

# STATE OF COLORADO

## Colorado General Assembly

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### MEMORANDUM

January 23, 2007

**TO:** Daniel Hayes and Eric Levine

**FROM:** Legislative Council Staff and Office of Legislative Legal Services

**SUBJECT:** Proposed initiative measure 2007-2008 #3, 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.

#### 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 project" means construction of new buildings or remodeling of such including private roads, pipelines, ditches, sidewalks, dams, excavation, landscaping, golf courses, and other construction work related to a non-exempt project;
- 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 local government;
- e. The fee is collected before a permit to build or any subsequent permit needed to complete the project is issued;
- f. 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;
- g. 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;
- h. Land acquisitions shall not be considered in the fee;
- i. 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, synagogues, or mosques;
- j. "Publicly owned" means a project constructed for the exclusive ownership of the federal, state, or local governments regardless of how such project is financed;
- k. "Educational facility" means a commercial institution dedicated to elementary, middle, or high school education, or to higher education offering an associate, bachelor, master, doctorate, law, or medical degree;
- l. "Health facility" means a commercial business institution where people receive medical, surgical, or psychiatric treatment and nursing care;
- m. "Farm and ranch" means cultivation, feeding, and raising food products including needed buildings and housing all located on a particular agricultural land site;
- n. "Utilities" means construction related to providing water and sewer services, and providing energy in all forms throughout the state including exploration and extraction of such energy sources;
- o. Specifies where the fees are to be transmitted and creates the higher education cash fund;
- p. A volunteer financial board made up of at least two college educators from each public college and university with less than ten thousand students and four such

educators from those with more than ten thousand students be created and empowered by the general assembly to completely oversee and allocate the revenues from the fund;

- q. The purpose of the fund is superior scholastic achievement in Colorado public colleges and universities, including the creation of new institutions;
- r. Following the creation of the board, rules and regulations regarding the duties and selection of board members, term lengths, etc., may be changed by the unanimous vote of the existing board members.
- s. At least twenty percent of the moneys must be used to lower tuition costs and provide scholarships for legal in-state residents; and
- t. Funds from the fee shall not be used for athletic departments or programs.

### 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 hyphenate "ninety-day cure period" as used in subsection (1)?
3. In the last sentence of subsection (1), to conform to standard drafting practice, would the proponents either:
  - a. Change the numbering of "1.), 2).," etc., to semi-colons, so that it reads "CONSTRUCTION PROJECTS EXEMPTED FROM THIS FEE INCLUDE: PUBLICLY OWNED PROJECTS; PRIVATELY OWNED HEALTH AND EDUCATIONAL FACILITIES;" and so on; or
  - b. Break each exemption into a separate paragraph, as follows:  
"CONSTRUCTION PROJECTS EXEMPTED FROM THIS FEE INCLUDE:  
(a) PUBLICLY OWNED PROJECTS;  
(b) PRIVATELY OWNED HEALTH AND EDUCATIONAL FACILITIES;"
4. Would the proponents consider adding the word "projects" after "construction" and before "in Colorado as determined" in subsection (1)?
5. In subsection (3), would the proponents eliminate "etc." or replace it with a more specific term?

6. Would the proponents remove the hyphen between "ten" and "thousand" in subsection (3)?
7. There are two subsections numbered as "(4)"; would the proponents renumber the last subsection as (5)?
8. Would the proponents correct the spelling of "health" in the definition section?

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. Is a "construction project" limited to a project for which a building permit is required? What happens, for example, when there is construction in an unincorporated portion of a county that does not require building permits? If the fee is to be collected, how would the amount of the fee be calculated in such circumstances?
3. What is included in the estimated total cost of a project? The cost of land? Infrastructure? Financing costs? Other costs? How do the proponents intend for the ninety-day cure period to work? Is the ninety-day cure period something the general assembly will need to outline in enabling legislation or is it the proponents' intention that the process for the cure period be established by the board?
4. Do the proponents intend for the board to have the authority to promulgate rules as provided for in article 4 of title 24, Colorado Revised Statutes?
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. With regard to the definition of "publicly owned" in the proposed initiative:
  - a. Would the proponents consider defining "local governments"? Do the proponents intend for local governments to include special districts? Authorities? Any other entities?
  - b. Would the proponents clarify their intent with regard to the phrase "exclusive ownership"? For example, could a building owned by a federal government but leased to private company still be exempted from the imposition of the fee? Would a building owned privately but used exclusively by a governmental entity be exempt?
  - c. If a project is financed by a lease-purchase agreement, certificates of participation, or other method that results in a governmental entity either being the ultimate owner or user of what is built, would the project be exempt from the fee?
  - d. Does the timing of a project's ownership affect the exemption? For example, if a project is owned by a governmental entity when it is built, but is immediately sold

to a private entity, is the project exempt from the fee? Or, if a project is privately owned when constructed, but immediately conveyed to a governmental entity, is the project exempt from the fee?

