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MEMORANDUM

October 15, 2003

TO: Carol Hedges
Wade Buchanan

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2003-2004 #71, concerning fiscal stabilization

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado Constitution. We hereby submit our comments to you regarding your proposed amendment, a copy of which is attached.

The purpose of this statutory requirement of the Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in drafting the language of their proposal and to make the public aware of the contents of the proposal. Our first objective is to be sure we understand your intent and objective in proposing the amendment. We hope that the statements and questions in this memorandum will provide a basis for discussion and understanding of the proposal.

Purposes

The major purposes of the proposed amendment appear to be:

1. To specify that the purpose of the proposed new section is to modify current restrictions on spending and revenue to enhance the ability of the state of Colorado and local districts to support and sustain essential services through economic cycles, without changing restrictions on new taxes or increasing tax rates, and to specify that article X, section 20 of the Colorado constitution ("TABOR"), is to be broadly construed to effectuate this purpose.
2. To specify that the intent of the proposed new section is to preserve and affirm the requirements of TABOR, including the requirements for voter approval of new taxes or increases in tax rates.

3. To specify that nothing in the proposed amendment shall be construed to change restrictions on the type of taxes that are prohibited.
4. To limit maximum fiscal year spending for the state of Colorado to an unspecified percentage of total Colorado personal income, as computed annually by the federal bureau of economic analysis, for the prior calendar year, and to further specify that the limit shall be the only limitation on state and local district spending and revenue under TABOR.
5. To require the first \$100 million in revenue collected in excess of the state spending limit to be deposited in a newly created budget stabilization fund.
6. To limit the balance of the budget stabilization fund to a maximum of fifteen percent of the general fund operating budget for the prior fiscal year and to require any excess revenue that would otherwise be deposited to the fund to be distributed pursuant to TABOR.
7. To designate the proposed amendment as article X, section 21 of the Colorado constitution.

Comments and Questions

The form and substance of the proposed amendment raise the following comments and questions:

Technical questions:

1. To conform to standard drafting practices regarding the form of proposed amendments to the Colorado constitution, would the proponents consider:
 - a. Capitalizing the word "enacted" in the enacting clause of the proposed amendment as required by article V, section 1 (8) of the Colorado constitution and removing the **bold** typeface from the enacting clause?
 - b. Would the proponents consider including an amending clause after the enacting clause? For example, "Article V of the constitution is amended by the addition of a new section to read:".
 - c. Indicating the desired placement and title of the proposed amendment by adding a head note immediately following the enacting clause of the proposed amendment and deleting both the words "Fiscal Stabilization Amendment" from above the enacting clause of the proposed amendment and paragraph 5 of the proposed amendment? An appropriate head note, which should be in **bold** typeface, might state: "**Section 21. Fiscal stabilization.**".
 - d. Changing the numbering and head note for each subsection of the proposed amendment so that the number is in parentheses and the head note is in **bold** rather than *italics*

typeface? For example, "1. *Statement of purpose.*" should be changed to "(1) **Statement of purpose.**".

- e. Removing capitalization (except at the beginning of sentences or head notes) from the following words and phrases that appear in the proposed amendment:
 - i. Section?
 - ii. State?
 - iii. Article?
 - iv. Constitution?
 - v. Act?
 - vi. "Federal Bureau of Economic Analysis"?
 - vii. "Budget Stabilization Fund"?
- f. Indicating that all of the substantive text of the proposed amendment (all of the text other than the enacting clause, numbering, and head notes) is new constitutional language by putting it in "LARGE AND SMALL CAPITAL LETTERS" instead of in standard typeface?
- g. On the fourth line of subsection 1 of the proposed amendment, replacing "Article" with "section" if, in fact, the proponents intend the word to reference the text of the proposed amendment rather than all of article X of the Colorado constitution?
- h. On the second and third lines of subsection 2 of the proposed amendment, replacing "Article X Section 20 (4) of the Colorado constitution" with "section 20 (4) of this article"?
- i. On the fourth line of subsection 2 of the proposed amendment, replacing "Act" with "section"?
- j. On the seventh and eighth lines of subsection 3 of the proposed amendment, replacing "Article X Section 20 of the Colorado Constitution" with "section 20 of this article"?
- k. On the first line of subsection 4 of the proposed amendment, replacing "\$100 million" with "one hundred million dollars"?
- l. On the third and fifth lines of subsection 4 of the proposed amendment, replacing 15% with "fifteen percent"?
- m. On the last line of subsection 4 of the proposed amendment, replacing "Article X, section

20." with "section 20 of this article."?

