

COLORADO TRANSPORTATION FINANCE AND IMPLEMENTATION PANEL

VOTER APPROVAL PAPER

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1. **What must be voted?**

- (a) New tax
- (b) Increase of an existing tax
- (c) Extension of an expiring tax
- (d) Tax policy change causing a net tax revenue gain to the state or any local government (excluding enterprises)
- (e) Multiple fiscal year direct or indirect debt or other financial obligation, with the following exceptions:
 - (i) Adequate present cash reserves pledged irrevocably and held for payments in all future fiscal years
 - (ii) Lease-purchase financing
 - (iii) Refunding bonded debt at a lower interest rate
 - (iv) Adding new employees to existing pension plans
- (f) Retention of revenue in excess of TABOR spending/revenue limit (commonly referred to as “de-Bruceing”)
- (g) Retention of revenue from a voted tax that exceeds the estimate set forth in the ballot question authorizing the tax
- (h) Changes in valuation for assessment ratio for a property tax class (relating to property taxes, which the state does not currently levy)

2. **What cannot be done without a Constitutional amendment?**

- (a) State debt
 - (i) The Constitutional limit on state debt technically permits up to \$50,000 of state debt, but practically that means no state debt.
 - (ii) Exceptions:
 - (A) Obligations subject to annual appropriation (although an obligation that is subject to annual appropriation is not debt, it may be a multiple fiscal year financial obligation that must be voted under TABOR)

(B) Obligations payable from a “special fund” – exception can be used to permit obligations payable from virtually any source other than property taxes and has been used to issue bonds payable from the HUTF

(b) State property tax other than a property tax for up to three mills for the limited purposes of “erecting public buildings.”

(c) Use of revenues derived from “any license, registration fee, or other charge for the use and operation upon any public highway in this state and the proceeds from the imposition of any excise tax on gasoline or other liquid motor fuel except aviation fuel used for aviation purposes” for any purpose other than “the construction, maintenance and supervision of the public highways of this state.”

3. **What qualifies as a fee that does not require voter approval?**

(a) General definition derived from Colorado case law:

(i) The proceeds of the fee are used to pay for a particular government service and not to pay the general expenses of government.

(ii) The fee is paid by those who benefit from the service. Some, but not all, cases mention a correlation between the amount paid and the benefit received by the payer.

(iii) The amount of the fee is reasonably related to the overall cost of the service. Mathematical exactitude is not required; the setting of the fee is a matter of legislative discretion that a court will not set aside unless the methodology chosen is inherently unsound.

(b) Examples of fees from Colorado court cases:

(i) Vehicle registration fee paid by owners of vehicles registered within the boundaries of the E-470 Public Highway Authority to pay a portion of the costs of constructing, operating and maintaining the E-470 toll road. *Board of County Commissioners v. E-470 Public Highway Authority*, 881 P.2d 412 (Colo. Ct. App. 1994), reversed on other grounds, *Nicholl v. E-470 Public Highway Authority*, 896 P.2d 859 (Colo. 1995).

(ii) Transportation utility fee to pay the cost of maintaining city streets paid by owners or occupants of developed lots fronting city streets based on number of feet of street frontage; the maintenance cost of each foot of frontage and the developed use of the property (including the amount of vehicular traffic generated by the property). *Bloom v. City of Fort Collins*, 784 P.2d 304 (Colo. 1989).

(iii) Street light service charge to finance the cost of street lighting paid by property owners based on whether their property is residential or commercial; the relative amounts of residential and commercial property within the city; and

the total estimated expense of operating the street lights. *Bruce v. City of Colorado Springs*, 131 P. 3d 1187 (Co. Ct. App. 2005), cert. denied April 3, 2006.

(iv) Cable television charge paid monthly by each subscriber to cable television provided by private company pursuant to franchise from the city in consideration for using city streets and rights of way by the franchisor and the grant of the franchise by the city. *Bruce v. City of Colorado Springs*, 131 P. 3d 1187 (Co. Ct. App. 2005), cert. denied April 3, 2006.

(v) Wastewater plant investment fee paid before issuance of a building permit or certificate of occupancy for a new building based on the peak effluent flow anticipated from the building to defray the cost of expanding wastewater infrastructure as development increases demand. *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687 (Colo. 2001).

