

# STATE OF COLORADO

## Colorado General Assembly

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## MEMORANDUM

**TO:** Colin Larson and John Brackney

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

**DATE:** April 6, 2022

**SUBJECT:** Proposed initiative measure 2021-2022 #140, concerning property valuation

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 with a series of initiatives including proposed initiatives 2021-2022 ##141 to 151. Comments and questions addressed in the memoranda for proposed initiatives 2021-2022 ##141 to 151 may also be relevant, and those questions and comments are hereby incorporated by reference in this memorandum.

## Purposes

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

1. To ensure that the actual value of real and personal property shall not be increased annually by more than inflation, limited to three percent, and shall equal the amount of the property's most recent sale, unless the property is substantially improved or suffers a decline in value.
2. To allow voters or the General Assembly to decide whether they want to keep the property valuation system established in the proposed initiative or return to the current system.

## **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. Throughout the proposed initiative, the changes to valuation apply to “real property.”
  - a. Do the proponents intend that the proposed initiative affect valuations for personal property?
  - b. Would the proposed initiative affect valuations for residential, industrial, commercial, and vacant real property?
  - c. Would the proposed initiative affect valuations for agricultural property? If so, how does this interact with the statement in article V, section 3 (1)(a) of the Colorado constitution that "the actual value of agricultural lands, as defined by law, shall be determined solely by consideration of the earning or productive capacity of such lands capitalized at a rate as prescribed by law"?
  - d. Would the proposed initiative affect valuations for producing mines? If so, how does this interact with the statement in section 39-1-103 (5)(a) that "[t]he valuation for assessment of producing mines... shall be determined pursuant to articles 6 and 7 of this title"?
  - e. Would the proposed initiative affect valuations for oil and gas producing property? If so, how does this interact with the statement in section 39-1-103 (5)(a) that "[t]he valuation for assessment of... lands or leaseholds producing oil or gas shall be determined pursuant to articles 6 and 7 of this title"?

3. Concerning section 1 of the proposed initiative:
- a. The proposed initiative adds a limit on the growth rate in the actual value of real property, and then duplicates this same limit on the growth rate in the actual value of residential real property. Does the first instance of the limit not govern valuations for residential real property? If it does, why include the same limit twice?
  - b. If the value of property "shall equal the amount of the property's most recent sale" price, unless the property was substantially improved, does this mean that property's value does not change until it is sold or is substantially improved? If so, what is the meaning of the language stating that "actual value shall not be increased by more than inflation, limited to 3%"? Are these not contradictory "shall" statements?
  - c. If a property's actual value would increase by more than three percent if not for the application of the limit in the proposed initiative, would the amount by which the actual value exceeds three percent carry over to future years, assuming that inflation exceeds three percent in those years?
  - d. If property is substantially improved, is there any limit on how much its value may increase?
  - e. If a property is sold, is there any limit on how much its value may increase?
  - f. What period of time should be considered when determining the amount of inflation relevant to determining the actual value of property?
  - g. May a property's value decrease? If so, may it decrease below the value of its most recent sale and does this situation need to be addressed in the Colorado constitution?
  - h. How should a parcel that was created after June 30, 2020, for example by the subdivision of a larger parcel, be initially valued? The proposed initiative appears to contemplate only parcels with a valuation as of that date or that have been sold since that date.
  - i. After the amendments in the proposed initiative, article X, section 3 of the Colorado constitution still requires assessors to use the cost approach, market approach, and income approach to appraisal. Do the

limits imposed in the proposed initiative allow assessors to apply the valuations that would be determined under these approaches?

- j. What is the purpose of repealing the ability of appraisers to use the cost approach when valuing residential property?
  - k. What is the purpose of the sentence stating: "Nothing in this subsection (1)(a) of the Colorado constitution shall be construed to change the applicability of the homestead exemption for qualifying seniors and qualifying disabled veterans as set forth in section 3.5 of article X of the Colorado constitution"?
  - l. How does this initiative interact with article X, section 3.5 (2) of the Colorado constitution which states: "Notwithstanding the provisions of subsection (1) of this section, section 20 of this article, or any other constitutional provision, for any property tax year commencing on or after January 1, 2003, the general assembly may raise or lower by law the maximum amount of actual value of residential real property of which fifty percent shall be exempt under subsection (1) of this section"?
  - m. Does this new system of determining property valuation change the role of the "valuation for assessment study" that is required by article X, section 3 (2)(a) of the Colorado constitution?
4. Concerning section 2 of the proposed initiative:
- a. The definitions in proposed section 39-1-102.5 will apply to the entirety of sections 39-1-103 and 39-1-104, including provisions in those sections that are not amended in the proposed initiative. Will there be any unintended consequences of using new definitions of inflation, sale, substantially improved, and portability in those sections?
  - b. Concerning the definition in proposed section 39-1-102.5 (1):
    - i. The Bureau of Labor Statistics currently publishes the Denver-Aurora-Lakewood consumer price indices as bimonthly, semiannual, and annual series. Does the definition require that only the annual series be taken into consideration?
    - ii. Annual data for the Denver-Aurora-Lakewood consumer price index are published after the end of the completed calendar year. For a property valued as of June 30, what inflation data should be used?

