

SUPREME COURT, STATE OF COLORADO
Two East 14th Avenue
Denver, CO 80203

ORIGINAL PROCEEDING PURSUANT TO
§ 1-40-107(2), C.R.S. (2007)

IN THE MATTER OF THE TITLE, BALLOT TITLE
AND SUBMISSION CLAUSE FOR 2007-2008, #95
("Taxable Values and Taxes of Property")

Petitioner:

ROBERT M. MOODY, Objector,

v.

Respondents:

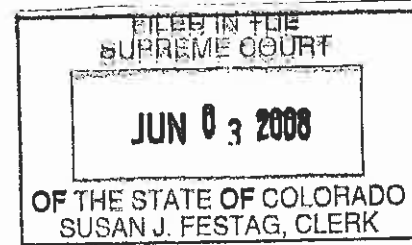
ERNEST L. DURAN, JR. and IRENE GOODELL,
Proponents,

and

Title Board:

WILLIAM A. HOBBS, SHARON EUBANKS, and
DANIEL DOMENICO.

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Case No. 08SA177

OPENING BRIEF OF PROPONENTS

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Ernest L. Duran, Jr., and Irene Goodell, the Proponents of Proposed Initiative 2007-2008 #95, submit this Opening Brief in response to the Petition for Review of Final Action of the Title Setting Board Concerning Proposed Initiative 2007-2008 #95, filed by the Petitioner, Robert M. Moody.¹

I. Introduction

Petitioner, as Objector, brought this original proceeding under C.R.S. § 1-40-107(2), to challenge the action of the ballot title setting board (“Title Board” or “Board”), which set the title, ballot title and submission clause (collectively “title”) for proposed ballot initiative 2007-2008 #95 (unofficially captioned by legislative staff as “Taxable Values and Taxes of Property”). Initiative #95 seeks to amend article X, section 3(1)(b), of the Colorado Constitution by increasing the valuation for assessment of all taxable property other than residential real property from 29 percent to 34 percent of its actual value.

Petitioner contends that the ballot title and submission clause is misleading because it states, erroneously according to Petitioner, that “residential property taxes cannot be impacted by the measure.” In addition, Petitioner contends that the

¹ The Petition to Review incorrectly lists Daniel Domenico as the third member of the Title Board for this initiative. The Title Board herein consisted of William Hobbs, Sharon Eubanks, and Jeffrey Blue.

ballot title and submission clause is misleading and vague because it uses overly technical terms and descriptions despite a simple and accurate alternative being presented at the rehearing before the Title Board. The Proponents respond that the title set by the Title Board accurately tracks the language and expresses the true meaning of the Initiative.

II. Facts and Procedural History

Initiative #95 (herein the “Taxable Values” initiative) proposes to amend article X, section 3, of the Colorado Constitution by increasing property taxes on non-residential property. It would add the following sentence to existing section 3(1)(b), replacing the corresponding sentence: “ALL TAXABLE PROPERTY OTHER THAN RESIDENTIAL REAL PROPERTY SHALL BE VALUED FOR ASSESSMENT AT THIRTY-FOUR (34) PERCENT OF ITS ACTUAL VALUE.” The second section of the Initiative would exempt “any additional revenues, appropriations, or expenditures attributable to the increase for valuation for assessment of non-residential property” from the limitations of article X, section 20, of the constitution or any other spending or revenue limitations. Finally, it provides that the increase would take effect in the first property tax year after the effective date of the amendment.²

² A copy of the Initiative as submitted to the Title Board is attached for reference as Appendix 1.

