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0248 An Analysis of 1980 Ballot Proposals

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Colorado **LEGISLATIVE COUNCIL,**
" **OF THE**
COLORADO GENERAL ASSEMBLY

AN ANALYSIS OF
" **1980 BALLOT PROPOSALS**

Research Publication No. 248
1980

COLORADO GENERAL ASSEMBLY

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LETTER OF TRANSMITTAL

August 7, 1980

This analysis of measures to be decided at the 1980 general election has been prepared by the Colorado Legislative Council as a public service to members of the General Assembly and to the general public pursuant to section 2-3-303, Colorado Revised Statutes 1973.

Four proposed constitutional amendments and two statutory measures are analyzed in this publication. The first four measures are proposed amendments to the constitution. Amendments 1 and 2 were referred by the General Assembly and amendments 3 and 4 are initiated measures. If approved by the voters, these four constitutional amendments could only be revised by a vote of the electors at a subsequent general election.

The statutory proposals, amendments 5 and 6, are both initiated measures. If approved by the voters, these items may be changed by the General Assembly. Initiated measures may be placed on the ballot by petition of the qualified electors. Initiated measures require the signature of not less than eight percent of the qualified electors.

The provisions of each proposal are set forth, with general comments on their application and effect. Careful attention has been given to arguments both for and against the various proposals in an effort to present both sides of each issue. While all arguments for and against the proposals may not have been included, major arguments have been set forth, so that each citizen may decide for himself the relative merits of each proposal.

It should be emphasized that the Legislative Council takes no position, pro or con, with respect to the merits of these proposals. In listing the ARGUMENTS FOR and the ARGUMENTS AGAINST, the council is merely putting forth the arguments commonly offered by proponents of each proposal. The quantity or quality of the FOR and AGAINST paragraphs listed for each proposal is not to be interpreted as an indication or inference of council sentiment.

Respectfully submitted,

/s/ Senator Fred Anderson
Chairman
Colorado Legislative Council

AMENDMENT NO. 1 — CONSTITUTIONAL AMENDMENT PROPOSED BY THE GENERAL ASSEMBLY

Ballot Title: An amendment to article V and XIX of the constitution of the state of Colorado, concerning the initiative and referendum process, and providing that an elector must be registered in order to sign a petition for an initiated or referred measure and that the proposed initiated measures shall be submitted to the legislative research and drafting offices of the general assembly for review and comment at a meeting open to the public before a ballot title is fixed.

Provisions of the Proposed Constitutional Amendment

The proposed amendment to the Colorado Constitution would:

— Require that any person signing a statewide or municipal initiative or referendum petition must be a "registered elector," that is, the signer must be registered to vote at the next general election. [Existing law requires that any person signing such a petition must be a "qualified elector" or a "legal voter," which are equivalent terms and refer to a person who is eligible to register to vote but need not be registered.]

— Change the number of signatures needed to propose an amendment to the state constitution or statutes by **initiative** from eight percent to five percent of the total votes cast for the Secretary of State at the previous election.

— Require that completed petitions proposing changes in the state constitution or statutes must be filed with the Secretary of State at least three months before the general election rather than four months before the general election.

— Require the legislative research and drafting offices to comment on the **original** drafts of all initiative measures at a meeting open to the public, but prohibit the General Assembly from establishing deadlines for the submission of an original draft of an initiative or requiring changes in any initiative proposed for submission to the voters.

— Add additional language providing that the form of petitions would be prescribed pursuant to law.

— Clarify that the General Assembly is prohibited from proposing amendments to more than six articles of the Colorado Constitution at any one general election.

— Eliminate conflicting language contained in Article XIX, Section 2, Colorado Constitution, requiring that proposed amendments to the Colorado Constitution submitted by the General Assembly be published in full in not more than one newspaper of general circulation in each county for four successive weeks prior to the election. [Another article of the constitution contains language requiring the publication of proposed constitutional amendments in two issues of two newspapers of opposite political faiths.]

Comments

The first power reserved to the people under Article V, Section 1, Colorado Constitution, is the initiative. Under the initiative provision, the qualified electors of Colorado may petition to place a proposed state law or state constitutional amendment before the voters at a general election.

The second power reserved to the people is the referendum, which involves two separate procedures: 1) the General Assembly **may** refer proposed changes in the statutes to a vote at a general election; and 2) the referendum also establishes a procedure whereby measures, or sections thereof, adopted by the General Assembly which are not necessary for immediate preservation of the public peace, health, and safety may be submitted to a vote at the polls upon petition. For all practical purposes, referendum by petition is obsolete because nearly all bills enacted by the General Assembly contain a "safety clause" stating that the measure is necessary for the immediate preservation of the public peace, health and safety. When a safety clause is utilized, the legislation is not subject to a referendum.

Presently, the Colorado Constitution requires that signers of initiative or referendum petitions be qualified electors or legal voters. Based on Colorado Supreme Court decisions, qualified elector and legal voter are equivalent terms. A qualified elector means every person who on the date of the next ensuing election has attained the age of eighteen years, is a citizen of the United States, and has resided in this state and a certain precinct thirty-two days immediately preceding the election. In order to vote in a general election, a qualified elector must first register with the county clerk. Briefly, registration includes affirming citizenship, residency, and signing the registration form. In sum, all legally registered electors are qualified electors, but not all qualified electors are registered electors.

In 1978, the number of registered electors in Colorado numbered 1,345,006, compared to an estimated 1.8 million qualified electors. Thus registered electors constitute a much smaller pool of potential signers of initiative measures. The amendment, however, would reduce the number of signatures needed for a statewide initiative from eight percent to five percent of the total votes cast for Secretary of State at the previous election. Based on 1978 data, about 62,200 signatures of qualified electors are needed on statewide initiative petitions — an estimated 3.4 percent of all **qualified** electors. The proposal would reduce the number of signatures required to about 38,800 — an estimated 2.9 percent of all **registered** electors. Although fewer persons would be eligible to sign petitions, the relative number of signatures required would be smaller.

The initiative and referendum are applicable to cities and towns, including home rule municipalities. The proposal would require that signatures of not more than 10 percent of the registered electors of a city or town would be needed for a referendum and not more than 15 percent for an initiative measure. Under current law these maximum signature requirements are applicable to qualified electors rather than registered electors.

Public hearing on initiative proposals. The proposed amendment would require that the **original** text of any proposed initiative must be submitted to the legislative research and drafting offices for review and comment. Both offices are agencies of the Colorado General Assembly. The review and comment by the two agencies would be presented to the proponents of an initiative at a meeting open to the public. The proponents could disregard any or all comments made by the legislative staff agencies and would **not** be required to amend, modify, or alter any measure prior to petition circulation and placement on the ballot.

The review and comment procedure proposed by the amendment would revise the current statutory procedure provided for proponents of statewide initiatives pursuant to section 1-40-101, *Colorado Revised Statutes of 1973*. Presently, comments made to proponents must be kept confidential until the time the ballot title is established. A purpose of the existing comment procedure is to assist the proponents of an initiative in developing technically

correct language that would achieve their objective if the measure were approved by the voters. Under the proposed amendment, the comment procedure would be designed to inform the public, as well as proponents, of the potential impact of the **original** draft of any proposed initiative.

Limitation on articles proposed for amendment by the General Assembly. While the people may initiate amendments to the Colorado Constitution under Article V, a separate article also authorizes the General Assembly to submit proposed constitutional amendments to the Colorado voters for their consideration. The Colorado Constitution currently provides that the General Assembly may not propose amendments to more than six articles of the constitution in any one session. The General Assembly is organized on a biennial or two-year basis, but convenes in regular sessions annually. The amendment would limit **each** General Assembly to proposing amendments to not more than six articles. In past general elections, the General Assembly has **not** offered amendments to more than six articles of the Colorado Constitution. As recently as the general elections in 1974, 1970, and 1954, the General Assembly did offer amendments to six articles. The Colorado Constitution contains 25 articles. The amendment would clarify the number of articles that the General Assembly could propose to amend at any one election, but it would **not** restrict the number of changes proposed for any six articles.

Popular Arguments For

1) The present procedure in which any qualified elector may be eligible to sign an initiative petition makes any challenge of the signatures on an initiative petition impractical because there is no official record of qualified electors. Without an inordinate expense of time and resources, it is impossible for a citizen, organization, or even the Secretary of State to actually determine the validity of the 62,200 signatures now required to place an initiative petition on the statewide ballot. The likelihood of fraud in the petition process would be greatly reduced by requiring the signatures of registered electors. If a question arises as to the authenticity or legality of the signatures gathered on any petition, verification could be easily made by comparing the signatures and residences on the petition with the names and residences of all registered electors as shown in the registration books of the county clerks and recorders.

2) The amendment would place greater responsibility on the part of those persons circulating petitions to determine whether the individual signing the petition is eligible to sign the petition. The proponents would have access to public records of registered electors and could ascertain the validity of their petitions prior to filing, thus reducing any possibility of challenge by those persons opposing the petition.