- c. Concerning the definition in proposed section 39-1-102.5 (2), C.R.S.:
- i. What is the difference between a transaction "in the ordinary course of business" and a "transaction that is: (a) bona fide, (b) at arm's length, (c) free from any donative intent"? 26 CFR section 25.2512-8 defines a "transfer of property made in the ordinary course of business" as "a transaction which is bona fide, at arm's length, and free from any donative intent." Are these intended to be two different things or should the "and" after "consideration" be changed to another word like "in" or "through"?
  - ii. 26 CFR section 25.2512-8 states that a "transfer of property made in the ordinary course of business...will be considered as made for an adequate and full consideration in money or money's worth." Is that not necessarily the case here?
  - iii. You use the phrase "property is sold" throughout the initiative, does this definition of "sale" apply in those instances?
  - iv. How is the value of property determined if a property is sold but does not satisfy the proposed definition of "sale"?
  - v. "If the property passes at death to anyone other than the deceased's spouse," does this count as a sale, even if the estate that the property passes from does not receive consideration?
- d. Concerning the definition in proposed section 39-1-102.5 (3), C.R.S.:
- i. Why are renovations that do not change the square footage of existing structures or buildings on real property not qualified as "substantially improv[ing]" the real property? Can such renovations not "substantially improve" the property?
  - ii. Is it correct that if a building on a piece of property is in a state of disrepair or otherwise has a low value, is completely destroyed in a natural disaster, and is entirely rebuilt, that this building does not qualify as substantially improved, unless the property on which the building sits exceeds 120% of the square footage of property before the disaster?
- e. Concerning the definition in proposed section 39-1-102.5 (4), C.R.S.:
- i. Does this definition create a right for owners of real property or identify an existing right? How is that right to be protected?

- ii. What is meant by "actual value" in this definition?
- iii. What is meant by "move the actual value" in this definition?
- iv. What is meant by "property" in this definition? Is this meant to only be "real property"?
- v. The definition applies "under certain circumstances." What are these circumstances? Or does the definition always apply, but the right is only extended to real property owners under certain circumstances?
- vi. Does the definition apply to instances where a structure is being relocated? If the definition applies to instances where a structure is being relocated, is it correct to say that value is being moved from one property to another, when the property itself is being moved?
- vii. Under current law, are there situations in which a real property owner may move the actual value of one property to another? If so, are there situations where a real property owner may not move the actual value of one property to another?

5. Concerning section 3 of the proposed initiative:

a. Concerning proposed section 39-1-103 (5)(a):

- i. The language added by the proposed initiative to article X, section (3) (1)(a) of the Colorado constitution states that "the actual value of real property shall equal the amount of the property's most recent sale (except that the actual value of real property that has not sold since June 30, 2022, shall be equal to the actual value used to calculate the property's 2021 property taxes)". Why is that parenthetical statement not repeated in this subsection and how does the omission of that parenthetical statement impact this subsection?
- ii. This subsection states that "the property's actual value shall be reappraised according to section 39-1-104 (10.2) and determined solely by consideration of...". The word "solely" is not used in the changes to language added by the proposed initiative to article X, section (3) (1)(a) of the Colorado constitution. Why is this the case and how, if at all, does this omission impact this subsection?

