

## MEMORANDUM

TO: QQ Members and partners  
FROM: Torie Jarvis and Barbara Green

DATE: September 18, 2018

RE: Potential impacts from 2018 Amendment 74 (Ballot Initiative 108)

### I. Introduction

In November, voters will consider a sweeping statewide ballot measure, Amendment 74 (formerly Initiative 108). This amendment would change the Colorado Constitution to require just compensation to be paid to any property owner when a government law or regulation reduces the fair market value of private property.

**At its August meeting, QQ unanimously opposed Amendment 74 because of the potential negative impact to the use of local and state regulations to protect water quality and quantity.**

The Colorado Farm Bureau submitted the ballot initiative, collected signatures, and remains a vocal proponent of the amendment. Additionally, Protecting Colorado's Environment, Economy and Energy Independence – or Protect Colorado for short—has raised tens of millions of dollars, with the largest funders being Noble Energy, PDC Energy, and Anadarko Petroleum.<sup>1</sup>

Amendment 74 adds the capitalized phrase to Article II, Section 15 of the Colorado Constitution:

Private property shall not be taken or damaged, or REDUCED IN FAIR MARKET VALUE BY GOVERNMENT LAW OR REGULATION for public or private use, without just compensation.<sup>2</sup>

The title of the ballot measure reads:

An amendment to the Colorado constitution requiring the government to award just compensation to owners of private property when a

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<sup>1</sup> Marianne Goodland, *Oil and Gas Industry Picking Up Pace of Campaign Funding*, Durango Herald (September 5, 2018), <https://durangoherald.com/articles/239864>, last accessed September 10, 2018. The initiative apparently was filed in response to Initiative 97 (now called Proposition 112) which would amend the Colorado Oil and Gas Conservation Act to require the new oil and natural gas development, except on federal lands, be sited at least 2,500 feet from occupied structures or defined “vulnerable areas. See Colorado Farm Bureau, *Colorado Farm Bureau Proposes Initiative to Protect Private Property Rights*, The Fence Post (January 11, 2018), available at <https://www.thefencepost.com/news/colorado-farm-bureau-proposes-initiative-to-protect-private-property-rights/>, last accessed September 10, 2018.

<sup>2</sup> 2017-2018 Initiative #108- Final Draft, Colorado Secretary of State, *2017-2018 Initiative Filings, Agendas & Results*, available at <https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/index.html>, last accessed September 10, 2018.

government law or regulation reduces the fair market value of the property.<sup>3</sup>

At minimum, Amendment 74 would confuse the current state of law and create additional litigation to distinguish which government actions do or don't require compensation. At worst, this amendment would require local and state governments to compensate for *any* loss of property value at all from the implementation of *any* regulation that reduces the value of property. Either one of these results comes at a huge expense for state and local governments— i.e., taxpayers— who would have to foot the bill for the litigation and compensation.

## **II. Private property is already protected under the U.S. Constitution, the Colorado Constitution, and Colorado statutes.**

**The U.S. and Colorado Constitution protect property owners from the taking of private property without just compensation.** Article II, section 15 of the Colorado Constitution provides that “[p]rivate property shall not be taken or damaged, for public or private use, without just compensation.” The Fifth Amendment to the U.S. Constitution provides “. . . nor shall private property be taken for public use without just compensation.” There are several forms of “taking” that require compensation.<sup>4</sup> This discussion will focus on a regulatory taking, i.e. a restriction on the uses to which the property can be put or a condition attached to those uses that “goes too far.”<sup>5</sup>

Colorado courts, which generally follow Supreme Court takings precedent, apply a two-tiered regulatory takings inquiry. First, the court will determine if a *per se* taking has occurred because a regulation “does not substantially advance legitimate state interests” or because a regulation results in a total loss of economically viable use of land.<sup>6</sup>

Second, a court may still determine a taking occurred if the landowner “falls into the rare category of a landowner whose land has a value slightly greater than de minimis but, nonetheless, given the totality of the circumstances, has had its land taken by a government regulation.”<sup>7</sup> This second inquiry is fact-specific and based on “a complex of factors including the regulation’s economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of government action.”<sup>8</sup> Under current law, a “mere decrease in property value” is not a taking requiring compensation because “a landowner is not entitled to the

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<sup>3</sup>*Id.*

<sup>4</sup> For example, a regulation that results in a physical occupation on one’s property or a requirement that a landowner grant an easement or access to the general public on one’s property without compensation is generally considered a taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

<sup>5</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (“while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking”).

