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MEMORANDUM

February 16, 2007

TO: Daniel Hayes and Eric Levine

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #4, 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 promote public Colorado colleges and universities;
 - d. The fee be assessed on the estimated cost of all new construction as determined by a respective building 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 before a permit to build or any subsequent permit needed to complete the project for intended purpose is issued;
 - 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;
 - k. "Publicly owned" means a project constructed for the exclusive ownership of the federal, state, or local governments 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. The Colorado commission on higher education is empowered to control the expenditure of the revenues from the fund;
- r. The purpose of the fund is the expansion and improvement of Colorado public colleges and universities, including the creation of new institutions;
- s. At least thirty percent of the moneys must be used to subsidize lower tuition costs and provide scholarships for Colorado residents;
- t. "Colorado residents" means persons who are citizens of the United States of America and are:
 - a. Persons at least twenty three years of age and have resided in Colorado for the last twelve months and have completed two of the following procedures in Colorado:
 - i. Registered to vote;
 - ii. Worked and filed a state income tax return;
 - iii. A driver's license;
 - iv. Have purchased a home;
 - b. Persons under the age of twenty three years old and whose parents or legal guardians qualify for the provisions in subsection (5) (i) (1);
- u. Funds from the fee shall not be used for athletic departments or programs;
- v. 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"); and
- w. Moneys from the fee shall not be used to displace public funding commitments established prior to the passage of initiative.

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. To conform to standard drafting practices, would the proponents move the definition for "Colorado residents " to the proper place in the list of definitions so that the definitions are in alphabetical order?
3. To conform to standard drafting practices, would the proponents hyphenate "twenty-three years of age" in subsection (5) (i)?
4. To conform to standard drafting practices, in subsection (5) (i), would the proponents change the subdivisions (1) and (2) to (I) and (II)?

Substantive questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed measures to have a single subject. What is the single subject of the proposed initiative?
2. The proponents specify that "this fee shall be assessed on the estimated cost of all new construction projects in Colorado **as determined by a respective building and zoning department.**" However, the proponents go on to define the term "planning and zoning department." Would the proponents consider using the same terms in both subsection (1) and the definition in subsection (5) (e)?
3. What is the meaning of the phrase "subsequent permit needed to complete such project"? Is it the intent of the proponents that a construction project requiring more than one building permit have more than one fee imposed? Can the fee be delayed as long as it is paid before the final permit is issued?
4. What do the proponents mean when they state "subsequent permit needed to complete such project **for intended purpose** shall be issued"? What is the intended purpose the proponents are referring to?
5. Would the proponents consider inserting an applicability clause such as "This act shall apply to building permits issued on or after January 1, 2008."?
6. There appears to be some words missing in subsection (4). Would the proponents consider adding the word "be" after "Revenues from this fee shall..."? Would the proponents consider

- adding the word "and" after "public Colorado colleges and universities"?
7. In the definition for "educational facilities", would the proponents consider making the word "institution" plural?
 8. In the definition for "health facilities", would the proponents consider making the word "institution" plural?
 9. With regard to the definition of "publicly owned" in the proposed initiative would the proponents consider defining "local governments"? Do the proponents intend for local governments to include special districts? Authorities? Any other entities?
 10. In the definition for "utilities" in subsection (5) (h) of the proposed initiative:
 - a. Would the proponents clarify what they mean by "exploration and extraction" of energy sources?
 - b. What if a construction project relates to the generation or transmission of multiple sources of energy? For example, would a transmission line that happens to carry electricity from a wind farm as well as a coal plant be considered a utility? What if it is constructed to carry wind energy, but is subsequently used to carry energy generated from fossil fuels?
 - c. Would the proponents consider defining the term "energy companies" as used in that particular definition?
 11. What do the proponents mean by the provision that the Colorado commission on higher education "be empowered to control the expenditure of the revenues..."? Have the proponents given consideration to the fact that giving the Colorado commission on higher education such authority would insulate the expenditure of money from public scrutiny? How would the Colorado commission on higher education control the expenditures? Would the general assembly appropriate the moneys to the Colorado commission on higher education? Would the controller simply disburse moneys at the direction of the Colorado commission on higher education?
 12. Have the proponents considered that specifying the Colorado commission on higher education in the constitution would give the Colorado commission on higher education constitutional status and would thereby make it difficult for the general assembly to change the Colorado commission on higher education in the future?
 13. The provision that empowers the Colorado commission on higher education to "control the expenditure of the revenues..." does not provide the Colorado commission on higher education with much guidance as to the distribution necessary among the different Colorado public colleges and schools. Would it be within the Colorado commission on higher education's power to award all the money to the University of Colorado, for example?

