

# STATE OF COLORADO

## Colorado General Assembly

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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 #126, concerning foreclosure due process

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 to the Colorado constitution appear to be:

1. To prohibit any person from commencing foreclosure proceedings against real property unless the person has previously recorded written evidence of a security interest in the property in the land records of the county in which the property is situated.

2. To specify the documentation that constitutes competent evidence of a security interest.
3. To supersede conflicting state and local laws.

## **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. It is standard drafting practice to number each section that is being amended or added with a bold section number before the amending clause and the effective date section, as shown below:

**SECTION 1.** In the constitution of the state of Colorado, **add** section 25a to article II as follows:

2. To show language being added to the Colorado constitution, it is standard drafting practice to use SMALL CAPITAL LETTERS, which are different than ALL CAPS.
3. Although the text of the proposed initiative should be in small capital letters, the proponents should use an uppercase letter to indicate capitalization where appropriate. The following should be capitalized:
  - a. The first letter of the first word of each sentence;
  - b. The first letter of the first word of each entry of an enumeration paragraphed after a colon; and
  - c. The first letter of proper names.
4. It is standard drafting practice to insert a left tab at the beginning of the first line of each new section, subsection paragraph, or subparagraph, including amending clauses and section headings. The left tab should be inserted before a section or paragraph number.
5. Constitutional provisions are usually divided into component parts using the following hierarchy: Subsections, denoted by numbers (1), (2), etc.; followed by paragraphs, denoted by lowercase letters (a), (b), etc.; followed by subparagraphs, denoted by Roman numerals (I), (II), etc.; followed by

sub-subparagraphs, denoted by capital letters (A), (B), etc. The subsections and paragraphs in the proposed initiative should follow the aforementioned format and be enclosed with parentheses. Reference technical comments 6 and 8 for examples.

6. Subsections 1 to 3 in the proposed initiative should instead be paragraphs (a) to (c), as shown below:

...THE COUNTY IN WHICH THE REAL PROPERTY IS LOCATED.

COMPETENT EVIDENCE INCLUDES:

- (a) THE EVIDENCE OF DEBT;
- (b) ENDORSEMENTS, ...; AND
- (c) DULY RECORDED ASSIGNMENTS, ....

7. Each section in the Colorado constitution has a headnote. Headnotes briefly describe the content of the section. Headnotes should: Follow the section number, be in bold-faced type, and be in lowercase letters.
8. When writing a headnote, it is standard drafting practice to use lowercase letters and bold-face type, capitalize only the first word, and use hyphens to separate different parts of the headnote. It appears that the following phrases are headnotes: "foreclosure due process," "self-executing, severability, conflicting provisions," and "effective date." If the proponents intend these phrases to be headnotes, they should be formatted as follows:

**Section 25a. Foreclosure - due process.** (1) NO PERSON SHALL BE DEPRIVED OF REAL PROPERTY...

(2) **Self-executing - severability - conflicting provisions.** ALL PROVISIONS OF THIS SECTION ARE SELF-EXECUTING...

(3) **Effective date.** UNLESS OTHERWISE PROVIDED BY THIS SECTION, ALL PROVISIONS...

9. On lines 11 and 22, respectively, the proponents use the terms "forclosure" and "forclosing." These terms should be replaced with the correct spellings: "foreclosure" and "foreclosing," respectively.
10. In line 14 of the proposed initiative, "it's" should be replaced with "its."
11. The proposal appears intended to apply substantive due process rights, as enumerated in article II, section 25 of the Colorado constitution, to the specific situation of foreclosure. Could the proposal be designated in

numerical sequence as section 25.1 or 25.5 rather than the unusual (though not unprecedented) "25a" or as "32"?

## **Substantive Comments and Questions**

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

1. The proposed initiative states that no "person" shall be deprived of real property unless certain conditions are met. Does "person" in this context include a corporation? Is the proposal intended to apply to commercial property as well as residential property?
2. The proposal requires evidence of a valid security interest to be "recorded before the foreclosure is commenced with the recorder of deeds, ... ."
  - a. This clause is ambiguous. A foreclosure is commenced through (or "with") the public trustee or, in the case of a judicial foreclosure, the county sheriff. It is not commenced "with the recorder of deeds," as the clause might be construed to say. Would you consider rewriting this clause to say that the evidence must be "recorded with the recorder of deeds, ... , before the foreclosure is commenced"?
  - b. Given that the proposal contains a list of documents that conflicts with the documents that a foreclosing party must file with the public trustee under § 38-38-101 (1), Colorado Revised Statutes, do the proponents intend that the general assembly would change the statute to conform to the requirements of this proposed initiative?
  - c. The proposed initiative says that competent evidence of a party's security interest "includes" the three items listed, all three of which must be recorded. Is this list exclusive, or may any of the documents now listed in § 38-38-101 (1), Colorado Revised Statutes, still be required when the foreclosing party commences a foreclosure with the public trustee?
3. Must the public trustee or a court accept the documents listed as conclusive evidence of a party's interest, or may further substantiation be required? For example, when a promissory note is endorsed in blank, a party must prove that it has physical possession of the note before it has standing to foreclose. *See Miller v. Deutsche Bank Nat'l Trust Co.*, 666 F.3d 1255, 2012 U.S. App. LEXIS 1863 (2012).

4. Would the recording requirement in this proposal unduly limit the ability of a party to transfer a security interest in property that was the subject of a pending foreclosure proceeding?
5. How would this initiative apply to proceedings already in progress? Would you consider an applicability clause, for example, "This section applies to foreclosure proceedings commenced on or after its effective date"?
6. Are there specific state or local laws or ordinances with which the proposal conflicts and that the proponents intend the proposal to supersede? Do the proponents intend the proposal to supersede § 38-38-101 (6) (b), Colorado Revised Statutes, which allows a court to accept the statement of a party's attorney as evidence of a valid security interest? Are proponents aware of other state or local laws that the proposal would supersede?