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LEGAL MEMORANDUM

TO: Senator Bill Cadman

FROM: Office of Legislative Legal Services

DATE: December 31, 2015

SUBJECT: Creation of a TABOR-exempt enterprise to charge and collect the hospital provider fee¹

Legal Question

May the General Assembly enact legislation to create a TABOR-exempt enterprise to charge and collect the hospital provider fee (HPF), which would result in the exclusion of HPF revenue from state fiscal year spending as defined by the Taxpayer's Bill of Rights (TABOR) and thus prevent HPF revenue from being counted against both the TABOR and statutory state fiscal year spending limits?

Short Answer

No. The General Assembly has plenary power to enact legislation to create a new entity to charge and collect the HPF, but designation of the entity as a TABOR-exempt enterprise would only withstand legal challenge if the entity could satisfy all

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.

constitutional requirements for TABOR-exempt enterprise status. Because the entity would not satisfy the requirement of being a government-owned business, it would not qualify as a TABOR-exempt enterprise, and HPF revenue it collected would be included in state fiscal year spending and counted against both state fiscal year spending limits.

Discussion

1. **To statutorily exclude HPF revenue from state fiscal year spending and prevent it from being counted against both the TABOR and statutory state fiscal year spending limits without obtaining voter approval for a revenue change, the General Assembly would have to enact legislation to create a new TABOR-exempt enterprise to charge and collect the HPF.**

Since July 1, 2009, the Department of Health Care Policy and Financing (HCPF) has administered the HPF program and has charged and collected the HPF "on outpatient and inpatient services provided by all licensed or certified hospitals . . . for the purpose of obtaining federal financial participation under the state medical assistance program . . . and the Colorado indigent care program" ² The state uses HPF revenue to match federal money so that it can increase reimbursement to hospitals for state medical assistance program and Colorado indigent care program services, cover more people with public medical assistance, and defray its own administrative costs of implementing and administering the HPF program. ³

TABOR defines "fiscal year spending" to include "all district expenditures and reserve increases except, as to both, those for refunds made in the current or next fiscal year or those from gifts, federal funds, collections for another government, pension contributions by employees and pension fund earnings, reserve transfers or expenditures, damage awards, or property sales." ⁴ TABOR imposes an annual state fiscal year spending limit and requires state fiscal year spending that exceeds the limit to be "refunded in the next fiscal year unless voters approve a revenue change as an offset." ⁵

Referendum C was a voter-approved revenue change that authorized the state to retain and spend all revenues in excess of the TABOR fiscal year spending limit for fiscal

² Section 25.5-4-402.3 (3) (a), C.R.S.

³ *Id.*

⁴ Colo. Const. Art. X., Sec. 20 (2) (e).

⁵ Colo. Const. Art. X., Sec. 20 (7) (d).

years 2005-06 through 2009-10 and to retain and spend revenues up to a statutory state fiscal year spending limit above the TABOR state fiscal year spending limit (the Referendum C cap) for fiscal year 2010-11 and each subsequent fiscal year.⁶ Referendum C did not modify the TABOR definition of fiscal year spending or any other TABOR provision in any way. Any state revenue that is counted against the TABOR state fiscal year spending limit is therefore also counted against the Referendum C cap.

TABOR defines "district" as "the state or any local government, excluding enterprises."⁷ Absent a voter-approved revenue change like Referendum C, there are only two situations in which state revenue is excluded from state fiscal year spending: (1) the revenue is from one of the excluded sources specifically identified in the TABOR definition of fiscal year spending; or (2) the revenue is collected by a state-owned TABOR-exempt enterprise.

HPF revenues are included in state fiscal year spending for two reasons. First, as a state-imposed fee collected by and for the state, the HPF does not fall under any of the exceptions listed in the TABOR definition of fiscal year spending. Second, HPF revenue is state fiscal year spending because HCPF, the state entity that charges and collects the HPF, is not a TABOR-exempt enterprise.

TABOR defines "enterprise" as "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."⁸ HCPF is not a government-owned business but is instead a principal department of the executive branch of state government⁹ charged with a purely governmental mission to "oversee and operate Colorado Medicaid, Child Health Plan Plus (CHP+), and other public health care programs for Coloradans who qualify."¹⁰ HCPF receives nearly thirty percent of its funding from grants from the state general fund¹¹ and appears to lack authority to issue

⁶ The voters of the state approved House Bill 05-1194, which the General Assembly referred for their consideration as Referendum C, at the November 2005 statewide election. In relevant part, Referendum C is codified as section 24-77-103.6, C.R.S.

