
MEMORANDUM

TO: Colorado Association of School Boards

FROM: Thomas M. Rogers III
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DATE: October 10, 2018

SUBJECT: Analysis of Amendment 73

EXECUTIVE SUMMARY

I. Background and Conclusion

Certain parties have suggested that Amendment 73 (2018)¹ would reduce the property tax revenue available to local governmental entities like Colorado counties and fire districts. This is not true. While Amendment 73 would make modifications to the assessment rates applicable to property taxes levied by school districts, its provisions would not affect property taxes levied by any other local government. In particular, nothing in Amendment 73 would affect the calculation used to determine the generally applicable residential assessment rate, which would continue to be calculated the same way it is today if Amendment 73 passes. Amendment 73 would not replace the assessment rates that are applicable to other local governments such as counties and fire districts.

A. Current Law

Property taxes in Colorado are, in general, determined by multiplying the actual value of a property by the “assessment rate” and again by the “mill levy.” Under the Gallagher Amendment,² (“Gallagher”) the assessment rate for residential property (the “Residential Assessment Rate”) changes each reappraisal period³ to ensure that the aggregate statewide assessed value attributable to residential real estate accounts for 45% of the sum of the aggregate statewide assessed value attributable to both residential and non-residential real property (the “Gallagher Ratio”).⁴

The change to the Residential Assessment Rate is calculated based on the following factors:

¹ Amendment 73 was previously numbered as Initiative #93 for purposes of title setting. See <https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/>.

² Codified at Colo. Const. art. X, § 3(1).

³ See Colorado Office of Legislative Legal Services, Effect of Gallagher Amendment, TABOR, Amendment 23, & Negative Factor on Public School Funding (March 2, 2016), available at <https://leg.colorado.gov/sites/default/files/gallagher-tabor-a23-nf.pdf>.

⁴ See, e.g., Colorado Department of Local Affairs Division of Property Taxation, Residential Assessment Rate Study Final Findings 2017-2018 (April 17, 2017) (“2017 Assessment Rate Study”), available at <https://www.colorado.gov/pacific/dola/residential-assessment-rate>.

1. The target percentages (i.e., roughly 45% for residential and 55% for non-residential);
2. The assessment rate applicable to non-residential properties (the “Non-Residential Assessment Rate”), which is fixed at 29% by the Colorado Constitution;
3. Estimated assessed values for residential and non-residential properties (calculated using the previous Residential Assessment Rate); and
4. The estimated actual value of all residential properties.⁵

These factors are used to determine the Residential Assessment Rate that is to be used for the following property tax years (until the next reassessment). The Residential Assessment Rate calculated using this method currently applies to all local government property taxes, including taxes assessed by school districts.⁶

B. Amendment 73

Amendment 73 would subject the property taxes collected by school districts to different assessment rates than those specified by Gallagher. Specifically, Amendment 73 would, for school district property taxes only:

- Fix a separate assessment rate applicable to residential properties at 7%; and
- Fix a separate assessment rate applicable to non-residential properties at 24%.

These new assessment rates would apply only to property taxes assessed by school districts and would not have any effect on the calculation of the Residential and Non-Residential Assessment Rates used for all other local government property taxes, which would continue to be subject to the provisions of the Gallagher Amendment as described above.

II. Proposed Alternative Interpretations of Amendment 73 Are Incorrect

Two other interpretations have been suggested with respect to Amendment 73’s effect on the calculation of the Residential Assessment Rate under the Gallagher Amendment. Neither of these proposed alternative interpretations can be correct as a matter of law.

- First, it has been suggested that Amendment 73 would negatively affect Colorado property taxing districts other than school boards by modifying the calculation of the generally applicable Residential Assessment Rate under Gallagher. This interpretation is incorrect. While Amendment 73 sets new, standalone assessment rates for school district taxes, these new assessment rates are used only for the limited purpose of determining school district taxes. The new assessment rates set by Amendment 73 are not used to determine assessed value for purposes of the Gallagher formula, which continues to rely on the assessed values calculated using the generally applicable assessment rates.

⁵ See *id.* at 5 (showing calculations required to determine the Residential Assessment Rate).

⁶ See C.R.S. § 39-1-104.2.

- Second, it has been suggested that Amendment 73 would override the generally applicable assessment rates under Gallagher for all types of property tax, in effect fixing the Residential Assessment Rate for *all* district taxes at 7% and fixing the Non-Residential Assessment Rate for *all* district taxes at 24%. This argument must fail because Amendment 73 is expressly limited in its application to “all school district tax levies.”

As is described in more detail below, neither of these alternative interpretations is consistent with the unambiguous language of Amendment 73. Furthermore, the analysis conducted by the Colorado Legislative Council Staff in connection with Amendment 73, including the fiscal analysis and the Blue Book description, reject the alternative interpretations and make clear that Amendment 73 has no effect on the calculation of the Residential Assessment Rate under the Gallagher Amendment.

