

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 2, 2006

TO: Tim Brown and Matthew Garrington

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2005-2006 #129, concerning the Change in Use 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 prohibit a change in use of land by a private interest that in any way diminishes the value of any portion of another privately owned or publicly owned real property or set of real properties; and
2. To require an offending private interest to either provide just compensation to the owner of the affected portion of real property or be enjoined from that particular land use.

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 word "Enacting" in the enacting clause of the proposed initiative?
2. To conform to standard drafting practices, would the proponents consider changing the amending clause in the proposed initiative to read as follows:

Article II of the constitution of the state of Colorado is amended BY THE ADDITION OF A NEW SECTION to read:

3. To conform to standard drafting practice, concerning the heading of the proposed initiative, would the proponents consider replacing the colon in the headnote with a period and only initial capitalizing the first word of the headnote as follows:

Section 15a. Protection of private property.

4. To conform to standard drafting practices, would the proponents consider capitalizing the first letter of the first word of the sentence contained in the proposed initiative?
5. Assuming the proposed initiative is not missing any words and the last clause of the proposed initiative is intended to form a separate sentence, would the proponents consider changing the comma after the word "properties" in the fourth line of the proposed initiative with a period to divide the proposed initiative into two separate sentences?

Substantive questions:

1. Section 1 (5.5) of article V of the Colorado constitution limits measures proposed by petition to a single subject. What is the single subject of the proposed initiative?
2. What is a "change in use of land by a private interest?" What are the types and kinds of "changes" in the use of land that would trigger the remedies specified in the proposed initiative? "Change" as of what date? Would the proponents consider clarifying their intent with respect to these issues?
3. What happens if the owner of the offending private interest has no control over the change in use of the property? What if, for example, a factory or successful business closes and causes a diminution in the value of other properties in a community? Would the affected property owners be entitled to compensation, and from whom?

4. What do the proponents mean by a "set of real properties"? What is the proponents' intent in adding this clause to the text of the proposed initiative?
5. How can the Colorado constitution mandate that a change in the use of land shall not diminish the value of other property? More specifically, the state may provide remedies for such diminishment, but it would appear the diminishment itself is caused by the operation of market forces over which the Colorado constitution has little, if any, say.
6. How would a change in the use of land by a private interest diminish the value of publicly owned real property? How is the value of publicly owned land determined where there is no comparable private property such as open space, a park, or a structure like the state capitol building? Who would enforce this measure on behalf of the public entity? Would a private citizen have a cause of action to enforce the provisions of the measure with respect to publicly owned land?
7. What do the proponents mean by a "private interest"? Would the proponents consider providing a definition of this term?
8. What do the proponents mean by "diminish the value"? Would the proponents consider providing a definition of this term? How is the diminution to be determined or measured? Does any degree of diminution trigger the remedies specified in the proposed initiative?
9. How are the remedies specified in the proposed initiative to be implemented? More specifically, for an alleged diminution in value caused by a private interest, how is the affected landowner to receive compensation or enjoinder of the offending use? What set of procedures do the proponents foresee as required for implementation of the proposed initiative? Does the property owner have a choice between recovering damages or injunctive relief? If not, how is the determination as to choice of remedy to be made?
10. By requiring the offending interest to provide just compensation, does this simply mean that the entity pays an amount equal to the diminution in value of the property to the property owner? Can the property owner require the offending interest to effectively condemn and take over ownership of the property and pay the entire fair market value for the property as just compensation?
11. Why are current causes of action lying in tort, including, for example, actions involving trespass or nuisance, insufficient to protect an injured property owner from injuries caused by other private interest? In fact, the civil justice system already provides aggrieved property owners with money damage or injunctive remedies for injuries caused to one's property by the acts or omissions of another. What form of legal protection would the proposed initiative provide that is not already available under current law?
12. Have the proponents considered the impact of the proposed initiative on other existing laws affecting real property? For example, could an individual now be enjoined from ever establishing any type of prescriptive easement or right over the property of another? Would

private entities be prohibited from condemning land for roadways, utilities, and other purposes as currently authorized by statute?

13. What if a private property owner has an existing legal or contractual right to make a specific use of his or her property? Can this right be extinguished by the proposed initiative without violating other provisions of the Colorado and United States constitutions?
14. What degree of causation would the proposed initiative require be demonstrated before damages or injunctive relief may be awarded? The text does not appear to require any link between the offending property and the injured property owner. Is such a link intended? For example, what if a particular industrial or agricultural facility adversely affected property values in an entire town even though the home of a particular "claimant" may not be contiguous to or even near the facility? In this example, would this claimant be entitled to these remedies? Would all property owners in the town be entitled to just compensation or injunctive relief? If not, why not? Who would decide? How would this determination be made?
15. What do the proponents mean by "just compensation" for purposes of the proposed initiative? Would the proponents consider clarifying their meaning with respect to this phrase?
16. Have the proponents considered the impact upon the civil justice system if the proposed initiative became law?
17. What is the effective date of the proposed initiative? Would the proponents consider adding an effective date to the text of the proposed initiative?
18. What would be the effect on the proposed initiative of a change in land use that took effect prior to the effective date of the proposed initiative?
19. How is the determination to be made whether the offending property owner pays compensation or is to be enjoined from the particular land use? What if the offending land owner desires to pay damages in lieu of being enjoined from continuing the activity (particularly where it may be more economically efficient for the offending property owner to simply pay such damages instead of stopping the offending activity)?