⁷ Colo. Const. Art. X, Sec. 20 (2) (b).

⁸ Colo. Const. Art. X, Sec. 20 (2) (d).

⁹ Section 24-77-102 (16) (a) (II) and (16) (b) (I), C.R.S., respectively define "state" for purposes of the statutes establishing state fiscal policies relating to TABOR as including "the departments of the executive branch;" and excluding "[a]ny enterprise."

¹⁰ HCPF web site, <https://www.colorado.gov/hcpf/about-hcpf>. [accessed March 16, 2015]

¹¹ For FY 2014-15, general fund appropriations account for 28.76% of HCPF's budget. State cash fund appropriations, most of which are also probably grants, account for an additional 12.05% of HCPF's

revenue bonds.¹² HCPF will not qualify as a TABOR-exempt enterprise in the future unless the state substantially alters its mission, authorizes it to issue revenue bonds, and dramatically reduces the state's share of its funding. To exclude HPF revenue from state fiscal year spending and prevent it from being counted against both the TABOR and statutory state fiscal year spending limits without obtaining voter approval for a revenue change, the General Assembly would therefore have to create a new TABOR-exempt enterprise to charge and collect the HPF.

2. A new entity created to charge and collect the HPF would not be a government-owned business and therefore would not qualify as a TABOR-exempt enterprise.

The General Assembly's power to enact legislation is plenary and is only limited by express or implied provisions of the Colorado or United States constitutions.¹³ Duly enacted legislation is therefore presumed constitutional, but a court will override this presumption and find legislation unconstitutional if the legislation clearly conflicts with a constitutional provision.¹⁴ This means that while the General Assembly may enact legislation that creates a new entity, presumably within HCPF,¹⁵ to charge and collect the HPF and may designate the entity as a TABOR-exempt enterprise, a court will uphold a challenge to that designation if the new entity does not satisfy the constitutional requirements for TABOR-exempt enterprise status.

To qualify as a TABOR-exempt enterprise, an entity must meet the three TABOR requirements of: (1) being a government-owned business; (2) being authorized to issue revenue bonds; and (3) receiving less than ten percent of its revenue in grants from Colorado state and local governments. A new entity created to charge and collect the

budget. *FY2014-15 Budget Package and Long Bill Narrative*, State of Colorado Joint Budget Committee, p. 59. www.tornado.state.co.us/gov_dir/leg_dir/jbc/14LBNarrative.pdf. [accessed March 16, 2015]

¹² Various electronic word searches of the Colorado Revised Statutes and the statutory index yielded no indication that HCPF has authority to issue revenue bonds.

¹³ *People v. Y.D.M.*, 593 P.2d 1356 (Colo. 1979).

¹⁴ See, e.g., *Bd. of County Comm'rs v. Vail Assocs., Inc.*, 19 P.3d 1263, 1267 (Colo. 2001) (Holding that section 39-3-136, C.R.S., [repealed 2002] unconstitutionally exempted from property taxation certain possessory interests in tax-exempt property in violation of article X, sections 3 (1) (a) and 6 of the Colorado constitution, which provide, in relevant part that "[e]ach property tax levy shall be uniform upon all real and personal property not exempt from taxation under this article" and that "[a]ll laws exempting from taxation property other than that specified in this article shall be void.").

¹⁵ To be eligible for federal funding, a state plan for medical assistance must "provide for the establishment or designation of a single state agency to administer or to supervise the administration of the plan . . ." 42 U.S.C. § 1396a (a) (5). The state has designated HCPF as the single state agency for this purpose. If the state created a new entity outside of HCPF to charge and collect the HPF, it would likely violate the sole state agency requirement and make the new entity ineligible to obtain federal matching money using the HPF.

HPF could satisfy the second requirement because nothing would prevent the General Assembly from providing the entity with statutory authority to issue revenue bonds, and might also satisfy the last requirement,¹⁶ but it would not satisfy the first requirement because it would not qualify as a government-owned business.

