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MEMORANDUM

April 4, 2008

TO: Nedra San Filippo and Kenneth Hoagland

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #86, concerning the creation of the Colorado housing investment fund

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 amendment appear to be:

1. To create the Colorado housing investment fund ("Fund") in the state treasury, which Fund shall be administered by the division of housing in the department of local affairs;
2. To specify the sources of moneys in the Fund, permitted uses for the moneys, the method for allocating the moneys, and eligible recipients of the moneys;
3. To impose a real estate transfer tax on certain real estate transactions to generate revenue for

the Fund, which tax shall be imposed at the rate of four cents for each one hundred dollars, or major fraction thereof, of consideration paid for the real property; and

4. To require the general assembly to enact laws to further the purpose of the article.

Comments and Questions

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

Technical questions:

The following comments are technical changes that we would recommend you make in order to conform the proposed initiative to standard drafting practices:

1. In a new amending clause, every letter of the word "section" is written in large caps. On page 1, line 3, "SECTION" should be written "SECTION."
2. Article headings should be initial capped. On page 1, line 7, "COLORADO HOUSING INVESTMENT FUND" should be written "COLORADO HOUSING INVESTMENT FUND."
3. Since the section numbers and headnotes are editorial language, rather than constitutional language, they do not need to be small capped. For example, the headnote on page 1, line 9, should be written "**Section 1. Purposes and findings.**"
4. On page 1, line 10, consider changing the word "THE" to "A." As it is written, the sentence could be interpreted as opinion, rather than fact. By saying that "SAFE, DECENT, ACCESSIBLE, AND AFFORDABLE HOUSING CREATES A FOUNDATION FOR FAMILY STABILITY," the proposed initiative avoids any criticism of this nature.
5. The phrase "BUT NOT LIMITED TO" should be set off with commas (page 1, line 16, and page 4, lines 8 and 9).
6. In the definitions section, it may be helpful to add "FUND" as a defined term that defines the Colorado housing investment fund. By defining "FUND," the full name of the Fund does not need to be repeated throughout the article.
7. In the definitions section, it may be helpful to define "AREA MEDIAN INCOME." If you are looking for guidance in finding a definition of this term, section 39-3-112 (1) (a), Colorado Revised Statutes, defines "area median income" as follows: "the median income of the county in which the property is located in relation to family size, as published annually by the United States department of housing and urban development."
8. The article refers to the "ADMINISTRATOR" in several places, but the defined term is "FUND ADMINISTRATOR." To correct this discrepancy, either use the term "FUND ADMINISTRATOR"

consistently throughout the article, or change the defined term to "ADMINISTRATOR."

9. On page 1, line 23, the comma after "UTILITIES" should be removed. It may also be helpful to insert the word "EITHER" after "COMPRISED OF." This change would help make a clear distinction between the two series of costs that constitute housing costs.
10. On page 1, line 24, consider removing the word "REAL."
11. On page 1, line 24, "HOME OWNERS" should be written as one word and the "s" should be followed by an apostrophe to make the plural form of the word possessive: "HOMEOWNERS'."
12. United States should be initial capped in all instances (page 1, lines 39 and 44).
13. All subsection numbers (as well as paragraph numbers, subparagraph numbers, etc.) should be indented and separated from the text of the subsection with two spaces. For example, section 2 (2) of article XXX should appear as follows:

"(2) "AFFORDABLE HOUSING STOCK" MEANS SAFE AND SANITARY SHELTERS, TRANSITIONAL HOUSING, PERMANENT SUPPORTIVE HOUSING, AFFORDABLE RENTAL OR AFFORDABLE OWNERSHIP UNITS, AND HOUSING FOR PEOPLE WITH SPECIAL NEEDS."
14. When referring to state agencies and departments, it is generally not necessary to precede the name of the agency or department with the words "STATE" or "COLORADO." On page 1, line 32, consider removing "STATE" before "DIVISION." On page 2, line 10, consider removing "COLORADO" before "DIVISION." When referring to the division of housing in the proposed initiative, consider referring to it as the "DIVISION OF HOUSING IN THE DEPARTMENT OF LOCAL AFFAIRS."
15. In headnotes, the term "creation" is generally set off with dashes, and it follows the name of the fund that is being created. Each headnote should also be indented. In conformity with these practices, the headnote on page 2, line 6, could be written as follows:

