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MEMORANDUM

April 16, 2004

TO: Tom Janich and Jim Nelms

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2003-2004 #141, concerning growth impact fees for water and transportation projects for the state of Colorado collected from growth impact areas that exceed 3% annual growth in residential units

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 state constitution. We hereby submit our comments to you regarding the appended proposed initiative.

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 determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained 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 amend the state constitution to allow the state of Colorado to collect growth impact fees as defined in this proposed amendment, effective January 1, 2005.
2. To establish that if a growth impact area has exceeded 3% growth in any residential classification in the preceding year per the growth indicator in that growth impact area the state of Colorado shall collect a fee as follows: 1,000 dollars per residential classification I; 750 dollars per residential

classification II; and 500 dollars per residential classification III.

3. To establish that if the growth rate falls below 3% for an entire year in the growth impact area then the fees will not apply the following year. If a political subdivision never exceeds 3% annual growth per the growth indicator for that growth impact area then these fees shall not apply.
4. To require these funds be kept in a separate fund and can only be used for new water and transportation projects as defined in this proposed amendment. These funds cannot be used for any state employee's wages or benefits in any way. These funds cannot be used for replacement, renovations, or ongoing maintenance for any existing capital improvements or facilities.
5. To establish that these fees are designed to make growth pay its way and therefore are exempt from the Taxpayer's Bill Of Rights (TABOR).
6. To create definitions.
7. To establish exemptions for small businesses, individuals who build their own home, residential homes that are unintentionally destroyed, the agricultural community, and replacement of existing residential units, but if large developer or builders find loopholes to abuse these exemptions the state legislative body shall create statutes to protect the intent of these exemptions.
8. To create the following provisions:
 - a. That the funds shall be held in a separate state account labeled "growth impact fund" and not commingled with any other funds until appropriated. The funds shall be invested per state law requirements and any interest earned shall remain in the growth impact fund.
 - b. That all percentage shall be based on the preceding growth indicator date.
 - c. That the political subdivision shall monitor and start collecting all impact fees at the time of permit application for each residential unit when the growth impact areas exceed the percentages allowed.
 - d. That the state of Colorado shall have complete local control to use the funds as designated in this amendment.
 - e. That growth impact funds can be used with other political state funds for new capital construction. Example would be bond election sales tax revenues, person income tax, and certificate of participation (COP).
 - f. That these funds can only be used to build new capital construction projects and cannot be used for renovations, maintenance, or replacement of existing facilities.

- g. That all projects using these funds must use the Colorado state laws regarding sealed bid procedures.
 - h. That these funds shall not be allowed to be spent on any wages or benefits for any state employee or administration of capital construction for any state employee.
 - i. That these funds cannot be used to payoff past debt prior to the enactment of this amendment.
 - j. That December 31, 2004, shall be used as the first growth indicator date.
 - k. That each political subdivision that can issue residential permits and issue certificate of occupancy shall certify to the state controller office the growth indicator for each growth impact area and the three different residential classification counts as of the previous December 31 by January 31 of the current year. The state controllers shall maintain these records as public records.
 - l. That private donations with no conditions can be contributed to any of these growth impact funds.
 - m. That it shall be unlawful for any political subdivision, elected official, or government employee to knowingly reduce, eliminate, and circumvent the intent of these fees by changing other fees. These fees shall not be used to penalize any current laws, taxes, or fees that provide revenue to make growth pay its way.
9. To state that if there is conflict between this proposed amendment and any other constitutional provision this proposed amendment shall prevail. If any part of this amendment is found to be unconstitutional the remainder shall be in full force.

Comments and Questions

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

Technical questions:

1. The text of the proposed initiative does not identify where the state constitution would be amended for placement of its provisions. Would the proponents consider identifying where the proposed initiative would be added to the state constitution. For example, if the proposed initiative was to be placed in the state constitution as a new article, the proper form of listing the new article would be (new) "article XXIX" as illustrated in the question following question #2.

2. An initiated measure needs to be preceded by an enacting clause and an amending clause which, in the case of the proposed initiative, might state, at the beginning of its text the following:

"Be it Enacted by the People of the State of Colorado:

The constitution of the state of Colorado is amended BY THE ADDITION OF A NEW ARTICLE to read:

ARTICLE XXIX
Impact fees"

Would the proponents consider amending the text of the proposed initiative to conform to this form?