ANALYSIS

I. Background

A. The Gallagher Amendment

The Gallagher Amendment was passed in 1982 and, among its other functions, fixes a constant, statewide ratio (the “Gallagher Ratio”) in which (1) roughly forty-five percent of the state’s aggregate assessed value for property taxes is attributable to residential real property and (2) roughly fifty-five percent of the state’s aggregated assessed value is attributable to non-residential property. These percentages are subject to minor periodic adjustments based on new construction and natural resource development and referred to as the “Target Percentages.”⁷

In general, property tax in Colorado is determined by multiplying the “actual value” of a property by the “assessment rate” (the percentage of the actual value that will be subject to taxation) and again by the “mill levy” (the tax rate). The Gallagher Amendment fixes the Gallagher Ratio by setting the assessment rate for commercial property at 29% and then periodically adjusting the assessment rate applicable to residential property to ensure that the Target Percentages are attained.⁸ Each reassessment period, the General Assembly must adjust the assessment rate for residential property (the “Residential Assessment Rate”) to achieve the Target Percentages.

B. Amendment 73

Amendment 73 would add a new section just after Colo. Const. art. X, § 3(1)(b) as follows:

Notwithstanding the requirements of subsection (1)(b)(i)⁹ of this section, for all school district property tax levies in any property tax year commencing on or after January 1, 2019, residential real property shall be valued for assessment at seven percent of its actual value, and all other taxable property shall be valued for assessment at twenty-four percent of its actual value except as otherwise set forth in

⁷ For example, for tax year 2017, the target percentages were 45.75991507% for residential and 54.24008493% for non-residential. See 2017 Assessment Rate Study at 5.

⁸ See C.R.S. § 39-1-104.

⁹ Note that existing Colo. Const. art. X, § 3(1)(b) would be renumbered as § 3(1)(b)(I) under Amendment 73 but is otherwise unchanged.

subsection (1)(b)(i) of this section with regard to producing mines and lands or leaseholds producing oil or gas.

The effect of this language is accurately described by Legislative Council Staff as follows:

Assessment rate. Beginning January 1, 2019, the measure specifies that the residential assessment rate is 7.0 percent for property taxes levied by school districts. All other taxable property is valued for assessment at 24.0 percent for property taxes levied by school districts, with the exception of property and leases for mines and producing oil and gas. For property taxes levied by all other local governments, **current law determines the residential assessment rate.**

* * *

Property tax revenue. The Colorado Constitution requires that the proportion of taxable value for residential and nonresidential property remain constant between each reassessment cycle. This proportion is known as the target percentage, and is adjusted for any new construction and mineral production that occurs during the reassessment cycle. Nonresidential property is taxed at an assessment rate of 29 percent. The vehicle for achieving the target percentage is the adjustment of the residential assessment rate. The residential assessment rate for 2017 and 2018 is 7.20 percent in current law, however the General Assembly must adjust the residential assessment rate in 2019 to maintain the target percentage required under the state constitution.

* * *

The measure only applies to property taxes levied by school districts. Property taxes levied by other local governments are unaffected by the measure. **The calculation for the target percentage and the residential assessment rate will be determined by the assessed values used for all other local governments and is unaffected by the measure.**¹⁰

II. Analysis

A. Other Interpretations of Amendment 73

We understand that two alternative interpretations of Amendment 73 have been advanced, namely:

1. Because school district property taxes are subject to different assessment rates under Amendment 73 than other local taxes, they result in different levels of assessed value for

¹⁰ Marc Carey and Anna Gerstle, Fiscal Impact Statement for Initiative #93 (Jan. 3, 2018) (“Fiscal Impact Statement”) (emphasis added) *available at* <https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2017-2018/93FiscallImpact.pdf>.

determining school district taxes. That is, each property will have an assessed value determined using the generally applicable assessment rates determined under Gallagher as well as a second assessed value determined using the assessment rates set by Amendment 73. The first alternative interpretation would argue that these different assessed values must be factored into the Gallagher formula for purposes of calculating the generally applicable Residential Assessment Rate used for all other local taxes. In effect, this interpretation would find that the assessed values used in the Gallagher formula to set the Residential Assessment Rate must be modified to account for the new assessed values applicable to school district taxes under Amendment 73. Specifically, some have suggested that the assessed values under Gallagher must be averaged with the assessed values under Amendment 73 in order to determine aggregate statewide assessed values for purposes of Gallagher.

2. Because Amendment 73's assessment rates for school district property taxes apply *notwithstanding* the Gallagher formula for determining the generally applicable Residential Assessment Rate, the Amendment 73 assessment rates must apply to *all* local government property taxes, regardless of Gallagher's contrary provisions.

