

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

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 #126, concerning Compensation for Land Use Regulations 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 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;
2. To specify that the requirements of the proposed initiative shall not apply to land use regulations that are enacted prior to 1970 or enacted after 1970, but prior to acquisition of the property by the owner;

3. To specify that the requirements of the proposed initiative shall not apply to land use regulations that are necessary to restrict or prohibit activities historically recognized as nuisances under common law; to protect the public health, safety, morals, or welfare; or to comply with federal law;
4. To specify that the requirements of the proposed initiative shall not apply to any portion of privately owned real property that, if exempted from a specified land use regulation, would:
 - a. Decrease the fair market value of any portion of surrounding real properties;
 - b. Threaten commonly held community values, both market and those values external to the market and provides examples of those values; or
 - c. Threaten the natural or built environment including, but not limited to, any reduction in air or water quality, the fragmentation or reduction of wildlife habitats, or significant impact on a resource including, but not limited to, water that would impact current uses or rights.
5. To specify the following shall apply to any efforts to enjoin enforcement of a land use regulation or obtain just compensation from any public entity under the proposed initiative:
 - a. To require an owner to provide written demand for compensation or exemption to the public entity at least one hundred eighty days prior to commencing any court action;
 - b. To require the written demand to identify the affected portion of real property, land use regulation, and amount of diminution.
6. To require the written demand be made within five years of the effective date of the proposed initiative, the date of the enactment of the land use regulation, or the date the public entity seeks to enforce the land use regulation as an approval criteria to an application submitted by the owner;
7. To require the public entity, within one hundred eighty days after the written demand, to either exempt the owner from enforcement of the land use regulation, provide just compensation, or submit to the owner a statement that identifies currently approved uses of the affected property;
8. To allow the owner to enjoin enforcement of the land use regulation or to obtain just compensation by bringing an action in district court in the district where the real property is located;
9. To require the owner's claim for review to become ripe for judicial review one hundred eighty days after the written demand;
10. To require the owner to commence legal action within two years from the date the owner's claim becomes ripe for judicial review;

11. To specify that the owner need not complete any administrative procedures before instituting court action;
12. To require the owner to establish a diminution of value or just compensation by clear and convincing evidence;
13. To allow the owner to submit evidence in addition to evidence presented to a public entity or administrative body;
14. To require all exceptions in the proposed initiative to be liberally construed to protect the public health, safety, morals, or general welfare; and
15. To define the terms "land use regulation", "owner", "public entity", 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 initial capitalizing the first letter of each sentence of the proposed initiative and the word "Colorado"?
2. In the introductory portion of subsection (2) of the proposed initiative, the phrase "of any portion of privately-owned real property" suggests that the proposed initiative is only applicable in the case of a regulation that affects less than the entirety of the owner's property. Is this proponents' intent? If not, would they consider modifying this language so that it addresses the entirety as well as any portion of the owner's property?
3. To conform to standard drafting practices, would the proponents consider removing the hyphen from between phrases when the first word of the phrase ends in "ly"? For example, in the introductory portion of subsection (2) of the proposed initiative, removing the hyphen from the phrase "privately owned".
4. In subsection (2) (a) (II) (B) of the proposed initiative, would the proponents consider removing the space after the word "health" and inserting a space before the word "safety"?
5. To conform to standard drafting practices, would the proponents consider adding either the word "and " or "or", whichever word more accurately reflects the intent of the proponents, to the end of subsection (2) (a) (II) (B) of the proposed initiative?
6. There are two paragraph (b)'s in subsection (2) of the proposed initiative. Accordingly, would the proponents consider relettering the second paragraph (b) as paragraph (c) and then relettering the current paragraph (c) as paragraph (d)?

