ORIGINAL

Certification of Word Count: 3,132

SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	FILED IN THE SUPREME COURT MAR 2 0 2006 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK ▲ COURT USE ONLY ▲
ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), C.R.S. (2005) Appeal from Ballot Title Setting Board	
IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE FOR 2005-2006 #73 BEVERLY AUSFAHL AND NICOLE KEMP, Petitioners, v. JOHN CALDARA AND DENNIS POLHILL, PROPONENTS AND WILLIAM A. HOBBS, ALLISON EID AND DANIEL L. CARTIN, TITLE BOARD, Respondents.	Case No.: 06SA42
JOHN W. SUTHERS, Attorney General MAURICE G. KNAIZER, Deputy Attorney General* 1525 Sherman Street, 5th Floor Denver, CO 80203 (303) 866-5380 Registration Number: 05264 *Counsel of Record	

ANSWER BRIEF OF TITLE BOARD

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

PAGE

CONSTITUTIONS

STATUTES

William A. Hobbs, Allison Eid and Daniel C. Cartin, as members of the Title Board (hereinafter "Board"), hereby submit their Answer Brief.

STATEMENT OF THE ISSUES

1. Does proposed initiative 2005-2006 #73 (#73) contain a single subject?

2. Do the title, ballot title and submission clause fairly express the true meaning and intent of #73?

STATEMENT OF THE CASE

Beverly Ausfahl and Nicole Kemp (hereinafter "Objectors") accurately set forth the nature of the case, the course of proceedings and the disposition of #73 by the Board. (Opening brief, pp. 1-2). The Objectors' statement of the facts is also accurate, except for the allegations that "the proposed initiative stretches well beyond its primary subject" and "the title omits several critical components and effects." These statements constitute arguments.

In addition, it is important to note that #73 is an amendment to Colo. Const. art. X, § 20.

SUMMARY OF THE ARGUMENT

1. #73 contains only one subject: contributions made to a tax or debt campaign with the expectation of receiving a reward from a governmental entity.

All facets of the initiative relate to contributions made by individuals or entities to issue committees that support exceptions to tax and revenue limitations in Colo. Const. art. X, § 20.

2. The titles and submission clause accurately and succinctly summarize the measure.

ARGUMENT

I. THE MEASURE INCLUDES ONLY ONE SUBJECT: CONTRIBUTIONS MADE TO A TAX OR DEBT CAMPAIGN WITH THE EXPECTATION OF RECEIVING A REWARD FROM A GOVERNMENTAL ENTITY

The Objectors contend that the Board should not have set titles because #73 contains more than one subject, thereby violating Colo. Const. art. V, § 1(5.5), which states:

> No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in the title; but if any subject shall be embraced in any measure which shall not be expressed in the title, such measure shall be void only as to so much thereof as shall not be so expressed. If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls.

A proposed initiative violates the single subject rule if it "relate[s] to more than one subject and ...[has] at least two distinct and separate purposes which are not dependent upon or connected with each other." *In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-2002 #21 and #22*, 44 P.3d 213, 215 (Colo. 2002)(quoting *In re Proposed Initiative "Public Rights in Water II"*, 898 P.2d 1076, 1078-79 (Colo. 1995) (*#21*). A proposed initiative that "tends to effect or to carry out one general objective or purpose presents only one subject." *In re Ballot Title 1999-2000 #25,* 974 P.2d 458, 463 (Colo. 1999). The single subject rule both prevents joinder of multiple subjects to secure the support of various factions and prevents voter fraud and surprise. *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43*, 46 P.3d 438, 442 (Colo. 2002) (*#43*).

The Court will not address the merits of a proposed initiative, interpret it or construe its future legal effects. *#21*, 44 P.3d at 215-16, *#43*, 46 P.3d at 443. The Court may engage in a limited inquiry into the meaning of terms within a proposed measure if necessary to review an allegation that the measure violates the single subject rule. *#21*, 44 P.3d at 216. The single subject requirement must be liberally construed to avoid the imposition of undue restrictions on initiative proponents. *In*

re Title, Ballot Title and Submission Clause, and Summary for 1997-98 No. 74, 962 P. 2d 927, 929 (Colo. 1998).