These interpretations are incorrect. As an initial matter, neither is consistent with the stated intent of the drafters, the Blue Book, or the analysis by Legislative Council Staff. More importantly, however, neither alternative interpretation is consistent with the text of Amendment 73.

B. Standard for Reviewing Colorado Constitutional Amendments

When construing an amendment to the Colorado Constitution, courts must ascertain and give effect to the intent of the electorate adopting the amendment.¹¹ To determine intent, courts first examine the language of the amendment and give words their plain and commonly understood meaning.¹² Courts will not engage in a narrow or technical reading of language contained in an initiated constitutional amendment if to do such would defeat the intent of the people.¹³

If the intent of the electorate is not clear from the language of an amendment, courts should construe the amendment in light of the objective sought to be achieved and the mischief to be avoided by the amendment.¹⁴ Courts should consider the amendment as a whole and, when possible, adopt an interpretation of the language which harmonizes different constitutional provisions rather than an interpretation which would create a conflict between such provisions.¹⁵

C. The Text of Amendment 73 Is Unambiguously Limited to School District Taxes

¹¹ *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996) (citing *Bolt v. Arapahoe County Sch. Dist. No. Six*, 898 P.2d 525, 532 (Colo.1995); *Urbish v. Lamm*, 761 P.2d 756, 760 (Colo.1988)).

¹² *Id.*; *Bolt*, 898 P.2d at 532; *City of Aurora v. Acosta*, 892 P.2d 264, 267 (Colo.1995); *Urbish*, 761 P.2d at 760.

¹³ *People in the Interest of Y.D.M.*, 197 Colo. 403, 407 (1979).

¹⁴ *Zaner*, 917 P.2d at 283 (citing *People in Interest of Y.D.M.*, 197 Colo. at 407); see *Acosta*, 892 P.2d at 267.

¹⁵ *Bolt*, 898 P.2d at 532; *Bickel v. City of Boulder*, 885 P.2d 215, 229 (Colo. 1994), as modified on denial of *reh'g* (Oct. 11, 1994).

As an initial matter, the alternative interpretations must be rejected as inconsistent with the plain text of Amendment 73, which clearly limits its scope to “school district property tax levies.” It does so in its introductory words:

Notwithstanding the requirements of [the Gallagher Amendment], for all school district property tax levies in any property tax year commencing on or after January 1, 2019, residential real property shall be valued for assessment at seven percent of its actual value, and all other taxable property shall be valued for assessment at twenty-four percent of its actual value.

The use of the word “notwithstanding” should be read as analogous to “despite,” “nevertheless,” or “without prevention or obstruction from or by.”¹⁶ Its effect, therefore, is to resolve the potential conflict between the Gallagher assessment rates and the Amendment 73 assessment rates by making clear that the Amendment 73 assessment rates apply for purposes of “school district property tax levies” “without prevention or obstruction from” the assessment rates in the Gallagher Amendment. Importantly, what Amendment 73 *does not say* is that the assessment rates in Gallagher should be in any way modified with respect to any other local government taxes.

Had the drafters intended to modify the Gallagher formula for other local government taxes, they could have done so by amending the text of the Gallagher provision itself to achieve the desired result. But they did not. Instead, they made clear that Amendment 73 applies *notwithstanding* the Gallagher provisions—meaning that it applies despite those provisions, but does nothing to abrogate or modify those provisions as they apply outside the express circumstances of school district property taxes.

D. The Legislative History of Amendment 73 Does Not Support Either Alternative Interpretation

Beyond the clear text of Amendment 73, the legislative history materials—including the Blue Book, fiscal impact statement, and review and comment materials—make clear that the alternative interpretations are inconsistent with the commonly understood meaning of the Amendment. When interpreting a constitutional amendment, Colorado courts “look to the explanatory publication of the Legislative Council of the Colorado General Assembly, otherwise known as the Blue Book” because it provides “important insight into the electorate’s understanding of the amendment when it was

¹⁶ *Zamarripa v. Q & T Food Stores, Inc.*, 929 P.2d 1332, 1342 (Colo. 1997) (defining “notwithstanding”) (citing *Webster’s Third New International Dictionary* 614 (3d ed.1986)); see also *Theodore Roosevelt Agency, Inc. v. Gen. Motors Acceptance Corp.*, 156 Colo. 237, 240 (1965) (the word ‘Notwithstanding’ actually means ‘in spite of’) (citing *Webster’s New International Dictionary* (1958)).

passed and also shows the public's intentions in adopting the amendment.”¹⁷ Colorado courts likewise look to fiscal impact analyses to determine legislative intent.¹⁸

