

<p>Supreme Court, State of Colorado</p> <p>Court Address:  Colorado State Judicial Building  2 E 14<sup>th</sup> Avenue, Suite 400  Denver, CO 80203</p>	<div data-bbox="1031 199 1429 451"> <p>FILED IN THE SUPREME COURT</p> <p>MAY 04 2006</p> <p>OF THE STATE OF COLORADO SUSAN J. FESTO, CLERK</p> </div>
<p>ORIGINAL PROCEEDING PURSUANT TO  § 1-40-107(2), 1 C.R.S. (2006)</p> <p>Appeal from the Ballot Title Setting Board</p> <p><b>IN THE MATTER OF THE TITLE, BALLOT  TITLE AND SUBMISSION CLAUSE, AND  SUMMARY FOR 2005-2006, #86</b></p> <p><b>Petitioners:</b> MICHAEL A. BOWMAN and  DOUGLAS B. MONGER, Objectors,</p> <p><b>Respondents:</b> WILLIAM G. MOHRAM, JR. and  BETTY S. LAMONT, Proponents</p> <p><b>Title Board:</b> WILLIAM A. HOBBS, JASON  DUNN, and DAN CARTIN.</p>	<div data-bbox="958 472 1339 714"> <p>RECEIVED</p> <p>MAY - 4 2006</p> <p>CLERK COLORADO SUPREME COURT</p> </div> <p><b>▲ COURT USE ONLY ▲</b></p>
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<p align="center"><b>TRANSMISSION OF HEARING TRANSCRIPT TO SUPPLEMENT  RECORD</b></p>	

Petitioners Michael A. Bowman and Douglas B. Monger hereby submit as part of the record the transcript of the Initiative Title Setting Review Board Hearing on April 5, 2006, as a supplement to their Opening Brief filed on May 2, 2006, as addressed on page 15, fn. 4 of that Brief. The specific portions of the attached transcript that address Initiative #86 are found on pages 15-61 of the transcript. The discussion relevant to the issue addressed in the Brief may be found on pp. 37-38 of this transcript.

Respectfully submitted this 4<sup>th</sup> day of May, 2006.

**ISAACSON ROSENBAUM P.C.**

By:

  
Mark G. Grueskin

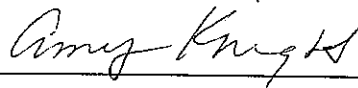
**ATTORNEYS FOR PETITIONERS**

**CERTIFICATE OF SERVICE**

I hereby certify that on the 4th day of May, 2006, a true and correct copy of the foregoing **TRANSMISSION OF HEARING TRANSCRIPT TO SUPPLEMENT RECORD** was served via hand delivery to the following:

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3  
4 INITIATIVE TITLE SETTING REVIEW BOARD  
5 WEDNESDAY, APRIL 5, 2006, 1:30 P.M.  
6 SECRETARY OF STATE'S BLUE SPRUCE CONFERENCE ROOM  
7 1700 BROADWAY, SUITE 270  
8 DENVER, COLORADO  
9

10  
11 The following proceedings were taken on  
12 Wednesday, April 5, 2006, commencing at 1:32 p.m., before  
13 Deborah D. Mead, Certified Shorthand Reporter and Notary  
14 Public within and for the State of Colorado.  
15  
16

17 THE BOARD:

18 William Hobbs, Chairman  
19 Jason Dunn  
20 Dan L. Cartin  
21 Sharon L. Eubanks  
22  
23  
24  
25

## P R O C E E D I N G S

THE CHAIRMAN: Good afternoon. Let's go ahead and get started.

This is a meeting of the Title Setting Board, pursuant to Article 40 of Title 1, Colorado Revised Statutes. For the record, the date is April 5, 2006. The time is 1:32 p.m. We're meeting in the Secretary of State's Blue Spruce conference room, 1700 Broadway, Suite 270, Denver, Colorado.

The Title Setting Board today consists of the following: My name is Bill Hobbs. I'm Deputy Secretary of State, and I'm here on behalf of Secretary of State, Gigi Dennis.

To my right is Jason Dunn, deputy attorney general, who is the designee of the attorney general, John Suthers. And Mr. Dunn will not participate in agenda item No. 3, which is rehearing on No. 86.

To my left is Dan Cartin, deputy director of the office of legislative legal services, who is the designee of the director of the office of legislative legal services, Charlie Pike. Mr. Cartin will be sitting as the director's designee for the first three agenda items, and then --

By the way, the fourth agenda item, No. 87, that measure has been withdrawn by the proponents, so we

1 will not have a rehearing on No. 87.

2 For the last agenda item, No. 93, the designee  
3 of the director of the office of legislative legal  
4 services will be Sharon Eubanks, who is a deputy director  
5 of the office of legislative legal services.

6 To my far left is Maurie Knaizer, deputy  
7 attorney general, who represents the title setting  
8 board.

9 To my far right is Cesi Gomez from the  
10 Secretary of State's office.

11 For anybody who wishes to testify, there are  
12 sign-up sheets on the table by the back door. The  
13 hearing is broadcast over the internet from the Secretary  
14 of State's website, and it's also a recorded formal  
15 meeting.

16 Let me talk a little bit about the procedures  
17 that the board follows. They are basically -- for each  
18 new measure, there's basically three steps that the board  
19 goes through. First it's important to make sure that the  
20 board understands each measure. So I'll provide an  
21 opportunity for the members of the board to ask questions  
22 of the proponents, just to make sure that we understand  
23 the measure.

24 The next step is for the board to determine if  
25 it has jurisdiction to set a title for the measure. And

1 that necessarily involves deciding at least one question,  
2 and that is whether the proposed measure complies with  
3 the single subject requirement of the constitution.

4 If the board determines that it does have  
5 jurisdiction to set a title, then the third step is for  
6 the board to work on titles for the measure. The board  
7 will work from staff prepared drafts, which are on the  
8 table by the back door.

9 I do want to emphasize one thing: The board  
10 is not concerned with the merits of any proposal. It  
11 really comes down to two questions: Does the measure  
12 comply with the single subject requirement, and if so,  
13 what are proper and fair titles for the measure.

14 Generally, we take testimony first, decision  
15 is reached by two of the three members of the board, and  
16 then anybody who is dissatisfied with the decision of the  
17 board, is -- or may file a motion for rehearing within  
18 seven days of today.

19 With that, let me turn to the first agenda  
20 item, which is 2005-2006 No. 90, term limits on court of  
21 appeals and supreme court judges. And as I indicated,  
22 I'd first like to hear from the proponents, and we'll see  
23 -- we've had versions of this before. Probably one of  
24 the questions that might be helpful to have addressed is  
25 how this differs from previous versions.

1 But Senator Andrews, are you here? And if you  
2 will introduce yourself for the record, please.

3 MR. ANDREWS: Thanks, Mr. Chairman. I am John  
4 Andrews. My organization is called backbone issue  
5 committee. And initiative No. 90 concerning terms of  
6 office and term limits for appellate judges is, in fact,  
7 a variation of what you have seen before and set title  
8 for it, which was No. 75.

9 Two principal differences would be that the  
10 status of incumbents as of the presumed date of enactment  
11 next January is made more clear in No. 90, that  
12 clarification being that they would stand for retention  
13 as of the date of the next general election if eligible  
14 for another term at that level, at court level.

15 The other thing that is clarified is that ten  
16 years total service at a particular appellate court level  
17 is the maximum, and that interacts with the other  
18 provision that I just described, so that judges or  
19 justices to whom that ten years of service would apply as  
20 of next January 1 would be effectively term limited after  
21 the 2008 general election.

22 There was also a question raised on No. 75 in  
23 regard to one court level, I believe that -- I don't have  
24 the old language in front of me, but the question was  
25 raised as to whether we had inadvertently encompassed all



1 judges with a term limit. But that was never the  
2 intention, and I believe that the drafting is tighter  
3 here to make it clear that this only applies to the court  
4 of appeals and the Colorado Supreme Court.

5 THE CHAIRMAN: Thank you. Are there questions  
6 of Senator Andrews?

7 If not, let's turn to the question whether  
8 measure complies with the single subject requirement. I  
9 don't have anybody else signed up to testify. Is there  
10 anybody else who wishes to testify with respect to the  
11 single subject measure on this request?

12 Seeing none, I'll turn to board discussion.  
13 We've previously determined that predecessor versions do  
14 comply with the single subject amendment, the single  
15 subject requirement. Any discussion from the board?  
16 Mr. Cartin.

17 MR. CARTIN: Thank you, Mr. Chairman. And I  
18 -- as you said, No. 90 appears to be closely modeled  
19 after its predecessor, No. 75, which the board found a  
20 single subject for. And I believe that with the changes  
21 that Senator Andrews has described in version No. 90,  
22 that the measure still encompasses a single subject,  
23 which, jumping a little bit ahead, I think is accurately  
24 reflected in the staff draft of the title.

25 THE CHAIRMAN: Would you like to offer a

1 motion?

2 MR. CARTIN: I move that the title board find  
3 that -- the title board has jurisdiction -- that measure  
4 No. 90 has a single subject, and that the title board has  
5 jurisdiction to set a title for initiative No. 90.

6 MR. DUNN: Second.

7 THE CHAIRMAN: So it's been moved and  
8 seconded. Any further discussion?

9 If not, all those in favor say aye.

10 THE BOARD: Aye.

11 THE CHAIRMAN: All those opposed, no.

12 That motion carries three to zero.

13 Then let's turn to the staff draft of the  
14 titles, excessive -- we'll display it on the screen in  
15 the room so that everyone can follow along.

16 Mr. Dunn.

17 MR. DUNN: Mr. Chairman, one question for the  
18 proponent. I don't think you addressed this in your  
19 comments. Existing judges or currently serving judges  
20 and justices who have ten years in office will be out  
21 upon enactment or upon January 1 or what is the exact  
22 date?

23 MR. ANDREWS: The intent, Mr. Dunn, is that  
24 their term would run until after the 2008 general  
25 election. And I think that intent is evident because the

1 proposed amendment language is silent as to any other  
2 result.

3 All it says, you see, is in the final  
4 sentence, in the new section 27, is that someone who has  
5 served ten years or more at one appellate court level  
6 should not be eligible for another term at that level.  
7 It doesn't say that their term ends as of January 1.

8 MR. DUNN: Okay. So would it end upon the  
9 term they're currently serving?

10 MR. ANDREWS: It ends upon the -- the next  
11 general election, and then however the current  
12 constitutional language operates, to whatever is the  
13 second Tuesday in January after the next term. So  
14 actually it's going to go to January 2009, in the case of  
15 an imaginary Judge Jones that has had ten years as of  
16 next January.

17 MR. DUNN: Okay. Thank you.

18 THE CHAIRMAN: Let me -- and maybe you really  
19 are already addressing this, but the -- in the middle of  
20 the text of Section 27 -- well, the second sentence says,  
21 "Incumbents, as of January 1, 2007, shall stand for  
22 retention at the next general election," so that would be  
23 January 2008, I think. And it says, "if eligible for  
24 another term at that level." Now, why would they not --  
25 you know, I assume the only reason they wouldn't be

1 eligible would be if --

2 MR. ANDREWS: That would be by the operation  
3 of the ten year provision.

4 THE CHAIRMAN: Okay. So on November of 2008,  
5 if anybody has served or -- well, if they would serve ten  
6 -- well, I'm not sure how to say it. I'll let you take  
7 a stab at that. What's --

8 MR. ANDREWS: Well, my imaginary judge, Judge  
9 Jones that took office in 1996, would be covered by the  
10 final sentence of section 27, and so that judge's term  
11 would end in January of 2009, because there would be no  
12 eligibility to have stood for retention to another term,  
13 and having not been retained, that judge is term limited.

14 THE CHAIRMAN: So -- maybe I'm being dense  
15 here, but as a practical matter, somebody who has, say,  
16 served six years as of November 2008 -- well, say seven  
17 years, would not be eligible for another four-year term,  
18 is that correct, because that would put them over the ten  
19 year limit?

20 MR. ANDREWS: You're presenting me with a new  
21 situation. Let me work my way through it.

22 No, I would -- I would say that -- that any  
23 judge or justice who has -- who has served even one day  
24 less than ten years is eligible for retention to, what, a  
25 four-year term, at the 2008 general election, because the

1 ineligibility is not prospectively triggered by will have  
2 served more than ten years.

3 THE CHAIRMAN: Okay.

4 MR. ANDREWS: It is triggered by that if you  
5 have served more than ten years, you're not eligible to  
6 stand for retention.

7 THE CHAIRMAN: Okay.

8 MR. ANDREWS: So somebody that serves nine  
9 years and 51 weeks as of the 2008 general election is  
10 still eligible to stand for another four-year term.

11 THE CHAIRMAN: Thank you.

12 MR. DUNN: Let me ask one clarifying  
13 question. It says on that second sentence, Incumbents as  
14 of that date shall stand for retention, blah, blah, blah,  
15 if eligible for another term at that level. So is it  
16 eligibility as of January 1, 2007, or January 1, 2008? I  
17 believe you answered his question as referring to 2008,  
18 the ten year would be 2008, or is it January 1, 2007?

19 MR. ANDREWS: No. January 1, 2007, only  
20 speaks to the incumbency, defining who is an incumbent.

21 MR. DUNN: Okay.

22 MR. ANDREWS: The operation of the ten year  
23 provision, the intention of proponents is that it  
24 operates as of the general election of 2008.

25 THE CHAIRMAN: Okay. Any other questions?

1 Well, let's turn to the staff draft.

2 Senator Andrews, have you had a chance to look at the  
3 staff draft and do you have any comments?

4 MR. ANDREWS: I've looked at it, Mr. Chairman,  
5 and all of my unfortunate instincts to play with the text  
6 coming from being both a legislator and an editor came up  
7 empty. I think it is fine as it's written.

8 THE CHAIRMAN: Again, I don't have anybody  
9 else signed up to testify, but let me know if there is  
10 somebody else who wishes to testify on the titles for  
11 this measure.

12 Let me turn then to board discussion. Any  
13 discussion by the board with respect to the draft, the  
14 staff drafts?

15 Mr. Cartin.

16 MR. CARTIN: Thank you, Mr. Chairman. I guess  
17 it would be in the nature of a question. The staff draft  
18 on lines 2 and 3, starting with "providing," it states,  
19 "providing four-year terms of office for justices of the  
20 supreme court and judges of the court of appeals." And  
21 the text of initiative 90, section 27 now speaks to terms  
22 of offices for appeals court judges and supreme court  
23 justices. And I note that appeals court judges is a  
24 change from the terminology used in initiative No. 75,  
25 which was court of appeals.

1 And so I'm -- what I'm wondering is whether or  
2 not on line 3 -- well, I guess it maybe first it would be  
3 a question of whether appeals court judges in the text of  
4 the measure means judges of the court of appeals.

5 MR. ANDREWS: That was our intention.

6 Mr. Cartin, I don't really think it's susceptible to any  
7 other interpretation than that, since we only have one  
8 Colorado court of appeals.

9 MR. CARTIN: And there are no other appellate  
10 court judges other than the court of appeals --

11 MR. ANDREWS: Not that I know of.

12 MR. CARTIN: -- and the Colorado Supreme  
13 Court?

14 Thank you.

15 THE CHAIRMAN: So again, I guess, following up  
16 on that, I guess the question then is, you know, is it  
17 fair enough for the titles, the draft titles, to refer to  
18 court of appeals, although it sounds like it probably is,  
19 although it's supplying some words that aren't in the  
20 measure, but I don't think I --

21 MR. ANDREWS: As I said, it's entirely  
22 agreeable to the proponents.

23 THE CHAIRMAN: Let me move on to maybe a  
24 little different question. I guess I'm wondering about  
25 line 4 in the staff draft in that in the clause it says

1 "requiring appellate judges serving on January 1, 2007,  
2 to stand for retention in the next general election."  
3 I'm wondering if it's worthwhile to include the  
4 qualifier, "if eligible for another term at that level,"  
5 because some may not be -- as I understand it, may not be  
6 eligible for another term if they've served ten years. I  
7 just don't -- and I don't know whether that's a detail or  
8 not.

9 Senator Andrews, do you have any comment about  
10 that? Do you see that as being significant?

11 MR. ANDREWS: I don't think so, because, as  
12 our colloquy already established, that the restriction on  
13 line 6 and 7 under the proposed title stands as a  
14 qualifier back to line 4, whether you put that language  
15 in line 4 or not.

16 THE CHAIRMAN: Okay. Any further discussion  
17 about the staff draft?

18 MR. DUNN: Mr. Chairman.

19 THE CHAIRMAN: Mr. Dunn.

20 MR. DUNN: We had a discussion last time on  
21 No. 75 about the use of the phrase term limit and whether  
22 or not that was a catch phrase, because I think it was a  
23 point of litigation in that case or is a point of  
24 litigation in that case that we should probably address.

25 And I think our consensus last time was that



1 it was not a catch phrase. I would support that again.  
2 I'd like to get that on the record that while I think  
3 it's a commonly-used phrase, I'm not sure it meets the  
4 legal definition of a catch phrase in that it incites  
5 voters or misleads voters to vote one way or another.

6 THE CHAIRMAN: Mr. Knaizer, would you want to  
7 comment on that? Do you have any advice for the board?

8 MR. KNAIZER: Right. We had argued in the  
9 brief that we had just filed this week that it is not a  
10 catch phrase. You know, the only issue, I think, for the  
11 board is whether or not they would want to eliminate that  
12 as a possible issue on future appeals.

13 THE CHAIRMAN: I think I'm okay with it. I  
14 understand -- we had the discussion and I think I can see  
15 both sides. But I think -- like today I think I'm okay  
16 with the phrase, but ...

17 MR. CARTIN: I am as well. I concur with  
18 Mr. Dunn's reasoning.

19 THE CHAIRMAN: If there is no other  
20 discussion, is there a motion?

21 I'll take a stab at it. I'll move that the  
22 board adopt the staff draft as the titles for number --  
23 No. 90.

24 MR. CARTIN: Second.

25 THE CHAIRMAN: It's been moved and seconded.

1 Is there further discussion?

2 If not, all those in favor say aye.

3 THE BOARD: Aye.

4 THE CHAIRMAN: All those opposed, no.

5 That motion carries three to zero, and that  
6 concludes action on No. 90. The time is 1:52 p.m..

7 Thank you, Senator Andrews.

8 MR. ANDREWS: Thank you, Mr. Chairman and the  
9 board.

10 (Discussion was had, which is not made a part  
11 of this record.)

