Part VI

Enterprises

The first year of TABOR implementation has seen special attention focused on the subject of "enterprises." TABOR excludes from its limitations any qualified "enterprise"; however, the term presents many difficult interpretive questions. Section 2(d) defines an "enterprise" to be:

> 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.

Municipalities have always maintained a wide variety of "enterprise funds," the nature and operation of which have traditionally been defined by generally accepted accounting principles (GAAP). It is important to recognize, however, that the definition of "enterprise" contained in TABOR is not cross-referenced to any traditional definition. An entity or activity which may have been considered an enterprise under an earlier analysis may not qualify under TABOR, and conversely an enterprise which meets the TABOR definition may not conform to an auditor's particular conception of the term under GAAP. A careful analysis and understanding of the TABOR definition is critical because it will determine whether large portions of municipal revenue and spending are to be included in the municipal base and thereby has the potential to dramatically affect the municipality's ability to keep and spend other revenues for other purposes starting in 1993.

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Some have suggested that an enterprise just "is" if it is an activity which currently meets the TABOR definition. One of the more fundamental questions associated with enterprises is whether the municipality must or should take some affirmative act to designate an enterprise, or whether an enterprise simply exists by operation of law. Furthermore, Section 7(d) suggests that the activity may lapse in and out of being considered a qualified enterprise, again by operation of law, whether or not the governing body takes some action to certify or de-certify the enterprise. The better view, however, is that each municipality can and should take some formal action to designate which of its activities it intends to recognize as enterprises (and disqualifying any activity which ceases to be an enterprise in the future). While it may generally be advantageous to use the enterprise exclusion in order to shield certain municipal operations from the restrictions of TABOR, there may be equally valid reasons for wanting to keep the enterprise in the municipality's base, especially in base year 1992. For

example, if a particular municipal operation generated a high amount of revenue in 1992 but was expected to have consistent or declining revenue in future years, it may be preferable to include it in the base in order to establish a larger overall municipal base upon which to grow.

During the 1993 legislative session, the General Assembly adopted a case-by-case approach to formally designating enterprises. Although SB 93-74 contained a general definition of "enterprise" and "grant," the legislature went on to adopt five separate bills specifically addressing certain types of activities as enterprises and considered several others. (See Appendix 2.) Many municipalities have also followed suit, categorically identifying certain of their operations as enterprises by ordinance, resolution, or charter amendment.

CML will continue to explore the possibility of supporting some form of generic enterprise enabling legislation.

There are differences of opinion about whether municipalities in general and statutory municipalities in particular need any enabling authority from the state legislature to begin designating enterprises. TABOR purports to be self-executing and seems to contemplate that enterprises can and will exist at every level of government. Arguably, statutory municipalities need no additional permission from the General Assembly to begin recognizing enterprises which qualify under TABOR. Almost certainly, home rule municipalities can recognize enterprises within the authority of their own charters. On the other hand, some have argued that a clear statutory procedure for establishing and governing enterprises and, most importantly, for the issuance of enterprise revenue bonds would be helpful to resolve any doubts. The legislature did pass one enterprise enabling bill directed at local governments, SB 93-130, which specifically authorizes water, sewer, and drainage enterprises but leaves open the larger question of how other types of "government-owned businesses" may be treated, § 37-45.1-101, *C.R.S. et seq.* CML will continue to explore the possibility of supporting some form of generic enterprise enabling legislation.

Government-owned business

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TABOR permits an enterprise to consist of any "government-owned business," but does not further define what such a business might be. Under even the strictest interpretation, such businesses would seem to include the kinds of activities which have some counterpart in the private sector, e.g., utilities, airports, parking facilities, certain recreational facilities, certain transportation services, etc. In the absence of a more specific definition, however, municipalities may have even broader discretion to determine what qualifies as a government-owned-business.

One interpretation is that a government-owned-business could be **any** municipal activity which otherwise meets the TABOR definition of enterprise. In other words, if a particular service or function subsists on an annual budget which includes less than 10% in state and local grants, then it is obviously more or less self-supporting and is therefore obviously akin to a business. Under this theory, the nature of the service being provided is

irrelevant; the structure of the service's revenue stream is the determining factor. Notice, however, that TABOR does not appear to grant municipalities any new substantive authority to engage in any service or activity which is not otherwise authorized by law. This point is especially important for statutory municipalities. Before rushing headlong to create a new enterprise, the threshold question for any municipality is whether the municipality has legal authority to engage in the type of business which is being proposed.