- iii. What is the purpose of the sentence that states: "Nothing regarding how the actual value of a property is determined shall be construed as a tax change or as a change to a property's mill levy rate or property tax rate"?
    - 1. Is this sentence meant to address section 1-40-106 (3)(f), C.R.S.? If so, given that the proposed initiative has not yet been enacted and section 1-40-106 (3)(f), C.R.S., is current law, how would that work?
    - 2. Why is this sentence not added to the end of article X, section 3 (1)(a) of the Colorado constitution?
    - 3. Is this sentence meant to apply to instances beyond the proposed initiative that would relate to the determination of "the actual value of a property"?
    - 4. Imposing a 3% limit on the rates at which property values may grow will have the effect of reducing inflation-adjusted values, and inflation-adjusted tax revenue to local districts, in years when inflation exceeds 3%. Is this the proponents' intent? If so, why is this not a tax change?
    - 5. How is this sentence necessarily and properly connected to the single subject of the proposed initiative?
  - iv. Why was the sentence stating: "Nothing in this paragraph (a) of this subsection (1) shall be construed to change the applicability of the homestead exemption for qualifying seniors and qualifying disabled veterans as set forth in section 3.5 of article X" added to the end of article X, section 3 (1)(a) of the Colorado constitution, but not here?
- b. Concerning proposed section 39-1-103 (15):
- i. What is the impact of striking "the cost approach, market approach, and income approach to appraisal as required by"?
  - ii. Why is the language added by the proposed initiative to this subsection structured as a finding and declaration by the General Assembly when it is being added as part of an initiated ballot measure?

- iii. The proposed amendment to this subsection would declare that the actual value of real property “shall equal the amount of the property’s most recent sale, unless the property is substantially improved, or that has been protested[...]”. It does not include a provision allowing valuations to grow by inflation, limited to 3%. How does this interact with the rest of the proposed initiative?
- iv. Concerning the protest provision:
  - 1. What does "that" refer to in the clause "or that has been protested in accordance with..."?
  - 2. This subsection allows for protest, but this same allowance is not included in the language added to the Colorado constitution by the proposed initiative. Why is this the case and how does this omission impact this subsection?
- c. Concerning proposed section 39-1-103 (15.5):
  - i. If a property suffers a decline in value or an assessor determines that a county has suffered a sustained economic downturn, it appears that the property is reappraised annually until it reaches a prior value. Is there a limit on how much the value of the property may be increased during a reappraisal?
  - ii. How do these annual reappraisals interact with the proposed language stating that "actual value [of property] shall not be increased annually by more than inflation, limited to 3%"?
  - iii. Since the Colorado constitution prevails in a conflict with statute, would the proposed language in article X, section 3 (1)(a) of the Colorado constitution prevent a property's value from annually increasing under this proposed section to "recover" its value by more than three percent or the rate of inflation, unless the property was sold or substantially improved?
- d. Concerning proposed section 39-1-103 (15.5)(a):
  - i. Unless property was sold or substantially improved, how would the owner know that it has declined in value for purposes of this subsection (15.5)(a)?
  - ii. What happens after a "property recovers all its value" under this section?

- iii. Does “actual value of the property prior to when the protest or appeal concluded” mean the actual value as determined by the appraiser using one of the permitted real estate valuation approaches, or the most recent sale value, adjusted for inflation?
- e. Concerning proposed section 39-1-103 (15.5)(b):
- i. Can anyone protest an assessor's determination that a "county has suffered a sustained economic downturn"?
  - ii. Can an assessor be petitioned to determine whether a "county has suffered a sustained economic downturn"?
  - iii. What is meant by "a sustained economic downturn"?
  - iv. Does the language "has suffered a sustained economic downturn" mean that an assessor can only make this determination after such a downturn has ended?
  - v. How should the value of a property "prior to the sustained economic downturn" be determined? For instance, how should the value of parcels that are split during a sustained economic downturn and thus did not exist as independent properties prior to the downturn be calculated?
  - vi. In this paragraph, does “actual value of the property prior to the sustained economic downturn” mean the actual value as determined by the appraiser using one of the permitted real estate valuation approaches, or the most recent sale value, adjusted for inflation?
- f. Concerning proposed section 39-1-103 (15.5)(c):
- i. Should the calculation of a property's value for purposes of this subsection (15.5)(c) also reference an assessor's determination of "a sustained economic downturn" so that this subsection (15.5)(c) better relates to subsection (15.5)(b) of this section?
  - ii. This paragraph states that “the property’s actual value shall be the value of the sale[...].” Does this requirement mean that the annual adjustments for inflation authorized elsewhere in the proposed initiative do not apply in this case?

