

# STATE OF COLORADO

## Colorado General Assembly

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### MEMORANDUM

November 8, 2005

TO: Daniel Hayes and Eric Levine

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2005-2006 #57, concerning the limitations on housing growth

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 amendment appear to be:

1. To amend article XVIII of the Colorado constitution by the addition of a new section;
2. To reserve the right to enact a limitation on privately owned housing units in each local government without legislative inhibition or penalty;
3. To reserve the right to enact a county-wide limitation on privately owned housing units, which shall include each local government and part of such within a Colorado county;
4. To specify that no permanent limitation shall restrict housing growth to less than one percent

annually;

5. To specify that a limit of one percent annual growth in privately owned housing units shall be adopted by each local government and any part of such in the counties of Adams, Arapahoe, Boulder, Douglas, El Paso, Jefferson, and Larimer for 2007 and subsequent years including 2010;
6. To specify that at least thirty percent of the regulated housing growth shall be affordable and affordable senior housing;
7. To specify that at a time when the amendment is initially declared approved by the voters no further permits for such regulated growth shall be issued until 2007 in specified counties;
8. To specify that the issue shall be called for the 2010 November general election to enact or repeal in specified counties;
9. To specify that a violation by public officials of the following regulations with regards to all housing as well as planning and zoning matters shall constitute a misdemeanor crime:
  - a. The open meetings act;
  - b. The open records act;
  - c. Failure to post public records, including financial, on the internet within thirty days of transaction;
  - d. Engaging in misleading or deceptive publicity; and
  - e. Violating the provisions of a limitation.
10. To specify that a second conviction of specified crimes shall require a mandatory sentence of at least thirty days in jail and a ten thousand dollar fine;
11. To specify that a conviction of an election violation, as specified in certain statutory sections, as it may pertain to a limitation related election shall be a felony offense with a mandatory sentence of at least six months in jail and a fifty thousand dollar fine.
12. To specify that specified complaints shall be vigorously investigated and prosecuted;
13. To specify that private parties may file complaints in district court for judicial review and shall recover reasonable legal fees from defendants upon conviction;
14. To specify that no public funds shall be used to defend public officials from specified crimes;
15. To define the terms housing unit, affordable and affordable senior housing, and public official.

## 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 changing the amending clause to read: "Article XVIII of the constitution of the state of Colorado is amended BY THE ADDITION OF A NEW SECTION to read:"?
2. To conform to standard drafting practices, would the proponents consider initial capping the first letter of the first word of each sentence?
3. To conform to standard drafting practices, would the proponents consider adding "**Section 15.**" before "COUNTY-WIDE LIMITATION"? To conform to standard drafting practice, would the proponents also consider placing the word "county-wide limitation" in lower case and bold face so that the full heading for the section would be listed in the same form as:

### **Section 15. County-wide limitation.**

4. To conform to standard drafting practices, would the proponents consider using parentheses to set off the subsection numbers rather than periods, for example (1) rather than 1.?
5. Would the proponents consider correcting the spelling of the following words in the text of the proposed initiative:
  - a. "ARTCLE" in the second line of the proposed initiative.
  - b. "ZONNING" in the second line of section 3.
  - c. "MISDOMEANOR" in section 3.
  - d. "INVEST! TGATED" in section 3.
  - e. "APPARTMENT" in the definition of the term "housing unit".
  - f. "DORMATORIES" in the definition of the term "housing unit".
  - g. "ACCOMODATIONS" in the definition of the term "housing unit".
  - e. "THIRTY" in the definition of "affordable and affordable senior housing".
  - f. "AVARAGE" in the definition of "affordable and affordable senior housing".
  - g. "ADMINISTATIVE" in the definition of "public official".

6. To conform to standard drafting practices, in subsection (3), would the proponents consider adding paragraph and subparagraph designations to the subsection, as shown in the example below:

(3) **Criminal conduct.** (a) A VIOLATION BY PUBLIC OFFICIALS OF THE FOLLOWING. . .  
(I) THE OPEN MEETINGS ACT. . .  
(II) THE OPEN RECORDS ACT . . .  
(III) FAILURE TO POST . . .  
(IV) ENGAGING IN MISLEADING. . .  
(V) VIOLATING THE PROVISIONS . . .  
(b) A SECOND CONVICTION OF AN . . . . ?