12 (Mr. Dunn is not present.)

13 THE CHAIRMAN: Let's move then to the next  
14 item on the board's agenda. This is 2005-2006 No. 86,  
15 Compensation for Land Use Regs at Diminished Value. This  
16 is before the board on a motion for rehearing. For the  
17 record, the time is 1:54 p.m.

18 Let me first hear -- I would like to first  
19 hear from representatives of the motion for rehearing.  
20 Mr. Grueskin, are you representing ...

21 MR. GRUESKIN: I am.

22 THE CHAIRMAN: If you'll identify yourself for  
23 the record, please, and we do have your written motion  
24 for rehearing, but if you want to highlight the things  
25 that you would like for the board to especially focus on,

1 we'd appreciate it.

2 MR. GRUESKIN: Thank you, Mr. Chairman.

3 My name is Mark Grueskin. I'm of the law firm  
4 Isaacson Rosenbaum, PC, and our firm represents the  
5 movements behind the motion for rehearing.

6 As indicated, Mr. Chair, you have my written  
7 motion. There are some things that, upon reflection, I  
8 guess I would have liked to have stated somewhat  
9 differently. So I'd like to take this opportunity to do  
10 that.

11 There are ten specific grounds listed in the  
12 motion, and I've been briefed on the motion so that I  
13 could be a little bit expansive here.

14 But the first one it seems to me may have been  
15 an oversight, but it is an important oversight. The  
16 title currently reads that the ballot measure in  
17 question, No. 86, applies -- in fairness, Mr. Chairman --

18 THE CHAIRMAN: Yes, sir.

19 MR. GRUESKIN: -- let me just ask whether or  
20 not it's appropriate -- I know that the proponents aren't  
21 here. Do you want to proceed notwithstanding?

22 THE CHAIRMAN: I think so.

23 MR. GRUESKIN: Okay.

24 THE CHAIRMAN: I mean, I think it's been duly  
25 noticed and ...

1 MR. GRUESKIN: I understand. I just...

2 THE CHAIRMAN: I appreciate you bringing that  
3 up. It's true, I don't have anyone else signed up, and I  
4 don't believe the proponents are present.

5 MR. GRUESKIN: The title -- the ballot title  
6 in question reads that it is a measure that would require  
7 just compensation if a public entity enacts land use  
8 regulations that reduce the value and fortune of the  
9 property by 20 percent or more. In fact, the new  
10 subsection 2 to article 2, section 15 says that if a  
11 public entity enacts or enforces any land use  
12 regulation.

13 And it seems to me that that "or enforces" is  
14 pretty critical language. What it signals is that this  
15 measure is going to apply not just to newly enacted land  
16 use regulations defined in the measure. It seems to me  
17 that omission is misleading, and I would go on, but I  
18 don't think I really need to.

19 Secondly, just compensation is a term of art  
20 used primarily in eminent domain litigation. And it has  
21 a meaning that is, frankly, unrelated to the meaning set  
22 out here. And this is one of those instances, whereupon  
23 reflection, it occurs to me that while I got the issue  
24 right, I didn't provide you enough detail to consider  
25 this issue.

1           If you take a look at the initiative, the  
2   definitional section, subsection C, begins, "As used in  
3   this subsection 2," and then goes on to define several  
4   terms, including just compensation. Well, that is  
5   notable because sub- -- what is now subject 1, what had  
6   always been the entire paragraph of article 2, section  
7   15, includes in the first sentence the following:  
8   Private property shall not be taken or damaged for public  
9   or private use without just compensation.

10           So this measure creates not just a new  
11   definition of just compensation, but a new and  
12   specialized definition of just compensation that is  
13   different from what applies under subparagraph 1.

14           Why is that important? Well supreme court has  
15   said, as recently as 2004, that just compensation, as  
16   used under article 2, section 15, is not merely a cash  
17   payment for a diminution in value. Just compensation  
18   anticipates that the condemning authority and ultimately  
19   a court, if it has to address the matter, will take into  
20   consideration the reduction in fair market value and then  
21   consider what the court calls special benefits.

22           Let me read to you from the supreme court's  
23   own case, because I think they explained it better than I  
24   do. This is the E-470 Public Highway Authority versus  
25   Revenig case cited at 91 Pacific 3d 1038. The example

1 the court gives is as follows: When part of a  
2 landowner's property is condemned for a highway project,  
3 the results to the landowner are a detriment in the form  
4 of the taking of property and in some cases a benefit in  
5 the form of the increased value of the remaining  
6 property. These offsetting consequences to separate  
7 parcels arise from a single transaction, the highway  
8 project. In addition, these offsetting consequences  
9 accrue to a single landowner. The court says basically  
10 just compensation under article 2, section 15, was that  
11 reduction in value offset by whatever benefits are  
12 attributable to the particular taking in question.

13 Well, this definition of just compensation is  
14 extraordinarily different. This definition of just  
15 compensation only takes into account the court's -- the  
16 first half of the court's equation; that is, the  
17 reduction in value. And therefore, anyone reading the  
18 term just compensation would presume that it is used as a  
19 term of art and that it means what it has always meant,  
20 and that would be incorrect.

21 And it seems to me the title cannot set up a  
22 new standard for just compensation without relating what  
23 that standard is and how different it is from the  
24 existing standard.

25 Third, it seems to me that if -- that there is

1 -- there was cause to use the phrase just compensation,  
2 and it's not just because it's wording in the initiative,  
3 but compensation that is just necessarily means that it  
4 -- if it wasn't being done in the way it was being done,  
5 it would be unjust.

6 And it seems to me that when you promote  
7 something as either just or not being unjust, then you're  
8 necessarily trying to appeal to the voter's sense of  
9 emotions here.

10 So if it is not a term of art, if we disagree  
11 there, it seems to me this is necessarily a catch phrase  
12 because just compensation does not truly describe what  
13 this measure, in fact, does under the definition.

14 In the same regard, the introductory clause to  
15 setting forth the single subject statement includes the  
16 phrase remedies, and remedies are only important when a  
17 legal wrong is done. And what we're talking about here  
18 is not a legal wrong, but an application of legal  
19 standards, standards that may have well preexisted the  
20 passage of this initiative. And it seems to me that  
21 remedies is not appropriate and is, in fact, prejudicial.

22 Arguments 5 and 6 are actually very similar to  
23 what I've laid out to you in regards to just  
24 compensation. Land use regulation, the court has noted  
25 very often, is a local matter. It's a matter for cities

1 and counties and appropriate political subdivisions to  
2 take into consideration.

3 But this is -- this is an exceedingly broad  
4 type of measure that includes public entities that would  
5 include the State of Colorado, any state agencies, and a  
6 variety of local entities that don't engage in land use  
7 regulation as we know it: school districts, service  
8 authorities, law enforcement authorities, housing  
9 authorities and all special districts, every single  
10 kind.

11 It seems to me that where the title talks  
12 about public entities engaged in land use regulation,  
13 voters could not know that the State of Colorado is going  
14 to be subjected to that same standard. They could not  
15 know that their local police department is going to be  
16 subjected to that same standard. They could not know  
17 that their local school district is going to be subjected  
18 to that same standard.

19 And it seems to me that, without that level of  
20 specificity, this title, the vague reference to public  
21 entities is necessarily problematic.

22 Similarly, land use regulation -- the word  
23 regulation has -- again, is a term of art, it has a  
24 meaning. It means -- it anticipates a regulatory process  
25 whereby there is an enactment, there is a legislative



1 enactment. The term -- the phrase land use regulation is  
2 not used in that regard here. It applies to guidelines,  
3 enforcement actions, deed restrictions and any action  
4 taken in connection with an application or permit.

5 Well, it is absolutely the right of the  
6 proponents to include that language, but it's the duty of  
7 the title board to reflect it in the title because one  
8 could not know, and this is not a detail, that land use  
9 regulation anticipates that where an existing  
10 administrative process is used, that this choice, either  
11 exemption from the regulation or a payment to the  
12 landowner is going to be invoked. And that seems to me  
13 to be problematic.

14 No. 7 on my hit parade is the fact that this  
15 is retroactive for all land use regulations, however that  
16 term is defined, since 1970. One would have no idea that  
17 regulations and administrative actions going back more  
18 than three decades are affected by this measure. And it  
19 seems to me that that is necessarily a fact that voters  
20 ought to know.

21 Additionally, there are certain types of land  
22 use regulations that would not be subject to this measure  
23 under its terms; nuisances, those necessary to protect  
24 health and safety or comply with federal law. Voters  
25 need to know that too. These are not insignificant or

1 rarely used exceptions. These are things that people  
2 need to know about.

3 No. 9 is particularly important, although it  
4 doesn't appear to be so necessarily from my motion,  
5 because it's such a brief reference, or from the  
6 initiative itself. But the initiative states quite  
7 clearly that the public entity engaged in land use  
8 regulation cannot establish one of those exceptions. It  
9 is -- there is no act by which they may establish the  
10 exception. The only way that the exception gets  
11 absolutely established under the initiative is by an  
12 appellate court from which there is no further review.

13 And it seems to me that voters are used to  
14 their land use agencies establishing whether or not a  
15 particular measure falls within one of these three  
16 categories. And they will no longer be able to do that  
17 with any legal effect; not any more than you or I.

18 And therefore, it seems to me that the title  
19 needs to say that the capacity of land use regulatory  
20 agencies as defined here is changed. It's changed in a  
21 significant way.

22 And then as a corollary to that, it seems to  
23 me that the title should also reflect that it is only a  
24 court of law that ultimately establishes whether or not  
25 one of these exceptions exists, that there is no

1 presumption any longer of regularity or correctness.  
2 There is no deference given in the legal process to the  
3 acts of local -- or of any public entity engaged in land  
4 use regulation.

5 Well, I don't have anything beyond  
6 that, Mr. Chairman. I'm happy to take your questions if  
7 you have any.

8 THE CHAIRMAN: Thank you. Questions for  
9 Mr. Grueskin? Mr. Cartin.

10 MR. CARTIN: Thank you, Mr. Chairman.

11 Mr. Grueskin, on item No. 5, I'm trying to  
12 understand your argument a little bit better. Is it --  
13 basically it's my understanding that you've -- you're  
14 arguing that under this newly created standard for a  
15 public entity that by putting public entity in the title  
16 and only the term public entity, that the voters won't  
17 know or could not know all of the various public entities  
18 that will be subject to the provisions of the measure.

19 And I guess my question would be, do you think  
20 that the voters currently have more or less an  
21 understanding of what governmental units or public  
22 entities, which of those units or entities are subject to  
23 the eminent domain provisions of the state constitution?

24 MR. GRUESKIN: Mr. Cartin, I think the court  
25 has recognized time and time again that land use

1 regulation is inherently a local matter. By using the  
2 term land use regulation, the message that is sent is  
3 that this is essentially an issue between you and your  
4 city council.

5 And the court has acknowledged that basically  
6 you have the right to presume that, because there are  
7 inherent rights relative to zoning and other types of  
8 land use regulations that occur at the local level.

9 At no point -- if this were a measure that was  
10 couched in terms of eminent domain, I might agree with  
11 you that it's not quite as important that it be spec- --  
12 that the title be specific that the state and the police  
13 department are affected. But those aren't entities that  
14 engage in land use regulation, which is what this applies  
15 to.

16 Now, this may have a corollary -- this may be  
17 a corollary to eminent domain. It's why it's under  
18 article 2, section 15. But if it really were just  
19 limited to eminent domain as we know it, then in my view,  
20 frankly, you wouldn't create a whole subsection with its  
21 own definition.

22 I don't think this is limited to eminent  
23 domain, and I think if the title is crafted that way and  
24 I think inherently you've understated the effect of the  
25 issue for the voters. I share your problem. If this

1 were just eminent domain, I think we'd be okay. But this  
2 -- this is eminent domain plus.

3 MR. CARTIN: That's helpful to me. I  
4 appreciate that.

5 I guess my follow-up question would be again,  
6 on objection No. 5, is it your argument that the title of  
7 the measure should list each of those governmental units  
8 that's included within the definition of a public entity?

9 MR. GRUESKIN: Well, I think that the board  
10 could get away, if it says the State of Colorado, not  
11 necessarily limiting -- not necessarily listing, excuse  
12 me, any agency or department of the state government. I  
13 think that's probably okay. I'm not -- I'm not looking  
14 to expand this title and make it unwieldy.

15 But it seems to me that any entity that falls  
16 outside what is traditionally associated with land use  
17 regulation will come as a dramatic surprise to voters  
18 unless the title relates it.

19 MR. CARTIN: And again, my last question on  
20 that would be, you're -- and I'm not as versed in this  
21 subject matter as you, but you're stating affirmatively  
22 that some of these governmental units that are listed are  
23 currently -- currently do not have this type of authority  
24 relative to land use regulation. School -- you mentioned  
25 school districts, special districts --

1 MR. GRUESKIN: Based on -- I'm sorry. Based  
2 on the kind of land use regulation that you and I and  
3 voters think of, the answer is no. They may have the  
4 capacity -- which is why I said I think the phrase land  
5 use regulation needs to be amplified. They may be  
6 perceived as having certain capacity in that regard.

7 But if you stick with the phrase land use  
8 regulation, then there's no way that people would know  
9 the breadth of that term.

10 MR. CARTIN: Thank you.

11 THE CHAIRMAN: While we're on, I guess, No. 5  
12 and No. 6, I'm still struggling with that. I mean I'm  
13 not quite sure I'm persuaded yet at least. I mean I  
14 understand -- the way I understand your argument,  
15 Mr. Grueskin, is that the expectation of a lot of people,  
16 a lot of knowledgeable people, is that land use  
17 regulation means something fairly specific that's done by  
18 local governments, counties primarily, and yet the  
19 measure that -- you know, does describe public -- public  
20 entities' land use regulation and defines it broadly.

21 And you know, public entities is not a narrow  
22 term. I mean, you know, the -- I didn't go back and find  
23 them, but the State of Colorado does have statutes that  
24 deal with land planning. I don't -- you know, I'm trying  
25 to figure out in my mind, you know, whether people think

1 of that as land use regulation.

2 But I think that it covers that subject about  
3 planning on -- mostly on the part of local governments.  
4 But I sus- -- I believe those statutes are prob- -- some  
5 of those statues are probably regulatory in nature and  
6 probably would be accurately described as land use  
7 regulation.

8 In any event, you know, I'm -- part of what  
9 I'm struggling with is on the one hand I understand that  
10 maybe the expectations of many people might be a little  
11 different here, and yet at the same time, how far does  
12 the board go in trying to overcome those expectations if  
13 those expectations may be jumping to conclusions?

14 I'm not articulating it very well, but in my  
15 mind it may be more something for the Blue Book or for  
16 the arguments for people to understand that it's a  
17 broader measure than traditional, local land use  
18 regulation by local governments. But the titles are  
19 pretty accurate as drafted by the board at this point.

20 Help me understand a little better.

21 MR. GRUESKIN: Well, let me point to another  
22 case where I've differed with the board, and we took it  
23 to the supreme court.

24 There was an initiative a few years back where  
25 a proponent wanted to change petition procedures, undo

1 the single subject requirement, and limit the right of  
2 referendum on zoning matters. And in that case, I don't  
3 know the cite offhand, but it was No. 43, the court said  
4 zoning is such a fundamentally local issue that it --  
5 when you change the right to associate it with that kind  
6 of decision making, you necessarily are doing something  
7 that's substantive and not procedural and, therefore, it  
8 necessarily is independent of the subject of the  
9 petitions.

10 Well, if that local zoning capacity and the  
11 right of people to be a part of it is identified as a  
12 local matter of substance, it seems to me hard to think  
13 of land use regulation, which zoning is typified with,  
14 but obviously land use regulation is limited, as anything  
15 but a local matter.

16 And to the extent that the title isn't clearer  
17 about what land use regulation means -- I mean, let me  
18 make the suggestion: I think if you amplified what land  
19 use regulation was and then talked about all -- you know,  
20 all state, public, local, district public entities, you  
21 would probably be informing voters of the kinds of things  
22 they need to know.

23 But absent -- because as I said before, I'm  
24 not looking to expand this title and make it unwieldy,  
25 but I would like it to be informative.



1           And as to your point about the Blue Book, I  
2   agree that the Blue Book can be a source of information,  
3   but that is handled by a different branch, it's handled  
4   at a different time, and unfortunately it's handled after  
5   petitions have been circulated.

6           And so if you're hoping that the legislature  
7   will clarify that, you're necessarily presuming that the  
8   petition signers can do without that information. And I  
9   think that maybe -- maybe is where we part.

10          THE CHAIRMAN: Let me back up. And maybe just  
11   to help me think through some of these arguments that  
12   you've made, let me kind of go through them one by one.

13          I think I agree with you on paragraph No. 1,  
14   unless there's some other -- something I'm overlooking.  
15   It seems to me the board needs to amend the titles to  
16   reflect your concern with paragraph No. 1.

17          No. 2, I'm not sure I agree, although maybe  
18   there's an easy fix anyway. I mean let me just make the  
19   argument on the other side of this. The fact that this  
20   particular measure is drafted as additional language for  
21   article 2, section 2 -- article 2, section 15, may be  
22   somewhat happenstance. I mean it's more than that. But  
23   it's -- it's somewhat different -- the subject is a  
24   little different than what's currently in section 15. It  
25   seems to me this measure could have been placed somewhere

1 else, could have been a stand-alone section or even in  
2 possibly another article. But the fact that the  
3 proponents chose to add it to an existing section and use  
4 the phrase just compensation seems to create some -- that  
5 tends to contribute to the argument there is an issue  
6 here.