"Colorado housing investment fund - creation - uses and allocation of moneys from the fund."
16. The internal reference on page 2, line 12, should be corrected to read as follows: "SECTION 4 OF THIS ARTICLE."
17. Each different subdivision of the article (section, subsection, paragraph, etc.) should be separated by a hard return. For example, the paragraphs in section 3 (2) should each have a space between them (page 2, lines 19 to 27).
18. The first letter of each different subdivision of the article should be capitalized (page 2, lines 19 to 27).
19. In section 3 (2)(c), consider inserting "ASSISTANCE WITH" before "PREDEVELOPMENT COSTS"

(page 2, line 21). In section 3 (2) (g), consider inserting "IMPROVEMENTS" after "ENERGY EFFICIENCY" (page 2, line 25). These changes may make these paragraphs read more smoothly when read in combination with the introductory portion in section 3 (2).

20. In section 3 (3), it would be more appropriate to instruct the Fund administrator to "complete" needs assessments, rather than "conduct" them. Consider inserting "COMPLETE" before "NEEDS ASSESSMENTS."
21. On page 2, line 42, consider inserting "IN WHICH THEY WERE" before "RECEIVED." This change may make the sentence read more clearly.
22. The first time the Colorado housing investment fund is mentioned in any paragraph, its full name should be used. After that, it can simply be called the "FUND." For example, on page 2, line 31, "COLORADO HOUSING INVESTMENT" should be inserted before "FUND." This practice is intended to avoid confusing the Fund created in this article with any other fund. An alternative to writing "COLORADO HOUSING INVESTMENT FUND" would be to add "FUND" to the list of defined terms. Another option would be to add language to section 3 (1) specifying that the Colorado housing investment fund will be known as the "FUND" (page 2, lines 8 and 9). For example, "THE COLORADO HOUSING INVESTMENT FUND, ALSO REFERRED TO IN THIS ARTICLE AS THE "FUND", IS HEREBY CREATED IN THE STATE TREASURY."
23. Section 3 (4) (a) and (4) (b) both address the allocation of moneys if the Colorado housing investment fund generates twenty million dollars or more in a fiscal year. Paragraphs (a) and (b) could be combined into a single paragraph (a), which would be an introductory portion, followed by two subparagraphs. The paragraph would then read as follows:

"(4) (a) IF THE COLORADO HOUSING INVESTMENT FUND GENERATES TWENTY MILLION DOLLARS OR MORE IN A FISCAL YEAR, THE MONEYS IN THE FUND SHALL BE ALLOCATED AS FOLLOWS:

(I) FORTY PERCENT OF THE MONEYS . . . ESTABLISHED BY THE FUND ADMINISTRATOR; AND

(II) SIXTY PERCENT OF THE MONEYS . . . REGIONAL NEEDS ASSESSMENTS."

The succeeding paragraphs and internal references would then need to be renumbered accordingly.

24. On page 3, line 2, consider replacing "COLLECTED ANNUALLY" with "IN THE FUND" to make the language consistent with the language that exists in section 3 (4) (a).
25. With respect to section 3 (4) (c) of the proposed initiative, moneys are not really "DISTRIBUTED SOLELY TO" the statewide competitive allocation, but rather "DISTRIBUTED IN ACCORDANCE WITH" or "BY MEANS OF" such allocation. Would you consider making this change?