7. To conform to standard drafting practices, would the proponents consider adding the word "SECTION" before the use of a statutory section, as is done in subsection (3)?
8. To conform to standard drafting practices, would the proponents consider changing the references to "C.R.S." in subsection (3) to "Colorado Revised Statutes"?
9. To conform to standard drafting practices, would the proponents consider changing the reference in subsection (3) of the text to "24-6-401, 402" in paragraph (1) of subsection (3) to "SECTIONS 24-6-401 AND 24-6-402"?
10. To conform to standard drafting practices, would the proponents consider changing the reference in subsection (3) of the text from "1-13-204, 205, 301, 703, 704, 708, 708.5, 710, 716" to "SECTIONS 1-13-204, 1-13-205, 1-13-301, 1-13-703, 1-13-704, 1-13-708, 1-13-708.5, 1-13-710, AND 1-13-716"?
11. To conform to standard drafting practices, would the proponents consider adding a (4) before "DEFINITIONS" and then changing (I) to (a), (II) to (b), and (III) to (c)?
12. To conform to standard drafting practices, would the proponents consider adding the phrase "AS USED IN THIS ARTICLE, UNLESS THE CONTEXT OTHERWISE REQUIRES:" after the headnote "DEFINITIONS"?
13. To conform to standard drafting practices, would the proponents set each defined term off with quotation marks in the definitions sections. For example, (I) "HOUSING UNIT"?
14. To conform to standard drafting practices, would the proponents consider adding the word "MEANS" after each defined term, but before the actual definition. For example:  
  
(I) "HOUSING UNIT" MEANS A HOUSE, AN APARTMENT, A GROUP... "?
15. In the interests of giving members of the public using the constitution assistance in finding the text of the proposed initiative, and to provide more basic information as to its content, would the proponents consider supplementing or clarifying the proposed section heading beyond the

phrase "county-wide limitation"?

16. To conform to standard drafting practice, would the proponents consider eliminating the subheadings for the different subsections of the proposed initiative?
17. To conform to standard drafting practice, would the proponents consider substituting the phrase "this section" for the phrase "this amendment" in subsection (2) of the proposed initiative?
18. To address the possibility that the citation to particular statutory provisions may not stay the same for all time, would the proponents consider adding the phrase "or successor sections" to follow the references to the various statutory provisions in subsection (3) of the proposed initiative? In the alternative, the proponents may wish to consider addressing the statutory provisions by general topic, without inclusion of their current statutory citation, e.g., "Colorado law concerning open meeting requirements".
19. Colorado law does not contain a provision specifically called the "Open Records Act" as is stated in subsection (3) of the proposed initiative. Instead, Colorado has enacted various statutory provisions addressing *public* records, codified in article 72 of title 24, C.R.S. Would the proponents changing the reference in the text of the proposed initiative to reflect these facts?
20. To conform to standard drafting practice, would the proponents consider placing a hyphen between "limitation" and "related" in subsection (3)?
21. The use of the term "affordable and affordable senior housing" is potentially confusing and liable to be misused. Would the proponents consider substituting the single umbrella term "affordable housing" that may include a separate component addressed to seniors?

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. Article V, section 1 (4) says that initiated measures "shall take effect from and after the date of the official declaration of the vote thereon by proclamation of the governor". Subsection (2) of the text of the proposed initiative states "At a time when this amendment is initially declared approved by the voters". Do the proponents intend to have the amendment take effect at the time of the proclamation of the governor or at another time? If it is the intent of the proponents to have the amendment take effect at another time, would they consider specifying what they mean by "initially declared by the voters"? To address these or related questions, would the proponents consider adding an internal effective date to the text of the proposed initiative?
3. With respect to subsection (1) of the text of the proposed initiative:

