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SUPREME COURT, STATE OF COLORADO
2 East 14th Ave.
Denver, Colorado 80203

ORIGINAL PROCEEDING PURSUANT TO §1-40-107(2), C.R.S. (2006) #126
Appeal from the Ballot Title Setting Board

Petitioners:
Stephen Durham, Petitioner,

v.

Respondents:

Timothy J. Brown and Matthew Garrington, Proponents,

and

Title Board:
WILLIAM A. HOBBS, JASON DUNN, and DAN CARTIN

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SUSAN J. FESTAG, CLERK

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Case Number: 06SA169

OPENING BRIEF OF PETITIONERS

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B. Is the ballot title and submission clause inaccurate, misleading, and incomplete because it fails to inform voters that the initiative creates a new property right that gives landowners the ability to enforce land use ordinances that apply to surrounding properties?

C. Is the ballot title and submission clause inaccurate, misleading, and incomplete because it fails to sufficiently inform voters that various exceptions are so broad and expansive that property owners will never receive compensation for land use regulations that diminish the value of their real property by twenty percent or more?

D. Does the ballot title and submission clause cause confusion among voters because it is misleadingly similar to the ballot title and submission clause in Proposed Initiative 2005-2006 #86?

II. STATEMENT OF THE CASE

Petitioner Steve Durham ("Durham") challenges the Title Board's actions with respect to the setting of the title, ballot title, and submission clause for Proposed Initiative 2005-2006 #126 ("Proposal 126").

The Title Board conducted its initial public meeting and set the title and submission clause for Proposed Initiative 2005-2006 #126 on May 17, 2006. On May 24, 2006, Durham filed a *Motion for Rehearing* under C.R.S. § 1-40-107(1), and the Title Board considered the *Motion for Rehearing* at its next meeting on May 25, 2006. The Board granted in part and denied in part the Motion. Durham now seeks review of the Title Board's decision under C.R.S. § 1-40-107(2).

III. SUMMARY OF ARGUMENT

The proposed initiative contains a second subject by creating a new right for neighboring property owners. It allows surrounding property owners a new right to enforce governmental regulations – a right that Colorado has rejected in the past, and a right directly at odds with the proposal's central purpose.

In addition, the ballot title and submission clause fail to inform voters about the breadth of the new private right to enforce land use regulations. Although the ballot title indicates that the new right is only triggered when a landowner seeks compensation or exemption from a governmental entity, in fact the new right of surrounding property owners operates independently from a landowner's efforts to receive compensation. At a minimum, the title should inform voters of the breadth of this new right.

Next, the ballot title and submission clause fail to inform voters of the initiative's true intent. In addition to the new right granted to surrounding property owners, the proposal contains very broad exceptions that make it impossible for

landowners to receive compensation or exemptions from land use regulations under the initiative. This court should apply its earlier precedent and require the ballot title and submission clause to reflect the true nature of the initiative.

Finally, the proposal's ballot title and submission clause are confusingly similar to an earlier ballot title and submission clause already approved by the Title Board. Indeed, the two ballot titles and submission clauses contain almost identical single subject phrases, and the current title and submission clause primarly differ by the addition of three implementing measures at the end. The identical language creates confusion among voters attempting to determine which initiative is represented by which title and submission clause.

In his *Petition for Review of Final Action of Ballot Title Setting Board Concerning Proposed Initiative 2005-2006 #126 ("Compensation for Land Use Regs that Diminish Value")*, Durham listed an additional three arguments. Durham withdraws those arguments in light of this Court's decision in *In the Matter of the Title, Ballot Title, Submission Clause and Summary for 2005-2006, #86*, No. 06SA113 (Colo. June 8, 2006).

IV. ARGUMENT

A. The proposed initiative contains a second subject by creating a new right for neighboring property owners.

No initiative may contain "more than one subject, which shall be clearly expressed in its title."[1] On three occasions this Court has recently reviewed the single subject standards that apply to all voter-initiated measures.[2] Under these standards, an initiative may not:

- Address disconnected and incongruous measures
- Result in fraud and surprise; and
- Contain surreptitious provisions coiled up on the folds of a complex measure.[3]

Beyond these standards, the Court has promulgated four additional principles:

- An initiative may not relate to more than one subject;
- An initiative may not have two distinct and separate purposes that are not dependent upon or connected with each other
- An initiative may not hide purposes unrelated to its central theme; and

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[1] Colo. Const. art. V, § 1(5.5).