3. To conform to standard drafting practice in Colorado, new constitutional or statutory language is typically shown in "ALL CAPS" format. Would the proponents consider amending the text of the proposed initiative to conform to this practice?
4. To conform to standard drafting practice in Colorado, would the proponents consider using the word "may" when referencing a grant of authority (instead of "can") and "shall" to indicate a mandatory command (instead of "must")?
5. For ease of reference and clarity, would the proponents consider using an outline format throughout the text of the proposed initiative, with numbered sections, subsections, paragraphs, subparagraphs, and sub-subparagraphs.
6. The first page of the proposed initiative, contains both declaratory statements about the intent and purpose of the proposed initiative as well as substantive provisions. Later sections of the proposed initiative also contain statements about intent mixed in with substantive provisions, see. e.g., the exemptions section. For clarity and ease of reference, especially for precision in understanding the obligations required by the text of the proposed initiative, and to conform to standard drafting practice in Colorado, would the proponents consider separating statements of intent and purpose from the substantive provisions of the proposed initiative? For example, it is customary in Colorado to place statements of intent and purpose at the beginning of the article, part, or section, followed by the substantive provisions.
7. It is standard drafting practice to refer to amounts received from the imposition of a few or tax as "moneys" or "revenues" and an account into which they are placed as a "fund". Would the proponents consider adopting this practice in their proposed initiative? (e.g. "These revenues shall be kept in a separate fund....")
8. Would the proponents consider referring to "TABOR" by means of its formal placement in the state constitution, which is section 20 of article X of the state constitution, rather than by the phrase

"TABOR Taxpayers Bill of Rights?"

9. To conform to standard drafting practice in Colorado, would the proponents consider placing terms to be defined in quotation marks?
10. To conform to standard drafting practice in Colorado, would the proponents consider placing the word "Occupancy" in lower case in the definition of "collection agent", as well as the word "agent" in the definition of "Collection agent," and the word "Ranchers" in lower case as it appears in the reference to the exemption for "farmers and ranchers"?
11. Would the proponents consider placing periods at the end of each sentence that ends without a period?
12. To conform with standard drafting practice in Colorado, in the definitions section, would the proponents consider making each definition a complete sentence? For example, the definition of "growth indicator date" would be listed as "'Growth indicator date' means December 31 of each year", instead of "Growth indicator date -- December 31 of each year."
13. Under the first exemption for "small business" would the proponents consider changing "less" to "fewer", and "then" to "than"?
14. In the exemptions section, for the purpose of consistency, would the proponents consider either deleting the words "Small business exemption" or adding a similar head note to the other exemptions listed?
15. To conform to standard drafting practice in Colorado, and to facilitate clarity of expression, in the exemption addressing urban renewal authorities areas, would the proponents consider breaking the paragraph into smaller units that would be presented as follows:

...conditions:

(1) The site is an existing...; and

(2) The urban renewal area must be 75% developed.
16. For grammatical purposes, would the proponents consider changing the word "developer" in the introductory portion of the exemptions section to "developers"?
17. In the 5th bullet point under the "Provisions" section of the text of the proposed initiative, for grammatical purposes, would the proponents consider making "example" and "certificate" plural? In addition, would the proponents consider changing the word "person" to "personal". Further, would the proponents consider changing the phrase so that it reads "bond proceeds, sales tax revenues, personal income tax revenue, and certificates of participation proceeds"?

18. If the proposed initiative is approved by the people, it will no longer be referred to as an amendment, but as a specific new article, section, etc. of the constitution. As such, would the proponents consider replacing the phrase "this amendment" in the text of the proposed initiative with a phrase such as "this article", "this section", etc.?
19. In the 7th bullet point under the "Provisions" section of the text of the proposed initiative, would the proponents consider using the phrase "comply with Colorado state laws" instead of "use the Colorado state laws"?
20. In the 11th bullet point under the "Provisions" section of the text of the proposed initiative, would the proponents consider changing the phrase "the state controller office" to "the state controller" and "state controllers" to "state controller"?
21. In the final bullet point under the "Provisions" section of the text of the proposed initiative, would the proponents consider deleting the comma between "any" and "political" Would the proponents consider changing the "and" in the second line" of that paragraph to "or"?
22. In the 1st bullet under the provisions section, to make the constitutional command more clear, would the proponents consider substituting the phrase "and shall not be commingled" instead of the existing phrase "and not commingled"?
23. To describe a monetary amount, the standard drafting practice in Colorado is to use either all letters, e.g., five hundred dollars, or only numbers, e.g., \$500. The second paragraph of the first page of the proposed initiative contains a mixture of numbers and letters. To conform to standard drafting practice in Colorado, would the proponents consider describing dollar amounts using either all letters or only numbers?
24. To conform to standard drafting practice in Colorado, would the proponents consider changing the form of the relevant part of the second paragraph on the first page of the proposed initiative so that it reads as follows: "the state of Colorado shall collect a fee as follows:...per residential classification I; ...per residential classification II; and...per residential classification III."?

