Enterprises Under Article X, § 20 of the Colorado Constitution—Part I

by Amy Kennedy and Dee P. Wisor

Editor's Note:
This is the first part of a two-part article discussing "enterprises" under the TABOR Amendment, Article X, § 20 of the Colorado Constitution. Part II of this article will be published in the May issue.

Article X, § 20 of the Colorado Constitution ("Amendment 1") was approved by Colorado voters and added to the Colorado Constitution approximately five years ago. Amendment 1 is a tax limitation, spending limitation, revenue limitation, and debt limitation that applies to all "districts," defined to include the state or any local government, excluding enterprises.[1] Since Amendment 1 was added to Colorado's Constitution, there have been many challenges to actions governments have taken to comply with it. Some of these challenges have resulted in judicial clarification of the confusing provisions and undefined terms found in Amendment 1's text.

One area where there are still many unanswered questions is in the area of "enterprises" formed under Amendment 1. This article describes some of the court decisions relating to enterprise issues that have been rendered to date, discusses some of the enterprise issues that have yet to be settled by judicial action, and offers some thoughts about how some of the unsettled issues relating to enterprises may be resolved given existing precedent in other areas of the law.[2]

General

Pursuant to Amendment 1, an enterprise is exempt from all of the limitations of Amendment 1, including the limits on debt and spending. Section 2(d) of Amendment 1 defines an enterprise as follows:

> "Enterprise" means a government-owned business authorized to issue its own revenue bonds and receiving under 10% of annual revenue in grants from all Colorado state and local governments combined.

An enterprise under Amendment 1 must satisfy each of the three components of the definition set forth above. This Part I addresses the requirement that the enterprise must be a government-owned business. Part II will address the second and third requirements, that the government-owned business must be authorized to issue its own revenue bonds and that the government-owned business must receive less than 10 percent of its annual revenue in grants from all Colorado state and local governments combined.

Government-Owned Business

In order to conclude that an enterprise exists under Amendment 1, it must first be determined that the activity in question is a "government-owned business." While neither "government-owned" nor "business" is defined in Amendment 1, the Colorado Supreme Court, in *Nicholl v. E-470 Public Highway Authority*,[3] stated that in order to determine whether something is an enterprise for Amendment 1 purposes, it is necessary to decide whether it is both government-owned and a business, "given the ordinary meaning and understanding of these terms."[4]

The issue in the *E-470* case was whether the E-470 Public Highway Authority ("Authority") was an enterprise. The Authority was created in 1988 when Douglas, Arapahoe, and Adams Counties entered into an establishing contract pursuant to the Public Highway Authority Law ("PHA Law").[5] Other governments became participants in the Authority by subsequent amendments to the establishing contract. Under the PHA Law, governments can cooperate to form a highway authority, which then becomes a body corporate and a political subdivision of the state of Colorado. The PHA Law allows public highway authorities to be formed to finance, construct, operate, or maintain all or a portion of a beltway or other transportation improvement in a metropolitan region.

At the time of the E-470 decision, § 43-4-506 of the PHA Law also granted certain powers to an authority, including the power to issue bonds, assess and collect vehicle registration fees, impose sales and use taxes, and charge tolls for highway use.[6] The Authority's primary sources of revenue are tolls from its existing roadway, the proceeds of a vehicle registration fee imposed in portions of Adams, Arapahoe, and Douglas Counties, and interest income. Although the Authority had the power to impose sales and use taxes under certain conditions, it had never attempted to use that power.

The Authority claimed it was an enterprise and so not subject to the limitations imposed by Amendment 1. The Colorado Court of Appeals agreed, but the Colora-

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do Supreme Court held that the Authority was not an enterprise, determining that it was not a government-owned business. According to the court, the term "government owned" is commonly used to indicate ownership by a governmental entity. Looking primarily to the Authority's establishing contract and determining that both ownership and control of the Authority were with the participating governments, the court concluded that the Authority was a "government-owned" entity.

