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MEMORANDUM

TO: Jeffery Dean Ruybal and Merrily D. Mazza
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: September 6, 2015
SUBJECT: Proposed initiative measure 2015-2016 #37, concerning Local Governance

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.

Purposes

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

1. Stating that the people of Colorado have an inherent and inalienable right to local community self-government.

2. Describing the types of powers included in that right and measures that may be used to secure that right.
3. Providing that local laws adopted pursuant to the right of local community self-government cannot be preempted by any other international, federal, or state laws, provided that the local laws do not restrict certain fundamental rights or weaken certain protections.

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. The proposed initiative is located under article II of the state constitution (the state "Bill of Rights"). As this article is concerned principally with *individual* rights and liberties, is this the most appropriate location for a local governance amendment?
3. The rights enunciated in the proposed initiative are enjoyed by "each county, city, town, and any other municipality".
 - a. Does the proposed initiative apply to both statutory and home rule counties and municipalities?
 - b. What "other" municipalities are included within the purview of this amendment?
4. Some local governmental entities are political subdivisions of the state, organized for the convenient administration of state government and possessing only those powers conferred by the legislature. However, the proposed initiative alludes to "an inherent and inalienable right of local community self-government". Does such a right currently exist, or is this right new? If the latter, is it the proponents' intent to alter the fundamental character of local governments?
5. Subsection (2) of the proposed initiative allows people and their governments to alter or eliminate the "rights, powers, privileges, immunities, or duties of corporations and business entities".
 - a. The scope of this provision is unclear. What types of rights, powers, privileges, immunities, and duties of businesses could be altered or eliminated? Is there any limitation whatsoever? Does this provision apply to existing rights?

- b. What "rights" do local communities enjoy? What "rights" does nature possess? Do these rights differ from the "fundamental rights" of communities and nature alluded to in paragraph (a) of subsection (3) of the proposed initiative?
 - c. What results if the rights of natural persons, local communities, and nature conflict?
 - d. Are the rights of businesses always trumped by the rights of persons, local communities, and nature? Would a property right of a business, for example, always be subject to any environmental regulation adopted by a local government? Can there be any attempt to weigh or balance the rights against each other?
6. Subsection (3) of the proposed initiative purports to insulate local laws from preemption or nullification by any international, federal, or state laws, provided that the local laws "do not restrict fundamental rights of natural persons, their local communities, or nature... or weaken protections" for those groups.
- a. Federal preemption of state or local law is premised on the Supremacy Clause of the United States constitution (art. VI, clause 2), which provides that the laws of the United States "shall be the supreme law of the land". The proposed initiative appears to upend this preemption doctrine so that a local law would supersede a federal law. How do the proponents intend the initiative to withstand federal preemption analysis?
 - b. The proposed initiative similarly upends well-settled law supporting the proposition that subordinate political subdivisions cannot unilaterally act to nullify the operation and effect of laws that cannot be abridged by local action, regardless of the type of local government acting and the matter with which a particular local law is concerned. Are the proponents creating a new preemption regime under which local laws take priority over state laws, even (for example) in matters of traditional statewide concern? Could a local government, for example, enact its own traffic laws that trump traffic laws used elsewhere in the state? Its own conflicting commercial code? Consumer protection laws? Criminal laws? Labor laws? Liquor laws?
 - c. Would state law preempt any conflicting local law so long as the former purports to secure the fundamental rights of persons/communities/nature or provide more stringent protections for those groups?
 - d. Under article XX, section 6 of the Colorado constitution, "home rule cities" have plenary authority over issues solely of local concern, and a home rule city is not inferior to the general assembly with respect to local and municipal matters that are within this authority. Under the

proposed initiative, will statutory cities in effect enjoy the same quantum of power as home rule cities?

- e. Many local governmental boundaries in Colorado overlap. If every type of local government act is supreme, what happens when the laws of overlapping local governmental entities conflict? How will courts determine which law should prevail?
7. Who would have the authority to enforce the provisions of the proposed initiative? The local government itself? Citizens residing within the boundaries of the local government? Both?

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. Each section in the Colorado Revised Statutes and the Colorado constitution has a headnote. Headnotes briefly describe the content of the section. The headnote should be in bold-face type, but headnotes are not underlined.
2. It is standard drafting practice to use SMALL CAPITAL LETTERS to show the language being added to the Colorado constitution.
3. Semicolons are used to connect two independent clauses, which could stand alone as their own sentences, and are not used with conjunctions such as "and", "but", or "yet". In subsection (2) of the proposed initiative, the semicolon should be removed.