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MEMORANDUM

April 1, 2008

TO: Daniel Hayes and Gregory DiLorenzo

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #84, concerning the sufficient and sustainable water supply act

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 memorandums dated December 21, 2007, February 15, 2008, and March 4, 2008. Proposal 2007-2008 #55 was discussed at a hearing on January 2, 2008, proposal 2007-2008 #66 was discussed at a hearing on February 19, 2008, and proposal 2007-2008 #72 was discussed at a hearing on March 6, 2008. 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, as altered from proposal 2007-2008 #72, appear to be:

1. To prohibit a local government from approving an application for a development permit that includes more than 50 housing units unless it determines that the applicant has demonstrated that the proposed water supply is sufficient and sustainable to serve the peak daily, monthly, and yearly water supply requirements of the development proposed in the application;
2. To require an applicant for such a development permit to submit estimated peak daily, monthly, and yearly water supply requirements for the proposed development, in a report prepared by a registered professional engineer, that identifies all water needs for the proposed development through build-out conditions and that may include implementation of reasonable conservation measures and dry-year water demand management measures;
3. To require that the local government's determination as to whether an applicant has demonstrated that a water supply is sufficient and sustainable be based on consideration of the following evidence:
 - a. The proposed physical sources of the water supply;
 - b. A report prepared by a professional engineer stating that the proposed water supply is physically available to the proposed development and is sufficient and sustainable to meet the daily, monthly, and yearly water supply requirements of the development;
 - c. A letter from the state engineer:
 - i. Commenting on the report by the professional engineer;
 - ii. Determining whether the proposed water supply is sufficient and sustainable to serve the peak daily, monthly, and yearly water supply requirements of the development proposed in the application; and
 - iii. Determining if irrigation water priorities for agricultural purposes are reasonably fulfilled and requiring such;
 - d. If water is to be provided by a water supply entity, a letter from the water supply entity stating the water supply entity's commitment and ability to satisfy the water supply requirements of the proposed development; and
 - e. Any other evidence deemed relevant by the local government to determining whether the water supply for the proposed development is sufficient and sustainable.

Comments and Questions

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

Technical questions:

1. With regard to the enacting clause, amending clause, and the constitutional section heading, page 1, lines 1 through 5:

- a. It is standard drafting practice to end the subject heading of a constitutional section with a period. On line 5, would the proponents add a period after the word "act"?
- b. It is standard drafting practice to not put such clauses and heading in small cap language. Would the proponents change the language to lower case, regular type, as follows?

Be it Enacted by the People of the State of Colorado:

SECTION 1. Article XVI of the constitution of the state of Colorado is amended BY THE ADDITION OF A NEW SECTION to read:

Section 9. Sufficient and sustainable water supply act. (1) A LOCAL GOVERNMENT SHALL NOT APPROVE

2. With regard to subsection (3), it is standard drafting practice that when subsections consist of subdivisions, each subdivision should begin on a separate line, indented with a tab, as the proponents have done in subsection (5), instead of being one continuous paragraph. Would the proponents' change the format of subsection (3) so that it is similar to the format of subsection (5), as follows?

(3) THE LOCAL GOVERNMENT'S DETERMINATION . . . THE FOLLOWING EVIDENCE:

- (a) THE PROPOSED PHYSICAL SOURCES OF THE WATER SUPPLY;
- (b) A REPORT PREPARED BY . . . TO SUBSECTION (2);
- (c) A LETTER FROM THE STATE ENGINEER;
- (I) COMMENTING ON THE REPORT BY . . . THIS SUBSECTION (I);
- (II) DETERMINING WHETHER THE . . . SUBSECTION (2); AND
- (III) DETERMINING IF IRRIGATION . . . REQUIRING SUCH;
- (d) IF WATER IS TO BE PROVIDED BY . . . FUTURE COMMITMENTS; AND
- (e) ANY OTHER EVIDENCE DEEMED . . . OR STATE STATUTES.

3. With regard to the internal references in subsection (3):
 - a. Would the proponents add "OF THIS SECTION" after "SUBSECTION (2)" in lines 28 and 33, for proper citation format and to indicate that the subsection referred to is within the new section 9?
 - b. In line 30, would the proponents change "THIS SUBSECTION (I)" to "THIS SUBSECTION (3)" for the correct citation?
4. On page 1, line 34, it seems that "PURPOSE" should be "PURPOSES". Would the proponents make such change?
5. On page 1, line 40, the proposed initiative refers to a "WATER DEMAND ENTITY". Do the proponents mean "WATER SUPPLY ENTITY", as defined for purposes of the new constitutional section? If so, would the proponents change "WATER DEMAND ENTITY" to "WATER SUPPLY ENTITY"?

6. On page 1, line 54, a word seems to be missing. Would the proponents add "OF" after "RAISING"?

Substantive questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. This measure limits the ability of home rule municipalities and counties to approve certain new residential development. In general, the regulation of residential development is considered a matter of local control. Under the constitution, the state cannot impose regulations that conflict with local ordinances of home rule municipalities and counties unless they are a matter of state interest. What is the state interest that would enable this measure to supercede local ordinances that conflict with this measure? Would the proponents consider adding language that defines this state interest?
3. What is the purpose of prohibiting a local government from approving a development permit unless irrigation water priorities for agricultural purposes are reasonably fulfilled? Is this prohibition intended to make water available for agricultural purposes that would not otherwise be available?
 - a. What if curtailing building permits has no effect on agricultural water rights - would issuance of building permits be allowed to resume?
 - b. How would a local government determine if irrigation water priorities for agricultural purposes are reasonably fulfilled? How would a local government "requir[e] such"?
4. Subparagraph (3) (c) (III) requires the state engineer to determine "if irrigation water priorities for agricultural purpose are reasonably fulfilled and requiring such." By what criteria will the state engineer make this determination? May such a determination be limited to a specific river basin or does such a determination apply statewide if the waters in at least one river basin are deemed insufficient? Would the proponents consider adding language to clarify how the state engineer is to determine whether irrigation water priorities for agricultural purposes are reasonably fulfilled?
5. This measure is similar to the introduced version of House Bill 08-1141, but that bill has already been substantially amended in committee and final action has not yet occurred. What is the proponents' intent with regard to any conflict that might arise if this measure is adopted and House Bill 08-1141 is enacted?