JOHN W. SUTHERS
Attorney General

CYNTHIA H. COFFMAN
Chief Deputy Attorney General

DANIEL D. DOMENICO
Solicitor General

STATE OF COLORADO
DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

RALPH L. CARR
COLORADO JUDICIAL CENTER
1300 Broadway, 10th Floor
Denver, Colorado 80203
Phone (720) 508-6000

FORMAL OPINION	No. 14-01
OF	AG Alpha No. HI HP AGBDY
JOHN W. SUTHERS Attorney General	August 1, 2014

This opinion, requested by Don Hunt, Executive Director of the Colorado Department of Transportation ("CDOT"), addresses how the spending limits set forth in Colo. Const. art. X, § 20 (commonly known as the "TABOR Amendment") apply to the transfers of non-cash assets from a TABOR-exempt enterprise operating within CDOT to CDOT, a department of the state ("State").

QUESTION PRESENTED AND CONCLUSION

Question: Is the transfer of a non-cash asset from an enterprise to the State, or a department of the State, accounted for as State "fiscal year spending" for purposes of the TABOR Amendment?

Answer: The proper treatment of the transfer of a non-cash asset from an enterprise to the State under the TABOR Amendment depends on whether the non-cash asset can easily be converted to cash. If so, the asset must be accounted for under State "fiscal year spending." If not, the transfer is not relevant to the spending calculation.

BACKGROUND

A. Factual

In 2009, the General Assembly created the Colorado High Performance Transportation Enterprise ("HPTE"), which, as an enterprise,[1] is exempt from the fiscal limitations set forth in the TABOR Amendment. Colo. Const. art. X, §20(2)(b); § 43-4-

[1] The TABOR Amendment defines an 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." Colo. Const. art. X, § 20(2)(d).

806(2)(d), C.R.S. (2013). While a distinct entity from CDOT, HPTE operates within CDOT as one of its divisions. § 43-4-806(2)(a)(I), C.R.S.

The General Assembly granted HPTE broad powers to pursue innovative means of financing surface transportation projects, including the power to enter into public-private partnerships and concession projects. § 43-4-806, C.R.S. To that end, HPTE recently entered into a public-private partnership with Plenary Roads Denver LLC ("Concessionaire") to operate and maintain the existing I-25 Express Lanes and the U.S. 36 Phase 1 managed and general purpose lanes currently being constructed, and to design, build, finance, operate, and maintain U.S. 36 Phase 2 ("Concession Agreement").[2] The Concession Agreement has many elements, including the construction of an additional managed lane in each direction of U.S. 36 Phase 2 (which will be used for free by High Occupancy Vehicles ("HOV") and Bus Rapid Transit service but will require non-HOV vehicles to pay user-fees) as well as the reconstruction of the existing U.S. 36 Phase 2 general purpose lanes ("General Purpose Lanes"). The General Purpose Lanes can be used by any vehicle without a user fee.

HPTE, together with a national accounting firm, performed an analysis on how to properly structure accounting for the transaction. Both HPTE and CDOT are statutorily obligated to comply with generally accepted accounting principles. *See* § 24-30-204, C.R.S. The advice provided by the national accounting firm relied on Governmental Accounting Standards Board Statement No. 60, which addresses the accounting and financial reporting for concession arrangements.

As part of the analysis, the national accounting firm advised CDOT to transfer, for accounting purposes, the General Purpose Lanes to HPTE so that the Concessionaire, as an obligation under the Concession Agreement, would reconstruct the General Purpose Lanes. The national accounting firm further advised that, upon completion of the project, the General Purpose Lanes should be transferred by HPTE back to CDOT, the entity generally responsible for operation and maintenance of non-tolled general purpose State highways. § 43-2-102, C.R.S. Because the General Purpose Lanes will be newly reconstructed when the proposed transfer by HPTE to CDOT occurs, they will have increased book value. According to CDOT, the standard accounting process for transferring the General Purpose Lanes from HPTE to CDOT involves recognizing the increased book value of the lanes as a type of revenue in the year in which the transaction is recorded.

