

# STATE OF COLORADO

## Colorado General Assembly

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### MEMORANDUM

June 2, 2003

**TO:** Jim Brandon and John Berry

**FROM:** Legislative Council Staff and Office of Legislative Legal Services

**SUBJECT:** Proposed initiative measure 2003-2004 #46, concerning the taking by a subdivision of the state of private property of an individual or corporation for sale or lease to other private interests.

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 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 initiative appear to be:

1. To amend the provisions of section 15 of article II of the state constitution to strike language stating that "whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such [sic] to any legislative assertion that the use is public."
2. To amend the provisions of section 15 of article II of the state constitution to add language stating that "no subdivision of the state shall take the private property of an individual or corporation and sell or lease such private property to another private individual, partnership, or corporation for a period of three years after taking such private property."

## Comments and Questions

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

### Technical questions:

1. The relevant clause in section 15 of article II of the state constitution that would be struck by the proposed initiative reads as follows: "[a]nd determined as such *without regard* to any legislative assertion that the use is private." (Emphasis added). The text of the proposed initiative omits the words "without regard". Would the proponents consider adding these words to the text of the proposed initiative so that the text of the proposed initiative accurately and completely reflects the text of the existing language in the state constitution that is being amended?
2. The text of the proposed initiative showing existing language to be struck shows a period mark, i.e., ".", after the word "question" that does not appear in the text of section 15 of article II of the state constitution. Would the proponents consider deleting this period mark so that the text of the proposed initiative accurately reflects the text of the existing language in the state constitution that is being amended?
3. To conform to standard drafting practice in Colorado, would the proponents consider changing the amending clause of the proposed initiative so that it reads as follows: "Section 15 of article II of the constitution of the state of Colorado is amended to read:"?
4. To conform to standard drafting practice in Colorado, would the proponents consider placing the reference in the body of the proposed initiative to "Section 15." in **boldface** type?

Substantive questions:

1. Would the proponents specify:
  - a. The public policy problem the proposed initiative intends to address; and
  - b. How the proposed initiative would solve or ameliorate the problem identified in response to subpart (a) of this question number 1?
2. What is the proponents' intent in deleting from the text of the existing constitutional section language specifying that, in the case of an attempt to take private property for a use alleged to be private, "the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is private"? How does removing this existing language further the proponents' intent as expressed in the new language added to the text of this section?
3. The language to be struck from the existing constitutional section by the proposed initiative appears to require a determination by the judiciary on the question of whether a contemplated use is indeed public. In striking this language, the proposed initiative appears to eliminate a constitutionally protected role for the judiciary in determining the nature of the taking at issue. Is this the proponents' intent? If so, in the absence of at least a constitutionally protected role for the judiciary, how will the question of whether a contemplated use is public or private be determined? May a legislative assertion that a use is public be considered in making such determination?
4. What do the proponents mean by the phrase "subdivision of the state" for purposes of the proposed initiative? For example, is it the proponents' intent that this term have the same meaning as "political subdivision" as defined in section 29-1-202 (2), Colorado Revised Statutes?<sup>1</sup> To eliminate any ambiguity and to provide greater clarity, would the proponents consider clarifying the entities they intend to be encompassed within the meaning of the phrase "subdivision of the state" for purposes of the proposed initiative?
5. How and to what extent does the phrase "subdivision of the state" apply to the government of the state of Colorado such that any department, agency, board, commission, or other entity of state government would be bound by its terms? Would the ability of the state to take property for public use be affected in any manner by the proposed initiative and, if so, how?
6. What do the proponents mean by the term "individual" for purposes of the proposed initiative? For example, section 10-2-103 (3), Colorado Revised Statutes, defines "individual" to mean "any

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<sup>1</sup>Section 29-1-202 (2), C.R.S., defines "political subdivision" to mean "a county, city and county, city, town, service authority, school district, local improvement district, law enforcement authority, city or county housing authority, or water, sanitation, fire protection, metropolitan, irrigation, drainage, or other special district, or any other kind of municipal, quasi-municipal, or public corporation organized pursuant to law."

private or natural person as distinguished from a partnership, corporation, association, or any foreign or domestic entity as defined in section 7-90-102, C.R.S." Do the proponents intend for the term "individual" to have the same meaning as that term is defined in section 10-2-103 (3), Colorado Revised Statutes, or do the proponents intend a different meaning for that term? To eliminate any ambiguity and to provide greater clarity, would the proponents consider clarifying the meaning they are giving to the term "individual" for purposes of the proposed initiative?

