FAQ Regarding Ballot Initiative 108

Q: Takings protections already exist. Why do we need to change the law?

A: The law is clear on takings when the government has either condemned or physically occupied private property. It is much less clear when the government passes laws or regulations that materially reduce the value of private property, but do not take all the property. These partial takings cases are very difficult to win because the standard in Colorado is a claimant must be left with no more than *de minimis* value – or almost 100%. Because of this, successful partial takings cases are extremely rare.

BACKGROUND: There are two types of takings: 1) categorical or "per se" takings are akin to condemnation or physical occupation; and 2) partial takings where property value has been diminished, but not extinguished. A "per se" taking occurs if a regulation deprives an owner of all economically beneficial or productive use of the land. A partial taking can occur if less than the total value of property is lost. In that circumstance, courts will evaluate: 1) the regulation's economic effect on a landowner; 2) the extent to which the regulation interferes with reasonable investment-backed expectation; and 3) the character of the governmental action.

Both types of takings cases are expert-driven and heavily fact dependent. They take at least a year and often longer to litigate and are very expensive to bring. Substantively, the burden of proof lies entirely on the private property owners and is difficult to meet. In Colorado, to prevail on a takings claim, an owner must demonstrate that nearly 100% of their value has been eliminated. *Animas Valley Sand & Gravel, Inc. v. Bd. of Cty. Comm'rs of the Cty. of La Plata*, 38 P.3d 59, 64 (Colo. 2001). This very high bar in *Animas Valley* is mirrored in many other cases which also found there was no taking in spite of fairly high property devaluations, including:

- *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926) (where rezoning eliminated seventy-five percent of the development value);
- *Hadacheck v. Sebastian*, 239 U.S. 394 (1915)(where a city annexation precluded clay mining and owner was left with only residential value, devaluing the property by 92.5%);
- *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)(property rezoning reduced value by 85%);
- *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001)(where new wetlands regulations eliminated 93% of the land value).
- *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019-20 n. 8, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (where new coastal zone regulations precluded construction of homes, diminishing the property value by 95%);
- *Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1349 (Fed. Cir. 2001)(where revocation of a mine permit precluded mining of 91% of the coal);

In *Animas Valley,* the majority stated that this "fact-specific test *[for a partial taking]* is to provide an avenue of redress for a landowner whose property retains value that is slightly greater than *de minimis*…" which is designed to merely, "provide a safety valve to protect the landowner in the truly unusual case." While the majority of the Colorado Supreme Court in

Animas Valley held that takings only provided an avenue of redress for a landowner whose property retains only minimum, if any, value due to the government action, Justice Rebecca Kourlis in her concurring opinion disagreed. She argued two points in her concurrence. First, she felt the Colorado Constitution provides a different and broader standard for a compensable taking than the U.S. Constitution because Colorado includes the words "or damaged" in its Constitutional takings clause and that term includes both physical and economic damages. Second, Judge Kourlis disagreed with the majority's interpretation of the *Palazzolo* decision, a landmark U.S. Supreme Court case that is often cited in takings litigation. She argued that *Palazzolo* does not limit compensable claims for partial takings to those cases where an owner is left with only "slightly greater than de minimis value," as stated in dicta by the majority in *Animas Valley*. Her view of *Palazzolo* was that it specifically provided for litigating partial takings where some but not all value had been taken. She suggested that a claimant should be allowed to move forward with a claim – subject to legal defenses – if they have suffered any reduction in fair market value, as long as the owner could demonstrate a reasonable investment-backed expectation that was impacted by a government law or regulation, which diminished the value of the property in a demonstrable way.

Q: The property rights measure will lead to too much litigation. An example of this is what happened in Oregon, which passed a property rights measure that later had to be partially repealed because of unintended conflicts.

A: Generally, takings claims must be litigated to ensure fair and justifiable outcomes, and to ensure the burden of proof is on the claimant. There is no administrative process to resolve takings claims in Colorado, so if private property is being taken by governments then claimants must go to court. The expense and time of proving a successful takings case will limit the amount of litigation. The legislature can also step in, if necessary, to make minor corrections through enabling statutes.

The case of Oregon's ballot measure 37 (2004) is an example of why the Colorado approach is better policy. Measure 37 created an administrative process that sent a claimant straight to the offending agency or governmental entity either to be paid or to receive a variance. An agency had 180 days to either pay, issue a variance or reject the demand. At that point a claimant could go to court. Because there was no clear adjudicatory process and no clear standard for the burden of proof, it caused a flood of claimants to approach agencies for payment or variances. And because there was no process for adjudication or money available to provide compensation, it resulted in more than 7,500 requests for variances. Oregon's measure 37 is an example of why Measure 108 is a better and more equitable way to resolve regulatory takings issues.

Q: Under 108, any government action would result in a taking.

