

# STATE OF COLORADO

## Colorado General Assembly

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### MEMORANDUM

March 18, 2004

**TO:** Mark Cavanaugh and Brenda Morrison

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

**SUBJECT:** Proposed initiative measure 2003-2004 #105, concerning state fiscal emergencies.

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 article X of the Colorado constitution, effective January 1, 2005, by adding a new section 21 titled "Response to fiscal emergencies";
2. To declare that:
  - a. The elected representatives of the people of the state of Colorado have been unable to adequately respond to fiscal emergencies in recent years due to inflexible constitutional restrictions and mandates relating to the use of state revenue.

- b. These constraints and demands on state revenue are integrally related.
  - c. The elected representatives of the people of the state of Colorado should be authorized to suspend those related provisions of law that prevent a reasonable response to fiscal emergencies so as to avoid crises in the provision of needed governmental services.
3. To allow a state fiscal emergency to be declared pursuant to the new section 21 by a three-fifths vote of each house of the General Assembly and with the approval of the Governor and to allow a local district fiscal emergency to be declared by a three-fifths vote of the governing body of the district;
  4. Upon the declaration of a state or district fiscal emergency, to suspend the state or district spending limits and refund provisions contained in TABOR for the governmental entity making the declaration for the length of time specified in the declaration of the emergency, but not to exceed three consecutive fiscal years beginning in the fiscal year in which the declaration of the emergency is made;
  5. Upon the declaration of a state fiscal emergency, to suspend up to one-half of the state spending required by section 17 (1) of article IX of the Colorado constitution for the length of time specified in the declaration of the emergency, but not to exceed three consecutive fiscal years beginning in the fiscal year in which the declaration of the emergency is made;
  6. To allow a fiscal emergency to be declared during or after the last year of a previously declared fiscal emergency notwithstanding any provision of law;
  7. To define the term "district" as any local government, excluding enterprises as defined in section 20 (2) (d) of article X of the Colorado constitution;
  8. To define the term "fiscal emergency" as:
    - a. After adjustment for the state or district population growth and inflation, reduction in the total tax revenues that are collected by the state or a district in a complete fiscal year when compared to the total state or district tax revenues that were collected by the state or the district during the previous fiscal year;
    - b. A natural or man-made disaster that places unanticipated demands on state or district revenues; or
    - c. As applicable, a determination that, notwithstanding any provision of law:
      - i. The application of the state spending limit and refund provisions contained in TABOR and in section 17 (1) of article IX of the Colorado constitution would significantly impair the ability of the state to provide needed existing services; or

- ii. The application of the local district spending limit and refund provisions contained in TABOR would significantly impair the ability of a district to provide needed, existing services.
9. To define the phrase "state or district spending limit and refund provisions contained in TABOR" as the limits described in the fourth sentence of subsection (1) of article X, section 20 of the Colorado constitution and paragraph (a) or (b), as applicable, and the first sentence of paragraph (d) of subsection (7) of article X, section 20 of the Colorado constitution.

### Comments and Questions

The form and substance of the proposed initiative 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:
  - a. Modify the amending clause of the proposed initiative so that it states: "Article X of the constitution of the state of Colorado is amended BY THE ADDITION OF A NEW SECTION to read:"?
  - b. Show the headnote to the new section 21 without using "LARGE AND SMALL CAPITAL LETTERS" so that it appears as follows: **"Response to fiscal emergencies."**?
  - c. Insert the words "OF THIS SECTION" after "(4)" on the last line of paragraph (a) of subsection (2) of the proposed initiative and after "(3)" on the fourth line of subsection (4) of the proposed initiative?
  - d. Replace the second "THE" on the second line of subsection (4) of the proposed initiative with "THIS"?
  - e. Capitalize the first word of each paragraph and subparagraph of subsection (6) of the proposed initiative (e.g., "DISTRICT" rather than "district")?
  - f. Replace the phrase "PARAGRAPH (d) OF SUBSECTION (2) OF ARTICLE X, SECTION 20 OF THE COLORADO CONSTITUTION." with the phrase "SECTION 20 (2) (d) OF THIS ARTICLE." in paragraph (a) of subsection (6) of the proposed initiative?
  - g. Replace "(b)" with "(c)" to begin the paragraph in subsection (6) of the proposed initiative that defines the phrase "STATE OR DISTRICT SPENDING LIMIT AND REFUND PROVISIONS CONTAINED IN TABOR" and replace the phrase "THE COLORADO" with the word "THIS"

on the third, fourth, fifth, and sixth lines of that paragraph?

