earlier cases and statutes utilize this nomenclature, and the term is still sometimes interchanged with the modern name.

[3] See e-mail from Ed Hamrick, Senior Assistant Attorney General, Natural Resources & Environment Section, Colorado Department of Law, to John Brejcha (March 18, 2009) (attached hereto). Mr. Hamrick cautions that the opinion is his alone and not meant to represent an official opinion from the Office of the Attorney General.

II. Issues Presented

1. Does the General Assembly have the authority to pass laws placing limitations on the authority of the Board to dispose of state lands?

2. Did Amendment 16 (1996) substantively limit the General Assembly's ability to act with respect to the Board?

III. Conclusions

1. Yes. Because the Board must act "subject to such terms and conditions consistent therewith as may be prescribed by law", the General Assembly has the authority to regulate the activities of the Board.

2. No. The replacement of the word "regulations" with the phrase "terms and conditions" in Amendment 16 was an immaterial change that cannot be read to have decreased the power of the General Assembly to statutorily regulate the Board's activities.

IV. Analysis

The Colorado Supreme Court has repeatedly held that the General Assembly's power is plenary and is limited only by express or implied provisions of the constitution. *People v. Y.D.M.*, 197 Colo. 403, 593 P.2d 1356 (1979). The scope and breadth of legislative power is reflected in the following statement: "Because state legislatures have plenary power for all purposes of civil government, state constitutions are limitations upon that power." *Colorado State Civil Service Employees Ass'n v. Love*, 167 Colo. 436, 448, 448 P.2d 624, 628 (1968). Hence, the General Assembly may enact any law not expressly or inferentially prohibited by the constitution of the state or of the nation. *People v. Y.D.M., supra*; *Denver Milk Producers v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers' Union*, 183 P.2d 529, 116 Colo. 389 (Colo. 1947).

The Colorado Constitution states that the Board "shall have the duty to manage, control, and dispose of [state] lands in accordance with the purposes for which said grants of land were made and section 10 of this article IX, **and**

subject to such terms and conditions consistent therewith as may be prescribed by law". Colo. Const. Art. IX, Sec. 9 (6) (emphasis added). Thus, the Board's ability to manage, control, or dispose of state lands is subject to three primary limitations: the Enabling Act[4], section 10 of article IX of the state constitution, and legislation passed by the General Assembly.

It is this third category of limitations that is implicated by the e-mail, in which it is asserted that HB 09-1317 "appears to impermissibly place a limitation and qualification on [the] [B]oard's ability to dispose of property under its control and would likely be a violation of the exclusive allocation of fiduciary duties to the Board by the Colorado Constitution".[5] Three cases are cited in support of this proposition. However, the limitation or restriction that HB 09-1317, if enacted, would impose appears to be consonant with the applicable constitutional principles and the referenced case law.

A. It is well-settled that the General Assembly has the authority to pass reasonable legislation affecting the Board.

The Colorado Supreme Court has long recognized the power of the state legislature, pursuant to its constitutionally granted authority, to pass laws respecting the Board. With *In re Leasing of State Lands*, 18 Colo. 359 (1893), the Court analyzed the constitutional scheme under which the Board must operate, concluding that "the provision, 'under such regulations as may be prescribed by law,' means such reasonable rules as may be prescribed from time to time, by the legislative department of the government.". *Id.* at 364.[6] The Court's holding leaves no doubt that the General Assembly has a substantial role in enacting statutes affecting the Board's leasing activities:

> Therefore, **in leasing state lands, the board must first look to the statutes to ascertain the**

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[4] Colorado Enabling Act, 18 Stat. 474 (1875) (making a grant of lands for public education).

[5] E-mail from Ed Hamrick, *supra* note 3. The e-mail raises only the Board's duty of *disposition* regarding state lands, and not the Board's management and control duties. This memo assumes that "disposition" encompasses both the sale and lease provisions of HB 09-1317, even though leases may be more accurately couched as falling under the Board's duties to manage or control state lands (since "disposition" may imply complete and final transfer or relinquishment of property).

