

SUPREME COURT, STATE OF COLORADO

2 East 14th Avenue  
Denver, Colorado 80203

FILED IN THE  
SUPREME COURT

JUN - 3 2008

IN RE THE MATTER OF THE TITLE, BALLOT TITLE,  
AND SUBMISSION CLAUSE FOR 2007-2008 #95  
("TAXABLE VALUES AND TAX ON PROPERTY")

OF THE STATE OF COLORADO  
SUSAN J. FESTAG, CLERK

**Petitioner:**

Robert M. Moody, Objector

v.

**Respondents:**

Earnest Duran, Jr. and Irene Goodell, Proponents,

v.

**Title Board:**

William Hobbs, Sharon Eubanks, and Daniel Domenico

▲ COURT USE ONLY ▲

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Case Number: 08SA177

**PETITIONER'S OPENING BRIEF**

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Petitioner Robert Moody, a registered elector of the State of Colorado, through his undersigned counsel, hereby submits his Opening Brief in this original proceeding challenging the title, ballot title and submission clause set by the Title Board for Proposed Initiative 2007-2008 #95 (“Taxable Values and Tax on Property”).

### **ISSUES PRESENTED FOR REVIEW**

- I. Is the title misleading because it erroneously states that residential property taxes will not be affected by the measure?
- II. Is the title misleading and vague because it uses overly technical terms and descriptions of property tax formulae?

### **STATEMENT OF THE CASE**

Proposed Initiative #95 was heard by the Title Board on May 7, 2008, at which the Board found that the measure contained only one subject and set a title. A copy of the title, ballot title and submission clause, and the measure are attached hereto. Petitioner subsequently filed a timely Motion for Rehearing challenging only the title as set by the Title Board. That motion was heard on May 21, 2008, after which the Title Board amended the title and otherwise denied the motion. Petitioner subsequently filed a timely petition for review in this court on May 28, 2008.

### **SUMMARY OF THE ARGUMENT**

Proposed Initiative #95 seeks to amend article 3(1)(b) of section 10 of the Colorado Constitution (the “Gallagher Amendment”) by raising the rate at which

nonresidential property is valued for purposes of assessing local property taxes from 29% to 34% - a 17% increase in both the rate itself and, ultimately, the taxes paid by the property owners. While short in length, understanding the measure requires an understanding of complex property taxation formulae and the interrelationship between the Gallagher Amendment and the Taxpayers' Bill of Rights ("TABOR", section 20 of article X).

Rather than setting a title that would explain the impact of the measure in simple terms, however, the Title Board drafted a title that simply parrots the technical language used in the measure. In doing so, the Board made two fundamental errors warranting reversal and revision to the title.

First, the single subject statement implies that only nonresidential property will be affected by the measure. While it is true that the proposed amendment changes the assessment rate on nonresidential property provide by the Gallagher Amendment, the change will have a dramatic impact on residential taxation.

Second, the title uses unnecessarily complex and technical language regarding the proposed change, despite the fact that much simpler language was proposed during the rehearing. In rejecting that suggestion and relying upon language that the violates the requirement of a clear and concise title, the Board committed reversible error.

### **STANDARD OF REVIEW**

The constitution requires that ballot titles clearly and accurately express the true intent and meaning of a proposed ballot initiative. COLO. CONST. art. V, § 1(5.5); §1-40-106; *In re Proposed Initiative on Education Tax Refund*, 823 P.2d 1353 (Colo. 1991). The Board's

duty is “to capture, in short form, the proposal in plain, understandable, accurate language enabling informed voter choice.” *In re Proposed Initiative for 1999-2000 No. 29*, 972 P.2d 257, 266 (Colo. 1999).

When drafting a title, the Title Board often defers to the actual language of the underlying measure if unsure how to describe the true purpose or effect of a measure. The Title Board may not, however, simply parrot the language of a measure if doing so would include unnecessarily complex legalese or economic jargon that would leave voters confused or ill-informed as to what exactly the measure does. § 1-40-106(3)(b) (Title Board must “consider the public confusion that might be caused by misleading titles.”); *In re Proposed Initiative on "Obscenity"*, 877 P.2d 848 (Colo. 1994). Adherence to the actual text of the measure is simply no vice when doing so fails to explain significant ramifications of the measure or impacts that the average voter supporting the measure would be surprised to learn about after the fact. *Id.* Thus, this court has historically rejected ballot titles that in repeating a measure’s text fail to apprise voters of the measure's true import. *See, e.g., In re Title, Ballot Title and Submission Clause and Summary Clause for 1999-2000 No. 104*, 987 P.2d 249, 259 (Colo. 1999). These principles ring particularly true when, despite complex legal or economic language in the measure, a more accurate and precise description of the measure can be had using language more easily understood by the average voter.