<sup>6</sup> *Animas Valley Sand & Gravel*, 38 P.3d 59, 63-64 (Colo. 2001), citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 116 (1992).

<sup>7</sup> *Id.* at 67.

<sup>8</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 125 (1978); see also *Animas Valley Sand & Gravel*, 38 P.3d at 65.

highest and best use of his property.”<sup>9</sup> Instead, “the level of interference must be very high”<sup>10</sup> because “[t]akings jurisprudence balances the competing goals of compensating landowners on whom a significant burden of regulation falls and avoiding prohibitory costs to needed government regulation.”<sup>11</sup>

**State statute protects private property from regulatory takings.** The Regulatory Impairment of Property Rights Act (RIPRA) requires that dedications or fees imposed by local governments as conditions of development approval have an “essential nexus” between the required dedication or payment and a “legitimate local government interest,” and that the dedication or fee be “roughly proportional” to the actual impact of the development.<sup>12</sup> When a local government imposes an impact fee, it must show that the fee is reasonably related to the overall cost of the service or improvement to be provided.<sup>13</sup> Finally, Colorado statutes protect vested rights from any zoning or land use action that would “alter, impair, prevent, diminish, impose a moratorium on development, or otherwise delay” the development or use of property as approved in a “site specific development plan.”<sup>14</sup>

### III. Impact of Amendment 74

Amendment 74 would add an entirely new phrase to the Colorado Constitution to require “the government to award just compensation to owners of private property when a government law or regulation reduces the fair market value of the property.” This is not a small update to existing takings law, as proponents suggest; it is a new requirement to provide compensation for government regulations above and beyond a taking. State and local governments would face litigation for challenging the implementation of *any* regulation that has *any* impact on a private property right, including real property interests, mineral rights, or water rights. If every instance of a diminution in property value, even 5% or 1%, required compensation, the cost of regulation to governments would become unbearable. Moreover, the specter of litigation alone to clarify what is meant by the new provision, and what law should apply, could be a deterrent to adopting or enforcing any regulation that could affect private property.

The deceptively simple language of the amendment leaves many unanswered questions. Some specific issues surrounding the amendment include:

- Because this is a constitutional amendment, it would be very difficult to change or amend.
- Because the amendment is “self-implementing,” litigation, not the legislature, would be the avenue for determining how and when the amendment applies.
- There are no exceptions to this amendment. Property owners arguably would be entitled to compensation even if the government regulation was critical to protect public health, safety

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<sup>9</sup> *Animas Valley Sand & Gravel*, 38 P.3d at 65.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 63, citing *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 695 (Colo. 2001).

<sup>12</sup> C.R.S. § 29-20-203(1).

<sup>13</sup> C.R.S. § 29-20-104.5.

<sup>14</sup> C.R.S. § 24-68-105.

and welfare, necessary to restrict activities recognized as public nuisance, or required by federal law.

- There is no grandfathering provision to the amendment, so implementation or enforcement of existing laws and regulations could also be subject to a claim for compensation.
- How exactions and impact fees would be effected is unclear; while exactions and impact fees are allowed under Colorado statute, any reduction in property value because of those requirements could be subject to just compensation.
- Both governmental action and inaction could create grounds for claims for just compensation due to decreased property values. For example, a local government may apply use restrictions preventing a commercial business from operating in a residential zone which would give rise to a claim for compensation. But a neighboring property might also have a claim for a reduction in its fair market value if the government allows a commercial activity to locate in a residential district.
- The amendment offers no guidance on how to calculate “fair market value,” so additional litigation would be required.
- There is no outlined process by which property owners might seek relief as an initial claim of loss of fair market value. Similar statutory initiatives in Oregon and Arizona established an initial administrative process for claims.

