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MEMORANDUM

February 3, 2004

TO: Pete Maysmith and Lorie Young

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2003-2004 #84 and #85, concerning the Colorado Fair Redistricting Act

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the 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. This memorandum contains our comments to you regarding the appended proposed initiative.

The purpose of this statutory review and comment requirement is to assist proponents in determining the language of their proposal and to make the public aware 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.

An earlier version of this proposed initiative, 2003-2004 #75, was the subject of a memorandum dated January 5, 2004, and was discussed at a public meeting on January 6, 2004. The questions and comments in this memorandum do not duplicate the comments and questions that were addressed at the earlier meeting, except when necessary to address issues in the revised measure. However, the comments and questions that have not been addressed by changes in the proposal continue to be relevant and are incorporated by reference into this memorandum. For convenience, changes to the "Purposes" section as a result of the revision of the proposed measure are shown in double underlined type.

The questions and comments in this memorandum refer to both proposed measures #84 and #85, except where specifically noted.

Purposes

The major purposes of the proposed amendment appear to be:

1. To amend the provisions of the state constitution on the division of the state into congressional districts in order to transfer the power to divide the state into congressional districts from the general assembly to a fair redistricting commission (commission);
2. To make a declaration of the purposes and rationale of the proposed measure;
3. To require that congressional districts be as equal in population as possible and that the deviation in population among the districts be as low as practicable;
4. To prohibit consideration of the location of the residence of any candidate for or incumbent member of congress or the general assembly in the drawing of congressional and state legislative districts;
5. To state that the plan for dividing the state into congressional and state legislative districts shall comply with all federal laws governing redistricting;
6. To apply to congressional redistricting the same criteria of compactness, contiguity, preservation of local government boundaries, and communities of interest that currently apply to state legislative districts; to add as a new criterion for both congressional and state legislative redistricting the requirement that districts be competitive to the extent practicable; and to state that the criteria shall be applied to the maximum extent practicable and in the order in which they are listed;
7. To state that congressional and state legislative districts shall be drawn once every ten years, after each federal census;
8. To transform the existing Colorado reapportionment commission into the Colorado fair redistricting commission; and to specify that the commission shall have seven members: Four appointed by the legislative department, two selected by lot, and one selected by the members of the commission;
9. To state that members of the commission shall be qualified electors of the state of Colorado who voted in at least one of the last two general elections in which they were eligible to vote;
10. To specify the following regarding the two members of the commission to be selected by lot:
 - a. The secretary of state shall conduct an open application process.
 - b. i. Under proposed measure #84, the secretary of state shall forward the names and biographical information of all qualified applicants to the chief justice of the state supreme court, and the chief justice shall select from all qualified applicants a pool

of at least six applicants who can, in the chief justice's judgment, bring fairness and balance to the commission.

ii. Under proposed measure #85, the secretary of state shall forward the names and biographical information of all qualified applicants to the director of the office of legislative council, and the director shall select from all qualified applicants a pool of at least six applicants who can, in the director's judgment, bring fairness and balance to the commission.

- c. No later than February 15 of the year after the year in which a federal census is taken, the secretary of state shall select two members of the commission by lot from the pool of applicants determined by the chief justice (#84) or the director (#85).
 - d. Each of the two members selected by lot shall be a registered Colorado voter who has been unaffiliated with any political party for at least three years before appointment to the commission.
11. To specify the following regarding the members of the commission appointed by the legislative department:
- a. The speaker of the house of representatives, the house minority leader, the president of the senate, and the senate minority leader, in that order, shall each appoint one member between February 16 and February 25 of the year after the year in which a federal census is taken.
 - b. Each of the four legislative appointees shall be a registered Colorado voter who has been continuously registered with the same political party for the three years before appointment to the commission.
12. To specify the following regarding the seventh member of the commission:
- a. The seventh member shall be appointed by a vote of at least five of the six previously appointed members by March 31 of the year following the federal census.
 - b. The seventh member shall be a registered Colorado voter who has not been affiliated with any political party already represented on the commission in the three years before appointment to the commission.
13. To specify that no more than two commission members shall be affiliated with the same political party;
14. To specify that no more than one member shall be appointed from any congressional district; except that if Colorado has fewer than seven congressional districts, each congressional district

shall be represented on the commission and up to two members may be appointed from a congressional district;