3) The amendment would reduce the number of signatures needed to place an initiative measure on the ballot and provide more time in the summer preceeding the election for the collection of signatures. For the 1980 general election, for example, sponsors of statewide initiative measures must obtain in excess of 62,000 signatures in order to place an initiative measure on the statewide ballot. If the proposed amendment were in effect, less than 39,000 signatures would be required. The amendment would also extend the date for collection of signatures by changing the final day for filing signatures from early July to early August. The increase in the number of days allowed for circulation of signatures at this time is important because voter interest increases with the proximity of the election. Furthermore, many initiative matters involve items considered by the General Assembly, and final legislative action for a given year may not be completed until June. Thus, more time would be allowed for proponents to determine whether a particular measure will be enacted into law by the General Assembly before attempting to initiate a measure.

4) The requirement that the review and comments of the legislative agencies be presented to the proponents of a proposed initiative at a meeting open to the public is a significant improvement over the current practice which provides for a confidential meeting with proponents. An open public meeting would help assure that all relevant questions and issues surrounding the proposals are raised at the proper time — before the circulation of the petition for signatures. At present, very little information is available to persons signing petitions other than that provided by sponsors and circulators of the petitions. Public disclosure from the beginning would enhance the likelihood of an informed electorate which is essential to a constructive initiative process.

Popular Arguments Against

1) The initiative and referendum are two fundamental exercises of political power provided by the state constitution. Any attempt to amend the initiative process should enhance rather than limit the ability of all adult citizens to petition for a change in the laws. The proposed amendment would mean that nearly 500,000 Coloradans, 18 years of age and older, would not be eligible to sign an initiative or referendum petition simply because they are not registered to vote. The current initiative and referendum process may encourage these individuals to participate in governmental decision making.

2) There is no need to tighten the integrity of the signature gathering process or initiated petitions. Every petition warns potential signers that it is a felony to sign a petition more than once or to sign a petition knowing that he or she is not a qualified elector. Each petition states the conditions that must be met to be a qualified elector. In those instances in which signatures of qualified electors are challenged, the courts may resolve the matter. Rather than ensure the integrity of petitions by requiring that signers be registered electors, the amendment would create uncertainty for both potential signers and circulators of petitions regarding whether an individual was a registered elector.

3) The amendment would require that original drafts of the text of initiated proposals must be submitted to legislative staff agencies for review and comment. Comments are to be rendered at a public hearing following full and timely notice. Substantial publicity probably would be given to a proposal at this time. However, the original draft of an initiative may be changed prior to the time the measure is circulated for signatures. Thus the information made available to the public at the proposed hearing may not reflect the actual language of the final petition or the language that would be considered by those signing petitions or voting on the measure at the general election. Giving publicity to the original draft language of a proposed measure would be unfair to initiative proponents, especially if significant revisions are made before a final draft measure is submitted for public consideration.

4) Colorado's initiative process has not resulted in an unreasonable number of statewide measures appearing on the ballot. During the 1970s, the total number of statewide initiated measures submitted to the people at each election was: 1970-zero; 1972-seven; 1974-four; 1976-six; and 1978-one. In considering these 18 proposals, the voters approved six and defeated 12. At the general election in November of 1980, only four statewide initiated measures will be considered. This would seem to indicate that the process has not been abused.

AMENDMENT NO. 2 — CONSTITUTIONAL AMENDMENT PROPOSED BY THE GENERAL ASSEMBLY

Ballot Title: An amendment to section 2 of article XVIII of the constitution of the state of Colorado, authorizing the establishment of a state-supervised lottery with the net proceeds, unless otherwise authorized by statute, allocated to the conservation trust fund of the state for distribution to municipalities and counties for park, recreation, and open space purposes.

Provisions of the Proposed Constitutional Amendment

The proposed amendment to the Colorado Constitution would permit the Colorado General Assembly to establish a "state-supervised lottery" after January 1, 1981. Proceeds from any state-supervised lottery, after deductions for prizes and expenses, would be allocated to the State Conservation Trust Fund for use by counties and municipalities for the acquisition, development, and maintenance of new conservation sites or for capital improvements for recreational purposes, unless the state legislature decides that the proceeds should be used for another purpose.

The proposal would eliminate the constitutionally established \$50 license fee for nonprofit bingo and raffles games and would direct the state legislature to establish a license fee. Other minor technical changes would be made to the Colorado Constitution to conform existing language with the proposed language regarding a state-supervised lottery.

Comments

At the 1976 general election, Colorado voters approved a statute referred by the Colorado General Assembly (H.B. 1080) which authorized a state agency to organize and administer a state sweepstakes program. The Colorado sweepstakes would have been a form of a lottery based on horse or dog races licensed by the Colorado Racing Commission. The act provided that net revenues from the sweepstakes would be deposited into the State Conservation Trust Fund for the purpose of assisting counties and municipalities in the acquisition, development, and maintenance of park and recreation areas.

In the 1977 session, the General Assembly rewrote the statute approved by the voters. The new act (H.B. 1596) transferred administration of sweepstakes races from the Racing Commission to the Department of Regulatory Agencies and provided for the appointment of a sweepstakes director. The revised law also provided that not more than ten percent of the gross proceeds from the sale of tickets was to be paid to licensed tracks for their expenses and purses awarded.

The actual implementation of the aforementioned legislation was hampered, in part, by the basic legal issue of whether the voter approved statute and subsequent revision thereof by the General Assembly was in conflict with the provisions of Article XVIII, Section 2, Colorado Constitution. This provision states, in part, that "The general assembly shall have no power to authorize lotteries for any purpose. . .". Both the General Assembly and the Governor requested the Colorado Supreme Court to rule on this matter.

The Colorado Supreme Court *In Re Interrogatories of the Governor Regarding the Sweep-*

stakes Races Act, 585 P.2d 595 (1978), found the Colorado sweepstakes legislation in conflict with Article XVIII, Section 2, Colorado Constitution. The opinion states, in part:

Article XVIII, Section 2, by its terms prohibits the General Assembly from authorizing lotteries. We think it clear that the framers of the Colorado Constitution intended that the legislative power of the state not be used to authorize lotteries whether or not that exercise of legislative power is ratified directly by the people through a referendum. . . .

When the framers adopted Article XVIII, Section 2, they extended its prohibitions to all existing legislative power. The constitutional draftsmen plainly intended that the power to conduct lotteries could be restored by constitutional amendment, but not by referendum. . . .

In this decision, the Colorado Supreme Court also ruled that three alternate approaches to implementing a sweepstakes would all fall under the definition of a lottery, thus contravening the constitutional prohibition against lotteries.

Following the court's decision, the General Assembly submitted this proposed constitutional amendment for consideration by the voters at the 1980 general election.

Since 1964, a total of fourteen states have enacted legislation providing for state-operated lotteries. Comparisons of lottery ticket sales in other states may give some indication of revenues that might be raised by a Colorado lottery. In eight states providing data on lottery revenues, gross ticket sales for fiscal years ending in 1979 were close to one billion dollars with net revenues in excess of \$400 million. For these states, per capita revenues for this period indicated that average gross ticket sales were in excess of \$20 per person and average net revenues approximated \$9.00 per person. However, the survey revealed a wide range in per capita net revenues. Two states — Illinois and Maine — reported less than \$3.00 per person in net revenues and Connecticut and Michigan reported more than \$13. Based on an **estimated** Colorado population of 2.7 million, the following amounts of money **might** be raised from various per capita net revenues.

Per Capita Net Revenue	Estimated Lottery Revenue Based on Population of 2.7 million
\$ 3.00	\$ 8.1 million
\$ 5.00	\$13.5 million
\$10.00	\$27.0 million

Popular Arguments For

1) A state sweepstakes was approved by Colorado voters at the general election in November of 1976. Implementation of the Colorado sweepstakes, one form of a lottery, was delayed on the basis of a legal technicality. If the proposal considered by the voters in 1976 had been submitted in the form of a constitutional amendment rather than a statute, then in all probability Colorado would have such a state lottery today. This proposal would resolve the legal issue by granting state constitutional authority to the General Assembly to establish a state-supervised lottery.

2) As early as 1974, the General Assembly recognized the need to establish a conservation trust fund to assist local communities in the development of park and recreation facilities. The program, however, has always lacked a viable revenue base. The last year that any appropriate

tion was made for this program was 1978. Only \$725,000 was authorized, and no funds were made available in the last two sessions. Concurrently, the energy crisis and inflation have increased demands for community based or neighborhood recreational activities. A state-supervised lottery would offer a unique opportunity for providing significant new revenues for a few specialized programs such as parks and recreation.

3) A state lottery provides an opportunity to raise revenue without the imposition of a direct tax. The purchase of a lottery ticket is voluntary and net revenues would accrue for the benefit of the general public. The proposed amendment is flexible in that the state's elected officials would be able to repeal any lottery program established pursuant to this amendment if such lottery was determined to be undesirable. Also, any subsequent legislation could be revised by the state legislature to correct any abuses or to allocate lottery revenues for public purposes that were deemed to be a higher priority or a more critical need.

