

STATE OF COLORADO

Colorado General Assembly

Kirk Mlinek, Director
Legislative Council Staff

Colorado Legislative Council
029 State Capitol Building
Denver, Colorado 80203-1784
Telephone (303) 866-3521
Facsimile (303) 866-3855
TDD (303) 866-3472
E-Mail: lcs.ga@state.co.us



Charles W. Pike, Director
Office of Legislative Legal Services

Office Of Legislative Legal Services
091 State Capitol Building
Denver, Colorado 80203-1782
Telephone (303) 866-2045
Facsimile (303) 866-4157
E-Mail: olls.ga@state.co.us

MEMORANDUM

February 3, 2006

TO: William Mohrman, Jr., Betty LaMont, and Scott Gessler

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2005-2006 #79, concerning compensation for land use regs that diminish value

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 initiative appear to be:

1. To amend section 15 of article II of the Colorado constitution;
2. To require a public entity to provide just compensation to the owner of private real property if the public entity enacts or enforces one or more land use regulations that diminish the fair market value of any portion of private real property by twenty percent or more;
3. To specify that in order to provide just compensation to an owner, a public entity may either:

- a. Pay the owner the fair market value of the total amount of diminution caused by enforcement of the land use regulation; or
 - b. Suspend enforcement of the land use regulation as it affects the owner.
4. To specify that the requirements of the proposed initiative shall not apply to land use regulations that:
 - a. Are enacted after 1970, but prior to the owner's acquisition of the property or prior to the acquisition of the property by an owner's family member, whichever occurs first;
 - b. Are necessary to restrict or prohibit activities historically recognized as nuisances under common law, to protect the public health and safety, or to comply with federal law, which exceptions shall be narrowly construed as shall be proven by the public entity by clear and convincing evidence; or
 - c. Result from a decision by a public entity or court to conform with the proposed initiative.
 5. To allow an owner of private real property to bring an action in district court in the district where the real property is located in order to obtain just compensation from a public entity under the proposed initiative;
 6. To require an owner to provide written demand for compensation to the public entity at least one hundred eighty days prior to commencing any court action;
 7. To require the written demand to identify the land use regulation, affected land, and amount of diminution;
 8. To require the written demand be made within five years of the effective date of the proposed initiative, the enactment of the land use regulation, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever occurs later;
 9. To require the owner to commence legal action within two years after making the written demand;
 10. To require the public entity, within one hundred eighty days after the written demand, to either provide just compensation or submit to the owner a statement that identifies allowable uses of the affected property under the land use regulation;
 11. To require the owner's claim for review to become ripe for judicial review one hundred eighty days after the written demand;
 12. To require the owner to establish a diminution in fair market value by a preponderance of the

- evidence;
13. To allow the owner to submit evidence in addition to evidence submitted to a public entity or administrative body prior to instituting court action;
 14. To specify that the owner need not complete any administrative procedures before instituting court action;
 15. To entitle the owner to reasonable costs and attorney fees incurred in obtaining just compensation, including just compensation obtained without final court action;
 16. To require the court to award monetary compensation; and
 17. To define the terms "family member", "land use regulation", "owner", "public entity", "public health and safety", and "real property".

Comments and Questions

The form and substance of the proposed initiative raise the following comments and questions:

Technical questions:

1. To conform to standard drafting practices, would the proponents consider dividing the text of the proposed initiative into component parts using the following structure: Subsection, or, for example, "(1)", followed by paragraphs, or, for example, "(a)", followed by subparagraphs, for example, "(II)", ending with sub-subparagraphs, or, for example, "(B)"? As applied to the proposed initiative, this would mean the existing text of section 15 of article II of the Colorado constitution would become subsection (1), the paragraph now enumerated as "(B)" would become new subsection (2), the introductory portion of the new section that begins with the words "[i]n order to provide just compensation," would become new paragraph "(a)", the sentences that begins with the words "[p]ay the owner the fair market value" and "[s]uspend enforcement of the land use regulation" would become new subparagraphs (I) and (II) of paragraph (a) of subsection (2) and so forth throughout the text of the proposed initiative.
2. Under Colorado law, the singular includes the plural. See section 2-4-102, Colorado Revised Statutes. An advantage of using the singular is that it frequently allows for a more precise and clear construction and may require fewer words to make the same point. For example, under this construction, the words "one or more land use regulations" in section (B) of the proposed initiative could more simply be stated as "any land use regulation". The phrase "land use regulations" in section (B) (2) of the proposed initiative could be stated as "any land use regulation that" or "a land use regulation that...." Would the proponents consider making these or parallel changes throughout the text of the proposed initiative?

