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SUPREME COURT, STATE OF COLORADO 2 E. 14th Avenue, Suite 400 Denver, CO 80203	FILED IN THE SUPREME COURT JUN 11 2008 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), C.R.S. (2007) Appeal from the Ballot Title Setting Board	
IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE FOR 2007-2008, #103 ("Colorado Housing Investment Fund") **Petitioner:** ROBERT GOLDEN, Objector v. **Respondents:** NEDRA SAN FILLIPPO and KENNETH HOAGLAND, Proponents **Title Board:** WILLIAM HOBBS, SHARON EUBANKS, and DANIEL DOMENICO	**▲COURT USE ONLY▲**
Attorney for Respondents: Blain D. Myhre Isaacson Rosenbaum P.C. 633 17th Street, Suite 2200 Denver, Colorado 80202 Phone Number: (303) 292-5656 FAX Number: (303) 292-3152 E-mail: bmyhre@ir-law.com Atty. Reg. #: 23329	Case Number: 08 SA 193
RESPONDENTS' OPENING BRIEF	

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I. STATEMENT OF THE ISSUES

1. Whether the Title Board correctly found the initiative concerning the creation of a real estate transfer tax to fund affordable housing programs comprises a single subject.

2. Whether the Title Board set a fair, accurate, and complete title that contained no catch phrases.

II. STATEMENT OF THE CASE

A. Nature of the case, course of proceedings, and Title Board results

Proponents Nedra San Fillippo and Kenneth Hoagland proposed an initiative concerning the creation of a real estate transfer tax to fund affordable housing programs. The proposal was designated Initiative 2007-08 #103.

The measure was considered by the Offices of Legislative Council and Legislative Legal Services and submitted to the Secretary of State for title setting. The Title Board established a title on May 21, 2008.

Robert Golden, a registered elector ("Golden"), objected to the title set by the Title Board. A rehearing was held on May 29, 2008, at which the Title Board denied Golden's motions for rehearing, except to the extent the Board modified some of the language of the title.

Golden filed his Petition for Review with this Court on June 3, 2008.

B. Statement of the Facts

Initiative #103 creates a real estate transfer tax to fund affordable housing programs. The initiative would create a Colorado Housing Investment Fund ("the Fund"), which would be funded through the imposition of a real estate transfer tax of $0.04 per $100 paid for certain real estate transaction and would exempt those transfer tax revenues from state and local government spending limits. The measure would require moneys in the Fund to be used for grants and loans to support the creation and preservation of affordable housing stock through new construction, acquisition of real property, predevelopment, defraying costs of local ordinance compliance, building rehabilitation, assistance with down payments and closing costs, energy efficiency improvements, accessibility modifications and construction, and foreclosure and homelessness prevention.

The Title Board set the following title:

> STATE TAXES SHALL BE INCREASED $38.0 MILLION ANNUALLY BY AN AMENDMENT TO THE COLORADO CONSTITUTION CONCERNING THE CREATION OF A REAL ESTATE TRANSFER TAX TO FUND AFFORDABLE HOUSING PROGRAMS, AND, IN CONNECTION THEREWITH, COMMENCING JULY 1, 2009, IMPOSING THE TRANSFER TAX AT THE RATE OF FOUR CENTS FOR EACH $100 PAID IN CERTAIN REAL PROPERTY TRANSACTIONS; CREATING A COLORADO HOUSING INVESTMENT FUND TO WHICH TRANSFER TAX REVENUES ARE CREDITED; REQUIRING MONEYS IN THE FUND TO BE USED FOR HOUSING PROGRAMS RELATING TO CONSTRUCTION, REAL PROPERTY ACQUISITION, PREDEVELOPMENT, ORDINANCE COMPLIANCE COSTS, BUILDING REHABILITATION, ASSISTANCE WITH PURCHASE COSTS, ENERGY EFFICIENCY

IMPROVEMENTS, ACCESSIBILITY MODIFICATIONS AND CONSTRUCTION, AND FORECLOSURE AND HOMELESSNESS PREVENTION; AND EXEMPTING REVENUES FROM THE TRANSFER TAX FROM STATE AND LOCAL GOVERNMENT REVENUE AND SPENDING LIMITS.

