ORIGINAL

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Supreme Court, State of Colorado Court Address: Colorado State Judicial Building 2 E 14th Avenue, Suite 400 Denver, CO 80203	FILED IN THE SUPREME COURT JUN 0 2 2006 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), 1 C.R.S. (2006) Appeal from the Ballot Title Setting Board	
IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE, AND SUMMARY FOR 2005-2006, #86 **Petitioners:** MICHAEL A. BOWMAN and DOUGLAS B. MONGER, Objectors, **Respondents:** WILLIAM G. MOHRAM, JR. and BETTY S. LAMONT, Proponents **Title Board:** WILLIAM A. HOBBS, JASON DUNN, and DAN CARTIN.	**▲COURT USE ONLY▲**
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REPLY BRIEF

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The Petitioners, through their counsel, hereby submit this Reply Brief in connection with the challenge to the accuracy of the title set for Initiative 2005-06 #86.

I. LEGAL ARGUMENT

A. "Land use regulation" is not currently an all-encompassing phrase, and its actual meaning, as set forth in the initiative, must be conveyed to voters in the title.

The Board and the Proponents both argue there is a blurred line among the various forms of governmental action that address land use. Board Answer Brief at 3-7; Proponents' Answer Brief at 7-11. As a result, they suggest that there was no need to clarify the extent of the newly defined phrase, "land use regulation."

To come to this conclusion, the Board and the Proponents urge this Court to overlook a clear distinction as to the disparate nature of measures included as land use regulations by #86. The Board and the Proponent argue that there is already no real difference between legislative and adjudicative decisions of government, and, for that reason, they are already considered to be "land use regulations." Yet, Colorado law codifies "the distinction between legislative and adjudicative decisions." *Krupp v. Breckenridge Sanitation Dist.*, 19 P. 3d 687, 696 (Colo. 2001). Legislative decisions have general applicability to all similarly situated parties, whereas adjudications determine the relative rights only of the affected

parties. *Id.* The ramifications flowing from the contention of the Board and the Proponents that there really is no difference between legislative and adjudicative decisions would be staggering. Standards of review by the courts for rules of general applicability and decisions of governments dealing with private parties would be conflated. The distinction between a party's ability to lobby decision makers on legislative matters but not on quasi-judicial ones would be eliminated. Without belaboring all of the consequences of the position taken by the Board and the Proponents, it is accurate to say the distinction between various types of governmental action is well-accepted by the courts, and therefore by the voters considering Initiative #86. *See Common Sense Alliance v. Davidson*, 995 P.2d 748, 754 (Colo. 2000) (the electorate is presumed to know the existing law that it is amending when it considers a ballot measure).

The Board argues that the phrase, "land use regulation," is a common one. It cites a number of judicial opinions in which property owners were compensated for governmental acts other than legislative measures. Board's Answer Brief at 5-6. However, Article II, sec. 15 simply states that "[p]roperty shall not be taken or damaged, for public or private use, without just compensation." And in this existing provision, there is no reference whatsoever to "land use regulation" as a triggering event for the land owner to be able to obtain an appropriate remedy.

Thus, it is not surprising that a range of compensable acts is recognized by the Colorado courts.

If the existing provisions of Article II, section 15 were broad enough to take in all of the governmental actions that are covered by Initiative #86, the Proponents would not have needed to introduce this measure, or at least would not need to include a newly defined phrase, "land use regulations," to accomplish their ends. The very fact that they cannot address their concerns within the existing constitutional provision supports the Petitioners' contention that "land use regulation," as used in #86, has a meaning that deviates from current law.

The Proponents, on the other hand, rely on the language inserted in the ballot title at the Petitioners' request, stating that the remedies proposed are available where a public entity "enforces" land use regulation. The term "enforce" means to "compel observance of (a law, etc.)" *Delta Sales Yard v. Patten*, 892 P.2d 297, 299 (Colo. 1995), citing Webster's New World Dictionary 463 (2nd ed. 1974). As a result, "enforce" indicates to voters that enforcement actions are contained within the definition of land use regulation. However, by itself, that one word is not broad enough to communicate to voters that #86 includes a public entity's other actions – deed restrictions, for example, or guidelines – as "land use regulations." *See* Proposed Colo. Const., art. II, sec. 15(2)(c)(III). Similarly, the title's reference

to "land use regulation" does not telegraph to voters that they are authorizing remedies for absolutely "any permanent or temporary action" that reduces the value of any portion of a property by twenty percent or more. *See* Proposed Colo. Const., art. II, sec. 15(2)(c)(V).

It is interesting to note that the Proponents rely on *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), for the proposition that there are no bright lines in defining land use regulation. In that case, the Court considered two development moratoria – one of 24 months and another of 8 months. The Court determined that these temporary actions of a governmental entity did not constitute a regulatory taking of private property. *Id.* at 332. Yet, under #86, a moratorium is expressly included in the definition of "land use regulation" and thus could be the basis for a remedy to an affected property owner. Perhaps inadvertently, the Proponents make Petitioners' point: this measure makes major changes to the law, but the ballot title does not disclose them.

The Proponents' citation of *Animas Valley Sand and Gravel, Inc. v. Board of County Com'rs of County of La Plata*, 38 P.3d 59 (Colo. 2001) is no more compelling. In that case, the Court was evaluating the legal effects of the county's land use plan. *Id.* at 61. It is hard to see what point can be taken from this decision

that supports the Proponents' position. This land use plan is precisely the type of government action that the voters would think of when they read the phrase, "land use regulation." The same cannot be said of actions like a permit approval or denial, a deed restriction, a moratorium, a guideline, or "any permanent or temporary action" that government takes that decreases an owner's property value by twenty percent or more. Thus, Animas Valley reinforces the notion that the Title Board erred when it presumed that voters would see through the reference to "land use regulation" and know all that it is intended to cover.[1]

The meaning of "land use regulation" is central to this ballot issue. Decades-old administrative decisions would become retroactively compensable under this measure. Informal actions like a deed restriction or a guideline, approved at any time in the last 36 years, would be open to the same claim. The suggestion that voters have no appreciation for the meaning of "regulation," Board Answer Brief at 7, is a departure from the presumptions used by this Court. *Common Sense Alliance*, *supra*. It also ignores the fact that initiated measures are

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[1] Interestingly, counsel for the Proponents filed a Motion for Rehearing to a similar proposed measure, Initiative 2005-06 #126. In that Motion (attached hereto as **Exhibit A**), he argues that the Title Board should have clearly stated how "land use regulation" is defined in #126. *See* Motion for Rehearing at 2, ¶2.g. He told the Board that he was merely preserving the argument, in case the Court rules against these Proponents. May 25, 2006 Transcript at 12:12-13:7 (attached hereto as **Exhibit B**).

often interpreted based upon the meanings of key terms, using appellate opinions and legal dictionaries. *See, e.g., Davidson v. Sandstrom*, 83 P.3d 648, 655 (Colo. 2004). If nothing else, the title should point out that "land use regulation" includes certain governmental acts that are discussed herein and are not typically considered to be a "regulation."

The Board's choice of language will not draw voters' attention to the fact that this measure's remedies apply to virtually anything a unit of government does that "affects" property values or ownership.[2] It will certainly apply to actions that are not currently considered to be regulations as that term is understood and employed. The title should be returned to the Board for correction.

B. Voters should know about the list of public entities affected by #86.

There is no limit on the state and local entities that are affected by this measure. By its terms, it applies to

> the State of Colorado, ***any*** political subdivision of the state, ***any*** agency or department of the state government, a county, city and county, city, town, service authority, school district, local improvement district, law enforcement authority, city or county housing authority, or water, sanitation, fire protection, metropolitan,

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[2] The Board suggests that the measure is not implicated where a property is "affected" by a public entity's actions. Board's Answer Brief at 1-2. Yet, this is the verb that the initiative text uses. A land use regulation is any action of such entity "that affects ownership of, or an interest in, real property." Proposed Colo. Const. art. II, sec. 15(2)(c)(V).

> irrigation, municipal, quasi-municipal, or public corporation organized pursuant to law, or ***any*** entity that independently exercises governmental authority.

Proposed Colo. Const., art. II, sec. 15(2)(c)(V) (emphasis added). There is not a state or local governmental entity that is not covered by this definition, but this fact is not apparent from the title.[3]

The Board maintains that takings actions have been instituted against some of these types of entities. By the limited citations in the Board's Answer Brief, it is also apparent that takings actions have not been instituted against all such entities. Further, the initiative's definition is all-encompassing – "any entity that independently exercises governmental authority" – so that voters would never contemplate the actual breadth of entities affected.

In their Opening Brief, the Petitioners suggested that the Board could have made a modest change that would have addressed this issue: convert "a" public entity to "any" public entity. This change would be consistent with the specific elements of the definition of "public entity" in #86, highlighted above.

The Board responded that "a" has the same effect in modifying "public entity" as "any" would have. But this is not the case. "A" is recognized as an indefinite term. *Brooks v. Zabka*, 450 P.2d 653, 655 (Colo. 1968). "Any," on the

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[3] Proponents' counsel raised this same concern to the Title Board as to Initiative #126. *See* fn. 1, *supra*.

other hand, means "all." *Sinn v. Sinn*, 696 P.2d 333, 335-36 (Colo. 1985). And in the land use arena, "any" certainly means "all." *See Winslow v. Morgan County Com'rs*, 697 P.2d 1141, 1142 (Colo.Ct.App. 1985). Since there is no limitation on the definition of public entities, "all" is the accurate way of informing voters just how expansive this measure is without requiring a listing of the public entities affected.

The Proponents point to § 29-1-202(2), C.R.S., as proof that the meaning of "public entity" is a broad one. Yet, the statute does not define, much less use, the phrase "public entity." It defines two other terms: "government" and "political subdivision." And these definitions are limited in applicability to Part 2 of Title 29, Article 1. *Id.* Further, these phrases are not "nearly identical" to "public entity," as suggested by Proponents. Proponents' Answer Brief at 12. It fact, they are not even close. And even if they were, the Court has held that similar phrases like "public funds" and "public moneys from any source" were not close enough for one to indicate the meaning of the other. *Denver Area Labor Fed'n v. Buckley*, 924 P.3d 524, 527 (Colo. 1996).

The Proponents also argue that the inclusion of the phrase "if a public entity enacts or enforces land use regulations" communicates to voters that governmental bodies not typically associated with land use matters will be affected by this

measure. But the issue was never whether voters would be unaware that land use regulations were implicated by this measure. Instead, voters would have no sense that every public entity in the state is covered by this measure if it takes "any permanent or temporary action" that reduces the value of any portion of a property by twenty percent or more. Proponents' misunderstanding of this point is reflected by their statement that this phrase "explicitly limits" the Initiative. Proponents' Answer Brief at 13. In fact, the types of entities affected are boundless. It is telling that Proponents misconstrue the extent of their own initiative, or at least portray a restriction on affected units of government that does not exist. Their representation is not relevant or binding on this Court. *See In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 2005-2006 #75*, Case No. 06SA63, Slip Op. at 14 (May 22, 2006) (initiative proponent was confused by the operation of his own initiative, and the Title Board correctly set a title based on the express language of the measure rather than his statement of intent).

In this same vein, the Proponents acknowledge that their measure treats law enforcement authorities as land use agencies. Proponents' Answer Brief at 13. It is highly unlikely that the unsuspecting voter would know that, notwithstanding this concession in this proceeding. And the Proponents argue that "any permanent or temporary action" that reduces the value of any portion of a property by twenty

percent or more cannot possibly mean the siting of a facility by a school district. But if this is the case, why are school districts treated as "public entities" under the measure? Because "any" does mean "all," siting a facility qualifies as a land use regulation. Again, the Proponents' misconstruction of their own measure is not meaningful in this Court's analysis. *#75, supra.*

The title thus should be corrected before this measure is placed before voters on a petition or a ballot.

C. The title should state that land use regulations adopted in 1970 are affected by this measure.

Despite the fact that the measure expressly relates back to any of the "land use regulations" (legislative or otherwise) in place in 1970, both the Board and the Proponents rely on the conditions in the measure as reason to omit any reference to that retroactivity.[4]

In truth, there is no way to know that the ramifications of this measure will be so limited. And if the Board and Proponents are correct, then this is a measure intended to benefit only a few landowners who can qualify for this preferential treatment – compensation for or outright exemption from the application of a given land use regulation. Whether these land owners own single lots or assemblages of

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[4] Proponents' counsel raised this same concern to the Title Board as to Initiative #126. *See* fn. 1, *supra.*

thousands of acres, the impact of these new remedies may be substantial as they affect the budgets and land use plans of communities across the state.

Voters need to know by means of the ballot title whether they are approving an initiative that will affect decisions that have already been made. For instance, in *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 No. 29*, 972 P.2d 257 (Colo. 1999), the Court found that voters would not know whether their vote on a judicial term limits initiative was going to affect other decisions they had already made in retaining certain judges. The resulting title was misleading. *Id.* at 267. Likewise, where voters were not informed that a redistricting proposal would reduce the size of the state senate and increase the size of the state house of representatives, the ballot title was misleading. *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for the Election Reform Amendment*, 852 P.2d 28, 36 (Colo. 1993). Here, voters will not know from the ballot title that there is a sphere of existing legislative and adjudicated decisions that could trigger either pay-outs by numerous government agencies or a double-standard of treatment under such regulations. Assuming Proponents are accurate that there is a limited group of landowners stand ready to profit from this measure, its retroactivity seems like a useful piece of information that should be conveyed in the title.

Proponents point to two cases as support for their position that retroactivity need not be mentioned in the titles. In the first case, the Court was never asked to address the measure's retroactivity, as the objectors limited their review of the title to two issues: (1) whether the measure comprised a single subject; and (2) whether the titles needed to disclose that a key phrase was not defined by the measure. *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for Proposed Initiative 1996-6*, 917 P.2d 1277, 1279 (Colo. 1996). And in the second case, the retroactivity of the measure was not expressly set forth in the initiative text, and the Court refrained from requiring the Board to so interpret it and thereby adjust the title. *In the Matter of the Title, Ballot Title and Submission Clause, and Summary Pertaining to Confidentiality of Adoption Records*, 832 P.2d 229, 232 (Colo. 1992). Here, the Proponents admitted the retroactivity of the measure, Tr. 37:20-24, 39:24-25, and a plain reading of the initiative would support no other interpretation. As a result, neither of the cases cited is authority for the Proponents' position advanced in their Answer Brief.

The Proponents finally suggest that the inclusion of "enforces" is enough to connote retroactivity and take a partial statement of Petitioners' counsel as evidence in support of their position. Proponents' Answer Brief at 15-16. The

Proponents fail to note that the additional statement was made before the Title Board:

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

Tr. 57:10-17. As such, voter would read "enforce" in the ballot title and fail to understand it to mean to apply to regulations in place since 1970.

The Proponents' contention also ignores the fact that, under #86, the mere act of enforcing a land use regulation is a separate governmental act. As compared to enactment, there are different procedures, consequences, and rights of review. Yet, the enforcement of such a regulation gives rise to a new and totally independent claim for compensation or exemption. Given such past decisions, such as the denial of a setback which was adopted as part of a general zone district regulation or the denial of a building permit for a gas station in a residential zone district, the retroactivity element of this measure is a hidden way of creating rights that have not existed previously. Voters should know this fact in reading the ballot title rather than being surprised by the initiative's circuitous provisions after the election.

The Title Board erred. However, the following reference at the end of the ballot title could address this error: "providing such remedies for land use regulations enacted since 1970 if ownership of the property has not changed since 1970 and the property is not otherwise excepted under this amendment."[5] The Board should be ordered to amend the title accordingly.

D. The title should relate the fact that #86 creates sham exceptions for nuisances, protection of the public health and safety, or compliance with federal law.

The titles do not state that the measure appears to except from its requirements land use decisions that combat nuisances, protect the public health and safety, or comply with federal law but, in so doing, erects significant procedural barriers to actually using such exceptions.[6] The Board and the Proponents both argue that because the initiative so limits these exceptions, they are not significant elements of the resulting land use legal structure and do not deserve mention in the title. Board Answer Brief at 11-12; Proponents' Answer Brief at 17-20.

The ability of land use entities to protect the essential nature of communities and the welfare of its inhabitants is the bedrock of land use law. *Penn Central*

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5 The specific exceptions, which should be set forth, are discussed in the following section of this Reply Brief.

6 Proponents' counsel raised this same concern to the Title Board as to Initiative #126. *See* fn. 1, *supra*.

Transp. Co. v. City of New York, 438 U.S. 104, 105-06, 125, 131, 133 (1978) (discussing the use of broad police powers to justify land use regulation). The measure holds out the continued ability of government to protect citizens in this manner, but then, it so complicates this process as to undermine the historic capacity of such entities to protect local residents through land use regulations put in place for these purposes. Voters should be told that, in this regard, the measure is designed to be something other than what it appears to be.

It is the job of the Title Board to summarize the provisions that are central to the measure. It is significant that "public entities" could be able to defend their land use decisions on grounds that have long been used in the exercise of this governmental prerogative only if the hurdles established by #86 are overcome. The initiative text prevents the public entity's determination from establishing an exception, using the grounds stated, and requires that any exception be narrowly construed, proven by clear and convincing evidence, and subject to de novo review at each level. Proposed Colo. Const., art. II, sec. 15(2)(b)(VI). As a result, it is impossible to imagine how, in practice, the measure's exceptions could be successfully applied by public entities. And the resulting question for the Court is whether the voters should know that the exceptions set forth in the measure are effectively window dressing.

As this Court has noted in the past, it is the Board's duty to inform voters these obstacles have been erected and will be difficult to surpass. In *In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-02 #21 and #22*, 44 P.3d 213 (Colo. 2002), the Court did not hold that mention of a difficult-to-obtain waiver relating to English immersion should be omitted from the titles. Instead, it held that the titles should be amended to reflect that there were built-in obstacles to obtaining the waiver. The Court erred on the side of providing accurate information about the smoke and mirrors built into those measures, lest voters be led to believe that the measure contained a waiver that would preserve existing programs. Here, too, the Proponents will argue that these historic protections are still available as buffers to this remedial scheme providing either compensation or exemption to a landowner. They will not mention the new, challenging hoops that governments will have to jump through in order to justify their land use regulations and decisions. And it is that gap that the title must fill. After all, the Board's titles must "enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal." *In re Proposed Initiative Concerning "State Personnel System"*, 691 P.2d 1121, 1123 (Colo. 1984).

The Title Board should clearly state that the relevant exceptions exist but will be difficult to access. The language could state, "and creating exceptions from such remedies for nuisances, protection of the public health and safety or compliance with federal law but setting conditions on such exceptions that will be extremely difficult to meet."

II. CONCLUSION

For the reasons stated, it is respectfully requested that the Court return the ballot title to the Board for reconsideration in a manner that is consistent with the issues raised by Petitioners.

Respectfully submitted this 2nd day of June, 2006.

ISAACSON ROSENBAUM P.C.

By: _____
Mark G. Grueskin

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of June, 2006, a true and correct copy of the foregoing **REPLY BRIEF** was served via hand delivery to the following:

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COLORADO TITLE SETTING BOARD

In re Title and Ballot Title and Submission Clause for Initiative 2005-2006 #126

MOTION FOR REHEARING

On behalf of Steven Durham, a registered elector of the State of Colorado, the undersigned hereby moves for a rehearing of the title, ballot title, and submission clause for Proposed Initiative 2005-2006 #126, set by the Title Board on May 17, 2006, and states as follows:

1. The initiative violates the single-subject requirement because the initiative creates a new property interest for owners of surrounding properties. This new right gives landowners a property interest in land use regulations that affect neighboring properties. As a result, the initiative gives neighboring landowners due process claims against, and private enforcement of, land use regulations. This provision directly overturns *Hillside Community Church v. Olson*, 58 P.3d 1021 (Colo. 2002) (a copy of which is attached). It is a subject separate and distinct from the requirement that public entities provide remedies to owners of real property for a diminution of their value.