[6] Prior to the adoption of Amendment 16 in 1996, section 9 of Article IX of the Colorado Constitution described "regulations" passed by the General Assembly in regard to the Board. With the passage of Amendment 16, this word was replaced with the phrase "terms and conditions". For a discussion on the effect of this modification, please see section IV.B of this memorandum, *infra*.

> **regulations therein prescribed,** and then, in exercising their constitutional powers, they must so act as in the judgment of the board will secure the maximum amount, under the prescribed regulations. **The power to regulate being expressly reserved to the legislature."**

Id. (emphases added).

The Court tempered this announcement with an acknowledgment that the General Assembly's authority was not absolute:

> It is not to be inferred from this that all legislation upon the subject would be binding upon the state board. **Should the legislature, under the guise of regulations, attempt to take away all power of disposition of the state lands from the state board,** or should laws be enacted for the manifest purpose of favoring other than the highest bidder, **such acts would be manifestly in violation of the constitution, and void.**

Id. at 365 (emphases added).

The e-mail invokes the above statement in support of the proposition that HB 09-1317 represents the type of overreaching that the Court cautioned would be repugnant to the constitutional authority granted the legislature in article 9, section 9. Clearly, though, HB 09-1317 does not "take away all power of disposition of the state lands" from the Board, even with respect to the particular lands at issue. Instead, the bill merely proscribes the disposal of state lands when such disposal would cause a specific, narrowly defined result [the expansion of the Pinon Canyon Maneuver Site (PCMS)]. Indeed, under HB09-1317, the board may still dispose of the particular lands abutting the PCMS, so long as such disposition does not trigger the proscribed result. With its limited applicability, HB09-1317's restriction on the Board is much less pervasive than the limitation condoned by *In re Leasing of State Lands.*

In *Evans v. Simpson*, 190 Colo. 426 (1976), the Supreme Court of Colorado again analyzed sections 9 and 10 of Article IX of the Colorado Constitution and concluded that "[i]t is this clear that the legislature has the constitutional authority to regulate the Board's activities; and it is equally clear that the Board's activities may not contradict or exceed specific statutory

limits." *Id.* at 430. The Court further held that "the constitution mandates that, **unless limited by specific statutory regulations**, the Board shall enter into whatever leases it deems to be most beneficial to the state".[7] *Id.* (emphasis added).

Reliance on *Sunray Mid-Continent Oil Company Co. v. State*, 149 Colo. 159 (1962), for support of the allegation that HB 09-1317 defies constitutional strictures is misplaced. The Supreme Court's holding in that case did state that the Board has "exclusive powers of disposal" over the lands within its control. When that statement is examined in context, however, it becomes clear that the holding of that case is distinguishable from the situation presented by HB 09-1317. The law at issue in *Sunray* would have granted the state Board of Agriculture the power to consent and approve of oil and gas leases of certain state lands. Such concurrent jurisdiction was held to be antithetical to the exclusive power of the Board. As HB 09-1317 does not disturb such exclusive authority, *Sunray* is not analogous. The bill would not enable the General Assembly to encroach upon the exclusive authority of the Board to dispose of state lands; rather, the legislation, wholly consonant with the state constitution, simply prevents the Board from facilitating the expansion of the PCMS through state land disposal. The probative value of *Sunray* is further reduced in this instance because, although the opinion noted that "the General Assembly does not have the power to place limitation or qualification upon the exercise of [the Board's] power", *id.* at 164, the Supreme Court explicitly admitted that "the authority of the legislature to adopt 'regulations' governing the sale or disposition of the said lands is not involved in this dispute". *Id.* at 165.

The position set forth in the e-mail would endow the Board with a breadth of discretion that is unsupported by law and untenable in practice. The Colorado constitution vests the General Assembly with the power to enact legislation regarding the disposal of state lands, and the Board must act consistent with such legislation.