III. SUMMARY OF THE ARGUMENT

The Title Board correctly found that #103 contains a single subject and included in the title the central features of the proposal. The title accurately summarized the single subject and other aspects of the measures. The title does not use an impermissible catch phrase and is neither vague nor misleading. This Court, in its limited review of the title, should affirm the Title Board's decision.

IV. ARGUMENT

A. General Standards of Review

As this Court recently said, "Our review of Title Board actions is limited. At this stage, we do not address the merits of a proposed measure, interpret it, or construe its future legal effects. *See, e.g., In re Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 443 (Colo. 2002); *In re Proposed Initiatives 2001-2002 #21 & #22*, 44 P.3d 213, 215-16 (Colo. 2002); *In re Proposed Initiative 1999-2000 #200A*, 992 P.2d 27, 30 (Colo. 2000). Instead, these are matters 'for judicial determination in a proper case should the voters approve the initiative.' *In re Proposed Initiative 1999-2000 #200A*, 992 P.2d at 30. In reviewing an action of the Title Board, all legitimate presumptions must be resolved in favor of the Board. *In re Proposed*

Initiative on Educ. Tax Refund, 823 P.2d 1353, 1355 (Colo. 1991). An initiative title will only be invalidated in a clear case. *Id.*" *In the Matter of the Title, Ballot Title, and Submission Clause for 2007-2008 #57*, No. 08SA91, Slip opinion at 5-6 (May 23, 2008) ("*In re Proposed Initiative 2007-08 #57*").

In its limited review, this Court will not reverse the actions of the Title Board if improvements could be made to an otherwise legally sufficient title. *In re School Pilot Program*, 874 P.2d 1066, 1070 (Colo. 1994). The Title Board is not required to describe every nuance and feature of the proposed measure. *In re Proposed Initiative Concerning "State Personnel System"*, 691 P.2d 1121, 1124 (Colo. 1984). This Court does not demand that the Title Board draft the best possible titles, and grants great deference to the Title Board in the exercise of its drafting authority. *In re Proposed Initiative 2007-08 #57*, Slip op. at 10. The titles are intended to be a "relatively brief and plain statement by the Board setting forth the central features of the initiative for the voters," rather than "an item-by-item paraphrase of the proposed constitutional amendment or statutory provision." *Id.* at 11, quoting *In re Proposed Initiative 1997-1998 #62*, 961 P.2d 1077, 1083 (Colo. 1998).

Thus, the goal of the title setting process is "to ensure that persons reviewing the initiative petition and voters are fairly advised of the import of the proposed

amendment." *In re Proposed Initiative on "Trespass - Streams with Flowing Water,"* 910 P.2d 21, 23 (Colo. 1996). Only where the titles and submission clause are clearly vague, misleading, or confusing will a decision of the Title Board be overturned. *In re Proposed Initiated Constitutional Amendment Concerning Limited Gaming in the City of Antonito*, 873 P.2d 733, 739-40 (Colo. 1994).

B. The Title Board correctly found the single-subject requirement was met.

1. Legal Standards

Article V, section 1(5.5) of the Colorado Constitution requires that a proposed initiative contain a single subject. A proposed initiative violates the single-subject rule if it relates to more than one subject *and* has at least two distinct and separate purposes that are not dependent upon or connected with each other. *See In re Proposed Initiative 2007-08 #57*, Slip op. at 7. This Court construes the single-subject requirement liberally so as not to impose undue restrictions on the initiative process. *In the Matter of the Title, Ballot Title, and Submission Clause for 2007-2008 #61*, No. 08SA89 (May 16, 2008), Slip opinion at 8.