[2] *In re Title, Ballot Title and Submission Clause, and Summary for 2005-2006 #73*, No. 06SA42, slip op. at 3 (Colo. May 22, 2006); *In re Title, Ballot Title and Submission Clause, and Summary for 2005-2006 #74*, No. 06SA41, slip op. at 3 (Colo. May 30, 2006); *In re Title, Ballot Title and Submission Clause, and Summary for 2005-2006 #55*, No. 06SA20, slip op. at 3 (Colo. June 30, 2006).

[3] *In re #55*, 06SA20 at 9.

- An initiative may not group distinct purposes under a broad theme.[4]

As expressed in the ballot title, Proposal 26 has a single purpose "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"[5] Functionally, Proposal 126 is modeled after Proposed Initiative 2005-2006 #86 ("Proposal 86 ")(**Exhibit A**), which provides property owners compensation for the diminishment of value due to land use regulations. Unlike Proposal 86, however, Proposal 126 contains a surprising and unusual purpose hidden in one of its exceptions. Specifically, it states that landowners may not receive compensation if exempting the landowner from the land use regulation would "decrease the fair market value of any portion of surrounding real properties."[6]

This provision violates the single subject standards because it creates a new property right that allows property owners to prevent government entities from exempting neighboring landowners from land use regulations. Accordingly, Proposal 126 suffers several single subject problems.

First, the exception concerning impact on surrounding properties contains a new and surprising change in the law. Currently, property owners in Colorado do

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[4] *Id.* at 9-11.

[5] Ballot Title and Submission Clause, Proposed Initiative 2005-2006, #126.

[6] Proposed Colo. Const. art. II, § 15(2)(b)(I).

not have a property interest in the enforcement of land use regulations affecting neighboring property.[7] Under this proposed initiative, for the first time Colorado law would enable neighboring landowners to bring due process claims against, and private enforcement of, land use regulations, in part overturning this Court's decision in *Hillside Community Church v. Olson*.

Second, the exception operates independently of a landowner's efforts to receive compensation or an exemption from land use regulations. Although phrased as an exception to a general rule, in fact this exception prohibits landowners from receiving any exemption from land use regulations if (1) the land use regulation reduces property value by 20% or more, and (2) an exemption from the land use regulation would in any manner decrease the fair market value of surrounding properties. Although the initiative centrally focuses on the right of a landowner to receive compensation, in fact a surrounding property owner may enforce a different right, regardless of whether the first landowner seeks an exemption. In short, the exception is unconnected to a landowner's efforts to obtain compensation.

Accordingly, a surrounding property owner may exercise the new right, even if a landowner and government agree upon an exemption (or partial exemption) from a land use regulation for reasons unrelated to a diminution in value. For example, a landowner may own two parcels of property and agree to

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[7] *Hillside Cmty. Church v. Olson*, 58 P.3d 1021 (Colo. 2002).

deed one parcel to a governmental entity in exchange for certain land use exemptions on the second parcel. Or a landowner may receive a zoning exemption due to unusual hardship. Or a governmental entity may agree to exempt a landowner from regulation as part of a court settlement. But in all of these examples, the "surrounding" landowners could block those exemptions if the exemptions result in ***any*** decrease in the surrounding landowners' property.

One cannot argue that this new provision is an enforcement mechanism. It is, in fact, the opposite. Rather than being a mechanism that allows landowners to recover from governmental entities, it instead restricts a landowner (and a governmental entity) from implementing the measure.

