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FORMAL OPINION	)	
	)	No. 14-04
of	)	
	)	December 19, 2014
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This opinion, requested by the Colorado Department of Public Health and Environment ("the Department"), concerns the legal distribution of monies from the medical marijuana program cash fund established by section 25-1.5-106(16), C.R.S.

QUESTIONS PRESENTED AND ANSWERS

Question: Can the Department use any remaining balance in the medical marijuana program cash fund to support other programs—such as, for example, a substance abuse program operated by the Department of Human Services?

Answer: No. There is expressed statutory language within section 25-1.5-106(17), C.R.S. governing the medical marijuana program that requires any medical marijuana program cash fund balance be retained within the fund for future administration of the program. The Department may, however, use any remaining medical marijuana program cash fund balance toward activities that further the operation and maintenance of the medical marijuana program.

Question: Does the Governor and/or the General Assembly have the authority to transfer money from the medical marijuana program cash fund to the general fund or to any other funds?

Answer: No. The Governor cannot unilaterally transfer money from the medical marijuana program cash fund. And, although the General Assembly could pass legislation, as it did in 2010, allowing a transfer from the medical marijuana program cash fund to the general fund or to any other fund, such action is not recommended. The previous transfer was an extraordinary remedial measure

taken during an economic downturn. Repeated transfers from the medical marijuana program cash fund to the general fund will result in legal vulnerabilities for the program fees because they will be more likely to be characterized as a "tax" subject to TABOR limitations.

ANALYSIS

I. The Department is statutorily prohibited from crediting or transferring medical marijuana program cash fund monies to the general fund or to any other fund.

On November 7, 2000, voters approved Article XVIII, Section 14 of the state constitution ("Section 14"), authorizing the use of medical marijuana in Colorado. Colo. Const. art. XVIII, § 14. Section 14 directs the Department to "create and maintain a confidential registry of patients" who may legally use medical marijuana to treat debilitating medical conditions. Colo. Const. art. XVIII, § 14(3).

The Department is authorized to independently "determine and levy reasonable fees to pay for any direct or indirect administrative costs associated with [the Department's] role in [the medical marijuana program]." Colo. Const. art. XVIII, § 14(3)(i); *see also* § 25-1.5-106(16)(a), C.R.S.[1] Any fees collected by the Department for this purpose are then transferred to the medical marijuana program cash fund; a cash fund created and governed by the medical marijuana program statute in Title 25. § 25-1.5-106(16)(a), C.R.S. The statute subjects the medical marijuana program cash fund to "annual appropriation by the general assembly to the state health agency for the purpose of establishing, operating, and maintaining the medical marijuana program." *Id.* at (17)(a).

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[1] Although the term "program" is undefined in Section 14, the reference is located within the subsection governing the creation and maintenance of the confidential medical marijuana registry program. *Id.* at (3)(a), (i). Pursuant to canons of statutory interpretation, it can be inferred that the "program" referenced within this constitutional provision, and to which the levied fees are assigned, is the medical marijuana registry program. *See Romanoff v. State Comm'n on Judicial Performance*, 126 P.3d 182, 188 (Colo. 2006) ("When interpreting a statute, we begin with established canons of statutory interpretation . . . We also must consider the language in the context of the statute as a whole."). Furthermore, the medical marijuana statute does define the term "medical marijuana program" to mean "the program established by [Section 14 of the Colorado Constitution] and [§ 25-1.5-106, C.R.S.]." § 25-1.5-106(2)(d), C.R.S.

Relevant to the question posed here, the statute further requires that:

> All moneys credited to the medical marijuana program cash fund and all interest derived from the deposit of such moneys that are not expended during the fiscal year ***shall be retained in the fund for future use and shall not be credited or transferred to the general fund or any other fund.***

§ 25-1.5-106(17)(a), C.R.S. (emphasis added).

This statutory provision designates monies within the medical marijuana program cash fund to be used for activities that further the purpose of the fund. *Id.* Thus, all monies collected by the Department and deposited into the medical marijuana program cash fund that are not used during a fiscal year must be kept in the fund "for future use." *Id.* The statute explicitly prohibits the transfer or credit of medical marijuana program cash fund monies for programs outside of that stated purpose. *Id.*

Pursuant to this expressed statutory language, the Department is limited to using any remaining medical marijuana program cash fund balance for expenditures that further the fund's purpose—the establishment, operation, and maintenance of the medical marijuana program. Consequently, the use of such cash fund money to support, for example, a substance abuse program operated by the Department of Human Services, would be in direct violation of the express usage limitations and language of the statute prohibiting credits or transfers to the general fund or to any other fund.