In applying the single-subject test, the Court will assess whether the initiative tends to effectuate "one general objective or purpose" (in which case it presents only one subject) or whether it "addresses subjects that have no necessary

or proper connection to one another" (in which case it will be disallowed as containing more than one subject). *In re Initiative for 1999-2000 #25*, 974 P.2d 458, 463 (Colo. 1999). Provisions that assist in accomplishing a measure's essential purpose are well within its single subject. As such, the Court analyzes whether implementation provisions tend "to effect or to carry out" the "one general object or purpose" of the initiative. *In re "Public Rights in Water II,"* 898 P.2d 1076, 1079 (Colo. 1995). Where details are "directly tied" to a proposal's "central focus," the Court will not find that a separate subject exists. *In re Initiative for 1999-2000 #200A*, 992 P.2d 27, 30 (Colo. 2000).

Further, a ballot measure encompasses a single subject, even if it includes "provisions that are not wholly integral to the basic idea of a proposed initiative." *In re Initiative for 1997-98 #74*, 962 P.2d 927, 929 (Colo. 1998). Thus, the fact that one or more provisions might stand alone as another initiative or that the measure itself is comprehensive or multi-faceted does not automatically make any aspect of the proposal a separate and distinct subject.

2. Initiative #103 meets the single-subject requirement

In his Petition, Golden argues the initiative contains "at least five separate subjects." Petition for Review at 2. Golden made the same argument before the Title Board, which properly rejected it.

Golden asserts that the stated subject of the initiative is to "increase the quantity of affordable housing units in Colorado." Motion for Rehearing at 1. That misstates the subject of the initiative. As the measure states, the purpose of the initiative is "to establish a housing investment fund to provide a dedicated, statewide source of revenue to support the creation and preservation of affordable housing opportunities for residents of the state from very low-income households, low-income households, and workforce households, including, but not limited to, persons with special needs and the homeless." *See* Initiative section 1. The purpose is not simply increasing the quantity of affordable housing units in Colorado, but instead to help create and preserve affordable housing opportunities. *See id.* The Title Board properly recognized the single subject, by stating it in the title as "the creation of a real estate transfer tax to fund affordable housing programs." Golden's statement of the subject is too narrow.

In his motion for rehearing, Golden argued that there are at least four other "additional separate subjects," which he identifies as: (1) funding for a wide range of social programs, including mental health services, HIV/AIDS treatment, healthcare, child care, alcohol treatment, and drug treatment; (2) funding for foreclosure prevention programs and related services; (3) funding for homelessness prevention programs and related services; and (4) a new constitutional definition of

"affordable housing" not used anywhere in the measure nor necessary to its provisions. Motion for Rehearing at 1.

The Title Board properly rejected Golden's argument that there are additional subjects. The first item—funding for a wide range of social programs, including mental health services, HIV/AIDS treatment, healthcare, child care, alcohol treatment, and drug treatment—is not found anywhere in the measure. Instead, it derives solely from Golden's own interpretation of the term "permanent supportive housing" found in the measure's definition of "affordable housing stock." *See* Initiative section 2(2). Golden's argument misstates the measure's operation.

The measure provides funding for grants and loans to support the statewide creation and preservation of affordable housing stock through the means listed in section 3(2) of the initiative. While permanent supportive housing is part of the definition of affordable housing stock, it does not follow that the measure funds the wide range of social programs Golden claims. Instead, moneys from the Fund may be used only for the nine types of services listed in section 3(2), and then only so long as those services "support the creation and preservation of affordable housing stock." The nine items are: new construction, acquisition of real property, predevelopment, defraying costs of compliance with local ordinances, building

rehabilitation, assistance with down payments and closing costs, energy efficiency improvements, accessibility modifications and construction, and foreclosure and homelessness prevention. Each of these nine items relates to the subject of creating affordable housing opportunities. They each assist in supporting the creation or preservation of affordable housing stock. The measure itself simply does not allow the wide array of funding Golden claims. Thus, the Title Board properly rejected Golden's argument that "funding for a wide range of social programs" is a separate subject of the measure.