Nor is the Title Board required to include every possible effect within the title or to speculate on the future effects the initiative may have if adopted. *In re Ballot Title 1999-2000 No. 256*, 12 P.3d 246, 255 (Colo. 2000); *In re Title Pertaining to Sale of Table Wine in Grocery Stores*, 646 P.2d 916 (Colo. 1982). Likewise, a ballot title may not predict or give

the impression that certain outcomes will *not* occur if such outcome is in doubt or simply inaccurate, even if such negative inferences are suggested by the language of the measure itself.

## ARGUMENT

### **I. The single subject clause of the title is misleading because it implies that residential property taxes will not be impacted.**

The single subject clause of the title states:

Local taxes shall be increased \$577.3 million annually in the statewide aggregate on **non-residential** property by an amendment to the Colorado constitution...

The Title Board drafted this language to mirror the actual text of the measure, which now reads: “All taxable property other than residential real property shall be valued for assessment at thirty-four (34) percent of its actual value.” The existing language simply uses a 29% figure rather than 34%.

Use of the term “non-residential” in the single subject clause, however, is misleading because it creates the perception that the measure will not impact residential property taxes. In reality, the measure will have a dramatic impact on residential property taxes. To understand why, an explanation of the Gallagher Amendment and its interrelation to the TABOR Amendment is necessary.

Enacted in 1982, the Gallagher Amendment divides the state’s total property tax burden between residential and nonresidential property, such that 45% of the total assessed value must come from residential property while 55% must come from nonresidential property. *See* Colo. Const. art. X § 3(b). In addition, the Gallagher Amendment mandates

that the assessment rate (the percentage of the property's value subject to taxation) for nonresidential property be fixed at 29%, while the residential assessment rate is allowed to float in order to maintain the required 55/45 ratio. *See* COLO. CONST. art. X, § 3(1)(b); § 39-1-104.2(5), C.R.S. Using these requirements, property taxes in Colorado are calculated according to the following formula:

$$\text{Property tax} = (\text{assessed value}) \times (\text{assessment rate}) \times (\text{mill levy})$$

Under this formula, a given nonresidential property with an assessed value of \$1,000,000 and a local mill levy of 90 mills will be assessed \$26,100 ( $\$1,000,000 \times .29 \times .90$ ). Yet because residential property values have risen steadily since the enactment of the Gallagher Amendment in 1982, the 55/45 requirement has caused the residential assessment rate to drop dramatically from approximately 21% in 1982 to 7.96% today.

As a result of decreasing residential property values, however, the residential assessment rate (calculated in odd-numbered years by the Colorado Division of Property Taxation and enacted by the legislature), should have been adjusted upwards in 2006 to 8.17% for the 2007-2008 period.<sup>1</sup> The rate was held constant at 7.96%, however, due to the voter-approval requirement for any tax rate increases found in article X, section 20, of the constitution (the TABOR Amendment).<sup>2</sup> Thus, while the Gallagher Amendment drove down the residential assessment rate for the 21 years since its enactment, when it came time

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<sup>1</sup> *See 2006 Annual Report*, Colorado Division of Property Taxation, at 9-10, available at: [http://www.dola.state.co.us/dpt/publications/docs/2006\\_annual%20report/SECII.pdf](http://www.dola.state.co.us/dpt/publications/docs/2006_annual%20report/SECII.pdf)

<sup>2</sup> *Id.*



increase the residential rate in order to maintain the 55/45 balance, TABOR was interpreted as superseding Gallagher and requiring a public vote before such an adjustment could be made. As a result, the residential assessment rate is now "frozen" as a ceiling at 7.96%.

It necessarily follows from this analysis that as the assessed value on nonresidential property increases, the TABOR-induced cap on the residential assessment rate will exacerbate the disparity between what Gallagher requires (the 55/45 ratio) and what TABOR allows (no tax rate increases without a vote). As a result, a true 55/45 balance will not exist again until either there is a public vote to increase the residential assessment rate or the assessed value of nonresidential property drops to a point at which the residential rate can again float downward (ie: below the current 7.96%).