3. To conform to standard drafting practices, would the proponents consider initial capitalizing the first letter of each sentence as illustrated by the following example:

"(1) In order to provide just compensation to an owner, a public entity...."?
4. To conform to standard drafting practices and to eliminate surplusage, would the proponents consider deleting the word "then" in the first section (B) on page one of the proposed initiative?
5. In section (B) (1) of the proposed initiative, the sentence that begins "[i]f a public entity enacts or enforces" is separated from the sentence that begins "[i]n order to provide just compensation" as if the first sentence were an introductory portion to the second sentence when it appears that the second sentence is an independent, free-standing sentence that does not depend for its meaning upon the first sentence. Assuming this is the case, would the proponents consider moving the second sentence to follow the first, eliminating the space between the 2 sentences, and making any corresponding change in the structure of the proposed initiative?
6. In section (2) (A) of the proposed initiative, would it satisfy the proponents' intent if the relevant language read "prior to acquisition of the property by the owner or a family member of the owner, whichever occurs first"? If so, would the proponents consider making this change?
7. To conform to standard drafting practices and to promote clarity, in section (2) (B) of the proposed initiative, would the proponents consider adding a colon after "to" in the first line of that section and then breaking up the rest of the section into component parts that would begin with the words "[R]estrict," "[P]rotect" and "[C]omply"?
8. The introductory portion to section (3) of the proposed initiative references "this section". In fact, "this section" actually refers to all of section 15, including the existing language not addressed in the proposed initiative and for which references to a civil action would presumably not apply. To address this concern, would the proponents consider referencing "this subsection" or some unit smaller than the entire section to reference the statutory provisions to which the legal proceedings apply?
9. Section (3) of the proposed initiative, concerning the procedures to obtain just compensation from a public entity, appears to contain an introductory paragraph followed by several subparts that flow from the introductory paragraph but it does not appear that there is any language that leads into the subparts from an introductory sentence. In fact, the introductory sentence appears to be simply another step in the process aligned with the other subparts. Would the proponents consider addressing this matter, by, for example, providing an introductory sentence that states "[i]n order to obtain just compensation from a public entity under this [sub]section, an owner of private real property shall do the following" or words of the same effect, followed by a listing of all of the required steps in separate subparts?

10. In section (3) (A) and (3) (D) of the proposed initiative, to conform to standard drafting practices, would the proponents consider writing out the number "180" as "one hundred eighty"?
11. With respect to section (3) of the proposed initiative, it appears some of the items in (A) through (F) may not follow a straight chronological path, which may make the section more difficult to understand. For example, it seems the matters discussed in subsection (D), which concerns the response to the demand, should come before subsection (C), which provides a statute of limitation on filing an action after the written demand is made. Would the proponents consider modifying subsection (3) to make the chronological path leading to the filing of a civil action easier to follow?
12. In section (3) (A) of the proposed initiative, to be consistent with the general terminology used in the measure, would the proponents consider substituting the phrase "affected property" or "affected portion of real property" for the phrase "affected land"?
13. In section (3) (B), to promote clarity, would the proponents consider modifying the clause affecting the "enactment of the land use regulation" so that it reads "the date of the enactment of the land use regulation", or words of comparable effect?
14. In section (3) (B) of the proposed initiative, to conform to standard drafting practices, and to promote clarity of expression, would the proponents consider dividing this paragraph into three subparts, with the "or" only required between the second and third components?
15. Section (3) (B) of the proposed initiative references "this act." In fact, the proposed initiative is not "an act", a term generally restricted to statutory enactments, but an initiated measure that would amend the state constitution. Would the proponents consider substituting the phrase "this measure" or "this section, as amended," for the phrase "this act"?
16. In section (3) (C) of the proposed initiative, in the interests of promoting clarity of expression, would the proponents consider substituting the phrase "no later than two years from the date of the written demand" for the phrase "within two years after making written demand"?
17. To conform to standards drafting practices, on the first line of the section containing definitions, would the proponents consider deleting the word "definitions" in favor of the words "[a]s used in this section [or, subsection (2)], unless the context otherwise requires"?
18. In section (4) (A) of the proposed initiative, to conform to standard drafting practices, and to promote clarity of expression, would the proponents consider dividing this paragraph into four subparts? To more firmly delineate the requirements of this paragraph, would the proponents consider changing the comma between "foregoing" and or to a semi-colon? Would the proponents also consider substituting the more familiar term "ancestor" for the less well-known word "forebear"?
19. In section (4) (C) of the proposed initiative, to conform to standard drafting practices and to

promote clarity, would the proponents consider substituting the phrase "[o]wner shall not include" for the phrase "[i]t shall not include"?