- iii. Does this subsection prevent a property from being reappraised in the case of a later "sustained economic downturn" or in the case of a property suffering a later decline in value?
- 6. Concerning proposed section 4:
  - a. Is there a difference between the requirements of proposed section 39-1-104 (10.2)(c) and the amendments to article X, section (3) (1)(a) of the Colorado constitution? If not, why is the language different in the two sections?
- 7. Concerning proposed section 5:
  - a. Why is this section not the last section in the proposed initiative before the effective date, when it amends article 5 of title 39, while the succeeding sections amend article 1 of title 39?
  - b. Concerning the notice of valuation mailed pursuant to subsection 39-5-121 (1)(a)(I):
    - i. How will the "actual value" for agricultural property and "all other property" be determined for purposes of the notice?
    - ii. Do these new requirements for the notice conflict with the requirement in article (X) section 20 (8)(c) of the Colorado constitution that "[a]ctual value shall be stated on all property tax bills and valuation notices and, for residential real property, determined solely by the market approach to appraisal"?
  - c. Are the amendments to subsections 39-5-121 (1)(b)(I) and (1.2) intended to eliminate the state's biennial reassessment cycle?
  - d. Are these amendments sufficient to accomplish the elimination of the biennial reassessment cycle?
- 8. Concerning proposed section 6:
  - a. This section appears to authorize the Department of Local Affairs to conduct rulemaking without requiring the department to do. Is this correct? If not, is there any deadline by which the department is required to conduct rulemaking, and under what circumstances, if any, may the department choose not to undertake rulemaking?

- b. The phrase "undertake rulemaking" is not used elsewhere in Colorado Revised Statutes. What does it mean here? Does it mean something different than promulgating rules in accordance with article 4 of title 24?
  - c. Does this authorization allow the department to make rules that limit portability?
  - d. What is meant by "including the possibility"? Do the proponents intend that the rules facilitate portability as contemplated in this section and the preceding definitions?
  - e. What does it mean to "make the actual value of real property portable to another property"? Does this refer to relocating real property, such as structures, or some financial transfer of that property's value in order to reduce the property owner's tax liability?
  - f. What rules might the department make to accomplish this? How would these rules interact with a local government's authority to impose property taxes? Would rules allowing portability be enforceable in a case in which the property to which actual value is moved is located within a home rule municipality?
  - g. Could portability rules qualify as "a tax policy change directly causing a net tax revenue gain to any district" or otherwise require an election under TABOR? If so, how would this be handled?
9. Concerning proposed section 7:
- a. What is the purpose of this section?
  - b. How does this section interact with current law? Does it override any current statutory law or case law?
  - c. If the proponents intend "the provisions of this initiative" to refer to this proposed initiative #140, will this be clear when this language appears in statute?
  - d. The headnote for proposed section 39-1-126 is "Repealing Other Changes to Law", and the section refers to "any provision of law enacted prior to November 8, 2022". Does the section apply only to legislation that would otherwise conflict with the initiative, or to all legislation enacted prior to that date?

- e. How does this section interact with legislation enacted during the 2022 legislative session that takes effect before the proposed initiative's effective date?
- f. How does this section interact with legislation enacted during the 2022 legislative session that takes effect after the proposed initiative's effective date?

10. Concerning proposed section 8:

- a. Concerning the reauthorizing of the proposed initiative:
  - i. When will "registered electors of the state or the General Assembly" be able to reauthorize the proposed initiative?
  - ii. Proposed section 39-1-127 states that "the provisions in the Colorado Revised Statutes and the constitution of the state of Colorado affected by this initiative will return as to they were before the initiative was initially passed[...]". When does this happen?
  - iii. If the return to preexisting law happens when section 8 takes effect, does it immediately cancel the effect of the rest of the proposed initiative? In other words, do "the provisions in the Colorado Revised Statutes and the constitution of the state of Colorado affected by" the proposed initiative not go into effect unless they are immediately reauthorized?
  - iv. Does the return to preexisting law constitute a tax increase requiring voter approval for the purposes of subsection (4) of TABOR? If so, could the general assembly decide not to reauthorize the proposed initiative without submitting a question to the voters?
  - v. How can this provision, which would appear in statute, dictate what language appears in the Colorado constitution, if the initiative is not reauthorized?
  - vi. How would the registered electors of the state reauthorize this initiative? Would this require a new initiated measure?
  - vii. How would the General Assembly reauthorize this initiative? Would this require the General Assembly to act to amend the

Colorado Constitution, which this initiative does, without submitting a question to the registered electors of the state?

