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MEMORANDUM

TO: Bruce Mason, Karen Dike, and Martha Tierney
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: December 30, 2015
SUBJECT: Proposed initiative measure 2015-2016 #64, concerning oil and gas development

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.

Purpose

The major purpose of the proposed amendment to the **Colorado constitution** appears to be to give local governments the authority to adopt laws concerning oil and gas development, including the ability to enact prohibitions, moratoria, or limits on oil and gas development that may be more restrictive, but not less protective, of the community's health, safety, general welfare, and environment than laws enacted by the general assembly or regulations adopted by state agencies.

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and 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. As a change to the Colorado constitution, the proposed initiative may be amended only by a subsequent amendment to the constitution. Is this your intention?
3. Do you want to specify the effective date of the proposed initiative?
4. Section 1 is entitled "Purposes and findings," but subsection 1 (c) seems to impose a duty on the state, rather than simply state purposes or findings, by specifying that the state "shall" encourage, facilitate, and defend efforts by local governments to prevent and mitigate detrimental impacts of oil and gas development.
 - a. Do the proponents intend to impose a duty by this language, and, if so, would you consider moving substantive language out of the purposes and findings section?
 - b. If the intent is to impose a duty:
 - i. Does this provision obligate the state to provide staffing or other resources to enable local governments to prevent or mitigate detrimental impacts on public health, safety, general welfare, and the environment?
 - ii. If the state operates programs to prevent or mitigate detrimental impacts of oil and gas development on public health, safety, general welfare, and the environment, must the state also assist local governments to prevent or mitigate such impacts if those measures would be redundant with the state's efforts?
 - iii. Does this measure obligate the state to mitigate detrimental impacts on public health, safety, general welfare, and the environment that it did not cause? If so, how is the state to pay for the mitigation and when must the mitigation be completed?
5. Similarly, section 1 (d) states that local governments have broad authority to regulate land use to limit detrimental impacts not only on "their community" but also on "surrounding areas," while section 3 (a) purports to vest local governments with authority to adopt laws concerning oil and gas developments "within their

geographic borders." Do the proponents intend section 1 (d) to have the force of law, or is it only a statement of purpose and intent? Would the proponents consider making sections 1 (d) and 3 (a) consistent regarding the areas within which local governments have authority under the proposed initiative?

6. Regarding section 2 (b): The proposed definition of "oil and gas development" is similar to, but less detailed than, the statutory definition of "oil and gas operations" ("exploration for oil and gas, including the conduct of seismic operations and the drilling of test bores; the siting, drilling, deepening, recompletion, reworking, or abandonment of an oil and gas well, underground injection well, or gas storage well; production operations related to any such well including the installation of flow lines and gathering systems; the generation, transportation, storage, treatment, or disposal of exploration and production wastes; and any construction, site preparation, or reclamation activities associated with such operations").
 - a. Does this definition of "oil and gas development" apply only to a local government's authority under this article, or do the proponents intend to apply this definition to affect the Colorado oil and gas conservation commission's authority to regulate oil and gas operations? If so, how do the differences between the statutory definition and the proposed constitutional definition affect the ability of a local government and the Colorado oil and gas conservation commission to regulate oil and gas operations?
 - b. The definition also defines "oil and gas development" to include the use of hydraulic fracturing "and associated components." What do the proponents mean by the phrase "associated components"?
7. Section 1 (d) refers to local governments' broad authority to regulate "land use" to limit detrimental impacts on public health, safety, general welfare, and the environment, but section 3 does not refer to land use authority when it vests local governments with authority to adopt laws concerning oil and gas development. Is the authority vested by section 3 a type of land use authority? Or does section 3 vest local governments with authority that is broader than what is currently generally thought of as land use authority, such as the authority to regulate what happens below the ground in an oil and gas well as opposed to where oil and gas facilities may be located?
8. Historically, Colorado's laws regarding state-law preemption of the authority of local governments has focused on whether a matter is of purely local concern; if so, a local home rule government's laws would not be preempted by a state law, but as to matters of mixed state and local concern or statewide concern, state law

would preempt conflicting local laws, and state law preempts local law even as to matters of purely local concern if a local government is not a home rule local government. Section 3 (b) reverses this precedent by specifying that local laws, regardless of whether adopted by a home rule local government, are not preempted by state law even when there is a mixed state and local matter or a matter of statewide concern.