2. The substantive provisions of the proposed amendment appear, in some cases, to modify or conflict with provisions of TABOR. Have the proponents' considered amending TABOR itself instead of creating a new constitutional section?

Substantive questions:

1. Article V, section 1 of the Colorado constitution requires all proposed initiatives to have a single subject. The proposed amendment appears to have several different purposes, however, including changing the manner in which the state fiscal year spending limit is calculated, creating a budget stabilization fund, and requiring certain excess state revenues that would otherwise be refunded to be deposited into the budget stabilization fund. Additionally, from subsections 1 and 2 of the proposed amendment it appears that the amendment may have multiple purposes. Does the proposed amendment have a single subject to which all of its purposes are necessarily and properly connected? If so, what is the single subject of the proposed amendment?
2. With respect to subsection 1 of the proposed amendment:
 - a. The use of the word "current" might be confusing to persons who will read the text of the proposed amendment if it becomes part of the Colorado constitution. If the amendment modifies a spending or revenue restriction, doesn't the modified provision become "current"? Would the proponents consider referencing restrictions on spending and revenue "in effect as of [specified date]" or similar language instead to clarify the restrictions that the proposed amendment is intended to modify?
 - b. The substantive provisions of the measure do not appear to affect local governments. How does the new section enhance the ability of local districts to support and sustain essential services?
3. With respect to subsection 2 of the proposed initiative:
 - a. The first sentence expresses an intention to preserve and affirm the voter approval requirements of section (4) (a) of TABOR, including the requirements for voter approval of new taxes or increases in tax rates. Do the proponents consider these voter approval requirements to be "current restrictions on spending and revenue"? If so, does subsection 2 of the proposed amendment conflict with subsection 1 of the proposed amendment, which states that the purpose of the proposed amendment is to modify current restrictions on spending and revenue . . ."?
 - b. The second sentence states that "nothing in this act shall be construed to change restrictions on the type of taxes that are prohibited." What restrictions does this sentence refer to? Restrictions contained in TABOR? All constitutional restrictions?

- c. Subsection (1) of TABOR states that TABOR supersedes conflicting state constitutional provisions? In light of this provision, is subsection 2 of the proposed initiative necessary? Do the proponents believe that any provision of the proposed amendment conflicts with TABOR?
4. With respect to subsection 3 of the proposed amendment:
- a. The first sentence states that "[n]otwithstanding any provision of law to the contrary, maximum fiscal year spending for the State of Colorado shall not exceed _____ of total Colorado personal income for the prior calendar year", which raises the following questions:
 - i. When used in the Colorado constitution, the phrase "provision of law" typically refers to statutory provisions only. Do the proponents intend that the new maximum fiscal year spending limit for the state replace the existing state fiscal year spending limit of section (7) (a) of TABOR? If so, would the proponents consider:
 - A. Replacing the phrase "provision of law" with the phrase "provision of law or this constitution"?
 - B. Adding language to the proposed amendment that would repeal section (7) (a) of TABOR?
 - ii. It appears that it would be impossible to calculate the new maximum fiscal year spending limit so long as the blank remains in the first sentence. Do the proponents intend to replace the blank with a number and percentage? If so, what number and percentage will replace the blank?
 - iii. The proposed amendment does not define the phrase "fiscal year spending". Do the proponents intend that this phrase have the same meaning for purposes of the proposed amendment that it does for purposes of TABOR? If so, would the proponents consider adding language to the proposed amendment to indicate this? If not, would the proponents consider defining the phrase in the proposed amendment?
 - iv. Estimates of total Colorado personal income for any given calendar year are revised several times, which raises the following questions:
 - A. Which estimate would be used to calculate the new maximum state fiscal year spending limit?
 - B. Who would calculate the new maximum state fiscal year spending limit? Would the general assembly be able to designate by law which estimate to use? Would the state controller or some other executive branch agency or officer be able to choose which estimate to use?

