

STATE OF COLORADO

Colorado General Assembly

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MEMORANDUM

TO: Dee Wisor and Dalton Kelley
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: November 3, 2022
SUBJECT: Proposed initiative measure 2023-2024 #3, concerning a Community Attainable Housing Fee

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 purposes of the proposed amendment to the Colorado Revised Statutes appear to be:

1. Commencing on and after January 1, 2024, to impose on the recording of deeds that effectuate a transfer of real property a fee of one-tenth of one percent of the consideration paid or to be paid for the real property less two

hundred thousand dollars and to require the county clerk and recorder to compute and collect the fee as a prerequisite to the recording of a deed.

2. To exempt correction deeds and deeds that evidence the conveyance of real property from one spouse or other martial partner to another from the fee.
3. To require the revenue, net of collection costs, generated by the fee to be credited to a newly established Colorado attainable housing fund and used only to fund new and existing programs administered by the division of housing that support the financing, purchase, refinancing, construction, maintenance, rehabilitation, or repair of attainable housing in Colorado.
4. To define "attainable housing" as housing that is attainable by a household that makes between eighty percent and one hundred and twenty percent of the area median income and is priced so that the household need not spend more than thirty percent of its income on housing costs.
5. To exempt revenue generated by the fee from the limitation on state fiscal year spending as a voter-approved revenue change.

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. The following questions are regarding the proposed community attainable housing fee ("fee") established by the proposed initiative:
 - a. Who is intended to pay the fee? Would the proponents consider clarifying who they intend to pay the fee in the proposed initiative?
 - b. Article X, section 20 (8)(a) of the Colorado constitution states that "[n]ew or increased transfer tax rates on real property are prohibited." It appears that the fee will be calculated, imposed, and collected in much the same manner as real estate transfer taxes, which may raise the question of whether the fee is actually a prohibited real estate transfer tax. What makes the "fee" a fee rather than a tax? Specifically:
 - i. How is the fee reasonably related to the overall cost of financing attainable housing in Colorado communities?

- ii. How are those who are subject to the fee reasonably likely to benefit from or use the service or services the fee relates to?
 - iii. What is "the benefit" that is enjoyed by the owners of real property as referenced in proposed section 29-4-1201 (13)?
- 3. The following questions are regarding the definition of "attainable housing" in proposed section 29-4-1202 (a):
 - a. What does the term "household" mean?
 - b. What is meant by the term "housing costs"?
- 4. Do the proponents intend for the phrase "any real property" as used in the definition of "deed" in proposed section 29-4-1202 (b) to be without limitation? For instance, does the phrase include land? Does it include commercial property? If the phrase is intended to be used without limitation, what benefit do owners of land or commercial real property receive in exchange for payment of the fee?
- 5. What does "other marital partner" mean as the phrase is used in proposed section 29-4-1203 (1)(b)?
- 6. What does "correction deed" mean as the phrase is used in proposed section 29-4-1203 (1)(b)?
- 7. With respect to the Colorado attainable housing fund ("fund") created in proposed section 29-4-1203 (1)(d), do the proponents intend for money in the fund to be subject to annual appropriation by the General Assembly? Alternatively, do the proponents intend for money in the fund to be continuously appropriated? Would the proponents consider clarifying their intent?
- 8. Have the proponents analyzed the fiscal or other impacts that may result from the enactment of the proposed initiative on local governments in the state, specifically on county clerk and recorder offices? Do the proponents believe the five percent of the fee that a county clerk and recorder is permitted to retain pursuant to proposed section 29-4-1203 (3) sufficiently defrays the costs to their office?
- 9. Have the proponents considered any fiscal or other impacts that may result from the enactment of the proposed initiative on the state, specifically on the division of housing ("division")? Do the proponents intend that the division be allowed to use money in the fund for administrative costs associated with

implementing new and existing programs pursuant to proposed section 29-4-1203 (4) & (5)? If so, would the proponents consider specifying this intent in the proposed initiative?

10. Proposed section 29-4-1203 (6)(c) allows the division to make money in other funds administered by the division available to the fund. Regarding this provision:

- a. Is this allowance intended to be without limitation? Often money in funds are statutorily limited to enumerated uses. In that instance, do the proponents see a conflict? How do the proponents suggest any conflicts be resolved? Might conforming amendments to existing statutes limiting the use of such funds be necessary?
- b. Logistically, how do the proponents intend for the division to make money in other funds it administers available to the fund? Will money in other funds be transferred to the fund? If so, who would be responsible for making the transfer?

11. Proposed section 29-4-1203 (7) provides that approval of the proposed initiative by the registered electors of the state constitutes a "voter-approved revenue change to allow the retention and expenditure of state revenues in excess of the limitation on state fiscal year spending." Do the proponents intend that only money generated by the proposed initiative be exempt from the limitation on state fiscal year spending?

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. Before the amending clause, number each section, part, etc. that is being amended or added with a section number (e.g., SECTION 1., SECTION 2.). For example:

SECTION 1. In Colorado Revised Statutes, **add** article XXX as follows:

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

Please ensure statutory sections are sequentially numbered and correct any errors in numbering. For example, proposed section 29-4-1206 appears to be numbered in error. Please also ensure any divisions within proposed statutory sections comport with the manner of dividing into subsections, paragraphs, subparagraphs, and sub-subparagraphs as outlined above. For instance, the introductory portion of the legislative declaration should be numbered (1), and the paragraphs that follow should be lettered appropriately. Definitions sections are an exception to this rule. The introductory portion does not need to be numbered and each defined term should be numbered.

3. It is standard drafting practice when referencing statutory sections to include the word "section" before the number. For example, "section 24-35-204.5." It is standard drafting practice when referencing a subsection within the same section to cite as follows: "subsection __ of this section". Please consider revising such references or citations in the proposed initiative accordingly. For instance, in 29-4-1203 (1)(b), " SUBSECTION (8) OF SECTION 29-4-1203, COLORADO REVISED STATUTES," should read "SUBSECTION (8) OF THIS SECTION."
4. It is standard drafting practice to use SMALL CAPITAL LETTERS [rather than ALL CAPS] to show the language being added to and stricken type, which appears as stricken type, to show language being removed from the Colorado constitution or the Colorado Revised Statutes.

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."
6. Although the text of the proposed initiative should be in small capital letters, use an uppercase letter to indicate capitalization where appropriate. The following should be large-capitalized:
 - a. The first letter of the first word of each sentence;
 - b. The first letter of the first word of each entry of an enumeration paragraphed after a colon; and
 - c. The first letter of proper names.
7. In Section 29-4-1203 (5), "requaltions" should be spelled "regulations".
8. Provisions that follow grammatically from another provision (such as those that follow the first provision in the legislative declaration) should end with a semicolon, and the penultimate provision should end with a semicolon followed by an "and." However, if the provision is more than one sentence (as in the current "(5)" of the legislative declaration), the provision should end with a period. Again, definitions sections are an exception, and each definition should end with a period. As such, proposed section 29-4-1202 has been formatted correctly.
9. The following language in the proposed initiative may require further proofing:
 - a. The first sentence of paragraph (5) of the legislative declaration seems to be missing some words to make it a complete grammatical phrase; and
 - b. Paragraph (7) of the legislative declaration appears to be missing some words in order to make it a complete statement.
10. Please differentiate between the supreme court and the Colorado supreme court when citing opinions. The same goes for the Colorado court of appeals. To do this add (Colo. [year of opinion]) for the Colorado supreme court, and (Colo. App. [year of opinion]) for the Colorado court of appeals. For example, "BARBER V. RITTER, 196 P.3d 238 (COLO. 2008)".