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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 #142, concerning the growth impact fees for new capital construction for political subdivisions that issue residential permits and certificates of occupancy and exceed 4% 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 political subdivisions to collect growth impact fees as defined in this proposed amendment, effective January 1, 2005.
2. To establish that if a political subdivision has exceeded 4% growth in any residential classification in the preceding year per the growth indicator in that growth impact area the political subdivision shall collect a fee as follows: the political subdivision shall increase all fees collected at the time a

residential permit is issued in that residential classification by 25%. This includes water and sewer tap fees, park and recreation fees, traffic impact fees, open space fees, and any other required permit fees that are required to build new capital construction facilities or infrastructure

3. To establish if the growth rate falls below 4% for an entire year then the fees will not apply. If a political subdivision never exceed 4% annual growth per the growth indicator for any growth impact area in that political subdivision then these fees shall not apply.
4. To require these funds be kept in a separate fund and can only be used for new capital construction as defined in this amendment and that these funds cannot be used for political subdivision employee's wages or benefits in any way.
5. To require that these funds cannot be used for renovations or ongoing maintenance.
6. 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).
7. To create definitions.
8. To establish exemptions for small businesses, individual 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.
9. To create the following provisions:
 - a. That the funds shall be held in a separate political subdivision 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. All percentages shall be based on the preceding growth indicator date.
 - b. 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.
 - c. That the political subdivision shall have complete local control to use the funds as designated in this amendment.
 - d. That Growth impact funds can be used with other political subdivision funds for new capital construction. Example would be bond election, sales tax revenues, and certificate of participation (COP).

- e. 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.
 - f. That all projects using these funds must use the Colorado state laws regarding sealed bid procedures.
 - g. These funds shall not be allowed to be spent on any wages or benefits for any political subdivision employee or administration of capital construction for any political subdivision employee.
 - h. That these funds cannot be used to payoff past debt prior to the enactment of this amendment.
 - i. That December 31, 2004, shall be used as the first growth indicator date.
 - j. 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.
 - k. That private donations with no conditions can be contributed to any of these growth impact funds.
 - l. 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.
10. To state that if there is conflict between this proposed amendment and any other constitutional provision this 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 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 ease of clarity and 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. 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?"

8. To conform to standard drafting practice in Colorado, would the proponents consider placing terms to be defined in quotation marks?
9. To conform to standard drafting practice in Colorado, would the proponents consider placing the word "Occupancy" in lower case in the definition of "political subdivision", and the word "Ranchers" in the reference to the exemption for "farmers and ranchers"?
10. Would the proponents consider placing periods at the end of each sentence that ends without a period?
11. 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".
12. Under the first exemption for "small business," would the proponents consider changing "less" to "fewer", and "then" to "than"?
13. 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?
14. To conform to standard drafting practice in Colorado, and to facilitate clarity of expression, in the exemption addressing urban renewal authority 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.
15. For grammatical purposes, would the proponents consider changing the word "developer" in the introductory portion of the exemptions section to "developers"?
16. In the introductory portion of the exemptions section of the proposed initiative, would the proponents consider making the word "individual" plural for grammatical purposes? In that same sentence, to preserve the flow of the sentence for grammatical purposes, would the proponents consider substituting the phrase "individuals or businesses who replace existing residential units" for the existing language "replacement of existing residential units"?
17. In the 6th 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 phrase so that it reads "bond proceeds, sales tax revenues, 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 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 13th 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 this bullet point 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"?

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 the first 2 paragraphs on the first page of the proposed initiative:
 - a. What does it mean for a political subdivision to have exceeded 4% growth in any residential classification over the preceding year? Are the proponents referring to the growth in the construction of a particular form of residential classification within the boundaries of the political subdivision in that period of time or some other unit of measurement?

- 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 4%. 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? If, for example, the number of new units as of December 31, 2004, in a certain political subdivision is 100,000, and 5,000 new units are approved during the following year, will the first 4,000 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 4% 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 4%, or as soon as the growth rate meets that figure in a given year? Would the proponents consider clarifying their intent with respect to this issue?
 - d. The proposed fee appears to be stated as an increase in the amount of "all fees collected at the time a residential permit is issued". Does the proposed initiative require fees to be collected? Can the amount of existing fees be reduced or eliminated?
 - e. How is the fee levied? Who pays the fee? How does the political subdivision collect the fee? When is the fee collected?
 - f. What is the meaning of the phrase "residential permit" referenced in the second paragraph of the first page of the proposed initiative?
 - g. 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?
 - h. What do the proponents mean by the phrase "all fees collected at the time a residential permit is issued in that residential classification by 25%"? What is the basis for the 25% figure by which such fees shall be increased? What is the proponents' rationale for increasing all such fees by 25% whenever the 4% trigger has been reached?
 - i. How did the proponents arrive at the figure of 4% used to trigger the imposition of the impact fee?
 - j. Are the 25% increased cumulative? If, for example, growth exceeds 25% for four years in a row, are the fees increased by 100%?
5. Paragraph three of the first page of the proposed initiative states that if the growth rate falls below 4% 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, 50 new

units are added. The 25% fee increase goes into effect because the growth rate exceeds 4%. In 2006, no new units are built. Because the growth rate fell below 4% 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?

6. With respect to the fourth 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 political subdivision maintains a separate fund of each fee it collects or that all fees collected by all political subdivisions are placed in a separate fund? Would the proponents consider clarifying their intent with respect to this provision?
 - b. What does the phrase "new capital construction" 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 "school district wages or benefits"? What is the proponents' intent in including this requirement in the text of the proposed initiative?
 - d. Please explain what proponents mean by "renovations or ongoing maintenance"? How would a project that involved a mixture of capital construction and renovations be treated under the proposed initiative? What is the proponents' intent in including this requirement in the text of the proposed initiative?
7. With respect to sixth 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 initiative nullify or preempt? Would the proponents consider clarifying their intent with respect to this issue?
8. 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?
9. 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?

10. 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?
11. 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? What do the proponents mean by "large developer[s]" or builders? 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 4% increase calculation?
12. 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?

13. 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?
14. 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?
15. 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. With respect to the 4th bullet point under this section, what do the proponents mean by the phrase "[t]he political subdivision 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?
16. 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?