Substantive questions:

1. What is the proponent's rationale for the proposed initiative?
2. Section 1 (5.5) of article V of the state constitution requires that no measure proposed by petition shall contain more than one subject that is clearly expressed in its title. What is the single subject contained within the text of the proposed initiative?
3. What is a "growth impact fee" for purpose of the proposed initiative?

4. With respect to the provisions contained in second paragraphs on the first page of the proposed initiative:
 - a. What does it mean for "a growth impact area to have exceeded 3% growth in any residential classification in the preceding year per the growth impact area"?
 - b. The provisions section of the proposed initiative indicates that the political subdivision should begin collecting the growth impact fee as soon as the growth level exceeds 3%. Does this mean that only those persons applying for residential permits or certificates of occupancy after that time during a given year must pay the fee? In other words, if the number of new units as of December 31, 2004, in a certain political subdivision is 100,000, and 4,000 new units are approved during the following year, will the first 3,000 applicants be exempt from the application of the fee?
 - c. In the alternative, the proposed initiative also appears to indicate (first page, second paragraph) that the fees will not be collected until the political subdivision has exceeded 3% growth in the preceding year. Is it the proponents intention that the fees be collected starting January 1 of the year following a year that experiences a growth rate in excess of 3%, or as soon as the growth rate meets that figure in a given year?
 - d. How is the fee levied? Who pays the fee? When is the fee collected?
 - e. If the impact fee is only imposed on one of the residential classifications, must the new construction that is financed by the fee be used only for improvements that benefit residents within that classification?
 - f. What is the proponents' intent in allocating the amount of the fee on the type of residential classification? How did the proponents arrive at the amounts presented in the fee schedule?
5. Under the terms of the proposed initiative, how is the state to know which particular growth phase it is operating under, if any, in any particular year?
6. Paragraph three of the first page of the proposed initiative states that if the growth rate falls below 3% for an entire year, then the fee schedule will not apply. Consider the following scenario: Assume that, on December 31, 2004, a political subdivision has 1,000 units. In 2005, 40 new units are added. The increased fee schedule goes into effect because the growth rate exceeds 3%. In 2006, no new units are built. Because the growth rate fell below 3% for the entire year of 2006, does this mean that the fee increase already imposed because of the 2005 growth no longer applies, and the fee falls to its original level?
7. With respect to the fifth paragraph on the first page of the proposed initiative:
 - a. Does the wording of the text of the proposed initiative on this point mean that each state

maintains a separate fund of each fee it collects or that all fees collected by the state are placed in a separate fund? Would the proponents consider clarifying their intent with respect to this provision?

- b. What does the phrase "new water and transportation projects" mean? The text states that the phrase is "defined in this amendment," but it does not appear such a definition has been provided.
 - c. What does it mean that funds cannot be used for "any state employee's wages or benefits in any way"? What is the proponents' intent in including this requirement in the text of the proposed initiative? How would the proposed initiative treat the wages or benefits of state employees working on the new water and transportation projects?
 - d. Please explain what proponents mean by "replacements, renovations or ongoing maintenance"? How would a project that involved a mixture of capital construction and replacements, renovations, or ongoing maintenance be treated under the proposed measure? What is the proponents' intent in including this requirement in the text of the proposed initiative?
8. With respect to the fifth paragraph on the first page of the proposed initiative:
- a. What does it mean for "growth to pay its own way?" How does the proposed initiative make "growth pay its own way"?
 - b. How does the fact that fees are designated to make growth pay its way make the fees exempt from TABOR? What portions of TABOR does the proposed measure nullify or preempt? Would the proponents consider clarifying their intent with respect to this provision?
9. With respect to the definition of "growth indicator", what does it mean for the "[t]otal number of units that have been given [sic] certificate of occupancy for residential units in each growth impact area to be "totaled" by the 3 different residential classifications? Would the proponents provide an example of how this calculation is to work in practice?
10. With respect to the definition of "growth impact area," although counties are discussed in the text of the proposed initiative, the definition does not list counties (apart from a city and county) as political subdivisions with the power to issue residential permits and certificates of occupancy. Is there any reason why the definition omits a county that is not a city and county? Are the proponents aware of any political subdivisions in Colorado that have the power to issue residential permits and certificates of occupancy apart from municipalities and counties? Does the last clause of the last sentence of this definition mean that growth impact areas are limited to unincorporated areas of counties except where the political subdivision is a city and county. If so, to make their intentions more clear, would the proponents consider clarifying the text of the proposed initiative

on this point?

