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Colorado General Assembly

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MEMORANDUM

TO: Anne Lee Foster and Suzanne Spiegel
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: January 2, 2018
SUBJECT: Proposed initiative measure 2017-2018 #97, concerning a Buffer Zone Requirement for 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.

Purposes

The major purposes of the proposed amendment to the **Colorado Revised Statutes** appear to be:

1. To declare that proximity to oil and gas development can have detrimental impacts on public health, safety, welfare, and the environment.

2. To require a minimum distance of two thousand five hundred feet between an occupied structure or vulnerable area and any new oil and gas development not on federal land.

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. Under section 1-40-105.5, Colorado Revised Statutes, the director of research of the legislative council is required to prepare an initial fiscal impact statement, which includes an abstract that appears on petition sections, for each initiative that is submitted to the Title Board. In preparing the statement, the director is required to consider any fiscal impact estimate prepared by the proponents.
 - a. Will you submit the initiative to the Title Board? If so, when do you intend to do so?
 - b. Are you submitting a fiscal impact estimate today? If not, do you plan to submit an estimate in the future, and, if so, when do you intend to do so?
 - c. To ensure that there is time for consideration, you are strongly encouraged to submit your estimate, if any, at least 12 days before the measure is scheduled for a Title Board hearing. The estimate should be submitted to the legislative council staff at BallotImpactEstimates.ga@state.co.us.
3. Do you intend that "occupied structure," as defined in subsection (2)(a) of the proposed initiative, would include a mobile home, which appears to be a "structure intended for human occupancy"?
 - a. If so, would an oil and gas development that is under construction be in violation of the distance requirement if a mobile home was moved to a location within 2,500 feet of the location of the oil and gas development construction site?
 - b. If not, you might consider adding language excluding a mobile home from the definition.

4. The definition of "oil and gas development" in subsection (2)(b) is very similar to the definition of "oil and gas operations" in section 34-60-103 (6.5). You might want to consider using the existing definition, modified as necessary for purposes of the proposed initiative.
5. For the definition of "vulnerable areas" in subsection (2)(c) of the proposed initiative, you've used the word "include" instead of "means." If you intend to indicate an exclusive list, "means" conveys that exclusivity, but "include" does not. If you do in fact intend to indicate a nonexhaustive list:
 - a. How would an owner or operator of a new oil and gas development know which types of structures or areas beyond those listed in the definition could be considered "vulnerable areas" for purposes of the statute?
 - b. An attempt to apply this statute with regard to a type of "vulnerable area" that is not listed in the definition in subsection (2)(c) could be found to be unconstitutionally vague. *See People v. Becker*, 759 P.2d 26, 31 (Colo. 1988) (void-for-vagueness challenge requires a determination whether a statutory prohibition forbids an act in terms so vague that "persons of ordinary intelligence must necessarily guess as to its meaning and differ as to its application").
6. Does the phrase "public and community drinking water sources," as used in subsection (2)(c), include:
 - a. All of the components necessary to distribute drinking water to the public or to a community? If so, you might consider instead using the phrase "water distribution systems" and adding a definition of that term. "Water distribution system" is defined in statute in section 25-9-102, Colorado Revised Statutes, to mean "any combination of pipes, tanks, pumps, or other facilities that delivers water from a source or treatment facility to the consumer."
 - b. Water treatment facilities? If so, you might consider listing "potable water treatment facilities" separately in the definition and then adding a definition of that term. "Potable water treatment facilities" is defined in statute in section 39-29-110, Colorado Revised Statutes, to mean "a system or facility of a political subdivision for treating water to be supplied to the public for domestic use, and 'potable water treatment facilities' includes water treatment plants, treated water storage facilities, water mains, water distribution lines, pumps, and appurtenances."

