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MEMORANDUM

April 2, 2014

TO: Lisa Brumfiel and Peter Coulter

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2013-2014 #129, concerning the definition of fee

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 amendment appear to be:

1. To define the term "fee" for purposes of the Colorado constitution, Colorado Revised Statutes, codes, directives, and all public Colorado legal documents;

2. To prohibit ancillary or extraneous benefits of any fee from being considered when determining the value of a fee; and
3. To specify that the proposed initiative is self-executing and severable and supersedes state and local laws and ordinances.

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. Pursuant to article V, section 1 (2) of the Colorado constitution, proposed initiatives must amend either the Colorado constitution or state law (i.e., the Colorado Revised Statutes). The proposed initiative should be revised to indicate whether it amends the Colorado constitution or the Colorado Revised Statutes and to show where in the constitution or statutes its provisions should be inserted.
2. Commas need to be used in a series before the conjunction.
3. Each constitutional and statutory section being amended, repealed, or added is preceded by a separate amending clause explaining how the law is being changed. For example, "In Colorado Revised Statutes, **add** article __ to title 39 as follows:".
4. It is standard drafting practice to number each section, part, etc. that is being amended or added with a bold section number (e.g., **SECTION 1.**, **SECTION 2.**) before the amending clause.
5. Each section in the Colorado Revised Statutes and Colorado constitution has a headnote. Headnotes briefly describe the content of the section. Headnotes should: Follow the section number, be in bold-faced type, be in lowercase letters, and be on the same line as the text of the section.
6. To show language being added to the Colorado constitution or Colorado Revised Statutes, it is standard drafting practice to use SMALL CAPITAL LETTERS, which are different than ALL CAPS.
7. On line 10 of the proposed initiative, "documents" is misspelled.

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and 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. Why does "fee" need to be defined as you specify?
3. What does "voluntarily incurred" mean? If the payer wants to avail him or herself of the benefit, does the payer have a choice to pay the fee or not? Or does "voluntarily incurred" refer to the payer's ability to choose to make use of the program?
4. How would "the payer's fair share of the costs incurred by the government" in providing the benefit be determined? Who would make such a determination? Is mathematical exactitude required?
5. To which entities does the proposed initiative apply? The state? Local governments? Special districts? Private entities?
6. Is your initiative proposal intended to affect a state or local government's ability to assess a fine?
7. What constitutes a "public Colorado legal document"? Any document that is filed or recorded publicly? Would it include a deed filed with a clerk and recorder? A corporate filing with the secretary of state?
8. Does the state or local government have the authority to adjust the fee if the cost of the program changes? Are you intending that there be any limitations on such adjustments?
9. What are "ancillary and/or extraneous benefits" of a fee?
10. Who determines the "ancillary and/or extraneous benefits" of a fee?
11. You say that "ancillary and/or extraneous benefits" of a fee shall not be considered in determining "the value" of said fee. What do you mean by "the value"? Is this a reference to the amount of the fee?

12. You specify that your definition of a fee is intended to supersede any conflicting local charter, ordinance, or resolution. Is this proposed initiative an exception to a local government's home rule charter adopted pursuant to section 16 of article XIV or section 6 of article XX of the state constitution?
13. The Colorado Supreme Court held that "a charge is a fee and not a tax when the express language of the charge's enabling legislation explicitly contemplates that its primary purpose is to defray the cost of services provided to those charged." *Barber v. Ritter*, 196 P.3d 238, 250 (2008). In a subsequent footnote the Colorado Supreme Court also noted that "a statutory charge may be labeled a fee, but in effect be a tax, if the statutory rate of the charge is unreasonably in excess of the cost of services the charge is designed to defray. The rate of fees imposed on users must bear some reasonable relationship to the cost of services provided." *Barber v. Ritter*, 196 P.3d 238, 250 (2008). How is your definition different from the Colorado Supreme Court's? And if different, what effect does your definition have on law? Are you intending to supersede the Colorado Supreme Court's definition?
14. Your section on "conflicting provisions" specifies that the definition "shall supersede conflicting state statutory, local charter, ordinance, or resolution, and other state and local provisions". Is a Colorado Supreme Court decision a "state and local provision"?
15. The Colorado Supreme Court also held in *Barber v. Ritter* that "when determining whether a charge is a fee or a tax, courts must look to the primary or principal purpose for which the money was raised, not the manner in which it was ultimately spent." 196 P.3d 249 (2008). How does your definition of a fee work with this decision? Would the proposed initiative affect the ability of the state to transfer fee revenues to the general fund?
16. Do all existing state and local fees meet the proposed initiative's definition of fees? Can the proponents provide examples of fees that do not meet the definition? What would happen to any existing state and local fees that fall outside of the definition?
17. Have you considered any fiscal or other impacts that may result from the enactment of the proposed initiative on the state or local governments?
18. If certain fees are eliminated under your new definition, have you considered a mechanism to fund the maintenance of those programs?

19. Who could enforce the provisions of the proposed initiative? What would the consequence be for treating a charge that does not meet the definition of a fee in the proposed initiative as a fee?