

STATE OF COLORADO

Colorado General Assembly

Legislative
Comments
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Complete Re-do
#114
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MEMORANDUM

May 7, 2008

TO: Graham Hill and Mark Richert

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #114, concerning rail authority and sales tax for its operation

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 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 initiative appear to be:

1. To add a new article to title 43, Colorado Revised Statutes, that would:
 - a. Create a new Colorado rail authority (authority) as a regional transportation activity enterprise;
 - b. Specify the composition and manner of appointment of the board of directors of the authority;
- Specify some of the powers of the authority, apparently for the purpose of designing,

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building, and operating passenger and freight rail service in Colorado; and

- d. Levy a four-tenths of one percent sales tax to fund the creation of the authority.

Comments and Questions

The form and substance of the proposed initiative raise the following comments and questions:

Technical comments and questions:

1. Drafting a proposed initiative in accordance with standard drafting practices typically helps people other than the proponents of a proposed initiative better understand the proposed initiative and also can help prevent unintended consequences of misinterpretation of a proposed initiative that is approved by the voters of the state and becomes law. If the proponents wish to conform the proposed initiative to standard drafting practices, they should make the following changes to the proposed initiative:

- a. Replace page 1, lines 7 and 8 of the proposed initiative with the following enacting clause, amending clause, and article heading:

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

Title 43, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW ARTICLE to read:

ARTICLE 7

Colorado Rail Authority

- b. Organize the provisions of the proposed initiative so that provisions that serve similar functions are grouped together. For example, the proposed initiative defines the legal status of the authority as "an instrumentality of the state of Colorado" on page 1, line 10 as ""a body corporate and political subdivision of the state created pursuant to this part 5"" on page 1, lines 15 and 16 and as "a regional activity enterprise" on page 1, line 39. For example, section 29-4-704 (1), Colorado Revised Statutes, which creates the Colorado housing and finance authority, states as follows:

29-4-704. Colorado housing and finance authority. (1) There is hereby created the Colorado housing and finance authority, which shall be a body corporate and a political subdivision of the state, shall not be an agency of state government, and shall not be subject to administrative direction by any department, commission, board, bureau, or agency of the state.

- c. Subdivide the provisions of the proposed initiative into numbered statutory sections

with headings that briefly describe the contents of the sections and, to the extent necessary, further subdivide each section into subsections, paragraphs, subparagraphs, and sub-subparagraphs. If the proponents choose to place the provisions in a new article 7 of title 43, Colorado Revised Statutes, sections should be numbered as 43-7-101, 43-7-102, 43-7-103, etc. As an example of standard section numbering and subdivision, see section 43-4-803, Colorado Revised Statutes, which creates the statewide tolling enterprise as follows (**[bracketed]** language is explanatory and not actually part of section 43-4-803):

[Example of a section number, which is indented] 43-4-803. [Example of a section heading] Statewide tolling enterprise - creation by commission - enterprise status - transfer. [Subsection number] (1) The commission may create and operate a statewide tolling enterprise, which shall operate as a government-owned business within the department and shall be a division of the department. The commission shall serve as the board of the enterprise, but shall, with the consent of the executive director, appoint a director of the enterprise who shall possess qualifications as may be established by the commission and the state personnel board. The director shall oversee the discharge of all responsibilities of the enterprise and shall serve at the pleasure of the board.

(2) **[Paragraph number]** (a) The enterprise shall constitute an enterprise for purposes of **[Example of a statutory reference to a constitutional provision]** section 20 of article X of the state constitution so long as the enterprise retains the authority to issue revenue bonds and receives less than ten percent of its total annual revenues in grants, as defined in **[Example of a statutory reference to a different statutory section]** section 24-77-102 (7), C.R.S., from all Colorado state and local governments combined. So long as it constitutes an enterprise pursuant to this **[Example of a statutory reference to a portion of the same statute in which the reference is made]** subsection (2), the enterprise shall not be subject to any provisions of section 20 of article X of the state constitution.

(b) **[Note indentation of this line that begins a new paragraph]** For purposes of part 2 of article 72 of title 24, C.R.S., the records of the enterprise shall be public records, as defined in section 24-72-202 (6), C.R.S., regardless of whether the enterprise receives less than ten percent of its total annual revenues in grants, as defined in section 24-77-102 (7), C.R.S., from all Colorado state and local governments combined.

(3) **[Note indentation of this line that begins a new subsection]** The enterprise and the director shall exercise their powers and perform the duties specified in this part 8 under the department as if the same were transferred to the department by a **type 1** transfer, as such transfer is defined in the "Administrative Organization Act of 1968", article 1 of title 24, C.R.S.