Finally, the new provision is designed to create fraud and surprise. Upon reading the measure, voters expect the measure to protect from governmental regulations. But this initiative in fact accomplishes the opposite. Rather than reducing the ability of a government to diminish land use values, the initiative instead grants "surrounding property owners" an additional, independent basis to enforce land use regulations. Likewise, the initiative gives property owners a veto that reduces governmental flexibility and cooperation with landowners. A neighbor merely need to show that he seeks to enforce a land use regulation that reaches a 20% threshold.

B. The ballot title and submission clause fail to inform voters about the breadth of the new private right to enforce land use regulations.

In setting a title, the Title Board "shall consider the public confusion that might be caused by misleading titles," and the title "shall correctly and fairly express the true intent and meaning thereof. Ballot titles must enable voters to answer "yes" or "no."[8] Accordingly, the ballot titles must enable the electorate to "determine intelligently whether to support or oppose such a proposal."[9]

As currently fashioned, the initiative does not allow an intelligent decision. As noted above, the new right given to surrounding property owners is a major departure from current law in Colorado. Under the initiative's plain language, a surrounding property owner may prevent every effort by a governmental entity efforts to exempt a landowner from land use regulations that diminish the landowner's property value by 20% or more. Indeed, the proposal specifically identifies a surrounding owner's property right (a decrease in value) and prevents a regulatory exemption in that instance.

But the title and submission clause fail to state the breadth and scope of this new right. Instead, they state that the exemption resulting from landowner application under the initiative may occur "unless said exemption results in a decrease in fair market value of any portion of surrounding real properties." But this phrase does not indicate the breadth of the exception. It implies that the

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[8] Colo. Rev. Stat. § 1-40-106(3)(b).

[9] *In re Title, Ballot Title and Submission Clause Adopted April 4, 1990, Pertaining to the Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo. 1990).

neighboring property right only occurs if a landowner seeks compensation. But as noted above, the new right may be exercised if the landowner seeks an exemption for purposes unrelated to the diminution in value (such as a hardship zoning variance or form of land swap). Accordingly, the phrase remains inaccurate and misleading. At a minimum, the title and submission clause should inform voters of the breadth of their neighbors' new rights under Colorado law.

C. The ballot title and submission clause fail to inform voters of the initiative's true intent.

Proposal 126 is modeled after Proposal 86. Indeed, except for several exemptions and some minor grammatical changes, the two initiatives are nearly identical. A copy of Proposal 86 is contained in **Exhibit A**, which is reproduced from the *Petition for Review of Final Action of Ballot Title Setting Board Concerning Proposed Initiative 2005-2006 #86 ("Taking Property for Public Use - Compensation, How Ascertained")* filed with this Court in *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 2005-2006, #86*, No. 06SA113 (Colo. June 8, 2006). For the Court's convenience, a "red line" comparison of the two initiatives is contained in **Exhibit B**. Proposal 126 mimics Proposal 86 throughout, and in many areas it is a word-for-word replica. Indeed, the striking similarities show that the proponents of Proposal 126 purposely modeled their initiative after Proposal 86.

But Proposal 126 contains provisions ensuring that it will affect property owners exactly opposite from Proposal 86. In fact, Proposal 126 contains several "exceptions" that make it impossible to for landowners to ever receive compensation for land use regulations that diminish property values, thus achieving an effect directly opposite of the initiative's intended purpose.

The initiative contains three "exemptions" that nullify the effect of the measure, as follows:

> (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.[10]

Collectively, these three exceptions prohibit any private owner from ever receiving compensation. First, the proposed initiative grants an expansive new right to surrounding property owners (as noted above). In addition, however, the

[10] Proposed Colo. Const. art. II, § 15(2)(b) (emphasis added).

surrounding property owner may show an injury for ***any*** reduction in value – even as little as one dollar. It is highly likely that at least one "surrounding" property owner may claim that fair market value has decreased, for nearly any reason, such as a reduced view shed, or slight increase in noise or traffic.

