

# STATE OF COLORADO

## Colorado General Assembly

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### MEMORANDUM

March 5, 2014

**TO:** Vickie Armstrong and Bob Hagedorn

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

**SUBJECT:** Proposed initiative measure 2013-2014 #81, 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 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 #80. The comments and questions raised in this memorandum do not include comments and questions that were addressed in the memorandum for proposed initiative 2013-2014 #80, 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.

## **Purposes**

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

1. To increase funding for K-12 education by creating a new revenue source from limited gaming at Class B horse racetracks;
2. To legalize limited gaming at horse racetracks to the extent that it is currently legal in the cities of Blackhawk, Central City, and Cripple Creek;
3. To distribute a portion of adjusted gross proceeds from horse racetrack limited gaming to local governments authorizing horse racetrack limited gaming.

## **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 draft as suggested below.

1. It is standard drafting practice to set off the year in a date with commas. For example, in the fifth line of paragraph (c) of subsection (2), a comma should be inserted after 2014."
2. It is standard drafting practice to set off certain phrases such as introductory, parenthetical, or prepositional phrases with commas.
  - a. In paragraph (f) of subsection (2):
    - i. The parentheses around "in the form of a coin or bill" indicate that the phrase is a nonrestrictive clause and is additional information that is unnecessary to the meaning of the sentence. If that is the intent, it should be set off with commas, but if the phrase is important to the meaning of the sentence, both the parentheses and commas should be omitted.
    - ii. Commas are preferred to parentheses for the second parenthetical phrase "including electronic credits." See the example in technical comment 3.

- b. In subparagraphs (I) and (II) of paragraph (b) of subsection (5), a comma should be inserted after the introductory phrases "To the state treasurer" and "To the host community."
3. It is standard drafting practice to separate items in a series with commas and to use a comma after the second to last item in the series; however, when an item in the series contains commas, such as a series within a series or a parenthetical phrase, it is common to separate the larger series with semi-colons. Combining the changes recommended in technical comment 2 and this comment, paragraph (f) of subsection (2) would read:

(f) "SLOT MACHINE" MEANS: ANY MECHANICAL, ELECTRICAL, VIDEO, ELECTRONIC, OR OTHER DEVICE, CONTRIVANCE, OR MACHINE WHICH, AFTER INSERTION OF CASH IN THE FORM OF COIN OR BILL; A TOKEN OR SIMILAR OBJECT; OR UPON PAYMENT BY ANY MEDIUM, INCLUDING ELECTRONIC CREDITS, OF ANY REQUIRED CONSIDERATION WHATSOEVER BY A PLAYER, ...

4. In paragraph (f) of subsection (2), the measure says "'SLOT MACHINE' MEANS ANY MECHANICAL, ELECTRICAL, VIDEO, ELECTRONIC OR OTHER DEVICE, CONTRIVANCE OR MACHINE WHICH... IS AVAILABLE TO BE PLAYED OR OPERATED, AND WHICH... MAY DELIVER OR ENTITLE THE PLAYER OPERATING THE MACHINE TO..." It seems as if you intend the phrases that follow the word "which" to further define the contrivance or machine. If so, this is a restrictive clause. It is considered a better drafting practice to use the word "that" instead of "which" for restrictive clause.
5. In paragraph (f) of subsection (2) the proponents use the phrase "any required consideration whatsoever." In this phrase, "any" and "whatsoever" serve the same purpose to emphasize that the rule applies to all consideration and are therefore redundant. Consider using only one of these terms.
6. In subsection (3), the draft contains the clauses "THE COMMISSION SHALL NOT UNREASONABLY WITHHOLD A LICENSE, AND IN NO CASE SHALL THE LICENSE REQUIREMENTS FOR HORSE RACETRACK LIMITED GAMING BE STRICTER THAN..." The second clause beginning with "in no case" does not follow the form used for the first clause. The first clause makes it clear that the commission has the duty to not withhold a license. The second clause is ambiguous but appears to give the commission a duty to not be too strict. If so, then it should be rewritten to make it clear who has the duty: "THE COMMISSION SHALL NOT UNREASONABLY WITHHOLD A LICENSE AND SHALL NOT IMPOSE LICENSE REQUIREMENTS FOR HORSE RACETRACK LIMITED