2. The title and submission clause set by the Board is misleading, inaccurate, and incomplete for the following reasons:

a. The title and submission clause are misleadingly similar to the title and submission clause in Proposed Initiative 2005-2006 #86. In order to meaningfully inform voters, the title and submission clause must explain the differences between this initiative and Proposed Initiative 2005-2006 #86.

b. The title and submission clause do not sufficiently inform voters that the intent of the measure is to prevent private owners of real property from receiving compensation, because the title and submission clause fail to inform voters of the sweeping breadth of the exceptions that prevent owners from receiving compensation of the exemption: (1) decreases the value of surrounding real property; (2) threatens commonly-held community values, to include aesthetics; or (3) threatens the natural or built environment.

c. The title and submission clause state that a public entity may enact regulations that "serve to prevent" a decrease in fair market. In fact a land use regulation may only be exempted if it can be shown that the fair market value of a surrounding property is actually decreased.

d. The title and submission clause state that a public entity may enact regulations

that "protect" commonly held values or the built or natural environment. In fact, the exceptions are far broader and may be invoked on a mere showing that the exemption would "threaten" community held values.

e. The title and submission clause fail to state that the exemptions may also be construed to protect the public health, safety, morals or general welfare.

f. The title and submission clause do not reflect the initiative's newly created standard for a "public entity" engaged in land use regulation. That new standard includes entities not currently involved in or associated with such regulation.

g. The title and submission clause do not reflect the initiative's newly created, open-ended standard for "land use regulation." That new standard is not limited to the listed actions and includes acts that have never been considered to be land use regulations such as guidelines, enforcement actions, deed restrictions, and any action taken in connection with applications and permits, including their denial.

h. The title and submission clause fail to state that the measure applies to land use regulations that have been in effect since 1970.

i. The title and submission clause fail to state that it creates a new burden of proof, different from current statute, that requires a landowner to establish a diminution through clear and convincing evidence.

Respectfully submitted this 24th day of May, 2006.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 2006, a true and correct copy of the foregoing **MOTION FOR REHEARING** was placed in the United States mail, postage prepaid, to the following:

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Briefs and Other Related Documents

Supreme Court of Colorado,
En Banc.
In the Matter of the TITLE, BALLOT TITLE AND SUBMISSION CLAUSE, AND SUMMARY FOR 1999-2000 # 25,
John S. Outcelt, Petitioner,
v.
Douglas Bruce and Jeffrey Wright, Respondents,
and
Rebecca Lennahan and Richard Westfall, Title Board.
No. 98SA388.

Feb. 22, 1999.

In a challenge to the Ballot Title Setting Board's fixing of titles and summaries for a proposed state ballot initiative to cut state and local taxes, the Supreme Court, Rice, J., held that where the Board was unable to ascertain the meaning of the initiatives well enough to address the question of whether they might have the consequence of reducing state spending on state programs, so that the Board was incapable of setting clear titles that would not mislead the electorate, the initiatives could not be forwarded to the voters.

Reversed and remanded with directions.

West Headnotes

[1] **Constitutional Law** 9(1)
92k9(1) Most Cited Cases
Ballot Title Setting Board must assist potential proponents in implementing their right to initiate laws, while concurrently protecting the voters against confusion and fraud. West's C.R.S.A. Const. Art. 5, § 1.

[2] **Constitutional Law** 9(1)
92k9(1) Most Cited Cases
Ballot Title Setting Board must give deference to the intent of the proposal as expressed by its proponent, without neglecting its duty to consider the public confusion that might result from misleading titles. West's C.R.S.A. § 1-40- 106(3)(b).

[3] **Constitutional Law** 9(1)
92k9(1) Most Cited Cases
If the Ballot Title Setting Board cannot comprehend a proposed initiative sufficiently to state its single subject clearly in the title, it necessarily follows that the initiative cannot be forwarded to the voters. West's C.R.S.A. Const. Art. 5, § 1(5.5); West's C.R.S.A. §§ 1-40-106(3)(b), 1- 40-106.5.

[4] **Constitutional Law** 9(1)
92k9(1) Most Cited Cases
In reviewing actions taken by the Ballot Title Setting Board, the Supreme Court may not address the merits of a proposed initiative, nor

may the Supreme Court interpret its language or predict its application.

[5] Constitutional Law ⇐9(1)
92k9(1) Most Cited Cases
Actions of the Ballot Title Setting Board are presumptively valid.

[6] Constitutional Law ⇐9(1)
92k9(1) Most Cited Cases
Where the Ballot Title Setting Board was unable to ascertain the meaning of proposed state ballot initiatives to cut state and local taxes well enough to address the question of whether the initiatives might have the consequence of reducing state spending on state programs, so that the Board was incapable of setting clear titles that would not mislead the electorate, the initiatives could not be forwarded to the voters. West's C.R.S.A. Const. Art. 5, § 1(5.5); West's C.R.S.A. §§ 1-40-106(3)(b), 1-40-106.5.

[7] Constitutional Law ⇐9(1)
92k9(1) Most Cited Cases
Proposed state ballot initiatives to cut state and local taxes also addressed the subject of reducing state spending on state programs, in violation of single-subject requirement, though initiatives provided that state, which had limited ability to raise taxes under Amendment 1, was not required to replace lost state and local tax revenue unless state had fiscal year revenue increase of $200 million or more above that year's loss of state and local tax revenue, as it was impossible to foresee whether state would be required to reduce state spending on state programs in every year, in no year, or only in some years. West's C.R.S.A. Const. Art. 5, § 1(5.5); Art. 10, § 20(8); West's C.R.S.A. § 1-40-106.5.

*459 Susan E. Burch, Denver, Colorado, Attorney for Petitioner.

Douglas Bruce, Pro Se, Colorado Springs, Colorado.

No appearance on behalf of Respondent Jeffrey Wright.

Ken Salazar, Attorney General, Michael E. McLachlan, Solicitor General, Barbara McDonnell, Chief Deputy Attorney General, Paul Farley, Deputy Attorney General, Maurice G. Knaizer, Deputy Attorney General, State Services Section, Denver, Colorado, Attorneys for Title Board.

Justice RICE delivered the Opinion of the Court.

Petitioner, John S. Outcelt, brought these original proceedings under section 1-40-107(2), 1 C.R.S. (1998). Petitioner seeks review of the Title Board's (Board) September 2, 1998 action in fixing the titles, ballot titles and submission clauses, and summaries (titles and summaries) for three proposed ballot initiatives designated "1999-2000 # 25" (Initiative # 25), "1999-2000 # 26" (Initiative # 26), and "1999-2000 # 27" (Initiative # 27). [FN1] Because these initiatives are nearly identical, we consolidated the proceedings for review in this court. [FN2]

FN1. The title and summary of

Initiative # 25 are attached hereto as APPENDIX A. The title and summary of Initiative # 26 are attached hereto as APPENDIX B. The title and summary of Initiative # 27 are attached hereto as APPENDIX C. We also note that the initiative titles and summaries provided by the respondent differ slightly from the certified versions provided by the Secretary of State. We rely herein upon the language from the certified versions.

FN2. Cases 98SA415 and 98SA446 were consolidated for review herein.

Petitioner argues that these initiatives are unconstitutional because: (1) the initiatives contain more than one subject; (2) the titles and summaries fail to express the true intent and meaning of the initiatives; (3) the titles and summaries are misleading and fail to reflect the true fiscal impact of the proposals; (4) the titles and summaries fail to conform with Article X, section 20(3)(c) of the Colorado Constitution; and (5) the titles and summaries contain a prejudicial catch phrase.

We agree with the first and second of the foregoing contentions because the Board has acknowledged that it cannot comprehend the initiative well enough to state its single subject in the title. Accordingly, we reverse the Board's action.

I.

Each of the initiatives at issue proposes to add a new paragraph (d) to subsection (8) of section 20 of Article X of the Colorado Constitution, which is commonly known as Amendment 1. Under Initiative # 25, the new paragraph (d) would read as follows:

A $25 tax cut, increased $25 yearly (to $50, $75 ...), shall lower each tax bill for each 2001 and later district: utility customer tax and franchise charge; vehicle ownership tax; yearly income tax; property tax spent on human and health services, economic development, retirement benefits, enterprises, authorities, courts, jails, libraries, schools, elections and district attorney, assessor, financial, and legal offices combined; income or property tax equal to the combined yearly cost of lease-purchases, unbonded obligations not paid or offset by a pledged cash reserve in the year created, tax-increment financing, tax and spending and future local debt increases voter-approved after 1992 that last more than 10 years after approval, excess revenue for more than one year per election, revenue increases voter-approved after 2000 above a fixed tax rate and a fixed maximum number of dollars yearly, and tax credits and rebates unless voter-approved, for overpayment, or for general refunds of excess or illegal revenue; income or property tax equal to prior year revenue above 99% of its spending limits; income or property tax equal to yearly revenue from a tax rate increased or a spending limit percentage, computed since 1992, exceeded from 1993 through 2000, except by a fixed tax rate and a voter-approved fixed maximum number of dollars yearly; income or property tax equal to yearly revenue of

each authority wholly *460 or partly created by or related to the district but outside fiscal year spending limits, computed since 1992, and yearly cost of all state and local tax and business charge exemptions related to each authority and enterprise; and remaining business personal property tax. (8)(d) *does not require* specific ballot issue titles or content, does not apply to impair those binding contracts or debts existing in 2000, and does not increase state or local tax or spending limits; the state shall replace local tax cut revenue when the state has a fiscal year *revenue increase* from all sources of $200 million or more above that year's increase in local replacement, and shall audit each limit yearly; (8)(d) shall be strictly construed--substantial compliance is insufficient--and not balanced or harmonized with existing provisions; and all attorney fees and costs to enforce (8)(d) *shall always* be paid to successful plaintiffs only.
(Emphasis in original.)

The only difference in the new paragraph (d) under Initiative # 26 is that it contemplates an initial thirty dollar tax cut, increased by an additional thirty dollars each year thereafter. Initiative # 27 differs only insofar as it contemplates an initial twenty-five dollar tax cut, increased by an additional twenty-five dollars the next year, and increased by fifty dollars each year thereafter.

Under the instant initiatives, the new paragraph (d) would progressively lower various state and local taxes. This tax reduction would, in turn, reduce the revenue which municipalities, school districts, and various special districts depend upon to fund local programs such as human and health services, retirement benefits, district attorney and assessors offices, schools, libraries, courts, and jails. Under the terms of the instant initiatives, the state would only be required to replace the resultant shortfall in revenue for local programs in years when the state's fiscal year revenue exceeded the amount of the shortfall by $200 million or more.

II.

The petitioner's first contention is that the instant initiatives contain multiple subjects in violation of Article V, section 1(5.5) of the Colorado Constitution. *See also* § 1-40-106.5, 1 C.R.S. (1998). Specifically, the petitioner contends that the initiatives include the following subjects: (1) the implementation of various state and local tax cuts; (2) a corresponding transfer of funding responsibility from the local government to the state government, which will result in the reduction of state spending on state programs; (3) the requirement to set ballot titles which fix maximum tax rates; and (4) the implementation of franchise fee cuts. The petitioner also contends that the titles and summaries set by the Board are misleading because they do not clearly express the single subject of the proposed initiatives. Given the interdependent nature of these arguments, we address them together.

A.

A brief historical review of the single-subject and clear title requirements provides the necessary background for our decision. The single-subject and clear title concepts first arose in the context of bills proposed by the General Assembly and were a part of our state's first constitution. Article V, section 21 of the Colorado Constitution provides:

> No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed.

Thus, the express language of Article V, section 21 embraces two interdependent mandates: one forbidding the union of separate and distinct subjects in the same legislative bill, and the other commanding that the single subject treated in the body of the bill shall be clearly expressed in its title. *See In re Breene*, 14 Colo. 401, 404, 406, 24 P. 3, 3-4 (1890); *see also* Research Memorandum No. 2, "Bills to Contain Single Subject: No Change of Original Purpose," Colorado Legislative Drafting Office, Dec. 1971, at 6 (discussing how Article V, section 21 addresses ***461** these two separate, but related, requirements). As the *Breene* court held:

> [the constitutional provision] embraces two mandates, viz.: one forbidding the union in the same legislative bill of separate and distinct subjects, and the other commanding that the subject treated in the body of the bill shall be clearly expressed in its title. Each of these mandates is designed to obviate flagrant evils connected with the adoption of laws. The former prevents joining in the same act disconnected and incongruous matters. The purpose of the latter is ... "to prevent the passage of unknown and alien subjects, which might be coiled up in the folds of the bill."

In re Breene, 14 Colo. at 404, 24 P. at 3-4 (citation omitted).

We first addressed the single-subject aspect of this constitutional provision in a trio of cases decided around the turn of the century. In 1890, we interpreted this provision to prohibit a single legislative act from addressing "disconnected and incongruous matters." *Id.* at 404, 24 P. at 3. Three years later, we held that the requirement that a bill be limited to a single subject serves the beneficent purpose of making each legislative proposal depend upon its own merits for passage and, therefore, forbids a bill from containing "subjects having no necessary or proper connection." *Catron v. Board of County Comm'rs*, 18 Colo. 553, 557, 33 P. 513, 514 (1893). Finally, we held in *People ex rel. Elder v. Sours*, 31 Colo. 369, 403, 74 P. 167, 177 (1903), that in order for the text of a bill to constitute more than one subject, it "must have at least two distinct and separate purposes which are not dependent upon or connected with each other."

Although we have not been frequently presented with the issue of whether proposed legislation contains more than one subject, [FN3] we have had occasion to apply the foregoing legal standard in two recent cases.

In *Parrish v. Lamm*, 758 P.2d 1356, 1360 (Colo.1988), we reviewed a statute which sought to prohibit health care providers from waiving their patients' obligations to pay insurance deductibles and copayments, and simultaneously advertising their willingness to waive these fees. This bill, which had been proposed by the legislature, was challenged as impermissibly containing two subjects: "the regular business practice of advertising a willingness to waive certain patient fees, and the related but separate crime of abuse of health insurance." *Id.* at 1362. Relying in part upon *Catron*, we concluded that the bill contained only one subject because the two matters encompassed by the bill were properly connected. *See Parrish*, 758 P.2d at 1362. "The act of advertising is simply one means of alerting patients that a health care provider is willing to waive payment of deductible and copayments." *Id.*

> FN3. We have considered challenges to bills on many occasions on the ground of noncompliance with Article V, section 21 of the Colorado Constitution. The great majority, however, have focused principally on the sufficiency of the title to describe the contents of the bill. *See, e.g., Goldberg v. Musim*, 162 Colo. 461, 427 P.2d 698 (1967); *California Co. v. State*, 141 Colo. 288, 348 P.2d 382 (1959); *Gordon v. Wheatridge Water Dist.*, 107 Colo. 128, 109 P.2d 899 (1941); *Titus v. Titus*, 96 Colo. 191, 41 P.2d 244 (1935); *Lowdermilk v. People*, 70 Colo. 459, 202 P. 118 (1921); *Sugar City v. Board of Comm'rs*, 57 Colo. 432, 140 P. 809 (1914); *People ex rel. Colorado Bar Ass'n v. Erbaugh*, 42 Colo. 480, 94 P. 349 (1908); *Brown v. Elder*, 32 Colo. 527, 77 P. 853 (1904).

On the other hand, in *In re House Bill No. 1353*, 738 P.2d 371, 373 (Colo.1987), we reviewed legislation which sought to accomplish numerous goals including: the creation of a commission on information management to oversee strategic planning and set policy for the state's information systems; the imposition of a requirement that prisoners be charged for medical visits; the elimination of the use of salary surveys by the state personnel department to determine comparable pay rates for state employees; the repeal of a statute entitling old age pensioners to receive additional payments during the winter months to defray increased heating expenses; the amendment of a statute for Medicaid reimbursement to nursing homes; and the adoption of provisions that would allow banks to dispose of intangible property in their possession and to subsequently credit the proceeds from same to the state. The General Assembly argued that this bill contained one subject--the "increase in the moneys ***462** available to the state ... for the purpose of providing moneys to fund certain designated expenditure priorities for the 1987 regular session." *Id.* However, we held that "it would strain logic to conclude that the matters encompassed by House Bill No. 1353 are necessarily or properly connected to each other, *see Catron*, 18 Colo. at 557, 33 P. at

514, rather than disconnected or incongruous, *see In re Breene*, 14 Colo. at 404, 24 P. at 3." *In re House Bill No. 1353*, 738 P.2d at 373.

Turning to the background of the clear title aspect of the constitutional provision, we likewise first interpreted this mandate over 100 years ago in *In re Breene*. In that case, the state treasurer was criminally charged with lending public moneys for private gain. In his defense, the treasurer challenged the constitutionality of the statute under which he had been charged and ultimately convicted by the trial court, claiming that the title of the act, namely "An act to provide for the assessment and collection of revenue, and to repeal certain acts in relation thereto," did not clearly express the subject matter. *See id.* at 403, 24 P. at 3. The court agreed with Treasurer Breene, and vacated his conviction. *See id.* at 408, 24 P. at 5. In the course of its discussion, the *Breene* court established the standard for evaluating the clarity of titles, to wit:

> It will not do to say that the general subject of legislation may be gathered from the body of the act, for, to sustain the legislation at all, it must be expressed in the title. Moreover, we are bound to assume that the word "clearly" was not incorporated into the constitutional provision under consideration by mistake. It appears in but few of the corresponding provisions of other state constitutions; a fact that could hardly have been unobserved by the convention. That this word was advisedly used, and was intended to affect the manner of expressing the subject, we cannot doubt. The matter covered by legislation is to be "clearly," not "dubiously" or "obscurely," indicated by the title. Its relation to the subject must not rest upon a merely possible or doubtful inference. The connection must be so obvious as that ingenious reasoning, aided by superior rhetoric, will not be necessary to reveal it. Such connection should be within the comprehension of the ordinary intellect, as well as the trained legal mind.

Id. at 406, 24 P. at 4; *see also Parrish*, 758 P.2d at 1363; *Sullivan v. Siegal*, 125 Colo. 544, 551-52, 245 P.2d 860, 863-64 (1952); *Lowdermilk v. People*, 70 Colo. 459, 463, 202 P. 118, 119 (1921); *Lamar Canal Co. v. Amity Land & Irrigation Co.*, 26 Colo. 370, 374, 58 P. 600, 601 (1899); *Brooks v. People*, 14 Colo. 413, 417, 24 P. 553, 554 (1890).

B.

The citizens of Colorado have enjoyed the right to initiate and pass constitutional amendments and laws since 1910. *See* Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. Colo. L.Rev. 47, 65 (1995). Since this time, there have been over 160 ballot initiatives to amend the constitution and approximately sixty ballot initiatives to enact laws. *See id.* at 66. However, more than one-half of the total of all initiatives proposed since 1910 were promulgated after 1976. *See id.* at 66-67.

In response to this proliferation of initiative activity, the General Assembly amended the statutes governing the initiative process in their entirety in 1993. *See* Act effective May 4, 1993, ch. 183, 1993 Colo. Sess. Laws 676;

see also Collins & Osterle, 66 U. Colo. L.Rev. at 68-69. Therein, the General Assembly sought to "properly safeguard, protect, and preserve inviolate for [the citizens] these modern instrumentalities of democratic government." § 1-40-101, 1 C.R.S. (1998). As a part of this amended article, the General Assembly incorporated, among other things, the clear title standards that we first discussed in *Breene:*

> In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a "yes" or "no" vote will be unclear.