4) The U.S. Congress created a commission on gambling in the early 1970's. In its final report to Congress in 1976, the commission found that 75 percent of the persons living in states with state-operated lotteries favored legalization of lotteries. This is a strong indication of public support and reflects a positive public attitude with regard to the management and operation of state lotteries. The percentage of persons supporting legalization of lotteries in such states was much higher than the number of persons who actually purchased lottery tickets. Those persons in Colorado wishing to purchase lottery tickets should be afforded the legal means to participate in such activities.

Popular Arguments Against

1) The proposed amendment is substantially different from the proposal regarding sweepstakes that was approved by the Colorado voters in 1976. The 1976 sweepstakes proposal was a statutory measure that would have authorized a state agency to operate a sweepstakes. The current proposal is a constitutional amendment that would permit the General Assembly to authorize any type of lottery, including the development of so-called "instant games," numbers, and other forms of repetitive gambling. In all states with legal state lotteries, the games are state operated. The proposal does not mandate that the games be state operated. This could mean that private individuals and businesses licensed by the state might be permitted to conduct lotteries in Colorado. The proposed amendment would open the door for those persons associated with the gambling industry to exert pressure on elected officials to expand the gambling activities.

2) In lottery states, a very small percentage of total state revenue, between one and two percent, is raised from lotteries. Not only is this form of gambling a poor way to raise money for public projects, it is also inefficient and expensive. All the lottery states have found that constant revision of the lottery format is needed to hold the public interest. This means that a portion of gross revenue must be used for promotional and administrative expenses. There are no restrictions in the proposal on the amount of money that may be used for advertising, operators' expenses, commissions, etc.

3) A number of Coloradoans believe that gambling in any form is wrong on both religious and secular grounds. Gambling simply drains earnings, savings, and resources of a community for an activity that serves no real need. Thus, gambling weakens the moral fiber of the individual and lowers the ethical standards of the community. Government should not be in the business of publicizing and promoting an activity that rewards according to "chance" rather than on constructive, creative human activity. The amendment would authorize a public policy that is contrary to the ethical views of many Coloradoans.

4) The Colorado Constitution currently authorizes the conduct of bingo games and raffles by nonprofit organizations (religious, charitable, labor, fraternal, education, and veterans organizations and volunteer fire departments). The proceeds from these activities are used for various kinds of public benefit programs. The "jar raffles" which are very similar to lottery games operated by other states netted about \$4.8 million in net revenues for support of nonprofit organizations in Colorado in 1979. The citizens of Colorado have only a certain finite amount of discretionary income available for participation in charitable raffles and lotteries, and the authorization of any new state lottery would provide competition for these nonprofit programs and could lessen their effectiveness.

5) Lotteries in the various states with legal games are placing increased reliance on the so-called "instant games" where the purchaser can assess the results immediately. The effect has been a growth in the repetitive purchase of lottery tickets. This proposal could mean the development of instant games in Colorado, or a public policy in Colorado that fosters a very regressive form of gambling which could have its greatest impact on low income groups. Since the total amount of money paid in prizes in state lotteries is much smaller than the total payouts in other forms of gambling, any lottery which encourages frequent participation would be contrary to the general welfare.

AMENDMENT NO. 3 — CONSTITUTIONAL AMENDMENT INITIATED BY PETITION

Ballot Title: Shall article II of the constitution of the state of Colorado be amended to provide that an unincorporated area may be annexed to a municipality only if the annexation has been approved by a majority vote of the landowners and the registered electors in such area who vote on the question, or if the annexing municipality has received a petition for annexation signed by persons comprising more than fifty percent of the landowners in such area and owning more than fifty percent of such area, or if such area is entirely surrounded by or is solely owned by the annexing municipality; and providing that this section does not apply to the city and county of Denver to the extent that annexations thereto are governed by other provisions of the state constitution?

Provisions of the Proposed Constitutional Amendment

The proposed amendment to the Colorado Constitution would require that one of the following conditions would have to be met before an unincorporated area could be annexed to a municipality:

— the question of annexation has been submitted to a vote of the landowners and registered electors of the area to be annexed, and the majority of such persons voting have voted for annexation; or

— the annexing municipality has received a petition for annexation signed by more than fifty percent of the landowners in the area who own more than fifty percent of the land; or

— the area to be annexed is entirely surrounded by or is solely owned by the annexing municipality.

The amendment would not apply to annexations of the City and County of Denver to the extent such annexations are governed by other provisions of the Colorado Constitution. The General Assembly could adopt procedures for the implementation of the amendment.

Comments

The proposed amendment does not define the term "landowner" as it is used in either the petition or electoral process. Current statutes distinguish voting and petitioning rights of various classes of landowners, including surface landowners, corporate landowners, owners of mineral rights, and alien landowners. Under the provisions of this constitutional amendment, it is unclear whether such statutory provisions would apply with respect to such landowners.

Municipal annexation laws were in effect before the turn of the century. The early annexation laws generally conditioned annexations on approval by a municipality. For example, annexations were authorized by a vote of the residents of a municipality, by three-fourths of the membership of the governing body of a municipality, or by petition to the

county court to determine whether justice and equity required annexation. Annexation was later conditioned (1913) on the written consent of the landowners of tracts larger than four and one-half acres.

1902. The formation of the City and County of Denver at the turn of the century occurred with the approval of Article XX of the Colorado Constitution. Article XX subsequently proved to have considerable influence on the history of annexations in Colorado because the article originally provided that the general annexations laws of the state applied to Denver as a municipality and also provided that the boundaries of Denver School District No. 1 would be coterminous with the city and county boundaries. Any change in Denver's boundaries through annexation also meant a change in the county and school district lines. This situation was unique to the City and County of Denver and has never been applicable to other cities and towns in Colorado.

1945. The statutory annexation laws were revised in 1945 and made more restrictive. Chapter 243, *Session Laws of Colorado 1945*, provided that municipal annexation of contiguous land could only be initiated by the owners of at least two-thirds of the area to be annexed. For land to be contiguous, one-sixth of the area proposed to be annexed was required to be in common with the boundary of the municipality. If the municipal governing body approved a planned annexation, it was then necessary to submit the question to an election of the landowners within the territory to be annexed. In 1947 unilateral annexation of enclaves was permitted if the territory had been surrounded by the municipality for a period of 20 years.

1965. Pursuant to the recommendations of the Governor's Local Affairs Study Commission, the General Assembly enacted the "Municipal Annexation Act of 1965." The act permits municipalities to unilaterally annex the following areas: 1) enclaves; 2) any area with more than two-thirds boundary contiguity with the municipality for at least three years; and 3) municipally owned land with one-sixth boundary contiguity with the municipality. Reciprocal provisions of the act require a municipality to annex unincorporated enclaves and areas with two-thirds boundary contiguity upon petition of the landowners in such areas. The 1965 act set forth new criteria and standards designed to reflect the commonality of areas proposed for annexation with a municipality. Such factors as community of interest, urbanization, practicality of extending municipal services to the area, employment, use of municipal facilities by residents of the area proposed for annexation, and whether the land was to be utilized for agricultural purposes were to be considered by the governing body of the municipality.

Except for the three classes of land enumerated in the preceding paragraph, the 1965 act provides that areas with one-sixth boundary contiguity with a municipality may be annexed by said municipality pursuant to an election of the landowners of the area to be annexed. If the landowners of more than fifty percent of such an area petition a municipality for annexation, and a counter petition requesting an election is not filed, then the area may be annexed without an election. These basic provisions of the 1965 act are the law today.

1974. Two amendments concerning annexations were added to the Colorado Constitution in 1974. Both amendments placed limitations on annexations by the City and County of Denver. Basically, the amendments: 1) require that annexations by the City and County of Denver must be approved by a boundary control commission; 2) require that changes in Denver's boundaries be governed by laws applicable to counties rather than municipalities; and 3) permit the General Assembly to revise procedures for changing county boundaries. These amendments would not be changed by this proposal.

1979. Legislation similar in intent to the proposed amendment was passed in the 1979 session of the Colorado General Assembly. This bill was vetoed by the Governor, and the Governor's veto was sustained. H.B. 1232 would have provided that annexations of unincorporated areas with two-thirds boundary contiguity to a municipality would be conditioned on a petition signed by more than fifty percent of the landowners of the area proposed to be

annexed or by election of the qualified electors and eligible landowners. H. B. 1232 would not have been generally applicable to all annexation proceedings.

