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Colorado General Assembly

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MEMORANDUM

TO: Scott Wasserman and Javier Mabrey
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: April 5, 2022
SUBJECT: Proposed initiative measure 2021-2022 #104, concerning Supplemental Tax on Luxury Residential Real Property

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 #105 and #106. The comments and questions raised in this memorandum will not include comments and questions that were addressed in the memoranda for proposed initiatives 2021-2022 #105 and #106, 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 and the Colorado Revised Statutes appear to be:

1. To repeal the existing constitutional limit on the rate of property tax, for state purposes, of four mills on each dollar of valuation plus an additional one mill for certain specified purposes only.
2. To create an exemption from the constitutional requirement that the property tax levy be uniform in order to impose a supplemental property tax on luxury residential real property as determined by its actual appraised value.
3. To amend the provisions of section 20 of article X of the state constitution, commonly known as the Taxpayers' Bill of Rights or TABOR, to allow for new state real property taxes to be imposed.
4. To impose a supplemental tax on luxury residential real property, as defined by the measure, in the amount of 0.57% of the actual value of such property.
5. To require the revenue raised from the supplemental property tax on residential real property to be remitted to the department of treasury for reallocation and distribution to political subdivisions for the specific purpose of addressing shortages in and enhancing the availability of affordable housing on an equitable and need-driven basis.
6. To authorize the General Assembly to apply all or part of the revenues raised from the levy of the supplemental property tax on luxury residential real property to reduce the property tax burden upon residential and nonresidential real property instead of using the revenue to address shortages in and enhancing the availability of affordable housing.
7. To specify that the receipt by and distribution to the state's political subdivisions of tax revenue by the department of the treasury by means of the supplemental luxury tax under the proposed initiative does not constitute receipt of revenue or spending by the state under TABOR.

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. What will be the effective date of the proposed initiative?
3. What is the rationale for repealing section 11 of article X of the state constitution? How is this repeal connected to the rest of the proposed initiative?
4. Is the supplemental tax intended to constitute the entire property tax levied upon luxury residential real property or is the supplemental tax intended to be in addition to the existing tax already imposed on such real property? To minimize confusion, would the proponents consider clarifying their intent on this point?
5. What is meant by "actual appraised value," which the proposed initiative would add to article X, section 3 (1)(a) of the Colorado constitution? Does this differ from "actual value," the term used elsewhere in the proposed initiative?
6. The repeal in the proposed initiative of the current prohibition on the imposition of a new state real property suggests that proponents see the supplemental tax on luxury real property under the proposed initiative as a new state real property tax. Is this a correct assumption? Is there any additional reason why the proponents included this repeal language in the proposed initiative?
7. What study found that Denver and Colorado Springs "were in the top ten least affordable housing markets in the country in 2022"? What criteria were used to rank housing markets by affordability? Which markets were included in these rankings?
8. What "[n]ationwide data" are available to support the declarations in proposed section 39-1-104.3 (1)(c)?
9. What "[p]rojections" are available to support the declarations in proposed section 39-1-104.3 (1)(e)?
10. What "[n]ationwide data" are available to support the declarations in proposed section 39-1-104.3 (1)(f)?
11. With respect to proposed section 39-1-104.3 (1)(f), please explain how the increased construction and inflated prices of luxury homes are "crowding out construction of smaller homes and rental properties and impacting the production and availability of affordable housing throughout the state"?

12. Proposed section 39-1-104.3 (1)(f) says that construction of luxury homes is outpacing construction of smaller homes, and provides statistics to compare between the growth rates in sales of homes valued at one million dollars or more and homes valued at less than one million dollars. However, proposed subsection (2) of the same section defines "luxury residential real property" to mean property with actual value of at least two million dollars. Are these two subsections inconsistent with one another? Does the definition in subsection (2) not apply to the declaration in subsection (1)?
13. With respect to proposed section 39-1-104.3 (1)(g), please explain how "these impacts and policy considerations affect the entire state"? Do the proponents know how luxury residential real property, as defined in the proposed initiative, is distributed around the state? How does construction of a luxury home in a mountain community or on the Western slope affect the production and availability of affordable housing on the Front Range?
14. What do proponents mean by "affordable housing"? To minimize confusion, would they consider adding a definition of this term as used in the proposed initiative?
15. With respect to proposed section 39-1-104.3 (2):
 - a. Definitions that appear in statute are often preceded by a clause indicating to which statutes the definition applies. Does this definition apply only to proposed section 39-1-104.3, or is it intended to apply more broadly in state law?
 - b. The definition is sensitive to the actual value "determined by the assessor and the administrator in the manner prescribed by law." Is a determination by both the assessor and the administrator necessary for property to meet the definition?
 - c. Under current law, valuations for residential property are performed by county assessors. Does the proposed initiative require the property tax administrator, who is a state official, to perform residential property valuations?
 - d. What does "in the manner prescribed by law" mean here? Would the definition apply differently than it would if this phrase were not included?

