

# STATE OF COLORADO

## 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 #105, concerning New Fee Assessment 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 ## 104 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 ## 104 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. Only new comments and questions are included in this memorandum.

## **Purposes**

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

1. To impose a supplemental fee in the amount of 1.1% of the amount by which the appraised actual value of each luxury residential real property, as defined by the measure, exceeds the baseline for that property's qualification as a luxury residential real property.
2. To require that the fee be charged and determined by the division of housing in the department of local affairs and remitted to the Colorado affordable housing fund.
3. To establish the Colorado affordable housing fund in the department of the treasury.
4. To require the revenue raised from the supplemental fee on luxury residential real property to be disseminated and disbursed by the department of the treasury to political subdivisions of the state for the specific and exclusive purpose of addressing shortages in and enhancing the availability of affordable housing on an equitable and need-driven basis throughout the state.
5. To require that all funds disseminated and disbursed from the Colorado affordable housing fund and received by the political subdivisions of the state be used only for the purpose of addressing shortages in and enhancing the availability of affordable housing within the jurisdiction of each such political subdivision according to the specific criteria and direction to be provided by the division of housing.
6. To authorize the General Assembly, in its discretion, to designate that a portion of the funds raised from the fee be disseminated and applied to offset in part any reduction in local district revenue resulting from a reduction in the residential or nonresidential assessment rates.
7. To authorize the General Assembly to supplement revenue received from the fee increase by appropriation on an annual basis from the general fund.
8. To specify that the amount of any appropriation received and spent by the state is to be treated as a voter approved revenue change under section 20 (7)(d) of the TABOR amendment to the state constitution.

## **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. Is the fee required by the proposed initiative to be collected during each year going forward, without restriction?
3. To promote clarity, would the proponents consider providing a definition of "affordable housing," "baseline," and "political subdivision" as these terms are used in the proposed initiative?
4. With respect to proposed section 29-26.5-103:
  - a. How did the proponents determine that the amount of the fee should be 1.1% of the amount by which the appraised actual value exceeds the baseline?
  - b. What is the "baseline for that property's qualification as a luxury residential real property"?
  - c. Under current law, property is valued biennially, while the Denver-Aurora-Lakewood consumer price index is currently published on an annual, semiannual, and bimonthly basis. If inflation is positive, then the baseline amount will rise each year, causing the fee assessed on any property to decrease in intervening years when properties are not reassessed. Is this a correct interpretation of the proposed initiative? Is it the proponents' intent?
  - d. If the amount of the fee is set in statute, what "determination" regarding the fee is to be made by the division in accordance with this section?
  - e. The fee appears to be a supplemental fee on luxury residential real property. As property taxes are normally assessed by the assessor in each county and collected by the treasurer of the county, it would seem natural and appropriate for this supplemental fee to be assessed and collected in this same manner. Yet, under the terms of section 29-26.5-103, it appears the division of housing will be charging the fee. Is this a correct assumption? If so, how do the proponents anticipate that the

division of housing will be able to charge and collect the revenue generated by this fee?

- f. How is the fee to be assessed and collected under the proposed initiative? How will an owner of luxury residential real property know the amount of the fee the owner is to be pay? How does the owner pay the fee? How does the fee payment makes its way into the fund?
  - g. Can a homeowner dispute a fee assessment with the division of housing?
  - h. What are the consequences, if any, for a homeowner who does not pay the fee?
  - i. Do the proponents intend that the rules required to be promulgated by the division pursuant to section 29-26.5-103 and 28-26.5-105 be promulgated in accordance with the Administrative Procedures Act? If so, would the proponents consider adding this requirement to the pertinent text of the proposed initiative?
5. With respect to proposed section 29-26-5-104 (2), technically, the fund itself does not hold a "fee." This language also appears in substantially the same form in proposed new section 29-26.5-105 (1) ("all fees paid into the fund..."). In reality, a fund holds revenue generated by the fee. In addition, a fund itself is not able to disseminate money deposited into it. This is a task that must be performed by the administrator of the fund or some other person directing the activities of the fund. Would the proponents consider clarifying the text of the proposed initiative on these points?
6. Under traditional legal principles as affirmed by court cases, a "tax" is a general charge imposed upon a broad class of persons to fund general government operations whereas a "fee" is a charge imposed upon the users of a particular government services to defray the costs to the government of providing this service. With respect to the proposed initiative, it appears the charge at issue will be paid by owners of luxury residential real property to be disseminated and disbursed for affordable housing projects across the state. It does not appear that these property owners will be benefiting from the service being provided, and it is quite possible that revenue generated by the fees they pay will not even be expended in their local communities. Given these anticipated realities, how can the charge at issue be reasonably classified as a fee?
7. Proposed section 29-26.5-101 (6) states in effect that the intent of the proposed initiative is to "requir[e] owners of luxury residential real property to pay a fee

