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Colorado General Assembly

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MEMORANDUM

TO: Michele Haedrich and Steven Ward

FROM: Legislative Council Staff and Office of Legislative Legal Services

DATE: April 3, 2024

SUBJECT: Proposed initiative measure 2023-2024 #284, concerning transportation fees

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 purpose of the proposed amendment to the Colorado Revised Statutes appears to be:

1. To add a new statute to article 77 of title 24, C.R.S., that requires that "[a]ny fees assessed for the purpose of funding mass transportation such as light rail, high speed rail, passenger rail or fixed rail projects shall: (a) Be assessed only to a person whose point of sale is in the jurisdiction[] that is served by such mass

transportation; and (b) Be approved by a vote of the people in any jurisdiction where such fees will be collected."

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.
 - a. Is the single subject of the proposed initiative limited to charges specifically identified as "fees" in the legislation that creates them? Or is the subject of the proposed initiative all types of charges that may be assessed for the purpose of funding mass transportation, including charges that are not labeled "fees" in the law, such as surcharges or special assessments? What about fines? Or penalties?
 - b. Is the single subject of the proposed initiative limited to fees assessed solely "for the purpose of funding mass transportation" projects?
 - i. Are fees assessed for multiple purposes, one of which is the funding of a mass transportation project, intended to be included as part of the single subject of the proposed initiative?
 - ii. Are fees assessed to fund transportation projects, including light rail, high speed rail, passenger rail, or fixed rail projects, that do not meet the definition of "mass transit" in section 43-1-102 (4), C.R.S. ("a coordinated system of transit modes providing transportation for use by the general public"), intended to be included as part of the single subject of the proposed initiative?
 - iii. Are fees assessed in connection with motor vehicles, including but not limited to motor vehicle registration fees and tolls, to fund roads, bridges, and other similar projects under titles 42 and 43, C.R.S., intended to be included as part of the single subject of the initiative?
2. With respect to a "fee", what is a person's "point of sale"? Is it:
 - a. Where the person lives or has a place of business?
 - b. Where the person pays the fee?

3. Regarding the placement of the proposed new section in the Colorado Revised Statutes, the amending clause for section 1 proposes to "add" section 24-77-108, C.R.S., with the headnote "**Fees**"; however, this placement raises multiple substantive questions:
 - a. First, section 24-77-108, C.R.S., with the headnote "**Creation of a new fee-based enterprise**" already exists. Is section 1 intended to amend existing section 24-77-108, C.R.S.? If so, the amending clause for section 1 should be changed to indicate that by indicating how section 24-77-108, C.R.S., is being amended. If not, the amending clause for section 1, as well as the C.R.S. section number in the headnote of section 1 of the proposed initiative, should be changed to indicate the correct number for the new C.R.S. section to be added.
 - b. Second, section 1 of the proposed initiative refers to any fees "assessed for the purpose of funding mass transportation such as light rail, high speed rail, or fixed rail projects." However, "transportation" and "mass transit" are specifically defined in and administered pursuant to title 43 of the Colorado Revised Statutes. In contrast, article 77 of title 24, C.R.S., pertains solely to state fiscal policies relating to section 20 of article X of the state constitution. Why did the proponents choose to add a new section regarding mass transit related fees in article 77 of title 24 rather than title 43, C.R.S.?
 - c. Relatedly, as confirmed in multiple state appellate court decisions, including *Tabor Foundation v. Colo. Bridge Enter.*, 353 P.3d 896, 900-04 (Colo. App. 2014) and *Bruce v. City of Colo. Springs*, 131 P.3d 1187, 1190 (Colo. App. 2005), section 20 of article X of the state constitution does not apply to fees. Because the subject matter of the proposed initiative is expressly limited to "fees assessed for the purpose of funding mass transportation," would the proponents consider changing the amending clause to place the proposed new section in title 43, C.R.S., or somewhere else other than article 77 of title 24, C.R.S.
 - i. If not, what is the proponent's reasoning and legal support for placement in article 77 of title 24, C.R.S.?
 - ii. What is the intended legal effect of placing the new statutory section set forth in section 1 of the proposed initiative, which requires, among other things, that "[a]ny fees assessed for the purpose of funding mass transportation . . . [b]e approved a vote of the people in any jurisdiction where such fees will be

collected" in article 77 of title 24, C.R.S.? Is the intended effect to have such "fees" treated similarly to "taxes" for purposes of section 20 of article X of the state constitution? Even if this is not the intent, have the proponents considered whether this would be the effective result of the proposed initiative?

- iii. Consider whether the issue of changing the legal status and treatment of fees related to mass transportation, or all fees, pursuant to the provisions of article 77 of title 24, C.R.S., and section 20 of article X of the state constitution constitutes a separate subject of the proposed initiative. Also consider whether such a change requires additional conforming amendments, including to section 20 of article X of the state constitution, to be added to the proposed amendment in order for it to achieve its intended effect.

