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## **MEMORANDUM**

**TO:** Katina Banks and Robert DuRay

**FROM:** Legislative Council Staff and Office of Legislative Legal Services

**DATE:** March 22, 2016

**SUBJECT:** Proposed initiative measure 2015-2016 #123, concerning bipartisan reapportionment commission

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 constitution appear to be:

1. To change the name of the Colorado reapportionment commission to the Colorado bipartisan reapportionment commission ("commission").

2. To change the number of members of, appointment process for, qualifications of members of, and procedures and time frames for the commission to follow in drawing state legislative districts.
3. To establish drawing a plan that fosters competitiveness as additional criteria for the commission to follow.
4. To specify ethical obligations and requirements for commissioners, staff, and persons who contract or receive compensation for advocating to the commission or staff.

## **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. At the time that article V, section 48 of the Colorado constitution was originally adopted, the lieutenant governor was the president of the senate. Since the lieutenant governor was not always a member of the majority party in the senate, the majority leader was designated as the member of the reapportionment commission. Currently, the president of the senate makes appointments on behalf of the majority party in the senate. Do the proponents still believe that it is appropriate to have the majority leader of the senate make appointments to the commission?
3. Are the legislative appointees required to be members of the political party of the legislative leader making the appointment? If not, would the governor still be required to appoint members from the two major political parties?
4. In section 48 (1) (b), the governor is to appoint members affiliated with *major* political parties. What do the proponents mean by major political parties?
5. In section 48 (1) (b), the chief justice is to appoint members who have not been affiliated with any political party. Should the chief justice be able to appoint a member who is affiliated with a minor political party?
6. Section 48 (1) (b.1) directs staff to determine whether an applicant meets the criteria specified in subsection (1) (b) and to forward a list of qualified applicants to the chief justice.

- a. What criteria shall staff use?
  - b. May staff rely upon statements made in the application, or is staff to conduct additional investigation into an applicant's qualifications?
  - c. What criteria or qualifications, if any, should the chief justice consider when selecting commissioners from the list of qualified applicants?
- 7. The proposed initiative provides that no more than two commissioners may be from the same congressional district and that each congressional district must have one commissioner.
  - a. What happens when Colorado is apportioned nine congressional districts? May two members reside in the same congressional district?
  - b. What happens when Colorado is apportioned more than nine congressional districts?
- 8. Section 48 (1) (c.1) provides that no person may serve on the commission if the person is "COMPENSATED BY A MEMBER OF, OR A CAMPAIGN COMMITTEE ADVOCATING THE ELECTION OF A CANDIDATE TO," the state legislature.
  - a. What do the proponents mean by "compensated by"? An employee of the member or campaign committee? An independent contractor working for the member or campaign committee?
  - b. May a commissioner be compensated by anyone else for serving as a commissioner?
- 9. Under section 48 (1) (b), the last appointment to the commission is to be made by March 10. Between that date and early May, the state legislature is in session and staff, as defined by the initiative, is busy with its responsibilities for them. Do the proponents believe that staff will be able to handle both its responsibilities to the general assembly and to the commission?
- 10. Section 48 (1) (e) requires the commission to adopt a preliminary plan within thirty days after the commission is convened or the census data is available. Previous commissions have divided the state into smaller areas and conducted public hearings on each area before adopting the preliminary plan. Do proponents envision the commission still holding such hearings? If so, do the proponents believe that thirty days is enough time to conduct such hearings?

