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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 #65, concerning mandatory setbacks for oil and gas development

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.

This initiative was submitted with a series of initiatives including proposed initiatives 2015-2016 #66 to #72. Comments and questions addressed in those memoranda may also be relevant, and those questions and comments are hereby incorporated by reference in this memorandum.

Purpose

The major purpose of the proposed amendment to the Colorado constitution appear to be to require that new oil and gas development be at least 2,500 feet from occupied structures and areas of special concern.

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. Do you want to specify an effective date for the proposed initiative?

Questions for the section entitled "Definitions":

3. For the definitions of "oil and gas development facility" and "areas of special concern," you've used the word "includes" instead of "means." If you intend that the lists of facilities and areas in the definitions are exclusive lists, the word "means" would convey that exclusivity.
4. For the definition of "oil and gas development," you include "hydraulic fracturing and associated components." What do the proponents mean by the phrase "associated components"? Do you want to include "processes" as well with respect to hydraulic fracturing?
5. For the definition of "oil and gas development facilities," do you want to include "and equipment" after "associated production and processing facilities?"
6. Are there structures accompanying oil and gas operations that would fall within the "occupied structure" definition? If so, you might consider expressly excluding them from the definition of "occupied structure."
7. What are "public and community drinking water sources"?
 - a. Do you intend the term to refer only to the supply sources of water such as lakes and streams? If so, then it need not be included as those water sources are already listed.
 - b. Do you intend the term to include all of the components necessary for distributing drinking water to the public or to a community? If so, you might consider stating instead "water distribution systems" and then

adding a definition of that term. "Water distribution system" is defined in statute in section 25-9-102, Colorado Revised Statutes, as meaning "any combination of pipes, tanks, pumps, or other facilities that delivers water from a source or treatment facility to the consumer."

- c. Do you intend the term to include water treatment facilities? If so, you might consider listing "potable water treatment facilities" separately in the definition and then adding a definition of that term. "Potable water treatment facilities" is defined in statute in section 39-29-110, Colorado Revised Statutes, to mean "a system or facility of a political subdivision for treating water to be supplied to the public for domestic use, and 'potable water treatment facilities' includes water treatment plants, treated water storage facilities, water mains, water distribution lines, pumps, and appurtenances."

Questions for the section entitled "Grant of Authority":

8. It is our drafting convention not to use "shall" to indicate future action. "Shall" is defined in section 2-4-401 (13.7), Colorado Revised Statutes, to mean "that a person has a duty." Furthermore, for purposes of statutory construction, as set forth in section 2-4-104, Colorado Revised Statutes, "[w]ords in the present tense include the future tense." You might consider replacing "shall be" in the last sentence of this section with "is."
9. Does there have to be more than one occupied structure or area of special concern for the new setback to apply? If not, you should consider rephrasing this as "... at least 2,500 feet from an occupied structure or area of special concern."
10. Current law allows a landowner to waive the setback restriction. Do you intend to allow a landowner to waive the expanded setback restriction as well? If so, you might consider including language to that effect.

Questions for the section entitled "Prohibition of new occupied structures within drilling setbacks":

11. In sections 4 and 5 of the proposed initiative, you use the term "local government." Do you want to define what is a local government? There are a number of definitions of local government in statute. For example, section 10-16-102 (42), Colorado Revised Statutes, provides one of the more comprehensive definitions of "local government" to mean "any city, county, city and county, special district, or other political subdivision of this state."

12. As drafted, despite limiting this provision to "new" occupied structures, the measure would restrict owners of existing occupied structures that are located within 2,500 feet of an oil and gas development facility from building a new occupied structure to accompany existing occupied structures, for example, a new building on an existing school or hospital campus. Restricting the owner's ability to build accompanying occupied structures might constitute a partial taking requiring just compensation under the Fifth Amendment of the United States constitution. You might consider excluding new occupied structures that would accompany an existing occupied structure from the prohibition.
13. Do you intend that the reconstruction of an existing occupied structure would constitute a "new" occupied structure? If not, you might consider excluding such reconstructed occupied structure from the prohibition. Otherwise, you might consider adding exclusions for certain types of reconstruction, such as those resulting from damage caused by weather or a disaster.
14. You might consider adding "the building or designation of new areas of special concern" to this prohibition to cover new playgrounds, sports fields, parks, and irrigation ditches.
15. Do you intend this prohibition to apply to an oil and gas development facility that consists of only a well that has been properly plugged and abandoned? If not, you might consider adding language explaining that the prohibition only applies to "active" oil and gas development facilities.

Question for the section entitled "Ability of local governments to establish larger setbacks":

16. You might consider adding the word "new" before "oil and gas development facilities" to align with section 2 and to avoid a constitutional takings issue.
17. What if two or more local governments with jurisdiction over the same geographic area covering the location of a new oil and gas development facility have enacted conflicting setback distances? You might consider addressing which setback should govern.
18. Is the ability to establish a larger setback contingent on at least two local governments coordinating to establish the setback? If not, you should consider rephrasing this as "A local government may... ."
19. In addition to local governments, do you want to allow the state to require further setback distances?

Question for the section entitled "Self executing, severability, conflicting provisions":

20. Because the proposed measure is a constitutional provision, it necessarily supersedes conflicting state and local laws and regulations. Therefore, you do not need to state that the proposed measure supersedes them.
21. Colorado oil and gas conservation commission rules require an oil and gas operator to provide thirty days' notice of planned well drilling activities to surface owners within five hundred feet of the well. Do you intend that such notification be amended to include surface owners further back from the well? If so, you might consider adding language to identify which surface owners should be notified.

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 Colorado constitution is divided into sections, and each section may contain subsections, paragraphs, subparagraphs, and sub-subparagraphs as follows:

Section 1. Headnote. (1) Subsection.

- (a) Paragraph
 - (I) Subparagraph
 - (A) Sub-subparagraph
 - (B) Sub-subparagraph
 - (II) Subparagraph
- (b) Paragraph

Sections 1 and 2 of the proposed initiative are subdivided first with paragraph letters. They should be divided first with subsection numerals.

2. The beginning of each subdivision begins with a capital letter, even if it is a continuation of a sentence begun in a larger subdivision. Therefore, each subdivision in section 1 should begin with a capital letter.
3. The term "including" indicates an example or a nonexclusive list; it does not imply exclusivity. Therefore, "but not limited to" is not necessary.
4. Definitions typically appear in alphabetical order. Consider reorganizing the terms in section 2 to be alphabetical. Also, consider moving the phrase, "For purposes of this article" from the beginning of each paragraph of section 2 to just after the headnote.
5. The term "or" includes the meaning "and"; therefore it is unnecessary to use the term "and/or" in section 3. "Or" will suffice.
6. It is standard drafting practice to describe a prohibition of something in terms of what an entity may not do instead of what no entity may do. Therefore, in section 4, consider changing "No local government may allow..." to "A local government shall not allow....".
7. When used as an internal reference, "section" should not be capitalized. The term is correctly shown in regular-case letters in section 4, but it is shown capitalized in section 5. Consider changing the reference in section 5.