It therefore also follows that any increase in the nonresidential assessment rate – such as that proposed by Initiative #95 - will further exacerbate this disparity. That is, because an increase in the nonresidential assessment rate will increase the total property tax collection on nonresidential property, the percentage of the total property tax revenue deriving from nonresidential property will also increase, thereby prolonging the time until residential rates can again float downward below their current rate of 7.96%.

In short, changes to the nonresidential assessment rate have a direct impact on residential taxation because any increase in the nonresidential assessment rate will necessarily freeze the residential rate and its current level for longer period of time than it would otherwise. Thus, because residential property owners will pay higher taxes under this measure than they otherwise would, the description of Initiative #95 as affecting only “non-residential” property is not only impermissibly predictive, it is simply inaccurate.

Accordingly, the term “non-residential property” should be stricken from the single subject clause of the title or replaced with language such as “certain real property.”

**II. The title is misleading because it implies that commercial property taxes will only be raised five percent, when the actual increase is over seventeen percent.**

The ballot title set for Initiative #95 states in relevant part:

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 . . . ?** [emphasis added]

While the emphasized language obviously tracks the language of the measure itself, use of phrases such as “valuation for assessment” and “29% to 34% of the property’s actual value for property tax purposes” will leave the average voter bewildered as to what the measure actually does. Unfortunately, the average voters simply has no idea how their taxes are calculated, what a “valuation for assessment” is, what an assessment rate is, or how a five percent increase in the assessment rate will actually impact them. And while the Title Board’s use of this language might be unavoidable if no clearer or more concise alternative exist, the reality is that the Board was in fact presented with an alternative. During consideration of Petitioner’s Motion for Rehearing, Petitioner proposed amending the emphasized language above to read:

Shall local taxes be increased \$577.3 million annually in the statewide aggregate on property by an amendment to the Colorado constitution **increasing the tax rate on nonresidential real property by 17.24%.**

The 17.24% figure is the increase in the assessment rate from 29% to 34%. Using this language accomplishes several things. First, it avoids the use of tax jargon such as

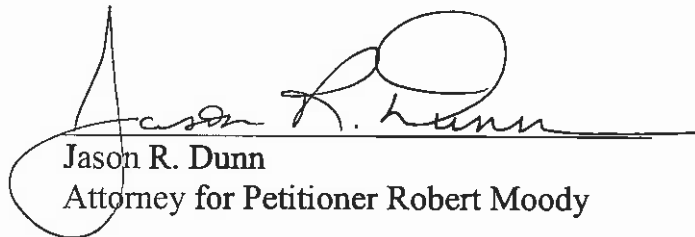
“valuation for assessment.” Second, it avoids the misperception that property taxes would increase by only five percent. Third, it simply makes the title shorter, more clear and concise, and thus one that the average voter can comprehend. Accordingly, the court should amend the title to reflect this change.

### CONCLUSION

Petitioners respectfully ask this court to reverse the final decision of the Title Board in setting title for Proposed Initiative #95 and to amend the title as requested herein.

Respectfully submitted this 3<sup>rd</sup> day of June, 2008.

BROWNSTEIN HYATT FARBER SCHRECK LLP



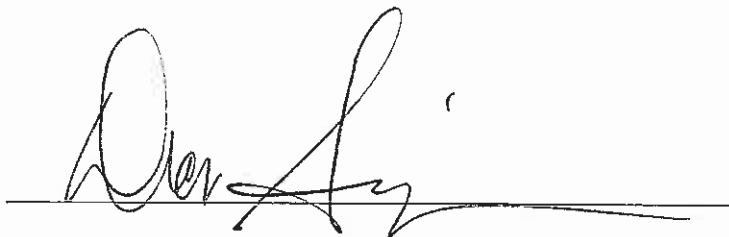
Jason R. Dunn  
Attorney for Petitioner Robert Moody

**CERTIFICATE OF SERVICE**

I hereby certify that on June 3, 2008, a true and correct copy of this PETITIONER'S  
OPENING BRIEF was delivered via hand delivery to:

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A handwritten signature in black ink, appearing to read "Maurice Knaizer", is written over a horizontal line. The signature is stylized and cursive.

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Ballot Title Setting Board

Proposed Initiative 2007-2008 #95<sup>1</sup>

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.*

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<sup>1</sup> 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.

*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.