- a. What does it mean to state "the people of Colorado do hereby *reserve the right to enact* a limitation..."? Would voter approval of the proposed initiative result in adoption of the limitation or is some other action required before such a limitation would become effective? Would the proponents consider clarifying their intent with respect to this issue?
- b. What do the proponents mean by "local government" for purposes of the text of the proposed initiative? Does the term include all Colorado towns, cities, counties, home rule city and counties, and home rule counties, or is some other meaning intended? Is it limited to local governmental entities that approve the construction of housing units? Does the term include special districts? Are any of these forms of local government excluded from the definition of "local government"? Would the proponents consider adding a definition of "local government" to the text of the proposed initiative?
- c. What does it mean to give the people a right to enact a limitation "WITHOUT LEGISLATIVE INHIBITION OR PENALTY"? What is a "legislative inhibition or penalty" for purposes of the text of the proposed initiative? If it became part of the state constitution, how would the proposed initiative be *inhibited* by a legislative body? Are the proponents referring to the General Assembly or the governing body of particular local governments? Would the proponents consider clarifying their intent with respect to this issue?
- d. How would the restrictions required by subsection (1) be applied? Are the growth restrictions that would be required by the measure restrictions on the issuance of building permits by local governments or is some other meaning intended? If the term refers to building permits, to what extent are building permits granted before the effective date of the proposed initiative, if adopted, subject to its requirements?
- e. Does the proposed initiative grant county governments the authority to adopt growth limitations for all municipalities located within the county? If so, how would the allowable number of housing units that could be constructed under a county-wide growth restriction be allocated to municipalities located within the county?
- f. What does it mean for housing growth to be restricted to "less than one percent annually"? What do the proponents mean by "housing growth" for purposes of the text of the proposed initiative? Does it mean growth in the number of units constructed, growth in building permits issued, or is some other meaning intended? Would the proponents consider adding a definition of "housing growth" to the text of the proposed initiative? How did the proponents arrive at the one percent figure? Is the "one percent figure" to be calculated on a statewide basis or is it to be calculated solely with reference to the political subdivision that has enacted the limitation? Would the proponents consider clarifying their intent with respect to this issue?
- g. What does it mean for housing units to be "in each local government." Do the

proponents intend the phrase to mean located within the territorial boundaries of each local government". If so, would the proponents consider modifying the text of the proposed initiative on this point?

4. With respect to subsection (2) of the text of the proposed initiative:
  - a. What do the proponents mean by "privately owned housing units"? Would the proponents consider adding a definition of this term to the text of the proposed initiative?
  - b. Does the first sentence in the text of this section impose a housing unit growth limit of one percent within the specified counties in an applicable calendar year?
  - c. Why are the requirements of this section imposed only upon certain counties? How did the proponents decide which counties are to be covered by the requirements of this subsection (2)? Why were the City and County of Denver and Weld County omitted from this list?
  - d. By using the words "a limit...shall be adopted", do the proponents intend that the limitation not be self-executing but that the governing body of the local government would have to adopt an ordinance or resolution codifying the limitation for it to take effect? Would the proponents consider clarifying their intent with respect to this issue? What would be the consequence if no ordinance or resolution were adopted?
  - e. What do the proponents intend by stating "2007 and subsequent years including 2010" since 2010 is a subsequent year to 2007? Is it the proponents intent that 2010 be the final year that a limitation could remain effective? If so, would the proponents consider modifying the text of the proposed initiative so that it reads "subsequent years through and including 2010", or words of comparable effect?
  - f. Does the last sentence of this subsection (2) mean that a proposition will be placed on the ballot in 2010 on the question of whether a previously enacted growth limitation is to be continued? If so, for how long may the limitation be extended? Will the question be placed on the statewide election ballot in 2010 or only on the ballot in specified counties? If the voters elected to continue the limitation, to what extent would they be able to modify the requirements of the limitation in later years by, for example, adjusting the applicable percentage? To what extent would the limitations period ever be placed before the electorate again? Would the proponents consider clarifying their intent with respect to these issues?
  - g. What does it mean to state that "at least thirty percent of the regulated housing growth shall be affordable and affordable senior housing"? Could all thirty percent be affordable senior housing, or must the thirty percent include both affordable and affordable senior housing? How did the proponents arrive at the thirty percent figure? What do the proponents mean by "regulated housing growth"? Is it the same thing as housing subject to the limitation or is some other meaning intended? Would the

proponents consider clarifying their intent with respect to these issues?