- h. Replace the phrase "SUBSECTION (1) OF ARTICLE X, SECTION 20" with "SUBSECTION (1) OF SECTION 20 OF ARTICLE X" on the second line of paragraph (b) of subsection (6) of the proposed initiative?
  - i. Replace the phrase "SUBSECTION (7) OF ARTICLE X, SECTION 20" with "SUBSECTION (7) OF SECTION 20 OF ARTICLE X" on the third and fourth lines of paragraph (b) of subsection (6) of the proposed initiative?
  - j. Replace "SUBSECTION (7) OF ARTICLE X, SECTION 20" with "SUBSECTION (7) OF SECTION 20 OF ARTICLE X" on the fifth line of paragraph (b) of subsection (6) of the proposed initiative?
- 2. Would the proponents replace the word "FORTH" with the word "FOURTH" on the second line of the second paragraph (b) of subsection (6) of the proposed initiative?
  - 3. Would the proponents capitalize "TABOR" in a consistent manner throughout the proposed initiative?
  - 4. Would the proponents remove the comma after the word "NEEDED" on the third line of sub-subparagraph (A) and the last line of sub-subparagraph (B) of subparagraph (III) of the first paragraph (b) of subsection (6) of the proposed initiative?

Substantive questions:

- 1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
- 2. With respect to subsection (1) of the proposed initiative:
  - a. Which "inflexible constitutional restrictions and mandates relating to the use of state revenue are being referenced?
  - b. Subsection (1) first references "restrictions and mandates" and subsequently references "constraints and demands". Are these two phrases referring to the same constitutional provisions?
  - c. Since the proposed initiative applies to both state and district fiscal emergencies, should the word "state" be removed from or, alternatively, be replaced with the phrase "state or district" on the fourth and fifth lines of subsection (1)?
- 3. With respect to paragraph (b) of subsection (2) of the proposed initiative:

- a. Is the governing body of a district, the district's main legislative body?
  - b. Do the proponents intend to exclude the chief executive officer of a district from having any role in the declaration of a district emergency?
4. Subsection (3) of the proposed initiative does not appear to allow a district that declares a fiscal emergency to suspend the constitutional limitation on district property tax revenue growth contained in section 20 (7) (c) of article X of the Colorado constitution. Is this the proponents' intent, and, if so, are there circumstances in which the limitation on property tax revenue growth might impair a district's ability to respond to a declared fiscal emergency even if the constitutional limitation on the district's fiscal year spending is suspended upon the declaration of a district fiscal emergency?
5. With respect to subsection (3) of the proposed initiative:
- a. What does it mean to "suspend" the spending limit for the period set forth in the fiscal emergency declaration? Does it mean that the state can retain and expend any revenues brought in during each of the fiscal years in the declaration? How is the spending limit calculated after the end of the suspension?
  - b. Section (7) (d) of TABOR requires excess revenues from one fiscal year to be refunded in the next fiscal year. Subsection (3) of the proposed initiative suspends the "refund provisions contained in TABOR" upon declaration of a fiscal emergency. If a fiscal emergency is declared for a given fiscal year, is any obligation to refund excess revenues for the prior fiscal year suspended, or only refund obligations that might arise from fiscal years for which the fiscal emergency is declared? Is any such suspension permanent? If it is temporary, would such revenues be required to be refunded after the suspension period?
  - c. If the qualifications for a fiscal emergency are met for one fiscal year, can an emergency be declared for up to three consecutive fiscal years even if the qualifications are not met for the second and/or third fiscal years?
6. With respect to subsection (4) of the proposed initiative:
- a. This subsection specifies that the general assembly shall suspend up to one half of the spending required for public education. Does this mean that the General Assembly has the authority to choose the amount to be suspended? For example, could the General Assembly choose to suspend anywhere from one dollar up to one half of the amount required in the constitution? If the amount to be suspended is, in effect, discretionary, would the proponents consider changing the word "shall" to "may"?
  - b. What spending is to be suspended? Per pupil funding? Funding for all categorical programs? Deposits of state income tax revenues to the state education fund? The

maintenance of effort provisions relating to general fund appropriations?