§ 1-40-106(3)(b), 1 C.R.S. (1998). This revised article also authorized the Secretary of State to convene a Title Board consisting of ***463** the Secretary of State, the Attorney General, and the Director of the Office of Legislative Legal Services. *See* § 1-40-106(1), 1 C.R.S. (1998).

The following year, in 1994, the General Assembly sought to extend the single-subject/clear title limitation applicable to bills to proposed initiatives by way of a referred constitutional amendment. [FN4] The language of the proposed amendment mirrored the language of Article V, section 21 of the Colorado Constitution insofar as it sought to prohibit initiatives from containing more than a single subject, which subject must be expressed clearly, to wit:

> No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title.... If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls.

Colo. Const. art. V, § 1(5.5); *see also* § 1-40-106.5. This single-subject/clear title provision was passed by the electorate as a constitutional amendment to the initiative process, a power reserved to the people by Article V, section 1(1) of the Colorado Constitution.

Finally, effective July 19, 1995, the General Assembly enacted legislation that explained its rationale for extending the single-subject/clear title requirement to initiated and referred measures. *See* § 1-40-106.5. This legislation stated that "in setting titles pursuant to section 1(5.5) of Article V, the initiative title setting review board created in section 1- 40-106 *should apply judicial decisions construing the constitutional single-subject requirement for*

FN4. The General Assembly referred this constitutional amendment to the voters as Referendum A on the 1994 general election ballot. It was approved and became effective upon proclamation by the Governor on January 19, 1995. *See* Sen. Conc. Res. 93-4, 1993 Colo. Sess. Laws 2152; *see also In re Proposed Initiative on "Public Rights in Waters II,"* 898 P.2d 1076, 1078 (Colo.1995).

bills...." § 1-40-106.5(3) (emphasis added). [FN5] In so stating, the General Assembly reiterated its intent that the standards developed for the analysis of bills as discussed above be applied to the interpretation of citizen initiatives.

> FN5. We note that the recent Supreme Court decision in *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 119 S.Ct. 636, 637, 142 L.Ed.2d 599 (1999), recognized the existence of the single-subject limitation upon initiatives set forth at section 1-40-106.5(1)(a). However, the Court did not address the nature of the single-subject requirement because it was not at issue between the parties.

We first interpreted the new constitutional provision in *In re Proposed Initiative on "Public Rights in Waters II,"* 898 P.2d 1076 (Colo.1995). Mindful of the legislative history which requires us to evaluate the single-subject/clear title mandate in initiatives in the same way that we evaluate single subjects and clear titles in bills, we relied upon the standard that we had established in *Sours, Catron,* and *Breene.* After applying this standard, we held that an initiative violates the single-subject requirement when it (1) relates to more than one subject and (2) has at least two distinct and separate purposes which are not dependent upon or connected with each other. *See In re "Public Rights in Waters II,"* 898 P.2d at 1078-79; *see also In re Proposed Initiative on Petition Procedures,* 900 P.2d 104, 109 (Colo.1995).

However, our analysis did not end with our articulation of the foregoing two-part test. We further stated that an initiative which tends to effect or to carry out one general objective or purpose presents only one subject. *See In re "Public Rights in Waters II,"* 898 P.2d at 1079. On the other hand, an initiative which addresses subjects that have no necessary or proper connection to one another will be disallowed as containing more than one subject. *See id.* at 1078-79. This interpretation of the single-subject requirement of Article V, section 1(5.5) ensures that each proposed initiative "depends upon its own merits for passage." *Id.* at 1078.

Since our decision in *In re "Public Rights in Waters II,"* we have consistently applied the foregoing standard to a variety of initiative proposals in order to analyze whether a proposed initiative contains more than one subject. For example, we found multiple ***464** subjects in *In re Petition Procedures,* 900 P.2d at 109 (holding that proposed initiative included such diverse subjects as retroactive fundamental rights, judicial review of petitions, recall, referendum, and initiative petition procedures); *In re Amend Tabor 25,* 900 P.2d 121, 125 (Colo.1995) (noting that proposed initiative not only proposed a tax credit, but also set forth several procedural requirements for future ballot issues); and *In re Proposed Initiative for 1997-1998 # 64,* 960 P.2d 1192, 1197-1200 (Colo.1998) (holding that proposed initiative not only established qualifications for judicial officers, but also impermissibly established a minimum number of district judgeships to which a

particular district is entitled, proposed the repeal of Article VI, section 26 of the Colorado Constitution, included an immunity provision conferring absolute immunity upon individuals who criticized a judicial officer's qualifications outside a courtroom, and included provisions divesting the Commission on Judicial Discipline of its investigative and remedial powers and changing qualifications for Commission membership).

On the other hand, we found single subjects in *In re Amend Tabor No. 32*, 908 P.2d 125, 129 (Colo.1995) (upholding proposed initiative that included a tax credit for six state and local taxes, where single purpose of initiative was implementation of tax credit, all six taxes were connected to same tax credit and were bound by same limitations, and initiative provision requiring mandatory replacement of lost local government revenues was dependent upon and closely connected to the tax credit); *In re Proposed Ballot Initiative on Parental Rights*, 913 P.2d 1127, 1131 (Colo.1996) (upholding proposed initiative that sought to establish parents' rights of control of their children in four distinct areas: upbringing, education, values, and discipline); and *In re Proposed Initiative for 1997-1998 # 74*, 962 P.2d 927, 929 (Colo.1998) (upholding proposed initiative creating school impact fees on new construction, although initiative also specified that payment or exemption from fees would be resolved by school boards or by current law governing use of school initiatives and referenda).

Turning next to the companion requirement that the title clearly state the single subject of the initiative, here again, we have applied the standards applicable to bills. In doing so, we have implemented the General Assembly's directives for initiatives as set forth in both section 1-40-106(3)(b) and Article V, section 1(5.5). [FN6]

> FN6. *In re "Public Rights in Waters II "* offers the following important guidance for our application of the clear title mandate, to wit:
> Again, this requirement parallels the same requirement in Article V, Section 21, concerning the single subject requirement for bills and is intended to prevent voter surprise or uninformed voting caused by items concealed within a lengthy or complex proposal.
> *Id.* at 1079.

For example, we held a title to be clear in *In re Proposed Initiative Concerning "Automobile Insurance Coverage,"* 877 P.2d 853, 856-57 (Colo.1994) (rejecting clarity challenge to title of proposed initiative that did not contain specific provisions establishing a particular automobile insurance pool system, but which instead required the General Assembly to create such a system).

In contrast, we held titles to be unclear in *In re Proposed Initiative on Limited Gaming in Antonito*, 873 P.2d 733, 741 (Colo.1994) (holding that title was misleading since a voter scanning the initiative could be misled into

believing that the measure concerned only one city, even though the proposed initiative also changed provisions applicable to other areas of the state where limited gaming was lawful); *In re Proposed Initiative on "Obscenity,"* 877 P.2d 848, 850 (Colo.1994) (holding that the title permitting state and local entitles to "control the promotion of obscenity to the full extent permitted by the First Amendment to the U.S. Constitution" did not contain sufficient information to enable electorate to ascertain that the proposed initiative intended to foreclose Colorado courts from permitting any broader protection of obscenity under the Colorado Constitution); and *In re Proposed Initiative 1996-17,* 920 P.2d 798, 803 (Colo.1996) (holding that title was misleading to extent that it failed to disclose that a proposed initiative that would require revision of current enhanced emissions testing program would affect*465 only the six-county Denver metropolitan area).

C.

In order to facilitate the initiative process, the General Assembly assigned duties to the Title Board which include: (1) "designat[ing] and fix [ing] a proper fair title for each proposed law or constitutional amendment, together with a submission clause," § 1-40-106(1); (2) "prepar[ing] a clear, concise summary of the proposed law or constitutional amendment" which "shall be true and impartial and shall not be an argument, nor likely to create prejudice, either for or against the measure," § 1-40-106(3)(a), 1 C.R.S. (1998); (3) "consider[ing] the public confusion that might be caused by misleading titles and ... whenever practicable, avoid[ing] titles for which the general understanding of the effect of a 'yes' or 'no' vote will be unclear," § 1-40-106(3)(b); (4) not permitting "the treatment of incongruous subjects in the same measure," § 1-40-106.5(1)(3)(I); and (5) acting to "prevent surreptitious measures and appris[ing] the people of the subject of each measure by the title" in order to "prevent surprise and fraud from being practiced upon voters," § 1-40-106.5(1)(e)(II). *See also Aisenberg v. Campbell,* 972 P.2d 257, 260 (Colo.1999).

[1][2][3] Thus, the General Assembly has squarely placed the responsibility for carrying out the dual mandate of Article V, section 1(5.5) on the Title Board. Implementation of this mandate often requires the Board to balance competing interests. For example, the Board must assist potential proponents in implementing their right to initiate laws, *see In re Proposed Initiative Concerning Drinking Age in Colorado,* 691 P.2d 1127, 1130 (Colo.1984), while concurrently protecting the voters against confusion and fraud. Likewise, the Board must give deference to the intent of the proposal as expressed by its proponent, *see In re Proposed Initiative on Unsafe Workplace Env't,* 830 P.2d 1031, 1034 (Colo.1992), without neglecting its duty to consider the public confusion that might result from misleading titles. However, if the Board cannot comprehend a proposed initiative sufficiently to state its single subject clearly in the title, it necessarily follows that the initiative cannot be forwarded to the voters.

[4][5] This is especially true in light of the limited scope of our review of actions taken by the Board. For example, we may not address the merits of a proposed initiative, nor may we interpret its language or predict its application. *See In re Petition on Campaign & Political Fin.*, 877 P.2d 311, 313 (Colo.1994); *In re Proposed Initiative on Fair Treatment of Injured Workers*, 873 P.2d 718, 719-20 (Colo.1994); *In re Proposed Election Reform Amend.*, 852 P.2d 28, 31-32 (Colo.1993). Further, in conducting such a review, the actions of the Board are presumptively valid. *See Say v. Baker*, 137 Colo. 155, 159, 322 P.2d 317, 319 (1958); *see also In re Proposed Initiative for 1997-1998 No. 105*, 961 P.2d 1092, 1097 (Colo.1998); *In re Proposed Initiative for 1997-1998 No. 75*, 960 P.2d 672, 673 (Colo.1998); *In re Proposed Initiative "Automobile Insurance Coverage,"* 877 P.2d at 856 (noting that reviewing court is required to engage all legitimate presumptions in favor of the propriety of the Board's actions).

D.

Finally, for the purpose of general background, we note that two prior versions of these initiatives have been presented to us for review. In April 1998, we issued an opinion regarding Initiative # 30, the first version of the instant initiatives. *See In re Proposed Initiative for 1997-98 # 30*, 959 P.2d 822 (Colo.1998). Therein, we held that Initiative # 30 was unconstitutional because it contained two subjects--a tax cut and new criteria for voter approval of revenue and spending increases. *See id.* at 827. In June 1998, we reviewed redrafted versions of the initiatives, entitled Initiatives # 84 and # 85. *See In re Proposed Initiative for 1997-98 No. 84*, 961 P.2d 456 (Colo.1998). Initiatives # 84 and # 85 did not include the language that we found objectionable in Initiative # 30. We held, however, that the redrafted initiatives were unconstitutional because they contained more than one subject--namely, tax cuts and the imposition of mandatory ***466** reductions in state spending on state-sponsored programs. *See id.* at 457, 460-61. Our decisions in these cases serve as controlling precedent which governs not only the courts of Colorado, but also the Title Board. *See* § 1-40-106.5(3).

III.

Turning to an analysis of the initiatives now before us, the petitioner contends that the instant initiatives still contain multiple subjects. First, the petitioner argues that these initiatives involve the following discrete subjects: (1) tax cuts, (2) a transfer of funding responsibility which will necessarily result in a reduction in state spending on state programs, and (3) the addition of new criteria for voter approval of revenue and spending increases pursuant to Amendment 1 of the Colorado Constitution. Second, the petitioner argues that the titles of the initiatives do not clearly express the single subject of the measures.

A.

In support of the petitioner's assertion that the instant initiatives will result in a reduction of state spending on state programs, he directs our attention to language in the initiatives

which not only requires the state to "replace local tax cut revenue when the state has a fiscal year revenue increase from all sources of $200 million or more above that year's increase in local replacement," but also prohibits the state from "increas[ing] state or local tax or spending limits." In essence, the petitioner argues that, although the text of the instant initiatives has changed, the initiatives again will reduce state spending on state programs, our concern in *In re Proposed Initiative No. 84*, 961 P.2d 456, because the state will not be able to meet its obligations to fund local programs by raising taxes.

In contrast, the respondents argue that the initiatives presently before us differ from Initiative # 84 insofar as no shift in funding obligations occurs unless the state realizes a revenue increase of at least $200 million. As such, the respondents argue that state replacement of local revenue is not automatic and, therefore, no reduction of state spending on state programs will result. In short, respondents assert that the initiatives have only one objective or purpose--cutting taxes.

In light of the foregoing arguments, we must begin with a review of our holding in *In re Proposed Initiative No. 84*, 961 P.2d 456. [FN7] As noted above, Initiative # 84 was substantially similar to the instant initiatives insofar as it required a transfer of funding responsibility from the local government to the state government. Initiative # 84 also required the state to "replace monthly the local government revenue affected by the tax cuts established by this measure, *within all tax and spending limits.*" *In re Proposed Initiative No. 84*, 961 P.2d at 459 (emphasis added). In reviewing Initiative # 84, we recognized that the foregoing "within all tax and spending limits" provision included the spending and revenue limits imposed by Amendment 1. [FN8] *See id.* at 460. In light of this fact, we found that Initiative # 84 would require the state to reduce the amount it spent on state programs in order to replace lost local revenue as a result of the tax cuts. *See id.* We held that this mandatory reduction in state spending on state services constituted a separate and unrelated subject in violation of Article V, section 1(5.5) of the Colorado Constitution. *See id.* at 460- 61.

FN7. Due to the nearly identical language of Initiatives # 84 and # 85, we limit our discussion to Initiative # 84.

FN8. Amendment 1 strictly limits increases in the state's annual spending and revenue collection. *See* Colo. Const. art. X, § 20(4)- (8). The state's maximum annual increase in spending is tied to the amount by which inflation and population increase. *See* Colo. Const. art. X, § 20(7)(a). Without voter approval, the state may not impose any new tax, tax rate increase, or mill levy above that for the prior year. *See* Colo. Const. art. X, § 20(4); *see also In re Proposed Initiative No. 84*, 961 P.2d at 460.

The initiatives presently before us do not

include the proviso that we found objectionable in *In re Proposed Initiative No. 84.* However, the instant initiatives include the language: "(8)(d) ... does not increase state or local tax or spending limits...." Therefore, the question we must decide is whether *467 these initiatives, given the $200 million revenue cushion before which the state's obligation to fund local programs begins, still have the consequence of reducing state funding to state programs. If, under these initiatives, state funding to state programs is reduced, then the resolution of this case is controlled by our decision in *In re Proposed Initiative No. 84,* 961 P.2d 456, since these initiatives would contain two subjects. On the other hand, if state funding to state programs is not reduced, then it follows that the initiatives contain only one subject. Based on our decision regarding the number of subjects in the proposed initiatives, we must secondarily determine whether the titles clearly state the single subject of the initiatives.

[6] Our review of the Board's proceedings reveals that the Board did not determine whether the initiatives encompassed dual subjects. Rather, the record demonstrates that the Board was unable to ascertain the meaning of the initiatives well enough to address the question of whether the initiatives might have the consequence of reducing state spending on state programs. Finally, the record reveals that the Board's failure to resolve this ambiguity rendered the Board incapable of setting clear titles that would not mislead the electorate. Accordingly, we reverse the Board's actions.

B.

In light of the legislative directive that requires the Board to apply our prior decisions, the Board's first responsibility was to determine whether these initiatives would reduce state spending on state programs even after the addition of the new $200 million dollar cushion language. The Board failed to resolve this seminal question.

The transcript of the hearings before the Board evidences the fact that the Board members recognized the potential shortcomings of the proposed initiatives. Specifically, the Chairman of the Board stated:

> Mr. [Proponent] in defense of both the title setting process here and--and the comments that you are make--making, I think it's critically important that you understand that we can take this matter that you have here before us today [the proposed initiative]--*we could go out and walk and talk to any twenty people on the street and they would have an almost impossible time trying ... to figure [the proposed initiative] out.* And one of the difficulties we have with your measures, Mr. [Proponent], and we're trying to bend over backwards to be accommodating to you, but *we have to try to understand them and you--the way you write them they are extremely difficult to understand....*

Tr. of Board Hearing at 60 (Sept. 2, 1998) (emphasis added). Similarly, at a later point in the hearing, another Board member stated:

> I just want to comment on the complexity

[of the proposed initiatives] as well before we -before we get into that. It--*it makes it virtually impossible to determine what the—what the single subject ramifications of this [proposed initiative] are because of the complexity,* but I think it's incumbent on us to go forward and do it.

....

... I think *there's probably a fairly [decent] argument that that second sentence does include a potential violation of the single subject rule* in the hypothetical that involves the federal funds.

Tr. of Board Hearing at 80 (Sept. 2, 1998) (emphasis added).

This Board member's recognition of the fact that the proposed initiatives may contain multiple subjects is particularly significant for purposes of our review. However, after acknowledging the potential violation of the single-subject requirement, the record reveals that the Board made no effort to resolve this discrepancy. Instead, the Chairman of the Board summarily concluded that "a contraction in ... state expenditures ... does not appear to be the case ... or a very likely outcome [of the proposed initiatives]." Tr. of Board Reh'g at 48 (Sept. 16, 1998).

[7] In the interest of extending all presumptions in favor of the Board's determination that these initiatives contained only one subject, we turn to the summary of the proposed ***468** initiatives. However, the text of the summary offers no support for the Board's conclusion that the addition of the $200 million cushion eliminated the secondary subject that we found to exist in our review of Initiative # 84. In fact, the following language from the "state impacts" portion of the summary appears to confirm the concerns expressed by the Board members at the hearings, to wit:

> If the state replaces local government revenue losses resulting from the measure, the measure would have a significant but indeterminate negative fiscal impact on the state. Assuming no state replacement of local revenue, the measure would have a net negative state fiscal impact of at least $255,748,000 [FN9] during the three-year period beginning with fiscal year 2001-02. The figure does not include the amount of negative fiscal impact that will occur but is indeterminate at this time.
>
> FN9. Under Initiative # 26, this figure is $305,490,000. Under Initiative # 27, this figure is $293,030,000.

This statement that the instant initiatives will, at least in certain years, result in a negative fiscal impact does not square with the Board's implicit conclusion that the addition of the $200 million cushion eliminated what we found to be a secondary subject in our review of Initiative # 84. As the foregoing excerpt from the summary correctly notes, it is impossible to foresee whether the state will be required to reduce state spending on state programs in every year, in no year, or only in some years. Thus, in finding that the instant initiatives contained only one subject, the Board erred in concluding that the new language cured the

deficiency we noted in *In re Proposed Initiative No. 84*.

Similarly, the petitioner asserts that the instant initiatives contain more than one subject insofar as they add new criteria for voter approval of revenue and spending increases pursuant to Amendment 1 of the Colorado Constitution. We first addressed the issue of additional criteria for voter approval of revenue and spending increases in *In re Proposed Initiative for 1997-98 # 30*, 959 P.2d 822 (Colo.1998).