The court next turned its attention to the definition of the term "business" under Amendment 1. Citing previous case law, the court stated that the term business is "generally understood to mean an activity which is conducted in the pursuit of benefit, gain or livelihood."[7] The court then determined that providing access to a public roadway in exchange for the payment of tolls and user fees, as the Authority was set up to do, was business-like, but that the Authority had other characteristics that were not typical of a business.

Specifically, the court said that the PHA Law permitted the Authority to finance its operations in a manner not typical of a "business," as the term is commonly used, because the PHA Law permitted the Authority to levy sales and use taxes. "The ability to levy general taxes is inconsistent with the characteristics of a business."[8] In addition, the court stated that including a taxing authority within the Amendment 1 definition of enterprise is also inconsistent with the terms of the definition considered as a whole. The court's rationale was that the third component of the definition of enterprise (relating to receipt of grants) is designed to distinguish a purported enterprise from a governmental unit. The court concluded as follows:

> If an entity has the power to impose taxes on the same transactions taxable by the state and local government, limiting its receipt of "grants" from those entities would be unnecessary because an enterprise could simply raise its revenue independently from the same sources. Accordingly, we conclude that the limitation on revenues from "grants" in the definition of "enterprise" is inconsistent with the independent power to levy taxes.[9]

The court, then, concluded that the power to unilaterally impose taxes, with no direct relation to services provided, was "inconsistent with the characteristics of a business as the term is commonly used,"[10] as well as being inconsistent with the definition of enterprise read as a whole. Because the court held that the Authority was not a government-owned business, it never discussed how the second and third components of the enterprise definition applied to the Authority.

Single-Purpose Entities Owning Governmental Businesses

Subsequent to the *E-470* case, there were those who wondered whether a single-purpose governmental entity such as a hospital district, a sanitation district, or a recreation district could have an enterprise even though the district had statutory taxing power. Questions also were raised about water enterprises and other enterprises owned by general purpose governments because usually the government which created the enterprise had the power to tax to support its enterprise.

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A careful review of the *E-470* decision in its entirety does not lead to the conclusion that the power to tax alone determines enterprise status. If the power to tax were the determining factor, it would either write the enterprise exception out of the law or it would create absurd results differentiating between identical government-owned businesses based on the type of government that owned the business.

If the court in *E-470* was saying that a government cannot create an enterprise for any activity for which it has the authority to tax, there would be virtually no enterprises because by definition an enterprise is a *government*-owned business and governments generally have the power to tax. Similarly, if the court was saying that a single-purpose entity such as a special district formed to perform only one function can not have an enterprise, it would create the absurd result that a city or a water and sanitation district could have a water enterprise, but a water district performing the exact same function and financing its water operations the same way could not operate an enterprise.

It appears that the court in the *E-470* case was reacting to the fact that the Authority was arguing that it was entirely exempt from Amendment 1 as an enterprise. The issue before the court in the *E-470* case was not whether the public toll road of the Authority was an enterprise. The issue, as stated by the court, was whether the Authority as an entity was an enterprise. The holding of the case is not surprising because the Authority has both governmental and enterprise activities. The same is true for a single-purpose special district or a general-purpose government like a city. The *E-470* decision does not stand for the proposition that a single-purpose government cannot have an enterprise, or that an activity for which taxes are permitted to be levied by a government cannot be an enterprise. The better analysis is that most public entities, be they general-purpose or single-purpose governments, potentially have one or more enterprises as well as one or more governmental functions. The enterprise functions can be exempt from Amendment 1, but the governmental functions cannot be.

Prior to the *E-470* decision, some lawyers representing special districts believed that if a district's tax revenue was less than 10 percent of the total revenues of the district in any year, in the following year the entire district would be exempt from Amendment 1 as an enterprise. This would have potentially allowed those exempt districts to raise mill levies without regard to the tax limits of Amendment 1. The *E-470* case indicates that this approach does not work, but it does not say that a business owned by a single-purpose government can never be an enterprise. To the extent that the government levies taxes and exercises other governmental powers limited by Amendment 1, Amendment 1's limits apply. In addition, what the government does with any tax revenues it generates will help to determine whether its activities meet the enterprise definition. Specifically, if the government uses tax revenues to subsidize the functions of a government-owned business, those tax revenues will probably be considered a "grant" and must be considered in determining whether the 10 percent grant test of the enterprise definition is met.