In the context of determining whether a government-owned entity is a TABOR-exempt enterprise, the Colorado Supreme Court has stated that "[t]he term 'business' is generally understood to mean an activity which is conducted in the pursuit of benefit, gain or livelihood."¹⁷ The activity thus normally involves the provision of a service by the business in exchange for some sort of payment.¹⁸ Accordingly, Colorado courts have determined that both the provision of access to a toll highway by a public highway authority in exchange for the payment of a toll and the construction and improvement of state highway system bridges by the Colorado bridge enterprise (CBE) in exchange for the payment of a bridge safety surcharge on motor vehicle registrations are business activities.¹⁹ Other examples of TABOR-exempt enterprises include the Division of Parks and Wildlife, which provides access to state parks and hunting and fishing opportunities in exchange for the purchase of parks passes and hunting and fishing licenses, and the University of Colorado and Colorado State University systems, which provide education to students in exchange for tuition payments.

A state entity created to administer the HPF program by charging and collecting the HPF would lack the characteristics of a business required for and shared by these TABOR-exempt enterprises. In essence, all that such an entity would be doing is

¹⁶ TABOR does not define "grant", but section 24-77-102 (7) (a), C.R.S., defines a "grant" for TABOR implementation purposes as "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." Federal matching money and HPFs paid by Colorado hospitals that are not owned by the state or a local government thus are not grants. While some hospitals that pay HPFs are owned by the state or a local government, the HPFs that those hospitals pay arguably are not grants either because the state must repay them back to hospitals (although not necessarily to the specific hospitals from which they are received in proportion to their HPF payments).

¹⁷ *Nicholl v. E-470 Pub Hwy. Auth.*, 896 P.2d 859, 868 (Colo. 1995).

¹⁸ See *TABOR Foundation v. Colorado Bridge Enterprise*, 2014 COA 106, P60 (Citing *Nicholl* and concluding that "the CBE is a business because it pursues a benefit and generates revenue by collecting fees from service users" and further stating that "[b]ecause the bridge safety surcharge is a fee and the CBE is a business providing a government service for a fee, we conclude that the CBE meets the appropriate definitions [of business and enterprise].")

¹⁹ *Nicholl*, 896 P.2d at 868-69. (Concluding that the E-470 Public Highway Authority acted in a "business-like" manner by constructing and operating a toll highway, but also concluding that the Authority was not a "business" and therefore not an enterprise because it had authority to impose taxes); *TABOR Foundation*, 2014 COA at P60. After the Court's decision in *Nicholl*, the General Assembly repealed the statutory authority of public highway authorities to impose taxes so that public highway authorities could qualify as TABOR-exempt enterprises. See *Senate Bill 96-173*.

collecting money from businesses from which it purchases services, leveraging the money to obtain more money from the federal government, and then using the money collected plus the additional federal money to purchase additional services through a state-administered federal assistance program and pay more for those services. So, unlike TABOR-exempt enterprises, which have a primary function of providing one or more services to users in exchange for a fee or charge of some sort, the new state entity would function as a customer purchasing health care services from hospitals rather than as a business selling a service to hospitals.

One might argue that such a new state entity would in fact provide a business service to hospitals by procuring additional federal government money for them that they could not otherwise obtain on their own in exchange for the payment of the HPF. But such a supposed business activity would be very different from the business activities engaged in by TABOR-exempt enterprises that have a private-sector parallel.

The TABOR-exempt enterprises described above all engage in business activities that private-sector entities also engage in: Privately owned fee-for-use roads and bridges were once common in the United States and some still remain; private landowners sometimes lease access to their land for hunting or other recreational access; and private universities collect tuition in exchange for educational services. In contrast, because the "profits" (federal matching money) to be gained by operating a new state entity as a "business" that collects and leverages the HPF fee are available only to states, no private entity could engage in a similar "business." This ability of a new state entity "to finance its operations in a manner not typical of a 'business' as that term is commonly used . . . is inconsistent with the characteristics of a business" that can qualify as a TABOR-exempt enterprise.²⁰ An entity created to charge and collect the HPF would not have the clear relationship between itself as a service provider charging a fee for a service and hospitals as customers paying the fee for that service that a TABOR-exempt enterprise has, and such an entity therefore would not be a government-owned business and would not qualify as a TABOR-exempt enterprise.

²⁰ *Nicholl*, 896 P.2d at 868-69.