26. "(4)" should be inserted after "THIS SUBSECTION" on page 3, lines 12, 16, 22, and 26.
27. On page 3, line 15, "TWENTY MILLION DOLLAR" should be hyphenated so that it reads "TWENTY-MILLION-DOLLARS."
28. On page 3, line 22, consider changing "FUNDS" to "MONEYS." On line 23, consider changing "FUNDING" to "DISTRIBUTION." These changes will make the language more consistent with language used elsewhere in the article.
29. On page 3, line 28, "WILL" should be changed to "DOES." Constitutional language should be written in the present tense whenever possible.
30. For completeness and clarity, consider adding the phrase "PURSUANT TO SECTION 3 (3) OF THIS ARTICLE" at the end of section 3 (4) (a).
31. In section 3 (4) (f), consider replacing the phrase "OF A REVERSION" with "IN WHICH A REVERSION OCCURS" (page 3, lines 25 and 29). This change may make those sentences read more clearly.
32. An internal reference in a paragraph that refers to another paragraph in the same subsection should include the phrase "of this subsection ()." On page 3, line 30, "OF THIS SUBSECTION (4)" should be inserted after "PARAGRAPH (a)."
33. Check the spacing on page 3, line 32. There should be only two spaces between "(g)" and "PAYMENT."
34. Sections 5 and 6 of the article are incorrectly numbered. The numbers of those sections should be changed to "4" and "5," respectively. If this change is made, any internal references to those sections would need to be corrected accordingly.
35. For reasons of completeness and consistency, section 3 (4) (d) should also contain a reference to section 3 (4) (f), which also references the twenty-million-dollar threshold.
36. On page 3, line 35, the substantive text of section 5 of the article should be placed on the same line as the headnote for the section, and the form of the headnote should follow that specified under technical question number 15 above. Consider changing the headnote to read as follows:

"Section 5. Fees to generate revenue for fund - real estate transfer tax. (1) NOTWITHSTANDING SECTION 20 (8) (a) . . ."

37. Constitutional internal references should be spaced properly. For example, on page 3, line 37, "SECTION 20(8)(a)" should be written "SECTION 20 (8) (a)."
38. When making internal references to other parts of the constitution, refer to the constitution as "this constitution." For example, the internal reference on page 3, line 37, should read as

follows: "SECTION 20 (8) (a) OF ARTICLE X OF THIS CONSTITUTION." Consider making the same change on page 4, lines 4 and 5.

39. On page 3, line 42, a comma should be inserted after the word "CONVEYANCE."
40. To eliminate any ambiguity, consider replacing the reference to "LAWS" on page 4, line 8, with a reference to "LEGISLATION," "BILLS," or "STATUTES" to distinguish these forms of action by the general assembly from other types of acts or "laws" that may not have the same legal force and effect as a bill or statutory enactment . Such a change may require additional modifications to the language of this first sentence. For example, the standard form of expressing the idea expressed in the first sentence of section 6 is: "THE GENERAL ASSEMBLY MAY ENACT LEGISLATION AS NECESSARY TO IMPLEMENT THE PURPOSES OF THIS ARTICLE" or "...AS NECESSARY TO FURTHER THE PURPOSES OF THIS ARTICLE" (or words of similar effect).
41. The internal reference on page 4, line 8, should reference "THIS ARTICLE," not "THIS AMENDMENT."
42. Assuming the changes suggested in technical question number 34 are made, the internal reference on page 4, line 14, should read as follows: "SECTION 4 OF THIS ARTICLE."
43. On page 4, line 9, insert "ESTABLISHING" before "A MAXIMUM PERCENTAGE." On line 10, insert "DESIGNATING" before "REQUIRED REPORTS." On line 11, insert "ESTABLISHING" before "FORMULAS." On lines 13 and 14, insert "ESTABLISHING" before "THE MEANS."
44. The text of the proposed initiative uses the terms "FUNDS" and "MONEYS" somewhat interchangeably (page 3, lines 19 and 22). Assuming these words are intended to have the same meaning, to avoid any unintended confusion or consequences, consider using the single term "MONEYS" to refer to this type of monetary deposit into, or withdrawal from, the Fund.