Popular Arguments For

- 1) It is now possible for municipalities to annex unincorporated areas with two-thirds boundary contiguity without the consent of the residents or landowners of the area proposed for annexation. With the exception of enclaves, the amendment would assure that annexations would be by petition of a majority of persons owning a majority of the land, or by popular vote of landowners and registered electors in the area to be annexed. The present system of unilateral annexation by the governing body of a municipality — in which the residents of certain areas proposed to be annexed have no representation in the decision of government — is contrary to our democratic principles of representative government.
- 2) Except where a majority of persons owning a majority of the land in the area have petitioned for annexation, the proposed amendment would allow all registered electors to vote at an annexation election. This simply means that qualified electors who are residents of the area involved in the annexation but who are **not** landowners would be able to vote. Renters have a financial stake in an annexation. A change in the level of property taxes paid by the landlord affects the renter. A renter may also be directly responsible for charges for water and other municipal services.
- 3) The residents and landowners of an area are in the best position to determine whether an annexation would be desirable or whether more government is needed. Many residents of unincorporated areas are adequately served by county and special district government. Another layer of government would simply impose costs on these people without any guarantee of additional services. Annexation does not reduce the debt service incurred by an unincorporated area for water and sewer systems. It does mean, however, that such areas will be responsible for both existing special district debt and similar capital expenses incurred by the municipality prior to annexation.
- 4) Under the present law, municipalities are encouraged to develop so-called "finger" annexations into unincorporated areas on either side of an urbanized unincorporated area that may have resisted annexation. The finger annexations may permit a developer or other large landowners to achieve a change of zoning or obtain essential water and sewer services. Although the extension of city services to such areas may not be economical or practical, such finger annexations may eventually permit the municipality to achieve two-thirds boundary contiguity with the area that has resisted annexation. Two-thirds contiguity permits unilateral annexation by a municipality. Thus the annexation decisions made by a few large landowners may subject a whole urbanized area to annexation by a city. The proposal would help ensure that annexations must be based on consent, thus tending to discourage uneconomical finger annexations which raise the cost of government for municipal residents. The present energy crisis suggests that municipalities should do more to concentrate growth within existing boundaries rather than encourage uneconomical finger annexations.
- 5) The "Municipal Annexation Act of 1965" was devised during a period when the General Assembly was concerned with the logical provision and extension of municipal-type services to rapidly growing urban fringe areas. Perhaps this legislation was based on the theory that economy in government could be achieved by expansion of the boundaries of existing municipalities and limiting the growth in new units of government. There are indications, however, that for many larger governmental units the per capita costs of governmental

services tend to be higher and government less responsive to neighborhood needs than smaller entities. In 1979, the majority of the members of the General Assembly approved legislation to limit unilateral annexation by municipal governments. This proposal would help ensure that expansion of municipal boundaries has the general support of areas proposed for annexation.

Popular Arguments Against

1) The amendment would require the approval of a majority of the landowners owning a majority of the land or an election of landowners and residents of any area proposed for an annexation. This proposal for self determination, however, does not address the voting rights of residents of the municipality who are equally affected by annexation decisions. Municipal residents may now vote on annexation matters only if an annexation ordinance is submitted to them under the initiative or referendum process. The rights of landowners and residents in fringe areas adjacent to municipalities should be equal to, but not greater than, those rights provided for municipal residents. Municipal residents should have equal constitutional voting and petition rights in matters involving the extension of municipal services to unincorporated areas.

2) The amendment addresses only one side of complex economic and governmental issues relating to the provision of governmental services to rapidly expanding urbanized areas. The amendment places restraints on a carefully formulated annexation policy adopted by the Colorado General Assembly and fails to adequately address the overall question of how governmental services are to be provided to fringe areas. For example, a home built in a low density area may be able to function with a septic tank. As density increases, septic tanks no longer can handle the problem. Private wells provide high quality water in semi-rural areas. With increases in density, the water table may drop, sewage effluent becomes a problem, and the ground water may become unsafe. As urbanization takes place, water, sewer, fire, police, street maintenance, park and recreation, and other services must be provided by some governmental unit or units. Restrictive annexation laws (such as proposed by this amendment) tend to encourage the formation of special districts, involvement of county government in the provision of urban services, and the incorporation of new cities and towns adjacent to existing municipalities. Fragmentation of local governments prevents compatible development of an urbanized area and ultimately means higher cost of government for everyone. Opportunities for achieving economies of scale are lost. It would be unwise to place limitations in the constitution that would restrict the capacity of the General Assembly to balance all of the diverse elements involved in urban growth.

3) The major thrust of this amendment would be to remove provisions of existing statutory law that allow a municipality to annex certain areas that actually extend into the municipality as peninsulas. For all intents and purposes, these peninsulas are part of the economic entity that is the basis of the municipality. The residents of such areas often depend on the municipality for their livelihood, various services, and amenities of urban living, but do not pay municipal property taxes. Fringe area residents have a fundamental responsibility to the social and economic community of which they are a part and should not be given carte blanche authority to remain a tax free peninsula without responsibility to the total community. Even the proponents of the amendment recognize that enclaves within a municipality should not be free from annexation, and the amendment specifically excludes enclaves from the limitations imposed by the amendment.

4) Most annexations in Colorado are voluntary, involving petition by the landowners. The amendment may make it more difficult to implement voluntary annexations because a

majority of landowners, rather than those owning a majority of the land, would have to petition for annexation. At present, municipal services often are extended to unincorporated areas pursuant to agreements with the landowners and developers giving their consent to annexation at a later date. The amendment would tend to "cloud" such agreements because of the requirement that persons other than landowners would participate in the decision with regard to annexation. Municipalities may be less willing to annex an area at the request of a developer or other landowners when there is little assurance that adjacent areas could be annexed. If services cannot be provided within a compact area, the cost of extension of municipal services may be unreasonable. The ultimate effect of the amendment may be to discourage the extension of municipal services to newly developing areas because the amendment would make the overall economic growth and expansion of a municipality much more difficult. Thus the amendment could have a negative impact on land values on the fringes of some municipalities and reduce the economic viability of both the incorporated and unincorporated areas.

5) For enclaves and areas with two-thirds boundary contiguity with a municipality, the present annexation law contains a carefully constructed compromise between the needs of landowners of the unincorporated area and the municipality. For any such area that would be an asset to a municipality or attractive for annexation, the municipality may utilize unilateral annexation power. If such an area would place a drain on city resources or require considerable upgrading in urban services, the landowners of the area can still force the annexation by petition. The amendment destroys this tradeoff by removing the unilateral annexation authority of the city but does not give the municipality the right to refuse to accept an annexation petition by the landowners of such an unincorporated area.

6) The issue of annexation is extremely complex involving a variety of urban issues and affecting residential and commercial construction and related business activity; patterns of employment; transportation facilities and services; the character of neighborhoods; zoning; availability of water, sewer, and other governmental services; the formation and expansion of special districts and new municipal governments; the expansion of existing municipal governments; and other related issues. The "Municipal Annexation Act of 1965" was designed to recognize and balance some of the conflicting aspects involved in annexations. This law is subject to revision by the General Assembly in each legislative session. The proposed constitutional amendment, however, addresses only one aspect of the annexation issue and would restrict the capacity of the General Assembly to balance these issues with changing conditions. The amendment is silent as to the definition of "landowner." Since the meaning of landowner is unclear, the initiative and voting rights of landowners may not be restricted only to Colorado and United States residents or persons 18 years of age and older. Furthermore, a question exists as to whether owners of mineral rights could exercise franchise in annexation matters.

AMENDMENT NO. 4 — CONSTITUTIONAL AMENDMENT INITIATED BY PETITION

Ballot Title: Shall article XVIII of the constitution of the state of Colorado be amended to provide that in order that all persons shall have the right to sell or transfer their real estate or any interest therein subject to existing financing, no person or lending institution with a security interest in the real estate shall accelerate or mature the indebtedness secured by such real estate or alter the terms and conditions of the indebtedness or security interest because of such sale or transfer, so long as the original debtor remains directly responsible for the indebtedness and the security for the indebtedness is not substantially impaired by the sale or transfer?

Provisions of the Proposed Constitutional Amendment

The proposed amendment to the Colorado Constitution contains language unique to real estate transactions. For this reason, the text of the amendment is reproduced in its entirety:

In order that all persons shall have the right to freely sell or transfer their real estate or any interest therein **subject to existing financing**, no person or lending institution with a security interest in real estate shall directly or indirectly accelerate or mature the indebtedness secured by such real estate or alter the terms and conditions of the indebtedness or security interest on account of the sale or transfer of such real estate or any interest therein, **so long as the original debtor remains directly responsible for the indebtedness** and the security for the indebtedness is not substantially impaired by the sale or transfer.

This section of the Constitution shall be in all respects self-executing. (Emphasis added.)

Comments

Prior to the 1970's, it was a common practice for the purchaser of real estate to assume any loan secured by the property. Mortgage assumptions at the time of transfer of real estate were routine and a convenience to the lender, the original borrower, and the purchaser of the property. In recent years, however, lenders have been invoking a so-called "due-on-sale" clause. Many residential mortgage contracts, for example, utilize a uniform mortgage instrument developed jointly by the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association. These loan instruments contain a due-on-sale clause allowing the lenders the option to "call the loan" or require the unpaid balance of a loan to be entirely paid off in the event that the property securing the loan is sold or transferred.