20. To conform to standard drafting practices, would the proponents consider adding a comma after the word "regional" but prior to the word "or" in the first line of section (4) (D) of the proposed initiative?
21. In section (4) (D) of the proposed initiative, would the proponents consider adding a comma after "districts"?
22. Under standard drafting practice in Colorado, substantive law is generally not placed in the definitions section. The provisions addressing "public health and safety" in section (4) (E) arguably contain substantive legal requirements and not definitions. Accordingly, to be consistent with standard drafting practices, would the proponents consider moving these provisions to a different place in the text of the proposed initiative containing substantive law, perhaps in connection with the requirements of section (3)?

Substantive 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. Article V, section 1 (4) says that initiated measures "shall take effect from and after the official declaration of the vote thereon by proclamation of the governor." The proposed initiative does not contain an internal effective date. Is it the proponents' intent that the proposed initiative will take effect "from and after the official declaration of the vote thereon by proclamation of the governor" or do they intend some other effective date?
3. To what acts of enacting or enforcing land use regulations would the proposed initiative apply - - regulations enacted or enforced prior to the effective date of the proposed initiative or after the effective date? Would the proponents consider clarifying the applicability of the provisions in the proposed initiative?
4. The proposed initiative adds new requirements to the state constitution instead of the Colorado Revised Statutes. Among other things, this means any changes to the text of the proposed initiative, including changes made to better effectuate the proponents' intent, could only be accomplished upon voter approval in a general election. In drafting the proposed initiative, have the proponents considered this issue?
5. In section (B) of the proposed initiative, what does it mean to *enforce* a land use regulation in this context? Does *enforcement* mean something different from *enactment*?
6. What is "private real property" for purpose of the proposed initiative? Does this term differ from "real property"?
7. What is the basis for the twenty percent figure that requires payment of the just compensation

or suspension of the regulation under the proposed initiative? How did the proponents arrive at this figure? As of what date or time is the diminution in value to be measured? For what period is the diminution measuring?

8. The measure requires just compensation to be paid when "one or more" land use regulations diminish the fair market value of any portion of private real property by twenty percent. Does this mean that the cumulative effect of different types of regulations can be considered in order to arrive at the twenty percent figure? For example, if a zoning regulation alone does not diminish the value by twenty percent, would an owner be able include the effect of a master plan, subdivision regulations, and other regulations affecting the property to reach the requisite twenty percent? Could the net affect of different regulations applied separately over time be combined to reach the twenty percent?
9. What is "just compensation" under the proposed initiative? How is just compensation to be measured? What is the difference, if any, between how compensation is to be determined under existing law in the case of a regulatory taking and how it would be determined under the proposed initiative?
10. What is the "fair market value of the total amount of diminution caused by enforcement of the land use regulation" as used in section (1) (A) of the proposed initiative? How is a public body to determine the fair market value of the total amount of diminution? Is this the same as the "diminution in the fair market value caused by the regulation" or is some other meaning intended? How is the diminution in value to be determined?
11. What do the proponents mean by "fair market value" for purpose of the proposed initiative? How is fair market value to be determined?
12. Can the effects of a land use decision directly affecting one property be weighed against the effect on adjoining properties? For example, a decision to deny a commercial use on one tract of land might cause its value to decrease; however, allowing the use might cause a decrease in the value of surrounding residential properties. In such a case, would the public entity or a court be able to look at the cumulative effect of the enforcing the regulation, or only the effect on each owner's property separately?
13. The introductory portion of section (B) uses the words "enacts or enforces", but the remedy provision in subsection (1) (A) references only enforcement. Is there any inconsistency between these two provisions? If a public entity enacts but does not enforce a land use regulation, is the entity still required to comply with the terms of the proposed initiative?
14. What does it mean to "suspend" enforcement of the land use regulation? This wording suggests a temporary cut-off of enforcement of the regulation. Is this the proponents' intent? Have the proponents considered whether there are any equal protection or other constitutional challenges to suspending enforcement of a regulatory enactment for particular persons?
15. In section (2) (A), what is the basis for using the year 1970 as a cutoff for the application of

certain land use regulations? What is the basis for excluding application of the proposed initiative to regulations adopted after 1970 but prior to the acquisition of subject property by the owner or the owner's family? Does the measure apply to regulations adopted before 1970 since they do not appear to be expressly excluded? Are the proponents aware of specific persons or cases that would be directly affected by these provisions? Do the proponents have any idea as to how many persons or specific land use regulations will be affected by this section of the proposed initiative?