The Objectors contend that #73 contains three unrelated subjects: (1) restrictions on the power of governmental districts to provide any economic or business benefit to individuals or entities who have contributed more than $500 to an issue committee that supported a ballot measure under article X, § 20 with the intent or expectation of receiving a benefit from the governmental entity; (2) a prohibition on pass-through contributions to issue committees generally, thereby amending the Campaign and Political Finance Amendment, Colo. Const. art. XXVIII; and (3) retroactive invalidation of otherwise valid elections, including refund of all collected revenues, under article X, § 20 if a district signs a contract with a person or entity who contributed with the expectation that the person or entity would receive some economic benefit.

The Objectors argue that the prohibition on pass-through contributions to issue committees creates a second subject because it amends the "issue committee" provisions within Colo. Const. art. XXVIII. (Objectors' Brief, p. 5.) The Court must reject this argument. Article XXVIII applies to all ballot issues and ballot questions. Colo. Const. art. XXVIII, § 10(a). Section 10(b) of #73 is much more

limited. Its reach is to limited to preventing persons who make contributions in excess of five hundred dollars to a ballot issue under article X, § 20 with the expectation of a benefit from receiving a benefit from the district that receives the additional taxes or is allowed to benefit from increased debt. As noted in section (10)(1) of the measure, "The preferred interpretation shall be reasonably discourage the practice known as pay-to-play, where individuals and entities contribute to a tax or debt election campaign with the expectation of or prerequisite of receiving, a reward, either financial or otherwise." It does not extend beyond the limited universe of ballot issue elections authorized by Colo. Const. art. X, § 20.

Any indirect effect on a provision within article XXVIII does not alter the single subject analysis. "[T]he mere fact that a constitutional amendment may affect the powers exercised by government under pre-existing constitutional provisions does not, taken alone, demonstrate that a proposal embraces more than one subject. All proposed constitutional amendments or laws would have the effect of changing the status quo in some respects if adopted by the voters." *In re Ballot Title 1999-2000 #258(A)*, 4 P.3d 1094, 1098 (Colo. 2000). (*#258(A)*) Any

incidental impact on another constitutional provision does not create an additional subject.

The Objectors next contend that #73's enforcement provision, section (10) (2) (D), is a separate subject because it invalidates elections and requires a refund of revenues collected if a district provides some form of remuneration "in exchange for goods or services from that district for which this section applies for the period the subject tax or public indebtedness is in place", as provided in (10) (2) (A). Under the Objectors' reading, this provision is not connected to the measure and is surreptitious. The Court must reject this argument.

Subsection (10) (D) states:

> Enforcement. When a district is found to have violated pay-to-play stated in (2) (A), the subject election is considered void. Revenues collected prior to an upheld pay-to-play challenge, shall be refunded to taxpayers.

This subsection does nothing more than allow citizens to enforce the prohibition by filing a lawsuit. If the citizen's lawsuit is successful, then the election is void. This provision is similar to the Colo. Const. art. X, § 20(1), which states:

> Individual or class action enforcement suits may be filed and shall have the highest civil priority of resolution....Revenue collected, kept, or spent illegally

> since four full fiscal years before a suit is filed shall be refunded with 10% annual simple interest from the initial conduct.

The Court has denominated this part of section 20(1) "an enforcement clause." *Bickel v. City of Boulder*, 885 P.2d 215, 227 (Colo. 1994). Section 10(B) is, in all substantial respects, like section 20(1). Because the provision prescribes an enforcement mechanism directly related to the measure, it is an integral part of the measure. *#258(A)*, 4 P.3d at 1099.

The Objectors argue that the measure "would constitute a major and broad-sweeping undoing of the public will" to punish a minor violation by a governmental entity. (Objectors' Brief, p. 6) The Objectors' claim is based upon a misapprehension of the measure. It does not place restrictions upon any person or entity that contributes more than $500. Instead, it prohibits public entities from contracting with contributors that make a contribution "with the expectation of or perquisite of receiving, a reward, either financial or otherwise." A violation of a measure that is intended to limit the practice of making *quid pro quo* contributions is not "minor".

