

# STATE OF COLORADO

## Colorado General Assembly

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## MEMORANDUM

**TO:** Kevin Grantham and Cheri Jahn  
**FROM:** Legislative Council Staff and Office of Legislative Legal Services  
**DATE:** April 3, 2024  
**SUBJECT:** Proposed initiative measure #291, concerning Local Control Over Land Use.

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 2023-2024 #292 and #293. The comments and questions raised in this memorandum will not include comments and questions that are addressed in the memoranda for proposed initiatives 2023-2024 #292 and #293, except as necessary to fully understand the issues raised by the revised proposed initiative. Comments and questions addressed in those other memoranda 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** appear to be to:

1. Give a local government's land use regulations and decisions primacy and presumptive effect over any state government entity's conflicting land use law, rule, approval, permit or determination and prohibit state statutes, regulations, and decisions from taking precedence over any local land use regulations or decisions.
2. Provide plenary and exclusive control to local governments over land use regulations or decisions within their jurisdictions.
3. Prohibit the state government from withholding other permits or approvals necessary for development if a local government approves a land use decision applicable to specific parcels of property.
4. Prohibit the state government from taking adverse action against a local government in response to a local government's decision or authority to regulate land use.

## 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. Subsection (2)(a) of the proposed initiative defines "local government". This definition includes counties, which are instrumentalities of the state and only have those powers granted to them by statute or necessarily implied by the existence of such statutory powers. How will defining "local government" to include counties for purposes of the proposed initiative impact the relationship and balance of power between the state and counties?
3. The definition of "local government" in subsection (2)(a) provides that a local government has "final approval authority over a land use regulation or decision."
  - a. What does "having final approval authority over a land use regulation or decision" mean?

- b. Does a court have "final approval authority" over a challenged land use regulation?
- 4. Does "local government" include any board, commission, or agency having final approval authority, or only a local government acting through a board, commission, or agency?
- 5. Subsection (2)(b) of the proposed initiative defines "state government" as the "state of Colorado, including its regulatory agencies or divisions thereof."
  - a. What is the intended scope of this provision?
  - b. Does it include state boards and commissions?
  - c. Does it include quasi-governmental entities and instrumentalities of the state such as special purpose authorities?
  - d. Does it include third parties funded with state money?
  - e. Is a public school district or its school board considered a division of the state?
  - f. Is a water conservation district considered a division of the state?
  - g. Is an irrigation district considered a division of the state?
  - h. Are special districts local or state government?
- 6. Subsection (2)(c) defines "land use regulation or decision."
  - a. What is a "zoning law of general applicability"?
  - b. What is a zoning law affecting a "particular parcel"?
  - c. Who approves a "plan or permit describing with reasonable certainty the type and intensity of land use for a specific parcel" of property?
    - i. How would a plan or permit describe a land use for a specific parcel of property with "reasonable certainty"?
    - ii. What is the difference between an approved "plan" and an approved "permit"?
    - iii. What is the meaning of "intensity of land use"?
    - iv. What comprises a "parcel"?
  - d. What is a "decision to grant or deny a use or siting permit"?

7. Subsection (2)(c) provides examples of what constitutes an "approved plan or permit" for purposes of the proposed initiative. Many of the examples are for "plans" but there is no approval requirement for any of these plans.
  - a. Is the intent that a plan for development not yet approved by a local government be considered "approved" for purposes of the proposed initiative?
  - b. Will a "plan" not yet approved supersede a conflicting state regulation?
8. Subsection (3) of the proposed initiative provides that local governments have "plenary and exclusive control over land use regulations or decisions."
  - a. What does "plenary" mean in this context?
  - b. Does "exclusive control over land use regulations" mean the state has no authority to regulate land use, or does it mean that the state may regulate land use to the extent that the regulation does not conflict with local regulations?
9. Subsection (3) of the proposed initiative provides that a local government's land use regulation or decision "shall have primacy and presumptive effect" over a state entity's "conflicting determination, rule, approval, permit, or statute."
  - a. Do the proponents intend to exempt "regulations" promulgated by the state from being superseded by a local land use decision?
  - b. Do the proponents intend to exempt the state constitution from being superseded by a local land use decision?
10. State law regulates many areas of land use. Is the proponent's intent to supersede the state's authority to regulate:
  - a. Oil and gas and mining operations? The state regulates oil and gas and mining operations and locations, which involves land use decisions.
    - i. Is the state precluded from imposing land use regulations for oil and gas drilling and mining locations, such as set-backs, road construction, and the number of wells allowed to be drilled?
    - ii. Is it intended that a local government may completely restrict oil and gas land use to prohibit exploration for oil and gas, while another local government does away with all oil and gas land use regulations?

