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MEMORANDUM

March 19, 2007

TO: Daniel Hayes and Eric Levine

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #7, 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, and March 6, 2007. Proposals 2007-2008 #3, 4, and 5 were discussed at meetings on January 25, 2007, February 21, 2007, and March 8, 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 meetings 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, gas and electrical infrastructure, sidewalks, dams, excavation, landscaping, golf courses, and any other construction work related to non-exempt projects. Each building in a residential, commercial, and industrial project shall be considered a new construction project;
 - c. The fee be used to fund public Colorado colleges and universities;
 - d. The fee be assessed on the estimated cost of all qualifying construction projects 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 on or before the issuance of a permit to build or any subsequent permit needed to complete the project is issued;
 - g. A project completion date shall be set of no more than three years subject to review;
 - h. 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;
 - i. 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;
 - j. Land acquisitions shall not be considered in the fee;
 - k. 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;
 - l. 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;
 - m. "Publicly owned" means a project constructed for the exclusive ownership of a federal, state, or local government regardless of how such project is financed;

- n. "Health facilities" means any business institution where people receive medical, surgical, or psychiatric treatment and nursing care;
- 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. "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;
- r. Specifies where the fees are to be transmitted and creates the higher education cash fund (fund);
- s. 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;
- t. Specifies that these funds are not intended to affect the enterprise status of institutions of higher education;
- u. At least twenty-five percent of the allocated funds must be used to replace student enrollment fees for Colorado residents thereby lowering tuition in each institution for higher learning for Colorado residents only;
- v. "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;
- w. 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 collegeinvest under part 2 of article 3.1 of title 23, Colorado Revised Statutes, or similar programs;

- x. 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");
- y. Moneys from the fee shall not be used to displace public funding commitments established prior to the passage of initiative; and
- z. 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?
2. Would the proponents consider using a hyphen in subsection (2) when using the word "twenty-five"?
3. Would the proponents consider using an apostrophe in subsection (2) when using the phrase "particular institution's demonstrated costs" to make it possessive?

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. The proponents specify that "A project completion date shall be set of no more than three years subject to review." What do the proponents mean by this? What entity will "set" the date? Who will monitor whether or not the project is complete in that period?
3. 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? Could the exempted use be changed to another exempted use without causing the fee to be levied? As long as there is no sale, transfer, or lease, can the

nonexempt use continue indefinitely without imposition of the fee?

4. The proponents specify that "This fund shall be appropriated to institutions of higher education based on 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 institutions demonstrated costs of operation in a manner as presently appropriated or as determined by future action by the general assembly." What do the proponents mean by "in a manner as presently appropriated"? What do the proponents mean by "as determined by future action by the general assembly"? Do the proponents intend for the general assembly to determine the appropriate program for appropriation of these funds as guided by the factors stated in the initiative proposal?
5. The proponents have specified that "These funds are not intended to affect the enterprise status of institutions of higher education." Would the proponents consider changing this sentence to read, "Notwithstanding any provision of section 20 of article X of this constitution to the contrary, these funds shall not constitute grants or revenue from the state or any local government."?
6. The proponents specify that "At least twenty five percent of allocated funds shall be used to replace student enrollment fees for Colorado residents." What do the proponents mean by replacing student enrollment fees?
7. 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?
8. Do the proponents intend that the institutions of higher education have a role in determining the distribution of the revenue?
9. The proponents specify in subsection (4) that legislation may be enacted to facilitate the operation "of this section 18, but in no way shall such legislation limit or restrict the provisions of this **article** or the powers herein granted." The proponents are not creating an article in the proposed initiative. Would the proponents consider replacing "article" with "section 18"?
10. The proponents have expanded the definitions of "construction projects" to include "gas and electrical infrastructure." However, the proponents have exempted utilities from the imposition of the fee. The proponents have defined "utilities" as "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...." Can the proponents explain why "gas and electrical infrastructure" is not exempt? Would the proponents be willing to clarify this ambiguity?
11. The proponents have added the sentence "Each building in a residential, commercial, and industrial projects shall be considered a new construction project" to the definition of "construction projects." What do the proponents mean by the inclusion of this sentence? Does the inclusion of this sentence negate the exemptions specified in subsection (1) of this

proposed initiative? What do the proponents mean by a "residential project"? What do the proponents mean by a "commercial project"? What do the proponents mean by an "industrial project"? Do the proponents intend to include all buildings or just buildings that are newly constructed or being remodeled?

12. The proponents have defined "local county". This phrase is no longer used in the body of the proposed initiative. Would the proponents consider deleting this definition in order to clarify the proposed initiative?