On May 7, 2008, the Title Board, without opposition, found that the Initiative contained a single subject and set the title. Petitioner, Robert Moody, filed a motion for rehearing, alleging that the title of the Initiative allegedly fails to conform with the required language of article X, section 20(3)(c), of the Colorado Constitution; that the title is misleading because the fiscal analysis prepared by the Office of State Planning and Budgeting makes erroneous assumptions as to the effective date of the measure and understates first year revenues; and that the title inaccurately states that residential property taxes will not be impacted. (Motion for Rehearing, attached to Petition for Review.) On May 21, 2008, the Title Board rejected the Petitioner's contentions and denied the motion for rehearing.³

III. Analysis and Argument

Petitioner does not challenge the Title Board's conclusion that Initiative #95 contains a single subject. Instead, he contends that the title is flawed. From Petitioner's description of the issues presented for review, he appears to have abandoned his contention that the fiscal analysis was erroneous. It is not clear whether he still contends that the title does not comport with the required language of article X, section 20(3)(c). (Petition for Review, at 2.) Therefore, the Proponents will address only the issues expressly presented for review.

³ A copy of the title, ballot title and submission clause is attached for reference as Appendix 2.

1. The title set by the Title Board clearly and accurately captures the purpose and provisions of the Initiative.

The Court employs a deferential standard in reviewing the title set by the Board:

While titles must be fair, clear, accurate, and complete, the Title Board is not required to set out every detail of an initiative. In addition, the Title Board may not speculate as to the measure's efficacy, or its practical or legal effects. We give great deference to the Title Board in the exercise of its drafting authority, and will reverse the Title Board's decision only if the titles are insufficient, unfair or misleading.

In the Matter of the Title, Ballot Title, and Submission Clause for 2007-2008 #62, 2008 Colo. LEXIS 455, at *19.

The Title Board set the ballot title and submission clause for the Taxable Values initiative as follows:

Shall local taxes be increased \$577.3 million annually in the statewide aggregate on non-residential property by an amendment to the Colorado constitution concerning an increase in the valuation for assessment of all taxable property other than residential real property from 29% to 34% of the property's actual value for property tax purposes, and, in connection therewith, exempting additional revenues, appropriations, or expenditures resulting from the increase in valuation for assessment from all constitutional or statutory revenue or spending limitations?

Petitioner contends that the title is misleading because it "erroneously states that residential property taxes cannot be impacted by the measure." The Taxable

Values initiative, however, is expressly an increase on **non-residential** property taxes. Its central feature is the revision to article X, section 3(1)(b): “All taxable property **other than residential real property** shall be valued for assessment at thirty-four (34) percent of its actual value.” (Emphasis added.) In its second section, the Initiative emphasizes this intent and purpose by providing that additional revenues, appropriations, or expenditures “attributable to the increase for valuation for assessment of non-residential property” shall be exempt from constitutional or statutory spending or revenue limitations.

Hence, the Title Board rightly rejected Petitioner’s claim that the title should address a speculative, arguable, or potential impact upon residential property taxes. Although this Court does not have the benefit of the Title Board’s discussion of this issue, suffice to say the discussion demonstrated that reasonable people—with more expertise in the niceties of property tax than the undersigned—could differ about whether residential taxes would be affected in any respect, or whether the current “freeze” on valuation for assessment of residential property caused by the complex interplay of article X, section 3, and article X, section 20, would be affected by the increase in the non-residential assessment rate proposed by Initiative #95.

The Court recently disposed of a similar contention that an initiative failed to inform voters of a purported effect of the initiative argued by the opponents:

[I]t is not our role to rephrase the language adopted by the Board to obtain the most precise and exact title. Rather, we will uphold the Board's choice of language if it "clearly and concisely reflects the central features of the initiative." Accordingly, **the Board is not required to provide explanations of the measure or discuss its every possible effect.** Therefore, we will reject the Board's language only if it is so inaccurate as to clearly mislead the electorate.

In the Matter of the Title, Ballot Title and Submission Clause 2007-2008 #61, 2008 Colo. LEXIS 454, at *14 – 15 (citations omitted) (emphasis added). *See also In re Title, Ballot Title & Submission Clause, & Summary for a Petition on School Finance*, 875 P.2d 207, 212 (Colo. 1994) ("The Board's duty is merely to summarize the central features, and not every feature, of the proposed initiative measure in drafting a title or ballot title and submission clause in a clear and concise manner.").