The second and third items that Golden claims are separate subjects are funding for foreclosure and homelessness prevention programs and related services. *See* Motion for Rehearing at 1. The initiative provides that the moneys in the Fund can be used to support "the creation and preservation of affordable housing stock" through "foreclosure and homelessness prevention." *See* Initiative section 3(2)(i). Thus, "foreclosure and homelessness prevention" services can be funded by the Fund only to support "the creation and preservation of affordable housing stock." *Id.* That provision directly ties to the single subject of creating a real estate transfer tax "to fund affordable housing programs." Therefore, foreclosure prevention and homelessness prevention are not separate subjects. *See In re Initiative for 1999-2000 #200A*, 992 P.2d at 30 (where details are "directly

tied" to a proposal's "central focus," the Court will not find that a separate subject exists).

Finally, Golden argues that a separate subject exists due to a "new constitutional definition of 'affordable housing' not used anywhere in the measure nor necessary to its provisions." Motion for Rehearing at 1. The Title Board properly rejected that argument.

Contrary to Golden's assertion, the term "affordable housing" is used in the measure, appearing both in section 1 and section 3(1). The term is defined to mean "housing where total housing costs, comprised of either rent, renter's insurance, and utilities or mortgage payments, homeowner's insurance, property taxes, dues to a homeowners' association, land lease payments, and utilities, represent no more than thirty percent of gross household income." Section 2(1). The term is then used in the measure to modify "opportunities" in both section 1 and section 3(1). The term thereby explains the types of opportunities that constitute "affordable housing opportunities." It helps define the purpose of the initiative (section 1) and the creation of the Fund (section 3(1)). In so doing the term provides important and necessary guidance to the interpretation of the measure for the Fund administrator (the Division of Housing), for the courts, for local governments (for whom funds will be made available for distribution—*see* Initiative section

3(4)(a)(II)), and others. Moreover, the term, and its definition, are certainly related to the single subject of the "creation of a real estate transfer tax to fund affordable housing programs." Therefore, the definition is not a separate subject. *See In re Initiative for 1999-2000 #200A*, 992 P.2d at 30 (an initiative that tends to effect or carry out one general object or purpose satisfies the single-subject requirement).

In sum, the Title Board properly found that the measure satisfies the single-subject requirement. That decision was correct and should be affirmed.

C. The Title is fair, accurate, and complete.

1. Legal Standards

The Title Board's stated task is to "unambiguously state the principle of the provision sought to be added, amended, or repealed." C.R.S. § 1-40-106(3)(b). The title is intended to be a "relatively brief and plain statement by the Board setting forth the central features of the initiative for the voters" rather than "an item-by item paraphrase of the proposed constitutional amendment or statutory provision." *In re Proposed Initiative 1997-98 #62*, 961 P.2d at 1083. A title need only provide voters with an overview of the "central features" of an initiative, *In re Amendment to Article XVI, Section 6, Colorado Constitution, Entitled "W.A.T.E.R."*, 875 P.2d 861, 864-65 (Colo. 1994), and it need not set forth each and every nuance and subtlety of a measure. *In re Proposed Initiative Designated*

"Governmental Business," 875 P.2d 871, 878 (Colo. 1994). This Court does not demand that the Title Board draft the best possible titles, and grants great deference to the Title Board in the exercise of its drafting authority. *In re Proposed Initiative 2007-08 #57*, Slip op. at 10. Given these standards, the Court should affirm the title set.

2. *The title does not include an impermissible catch phrase.*

Golden contends the phrase "affordable housing" is an impermissible catch phrase that "impl[ies] a limited scope to the measure that belies the vast range of social programs covered by the measure." Motion for Rehearing at 1. It is not.