Substantive questions:

1. Section 1 (5.5) of article V of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. What is the source of the definition of "affordable housing" provided in section 2 (1) of the proposed initiative?
3. Are the definitions of "LOW-INCOME HOUSEHOLD" (section 2 (5) of the proposed initiative) and "VERY-LOW INCOME HOUSEHOLD" (section 2 (6) of the proposed initiative) identical to the definitions of these same terms as promulgated by the United States Department of Housing and Urban Development ("HUD")? Tying these provisions to definitions promulgated by HUD means these definitions may only be changed by further promulgation by HUD or by a further amendment to the state constitution. Are you satisfied that these somewhat restricted options will provide sufficient flexibility for amending the definition of these terms if that becomes necessary in the future?

4. In connection with the definitions of "LOW-INCOME HOUSEHOLD," "VERY LOW-INCOME HOUSEHOLD," and "WORKFORCE HOUSEHOLD," what geographic region is to be used to define the word "area" for purposes of these definitions?
5. What is the basis for the particular income level used in the definitions of "low-income household" and "very low-income household" (section 2 (5) and (6) of the proposed initiative)?
6. With respect to the definition of "WORKFORCE HOUSEHOLD" contained in section 2 (7) of the proposed initiative:
 - a. What is the source or basis for the "ONE HUNDRED TWENTY PERCENT" requirement?
 - b. How does the definition of workforce household compare to the median income in the counties in the state with the highest household income?
 - c. How is the "DOCUMENTED SHORTAGE OF HOUSING" in the definition to be demonstrated? By what criteria is the determination to be made? Which person or entity is to make the determination?
7. To eliminate future confusion, ambiguity, and potential litigation, consider supplying a definition of "REAL ESTATE TRANSFER TAX" for use in section 5 of the proposed initiative? Section 20 (8) (a) of article X of the state constitution ("TABOR") prohibits new or increased transfer tax rates on real property, and it would be helpful to have a definition in the constitution that defines this term.
8. The proposed initiative makes the division of housing (the "Division") the Fund administrator but does not appear to give any body authority for independent oversight of the Fund or its activities, as, for example, through the creation of a separate board of directors. Does this mean that all responsibilities involved in Fund administration would be performed by employees of the Division? Do you know whether these responsibilities could be performed using existing resources, or whether or to what extent implementation of the proposed initiative would require additional full-time state employment? Have you considered the need for a separate board of directors or other entity that may provide independent oversight of the Fund?
9. Section 3 (1) of the proposed initiative references "MONEYS TRANSFERRED INTO THE FUND PURSUANT TO SUBSECTION (5) OF THIS SECTION . . .", but this provision (technically, section 4), provides no requirement explicitly stating that revenues from the increased tax are to be transferred into the Fund. Assuming this is your intent, would you consider adding language that explicitly states that moneys raised from the real estate transfer tax are to be transferred into the Fund (or, perhaps, into the state treasury for ultimate transfer into the Fund) and any necessary related general instructions for accomplishing that goal?
10. To eliminate any ambiguity or confusion, would you consider specifying the "OTHER" forms of public or private funding that may be transferred into the Fund, e.g., direct appropriations

from the general assembly or gifts, grants, and donations (page 2, lines 12 and 13)?