4. What does "fee" mean for purposes of the proposed initiative?

- a. What types of charges or payments are "fees" subject to the requirements of section 1 of the proposed initiative?
- b. Which entities' "fees" are intended to be encompassed by the proposed initiative? State and local governments? Section 43-1-102 (5), C.R.S., defines "public mass transit operator" to mean "a state or local governmental entity which provides mass transit services within the state of Colorado"; would this be the limit of the entity fees subject to the requirements of section 1 of the proposed initiative?
- c. If not, what other entities' "fees" are intended to be encompassed by the proposed initiative?
 - i. The regional transportation district is authorized "to develop, maintain, and operate a mass transportation system for the benefit of the inhabitants of the district" pursuant to section 32-9-107, C.R.S., and, in addition to the power to levy a sales tax, has the power to "fix and from time to time increase or decrease the revenues for services and facilities provided by the district" under section 32-9-119 (1)(m), C.R.S. Would such charges for mass transportation services by RTD be subject to the limitations on assessment set forth in section 1 of the proposed initiative?
 - ii. Would section 1 apply to a mass transportation related fee imposed by an enterprise, as defined in section 20 (2)(d) of article

X of the state constitution? If so, are the proponents intending to supersede the Colorado Court of Appeals decision in *Tabor Foundation v. Colo. Bridge Enter.*, 353 P.3d 896, 900-04 (Colo. App. 2014) that a bridge safety surcharge imposed by the Colorado Bridge Enterprise in connection with a vehicle's registration on any person reasonably likely to benefit from the use of a bridge does not require prior voter approval?

- iii. Would section 1 apply to a "fee" charged by a special purpose authority or special district, such as a metropolitan district?
 - iv. Would section 1 apply to a "fee" charged by a private entity, such as an entity that owns a toll road or funds an express lane?
5. "Mass transit" is defined in section 43-1-102 (4), C.R.S., as "a coordinated system of transit modes providing transportation for use by the general public." How is the phrase in the proposed initiative, "mass transportation such as light rail, high speed rail, passenger rail, or fixed rail projects" intended to be interpreted in relation to the existing statutory definition of "mass transit"? Is the language in the proposed initiative intended to be more broad or more narrow than the existing definition of "mass transit"? Might section 1 create confusion or conflict with existing statutes using the defined term, "mass transit"?
 6. The definition of "transportation" in section 43-1-102 (6), C.R.S., ("transport of person or property by motor vehicle, bus, truck, railroad, light rail, mass transit, airplane, bicycle, or any other form of transport") makes clear that "railroad" and "light rail" are not inherently "mass transit," but rather other forms of transportation that might be included in a "coordinated system of transit modes" that is mass transit. Might section 1 create confusion or conflict with existing statutes using the defined terms "transportation," "railroad," "light rail," and "mass transit"?
 7. With regards to proposed subsection (a) of section 1 of the proposed initiative, which requires that a fee for the purpose of funding mass transportation "[b]e assessed only to a person whose point of sale is in the jurisdiction[] that is served by such mass transportation," what does the term "point of sale" mean?
 - a. What is the connection between the "person" and the "sale"?
 - b. What is the connection between the "sale" and the assessment of a "fee"?

- c. Is it the intent of the proponents to require or limit the assessment of a "fee" for the purpose of funding mass transportation to a transaction that is subject to sales tax? If so, why and on what legal basis?
 - d. How will the requirement that the "fee" be assessed "only to a person whose point of sale is in the jurisdiction[] that is served by such mass transportation" be administered and enforced?
- 8. With regards to proposed subsection (b) of section 1 of the proposed initiative, what is the intended scope of applicability for the requirement that the fee "[b]e approved by a vote of the people in any jurisdiction where such fees will be collected"?
 - a. Is this requirement for voter approval meant to incorporate and be applied in accordance with the election provisions of article 77 of title 24, C.R.S., and section 20 of article X of the state constitution? If so, what is the legal basis for requiring a "fee" to comply with legal requirements that, by their plain language and pursuant to case law, are only applicable to a tax?
 - b. Is it the intent of the proposal to require a "fee" for the purpose of funding mass transportation to be treated as and subject to the same limitations as a tax for purposes of article 77 of title 24, C.R.S., or section 20 of article X of the state constitution? If so, consider whether this purpose and intended effect is clearly expressed by the current language in the proposed initiative.
- 9. What is the intended scope of the requirements set forth in proposed subsections (a) and (b) of section 1 in terms of applicability, if any, to existing fees assessed for the purpose of funding mass transportation projects?
 - a. Is the requirement for voter approval set forth in proposed subsection (b) limited to any fee that may be proposed or imposed after the effective date of the proposed initiative? Or, is the requirement for an election intended to apply in some manner to fees already in existence?
 - b. If the requirement for voter approval is intended to apply to existing fees, what will be the immediate effect of the proposed initiative? Will assessment of such fees have to stop immediately and completely pending a vote? Who will be responsible for conducting such elections and how will such elections be administered? Consider whether details regarding this process should be added to the proposed initiative to fully inform voters of the scope and effect of the proposed initiative.