- b. Alcohol beverage sales locations. The state regulates the location of places that sell alcohol beverages, including liquor stores and restaurants. State law governs the hours that these businesses may operate, the conditions of their operation, and their location. If a local government passed a land use law regulating the location and hours of an alcohol beverage sales business, is the state precluded from regulating where, when, and how an alcohol beverage business may operate?
- c. Water operations. Are regulations involving water operations, such as water well locations, irrigation ditch locations, and reservoir locations and management considered a "land use regulation" by which a local government will have primacy over state law?
- d. State lands. The state owns land throughout the state, most of which is productively used for agriculture, hunting, fishing, and natural resource extraction.
  - i. May a local government enact a land use regulation that changes the way the state may use its lands?
  - ii. The state derives income from the use of its land to fund state operations. If the operations cease or change and revenue is decreased as a result, how will the loss in revenue be backfilled?
- e. State buildings. The state owns buildings located in local government jurisdictions throughout the state.
  - i. Are state buildings subject to land use regulations imposed by a local government?
  - ii. May a local government prohibit the location of state buildings by enacting a land use regulation?
  - iii. May the City and County of Denver require that the grounds of the state capitol adhere to Denver's land use regulations?
- f. Conservation easements. The state administers the conservation easement program and tax credit. Conservation easements are created under state real estate law.
  - i. May a local government restrict the use of conservation easements?
  - ii. May a local government restrict the type of lands that a conservation easement may encumber?

- g. State highways and roads. The state constructs and maintains roads and highways throughout the state. The state owns easements on which the roads and highways are located. Using an easement for a road could be considered a land use.
    - i. Are state highways and roads through a local government's jurisdiction subject to the proposed initiative?
    - ii. May a local jurisdiction prohibit state roads and highways as part of its land use regulations?
    - iii. If so, may the prohibition be retroactive or only prospective?
11. Subsection (3) of the proposed initiative provides that the state may not take an "action adverse to a local government in response to a local government's decision or authority under this Section 17."
- a. What would be an "adverse action" to local government by the state?
  - b. What is the remedy if the state takes an "adverse action" to a local government?
  - c. If the state decreases funding to a local government, could this be considered an "adverse action"?
  - d. Does it matter if the funding is cut to balance the state's budget?
12. Subsection (4) of the proposed initiative provides that the state must issue all permits or approvals necessary to implement a local land use decision.
- a. Does this mean that the state must approve applications for a state-issued permit to drill for oil and gas if the oil and gas drilling site is approved locally? Must the state deny an application if a local government disapproves of a drilling location?
  - b. If a local government approves the location and zoning of a refinery, does the Department of Public Health and Environment have the ability to require air and water quality permits for the facility to operate?
  - c. If a local government approves the location and zoning of a hospital, does the state have the ability to require a permit to operate the hospital?
  - d. If a local government approves the location and zoning of a retail marijuana dispensary, is the Department of Revenue required to issue the state's permit to operate?

13. A county and a municipality located in that county may disagree about a land use decision. Which takes primacy if two local governments in the same jurisdiction disagree about a land use decision?
14. Is the proposed initiative meant to supersede all existing state land use regulations or only state land use regulations after the proposed initiative is effective?

## **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. In subsection (1) of the proposed initiative "land-use" should be "land use."
2. Definitions should appear in alphabetical order.
3. In subsection (2)(c), the paragraph letter (c) should not be shown in small capitals, but instead should be shown in lowercase lettering.
4. The following words should not be capitalized:
  - a. In subsection (2)(c) of the proposed initiative, the "A" after "BUT IS NOT LIMITED TO"; and
  - b. In subsection (3) of the proposed initiative, "Section."
5. When referencing the section you are currently in, the section number does not need to be referenced. For example, "this section 17" should instead read as "this section."