Moreover, the Objectors' argument misapprehends initiative rights. While the right of the voters to decide matters is crucial to democratic values, it is not

sacrosanct. The right is subject to constitutional principles and limitations. *Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996) (overturning citizen initiative prohibiting all governmental action designed to protect gays from discrimination); *City of Denver v. Hayes,* 28 Colo. 110, 63 P. 311 (1900) (overturning bond measure approved by voters on ground that measure violated single subject limitation).

The enforcement provision is not a subterfuge. It does not alter existing rights. It does nothing more than incorporate existing common law. Colorado courts have long recognized the inherent right of taxpayers to challenge tax, spending or bond measures when they have standing to do so. *Dodge v. Department of Social Services*, 198 Colo. 379, 600 P.2d 70 (1979); *City of Denver v. Hayes, supra.* The enforcement provision merely makes explicit that citizens have standing to compel government agencies to comply with this particular constitutional provision and to have the court enforce the authorized sanction.

The Objectors also complain that the measure could lead to a delay in the implementation of projects or the outright demise of projects. This impact has been acknowledged as the logical and natural result of a breach of certain laws governing enactment of tax, spending or bond measures. In *City of Denver v.*

Hayes, this Court overturned an election in which Denver voters had approved a bond for eleven different construction projects. As a result, the projects were cancelled, and the Court affirmed an order mandating that Denver return money to a contractor. More recently, the Court held an election invalid because it raised an ad valorem tax in violation of Colo. Const. art. X, § 20. *Bickel v. City of Boulder*, 885 P.2d at 237.

The Objectors cite *In re Proposed Initiatives for 1997-1998 #84 and #85,* 961 P.2d 456 (Colo. 1998) (*#85*) for the proposition that #73 surreptitiously makes ballot issues elections under article X, § 20 voidable. This case is inapposite. The Court found a single subject violation because the measure simultaneously decreased state and local taxes and reduced existing state programs. #73 is not similarly flawed. Unlike *#85*, it does not affect existing tax or bond measures, and it is not hidden in a complex and dense measure. Moreover, any invalidation of a future election depends upon the occurrence of a future contingent event. An election will be declared void only if a district violates the provision.

Contrary to the Objectors' argument, the enforcement provision is not unusually "draconian" or a radical change. (Objectors' brief, p. 7.) In fact, it less harsh than the general enforcement provision in article X, § 20(1). Under

subsection 1, revenue collected kept or spent in violation of tax and spending limits must be refunded with ten percent annual simple interest from the initial violation. Under subsection 10, the districts would not pay interest on any amounts collected. Moreover, the measure does not target any person or entity that makes a contribution to an issue committee in support of a ballot issue election. Instead, it concerns only persons or entities that contribute to a ballot issue election "with the expectation of or prerequisite of receiving, a reward, either financial or otherwise." Before an election can be declared void, a court must find some *quid pro quo*.

At their core, the arguments focus on the Objectors' opposition to the policy underlying the measure. The policy underlying the measure and the measure's impact are immaterial as long as the measure includes only one subject. The penalty of voiding an election for action taken after the election does not raise single subject concerns. It is relevant to the policy debate but not to the single subject issue.

For the above-stated reasons, the Court must conclude that #73 comprises a single subject.

II. THE TITLES FAIRLY EXPRESS THE TRUE MEANING AND INTENT OF THE MEASURE.

Section § 1-40-106(3), C.R.S. (2005) establishes the standard for setting titles. It provides:

> In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general effect of a "yes" or "no" vote will be unclear. The title for the proposed law or constitutional amendment, which shall correctly and fairly state the true intent and meaning thereof, together with the ballot title and submission clause, shall be completed within two weeks after the first meeting of the title board....Ballot titles shall be brief, shall not conflict with those selected for any petition previously filed for the same election, and shall be in the form of a question which may be answered "yes" (to vote in favor of the proposed law or constitutional amendment) or "no" (to vote against the proposed law or constitutional amendment) and which shall unambiguously state the principle of the provision sought to be added, amended or repealed.

The titles must be fair, clear, accurate and complete. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #256,* 12 P.3d 246, 256 (Colo. 2000) (*#256*). However, the Board is not required to set out every detail. *#21,* 44 P.3d at 222. In setting titles, the Board may not ascertain the future effects, either practical or legal, of a measure. *#256*, 12 P.3d at 257, or its efficacy.