A: This is hyperbole. There are several factors courts apply in takings cases that demand a high burden of proof on claimants that would still apply even if 108 becomes law. These factors

reduce the scope of what constitutes a compensable taking. Claimants would still have to establish the factors and be able to overcome legitimate defenses. These factors include:

- Damages – any claim for damages cannot be speculative and must be proven with a relative high degree of certainty. Changes in fair market value would be need to be proven with expert evidence by the claimant.

- Reasonable Expectations – before a party can succeed on a takings claim, it must demonstrate that its "reasonable investment-backed expectations" are adversely impacted by the challenged governmental action. This is a complicated analysis, but broadly speaking courts will look to the regulatory regime in place at the time of the investment to determine whether a property owner had a reasonable expectation of developing its property in the manner now prohibited.

- Nuisance and Police Power Defenses – under takings doctrine, no compensation will be due from a governmental entity, even if a regulation completely diminishes a property's value, when the regulation mirrors the result that could have been achieved by the government to abate a nuisance. See *Rith Energy, Inc. v. United States*, 770 F.3d 1347, (Fed. Cir. 2001)(rejecting takings claim on ground that under Tennessee nuisance law, Rith had no right to mine in a way that was likely to produce acid mine drainage, and that its property right in the coal leases therefore did not include the right to mine the Sewannee seam in the way it wanted to). Accordingly, if 108 passes, the state and local governments will **not** lose their ability to regulate and prevent nuisances or otherwise to protect public health and the environment.

- Permissive Use – the language in 108 is written to narrow the scope of compensable claims for partial takings – or reductions in fair market value – by limiting those claims to situations arising out of changes in law and regulation. This is meant to preclude claims by third parties against a government for permitting otherwise lawful uses. Thus, a feedlot owner directly impacted by a regulation might be able to raise a takings claim, but a neighbor near a feedlot would not be able to claim a taking against the government for permitting a lawful activity in a zone appropriate for that use.

Q: Will 108 give third parties the opportunity to sue other private interests?

A: No. Takings cases are always against government entities. Measure 108 does not expand or change who may be a defendant in a takings case.

Q: Will 108 make it impossible for local governments to zone?

A: Local governments will not become liable for takings simply because they create new zones or change old zones in their land use codes. Takings of private property only arise when a

private property owner has a demonstrable and reasonable investment-backed expectation of putting their property to a certain lawful use, and then government changes the law or regulations in a way that precludes or diminishes that use, with no clear purpose of abating a nuisance or a public health hazard.

Most property owners who intend to put property to certain uses acquire property in areas already zoned for that use. In the case where a property owner acquires property and works unsuccessfully to get the zoning changed, there would be no taking because the government hasn't acted. In the case where a property owner seeks to put his or her property to a certain lawful use, and then government changes the zone to preclude that use, the property owner might have a successful claim if they can prove they had a reasonable investment-backed expectation, that the fair market value has now been reduced because of a zoning change, that damages are not speculative, and that its activity did not constitute a nuisance or a threat to public health.

Q: If 108 passes, would that mean that if Colorado changes the marijuana laws, growers and producers would have a big claim against the state.

A: A marijuana grower would have to prove they had a reasonable investment-backed expectation of being able to grow and sell marijuana forever. This would be a very hard case to make when every grower today remains subject to prosecution for violating the federal Controlled Substances Act as well as a variety of other interstate trafficking and money laundering statutes.

Q: Is 108 just designed to help oil and gas companies if the setback Measure 97 is adopted?

A: 108 is designed to give all property owners an avenue of recourse where government has reduced the fair market value of their property, subject to several factors and defenses mentioned above. Under current law, private property owners do not have that option.

Regarding Measure 97, it is so extreme that there will likely be hundreds of thousands of acres where mineral owners, as well as operators, can no longer develop oil and gas because they are 100% precluded from access. Those claims will not be partial takings – they will be "per se" categorical takings – akin to condemnation. That means Measure 97 would expose the state to tens of billions of dollars in takings liability even without 108.

108 is more nuanced and would apply to less extreme conditions. As an example, Boulder County first imposed a moratorium on permitting in Feb 2012. They extended that in 2013, 2014 and 2017. As of today, a mineral owner has been precluded from developing his or her property for six years, but does not have a likelihood of proving a compensable taking because a six-year pause would not come close to the near-100% threshold for a successful claim. In fact, the U.S. Supreme Court even opined on this type of temporal regulatory taking in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302

(2002), where they held that a three-year moratorium was not a taking because it was only a partial reduction in net present value.

Q: Why is 108 a constitutional measure and not statutory?

A: The underlying takings provision that gives rise to Colorado's statutory framework around eminent domain and regulatory takings, is in the Colorado Constitution. By seeking to put the new 108 language in the Constitution, it will ensure that the legislature and courts cannot ignore it, or eviscerate it through amendment. By keeping the language very simple it avoids unforeseen consequences that accompany locking restrictive formulas into the Constitution; utilizing guiding principles will allow case law and legislation to further establish the definition.