The "government-owned business" issue was recently addressed by the Arapahoe County District Court in the case of *Board of County Commissioners of Arapahoe County v. E-470 Public Highway Authority.* The Court rejected the argument that the authority should be exempt from TABOR as an enterprise. The Court's stated rationale was that an entity which exists solely to finance and build a **public** road should not be considered a "business." Echoing language from the Supreme Court's *Interrogatories* decision, the Court found the authority to be "essentially governmental in nature" and thus an unlikely candidate for the enterprise exception. This decision may be appealed.

Grants to enterprises

Another elusive factor in determining whether an enterprise qualifies under TABOR is understanding what may or may not be considered a "grant" for purposes of the 10% limitation. Interpretations have run the gamut from quite narrow (i.e., the term only includes the kind of grants which a municipality may receive through application to some sort of formal grant program) to extremely broad (i.e., grant includes any kind of support, tangible or intangible, direct or indirect, cash or in-kind, which the government may give to an enterprise). Several different grant definitions appeared in the enterprise bills passed by the legislature this year. The one which received the most attention was contained in SB 93-74, § 24-77-102 (7), C.R.S., and is apparently intended to apply to state enterprises:

- "Grant" means any direct cash subsidy or other direct contribution of money from the state or any local government in Colorado which is not required to be repaid.

In SB 93-74, "grant" does not include:

- Any indirect benefit conferred upon an enterprise from the state or any local government in Colorado;
- Any revenues resulting from rates, fees, assessments, or other charges imposed by an enterprise for the provision of goods or services by such enterprise;
- Any federal funds, regardless of whether such federal funds pass through the state or any local government in Colorado prior to receipt by an enterprise.

Although this definition does not necessarily apply to municipal enterprises, it may be helpful to consider the details of the approach which has been taken by the state.

First, the definition clearly contemplates that grants are defined to include only cash money, not any of the various sorts of in-kind assistance or intangible subsidies which a government may provide to an enterprise. Second, it clearly distinguishes grants from loans and provides that loaned money will not be considered within the 10% limitation. Third, it excludes from the definition any payments that a government may make to an enterprise for goods or services rendered by the enterprise to that government. Fourth, since the 10% limitation only applies to state and local grants, it clarifies that federal monies will never be counted as a grant and will retain their character as federal monies even if they are passed through another government. Each of these interpretations are reasonable on the face of TABOR and are consistent with the intent of TABOR as explained by the author prior to November 3, 1992.

Fluctuations in grants to an enterprise from year to year will be the most likely reason an enterprise will qualify or disqualify, and thereby lapse in and out of the municipal base as provided in TABOR Section 7(d).

In the case of *Regional Transportation District v. Romer*, currently pending in the Denver District Court, RTD is seeking a declaration that their district is an enterprise and that the sales tax infusions received by the district should somehow not be considered "grants" within the meaning of TABOR.

Enterprise revenue bonds

According to TABOR, a qualified enterprise must be "authorized to issue its own revenue bonds."

The third prong to the enterprise definition is one which may also pose problems in implementation. According to TABOR, a qualified enterprise must be "authorized to issue its own revenue bonds." If taken absolutely literally, this requirement is troublesome for several reasons. At the time TABOR was adopted, there seemed to be almost no government-owned business in the state which truly issued its "own" revenue bonds. Instead, the common practice was and is for government entities to issue bonds, secured by enterprise revenue, in the name of the government itself. Moreover, the author of TABOR seemed to contradict himself when he cited the City of Colorado Springs' utilities as an example of a qualifying enterprise. Revenue bonds for these utilities, like those in virtually every other municipality, are approved by the Colorado Springs city council, not some separate governing body for some separate enterprise entity. Therefore, it may be reasonable to interpret the enterprise revenue bond requirement somewhat broadly to encompass any situation where legal authority exists to issue bonds secured by enterprise revenue.

The General Assembly treated this issue inconsistently in the various enterprise bills adopted in 1993. (See Appendix 2.) In some cases, revenue bonding authority was delegated directly to the enterprise itself; in other cases, revenue bonding authority was reserved to the government which owned the enterprise.

One proposed rationale for seeking additional enterprise enabling legislation for local government enterprises would be to clarify certain revenue bonding questions. It has been suggested, especially for statutory municipalities, that unless express authority for revenue bonding for a particular type of municipal activity is included in the statutes, then the municipality may have a difficult time qualifying that activity as an enterprise. On the other hand, some argue that revenue bonding is an inherent financial power which can be exercised in furtherance of any activity which the municipality is otherwise legally authorized to pursue. The ultimate resolution of this issue may require further legislation or a test case or both.