"'Catch phrases' are words that work to a proposal's favor without contributing to voter understanding. By drawing attention to themselves and triggering a favorable response, catch phrases generate support for a proposal that hinges not on the content of the proposal itself, but merely on the wording of the catch phrase." *In re Initiative 1999-2000 # 258(A)*, 4 P.3d 1094, 1100 (Colo. 2000). "Affordable housing," as noted, is used in the measure and explains the types of housing opportunities the measure addresses. It thereby helps define the purpose of the initiative as a whole (section 1) and the purpose underlying the creation of the Fund (section 3(1)). It thus simply describes elements of the initiative, and is similar to "concerning the management of growth," which the

Court found to be "a neutral phrase, with none of the hallmarks that have characterized catch phrases in the past." *See In re Proposed Initiative 1999-2000 #256*, 12 P.3d 246, 257 (Colo. 2000). "Affordable housing" is no more prejudicial in terms of voter perception than "protect the environment and human health," a term that did not rise to the level of a catch phrase. *See In re Proposed Initiative 1997-98 #112*, 962 P.2d 255, 256 (Colo. 1998).

The mere assertion by Golden that the phrase "affordable housing" is a catch phrase does not satisfy his burden for this claim. Instead, Golden was required to adduce some evidence that this phrase is something other than merely descriptive of the proposal. *See In re Proposed Initiative #256*, 12 P.3d at 257. Having failed to do so, this claim cannot be the basis for a successful appeal to this Court.

Moreover, had the Title Board used the term "housing," instead of "affordable housing," Golden would likely have argued that the title was misleading because it did not inform the voting public of the true nature of this measure. The measure addresses "affordable housing programs," not "housing programs" in general. Without the term "affordable housing," the title would be less accurate. The Title Board properly concluded it was not an impermissible catch phrase.

3. *The Title Board did not err in setting this title.*

Under its limited, deferential review of the Title Board's decision, this Court does not demand that the Title Board draft the best possible titles, only that the titles are fair, accurate, and complete. The title set here is fair, accurate, and complete, and the decision of the Title Board should be affirmed.

In his Petition, however, Golden asserts the title is vague and misleading, but does not specify how or why. *See* Petition at 2. In his Motion for Rehearing, though, he asserted six reasons the title is misleading. None of his reasons has any merit.

First, Golden objects that the "title does not communicate that the entire revenue stream may be used to fund social programs such as drug and alcohol treatment, job training, child care, treatment of mental illness, support for people with HIV/AIDS, and support for people with physical disabilities." Motion for Rehearing at 1. Like his single-subject argument on this point, Golden misstates what the initiative does. It does not permit the "entire revenue stream" to be used for assorted social programs; instead it requires the funding to be used for grants and loans to support the "creation and preservation of affordable housing stock through" nine specified means: (1) new construction; (2) acquisition of real property; (3) predevelopment; (4) defraying costs of local ordinance compliance;

(5) building rehabilitation; (6) assistance with down payments and closing costs; (7) energy efficiency improvements; (8) accessibility modifications and construction; and (9) foreclosure and homelessness prevention. *See* Initiative section 3(2). The title accurately reflects what the measure would do, and therefore is not misleading or vague. Golden's objection thus is not well-taken.

Second, Golden argues that foreclosure and homelessness prevention are "potential uses . . . unrelated to affordable housing and should be disclosed in the title." Motion for Rehearing at 1-2. As a preliminary matter, the Title Board on rehearing, modified the title to include the phrase "foreclosure and homelessness prevention." So the argument may be moot. To the extent Golden continues to argue that the title is misleading because foreclosure and homelessness prevention are uses unrelated to affordable housing, that is simply untrue. Preventing foreclosure and homelessness are means of supporting the creation and preservation of affordable housing stock by ensuring that people from very low-income, low-income, or workforce households do not lose their housing. Keeping people in their current housing means keeping that housing affordable for them. Foreclosure prevention and homelessness prevention services do that. Therefore, Golden is simply wrong that those are "uses" that are unrelated to affordable housing. The Title Board properly added the phrase "foreclosure and

homelessness prevention" to the title, since that phrase is neither misleading, nor inaccurate. *See In re Proposed Initiative on "Trespass - Streams with Flowing Water,"* 910 P.2d at 23 (goal of title-setting process is to ensure that voters are fairly advised of the import of the proposed amendment).