7. With respect to subsection (4) of the proposed initiative, would the declaration of a state fiscal emergency allow or require the General Assembly to make negative supplemental appropriations in the fiscal year in which the fiscal emergency is declared to reduce amounts of moneys previously appropriated to school districts to satisfy the funding requirements of section 17 (1) of article IX of the Colorado constitution? If so:
  - a. What would happen if a school district had already expended the moneys previously appropriated?
  - b. If the General Assembly took back previously appropriated moneys from school districts that had not already spent them, but not from other school districts that had already spent those moneys, would the requirement of section 2 of article IX of the Colorado constitution that the General Assembly provide a "thorough and uniform system of free public schools throughout the state" be violated.
8. Would subsection (5) of the proposed initiative allow the General Assembly and the Governor to declare an uninterrupted series of state fiscal emergencies or allow the governing body of a district to declare an uninterrupted series of district fiscal emergencies that would, as a practical matter, constitute a single state or district fiscal emergency of unlimited duration?
9. With respect to subsection (6) of the proposed initiative:
  - a. Would at least one of the three situations that constitute a fiscal emergency, as defined in subsection (6), have to occur before the General Assembly and the Governor could declare a state fiscal emergency or the governing body of a local district could declare a district fiscal emergency pursuant to subsection (2) of the proposed initiative? If so, would the General Assembly and the Governor, or the local governing body of the district, have to specifically declare which situation or combination of situations has occurred when declaring a fiscal emergency?
  - b. Does the phrase "total tax revenues":
    - i. Include all revenues generated by taxes imposed by the state or a district including:
      - A. Revenues in excess of the TABOR state or district fiscal year spending limit that are required to be refunded under current law?
      - B. In the case of the state, revenues of taxes imposed by the state that are not used for state purposes such as gasoline and special fuel tax revenues that are credited to the highway users tax fund and allocated to counties and municipalities?

- ii. Include revenues from sources other than taxes such as fees, interest on the investment of state or district moneys, property sales, and gifts?
  - iii. Include federal moneys received by the state or a district that another government, such as the federal government, originally obtained through the imposition of the other government's taxes?
- c. Concerning the phrase "adjustment for the state or district population growth and inflation":
- i. What are the meanings of the terms "population growth" and "inflation"?
  - ii. How and for what period are population growth and inflation to be calculated for purposes of making an adjustment?
  - iii. Could revisions in measurements of population growth and inflation affect implementation of the proposed initiative or the state or a district's powers or obligations as specified in the proposed initiative?
  - iv. How does "adjustment for the state or district population growth and inflation" affect the determination of whether there is a reduction in total tax revenues? Would total tax revenues be deemed to have been reduced in any fiscal year in which they did not increase by a percentage equal to population growth plus inflation? Would population growth and inflation be used to calculate tax revenues on a per capita basis to determine whether there is a decrease?
  - v. Is data on district population growth currently collected on an annual basis? If not, who would be responsible for collecting that data? How would the cost of paying for the collection of that data be paid?
- d. If a disaster, such as a major forest fire, is a reasonably foreseeable result of observable conditions, such as several years of drought conditions, and the resulting demands on state or district revenues therefore are anticipated or should have been anticipated, may the General Assembly and the Governor or the governing body of a district declare a fiscal emergency in order to address the disaster?
- e. Concerning the phrases "significantly impair the ability of the state to provide needed, existing services" and "significantly impair the ability of that local district to provide needed, existing services":
- i. Does the General Assembly or the governing body of a district determine whether the ability of the state or the district to provide needed existing services has been significantly impaired? In the case of the state, does the General Assembly make the determination in conjunction with the Governor?
  - ii. What are "needed, existing services"? Are new cases above existing case loads

for existing public assistance programs "existing services"?

- iii. Does this phrase place any real limit on the ability of the General Assembly and the Governor to declare a state fiscal emergency or the ability of the governing body of a district to declare a district fiscal emergency?
  
- f. In the second paragraph (b) of subsection (6) of the proposed initiative, is it the proponents' intent to exclude the constitutional limitation on district property tax revenue growth contained in section 20 (7) (c) of article X of the Colorado constitution from the definition of "state or district spending limit and refund provisions contained in TABOR"?