II. Although an outright transfer to the general fund or otherwise is prohibited by statute, the Department can use any remaining medical marijuana program cash fund balance toward expenditures associated with the operation and maintenance of the medical marijuana program.

Although the Department is limited in its use of the medical marijuana program cash fund monies, it does have the authority to use the fund monies for certain types of permitted expenditures.

As previously discussed, pursuant to Section 14, the Department may levy fees to pay for its role in administering and enforcing the medical marijuana program. Colo. Const. art. XVIII, § 14(3)(i). Included within the "medical marijuana program" are constitutional directives requiring the Department to, for

example: (1) create and maintain the confidential medical marijuana registry; (2) restrict access and maintain the confidentiality of patient information on the registry; (3) impose requirements on patients seeking a registry identification card; and (4) "verify medical information contained within the patient's written documentation." Colo. Const. art. XVIII, § 14(3)(a)-(b).

Section 14 and the medical marijuana statute in Title 25 also require the Department to enact rules of administration to govern the various aspects of the program; a directive with which the Department complied by enacting the "Rules and Regulations Pertaining to Medical Use of Marijuana." Colo. Const. art. XVIII, § 14(9); § 25-1.5-106(3), C.R.S.; 5 Code Colo. Regs. 1006-2.

The regulations govern, in part: (1) the establishment and confidentiality of the registry (Regulation 1); (2) the issuance and form of registry identification cards (Regulation 2); (3) the verification of medical information (Regulation 3); (4) communications with law enforcement officials (Regulation 5); and (5) the manner in which the agency may consider adding debilitating medical conditions to the list, including a process by which physicians or patients can petition to add debilitating medical conditions (Regulation 6). 5 Code Colo. Regs. 1006-2.

Thus, the administration of the medical marijuana registry program and all of the various facets that encompass the program are detailed in regulation. And, although the cash fund is a creature of the medical marijuana program statute, that same statute requires that all fees collected by the Department, which ultimately must be transferred to the cash fund, be used "for the purpose of offsetting [the Department's] direct and indirect costs of administering the program." § 25-1.5-106(16)(a), C.R.S.

It follows then, if the Department were to use the remaining medical marijuana program cash fund monies toward projects or initiatives that directly or indirectly further its purpose of "operating and maintaining" the medical marijuana program, then there would be no violation of the statute or otherwise. For example, a direct cost might involve using cash funds to buy new software to improve the functionality and/or the security of the confidential registry. Such an upgrade would serve the general purpose of "maintaining" the registry and satisfy the regulatory requirements mandating that any patient information remain accessible and confidential. 5 Code Colo. Regs. 1006-2, Regulation 1(A). By contrast, an "indirect cost" might include funding medical research initiatives that assist the Department in determining what debilitating medical conditions should be included within the list for placement on the registry, as well as the efficacy of medical marijuana on those conditions. Colo. Const. art. XVIII, Section (9); 5 Code Colo. Regs. 1006-2, Regulation 6. This would achieve the general purpose of "operating"

the medical marijuana program by assisting the Department in its determinations related to debilitating medical conditions.

In sum, while the Department is limited to using medical marijuana program cash fund monies to further the operation and maintenance of the medical marijuana program, the extent to which those limitations affect a Department project must be considered in light of the directives of Section 14, the medical marijuana statute, and the Department's own regulations.

III. The Governor cannot unilaterally circumvent the clear language of the medical marijuana statute wherein credits and transfers from the medical marijuana program cash fund are expressly prohibited. And, while the General Assembly may have the authority to enact legislation, as it did in 2010, that would allow a transfer from the medical marijuana program cash fund to the general fund or to another specified fund, such a transfer is not recommended. Repeated transfers to the general fund would likely result in the fees being characterized as a "tax" subject to TABOR limitations.

"The General Assembly enjoys broad legislative responsibility under our constitution to raise and spend funds for government purposes." *Dempsey v. Romer*, 825 P.2d 44, 51 (Colo. 1992). "The legislature's power over appropriations is plenary, subject only to constitutional limits, and includes the power to attach conditions on expenditures." *Colo. Gen. Assembly v. Owens*, 136 P.3d 262, 266 (Colo. 2006).