- reflective of the proportionate impact of their property's incremental appraised valuation upon the resulting deficit of affordable housing in their community." However, under the proposed initiative, is there any necessary connection between the payment of the fee and any particular affordable housing project financed through the fee? Specifically, is there any connection between an affordable housing project being funded by the fee and the payment of the fee? Won't fee revenues in most cases be disseminated throughout the state away from the community in which the luxury residential housing is located and the fee is paid as prioritized by local needs as determined by the administrator of the Colorado affordable housing fund?
8. With respect to proposed section 29-26.5-105 (1), which "political subdivisions" of the state will receive money from the fund under the proposed initiative? Which political subdivisions beyond counties and municipalities? Who decides which political subdivisions will receive a share of the funds and the amount of funding that a particular political subdivision will receive?
  9. What types of the many uses satisfying the general goals of addressing shortages in and enhancing the availability of affordable housing are eligible for funding under the proposed initiative? Do the proponents have a sense of what types of projects satisfying these general goals will be eligible for funding? Who is to make that determination under the proposed initiative? How is the determination to be made?
  10. It does not appear that the proposed initiative makes any provision for payment of the administrative costs of the division of housing or any other entity that plays a part in administering the fund. Do the proponents have an idea for how these administrative costs are to be paid?
  11. With respect to proposed section 29-26.5-105 (2), it appears that this provision would give the General Assembly the ability to use some portion of the revenue from the luxury residential real property tax to offset in part any reduction in local district revenue resulting from a reduction in the residential or nonresidential assessment rates. In what manner does the proposed initiative result in a reduction in the residential or nonresidential assessment rate? Under this provision, would the General Assembly be able to expend half of the revenues from the fee on affordable housing needs and the other half on property tax reduction? Are there any requirements or principles to guide this offset requirement? To minimize confusion, would the proponents consider clarifying their intent on this point?
  12. Concerning proposed section 29-26.5-105 (3):

- a. It appears that this subsection (3) creates a voter-approved revenue change for appropriations to the Colorado affordable housing fund that supplement fee-generated funds. Is this a correct reading of this subsection?
- b. Is the voter-approved revenue change limited in any way?
- c. Could the General Assembly appropriate an amount equal to the revenue the state collected above the excess state revenues cap, thereby eliminating any overage that the state would otherwise be required to refund to taxpayers?
- d. The voter-approved revenue change in this subsection (3) does not appear to apply to fee revenue collected pursuant to proposed section 29-26.5-103. Is it the proponents' intent that fees collected as required in the proposed initiative constitute fiscal year spending? If so, this may increase the amount that the state is required to refund to taxpayers under TABOR.
- e. The voter-approved revenue change in this subsection (3) does not apply to local governments that receive disbursements from the Colorado affordable housing fund. This may increase the amount that local governments are required to refund to taxpayers under TABOR.

## 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 following is the standard drafting language used for creating a legislative declaration: "The general assembly hereby finds and declares that..."
3. The following is the standard drafting language used for creating a definition: "As used in this [section][subsection][paragraph], unless the context otherwise requires, '[term]' means (the definition for the term)..."

4. State funds are typically created in the "state treasury" and not in the "department of the treasury."