Theoretically, the due-on-sale clause protects the security of the lender. The due-on-sale clause is intended to permit the lender to determine: 1) whether the purchaser is financially capable of making payments on the outstanding loan; and 2) whether the purchaser is capable of maintaining and preserving the value of the property. Recently, however, the due-on-sale clause has been used by some lenders for the sole purpose of renegotiating interest rates

when the property securing the mortgage is sold or transferred. This practice has been encouraged by the difference in rates of interest received from older loans as opposed to current interest rates on new loans.

Enforcement of due-on-sale clauses has been challenged in court in a number of jurisdictions as an unreasonable restraint on the alienation (sale or transfer) of property, and there have been conflicting decisions rendered by various state courts. In *Malouff v. Midland Federal*, 181 Colo. 294, 509 P.2d 1240 (1973), the Colorado Supreme Court ruled on a due-on-sale issue. The *Malouff* case involved a buyer who **assumed** an existing mortgage.

The doctrine of restraints on the alienation of property is a part of the law of Colorado, according to the *Malouff* opinion. This means that public policy requires property interest to be freely transferable and that restrictions which withdraw property from the stream of commerce are invalid if they are found to be unreasonable. In *Malouff*, the Colorado Supreme Court subscribed to the view that a restraint on alienation may or may not be invalid depending upon the reasonableness of the restraint.

The court upheld the use of a due-on-sale clause as a reasonable restraint where the assumption of a loan was conditioned upon an increase in interest rates. In part, the opinion stated: "We do not consider the motive of [the lender] in seeking to protect itself and the borrower from the effects of inflationary or deflationary conditions in the money market to be improper or unlawful. Both parties have the benefit of their original bargain during their continued creditor-debtor relationship. However, when the property is sold to a purchaser who desires to assume the existing loan, economic consideration may reasonably justify the lender in raising the interest rate to or approaching one equal to the current market rate and the operative effect of the clause does not therefore constitute an invalid restraint on alienation."

Present statute. In 1975, following the *Malouff* decision, the Colorado General Assembly adopted legislation limiting the use of the due-on-sale clause. This statute, section 38-30-165, C.R.S. 1973, prohibits any person from:

1) directly or indirectly "... Accelerat[ing] or matur[ing] the indebtedness secured by such real estate on account of the sale or transfer of such real estate or on account of the assumption of such indebtedness; . . ." except this shall not apply if the lender "reasonably determines" that the purchaser is financially incapable of retiring the indebtedness; and

2) "... Inceas[ing] the interest rate more than one percent per annum above the existing interest rate of the indebtedness or otherwise modify, . . . the terms and conditions of the indebtedness secured by such real estate. . . ."

The proposed amendment and section 38-30-165, C.R.S. 1973, have similar objectives in that both contain language to prohibit the lender from requiring payment of a real estate loan because of the sale or transfer of the property. Differences exist between language in the current law and the language proposed in the amendment. These differences are involved in discussions of the applicability of the amendment.

The amendment's prohibition on acceleration or maturation of an indebtedness would apply to transactions where (1) "the original debtor remains directly responsible for the indebtedness" and (2) "the security for the indebtedness is not substantially impaired." Thus a "pure" assumption (as was involved in the *Malouff* case), where the seller-original debtor is completely released from any further obligation to pay, would not be affected by the amendment.

In some types of assumptions, the seller-original debtor becomes a type of guarantor for the indebtedness. In this kind of assumption, the agreement might provide that the buyer becomes **primarily** liable for the indebtedness but that the seller-original debtor could be held liable under specified circumstances if the buyer defaults on loan payments. It is not clear

whether this arrangement makes the seller-original debtor "directly responsible" for paying the indebtedness.

Other transfers to which the amendment would apply are those in which the sale documents specify that the transfer is made "subject to" existing financing. The significance of the phrase "subject to" is that the seller-original debtor would continue to be primarily liable for the indebtedness, in spite of the fact that he has transferred the property to the buyer. "Subject to" transactions have become increasingly popular in recent years due to the rapid inflation in interest rates which has increased the cost of new real estate loans making it more difficult to sell real estate. Some forms of these transactions are wraparound financing, all-inclusive deeds of trust, overriding deeds of trust, installment land contracts, and contracts for deed. Often the lender involved in the original mortgage is not consulted at the time the seller-original debtor transfers the property.

Although it has been standard practice for the lender to determine whether the buyer is financially qualified to assume a loan (and the current Colorado statute specifically authorizes this practice when an assumption is involved), the amendment expressly permits lenders to accelerate or mature the indebtedness only when the security — the value of the property itself — is substantially impaired. Thus lenders in transactions to which the amendment applies would be dependent on the property itself and on the continuing responsibility of the original debtor to satisfy the debt.

The Federal Home Loan Bank Board has promulgated regulations authorizing the federal savings and loan associations to include in contracts with borrowers a due-on-sale clause. The clause could be waived at the time of sale of the property provided the purchaser's credit is satisfactory and the interest rate on the loan is agreed to by the respective savings and loan association (12 C.F.R. Section 545. 8-3 (1979)).

Federal preemption. There are court rulings in other jurisdictions which have supported the concept that the Federal Home Loan Bank Board has exclusive authority to regulate federal savings and loan associations thus preempting state regulations. On this basis, federally chartered institutions in Colorado have increased the interest rates in excess of the state statutory limitation. This matter was brought before the District Court of Colorado in Civil Action No. 79-CV-4680. Denver District Court Judge James C. Flannigan ruled on June 18, 1980, that federal regulations promulgated by the Federal Home Loan Bank Board preempt the provisions of section 38-30-165, C. R. S. 1973, with respect to federally chartered institutions. This ruling is being appealed. There are court decisions in other jurisdictions that indicate that federal preemption is not total and federal rules would not supersede state laws in this matter. Since the proposed amendment and section 38-30-165 have similar objectives, the appeal of Judge Flannigan's ruling would be important in determining the applicability of the amendment to federally chartered institutions. Finally, the fact that the proposal would amend the state constitution rather than the state statutes has little bearing on the issue of federal preemption.

When legislation was adopted by the General Assembly in 1975, limiting the use of the due-on-sale clause, specific language was added to the statutes providing that the legislation was intended to apply to real estate loans executed after the effective date of the act. The proposed amendment does not contain such language. Thus it is not clear whether the proposal would apply to existing real estate mortgages, or only to loans made after the effective date of the amendment.

Popular Arguments For

1) A fundamental principle of our democratic system is the right to own and dispose of property. The amendment would help ensure the continuation of this fundamental right of

alienation of property. Many property owners are unaware that their mortgage contracts contain a clause commonly referred to as a due-on-sale clause. This clause is utilized by lenders to increase the interest rates on a real estate loan at the time the property is transferred.

The current high interest rates often make it extremely difficult for potential buyers of property to qualify for new real estate loans. Under present economic circumstances, if a property owner cannot offer an opportunity for the buyer to base his financing on an existing mortgage, the property owner may not be able to sell his property. The amendment is designed to ensure that a lender could not disrupt the sale of property in those instances in which the original borrower remains responsible for the outstanding indebtedness and the security of the lender is not impaired.

2) Current high interest rates mean that fewer and fewer persons can qualify for a real estate loan. Financial measures are needed to permit young families to purchase a home and to protect the value of property that many existing homeowners have acquired over a period of years. Property owners are finding it to their financial advantage both for tax reasons and as a long-term investment to help the purchaser with financial arrangements by entering into some form of wraparound financing, such as land installment contracts. Federal tax laws make specific provision to permit property owners to utilize land installment contracts.

Alternatives to existing institutional financing are needed to stimulate real estate finance. The amendment would encourage competition in capital formation at a time when the development of investment funds is particularly important for a high growth, capital short area such as Colorado.

3) The owner of real property has concomitant responsibilities for the payment of any debt incurred in the purchase of the property, as well as the obligation to protect the security interest of the lender by preserving the property in a fit condition. The amendment specifically addresses the continuing responsibility of the property owner for any original debt incurred by him and does not prohibit the acceleration of a real estate loan when the security of the lender is impaired.

For a lender to accelerate a loan when his security interest remains unimpaired is unreasonable, particularly when the lender invokes an early payment penalty. Why should the homeowner who is fortunate enough to remain in his property benefit from a fixed interest rate while those property owners who are forced to dispose of their property lose part or all of their equity because of an acceleration clause? The amendment would help eliminate this unfair and unequal treatment accorded different classes of property owners.