15. To specify that no person shall be appointed to the commission who currently holds elective office in Colorado or has within the previous three years been appointed to, elected to, or a candidate for any elected public office, _____ served as an officer or employee of a political party, or served as a registered paid lobbyist;
16. To state that during the term of office and for three years thereafter, a member shall be ineligible for elected public office in Colorado or for registration as a paid lobbyist;
17. To state that all existing provisions regarding the timeline and supreme court approval for the reapportionment of the members of the general assembly shall also apply to the redrawing of congressional districts;
18. To require the commission to convene, appoint the seventh member, and elect its officers no later than March 31 of the year of the appointment of its members;
19. To state that if the commission fails to submit an agreed upon plan, the state supreme court shall adopt a plan in accordance with all the constitutional criteria for drawing districts no later than fifty-five days prior to the date established in statute for the event commencing the candidate selection process in such year;
20. To state that if an agreed upon plan is challenged in court, the state supreme court shall have original jurisdiction and discretion to establish a procedure to dispose of the matter promptly, consistent with the rights of the parties, either affirming the commission's action or reversing it, in which case the court shall remand the plan to the commission with instructions indicating the commission's errors in preparing the plan;
21. To specify that five commissioners, including the chair or vice-chair, constitute a quorum and that five or more votes are required for any official action;
22. To state that where a quorum is present, the commission shall conduct business in meetings open to the public with at least seventy-two hours notice;
23. To require the commission to hold at least one public hearing in each congressional district on its proposed plan, allowing for comments and questions from the public; and to specify _____ that each public hearing shall be publicized at least two weeks in advance;
24. To require the commission to make redistricting data and mapmaking tools available to the public in at least one location in each congressional district and to allow the public and the general assembly to submit redistricting maps, recommendations, and inquiries;

25. To require the general assembly to appropriate sufficient funds for the compensation and payment of the expenses of the commission members and any staff employed by it and for fees and expenses incurred by the commission in the event of a legal challenge to its plan;
26. To state that the commission shall have access to statistical information compiled by the state or its political subdivisions and computer software necessary for its reapportionment duties;
27. To state that if any provision of sections 44 to 48 of article V of the state constitution or the application thereof to any person or circumstances is held invalid, the remaining provisions of the article that can be given effect without the invalid provision shall remain in effect, and to declare that sections 44 to 48 of article V are severable.

Comments and Questions

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

Technical questions:

1. The amending clause of the proposed measure states that section 48 of article V of the state constitution is amended. This implies that all of section 48 is being amended, so if subsection (1) (e) of that section is not included in the proposed measure, it may be considered to be deleted by amendment. In addition, the amending clause states that new sections are added to article V, when in fact the proposed measure adds only one new section. The proposed measure uses the enacting clause we recommended in our previous memo, but this language is no longer appropriate since section 48 (1) (e) and some new sections have been removed from the proposed measure. Would the proponents consider using two amending clauses? The first amending clause would be at the beginning of the proposed measure as follows:

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

Sections 44, 46, 47, and 48 (1) (a), (1) (b), (1) (c), (1) (d), and (1) (f) of article V of the constitution of the state of Colorado are amended, and the said section 48 (1) is further amended BY THE ADDITION OF THE FOLLOWING NEW PARAGRAPHS, to read:

The second amending clause would be near the end of the proposed measure, just before the new section 51:

Article V of the constitution of the state of Colorado is further amended
BY THE ADDITION OF A NEW SECTION to read:

2. In standard drafting style, section headings are not shown in small capitals. Would the proponents

consider setting forth the heading of section 44 in lower case ("**Section 44. Fair political representation.**")?