7           And I guess I would argue that I'm not sure  
8 there's an issue, because what would become subsection 1,  
9 as you pointed out has case law, definition of term just  
10 compensation. But for subject 2, proponents are  
11 providing their own definition, which I think you're  
12 accurate, it's a different definition. But they've  
13 limited it just to subsection 2. And if subsection 1 can  
14 use the term just compensation, it seems like proponents  
15 could use that term in the constitution somewhere as  
16 well, and like I say, it seems like they could have a  
17 separate definition.

18           And so I -- to me there may be some confusion  
19 just about the fact that it's -- that it's located in a  
20 section that already uses that term. That maybe adds to  
21 the confusion.

22           You know, I am a little concerned about  
23 potential catch phrase or argument because "just" is a  
24 judgment. But you know, it is a legal term, I can see  
25 why proponents used it, and I'm not -- you know, there's

1 this temptation just to recognize that that is a legal  
2 term and they're entitled to use it and entitled to  
3 defend it -- or define it somewhat differently.

4 But having said all of that, I mean maybe it's  
5 quite sufficient just to take the word "just" out of the  
6 titles. I'm not sure that we lose anything if we refer  
7 to requiring public entities to provide compensation to  
8 an owner.

9 And it strikes me that maybe that just avoids  
10 the issue. I don't know that there's anything lost by  
11 that. Do you have any comment about simply taking it  
12 out, the word "just" that is?

13 MR. GRUESKIN: I think that -- I think that  
14 helps measurably.

15 THE CHAIRMAN: Okay. Paragraph -- your  
16 paragraph 4 about remedies, I'm -- I'm not quite with you  
17 on that yet either. I'm -- I'm not -- I'm not sure about  
18 the word. If there were a better word, I'd like to find  
19 it. But in the context of the titles, it's talking about  
20 providing remedies to owners for land use regulation that  
21 diminished the value of property.

22 And there needs to be a term in order to  
23 describe a single subject. I mean there's more than one  
24 thing that owners can do, but to avoid the appearance of  
25 stating multiple subjects, I think there needs to be a

1 single term there. And I think the concept is it  
2 provides a method of addressing land use regulations that  
3 diminish the value of property.

4 And remedy, I'm not sure, is inaccurate or  
5 misleading. It's -- it's something that addresses or  
6 fixes a situation. Fix I'm not sure is the right word  
7 either. But if I had a better word, I'd be happy to use  
8 it. But I'm not sure that remedies is -- is -- is  
9 misleading or that it's prejudicial, but I'm still trying  
10 to think that one through.

11 Harder one may be jumping down to paragraph  
12 7. I think I need some help understanding that as well.  
13 The titles fail to state that the measure applies to land  
14 use regulations that have been in effect since 1970. And  
15 I do just need to try to think that through a bit.

16 The measure says that it does not apply to  
17 land use regulation that is enacted prior 1970. And I  
18 think that's the key point that you're focusing on. I'm  
19 trying to figure out in my mind, trying to understand the  
20 measure on that point, because I am picturing the measure  
21 at this point as being prospective only in this respect:  
22 It doesn't apply to measures enacted prior to 1970. So I  
23 assume in theory it applies to measures enacted the  
24 beginning of 1970 on. But that may mean only with  
25 respect to enforcing previously enacted language

1 regulation.

2 And maybe where I need to start is at the  
3 beginning of subsection 2, because the -- you know,  
4 that's what kicks all of this off; if any public entity  
5 enacts or enforces, present tense, enacts or enforces.  
6 And I'm assuming that could be -- both of those could be  
7 prospectively only; in other words, on or after the  
8 effective date of this measure if a public entity enacts  
9 or enforces the land use regulation, et cetera, then this  
10 measure kicks in.

11 So the relevance of the provision in  
12 paragraph 8, it doesn't apply to measures enacted prior  
13 to 1970, is that something could have been enacted in  
14 1971, for example, but it's never been enforced. And  
15 after the effective date of this measure, the public  
16 entity begins to enforce that, and therefore, this  
17 measure would apply to that situation.

18 But it would not necessarily, and this is what  
19 I'm trying to figure out, would not necessarily apply to  
20 something that was enacted in 1970 by itself. Perhaps if  
21 it's been consistently enforced ever since.

22 But I don't know. I mean that's -- in other  
23 words, I'm not sure that this is that significant. It  
24 may be that this is just a detail if it's prospective  
25 only. I think your argument is that this is very

1 significant, that it is retrospective and that it has to  
2 be mentioned in the titles. Is that accurate?

3 MR. GRUESKIN: That's correct. I think if I  
4 could maybe advance that line of thought a little bit.

5 Under subsection 2.B., Roman numeral II --  
6 Roman Numeral I talks about how the process works; you  
7 have to provide written demand. And then Roman numeral  
8 II talks about when written demand has to be made. It  
9 has to be made within five years of -- and paragraph C is  
10 what's critical -- the date the public entity seeks to  
11 enforce the land use regulation.

12 So presumably, five years -- any date five  
13 years prior to the passage of this measure in which a  
14 local entity has enforced the land use regulation at  
15 issue, there would be an outstanding claim under the  
16 amendment, either for compensation or exemption.

17 And so it seems to me that there -- this --  
18 it is not directly prospective in nature; it anticipates  
19 actions that have already occurred or it permits that  
20 way, land use regulations that have already occurred.

21 And then there is a whole process under Roman  
22 numeral III whereby there is a public entity response and  
23 paragraph 4 on down. But there's nothing in here which  
24 prevents, and I would suggest to you that, in fact, the  
25 goal of the measure is to permit the retroactive seeking

1 of compensation for land use regulation enforcement that  
2 occurred within the last five years.

3 THE CHAIRMAN: Well -- and you may be right,  
4 but it still seems to me that there is a reading of it  
5 that's prospective only. And I appreciate you pointing  
6 out the language there about written demand shall be made  
7 within five years, et cetera. But you know, I'm still  
8 kind of bogged down with what really may be a matter of  
9 interpretation.

10 MR. GRUESKIN: Well, I suppose -- I suppose  
11 if the proponents were to say that this was not intended  
12 to apply to any land use action that occurred prior to  
13 the effective date of the measure, that would be  
14 something that -- there would be some reason to come to  
15 that conclusion.

16 Based upon the -- based upon the text, that's  
17 not the way the text reads. And frankly, it seems to me  
18 that that is a relatively important aspect, that there  
19 are a series of land use measures across the state,  
20 across the spectrum of public entities that are going to  
21 be covered by this measure.

22 THE CHAIRMAN: Let me see if I have any other  
23 questions about the motion for rehearing. But I don't --  
24 I don't think I do.

25 Mr. Cartin, do you have any further for

1 Mr. Grueskin?

2 MR. CARTIN: No, I don't.

3 THE CHAIRMAN: Thank you. I do have one other  
4 person signed up, Scott Gessler. If you'd like to  
5 identify yourself and who you represent, please.

6 MR. GESSLER: Thank you, Mr. Hobbs. My name  
7 is Scott Gessler and I represent the proponents in this  
8 matter, and I'll be happy to respond to the motion for  
9 hearing and perhaps address some of the board's questions  
10 that I heard earlier.

11 Maybe to start at the very end with respect to  
12 the very last point, I'm happy to explain exactly what  
13 the proponent's intent is with respect to the 1970  
14 issue.

15 Essentially, this provision would apply to  
16 land use regulations that were inactive and enforced  
17 after 1970, but prior to this amendment, but only to  
18 those owners who currently own it and continuously owned  
19 it at that time.

20 So in other words, the way the proposal  
21 intends for it to be structured is that this applies to  
22 all land use regulations that are enforced -- that are  
23 enacted and enforced and they have to be enacted or  
24 enforced either after 1970 -- I'm sorry. Let me rephrase  
25 that. It shall -- all enforced or enacted land use



1 regulations, but not any land use regulations that are  
2 enacted prior to 1970, or after 1970, but prior to the  
3 acquisition by an owner.

4 So in other words, if you are an owner -- if  
5 there's a land use regulation that went into effect in  
6 1975, and an owner purchased the land in 1980, they would  
7 not have a cause of action in this because they did not  
8 own the land at the time that the land use regulation was  
9 enacted.

10 If there is an owner who owned the land in  
11 1975 and then enactment of a land use regulation is  
12 enacted in 1985, for example, and that owner owns it  
13 today or at the time they file, they would have a cause  
14 of action.

15 If an owner owns a land in 1975, for example,  
16 the land use regulation goes into effect in 1985, and  
17 they sell it prior to this ballot measure passing, they  
18 would not have a cause of action.

19 So in other words, it's a dual requirement.  
20 They have to have -- it is enacted after 1970 -- in order  
21 for it to apply retroactively, it has to be enacted after  
22 1970 and apply at that time to an owner who owned the  
23 land then and owns it today.

24 THE CHAIRMAN: Let me --

25 MR. GESSLER: So -- so I guess my point with

1 respect to that is -- I'm certainly trying to explain the  
2 measure.

3 But if, with respect to paragraph 7 in the  
4 motion for rehearing, if that were simply placed in since  
5 1970, that would be misleading in itself because it's not  
6 all land use regulations since 1970, but only a small  
7 subset of land use regulations that apply to an owner  
8 that still owns that land. Does that clarify?

9 THE CHAIRMAN: I think that helps. Let me --  
10 let me go over it again, though.

11 MR. GESSLER: Okay.

12 THE CHAIRMAN: So owner buys property in  
13 1975. Land use regulation enacted in 1980. I mean and  
14 the owner has owned the land continuously and still does  
15 since 1975. Land use regulation enacted in 1980, let's  
16 assume not enforced, that it becomes effective or they  
17 begin enforcing it in 1985. So the measure applies to  
18 that except that written demand has to be made within  
19 five years of the date of enactment or the date the  
20 entity seeks to enforce it. Does that foreclose the  
21 owner then because it's more than five years since then?

22 MR. GESSLER: No, because it also includes the  
23 enactment of the measure, of this particular ballot  
24 measure. So in other words, the retroactivity provision  
25 will only apply for five years from the enactment.

1 In other words, if you look at paragraph  
2 2 (e)(c) -- I'm sorry -- paragraph 2(e)II, it says,  
3 Written demand shall be made within five years of, and  
4 the very first one is the effective date of this  
5 measure. I think you were just concentrating on either  
6 the date of the enactment or the date of the measure.

7 THE CHAIRMAN: Well, but I mean for the next  
8 five years someone can make a written demand, but I would  
9 -- my hypothetical was assuming that they could, except  
10 that the -- it has to be within five years of all of  
11 those things. And although it would be within five years  
12 of the effective date of the measure, it wouldn't be  
13 within five days of the date of the enactment or within  
14 five days of the date the public entity seeks to enforce  
15 the land use regulation.

16 MR. GESSLER: I mean our intent, and I'm happy  
17 to state this for the record, is that it's within five  
18 years of any one of those three items.

19 THE CHAIRMAN: Oh, and it is or.

20 MR. GESSLER: It is or.

21 THE CHAIRMAN: Okay.

22 MR. GESSLER: So -- and just to clarify one  
23 other point is that the land use -- the owner has to own  
24 the land when it's -- the land use regulation is enacted  
25 after 1970, not merely enforced, but enacted after 1970.

1 THE CHAIRMAN: Mr. Cartin.

2 MR. CARTIN: Mr. Gessler, item 10 of  
3 Mr. Grueskin's motion for rehearing says the titles fail  
4 to refer to the only process by which an exception listed  
5 under 8 above is established; namely, that such an  
6 exception is found by a court of law. Is that accurate?

7 MR. GESSLER: I would argue that that's not  
8 inaccurate. Both numbers 9 and 10 we believe do not  
9 accurately reflect what the measure says.

10 I'm happy to explain with respect to No. 10,  
11 where it says, The titles fail to refer to the only  
12 process by which an exception listed under 8 above is  
13 established; namely, that such exception as found by a  
14 court of law and such findings cannot be further  
15 appealed.

16 With respect to the finding by the court of  
17 law, the point is that, yes, it is a court of law that  
18 makes that finding because it's a legal process.

19 Secondly, that the finding cannot be further  
20 appealed. We believe that the -- that it can be  
21 appealed, but rather that it sets a -- it sets -- yeah,  
22 if you look at 2.B.VII, Roman VII -- I'm sorry, Roman VI,  
23 it says, All exceptions shall be narrowly construed,  
24 shall be proven by the public entity by clear and  
25 convincing evidence. Okay. It says a public entity's

1 determination shall be insufficient to establish an  
2 exception between subsection 2.A.I.2.

3 All that that means is that a public entity  
4 cannot simply state we hereby find X and that that is  
5 sufficient evidence to overcome their burden of proof.  
6 They actually have to provide proof that they have met  
7 the exception --

8 MR. CARTIN: Do they have to --

9 MR. GESSLER: -- before a court of law.

10 MR. CARTIN: So they have to prove it in a  
11 court?

12 MR. GESSLER: They have to prove it in a court  
13 of law.

14 And I would simply argue that this is like any  
15 other civil action that exists in our state. It has to  
16 be proved in a court of law.

17 MR. CARTIN: So 10 is accurate?

18 MR. GESSLER: Ten is accurate to the extent  
19 that the exception has to be found by a court of law.  
20 But it's inaccurate with respect to say and such funding  
21 cannot be further appealed. Rather it says it shall be  
22 subject to de novo review upon appeal. So basically it  
23 allows the appellate court to engage in de novo appeal,  
24 okay, rather than an abuse of discretion standard.

25 So it definitely can be appealed. There is no

1 doubt of that. It simply sets forth the standard for  
2 that appeal on that particular finding.

3 MR. CARTIN: Thank you.

4 MR. GESSLER: You're welcome.

5 THE CHAIRMAN: And it seems to me that the way  
6 -- with respect to item No. 9, it occurred to me that  
7 that was somewhat inaccurate because the exceptions may  
8 be established by public entity engaged in regulation,  
9 but only if they go to a court and establish it through  
10 that process. They can't unilaterally establish --

11 MR. GESSLER: Correct.

12 THE CHAIRMAN: -- the exceptions.

13 MR. GESSLER: Correct. For example, you know,  
14 the general assembly regularly includes a safety clause  
15 that such legislation is necessary for public safety and  
16 health. The concern is that public entities would merely  
17 say this exception is necessary -- this land use  
18 regulation is necessary to protect the public health and  
19 safety, in other words.

20 They are certainly welcome to say that, but  
21 they must prove that it is intended to protect the public  
22 health and safety or it is intended to comply with  
23 federal law or it is attempting to restrict -- restricts  
24 or prohibits activities historically recognized as  
25 nuisances in common law. I mean they can say that, but

1 they still have to prove it in a court of law. So they  
2 are certainly able to establish it.

3 So yes, that's why I believe No. 9 and 10  
4 would be inaccurate.

5 THE CHAIRMAN: Let me ask you a couple other  
6 questions about the arguments advanced by Mr. Grueskin,  
7 and Ms. Gomez, maybe you could put the titles on --  
8 project them on the screen just so everyone can see the  
9 titles.

10 I'm wondering about a couple of the things  
11 that Mr. Grueskin has raised. For example, No. 1 seems  
12 to have -- his objection No. 1 or concerning No. 1 is  
13 perhaps the title should reflect, I think it's -- one,  
14 two, three -- fourth line down, if a public entity enacts  
15 or enforces land use regulations, et cetera.

16 MR. GESSLER: I don't often find myself in  
17 this position, but I would agree with Mr. Grueskin and  
18 have no objection to including the term "enforces" as  
19 well.

20 THE CHAIRMAN: Then with respect to No. 2 and  
21 3, paragraphs 2 and 3 of the motion for rehearing, as I  
22 indicated to Mr. Grueskin, I'm not quite sure that I  
23 agree with the arguments, but it seemed like it would be  
24 easier just to take the word "just" out and refer to  
25 public entities to provide compensation to an owner,

1 et cetera. Would you have any objection to just taking  
2 the word "just" out?

3 MR. GESSLER: No, I don't. I would also  
4 propose as well using the phrase saying a public entity,  
5 and I think this would be accurate, help make fair market  
6 value. Fair market value is used in the definition of  
7 just compensation by the statute as well. And I think it  
8 has -- it's well defined in law to be the price that a  
9 willing payer -- willing buyer is -- will pay to a  
10 willing seller through an arm's-length transaction. So  
11 it's a well recognized definition. It would not be  
12 misleading. It would be accurate. And it is  
13 specifically used in the initiative itself.

14 THE CHAIRMAN: So what actually is paid is the  
15 diminution in fair market value, isn't it? Not just fair  
16 market value, but ...

17 MR. GESSLER: Correct. So just compensation  
18 -- so rather than saying to provide just compensation to  
19 pay fair market value for the diminution to an owner. So  
20 I would agree with you.

21 THE CHAIRMAN: Or reduction in fair market  
22 value? I'm a little concerned about the term -- I'm not  
23 sure I even can say it right -- diminution.

24 MR. GESSLER: Reduction works fine. The  
25 reduction in fair market value.



1 THE CHAIRMAN: Mr. Cartin.

2 MR. CARTIN: Mr. Chairman, I just want to say  
3 as far as 2 and 3 go, I appreciate Mr. Grueskin's  
4 arguments and Mr. Gessler's amenability to go along with  
5 that change. And I'm not going to -- I wouldn't object  
6 to striking "just" and making it "compensation."

7 I would say, though, that I don't think that  
8 the use of the term "just compensation" is necessarily  
9 misleading in the context of the measure, given the fact  
10 that it's creating new language, and I don't think it's  
11 necessarily a catch phrase.

12 I note that it's used in the text. But that  
13 term, that phrase is used at least seven times besides  
14 the definition. And so I think it's a term that's  
15 integral to the measure. But so long as Mr. Gessler  
16 doesn't object, I won't make his argument for him.

17 MR. GESSLER: Yeah, I mean my -- my preference  
18 would be to stay with the -- my strong preference would  
19 be to stay with the language of the initiative, and  
20 that's why I was willing to and happy to propose using  
21 the term fair market value of the reduction or of the  
22 diminution, because I think that gets to the essential  
23 central tenet of what's going on is that we, you know,  
24 the value that's normally paid on market in a fair  
25 transaction between a buyer and a seller, that's the

1 standard by which this is judged.

