

STATE OF COLORADO

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MEMORANDUM

April 2, 2007

TO: Daniel Hayes and Eric Levine

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #9, concerning the higher education funding fee on new construction

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.

Earlier versions of this initiative were the subject of memoranda dated January 23, 2007, February 16, 2007, March 6, 2007, and March 19, 2007. Proposals 2007-2008 #3, 4, 5, and 7 were discussed at meetings on January 25, 2007, February 21, 2007, March 8, 2007, and March 22, 2007. The comments and questions raised in this memorandum will be limited so as not to duplicate comments and questions that were addressed at the earlier hearing unless it is necessary to fully address the issues in the revised measure. However, the comments and questions that have not been addressed by changes in the proposal continue to be relevant and are hereby incorporated by reference in this memorandum.

Purposes

The major purposes of the proposed amendment appear to be:

1. To amend article IX of the state constitution by the addition of a new section 18 specifying that:
 - a. A one-half of one percent higher education funding fee (fee) be assessed on all construction projects, except for specifically exempted projects;
 - b. "Construction projects" means new construction or remodeling of buildings, private roads, pipelines, ditches, sidewalks, dams, excavation, landscaping, golf courses, and any other construction work related to non-exempt projects;
 - c. The fee be used to fund public Colorado colleges and universities;
 - d. "Public college and university" means an educational facility offering an associate, bachelor, master, doctorate, law, or medical degree that is owned and maintained by a Colorado state or local government and regulated at least in part by the Colorado Commission on Higher Education;
 - e. The fee be assessed on the estimated cost of all qualifying construction projects as determined by a respective planning and zoning department;
 - f. "Planning and zoning department" means that part of a state or local government with the responsibility to assess the cost for and direct the issuance of building permits in a particular zoning jurisdiction;
 - g. "Local government" means, without regard to home rule status, a county, city and county, city, municipality, town, school district, special district, or any other department, agency, or instrumentality thereof, or any political or public corporation of the state;
 - h. The fee is collected on or before the issuance of a permit to build or any subsequent permit needed to complete the project is issued;
 - i. A project completion date shall be set of no more than three years subject to review;
 - j. A ninety-day cure period exists after completion of construction to assess the final amount of the fee and to collect or refund any balance due;
 - k. The fee is not assessed when the estimated total cost of a construction project is less than one hundred thousand dollars subject to review upon completion;
 - l. Land acquisitions shall not be considered in the fee;

- m. Construction projects exempted from the fee shall require that such exempted use continue for a period of not less than ten years or the fee shall be levied before a sale, transfer, or lease to a non-exempt purpose is made;
- n. Construction projects exempted from the fee include: Publicly owned projects; privately owned health and educational facilities; farms and ranches; railroads and utilities; houses of worship, such as churches, mosques, and synagogues; and senior housing projects;
- o. "Educational facilities" means any business institution dedicated to elementary, middle, or high school education, or to higher education offering an associate, bachelor, master, doctorate, law, or medical degree;
- p. "Farms and ranches" means facilities used for cultivation, feeding, and raising food products, and include needed buildings and housing located on a particular commonly owned agricultural land parcel or parcels;
- q. "Health facilities" means any business institution where people receive medical, surgical, or psychiatric treatment and nursing care;
- r. "Publicly owned" means a project constructed for the exclusive ownership of a federal, state, or local government regardless of how such project is financed;
- s. "Senior Housing" means housing projects consisting of at least twelve separate dwellings units in the form of an apartment or condominium building or at least four such units in a town home building where all occupants shall be required by deed to be at least sixty years of age;
- t. "Utilities" means construction related to providing water and sewer services, and providing energy in all forms throughout the state, including, but not limited to, exploration, extraction, generation, and transmission of energy sources, including renewable energy sources such as wind and solar and buildings used for such related purposes including administration. This exemption includes only infrastructure exclusively owned and maintained by such utility entities;
- u. Specifies where the fees are to be transmitted and creates the higher education cash fund (fund);
- v. Specifies that the fund shall be appropriated to institutions of higher education based on the factors such as total student enrollment, higher institutional costs with regards to specialized course matter such as medical, engineering, and sciences, or any other factors affecting a particular institution's demonstrated costs of operation in a manner as presently appropriated or as determined by future action by the general assembly;
- w. Specifies that these funds shall not constitute grants or revenue from the state or any local government;

- x. At least twenty-five percent of the allocated funds must be used to reduce tuition for Colorado residents in all public colleges and universities;
- y. "Colorado residents" means persons who are citizens of the United States of America and who are qualified as Colorado in state residents as defined by the general assembly for all institutions of higher education;
- z. Moneys from the fee shall not be used for athletic departments or programs, including, but not limited to, buildings, coaches, personnel, stadiums, and equipment; moneys from this fee shall not be used for the financial assistance program, the Colorado student incentive grant program, the tuition assistance grant program, the teacher loan forgiveness program in articles 3.3, 3.5, 3.7, and 3.9 of title 23, Colorado Revised Statutes, respectively, and to the institutional loan programs administered by collegeinvest under part 2 of article 3.1 of title 23, Colorado Revised Statutes;
- aa. Revenues from this fee shall be for the benefit of public Colorado colleges and universities and do not constitute "fiscal year spending" for the purposes of section 20 of article X of the Colorado constitution ("TABOR");
- bb. Moneys from the fee shall not be used to displace public funding commitments established prior to the passage of initiative; and
- cc. Legislation may be enacted to facilitate the operation of this proposed initiative, but in no way shall such legislation limit or restrict the provisions of the initiative or the powers herein granted.

Comments and Questions

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

Technical questions:

1. Standard drafting practices require that the first word of a sentence contain initial capitalization. Would the proponents remove the initial capitalization on "A" in the middle of the first line of subsection (1)?
2. To conform to standard drafting practices, would the proponents insert "and" before "senior housing projects" in the last line of subsection (1)?
3. To conform to standard drafting practices, would the proponents place a comma before the last item in the series of three or more, including before "and" in the last sentence of subsection (2); before "or" in subsection (5) (d); and after "law" in (5) (h)?
4. To conform to standard drafting practices, would the proponents place a comma after "Statutes" in the last sentence of subsection (2)?

5. To conform to standard drafting practices, would the proponents place a comma before "including" at the end of the first sentence of subsection (5) (k).

Substantive questions:

1. Given that this measure would be submitted to the voters in November 2008 because proponents have characterized this a funding fee instead of a tax and therefore will not become law until late December 2008 or January 2009, does the timing of the measure work? Would it have any retroactive effect and, if so, would that violate federal and state prohibitions on enacting ex post facto laws?
2. What do the proponents mean by "occupants shall be required by deed to be at least sixty years of age"?
3. The proponents specify in the definition of utilities that, "This exemption includes only infrastructure exclusively owned and maintained by such utility entities." What do the proponents mean by "infrastructure" and "utility entities"?