B. Amendment 16's change from "regulations" to "terms and conditions" was immaterial.

The e-mail also contends that the General Assembly's ability to act with respect to the Board was circumscribed in 1996, when Amendment 16, an

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[7] "Most beneficial to the state" was the earlier standard to which the Board was expected to conform in relation to its disposal of state lands. This phrase was eliminated with the passage of Amendment 16 in 1996.

initiated measure, dramatically revised Section 9 of Article IX of the Colorado Constitution. Prior to the enactment of Amendment 16, the pertinent portion of section 9 stated:

> The state board of land commissioners shall be composed of three persons to be appointed by the governor, with the consent of the senate, who shall have the direction, control, and disposition of the public lands of the state **under such regulations as are and may be prescribed by law**, one of which persons shall at the time of his appointment be designated as president of the board and one of which persons shall at the time of his appointment be designated as register of the board.

Colo. Const. Art. IX, Section 9 (1) (1996). Amendment 16 modified this qualification on the Board's power with the current language:

> The board shall serve as the trustee for the lands granted to the state in public trust by the federal government, lands acquired in lieu thereof, and additional lands held by the board in public trust. It shall have the duty to manage, control, and dispose of such lands in accordance with the purposes for which said grants of land were made and section 10 of this article IX, **and subject to such terms and conditions consistent therewith as may be prescribed by law**. Colo. Const. Art. IX, Section 9 (6) (2008).

In effect, then, the Board must now comply with "terms and conditions" (as opposed to the "regulations") prescribed by law. The e-mail interprets this as a substantive change that increased limitations on the state legislature to act with respect to the Board's disposal of state lands. However, this interpretation is not borne out by either the text of the constitutional provision nor the legislative history of Amendment 16.

1. HB 09-1317 does not contravene the "terms and conditions" clause of subsection (6) of section 9 of Article IX of the Colorado Constitution.

The e-mail postulates that Amendment 16's replacement of the word "regulations" with the clause "terms and conditions" implemented a new, substantive restriction on the General Assembly to fashion legislation affecting the Board's power to dispose of state lands. Specifically, the e-mail proffers the claim that the phrase "terms and conditions" binds the General Assembly to "**procedural and general** terms and conditions rather than prohibitions on the [B]oard's power to dispose of the property"[8]. This interpretation, however, disregards the plain language of the text and grafts onto the constitution an elucidation that is unfounded.

The court's duty in construing the constitution is to give effect to the electorate's intent in enacting the provision at issue. *In re Interrogatories Propounded by the Senate Concerning House Bill 1078*, 189 Colo. 1, 7, 536 P.2d 308, 313 (1975); *White v. Anderson*, 155 Colo. 291, 298, 394 P.2d 333, 336 (1964); *Board of Education v. Spurlin*, 141 Colo. 508, 516-17, 349 P.2d 357, 362-63 (1960). Where the language of the constitution is plain and its meaning clear, that language must be declared and enforced as written. *Colorado Assn. of Public Employees v. Lamm*, 677 P.2d 1350, 1353 (1984) (citations omitted). When that intent is expressed in plain, clear language, we may not resort to a strained interpretation but instead must apply the constitutional provision according to its clear terms.

The alteration made by Amendment 16 appears to be an update or clarification (since the word "regulation" is more properly applied in an administrative context). The clause "terms and conditions" includes a broad range of actions that the legislature may undertake. Hence, even if one accepts the proposition that Amendment 16 decreased the authority of the General Assembly to enact legislation regarding the Board's disposition of state lands, the limitation on the Board's power of disposition that would be imposed by HB 09-1317 is still a constitutionally authorized "condition".[9]

> In interpreting a constitutional amendment, which has been adopted by popular vote, the court must presume that the words were used in their ordinary meaning and that the people intended

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[8] E-mail from Ed Hamrick, *supra* note 3 (emphasis added).