- a. Why do the proponents reverse this historical precedent with regard only to oil and gas development?
 - b. If there is a state law governing oil and gas development that addresses a legitimate matter of statewide concern (as the proposed initiative seems to concede that there may be), why should a local law that materially impedes the purposes of that state law be immune from preemption? Why should purely local interests prevail over the interests of the entire state?
9. Section 4 uses the passive voice in specifying that laws and regulations "may be enacted" to facilitate the operation of the new article.
- a. May both the general assembly and local governments enact laws and regulations?
 - b. Section 3 refers four times to "laws, regulations, ordinances or charter provisions" in authorizing local governments to legislate regarding oil and gas development, but section 4 refers only to "[l]aws and regulations." Is there a reason for the distinction? If so, what is it? If not, would the proponents consider using consistent terms?

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. To conform to standard drafting practice in the Colorado constitution, the heading for section 1 should read "**Legislative declaration.**" rather than "**Purposes and findings.**"
2. Section 1 should begin with subsection (1), followed by paragraphs (a), (b), etc. as follows:

Section 1. Legislative declaration. (1) THE PEOPLE OF THE STATE OF COLORADO FIND AND DECLARE THAT:

- (a) OIL AND GAS DEVELOPMENT, ...
- (b) THESE DETRIMENTAL IMPACTS ...
- (c) THE STATE OF COLORADO HAS ...

3. In the above example, notice the following recommendations:

- a. The word “that” is included at the end of the introductory portion to subsection (1) rather than at the beginning of each paragraph; and
- b. The first word of each paragraph begins with a capital letter. Be sure to capitalize the first word of each subsection and paragraph throughout the new article.

4. Similar to section 1, sections 2 and 3 should be organized as follows:

Section 2. Definitions. FOR PURPOSES OF THIS ARTICLE, UNLESS THE CONTEXT OTHERWISE REQUIRES:

- (1) "LOCAL GOVERNMENT" MEANS ...
- (2) "OIL AND GAS DEVELOPMENT" MEANS ...

Section 3. Grant of authority. (1) THE PEOPLE OF THE STATE OF COLORADO HEREBY VEST IN LOCAL GOVERNMENTS ...

(2) IN MATTERS OF LOCAL, STATEWIDE, OR MIXED LOCAL AND STATE CONCERN ...

5. In section 3, you may want to consider breaking up the first sentence into two sentences at the semicolon as follows: "THE PEOPLE OF THE STATE OF COLORADO HEREBY VEST IN LOCAL GOVERNMENTS THE POWER AND AUTHORITY TO ADOPT LAWS, REGULATIONS, ORDINANCES, OR CHARTER PROVISIONS CONCERNING OIL AND GAS DEVELOPMENT WITHIN THEIR GEOGRAPHIC BORDERS. THIS POWER AND AUTHORITY INCLUDES THE ABILITY TO ENACT PROHIBITIONS, MORATORIA, OR LIMITS ON OIL AND GAS DEVELOPMENT." In addition, a comma is not needed after "This power."
6. Section 3 refers three times to "laws, regulations, ordinances or charter provisions," but in one instance uses a comma after the word "ordinances." Standard usage in the constitution would include the comma; the proponents should consider making these references consistent.

7. In the heading of section 4, separate each phrase by a dash rather than a comma:
"Section 4. Self-executing – severability – conflicting provisions."
8. In section 4, change the words "BUT IN NO WAY LIMITING OR RESTRICTING" to "BUT MAY NOT LIMIT OR RESTRICT" in order to maintain parallel structure in the sentence.
9. In the last sentence of section 3 (a) and the last sentence of section 4, a comma is not needed before the word "but."