(vi) Storm drainage and flood management fee based on the zoning, use and state of the development of property to pay the costs of a storm drainage and flood management system. *City of Littleton v. State*, 855 P. 2d 448 (Colo. 1993).

(vii) Public transportation fee on commercial property located within the geographical area surrounding a proposed fixed guideway rapid transit system based on number of employees to plan, finance, construct, maintain and operate a fixed guideway rapid transit system that never got beyond the planning stage. *Anema v. Transit Constr. Auth.*, 788 P.2d 1261 (Colo. 1999).

(viii) Storm drainage fee on all owners of property of the city based on the ratio of impervious to pervious land surface to finance storm drainage facilities. *Zelinger v. City & County of Denver*, 724 P.2d 1356 (Colo. 1986).

(ix) Water system development fee against all persons and entities coming into the Denver Water Board's water system after a certain date to finance the costs of future water system capital projects. *City of Arvada v. City & County of Denver*, 663 P.2d 611 (Colo. 1983).

(x) Building permit fee for the issuance of building permits to pay the direct and indirect costs of a county building department. *Bainbridge, Inc. v. Bd. of County Comm'rs.*, 964 P.2d 575 (Colo. App. 1998).

(xi) Airport user fee of a flat dollar amount on the rental of each vehicle at Stapleton airport to pay the costs of operating the airport. *Thrifty Rent-A-Car Sys. Inc. v. City & County of Denver*, 833 P.2d 852 (Colo. App. 1992).

(xii) Airport user fee of a percentage of the gross revenues from the rental of cars to customers picked up at the airport to pay the costs of operating the airport. *Westrac, Inc. v. Walker Field*, 812 P. 2d 714 (Colo. App. 1991).

(xiii) Sewage development and service fees imposed on new customers of the city's sewage system to defray the cost of increased treatment capacity required to serve the new customers and on all customers based on the number of dwelling units or water consumption to pay costs of treating sewage. *Loup-Miller Const. Co. v. City and County of Denver*, 676 P.2d 1170 (Colo. 1984).

(c) Revenues sources that may qualify as fees (subject to confirmation based on specific design of the fee and use of the revenues from it):

- (i) Tolls
- (ii) Vehicle registration fees
- (iii) License fees
- (iv) Weight-distance fees on trucks
- (v) Vehicle miles traveled fees
- (vi) Impact fees
- (vii) Emission fees

4. Can the TABOR enterprise exception be used to avoid voter approval and TABOR spending/revenue limits?

(a) An enterprise may impose fees and issue revenue bonds without voter approval and is not subject to the TABOR spending/revenue limits.

(b) An enterprise is a government-owned business that is authorized to issue its own revenue bonds and receives under 10% of annual revenue in grants from all Colorado state and local governments combined.

(c) An enterprise cannot have the power to tax. Possession of the power to tax, even if never exercised, will disqualify the activity from enterprise status.

(d) The Colorado Statewide Tolling Enterprise established under C.R.S. § 43-4-801 *et seq.* is a TABOR enterprise.

(e) It may be possible to create an enterprise that imposes fees, receives no or limited governmental subsidies and owns and operates particular transportation projects. *See Concept Paper and Preliminary Issue Discussion for Colorado Transportation Finance Authority* dated June 4, 2007.

5. Can a tax and the de-Bruceing of the revenues from the tax be authorized in the same ballot question?

Yes. Revenues from a voter approved tax are automatically de-Bruced as a “revenue change approved by voters after 1991” within the meaning of TABOR subsection (7). It is, nevertheless, common to add words to the ballot question specifically authorizing that result.

6. Can more than one tax be authorized in the same ballot question?

Yes. But the ballot question should be placed on the ballot by joint resolution of the House and Senate and the legislature should adopt an act stating that the common law single subject rule does not apply. See the discussion of the single subject issue in the answer to question 10 below.

7. Can a tax and bonds payable from all or a portion of the revenues from such tax be authorized in the same ballot question?

Yes. Case law specifically permits this.

8. Can a tax or bonds to finance more than one transportation project be authorized in the same ballot question?

Yes. But the ballot question should be placed on the ballot by joint resolution of the House and Senate. It would also be prudent to have the legislature enact a statute stating that the common law single subject rule does not apply to any such question. See the discussion of the single subject issue in the answer to question 10 below.