[9] Although a less accurate descriptor than "condition", HB 09-1317 could also be deemed to contain a "term" with which the Board must abide. The ordinary meaning of the word "term" includes "provisions that determine the nature and scope of an agreement ". *See* "term", Merriam-Webster Online Dictionary, 2009 (retrieved March 28, 2009, http://www.merriam-webster.com/dictionary/term).

what they have said.

Colorado State Civil Service Employees Asso. v. Love, 448 P.2d 624, 628 (1968).

The ordinary meaning of the word "condition" includes "a restricting or modifying factor".[10] HB 09-1317 would place such a restricting factor on the authority of the Board to act. That is, forbidding the disposal of state lands when the expansion of Pinon Canyon Maneuver Site would result is a condition on the Board's ability to dispose of lands abutting PCMS. The Board is not prevented from conducting its transactions in accordance with its constitutionally prescribed fiduciary duties, and is still free to dispose of the lands subject to HB 09-1317, to any party and in any manner, so long as the expansion of PCMS will not result. It cannot be fairly argued that the *only* way the Board can fulfill its fiduciary duties is to sell or lease the lands to increase PCMS, or that the prohibition contained in HB 09-1317 is invasive enough to be constitutionally infirm.

2. The legislative history of Amendment 16 demonstrates that the terminology change was immaterial.

As discussed above, the plain meaning of section 9 (6) of article IX of the state constitution is clear. However, even if the phrase "terms and conditions" is determined to be susceptible to more than one reasonable interpretation, the history of Amendment 16 supports the notion that the measure was meant to maintain the General Assembly's authority vis-a-vis the Board.

In construing a constitutional provision, courts should ascertain and give effect to the intent of the framers thereof and of the people who adopted it. *Cooper Motors, Inc. v. Board of County Comm'rs*, 131 Colo. 78, 83 (1955). In order to assess the intent behind the particular modification made by Amendment 16, it is instructive to look to the legislative history surrounding its adoption.

> When interpreting a constitutional amendment, we may look to the explanatory publication of the Legislative Council of the Colorado General Assembly, otherwise known as the Blue

[10] Merriam-Webster Online Dictionary, 2009 (retrieved March 28, 2009, http://www.merriam-webster.com/dictionary/condition).

> Book. While not binding, the Blue Book provides important insight into the electorate's understanding of the amendment when it was passed and also shows the public's intentions in adopting the amendment.

Grossman v. Dean, 80 P.3d 952, 962 (2003) (citations omitted). The state Supreme Court has also described the Blue Book as "a helpful source equivalent to the legislative history of a proposed amendment". In re Proposed Initiative "Public Rights in Waters II", 898 P.2d 1076, 1079 (1995) (footnote 5).

In this case, the legislative history surrounding the enactment of Amendment 16 is notable for the paucity of analysis regarding the change from "regulations" to "terms and conditions". The ballot title is completely devoid of any reference to that provision. The 1996 Blue Book is largely silent on the issue, except to note that the proposed amendment "continues the ability of the General Assembly to enact laws on the management of trust lands, as long as the laws are consistent with the new constitutional provisions". *Legislative Council of the Colo. Gen. Assembly, An Analysis of 1996 Ballot Proposals*, 33-39 (Research Publ'n No. 415, 1996). This statement suggests that the change in terminology was not intended to have any substantive effect. Rather, the new wording was meant to leave undisturbed the authority of the legislature as it existed prior to Amendment 16.

Because it is unlikely that a substantial change such as the withdrawal or curtailment of the power of the state legislature to act in regard to the duties of the Board would be unmentioned or inadvertently omitted, the legislative history supports the conclusion that the wording change is immaterial.

V. Conclusion

The Board must act "subject to such terms and conditions consistent therewith as may be prescribed by law", and the "terms" or "conditions" contained in HB 09-1317 appear to fall squarely within the General Assembly's authority. This position is supported by the cases cited by the e-mail, the plain meaning of the constitutional language, and the legislative history of Amendment 16.

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