Whether Amendment 1 permits single-purpose entities to create enterprises has not yet been decided definitively. However, in September 1997, the Colorado Supreme Court accepted several enterprise

questions from the U.S. District Court for the District of Colorado.[11] Among the questions accepted by the court is whether an irrigation district can "create a water activity enterprise by board resolution pursuant to the provisions of Article 45.1 of Title 37, Colo. Rev. Stat." The court will reach this question only if it decides that an irrigation district is subject to Amendment 1. Assuming that the court decides that an irrigation district is required to comply with Amendment 1, the court may provide some further guidance on single-purpose districts, whether they are treated differently under Amendment 1 than more general purpose governments, and how single-purpose districts should go about creating enterprises under Amendment 1.

Other Governmental Powers

Because of the language in the *E-470* case stating that the power to tax is inconsistent with the characteristics of a business, the question of whether other unique powers governments exercise on behalf of their business activities also might be inconsistent with the characteristics of a business has been raised. For example, many governments have the power to condemn property. Another power that governments are often granted is the power to place liens on property to enforce the payment of fees and charges. In addition, governments, including their business activities, often have governmental immunity preventing them from being sued except in certain statutorily defined instances. Should the fact that a government can condemn property for its water system or that it can place liens on property to enforce payment of water charges prevent it from having an Amendment 1 water enterprise? Does the existence of governmental immunity affect the result?

The existence of these unique governmental powers should not prevent a government from creating enterprises. Although these powers are typically exercised only by governments, many private businesses exercise powers that are similar to these governmental powers. For example, investor-owned utilities have limited condemnation rights. The ski industry has successfully lobbied for limits on its liability to skiers using ski areas in the state. In addition, if the existence of any power that is not typically shared by private businesses is fatal to enterprise status, this could write the enterprise exception of Amendment 1 out of existence. The enterprise definition does, after all, assume a *government*-owned business, and governments are different from private businesses.

The *E-470* case's discussion of the ability to tax as being inconsistent with the characteristics of a business should be read as being limited to the idea that an enterprise cannot have taxing power. This is primarily because taxing power is something Amendment 1 specifically sought to limit. By allowing an enterprise to have taxing power, a large part of Amendment 1's basic purpose would be defeated. Other powers not related to taxing that governments might be able to exercise on behalf of an enterprise or that an enterprise might be able to exercise by itself will not generally disqualify an activity from being an enterprise for purposes of Amendment 1. This analysis is supported by the court's point in *E-470* that allowing an enterprise to have taxing power would severely impact the limit sought to be imposed by the third component of the enterprise definition.

Necessity of a Private Business Analogue

One other issue that should be considered in determining whether a government has created a government-owned business for purposes of Amendment 1 is whether the "business" is one that has a private business analogue. If the business is not one that has a private business counterpart, the question may be raised of whether it is a "business" at all. This situation arises especially with respect to a "business" that does not have customers who freely choose to use it; instead, it is dependent on involuntary exactions to exist. Examples of this type of business are a storm water business and a transportation utility business, supported by fees imposed on those whom the government has deemed use the service.

Looking simply to whether the "business" is an activity conducted in the pursuit of benefit, gain, or livelihood might lead to the conclusion that any activity that is conducted by a government and is supported by user fees rather than taxes can be a government-owned business. Both the *E-470* case and existing Colorado case law describing what constitutes a fee rather than a tax might support this argument.

For example, in *Zelinger v. City and County of Denver*,[12] the Colorado Supreme Court determined that a storm drainage service charge was a fee and not a tax or a special assessment, even though the charge was imposed on all owners of property in a certain area to pay for the operation, maintenance, improvement, and replacement of storm drainage facilities. Similarly, in *Bloom v. City of Fort Collins*,[13] the Colorado Supreme Court considered a mandatory transportation utility fee that was imposed on owners or occupants of developed lots. The court concluded that the fee was not a tax or a special assessment. The court also specifically stated that its decisions relating to whether something was a fee had not turned on whether the fee was voluntary or on the availability of the services from a nongovernmental source. Instead, its decisions were based on the fact that the fees in question were "reasonably designed to offset the overall cost of services for which the fees were imposed."[14]