- C. Would the maximum state fiscal year spending limit for a state fiscal year be adjusted retroactively to reflect revised estimates of Colorado personal income that revise the estimate originally used to determine the limit? Would the maximum state fiscal year spending limit for future fiscal years be adjusted in light of revised estimates?
- b. In the second sentence, would the proponents consider changing the word "Federal" to "United States" to more accurately name the "United States Bureau of Economic Analysis"?
- c. The third sentence states that "The prior calendar year is the most recent calendar year for which the bureau has computed state total personal income for the state of Colorado"? Is the first estimate considered a computation or is a final revised estimate required?
- d. What happens if the federal bureau of economic analysis modifies the method used to compute total Colorado personal income? Would the state continue to compute the spending limit using the methods as they existed when the proposed amendment becomes effective? What if the bureau no longer calculates total Colorado personal income or calculates it other than annually?
- e. The last sentence states that "[T]his [presumably the new maximum state fiscal year spending limit] shall be the only limitation on state and local district spending and revenue under Article X Section 20 of the Colorado Constitution", which raises the following questions:
 - i. Is it the proponents' intent that the proposed amendment supersede or eliminate the following provisions of TABOR:
 - A. The three percent emergency reserve requirement of subsection (5) of TABOR?
 - B. The provisions of subsection (6) of TABOR that govern the circumstances and manner in which the state or a local district can impose emergency taxes?
 - C. The spending limits provisions of subsection (7) of TABOR?
 - D. The revenue limits provisions of subsection (8) of TABOR?
 - E. Any other provision of TABOR?
 - ii. If it is the proponents' intent that the proposed amendment supersede or eliminate provisions of TABOR, would the proponents consider adding provisions to the proposed amendment that would directly repeal such provisions?

- iii. Is it the proponents' intent that the proposed amendment supersede, eliminate or allow the general assembly to weaken by statute existing statutory limitations on spending or revenue (such as the six percent limitation on general fund appropriations growth set forth in section 24-75-201.1 (1) (a) (I) (B), C.R.S., or the six and nine tenths percent limit on total sales tax set forth in section 29-2-108 (1), C.R.S.) that currently "may be weakened only by future voter approval" under subsection (1) of TABOR?
- iv. By stating that the proposed limitation shall be the only limitation on local district spending, is it the proponents' intent to eliminate all local district fiscal year spending limits? If not, what limits would remain and how would they be calculated? Does the proposed amendment itself limit local district spending?

5. With respect to subsection 4 of the proposed amendment:

- a. The first sentence states that "[t]he first \$100 million in revenue collected in excess of the state spending limit shall be deposited in a Budget Stabilization Fund". Does this requirement mean only that a total of \$100 million in excess state revenues must be deposited in the fund regardless of when such revenues are collected or does it apply to the first \$100 million in excess state revenues collected in any given state fiscal year?
- b. The proposed amendment does not define the phrase "general fund operating budget", which raises the following questions:
 - i. Is the general fund operating budget the amount of general fund appropriations made in any given fiscal year? The amount of moneys appropriated from the general fund or transferred without appropriation to another fund (such as the capital construction fund) pursuant to law? Something else?
 - ii. Does the general fund operating budget include supplemental appropriations made during a fiscal year?
- c. Under what conditions may moneys be expended from the budget stabilization fund? Does the general assembly have discretion to appropriate moneys from the fund as it sees fit?
- d. May the principal of the fund be invested? If so, if investment earnings cause the balance of the fund to exceed the specified fifteen percent limit, must the investment earnings be expended? Refunded to the taxpayers of the state? Transferred to the general fund or some other fund?
- e. What does it mean to distribute excess revenue "pursuant to Article X, section 20"? Do the proponents intend that such revenue be refunded in the manner that excess state revenues are currently refunded?

- f. For what fiscal year would the proposed amendment first be effective? Would it be the same for all provisions of the proposed amendment?