Second, an exception applies if exemption from the land use regulation merely threatens "commonly held community values." This represents an exceedingly low threshold, because one need not show harm – merely a threat. And according to the plain language of the statute, the threat need not be great. In fact, it may be a minimal threat. Furthermore, the land use regulation can threaten "commonly held" values. Again, there is no threshold, and nearly any value that affects more than one person qualifies as "commonly held." Finally, land use regulations ***always*** embody "commonly held community values."[11] Indeed, many courts have held that the opinions of individual zoning board members reflect commonly held community values.[12]

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[11] *See, e.g.*, 101A C.J.S. *Zoning & Land Planning* § 3 (2006) ("The purpose of zoning is to limit, restrict, and regulate the use of land in the interest of the public welfare, to stabilize the use, and conserve the value, of property, and to preserve the character of neighborhoods; the aim of planning is to secure the uniform and harmonious growth of localities.")

[12] *See, e.g., State v. Champoux*, 566 N.W.2d 763, 765 (Neb. 1997) (zoning board members reflect community values); *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 25 (Wis. 1993) (zoning board members reflect community values) (unpublished decision); *Tri-County Concerned Citizens, Inc. v. Bd. of County Com'rs of Harper County*, 95 P.3d 1012, 1019 (Kan. Ct. App. 2004); (opinion on land use board reflects community values and preferences); *First United Methodist Church of Seattle v. v. Hearing Exam'r for Seattle Landmarks Pres. Bd.*, 916 P.2d 374, 379

Finally, the third exception again discusses an exemption that creates a "threat"without a showing of harm. And in this instance, the threats apply to the "natural or built environment." By way of example, however, the initiative defines "natural or built environment" to effectively include anything physically near a piece of property or related to a piece of property in any manner. Because the "natural or built environment" is defined so broadly, is will always be possible to demonstrate some threat, thus preventing an exemption for land use regulations that diminish a property's value.

This Court should recognize that Proposal 126 is effectively a sham measure that accomplishes the opposite of its stated purpose. In *In re Title, Ballot Title and Submission Clause For Proposed Initiatives 2001-2002 No. 21 and No. 22 ("English Language Education")* this Court recognized that it should properly evaluate how a proposed measure will be implemented, in order to determine whether the title reflects the intent of the measure.[13] In that case, the Court voiced its concern that the title did not properly explain the parental waiver process, and thus the title tended to "overwhelm and obscure the inevitable outcome of the waiver process when all of the provisions are properly taken into account." This

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n. 3 (Wash. 1996) (landmark regulations represent community values balanced against First Amendment concerns).

[13] *In re Title, Ballot Title and Submission Clause For Proposed Initiatives 2001-2002 #21 and #22 ("English Language Education")*, 44 P.3d 213, 221 (Colo. 2002).

Court should apply the same principal to this matter, recognizing that the title and ballot submission clause must fairly apprise voters of the initiative's operation.

In this particular case, the ballot title and submission clause in no way indicate the difficulty – indeed the near impossibility – of obtaining relief from land use regulations that diminish property values. Titles must reflect the true intent of the proponents.[14] Here the intent is to make it impossible for landowners to obtain compensation from land use regulations. Not only are the exceptions daunting, and not only does the initiative allow surrounding landowners the ability to enforce land use regulations, but the proposed measure even creates additional hurdles, such requiring landowners to prove their case by "clear and convincing" evidence[15] and requiring all exceptions to be interpreted to "protect the public health, safety, morals, or general welfare."[16]

Based upon the title approved by the Title Board, the general understanding for a "yes" vote would be that the initiative reduces the ability of governmental entities to enact regulations. But no such thing occurs. The initiative creates impossible barriers for landowners, and it then erects additional procedural hurdles, such as a new, heavier burden of proof for landowners. Voters will be

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[14] *In re Title, Ballot Title, Submission Clause, and Summary by the Title Bd. Pertaining to a Proposed Initiative on "Obscenity"*, 877 P.2d 848, 849 (Colo. 1994).

[15] Proposed Colo. Const. art. II, § 15(2)(c)(V).

[16] Proposed Colo. Const. art. II, § 15(2)(c)(VI).

astonished to learn that the initiative does the exact opposite of its single-subject. Although an initiative may certainly contain numerous "poison pills" that alter the effect of the measure, the ballot title and submission clause should reflect those features.

D. The new ballot title is confusingly similar to the ballot title and submission clause for Proposed Initiative 2005-2006 #86.