CDOT requested this opinion to determine whether the transfer of the General Purpose Lanes from HPTE to CDOT is relevant in calculating State "fiscal year spending" under the TABOR Amendment.

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[2] U.S. 36 Phase 1 starts at Pecos Street and ends at 88th Avenue. U.S. 36 Phase 2 starts at 88th Avenue and ends at Table Mesa Drive.

B. Legal

The TABOR Amendment is a voter-initiated constitutional amendment approved in 1992 by Colorado voters that limits the growth of government by implementing various restrictions on, and requirements related to, tax increases. *See* Colo. Const. art. X, § 20; *In re Submission of Interrogatories on Senate Bill 93-74*, 852 P.2d 1, 4 (Colo. 1993). These limitations range from requiring voter approval for any tax rate increase, § 20(4), to limiting the amount of revenue that can be spent by State and local governments. § 20(7). The latter restriction on spending (the "Spending Limit") is most pertinent to the current question posed by CDOT. Section 7(a) of the TABOR Amendment, which contains the Spending Limit, provides that "[t]he maximum annual percentage change in state *fiscal year spending* equals inflation plus the percentage change in state population in the prior calendar year, adjusted for revenue changes approved by voters . . . ." *Id.* (emphasis added). If revenues from sources not excluded from the definition of "fiscal year spending" exceed this limitation in any fiscal year, the excess must be refunded the following year. § 20(7)(d). This limitation functions to control the "growth of state revenues, usually met by tax increases" and is generally thought of as a limit on the revenues that can be collected by state and local governments. *In re Interrogatories Senate Bill 93-74*, 852 P.2d at 4.

The TABOR Amendment, including the Spending Limit contained therein, has been further codified by the Colorado General Assembly ("General Assembly") as set forth at section 24-77-101, et seq., C.R.S. (the "TABOR Statute"). The TABOR Statute facilitates the operation of the TABOR Amendment within the State government and was intended to guide the State in complying with the Spending Limit by giving the TABOR Amendment's text its natural and obvious significance. *Id.*; *see also In re Interrogatories Senate Bill 93-74*, 852 P.2d at 5.

DISCUSSION

The existing case law on the TABOR Amendment does not squarely address CDOT's question. As a result, this opinion provides a constitutional and statutory analysis of both the TABOR Amendment and the TABOR Statute to determine how the language in each text functions on this topic.

A. Interpretive Guidelines

When courts construe the language of constitutional amendments adopted by popular vote, they "must take into account what the people believed the amendment to mean when they accepted it as their fundamental law." *Havens v. Bd. of County Comm'rs*, 924 P.2d 517, 522 (Colo. 1996) (internal quotations and citations omitted). This means that words used in the TABOR Amendment must be given their "natural and popular meaning usually understood by the voters." *City of Wheat Ridge v. Cerveny*, 913 P.2d 1110, 1114 (Colo. 1996). While the TABOR Amendment, by its terms, favors the construction that would

"reasonably restrain most the growth of government," Colo. Const. art. X, § 20(1), it has been determined that this principle applies only in the limited circumstances where the language of the amendment supports multiple interpretations equally. *Havens*, 924 P.2d at 523 n.8. The Colorado Supreme Court is reluctant to interpret the TABOR Amendment in a manner that would "hinder basic government functions or cripple the government's ability to provide services." *Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008). The Colorado Supreme Court has also noted that a narrow or technical reading of the TABOR Amendment's language should be avoided if doing so "would defeat the intent of the people." *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996).

While legislative drafting principles do not apply to the TABOR Amendment, such principles do apply to the TABOR Statute. *Bruce v. City of Colo. Springs*, 129 P.3d 988, 993 (Colo. 2006). In interpreting statutes, the primary task is to "ascertain and give effect to the legislative purpose underlying it." *City of Westminster v. Dogan Constr. Co.*, 930 P.2d 585, 590 (Colo. 1997). This is done by giving the words and phrases comprising the statute their plain and ordinary meaning, unless the result is absurd. *Id.*

B. TABOR Amendment

The question posed by CDOT is whether the increased value of the reconstructed General Purposes Lanes, when transferred to CDOT, should be considered when calculating the State's fiscal year spending for purposes of TABOR compliance. The TABOR Amendment defines "fiscal year spending" as all "*expenditures* and *reserve increases* except, as to both, those for refunds made in the current or next year or those from gifts, federal funds, collections for another government, pension contribution by employees and pension fund earnings, reserve transfers or expenditures, damage awards, or property sales." Colo. Const. art. X, §20(2)(e) (emphasis added).