2 So -- and simply for the record, again, I'm  
3 not pulling out my sword, but for the record I would  
4 argue that just compensation is not a catch phrase, that  
5 it does accurately reflect the legal standard that's been  
6 developed by courts to provide compensation to private  
7 individuals and private entities when a governmental  
8 entity exercise is taken under the Fifth Amendment and  
9 the government is required to pay just compensation.

10 So I think that that's a pretty standard legal  
11 term of art. I actually did look it up in Black's Law  
12 Dictionary before I came here and would stand on that.

13 And I think that essentially what this is  
14 getting at, this entire initiative, is the whole issue of  
15 regulatory taking, which in some instances is recognized  
16 under the Fifth Amendment. When the diminution reaches a  
17 certain threshold, just compensation will be paid under  
18 normal conditions.

19 MR. CARTIN: Mr. Chairman, would it be  
20 appropriate to move to make those changes right now as  
21 we're going along?

22 THE CHAIRMAN: Sure.

23 MR. CARTIN: On the staff draft --

24 THE CHAIRMAN: Actually on the title set by  
25 the board.

1 MR. CARTIN: Yeah, that's right. Okay. I  
2 would move that in the line -- fourth line at the very  
3 end where it says "public entity enacts," after "enacts,"  
4 I would move that the words "or enforces" be inserted.

5 THE CHAIRMAN: I'll second that. Any  
6 discussion?

7 If not, all those in favor say aye.

8 THE BOARD: Aye.

9 THE CHAIRMAN: All those opposed, no.  
10 That motion carries two to zero.

11 Mr. Cartin.

12 MR. CARTIN: Thank you, Mr. Chairman. And on  
13 the third line at the very end, "provide just," strike  
14 the word "just," the third line down, strike the word  
15 "just." I think that's the only ...

16 THE CHAIRMAN: I'll second that. Any  
17 discussion?

18 Again, I only have Mr. Grueskin and  
19 Mr. Gessler signed up. Is there anybody else who wishes  
20 to testify on the motion for rehearing?

21 Seeing none, the motion is to strike the word  
22 "just" at the end of line 3.

23 All those in favor say aye.

24 THE BOARD: Aye.

25 THE CHAIRMAN: All those opposed, no.

1 That motion cares two to zero.

2 Any other suggested changes to the titles?

3 Mr. Cartin.

4 MR. CARTIN: Thank you, Mr. Chairman.

5 And I'll be brief. I'll work hard not to  
6 repeat anything we've already said.

7 I do want to say on paragraph 4 of the motion  
8 where it says remedies -- the objection is that remedies  
9 in the introductory clause of the title is not found in  
10 the initiative text and is prejudicial.

11 And when I went back and looked at the  
12 measure, I wanted to make sure that there were remedies,  
13 and I guess this might be a quick opportunity to ask you,  
14 Mr. Gessler, are the remedies in the measure the  
15 compensation or the enjoining of a land use regulation?  
16 Or are there -- is there only one -- what would you  
17 characterize as the remedies?

18 MR. GESSLER: I think the remedies are the  
19 compensation of fair market value or enjoining. And of  
20 course, a landowner does not have to seek those  
21 remedies. I mean if the landowner does nothing, then the  
22 land use regulation will remain in effect.

23 So I think they're properly characterized as  
24 remedies, doesn't seek to change the status quo. And  
25 just very briefly I would argue that the title board

1 certainly has authority to include words that don't  
2 necessarily -- that don't appear in the title itself. I  
3 won't -- I won't read the entire name of the case, but  
4 simply cited 646 Pacific 2d 916, Colorado Supreme Court,  
5 involving a title pertaining to the sale of table wine in  
6 grocery stores.

7           So I think there's ample court authority to  
8 say that the title board can use words that don't  
9 necessarily appear within the text, but are used to place  
10 the initiative in context and make it understandable.

11           MR. CARTIN: And my thinking, Mr. Chairman,  
12 was that it seemed to me that one way to address that, if  
13 the board wanted to do it, and I'm not completely sold on  
14 it, is to do a broadening of the title to where, rather  
15 than referencing the remedies, the other language to the  
16 effect it was concerning land use regulation of public  
17 entities that diminished the value of privately owned  
18 real property.

19           And I would just put that out there for  
20 consideration. There would be no reference to the  
21 remedies, but you would in, again, in the language that  
22 follows, the true title, there would be -- you would have  
23 the language about providing compensation in exempting.  
24 And so there would be language in the title that  
25 specified what the remedy was.

1 But the true title of the measure, the  
2 language proceeding any connection or width would be more  
3 of a -- take more of a broader brush. That might be one  
4 way to address that.

5 Again, I'm not -- I put that for your  
6 consideration.

7 THE CHAIRMAN: So again, that would be  
8 concerning, did you say, land use regulations that  
9 diminish the value of --

10 MR. CARTIN: Privately owned real property.

11 THE CHAIRMAN: Mr. Gessler, any comment about  
12 that?

13 MR. GESSLER: We think that the use of the  
14 word "remedies" is accurate. I'm not exactly sure, and I  
15 apologize if I didn't pick up on what Mr. Grueskin said  
16 because I arrived a little bit late, exactly how this is  
17 viewed as prejudicial. I think -- I think the actual --  
18 the standard is that is it misleading, is it inaccurate,  
19 or does it create a catch phrase?

20 Now, the use of the word prejudicial, I don't  
21 think, is necessarily standard. I don't think it's  
22 misleading, inaccurate, and I certainly don't see how it  
23 creates a catch phrase by using that word. It's  
24 inaccurate in the sense that it does provide a remedy for  
25 an owner subject to land use regulations in diminution of

1 the value of their property more than 20 percent. It's  
2 absolutely accurate what it does. It doesn't mislead the  
3 public, and it does not create a catch phrase, although  
4 I'm willing to entertain how it may.

5 MR. CARTIN: I must confess I can't remember  
6 the particulars of the argument, so ...

7 THE CHAIRMAN: Well, I'm not going to speak  
8 for Mr. Grueskin, although I think he referred to legal  
9 remedies, and I think that was -- but I -- it seems to me  
10 that the measure does provide two legal remedies in  
11 circumstances where there are land use regulations that  
12 diminish the value of property, and it does seem accurate  
13 to me, you know.

14 I mean on the one hand, I appreciate the  
15 suggestion of Mr. Cartin if it resolves the problem, but  
16 also something is lost as well by removing the concept  
17 that there's -- that the measure provides legal remedies  
18 for that circumstance.

19 MR. CARTIN: And I -- I guess I concur with  
20 that, and I would just -- just wanted to raise that  
21 suggestion, and I will withdraw it.

22 And then as far as -- may I?

23 THE CHAIRMAN: Sure.

24 MR. CARTIN: As far as items 5 and 6 go, I  
25 think that I more or less am of the same mind as you,

1 Mr. Chairman, on these, although I think that there's a  
2 good discussion.

3 My simplistic take on objections 5 and 6, I  
4 guess, is that, while I appreciate that use of the terms  
5 public entity and land use regulation may be expansive,  
6 maybe impact the interpretation of that terminology based  
7 on supreme court decisions and local control and those  
8 kinds of things that Mr. Grueskin articulated, I think to  
9 somehow -- I'm not sure how or if it's the title board's  
10 responsibility, given the relevant line of cases, to some  
11 how convey that in the title of the measure.

12 I'm thinking that both 5 and 6 may be subject  
13 to debate, may be an interpretation, and that I guess I'm  
14 reluctant to -- to try and work out or -- I guess what  
15 I'm saying is that I don't think that the relevant  
16 authority requires us to go forward and incorporate that  
17 in the title. And so I wouldn't have any suggested  
18 changes on 5 and 6.

19 And then I'm going to jump over 7.

20 And I guess as far as 8, 9 and 10 go, and I'll  
21 just cut to the chase, there may be a way, and it may be  
22 appropriate, and I guess I would be interested in --  
23 well, I'd like to hear what Mr. Gessler thinks of going  
24 ahead and addressing 8, 9 and 10.

25 And at least 9 and 10 I think may be able --



1 you could maybe resolve those in one additional line to  
2 the current language of the title, and maybe, in fact,  
3 No. 7 as well. And I'm thinking too that that may be  
4 consistent with some of the case law in this area.

5 My suggested language for your consideration,  
6 Mr. Chairman, is accepting would be additional language  
7 at the end of the current title that was to the effect  
8 accepting -- accepting certain land use regulations based  
9 on the date of enactment, which would try to address the  
10 1970 date without specifically stating it, or if -- or if  
11 the regulations are found by a court to be necessary to  
12 prevent nuisances, protect the public health and safety,  
13 or comply with federal law.

14 In other words, somehow these objections that  
15 are found in 7, 8, 9 and 10, there may be a way to  
16 incorporate those in the measure. And I guess my  
17 question to you, Mr. Gessler, is do you -- are you  
18 supportive of that or ...

19 MR. GESSLER: I'd like to take a look at it,  
20 see actually how it's written first, but my initial  
21 reaction is I don't have an objection.

22 THE CHAIRMAN: I -- you know, I'm not sure  
23 that I see it as significant enough to amend the titles.  
24 I mean it's -- you know, I'm trying to balance the fact  
25 on the one hand the board is required to have titles that

1 are brief and state the measure features. And here on  
2 the other hand we don't want to leave out anything  
3 significant.

4 There are -- and the questions are the  
5 exceptions -- is how significant are the exceptions.  
6 There are exceptions to the general rules stated in the  
7 titles. Those exceptions relating to public health and  
8 safety, comply with federal law; nuisances, I'm not sure  
9 that any of them surprise -- you know, and one of the  
10 tests is to what extent would people be surprised with or  
11 misled by not including something in the titles about  
12 those exceptions. And I'm not quite convinced that there  
13 would be something that would rise to that level, but ...

14 Mr. Gessler.

15 MR. GESSLER: I would be happy to respond to  
16 that. I think -- I mean my initial support is based on  
17 the fact that I'd like to move forward with the process.  
18 And that said, either it's pretty clear -- clear case  
19 law, that the court -- I'm sorry -- that the title board  
20 need not include all exceptions or need not include  
21 exceptions to the general concepts that are related.

22 The question really becomes would it otherwise  
23 be misleading if the court -- or if the title board were  
24 to fail to include such exceptions? I don't think as it  
25 is now it's misleading.

1           That said, I recognize that the title board  
2           wants to keep things brief and avoid undue complexity by  
3           recognizing that it's wrestling with that trade-off.

4           I apologize, I'm not taking a strong stand and  
5           helping the board one way or the other.

6           MR. CARTIN: It doesn't seem to be finding  
7           support with you, but I -- I wouldn't ... that's all that  
8           I have, Mr. Chairman.

9           THE CHAIRMAN: Thank you. Mr. Grueskin, do  
10          you have anything further? I didn't give you a chance to  
11          kind of respond to Mr. Gessler, but if you have anything  
12          you wanted to advise the board about, having heard  
13          Mr. Gessler.

14          MR. GRUESKIN: Just one quick comment.

15          It seems to me that the -- that the  
16          proponent's discussion of the retroactivity was useful.  
17          It brought into, for me anyway, some kind of relief that  
18          this provision as written, does apply to provisions that  
19          are already on the books, and they have been on the books  
20          for quite a while.

21          And I just want to clarify, and I think it was  
22          the statement that you made, Mr. Chair, that the written  
23          demand provision relating to the five years, because, as  
24          Mr. Gessler pointed out, these are all ors, that the  
25          public entity that seeks to enforce that land use

1 regulation, so therefore, something that's been on the  
2 books for five years, so any -- an enforcement action in  
3 the year 2010 of the land use regulation that was enacted  
4 in 1980 can be -- is the subject of a claim until the  
5 year 2015.

6 And just so it's understood here, there are no  
7 limitations except as set forth by Mr. Gessler, that  
8 ownership can't have changed, but there's no limitation  
9 in terms of looking back on those regulations.

10 And I would like to think that the language  
11 "enacts or enforces" is broad enough. But it doesn't  
12 connote any retroactivity. "Enact" suggests a present  
13 act. "Enforce" is broad enough to also be prospective as  
14 to an enactment, but it doesn't even imply that there are  
15 regulations enacted 36 years ago that would be covered by  
16 this measure. And I think the title ought to address  
17 that retroactivity.

18 That's the only thing I'd add for the  
19 discussion.

20 THE CHAIRMAN: Thank you. And I -- just in  
21 response, I -- I think Mr. Gessler's comments do indicate  
22 this is more significant, frankly, than I was  
23 appreciating before Mr. Grueskin raised the issue. I'm  
24 still not sure I actually can conclude what -- what to  
25 say about the retrospectivity.

1           If I had a clear picture of what the board can  
2 say in the titles, but there's a certain amount of legal  
3 interpretation there that I'm reluctant to make, even  
4 though it is apparent there is some kind of  
5 retrospectivity there that may be more than I  
6 appreciated. I just -- like I say, I just don't know,  
7 once we get into that how to accurately make that call in  
8 a fair way in the title.

9           And I don't know, Mr. Gessler, if you have a  
10 suggestion on that, I'm open to it, because that is  
11 something that does bother me to the extent that it may  
12 be a significant, well, effect, of the measure.

13           Like I say, I just -- without being able to  
14 interpret the measure more thoroughly, I just don't know  
15 that I have any language to offer at this point.

16           Mr. Gessler, do you have a comment?

17           MR. GESSLER: I don't have any specific  
18 answers, but I will make one or two comments. One is  
19 that it doesn't apply to all regulations, all  
20 regulations, and I argued that it is far narrower than  
21 the initial plans. And the reason why it is far narrower  
22 is that it only applies to an owner as defined in this  
23 family, the owner that owned the land at the time that  
24 land use regulation was enacted.

25           So it's not any land use regulation that

1 applies to any land, but only land, certain land under  
2 continuous ownership since the time prior to the  
3 initiatives, after 1970, and was owned at the time it was  
4 enacted.

5 So sort of the sense is that the owner is  
6 entitled to benefit from the investment fact expectations  
7 of what that land will bring upon the purchase.

8 So if there is a land use regulation in effect  
9 and owner sells it tomorrow, the new owner cannot, you  
10 know, afford himself of this cause of action. So that's  
11 the first thing.

12 The second one would be an empirical one, and  
13 I recognize that my empirical statements may not be  
14 entirely accurate, but it's the best I have to offer. My  
15 understanding is that there was an Oregon initiative that  
16 was passed, later struck down, then later crossed out,  
17 reversed, the court reversed, that applies to all land  
18 use regulations, did not have a 1970 limitation, did have  
19 the continuous ownership limitation, and state-wide, I  
20 think, it had a one-year statute of limitation, perhaps  
21 two.

22 But in the first year approximately there  
23 were, I think, 143 claims state-wide in Oregon based on  
24 that statute.

25 So my point is that from an empirical

1 standpoint I don't think it's necessarily that  
2 significant. From a -- the actual exception as well,  
3 because it's so limited based on that continuous  
4 ownership provision, that as well would -- would limit  
5 the significance of it.

6 THE CHAIRMAN: Thank you. Any other  
7 discussion by the board or suggested changes to the  
8 titles previously adopted by the board?

9 MR. CARTIN: I have nothing.

10 THE CHAIRMAN: I don't think I do either. So  
11 I believe a motion would be in order.

12 MR. CARTIN: I move to grant the motion for  
13 rehearing to the extent of the changes made and adopted  
14 by the title board.

15 THE CHAIRMAN: I'll second that. And then the  
16 understanding, of course, is the changes made in the  
17 ballot title were the same changes we made in the ballot  
18 title submission clause, which is exactly the same except  
19 in the form of a question.

20 So that's been moved and seconded. Is there  
21 any further discussion?

22 If not, all those in favor say aye.

23 THE BOARD: Aye.

24 THE CHAIRMAN: All those opposed, no.

25 That motion carries two to zero.

1 That concludes action on No. 86, and the time  
2 is 3:02 p.m. We will take a brief recess.

3 (Recess taken.)

4 (Mr. Cartin is not present. Ms. Eubanks and  
5 Mr. Dunn are present.)

6 (Proceedings were had, which are not made a  
7 part of this record.)

8 THE CHAIRMAN: Okay. Let's turn to the next  
9 agenda item. As I indicated earlier, No. 87 was  
10 withdrawn by the proponents, so the next item on the  
11 board's agenda is item No. 93, PERA reform.

12 And earlier -- first the board would like to  
13 hear from proponents, and find out if -- make sure -- we  
14 want to make sure that the board understands the measure  
15 and see if the board has any questions about the measure  
16 itself.

17 So if I could first hear from proponents. If  
18 you could identify -- you are proponents? If you will  
19 identify yourself for the record, please.

20 MR. POULSON: Barry Poulson.

21 MS. BURTT: My name is Christine Burtt.

22 THE CHAIRMAN: Thank you.

23 MR. POULSON: We would like to answer any  
24 questions you have about the draft itself.

25 MS. BURTT: Well, we want to say that we



1 looked at the title and we have no objections to it. We  
2 think it accurately reflects our intentions.

3 THE CHAIRMAN: Thank you. Are there questions  
4 about the measure that the board has for the proponents?  
5 Ms. Eubanks.

6 MS. EUBANKS: In terms of the measure that's  
7 before the title board right now, there were some changes  
8 made between the review and comment version and the  
9 version that's in front of the title board right now.

10 I'd just like to know whether those changes  
11 you feel are in direct response to questions that were  
12 raised in the review and comment hearing.

13 MR. POULSON: Yes, they were, and I think that  
14 in terms of specific changes that were requested, changes  
15 involve mainly clarification of language involved in  
16 oversight of the board, the oversight of the program.

17 And I think the question -- one of the  
18 questions was should this be state treasure's office or  
19 in the budget planning office of the governor. And our  
20 response was, the decision was to place this in the state  
21 planning and budget office.

22 MS. EUBANKS: In terms of that placement, as I  
23 understand the measure -- and I'm trying to get sort of  
24 from a global perspective of what's going on here. In  
25 terms of the PERA entity itself, there's two provisions;

1 one that says that PERA is subject to the administrative  
2 direction of OSPB, as well as then the new board of  
3 trustees is created within OSPB in the Governor's office;  
4 is that correct?