4) Limitations on the acceleration of real estate loans because of the sale or transfer of property have been supported by policies of some federal agencies, the Colorado General Assembly, and by judicial and legislative policies and decisions in other states. Both the Veterans Administration and the Federal Housing Administration prohibit the acceleration of VA and FHA loans simply because of the sale or transfer of the property. The Federal National Mortgage Association, a governmentally sponsored but privately owned corporation which purchased \$592,000,000 in loans in Colorado in 1979, permits the inclusion of a due-on-sale clause in its uniform mortgage instrument; however, under present policies this clause is not enforced by the Federal National Mortgage Association. Thus there is general support and recognition of the inequities involved in changing the conditions of a loan simply because of the sale or transfer of the property. The provisions of this amendment are in substantial conformity with the aforementioned policies.

Popular Arguments Against

1) A major concern of mortgage lenders is the ability of the borrower to fulfill the conditions of the loan. For all loans, the concern is primarily whether the borrower can make the payments or not. For loans on business properties, the borrower's ability to make the payments plus the management skills necessary to operate the particular type of business property are important. The amendment would not allow a lender to protect these legitimate concerns. It simply is not sound business practice for a mortgage lender to allow a subsequent buyer — with whom the lender has no contractual or other relationship — to take possession of the property without qualification of the subsequent buyer. The requirement that the original borrower would remain liable for repaying the loan does not necessarily protect the lender, especially if the original borrower is an individual who cannot later be located or a corporation that later ceases to exist.

2) The amendment could jeopardize the flow of mortgage money into Colorado. Colorado is a capital-short state, which means that the state does not generate enough savings deposits to keep pace with the demands for loans. Mortgage funds from outside of Colorado are needed to house an expanding population and for the commercial and industrial development necessary to service and support the economy.

Lenders in Colorado are able to sell mortgages to investors in capital surplus states and to various federal and quasi-governmental agencies through the so-called "secondary market." These investors bring needed money into the state which Colorado lenders can use to make new loans. Without the capacity to sell mortgages to investors in other states, lenders could only depend on increased savings deposits and the retirement of existing loans in order to make funds available for new mortgages. In order to facilitate the sale of mortgages, standard mortgage documents are utilized which contain a due-on-sale provision. The proposed amendment would not specifically allow for credit reviews of persons purchasing property for property transfers to which the amendment would apply. Credit underwriting is a standard mortgage lending practice.

Since 1977, the Federal Home Loan Mortgage Corporation has purchased over \$685 million in mortgages in Colorado. The Federal Home Loan Mortgage Corporation as a secondary mortgage market corporation has not provided capital, through the purchase of residential mortgage loans, in those states where state law restricts the lender from reviewing the credit of transferees and accelerating the loan if the credit is found unsatisfactory. This amendment could tend to increase the risk associated with the purchase of Colorado real estate mortgages. Investors could view Colorado real estate loans as less attractive than the loans on properties in other states.

3) The amendment would not have general applicability to all real estate transactions in which there is an existing mortgage on the property. The amendment would not apply to a real estate transaction in which the purchaser assumes the loan and the original debtor is released from liability.

A major question raised by the amendment is whether it would be applicable to existing mortgage contracts which contain a due-on-sale provision. Article 1, Section 10, United States Constitution, prohibits any state from passing a "... law impairing the obligation of contracts," For example, when the General Assembly considered legislation in 1975, relating to the applicability of due-on-sale clauses, consideration was given to the impairment of contracts clause. As a result, the current statutory law relating to due-on-sale clauses was made applicable to those loans entered into after the effective date of the act.

Finally, it is doubtful whether the amendment would be applicable to federally chartered savings and loan institutions. Federal courts have held that federal savings and loan associa-

tions are governed exclusively by federal law and state statutes are not applicable. Denver District Judge James C. Flannigan ruled on June 18, 1980, that section 38-30-165, C.R.S. 1973, relating to due-on-sale clauses was preempted by federal regulation with respect to federally chartered savings and loan associations.

4) The amendment would have an adverse impact on savers, first-time home buyers, potential new home buyers, and the housing and construction industry. Commercial lenders who are in the business of providing long term loans through 20 to 30-year mortgage contracts are in a cost/price squeeze because of inflation. The commercial lender must have sufficient income from outstanding loans to pay interest on deposits and to provide funds for new loans. Interest received from below market loans is not sufficient to pay a return that will attract depositors during high inflationary periods, and old loans do not produce enough capital to service new construction at levels comparable to that supported from the original loans. This problem can be minimized if lenders are permitted to renegotiate loans at the time of sale or transfer of property.

Statistics have clearly demonstrated that mobility in our society means that the ownership of most properties will change every seven or eight years. Lenders have based their estimated costs of long-term loans on such data and on contractual arrangements that permit renegotiation of loans at the time of transfer. Thus lenders are able to reduce the impact of below market loans through renegotiation of interest rates at the time of sale of the property. Without this opportunity, lenders will have to balance their portfolios by a substantial increase in interest charges for loans for those persons buying new properties or requiring a second or third mortgage. Thus the economic burden imposed by the amendment would fall on younger families with fewer resources. The end result of any further limitation on due-on-sale clauses might be to drive interest rates higher, force more buyers out of the real estate market, and further depress the housing and construction industries.

5) An amendment to the Colorado Constitution is difficult to change. This amendment could have a significant impact on real estate finance in Colorado, but at this time no one can forecast its ultimate effects with accuracy. The sponsors could have initiated this proposal as a statute which, if later proven to be detrimental, could be modified by the General Assembly. The constitution, however, can only be changed every two years, and then only by the voters. It does not make sense to place such a complex issue in the Colorado Constitution, especially when the amendment is so likely to be the subject of litigation.

AMENDMENT NO. 5 — PROPOSED STATUTE INITIATED BY PETITION

Ballot Title: Shall any bank, beginning July 1, 1981, be permitted to establish one or more branch banking facilities separate from the principal office of the bank anywhere in the state if the banking board determines that the proposed branch will serve the public need and convenience in the community or area to be served, all administrative costs of filing and processing an application for a branch to be paid by the applicant bank?

Provisions of the Proposed Statute

The proposed amendment to the Colorado Revised Statutes would:

- have the effect of allowing commercial banks to request approval from respective federal and state regulatory agencies to establish one or more branches;

- base the authorization of a branch bank on a determination of "public need and convenience";

- charge the Colorado Banking Board with establishing rules and regulations for procedures for processing any application for a branch of a state chartered bank;

- provide that administrative costs for filing and processing an application for a branch of a state chartered bank be paid by the applicant bank; and

- permit branching after July 1, 1981.

A "branch" is defined by the amendment to mean a bank facility separate from the principal office of the bank, at which customer services and other banking activities are conducted.

Comments

Current state law prohibits branch banking. There is some public confusion on this issue, however, because of the common names and symbols used by banks affiliated with a bank holding company, the establishment of detached facilities, and the operation of branch facilities by savings and loan associations. In multi-bank counties, a detached facility usually is designed to permit drive-in banking and must be located within 3,000 feet of the bank. In a single bank county, the bank may operate one detached facility in a community separate from the home banks. If a county does not have a chartered bank, one detached facility may be located in the county by a bank chartered in an adjacent county. Services at such facilities are restricted and largely involve receiving deposits and cashing checks.

Although the language of the amendment refers to "any bank," the amendment actually applies to commercial banks only and does not apply to industrial banks because of the statutory definition of a bank.

The chartering, supervision, and examination of commercial banks in the United States is a responsibility of both the federal and state governments. In order to establish a commercial bank in Colorado, permission must be obtained from either the Colorado Banking Board or the federal government. Currently, there are 315 commercial banks in Colorado — 140 are national banks chartered by the federal government and 175 are state chartered banks. Under the terms of the amendment, state chartered banks would file an application with the Colorado Banking Board for permission to establish a branch bank. Although the amendment would have the effect of authorizing Colorado banks which are federally chartered to open branch offices in Colorado, the federal Comptroller of the Currency would actually approve all branch applications by national banks. Specifically, Congress has provided that:

A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: . . . at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to state banks by the statute law of the State . . . and subject to the restrictions as to location imposed by the law of the State on state banks. . . .

(12 USCS 36)

State statutes. Generally, the Great Plains states tend to have the most restrictive laws on branch banking. With the exception of West Virginia, the 12 states prohibiting branching either border or are in the Great Plains — Colorado, Illinois, Kansas, Minnesota, Missouri, Montana, Nebraska, North Dakota, Oklahoma, Texas, Wyoming. The far western states, including Alaska and Hawaii permit statewide branching. Statewide branching also predominates along the East Coast. Between the Mississippi River and the Appalachian Mountains, limited branching seems to be the general rule. Banks in a limited branching state may open branch offices only within the county in which the main bank is located or an adjacent county or in accordance with some other geographical restriction. A total of 22 states permit statewide branching, while 16 states have limited branching.