The Colorado Constitution provides that "[n]o moneys in the state treasury shall be disbursed therefrom by the treasurer except upon appropriations made by law, or otherwise authorized by law. . . ." Colo. Const. art. V, § 33. The plenary power of appropriation is reserved to the legislature alone and encompasses "the power to set apart from the public revenue a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object and for no other." *Colo. Gen. Assembly v. Lamm*, 700 P.2d 508, 519 (Colo. 1985) (quoting *People ex rel. Ammons v. Kenehan*, 55 Colo. 589, 598, 136 P. 1033, 1036 (1913)) (internal quotation marks omitted).

Only once an appropriation has been made does the executive's duty to administer the funds begin, subject to the limitations imposed by the legislature. *Owens*, 136 P.3d at 266. Although "[e]ach executive department is responsible for a particular area of governmental concern, as defined by the statute creating the

department," it is the General Assembly that determines the amount of appropriations or cash fund spending authority to be used by a particular executive department. *Lamm*, 700 P.2d at 520-21.

Based on these principles, the Governor, as the chief executive of the state, cannot unilaterally initiate a transfer that dramatically alters the General Assembly's intended objectives for the use of state monies. *Id.* at 521. Indeed, "whatever inherent authority to administer the executive budget may exist in the office of the chief executive, such authority may not normally be invoked to contradict major legislative budgeting determinations," such as initial appropriations to an executive department. *Id.* The Governor simply does not have the authority to transfer monies between executive departments because it would serve to infringe upon the General Assembly's plenary power of appropriation. *Id.* at 522.

As it applies here, the medical marijuana program cash fund is subject to annual appropriation by the General Assembly and thus, is considered to be a major legislative budgeting determination. *See* § 25-1.5-106(17), C.R.S.; *Lamm*, 700 P.2d at 521. As such, the Governor does not have the authority to contradict legislative action by unilaterally transferring monies from the medical marijuana program cash fund to the general fund or otherwise.

a. The Taxpayer's Bill of Rights

Notably, however, the General Assembly's power of appropriation is not without limits. It "must be exercised in conformity with express or implied restraints imposed thereon by specific constitutional provisions." *Dempsey*, 825 P.2d at 51; *see also Lobato v. People*, 218 P.3d 358, 373 (Colo. 2009). One such restraint can be found within Article X, Section 20 of the Colorado Constitution—the Taxpayer's Bill of Rights ("TABOR"). Colo. Const. art. X, § 20.

TABOR "requires voter approval for tax increases and limits spending increases unless approved by the electorate." *City of Aurora v. Acosta*, 892 P.2d 264, 268 (Colo. 1995). More specifically, TABOR prohibits "any new tax, tax rate increase . . . or a tax policy change directly causing a net tax revenue gain to any district," unless voters specifically approve such changes in advance. Colo. Const. art. X, § 20(4)(a).

The purpose of a tax is to "provide revenues in order to defray the general expenses of government as distinguished from the expense of a specific function or service." *Bloom v. City of Fort Collins*, 784 P.2d 304, 307 (Colo. 1989). By contrast, the purpose of a fee is to impose a charge upon persons or property "for the purpose

of defraying the cost of a particular governmental service." *Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008) (quoting *Bloom*, 784 P.2d at 308).

In light of this distinction, the Colorado Supreme Court, in *Barber v. Ritter*, held that, for purposes of determining whether voter approval under TABOR is required, "a charge is a 'fee,' and not a 'tax,' when the express language of the charge's enabling legislation explicitly contemplates that its primary purpose is to defray the cost of services provided to those charged." *Barber*, 196 P.3d at 241. The court stated:

> Because the purpose for which the charge is imposed, rather than the manner in which the monies generated by the charge are ultimately spent, determines the characterization of the charge as a fee or a tax, the transfer of fees from the cash funds to the General Fund in this case did not alter the essential character of those fees as fees.

Id. at 250; *see also Clean Water Coalition v. M Resort, LLC*, 255 P.3d 247, 258 (Nev. 2011) ("the court in *Barber* held that it was permissible under TABOR to require the money retained in state special funds to be transferred to the state's general fund, reasoning that the transfers did not amount to a tax subject to TABOR's voter approval requirement because the transfer of fees from state cash funds to the state's general fund did not alter their essential character as fees.").

