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MEMORANDUM

May 3, 2006

TO: Tim Brown and Matthew Garrington

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2005-2006 #135, concerning Condemnation of Private Property

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 define "public use" to mean:
 - a. Possession and occupation of condemned property by a public entity or public utility, regardless of whether such public utility is a private entity and notwithstanding the authority of the public utilities commission under article XXV of the Colorado constitution; or

- b. The acquisition and disposition of property in order to remedy conditions in slum or blighted areas that are injurious to the public health, safety, morals, and welfare to the extent that elimination of the existing conditions is necessary.
2. To specify that the public or private benefits of economic development, including an increase in the tax base, tax revenues, employment, or general economic health, shall not constitute a public use in the absence of conditions of slum or blighted areas that are injurious to the public health, safety, morals, and welfare to the extent that elimination of the existing conditions is necessary;
3. To specify that private property shall not be taken by a private party except as a private way of necessity as provided under section 14 of article II of the Colorado constitution or for other purposes as authorized by the proposed initiative; and
4. To declare that by proposing and enacting the proposed initiative, the intent of the general assembly and the voters of Colorado is to ensure that no force or effect is given to any part of any other amendment or amendments to section 15 of article II of the Colorado constitution dealing with private property rights that are considered at the 2006 general election, if the votes cast in favor of such amendment or amendments are fewer than the number of votes cast in favor of the proposed initiative.

Comments and Questions

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

Technical questions:

1. The proposed initiative appears to have a mixture of small and large cap type. To conform to standard drafting practices, would the proponents consider showing the new language in small cap type (SMALL CAP TYPE), the language they are removing in stricken type (~~stricken type~~), and existing constitutional language in regular type (regular type)? For example:

(1) IN ORDER TO PROTECT PROPERTY RIGHTS, WITHOUT THE CONSENT OF THE OWNER OF THE PROPERTY, private property shall not be taken or damaged, for A public USE. . .
2. Is it the proponents' intent that the line numbers in the left margin of the proposed initiative are for discussion purposes and are not part of the substance of the proposed initiative? Would the proponents consider removing these numbers to avoid any confusion over whether the numbers are part of the proposed initiative itself?
3. To conform to standard drafting practices, would the proponents consider capitalizing the first letter of the first word of each of the new sentences?
4. a. To conform to standard drafting practices and because the term "public use" is used

in subsections (1) and (2) of the proposed initiative, would the proponents consider moving the definition of "public use" to a new subsection (3) and applying the definition to the entire section, as shown in the following example:

(3) AS USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(a) "PUBLIC USE" SHALL MEAN:

(I) THE POSSESSION AND OCCUPATION. . .;

(II) THE ACQUISITION AND DISPOSITION OF PROPERTY IN ORDER TO. . .;?

- b. If a new subsection (3) is created the proponents should renumber the existing subsection (3) in the proposed initiative and any internal references should be corrected to reflect the change to the numbering.
5. In the first sentence of subsection (2) (b) of the proposed initiative, to conform to standard drafting practices, would the proponents consider adding a comma after the word "morals"?
 6. In the second sentence of subsection (2) (b) of the proposed initiative, it appears there is some double-underlining between the words "use" and "in". As such, would the proponents consider removing this double-underlining?
 7. In the last sentence of subsection (2) (b) of the proposed initiative, to conform to standard drafting practices, would the proponents consider adding the word "this" before the word "article"?
 8. In the last sentence of subsection (2) (b) of the proposed initiative, to conform to standard drafting practices, would the proponents consider changing the phrase "by subsection (2) of this section" to "by this subsection (2)"?
 9. In subsection (3) of the proposed initiative, would the proponents consider changing the references to "this amendment" to "this section, as amended,"?
 10. Under Colorado law, the singular includes the plural. Because of this law, would the proponents consider using the singular only when referencing "any other amendment or amendments" in subsection (3) of the proposed initiative?
 11. In subsection (3) of the proposed initiative, to conform to standard drafting practices, would the proponents consider changing the reference to "Section 15 of Article II of the constitution" to "this section"?

Substantive questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed measures to have a single subject. What is the single subject of the proposed initiative?
2. What is the proponents' intent in including the phrase "in order to protect property rights," in line 10 of the proposed initiative? What effect would the phrase have on the enforcement

or interpretation of the proposed initiative?

