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MEMORANDUM

April 3, 2012

TO: Corrine Fowler, Stephen Brunette, and Miriam Pena

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2011-2012 #84, concerning foreclosure due process and fraud prevention

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 purpose of the proposed amendment to the Colorado constitution appears to be to prohibit the commencement of foreclosure proceedings until the party claiming the right to foreclose in the foreclosure proceedings files competent evidence of its right to foreclose with the clerk and recorder of the county in which the real property is located.

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment

meeting. Please consider revising the proposed initiative as suggested below.

1. Do you intend Miriam Pena to be listed as a proponent of the proposed initiative? She is not listed on the initiative.
2. Article V, section 1 (8) of the Colorado constitution requires that the following enacting clause be the style for all laws adopted by the initiative: "Be it Enacted by the People of the State of Colorado". To comply with this constitutional requirement, this phrase should be added to the beginning of the proposed initiative.
3. Each constitutional section being amended, repealed, or added is preceded by a separate amending clause explaining how the law is being changed. For example, your current amending clause should be changed to "In the constitution of the state of Colorado, **add** section 25a to article II as follows:".
4. It is standard drafting practice to insert a left tab, not a hard indent, at the beginning of the first line of each new section, subsection, paragraph, or subparagraph, including amending clauses and section headings.
5. Each section in the Colorado constitution has a headnote. Headnotes should briefly describe the contents of the section, should follow the section number, should be in bold-faced type, and should be in lower case letters. The headnote in the proposed initiative could read:

Section 25a. Foreclosure due process - fraud prevention.

6. It is standard drafting practice to use small capital letters [rather than ALL CAPS] to show the language being added to the Colorado constitution. For example, the first sentence would begin "NO PERSON SHALL BE..."
7. Constitutional provisions are often divided into subsections, paragraphs, subparagraphs, and sub-subparagraphs, for ease of reading. It is standard drafting practice to divide lists into different subsections and paragraphs on different lines and initial cap the first word in each subsection. The designation of a list begins with a colon and each item in the list is separated by a semi-colon. For example:
 - (1) NO PERSON SHALL BE... INCLUDE:
 - (a) THE... DEBT;
 - (b) ENDORSEMENTS... PARTY; AND
 - (c) DULY ... PARTY.
 - (2) ANY STATUTES...SECTION.
8. It is standard drafting practice to make sentences as reader friendly as possible by locating verbs directly before adjectives and nouns. For example, line 2 should read "CLAIMING THE RIGHT TO FORECLOSE IN THE FORECLOSURE PROCEEDING FILES COMPETENT EVIDENCE OF".
9. "In accord" means to be in agreement, while "in accordance" means to be in compliance. It

is standard drafting practice to use "in accordance" when determining whether something is in compliance with a particular section of the Colorado constitution (line 5).

10. It is standard drafting practice when citing the Colorado constitution to format citations to read "section __ of article __ of this constitution". For example, the citation on line 5 should read "SECTION 8 OF ARTICLE XIV OF THIS CONSTITUTION."
11. Sentences should generally be stated in the present tense. The second sentence should read: "Competent evidence includes:...."
12. When providing an internal reference to the section of the Colorado constitution that is being amended, repealed, or added, it is standard drafting practice to refer to it as "this section/subsection/paragraph". For example, the reference on lines 8 and 9 should read "ANY STATUTES INCONSISTENT WITH THIS SECTION...".
13. It is standard drafting practice to capitalize only proper nouns. For example, the end of line 9 should read "SECTION." (not initial capped).

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. What is the single subject of the proposed initiative?
2. What is the purpose of the reference to section 8 of article XIV of the Colorado constitution on line 5? This section only deals with the election and salaries of county officials, not the functions or duties of their office. Therefore, it is not necessary to say "in accordance with" in the preceding part of the sentence as no standard procedures regarding filing documents with a county clerk or recorder are described in that particular section of the Colorado constitution.
3. Section 38-38-102 (6) (b), Colorado Revised Statutes, allows a holder of an evidence of debt to foreclose on real property under a deed of trust, even if the holder's interest is based on an assignment from the original lender and the assignment or other intermediate documents are not produced, by providing a statement from the holder's attorney that the holder's interest in the property is valid. Is it your intent for the proposed initiative to replace this section of the law?
4. In order to repeal sections of the Colorado Revised Statutes that are in conflict with a proposed constitutional amendment (lines 8 and 9), it is standard drafting practice to make conforming amendments for all possible conflicts. This entails amending or repealing each section of the Colorado Revised Statutes that may be in conflict with your addition to the Colorado constitution. Are you aware of any other sections of the Colorado Revised Statutes that may be in conflict with your addition?

5. What will be the effective date of the proposed initiative (line 9)?
6. As a change to the Colorado constitution, the proposed initiative may be amended only by a subsequent amendment to the constitution. Is this your intention?