As instructed by case law, the definition of "fiscal year spending" must be given its natural and popular meaning. *City of Wheat Ridge*, 913 P.2d at 1114. As a result, it must be determined whether the transfer of the General Purpose Lanes, a non-cash asset, to CDOT constitutes an "expenditure" by CDOT or results in an increase of "reserves" held within CDOT, as both terms are commonly used. Neither of these terms is defined in the TABOR Amendment. *Bickel v. City of Boulder*, 885 P.2d 215, 238 (Colo. 1994) (recognizing that "expenditures" and "reserve increases" are not defined in the TABOR Amendment and declining to ascribe definitions to the terms).

The word "expenditure" is normally used to denote the act or process of expending money. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 800 (2002). Because CDOT's receipt of the General Purpose Lanes would not entail an "expenditure" by CDOT of money, the "expenditure" component of the "fiscal year spending" calculation is inapplicable here.

"Reserves," as it is commonly used, denotes money or an equivalent that is set aside to meet potential future liabilities.[3] *Id.* at 1930. In this instance, CDOT would receive the General Purpose Lanes—an asset that it is statutorily obligated to ensure is properly operated and maintained. § 43-2-102, C.R.S. As the steward of the General Purpose Lanes, CDOT would not use the General Purpose Lanes to meet future liabilities (e.g., through liquidation). But even if CDOT intended to use the General Purpose Lanes for this purpose, it is unlikely that a market exists for CDOT to easily convert the General Purpose Lanes to cash or cash equivalents to satisfy any such liabilities. This suggests that the transfer of the General Purpose Lanes, while resulting in a type of accounting revenue for CDOT, does not result in an increase of CDOT reserves. It is the increase of reserves that is relevant in determining the effect the transfer has under the TABOR Amendment.

Based on the common understanding of "expenditure" and "reserve increases" as such terms are found in the definition of "fiscal year spending" in the TABOR Amendment, the transfer of the General Purpose Lanes by HPTE to CDOT is not relevant in calculating State "fiscal year spending" in implementing the Spending Limit.[4]

C. TABOR Statute

The TABOR Statute defines "State fiscal year spending" as "all state *expenditures* and *reserve increases* occurring during any given fiscal year . . ., including but not limited to, state expenditures or reserve increases from: *[m]oneys received by the state from enterprises* . . . ." § 24-77-102(17), C.R.S. (emphasis added).

Unlike the TABOR Amendment, the TABOR Statute defines "expenditure" and "reserve increase." "Expenditure" is defined as "the appropriation or disbursement of any state general fund or cash fund moneys for any expense incurred by the state." § 24-77-102(4), C.R.S. "Reserve increase" is defined as "any action which has the effect of increasing a reserve," which is defined as "any unrestricted general fund or cash fund year-end balance which is held by the state to meet any needs or demands." § 24-77-102(12) & (13), C.R.S.

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[3] This definition is consistent with how the Colorado Supreme Court has explained the "reserve" component of "fiscal year spending": "[N]ot only does [the TABOR Amendment] attempt to limit the amount that the state spends, it also attempts to limit the amount that the state does not spend, but collects, and keeps in reserve." *In re Interrogatories Senate Bill 93-74*, 852 P.2d at 12.

[4] This interpretation of the TABOR Amendment draws support from the Colorado Supreme Court's description of the TABOR Amendment as being limited to matters related to government, finance, spending, or taxation. *See Zaner*, 917 P.2d at 284 (noting that TABOR Amendment provided taxpayers with the ability "to influence governing authorities only with respect to government financing, spending and taxation."). The results of the internal accounting principles required to be complied with by HPTE and CDOT arguably do not implicate government finance, spending, or taxation, suggesting that the TABOR Amendment was never intended to address government accounting.