The 2018 Blue Book does not support either of the alternative interpretations because it describes the effect of Amendment 73 as being limited to property taxes levied by school districts. The Blue Book statement begins by explaining that Amendment 73 amends the Colorado Constitution to:

for property taxes levied by school districts, set the assessment rate at 7.0 percent for residential properties and decrease the assessment rate to 24.0 percent for most nonresidential properties.¹⁹

This general description makes clear that the assessment rates in Amendment 73 apply exclusively to property taxes levied by school districts and makes no mention to a change in the Gallagher Amendment formula. The 2018 Blue Book goes on to explain the effect in more detail:

*Changes to property taxes under Amendment 73. For school district property taxes **only***, beginning in 2019, Amendment 73 reduces the nonresidential assessment rate from 29 percent to 24 percent, thereby reducing taxes for nonresidential property. The measure reduces the current residential assessment rate from 7.2 percent to 7.0 percent, and sets it at this lower rate, keeping it from falling further. Relative to a projected 6.1 percent residential assessment rate, the rate under the measure will result in a tax increase for residential property taxpayers. The measure does not impact the assessment rates for mines and lands producing oil and gas.²⁰

This more detailed analysis underscores that the assessment rate provisions in Amendment 73 are limited to school district property taxes and do not affect the Gallagher Amendment formula.

Similarly, Legislative Council Staff’s fiscal analysis of Amendment 73 does not endorse either of the alternative interpretations described above. It states that “[f]or property taxes levied by all other local governments, current law determines the residential assessment rate,” and that “[t]he calculation for the target percentage and the residential assessment rate will be determined by the assess values used for all other local governments and is **unaffected by the measure**.”²¹ These statements unambiguously reject the alternative interpretations, making clear that Gallagher formula will remain unaffected by Amendment 73.

¹⁷ *People v. Clendenin*, 232 P.3d 210, 215 (Colo. App. 2009) (quoting *Grossman v. Dean*, 80 P.3d 952, 962 (Colo.App.2003)); see also *Matter of Title, Ballot Title, Submission Clause, & Summary Adopted Apr. 5, 1995, by Title Bd. Pertaining to a Proposed Initiative Pub. Rights in Waters II*, 898 P.2d 1076, 1079 (Colo. 1995), as modified on denial of reh’g (July 31, 1995) (“In past cases, we have found the Legislative Council’s publication to be a helpful source equivalent to the legislative history of a proposed amendment.”) (citing *Bloomer v. Cty. Bd. of Comm’rs*, 799 P.2d 942 (Colo.1990); *Carrara Place, Ltd. v. Arapahoe County Bd. of Equalization*, 761 P.2d 197, 203 (Colo.1988)).

¹⁸ *People v. Winters*, 765 P.2d 1010, 1013 (Colo. 1988).

¹⁹ 2018 Blue Book at 41, available at <https://leg.colorado.gov/content/initiatives/initiatives-blue-book-overview/ballot-information-booklet-blue-book>.

²⁰ *Id.* at 44 (emphasis added).

²¹ Fiscal Impact Statement at 2, 6 (emphasis added).

Further, this conclusion is consistent with the discussion at the review and comment process for Amendment 73, in which the proponents clearly explained that the new assessment rate that applies to school district property taxes is not meant to be used for purposes of calculating the future residential assessment rates in accordance with the Gallagher Amendment.²²

Finally, the ballot title set by the Colorado Title Board similarly does not support either alternative interpretation. It states, in relevant part: “STATE TAXES SHALL BE INCREASED \$1,600,000,000 ANNUALLY . . . AND, IN CONNECTION THEREWITH . . . **FOR PURPOSES OF SCHOOL DISTRICT PROPERTY TAXES**, REDUCING THE CURRENT RESIDENTIAL ASSESSMENT RATE OF 7.2% TO 7.0% AND THE CURRENT NONRESIDENTIAL ASSESSMENT RATE OF 29% TO 24%.”²³ This aspect of the title clearly indicates that the new assessment rates in Amendment 73 apply only to “school district property taxes” and makes no reference to the Gallagher Amendment formula.

CONCLUSION

Amendment 73’s effect on property taxes is limited to the context of the assessment rates used for taxes assessed by school districts. As we have explained herein (and as has been explained by Legislative Council), Amendment 73 has no effect on the calculation of the Residential Assessment Rate under the Gallagher Amendment, which will remain the same as under current law regardless of whether Amendment 73 passes.

²² See Audio Recording of Review and Comment Hearings for Initiatives 2017-2018 #72, #73, #74, #75, #76, #77, #78, #79, available at <https://leg.colorado.gov/committee/granicus/964136>. Note that these proposed initiatives were very similar to #93, and the comments made in this hearing were incorporated by reference in the hearing on Initiative 93, which is available at the same link.

²³ Results for Proposed Initiative #93, available at <https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/results/2017-2018/93Results.html> (emphasis added).