11. With respect to section 3 (2) of the proposed initiative:
 - a. What are "PREDEVELOPMENT COSTS" as used in section 3 (2) (c)?
 - b. What types of costs are covered under section 3 (2) (c)?
 - c. What is meant by "ENERGY EFFICIENCY" as used in section 3 (2) (g)?
 - d. What is meant by "ACCESSIBILITY MODIFICATIONS AND CONSTRUCTION" as used in section 3 (2) (h)?
 - e. What is meant by "HOMELESSNESS PREVENTION" as used in section 3 (2) (i)?
12. Because of the difficulties of amending the constitution, and to address unforeseen problems arising in the future, have you considered adding an additional requirement in section 3 (2) of the proposed initiative that would enable moneys in the Fund to be used for additional purposes that would, in the discretion of the Fund administrator (or some other person or entity), further the purposes of the article?
13. Is there any requirement as to whether moneys distributed from the Fund are to be allocated among the items specified in section 3 (2) of the proposed initiative under any equitable formula or apportionment, or is the allocation entirely within the discretion of the Fund administrator? For example, is it possible under current economic conditions that all moneys in the Fund could be expended on foreclosure prevention to the possible exclusion of the other uses designated in section 3 (2)? Would this type of outcome be satisfactory to you? If not, would you consider modifying the text of the proposed initiative to address this concern?
14. Would you consider adding some form of requirement capping the administrative costs, for example, as a percentage of revenues received or moneys expended in a particular fiscal year?
15. With respect to section 3 (3) of the proposed initiative:
 - a. What do you mean by a "NEEDS ASSESSMENT"?
 - b. How is such an assessment to be conducted? Which person or entity is to conduct this assessment?
 - c. What will the "ANNUAL FUNDING PRIORITIES" consist of?
 - d. How will such priorities be determined?
 - e. Who makes the determination of the annual funding priorities?

- f. What do you mean by "NATURAL DISASTERS"? How great in effect or extent does the natural disaster have to be for the administrator to be authorized to amend the plan?
 - g. Would you consider adding a definition of "natural disaster" to the text of the proposed initiative?
 - h. When do you anticipate the Fund administrator would conduct the public hearings, complete a needs assessment, and determine the funding priorities? Because the distribution of moneys from the Fund is contingent on the completion of these tasks, would you consider adding a date by which the determination is to be completed?
16. With respect to section 3 (4) (a) of the proposed initiative:
- a. What is the basis for the twenty-million-dollar figure?
 - b. What is the basis for the forty percent requirement?
 - c. What is the rationale for giving Fund moneys to a for-profit corporation under this paragraph (a) and section 3 (4) (b)?
 - d. Does the language contained on page 2, line 40, and page 3, line 5, mean that only a special district formed by a local government is entitled to be the beneficiary of Fund moneys? If so, what is the rationale for this exception (from the entirety of special districts)?
 - e. What does it mean for moneys to be "OBLIGATED"?
 - f. Does the "STATEWIDE ALLOCATION" (page 2, line 44) refer to the allocation under this section 3 (4) (a)?
 - g. How does the "STATEWIDE ALLOCATION" required by this paragraph (a) differ from the "local" allocation under section 3 (4) (b)?
 - h. What does it mean for moneys to be "AVAILABLE ON A COMPETITIVE BASIS" (page 2, lines 37 and 38)? Who decides how the moneys are to be awarded under this paragraph (a)? What is the process for awarding the moneys?
 - i. What does it mean for an entity to be "ACTING ON BEHALF OF LOCAL GOVERNMENTS" (page 2, line 41)?
17. With respect to section 3 (4) (b) of the proposed initiative:
- a. What is the basis for the sixty percent requirement?
 - b. Which person or entity is to complete the local or regional housing plan and the accompanying local or regional needs assessments? What happens to distributions

from the Fund if all local or regional needs assessments are not completed by the same date?