- c. Similarly, what will be the consequence if it is determined that an existing fee or other charge is not assessed "only to a person whose point of sale is in the jurisdiction[] that is served by such mass transportation"?
 - i. For example, highway safety projects are funded pursuant to section 43-4-804, C.R.S., through the imposition of a safety surcharge at the time a person registers their vehicle. Would this surcharge violate proposed subsection (a) of the proposed initiative? If so, what must the state do to come into compliance with the proposed initiative?
 - ii. What about existing fees that are assessed to fund the regional transportation district?
 - d. Will past payments of existing fees or charges found to violate the requirement of proposed subsection (a) or (b) of the proposed initiative have to be refunded? If so, how will such refunds be calculated and administered?
10. How will the requirements set forth in proposed subsections (a) and (b) of section 1 operate as applied to any newly created "fees"?
- a. Must compliance with the requirement that the fee "be assessed only to a person whose point of sale is in the jurisdiction[] that is served by such mass transportation" be made at the outset of the legislative process or at some point prior to the enactment of any legislation authorizing a "fee" for the purpose of funding mass transportation? If so, who will be charged with determining compliance, how will compliance be determined, and how will such an analysis be incorporated into the legislative process?
 - b. What will be the consequence if it is determined that a "fee" contained in proposed legislation does not comply with this requirement? What happens to that legislation, if anything?
 - c. What will be the consequence if such a determination is not made until after a bill becomes law? How will the requirement of the proposed initiative be enforced at this stage? Through judicial challenge to strike down the law completely as an impermissible assessment of a mass transportation fee? Through modification of the assessment process for the "fee" to comply with the requirement in proposed subsection (a) of section 1 of the proposed initiative?

- d. With regard to proposed subsection (b), does the requirement for prior voter approval mean that any legislation proposing a "fee" for the purpose of funding mass transportation must be referred by the General Assembly, or a local government, to a vote of the people of the state or local government? If so:
 - i. What is the applicable formula for voter approval under proposed subsection (b)? A majority of the registered electors in the district? Something else?
 - ii. What will be the standard procedures and requirements for such elections? Will they be required to comply with the requirements for elections set forth in section 20 of article X of the state constitution and article 41 of title 1, C.R.S.? If so, on what legal basis do these provisions apply to "fees"? If not, consider whether additional, more specific details about the voter approval requirement in proposed subsection (b) of section 1 of the proposed initiative need to be included in the initiative to fully inform voters about the intent and effect of the proposed initiative.
 - iii. What would be the result if fees for a multijurisdictional mass transportation project were approved by the voters of some but not all of the affected jurisdictions?
 - iv. Are there any limitations on voter approval? Is it indefinite or are subsequent votes required under any circumstances? What circumstances, if any, would require subsequent voter approval?
 - e. Does the state or a local government have the authority to adjust a fee in terms of its amount or the collection process after it has been approved by voters? Would there be any limitations on such adjustments? If so, what would those limitations be?
11. Is the proposed initiative intended to affect a state or local government's ability to assess a fine?
 12. Who could enforce the provisions of the proposed initiative?
 13. Would any fiscal or other impacts result from the enactment of the proposed initiative on state or local governments? If so, what would those impacts be?
 14. If certain fees are eliminated under the proposed new statutory section, how would the programs and services that were funded by those fees be funded?

15. With regard to section 2 of the proposed initiative, the effective date of a proposed initiative is governed by section 1 (4) of article X of the state constitution, which provides for the initiative to take effect from the date "of the official declaration of the vote thereon by proclamation of the governor," not the signature of the governor. Section 2 should be revised to reference and reflect this constitutional standard for the effective date of the proposed initiative. Alternatively, if section 2 is simply removed, the proposed initiative, if approved by the voters, will take effect as specified in section 1 (4) of article X of the state constitution.

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. Consider changing the current headnote for section 1 (**Fees.**) to a headnote that more accurately and specifically describes the substance of the proposed new section, including that it is limited to fees for the purpose of funding mass transportation projects and that it imposes limitations, such as "**24-77-108. Mass transit fees – limitations on assessment.**"
 - b. In the headnote for section 2 of the proposed initiative, "Effective date." should appear in bold face type.
2. 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

Accordingly, section 1 of the proposed initiative should be redrafted using the following structure:

24-77-108. Fees. (1)

(a)

(b)

3. For purposes of this statutory initiative, the word "shall" is defined in section 2-4-401 (13.7), C.R.S., and it means "that a person has a duty." The related word "must," which is defined in section 2-4-401 (6.5), C.R.S., "means that a person or thing is required to meet a condition for a consequence to apply." Furthermore, "[m]ust' does not mean that a person has a duty."
 - a. In section 1 of the proposed initiative, "shall" should be changed to "must" as the sentence references to a fee, which is not a person that has a duty. Rather, a fee is thing that is required to meet the conditions set forth in proposed subsections (a) and (b) of section 1.
4. In proposed subsection (a) of section 1 of the proposed initiative, there is a grammatical error created by the use of the plural "jurisdictions" but the singular "is"; this subsection should be revised to refer only to a single jurisdiction."