However, as was the case with the Board's failure to apply our holding in *In re Proposed Initiative No. 84*, the record also reveals that the Board failed to apply our holding in *In re Proposed Initiative # 30*, 959 P.2d 822. As one member of the Board noted:

> [O]n the other point the--the Number 30 case, I--*I am still very confused about the ... affect [sic] of the change in the language and whether or not the Number Thirty case would in fact, indicate that we've still got a violation of single subject.* But, in view of my confusion--again and my feeling is that we should probably go forward and set the title because I think that it's going to take more time than we have today to try and unravel all of that confusion.

Tr. of Board Hearing at 81 (Sept. 2, 1998) (emphasis added). The Chairman of the Board then stated:

> I share your concerns, but I also share your views of--of our role here as the title setting board and our obligations to resolve -benefits of the doubt in favor of the proponents of the measure, so I'm prepared to say it's a single subject as well at this point and move forward.

Tr. of Board Hearing at 81 (Sept. 2, 1998). Instead of working through its confusion as to whether this issue constituted a separate subject, the Board simply left this question unresolved for appellate review. This practice was in derogation of the Board's duty under section 1-40-106.5(1)(3)(I).

Moreover, the Board's uncertainty as to whether the instant initiatives contained multiple subjects necessarily leads us to the conclusion that the title does not satisfy the long-standing requirement that it "clearly" state the single subject proposed by the initiatives. Before a clear title can be written, the Board must reach a definitive conclusion as to whether the initiatives encompass multiple subjects. *See In re Breene*, 14 Colo. at 406, 24 P. at 4 (noting that the title of an initiative cannot rest upon a merely possible or doubtful inference). Absent a resolution of whether the initiatives contain a single *469 subject, it is axiomatic that the title cannot clearly express a single subject. *See* Colo. Const. art. V, § 21.

The record of the hearings before the Board demonstrates that the Board believed its duty to assist potential proponents in implementing their right to initiate laws, *see In re Proposed Initiative Concerning Drinking Age in Colorado*, 691 P.2d at 1130, included resolving all ambiguities in favor of the proponents herein. While the Board must give deference to a proponent's expression of

his or her initiative's intent, *see In re Proposed Initiative on Unsafe Workplace Env't*, 830 P.2d at 1034, it may not do so at the expense of its other equally important duties. The Board must simultaneously consider the potential public confusion that might result from misleading titles and exercise its authority in order to protect against such confusion.

In sum, the Board, whether out of perceived time constraints or a misunderstanding of the scope of the deference to be given to a proponent of an initiative, has not submitted for our review titles which take into account the public confusion that might be caused by misleading titles. Instead, the Board has submitted to us titles for which the general understanding of the effect of a "yes" or "no" vote will be unclear. *See generally* § 1-40-106(3)(b); *see also In re Proposed Initiative on "Obscenity,"* 877 P.2d at 850-51. In cases such as this one, where the Board has acknowledged that it cannot comprehend the initiatives well enough to state their single subject in the titles, we hold that the initiatives cannot be forwarded to the voters and must, instead, be returned to the proponent.

When writing future titles, the "connection between the title and the initiative must be so obvious as that ingenious reasoning, aided by superior rhetoric, will not be necessary to understand it." *Breene*, 14 Colo. at 406, 24 P. at 4. Further, such connection should be within the comprehension of voters of average intelligence. *See id.*; *see also Parrish*, 758 P.2d at 1363; *Sullivan*, 125 Colo. at 551-52, 245 P.2d at 863-64; *Lowdermilk*, 70 Colo. at 463, 202 P. at 119; *Lamar Canal Co.*, 26 Colo. at 374, 58 P. at 601; *Brooks*, 14 Colo. at 417, 24 P. at 554. Finally, it bears emphasis that the Board must follow the express mandate of the General Assembly, which stated that "in setting titles pursuant to section 1(5.5) of article V, the initiative title setting review board ... *should apply judicial decisions construing the constitutional single-subject requirement for bills....*" § 1-40-106.5(3) (emphasis added).

IV.

As the Board not only failed to apply our holding in the *Initiative No. 84* decision, but also failed to write a title which clearly expressed a single subject, we remand this matter to the Board with directions to strike the title, ballot title and submission clause, and summary for Initiatives # 25, # 26, and # 27 and to return the initiatives to the proponents.

APPENDIX A

PROPOSED INITIATIVE NUMBER "1999-2000 # 25" [FN10]

FN10. Amend TABOR.

The title as designated and fixed by the Board is as follows:

AN AMENDMENT TO THE COLORADO CONSTITUTION ESTABLISHING A $25 TAX CUT TO LOWER EACH 2001 STATE AND LOCAL TAX BILL FOR EACH UTILITY CUSTOMER TAX AND

FRANCHISE CHARGE, VEHICLE OWNERSHIP TAX, AND SPECIFIED INCOME TAX AND PROPERTY TAX, AND, IN CONNECTION THEREWITH, INCREASING THE TAX CUT $25 YEARLY THEREAFTER; REQUIRING STATE REPLACEMENT OF AFFECTED LOCAL REVENUE WHEN YEARLY STATE REVENUE INCREASES $200 MILLION OR MORE ABOVE THAT YEAR'S INCREASE IN LOCAL REVENUE REPLACEMENT; REQUIRING YEARLY STATE AUDITS OF TAX AND SPENDING LIMITS; SPECIFYING RULES FOR CONSTRUING THIS AMENDMENT; STATING THAT THIS AMENDMENT *470 DOES NOT REQUIRE ANY SPECIFIC BALLOT ISSUE TITLE, DOES NOT IMPAIR BINDING CONTRACTS OR DEBTS EXISTING IN 2000, AND DOES NOT INCREASE STATE OR LOCAL TAX OR SPENDING LIMITS; AND AWARDING MANDATORY ATTORNEY FEES AND COSTS TO SUCCESSFUL PLAINTIFFS ONLY.

The ballot title and submission clause as designated and fixed by the Board is as follows:

SHALL THERE BE AN AMENDMENT TO THE COLORADO CONSTITUTION ESTABLISHING A $25 TAX CUT TO LOWER EACH 2001 STATE AND LOCAL TAX BILL FOR EACH UTILITY CUSTOMER TAX AND FRANCHISE CHARGE, VEHICLE OWNERSHIP TAX, AND SPECIFIED INCOME TAX AND PROPERTY TAX, AND, IN CONNECTION THEREWITH, INCREASING THE TAX CUT $25 YEARLY THEREAFTER; REQUIRING STATE REPLACEMENT OF AFFECTED LOCAL REVENUE WHEN YEARLY STATE REVENUE INCREASES $200 MILLION OR MORE ABOVE THAT YEAR'S INCREASE IN LOCAL REVENUE REPLACEMENT; REQUIRING YEARLY STATE AUDITS OF TAX AND SPENDING LIMITS; SPECIFYING RULES FOR CONSTRUING THIS AMENDMENT; STATING THAT THIS AMENDMENT DOES NOT REQUIRE ANY SPECIFIC BALLOT ISSUE TITLE, DOES NOT IMPAIR BINDING CONTRACTS OR DEBTS EXISTING IN 2000, AND DOES NOT INCREASE STATE OR LOCAL TAX OR SPENDING LIMITS; AND AWARDING MANDATORY ATTORNEY FEES AND COSTS TO SUCCESSFUL PLAINTIFFS ONLY?

The summary prepared by the Board is as follows:

This measure amends article X, section 20 of the Colorado Constitution, by adding a new paragraph (d) to subsection (8). A $25 tax cut increased $25 each year thereafter, would lower each state and local tax bill for each utility customer tax and franchise charge; vehicle ownership tax; yearly income tax; property tax spent on human and health services, economic development, retirement benefits, enterprises, authorities, courts, jails, libraries, schools, elections, and district attorney, assessor, financial, and legal offices

combined; income or property tax equal to the combined yearly cost for lease-purchases, unbonded obligations not paid or offset by a pledged cash reserve in the year created, tax-increment financing, tax and spending and future local debt increases approved by voters after 1992 that last more than 10 years after approval, excess revenue for more than one year per election, revenue increases voter-approved after 2000 above a fixed tax rate and a fixed maximum number of dollars yearly, and tax credits and rebates unless voter-approved, for overpayment, or for general refunds of excess or illegal revenue; income or property tax equal to the prior year's revenue above ninety-nine percent of its spending limits; income or property tax equal to yearly revenue from a tax rate increased or a spending limit percentage, computed since 1992, exceeded from 1993 through 2000, except by a fixed tax rate and a voter-approved fixed maximum number of dollars yearly; income or property tax equal to the yearly revenue of each authority wholly or partly created by or related to the district by outside fiscal year spending limits, computed since 1992, and the yearly cost of all state and local tax and business charge exemptions related to each authority and enterprise; and remaining business personal property tax. The initial tax cut of $25 is applied to tax bills for tax year 2001.

The measure specifies that it does not require any specific ballot issue title or content, does not impair binding contracts or debts existing in 2000, and does not increase state or local tax or spending limits. The state is required to replace the local government revenue affected by the tax cuts established by this measure when the state has a fiscal year revenue increase from all sources of $200 million or more above that year's increase in the amount of local revenue to be replaced. The state is required to audit each tax and spending limit yearly. The measure provides that it is to be strictly construed and not balanced or harmonized with existing provisions. Substantial compliance with the *471 measure is not sufficient. All attorney fees and costs are always awarded to successful plaintiffs only who seek to enforce this new measure.

State impacts. The state income tax cut would reduce the growth in state general fund revenue by $256,648,000 during the three-year period beginning with fiscal year 2001-02. The cut in the state utility customer tax and other income tax cuts contained in the measure would reduce the growth in state general fund revenue by an indeterminate amount during the same three-year period.

The state would incur costs of at least $1,100,000 to administer the tax cuts allowed by this measure. In addition, the state may incur costs for possible annual audits, but the amount of these additional costs is indeterminate.

If the state replaces local government revenue losses resulting from the measure, the measure would have a significant but indeterminate negative fiscal impact on the state. Assuming no state replacement of local revenue, the

measure would have a net negative state fiscal impact of at least $255,748,000 during the three-year period beginning with fiscal year 2001-02. The figure does not include the amount of negative fiscal impact that will occur but is indeterminate at this time.

Local impacts. If the state does not replace local government revenue lost due to the measure, the measure would have a significant negative fiscal impact on local governments.

Even if the state replaces lost local government revenues, the measure may have a negative fiscal impact on some local governments, since the measure does not increase local tax and spending limits and revenues are currently being collected outside those limits. This measure may increase local government costs due to possible accounting and audit costs, attorney fees and costs that must be mandatorily awarded, and possible increased litigation. The amount of these additional local costs is indeterminate.

September 2, 1998
Hearing adjourned 4:14 p.m.

Rehearing, September 16, 1998
Motion for Rehearing from Douglas Bruce Granted in Part
Motion for Rehearing from John Outcelt Denied
Hearing adjourned 3:08 p.m.

APPENDIX B
PROPOSED INITIATIVE NUMBER "1999-2000 # 26" [FN11]

FN11. Amend TABOR.

The title as designated and fixed by the Board is as follows:

AN AMENDMENT TO THE COLORADO CONSTITUTION ESTABLISHING A $30 TAX CUT TO LOWER EACH 2001 STATE AND LOCAL TAX BILL FOR EACH UTILITY CUSTOMER TAX AND FRANCHISE CHARGE, VEHICLE OWNERSHIP TAX, AND SPECIFIED INCOME TAX AND PROPERTY TAX, AND, IN CONNECTION THEREWITH, INCREASING THE TAX CUT $30 YEARLY THEREAFTER; REQUIRING STATE REPLACEMENT OF AFFECTED LOCAL REVENUE WHEN YEARLY STATE REVENUE INCREASES $200 MILLION OR MORE ABOVE THAT YEAR'S INCREASE IN LOCAL REVENUE REPLACEMENT; REQUIRING YEARLY STATE AUDITS OF TAX AND SPENDING LIMITS; SPECIFYING RULES FOR CONSTRUING THIS AMENDMENT; STATING THAT THIS AMENDMENT DOES NOT REQUIRE ANY SPECIFIC BALLOT ISSUE TITLE, DOES NOT IMPAIR BINDING CONTRACTS OR DEBTS EXISTING IN 2000, AND DOES NOT INCREASE STATE OR LOCAL TAX OR SPENDING LIMITS; AND AWARDING MANDATORY ATTORNEY FEES AND COSTS TO SUCCESSFUL PLAINTIFFS ONLY.

The ballot title and submission clause as designated and fixed by the Board is as

follows:

SHALL THERE BE AN AMENDMENT TO THE COLORADO CONSTITUTION *472 ESTABLISHING A $30 TAX CUT TO LOWER EACH 2001 STATE AND LOCAL TAX BILL FOR EACH UTILITY CUSTOMER TAX AND FRANCHISE CHARGE, VEHICLE OWNERSHIP TAX, AND SPECIFIED INCOME TAX AND PROPERTY TAX, AND, IN CONNECTION THEREWITH, INCREASING THE TAX CUT $30 YEARLY THEREAFTER; REQUIRING STATE REPLACEMENT OF AFFECTED LOCAL REVENUE WHEN YEARLY STATE REVENUE INCREASES $200 MILLION OR MORE ABOVE THAT YEAR'S INCREASE IN LOCAL REVENUE REPLACEMENT; REQUIRING YEARLY STATE AUDITS OF TAX AND SPENDING LIMITS; SPECIFYING RULES FOR CONSTRUING THIS AMENDMENT; STATING THAT THIS AMENDMENT DOES NOT REQUIRE ANY SPECIFIC BALLOT ISSUE TITLE, DOES NOT IMPAIR BINDING CONTRACTS OR DEBTS EXISTING IN 2000, AND DOES NOT INCREASE STATE OR LOCAL TAX OR SPENDING LIMITS; AND AWARDING MANDATORY ATTORNEY FEES AND COSTS TO SUCCESSFUL PLAINTIFFS ONLY?

The summary prepared by the Board is as follows:

This measure amends article X, section 20 of the Colorado Constitution, by adding a new paragraph (d) to subsection (8). A $30 tax cut, increased $30 each year thereafter, would lower each state and local tax bill for each utility customer tax and franchise charge; vehicle ownership tax; yearly income tax; property tax spent on human and health services, economic development, retirement benefits, enterprises, authorities, courts, jails, libraries, schools, elections and district attorney, assessor, financial, and legal offices combined; income or property tax equal to the combined yearly cost of lease purchases, unbonded obligations not paid or offset by a pledged cash reserve in the year created, tax-increment financing, tax and spending and future local debt increases approved by voters after 1992 that last more than 10 years after approval, excess revenue for more than one year per election, revenue increases voter-approved after 2000 above a fixed tax rate and a fixed maximum number of dollars yearly, and tax credits and rebates unless voter-approved, for overpayment, or for general refunds of excess or illegal revenue; income or property tax equal to the prior year's revenue above ninety-nine percent of its spending limits; income or property tax equal to yearly revenue from a tax rate increased or a spending limit percentage, computed since 1992, exceeded from 1993 through 2000, except by a fixed tax rate and a voter-approved fixed maximum number of dollars yearly; income or property tax equal to the yearly revenue of each authority wholly or partly created by or related to the district but outside fiscal year spending limits, computed since 1992, and the yearly cost of all state and local tax and business charge

exemptions related to each authority and enterprise; and remaining business personal property tax. The initial tax cut of $30 is applied to tax bills for tax year 2001.

The measure specifies that it does not require any specific ballot issue title or content, does not impair binding contracts or debts existing in 2000, and does not increase state or local tax or spending limits. The state is required to replace the local government revenue affected by the tax cuts established by this measure when the state has a fiscal year revenue increase from all sources of $200 million or more above that year's increase in the amount of local revenue to be replaced. The state is required to audit each tax and spending limit yearly. The measure provides that it is to be strictly construed and not balanced or harmonized with existing provisions. Substantial compliance with the measure is not sufficient. All attorney fees and costs are always awarded to successful plaintiffs only who seek to enforce this new measure.

State impacts. The state income tax cut would reduce the growth in state general fund revenue by $304,390,000 during the three-year period beginning with fiscal year 2001-02. The cut in the state utility customer tax and other income tax cuts contained in the measure would reduce the growth in state general fund revenue by an indeterminate *473 amount during the same three-year period.

The state would incur costs of at least $1,100,000 to administer the tax cuts allowed by this measure. In addition, the state may incur costs for possible annual audits, but the amount of these additional costs is indeterminate.

If the state replaces local government revenue losses resulting from the measure, the measure would have a significant but indeterminate negative fiscal impact on the state. Assuming no state replacement of local revenue, the measure would have a net negative state fiscal impact of at least $305,490,000 during the three-year period beginning with fiscal year 2001-02. The figure does not include the amount of negative fiscal impact that will occur but is indeterminate at this time.

Local impacts. If the state does not replace local government revenue lost due to the measure, the measure would have a significant negative fiscal impact on local governments.

Even if the state replaces lost local government revenues, the measure may have a negative fiscal impact on some local governments, since the measure does not increase local tax and spending limits and revenues are currently being collected outside those limits. This measure may increase local government costs due to possible accounting and audit costs, attorney fees and costs that must be mandatorily awarded, and possible increased litigation. The amount of these additional local costs is indeterminate.

September 16, 1998

Hearing adjourned 4:38 p.m.

Rehearing, October 7, 1998
John S. Outcelt Motion for Rehearing Granted as to paragraph 8 of the Motion, otherwise denied in part.
Hearing adjourned 2:50 p.m.

APPENDIX C
PROPOSED INITIATIVE NUMBER "1999-2000 # 27" [FN12]

FN12. Amend TABOR.

The title as designated and fixed by the Board is as follows:

AN AMENDMENT TO THE COLORADO CONSTITUTION ESTABLISHING A $25 TAX CUT TO LOWER EACH 2001 STATE AND LOCAL TAX BILL FOR EACH UTILITY CUSTOMER TAX AND FRANCHISE CHARGE, VEHICLE OWNERSHIP TAX, AND SPECIFIED INCOME TAX AND PROPERTY TAX, AND, IN CONNECTION THEREWITH, INCREASING THE TAX CUT $25 THE NEXT YEAR, AND $50 YEARLY THEREAFTER; REQUIRING STATE REPLACEMENT OF AFFECTED LOCAL REVENUE WHEN YEARLY STATE REVENUE INCREASES $200 MILLION OR MORE ABOVE THAT YEAR'S INCREASE IN LOCAL REVENUE REPLACEMENT; REQUIRING YEARLY STATE AUDITS OF TAX AND SPENDING LIMITS; SPECIFYING RULES FOR CONSTRUING THIS AMENDMENT; STATING THAT THIS AMENDMENT DOES NOT REQUIRE ANY SPECIFIC BALLOT ISSUE TITLE, DOES NOT IMPAIR BINDING CONTRACTS OR DEBTS EXISTING IN 2000, AND DOES NOT INCREASE STATE OR LOCAL TAX OR SPENDING LIMITS; AND AWARDING MANDATORY ATTORNEY FEES AND COSTS TO SUCCESSFUL PLAINTIFFS ONLY.