- e. The definition appears to apply an inflation adjustment to the two million dollar threshold amount. Is this the correct interpretation of the definition?
- f. From what point in time is the inflation adjustment applied?
- g. The United States Bureau of Labor Statistics publishes the Denver-Aurora-Lakewood consumer price index as an annual, semiannual, and bimonthly series. Which series should be used?
- h. Consumer price indices are published after the end of the completed period for which prices are being indexed. For a property valued as of June 30, what data should be used? Could lags in publication of the consumer price index delay tax assessment and collection?
- i. Under current law, county assessors value residential real property on a biennial basis. However, consumer price indices are published more frequently. If a property is valued at \$2,050,000 and the threshold is \$2,000,000, then the property will be subject to the supplemental tax in this year. If the property is not revalued the following year, its valuation will still be \$2,050,000, while the threshold might rise to \$2,070,000 after application of a 3.5% inflation adjustment. This would make the property not subject to the supplemental tax in this year. Is this a correct understanding of the proposed initiative?
- j. Historically, home prices have outpaced overall inflation in consumer goods and services. If this trend continues, a larger share of residential property will meet the definition in this section over time. Is this the proponents' intent?

16. With respect to proposed section 39-1-104.3 (3):

- a. This subsection (3) says that "a supplemental tax shall be assessed and imposed[...]". What government entity or entities assess or impose this tax? Including the imposition of this tax in state law suggests that the state government is imposing the tax. Is this a correct interpretation of the measure?
- b. Property taxes are currently administered by county governments. Does the proposed initiative require counties to administer a state tax?
- c. Will counties be responsible for the implementation and administration costs to assess and collect the tax imposed in this subsection?

- d. Under current law, property taxes are assessed as a collection of mill levies that are applied to a property's assessed value. However, this measure applies a tax as a percentage of the property's actual value. Why assess this tax differently than property taxes imposed under current law?
 - e. How did the proponents determine that the supplemental luxury residential real property tax rate should be 0.57% of the actual value of such property?
 - f. How did the proponents determine that luxury residential real property is real property with an actual value of at least two million dollars?
 - g. What does "in the manner prescribed by law" mean here? Would the tax apply differently than it would if this phrase were not included?
 - h. The proposed initiative would not impose a supplemental tax on a residential property with actual value of \$1,995,000, but would impose a tax of \$11,400 on a residential property with actual value of \$2,000,000. Could this incentivize some homeowners to reduce their property's value in order to avoid the tax?
17. With respect to proposed section 39-1-112 (2) and (3):
- a. In reality, it is not the "taxes" that would be received and remitted to the state treasurer but the *revenues* from the taxes. To minimize confusion, would the proponents consider clarifying their intent on this point?
 - b. What do the proponents mean by "political subdivision" for purposes of the proposed initiative? Does the proposed initiative rely on the definition of the term found in section 39-1-102 (12), C.R.S.? If so, under the proposed initiative, money collected from the tax would be disbursed to any entity of government authorized by law to impose an ad valorem tax on property within its territorial limits.
 - c. The phrase "luxury residential real property tax fund" appears in quotation marks in all four instances where it is printed in the proposed initiative. Why? Do the proponents intend for the quotation marks to be a part of the fund's name?
 - d. Does tax revenue collected by a county constitute fiscal year spending for the purposes of the county's TABOR computations? If it does,

collection of the supplemental tax could cause the county to be required to refund up to an equivalent amount of revenue from other sources.