Third, Golden argued that the title's reference to the tax imposed as $0.04 per $100 should be changed to $40 per $100,000 consideration. But the title language chosen is accurate, reflecting what the initiative says in section 4: "a real estate transfer tax shall be imposed at the rate of four cents for each one hundred dollars, or major fraction thereof, of consideration paid for the real property." The figures in the ballot title match the figures used in the measure. They accurately inform the voters the nature of the tax that the initiative will impose. The title language thus is both fair and accurate, and this Court should defer to the Title Board's choice of language. Where the Board's chosen language is not vague, misleading, or confusing, it should not be overturned. *See In re Proposed Initiated Constitutional Amendment Concerning Limited Gaming in the City of Antonito*, 873 P.2d at 739-40.

Fourth, Golden argues that the title refers to each $100 "paid," but that "the measure contemplates any form of consideration paid, which might be cash, credit, personal or real property, forbearance, etc." Motion for Rehearing at 2. Again, the

title fairly and accurately informs the voters that the tax is for each $100 paid. The term "paid" fairly encompasses any form of consideration paid, whether cash, credit, property exchange, and the like. It is not vague or misleading, but instead accurately states what the measure does. Accordingly, the Board's language should not be overturned. *See In re Proposed Initiated Constitutional Amendment Concerning Limited Gaming in the City of Antonito*, 873 P.2d at 739-40.

Fifth, Golden argues that the title "does not disclose that up to 100% of the tax proceeds can be used to fund large scale energy efficiency improvements such as solar panel fields, biomass projects or thermal energy projects." Motion for Rehearing at 2. But again Golden does not accurately state what the measure does. The measure requires that moneys in the Fund be used for grants and loans to support the creation and preservation of affordable housing stock through, among other means, energy efficiency improvements. The Fund can only issue grants or give loans for energy efficiency improvements if such improvements will support the creation and preservation of affordable housing stock. The title notes this fact by including "energy efficiency improvements" in the title language. The title language is thus fair and accurate and should be upheld.

Finally, Golden argued in his motion for rehearing that the title "does not reflect that the measure authorizes the state to enter into loans as a means of

subsidizing affordable housing projects and the vast array of social programs covered by the measure. Such lending is typically a high risk venture that voters should be made aware of in the title." Motion for Rehearing at 2. But as pointed out at the rehearing, the Division of Housing already makes grants and loans.[1] And the fact that the Fund would possibly get a return of funds by giving a loan, as opposed to a grant, would be beneficial to taxpayers. The fact that the state may make loans is not something that is necessary to include in the title language. *See In re Proposed Initiative Concerning "State Personnel System"*, 691 P.2d at 1124 (the Title Board is not required to describe every nuance and feature of a proposed measure). The title language accurately describes to voters what the Fund may use the moneys for. That language is fair, accurate, and complete and therefore should be upheld.

To a large degree, Golden's arguments turn on his erroneous interpretation of the measure. The Title Board, on the other hand, got it right. The title language is not misleading, vague, or confusing, and thus should be upheld. *See In re Proposed Initiated Constitutional Amendment Concerning Limited Gaming in the City of Antonito*, 873 P.2d at 739-40.

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[1] *See* Audio recording of Title Board Hearing 05-29-2008 part 1, beginning at ~1:45:45. The audio can be found at this link http://www.sos.state.co.us/pubs/info_center/archived_conference.htm.

V. CONCLUSION

The decision of the Title Board should be affirmed.

Respectfully submitted this 11th day of June, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of June 2008, a true and correct copy of the foregoing **Respondents' Opening Brief** was sent via email and hand-delivery to the following:

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