14. Proponents specify that thirty percent of the revenues generated are to be used to "subsidize lower tuition costs." Does such subsidization include all financial assistance in forms of loans, loan matching, scholarships, grants, or work study programs? If so, should the revenues be distributed among the following Colorado commission on higher education run programs:
- a. The financial assistance program in article 3.3 of title 23, Colorado Revised Statutes;
 - b. The Colorado student incentive grant program in article 3.5 of title 23, Colorado Revised Statutes;
 - c. The tuition assistance grant program in article 3.7 of title 23, Colorado Revised Statutes; or
 - d. The teacher loan forgiveness program in article 3.9 of title 23, Colorado Revised Statutes?

Should some of the revenues be distributed to the institutional loan programs administered by collegeinvest under part 2 of article 3.1 of title 23, Colorado Revised Statutes?

15. If proponents intend that part of such revenues are distributed to collegeinvest for assistance with institutional loans under part 2 of article 3.1 of title 23, Colorado Revised Statutes, have the proponents considered what impact that transfer of money to collegeinvest would have on that entity's enterprise status?
16. If the proponents intend for the Colorado commission on higher education to distribute such money under different programs not already in statute, will the Colorado commission on higher education be responsible to define the scope of the program? Have the proponents reviewed the commission's duties and powers to determine whether they have current statutory authority to create such programs? Would the proponents be opposed to specifying such duties and powers in their initiative petition or including language that specifically allows the general assembly to pass legislation regarding those duties and powers?
17. 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?
18. Do the proponents think there is a conflict between subsection (2) of this proposed initiative petition and the provision that the Colorado commission on higher education be empowered to control the expenditure, in that the money is subject to appropriation by the general assembly? If the proponents intend for the Colorado commission on higher education to handle the distribution of all revenues, would the proponents consider specifying that all the money in the higher education cash fund is continuously appropriated to the Colorado commission on higher education?

19. The proponents specify that the revenues from the higher education cash fund are for the "purpose of the expansion and improvement of Colorado public colleges and universities..." Would the proponents be willing to clarify what is meant by this phrase?
20. How do the proponents intend for the revenues from the higher education cash fund to "subsidize lower tuition costs"?
21. The proponents provide that "'Colorado residents' means persons who are citizens of the United States of America." However, when specifying the "procedures" a person at least twenty-three years of age can complete, the proponents have listed "procedures" that a legal resident of the United States can complete as well (other than registering to vote). Did the proponents intentionally leave out legal residents of the United States?
22. The proponents specify that a Colorado resident is a person at least twenty-three years of age that has **resided in Colorado for the last twelve months**. When does the time period begin for the counting of the twelve-month period? Does a person look back twelve months from when the application is submitted for a scholarship? Does a person look back twelve months from when the grant or scholarship would be awarded? Does a person look back twelve months from when he or she is attending a public Colorado college or university?
23. The proponents specify that persons under the age of twenty-three may qualify for scholarships whose parents or legal guardians qualify for the procedures in subsection (i) (1). Do the proponents intend for both parents or legal guardians to have individually completed the procedures or is it sufficient for one parent or legal guardian to have completed the procedures? Do the proponents really intend to include every person under the age of twenty-three? Does this mean that a ten-year-old child could qualify for a scholarship under this proposed initiative? What if a person is under the age of twenty-three, but does not have either parents or a legal guardian? Could such a person be a resident?
24. Do the proponents intend that the institutions of higher education have a role in determining criteria for the scholarships and distribution of the revenue?
25. Would the proponents consider defining "athletic departments" as used in the last sentence of subsection (3) of the proposed initiative?
26. Would the proponents consider including language that specifically allows the general assembly to pass implementing legislation if this ballot proposal were to pass?