- e. Why do the proponents delegate the task of developing criteria for the reallocation and distribution of the revenues raised by the levying of the supplemental luxury residential real property tax to the department of the treasury? Does the department of the treasury have any particularized expertise in affordable housing matters as contrasted with, for example, the division of housing in the department of local affairs or the Colorado Housing and Finance Authority? How do you envision the process by which the department of the treasury will promulgate these criteria?
- f. What is "an equitable and need-driven basis"? Can these two attributes conflict with each other and, if so, which should be prioritized?
- g. Beyond stating that the revenues raised from the luxury tax are to be reallocated and distributed "for the specific purpose of addressing shortages and enhancing the availability of affordable housing on an equitable and need-driven basis," how will it be determined which of many uses under the general goals of addressing shortages and enhancing the availability of affordable housing are eligible for funding? Do the proponents have an idea of which types of projects among the myriad of affordable-housing related uses that could be enumerated are eligible for funding?
- h. With reference to the last sentence of proposed section 39-1-112 (3), what does it mean for political subdivision to use revenues distributed to it "in such manner as each political subdivision may determine"? This provision could be read as meaning that the political subdivision could use the revenues for any purpose it desires and would not be required to make expenditures from the supplemental tax that are intended to address shortages in and enhancing the availability of affordable housing. If this is an incorrect reading of the proposed initiative, would the proponent consider clarifying their intent on this point?
- i. It appears that funds to address affordable housing shortages and enhance affordable housing availability may only be reallocated and distributed to "political subdivisions," defined in section 39-1-102 (12) as "any entity of government authorized by law to impose ad valorem taxes on taxable property located within its territorial limits." Therefore, funds

could be distributed to counties and school districts, most municipalities, and many special districts, but not to a housing authority or to a state government entity like the division of housing. Is this the proponents' intent?

- j. Do disbursements from the "luxury residential real property tax fund" require appropriations? If they do, what would happen if the amount appropriated is less than the amount received?

18. Proposed subsection 39-1-112 (4) states that "[t]he general assembly may elect" to apply tax revenue to reduce property tax burdens. What action would constitute such an election? Is this a different process than normal legislation?

19. With respect to proposed section 39-1-112 (4), it appears this provision would give the General Assembly the ability to use *all* revenue from the luxury residential real property tax to reduce the property tax burden upon residential and nonresidential real property. Is this a correct reading of the provision? In other words, the General Assembly could use all revenues from the supplemental tax for property tax relief without spending any of the revenue on affordable housing? So the General Assembly could impose the supplemental tax and then turn around and give property tax relief to the same parties upon whom the state had imposed the supplemental tax in the first place? If this is not a correct reading of the proposed initiative, would the proponents consider clarifying their intent on this point?

20. The steps that may be taken to reduce property tax burdens are not specified in the proposed initiative. Is it correct to assume that these would be determined by the General Assembly in legislation?

21. With respect to proposed section 39-1-112 (5):

- a. This subsection would appear in statute, but appears to attempt to create an exemption from a constitutional provision.
- b. Is it the proponents' intent to create a voter-approved revenue change to allow the state to retain and spend revenue collected via the tax imposed in the proposed initiative?
- c. Is it correct to read this subsection as affecting the state's TABOR computation only? Or is it the proponents' intent that this subsection also affect TABOR computations for local governments?

- d. If it is the proponents' intent that the proposed initiative create voter-approved revenue changes to local fiscal year spending limits, is this something that can be accomplished in a statewide election, rather than a local district election?
- e. If the proposed initiative does not create voter-approved revenue changes to local fiscal year spending limits, then the initiative could increase refund requirements for local districts that collect the supplemental tax in the initiative, or that receive state funds to administer the tax, or that receive state distributions of supplemental tax revenue for affordable housing purposes.

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. It is standard drafting practice that the phrase "except that" be preceded by a semicolon:

"...levying the tax; EXCEPT THAT A SUPPLEMENTAL..."
2. In proposed section 39-1-104.3 (g), "Luxury" should be lowercase.
3. All paragraphs that follow an introductory portion, should end with a semicolon with three exceptions: If the paragraph has a period in the middle of it, the paragraph also ends in a period; the penultimate paragraph should end with a semicolon followed by the word "and"; and the last paragraph should end with a period. In the legislative declaration in proposed section 39-1-104.3, for instance, subsection (1)(b) correctly ends in a period since there is a period in the middle of the paragraph, but subsection (1)(d) should end with a semicolon. Since subsection (1)(f) is the penultimate paragraph, it should end with a semicolon followed by the word "and".
4. In Section 5 of the proposed initiative, subsection (2) should end with the period outside of the quotation marks.
5. For purposes of this statutory initiative, the word "shall" is defined in section 2-4-401 (13.7), Colorado Revised Statutes, and it means "that a person has a

duty." The related word "must," which is defined in section 2-4-401 (6.5), Colorado Revised Statutes, "means that a person or thing is required to meet a condition for a consequence to apply." Furthermore, "'must' does not mean that a person has a duty."