(4) The enterprise shall constitute a public entity for

purposes of part 2 of article 57 of title 11, C.R.S.

- d. Indent the first line of each statutory section and each statutory subdivision, as indicated in the example of section 43-4-803, Colorado Revised Statutes, shown above.
- e. Show new language that will be added to the Colorado Revised Statutes, excluding section headings, in "LARGE AND SMALL CAPITAL LETTERS."
- f. Capitalize the first letter of only those words that identify geographical locations (e.g., Colorado) or begin a sentence or a section heading.
- g. Reference statutory sections by using the word "section" followed by the number of the section and "C.R.S." (e.g., on page 1, line 16 of the proposed initiative, change the reference to "43-4-503 of the Colorado Revised Statutes" to a reference to "section 43-4-503, C.R.S.>").
- h. Eliminate parenthetical references in the bill (e.g., the parenthetical reference "(over 50%)" on page 1, line 13 of the proposed initiative).
- i. On page 1, line 16 use the correct spelling of "Statutes."
- j. Add semicolons at the end of the phrases on page 1, lines 21 through 31 of the proposed initiative.
- k. Remove the square box character on page 1, line 22.
- l. Add a semicolon and the word "and" at the end of the phrase on page 1, line 32 of the proposed initiative.
- m. Add a period at the end of the phrase on page 1, line 33 of the proposed initiative.
- n. Spell out all numbers other than numbers identifying specific dates or statutory sections or subdivisions of statutory sections referenced in the proposed initiative (e.g., on page 1, line 46 of the proposed initiative, change "40%" to "forty percent.")
- o. Remove the quotation marks around the phrase "'a body corporate and political subdivision of the state created pursuant to this part 5'" on page 1, lines 15 and 16 of the proposed initiative.
- p. Remove the phrase "and/or" and replace it with either the word "and" or the word "or."
- q. On page 1, line 23 of the proposed initiative, remove the word "Colorado."
- r. On page 1, line 24 of the proposed initiative, remove the word "Colorado," add the

words "by the" after the word "appointed," and add the words "of representatives" after the word "House."

- s. On page 1, line 25 of the proposed initiative, remove the words "of Colorado."
- t. On page 1, line 29 of the proposed initiative, remove the words "Regional Transit District" and substitute the words "the Regional Transportation District created in article 9 of title 32, C.R.S."
- u. On page 1, lines 42 and 43 of the proposed initiative, put the text into the form of a complete sentence rather than in what appears to be outline form.

Substantive comments and questions:

1. Section 1 (5.5) of article V of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. The proposed initiative does not specifically identify rail facilities and services to be provided by the authority. Do the proponents intend that the authority construct and operate any particular rail facilities and services? If so, why have the proponents chosen not to identify such rail facilities and services in the proposed initiative?
3. Page 1, line 10 of the proposed initiative specifies that "[t]he Colorado Rail Authority will be an instrumentality of the State of Colorado, as defined in 24-56-102," but section 24-56-102, Colorado Revised Statutes, does not define the term "instrumentality" or the phrase "instrumentality of the State of Colorado." Is it the intent of the proponents that the authority be a state agency as defined in section 24-56-102 (6), Colorado Revised Statutes?
4. On page 1 of the proposed initiative, lines 15 and 16 state that "[t]he Colorado Rail Authority shall be "a body corporate and political subdivision of the state created pursuant to this part 5" as defined in [section] 43-4-503 of the Colorado Revised Statu[t]es." Section 43-4-503, Colorado Revised Statutes, does not define the quoted phrase, but instead uses the phrase to define the term "authority" for purposes of the "Public Highway Authority Law," part 5 of article 4 of title 43, Colorado Revised Statutes. What is the proponents' intent in referencing this definition?
5. With respect to the board of the authority, as described by lines 18 through 33 of page 1 of the proposed initiative:
 - a. If all board members are appointed to four-year terms at the same time, the terms of all board members will expire at the same time. Have the proponents considered making the initial terms of some of the members shorter or longer (e.g., two years or six years) so that only a portion of the board is replaced at any one time?
 - b. The proposed initiative does not explicitly authorize or prohibit reappointment of board members. Do the proponents intend to allow board members to serve multiple

terms?

