

Initiative #108 Compensation for Reduction in Fair Market Value by Government Law or Regulation

1 Amendment ? proposes amending the Colorado Constitution to:

- 2 ♦ require the state or a local government to compensate a property owner if a law
3 or regulation reduces the fair market value of his or her property.

4 Summary and Analysis

5 **Background.** Both the Colorado Constitution and state law specify that a
6 government may not take or damage private property without providing compensation to
7 the owner. Procedures in law exist to evaluate and challenge government decisions that
8 lead to takings or cause damages, including asking for public and property owner input
9 and establishing the amount of compensation owed.

10 **Takings and damages.** There are three primary ways that the state or a local
11 government can take or damage private property. Governments in Colorado are
12 generally required to compensate a property owner in these cases. The first type of
13 taking is called “eminent domain.” A government may take land from a private property
14 owner for a public use or benefit. For example, a government may take land from a
15 property owner to expand a highway. The second type of taking occurs if a government
16 causes damage to private property, whether intentional or accidental. For example, a
17 government may build a road that effectively limits access to an individual’s property.
18 The third type of taking is a “regulatory taking,” which occurs when a government enacts
19 a law or regulation that deprives a property owner of the use or value of his or her
20 property, even though he or she usually maintains ownership of the property. For
21 example, a government may prohibit a property owner from constructing buildings on his
22 or her property, leaving the property with almost no value.

23 **Changes under Amendment ?.** Amendment ? expands the circumstances under
24 which the state or a local government is required to provide compensation to a property
25 owner for a regulatory taking. Under this measure, a law or regulation that results in any
26 decrease in the fair market value of a property, as opposed to the current standard of an
27 almost total loss in value or use, becomes a regulatory taking. For example, if a
28 government limits natural gas development, an owner of the mineral rights could file a
29 claim for the reduced value of his or her property.

*For information on those issue committees that support or oppose the measures on the ballot at the **November 6, 2018**, election, go to the Colorado Secretary of State's elections center web site hyperlink for ballot and initiative information:*

<http://www.sos.state.co.us/pubs/elections/Initiatives/InitiativesHome.html>

1 **Argument For**

2 1) Amendment ? ensures that when a property's value is harmed by government
3 action, the owner of that property is fairly compensated for the loss. For many
4 Coloradans, property is the most significant asset they own. If a law or regulation
5 causes any loss of value, the property owner should be fairly compensated by
6 the state or a local government. However, current law does not require a
7 government to compensate an owner unless the loss in value to the property is
8 near total.

9 **Argument Against**

10 1) Amendment ? has potentially far-reaching and costly consequences for
11 taxpayers and governments. Under the measure, taxpayers will be responsible
12 for payments to property owners for any loss in property value resulting from a
13 change in law or regulation, regardless of whether the property retains a
14 profitable use. The potential liability for large payouts to private property owners
15 may discourage governments from making decisions that benefit communities
16 and protect vital public resources, such as water, air, and infrastructure.

17 **Estimate of Fiscal Impact**

18 The measure requires that the state or a local government compensate property
19 owners any time a law or regulation reduces the fair market value of private property.
20 The measure will increase state and local expenditures to compensate private property
21 owners as a result of regulatory or legislative action.

Last Draft as Mailed to Interested Parties

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3 action, the owner of that property is fairly compensated for the loss. For many
4 Coloradans, property is the most significant asset they own. If a law or regulation
5 causes any loss of value, it is only right that the property owner be fairly
6 compensated by the state or a local government. However, current law does not
7 require a government to compensate an owner unless the loss in value to the
8 property is near total.

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17 public resources, such as water, air, and infrastructure.

18 **Estimate of Fiscal Impact**

19 The measure requires that the state or a local government compensate property
20 owners any time a law or regulation reduces the fair market value of private property.
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22 owners as a result of regulatory or legislative action.