The Court rejected a similar contention about a proposed tax measure in a case decided shortly after the adoption of article X, section 20, and its notification requirements for tax measures:

Although Article X, Section 20 of the Colorado Constitution was not in effect when we decided *Tobacco Tax II*, **the subsequent adoption of Article X did not obligate the Board to disclose every ramification of a proposed tax measure.** We have recognized:

There is no requirement that every possible effect of a measure be included within the title or the ballot title and submission clause. **Certainly, therefore, effects of a measure which might be implied but would not occur, cannot be required to be included in the descriptions which are statutorily required to be brief.**

See, e.g., In re Initiative Concerning "Taxation III," 832 P.2d 937, 941 (Colo. 1992). Article X, Section 20 does not alter this principle.

In re Title, Ballot Title & Submission Clause, & Summary Pertaining to the Proposed Tobacco Tax Amendment 1994, 872 P.2d 689, 695 (Colo. 1994) (citation omitted) (emphasis added).

Here, the title tracks the precise language of Initiative #95 and accurately informs the electorate that the Initiative would increase the valuation for assessment on non-residential property from 29 percent to 34 percent:

Shall local taxes be increased \$577.3 million annually in the statewide aggregate on non-residential property by an amendment to the Colorado constitution concerning an increase in the valuation for assessment of all taxable property other than residential real property from 29% to 34% of the property's actual value for property tax purposes

If the Board had deleted the term “on non-residential property” from the second line of the title as suggested by the Objector, the title would then be truly misleading to voters, because it would imply that all property taxes, including residential taxes, would be increased by \$577.3 million—a result completely at odds with the provisions of the Initiative and prejudicial to the Proponents. The

title “must be a true and impartial statement of the intent of the proposed law and must not be an argument, nor likely to create prejudice either for or against the measure.” *In The Matter of the Title, Ballot Title, Submission Clause and Summary Pertaining to the Branch Banking Initiative Adopted on March 19, 1980*, 612 P.2d 96, 99 (Colo. 1980).

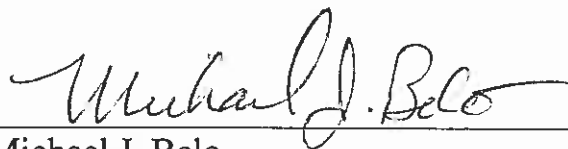
In summary, the title set by the Board correctly and fairly expresses the true intent and meaning of the proposed text of Initiative #95.

IV. Conclusion

The title set by the Board accurately expresses the subject and true meaning of Initiative #95. Therefore, the Proponents request the Court to affirm the action of the Title Board.

DATED this 3rd day of June, 2008.

BERENBAUM, WEINSHIENK & EASON, P.C.



Michael J. Belo
Eugene M. Sprague

Attorneys for Proponents

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2008, a true and correct copy of the foregoing document was served via hand delivery upon the Petitioner's attorneys at the following address:

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Proposed Initiative
Text #95
Final

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

Section 3(1)(b) of article X of the constitution of the state of Colorado is amended, and the said section 3 is further amended BY THE ADDITION OF THE FOLLOWING NEW SUBSECTIONS, to read:

Section 3. Uniform taxation – exemptions. (1)(b) Residential real property, which shall include all residential dwelling units and the land, as defined by law, on which such units are located, and mobile home parks, but shall not include hotels and motels, shall be valued for assessment at twenty-one percent of its actual value. For the property tax year commencing January 1, 1985, the general assembly shall determine the percentage of the aggregate statewide valuation for assessment which is attributable to residential real property. For each subsequent year, the general assembly shall again determine the percentage of the aggregate statewide valuation for assessment which is attributable to each class of taxable property, after adding in the increased valuation for assessment attributable to new construction and to increased volume of mineral and oil and gas production. For each year in which there is a change in the level of value used in determining actual value, the general assembly shall adjust the ratio of valuation for assessment for residential real property which is set forth in this paragraph (b) as is necessary to insure that the percentage of the aggregate statewide valuation for assessment which is attributable to residential real property shall remain the same as it was in the year immediately preceding the year in which such change occurs. Such adjusted ratio shall be the ratio of valuation for assessment for residential real property for those years for which such new level of value is used. In determining the adjustment to be made in the ratio of valuation for assessment for residential real property, the aggregate statewide valuation for assessment that is attributable to residential real property shall be calculated as if the full actual value of all owner-occupied primary residences that are partially exempt from taxation pursuant to section 3.5 of this article was subject to taxation. ~~All other taxable property shall be valued for assessment at twenty-nine percent of its actual value.~~ ALL TAXABLE PROPERTY OTHER THAN RESIDENTIAL REAL PROPERTY SHALL BE VALUED FOR ASSESSMENT AT THIRTY-FOUR (34) PERCENT OF ITS ACTUAL VALUE. However, the valuation for assessment for producing mines, as defined by law, and lands or leaseholds producing oil or gas, as defined by law, shall be a portion of the actual annual or actual average annual production therefrom, based upon the value of the unprocessed material, according to procedures prescribed by law for different types of minerals. Non-producing unpatented mining claims, which are possessory interests in real property by virtue of leases from the United States of America, shall be exempt from property taxation.

(3) ANY ADDITIONAL REVENUES, APPROPRIATIONS, OR EXPENDITURES ATTRIBUTABLE TO THE INCREASE IN THE VALUATION FOR ASSESSMENT OF NON-RESIDENTIAL PROPERTY FROM TWENTY-NINE TO THIRTY-FOUR PERCENT SHALL NOT BE SUBJECT TO THE LIMITATIONS OF SECTION 20 OF ARTICLE X OF THIS CONSTITUTION, OR ANY OTHER REVENUE OR SPENDING LIMITATION EXISTING IN CURRENT LAW OR SUBSEQUENTLY ENACTED BY THE GENERAL ASSEMBLY.

(4) THE INCREASE IN VALUATION FOR ASSESSMENT OF NON-RESIDENTIAL PROPERTY SPECIFIED IN SUBSECTION 1(B) SHALL TAKE EFFECT IN THE FIRST PROPERTY TAX YEAR AFTER THE EFFECTIVE DATE OF THIS AMENDMENT.

RESPONDENTS'
APPENDIX 1
Case 08SA177
Colo. Supreme Court

Ballot Title Setting Board

Proposed Initiative 2007-2008 #95¹

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

Local taxes shall be increased \$577.3 million annually in the statewide aggregate on non-residential property by an amendment to the Colorado constitution concerning an increase in the valuation for assessment of all taxable property other than residential real property from 29% to 34% of the property's actual value for property tax purposes, and, in connection therewith, exempting additional revenues, appropriations, or expenditures resulting from the increase in valuation for assessment from all constitutional or statutory revenue or spending limitations.

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

Shall local taxes be increased \$577.3 million annually in the statewide aggregate on non-residential property by an amendment to the Colorado constitution concerning an increase in the valuation for assessment of all taxable property other than residential real property from 29% to 34% of the property's actual value for property tax purposes, and, in connection therewith, exempting additional revenues, appropriations, or expenditures resulting from the increase in valuation for assessment from all constitutional or statutory revenue or spending limitations?

Hearing May 7, 2008:

Single subject approved; staff draft amended; titles set.

Hearing adjourned 4:17 p.m.

Hearing May 21, 2008:

Motion for Rehearing denied

Hearing adjourned 2:30 p.m.

¹ Unofficially captioned "Taxable Values and Taxes of Property" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.