As noted above, Proposal 126 is modeled after Proposal 86. Likewise, the title and submission clauses are strikingly identical. Below is the approved ballot title and submission clause for Proposal 86, reproduced from the *Petition for Review of Final Action of Ballot Title Setting Board Concerning Proposed Initiative 2005-2006 #86 ("Taking Property for Public Use - Compensation, How Ascertained")* filed with this Court in *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 2005-2006, #86*, No. 06SA113 (Colo. June 8, 2006).

> 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 provide compensation to an owner or exempt the owner from the land use regulations if a public entity enacts or enforces land use regulations that reduce the value of any portion of the property by twenty percent or more.

And below is the ballot title and submission clause for Proposal 126.

> 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 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 twenty 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.

Except for the ambiguous phrase "in limited circumstances" the expressed single subjects are identical. The single subject for Proposal 86 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

And the single subject for Proposal 126 is:

> 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 except for additional minor grammatical changes, the titles are identical but for a concluding summary of the three "exceptions" in Proposal 126. In other words, the single subject provisions are nearly identical, as are the first three quarters of the entire ballot titles. Indeed, the only meaningful differences are tacked at the end of Proposal 126, but these are insufficient to explain the fundamental differences between the initiatives. Accordingly, voters will be confronted with two submission clauses that are nearly identical.

Unlike readers of this brief, on election day voters will be confronted with multiple candidates and multiple ballot initiatives. They will be voting in a public place, often with people waiting in line behind them. And although many voters seek to inform themselves about the substance of initiatives before voting, because these two ballot titles are so similar voters must very carefully examine the differing language to understand which ballot title contains which implementation details.

Durham submits that at upon initial review, it is extremely difficult for readers to immediately determine the differences between the two ballot titles and submission clauses. Accordingly, below is a "red line" comparison of the final ballot title for proposed initiative #126 (showing modifications made to final ballot title for proposed initiative #86) for the Court's convenience:

> 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 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 ~~provide compensation to~~ compensate an owner or exempt the owner from the land use regulations if a public entity enacts ~~or enforces~~ land use regulations that reduce the value of any portion of the property by twenty 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.

Unfortunately, voters do not have the luxury of a red line version or even a side-by-side comparison of the two ballot titles and submission clauses. Although this "red line" comparison makes the differences clear for this Court, voters do not receive such clarity. Accordingly, the two similar ballot titles create confusion.

Finally, it is respectfully submitted that the proponents of Proposal 126 modeled their initiative after Proposal 86, specifically to cause confusion. This Court should require the Title Board to set a ballot title and submission clause in Proposal 126 that differs substantially from the ballot title and submission clause in Proposal 86. If the current title and submission clause stand, future opponents of initiatives will follow a clear-cut formula to defeat targeted initiatives through voter confusion. The steps are straightforward:

1. Identify the target proposal and copy it exactly.
2. Bury one or more exceptions in the new proposal. The exceptions should nullify the initiative's effectiveness.
3. Argue before the Title Board and argue that the new title and submission clause should have only a few variations compared to the targeted title and submission clause. Indeed, this will be a strong argument because the Title Board has already approved title language, and the exceptions only appear to be minor implementation measures. The argument will be irrefutable if this Court upholds the current ballot title.

In short, if this Court does not prohibit this tactic now, it will be used in the future.

As the initiative process proliferates, both this Court and the Title Board must adjust their decision making to counter new efforts to confuse and surprise voters. When proponents slyly advance initiatives that closely resemble other initiatives, but have radically different effects, voters face a substantial challenge in sorting through differences hidden as exemptions or implementing details. It requires voters to compare two initiatives, thoroughly understand differing details, and exercise incredible care so as avoid mix-ups at the ballot box. This Court should not allow proponents or the Title Board to place such burdens on voters' ability to readily understand and vote for initiatives.

V. CONCLUSION

Durham requests that this Court declare that the initiative violates the constitutional provision against single subjects. If necessary, Durham requests that the title and submission clause be returned to the Title Board for revisions.