These definitions are largely consistent with the definitions extrapolated from the language of the TABOR Amendment. "Expenditure" requires using funds for an expense of the State, which is not present here, and "reserve increase" is the increase of certain funds which are held by the State to meet needs or demands, which, as discussed above, is not present here either. Accordingly, the prior analysis on "expenditure" and "reserve increases" is equally applicable to the statutory analysis here.

The General Assembly goes further to confirm these conclusions. Most noteworthy in this regard is the inclusion of certain specified assets the State receives from an enterprise in the calculation of State fiscal year spending. Specifically, the TABOR Statute requires that the calculation include "[m]oneys received by the state from enterprises." § 24-77-102(17), C.R.S. The term "moneys" is not defined in the TABOR Statute or in case law interpreting the language. Courts have, however, ascribed a meaning to the word in other contexts, defining it as "cash or assets that can easily be converted to cash" like money markets, mutual funds, stocks, and bonds. *Casteel v. Davidson*, 78 P.3d 741, 749 (Colo. 2003) (internal quotations and citations omitted); *see also Bickel*, 885 P.2d at 229 (noting that in construing ambiguous statutes, courts may consider the common law); § 2-4-203(1)(d), C.R.S. ("If a statute is ambiguous, the court . . . may consider . . . the common law . . . .").

Applying the interpretive canon *expressio unius exclusio alterius* (the inclusion of certain items implies the exclusion of others), the inclusion of "moneys" and not a broader term like "assets" implies that the General Assembly intended to exclude the receipt of non-monetary assets from enterprises in determining State fiscal year spending. *See Henisse v. First Transit, Inc.*, 247 P.3d 577, 580 (Colo. 2011) (acknowledging the interpretive doctrine). Had the General Assembly intended for non-monetary assets, like the General Purpose Lanes, to be included in the definition, the General Assembly could have done so. Without doing so, its inclusion of the term "moneys" suggests that the General Assembly intended to exclude the transfer of non-monetary assets in determining compliance with the Spending Limit.

This analysis is further supported by how the TABOR Statute addresses transfers of assets going the other way, from the State to an enterprise. The TABOR Amendment applies a revenue limit on enterprises; enterprises must receive less than "10% of annual revenue in *grants* from all Colorado state and local governments combined." Colo. Const. art. X, §20(2)(d) (emphasis added); § 24-77-102(3), C.R.S. The TABOR Statute defines a grant to an enterprise as "any direct cash subsidy or other direct contribution of money from state or any local government in Colorado which is not required to be repaid." § 24-77-102(7), C.R.S.

The definition of "grants" excludes non-monetary assets contributed to enterprises by the State, creating symmetry between the two definitions. It makes sense to achieve a certain level of symmetry when addressing the exchange of assets between enterprises and the State

in calculating the limits imposed by the TABOR Amendment. *McKinley v. Dunn*, 349 P.2d 139, 141 (Colo. 1960) (noting that courts, if at all possible, are to construe statutory sections harmoniously). If this were not the case, the State and an enterprise would be in a peculiar position where the transfer of a non-monetary asset would not count toward the applicable TABOR-imposed limit for the enterprise, but the transfer back to the State would. In considering that the General Purpose Lanes are being transferred back and forth between CDOT and HPTE to comply with applicable accounting principles, a lack of symmetry in how non-monetary assets are considered in this context could frustrate how CDOT and HPTE statutorily function and may result in unpredictable fiscal consequences for the State. This is especially true here since HPTE operates within CDOT as a CDOT division and will likely face asset transfers between it and CDOT in the future.

CONCLUSION

The transfer from HPTE to CDOT of the newly constructed General Purpose Lanes, a non-cash asset not easily monetized, is not relevant in calculating State "fiscal year spending" under the TABOR Amendment's Spending Limit. This conclusion is supported by the text of both the TABOR Amendment and the TABOR Statute, both of which, in applying the appropriate interpretative canon, exclude assets like the General Purpose Lanes from the Spending Limit.

Issued this 1st day of August, 2014.

JOHN W. SUTHERS
Colorado Attorney General