However, the Colorado Supreme Court has never confronted the question of whether any service supported by fees can be a "business" under Amendment 1. In addition, the language in the *E-470* case indicating that the court was looking beyond the enterprise definition to determine whether something was a business "as the term is commonly used"[15] may indicate that the court interprets Amendment 1 to require an enterprise to be something that is typically a business. Particularly troubling in this regard may be that the court in the *E-470* case approvingly cited *Matter of Title, Ballot Title & Submission Clause*.[16] This case involved a challenge to a proposed constitutional amendment relating to governmental businesses, among other matters. The amendment at issue in the case was unrelated to Amendment 1, but the amendment contained a definition of "governmental business" that was as follows:

> "Governmental business" or "governmental business activity" means a function of a government which offers any goods or services to the public for which there are reasonable substitutes provided by nongovernmental entities.[17]

The petitioner in the case argued that this definition of "governmental business" should have been included in the title and submission clause in order to express fairly the meaning of the initiative. The court noted that a definition need be included in a ballot title and submission clause only if it would "adopt a new or controversial legal standard which would be of concern to all concerned with the issue."[18] If, by contrast, the definition concerns a term that is within the common understanding of most voters, there is no need to in-

clude it in the ballot title and submission clause. Under these standards, the court concluded that the definition did not need to be included in the ballot title and submission clause.

It might be concluded that the court, in effect, said that the definition of governmental business is commonly understood to be that which the proponents of the initiative included in their proposal. On the other hand, the court also relies on the fact that the title and submission clause describe how governmental business activities were to be subject to the same legal requirements as similar nongovernmental businesses. It might be argued that the court was really saying that the title otherwise made clear that only certain governmental businesses, being the ones in competition with private businesses, were to be covered by the amendment.

Unless and until the Colorado Supreme Court directly rules on whether "businesses" under Amendment 1 must provide services that also are offered in the private sector, governments establishing "businesses" that have no private business analogue may want to consider whether Amendment 1 will ultimately be interpreted to permit the activity in question to be an enterprise. Given that there is no post-Amendment 1 case that directly prohibits governments from creating enterprises for any conceivable activity that can be self-sustaining, governments owning a business with no private business analogue will probably want to focus on existing case law that differentiates fees from assessments and taxes and at least be certain that the fee for the activity would not be deemed to be a tax or an assessment if challenged.

Conclusion

Governments establishing enterprises under Amendment 1 need to feel comfortable that the activity in question is, in fact, both "government-owned" and a "business" in order to satisfy the first component of the enterprise definition of Amendment 1. This Part I has addressed some of the issues which should be considered in making such an analysis. Part II of this article will discuss factors to be considered in determining if the revenue bond and governmental grant components of the enterprise definition are satisfied.

NOTES

1. Article X, § 20(2)(b), Colorado Constitution.
2. For a general description of Amendment 1, *see* Wisor, "Amendment One: Government By Plebiscite," 22 *The Colorado Lawyer* 29 (Feb. 1993). For a review of legislation on water enterprises, *see* Hobbs, "Water Activity Enterprises," 22 *The Colorado Lawyer* 2555 (Dec 1993).
3. 896 P.2d 859 (Colo. 1995).
4. *Id.* at 868.
5. CRS §§ 43-4-501 to -522.
6. The PHA Law was changed in 1996 at the request of the Authority. Public highway authorities no longer have the power of taxation.
7. *E-470, supra*, note 3 at 868.
8. *Id.* at 869.
9. *Id.*
10. *Id.*
11. *Charles L. Campbell et al. v. Orchard Mesa Irrigation District et al.*, Case No. 97SA30 (Colo. September 24, 1997).
12. 724 P.2d 1356 (Colo. 1986).
13. 784 P.2d 304 (Colo. 1989).
14. *Id.* at 310-311.
15. *E-470, supra*, note 3 at 868.
16. 875 P.2d 871 (Colo. 1994).
17. *Id.* at 877.
18. *Id.*