16. In section (2) (B) of the proposed initiative, what do the proponents mean by:
 - a. "[A]ctivities historically recognized as nuisances under common law"; and
 - b. "[A]ctivities. . . to protect the public health and safety"?
17. What is meant by section (2) (C) of the proposed initiative?
18. Subsection (3) of the proposed initiative states that owners *may* file an action, which suggests an owner may need not file any action to obtain just compensation, and this interpretation may not reflect the proponents' intent. Under the proposed initiative, is filing a civil action in accordance with the requirements of subsection (3) the only way an owner is able to obtain just compensation in lieu of obtaining suspension of the land use regulation at issue? If so, would it be more precise to state that "an owner seeking just compensation who elects to pursue just compensation *shall* bring an action in district court..." or words of comparable effect? Could an owner seek to enjoin the application or enforcement of a regulation pursuant to this proposed initiative, or would the owner be limited to seeking just compensation?
19. With respect to section (3) (E) of the text of the proposed initiative, how detailed is the statement that identifies allowable uses of the affected property? What is the purpose of this requirement? To what extent does the statement serve as a condition precedent for civil action on the claim for just compensation?
20. What does the second sentence in section (3) (E) of the proposed initiative mean? Would the proponents consider modifying the language of this sentence so that their intent is more easily understood?
21. In section (3) (F) of the proposed initiative, the clause that begins "to include just compensation" as well as the last sentence seem awkward and unclear. What is the intent of the clause added to the first sentence? With respect to the last sentence, is "monetary compensation" the same as "just compensation"? When is the court to award such compensation? On what basis? Is this sentence merely trying to state that a court shall award just compensation to a victorious plaintiff or is some other meaning intended? Would the proponents consider modifying the language of this section so that their intent on these two points is more clearly understood?
22. With respect to section (4) (B) of the proposed initiative, in defining the term "land use

regulation," does a regulation have to involve the granting or denial of an application or permit, or is the phrase "action taken in connection to an application or permit" simply illustrative of certain types of regulations encompassed by the proposed initiative? Is there any facet of land use regulation that would not affect "ownership of, or an interest, in, real property"? Under this standard, is it not conceivable that the proposed initiative would also implicate other forms of regulation that may not come under the rubric of land use regulation but that would similarly affect "ownership of, or an interest in, real property"?

23. Why does the definition of "land use regulation" in section (4) (B) use the phrase "governmental entity" instead of "public entity"? Are these terms intended to be synonymous? If so, in the interests of promoting consistency in terms, would the proponents considering using the term "public entity" in this section?
24. With respect to the definition of "public entity" in section (4) (D) of the proposed initiative:
 - a. The definition expressly includes "one or more state...governments". Is it the proponents' intent that the proposed measure apply to more state governments than the state of Colorado (assuming that were legally possible)? If it is the proponents' intent that the proposed initiative apply to only one state government, i.e., Colorado, and one or more local governments in this state [as defined therein], would the proponents consider clarifying their intent on this point?
 - b. What do the proponents mean by "regional governments" for purposes of the proposed initiative? Would the proponents consider clarifying their intent on this point?
 - c. What do the proponents mean by "local governments" for purposes of the proposed initiative? Would the proponents consider clarifying their intent on this point?
 - d. What do the proponents mean by "districts" for purposes of the proposed initiative? Would the proponents consider clarifying their intent on this point?
 - e. What does it mean for a public entity to "independently exercise governmental authority"? Instead of providing their own definition of "public entity", have the proponents considered adopting or at least modifying a definition of "political subdivision" already codified in the Colorado Revised Statutes for purpose of the proposed initiative? *See*, for example, section 29-1-202 (2), Colorado Revised Statutes.
25. With respect to section (4) (E) of the proposed initiative, what degree of evidence is sufficient to establish findings of a public health or safety hazard? Which court or other body is to review the trial court's findings *de novo*? What is the basis for this requirement?
26. Have the proponents considered any fiscal or other impacts that may result from the enactment of the proposed initiative on local governments in this state?

27. Have the proponents considered any fiscal or other impacts that may result from the enactment of the proposed initiative on the Colorado state judicial system? Insofar as enactment of the proposed initiative were to lead to a strain on judicial resources, have the proponents considered incorporating a fee or some other mechanism that would allow this new system to cover some or all of the costs it may impose on the judicial system?

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