Here, the enabling statute of the medical marijuana program cash fund expressly contemplates assessing fees to the medical marijuana registry patients for the purpose of defraying the Department's direct and indirect costs of operating and maintaining the registry. § 25-1.5-106(16)(a), C.R.S. The plain language of the statute expressly states that "[a]ll monies credited to the medical marijuana program cash fund . . . *shall be retained in the fund for future use and shall not be credited or transferred to the general fund or to any other fund.*" *Id.* at (17)(a) (emphasis added). Accordingly, the monies within the medical marijuana cash fund are a "fee" rather than a "tax," and are not subject to the tax limitations found within TABOR. *See Barber*, 196 P.3d at 250.

That is not to say, however, that this characterization as a "fee" is infallible. The Colorado Supreme Court's analysis in *Barber* "left open the possibility that, despite a statutory label of 'fee,' a charge may be a 'tax' if it 'is unreasonably in excess of the cost of services the charge is designed to defray.'" *Milo v. Coulter*, 333 P.3d 101 n.2 (Colo. 2014) (citing *Barber*, 196 P.3d at 250 n.15). While "mathematical exactitude is not required," the rate of the fees imposed on users

"must bear some reasonable relationship to the cost of the services provided." *Tabor Found. v. Colo. Bridge Enter.*, __ P.3d ___ (Colo. App. No. 14CA1621, August 14, 2014) (citing *Barber*, 196 P.3d at 250 n.15). Otherwise, excessive fees might be charged for specific government programming in order to supplement the general fund and avoid TABOR limitations.

Furthermore, it is significant to note that the holding in *Barber* addressed actions by the General Assembly that occurred during an economic downturn in Colorado between 2001 and 2004. *Barber*, 196 P.3d at 242. Within that context, the General Assembly enacted a series of bills to address revenue shortfalls in the state's General Fund by directing the state treasurer to transfer over $442 million from thirty-one special cash funds to the state's General Fund as an "extraordinary remedial measure." *Id.* At present, without the threat of economic distress, a court might be much less inclined to continue characterizing monies collected within a state cash fund as a "fee" if the General Assembly were to repeatedly transfer these monies to the general fund.

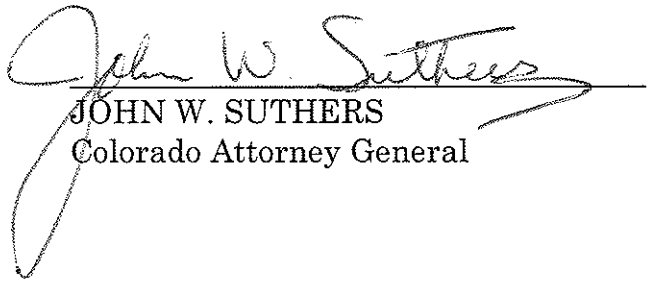
In sum, because the medical marijuana program cash fund is comprised of fees collected for the purpose of defraying the cost of administering the medical marijuana program, there is no violation of the provisions within TABOR prohibiting any new taxes, tax rate increases, or a tax policy changes. Colo. Const. art. X, § 20(4)(a). However, this designation is not forever assured and is dependent on factual circumstance. Although the General Assembly has some authority to legislate a transfer from the medical marijuana program cash fund to the general fund or otherwise, it should employ such measures only sparingly and in extreme circumstances. Otherwise, the medical marijuana program fees are vulnerable to being characterized as a "tax," no longer assessed for the primary purpose of defraying the costs of administering the medical marijuana program.

CONCLUSION

As to the first question posed by the Department, the medical marijuana program cash fund is a statutorily-created reserve established for the purpose of operating and maintaining the medical marijuana program. The statute requires that any monies credited to the fund that are not expended during a fiscal year be retained therein for future use. The statute also expressly prohibits any credits or transfers from the medical marijuana program cash fund to the general fund or to any other fund. Accordingly, although an outright transfer for a purpose outside of that which is promulgated in statute is prohibited, the Department is free to utilize the medical marijuana program cash fund toward expenditures that further the purpose of the fund—the operation and maintenance of the medical marijuana program.

As to the second question posed by the Department, the Governor's authority is clearly limited to administering the funds appropriated by the General Assembly; authority that does not include the ability to initiate a transfer of cash funds. And, while the General Assembly does have the authority to pass legislation that would require a transfer from the medical marijuana program cash fund to the general fund or otherwise, such action is not recommended. Repeated use of such authority may result in the medical marijuana program fees being characterized as a "tax" subject to TABOR limitations, rather than a "fee" intended to finance the costs of administering the medical marijuana program.

Issued this 19th day of December, 2014.



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