- c. Who decides how Fund moneys are to be awarded under this paragraph (b)? What is the process for awarding the moneys?
 - d. In what sense, if any, is the process for awarding Fund moneys under this paragraph (b) *not* competitive?
 - e. If moneys are available pursuant to this paragraph (b) by application, are moneys distributed on a "first come, first served" basis? Is there reason for concern that early applicants may garner the most funding or that one early applicant may be permitted to receive all of the funding in connection with a particular allocation year?
18. Section 3 (4) (a) to (4) (c) specify allocation of moneys collected *annually* depending upon whether or not the Fund generates at least twenty million dollars in a *fiscal year*. Does the use of the word "annually" mean a calendar year or a fiscal year? If you intend the word annually to mean something other than a fiscal year, it is not clear how the Fund administrator will be able to determine whether the requirements of the proposed initiative have been satisfied since he or she may be trying to determine the amount collected during a calendar year for purposes of satisfying a threshold funding requirement based upon the fiscal year. Would you consider modifying the language of the proposed initiative to address any confusion with respect to this issue?
19. It may not be known whether the twenty-million-dollar threshold has been reached until the end or close to the end of a particular fiscal year. If so, is it your intent that the distribution of moneys be made at a point in time following the fiscal year so that it is clear whether the threshold has been achieved at the time the distribution determination is made? If so, would you consider modifying the language of the proposed initiative to address any confusion with respect to this issue?
20. What is the rationale for the split between the statewide and local allocations in the event the funding threshold has been reached? In the event the threshold has not been reached, what is the rationale for distributing all Fund moneys by means of the statewide allocation?
21. With respect to section 3 (4) (d) of the proposed initiative:
- a. Presumably it is not the "TWENTY MILLION DOLLAR *THRESHOLD*" that is indexed for inflation but rather the precise twenty-million-dollar figure itself. Assuming this assumption is correct, would you consider clarifying the language of the proposed initiative to address any uncertainty on this point?
 - b. Would you please clarify the time frame during which the threshold amount would be adjusted for inflation under this paragraph (d)? Specifically, if the proposed initiative were to become law following its passage in the November 2008 general election, the Fund would presumably be established in the 2008-09 state fiscal year.

If so, under the provisions of this paragraph (d), would the threshold be adjusted for inflation in the 2009-10 state fiscal year or the 2010-11 state fiscal year? Would you consider clarifying the language of the proposed initiative to address any uncertainty on this point?

22. With respect to section 3 (4) (e) of the proposed initiative, what is the basis for the fifty percent figure? What is the rationale for this requirement?
23. Section 3 (4) (f) requires moneys that are obligated but not expended to revert to the Fund. Does this mean a project may be defunded if all the moneys for the project are not expended within three years of the date the funds were obligated? What if the project requires more than three years to complete or the project is delayed for reasons beyond the control of the beneficiary of Fund moneys, e.g., acts of God and natural disasters?
24. What would happen if the Fund receives at least twenty million dollars in a given fiscal year and enough money is distributed so that the next fiscal year less than twenty million dollars remains in the Fund?
25. With respect to section 5 (1) of the proposed initiative:
 - a. Is it your intent that the real estate transfer tax be imposed on all property transactions, including transactions involving residential, commercial, industrial, agricultural, and vacant land?
 - b. Do you have an estimated figure for the amount of revenue the real estate transfer tax will generate annually? Is the amount of the tax set at a level intended to raise the twenty-million-dollar threshold amount, or do you have some other amount in mind?
 - c. For purposes of providing an example, what will the amount of the real estate transfer tax be in the case of the sale of property for which the consideration is one hundred thousand dollars?
 - d. What does it mean to say the tax shall be imposed "AT THE RATE OF FOUR CENTS FOR EACH ONE HUNDRED DOLLARS, *OR MAJOR FRACTION THEREOF*, OF CONSIDERATION PAID . . ."?
 - e. How did you arrive at the tax rate of four cents?
 - f. Who is to collect the tax? How are revenues from the tax to be transferred into the Fund?
26. Do you have an estimate of the annual amount of state resources, in terms of both funding and full-time employment, that will be required to implement the proposed initiative?
27. Initiated measures are effective upon proclamation of the governor unless a later effective date is specified. Would you care to specify a later or more particular effective date for the

proposed initiative?