Respectfully submitted this 19th day of June, 2006.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of June, 2006, a true and correct copy of the foregoing **OPENING BRIEF OF PETITIONERS** was hand delivered to the following:

Mark Detsky
Bernard, Lyons, Gaddis & Kahn, P.C.
515 Kimbark Street, 2nd Floor
Longmont, Colorado 80502

Office of the Attorney General
Maurice Knaizer
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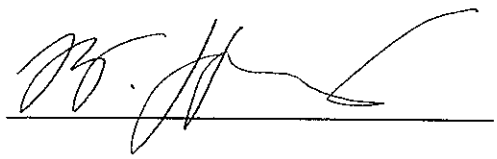

STATE OF COLORADO

DEPARTMENT OF
STATE

CERTIFICATE

I, **GINETTE DENNIS,** Secretary of State of the State of Colorado, do hereby certify that:

the attached are true and exact copies of the text, motion for rehearing, titles, and the rulings thereon of the Title Board on Proposed Initiative "2005-2006 #86"...

IN TESTIMONY WHEREOF I have unto set my hand and affixed the Great Seal of the State of Colorado, at the City of Denver this 6th day of April, 2006.

Ginette Dennis

SECRETARY OF STATE

EXHIBIT
A

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FEB 28 2006
ELECTIONS / LICENSING
SECRETARY OF STATE

Final revised measure

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.

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

(I) IS ENACTED:

(A) PRIOR TO 1970; OR

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

(II) IS NECESSARY TO:

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

(B) PROTECT THE PUBLIC HEALTH AND SAFETY; OR

(C) COMPLY WITH FEDERAL LAW.

(b) 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, WHICH ENFORCEMENT SHALL 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 USES OF THE AFFECTED PROPERTY THAT ARE APPROVED BY THE PUBLIC ENTITY. THE PUBLIC ENTITY MAY NOT ACT INCONSISTENTLY WITH THE STATEMENT SUBMITTED TO THE OWNER.

(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'S CLAIM 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 A PREPONDERANCE OF THE EVIDENCE. THE OWNER MAY SUBMIT EVIDENCE IN ADDITION TO EVIDENCE PRESENTED TO A PUBLIC ENTITY OR ADMINISTRATIVE BODY.

(VI) ALL EXCEPTIONS IN SUBSECTION (2)(a)(II) SHALL BE NARROWLY CONSTRUED AND SHALL BE PROVEN BY THE PUBLIC ENTITY BY CLEAR AND

CONVINCING EVIDENCE. A PUBLIC ENTITY'S DETERMINATION SHALL BE INSUFFICIENT TO ESTABLISH AN EXCEPTION CONTAINED IN SUBSECTION (2)(a)(II), AND A DISTRICT COURT'S APPLICATION OF AN EXCEPTION CONTAINED IN SUBSECTION (2)(a)(II) SHALL BE SUBJECT TO *DE NOVO* REVIEW UPON APPEAL.

(VII) THE OWNER SHALL BE ENTITLED TO REASONABLE COSTS AND ATTORNEY FEES INCURRED IN:

(A) OBTAINING INJUNCTIVE RELIEF OR JUST COMPENSATION; OR

(B) SEEKING INJUNCTIVE RELIEF OR JUST COMPENSATION IF THE PUBLIC ENTITY PROVIDES RELIEF WITHOUT FINAL COURT ACTION.

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

(I) "FAMILY MEMBER" SHALL INCLUDE:

(A) ANY DESCENDANT OR ANCESTOR, BY BIRTH, ADOPTION OR MARRIAGE, OF AN OWNER;

(B) AN UNCLE, AUNT, NIECE OR NEPHEW;

(C) AN ESTATE OR TRUST ESTABLISHED BY OR IN THE NAME OF ANY OF THE FOREGOING; OR

(D) A LEGAL ENTITY OWNED BY THE OWNER, ANY OF THE FOREGOING FAMILY MEMBERS, OR A COMBINATION OF THE OWNER OR ANY OF THE FOREGOING FAMILY MEMBERS.