- GAMING THAT ARE STRICTER THAN..." Similarly, the last sentence of paragraph (a) of subsection (6) should read, "THE STATE TREASURER SHALL INVEST MONEYS IN THE FUN AND DEPOSIT ANY INTEREST OR INCOME EARNED ON THE INVESTMENTS IN THE FUND."
7. There is a period missing at the end of the second sentence in subsection (3).
  8. The word "shall" should be used to indicate that a person has a duty; it should not be used as a future tense verb. See section 2-4-401 (6.5) and (13.7), Colorado Revised Statutes, which define "must" and "shall." Simple present tense verbs should be used when possible. So, for instance:
    - a. In paragraph (a) of subsection (4), while the counties of Arapahoe, Mesa, and Pueblo are authorized to permit limited gaming at a horse racetrack, the section is not imposing a duty upon them to do so, therefore it is better to write: "HORSE RACETRACK LIMITED GAMING MAY TAKE PLACE ...;"
    - b. In paragraph (c) of subsection (5), the horse racetrack is authorized to retain the balance of the proceeds from limited gaming, but there is no duty imposed upon them to do so, therefore it is better to write: "HORSE RACETRACKS MAY RETAIN THE BALANCE ...."
  9. For readability in paragraph (b) of subsection (4), you might consider moving "slot machines" to follow "two thousand five hundred" and deleting the word "of" so that the sentence reads, "...AUTHORIZED TO HAVE THE GREATER OF TWO THOUSAND FIVE HUNDRED SLOT MACHINES OR SUCH OTHER NUMBER AS REQUESTED...."
  10. In paragraph (d) of subsection (4), the word "each" at the beginning of the second sentence should be capitalized.
  11. When a list is broken down into paragraphs or smaller subdivisions, it is standard drafting practice to separate each paragraph with a semi-colon. In subparagraph (I) of paragraph (a) and subparagraph (I) of paragraph (b) of subsection (5), insert a semi-colon before the word "AND" at the end of the paragraph.
  12. It is standard drafting practice to capitalize only proper names, for example "Colorado" or "Cripple Creek." In paragraph (a) of subsection (6), "state treasurer" should not be capitalized.

## Substantive Comments and Questions

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

1. The following questions concern the definitions to be added by subsection (2) of section 17 of the Colorado constitution:
  - a. In paragraph (a), what is the purpose of the statement "as it is applied as of January 1, 2014, or may subsequently be applied to limited gaming licensees"? If the purpose is to ensure that the term "adjusted gross proceeds" is applied to horse racetrack limited gaming in the same manner as it is applied to other forms of limited gaming, then would you consider changing this phrase to "as it is applied to limited gaming establishments licensed under section 9 of this article"?
  - b. In paragraph (c), "horse racetrack" is defined as a class B horse racetrack that has been continuously operating and licensed for the preceding five years. Does this mean that the racetrack must have been licensed only as a class B racetrack for the preceding five years, or may the racetrack have been licensed as a class A racetrack for a portion of that five-year period?
  - c. In paragraph (e), by defining a "host community" as "the single local jurisdiction that issues the permits and approvals necessary for an exclusive location to operate video lottery terminals", do you require a city, town, or county to explicitly authorize limited gaming in an existing horse racetrack in order for that city, town, or county to qualify for a distribution of adjusted gross proceeds? Must a city, town, or county separately approve horse racetrack limited gaming?
2. The equal protection clause of the Fourteenth Amendment to the United States Constitution requires that state laws be rationally related to a legitimate government purpose. Courts will usually ask whether a rational basis exists for the way a class has been defined. In paragraph (a) of subsection (4), what are the policy reasons for permitting only one racetrack per county to operate video lottery terminals? By what standard is

one racetrack to be chosen to operate video lottery terminals over another racetrack in the same county?