Bank holding companies. An important aspect of Colorado's bank structure has been the development of bank holding companies. Over 68 percent of all commercial bank deposits in Colorado are with affiliates of multi-bank (two or more) holding companies. The growth of multi-bank holding companies during the 1960's and 1970's has been substantial, particularly in the so-called "unit" bank states like Colorado, or those states in which branching is prohibited. The Federal Deposit Insurance Corporation reports that there are 14 multi-bank holding companies in Colorado operating 106 banks. Each bank affiliated with a holding company in Colorado must maintain a separate board of directors and meet all of the conditions for chartering required of any individual bank. Ownership, however, is vested with the holding company. Each affiliated bank must maintain separate capital and deposit accounts.

In 1956, Congress restricted corporate ownership of multiple units of banks; required bank holding companies to limit their activities to banking related activities; and restricted the expansion of bank holding companies across state lines. The development of bank holding companies occurred for a number of reasons, including greater financial resources; ability of individual affiliated banks to have access to highly skilled personnel in such areas as computer technology and other specialized management functions; expanded opportunities for employee promotion and development; and tax advantages. The latter also has been a factor in the development of single bank holding companies.

Individuals may own more than one bank. Such ownership is commonly referred to as "chain" banking. Similar to holding company banks, each bank owned by a chain must have a separate board of directors.

Popular Arguments For

1) Many Coloradans do not have easily accessible banking services. Colorado has fewer bank offices than most other states. Today 38 states permit some form of branch banking. National data for 1978 indicates a bank or branch office for every 4,800 persons, while Coloradans had only one bank office for every 9,000 persons. Colorado banks are prohibited from offering complete services in more than one location. Despite increased population growth and changes in economic conditions, a bank, unlike other businesses, cannot open offices at shopping centers, industrial parks, and new residential areas. This limitation on branching may require consumers to spend additional time and money for travel to obtain bank services.

2) On March 31, 1980, Congress adopted Public Law 96-221 — the "Depository Institutions Deregulation and Monetary Control Act of 1980." The act authorizes federal savings and loan associations to offer interest bearing checking accounts (NOW accounts), trust services, and consumer loans. Generally, the 1980 federal legislation would eliminate governmentally imposed barriers to competition among financial institutions. Savings and loan associations have had authority to open branches in Colorado for many years. The new federal legislation and the capacity to operate branches may give federal savings and loan associations an advantage over commercial banks in attracting depositors. The proposed amendment would help restore a competitive balance between these types of financial institutions and allow freer competition in the marketplace.

3) Colorado's unit bank law has resulted in a local marketing system in which many small communities have only one bank. There are nearly 100 communities in Colorado which have only one bank and many more communities with only two banks. Small businesses and individuals in these communities depend on the local bank for financial services. There may be little incentive for a bank to improve efficiency and reduce costs for services when it is not confronted with competition in its market area. The present prohibition on branching was originally enacted under conditions different from those that exist today and has resulted in a public policy that limits bank competition in some communities. Such a policy does not provide protection for Colorado consumers in such market areas.

4) The cost of chartering a new bank in many small communities or fringe areas of large communities in which development is taking place often requires more capital than may be justified based on expected demands for bank services. Nevertheless, these communities could benefit from new or increased banking services.

A branch facility can be opened for less capital than chartering of a new bank and does not require all the operating personnel and administrative staff required of an individual home bank. For example, the functions such as personnel administration, accounting, investment portfolio management, market research, etc., would not have to be provided in each branch facility. Thus by reducing such personnel and related expenditures, it would be feasible to establish bank facilities in areas of the state in which the chartering of a new bank would not be practical.

5) An individual bank does not have the opportunity to spread risk among as wide a range of economic activity as that available to a bank with a number of operating branches. The loans made by any branch office may be protected by the assets of all other branches and the home office of a branching bank. In this way, an individual branch office may maximize loans to the community it serves. The movement of funds through a branch banking system tends to be more fluid than the present system which is dependent upon participating correspon-

dent banks or the cooperation of individual banks. Thus opportunities for community investment may be stimulated by branching.

6) In the last 20 years, five states have changed from a unit banking structure to some form of branching (Arkansas, Florida, Iowa, New Hampshire, and Wisconsin). In these five states a large number of banks continue to operate. Based on 1978 data, Arkansas had 260 banks, Florida — 599 banks, Iowa — 655 banks, New Hampshire — 104 banks, and Wisconsin — 627 banks. There does not seem to be any evidence in recent decades of a state reverting to a unit banking structure. The proposed amendment is a statutory provision and may be modified in any session of the General Assembly to provide a system of branching that would best meet Colorado's needs.

Popular Arguments Against

1) The amendment could result in a higher proportion of bank deposits being concentrated in the larger metropolitan banks. New branch facilities would not increase the ability of Coloradoans to save money and would not increase the availability of capital in Colorado. Banks with the largest capital resources would be in the best position to open branches in order to increase deposits. Thus smaller financial institutions might not be able to maintain their current proportion of deposits.

Rather than increasing competition, branching in the long run may reduce the relative number of banks serving Coloradoans. Branches may be opened at less cost than chartering a new bank. A branch could be located in a growth area prior to the time a full service bank would be economically justifiable. Thus branching would mean a reduction in new bank charters in Colorado.

2) Deposits collected by any branch may be exported from a community to a home bank office. Investment decisions under any branch banking system tend to be under the control of the home office. No longer would each full service bank facility in Colorado have its own board of directors to help determine loan policy. Branches could serve as collection points for community savings, but the loan and investment decisions would tend to be made by the home office.

Capital structure limits the size of a loan any bank may make to a single customer. With a larger deposit base, the major banks could increase the size of individual loans to various multi-national corporations involved in energy and other resource development activities. It would be difficult for the board of directors of a major bank to become familiar with the investment needs of each community in which a branch is located. Large banks cannot be expected to have the orientation and concerns of a unit bank serving a small community. Branch banking could mean less attention to individual community investment requirements and greater focus on the capitalization needs of larger industries.

3) Bank regulation by the federal government and in the majority of states has been based on a fundamental policy of keeping banking resources decentralized. The formation of new branch banks across state lines is prohibited by the federal government. Without such regulation it is extremely unlikely that the Colorado banking industry would have emerged with as many individual banks. In Canada, for example, there are only 10 commercial banks, and this is characteristic of many nations. In contrast, the United States has a total of over 14,000 commercial banks.

In 1950, there were 14,524 commercial banks in the United States and 5,150 branches. Despite the issuance of new charters, mergers and consolidations have held the number of banks at about the same level as in 1950. The number of branches, however, increased

dramatically to 31,160 in 1978. Decentralization of the nation's financial system has been part of the economic policy for the nation and Colorado. The amendment would be counter to the carefully formulated policy of Colorado's elected officials.

4) In 1978, there were 22 states classified as statewide branching states. In these states there were a total of 2,037 banks (630 national and 1,407 state bank and trust companies) and 17,557 branches or 8.6 branch facilities for every bank. The seven contiguous states west of Colorado are all statewide branching states — Arizona, California, Idaho, Nevada, Oregon, Utah, and Washington. There were an estimated 33.7 million persons in these states in 1978. To serve this population there were 101 national banks with 4,099 branch facilities. In 1978, Colorado had 135 national banks or 34 more than these seven states combined. With regard to state banks, these seven western states had a total of 395 banks, compared to 161 state banks reported for Colorado during this period. While there were almost 2.5 times as many state banks in these seven states as Colorado, the population of the seven states exceeded Colorado's by more than 12 times. Although branching probably would not result in an immediate change in Colorado's banking structure, the statistical data of other statewide branching states suggests that the proposal would gradually result in greater concentration of deposits in fewer banks.

AMENDMENT NO. 6 — STATUTE INITIATED BY PETITION

Ballot Title: Shall the Colorado Revised Statutes be amended to provide for the election of one director from each director district for a fifteen member board of directors of the Regional Transportation District?

Provisions of the Proposed Statute

The proposed statute would provide for the election of the board of directors of the Denver Regional Transportation District (RTD) for terms beginning in January of 1983. A 15-member board of directors would be elected from individual director districts. Board members would be paid an annual salary of \$3,000. An outline of election procedures contained in the proposal follows:

—director districts would be apportioned by the governing board of the RTD after each federal census on the basis of population;

— nomination of candidates to appear on the ballot for each director district would be made by petition signed by not less than 100 registered electors in the manner provided for nominating independent candidates under the general election laws of the state;

— the order of the names of candidates appearing on the ballot would be established by lot;

— at the general election in 1982, eight members of the board of directors would be elected for two-year terms as determined by lot following the apportionment of director districts; seven members would be elected for four-year terms; and thereafter all members would be elected for four-year terms;

— all board member elections would be held concurrently with the state general election;

— depending on the location of respective director districts, vacancies in director districts would be filled by the governing body of the county or the Mayor of Denver (subject to approval by the city council); and

— recall of board members would be provided in the same manner as for recall of any member of any local improvement and service district (this law requires a recall petition to be signed by not less than ten percent of the qualified electors of the district).