5 MR. POULSON: That's right.

6 MS. EUBANKS: So the way that I've always  
7 viewed PERA as it exists right now, I think what we  
8 commonly refer to it as a special purpose authority, that  
9 it's a state entity, it's created by state statute, but  
10 it's not part of what I would think of traditional state  
11 government in terms of the three branches of government;  
12 it's something else.

13 Is the point of making PERA subject to  
14 administrative direction by OSPB and putting the trustees  
15 within OSPB, is PERA, by this measure, being pulled into  
16 the executive branch of state government?

17 MR. POULSON: No. I think that the purpose is  
18 mainly one of oversight. Our perception is that, this is  
19 based on our review of similar state pension programs,  
20 especially in Michigan, that by placing it within the  
21 state office of planning and budget, which is essentially  
22 what the Michigan reform involved, that the purpose is to  
23 establish more effective oversight.

24 MS. EUBANKS: And in terms of that oversight,  
25 other than being subject to administrative direction by

1 OSPB, and I'm not quite sure what that is, the measure  
2 itself doesn't provide for any direct oversight; is there  
3 -- I mean, for example, the powers of the board of  
4 trustee and -- trustees in terms of making certain  
5 decisions isn't contingent upon approval of the director  
6 of OSPB. There's -- I didn't see any correlation  
7 between, other than creating the board within OSPB, there  
8 is no oversight?

9 I mean you haven't -- you haven't changed  
10 anything in terms of the statutory authorization for OSPB  
11 in regard to PERA. And other than administrative  
12 direction, which I don't quite know what that means, I  
13 mean I don't know what your measure provides.

14 And the reason that I'm asking is, for  
15 example, the language that you've changed that used to  
16 say that it wasn't subject to administrative direction,  
17 now it is, that's usually the kind of language that is  
18 specifically used to designate a special purpose  
19 authority, for example, which are excluded from the  
20 definition of state for TABOR purposes.

21 PERA right now is a special -- is considered a  
22 special purpose authority and is excluded from the state,  
23 because now you've made them subject to administrative  
24 direction of OSPB, of an entity of the state. It no  
25 longer qualifies under the statutory definition of a

1 special purpose authority for TABOR purposes. And so I  
2 don't know whether that means now PERA is now included  
3 within the state limit on fiscal year spending, for  
4 example.

5 I don't know -- and that's why I'm trying to  
6 get this feel. I don't know whether that would have  
7 personnel implications in terms of right now because PERA  
8 is outside of the state system, whether by the oversight  
9 of OSPB that's making it more of a state entity in terms  
10 of the requirement that state monies be in the state  
11 treasury and subject to appropriation, which is -- right  
12 now their monies are separate and apart because they're  
13 not part of the state.

14 I'm just trying to get from sort of this  
15 global perspective of the oversight when you haven't  
16 really provided for any oversight other than this one  
17 statement. I'm just trying to figure out what your  
18 measure does and what -- how it might affect these types  
19 of areas.

20 MR. POULSON: I think the specific question  
21 that came up regarding the previous draft did involve the  
22 question of funding. And we have explicitly provided for  
23 this funding, and it's a very specific funding, and that  
24 is the language is for -- that the legislature must  
25 provide funding for the oversight function of the state

1 office of planning and budget, that is the idea that this  
2 current budget, of course, obviously doesn't provide for  
3 this type of oversight.

4 So with regard to the funding for this, with  
5 regard to the intent, it's clear that this function of  
6 the state office of planning and budget is clearly an  
7 oversight function. We haven't attempted to answer the  
8 question -- the other types of questions involving  
9 personnel and so forth. Our expectation is that that  
10 would be up to them, that office.

11 MS. EUBANKS: But again, can you point me to  
12 anything other than this language in terms of explaining  
13 to me what that oversight involves, because it seems to  
14 me that the board of trustees' powers and duties in  
15 general haven't changed at all. And so, you know, in  
16 terms of them making decisions, what oversight is there  
17 for OSPB?

18 MR. POULSON: I would disagree that functions  
19 of the board are certainly changed by this. And I think  
20 the background of this is that, as it is currently  
21 constituted, PERA is subject to oversight by the state  
22 treasurer's office. And at this point state treasurer  
23 does sit on the board.

24 I think our perception was that that oversight  
25 function was lacking, and that for a variety of reasons

1 some of the problems that we've identified with PERA are  
2 a result of that lack of oversight.

3 And so I think first of all that there is an  
4 oversight function that the state is performing now.  
5 Currently it's performed by having the state treasurer  
6 serve on the board. This is a somewhat different  
7 oversight function. We have tried to make it more  
8 explicit and we certainly have changed the function.

9 MS. EUBANKS: But it's not contingent upon any  
10 approval by OSPB.

11 MR. POULSON: That's true.

12 MS. EUBANKS: So other than sort of the  
13 physical location of the board within the office -- and,  
14 you know, usually like through the budgetary process, you  
15 know, the governor's office submits a budget to the  
16 general assembly which includes funding for those various  
17 offices. And with the board of trustees within OSPB, I  
18 mean it seems like perhaps there's a budgetary function  
19 now created by the fact that you put the board actually  
20 in the office?

21 MR. POULSON: Again, I would disagree to  
22 that. We have not made changes in terms of this  
23 oversight function. I think if you look at the language  
24 of this, there is a reporting responsibility here that  
25 the board must make to the legislature, and I think that

1 the oversight function, of course, would be to fulfill  
2 that mandate.

3 MS. EUBANKS: But there's no one, for example,  
4 like the director of the office of state planning and  
5 budgeting, they're not on the board of trustees, similar  
6 to the situation with the treasurer or state auditor.

7 MS. BURTT: Besides -- so that person has --  
8 there's no conflict of interest because the director of  
9 that office does not serve on that body.

10 MS. EUBANKS: But yet you've given the  
11 director no authority to oversee the board, because other  
12 than placing it, physically creating the board within the  
13 office, you've not specified what that oversight function  
14 is or that they can have access to any records or  
15 anything else. Is that -- am I missing something in the  
16 measure?

17 MR. POULSON: My understanding is that under  
18 the current plan there is an oversight function for the  
19 state treasurer, and in this case it involves the state  
20 treasurer serving on the board. I think you will see  
21 that the composition of the board changes with the  
22 appointment of board members by the governor, by the  
23 governor's office. That does change the composition of  
24 the board.

25 We have not attempted to make explicit the

1 details of the oversight function. That is certainly the  
2 expectations.

3 MS. EUBANKS: In terms of the measure in  
4 general, and you said that you were fine with the title  
5 as it's drafted, so I assume that you think that the  
6 statement of single subject is an accurate one --

7 MR. POULSON: Yes.

8 MS. EUBANKS: -- as reflected in the staff  
9 draft concerning retirement benefit plans for public  
10 employees in Colorado.

11 MR. POULSON: Yes.

12 MS. BURTT: Correct.

13 MS. EUBANKS: Okay. In terms of sort of the  
14 timing of the measure taking effect on January 1st of  
15 2007, assuming that voters approve the measure, and  
16 understanding that the -- at the very end of the measure  
17 it provides that it's supposed to take effect on that  
18 date after the vote and after the certification, I assume  
19 that you're not trying to change the constitutional  
20 requirement that actually makes initiated measures  
21 effective upon declaration of the governor.

22 MR. POULSON: That's right.

23 MS. EUBANKS: In terms of the timing itself,  
24 assuming that it takes effect on January 1, with the  
25 change of the makeup of the board, you've got four



1 members that have to be elected. Those elections would  
2 then have to take place sometime after January 1, so for  
3 a while at least the board would not have those members,  
4 is that correct, until the elections could actually  
5 happen?

6 MS. BURTT: (Nods head in the affirmative.)

7 MR. POULSON: (Nods head in the affirmative.)

8 MS. EUBANKS: Then you've got three members  
9 that are appointed by the governor. And I don't know in  
10 terms of -- you don't make any mention of consent of the  
11 senate, and I don't know whether or not there's any issue  
12 there in terms of the requirement under article 4,  
13 section 6 about governor's appointments of public  
14 officials subject to the consent of the senate.

15 But if consent is actually required, it seems,  
16 depending on when the governor makes those appointments  
17 in terms of being a vacancy appointment, when the general  
18 assembly isn't in session, yet if it were to happen very  
19 early in January or after the general assembly has come  
20 into session, where the persons can't actually take  
21 office until they've been confirmed by the senate, then  
22 is there any potential that all you'd have is two members  
23 of your board and you don't have a quorum operating in  
24 that early part?

25 MS. BURTT: There's no intention to go out of

1 statute in terms of the senate confirmation. So the  
2 language says that at the time of the appointments the  
3 governor shall designate, et cetera. Those would  
4 obviously have to be at the time that those appointments  
5 were valid. So that requires the senate confirmation,  
6 and then that would be the case.

7 Your issue is concerned about time. It seems  
8 to me that there was specific language in here that kept  
9 the current board on until the new one is put in place.

10 MS. EUBANKS: And I guess I just saw the  
11 language that said that as of January 1 the old board was  
12 abolished.

13 MS. BURTT: Right.

14 ME. EUBANKS: And so I just wasn't sure  
15 exactly how that transition would work, especially with,  
16 you know, meeting to get the recommended persons from the  
17 various groups that you required in terms of the  
18 different expertise, the Bar Association, things like  
19 that. I mean it seems like that would take some time for  
20 the governor to get a list. Then in terms of senate  
21 confirmation, that may take time, that you may end up in  
22 the situation where all you've got is the auditor and the  
23 treasurer.

24 MS. BURTT: Well, there would be no intention  
25 of having a board that would --

1 MS. EUBANKS: I'm not sure that I had any  
2 other questions.

3 Oh, I did have a couple of questions on  
4 possible typographical errors that I wanted to ask you  
5 about. And I'm looking at page 10, which at the very  
6 beginning of the page it says section 12, Repeal, and it  
7 has a section 13, which has a new service credit table  
8 for certain employees, and about halfway down in that  
9 provision it has a reference to section 24-51-603, and  
10 then it's subsection 1 and then there's a 27 and then  
11 peren, c, closed peren, and that doesn't conform to what  
12 I would call normal statutory references in terms of  
13 codification.

14 And so I was just wondering if that might be a  
15 typo that you might need to consider in terms of  
16 correcting.

17 MS. BURTT: You know, we responded -- yes. We  
18 responded to legislative counsel on this.

19 MS. EUBANKS: Okay. And then there's another  
20 one on page 14 of the draft, and it's in the headnote to  
21 section 24-51-1603, where it says Employer and Employee  
22 contributions, and the words "AND EMPLOYEE" are  
23 capitalized.

24 MS. BURTT: Hm-hmm.

25 MS. EUBANKS: Usually in a headnote, even

1 though it's a new provision of law, it would be lower  
2 case instead, except for the initial cap. And so I was  
3 wondering whether "AND EMPLOYEE" actually should be lower  
4 case.

5 MS. BURTT: Sure.

6 THE CHAIRMAN: Let me go back to the first  
7 possible typographical issue that Ms. Eubanks raised on  
8 page 10. Do you know what the correct reference is  
9 supposed to be there? Is it supposed to be (1)(c),  
10 603(1)(c), or do you know? I mean I -- I'm not sure what  
11 (1)27(c) would be.

12 MS. BURTT: I'm sorry. I don't have any  
13 documents that far back with me. This is exactly as we  
14 received it back. This was the original that was  
15 submitted and I don't have it. I'm sorry.

16 THE CHAIRMAN: We had gotten an e-mail after  
17 the measure was submitted -- or an e-mail that we  
18 received from Bob Hoban, and I think probably  
19 representing proponents, that he indicated he had another  
20 -- a version that removed some codes and things that I  
21 think he thought was going to clean up some what I  
22 thought -- thought were formatting issues and so forth.

23 MS. BURTT: Right.

24 THE CHAIRMAN: And since it was tendered after  
25 the deadline for the board to consider today, we did not

1 include it as the official version of the measure, and I  
2 don't have it with me. But if you have it, or if we have  
3 it, it might be useful to compare. I'm just wondering if  
4 that is somehow a product of the -- of coding or  
5 something like that.

6 MS. BURTT: I believe it probably is, because  
7 this was submitted as a Word document. The legislative  
8 counsel translates everything into Word Perfect, and  
9 there were a number of formatting differences that, when  
10 we compared them with the originals, you saw that there  
11 were a number of changes in there.

12 I'm going to ask that Richard Westfall --

13 THE CHAIRMAN: Mr. Westfall, if you'll  
14 identify yourself for the record, please.

15 MR. WESTFALL: I will, and I'll be happy to  
16 sign in as well. I wasn't planning on speaking. Richard  
17 Westfall, the law firm of Hale Friesen, on behalf of the  
18 proponents.

19 When we went back and we did a very careful  
20 read of the original draft and prepared the red line and  
21 prepared the final version, we recognized that there were  
22 a couple of typos that you've spotted, and there's one or  
23 two others as well.

24 To be absolutely abundantly careful about the  
25 statutory obligation to make sure that there be no change

1 that's not in direct response to a question posed by  
2 legislative legal services, those were all particular  
3 typos that were not caught by the questions that were  
4 posed by legislative legal services.

5           My legal position, and I again I thought it  
6 was important that I get up and present to you a legal  
7 position, the proviso of statutes will have the ability  
8 to make any conforming changes that will be necessary.  
9 We felt, given the way that the -- these measures play  
10 themselves out now with opponents being able to make  
11 challenges for the smallest technical issue, that it was  
12 more important that, given the fact that these  
13 typographical errors are very small, have no substance,  
14 and I believe can very adequately be addressed by the  
15 reviser of statute, that it was more important in this  
16 context that we comply with the specific statutory  
17 obligation on behalf of proponents to make sure that any  
18 changes in the measure be only those changes that are in  
19 direct response to questions posed by legislative legal  
20 services. And that's what we attempted to do.

21           THE CHAIRMAN: Thank you. Are there other  
22 questions from the board for the proponents? If not,  
23 let's turn then -- the next item of business before the  
24 board is whether or not the measure complies with the  
25 single subject requirement of the constitution.

1 And I don't have -- well, is there anybody  
2 signed up who wishes to testify on that issue, whether  
3 the measure legally complies with the single subject  
4 requirement?

5 If you'll come forward and identify yourself  
6 for the record, please, and who you represent.

7 MR. DUNN: Mr. Chairman, while they're coming  
8 up, I forgot to make one disclosure. That reminded me  
9 when Mr. Westfall came up. Mr. Westfall and I, just for  
10 the record, used to practice together. It's over a year  
11 ago, so I don't think it's a conflict.

12 He also is -- Mr. Westfall and his firm also  
13 represent the attorney general's office in litigation,  
14 and we're also opposite Mr. Westfall and his firm in  
15 other litigation. So there's probably other conflicts  
16 I've forgotten about, but those are the ones I remember.

17 So I wanted to put it on the record. I don't  
18 think that infringes on my ability to be impartial here.

19 THE CHAIRMAN: Thank you, Mr. Dunn.

20 MS. EUBANKS: And since we're making  
21 disclosures, Mr. Westfall has been retained by the  
22 general assembly to represent a member in a particular  
23 legal matter. It has nothing to do with the measure  
24 before us today, but I did also want to make that  
25 disclosure for the record.

1 THE CHAIRMAN: Thank you. Okay. If you'll  
2 proceed, please.

3 MS. ULIBARRI: Good afternoon, ladies and  
4 gentlemen. My name is Mary Ulibarri, and I'm  
5 representing the employees of the University of Colorado  
6 Denver staff counsel, as well as the classified staff  
7 members of the University of Colorado. I'm also here on  
8 behalf of your state-wide liaison counsel.

9 THE CHAIRMAN: Would you spell your name.

10 MS. ULIBARRI: You bet. U-l-i-b-a-r-r-i.

11 THE CHAIRMAN: Thank you very much. Go ahead  
12 and give us your testimony, please.

13 MS. ULIBARRI: Yes. I'm actually looking at  
14 the page that was listed, the summary or the recap that  
15 was listed after the ballot initiative that their  
16 proponents put together. And there are numbers  
17 associated with -- they go all the way down to 24. So  
18 I'm going to start on line 4. You don't have that  
19 there?

20 MS. EUBANKS: We don't have that.

21 MS. ULIBARRI: I've got the page numbers. If  
22 you have the ballot initiative in front of you, I can go  
23 ahead with that. There is a recap page with numbers on  
24 it. You guys are not seeing that?

25 THE CHAIRMAN: What is a recap page?



1 MS. EUBANKS: The title.

2 THE CHAIRMAN: The title. This is the staff  
3 draft, which we have not yet gotten to.

4 MS. ULIBARRI: Okay.

5 THE CHAIRMAN: If you have some issues with  
6 the proposed titles as drafted by staff, we'll come to  
7 that next.

8 MS. ULIBARRI: Well, I actually do have some  
9 issues that are actually in the ballot proposal and I do  
10 have the page numbers associated with that.

11 The way I'm reading this ballot initiative,  
12 for one, it's 22 pages long, and you're talking about a  
13 single subject. The way I read it, I'm coming up with  
14 three separate subjects.

15 The three separate subjects that I see, and it  
16 would be 24-51-202 on the bottom of page 4, that has to  
17 do with creating a new board of trustees. The second  
18 subject that I've come up with that I'm seeing as a  
19 second subject is 24-51-211 on page 9, which is stating  
20 reducing the amortization period that is deemed  
21 actuarially sound for the association's defined benefit  
22 planned trust funds. And the third subject that I'm  
23 seeing is 24-51-1601, page 12, that states creating a new  
24 defined contribution plan requiring employees of the  
25 existing defined contribution plan and employees hired on

1 or after January 1, 2007, to become members of the new  
2 defined contribution plan.

3 The reason I am reading this as three separate  
4 subjects is because you're taking the PERA board and  
5 you're changing the entire makeup of the board with  
6 having, as this lady pointed out, governor appointees.  
7 That's a separate issue.