The ballot title and submission clause as designated and fixed by the Board is as follows:

SHALL THERE BE AN AMENDMENT TO THE COLORADO CONSTITUTION ESTABLISHING A $25 TAX CUT TO LOWER EACH 2001 STATE AND LOCAL TAX BILL FOR EACH UTILITY CUSTOMER TAX AND FRANCHISE CHARGE, VEHICLE OWNERSHIP TAX, AND SPECIFIED INCOME TAX AND PROPERTY TAX, AND, IN CONNECTION THEREWITH, INCREASING THE TAX CUT $25 THE NEXT YEAR, AND $50 *474 YEARLY THEREAFTER; REQUIRING STATE REPLACEMENT OF AFFECTED LOCAL REVENUE WHEN YEARLY STATE REVENUE INCREASES $200 MILLION OR MORE ABOVE THAT YEAR'S INCREASE IN LOCAL REVENUE REPLACEMENT; REQUIRING YEARLY STATE AUDITS OF TAX AND SPENDING LIMITS; SPECIFYING RULES FOR CONSTRUING THIS AMENDMENT; STATING THAT THIS AMENDMENT DOES NOT REQUIRE ANY SPECIFIC BALLOT ISSUE TITLE, DOES NOT IMPAIR BINDING CONTRACTS OR DEBTS EXISTING IN 2000, AND DOES

NOT INCREASE STATE OR LOCAL TAX OR SPENDING LIMITS; AND AWARDING MANDATORY ATTORNEY FEES AND COSTS TO SUCCESSFUL PLAINTIFFS ONLY?

The summary prepared by the Board is as follows:

This measure amends article X, section 20 of the Colorado Constitution, by adding a new paragraph (d) to subsection (8). A $25 tax cut, increased $25 the next year and $50 each year thereafter, would lower each state and local tax bill for each utility customer tax and franchise charge; vehicle ownership tax; yearly income tax; property tax spent on human and health services, economic development, retirement benefits, enterprises, authorities, courts, jails, libraries, schools, elections, and district attorney, assessor, financial, and legal offices combined; income or property tax equal to the combined yearly cost of lease purchases, unbonded obligations not paid and not offset by a pledged cash reserve in the year created, tax-increment financing, tax and spending and future local debt increases approved by voters after 1992 that last more than 10 years after approval, excess revenue for more than one year per election, revenue increases voter-approved after 2000 above a fixed tax rate and a fixed maximum number of dollars yearly, and tax credits and rebates unless voter-approved, for overpayment, or for general refunds of excess or illegal revenue; income or property tax equal to the prior year's revenue above ninety-nine percent of its spending limits; income or property tax equal to yearly revenue from a tax rate increased or a spending limit percentage, computed since 1992, exceeded from 1993 through 2000, except by a fixed tax rate and a voter-approved fixed maximum number of dollars yearly; income or property tax equal to the yearly revenue of each authority wholly or partly created by or related to the district but outside fiscal year spending limits, computed since 1992, and the yearly cost of all state and local tax and business charge exemptions related to each authority and enterprise; and remaining business personal property tax. The initial tax cut of $25 is applied to tax bills for tax year 2001.

The measure specifies that it does not require any specific ballot issue title or content, does not impair binding contracts or debts existing in 2000, and does not increase state or local tax or spending limits. The state is required to replace the local government revenue affected by the tax cuts established by this measure when the state has a fiscal year revenue increase from all sources of $200 million or more above that year's increase in the amount of local revenue to be replaced. The state is required to audit each tax and spending limit yearly. The measure provides that it is to be strictly construed and not balanced or harmonized with existing provisions. Substantial compliance with the measure is not sufficient. All attorney fees and costs are always awarded to successful plaintiffs only who seek to enforce this new measure.

State impacts. The state income tax cut

would reduce the growth in state general fund revenue by $291,930,000 during the three-year period beginning with fiscal year 2001-02. The cut in the state utility customer tax and other income tax cuts contained in the measure would reduce the growth in state general fund revenue by an indeterminate amount during the same three-year period.

The state would incur costs of at least $1,100,000 to administer the tax cuts allowed by this measure. In addition, the state may incur costs for possible annual audits, but the amount of these additional costs is indeterminate.

***475** Assuming the state's revenue growth is sufficient to require state replacement of local government revenue losses resulting from the measure, the measure would have a significant but indeterminate negative fiscal impact on the state. Assuming no state replacement of local revenue, the measure would have a net negative state fiscal impact of at least $293,030,000 during the three-year period beginning with fiscal year 2001-02. The figure does not include the amount of negative fiscal impact that will occur but is indeterminate at this time.

Local impacts. If the state's revenue growth is not sufficient to require state replacement of local government revenue lost due to the measure, the measure would have a significant negative fiscal impact on local governments. Even if the state replaces lost local government revenues, the measure may have a negative fiscal impact on some local governments, since the measure does not increase local tax and spending limits and revenues are currently being collected outside those limits. This measure may increase local government costs due to possible accounting and audit costs, attorney fees and costs that must be mandatorily awarded, and possible increased litigation. The amount of these additional local costs is indeterminate.

October 7, 1998
Hearing adjourned 3:15 p.m.

Rehearing, October 21, 1998
John S. Outcelt, Motion for Rehearing denied
Hearing adjourned 2:11 p.m.

974 P.2d 458, 1999 CJ C.A.R. 1014

Briefs and Other Related Documents
(Back to top)

- 1998 WL 34193892 (Appellate Brief) Reply Brief (Nov. 05, 1998)Original Image of this Document with Appendix (PDF)

- 1998 WL 34193893 (Appellate Brief) Brief of Respondents (Oct. 26, 1998)Original Image of this Document with Appendix (PDF)

END OF DOCUMENT

Final Text #126 Jun

Be it enacted by the People of the State of Colorado:

Section 15 of article II of the constitution of the state of Colorado is amended to read:

Section 15. Taking property for public use – compensation, how ascertained

(1) Private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

(2) IF ANY PUBLIC ENTITY ENACTS OR ENFORCES ANY LAND USE REGULATION OR ANY COMBINATION OF LAND USE REGULATIONS THAT DIMINISHES THE FAIR MARKET VALUE OF ANY PORTION OF PRIVATELY OWNED REAL PROPERTY BY TWENTY PERCENT OR MORE, THE PUBLIC ENTITY SHALL EITHER PROVIDE JUST COMPENSATION TO THE OWNER OF THE AFFECTED PORTION OF REAL PROPERTY OR EXEMPT THE OWNER FROM THE LAND USE REGULATION AT THE DISCRETION OF THE PUBLIC ENTITY.

(a) THIS SUBSECTION (2) SHALL NOT APPLY TO ANY LAND USE REGULATION THAT IS:

(I) ENACTED:

(A) PRIOR TO 1970; OR

(B) AFTER 1970 BUT PRIOR TO ACQUISITION OF THE PROPERTY BY THE OWNER; OR

(II) NECESSARY TO:

(A) RESTRICT OR PROHIBIT ACTIVITIES HISTORICALLY RECOGNIZED AS NUISANCES UNDER COMMON LAW;

(B) PROTECT THE PUBLIC HEALTH, SAFETY, MORALS, OR WELFARE;

(C) COMPLY WITH FEDERAL LAW.

(b) THIS SUBSECTION (2) SHALL NOT APPLY TO ANY PORTION OF PRIVATELY OWNED REAL PROPERTY THAT, IF EXEMPTED FROM SAID LAND USE REGULATION, WOULD:

(I) DECREASE THE FAIR MARKET VALUE OF ANY PORTION OF SURROUNDING REAL PROPERTIES;

(II) THREATEN COMMONLY-HELD COMMUNITY VALUES, BOTH MARKET AND THOSE VALUES EXTERNAL TO THE MARKET. EXAMPLES INCLUDE, BUT ARE NOT LIMITED TO: THE REDUCTION OF OPEN SPACE, LOSS OF RECREATIONAL OPPORTUNITIES, OR A DEGRADATION OR CHANGE IN THE NEIGHBORHOOD AESTHETIC;

(III) THREATEN THE NATURAL OR BUILT ENVIRONMENT INCLUDING, BUT NOT LIMITED TO, ANY REDUCTION IN AIR OR WATER QUALITY, THE FRAGMENTATION OR REDUCTION OF WILDLIFE HABITATS, OR SIGNIFICANT IMPACT ON A RESOURCE INCLUDING, BUT NOT LIMITED TO, WATER THAT WOULD IMPACT CURRENT USES OR RIGHTS.

(c) THE FOLLOWING SHALL APPLY TO ANY EFFORT TO ENJOIN ENFORCEMENT OF A LAND USE REGULATION OR OBTAIN JUST COMPENSATION FROM ANY PUBLIC ENTITY

UNDER THIS SUBSECTION (2)

(I) THE OWNER SHALL PROVIDE WRITTEN DEMAND FOR COMPENSATION OR EXEMPTION TO THE PUBLIC ENTITY AT LEAST ONE HUNDRED EIGHTY DAYS PRIOR TO COMMENCING ANY COURT ACTION. THE DEMAND SHALL IDENTIFY THE AFFECTED PORTION OF REAL PROPERTY, ANY LAND USE REGULATION, AND THE AMOUNT OF DIMINUTION;

(II) WRITTEN DEMAND SHALL BE MADE WITHIN FIVE YEARS OF:

(A) THE EFFECTIVE DATE OF THIS MEASURE;

(B) THE DATE OF THE ENACTMENT OF THE LAND USE REGULATION; OR

(C) THE DATE THE PUBLIC ENTITY SEEKS TO ENFORCE THE LAND USE REGULATION, TO INCLUDE USE OF THE LAND USE REGULATION AS AN APPROVAL CRITERIA TO AN APPLICATION SUBMITTED BY THE OWNER.

(III) WITHIN ONE HUNDRED EIGHTY DAYS AFTER THE WRITTEN DEMAND IS SENT, THE PUBLIC ENTITY SHALL:

(A) EXEMPT THE OWNER FROM ENFORCEMENT OF THE LAND USE REGULATION;

(B) PROVIDE JUST COMPENSATION; OR

(C) SUBMIT TO THE OWNER A STATEMENT THAT IDENTIFIES CURRENTLY APPROVED USES OF THE AFFECTED PROPERTY.

(IV) AN OWNER MAY ENJOIN ENFORCEMENT OF THE LAND USE REGULATION OR OBTAIN JUST COMPENSATION BY BRINGING AN ACTION IN DISTRICT COURT IN THE DISTRICT WHERE THE REAL PROPERTY IS LOCATED. THE OWNER'SCLAIM SHALL BECOME RIPE FOR JUDICIAL REVIEW ONE HUNDRED EIGHTY DAYS AFTER THE WRITTEN DEMAND. THE OWNER SHALL COMMENCE LEGAL ACTION NO LATER THAN TWO YEARS FROM THE DATE THE OWNER'S CLAIM BECOMES RIPE FOR JUDICIAL REVIEW. THE OWNER NEED NOT COMPLETE ANY ADMINISTRATIVE PROCEDURES BEFORE INSTITUTING COURT ACTION.

(V) THE OWNER SHALL ESTABLISH A DIMINUTION OF VALUE OR JUST COMPENSATION BY CLEAR AND CONVINCING EVIDENCE. THE OWNER MAY SUBMIT EVIDENCE IN ADDITION TO EVIDENCE PRESENTED TO A PUBLIC ENTITY OR ADMINISTRATIVE BODY.

(VI) ALL EXCEPTIONS PARAGRAPH (a) AND (b) OF THIS SUBSECTION (2) SHALL BE CONSTRUED TO PROTECT THE PUBLIC HEALTH, SAFETY, MORALS, OR GENERAL WELFARE.

(d) AS USED IN THIS SUBSECTION (2):

(I) "LAND USE REGULATION" INCLUDES ANY PERMANENT OR TEMPORARY ACTIONS TAKEN BY ANY PUBLIC ENTITY THAT AFFECTS OWNERSHIP OF, OR AN INTEREST IN, REAL PROPERTY. THE TERM SHALL INCLUDE, BUT NOT BE LIMITED TO, ANY LAW, REGULATION, MORATORIUM, ORDINANCE, RULE, GUIDELINE, ENFORCEMENT ACTION, DEED RESTRICTION, OR OTHER ACTION TAKEN IN CONNECTION TO AN APPLICATION OR PERMIT, TO INCLUDE THE DENIAL OF AN APPLICATION OR PERMIT. "LAND USE REGULATION" SHALL INCLUDE TWO OR MORE LAND USE REGULATIONS.

(II) "OWNER" SHALL INCLUDE THE PRESENT OWNER OF REAL PROPERTY OR ANY INTEREST IN REAL PROPERTY. "OWNER" SHALL NOT INCLUDE A PUBLIC

ENTITY, OR THE UNITED STATES, OR ANY AGENCY, DEPARTMENT OR DIVISION OF THE UNITED STATES.

(III) "PUBLIC ENTITY" INCLUDES THE STATE OF COLORADO, ANY POLITICAL SUBDIVISION OF THE STATE, ANY AGENCY OR DEPARTMENT OF THE STATE GOVERNMENT, A COUNTY, CITY AND COUNTY, CITY, TOWN, SERVICE AUTHORITY, SCHOOL DISTRICT, LOCAL IMPROVEMENT DISTRICT, LAW ENFORCEMENT AUTHORITY, CITY OR COUNTY HOUSING AUTHORITY, OR WATER, SANITATION, FIRE PROTECTION, METROPOLITAN, IRRIGATION, DRAINAGE, OR OTHER SPECIAL DISTRICT, OR ANY OTHER KIND OF MUNICIPAL, QUASI-MUNICIPAL, OR PUBLIC CORPORATION ORGANIZED PURSUANT TO LAW, OR ANY ENTITY THAT INDEPENDENTLY EXERCISES GOVERNMENTAL AUTHORITY. "PUBLIC ENTITY" SHALL INCLUDE TWO OR MORE PUBLIC ENTITIES. "PUBLIC ENTITY" SHALL NOT INCLUDE A COURT OF RECORD.

(IV) "REAL PROPERTY" MEANS ANY INTEREST IN REAL PROPERTY RECOGNIZED BY THE LAWS OF COLORADO.

Proponents:

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 - Taking Property for Public Use2.doc

Ballot Title Setting Board

Proposed Initiative 2005-2006 #126[1]

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado constitution concerning a requirement that public entities provide remedies to owners of privately-owned real property for land use regulations that diminish the value of the property, and, in connection therewith, requiring public entities to compensate an owner or exempt the owner from the land use regulations if a public entity enacts land use regulations that reduce the value of any portion of the property by twenty percent or more.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be an amendment to the Colorado constitution concerning a requirement that public entities provide remedies to owners of privately-owned real property for land use regulations that diminish the value of the property, and, in connection therewith, requiring public entities to compensate an owner or exempt the owner from the land use regulations if a public entity enacts land use regulations that reduce the value of any portion of the property by twenty percent or more?

Hearing May 17, 2006:
At request of proponent, technical corrections allowed in text of measure. (In Section 15(2)(c)(IV), line 3, inserted a space after the word "owner's"; in Section 15(2)(d)(I), line 6, changed the first "to" to "with".)
Single subject approved; staff draft amended; titles set.
Hearing adjourned 1:46 p.m.

[1] Unofficially captioned "**Compensation for Land Use Regs that Diminish Value**" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

ORIGINAL

INITIATIVE TITLE SETTING REVIEW BOARD

THURSDAY, MAY 25, 2006, 3:02 P.M.

SECRETARY OF STATE'S BLUE SPRUCE CONFERENCE ROOM

1700 BROADWAY, SUITE 270

DENVER, COLORADO

The following proceedings were taken on Thursday, May 25, 2006, commencing at 3:02 p.m., before Deborah D. Mead, Certified Shorthand Reporter and Notary Public within and for the State of Colorado.

THE BOARD:

William Hobbs, Chairman

Jason Dunn

Dan L. Cartin

PROPOSED INITIATIVE 2005-2006 #126

P R O C E E D I N G S

THE CHAIRMAN: Good afternoon. Let's resume our meeting of the Title Board. The time is 3:02 p.m., and just for the record, the Title Board for the next agenda item, which is 126, is Dan Cartin, Jason Dunn and Bill Hobbs.

The No. 126 is before the Board on a motion for rehearing submitted by Scott Gessler on behalf of Steve Durham.

Mr. Gessler, if you could come forward and tell us about your motion for rehearing, please.

MR. GESSLER: Thank you, Mr. Hobbs.

For the record, my name is Scott Gessler, and I represent Mr. Steven Durham in this motion for rehearing.

I guess I'll just walk through the motion for rehearing in a summary fashion to set the framework and then maybe address just a few specific points.

First of all, as the jurisdictional issue, as we said in the motion, what this initiative actually does, sort of hidden within the folds of this initiative, I guess to use language from the single subject case law, is essentially it creates a new right, creates a new right to landowners to give them a property interest in land use regulations that affect their neighboring

property.

And what I've done is I've provided, just prior to the break, a copy of the Colorado Supreme Court case, Hillside Community Church versus Olson. And that came up in, obviously, not the exact same context.

But what that issue -- what that was was a due process claim against -- against a church as well as against the City of Golden. And what it said was that the -- Marian Olson, what they did is they argued -- or Ida Brueske. What they did is they argued that they had a property interest in the manner in which land use regulations were enacted. And it didn't -- and it wasn't land use regulations that affected their property, but it was land use regulations that affected a neighboring property, an adjoining property. And it reached the Colorado Supreme Court, which ultimately rejected that, said there was not a property interest and, therefore, they did not have a due process right in the manner in which the land use regulations were applied.

This was -- I didn't provide the full cite. This was -- there was a petition for cert before the United States Supreme Court, which was ultimately declined.

But ironically, if you look at case law, there was quite a bit of a split as to whether or not certain

laws create property interest or not, with respect to land use regulations affecting neighboring properties and with respect to those land use regulation procedures.

My point is this is a well-trod area. It's one that's received a lot of analysis. It's one in which the Colorado Supreme Court has come down firmly on one side of the debate.

And in this particular instance, what this initiative does, hidden essentially within one of the exceptions, is it creates a right, the ability of someone to intervene because someone has an interest in this, a property owner to intervene, in the way land use regulations apply to their neighboring property.

In other words, someone can say, my property, the value of my property is being reduced because of this particular exemption, because of the way this particular land use regulation is being applied; therefore, I have a protected property interest in it.

So that's a separate subject, and in fact, it's a very -- it's a major and a large separate subject. It's different from providing compensation for the diminution of value for someone who's subject to land use regulations. Rather what it does is it creates a right of someone to enforce land use regulations and gives them a property interest.

So that's the first argument.

The second argument -- or some of the arguments have -- or the remaining arguments have to do with the title itself rather than the single subject analysis.

I would note it's -- I don't know if there's an error, but it doesn't change my argument, but I will point it out, that it seems as though the official, published ballot title at least didn't reflect my notes of what was adopted by the Board last week. If I remember correctly, the proponents in that matter sort of passed out a prepared draft of -- for a title for Initiative No. 126, which added some language at the end of the proposed staff draft.

And I looked at the staff draft in No. 126, and it didn't seem to reflect that. In fact, the staff draft, as it currently appears on the website, and the one that was passed out, is almost identical to ballot issue -- to the title for No. 86.

And if I may approach the Board, I actually have copies of the title for No. 86.

THE CHAIRMAN: We have it. We do have it. Thank you.

MR. GESSLER: Does proponent have a copy of it?

MR. COYNE: I have a copy of 86.

MR. GESSLER: Okay. Well, if you compare that to No. 126, I think the only difference is one says "to provide compensation," the other one, I think, says "providing compensation." I mean the differences are absolutely meaningless I'd argue.

And in order to create a clear title, because we already have No. 86, and I think it's plain from looking at No. 126, is what it was designed to do was essentially confuse voters. Well, I'm sorry. I wouldn't purport that level of intent to the proponents.

But what it does, it takes the exact same framework, most of the exact same language, and adds a few -- a few changes, few in number, to the -- to No. 86.