9. Can a single ballot question authorize the imposition of more than one tax to finance more than one transportation project and the issuance of bonds payable from all or a portion of the proceeds of such taxes?

Yes. But the ballot question should be placed on the ballot by joint resolution of the House and Senate and the legislature should adopt an act stating that the common law single subject rule does not apply. See the discussion of the single subject issue in the answer to question 10 below.

10. What is the single subject issue and how does it apply to questions 6, 7, 8 and 9?

(a) Constitutional single subject rules

(i) There are two:

(A) Article V, Section 1(5.5) provides that Constitutional amendments and statutes initiated by voters (by petition) may contain only a single subject.

(B) Article V, Section 21 provides that legislative bills may contain only a single subject.

(ii) Case law under these provisions of the Constitution is extensive, often contradictory and therefore difficult to plan around.

(iii) Referendum D was placed on the ballot by joint resolution of the House and the Senate in order to avoid having to comply with the Constitutional single subject rules. Referred measures are not subject to Article V, Section 1(5.5). Joint resolutions are not subject to Article V, Section 21.

(b) Common law single subject rule

(i) Judge-made common law that limits ballot questions to a single subject.

(ii) Has been applied by the Colorado Supreme Court (A) to invalidate a the inclusion of multiple projects for different purposes in single ballot question that authorized general obligation bonds (the question authorized bonds to finance erecting a public auditorium, sewers, purchasing or condemning park land, improving parks, constructing viaducts, constructing reservoirs, constructing bridges, refunding outstanding debt, improving the channel of a river, constructing ditches and other water facilities and paying the city's portion of other local improvements) but (B) to permit inclusion of more than one project for the same general purpose in a single ballot that authorized general obligation bonds (more than one school for a school district).

(iii) Colorado case law specifically permits the authorization of taxes and bonds payable from all or a portion of the proceeds of such taxes in the same ballot question.

(iv) We have not found any cases applying the single subject rule to a ballot question that authorizes multiple taxes.

(v) The Colorado Supreme Court has rejected the argument that a ballot question that would create a credit against more than one tax or would lower more than one tax violated the single subject rule for initiated Constitutional amendments because more than one tax was dealt with in the same ballot question. The cases are, however, arguably distinguishable because they dealt with a credit against, or the lowering of, taxes instead of a tax increase. *In re Amend Tabor #32*, 908 P.2d 125 (Colo. 1995) (holding that granting a credit against six state taxes and requiring the state to replace lost local government revenues was a single subject for purposes of Article V, Section 1(5.5)); and *In re Proposed Initiative for 1997-98 #84*, 961 P.2d 456 (Colo. 1998) (holding that lowering a variety of state taxes was a single subject but that an additional provision requiring the state to replace lost local government revenues *within tax and spending limits* created two separate subjects for purposes of Article V, Section 1(5.5) [the italicized language distinguishing the replacement of local government revenues requirement from the proposed Constitutional amendment that was the subject of *In re Amend Tabor #32, supra.*]).

(vi) Judge made common law may be overridden by legislation enacted by the Colorado General Assembly.

(c) Our advice:

(i) If ballot question that authorizes the financing of more than one transportation project, (A) the ballot question should be placed on the ballot by joint resolution of the House and Senate in order to avoid the Constitutional single subject rules; and (B) it may be prudent (but is probably not necessary) to have the Colorado General Assembly enact legislation stating that the common law single subject rule does not apply.

(ii) If a ballot question authorizes the imposition of more than one tax, (A) the ballot question should be placed on the ballot by joint resolution of the House and Senate in order to avoid the Constitutional single subject rules and (B) the Colorado General Assembly should enact legislation stating that the common law single subject rule does not apply.

11. What will the ballot question look like?

(a) TABOR prescribes the form of ballot questions for tax increases and bonded debt: “Ballot titles for tax or bonded debt increases shall begin, “SHALL (DISTRICT) TAXES BE INCREASED (first, or if phased in, final, full fiscal year dollar increase) ANNUALLY . . . ? or “SHALL (DISTRICT) DEBT BE INCREASED (principal amount), WITH A REPAYMENT COST OF (maximum district cost), . . . ?”

(b) Ballot questions for other matters that must be voted (see the answer to question 1 above) do not have to be in any particular form, but are commonly drafted in a manner consistent with other ballot questions that have survived challenges in court.