3. The proposed initiative makes two references to section 14 of article II of the Colorado constitution, in lines 12 and 41. In the interests of facilitating a harmonious convergence of these two related sections of the Colorado constitution, have the proponents considered making changes to section 14 of article II of the Colorado constitution that would parallel the changes found in section 15 of article II of the Colorado constitution?
4. To which persons or entities is the proposed initiative intended to apply? More specifically, is the proposed initiative intended to apply to any public or private entity that is authorized to exercise the power of eminent domain or is some other construction intended? Are the proponents aware of any public or private entities that would not be covered by the application of the proposed initiative?
5. What is the proponents' intent in excluding consensual condemnation from the scope of the proposed initiative? Are the proponents familiar with circumstances under which consensual condemnation typically takes place?
6. With respect to the phrase "possession and occupation" found in line 23 of the proposed initiative:
 - a. What do the proponents mean by this phrase? More specifically, would possession and occupation include the condemnation of easements or other interests in real property?
 - b. What is the nature of the possession and occupation that must be demonstrated by a public entity or utility in order for the entity or utility to satisfy this prong of the definition of public use contained in the proposed initiative?
 - c. Although it may be assumed that the possession and occupation relates to the property that is the subject of the condemnation action, the proposed initiative does not so specify. Would the proponents consider modifying the text of the proposed initiative to address this particular issue?
7. What do the proponents mean by a "public entity" for purposes of the proposed initiative? Are there any political subdivisions at the state or local levels that would not be included within proponents' intended meaning for this term? More specifically, does "public entity" include an urban renewal authority? Would the proponents consider adding a definition of this term to the text of the proposed initiative?
8. What do the proponents mean by a "public utility"? Would the proponents consider adding a definition of this term to the text of the proposed initiative? What is the relevant authority of the public utilities commission that would potentially be supplanted by the terms of the proposed initiative? Why do the proponents feel it necessary to add this language to the text of the proposed initiative?

9. What do the proponents mean by "slum" and "blighted" for purposes of the proposed initiative? Would the proponents consider adding a definition of these terms to the text of the proposed initiative?
10. Do the proponents intend the words "acquisition" and "disposition" as used on line 28 of the proposed initiative to have their ordinary and common meaning for purposes of the initiative, or do the proponents intend some other or expanded meaning for these words?
11. What do the proponents mean by "the public health, safety, morals and welfare"? Would the proponents consider adding a definition of these terms to the text of the proposed initiative? Does the use of the conjunction "and" indicate proponents' intent that each of these four conditions need be present in order for the threshold condition to be met? If not, would the proponents consider modifying the text of the proposed initiative?
12. Under subsection (2) (b) of the proposed initiative, how will interested parties know that the threshold circumstances have been met, i.e., the presence of "conditions in slum or blighted areas that are injurious to the public health, safety, morals and welfare to the extent that elimination of the existing conditions is necessary"? What are some examples of the types of conditions that would satisfy this requirement?
13. What do the proponents mean by the phrase "to the extent that elimination of the existing conditions is necessary"? What do the proponents mean by "necessary"? Necessary to whom? How is the determination to be made that elimination of the existing conditions is necessary? Who is to make the determination and in what manner? If conditions are present in slum or blighted areas that are injurious to the public health, safety, morals, and welfare, are the proponents aware of any circumstances under which the elimination of such conditions would not be necessary? Accordingly, what does this inclusion of this phrase add to the fundamental definition of public use contained in the proposed initiative?
14. What do the proponents mean by "economic development" for purposes of the proposed initiative? Would the proponents consider adding a definition of this term to the text of the proposed initiative?
15. Under the proposed initiative, to what extent, if any, would the exercise of eminent domain that results in the acquisition of private property for subsequent transfer to another private party be prohibited? If so, is there any time limitation between the original condemnation by the condemning entity and a subsequent transfer that would permit the acquisition if the proposed initiative became law?
16. Would the possession and occupation of private property by an urban renewal authority satisfy the first prong of the definition of public use under the proposed initiative? If not, why not? If so, how long would the authority be permitted to possess or occupy the subject property before it could be transferred to another private party?
17. To what extent, if any, would a condemnation by a public entity that results in indirect private benefits be prohibited if the proposed initiative became law? To what extent are any

private benefits that flow from the condemnation to be considered in determining the legality of the condemnation under the proposed initiative?