And if I may approach, I actually have a red-lined version that compares No. 86 to No. 126 that highlights the changes.

MR. DUNN: Do you have one more?

MR. GESSLER: I have one for the proponent.

MR. DUNN: I can give you this one.

MR. GESSLER: So if you look at the changes of No. 126 compared to No. 86, some of these obviously are based on the way the Word Perfect -- or I'm sorry -- Microsoft Word actually operates in this. But -- so many

of them are sort of just focussed on capitalization versus noncapitalizations.

But really the main -- the main changes has to do with Section 2.b., 1 through 3. Those are the main changes that are added.

The second, I think I would argue, meaningfully changed -- meaningful change is the clear and convincing standard. That would be on the third -- the third page about halfway down. At the top, see the "currently approved" versus "that are approved by the public entity" and the removal of the public entity may not act inconsistently with the statements submitted to the owner. I'm not using that as a basis for my argument. I think the change is relatively minor. But it does change the burden of proof.

And then at the bottom of that same sheet it changes the actual hands of interpretation, how this should be interpreted.

And then, of course, it removes the family member language as part of owner, which is defined at the top of the fourth page.

So what I've tried to do is provide the Board, because my argument is going to basically revolve -- my argument basically is this: That what the Board needs to do in order to avoid confusion is create a title that

highlights the differences. Well, that not only summarizes No. 126, but highlights the differences between No. 86 and 126. Because if you don't highlight those differences, the voters will essentially be confused by a generalized title that seems to say the exact same thing. And that's why I provided an indication of the exact differences.

The items I'd like to argue, 2.a., and the motion for rehearing specifically focuses on the misleadingly similar -- the misleading similarities between 86 and 126. And that was what I just explained. It has to highlight those.

The second argument is that IRS essentially creates sort of a, I would -- the argument is this: That the exceptions contained in No. 126 effectively nullify the function of the statute, the function of the proposal, and the Title Board needs to indicate that.

And that, you know, the authority for that is the English only or the English language education ballot title, that's 44 Pacific 3d 213. In there the Court said as far as the parental waiver provisions, there are so many conditions, that essentially the purpose, the intent based on what it says, is to effectively prevent people from ever using the parental waiver provisions.

Here I argue it functions the exact same. For

example, if you look at the second sheet where it says "threatens commonly-held community values," that's item 2.b.(2); and 2.b.(3) says, "threatens the natural or built environment," including, I think there is -- I think that there is -- it's a slam-dunk argument for someone to say whenever a public entity, whenever the representatives of a public entity enact a law, enact an ordinance, enact anything, that that is a representation of commonly-held community values.

Okay. It doesn't say, you know, a majority of people hold those values; simply says commonly-held. And that I think can always be argued that any public entity that does this, creates a commonly -- that's evidence itself of a commonly-held community value.

Furthermore, the way these are invoked, it doesn't have to violate those, it doesn't have to oppose or contradict those commonly-held community values; rather, it really has to threaten them. Extremely low standard to be able to show that, you know, this exception threatens my community, the commonly-held community values.

Well, I think the argument is, and I think -- and it's always a winning argument, is that what this initiative does is it allows a public entity to say, we have, as the public entity, as the representatives of the

voters, we're allowed to speak for publicly-held community values, that's our job. And as part of our job, we've created this, for example, zoning ordinance or a permit requirement because that reflects community values. And anything that contradicts that threatens those community values.

It's a very, very, very low threshold, to threaten commonly-held community values, and likewise, to threaten the natural or built environment.

In combination with that, if you look at the bottom of the next page where it says, "All exceptions in Paragraph (a) and (b) of this subsection shall be construed to protect public health, safety," which mimic the language, but it goes beyond that, "the morals or general welfare."

Well, how do you determine what morals and general welfare are? Essentially what you do or what I -- what happens here, the way this functions, is the morals and general welfare is sort of what the general assembly does. It says at the end of every single piece of legislation, it makes a determination that it's necessary for public health, safety, and general welfare. I believe that's the exact phraseology.

And any public entity can make that exact same determination, say they're the ones who make that

determination, and then for a proponent, for someone seeking an exemption would have to overcome that through clear and convincing evidence. That's an impossible standard.

What this does is it essentially -- the exceptions swallow the rule here, and any title is going to have to explain that exactly the way it happened in the English only language, where all of the exceptions and the procedural hurdles for the parental labor notification effectively nullify the parental waiver notification ability. And because that title had not explicitly said that, had not made it clear to voters what they were voting for, it was a misleading title.

Items 2.c., the title, and I'm going off my notes, what was handed to me as the -- not the one that's published, but the staff -- for the staff draft that I received from the proponents when they passed it out. My understanding was that the Board had adopted that.

Under that assumption, under that assumption, what that said is it added to the title, "Unless the said land use regulations serve to prevent the decrease in fair market value of any portion of surrounding real properties, protect commonly-held community values, or protect the built or natural environment."

I'd argue those are misleading, because as I

talked about the exceptions themselves, it merely has to threaten commonly-held community values. It doesn't have to violate them. And protecting them indicates that it prevents a violation. Same with threatening the natural or built environment. The standard is different than the one indicated in the language. That's for both 2.c. and 2.d.

2.e. focuses again on the failure of the title to state that it -- that the initiative -- I'm sorry -- that the exemptions must be construed to protect the public health, safety, morals and general welfare.

And then finally items f. through i., I included those and am truthfully not going to argue them before the Board, and I'll explain why.

This board may -- as a board probably knows, initiative number 86 has been appealed to the Colorado Supreme Court. The motion for rehearing for initiative No. 86 focussed on items f. through i. As the representative of the proponents for that, I am arguing that f. through i. don't apply to No. 86. I've only included them here in order to preserve my ability to make those challenges before the Colorado Supreme Court in the event the Colorado Supreme Court rules against the proponents in No. 86.

So I'm -- it's a strange procedural posture

for me to be in, but I do need to preserve these. I won't makes these objections before the Title Board, but I am anticipating that the Title Board will reach the exact same conclusion that it did with No. 86, and I'm assuming that the Colorado Supreme Court, if and when this one is appealed, will reach the same decision with respect to items f. through i. there as well.

So I'm not going to belabor those points.

In some really -- I think the single subject issue is a critical one here, because what this does is, hidden within the initiative itself, it creates a new, a new right, a new property right that effectively overturns a portion of a Colorado Supreme Court case, which really isn't that old either, just several years old, walks into the middle of sort of an ongoing national property rights debate, and determines that. And that's a fundamentally different subject than providing compensation to owners for reduction in value of their land due to regulations.

I'm happy to answer any questions that the Board may have.

THE CHAIRMAN: One area of confusion I have is it sounds like -- I'm concerned if we messed up our official results from what the Title Board did before. So I'm trying to figure out -- you indicated that the

results that we're showing as what we set for 126 is different than what you think the Title Board actually did last week.

MR. GESSLER: Yes, sir.

THE CHAIRMAN: And I think Ms. Gomez was at least attempting to locate what we did on 126, which if it's the staff draft as amended --

MS. GOMEZ: Hm-hmm.

THE CHAIRMAN: I'm just trying to figure it out. It looks like we did change "provide just compensation" to "compensate," according to this anyway, if we're looking at the right one.

MR. GESSLER: My understanding -- I keep wanting to say Your Honor -- Mr. Hobbs, and I apologize, I only have one copy, and this is what the proponents had handed me. I'm happy to hand it to the Title Board here. My understanding -- I will stand in front of the mike.

My understanding is what the Board did was actually adopt this almost in its entirety, if not in its entirety. I could be wrong. If I'm wrong, I think my arguments about misleadingly similar are even stronger.

So in any event, I'm happy -- I will provide a copy of this.

THE CHAIRMAN: This is -- I'm sorry. I just

want to be clear.

MR. GESSLER: Was that your recollection?

MR. COYNE: Yes.

MR. GESSLER: So it's the proponent's recollection that you had adopted that as well.

THE CHAIRMAN: Where we would have inserted "in certain circumstances" and I added a -- added new -- added material at the end, it looks like, "20 percent or more," but then added "unless said land use regulations serve to prevent the decrease," et cetera.

MR. DUNN: While they're looking that up, I have a question.

THE CHAIRMAN: Mr. Dunn, go ahead.

MR. DUNN: Is this a printout from what the -- from the Title Board, from what we were doing? Yeah, if you would introduce yourself.

MR. COYNE: Hi. My name is Will Coyne. I'm representing proponents of Initiative 126.

What you have in front of you is a document that we gave to you all on May 17, and it was also my recollection that you all adopted those changes at that time.

THE CHAIRMAN: So this is your document, but you think that's what we adopted?

MR. COYNE: Right. That's my document that we

gave to Mr. Gessler at the last hearing.

THE CHAIRMAN: Okay. Thanks. And we could try to listen to the tape and find that out, and we may want to take a break, but it does seem to be real important to straighten this out.

MR. GESSLER: My objection, even if the Board in its entirety adopts this, you know, all of my objections would apply. The only one that it changes is, I believe, objection 2.c. -- I'm sorry -- 2.c. and 2.d., which focussed on that appended language. But otherwise, my arguments pretty much remain the same.

THE CHAIRMAN: I'm sorry. I'm not sure I fully digested that.

One of your concerns is the similar titles.

MR. GESSLER: Yes.

THE CHAIRMAN: A legitimate concern.

MR. GESSLER: And my concern about similar title applies to both what appears on the website as the official and it applies to that equally.

THE CHAIRMAN: Okay.

MR. GESSLER: And then I had two specific issues as to why the appended language on that was misleading, which applies to that version in your hand, but would not apply to the version on the Secretary of State's website.

I see Mr. Cartin vigorously nodding his head, so I hope I'm being -- I may be being clear, at least, to one person. I hope that answers your questions.

THE CHAIRMAN: Well, I had more questions, but I'm pretty sure that the first thing we need to do is establish what did the Board do last time regardless. Because it's kind of hard to go from here without knowing for sure what the Board did at its previous meeting. Does everybody agree to that?

MR. CARTIN: Yes.

THE CHAIRMAN: I mean, I am inclined to take a time-out here and -- you know, the recording is on our website. Unfortunately, I don't think we have audio capabilities in this room to all listen to it together.

MS. GOMEZ: I recorded on tape also last time, so I could go get the tapes.

THE CHAIRMAN: But unfortunately, it may take awhile to locate it and locate where on tape this one is.

MS. GOMEZ: I have them numbered. I could go get it.

MR. DUNN: Is it easier just to have somebody jump on the computer, your computer, and listen to it?

MS. GOMEZ: Yeah.

MR. GESSLER: I think she is saying she is so well organized, she can immediately get the tape.

MR. DUNN: Whatever is quickest.

THE CHAIRMAN: Well, yeah, I think this is probably the file.

MS. GOMEZ: From what I remember, we didn't adopt this suggestion. But I can go get the tape.

THE CHAIRMAN: I mean this does look familiar to me. That's what's causing me some additional concern. I didn't bring my file in, so I -- I mean I think we just need to take a break.

MR. GESSLER: That's fine. And I can argue off of either baseline.

THE CHAIRMAN: So I don't know how long it will take, but I'm guessing at least 10 or 15 minutes.

MR. GESSLER: Mr. Dunn had earlier requested that I keep this brief. So with respect to his objections, I -- I mean I have no objection.

THE CHAIRMAN: I mean, in fact, just for the sake of safety, what if we said we recess until 3:45? Is that okay with everybody?

MR. GESSLER: That's fine. If I could just get a copy of that back at your convenience.

THE CHAIRMAN: Maybe Ms. Gomez could first copy it, make several copies of that, and then we'll go from there and reconvene at 3:45. And I'm not sure what we'll figure out where the best resources are, but we'll

come back and somebody will report on what we found out.

Okay. So we're in recess until 3:45.

(Recess taken.)

THE CHAIRMAN: Let's resume after our recess. It's 3:56 p.m., after a brief recess to try to figure out whether or not there's an error in the final results that we're showing for the Title Board action on No. 126 previously.

And we've listened to the record, and the results that are -- that we recorded are incorrect. And I first would like to correct that, get that on the record. And we did listen to almost the entire hearing, and also the final results were read into the record at the last meeting. So I think we can fix that up on the results that are shown on the screen, which is what Ms. Gomez is trying to do.

What we heard was there were -- first, the changes that are reflected there, there was a change to the staff draft. Instead of saying "to provide just compensation," as the original staff draft provided, the Board adopted a change that said simply "to compensate an owner," and that was already correctly reflected in the results reported.

But the draft submitted by the proponents with the changes that Ms. Gomez is showing, those were also

adopted as well.

And there were a couple of variations -- there were a couple of commas inserted in the proponent's draft. In that last clause that begins, "unless said land use regulations serve," that the clause was omitted from the results that were reported by my office, but that was adopted.

But there was a comma inserted between "more" and "unless" that was different from what Mr. Detsky proposed last time.

And then there was a comma also inserted in -- right after "values," "commonly-held community values," comma, "or protect the built or natural environment." That comma was also added by the Board.

What Ms. Gomez has now edited into the final results previously shown, I think, is the correct results adopted by the Board last time, and I don't think we need a motion for that. I think I'm simply reflecting, having listened to the record now, that what is shown is what was adopted by the Board.

Any discussion? I'm planning to then just move on to the motion for rehearing, unless there's some question or objection.

Mr. Gessler.

MR. GESSLER: Could I just have my piece of

paper back that I handed out. Thank you.

THE CHAIRMAN: A modest request. I'm sorry. That whole explanation was -- you should have had your version -- your copy handy.

MR. GESSLER: That reflects -- I think that pretty much reflects exactly what was -- what the proponents had submitted to the Title Board. And that's what my notes reflect as well.

THE CHAIRMAN: Okay. And I apologize for the confusion. I think what happened was when we were considering this before, I failed to ask Ms. Gomez to type those changes into that version. She had already included what we adopted, but not what was proposed by proponents.

So I hope we're back on track, back to the motion for rehearing. And you might need to straighten us out just a little bit, Mr. Gessler. I know you still have objections, but now that we've at least gotten the correct version before us, if you could get us back on track.

MR. GESSLER: Thank you, Mr. Hobbs.

My objections were -- I mean my objections were based on this particular version, the one that's currently on the screen and has been adopted by the Title Board. That served as the basis for my objections, and I

just wanted to point out that 2.c. and d. were somewhat nonsensical, based on the published version. But my entire motion for rehearing applies to this particular version.

THE CHAIRMAN: One of the things -- let me ask you about this, and again I'm still trying to figure out where we are in my own mind. One of the questions that came up last time, and I just wanted to go back over this again, was the similarity of titles.

MR. GESSLER: Yes.

THE CHAIRMAN: Now, now that we know what the Title Board actually adopted last time, there is more difference between the titles than we were reflecting.

And I guess it sounds to me like the major substantive difference between 86 and 126 is 2.b., as I recall. And there's also a change in the burden of proof as well.

But the -- I think that that change -- since No. 126 adds that new Paragraph (b)(II)(b) and the last clause of what the Title Board added reflects that, there is -- there is a difference between this title for 126 and the title set for 86. I don't know whether that's still -- represents confusion between the two titles.

MR. GESSLER: I still argue that it does represent confusion. And I distinctly remember

Mr. Knaizer advising the Board that it was probably sufficiently dissimilar to meet standards.

I respectfully disagree. And in part, not only the particular -- the failure that it should highlight additional differences, but also the way it's actually structured.

In reading that, it isn't until the sixth line of text that a voter begins to identify any meaningful differences between No. 86. And there is probably a high likelihood that these won't be immediately adjacent to one another on the ballot either.

And I think that the vast majority of voters would look at this and say, Hmm, I've seen this before and I'll vote the same way as I did before, because it's so far at the bottom, because it's structured pretty much identically.

I think, you know, without our -- take basically our discussions and compress them into 15 seconds of reading through this in a poll booth while there's a line behind you and you've got to go pick up your kids from work or you've got to get to work. In other words, it's -- that's the context in which this stuff is read.

And because of the structure is so identical and the differences don't appear until the very end, that

it's a -- that it remains confusing.

And just to highlight a few of the other differences. 2.a., 2.b. on the first page, the third block of type from the bottom where it says, "Protect the public health, safety, morals or welfare," and adds those differences, all of 2.b.

The other ones are on the clear and convincing standard, that's the second-to-the-last -- or I'm sorry -- third-to-the-last sheet. The very bottom of that same sheet, they all are construed to protect public health, safety, morals and general welfare.

And then -- I'm sorry. Going back to the very first page again, (2)(a)(I)(b), where it says, "Prior to the acquisition of the property by the owner or a family member of the owner," removes the entire family, I think those are all meaningful, substantive differences that in effect create a much, much different result than the other initiative, No. 86.

And that's, of course, once we get past the single subject.

THE CHAIRMAN: Questions for Mr. Gessler? Mr. Dunn, go ahead.

MR. DUNN: Mr. Gessler, do you think this provision -- the measure as drafted, and you cited the English only, or if that's the correct name of the case,

the practical implication issue in that case. Do you think beyond sort of representing technically what the measure does -- because I remember reading that case. The court actually said the title needed to reflect that it would all but eliminate bilingual education. If anybody wants to confirm that -- that analysis.

MR. GESSLER: I think that's the identical analysis. I think that's the exact analysis they used in the English only.

I mean the standard was that, you know, that after reading through it, the court concluded that nevertheless, the ex- -- you know, the procedural hurdles and the exemptions for the parental waiver tended to overwhelm and obscure the inevitable outcome of the waiver process when all the provisions are properly taken into account, and then require the Board to say that.

MR. DUNN: Did the court set a new title or did they remand it?

MR. GESSLER: The court remanded it. I don't think the court actually set a new title. I think the court ordered action not inconsistent with their opinion.

MR. DUNN: But do you think this title needs to reflect a laundry list of what the measure does, or do you think it needs to actually state that ramification as it relates to exemptions?

MR. GESSLER: Just give me one moment. I think it requires the Title Board to actually state ramifications. Could you just give me a moment to take a look at the language from the English only.

MR. DUNN: Because I'd be interested in hearing from the proponents actually. Sorry.

THE CHAIRMAN: Mr. Knaizer.

MR. KNAIZER: Perhaps I can answer that question.

The court in the English immersion case was concerned because we, we as the Title Board, did list all of the requirements to get a waiver to participate in the bilingual education program. And the court said that the listing of those, of all of the requirements actually obfuscated the true intent of the measure.

And what they asked us to do was to take all of those exceptions and summarize them.

Eventually we did summarize them in a measure that was not appealed to the Supreme Court, and I forget the exact terminology that we used, but it was something along the lines of very restrictive limits on obtaining waivers.

That actually -- that title actually eventually made it to the ballot with that type of language in there.

So I'm not saying that necessarily needs to be done in this case, but the court said that the listing of the exception sometimes isn't as informative as a summarization of what those exceptions may do.

THE CHAIRMAN: I concur in that interpretation. And I -- and I think what the titles finally said was that it authorized waivers, but the title said the waivers would be very difficult to obtain, I mean which I -- which was a conclusion that basically the court came to.

I think we in effect adop- -- well, more or less adopted the language from the court's decision.

MR. KNAIZER: In that decision, you know, the court used terms like very restrictive. And we basically adopted the language from the court decision and eventually put it in the title that was on the ballot.

MR. DUNN: My concern is that if, and I'd like to hear the proponent's thought on it, but my concern is that if -- if the (2)(b) list is going to make the actual providing of just compensation almost impossible, and that's an if, but if that is the effect of it, perhaps the title needs to reflect somehow that that's the practical implication of it. So ...

THE CHAIRMAN: And maybe following -- I mean I'm trying to figure out practically if that's correct,

what we do to the titles. But where that, I think, points me is to several changes that we might need to make to the titles adopted by the Board.