8 And then if they were to take the amortization  
9 period of PERA now and reduce it from 40 years to 30  
10 years, as it states on Page 9 of the initiative, I would  
11 think that this fabricated crisis of PERA might just go  
12 away, if that reduction of liabilities could go for ten  
13 years. That, in my opinion, is another subject area.

14 And then itself creating from a pension plan,  
15 taking a new defined contribution plan, PERA is now  
16 currently a defined benefit plan. I have some concerns  
17 about that, and there's some language in the ballot  
18 initiative that I'm afraid the voters do not understand.

19 I'm actually an enrolled agent. I'm enrolled  
20 to practice before the Internal Revenue Service. And I  
21 don't think that most -- I deal with a lot of tax plans,  
22 that don't understand tax law.

23 And something that's not in this initiative is  
24 the fact that PERA members will not, are not now, nor  
25 will be in the future subject to social security. So

1 what happens with this initiative is the protection of  
2 social security -- and let me give you an example of some  
3 of the protection of social security.

4 THE CHAIRMAN: Excuse me for interrupting. I  
5 just want to make sure that this relates to the question  
6 of whether the measure complies with the single subject  
7 requirement.

8 MS. ULIBARRI: Okay. Well defined  
9 contribution plan is my -- I'm saying that that is  
10 another single subject. So I'm saying that there are  
11 three subjects in this particular ballot initiative.

12 THE CHAIRMAN: Okay. Thank you. And we'll  
13 come back to the titles at some point. But the first  
14 obligation of the board is to determine whether the  
15 measure complies with the single subject requirement.

16 MS. ULIBARRI: And I will end with saying this  
17 is a 22-page document. It is a long, involved -- I spent,  
18 and I am used to reading tax law for fun. I spent an  
19 entire Saturday on this ballot initiative. I mean that's  
20 what I do for kicks.

21 And it is a very complicated ballot initiative  
22 and I know that -- I mean I deal with people on a regular  
23 basis that may not understand the language.

24 THE CHAIRMAN: Thank you. Are there  
25 questions? Thank you.

1 I don't believe I have anyone else signed up  
2 to testify, but is there anybody else who wishes to  
3 testify on the single subject question? And while we're  
4 on that, I would like to give the proponents an  
5 opportunity to respond to the arguments that the measure  
6 is more than one subject.

7 MS. BURTT: Well, we think your staff had it  
8 right, that it is indeed a single subject, and this  
9 initiative reflects in great degree house bill 1083,  
10 which was killed in committee. It got that far. So it  
11 clearly met the single subject rule. And house bill --  
12 excuse me -- rather, senate bill 162, which is still  
13 moving forward, and also senate bill 174, in which case a  
14 discussion of the amortization schedules, the boards of  
15 trustees -- the board of trustees, rather, and the  
16 defined contribution plan are addressed.

17 So clearly that legislation and your staff saw  
18 this as meeting the single subject rule.

19 THE CHAIRMAN: Are there questions from the  
20 board?

21 And I'm jumping ahead a little bit to the  
22 titles, which I'm on the one hand trying to avoid, but it  
23 comes up because the titles -- it is a requirement that  
24 the titles clearly express the single subject of the  
25 measure. And the staff draft expresses the single

1 subject as a concerting retirement benefits plans for  
2 public employees in Colorado.

3 And I've -- I think you might have indicated  
4 before, but is that a fair statement of what you believe  
5 the single subject to be?

6 MS. BURTT: Yes.

7 THE CHAIRMAN: Thank you. Further -- I'll  
8 turn to board discussion concerning the question of  
9 single subject. Any discussion by the board?  
10 Ms. Eubanks.

11 MS. EUBANKS: Sure. I'll get it started.

12 I'm having problems, and I think it might be  
13 obvious from my questions that I asked the proponents in  
14 terms of the OSPB involvement in the placement, in terms  
15 of sort of that necessary connection of -- okay, we're  
16 dealing with retirement benefit plans and in terms of if  
17 we find a single subject, then we may have a discussion  
18 of what a statement of the single subject may be.

19 I'm not sure that I necessarily agree entirely  
20 with the statement as set forth in the staff draft right  
21 now.

22 But what concerns me is in terms of the OSPB  
23 involvement, understanding the proponent's explanation,  
24 there isn't anything textual in terms of that connection  
25 of oversight. I mean you've got the board of trustees

1 created within the office, but there's no authority given  
2 to the director for any sort of oversight.

3 I'm not sure what administrative direction  
4 means in terms of that reference. Like I say, that  
5 language -- I mean it's taking language that's usually  
6 used for an opposite or different purpose, which is to  
7 make it clear that something is not part of state  
8 government.

9 But again, OSPB then in the measure is not  
10 given, other than that general statement, is not given  
11 any specific oversight authority, none of the decisions  
12 by the board is required to be approved by OSPB, OSPB  
13 isn't given any authority to have access to the records  
14 of PERA, which are generally viewed, I think, as  
15 confidential.

16 I think in terms of trying to equate it to the  
17 treasurer's role in PERA, I think that's -- because he's  
18 a board member, versus here you don't have the director  
19 of OSPB being part of the board. I mean you still have  
20 the treasurer, you still have the state auditor.

21 And so I'm having difficulty there, especially  
22 because there may be unintended consequences of giving  
23 administrative direction to OSPB in terms of now, at  
24 least according to the statutory definition of special  
25 purpose authority for the state's TABOR limit, PERA no

1 longer qualifies because it is subject to administrative  
2 direction of OSPB in terms of whatever that means.

3 And so I -- I just don't -- I'm not sure I see  
4 the connection, the necessary connection why you have to  
5 have OSPB, the placement of the board in OSPB, or  
6 supposedly the administrative oversight as it relates to  
7 the functions of the board or the operations of the  
8 association or pension plans or anything else. It's just  
9 sort of there.

10 And that's -- I'm sort of stuck on that, both  
11 in terms of whether there's some sort of hidden  
12 complications by doing this that might surprise voters,  
13 as well as in terms of just the general test for single  
14 subject, which talks about -- you know, relates to more  
15 than one subject and if it has at least two distinct and  
16 separate purposes which are not dependent upon or  
17 connected with each other.

18 And from the text of the measure, I'm not sure  
19 of the connection between OSPB and the board of trustees  
20 and the association.

21 And so I'll just throw that out for  
22 discussion.

23 THE CHAIRMAN: Well, I think you raise a lot  
24 of good questions. I mean I -- but I'm not sure in my  
25 mind what extent to take that as having some effect on

1 our single subject analysis.

2 I -- the -- you know, I don't know what  
3 administrative oversight OSPB will have, but I am -- you  
4 indicated, I think the test is whether or not there's two  
5 separate and distinct purposes. I haven't yet gotten to  
6 that point where I can identify separate and distinct  
7 purposes. I mean it's a pretty broad subject.

8 If it's something like the way it's expressed  
9 in the staff draft, and I think the subject is something  
10 like retirement benefit plans for public employees, the  
11 governing board and how it fits into state government,  
12 all of that arguably is related.

13 And it's true, I don't know the answers to  
14 some of the questions that you raised, but I don't know  
15 that they also indicate separate purposes. It may be  
16 legal questions that are going to have to be resolved if  
17 the measure passes.

18 But again, I just can't necessarily identify  
19 separate purposes at this point.

20 MR. DUNN: Is that a question of  
21 implementation? The measure on its face says that it's  
22 subject to the administrative direction of OSPB. Take  
23 that on its face, and then it's a matter of  
24 implementation and whether or not their -- I don't have  
25 enough experience to know, but whether or not that has



1 any practical effect or not is one of implementation  
2 rather than subject matter.

3 THE CHAIRMAN: I mean I -- my response to that  
4 is yes, I'm not sure what administrative direction there  
5 will be in its form as adopted. I mean I actually have  
6 some ideas about what it could mean if -- based within  
7 implementing this, I have some theories about it, but I  
8 don't have answers. But I think those are the kinds of  
9 things that may have to be addressed in implementation.

10 So I'm not -- and I'm not sure they rise to  
11 the level of things that the board has to figure out at  
12 this point. But I don't know. I just kind of -- where I  
13 am at this point. I think there's lots of good questions  
14 here.

15 But it's not unusual for the board to have a  
16 measure where questions have arisen about exactly how  
17 something will be implemented or what one portion of the  
18 measure means.

19 But as Ms. Eubanks pointed out, the real test  
20 is whether or not there are separate purposes here. We  
21 don't see that yet.

22 MS. EUBANKS: And I guess where I'm sort of  
23 caught up is in terms of the connection of the plans or  
24 PERA or the board or whatever. I mean what is it about  
25 the OSPB involvement that makes -- is necessary or

1 connected to the other changes that are being made?

2 I -- I mean you could revamp the board, you  
3 could do everything that they're doing in terms of  
4 establishing a new defined contribution plan, those sorts  
5 of things.

6 But there's no connection, at least I think  
7 it's -- it's hard to make the connection between putting  
8 OSPB in in some way and not knowing the connection,  
9 because then they're given no role in the plans or with  
10 the board or in any decisions or access to records.

11 See, that's my difficulty is in terms of it's  
12 there, but is it connected somehow.

13 MR. DUNN: Do we want to give the --

14 MS. EUBANKS: And that's, you know -- pardon.

15 MR. DUNN: I was just asking if we wanted to  
16 give the proponents an opportunity to respond to some of  
17 the ...

18 MS. EUBANKS: Sure. That's fine.

19 THE CHAIRMAN: It might be helpful if there  
20 was some testimony about the issues that are being  
21 raised. Mr. Westfall.

22 MR. WESTFALL: Thank you, Mr. Hobbs. If I  
23 could just made a very quick observation based upon a  
24 conversation with a client, with the two proponents.

25 This was not meant as any major,

1 earth-shattering structural change along the lines that  
2 would be suggested by Ms. Eubanks' questions. And we  
3 certainly recognized the spirit in which those questions  
4 were presented, certainly in light of issues such as  
5 TABOR and things like that. And those are very serious  
6 issues. But it wasn't intended to make any of those  
7 major changes that we're talking about.

8           The change to get it within OSPB -- and again,  
9 that's where there is no discussion of any -- of laundry  
10 list of oversight functions that can and should be  
11 performed by OSPB.

12           All is intended is just a simply extra set of  
13 eyes by having the board placed underneath OSPB. So  
14 given the normal functions that OSPB performs for the  
15 governor, it was just thought that it would be very  
16 helpful, this one extra layer of oversight, to just have  
17 the entity within OSPB but not provide for all the other  
18 things that you're talking about, because that would  
19 raise those very questions that you're presenting.

20           So I think just by merely housing that within  
21 -- just physically within OSPB is not meant to create  
22 any major structural changes that would either raise  
23 single subject problems or TABOR problems. None of  
24 that's intended. It's merely to have the extra set of  
25 eyes by OSPB, and again, comparing and contrasting that

1 with having the treasurer who actually sits on the  
2 board. Here the treasurer will be free, he's an  
3 independent board member, to continue to perform that  
4 important role on the -- as a trustee of the PERA board,  
5 but not effect any major structural change.

6 MS. EUBANKS: But wouldn't it be true that as  
7 being put in OSPB then the budget for the board, and I  
8 mean, I don't know, presumably maybe the whole  
9 association is now going to need to be in the budget for  
10 the governor's office, because OSPB -- I mean it's  
11 created in that office. It's now within the executive  
12 branch of government. And I mean that's how it normal --  
13 that's why I say I --

14 MR. WESTFALL: I understand that's a huge  
15 potential effect, but that's not what was intended. And  
16 I believe it's silent on that and can be interpreted to  
17 preserve its independence.

18 MS. EUBANKS: Even though now it doesn't  
19 qualify as a special purpose authority because it's under  
20 the administrative direction? I mean I don't know, you  
21 know. It still says it's an instrumentality, but it's  
22 under administrative direction, and so I don't know what  
23 it is. Is there a fourth category? I don't know.

24 MR. WESTFALL: The proponent -- my client has  
25 to speak on it.

1 MR. POULSON: If I could respond to the  
2 specific question about funding. In fact, this is a  
3 question that was raised earlier with the staff. And the  
4 question was how should this oversight function be  
5 funded. And so that was the reason why we put the  
6 language into this about funding for the oversight  
7 function would be determined by the legislature. And we  
8 wanted to specifically distinguish between oversight  
9 function and funding of the pension system as a whole.  
10 And I think that we tried to design the language to  
11 accomplish that objective.

12 I should also add that in writing this  
13 legislation, we were very much influenced by Michigan  
14 legislation, which in effect, enacted similar reform of  
15 their state pension system, and which also placed an  
16 oversight function in their office of state planning and  
17 budget.

18 And when we drafted this, there was a  
19 discussion about how detailed we should make this and to  
20 what extent should we make it much more explicit, some of  
21 these provisions. And the decision was made in  
22 consultation with the legislative legal staff, that some  
23 of those questions would be resolved with legal  
24 legislation. That's the background why we have this  
25 particular wording.

1 MS. EUBANKS: And I appreciate that and I -- I  
2 understand in terms of the language that was added in  
3 terms of the funding for OSPB as it relates to its  
4 functions in relation to the -- to PERA. But the board,  
5 by creating it within the office of the governor, within  
6 OSPB, which is within the office of the governor, it's  
7 created in the executive branch of government, and the  
8 general assembly has the authority to appropriate  
9 monies. The governor's office has to get its budget  
10 approved and receive appropriations for all of its  
11 functions.

12 And by -- I mean understanding funding -- the  
13 oversight function over OSPB versus the fact that you've  
14 put the board within the office, it's now within the  
15 executive branch, that's -- that's what concerns me in  
16 terms of -- I mean to give OSPB on oversight function and  
17 not change the structure in terms of PERA being a special  
18 purpose authority and being outside the traditional three  
19 branches of government versus the fact that you've  
20 brought the board in, that's what concerns me, because  
21 now they're within the executive branch and -- in terms  
22 of the normal budgeting process, whereas before they're  
23 outside of that.

24 MR. POULSON: Let me respond to your question,  
25 because my understanding is that the office of state

1 planning and budget does exercise an oversight function  
2 over a variety of institutions, some of which are  
3 directly within its purview and directly under its  
4 budget, some of which are not. Is that true?

5 MS. EUBANKS: I believe it has that  
6 responsibility in terms of the executive branch of  
7 government.

8 MR. POULSON: All right.

9 MS. EUBANKS: But that's it. But that's --

10 MR. POULSON: That's what we're trying to do.

11 MS. EUBANKS: And so then that raises the  
12 issue, is PERA now part of the executive branch of  
13 government in terms of that change.

14 MR. POULSON: Well, only in the sense that  
15 that branch would exercise its oversight function. And  
16 as I say, I think our decision was not to try to make it  
17 explicit -- a whole set of details in terms of how that  
18 oversight would be. We did not try and answer that  
19 question.

20 MS. EUBANKS: Okay. Thank you.

21 THE CHAIRMAN: Further discussion by the  
22 board? It still seems to me that likely a single  
23 subject, a broad subject. And I've also been looking at  
24 the statute that implements constitution single subject  
25 requirement, and some of the tests and explanations that

1 are provided there, and I -- I mean, for example, the  
2 statute basically says the board should apply the same  
3 judicial standards to the single subject requirement that  
4 are used for bills.

5 And I -- although I don't know, I have not  
6 looked at the bills that were introduced in the current  
7 session, and certainly I don't think there's been -- I'm  
8 not aware of any challenges to whether or not any of  
9 those measures violate the single subject requirement for  
10 bills.

11 I'm going to, you know, at this point assume  
12 that they were fairly broad measures with similar  
13 provisions, and it seems like a similar standard would  
14 apply here. But maybe I'm presuming a lot.

15 But I -- you know, I'm also looking at the  
16 test that had been given to us about whether or not the  
17 measures have, you know, surreptitious provisions or  
18 incongruous subjects within the measure and so forth and  
19 so on.

20 So I'm just not there yet on seeing a  
21 violation of the single subject requirement. I'm still  
22 open to being persuaded, but ...

23 Mr. Dunn.

24 MR. DUNN: I'm still not convinced, even if  
25 some of the kind of worst case scenarios you're talking



1 about, about it impacting the executive branch and then  
2 falling under of the budgetary provisions of that  
3 process.

4 Even if that's -- even if that were true, if  
5 that would constitute a second subject or whether that  
6 maybe is a title issue that could be cured by adding that  
7 to the title that it is a move to OSPB.

8 I think I share the sentiments -- I think the  
9 single subject as stated in the staff draft covers the  
10 measure.

11 THE CHAIRMAN: Well, for the sake of seeing if  
12 we can move forward, maybe I'll go ahead and offer a  
13 motion and see if there's a second.

14 I'll move that the board find that the measure  
15 comprises a single subject and that the board proceed to  
16 set titles for the measure. Is there a second?

17 MR. DUNN: Second.

18 THE CHAIRMAN: Discussion on the motion?

19 MS. EUBANKS: I think I just want to say that  
20 I'll probably be a no vote, and I don't think there's any  
21 surprise there.

22 I just -- I don't see, based on the text of  
23 the measure, the connection, the necessary connection  
24 that in terms of revamping the board, doing defined  
25 contribution plans, the connection with OSPB, because the

1 measure is basically silent in terms of the role of  
2 OSPB.

3 And so I just don't see how that's dependent  
4 or connected to each other. And so I'll be a no vote.

5 THE CHAIRMAN: Thank you.

6 If there's no other discussion, all those in  
7 favor say aye.

8 MR. DUNN: Aye

9 THE CHAIRMAN: Aye.

10 All those opposed, no.

11 MS. EUBANKS: No.

12 THE CHAIRMAN: That motion carries two to one.

13 Then let's turn to the staff draft, and

14 Ms. Gomez will project it onto the screen.

15 I'd first like to hear from proponents and ask  
16 if you've had a chance -- I think you indicated actually  
17 at the beginning that you were fine with the staff draft,  
18 but perhaps if you could remind me if that was your  
19 opinion.