- h. What does it mean to state that, "at a time when this amendment is initially declared approved by voters no further permits for such regulated growth shall be issued until 2007 in said counties"? Does this mean that, upon adoption of the proposed initiative, any new growth is prohibited until 2007, at which time the one percent limit takes effect? Or, is some other meaning intended? What does "such regulated growth" mean? Would the proponents consider clarifying their intent with respect to these issues?
  - i. To what extent do the requirements of subsection (2) constrain county, as contrasted with municipal, governments?
  - j. As a general proposition, it is the law in Colorado that land use planning and zoning matters are held to be matters of local control, which means that local governments are generally free to act in such a sphere independent of the state government. Have the proponents considered whether and to what extent the proposed initiative contravenes principles of local control?
  - k. Have the proponents considered how the proposed initiative would affect the powers of home rule cities and home rule counties?
  - l. What is the relationship, if any, between the limitation authorized under subsection (1) of the proposed initiative and the limitation authorized under subsection (2)? Is it fair to say that the limitation authorized in subsection (2) is an additional and more precise requirement directed to particular local governments that flows from the general powers granted under subsection (1)? If not, please describe the relationship between these two subsections in more accurate terms.
5. With respect to subsection (3) of the proposed initiative:
- a. As a general proposition, the Colorado constitution and the Colorado Revised Statutes impose arguably thousands of mandates on public officials without supplementing each requirement with a criminal penalty for failure to perform the subject duties. As such, why do the proponents feel that specific criminal penalties for presumed nonperformance should be to the text of the proposed initiative?
  - b. Subsection (3) creates misdemeanor and felony offenses. Have the proponents considered specifying a class of misdemeanor and felony offenses?
  - c. What does it mean for a public official to commit a violation "with regards to all housing as well as planning and zoning matters"? It appears that these criminal provisions are not connected to the particular limitations requirements of the proposed initiative but address general violations of the specified statutory requirements. If so, why is it not permissible to conclude that subsection (3) creates a new "subject" of the proposed initiative (concerning general compliance with



general planning and zoning requirements on the part of public officials) separate and apart from the subjects addressed in subsections (1) and (2) of the proposed initiative (concerning housing limitations)?

- d. Current law provides a private right of action and penalties for an open meetings violation, *see* section 24-6-402 (9), C.R.S., in addition to a criminal penalty for violation of public records requirements. *See* section 24-72-206, C.R.S. Given these existing civil remedies and/or criminal penalties, why does the proposed initiative include additional civil remedies and/or criminal penalties for violation of these same statutory provisions? Have the proponents considered these existing statutory provisions in drafting the proposed initiative?
- e. What does it mean to "post public records including financial on the internet within thirty days of transaction"? Is this an existing offense under Colorado law? If so, where is this offense codified? What are the "public records" that must be posted to comply with this requirements? How are such records to be "posted?" What are the "financial" records this provision is intended to cover? What is "within thirty days of transaction?" Would the proponents consider clarifying their intent with respect to these issues?
- f. What actions would constitute "engaging in misleading or deceptive publicity?" How would a public official violate this requirement of the proposed initiative? What would be covered under this offense that is not currently encompassed under libel, slander, defamation, or related common law or statutorily derived offenses?
- g. What does it mean for a public official to "violat[e] the provisions of a limitation"?
- h. To what is the proposed initiative referring when it discusses "an election violation...as it may pertain to a limitation related election...."?
- i. Have the proponents considered whether the provisions of subsection (3) are excessively vague and over broad under prevailing constitutional standards?
- j. Why is it necessary to specify that "complaints regarding all aforesaid crimes shall be vigorously inves! tigated [sic] and prosecuted"? Does this mean that complaints under the proposed initiative are to take precedence over all other civil or criminal complaints that may be filed?
- k. In drafting the requirements of subsection (3), have the proponents considered the fiscal impact to the state of incarcerating a person for a felony offense?
- l. After discussing criminal complaints, subsection (3) proceeds to apparently grant private citizens the right to file complaints in state district court. However, the language of subsection (3) appears to mix civil and criminal standards and terms. Specifically, after requiring criminal complaints to be vigorously prosecuted and investigated, the language proceeds to give private parties the right to "file *such*