- c. The proposed initiative requires each of Colorado's five metropolitan planning organizations to appoint a board member, but does not provide for appointment of board members by Colorado's ten rural transportation regions. Is this the proponents' intent?
 - d. Lines 27 and 33 of page 1 of the proposed initiative respectively require board members to be appointed "from," rather than "by," specified railroad companies and the Colorado association of transit agencies. Does this mean that the companies and association must appoint their own board members or employees to the board of the authority or may they appoint anyone they wish to appoint?
 - e. Sometimes appointments to a board that includes legislative appointees allow the legislative leadership of the minority party (i.e., the minority leaders of the Senate and the House of Representatives) to appoint members to the board. Have the proponents considered whether such minority appointments are appropriate for the board of the authority?
6. Must a majority of all members of the board of the authority approve a decision of the authority or may a majority of a quorum of board members present at a meeting of the board approve a decision? If the latter, how many members of the board constitute a quorum?
 7. With respect to lines 39 and 40 of page 1 of the proposed initiative, which specify that "[a]s defined in 43-4-606, the [authority] shall be a regional transportation activity enterprise, with all the powers of a regional transportation activity, as defined in 43-4-606":
 - a. Section 43-4-606, Colorado Revised Statutes, does not define the terms "regional transportation activity" or "regional transportation activity enterprise." Is it the proponents' intent that the authority be a regional transportation activity enterprise as defined in section 43-4-602 (15), Colorado Revised Statutes?
 - b. The Colorado Supreme Court has held that "the power to unilaterally impose taxes, with no direct relation to services provided, is inconsistent . . . with the definition of "enterprise"" specified in section 20 (2) (d) of article X of the state constitution (TABOR), which defines an "enterprise" as "a government-owned business authorized to issue its own revenue bonds and receiving under 10% of annual revenue in grants from all Colorado state and local governments combined." *Nicholl v. E-470 Pub. Highway Auth.*, 896 P.2d 859, 869 (1995). Since lines 51 through 53 of page 2 of the proposed initiative either provide for the imposition of a sales tax by the authority, which appears to conflict with the conclusion of the Colorado Supreme Court that an enterprise cannot impose taxes on behalf of the authority, or provide a grant of revenues from a state-imposed sales tax to the authority, in apparent violation of TABOR's 10% grant limitation, how can the authority be an enterprise?
 - c. As noted in the previous question, an "enterprise" must be authorized "to issue its

own revenue bonds." The proposed initiative does not specify that the authority has this power.

8. With respect to lines 42 and 43 of page 1 of the proposed initiative, the General Assembly has plenary power to modify statutory provisions as it sees fit, subject only to limitations specified in the state constitution, the federal constitution, or, in some cases, federal law. Accordingly, if this provision is intended to allow the General Assembly to fill in gaps in the proposed initiative if it is approved by the voters of the state, it is unnecessary. If the proponents intend that the General Assembly be required to specify additional powers of the authority, the proposed initiative should clearly state that. Finally, the standard drafting practice would be to specify all of the powers and duties that the proponents intend the authority to have in the proposed initiative itself.
9. What is the proponents' intent in allowing the authority, which is a rail authority, to also operate bicycle and motorized vehicle rental agencies?
10. The proposed initiative requires the authority, unless the board votes otherwise, to build all new facilities, and restore old facilities, to LEED standards. What sorts of facilities do the proponents expect the authority to build or restore?
11. Under what circumstances do the proponents anticipate the board of the authority voting not to construct or restore a facility to LEED standards?
12. With respect to the four-tenths of one percent sales tax to be imposed pursuant to lines 51 through 53 of page 2 of the proposed initiative:
 - a. A tax imposed by a transportation authority is generally imposed only within the geographic territory of the authority (e.g., the sales tax created by the regional transportation district created in article 9 of title 32, Colorado Revised Statutes), but the proposed initiative does not define the geographic boundaries of the authority and would appear to impose the new sales tax throughout the state, which raises the following questions:
 - i. Is it in fact the proponents' intent that the sales tax be imposed throughout the state?
 - ii. Is it the proponents' intent that the authority construct and operate rail facilities throughout the state?
 - iii. Would the authority have the power to construct and operate interstate rail facilities?
 - b. The proposed initiative imposes the sales tax "[t]o fund the creation of the authority" and specifies that the revenues of the sales tax "shall be allocated solely by the Colorado Rail Authority." For what purposes may the authority allocate the revenues of the sales tax?

- c. How much revenue do the proponents expect the sales tax to generate for the authority?
- d. What are the anticipated costs to the authority of constructing and maintaining rail facilities and providing rail services on an ongoing basis? If the costs are greater than the expected revenues of the sales tax, how will the authority generate additional revenues sufficient to pay the costs?
- e. On what date will the imposition of the new sales tax start?
- f. The new sales tax would only be imposed for twenty years. Why have the proponents chosen to limit the duration of the sales tax and how would the ongoing operations of the authority be funded once the sales tax expires?