20 MS. BURTT: We have no objection to the staff  
21 draft.

22 THE CHAIRMAN: Thank you. Are there others  
23 then that want to address the staff draft?

24 Ms. Ulibarri. I'm sorry.

25 MS. ULIBARRI: Yes.

1 THE CHAIRMAN: And I may be saying your name  
2 wrong and I apologize.

3 MS. ULIBARRI: That's fine. You did well.

4 THE CHAIRMAN: Okay. Thanks. If you'd like  
5 to come forward and then address the staff draft, please.

6 MS. ULIBARRI: Yes, please.

7 The biggest area of concern that I have with  
8 this particular ballot initiative is that the voters will  
9 have no way of knowing that public employees do not pay  
10 into social security.

11 This ballot initiative 93 is taking a defined  
12 benefit plan and all of its advantages -- and I'm not  
13 just talking about retirement here. A defined benefit  
14 plan includes life insurance, disability coverage, as  
15 well as survivorship benefits.

16 This defined contribution plan in ballot 93  
17 covers none of that. That is my concern. There is no  
18 social security benefits for the employees to fall back  
19 on. In other words, this ballot initiative in my opinion  
20 is a disguised 401(k) plan and that's what it looks like  
21 to me.

22 I do not see the benefits of changing this  
23 plan, because a defined benefit plan is much more than a  
24 retirement account. It has the disability component,  
25 which is very important, as well as the survivorship.

1           So I think the public and the voters need to  
2 understand and they need to know that public employees,  
3 and whether it be a defined benefit plan or whether this  
4 ballot initiative passes on January 1, 2007, will not pay  
5 into social security.

6           Because when people understand that about  
7 public employees, teachers and state troopers and  
8 classified staff employees do not have social security  
9 benefits to fall back on, this is our retirement plan,  
10 and it would stay the same except what's happening in  
11 this ballot initiative is that those -- those advantages  
12 that we have with our PERA defined benefit plan are going  
13 to go away. That is my concern.

14           THE CHAIRMAN: And could you restate again,  
15 what are the benefits that go away?

16           MS. ULIBARRI: Well, if you look on number  
17 twenty -- excuse me -- line 22 of the ballot title and  
18 submission clause that was -- that was put -- and I'm  
19 just going to go ahead and read that line. "And  
20 authorizing members of the defined contribution plan to  
21 participate in the optional" -- the word optional here  
22 means you have to pay additional dollars for it.

23           Right now PERA -- PERA defined benefits plans  
24 provides us a life insurance benefit as well as  
25 survivorship benefits for our under-age-18 children as

1 well as disabled benefits if we become disabled while we  
2 are working.

3 Social security does something similar to that  
4 as well, as you're all aware -- you may even pay into  
5 social security -- that if you were to die before your  
6 children is of age 18, that social security would pay  
7 that child up until the time that they turn 18.

8 Those are the types of things that are being  
9 lost with this defined contribution plan, 'cause I do not  
10 see in -- anywhere in this ballot legislation the -- that  
11 information being addressed. And that's my concern.

12 So in other words, a teacher -- and I'll give  
13 the example that I've given other people. A teacher goes  
14 to Colorado State University, at age 22 gets a bachelor's  
15 degree in education and starts to teach. Ten years go  
16 by, she has a child that's ten years old. All right.  
17 She dies. Under this new plan, January 1, 2007, with  
18 this -- with this teacher that is now dead, the child may  
19 have or the family would have the employer contribution  
20 and the employee contribution. They would have that.  
21 But there would be no guaranty of benefits up to age 18  
22 for that child. These are the things that are missing.

23 If that same teacher didn't die but became  
24 disabled, there are no protections that I can see -- now  
25 maybe the proponents want to talk about this -- I cannot

1 see any disability. Yes, it says optional life  
2 insurance, long-term care insurance, which is not  
3 disability, voluntary investment, which means they can  
4 invest in whatever they want, and health care programs.  
5 Where's the disability in this? I don't see any issue  
6 here being addressed on disability at all.

7 Right now under the defined benefit plan if I  
8 was to get disabled tomorrow, I would be covered under  
9 PERA's disability plan. That's -- that's not -- see,  
10 it's not just a retirement plan, and that's what I'm  
11 concerned about here.

12 I'm concerned about the new teachers coming in  
13 in January 1, 2007, that will never have paid into social  
14 security. They just graduated from college. They don't  
15 have any social security credits, hence they're not going  
16 to have any disability credits if something happens to  
17 them along the way.

18 Those are my concerns with this ballot  
19 initiative.

20 THE CHAIRMAN: Any questions?

21 MR. DUNN: Yeah.

22 THE CHAIRMAN: Mr. Dunn.

23 MR. DUNN: Could that be cured by simply  
24 adding language that the measure simply removes certain  
25 existing benefits?

1 MS. ULIBARRI: Well, I think the voters have a  
2 right to understand this legislation. If they're going  
3 to be voting on it, it should be clear.

4 My -- the problem is that the voters don't  
5 understand that we don't have social security. And the  
6 voters don't understand that this new plan won't have  
7 those protections similar to social security or similar  
8 to what we have now.

9 So by adding language -- now, if the  
10 proponents want to say that this defined contribution  
11 plan is going to have disability benefits within it, then  
12 that needs to be clearer to me. It needs to be clearer  
13 to the voters.

14 So there needs to be, in my opinion, some  
15 additional language added, especially the social security  
16 piece. Voters are not aware that public employees don't  
17 pay into social security. This is our only retirement  
18 account. We cannot fall back.

19 In other words, many private employers will --  
20 you'll work for them and you'll have an option to pay  
21 into into a 401(k) plan and you'll also be covered by  
22 social security because you have to pay into social  
23 security. Hence, if anything happens to you, you're  
24 going to be taken care of. You have social security  
25 disability. If you're close to death, you can also apply

1 for that. So that's my concern.

2 So there needs to be some language that states  
3 in here that, yes, there's disability coverage, there's  
4 life insurance coverage, there's long-term disability  
5 coverage if -- you know, optional means additional  
6 dollars to me. If they want to clear that up and say  
7 that's not true, that's fine. I can -- I can understand  
8 that and they can clarify that.

9 The piece that's missing with this is all of  
10 those guaranties that we have through social security or  
11 through PERA right now.

12 I'm a current PERA member, and I -- if I'm  
13 disabled, I'll be okay. If I had a child that was under  
14 18, that child would be taken care of until that child  
15 reaches majority. I don't see any of that, and that's my  
16 concern.

17 Does that answer your question at all?

18 MR. DUNN: It does. Thank you.

19 THE CHAIRMAN: Yeah. Maybe if we could hear  
20 from proponents as well.

21 MS. BURTT: Without getting into the political  
22 debate defining the merits of the case, let me remind  
23 everyone that the changes to the defined contribution  
24 plan effect new employees.

25 And so yes, it is very much like a 401(k)



1 plan. They own it, it's their private property right,  
2 they invest those dollars in a professionally managed  
3 plan. They choose among five plans that PERA manages,  
4 the same plans that they'll be managing for their defined  
5 benefit folks.

6 And if they want additional insurances such as  
7 the type this lady has defined, there's no prohibition  
8 for them to buy those additional insurances. They  
9 actually will make a lot more money in this plan than  
10 they would in social security or in PERA if they're a new  
11 employee and they have the time to put their time into  
12 saving and investing.

13 For current employees over the age of 40,  
14 nothing really changes for them. They still have  
15 everything that's been promised to them with this  
16 exception: They start to -- their contribution to their  
17 own retirement increases in half-percent increments every  
18 year until it matches the taxpayer contribution.

19 And for current retirees, nothing changes for  
20 them. They still get everything that they have.

21 The unfunded liability is covered in two  
22 ways. One, the additional funds of existing employ -- of  
23 current PERA members in a defined benefit program,  
24 increasing their contribution to match the taxpayer  
25 contribution. And secondarily, a reallocation of a

1 taxpayer contribution for new employees such that a  
2 percentage goes to the employee and the rest goes to fund  
3 the unfunded liability.

4 And this is the model that's operational in  
5 Michigan, very successfully. This is the model that's  
6 been adopted now in Oregon and Washington.

7 Additionally, we have, just as in senate bill  
8 162, we have raised the retirement age for people under  
9 age 40 who are in the defined benefit plan to age 60. So  
10 if you're over age 40, again, this won't affect you. You  
11 need to have that kind of time frame so that those people  
12 have enough time to -- to make more money and if they  
13 choose to go into the defined contribution. We would  
14 make that optional choice for people who want to go into  
15 it.

16 I believe the lady's concern about the  
17 language in the title in lines 22, 23, and 24 is -- you  
18 know, that's why you have a political campaign is to  
19 explain to people what the ballot issue is about and what  
20 you're trying to accomplish. I think it's pretty clear  
21 here that it says that if you're in the defined  
22 contribution plan, you can buy any of the -- you're not  
23 precluded from buying any additional optional insurances  
24 you want, and yes, it's on your nickel.

25 THE CHAIRMAN: Mr. Poulson.

1 MR. POULSON: A comment about social  
2 security. I think currently PERA employees are not  
3 eligible for social security. Nothing in this changes  
4 that as far as informing employees. I know I've looked  
5 at the website that PERA has for employees. As I recall,  
6 that's made very explicit in that on their website.

7 I would assume that PERA would continue to  
8 make very clear to all employees under this plan that  
9 they would not be eligible for social security. Nothing  
10 in this changes that.

11 MS. BURTT: And the fact that PERA members do  
12 not pay into social security is addressed in other  
13 statutes, and we make no change to that.

14 So PERA would want to inform the public that  
15 they don't also get social security, but frankly, fall-  
16 back on social security is not that great a deal.

17 THE CHAIRMAN: And I'm -- I'm not sure I'm  
18 entirely clear yet. But you know, I do see the provision  
19 in the measure that says a member of the defined  
20 contribution plan may participate in optional life  
21 insurance, long-term care insurance, voluntary investment  
22 as provided in this article, which is article 51. I  
23 believe that means other provisions in article 51 that  
24 aren't changed by this measure.

25 MS. BURTT: That's correct. If they want to

1 participate in the PERA's insurance programs that PERA  
2 offers their defined benefit members, they would have an  
3 option to do that.

4 THE CHAIRMAN: So there's really no change.

5 MS. BURTT: Correct.

6 THE CHAIRMAN: Is there any change, though, to  
7 the benefits?

8 MS. BURTT: No.

9 THE CHAIRMAN: I mean I'm trying to  
10 understand. Is there anything like disability benefits?  
11 Is there something lost in the transition from a defined  
12 benefit plan to a defined contribution plan, as far as  
13 benefits like disability or --

14 MS. BURTT: No, no. I mean in the defined  
15 ben- -- if you're a defined benefit member, then you have  
16 this other set of benefits. We make no changes  
17 whatsoever to that. If you're a new employee beginning  
18 in January of '07, if you're in the defined contribution  
19 plan, you have your retirement plan that you're funding  
20 and your employer is funding.

21 If you in addition -- additionally want to  
22 participate in the other employee -- retirement funds  
23 that are -- excuse me -- rather, insurance funds that  
24 PERA offers, you have the option to buy into those, or  
25 you can go anywhere else in the private sector and buy

1 into those.

2 THE CHAIRMAN: Okay. Thank you.

3 Further discussion about the staff draft  
4 then? Any suggested changes to the staff draft?

5 MS. ULIBARRI: Yes.

6 THE CHAIRMAN: Okay. Yes. Please, if you  
7 will come up to the microphone so we make sure we get  
8 your remarks on the record, please.

9 MS. ULIBARRI: I would like to encourage the  
10 proponents to add that social security is not going to be  
11 an option for these employees, I think should be clearly  
12 stated.

13 THE CHAIRMAN: But my problem with that is  
14 there is no change there. It's not an option right now,  
15 is it, for people current --

16 MS. ULIBARRI: There's a huge change in the  
17 plans. As Christine had pointed out to you, a new  
18 employee coming in has the option to purchase the  
19 disability. Right now, that is provided through a  
20 defined benefit plan. That's the huge change. That --  
21 in my opinion, that is a huge change.

22 In other words, right now, we are covered by  
23 disability. After January 1, 2007, talking about a new  
24 person coming into the plan as Christine did, she talked  
25 about a new person, they would have the option to

1 purchase disability, but it is not provided for them as  
2 it is right now. To me that's a huge difference.

3 And the voters, I believe, have -- should have  
4 the opportunity to understand that we do not have a  
5 fall-back define -- that public employees do not have a  
6 fall-back to social security. They didn't then and they  
7 wouldn't now.

8 But the fall-back, there is PERA -- the older  
9 employees that she was talking about, anybody over 40, is  
10 going to go in and get grandfathered. We are protected.

11 The new ones coming in -- that's my concern --  
12 the new people coming in are not going to be provided  
13 those protection. And that's the difference, and that's  
14 why I want something in this -- in this to state that  
15 public employees do not pay into social security. Hence,  
16 they do not have the protections of social security.

17 THE CHAIRMAN: Mr. Dunn.

18 MR. DUNN: Is there a current group of  
19 employees that would lose that benefit? Is it somebody  
20 under 40, or because I --

21 THE CHAIRMAN: I thought --

22 MR. DUNN: Because I think there are all kinds  
23 of benefits for employees, people who are not yet  
24 employees, that they will not get when they are employed  
25 here, whether they're not their existing benefits today

1 or not.

2 And so I'm not sure it's -- I'm not saying  
3 this articulate. But it's not relevant to list benefits  
4 that a new employee is not getting because they're not  
5 employees now and they're not receiving them now.

6 MS. ULIBARRI: Well, I think there's a  
7 perception out there with the taxpayers that public  
8 employees are an elitist group. And once they understand  
9 -- no, really I think that PERA has been -- has been  
10 touted an elitist group, because we end up getting a  
11 guaranteed sum of money when we retire.

12 And so what the public's perception is, is  
13 that we also receive social security, which we do not.  
14 We haven't paid into it, we're not going to get a  
15 benefit, for the most part. Some people, yes. Some  
16 people had put enough quarters in and they're able to  
17 retire. But their social security is reduced.

18 My problem is that the taxpayers are going to  
19 look at this and say, Oh, that elitist group of PERA  
20 employees are going to get, you know, X number of  
21 dollars, not realizing that this is our only, our one and  
22 only retirement plan; for the majority of us, this is all  
23 we have, and this is the only money that we're going to  
24 be able to get.

25 And so that's why I'm pushing it so hard for

1 some sort of clarification language about the social  
2 security.

3 MR. DUNN: Right. I think in my mind, though,  
4 that's an issue of education during the campaign, for  
5 lack of a better word, rather than inclusion in the  
6 ballot title, which is designed to reflect what the  
7 measure itself does.

8 THE CHAIRMAN: Are there suggested changes to  
9 the staff draft? Ms. Eubanks.

10 MS. EUBANKS: In terms of the statement of  
11 single subject, I have a couple of concerns. First of  
12 all, I don't know in terms of just the board's practice  
13 whether "revised statutes" should be capitalized. The  
14 staff draft has "Colorado" capitalized.

15 THE CHAIRMAN: Don't remember.

16 MS. EUBANKS: Whether we usually have it all  
17 capitalized. But that's one small issue.

18 The other is in terms of the actual  
19 description, which right now talks about retirement  
20 benefit plans for public employees in Colorado.

21 I have a couple of concerns, because we're  
22 talking about, in terms of the specific terminology  
23 within the measure of defined benefit plan versus a  
24 defined contribution plan, and the use of benefit plan in  
25 the statement of single subject, whether it covers one



1 but not the other, I mean in a very strict sense, as to  
2 whether perhaps we might want to say either retirement  
3 benefits or retirement plans or something a little  
4 broader that isn't -- might not be exclusive to  
5 everything that's provided in the measure.

6 The other concern I have is in terms of the  
7 reference for public employees in Colorado. Not all  
8 public employees participate in PERA. For example, fire  
9 and police, a lot of times they're controlled by FPPA,  
10 which under those pensions you have school districts that  
11 don't participate such as Denver, you have municipalities  
12 that don't participate.

13 And so whether we talk about maybe for public  
14 employees who participate in PERA, and I spell it out in  
15 terms of public employees' retirement association,  
16 something to narrow it a little bit, because I'm not sure  
17 that the single subject, right now it may be too broad  
18 for what the measure is dealing with.

19 THE CHAIRMAN: Well, I think it would make  
20 some sense -- strikes me it would make some sense to take  
21 out the word "benefit" concerning retirement plans. I  
22 don't know that anything is lost there, and it does avoid  
23 maybe some confusion, given that so central to this is  
24 the difference between a defined benefit plan and a  
25 defined contribution plan.

1 I'll take a stab at leaving the "public  
2 employees" portion of it. So even though it's not all  
3 public employees, but as far as just stating the broad  
4 subject, I'm wondering if that's still good enough, I  
5 mean as a description of the basic subject of the  
6 measure. Part of it is I'm not quite sure exactly how to  
7 -- satisfactory way of dealing with it, although I think  
8 you were suggesting --

9 MS. EUBANKS: I said something like public  
10 employees who participate in the public employees'  
11 retirement association. I mean it would be nice if you  
12 could just refer to PERA. It's a little shorter. But I  
13 don't think you can go with the acronym at this point.

14 MR. DUNN: Would it be too ambiguous to just  
15 say, beginning on line 2, "for participating public  
16 employees in Colorado"?

17 THE CHAIRMAN: Say that again.

18 MR. DUNN: "Participating" after "for" in  
19 line 2.

20 MS. EUBANKS: I think that begs the question  
21 of what are they participating in.

22 MR. DUNN: That's what I was afraid of.

23 MS. EUBANKS: But ... in terms of just, you  
24 know, having it so broad, whether it all -- it's  
25 misleading in terms of they think it applies to every

1 public employee when, in fact, it doesn't, I think it's  
2 -- it was my only concern.

3 THE CHAIRMAN: You know, I guess partly to  
4 help me resolve that question in my mind is does the rest  
5 of the title -- is it clear enough that it's dealing  
6 basically with PERA? Now, I guess it doesn't, though,  
7 address -- you're still -- your concern about who these  
8 public employees are.

9 MS. EUBANKS: Or I guess another option, you  
10 know, but I don't know that it helps a lot, other than it  
11 makes maybe the voters aware that you're not talking  
12 about all employees, is you could say for certain public  
13 employees.