Comments

The Regional Transportation District (RTD) was established by the General Assembly as a political subdivision of the State of Colorado in 1969. Title 32, Article 9, *Colorado Revised Statutes of 1973*, sets forth the boundaries of the RTD and provides for the appointment of the board of directors of the district. The general powers of the district, including the taxing authority, and other provisions essential to the operation of the district are established by statute. The district encompasses: all of Boulder and Jefferson counties and the City and County of Denver; the urbanized areas of western Adams and Arapahoe counties; and the northeast portion of Douglas County.

The board of directors of the RTD consists of 21 members: two members from Adams, Arapahoe, Jefferson, and Boulder counties; one member from Douglas County; ten members from the City and County of Denver; and two at-large directors. Members representing the counties are appointed by the county commissioners; members from Denver are appointed by the Mayor with the approval of the city council; and at-large members are chosen by the other appointed members of the RTD. Appointments to the RTD board by the county commissioners must also be approved by a majority of governing bodies of the municipalities within the respective counties. Terms of members are four years. The RTD statute does not provide specific procedures for removal or recall of a board member.

The organization and operation of the Regional Transportation District is of primary concern to Denver-Area residents. However, in order for any change to occur in state law which governs the operation of the district, legislation must be adopted by the General Assembly or an initiated statute or constitutional amendment must be submitted to all the voters of Colorado for their consideration. Thus, this proposed initiated law will be voted on statewide at the November general election.

Popular Arguments For

1) The governing board of the Regional Transportation District is not directly accountable to the people through an elective process. The organization and structure of the appointed RTD board also diffuses accountability of the board to state and locally elected officials. This weakness of the present governing structure may have contributed in part to recent public criticism of the board's activity.

The Regional Transportation District derives its financial powers from the Colorado General Assembly. State elected officials, however, do not appoint the members of the governing board of the RTD and are not responsible for approval of the budget of the RTD. Local officials make appointments to the governing board of RTD but are not responsible for approval of the budget of the district or for the level of taxation. No elected official and no elected body actually approves the budget of the district. An appointed board is solely responsible for the budget of the RTD. Accountability, whether it involves the expenditure of public funds, operational efficiency, personnel management, or other measure of performance, may be achieved by making elected officials directly responsible for government programs. One way to improve public accountability of the RTD would be through the election of the governing board of the district.

2) Unlike other local issues such as taxation and land use that are subject to a great deal of public scrutiny, appointments to the RTD board are not likely to be critical issues during local elections. Some citizens may even be unaware that local officials are involved in making appointments to the RTD board. The appointive process is deficient in not providing citizens with a mechanism for recall of a member from the governing board of the RTD. Furthermore, the laws governing the RTD do not contain explicit removal provisions for the board of directors. Recent attempts by the General Assembly to change the laws to include removal provisions were unsuccessful. The proposed amendment would allow citizens to actively participate in the management of the RTD by providing both for election and recall of the members of the board of directors.

3) The Regional Transportation District is the fourth largest governmental unit in terms of spending in the state of Colorado with a 1980 budget in excess of \$137 million. Only three units of government are larger in terms of expenditure of public funds — the State of Colorado, the City and County of Denver, and Denver School District No. 1. The enormous expenditure of public funds by the district places the governing board of the RTD in a different position than

most other appointed boards and commissions.

In addition to sheer size, the complexity of issues confronting the RTD involve deep philosophical differences among residents of the community. For example, transit systems designed to maximize energy conservation and efficiency may not be of benefit to senior citizens or those members of the metropolitan region who are dependent on conveniently located public transportation. The financial resources of the community may be hard pressed to support both the development of transportation systems that will be of primary benefit in 1990 or the year 2000 and at the same time substantially improve existing public transit services.

It is doubtful that unanimity of opinion could ever be achieved in regard to the myriad of choices available in transportation policy. For these reasons, decision-making in the area of public transportation must be responsive to and shared by the public. Candidates for office to an elected RTD board would debate these issues. Direct election of the RTD governing board might help to achieve a public transit policy that would balance the conflicting needs of residents of the community.

4) The present appointed board of the Regional Transportation District does not provide equal representation in terms of the estimated 1980 population of the district. A total of 19 of the 21 members of the board are appointed by local units of government. Ten members are from Denver, which means that of the locally appointed members Denver is represented by 52.6 percent of the members. In contrast, Denver's population is an estimated 31.5 percent of the population of the RTD. Jefferson County, with over 23.4 percent of the RTD population, appoints only two of the 19 members or 10.5 percent of the locally appointed board members.

With the exception of Douglas County, which is only partially within the district, the other suburban counties tend to be under-represented in terms of appointments to the board. Douglas County's RTD population is less than one percent of the district's total estimated population. Douglas County has one board member. The establishment of individual director districts on a population basis as proposed by the amendment would help ensure that board representation would be evenly apportioned throughout the metro area.

5) The 21-member appointed board of the Regional Transportation District may be too large to function efficiently as a governing body. The RTD board has created various subcommittees and delegated responsibilities to an executive committee. The governing boards of other local units of government have far fewer members. Counties are usually governed by three to five members. City councils generally range from seven to 11 members. The proposed amendment would provide nearly a one-third reduction in the size of the RTD board to a more manageable 15-member board.

The proposed reduction in size of the board and the requirement that each board member serve from a director district would mean that one board member would represent any given area in the RTD. Each board member would be familiar with the geography and needs of his area. Thus residents of any given area in the RTD could contact their representative on the board.

Popular Arguments Against

1) In addition to the RTD, there are 33 transit systems in the United States that operate fleets of 200 buses or more. A total of 25 of these transit systems have their own governing boards. Of these 25 boards, only the Alameda Contra Costa Transit District board in Oakland, California, is elected. In addition to the aforementioned boards, the Bay Area Rapid Transit District in Alameda, which operates a rail system, also has an elected board. In the organization of large urban transit systems, there has been substantial preference for

governance by appointed boards.

Public transit is a key element in community land use planning and traffic control systems. Appointed boards provide direct lines of communication between the transit districts and municipal and county officials. Similarly, the RTD operates buses on local streets and highways and must have a good working relationship with the local governments in the Denver Area. The current appointment of RTD board members by local officials may enhance cooperation among these governmental units. An independently elected board, in which members would be elected from director districts which need not coincide with existing political boundaries, might weaken existing cooperation between the RTD and other local units of government.

2) An effective public transit system is far more important to the densely populated City and County of Denver than to suburban communities. Denver has a higher proportion of residents dependent on public transit and must deal with difficult problems of rush hour traffic congestion of the downtown area. Denver also collects nearly 40 percent of the sales taxes collected by the RTD. The Colorado General Assembly recognized the importance of the central city with regard to the governance of the RTD by providing that ten members of the 21-member board of the RTD would be from Denver. Apportionment of an elected board on the basis of population would mean that Denver's influence on the decisions of the governing board of the Regional Transportation District would be greatly reduced.

3) The 1980 population of the RTD is estimated at 1,655,000. Under the proposal, the average director district would have an estimated population of a little over 110,000 persons. Under the provisions of the proposal, any qualified elector may file for candidacy to the board by filing the signatures of 100 registered electors. This could mean a very large number of candidates running in each district.

The proposal does not provide any procedure for a runoff election and does not utilize a primary election in order to reduce the number of candidates. Voting machines utilized in the general election in the City and County of Denver already are at their capacity. A large number of candidates for an RTD director district seat could make it difficult for candidates to inform voters of their views.

An elective system that might force candidates to seek large campaign donations increases the vulnerability of board members and candidates to be influenced by special interest groups. It would not be in the public interest to develop an elective system in which it would be possible for a candidate to be elected to the RTD board by only a small percentage of the total votes cast in a director district.

4) The appointive process provides flexibility in the development of a board with a broad-based perspective. The present procedure permits the appointing authorities to nominate persons with a wide variety of skills in business, finance, labor, government, consumer affairs, land use and transportation planning, etc. Inherent in the power to appoint is the power to remove. Board members of the RTD have resigned when requested by appointing authorities.

A prime requisite for an elective policy-making board is its capacity to consider public transit issues in terms of an entire system. The RTD is supported from both user charges and tax revenues. If transit services are to be developed in a cost effective manner, policy makers must make decisions based on the impact to the entire district. The present appointive structure of the RTD board permits members to view decisions from a regional perspective. A board comprised of individuals elected from director districts would be subject to considerable pressure from the parochial interests of their respective constituencies to the detriment of an integrated and comprehensive public transit system.

5) The proposed amendment could mean that the present board of the Regional Transportation District would become a "lame duck" board at a critical time in the development of transit systems in the Denver Metropolitan Area. Voters in the RTD will be considering whether to authorize funding for the construction of a light rail system at the November general election. Under this proposal, the present board members and new members appointed in July of 1981 would serve until January of 1983. Thus for nearly two years, the appointed board would be in office at a time in which there could be considerable negotiation with transit planning consultants, contractors, and local governments. There could be great reluctance among such individuals and organizations to make commitments to a lame duck governing board.