- viii. Does a single reauthorization satisfy the requirement of this section? Or does the section require subsequent reauthorizations? Would the language in section 8 necessarily be reauthorized along with the rest of the language in the proposed initiative?
- ix. Would the General Assembly be able to preemptively reauthorize the initiative in order to prevent a reauthorization measure from appearing at an election?
- x. Could either the General Assembly or the registered electors only reauthorize portions of the proposed initiative?
- xi. What is meant by "the provisions in the Colorado Revised Statutes and the constitution of the state of Colorado affected by this initiative"?
- xii. Article V, section 24 of the Colorado constitution requires laws that are "revived" to be "published at length." Would this require the publication and submission to voters of both the proposed initiative and the relevant constitutional and statutory language as it existed prior to the election in November of this year?

b. Concerning the audit requirements:

- i. In addition to "ascertaining the property tax savings", would the audit also evaluate property tax increases in cases where property would have appreciated at less than the rate of inflation?
- ii. In addition to "ascertaining[...] the annual rate of increase in property tax revenues to school districts, fire districts, and other local districts", would the audit also evaluate decreases in property tax revenues?
- iii. Does "other local districts" include county and municipal governments?
- iv. The proposed initiative directs how county assessors are to value real property. Under the proposed initiative, how would an auditor determine the valuations that properties would carry if not for enactment of the initiative?

- v. When would this audit requirement cease to apply, if ever?  
Would this requirement continue to exist if either the General Assembly or the registered electors reauthorized the proposed initiative?

11. Concerning proposed section 9:

- a. Will there be enough time after the adoption of the initiative for the state and local governments to implement this initiative before assessing property taxes at the beginning of 2023?

## 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. Each section in the Colorado Revised Statutes and the Colorado constitution has a headnote. Headnotes briefly describe the content of the section. A headnote should be added to each section of the proposed initiative and be in bold-face type. For example:

In the constitution: "**Section 3. Uniform taxation – exemptions.** (1)(a)  
Each property tax..."

In the statutes: "**39-1-102. Definitions.** (6.9) "INFLATION" MEANS..."

2. When referencing the section you are currently in, the section number does not need to be referenced. For all other article and section divisions, the number or letter of what you are referencing should be specified for every level of the reference. For example:
  - a. This section
  - b. This article XXX
  - c. Article XIX of the Colorado constitution
  - d. Section 20 of article X of the Colorado constitution
  - e. Section 20 (3)(b) of the Colorado constitution

- f. Subsection (5)(b)(II) of section 9 of article XVIII of the Colorado Constitution
3. The Colorado Revised Statutes are divided into sections, and each section may contain subsections, paragraphs, subparagraphs, and sub-subparagraphs as follows:

**X-X-XXXX. Headnote.** (1) Subsection.

- (a) Paragraph
- (I) Subparagraph
- (A) Sub-subparagraph
- (B) Sub-subparagraph
- (II) Subparagraph
- (b) Paragraph
- (2) Subsection
- (3) Subsection

Additionally, each paragraph, subparagraph, etc. should begin on a new line.

4. Although the text of the proposed initiative should be in small capital letters, use an uppercase letter to indicate capitalization where appropriate. The following should be large-capitalized:
- a. The first letter of the first word of each sentence;
  - b. The first letter of the first word of each entry of an enumeration paragraphed after a colon; and
  - c. The first letter of proper names.
5. The following do not need to be capitalized: "Property", "general assembly", "department of local affairs", and "legislative audit committee".
6. The number or letter of what you're referencing needs to be specified for every other level of reference, even when you're referring to a provision within the same:
- a. Title: "this title 1"
  - b. Article: "this article 1"

- c. Part: "this part 1"
  - d. Subsection: "this subsection (2)"
  - e. Paragraph: "this subsection (2)(a)"
  - f. Subparagraph: "this subsection (2)(a)(I)"
  - g. Sub-subparagraph: "this subsection (2)(a)(I)(b)"
7. The phrase "except that" is always preceded by a semicolon. **Section 1** of the proposed initiative, for example, should appear like this: "...income approach to appraisal; EXCEPT THAT ACTUAL VALUE..."
  8. It is common drafting practice to use commas to set off parenthetical phrases. If a phrase that is set off by parentheses starts with "except that", refer to Technical Comment #8; if a phrase that is set off by parentheses does not start with "except that", set it off with commas.
  9. In **Section 3**:
    - a. "39-5-121 (1)(A)(I)" should not appear in small caps.
    - b. Section 39-1-103 (15.5), "(C)" should not appear in small caps.
  10. In **Section 3**, both instances of "pursuant to section 39-1-104 (10.2)" should be set off with commas.
  11. In **Section 3**, section 39-1-103(15.5)(c) should read, "NOTWITHSTANDING THE PROVISIONS OF SUBSECTIONS (15)(a) AND (15)(b) OF THIS SECTION..."
  12. **Section 4** should add a new paragraph rather than amending a repealed paragraph.