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MEMORANDUM

March 6, 2007

TO: Daniel Hayes and Eric Levine

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #5, 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.

An earlier version of this initiative was the subject of a memorandum dated January 23, 2007. Proposal 2007-2008 #3 was discussed at a hearing on January 25, 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 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. The fee be assessed on the estimated cost of all new construction as determined by a respective planning and zoning department;
 - e. "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;
 - f. The fee is collected in advance of the issuance of a permit to build or any subsequent permit needed to complete the project on or after January 1, 2008;
 - g. 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;
 - h. 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;
 - i. Land acquisitions shall not be considered in the fee;
 - j. Construction projects exempted from the fee include: publicly owned projects; privately owned health and educational facilities; farms and ranches; railroads and utilities; and houses of worship, such as churches, mosques, and synagogues; senior housing projects;
 - k. "Publicly owned" means a project constructed for the exclusive ownership of the federal, state, and local governments and publicly owned special districts, authorities and entities regardless of how such project is financed;
 - l. "Health facilities" means any business institution where people receive medical, surgical, or psychiatric treatment and nursing care;

- m. "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;
- n. "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;
- o. "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 and extraction of energy sources, and renewable energy sources such as wind and solar. Also included are commercial buildings owned by energy companies and used for related purposes including administration;
- p. Specifies where the fees are to be transmitted and creates the higher education cash fund;
- q. Specifies that the fund shall be appropriated as with present funding for Colorado public colleges and universities with specific exceptions;
- r. At least twenty-five percent of the moneys must be used to reduce tuition costs for Colorado residents;
- s. "Colorado residents" means persons who are citizens of the United States of America and who are qualified as Colorado in state residents by the state college or university to which they are applying for admission;
- t. 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, or similar programs, and to the institutional loan programs administered by colleginvest under part 2 of article 3.1 of title 23, Colorado Revised Statutes, or similar programs;
- u. 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");
- v. Moneys from the fee shall not be used to displace public funding commitments established prior to the passage of initiative; and
- w. 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. To conform to standard drafting practices, would the proponents place a comma before the last item in a series of three or more?

Substantive questions:

1. The proponents specify that the fee shall be collected "in advance of the issuance of a permit to build". Would the proponents consider specifying how far in advance?
2. The measure appears to require the fee to be collected in advance of issuing a permit to build or needed to complete a project on or after January 1, 2008. Does this refer to permits issued on or after that date? Is it limited to projects completed after that date?
3. Given that this measure would be submitted to the voters in November 2008 and 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?
4. The proponents specify that "Construction projects exempted from this 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." How would this work? Who would be keeping track of whether or not an exempted construction project is used for that particular period of time? How would the fee be collected? Could any penalties or interest be assessed?
5. The proponents specify that "This fund shall be appropriated as with present funding for Colorado public colleges and universities...". What do the proponents mean? Does this prevent the general assembly from appropriating moneys by different methods in the future? Current general assembly appropriations for higher education are limited to the appropriations set forth in the college opportunity fund as specified in article 18 of title 23, Colorado Revised Statutes, and fee-for-service contracts as specified in sections 23-1-109.7 and 23-5-130, Colorado Revised Statutes.
6. If the fund is not used for the specific programs listed, or as proponents state, for "any similar programs", how do the proponents intend for the fund to reduce tuition?
7. The proponents specify that tuition must be reduced for Colorado residents only. How do the proponents envision this occurring? What if the residency requirements are different for each school? Would this measure in any way restrict the ability of the general assembly to establish or modify residency requirements and, if so, how?

8. Do the proponents understand that the general assembly does not currently determine tuition for any public Colorado college or university?
9. If the proponents intend for a proportion of these revenues to be transferred directly to the Colorado institutions of higher education, have the proponents considered what impact that transfer of money would have on the schools' enterprise status? Would the proponents consider providing clarification in their initiative petition regarding this issue?
10. Do the proponents intend that the institutions of higher education have a role in determining the distribution of the revenue?
11. The proponents specify in subsection (4) that legislation may be enacted to facilitate the operation "of this article". The proponents are not creating an article in the proposed initiative. Would the proponents consider replacing "article" with "section 18" throughout subsection (4)?
12. The proponents have included "publicly owned special districts, authorities and other entities" in the definition of "publicly owned". Proponents have also defined "local government" and "local county".
 - a. Would proponents consider replacing the new definition of "publicly owned" with the following definition:

""Publicly owned" means a project constructed for the exclusive ownership of a federal, state, or local government regardless of how such project is financed."?
 - b. Would the proponents consider replacing the new definition of "local county" **and** the new definition of "local government" with the following definition:

""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."?
13. In the new definition for "utilities", the proponents provide "...and buildings used for such related purposes including administration buildings owned by such utility companies". This seems repetitive. Would the proponents consider stating instead, "...and buildings used for such related purposes including administration."?