3. In the heading of section 46, the word "Senatorial" is still capitalized even though it is no longer the first word of the heading. Would the proponents consider correcting this typographical error?
4. In proposed measure #85, section 48 (1) (b) refers to the "DIRECTOR OF THE OFFICE OF LEGISLATIVE COUNCIL". To use the official name of this position, would the proponents consider changing this to "DIRECTOR OF RESEARCH OF THE LEGISLATIVE COUNCIL" (see section 2-3-304, C.R.S.)?
5. In section 48 (1) (c), the sentence beginning "NO PERSON SHALL BE APPOINTED TO THE COMMISSION . . ." appears to contain an unintended double negative. The relevant portion of the sentence reads: "NO PERSON SHALL BE APPOINTED TO THE COMMISSION WHO . . . SHALL NOT HAVE SERVED AS AN OFFICER OR EMPLOYEE OF A POLITICAL PARTY . . ." Would the proponents consider rewording this sentence as follows: "NO PERSON SHALL BE APPOINTED TO THE COMMISSION WHO CURRENTLY HOLDS ELECTED OFFICE IN THE STATE OF COLORADO OR WHO HAS WITHIN THE PREVIOUS THREE YEARS BEEN APPOINTED TO, ELECTED TO, OR A CANDIDATE FOR ANY ELECTED PUBLIC OFFICE OR SERVED AS AN OFFICER OR EMPLOYEE OF A POLITICAL PARTY OR AS A REGISTERED PAID LOBBYIST."?
6. In standard drafting style, an internal reference to another subsection of the same section need only refer to the other subsection and not to the entire section. Would the proponents consider following this practice in section 47 (4) ("NOTWITHSTANDING SUBSECTION (2) OF THIS SECTION, COUNTIES MAY ALSO BE DIVIDED IN ORDER TO CREATE COMPETITIVE DISTRICTS AS LONG AS SUCH DIVISION IS CONSISTENT WITH SUBSECTION (3) OF THIS SECTION.") and section 48 (1) (f) (" . . . MEMBERS OF THE GENERAL ASSEMBLY AS SET FORTH IN PARAGRAPH (e) OF THIS SUBSECTION (1) . . .")?
7. In section 48 (1) (h), would the proponents consider hyphenating the number "SEVENTY TWO" ("SEVENTY-TWO")?
8. In section 48 (1) (i), the word "AT" is still capitalized even though it is no longer the first word in the sentence. Would the proponents consider correcting this error?
9. "General assembly" is capitalized in section 48 (1) (j) but not in section 48 (1) (k). Would the proponents consider changing the reference in section 48 (1) (j) to "GENERAL ASSEMBLY" to be consistent?
10. To clarify the use of singular and plural, would the proponents consider rewording section 51 as follows:

IF ANY PROVISION OF SECTION 44, 45, 46, 47, OR 48 OF THIS ARTICLE OR THE

APPLICATION THEREOF TO ANY PERSON OR CIRCUMSTANCE IS HELD INVALID, SUCH INVALIDITY SHALL NOT AFFECT OTHER PROVISIONS OR APPLICATIONS OF SECTIONS 44, 45, 46, 47, AND 48 OF THIS ARTICLE THAT CAN BE GIVEN EFFECT WITHOUT THE INVALID PROVISION OR APPLICATION, AND TO THIS END THE PROVISIONS OF SECTIONS 44, 45, 46, 47, AND 48 OF THIS ARTICLE ARE DECLARED TO BE SEVERABLE.

11. Would the proponents consider capitalizing the first letter of the first sentence in section 47 (4) ("TO THE EXTENT PRACTICABLE . . .") and the third and sixth sentences of section 48 (1) (c) ("NO MORE THAN ONE . . ." and "DURING THE MEMBER'S . . .")?

Substantive questions:

1. Section 46 prohibits the fair redistricting commission from considering the "PRIMARY LEGAL RESIDENCE" of any candidate for office, incumbent legislator, or incumbent member of congress when preparing its redistricting plan. What does "primary legal residence" mean? Does this term imply that a person can have more than one legal residence, with one of them being the primary legal residence? Colorado's constitution and statutes generally refer simply to a person's "residence" for purposes of voting and running for office. See, for example, section 4 of article V of the state constitution. The state election code, in section 1-1-104 (43), C.R.S., defines residence as "the principle or primary home or place of abode of a person", implying that a person has only one residence and that the person's primary home is his or her residence. To clarify the proposed measure, would the proponents consider changing "PRIMARY LEGAL RESIDENCE" to "LEGAL RESIDENCE" or simply "RESIDENCE"?
2. Under proposed measure #85, the director of research of the legislative council, rather than the chief justice of the state supreme court as in proposal #84, would select the pool of applicants for the fair redistricting commission to be selected by lot. What is the purpose of this change? The director of research is an employee of the general assembly who is appointed without reference to party affiliation and serves in a nonpartisan capacity. Is it the proponents' intent that the director would select applicants on a nonpartisan basis? Would the director have the authority to determine the manner and basis for selecting applicants that, in the director's judgment, are able to bring fairness and balance to the commission? Could the general assembly enact laws or rules governing the selection process? Could members of the general assembly otherwise attempt to influence the decision of the director?
3. Section 48 (1) (g) of the proposed measure refers to "THE DATE ESTABLISHED IN STATUTE FOR THE EVENT COMMENCING THE CANDIDATE SELECTION PROCESS IN SUCH YEAR". To what event or events does this refer? Would it clarify the intent of the proposed measure to refer specifically to the general election in that year, to avoid possibly implicating the candidate selection process for special district or primary elections?

4. In this version of the proposed measure, the general assembly has the opportunity to submit maps, recommendations, and inquiries to the fair redistricting commission. What is the purpose of this addition to the proposal? Would the general assembly have to act by bill or resolution to submit a map, recommendation, or inquiry? Would individual members of the general assembly, groups of members, committees, party caucuses, or the separate houses be allowed to make submissions pursuant to this provision?