7. To conform to standard drafting practices, at the end of the first subsection (2) (b) (II) of the proposed initiative, would the proponents consider removing the word "or" since this section contains two sentences. If the proponents make this change, would the proponents then end the second sentence in this subsection with a period?
8. To conform to standard drafting practices, would the proponents consider changing the punctuation at the end of the second subsection (2) (b) of the proposed initiative from a semi-colon to a colon?
9. In the second subsection (2) (b) (I) of the proposed initiative, to conform to standard drafting practices, would the proponents consider ending the second sentence with a period?
10. In the second sentence of the second subsection (2) (b) (IV) of the proposed initiative, it appears that the phrase "owner's claim" is one word, would the proponents consider splitting this phrase into two separate words?
11. In the second sentence of subsection (2) (c) (II) of the proposed initiative, to conform to standard drafting practices, would the proponents consider removing the word "or" after the word "entity"?
12. In the second sentence of subsection (2) (c) (II) of the proposed initiative, to conform to standard drafting practices, would the proponents consider adding a comma after the word "department"?
13. To conform to standard drafting practices, would the proponents consider adding the word "is" to the introductory portion of subsection (2) (a) following the word "that" so that the succeeding subparagraphs would begin with the capitalized words "enacted" and "necessary"?
14. The introductory portion of the first subsection (2) (b) appears to be stating that it is the property itself that would cause the effects specified in subparagraphs (I), (II), or (III) of paragraph (b), as contrasted with the exemption from the land use regulation that would cause the specified effect. Is this the proponents' intention? If not, would the proponents consider modifying the language of the proposed initiative to address this potential ambiguity?
15. The language of the second subsection (2) (b) (VI) seems misplaced. This sentence addresses the manner in which the exceptions are to be construed but is placed in the section addressing the procedures for the claimant to vindicate his or her rights. In light of this concern, would the proponents consider moving this provision?
16. In the second subsection (2) (b) (VI) of the proposed initiative, to conform to standard drafting practices, would the proponents consider changing the reference to "subsection (2)(a) and (b)" to "paragraphs (a) and (b) of this subsection (2)"?

17. Section 2-4-102, Colorado Revised Statutes, which would aid in the construction of constitutional provisions, holds that the singular includes the plural. An effect of this provision is that nouns can be stated in the singular (which often aids clarity of expression) without having to list the plural of the same noun in the same sentence. In light of this canon of statutory construction, would the proponents consider referring to "an action taken" in the definition of land use regulation, instead of "actions taken"? In addition, "land use regulation" and "public entity" may be more easily stated without referring to their plural counterparts in the text. Would the proponents consider making these changes?

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 Colorado 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 the introductory portion to subsection (2) 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 the basis for the twenty percent figure that requires payment of the just compensation or exemption of the offending 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?
7. The proposed initiative requires just compensation to be paid to any land use regulation or any combination of land use regulations that diminishes 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?

8. What do the proponents intend "just compensation" to mean 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?
9. What is the meaning of the phrase "fair market value of any portion of privately-owned real property" as used in the introductory portion of subsection (2) of the proposed initiative? Does this phrase have the same intended meaning 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?
10. What do the proponents mean by "fair market value" for purpose of the proposed initiative? How is fair market value to be determined under the proposed initiative?
11. 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?
12. The introductory portion of subsection (2) of the proposed initiative uses the phrase "enacts or enforces", but the remedy provision in the second subsection (2) (b) generally 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?
13. The introductory portion of subsection (2) of the proposed initiative gives the public entity discretion to select between paying just compensation and exempting the owner from the land use regulation. How is this determination to be made? Is there any standard to guide or restrain the public entity in exercising its discretion in making this determination?
14. In subsection (2) (a) of the proposed initiative, 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? Why is the date the owner acquired the property used as a cut-off point? 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?
15. Subsection (2) (a) (I) of the proposed initiative exempts regulations enacted prior to 1970 or

after 1970. What if a regulation was adopted in 1970, which would be neither before nor after 1970? Would the proponents consider changing the phrase "after 1970" to "on or after January 1, 1970"?