11. Under the definition of the residential classifications, is it the proponents intent (under residential classification II) that the addition of a triplex means the addition of 3 residential units for the purpose of calculating the growth indicator? Similarly, (under residential classification III) that the addition of a 16-unit complex means the addition of 16 residential units for the purpose of calculating the growth indicator?
12. With respect to exemptions contained in the text of the proposed initiative viewed generally:
 - a. In keeping with the tone of constitutional and statutory provisions generally, would the proponents consider deleting or amending the argumentative or pejorative language contained in the introductory portion of this section referencing "developer[s] and builders"? What do the proponents mean by "large developer[s]" or builders? How is one to know if large developers and builders have found loopholes to allegedly abuse these exemptions? What do proponents mean by loopholes? How do proponents distinguish a "loophole" from the exercise of a right that does not appear to be precluded by constitutional or statutory language? If constitutional or statutory language does not cover a particular situation, how is a party "abusing" an exemption by taking advantage of an exemption in these circumstances? If a "small developer" takes advantage of a "loophole" under the terms of the proposed initiative, is he or she free from oversight or penalties under the proposed initiative?
 - b. In general, is an exemption the equivalent of not having to pay the impact fee required by the proposed initiative?
 - c. Is it the proponents' intent that any unit that qualifies for an exemption should not be charged an increased impact fee and also that any exempt unit should not be included in the 3% increase calculation?
13. With respect to the 1st bullet point under the exemptions section of the proposed initiative:
 - a. Do the proponents have a definition of "builders and developers"?
 - b. Does the "20 units a year" component of this definition refer to 20 units anywhere or solely within the growth impact area at issue? Would the proponents consider clarifying the text of the proposed initiative on this point?
14. With respect to the 3rd bullet point under this section of the proposed initiative, what is the proponents' intent in creating this exemption? What do the proponents mean by "legitimate urban renewal" and "true renewal efforts?" How are these categories to be measured? What is the proponents' intent in making the impact fee requirement applicable to "newly formed urban renewal authorities that are for new developments on mostly vacant ground"? What do the proponents

mean by the phrase "the urban renewal area must be 75% developed"? Would the proponents consider clarifying the text of the proposed initiative on this point?

15. With respect to the 5th bullet under this section of the proposed initiative, how do the proponents define the term "Farmers and Ranchers."? Would the proponents consider clarifying this definition? What do the proponents mean by the phrase "residential units need to conduct their business of farming, agriculture, and ranching"? Would a large scale agricultural facility that contained housing units for large numbers of workers qualify for this particular exemption?
16. With respect to the "Provisions" section of the text of the proposed initiative:
 - a. With respect to the 2nd bullet point under this section, what do the proponents mean by the phrase "[a]ll percentages shall be based on the preceding growth indicator dates"?
 - b. The 3rd bullet specifies that the political subdivision "shall monitor and start collecting all impact fees," although the second paragraph of the first page of the proposed initiative states that the state of Colorado shall collect the fee. Would the proponents consider amending the text of the proposed initiative on this point to address any potential inconsistencies in its terms?
 - c. With respect to the 4th bullet point under this section, what do the proponents mean by the phrase "[the state of Colorado shall have complete local control to use the funds as designated in this amendment]"? What constraints does the proposed initiative impose upon the use of such funds?
 - d. The 6th bullet states that the funds can only be used for new capital construction projects? The fourth paragraph on the first page of the proposed initiative states that the funds are to be used for new water and transportation projects. Reading these provisions together, is it the proponents intent that the funds be used only for capital construction projects involving water and transportation? Would the proponents consider clarifying the text of the proposed initiative on this point?
 - e. With respect to the 13th bullet under the provisions section of the text of the proposed initiative, of what types of "other fees" are the proponents referring? What would it mean to circumvent the intent of the proposed initiative by changing other fees? What would be examples of "current laws, taxes, or fees that provide revenue to make growth pay its own way"? What penalties or sanctions do the proponents envision for a violation of this requirement of the proposed initiative?
17. Have the proponents considered whether the imposition of the impact fee under the circumstances of the proposed initiative satisfies current federal and state court holdings in this area of the law?

18. In placing the proposed initiative in the state constitution as contrasted with the Colorado revised Statutes, have the proponents considered the difficulties of amending the state constitution if circumstances in the future necessitate modifications of its terms?

19. Are the proponents aware that Colorado law already provides for the imposition of an impact fee in specified circumstances. See, section 29-20-104.5, Colorado Revised Statutes. Have the proponents considered whether and to what extent the statutory provision would be affected by enactment of the proposed initiative?