11. Section 48 (1) (e) also provides that the commission shall not adopt a plan until specified public hearings are conducted. Does this prohibition apply to the preliminary plan?
12. Section 48 (1) (e) also requires the commission to establish a website through which any Colorado resident may submit proposed plans for consideration.
  - a. How would a citizen submit a proposed plan?
  - b. Do the proponents intend that the commission establish a method for Colorado residents to create proposed plans?
  - c. Does the section 48 (1) (e) mandate that the commission maintain a website through which "any person" may submit maps or comments conflict with the provisions of this subsection limited to Colorado citizens only?
13. In interpreting sections 46 and 47 of the Colorado constitution, the Colorado supreme court has held that a plan must be consistent with six parameters in the following hierarchy from the most to the least important: (1) The Fourteenth Amendment Equal Protection Clause and the Fifteenth Amendment; (2) Section 2 of the Voting Rights Act; (3) Section 46 of the Colorado constitution, requiring equality of population; (4) Section 47 (2) of the Colorado constitution, requiring that districts not cross county lines except to meet equality of population requirements and that the number of cities and towns contained in more than one district are minimized; (5) Section 47 (1) of the Colorado constitution, requiring each district to be as compact as possible and to consist of contiguous, whole general election precincts; and (6) Preservation of communities of interest within a district....<sup>1</sup>
  - a. Do proponents intend that this hierarchy be maintained?
  - b. Section 48 (1) (e.1) requires the commission to draw a plan that fosters competitiveness between districts. Where does this criteria fall in the hierarchy established by the Colorado supreme court?
  - c. The competitiveness between districts is to be "CONSISTENT WITH THE OTHER CRITERIA TO BE CONSIDERED AS SET FORTH IN THIS

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<sup>1</sup> *In re Reapportionment of the Colorado General Assembly*, 828 P.2d 185, 190 (1982).

SUBSECTION.". Are the proponents referring to the criteria set forth in sections 46 and 47 of article V of the Colorado constitution?

14. Section 48 (1) (e.2) provides that "If THERE IS ONLY ONE SUCH PLAN, THE COURT SHALL ORDER THAT IT BE FILED WITH THE SECRETARY OF STATE.". Is the "such plan" a plan that the court determines complies with the requirements of law or just the only plan that is submitted to the court?

15. In section 48 (1) (f), the commission and staff are directed to cooperate with the citizens' congressional redistricting commission and its staff.

- a. Currently, no such commission exists. Would the proponents consider amending the initiative to take this into consideration?
- b. If such a commission did exist, would the proponents consider holding joint public hearings around the state optimizing the use of state resources?
- c. If there were two commissions, could one set of staff serve both commissions?

16. Section 48 (2) (d) refers to "ANY APPLICABLE ETHICAL REQUIREMENT IN PART 1 OF ARTICLE 18, TITLE 24,". In § 24-18-102 (8), C.R.S., the definition of "public officer" specifically excludes members of a commission who receive no compensation other than a per diem allowance or necessary and reasonable expenses. Section 24-18-109, C.R.S., establishes rules of conduct for members of boards and commissions

- a. Is § 24-18-109, C.R.S., the "ethical requirement" to which the proponents are referring?
- b. Are there other provisions of part 1 of article 18 of title 24, C.R.S., that proponents intend to apply to commissioners? If so, the proponents should specify those provisions.

17. Section 48 (2) (d) also authorizes the independent ethics commission established in article XXIX of the Colorado constitution to hear alleged violations of ethics violations.

- a. There has been raised an issue as to whether the independent ethics commission can adjudicate a violation of part 1 of article 18 of title 24, C.R.S. In light of this, the proponents might consider a conforming amendment to article XXIX, section 5 of the Colorado constitution.

- b. Article XXIX, section 2 of the Colorado constitution also excludes members of a commission who receive no compensation other than a per diem allowance or necessary and reasonable expenses from the definition of "public officer". Again, proponents might consider a conforming amendment to article XXIX.

## **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 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, and to show stricken language before capped language. You may consider reviewing the proposed initiative to verify that stricken language precedes added small-capped language.
2. Although the new text of the proposed initiative should be in small capital letters, use an uppercase letter to indicate capitalization where appropriate. You may consider reviewing the proposed initiative to verify that the first letter of the first word of each sentence is capitalized.
3. Constitutional and statutory provisions are often divided into subsections, paragraphs, subparagraphs, and sub-subparagraphs and referenced in a standard way for ease of reading. For example:
  - a. In Section 48 (b.1), after "SUBSECTION (b)" consider adding "OF THIS SECTION" to clarify this reference and to adhere to standard drafting practice.
  - b. In section 48 (d.1), instead of "PART 1 OF ARTICLE 4, TITLE 24, COLORADO REVISED STATUTES, AS AMENDED", consider revising the reference to "PART 1 OF ARTICLE 4 OF TITLE 24, C.R.S., AS AMENDED".
  - c. In section 48's headnote, consider removing the bold font and all caps, only capitalizing the first word, and punctuating with a period.