7. 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?
8. The measure states that projects exempted from the fee "include" five specific types of projects. Does this imply that this is not an exclusive list and that other projects could be exempt? If so, how would other exempt projects be designated?
9. The list of exemptions ends with "5.) houses of worship such as churches, synagogues or mosques." Would the proponents consider changing that to read "houses of worship such as churches, synagogues, **and** mosques"?
10. Would the proponents consider defining the plural terms of their words as used in the body of the amendment? For example, define "construction projects" instead of "construction project", define "educational facilities" instead of "educational facility", define "farms and ranches" instead of "farm and ranch", and define "health facilities" instead of "health facility".
11. Could the definition of "construction project" be changed so that it reads, "'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-exempted projects."
12. Could the definition for "farm and ranch" be changed so that it reads, "'Farms and ranches" means **facilities used for** cultivation, feeding, and raising food products, and **include** needed buildings and housing located on a particular agricultural land site." Would the proponents consider further clarifying what they mean by "agricultural land site"?
13. In the definition of "educational facility" the proponents use the phrase "commercial institution." What do the proponents mean by a "commercial institution"? Is this affected by the amount of public funding received by the institution? Did the proponents intend to include the word "business" in the definition of "educational facility" as they did for the definition of "health facility"? If left out intentionally, is there a specific reason for leaving it out?
14. In the definition of "health facility" the proponents use the phrase "commercial business institution." What do the proponents mean by a "commercial business institution"? Is this affected by the amount of public funding received by the institution?
15. In the definition for "utilities" in subsection (4) (g) of the proposed initiative:

- a. Would the proponents be willing to say "energy in all forms throughout the state, including, **but not limited to**, exploration and extraction of such energy sources"? What constitutes construction related to the extraction of energy sources? Would this include the construction of commercial buildings by energy companies? Housing for workers?
  - b. Would the proponents clarify what they mean by "exploration and extraction" of energy sources? Is the intent that the phrase includes energy harnessed from the wind or from the sun? If so, is such renewable energy truly extracted?
  - c. 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?
16. The proposed initiative states that a "volunteer financial board made up of at least two college educators from each public college and university with less than ten-thousand students and four such educators from those with more than ten-thousand students" will "completely oversee and allocate the revenues from this fund". The initiative further states that the board is to be created and empowered by the general assembly. Do the proponents intend for the general assembly to determine the following:
- a. The manner in which the members of the board are selected or elected;
  - b. The terms of the members of the board;
  - c. Whether the members of the board should have staggered terms;
  - d. The kind of governance structure the board should have; and
  - e. The powers and duties of the board?
17. The proponents state, "at least two college educators from each public college and university with less than...". Would the proponents consider changing that to read, "at least two college educators from each public college and university with **fewer** than...?"
18. The proponents have included that "Following the creation of such board, rules and regulations regarding the duties and selection of board members, term lengths, etc. may be changed by the unanimous vote of the existing board members." Does this statement imply that the general assembly is to determine the items addressed in question 16 above, but that the board can undo whatever statutory language is passed by the general assembly by simply unanimously passing a rule that would change such provisions? Or did the proponents intend that the board would make the decisions regarding the items addressed in question 16 above? Would the proponents be willing to clarify who will be making those decisions? If the

proponents intend to have the board make those decisions, would the proponents consider granting the board rule-making authority pursuant to the provisions in article 4 of title 24, Colorado Revised Statutes?

19. What do the proponents intend by empowering the board to "completely oversee and allocate the fund revenues"? Does this give the board exclusive authority to control the expenditure of the revenues? Could the general assembly simply empower the board to advise the general assembly in the allocation or appropriation of the revenues?
20. Do the proponents intend for the financial board to be under a particular state department or agency, for example, the department of higher education? Do the proponents intend for the financial board to have a relationship with the Colorado Commission on Higher Education?
21. Subsection (3) of the proposed initiative states that the purpose of the funds from this fee is "superior scholastic achievement". Would the proponents consider clarifying that phrase?
22. Is there anything that would prevent reductions in tuition, general fund appropriations, or other financial support for higher education that could potentially offset some or all of the revenues produced by the new fee? Is this why the proponents included the language that "Moneys from the fee shall not be used to displace public funding commitments established prior to the passage of this amendment"? Would the proponents be willing to change the word "amendment" to "section"? Would the proponents be willing to explain what that particular sentence means? Would the proponents explain how such a section would be enforced or policed?
23. How do the proponents intend for the revenues from this fee to "lower tuition costs"?
24. Would the proponents consider defining "legal in-state residents" for purposes of the scholarship portion of the proposal?
25. Do the proponents intend that the institutions have a role in determining criteria for the scholarships? Do the proponents intend that the Colorado Commission on Higher Education have a role in the establishment of the scholarships?
26. Would the proponents consider defining "athletic departments" as used in the last sentence of subsection (2) of the proposed initiative?
27. If local governments are to assess this fee when any building permits are issued for nonexempt construction projects, how is this fee to be collected for administration by the board?
28. It appears that the proponents have added a phrase to exempt the revenues of this fee from section 20 of article X of the Colorado constitution (TABOR). This phrase provides, "Revenues from this fee are fixed to construction rates and shall not be subject to section 20 of article X of the Colorado constitution." Would the proponents please explain what they mean by "revenues from this fee are fixed to construction rates"? Would the proponents

consider clarifying the exemption from TABOR by stating something like, "Revenues from the fee for the benefit of public Colorado colleges and universities do not constitute "fiscal year spending" for the purposes of section 20 of article X of the Colorado constitution ("TABOR")"? Since the proposed section 18 is also part of the Colorado constitution, would the proponents say "of this constitution" instead of "of the Colorado constitution" in this reference?

29. Would the proponents consider including language that specifically allows the general assembly to pass implementing legislation if this ballot proposal were to pass?