18. What effect, if any, do the proponents foresee the proposed initiative will have on urban renewal as it has been historically undertaken in Colorado?
19. To which condemnation actions would the proposed initiative apply? Those commenced on or after the effective date of the proposed initiative? Would the proponents consider specifying an effective date and to which condemnation actions the proposed initiative would apply?
20. What do the proponents mean by "a private party" for purposes of the text of the proposed initiative? Would the proponents consider adding a definition of this term to the text of the proposed initiative?
21. With respect to the actions of a private party under the proposed initiative, is the last sentence of subsection (2) (b) of the proposed initiative intended to mean that private property shall not be taken by a private party except as a private way of necessity as provided under section 14 of article II of the Colorado constitution or for other purposes as authorized by subsection (2) of the proposed initiative? What are these "other purposes"? To what extent does the text of the proposed initiative expand or restrict the uses for which private property may be taken at the present time under existing legal authority pursuant to section 14 of article II of the Colorado constitution? The proposed initiative appears to preclude whatever condemnation rights a private party may enjoy under section 7 of article XVI of the Colorado constitution. Is this the proponents' intent?
22. Under the proposed initiative, it appears the permitted exercise of eminent domain by a public utility is limited to "the possession and occupation" by the utility. Is this assumption correct, or does the proposed initiative contemplate any other permitted uses of eminent domain by a public utility?
23. With respect to the permitted exercise of eminent domain by a private party under the proposed initiative for private ways of necessity, what do the proponents intend "private way of necessity" to mean or include? Would the proponents consider clarifying their intended meaning for this phrase in the proposed initiative?
24. Would the proposed initiative prohibit the taking of private property for private toll roads? Please explain your answer with reference to the text of the proposed initiative.
25. Is the proponents' intent that only those entities listed under subsection (2) (a) of the proposed initiative, i.e., public entities and public utilities, be permitted to acquire and dispose of property solely for the purposes listed under subsection (2) (b) of the proposed initiative, i.e., remedying "conditions in slum or blighted areas that are injurious to the public health, safety, morals and welfare to the extent that elimination of the existing conditions is necessary"? If not, what other persons or entities may acquire or dispose of property for the purposes listed under subsection (2) (b) of the proposed initiative?

26. It appears that the proposed initiative states that remedying conditions in slum or blighted areas that are injurious to the public health, safety, morals and welfare to the extent that elimination of the existing conditions is necessary comes within the definition of public use. Is this an accurate depiction of the proposed initiative? If so, how would enactment of the proposed initiative represent a change, if at all, from existing law? Are the proponents able to identify any condemnation actions presently or recently undertaken by urban renewal authorities or other public entities across the state that would not have been permitted to go forward under the requirements of the proposed initiative?
27. To what extent, if any, would enactment of the proposed initiative change the manner in which areas are determined to be blighted under the "Urban Renewal Law", part 1 of article 25 of title 31, Colorado Revised Statutes?
28. Does the phrase "blighted areas" in line 30 of the proposed initiative mean that a public entity would be able to designate whole areas of real property as blighted even though specific parcels of property within the subject area may not meet the requirements for such designation?
29. To the extent that words and phrases are not defined specifically in the proposed initiative, can the general assembly define these words or phrases by law in the Colorado Revised Statutes?
30. With respect to subsection (3) of the proposed initiative:
 - a. Is it the proponents' intent that this subsection become part of the Colorado constitution?
 - b. The subsection claims to speak for the general assembly but the general assembly plays no part in the passage of the proposed initiative and there is no mechanism by which the general assembly expresses its intent with respect to the proposed initiative. Accordingly, would the proponents consider deleting the reference to the general assembly in the text of the proposed initiative?
 - c. Are the proponents relying upon any legal authority for the proposition that the instructions contained in subsection (3) be given force and effect? If so, what is this legal authority?
 - d. Section 1-40-123, Colorado Revised Statutes, already provides in relevant part that, in the case of the adoption of conflicting ballot measures, the greatest number of affirmative votes shall prevail in all particulars as to which there is a conflict. This provision would appear to make the requirements of subsection (3) unnecessary. Insofar as the proponents agree, would they consider deleting subsection (3) from the text of the proposed initiative?