7. In the definition of "local government" in subsection (2)(d) of the proposed initiative, you reference "any statutory or home rule county, city and county, city, or town." As written, it is not clear whether "statutory or home rule" modifies "city and county," "city," or "town." To modify each with "statutory or home rule," you might consider breaking up the definition into subparts as follows:

(d) 'Local government' means a statutory or home rule entity located in the state of Colorado that is a:

- (I) County;
- (II) City and county;
- (III) City; or
- (IV) Town.

8. In subsection (4), you might want to use "required by subsection (3) of this section" instead of "granted in (3) of this section" because the buffer zone distance set forth in subsection (3) imposes a requirement on a person rather than granting a right to the person.
9. The word "shall" is defined in section 2-4-401 (13.7), Colorado Revised Statutes, to apply to all statutes and to mean "that a person has a duty." The use of the word "shall" in subsections (4) in reference to a larger buffer zone and in subsection (5) in reference to the section taking effect and being self-executing do not comport with this definition. Furthermore, the use of the word "shall be" in subsection (3) does not comport with our drafting convention to use present tense. As such, we would recommend you change the references from "shall be considered" in subsection (3) to "is considered," from "shall govern" in subsection (4) to "governs," and from "shall take effect" and "shall be self-executing" in subsection (5) to "takes effect" and "is self-executing."
10. If an oil and gas development is permitted but not yet constructed before an occupied structure or vulnerable area is built within 2,500 feet of the geographic area subject to the oil and gas development permit, would the construction of that oil and gas development then constitute "new oil and gas development" prohibited under the statute? If so, does the permit holder have a property right in the permitted oil and gas development for which a prohibition against its construction might require just compensation under a Fifth Amendment takings analysis?
11. Current law allows the Colorado Oil and Gas Conservation Commission to grant an oil and gas operator's request for an exception from existing distance

requirements if the operator obtains a waiver or consent signed by an affected landowner. Do you intend that an operator may obtain such exception from the 2,500-foot distance requirement as well? If not, you might want to add language in statute prohibiting the Commission from granting requests for such exceptions.

12. You might consider adding an applicability clause stating that the statutory changes enacted by the initiative apply to oil and gas development constructed on or after the effective date of the act.

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. Although the text of the proposed initiative should be in SMALL CAPITAL LETTERS, the paragraph designations such as (a), (b), and (c) should not be in small capital letters.
2. Do not use a comma to separate two words or two phrases joined by a coordinating conjunction. For example, in subsection (2)(a), the phrases "any building or structure that requires a certificate of occupancy" and "or building or structure intended for human occupancy" should not be separated with a comma.
3. In subsection (2)(a), you need not state "including the use of hydraulic fracturing" because "oil and gas development" is defined in subsection (2)(b) to include hydraulic fracturing.
4. In subsection (2)(b), the definition of "oil and gas development" has two separate subjects: (1) "exploration for" and "drilling, production, and processing of" oil, gas, and other gaseous and liquid hydrocarbons and (2) "flowlines and the treatment of waste" associated with exploration, drilling, production, and processing.

In the first subject, the two verbs "exploration" and "drilling" should not be separated with a comma.

The word "and" or the word "or" should be used before the last item in a series, so the series following the first subject should include an "and" or an "or" before "gaseous and liquid hydrocarbons."

5. Do not put a comma before the first item of a series, after the last item of a series, or after a conjunction. In subsection (2)(d), the comma following the word "town," which is the last item in the series, should be removed.
6. It is standard drafting practice when referencing statutory subsection to include the word "subsection" before the number. For example, "subsection (3) of this section." In subsection (4) of the proposed initiative, the word "subsection" should be inserted before "(3)."
7. The following word is misspelled in subsection (3): "re-entry" should be spelled "reentry."
8. When a statute contains a legislative declaration and definitions, it is our drafting convention to add the words "legislative declaration" and "definitions" to the section's headnote. Therefore, we suggest that you amend the headnote to read: **"Mitigation of adverse oil and gas impacts to health and safety - buffer zones - legislative declaration - definitions."**