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MEMORANDUM

TO: Bruce Mason, Karen Dike, and Martha Tierney
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: December 30, 2015
SUBJECT: Proposed initiative measure #63, concerning the right to a healthy environment

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 directors of 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.

Purpose

The major purpose of the proposed amendment to the Colorado Constitution appears to be to guarantee natural persons of Colorado the right to a healthy environment, including making the protection of the environment a top priority in state and local government, giving local governments the power to enact legislation that protects the environment, and specifying enforcement mechanisms and remedies for violations.

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. 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?
3. Do you want to specify an effective date for the proposed initiative?
4. Regarding the definition of a "healthy environment":
 - a. The proposed initiative specifies that it means safe and sustainable conditions for "life." Is all life included, or only human life, or only aspects of ecological systems that affect human life?
 - b. "Healthy" typically refers to a condition of a living organism. What is "healthy" air, water, or land? Is it air, water, or land that is clean, pure, or unpolluted? Would the proposed initiative apply to an alteration to air, water, or land that does not affect the health of a living organism?
 - c. How is the health of the environment to be assessed? Does the continued presence of life indicate a healthy environment? If so, what types of life must be present for the environment to be considered healthy?
 - d. Is the environment currently healthy? If not, when was the environment healthy?
 - e. Are local governments and the state government obligated by this measure to restore the health of the environment or maintain the current level of environmental health?
 - f. Can environmental health be impacted in a specific area if environmental health, overall, is not impacted or minimally impacted? For example, can a parking lot be constructed if the sustainable conditions for life are eliminated in that area but are improved elsewhere?
 - g. Does any condition that causes the loss of life jeopardize the health of the environment? If not, is there an acceptable level of loss of life that is compatible with environmental health?

- h. Does maintaining "safe and sustainable conditions for life" require a balancing of economic development with a pristine environment?
- 5. Subsection (3) makes the right to a healthy environment a "fundamental" right, but subsection (4) requires state and local governments to assign the "highest" priority to the protection of a healthy environment. Does the proposed initiative therefore prevent state and local governments from altering the environment in any way that would adversely affect the health of any organism?
 - a. What is the intended effect of this priority? Does it preclude any activity that reduces the health of the environment regardless of how small the impact may be?
 - b. May a local or state government allow an activity that harms environmental health if such activity is temporary or fully remediated?
 - c. For example, would spraying an area with an insecticide to temporarily eliminate or limit populations of mosquitoes that carry West Nile virus violate the proposed initiative, even though doing so would protect human or mammalian health?
 - d. There will certainly be instances in which state and local governments must balance the impact to one aspect of air, water, land, or ecological system health against other aspects of those things, whether it is by taking or approving particular actions or by refraining from taking or approving actions. For instance, managing a landscape with fire might protect human safety and benefit one subset of plants and animals but adversely affect a different subset of plants and animals and cause air pollution. How do you foresee that governments would balance these competing interests?
- 6. Subsection (5) states that if a state and local law both address the same topic, then the one that is more protective of a healthy environment "shall govern."
 - a. Who determines whether a law or regulation:
 - i. Addresses the same topic? If two laws are enacted for different purposes (for example, to regulate land use (*i.e.*, to control where an industrial facility can be located) versus to regulate an industry (*i.e.*, to control how industrial processes must be conducted)), can they "address the same topic"? If so, would allowing the law that is more protective of a healthy environment "govern" over the other law frustrate

achievement of the purpose that the other law was enacted to promote?

- ii. Is more protective? What if both of two laws had both positive and negative aspects on the environment? For instance, what if removing pollutants from air emissions pursuant to a state law resulted in the creation of solid or liquid wastes that a local law prohibited the disposal of?

b. How is protectiveness determined?

7. Regarding subsection (6):

- a. The proposed initiative specifies that the right to a healthy environment may be enforced by "any aggrieved person or governmental entity."
 - i. Subsection (3) gives the right to a healthy environment to "natural persons," but the first sentence of subsection (6) refers only to a "person." Similarly, unlike the first sentence of subsection (6), which refers to a "governmental entity," the second sentence of subsection (6) refers (twice) to a "legal entity." Do entities or only natural persons have the right guaranteed by the proposed initiative, and do entities that are not governmental have the right to enforce the proposed initiative? Would the proponents consider making these provisions consistent?
 - ii. Must a governmental entity prove that it is aggrieved, or are only persons limited by the requirement to be aggrieved?
- b. The first sentence of subsection (6) refers to "this constitutional right to a healthy environment," but the second sentence refers to "the fundamental right to a healthy environment" and "the constitutional provisions." Do the proponents intend different things by these different phrases? If not, would the proponents consider using consistent language?
- c. Subsection (5) gives local governments the "power" to enact laws that are protective of a healthy environment, but subsection (6) creates a right to an injunction for the failure to "enforce the provisions of this constitutional right to a healthy environment." Does this mean that local governments also have a "duty" to enact laws that are protective of a healthy environment? Does state government have the same duty?

- d. What constitutes "reckless disregard resulting in violations of the constitutional provisions"? Must more than a single violation occur before punitive damages are authorized? Are natural persons, entities, and governments liable for punitive damages? Can a government be liable for punitive damages for failure to enact a law that is protective of a healthy environment?
8. Subsection (2) (b) defines "local government," and does not mention special districts, but subsection (7) specifies that the new section applies to every special district.
 - a. Is this intentional?
 - b. Does the proposed initiative not give special districts the duty to assign the highest priority to the protection of a healthy environment as specified in subsection (4) or the power to enact regulations that are protective of a healthy environment as specified in subsection (5)? Is a special district a "governmental entity" for purposes of enforcing the right to a healthy environment as specified in subsection (6)?

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. The state constitution is divided into articles and sections. Currently, article II, which comprises the bill of rights, has 31 sections. If this is to be a new section within the bill of rights, the section should be numbered and referred to as section (32) instead of section (x).
2. It is unnecessary to indicate the plural variation of a noun by including an "s" in parentheses following the singular noun, e.g. "person(s)". Section 2-4-102, Colorado Revised Statutes, governs construction of words and phrases and states, "The singular includes the plural, and the plural includes the singular." Writing "person" encompasses the plural.

3. It is standard drafting practice for headnotes to be shown in boldfaced type. All headnotes should end in a period. Statutory text that follows the headnote should proceed immediately after the headnote rather than on a new line. To be consistent with the above guidelines, the headnote in section 2 of the proposed initiative should read:

(2) **Definitions.** (a) FOR PURPOSES OF THIS SECTION...

4. In section (2) (b), the fourth instance of the word "of" should be "or": "ANY PROVISION OF ARTICLE XX OR SECTION 16 OF ARTICLE XIV... ."
5. In section 6, no comma should separate the two clauses in the first sentence. Currently, the comma separates the verb phrase "may be enforced" from the prepositional phrase "in an action..." that completes it.
6. For purposes of the Colorado Revised Statutes, the word "shall" is defined in section 2-4-401 (13.7), C.R.S., and it means that "a person has a duty." The related word "must," which is defined in section 2-4-401 (6.5), C.R.S., means that "a person or thing is required to meet a condition for a consequence to apply." Furthermore, "'must' does not mean that a person has a duty." If the subject of a sentence is subject to neither a duty nor a requirement, consider substituting a version of the verb "to be." For example, section 5 could read, "ALL LOCAL GOVERNMENTS HAVE THE POWER TO ENACT... ."