One very likely result of Amendment 74 would be “regulatory chilling,” where local and state governments do not adopt new regulations or enforce existing regulations that affect property rights in any way, even if there are public health and safety reasons for regulating. The threat of litigation and the potential obligation to provide compensation would be too significant. As Sam Mamet, the executive director of the Colorado Municipal League, said, “My advice to counties and municipalities if this passes, don’t do anything . . . no zoning, no ordinances.”<sup>15</sup>

### **III. Selected water-related state and local regulations that would be affected if Amendment 74 passes**

The purpose of this list is to help QQ members visualize the many impacts to water quality in Colorado and to use these examples in messaging around Amendment 74. This list is merely a selection of the many, many regulations that could be affected by the amendment. Because the amendment is so broad and not governed by the existing takings jurisprudence described above, these affects are only *possibilities*.

#### **a. Water Quality Control Commission (WQCC) regulations.**

- Amendment 74 would make it almost impossible to strengthen water quality standards, even if required by the U.S. Environmental Protection Agency, because property owners could file claims for compensation if additional treatment expenses to meet those standards reduced the value of their property.

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<sup>15</sup> Mark Jaffe, *Initiative 108 could blunt local land-use rules, officials warn*, Colorado Politics (August 1, 2018), <https://coloradopolitics.com/colorado-ballot-initiative-could-blunt-local-land-use-regulation/>, last accessed Sept. 11, 2018.

- Stormwater Construction Permits for stormwater discharged from any construction activity that disturbs at least one acre of land could impact the value of private property by making it more expensive to build, or requiring portions of the site to be left undeveloped, giving rise to claims for compensation.
- Any conditions of a 401 certification required to ensure that a water project achieves water quality standards could be seen as reducing the fair market value of the water rights or the associated real property.

**b. Administration of water rights.**

- If the implementation of existing laws and regulations were actions and not grandfathered and, instead, are subject to challenge under Amendment 74, then the State Engineer's enforcement of a "call" by a senior could be challenged by junior water rights holders claiming loss of value of their water right.
- As Anne Castle discussed with QQ at its April retreat, any efforts to shepherd water through Colorado to Lake Powell for "insurance" against a Colorado River compact call would require the State Engineer's assistance in shepherding the water. It's possible that, if the State authorized the bypass of water past a junior water right that otherwise would have been able to take water from the river, that water right holder could claim a reduction in the market value of her water right under Amendment 74.
- Similar to concerns around shepherding for Compact compliance, the State Engineer's role in ensuring environmental releases of water that are required to protect endangered species under the Programmatic Biological Opinion could be seen as causing a loss of fair market value of water rights.

**c. Local land use regulations.** Almost any land use regulation that does not allow the "highest and best use" of property could arguably diminish the value of private property and be subject to claims of loss of fair market value of property, including those regulations for water quality protection and to conserve water. Examples include:

- Development permit conditions to protect water quality
- Low impact development regulations that require clustering or restrict allowable impervious surfaces
- Zoning for open space, conservation, or other restrictions on use of land
- Stormwater runoff and erosion control regulations, especially when requiring additional infrastructure be completed on site at additional expense to the landowner or developer
- Regulations that require buffers, setbacks, open space, or similar development restrictions to protect streams and riparian areas
- Requiring new development to provide water rights
- Infrastructure improvements that create additional traffic, construction, noise, or disturbed views
- Best management practices and other limitations on mining or oil and gas development

- Terms or conditions on “1041” permits for water projects designed to mitigate impacts of reduced flows to the aquatic environment.

**d. Colorado Oil and Gas Conservation Commission Rules.** COGCC could face compensation claims for any rules that limit the use of mineral rights including those that protect public health and safety or forced pooling to ensure fairness amongst mineral rights owners.

**e. Mined Land Reclamation Permits.** The Mined Land Reclamation Board could face compensation claims for limitations imposed on the aerial extent of mining, water quantity and quality protections, or requirements that minerals to be left in the ground to prevent subsidence.

#### **IV. Conclusion**

The breadth of Amendment 74 is huge and would affect all aspects of state and local regulation. Water quality and planning for Colorado’s future water needs are just some of the ramifications of this amendment. It would negatively affect private property owners as well as all taxpayers who would bear the burden of mounting litigation. As opponents have said, if Amendment 74 were to pass it would make TABOR look like child’s play. QQ opposes Amendment 74 and urges members to help educate the public and other partners on this important issue.