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MEMORANDUM

April 2, 2014

TO: Vickie Armstrong and Bob Hagedorn

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2013-2014 #135, concerning Horse Racetrack Limited Gaming Proceeds for K-12 Education

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.

This initiative was submitted along with proposed initiative 2013-2014 #134. The comments and questions raised in this memorandum will not include comments and questions that were addressed in the memoranda for proposed initiative 2013-2014 #134, except as necessary to fully understand the issues raised by the revised proposed initiative. Comments and questions addressed in the other memorandum may also be relevant, and those questions and comments are hereby incorporated by reference in this memorandum.

An earlier version of this proposed initiative, proposed initiative 2013-2014 #81, was the subject of a memorandum dated March 5, 2014. Proposed initiative 2013-

2014 #81 was discussed at a public meeting on March 7, 2014. The comments and questions raised in this memorandum will not include comments and questions that were addressed at the earlier meeting, except as necessary to fully understand the issues raised by the revised proposed initiative. However, the prior comments and questions that are not restated here continue to be relevant and are hereby incorporated by reference in this memorandum.

Purposes

The major purposes of the proposed amendment to the **Colorado constitution** appear to be:

1. To establish the K-12 education fund for the purpose of providing additional revenue to address local educational needs;
2. To expand limited gaming to a single horse racetrack in each of the counties of Arapahoe, Mesa, and Pueblo; and
3. To deposit the additional revenues generated by the expansion of limited gaming in the K-12 education fund.

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. Each section in the Colorado constitution has a headnote. Headnotes briefly describe the content of the section. The headnote for the section might list multiple items to alert the reader about all subjects in the section. In these instances, the different items should be separated by a dash with a space on either side. The headnote for proposed section 17 should also include information about the expansion of limited gaming and rule-making power being delegated to the Colorado limited gaming control commission. For example: "**Section 17. K-12 education fund – horse racetrack limited gaming – rules.**"
2. Use active voice instead of passive voice, wherever possible. Active voice establishes who performs an action and eliminates confusion. For example, in the original sentences below, no person was identified as performing the actions specified:

- a. Paragraph (d) of subsection (3) is in passive voice. To change it to active voice, write "*The state treasurer shall set aside, allocate, allot, and continuously appropriate all moneys in the K-12 fund for distribution in accordance with this section.*"
3. When citing provisions with the Colorado constitution, it is standard drafting practice to refer to "the Colorado constitution" or "the state constitution" rather than "this constitution."
4. It is considered a better practice for statutory or constitutional language to be in the present tense. Although a provision is in the future when it is being considered for passage, it is applied in the present tense. Avoiding the future tense avoids the implication that the statute contemplates a timing element. In subsection (4), would the proponents consider replacing the phrase "will be" with "are" or rewriting the sentence to the active voice?
5. Subsection (6) lists a requirements for certain rules. The requirements are imposed using "shall." This word should not be used unless the word can logically be replaced with the phrase "has a duty to" or "have a duty to." Violation of a duty usually imposes legal consequences such as fines or damages. The rules cannot suffer these consequences. So this use of the word "shall" creates ambiguities about the legal consequences of a compliance failure and ambiguities about which actors are affected by the failure. For example, does a failure to comply mean that the rules are void? Would the proponents consider changing the word "shall" to the word "must" and specifying the legal consequences of the rules not meeting these requirements?
6. It is standard drafting practice to use the word "that" instead of "which" when indicating a restrictive (essential) clause. In other words, when the word, clause, or phrase following the word "that" is necessary to the meaning of the sentence, use "that." If the text is simply additional or descriptive information, use "which" and place a comma before it. In the second line of paragraph (f) of subsection (9), the word "which" should be changed to "that."

Substantive Comments and Questions

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

1. Paragraph (d) of subsection (2) requires the school district and the state charter school institute to use money from the K-12 fund "to improve the

education of the children in Colorado public schools by....” What if they use the money for other purposes? Would they have to suffer any consequences?

2. Paragraph (e) of subsection (2) requires an annual audit of the K-12 fund. The average cost for a performance audit is about \$175,000. Currently, it takes about ten months to complete a performance audit. That leaves two months between audits. Typically, it takes longer than two months to implement the audit recommendations from the last audit. Given the time needed to change rules and statutes, an agency can take up to a year to implement the audit recommendations. Also, the changes need to be implemented for some time before they generate enough data to make a meaningful comparison. If an audit is specified in statute, the standard practice is for the audit cycle to be on a five-year cycle. Another option is to allow the office of state auditor to determine the frequency based on the office’s assessment of risk. Would the proponents consider changing the audit cycle to five years or as determined by the office of state auditor?
3. Subsection (4) allows host communities to charge impact fees to horse racetracks after negotiations between the host community and the horse racetrack. When negotiating impact fees, what level of participation is required on behalf of the horse racetrack for the impact fees to be considered "established through negotiations?" Is it your intent that the host community must provide horse racetracks a threshold level of participation in the establishment of the impact fees?