7. What do the proponents mean by the term "corporation" for purposes of the proposed initiative? Section 7-90-102 (10), Colorado Revised Statutes, defines "corporation" to mean "a domestic corporation or a foreign corporation except as provided in section 7-113-101 (2)."<sup>2</sup> Do the proponents intend for "corporation" for purposes of the proposed initiative to have the same meaning as that term is defined in section 7-90-102 (10), Colorado Revised Statutes, or do the proponents intend a different meaning for that term? Defining the term as the term is defined for purposes of title 7, Colorado Revised Statutes, would obviously exclude any other form of business entity, such as partnerships, associations, cooperatives, limited liability companies, or any related form of these other business entities. Is this the proponents' intent? To eliminate any ambiguity and to provide greater clarity, would the proponents consider clarifying the meaning they are giving to the term "corporation" for purposes of the proposed initiative?
8. The text of the proposed initiative prohibits a political subdivision of the state from taking the private property of an individual or corporation and selling or leasing such property to another individual, partnership, or corporation. What is the proponents' rationale in excluding partnerships from the list of entities whose property shall not be taken but including partnerships in the list of entities restricted from purchasing or leasing the same property? What is the proponents' rationale in listing partnerships but not other forms of non-corporate business entities, e.g., associations, cooperatives, or limited liability companies? Does partnership include all forms of partnerships, e.g., general partnerships, limited liability partnerships, and limited liability limited partnerships? To eliminate any ambiguity and to provide greater clarity, would the proponents consider clarifying the meaning they are giving to the word "partnership" for purposes of the proposed initiative?
9. What do the proponents mean by the term "taking" for purposes of the proposed initiative? Is it different from the existing language as expressed in section 15 and as such language has been interpreted by the courts? To what extent does action by a public entity that results in damage to the property but that falls short of a physical ouster of the owner from the property constitute a taking for purposes of the proposed initiative?
10. Does "private property of an individual or corporation" mean private property *owned by* an individual or corporation, or do the proponents have some other meaning in mind? What if the

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<sup>2</sup>Section 7-90-102 (12), C.R.S., in turn, defines "domestic corporation" to mean "a corporation incorporated under or subject to the 'Colorado Business Corporation Act,' articles 101 to 117 of this title." Section 7-90-102 (22), C.R.S., defines "foreign corporation" to mean "an entity that is formed under the laws of a jurisdiction other than this state and that is functionally equivalent to a domestic corporation."

individual or corporation has a legal interest in the subject property that is less than a full ownership interest, such as a leasehold, license, or similar interest?

11. Under the proposed initiative, would it be permissible for a subdivision of the state to take the private property of a party that was not "an individual or a corporation"? If so, what is the basis for distinguishing between individuals and corporations on the one hand and all other entities on the other with respect to having their property taken from them? If not, would the proponents consider clarifying the language of the proposed initiative with respect to this issue?
12. Do the proponents intend any special meaning to be ascribed to the terms "sell" and "lease" as used in the proposed initiative, or do the proponents intend for these words to be given their ordinary and common meaning? Under what circumstances are subdivisions of the state typically taking property of one party for sale or lease to another party such as to implicate the provisions of the proposed initiative? Under the proposed initiative, would a subdivision of the state be permitted to trade, license the use of, or simply transfer the subject property to another party as long as the transaction is not a sale or lease?
13. Under the proposed initiative, would it be permissible for a subdivision of the state that has taken the property of an individual or corporation to sell or lease such property to a party that is not a private individual, partnership, or corporation? If so, what is the basis for distinguishing between individuals, partnerships, and corporations on the one hand and all other entities on the other with respect to their ability to purchase or lease property that has been taken? Would the proponents consider clarifying the language of the proposed initiative on this point?
14. Under the proposed initiative, would a subdivision of the state be permitted to sell or lease a portion of the property taken? For example, if a municipality or special district condemned property for a transit station, would it be permitted to lease space to a vendor on the subject property?
15. Under the proposed initiative, is taking private property for sale or lease to another party prior to the termination of the three-year period absolutely prohibited in all circumstances or is such action permissible upon the payment by the "taking" entity of just compensation? If the former, what is the proponents' rationale for prohibiting such a taking even when just compensation is being paid? In such case, would the owner of the subject property be permitted to voluntarily waive this restriction and accept just compensation? If the latter, would the proponents consider clarifying the language of the proposed initiative so that it is understood that such action may still be undertaken upon the payment of just compensation in accordance with the first sentence of section 15?
16. If it is the proponents' intent that taking private property for sale or lease to another party is absolutely prohibited prior to the termination of the three-year period, would the proponents consider beginning the new language with words to the effect of "notwithstanding the provisions of this section, no...." instead of "however, no " to make it more clear that the new language is an

exception to the general requirements of section 15 that a taking is authorized when accompanied by the payment of just compensation?

17. How did the proponents arrive at the three-year figure in connection with the specification of the time bar contained in the text of the proposed initiative? When does the "clock" start running for purposes of the three-year period, e.g., when the taking is commenced, when the taking is completed, or upon the occurrence of some other event?
18. In terms of the taking of private property for sale or lease to another party, what limitations bind the "taking entity" upon the completion of the three-year period?
19. In the new language to section 15 added by the proposed initiative, the reference to "private individual" following a reference to "individual" suggests different meanings for what may be intended to be the same term. Assuming the proponents intend the same meaning for the term "individual" in both places, would the proponents consider a consistent and uniform way of referencing an "individual"?
20. How is the proposed initiative to be enforced and what is the legal effect of property taken in violation of its terms? An injunction against the offending subdivision? Nullification of the sale or lease? Other effects? What person or entity would be responsible for enforcement of its terms?
21. To what transactions would the proposed initiative apply? Specifically, would the proposed initiative apply to any property taken by a subdivision of the state after the effective date of the proposed initiative, or do the proponents have another effective date in mind?