3. Given that parts of section 17 discuss licensing by the state limited gaming commission, the phrase "subject to licensure" in paragraph (e) of subsection (4) could be interpreted to require the limited gaming commission to license the sale of alcoholic beverages in horse racetracks conducting limited gaming. Currently, the state liquor control division and the local licensing authority are responsible for issuing a liquor license. The Colorado liquor code contains licenses for limited gaming establishments and racetracks in sections 12-47-414 and 12-47-418, Colorado Revised Statutes, respectively. Do you intend the licensure in paragraph (b) to be conducted by the limited gaming commission, the liquor control division and local licensing authority, or some other entity? If the you intend that horse racetracks are to be licensed according the Colorado liquor code, then would you consider mirroring the language in section 9 (3) (e) of article XVIII of the state constitution, which states "[l]imited gaming may occur in establishments licensed to sell alcohol"?
4. In subsection (5), the initiative says "FOR THE PRIVILEGE OF CONDUCTING HORSE RACETRACK LIMITED GAMING, IN ADDITION TO ANY APPLICABLE LICENSE FEES, A HORSE RACETRACK LICENSED TO CONDUCT LIMITED GAMING SHALL:" The following questions concern this clause:
  - a. The courts have not looked favorably on the distinction between a privilege and a right. See *Sherbert v. Verner*, 374 U.S. 398 (1963). It appears that the intention is to simply impose requirements, so the privilege language is unnecessary. Would the proponents consider deleting the word "privilege" and rewriting the introductory phrase?
  - b. The term "shall" imposes a duty. If a person fails to obey the duty, a punishment is usually required. The initiative should contain explicit consequences for a horse racetrack that fails to fulfil the duties outlined in subsection (5).
  - c. If the consequence is merely that a person loses the ability to offer this gaming, the word "shall" may be replaced with the word "must" to make it clear that these are licensing conditions. Nevertheless, it is a better practice to explicitly state the consequences of failing to meet the requirements. For example, if a person keeps money owed

to the state, is the state authorized to merely revoke the license? Or may the state collect the money?

5. Paragraph (d) of subsection (6) of the draft states that the moneys distributed to school districts and the state charter school institute under subsection (9) of the draft are in addition to other moneys "appropriated for distribution to school districts or otherwise allocated to school districts."
  - a. Are the moneys distributed under subsection (6) of the draft also in addition to other moneys appropriated for distribution or allocation to institute charter schools or to the state charter school institute?
  - b. Current law authorizes school districts to obtain moneys through mill levies in addition to the mills levied for the local share of total program funding, and authorizes school districts and institute charter schools to obtain moneys for capital construction through bond initiatives. Are the moneys distributed pursuant to subsection (6) of the draft in addition to any of these local revenues that a school district or an institute charter school may receive? Is it the proponents' intent that the moneys distributed pursuant to subsection (6) of the draft would have any effect on the limitations on a school district's ability to increase revenues through additional mill levies?
6. Paragraph (d) of subsection (6) of the draft states that a school district and an institute charter school are not required to use moneys distributed under subsection (6) of the draft "as a contribution to any funding formula contained in law nor shall any school district be required to offset distributions from the fund with local property tax revenue." What does the quoted language mean?
7. Current law includes a formula by which each school district that authorizes a charter school must distribute moneys to the charter school. Is a school district required to distribute any portion of the moneys received as a result of the distribution in section (6) of the draft to the charter schools authorized by the district? If so, what is the portion that a school district must distribute to its charter schools, and how is each charter school's share calculated?
8. Is a school district required to distribute any portion of the moneys received as a result of the distribution in subsection (6) directly to the schools of the district that are not charter schools?
9. Under paragraph (d) of subsection (6) of the draft, moneys are distributed to the state charter school institute. Is the institute required to distribute

those moneys to the institute charter schools? If so, what portion must the institute distribute, and how is each institute charter school's share calculated?

10. Paragraph (e) of subsection (6) gives each school district and each institute charter school discretion to use the moneys received from the K-12 education fund to address "local needs to improve the education of children in Colorado public schools...." Is there any limitation on the manner in which or the purposes for which a school district or an institute charter school can use these moneys? Is it the proponents' intent that the General Assembly would enact implementing legislation to address a school district's or the institute charter school's use of the moneys distributed under subsection (6) of the draft?
11. Proposed initiative 2013-2014 #80 provides that net VLT proceeds distributed to the K-12 education fund are to be continuously appropriated; in contrast this initiative (#81) says that the moneys may be distributed without an appropriation. An appropriation is the authority to spend money. The approach in proposed initiative 2013-2014 #80 is better drafting practice because it is clear that the money may be spent. Would the proponents consider using a continuous appropriation in this proposed initiative?
12. What does the term "all tax and fee revenues attributable to the operation of this section 17," as used in subsection (8), mean? For example, does this include revenues on drinks and food purchased by limited gaming customers, or is this limited only to the adjusted gross proceeds and initial one-time payments collected by the state treasurer according to subsection (5)? If the term is limited only to the adjusted gross proceeds and initial one-time payments collected by the state treasurer, would you consider changing this to "all tax and fee revenues derived from adjusted gross proceeds and initial one-time payments collected by the state treasurer?"