Last Draft Comments from Interested Parties

Initiative 108 Compensation for Reduction in Fair Market Value by Government Law or Regulation

Jason Dunn, representing Brownstein Hyatt Farber Schreck:

In addition to comments provided in track changes and bubble comments, we respectfully submit that the current draft's discussion of the breadth and scope of the measure is overly broad, and therefore inaccurate. There are several factors courts apply in takings cases that significantly limit recovery and that would still apply even if #108 becomes law. Indeed, #108 primarily serves to reverse the Supreme Court's decision in *Animas Valley Sand & Gravel v. Bd. of County Comm'rs of La Plata Cty.* to allow recovery if there is a reduction in fair market value, so long as other important factors are satisfied. These factors include:

- Any claim for damages cannot be speculative and must be proven with a relative high degree of certainty.
- Under takings doctrine, no compensation will be paid by a governmental entity, even if a regulation completely diminishes a property's value, when the regulation mirrors the result that could have been achieved by the government to abate a nuisance. See *Rith Energy, Inc. v. United States*, 770 F.3d 1347, (Fed. Cir. 2001)(rejecting takings claim on ground that under Tennessee nuisance law, Rith had no right to mine in a way that was likely to produce acid mine drainage, and that its property right in the coal leases therefore did not include the right to mine the Sewanee seam in the way it wanted to). Accordingly, if #108 passes the state and local governments will **not** lose their ability to regulate and prevent nuisances or otherwise to protect the environment.
- Before a party can succeed on a takings claim, it must demonstrate that its "reasonable investment-backed expectations" are adversely impacted by the challenged governmental action. This is a complicated analysis, but broadly speaking courts will look to the regulatory regime in place at the time of the investment to determine whether a property owner had a reasonable expectation of developing its property in the manner now prohibited.
- Another possible limitation may be that only property owners directly affected by a regulation can sue for takings. That is, a feedlot owner directly impacted by a regulation would be able to claim a takings. But homeowners in the vicinity of a feedlot may not be able to claim a takings (despite a diminished home value) against the government for permitting the facility.

We respectfully ask that these concepts, perhaps in some abridged format, be incorporated into the blue book as limiting principles regarding the effect of the measure.

Mr. Dunn also submitted written comments (Attachment A).

3rd Draft

Initiative #108
Compensation for Reduction in Fair Market Value by Government Law or Regulation

1 **Amendment ? proposes amending the Colorado Constitution to:**

2 ♦ require the state or a local government to compensate a property owner if a law
 3 or regulation reduces the fair market value of the owner's or lessee's his or her [JD1]
 property.

4 **Summary and Analysis**

5 **Background.** Both the Colorado Constitution and state law specify that a
 6 government may not take or damage private property without providing compensation to
 7 the owner. Procedures in law exist to evaluate and challenge government decisions that
 8 lead to takings or cause damages, including asking for public and property owner input
 9 and establishing the amount of compensation owed. However, under existing law, a
property owner typically cannot get compensation unless a regulatory taking causes 100% of
the value of the property to be lost. [JD2]

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 13 taking is called "eminent domain." A government may take land from a private property
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 18 type of taking is a "regulatory taking," which occurs when a government enacts a law or
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13 change in law or regulation, regardless of whether the property retains a
14 profitable use or the owner has been paid for prior claims of lost value^[JD4]. The
15 potential liability for large payouts to private property owners may discourage
16 governments from making decisions that benefit communities and protect vital
17 ~~public resources, such as water, air, and infrastructure~~^[JD5].

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Initiative 108
Compensation for Reduction in Fair Market Value by Government Law or Regulation

1 **Ballot Title:** Shall there be an amendment to the Colorado constitution requiring the
2 government to award just compensation to owners of private property when a government law or
3 regulation reduces the fair market value of the property?

4 *Be it Enacted by the People of the State of Colorado:*

5 SECTION 1. In the constitution of the state of Colorado, **amend** section 15 of article H
6 as follows:

7 **Section 15. Taking property for public use—compensation, how ascertained.**
8 Private property shall not be taken, of damaged, OR REDUCED IN FAIR MARKET VALUE BY
9 GOVERNMENT LAW OR REGULATION for public or private use, without just compensation. Such
10 compensation shall be ascertained by a board of commissioners, of not less than three
11 freeholders, or by a jury, when required by the owner of the property, in such manner as may be
12 prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the
13 property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested;
14 and whenever an attempt is made to take private property for a use alleged to be public, the
15 question whether the contemplated use be really public shall be a judicial question, and
16 determined as such without regard to any legislative assertion that the use is public.