complaints", i.e., criminal complaints, in state district court. Although private parties may be granted the right to file a *civil* complaint, private parties are generally not given the right to file *criminal* complaints, which are typically filed by government prosecutors in the name of the people. In addition, although a private party in a civil suit may be given the right to recover some manner of fees, such as attorney fees, from another party, such recovery is usually granted in the civil context from the opposing party to the civil action and not to a "defendant upon conviction," which implies a party to a criminal proceeding. Would the proponents consider clarifying the language of subsection (3) concerning these issues?

- m. Assuming the proposed initiative validly grants a private right of action to a private party, what cause of action would a private party have for violation of this section? Perhaps stated differently, what facts would prompt a private party to file an action under subsection (3)?
  - n. If a public official believes in good faith that he or she was acting in the scope of his or her duty in undertaking some action and a civil or criminal complaint is filed against him or her for violating the requirements of subsection (3), what is the objection, whether on legal, public policy grounds, or otherwise, to the official being reimbursed by his or her office for the costs of defending him- or herself against the lawsuit or in a criminal case? Would this have the effect of prohibiting the appointment of a public defender for a public official in a criminal case where the public official faces potential incarceration? If so, would this violate constitutional rights to be represented by legal counsel? Would the proposed initiative bar public funds from being used to defend the public official in a civil case?
6. With respect to the definition of "housing unit":
- a. Do the proponents intend the word "house" to mean a single family residence or is some other meaning intended?
  - b. In the case of a multiple family residential structure, does the entire structure count as one housing unit under the proposed initiative or would such a structure represent as many different housing units as there are separate "bedrooms", living quarters, or residential dwellers living within the structure?
  - c. What are "educational dormitories" for purposes of the proposed initiative?
  - d. What are "institutional-type quarters" for purposes of the proposed initiative?
7. With respect to the definition of "affordable and affordable senior housing":
- a. What requirements would an applicant for such housing have to meet in order to qualify for the purchase of such housing?
  - b. Although the definition includes the word "senior", the text contains no additional

language in terms of who or what would qualify for such "senior" housing. Would the proponents consider clarifying their intended meaning for this term?

- c. What does "housing in type and style and number of bedrooms" mean? What is the "type and style and number of bedrooms" of affordable housing?
  - d. How did the proponents arrive at the thirty percent figure stated in the definition?
  - e. How would the average mean price for such housing be calculated? How will local governments make this determination? Is it the intent of the proponents that local governments calculate this figure by finding the average housing unit price with their municipal limits and subtracting thirty percent from that figure?
  - f. What does "housing in a particular local government" mean? Does this mean housing located within the territorial boundaries of a particular local government or is some other meaning intended? Would the proponents consider clarifying their intended meaning for this phrase?
  - g. Does the proposed initiative contemplate any subsequent restrictions on a purchaser attempting to sell a housing unit that came within this definition?
  - h. What is the proponents' intent in including the affordable housing requirement within the terms of the proposed initiative?
8. With respect to the definition of "public official":
- a. What does it mean for a public official to have legislative capacity? Administrative capacity?
  - b. Are there any employees of a particular local government that would not be included within this definition? If "yes," which employees will not be included and how will local governments be able to apply this distinction?
9. The limitations contained in subsections (1) and (2) of the proposed initiative mandate a specified uniform percentage across the state and across the specified counties, as applicable. Accordingly, under the proposed initiative, a county seeking the infusion of new residents would be governed by the same limitations as a high-growth county overwhelmed with high-growth impacts. In light of the diverse interests and needs of the state, have the proponents considered allowing differing growth limitation requirements for different political subdivisions?
10. 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?