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MEMORANDUM

TO: Peter Coulter and Cliff Baptista

FROM: Legislative Council Staff and Office of Legislative Legal Services

DATE: January 26, 2016

SUBJECT: Proposed initiative measure 2015-2016 #86, concerning the definition of fee

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 directors of 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.

This initiative was submitted in a series with proposed initiative 2015-2016 #85. The comments and questions raised in this memorandum will not include comments and questions that were addressed in the memorandum for proposed initiative 2015-2016 #85, except as necessary to fully understand the issues raised by the revised proposed initiative. Comments and questions addressed in the other memorandum may also be relevant, and those questions and comments are hereby incorporated by reference in this memorandum. Only new comments and questions are included in this memorandum.

Purposes

The major purposes of the proposed amendment to the Colorado constitution appear to be:

1. To define the term "fee" for purposes of the Colorado constitution, Colorado Revised Statutes, codes, directives, and all public Colorado legal documents;
2. To prohibit ancillary or extraneous benefits of any fee from being considered when determining the value of a fee;
3. To specify that the proposed initiative is self-executing and severable and supersedes state and local laws and ordinances, and court findings and rulings, including the rulings and findings of fact in *Barber v. Ritter*;
4. To specify that the measure is effective retroactive to November 4, 2008; and
5. To require all excess fees of a state agency to be put to a vote to be refunded to Colorado citizens.

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. The proposed initiative states that "all provisions of this section shall become effective retroactive to November 4, 2008." Does "this section" refer to the proposed initiative? Why November 4, 2008?
2. The United States constitution, Article 1, Section 10, specifies that "no state shall ... pass any ... ex post facto law...." Generally, an ex post facto law is a law that retrospectively changes legal consequences. Are the proponents concerned with this prohibition and the retroactivity of their proposed initiative?
3. Who determines whether there are "excess fees" being charged and collected by any state agency? By what date? Is there a de minimis amount? Can the proponents give an example of an "excess fee"?
4. Should there be an election for each "excess fee" or can the election be for a collective group of "excess fees"?
5. The proponents limit the sentence to "excess fees charged and collected by any state agency". Does that mean that local governments are not subject to this requirement?

6. If a vote requires that "excess fee revenue" be refunded, is the refunded money excluded from state fiscal year spending and provided in article X, section 20 (2) (e)?
7. Is there a distinction between "refund" and "return"?
8. Article X, section 20 (1) specifies that "subject to judicial review, districts may use any reasonable method for refunds under this section, including temporary tax credits or rate reductions. Refunds need not be proportional when prior payments are impractical to identify or return." Will this provision apply to the refunds required in the proposed amendments?
9. The provision requiring excess fees to be voted upon and refunded appears at the end of the proposed initiative after provisions governing the effective date and under the heading "effective date." Given that this appears to be a substantive requirement of the proposed initiative, would the proponents consider moving this provision to Section 1 of the initiative?

Technical Comments

There are no new technical comments raised.