Early on we may need to say "instead of," for example, referring to required public entities in certain circumstances, it may need to be "requiring public entities in very limited and specific circumstances to compensate an owner."

But maybe more to the point, the -- instead of listing the exceptions, the -- you know, in the unless clause or any other exceptions, we would say but, you know, providing exceptions that effectively mean it would be unusual for there to be compensation, or something like that.

I mean that's -- that conclusion of the effect of the measure was what was happening, I think, with the English language immersion case. And I think that's kind of what I'm concluding, we need to do something like that here instead of listing those exceptions.

But again, as Mr. Dunn says, I want to hear from the proponents too.

Any other questions for Mr. Gessler?

MR. GESSLER: I hope I get some questions on the single subject.

MR. DUNN: I was wondering if we were just

skipping over that.

Mr. Chairman.

THE CHAIRMAN: Mr. Dunn.

MR. DUNN: The Hillside case really just said that a mere procedure does vest a person with a due process, right, correct?

MR. GESSLER: I think it -- I think the analysis was a little bit more complex than that.

A procedure does vest someone with a due process right, procedural due process, for example. But in order to be able to invoke that procedure, you have to have a property interest.

MR. DUNN: I'm sorry. I probably said that incorrectly. A procedure does not in itself vest someone with a property interest.

MR. GESSLER: Correct. Correct. You have to have the property interest first based on an analysis of state law.

Colorado analyzed state law and said no property interest in land use regulation, in land use regulations. You don't have a property interest in what land regulations do to your neighbor. This reverses that. It creates that property interest.

So maybe I shouldn't say it reverses enti- -- well, I guess it does reverse the Colorado Supreme

Court. It certainly fundamentally changes substantive Colorado law with respect to rights, those procedures.

MR. DUNN: Well, in my opinion, I'd actually go with what you first said. I don't think it reverses, I think it at most grants a property right, but I'm not sure it even does that.

I don't see it as reversing the opinion itself. Not that it's obviously a -- it's obviously a Constitutional measure. So I mean, there wouldn't be anything wrong with that anyway.

But is that -- my other question is isn't -- can't that be viewed as really just a ramification of the measure, that someone then has the right to cre- -- it's created by the measure as a result of their ability to get an exemption, if I've got that right?

MR. GESSLER: You know, I think --

MR. DUNN: Rather than creating a right, it's more just an effect.

MR. GESSLER: I don't want to put words in the proponents' mouth, but I would guess that they'd say, Yeah, it's just a ramification. But the ramification is you're a neighboring property owner, you now have a right to intervene because you have a property interest that's protected by that.

So it may be couched as a ramification

linguistically. In fact, it creates a substantive right.

THE CHAIRMAN: And how is that a separate and distinct purpose? Tell me about the surprise. I'm trying to figure out what the -- you know, the usual standards. How is this a hidden, separate, surreptitious purpose, or apply some standards for me here, 'cause to me it seems related.

You know, it seemed -- you know, I could see it's distinct maybe, but it seems to me properly related to the major purpose of the measure. Maybe I'm wrong about that, but ...

MR. GESSLER: I -- obviously, I'm arguing that you are wrong. And I guess the reason why is because the stated purpose of the measure is concerning requirement that public entities provide remedies to owners of privately-owned real property for land use regulations.

So that's an annunciated single subject currently. Okay?

This is, I'd argue, the exact opposite of providing a remedy to an owner of privately-owned real property for land use regulations that diminish the value of that owner's property; rather, it now applies it -- the reverse side of that is it allows a neighboring owner to say, You can't get regulation, you can't get compensation for diminution of value if it affects me. I

now have a property interest prohibiting you from getting your -- from getting your remedy.

So it's -- actually, it's a separate purpose. I mean, it would better be -- it would be articulated if it were part of a single subject, but that subject would be something along the lines of concerning a requirement that private landowners may enforce land use regulations on neighboring properties that diminish that landowner's or that affect that landowner's fair market value. Something along those lines.

THE CHAIRMAN: But what I'm -- the way I'm seeing this, I think it's quite a bit different. I'm seeing this as kind of a garden variety proposal, and with respect to this, that there's a major purpose, a general proposition that's established by the measure, and then there's exceptions, there's exceptions or limitations.

Here there's a general proposition of compensation or exemption, and there's an exception. And that seems to be connected. In fact, all exceptions, all limitations are the opposite of the major proposition. But they're all related.

And this one seems to be just one of the exceptions, a major exception or a major limitation. But why can't the proponents limit the very rights that

they're granting in their measure under certain circumstances?

MR. GESSLER: Well, I think there's a difference between limiting the right that they've granted in the measure as opposed to granting a right to a neighboring property. I mean, it grants a new right unrecognized in Colorado law to this day to a new party. I guess that's the concern.

I mean, yes, you can draft anything to be an exception to something else, sort of structurally and linguistically, which I guess is sort of my response to Mr. Dunn's comment as well.

But this particular exception here creates a new right, creates a new right to a party that, you know, has never attained these rights before. That becomes a different subject, a different matter. It changes the way Colorado law has been interpreted in the past in a way that is not connected with the private remedies to owners of privately-owned real property.

I mean, perhaps the Board could envision a subject that includes both of those types of activities, in which case the single subject would be something different than providing compensation for land use regulations diminish the value of that property.

One can always argue, I guess, that well,

yeah, it affects -- it's property regulations, it affects property regulations. We could always expand the subject as broadly as possible to include that.

But here the fact that it creates this new right, it's hidden, it would create surprise to voters to learn that all of a sudden their neighbors now have a right to enforce regulations against them. And that's sort of the essence of surprise.

And I don't think any owner would anticipate, any person who reads this, would anticipate that under the subject of I have a right to prevent the property from being diminished means all of a sudden now my neighbor has a right to enforce land use regulations against me.

THE CHAIRMAN: Let me take one more run at it maybe, because I'm not quite clear yet that I'm understanding the measure properly, and that's really important to me. But this seems to be a very logical and connected thing to me. So I'll take another run at it.

MR. GESSLER: Hm-hmm.

THE CHAIRMAN: The general proposition being that governments have to compensate or exempt landowners who are adversely affected by land use regulations. Apart from whether that's good or bad, that -- I can see that point of view, that somebody who is adversely

affected by the land -- if their land is adversely affected by land use regulations, there should be compensation or exemption.

The problem is what about -- that may be well and good -- and I'm trying to articulate this on behalf of the proponents. That may be well and good for the landowner who is adversely affected by that land use regulation. But what if exempting that owner ends up causing an adverse impact to the surrounding property? Doesn't that person necessarily need or want an opportunity to say, What about me?

Now, you know, I -- I am about to be adversely affected by this exemption, and isn't it perfectly logical for the proponents to deal with that? Isn't that what the measure does?

MR. GESSLER: As currently structured, that's -- I'd argue that's a different -- that's a different subject. I mean -- and here is where I -- where I step back. Maybe the Board would want to create a new single subject in its search for single subject in this.

But that next step, you know, Well, what about me? The "What about me" is something that's never been recognized in Colorado law before.

THE CHAIRMAN: But it didn't need to be maybe without this measure. I mean this measure creates the

need, because now the surrounding property owners would be adversely affected by what this measure grants to the -- I'm not sure what the right phrase is -- but the landowner who is asserting that they've had their land value diminished by 20 percent or more.

MR. GESSLER: Well, I agree that that's the way this functions, but it's nonetheless a new right. It's a new right in Colorado law recognized, you know, neighboring landowners -- I mean, it's a very radical departure from current Colorado law and as articulated by the Colorado Supreme Court.

And that radical departure is a different subject. By now not only granting rights -- I mean, not only grants rights to the landowners who are affected by that regulation, the regulation affects that particular piece of land, okay, but now everyone surrounding it and, of course, we have an ambiguity on just what the heck "surrounding" means, but now everyone surrounding it -- all of a sudden now they get new rights themselves.

This grants a lot more rights, since we're speaking in terms of rights, than simply landowners whose land is affected by land use regulation. It now gives rights to others as well, and that's the different subject.

THE CHAIRMAN: Well, I would like to hear from

the proponents so ...

Mr. Cartin.

MR. CARTIN: Mr. Gessler, is there any argument that -- is there an argument -- obviously, you seem very certain that this measure does create this right or rights on behalf --

MR. GESSLER: I sense I may be losing this argument, but yes, sir.

MR. CARTIN: Are there arguments that it doesn't, or could an argument be made that the measure doesn't? I guess what I'm saying is you're -- are you making -- your argument is based on your interpretation of the measure. The text of the measure doesn't say that it creates, as you say, a new property interest for owners of surrounding properties. The text of the measure doesn't say that.

MR. GESSLER: Correct.

MR. CARTIN: And so you're making the argument that that is what this measure does?

MR. GESSLER: Yes.

MR. CARTIN: Could not an argument be made on the other side of that, that it doesn't create a new property interest for owners, or are you -- I know where you're coming from, but I --

MR. GESSLER: I think one could make that

argument, certainly.

I guess the way I looked at it is I said, Okay, let's assume I want to intervene in a land use regulation enforcement or exemption matter. Do I have standing intervention? Or let's assume that I wanted to actually file a suit myself. Let's say there has been an exemption, you know, an entity provides an exemption after this notice. Do I have standing to actually file a lawsuit myself?

Well, the first question is, you know, is there is an injury to a recognized legal interest? And I would look to 2.b.(1), Decrease the fair market value of any portion of surrounding real properties. I own a surrounding real property, I have a right to prevent that from being -- the value from being decreased. I have a cognizable injury under Colorado law, I am a plaintiff, I now have standing, I can go in and litigate this matter. I guess that's the framework I looked at -- looked at it under, sort of under a standing analysis, Colorado standing analysis.

And I'm -- I'm -- well, obviously, I assert that I'm confident of my analysis. But I argue that analysis is correct under broad standing under Colorado law, particularly since it's broader than federal standing. But it creates an injury and it creates a

remedy. And so neighboring landowners do have now a right.

You know -- I mean, I guess one could even argue that it goes beyond landowners. You know, it may be a school district, for example, that claims their taxes are being reduced because the market value of the neighboring property has been reduced and, therefore, they have an injury.

So I guess it could even go beyond landowners. But it certainly, from the analysis of a neighboring landowner, creates a new right, because they have the right to enforce it.

MR. CARTIN: And so it -- this will be my last question here. In your view, the single subject, as currently stated, is concerning a requirement that public entities provide remedies to owners of privately-owned real property for land use regulations that diminish the value of the property.

If, in fact, if this measure does create a new property interest for owners of surrounding properties, it's your assertion that, utilizing some of the relevant case law here, that that secondary, or what you assert to be a secondary purpose, is disconnected or incongruous with the title as it's reflected in the measure?

MR. GESSLER: That's correct.

THE CHAIRMAN: One other question.

MR. GESSLER: I've been answering questions all day, and I'm more than willing to continue.

THE CHAIRMAN: It's the same subject. I mean I'm pretty comfortable with the inference that 2.b.(1) does create standing and, therefore, rights for the surrounding property owner. At this point I'm pretty comfortable with that notion.

But it seemed like those rights only concur when the property that is surrounded, when that property owner attempts to obtain the exemption. In other words, fundamentally the measure grants that that adversely affected property owner, if the effect is a 20 percent decline in value, that the property owner can seek an exemption.

It's only then that there's a right to intervene by the surrounding property owner, I think. There's no independent right granted here, I don't think, for the surrounding property owner to do anything. I don't see any other independent rights, unless the burdened property first attempts to get an exemption. Is that correct? Do you think that's correct?

MR. GESSLER: I have to think about that. I have to think about that. I'm just sort of looking at the language, and item 2 from -- it's unusual since I

essentially drafted that language.

But I have to think about that, if I could just have a few minutes. I mean, I can come up later after the proponents.

THE CHAIRMAN: Okay. But again, proponents -- we're asking a lot about the meaning of this measure, when we should be asking the proponents probably.

MR. DUNN: I have a lot of other questions, but I don't know if you want to sit down and think about that and I can ask my questions later.

MR. GESSLER: I would be happy to answer them while I'm up here.

MR. DUNN: I wasn't on the Board as part of 86, so remind me what was done on f., g., h. and i. You said these issues came up.

MR. GESSLER: Those issues were rejected by the Board and they're currently being litigated before the Colorado Supreme Court.

MR. DUNN: Those same complaints were made on 86?

MR. GESSLER: Yes. My only -- the reason I'm including them is so that I could preserve the argument in the event the Colorado Supreme Court rules that f. through i. have merit.

MR. DUNN: So you're conceding these issues on

86?

MR. GESSLER: I am actually representing a different party in this.

MR. DUNN: All right. Let me ask you a question on i. I'm not sure -- well, explain that one to me.

MR. GESSLER: Basically, Colorado statute currently contains a provision that says in civil actions the standard of proof is a preponderance of the evidence.

MR. DUNN: Okay.

MR. GESSLER: Okay?

MR. DUNN: Okay. That's all you need to say.

MR. GESSLER: But actually, let me argue about the clear and convincing standard for a moment.

Independent of number -- of letter i., I think the clear and convincing standard should be included in this title, not because it represents a departure from current law, but because it is the diametric opposite of Initiative No. 86 and it represents a departure from No. 86, and so should be included to avoid that confusion.

If you look at No. 86, basically it says that a public entity has to assert an exception, prove an exception, by clear and convincing evidence. Okay. No. 126 says that the actual substantive right has to be

proven by clear and convincing evidence.

So the use of clear and convincing evidence sort of flips the burden of proof from the way it's raised in No. 86.

So that's really the one that I'm sort of standing on as far as -- and including that as part of 2.a., as one of the differences between 126 and 86.

Does that make sense?

MR. DUNN: Yeah. Thanks.

The only other comment I have, I don't know if you want to comment on this, with regard to your Nos. c., d. -- well, c. and d., I guess, on the title -- I don't know if I'm jumping ahead to the title itself. I think -- I think you make a good point actually.

It seems to me rather than saying, in the language that was added on last time that we didn't consider until just now, rather than referring to "serve to protect" and "protecting commonly-held community values," or "protecting the built or natural environment," that we should really be saying something to effect of "unless said exemption results in a decrease in fair market value, threatens commonly-held values or threatens the build or natural environment. " I'll just throw that out there.

MR. GESSLER: Yeah, I think that would be more

accurate, and that sort of captures my objection.

THE CHAIRMAN: Thank you, Mr. Gessler.

MR. GESSLER: Thank you.

THE CHAIRMAN: Mr. Coyne, if you will reintroduce yourself for the record, please.

MR. COYNE: Thank you. I'm Will Coyne. I'm representing the proponents of 126.

I guess we can start with the single subject thing, since it's the first issue that Mr. Gessler brought forward.

I happen to disagree strongly with Mr. Gessler. I think that his notion that we are creating some new set of rights is really just his own interpretation of one detail of this measure. I think there's a very clear one, single subject here, and that is that public entities provide remedies to landowners for land use regulations that reduce the value of their property. It's very simple.

Single subject is not violated simply because one detail of implementation is spelled out. It is -- you know, as long as the procedure is specified, have the necessary and proper relationship with the substance of the initiative, then they're not a separate subject. I don't see that here.

It is not possible to address the merits of

the proposal, interpret the language, or suggest that how it's going to be interpreted by the legislatures or local government.

And I think that's what Mr. Gessler is doing here, is reaching pretty far to figure out how that would be interpreted.

MR. DUNN: Does that apply to just the single subject issue? Are you limiting your comments to that?

MR. COYNE: Yeah. I would start, I think, with that, and then we can move on to the rest of it.

THE CHAIRMAN: Go ahead then.

MR. COYNE: Okay. On the rest of it, I would say that in general the idea that we are somehow being misleading here and that this is substantially different from -- or that it is not substantially different from Initiative 86, I think, is untrue.

I think with the language that was included last time, and now we've been clear that that was included at the last hearing, we are very clear what the main, significant differences are between 126 and 86. Both measures set out criteria for when there will be remedies provided to landowners.

And in this title we've identified the three major times when there will be an exception. And it's, I think, as clear as day. For us to then sort of

pontificate on how big or small those exceptions are, I think that's really a job that the voters should have to decide, whether those are big or small.

It's very clear here and almost exactly the language that is put in the actual language of the measure.

On, Mr. Dunn, what you were just talking about, about changing the language from "unless said regulation serves to prevent the decrease," you wanted to change that to -- what was the language that you had said? Unless an exemption from one and then use the specific stuff. I think that's totally fair, and I would concede that so it does reflect exactly the language that's in the measure. Certainly are not trying to mislead.

So on a. I disagree and I think that we have been clear about what the main differences are.

On b. -- we just solved b.

Okay. On c. and d., we have also, I think, just have agreed to changes on those.

On e., I think that both for e. and for f., when we're talking about one including how the exemptions will be construed to protect public health, safety, morals, general welfare, and again, I'm including the clear and convincing evidence, I think those are pretty

minor points in the grand scheme of what we're talking about here, and I recommend that we not include those in the title.

You know, the average voter is going to know the difference between preponderance of evidence and clear and convincing. I think it certainly is a difference, but I don't think it's a major difference.

And then, you know, if we're going to include public health, safety, morals and general welfare in kind of the direction on how to construe all of these, I think we'd have to basically include all of the small details in this, which we haven't done here and we haven't done in the other initiative, 86.

And if we're not going to address f., g. and h., then I think that sort of wraps up my summary, and I'd be happy to take questions.

THE CHAIRMAN: Yeah. I'd like a little more discussion on the -- well, I'm not quite sure how to describe this subject -- but how 86 differs from 126, just in general principles. Because it seems to me that the addition in 126 of the exceptions in 2.b. --

MR. COYNE: Hm-hmm.

THE CHAIRMAN: -- it appears -- it does dramatically change -- it's a dramatic difference from, what, 86, because the exceptions do seem to be pretty

broad.

So I'd like a little more maybe discussion from you about that. I mean, it does seem -- you know, I think what Mr. Gessler was saying that, for example, the exception 2.b.(2), you know, the property may not be -- may not be exempted from land use regulation if the exception were to threaten commonly-held community values, for example, and/or threaten the natural environment.

I mean, it strikes me that most land use regulation, in fact, would be based on those kinds of beliefs on the part of the -- of the people who adopt those regulations. So that it -- it arguably is very easy to overcome the -- sort of the rights that the measure purports to exempt or to provide.

And you know, I am wondering to what extent this is like the English immersion case where we do need to reflect. This is very limited circumstances, if ever. Maybe I'll put that a little more strongly. That the landowner whose property is being diminished by 20 percent or more would actually be able to obtain an exemption.

Can you help me out with that a little bit?

MR. COYNE: Sure. Well, I mean, I can tell you that I think that the motivations and the ideas

behind both of these measures, 86 and 126, are fairly similar. That there are certain instances out there where there are land use regulations that negatively impact one person, and it's not fair, and that there should be some mechanism for those things to be remedied.

The difference between the two is on exactly when those things should be remedied. And so, you know, the details of invitation are slightly different.

I think in the title here we've clearly spelled out what those differences are. And I fundamentally disagree with the idea that this, you know, these are impossible standards to ever be met. I think there are a number of circumstances where someone could come forward and make the case that they've been unduly harmed by a land use regulation, there should be remedies, and that they would meet these standards.

You know, and bottom line, I think that the way that we've described what those exceptions are, they are clear enough to the voter that they would be able to decide whether or not those are appropriate instances for a remedy or possibility of a remedy to happen.