14 And I agree that once you get into the  
15 trailers, I don't think there's any doubt in terms of who  
16 you're talking about. It's just that, you know, that's a  
17 very broad statement as it's currently drafted in the  
18 staff draft.

19 But if you're comfortable in -- I mean that's  
20 fine. It just seemed like we're not dealing with all  
21 public employees. That's all.

22 THE CHAIRMAN: And that's true. I'm reluctant  
23 to say certain public employees.

24 MS. EUBANKS: Because it doesn't tell them  
25 much, other than it gives them notice that it's something

1 less than all, but ...

2 THE CHAIRMAN: And it might apply a lot less  
3 than all. I mean it's -- like specific public  
4 employees. I don't want to tilt this the other way  
5 either.

6 MS. EUBANKS: Well, in a way it is specific  
7 public employees that participate in PERA.

8 MR. DUNN: Could we just say, "An amendment to  
9 the Colorado revised statutes concerning retirement plans  
10 for members of the public employees' retirement  
11 association"?

12 MS. EUBANKS: Well, I think that -- well, I  
13 don't know. Since you have public employees in the  
14 retirement association, maybe that gets that concept.

15 THE CHAIRMAN: I sort of like that.

16 MS. EUBANKS: So it would be "for members of  
17 the public employees' retirement association," is that?

18 MR. DUNN: Hm-hmm. Yes.

19 THE CHAIRMAN: Let's -- I like that. Let's  
20 try to -- Cesi will put that on the screen, and think  
21 about it.

22 MR. DUNN: Members of the public employees'  
23 retirement association.

24 While she's typing that, that actually raises  
25 the question I had, where we have the peren, associations

1 or the definition.

2 MS. EUBANKS: Oh, uh-huh.

3 MR. DUNN: Does that -- in my short time on  
4 the board, I haven't seen that. Has that typically been  
5 done when we define terms in the title?

6 MS. EUBANKS: I don't know that we've done  
7 that on a regular basis. I don't know if we have the  
8 statement -- the name of -- the full name of the  
9 association the first time around, I don't know that it's  
10 necessary to have it set off in the perens. I mean I  
11 think you could just refer to the association with the  
12 idea being that it's referencing back to the association  
13 that you've named in full.

14 THE CHAIRMAN: Seems pretty obvious.

15 MS. EUBANKS: Yeah.

16 THE CHAIRMAN: I'm okay with taking the  
17 parenthetical part out if it is clear enough.

18 So this would be concerning retirement plans  
19 for members of the public employees' retirement  
20 association.

21 MR. DUNN: I'm not sure if we need "in  
22 Colorado," but ...

23 MS. EUBANKS: Right.

24 MR. DUNN: I would suggest striking that.

25 MS. EUBANKS: And I believe there should be a

1 possessive at the "employees'" is plural possessive. No,  
2 it's plural possessive, public employees'.

3 MS. BURTT: I don't think PERA actually uses  
4 possessive apostrophe in their name, do you?

5 MS. EUBANKS: In the statute it's plural  
6 possessive, the name of the association.

7 MS. BURTT: All right.

8 THE CHAIRMAN: While we're at it, I would  
9 suggest capitalizing the first letter in "Revised  
10 Statutes." I did look at one example, No. 71 that the  
11 board did before, and we -- I don't know how consistent  
12 we've been, but I think there was at least one example  
13 where it was Colorado Revised Statutes was initial  
14 capped.

15 MR. DUNN: Should "public employees'  
16 retirement association," the first letter capped?

17 MS. EUBANKS: From a drafting perspective, I  
18 mean, the statutes don't capitalize anything except  
19 proper names. I mean if you look at the statutes, it's  
20 in lower case.

21 THE CHAIRMAN: I suspect we've tended to  
22 follow the statutory or the legislative guidelines on  
23 capitalization, sometimes which means not much is  
24 capitalized.

25 MR. DUNN: Just to follow through with that

1 same amendment, then on lines 3 and 4 we would take out  
2 "public employees' retirement" and the parenthetical.

3 MS. EUBANKS: Yeah. Could we work on just the  
4 single subject first and then as we go on down ... but I  
5 agree with you, that then we wouldn't need the full name  
6 later.

7 THE CHAIRMAN: So I think then, just for the  
8 record, the proposed change to the beginning part of the  
9 statement single subject would then read, "An amendment  
10 to the Colorado Revised Statutes concerning retirement  
11 plans for members of the public employees' retirement  
12 association," comma.

13 MR. DUNN: I'll move that.

14 THE CHAIRMAN: It's been moved by Mr. Dunn.

15 MS. EUBANKS: I'll se- --

16 THE CHAIRMAN: I'll second that.

17 MS. EUBANKS: Go ahead.

18 THE CHAIRMAN: Any further discussion?

19 If not, all those in favor say aye.

20 THE BOARD: Aye.

21 THE CHAIRMAN: All those opposed, no.

22 That motion carries three to zero.

23 So then maybe we should follow through and  
24 look at conforming amendments.

25 MR. DUNN: I'll make that change.

1 THE CHAIRMAN: Go ahead, Mr. Dunn.

2 MR. DUNN: In line 3 and 4, taking out "public  
3 employees' retirement," and then subsequent  
4 parenthetical. No, leave "association." Yeah,  
5 association, then delete the parenthetical.

6 THE CHAIRMAN: Probably the rest of it will be  
7 okay, because it probably consistently uses  
8 "association."

9 Under that assumption, Mr. Dunn, is that your  
10 motion?

11 MR. DUNN: That is my motion.

12 THE CHAIRMAN: I'll second that. Any  
13 discussion?

14 If not, all those in favor say aye.

15 THE BOARD: Aye.

16 THE CHAIRMAN: All those opposed, no.

17 That motion carries three to zero.

18 Any other suggested changes to the staff  
19 draft?

20 MS. EUBANKS: Um --

21 THE CHAIRMAN: Ms. Eubanks.

22 MS. EUBANKS: Down on -- since everything --  
23 it's moved a little bit. I think it's in the phrase that  
24 starts on line 10. "Increasing the employee  
25 contributions rate for the defined benefit plan by



1 one-half percent of salary every year..." I was just  
2 wondering whether it would be helpful to say "employee  
3 salary" rather than just "salary." I don't know whether  
4 that would be helpful in terms of trying to explain -- I  
5 know that a lot of this is very technical, but ...

6 It's that phrase that begins on line 10,  
7 "increasing the employee contribution rate for the  
8 defined benefit plan by one-half percent of salary every  
9 year..." whether just to insert "employee" before  
10 "salary" so that it's clear. I mean I know it talks  
11 about employee contribution rate, but to be clear whose  
12 salary it's the one-half percent of each year.

13 THE CHAIRMAN: Mr. Burtt, did you have a --  
14 come to the podium, if you would, so we get you on the  
15 record.

16 MS. BURTT: I don't know who else's salary it  
17 would be other than the salary of the employee contained  
18 within that same one phrase. I mean it won't hurt it to  
19 add the word "employee," but it doesn't seem necessary.

20 MS. EUBANKS: And I mean my only concern is  
21 that, you know, most people who are reading this have no  
22 idea about PERA or retirement benefits or any of those  
23 sorts of things. And so it was just an idea that struck  
24 me when I was ...

25 MS. BURTT: So you just put "of the employee's

1 salary".

2 MS. EUBANKS: I don't know if it makes a  
3 difference one way or the other.

4 THE CHAIRMAN: I could go either way.

5 MS. EUBANKS: I don't need it.

6 THE CHAIRMAN: Okay.

7 MS. EUBANKS: Okay. In terms of the --  
8 further down, the next couple of phrases, "modifying the  
9 manner in which legal services are provided to the  
10 association." I don't know that I view that as a major  
11 component of the measure. I also don't know if  
12 "repealing the authority of members to repurchase  
13 forfeited service credit" is a major component of the  
14 measure, so I might just suggest striking those two  
15 phrases.

16 THE CHAIRMAN: Beginning on what's now line  
17 12?

18 MS. EUBANKS: Yes. Right there where Cesi has  
19 the cursor. I'm not sure that phrase or the next really  
20 are major components of the measure. The title is pretty  
21 long as it is and detailed, and whether or not that would  
22 help a little bit to simplify.

23 THE CHAIRMAN: I agree. Given the length of  
24 the title, if there's things that we can shorten, that  
25 would be very good. Modifying -- I mean that clause just

1 doesn't say much, and I sure don't see that that's  
2 significant.

3 I don't know about the next one, about  
4 "repealing the authority of members to repurchase  
5 forfeited service credit." I don't know. It says  
6 something, but I just don't know how significant it is,  
7 to be honest with you.

8 MS. EUBANKS: Right. I mean I think you can  
9 -- there -- you could make the title a lot more detailed  
10 and lengthy if you referenced every single change that  
11 the measure does. And I'm just not sure that we really  
12 need to do that. And those might be just a couple that  
13 we could take out just to shorten it up a little bit.

14 MR. DUNN: I'd agree on the first one. I'm  
15 not sure on the second one. I guess I'd ask for  
16 proponent's comment.

17 MS. EUBANKS: Please.

18 MR. WESTFALL: With respect to the first issue  
19 on the matter of legal services, I would agree with  
20 Ms. Eubanks. I mean that's a technical issue and I see  
21 this, obviously here from a proponent's standpoint,  
22 defending it against any kind of a legal challenge, the  
23 more stuff you put in there, the easier it is to defend  
24 because the more the other side doesn't -- you take away  
25 arguments that the opponents will raise that it doesn't

1 contain something that it should.

2 But I mean modifying the way in which legal  
3 services are provided, I think that's a very difficult  
4 one to defend, saying that's got to be in there.

5 With respect to the second measure, however,  
6 with repealing the ability -- on the service credits, I  
7 can just see an argument in any subsequent legal  
8 challenge where the opponents will say, that is a huge  
9 issue for existing employees and they should be told that  
10 up front; particularly existing employees and supporters  
11 of existing employees, they should be told that up front  
12 in the ballot title.

13 So because that's sort of a hot button issue,  
14 if you will, from a -- in an abundance of caution, while  
15 I agree with everything you said, Ms. Eubanks, about, you  
16 know, sort of in a rational world what would be  
17 acceptable, and sometimes the irrationality that is  
18 exhibited in the litigation process over some of these  
19 measures, probably the second one that you were talking  
20 about, should be kept in.

21 MS. EUBANKS: Well, then I would move striking  
22 the first phrase regarding legal services, but not the  
23 second -- all the way to the semicolon. I would so move.

24 THE CHAIRMAN: I'll second that. Any further  
25 discussion?

1 If not, all those in favor say aye.

2 THE BOARD: Aye.

3 THE CHAIRMAN: All those opposed, no.

4 That motion carries three to zero.

5 Ms. Eubanks.

6 MS. EUBANKS: The only other one I had -- let  
7 me see if I can find it -- oh, okay. No. That's fine.  
8 I'm looking for something that says "requiring certain  
9 amounts be directed."

10 Okay. It's on line 20 where it talks about  
11 requiring that certain amounts be directed to pay off  
12 unfunded liabilities, and I believe this relates to if  
13 there's any savings resulting from the defined  
14 contribution plan, that that be used to pay off unfunded  
15 liability for the defined benefit plan. And I just was  
16 wondering whether it would be helpful to say, when you  
17 say "certain amounts," that it be "certain amounts of the  
18 association" versus any potential confusion or that it's  
19 "employees' monies" or something along those lines,  
20 because it just says "certain amounts" and you don't know  
21 whose money you're talking about.

22 THE CHAIRMAN: That's a good point. But how  
23 to fix that.

24 MS. EUBANKS: And what I thought of, and I'm  
25 not bound by it, but just to say, "requiring that certain

1 amounts of the association be directed to pay off  
2 unfunded liabilities in the defined benefit plan."

3 THE CHAIRMAN: I think that helps. Any  
4 comments from proponents or anyone else? Mr. Poulson.

5 MR. POULSON: I think this is an important  
6 provision, and I think our expectation is that the  
7 amounts that are referred to in this provision would be  
8 specifically identified and earmarked for repaying funded  
9 liabilities.

10 So "requiring the certain amounts of the  
11 association," I'm not sure how that -- how that changes  
12 what our intent is here.

13 MS. EUBANKS: And I don't know that it's my  
14 intent to change your intent. I'm just trying to be more  
15 specific --

16 MR. POULSON: Clarify it.

17 MS. EUBANKS: -- as to whose monies we're  
18 talking about here.

19 MR. POULSON: Okay. I think if that's -- if  
20 that clarifies it in the mind of the board, that's fine.

21 THE CHAIRMAN: I think the idea is that it's  
22 association funds and not some outside source or tax  
23 dollars or ...

24 MR. DUNN: Would "funds" be a better word than  
25 "amounts"?

1 MS. EUBANKS: Or "monies."

2 MR. POULSON: Is it appropriate to add the  
3 term "earmarked," "the earmarked monies"?

4 MS. BURTT: A term rather than "amounts," you  
5 know, "requiring certain monies," might be more clear, an  
6 amount of what? And you could say "requiring that  
7 certain monies of the association be," I think,  
8 "directed" actually is the better term, because then  
9 that indicates that those monies are going from a source  
10 to a source. If you say "earmarked," then you're not  
11 sure exactly how they transition. Just a little ...

12 THE CHAIRMAN: Ms. Eubanks.

13 MS. EUBANKS: I think that this phrase is  
14 referring to a provision that's on page 14 of the  
15 measure. It's in subsection 3 and it's talking about the  
16 difference between the employer contribution rate  
17 specified in statute versus the actual contribution rates  
18 paid by the employer into a defined contribution plan be  
19 directed to pay off unfunded liabilities in the defined  
20 benefit plan. And then it goes on to refer to savings.

21 And so I'm assuming there's two different -- I  
22 mean it's the different -- the difference between  
23 contribution rates for, I assume, the defined  
24 contribution plan versus the defined benefit plan is one  
25 pot of money potentially, and the other is just

1 administrative savings --

2 MS. BURTT: Correct.

3 MS. EUBANKS: -- resulting from having a  
4 contribution plan.

5 MR. POULSON: Correct.

6 MS. EUBANKS: So there's two -- two  
7 groupings. I can't describe them all as savings. But  
8 maybe "monies" might be more descriptive than "amounts."

9 MR. DUNN: Do we have a typical protocol for  
10 using "monies" or "funds" or -- I thought we had a  
11 discussion on that.

12 THE CHAIRMAN: I don't know that we did.

13 MS. EUBANKS: And in terms of Mr. Poulson's  
14 suggestion about using the term "earmarking," I think the  
15 fact that we say "certain" is supposed to give some  
16 indication that the measure specifies what monies are to  
17 be used for this purpose without necessarily getting into  
18 the details of whether it's been earmarked along that  
19 line.

20 MR. POULSON: Right. And I think Christine is  
21 right, perhaps "certain monies of the association" rather  
22 than "certain amounts of the association" is a little  
23 clearer.

24 THE CHAIRMAN: And the usual statutory  
25 spelling of moneys is m-o-n-e-y-s, even though that's not



1 a term from the measure here. But I'd suggest as opposed  
2 to m-o-n-i-e-s, I would suggest e-y-s, unless there's a  
3 suggestion that -- I know that's a little nonstandard for  
4 the rest of the world, but ...

5 MS. EUBANKS: And so I would move those  
6 changes on line 20.

7 MR. DUNN: Second.

8 THE CHAIRMAN: It's been moved and seconded.

9 Just so maybe I don't have to end up reading  
10 the entire title into the record at the end, then this  
11 clause -- the motion is to change this clause so that it  
12 would read, "requiring that certain moneys of the  
13 association be directed to pay off unfunded liabilities  
14 in the defined benefit plan," semicolon.

15 Any further discussion? If not, all those in  
16 favor say aye.

17 THE BOARD: Aye.

18 THE CHAIRMAN: All those opposed, no.

19 That motion carries three to zero.

20 Any other suggested changes? I don't have  
21 any.

22 If not, is there a motion to adopt the staff  
23 drafts as amended with the -- with the understanding that  
24 the changes that we've adopted are -- one moment. Now,  
25 let me just finish that thought, Ms. Burtt, and I'll

1 recognize you -- the changes that we've made to the  
2 ballot title, the same changes would be made in the  
3 ballot title and submission clause, that's the same thing  
4 in the form of a question.

5 Ms. Burttt.

6 MS. BURTT: Just looking at it, on line 24  
7 we're just missing the last two words. "Administered by  
8 the association" now seems to have pushed into the next  
9 page. Is that any issue for you?

10 MS. EUBANKS: No.

11 MS. BURTT: Okay.

12 THE CHAIRMAN: No, we had just -- hopefully,  
13 we've actually shortened some things. But in its current  
14 form, it lengthened things.

15 MS. EUBANKS: Yeah, if Cesi switches it over  
16 with the changes, then it shows you without strike time.

17 THE CHAIRMAN: So was there a motion to adopt?

18 MS. EUBANKS: I would so move.

19 THE CHAIRMAN: I'll second that. Any further  
20 discussion.

21 MS. BURTT: No.

22 MR. POULSON: No.

23 THE CHAIRMAN: If not, all those in favor say  
24 aye.

25 THE BOARD: Aye.

1 STATE OF COLORADO )

2 ) ss. REPORTER'S CERTIFICATE

3 COUNTY OF BROOMFIELD)

4 I, DEBORAH D. MEAD, do hereby certify that I  
5 am a Certified Shorthand Reporter and Notary Public  
6 within and for the State of Colorado; that previous to  
7 the commencement of the examination, the deponent was  
8 duly sworn to testify to the truth.

9 I further certify that this deposition was  
10 taken in shorthand by me at the time and place herein set  
11 forth and was thereafter reduced to typewritten form, and  
12 that the foregoing constitutes a true and correct  
13 transcript.

14 I further certify that I am not related to,  
15 employed by, nor of counsel for any of the parties or  
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18 In witness whereof, I have affixed my  
19 signature and seal this day of 2006.

20 My commission expires June 18, 2009.

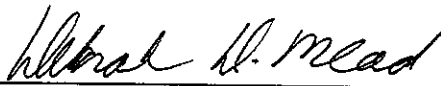
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