16. In subsection (2) (a) (II) of the proposed initiative, what do the proponents mean by:
 - a. "[A]ctivities historically recognized as nuisances under common law"; and
 - b. Regulations necessary "to protect the public health, safety, morals, or welfare"? What do the proponents mean by the "public health, safety, morals, or welfare"? Is there any activity engaged in by a public entity that is incapable of being subsumed under this phrase? How will a public entity fail to make a sufficient showing that almost any conceivable land use regulation meets this standard?
17. With respect to the first subsection (2) (b) of the proposed initiative:
 - a. What do the proponents intend the introductory portion of the first subsection (2) (b) to mean, i.e., the sentence that begins "[t]his subsection (2) shall not apply to any portion of privately-owned real property...."?
 - b. What is the basis for each of the conditions specified in subparagraphs (I) through (III) of the first subsection (2) (b)? Specifically, what is meant for any portion of property to "decrease the fair market value of any portion of surrounding properties"?
 - c. More specifically, how does a portion of property "threaten commonly-held community values"? What are those values? How are they determined? What is "both market and those values external to the market"?
 - d. What is the "built environment"? What other resources do the proponents intend this particular provision to cover?
 - e. For greater clarity, why are the factors listed in the first subsection (2) (b) not simply added to subsection (2) (a) as additional grounds for exempting particular land use regulations from the scope of the proposed initiative? In light of the broad grounds for the exemptions specified in subparagraphs (I) through (III) of the first subsection (2) (b), supplemented by the provisions of the second subsection (2) (b) (VI), are the proponents aware of any type or kind of land use regulation that would actually trigger application of the proposed initiative?
18. In second subsection (2) (b) (II) (A) of the proposed initiative, what is the basis for the five-year standard?
19. What is meant by that portion of second subsection (2) (b) (II) (C) of the proposed initiative that states in relevant part "to include use of the land use regulation as an approval criteria...."?

20. With respect to the second subsection (2) (b) (IV) of the proposed initiative:
- a. The first sentence of this subparagraph, which seems an appropriate introductory statement for the entire remedies section of the proposed initiative, is placed in the middle subparagraph, which makes the timetable of the action somewhat confusing. Would the proponents consider moving this sentence to the top of the relevant portion of the proposed initiative that contains the remedies provisions?
 - b. The introductory portion of subsection (2) appears to give the public entity discretion to pay just compensation or exempt the owner from the land use regulation. However, this subparagraph authorizes the owner to bring an action to enjoin enforcement of the land use regulation or to obtain just compensation, which suggests choice on the part of the property owner. Do the proponents see any inconsistency between these two provisions?
21. Would the proposed initiative provide for an extension of the deadlines specified, particularly upon mutual consent of the parties? Would the proponents consider modifying the text of the proposed initiative to provide for such modification?
22. In the second subsection (2) (b) (V) of the proposed initiative, what does it mean for the owner to establish a diminution in value or just compensation? Typically, the owner would be required to prove damages, i.e., diminution in value, and just compensation is the measure of damages to be awarded the owner if the owner prevails on his or her diminution claim. Under the proposed initiative, it appears the owner is required to prove diminution in value in all cases. If so, why does this provision require the owner to prove diminution or just compensation? Does this mean the owner may recover damages in the absence of diminution in value? Would the proponents consider addressing any ambiguity on this point?
23. In the second subsection (2) (b) (V) of the proposed initiative, why is the property owner required to prove his or her case by "clear and convincing evidence"? What do the proponents mean by clear and convincing evidence for purposes of the proposed initiative?
24. With respect to the provisions of the second subsection (2) (b) (VI) of the proposed initiative, what do the proponents mean by the "public health, safety, morals, or general welfare"? Is "general welfare" as stated in this subparagraph different from merely "welfare" as stated in subsection 2 (a) (II) (B)? If so, how? If the proposed initiative is to be liberally construed to protect the public health, safety, morals, or general welfare, is there any sense in which it provides any meaningful protection to owners of private property?
25. With respect to subsection (2) (c) (I) 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"?

26. With respect to the definition of "public entity" in subsection (2) (c) (II) of the proposed initiative:
 - a. Is there any form of special district not included within the definition of public entity?
 - b. Is an urban renewal authority included within the definition of public entity? If yes, why is it not included when so many other specific entities are included?
 - c. What does it mean for a public entity to "independently exercise governmental authority"?
27. 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?
28. 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 if the 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 the application of the proposed initiative to cover some or all of the costs it may impose on the judicial system?