And so we could get a -- I'd be happy, if you really want, to get into a debate about what are all the possible instances where this could happen. But I think

we're then getting into debate about sort of the merits of the measure, you know, and I don't necessarily know if that's exactly what we should be doing today.

MR. DUNN: Can I follow up on that?

THE CHAIRMAN: Mr. Dunn.

MR. DUNN: It's sort of a broader question to our role, but when do we cross the line from sort of doing what was required in English only and entering the realm of speculating about the implications of a measure?

MR. KNAIZER: You know, I think that this is sort of a unique situation, because in English only or English immersion, there weren't any competing measures. And I think what the court was saying was that because the waiver provisions were so detailed, that just listing the very -- the different aspects or criteria within the waiver provisions was in itself misleading.

I think the issue that you face here that was not faced in English immersion was that there is a competing measure, if you will, in No. 86. And so we have to also figure out a way to distinguish this measure from No. 86.

MR. DUNN: I'm not sure you answered my question, though. In English immersion, if that's the proper name of it, as I remember there was a quote

statement the supreme court made that the practical effect of the measure is to make bilingual educational all but possible or something like that, and that that should be reflected in the title; not so much just that a laundry list of waiver provisions masked the fact that that's the effect, but you've got to state that because that's voted in to be educated about what the practical implication is.

So what I'm trying to figure out is if this is such a scenario or not. When do we go from something on its face having a practical effect like that and when do we cross into impermissible speculation about what the ramifications of the measure might be?

MR. KNAIZER: You know, I think what the court was saying in English immersion was that you can -- you have a number of alternatives in terms of how you convey the message.

If the listing of the various components is not sufficient to convey the message, then you have to come up with language different from the language in the measure.

In this case, what I was trying to bring out, though, is that we have to consider that we do have a competing measure out there, which then may -- which then adds another factor to how we frame this particular

issue.

MR. DUNN: Well, certainly if we concluded that the practical effect of this measure was to make payment of compensation for a land use regulation almost impossible to obtain, if we concluded that on its face was the effect, and we drafted a title to say that, certainly, that would provide a clear distinction from 86.

MR. KNAIZER: And I think the one fact you have to look at is does the listing of the various exceptions convey that --

MR. DUNN: Absolutely.

MR. KNAIZER: -- convey that conclusion.

THE CHAIRMAN: Mr. Cartin.

MR. CARTIN: Just a comment. It seems to me that perhaps one thing or one avenue the Board could pursue, and maybe short of the -- kind of the arriving at the conclusion or interpretation for title purposes, that the Board did at the supreme court's direction in the English immersion case, is I think that what we probably can conclude is that the remedies or this requirement, the 20 percent requirement, is subject to, and this may be going too far too, some broadly-stated exceptions that are administered by the public entity.

Again, I don't know if that conveys the

message that that, in fact, is the direction that the Board wants to go, if that conveys the message that the requirement may be subsued by the exceptions.

But for example, I was playing with, and again I'll just say this and move on, but that in the single subject line, maybe saying up front on Line 3, for example, after "diminish the value of the properties," saying something to the effect there to distinguish again what the idea of distinguishing this measure -- both encompassing kind of the 2.b. and distinguishing this measure on Page 6 stating there, "unless exempted from the requirements by certain broadly-stated exceptions that are administered by the public entity."

That was my best shot for openers right now. I'm not sure. That may be --

MR. GESSLER: Could you repeat that.

MR. CARTIN: Yes. On line -- the gist of it would be to signal up front in the statement of the single subject the exceptions in the measure by saying, after "value of the property, unless exempted from the requirement," going back to the first line, "requirement of public entities, unless exempted from the requirement by certain broadly-stated exceptions that are administered by the public entity." And I don't know if that gets --

MR. GESSLER: Could I offer something?

I think the decision you're trying to make right now clearly is -- are the exceptions in this measure so broad that you need to make some separate statement, some value judgment by the Title Board, about what the level of those exemptions are.

And I would again argue that I don't think that you need to, because I disagree with the bigness or smallness of those things. I think that we're very clear in letting the voters know what those exceptions are.

And I guess -- I think the decision you should first make would be is there such a compelling reason that we need to make a separate statement here about the power of these exceptions or not. If so then you could go on to decide, well, then because it's -- because they're such powerful exemptions, then we should weight them and put them at the top.

But I don't think that that power is there. I think that it's very evidence here what the exemptions are, but there's no need to make a value judgment about the exemptions; and that by putting these exemptions, you're talking about up-front, then you're kind of defining the measure by the exemptions as opposed to the meat of the measure, which is providing remedies, which is the single subject, and that any voter who reads

through the whole six lines, which is -- you know, there's some amount of duty by each voter to read these things through, or read these six lines, will be able to see that this is a clearly different thing than No. 86.

THE CHAIRMAN: One other variation that I'd just like to throw out in thinking about as well as -- since we already have the "unless" language at the end, I mean, I think we need to do something more at the beginning to distinguish the measure, but maybe a shorter version, perhaps to -- as an alternative to Mr. Cartin's suggestion is just to insert "in limited circumstances" or something like that at the very beginning.

Perhaps insert it near the end of Line 1, "An amendment to the Colorado Constitution including a requirement that in limited circumstances public entities provide remedies," et cetera, so that you see it, not as an exception, where people may not -- may not read that far. More like the fine print when you get to the exemptions.

So in my opinion, it's difficult for people to see the differences when they're comparing them on the ballot, and they should start off stating the same basic principle. But to me there are dramatic differences between these.

So I don't know that should -- something along

those lines would be a shorter version, as well if we were to modify the expression of the single subject.

Does that -- I don't know whether that's any better for you.

MR. GESSLER: Where are you saying putting in "limited circumstances"?

THE CHAIRMAN: Well, probably it could be several places, but the requirement that in, right after the word "that" in Line 1, "in limited circumstances."

MR. GESSLER: What if we just, as an alternative, if in Line 4, 3 and 4, where we say "in certain circumstances" already, if we change "certain" to "limited"?

THE CHAIRMAN: Well, and actually I was thinking about saying it both places. And maybe even saying "in very limited circumstances" or something like that.

MR. GESSLER: I would not be comfortable with that, because I don't think it's very limited. I think it's certainly more limited than 86, but not significantly.

THE CHAIRMAN: I mean, where we have already said "in certain circumstances," that is kind of the -- in the trailers, that's the elaboration on the single subject. So I do tend to agree that "certain

circumstances" probably is not strong enough in my view; it should probably say "limited circumstances."

But I would probably still propose that we say it both places. But ...

MR. COYNE: Yeah, I could probably live with that.

THE CHAIRMAN: Mr. Gessler.

MR. GESSLER: Mr. Dunn, may I answer your question that your earlier made, since it bears on the single subject, and I will try and do that briefly.

MR. DUNN: Okay.

MR. GESSLER: You had asked that does the ability -- does the ability of a -- does the ability of a landowner to enforce this manner create an independent right. And I think it, sort of carefully analyzing Section 2, the main part of Section 2, the answer is yes.

You know, as 86 is structured, it's sort of a dispute, or the two parties to that are the public entity on one hand and the landowner that is affected by the land use regulations on the other.

What No. 126 does with that provision as far as the neighboring landowners is that sort of releases the provisions from the moorings of a two-way dispute and turns it into a three-way dispute.

And, in fact, if you look at No. 2, it allows public entities to do one of two things: to either exempt a land use -- exempt a land owner or provide just compensation to that landowner. You know, I could see an instance here where the public entity decides, make a decision to, for example, exempt a landowner. Or you can provide just compensation to an owner. And someone turns around and says, No, you still can't do that, because you hid the 20 percent threshold.

And in fact, let's say a public entity, you know, public entity enacts a regulation, it hits the 20 percent threshold, okay, and then that public entity decides to grant a special use permit or exempt them in some other format through a land exchange, swap or something along those lines.

Well, that exemption could prohibited, because once you hit the 20 percent threshold, then the neighboring landowner's rights spring into existence, regardless of what the public entity may want to do in this proceeding or with respect to these particular land use regulations even if -- I think it's a valid argument -- even if it's, for example, a special use permit or something, you know, exemption that would normally be allowed by other regulations, but it's a discretionary, dutatory type thing.

So I mean, it seems as though it does create those independent rights by neighboring landowners, and experience that as intervenors you always like wreaking havoc upon the efforts of the two parties to structure their dispute because you have rights that you want to assert, regardless of what those other parties may do.

So regardless of what the public entity does and the landowner who is affected does, this neighboring landowner is going to have rights.

And so, Mr. Cartin, when you just said -- and I guess what sort of helped me formulate that, is when you talked about a potential single subject, you know, land use regulations administered by a public entity or enforced by a public entity, this actually brings a third party into the mix. It includes neighboring landowners too.

So I'm happy to answer questions on that, but I don't mean to belabor that point.

THE CHAIRMAN: Thank you.

Mr. Coyne, did you have anything further? I'm not sure. I may have interrupted you. But is there anything else you wanted to tell the Board in response to the motion for rehearing?

MR. COYNE: Well, no, I think we mostly focussed our conversation on the single subject. So once

we get through that, then I may want to comment more.

THE CHAIRMAN: Well, I think you probably ought to go ahead and address your other responses as well.

MR. COYNE: Okay.

THE CHAIRMAN: Because unlike when we initially set the title, I wasn't planning to take that as a separate vote.

MR. COYNE: Okay.

THE CHAIRMAN: I mean, unless the Board members want to. If there's some feeling on the part of the Board that there is a single subject problem, then I think this as good time to stop, 'cause that would make the rest of it moot. But I'm not convinced that there's a single subject problem personally.

MR. CARTIN: Nor am I.

MR. COYNE: If you would just give me a quick second to review here what we've gone through.

THE CHAIRMAN: Okay.

MR. COYNE: I guess all I would sort of say in conclusion, is that I think that we've made a couple of changes that have addressed Mr. Gessler's concerns. I think that with adding in -- I thought about it more, and I think adding in the language that Mr. Hobbs suggested in terms of clarifying that this is a little more limited

than initiative 86, and then having the language at the end there that lists the three major differences, I'm comfortable that I think this is significantly different and would argue that the rest of the things that Mr. Gessler asked for, including talking about changing the legal threshold and the -- how to construe the specific exemptions, that all those are kind of final.

So that's all.

THE CHAIRMAN: Thank you.

Discussion by the Board. Mr. Cartin.

MR. CARTIN: Mr. Chairman, consistent with your comments and the discussion here, I would support inserting on Line 1, after the word "that," "in limited circumstances."

And then I believe it was also discussion that on Line 4, instead of "certain circumstances," it would be "in limited circumstances," instead of "in certain." So strike "certain" and insert "limited."

THE CHAIRMAN: And I would support that. And for discussion, I'll go ahead and make that motion.

MR. CARTIN: I'll second it.

THE CHAIRMAN: Any discussion?

MR. DUNN: Sorry. I'm trying to think about it from the perspective of the voter in the ballot box, and looking at this one and 86. And if I'm reading this

and I'm a pro just compensation voter, and when I read this and I think that seems like a good idea, to provide in limited circumstances compensation for land use regulation reduces the value of property.

And so I view this as a pro just compensation measure. And then I read 86 and it sort of reads the same way, except it doesn't say limited. And I'm just -- I think we're getting closer, but I'm just -- I'm not sure what the answer is, but it seems to me that it still should read -- maybe not verbatim similarly, but from a practical standpoint as a voter reading them, they get the same effect when they read them.

And I'm not sure if 126 is actually -- if that's actually what it is. It sort of has been expressed by, at least some of the Board. But I don't know.

THE CHAIRMAN: Well, my intent, or my thought here is that I think this proposal is a middle-of-the-road approach, and that is I -- I mean, I think a stronger approach would be more like the English immersion case, where we do something along the lines that just affirmatively states that the exemptions or that the rights afforded the landowner, to either compensation or exemption, are very difficult to get. I mean that would be the English -- I mean, expressing that

conclusion would be consistent perhaps with the English immersion case. And I'm a little uncomfortable with that.

What I -- and there may be a better way to do this, but what I -- when I compare the measures, they both do grant rights to landowners to either compensation or exemption for land use regulations. The devil is in the exemption -- I mean, the exceptions. And the exceptions seem so much broader, as Mr. Cartin said in No. 126, that the rights granted to the landowner are probably more limited.

And you know, if they -- you know, I can accept they both grant some rights to compensation or exemption from land use regulation, but just simply trying to distinguish them up front so that at least somebody comparing the two ballot titles, say, in the voting booth can see that one is more limited than the other. They both do grant these sort of rights or prohibit or provide the remedies.

So I don't know. I don't have a better approach, but to me that's a fairly modest way to recognize the difference between 86 and 126, and coupled with the exceptions that we've expressed at the end or which perhaps do need to be fixed up a bit, but ...

MR. DUNN: It's almost as if -- maybe this is

going too far. But it's almost as if what the measure really does is a prohibition on just compensation except in rare circumstances.

The proponent wouldn't agree with that.

MR. CARTIN: That would be a statement --

MR. DUNN: That may be a little strong, but my gut tells me that's the practical effect.

THE CHAIRMAN: Would it help if we moved the phrase "in limited circumstances" down to follow the word "remedies," so that it would read "concerning a requirement that public entities provide remedies in limited circumstances"? Does that help?

MR. DUNN: Say that again. Put it where?

THE CHAIRMAN: So that it would read, "Concerning a requirement that public entities provide remedies in limited circumstances to owners of privately-owned real property." If you're concerned that the way it's being proposed right now is that it limits -- that it's all about the limitations now -- I'm trying to find a way to address that concern. But I'm not sure that improves things, but ...

MR. DUNN: I actually think that's a good suggestion, putting it after "remedies"; is that what you said?

THE CHAIRMAN: Yeah. Mr. Cartin, what do you

think?

MR. CARTIN: I think that may move in the direction of Mr. Dunn's concern.

THE CHAIRMAN: Let's move that, Ms. Gomez.

I mean the downside is that -- I mean, I like signalling it right up front, but in some ways I do think moving it to follow "remedies" is a little better reading of what I'm -- or better expression of what I'm trying to achieve.

So after -- "remedies in limited circumstances." Is that any better, Mr. Dunn? Or I don't know.

MR. DUNN: Yeah, I -- yeah, I think it's marginally better. The concern is still there that it sounds like a pro compensation measure. But ...

THE CHAIRMAN: Was there a motion on that? I think there was a motion, but I'm not sure. There was?

Okay. So we'll just consider that a change to the motion.

MR. DUNN: And the motion is just on Lines 2 and 4?

THE CHAIRMAN: That's correct. If there's no other discussion, all those in favor say aye.

THE BOARD: Aye.

THE CHAIRMAN: All those opposed, no.

That motion carries three to zero.

Mr. Dunn, I think you had some good ideas about revising the language at the end of the measure or at the end of the title. If you want to address that.

MR. DUNN: Sure. I think just for discussion sake here at least, after -- you have comma, "unless said" and insert "exemptions result in a."

MS. GOMEZ: Exemptions resulting.

MR. DUNN: Results in. And exemption may need to be singular. I'm not sure, but we'll come back to that. Result in. I'm not sure yet actually.

A, and then delete all the way to "decrease." I think it should be singular, exemption. And results. Okay. And then after the next comma, delete "protect" and insert "threatens." The same in the last clause.

MS. GOMEZ: The right one?

MR. DUNN: Threatens, plural. That's right, threatens. Threatens, sorry, e-n-s. And the same thing on the last line.

MS. GOMEZ: After "evaluate"?

MR. DUNN: No. Instead of "protect," "or threatens." Does that make sense?

MR. CARTIN: Just so we're sure that that's what the measure says, the language of the measure says in Subsection 2, "The 20 percent requirement shall not

apply to any portion of privately-owned real property that if exempted from said land use regulation would decrease or threaten," and what you're suggestion is is kind of tying onto the "exempt the owner" in Line 4, "unless said exemption."

MR. DUNN: Yeah, because previously it said "unless said land use regulation serves," but it's really "unless the exemption results in a decrease in market value, threatens community values or built or natural environment." Is that right?

MR. CARTIN: Okay.

THE CHAIRMAN: Is that your motion?

MR. DUNN: That is my motion.

MR. CARTIN: I'll second that.

THE CHAIRMAN: Any further discussion?

If not, all those in favor say aye.

THE BOARD: Aye.

THE CHAIRMAN: All those opposed, no.

That motion cares three to zero.

Any other suggested changes to the titles in response to the motion for rehearing?

MR. CARTIN: I would just say that I think I echo -- I would echo Mr. Dunn's concern over whether or not the language "in limited circumstances" goes far enough in light of some of the case law and given the

text of this measure. But I think we've deliberated on this fairly extensively, and I can't -- I think it is -- it strikes a balance.

MR. DUNN: The only other suggestion I might have is to insert "only," I'm not sure if it's proper grammar, but in front of "in," "only in limited circumstances." I don't know if I'm making that suggestion. I don't know if that helps or not.

THE CHAIRMAN: I'm not too crazy about it personally. It seems a little awkward.

MR. DUNN: It does.

THE CHAIRMAN: And I'm not sure it's as accurate. I'd almost rather say "in very limited circumstances," but I'm still reluctant to go too far with this.

MR. CARTIN: I guess, one final comment. In light of Mr. Gessler's objection, going back to the specific objection, that the title and submission clause are misleadingly similar to the title and submission clause in '05-'06 86; in order to meaningfully inform the voters, the title and submission clause must explain the differences between this initiative and 86, I think these changes do, although it may be in some folks' eyes subtle, I think they do address both the statutory requirement that Mr. Knaizer elaborated on in our last

meeting and do address 2.a. of Mr. Gessler's objection, motion for rehearing.

THE CHAIRMAN: Well, if there are no other suggestions, then I'd entertain a motion to deny the motion for rehearing except to the extent that the Board has made changes to the titles. And again, for the record, the same changes will be made in the ballot title and submission clause.

Maybe before we -- if there is such a motion, before we do that, I'll probably read into the record what I think how the title would read, based on what we've done so far.

MR. DUNN: I'll make that motion.

THE CHAIRMAN: Mr. Dunn moves that the Board reject the motion for rehearing except to the extent the Board has made changes to the titles. Is there a second?

MR. CARTIN: Second.

THE CHAIRMAN: It's been moved and seconded.

And let me just read into the record how the title would read, and again with the understanding that the ballot title submission clause will be the same except for the form of the question.

The title would read, "An amendment to the Colorado Constitution concerning a requirement that

public entities provide remedies in limited circumstances to owners of privately-owned real property for land use regulations that diminish the value of the property, and, in connection therewith, requiring public entities in limited circumstances to compensate an owner or exempt the owner from the land use regulations if a public entity enacts land use regulations that reduce the value of any portion of the property by 20 percent or more, unless said exemption results in a decrease in fair market value of any portion of surrounding real properties, threatens commonly-held community values, or threatens the built or natural environment."

Any further discussion?

If not, all those in favor say aye.

THE BOARD: Aye.

THE CHAIRMAN: All those opposed, no.

That motion carries three to zero.

And that concludes action on No. 126. The time is 5:14 p.m. That closes our agenda.

MR. DUNN: For the year.

THE CHAIRMAN: For the year. Good season. We're adjourned. Thank you all.

(The hearing concluded at 5:14 p.m., May 25, 2006.)

STATE OF COLORADO)

) ss. REPORTER'S CERTIFICATE

COUNTY OF BROOMFIELD)

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

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

I further certify that I am not related to, employed by, nor of counsel for any of the parties or attorneys herein, nor otherwise interested in the result of the within action.

In witness whereof, I have affixed my signature and seal this day of 2006.

My commission expires June 18, 2009.

Deborah D. Mead
Certified Shorthand Reporter