(II) "JUST COMPENSATION" SHALL BE THE DIMINUTION IN FAIR MARKET VALUE CAUSED BY ANY LAND USE REGULATION OR COMBINATION OF LAND USE REGULATIONS.

(III) "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.

(IV) "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.

(V) "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.

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

FINAL PROPOSED INITIATIVE #126,
SHOWING MODIFICATIONS MADE TO INITIATIVE #86

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~~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) ~~IS ENACTED~~ ENACTED:

(A) PRIOR TO 1970; OR

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

(II) ~~IS N~~NECESSARY TO:

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

(B) PROTECT THE PUBLIC HEALTH ~~AND~~, 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:

EXHIBIT
B

(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.

(~~b~~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, ~~WHICH ENFORCEMENT SHALL~~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 ~~THAT ARE APPROVED~~

~~BY THE PUBLIC ENTITY. THE PUBLIC ENTITY MAY NOT ACT INCONSISTENTLY WITH THE STATEMENT SUBMITTED TO THE OWNER.~~

(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'S CLAIM SHALL BECOME RIPE FOR JUDICIAL REVIEW ONE HUNDRED EIGHT~~Y~~ 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 ~~A PREPONDERANCE OF THE~~CLEAR AND CONVINCING EVIDENCE. THE OWNER MAY SUBMIT EVIDENCE IN ADDITION TO EVIDENCE PRESENTED TO A PUBLIC ENTITY OR ADMINISTRATIVE BODY.

(VI) ALL EXCEPTIONS ~~IN~~PARAGRAPH (a) AND (b) OF THIS SUBSECTION (2)~~(a)(II)~~ SHALL BE ~~NARROWLY~~ CONSTRUED ~~AND SHALL BE PROVEN BY THE PUBLIC ENTITY BY CLEAR AND CONVINCING EVIDENCE. A PUBLIC ENTITY'S DETERMINATION SHALL BE INSUFFICIENT TO ESTABLISH AN EXCEPTION CONTAINED IN SUBSECTION (2)(a)(II), AND A DISTRICT COURT'S APPLICATION OF AN EXCEPTION CONTAINED IN SUBSECTION (2)(a)(II) SHALL BE SUBJECT TO *DE NOVO* REVIEW UPON APPEAL.~~

~~(VII) THE OWNER SHALL BE ENTITLED TO REASONABLE COSTS AND ATTORNEY FEES INCURRED IN:~~

~~(A) OBTAINING INJUNCTIVE RELIEF OR JUST COMPENSATION; OR~~

~~(B) SEEKING INJUNCTIVE RELIEF OR JUST COMPENSATION IF THE PUBLIC ENTITY PROVIDES RELIEF WITHOUT FINAL COURT ACTION.~~

~~(c)~~TO PROTECT THE PUBLIC HEALTH, SAFETY, MORALS, OR GENERAL WELFARE.

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

~~(I) "FAMILY MEMBER" SHALL INCLUDE:~~

~~(A) ANY DESCENDANT OR ANCESTOR, BY BIRTH, ADOPTION OR MARRIAGE, OF AN OWNER;~~

~~(B) AN UNCLE, AUNT, NIECE OR NEPHEW;~~

~~(C) AN ESTATE OR TRUST ESTABLISHED BY OR IN THE NAME OF ANY OF THE FOREGOING; OR~~

~~(D) A LEGAL ENTITY OWNED BY THE OWNER, ANY OF THE FOREGOING FAMILY MEMBERS, OR A COMBINATION OF THE OWNER OR ANY OF THE FOREGOING FAMILY MEMBERS.~~

~~(II) "JUST COMPENSATION" SHALL BE THE DIMINUTION IN FAIR MARKET VALUE CAUSED BY ANY LAND USE REGULATION OR COMBINATION OF LAND USE REGULATIONS.~~

~~(III~~

(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.

(~~IV~~I) "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.

(~~V~~III) "PUBLIC ENTITY" INCLUDES THE ~~S~~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~~I~~) "REAL PROPERTY" MEANS ANY INTEREST IN REAL PROPERTY RECOGNIZED BY THE LAWS OF COLORADO.