In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #246(e), 8 P.3d 1194, 1197 (Colo. 2000). The Court does not demand that the Board draft the best possible title. *#256* at p. 219. The Court grants great deference to the Board in the exercise of its drafting authority. *Id.* The Court will reverse the Board's decision only if the titles are insufficient, unfair or misleading. *In re Proposed Initiative Concerning "Automobile Insurance Coverage"*, 877 P.2d 853, 857 (Colo. 1994).

The Objectors state that the title misrepresents the scope of the measure because it refers to "a tax and debt campaign." Paragraph (10)(1) of the measure states, "The preferred interpretation shall reasonably discourage the practice known as pay-to-play, where individuals and entities contribute to a tax or debt election campaign...." Paragraph (10)(2) places limits on persons or entities contributions above five hundred dollars to any issue committee "that advocates in favor of a ballot issue that raises a tax rate, continues a tax that would otherwise expire, creates a new tax, or increases public indebtedness, or any other ballot issue that must adhere to this section." The objectors argue that the measure covers contributions to issue committees that advocate for issues other than "tax and debt", including (a) mill levies, (b) property valuation adjustments, (c) tax policy

changes, and (d) revenue and spending limits. (Objectors' Brief, pp. 8-9) The Court must reject this argument.

First, it is important to note that the Objectors have not accurately characterize the first three items. These items are listed in article X, § 20(6). Section 20(6) requires elections only when an increase in these items is requested. An election must be held not for the imposition of any mill levy but for "any mill levy above that for the prior year." Likewise, an election must be held only for "valuation for assessment ratio increase for a property class." Finally, an election must be held for "a tax policy change directly resulting in a net revenue gain to any district."

These items are indisputably taxes or are integral to the computation of a tax. A mill levy is an ad valorem tax. *People v. Letford*, 102 Colo. 284, 303, 79 P.2d 274, 284 (1938). The term "tax levy" includes a property tax mill levy. *Brooks v. Zabka*, 168 Colo. 265, 269, 450 P.2d 653, 655 (1969). A valuation for assessment ration is the ratio between the valuation for assessment and the actual value of the property. *Bd. of Assessment Appeals v. Colorado Arlberg Club*, 762 P.2d 146, 148 (Colo. 1988). An increase in valuation for assessment without a corresponding decrease in the mill levy will increase taxes. *Beaty v. Bd. Of*

Com'rs of Otero County, 101 Colo. 346, 354, 73 P.2d 982, 986 (1937). Similarly, a tax policy change that results in an increase in revenue is a tax increase.

The Objectors next argue that the phrase "tax and debt campaign" is not broad enough to include elections to provide relief from spending or revenue limits under Colo. Const. art. X, § 20. The argument presumes that the phrase "tax and debt campaign" encompasses only elections that will increase taxes or debt. The plain language of the term is not so narrow. A tax campaign includes not only campaigns to increase taxes but also any campaign under article X, § 20 that *affects* taxes.

Referendum C, passed at the November 2005, election offers an example. In prior years, refunds of excess revenues, as calculated under Colo. Const. art. X, § 20(7), were refunded through sales taxes and certain tax credits. Referendum C allowed the State to retain excess revenues, thereby eliminating refunds through sales taxes and certain tax credits. If voters enact #73 and a measure similar to Referendum C is presented to the voters, sales taxes and credits would be affected.

The Objectors next contend that the titles are flawed because it fails to mention the lower threshold contribution limit placed upon persons or entities that

pool their contributions. This provision is not a central feature of the measure. It is intended to block circumvention of the primary provision of the measure.

Finally, the Objectors argue that the titles fail to mention that a district must refund moneys collected in violation of this subsection. The titles do state that an election is void. It is commonly understood that a void election is treated as if it did not occur. If an election is void, then the district does not have the authority to retain the money. It logically follows that if the district does not have power to ask for the money, then it cannot retain the money. This result is not new. The courts have recognized that a void election on a referred measure voids the results of the election. *Fish v. Kugel*, 63 Colo. 101, 165 P. 249 (1917)

For the above-stated reasons, the Court must conclude that the titles are fair and accurate.

CONCLUSION

For the above-stated reasons, the Court must approve the Board's action.

JOHN W. SUTHERS
Attorney General

MAURICE G. KNAIZER, 05264*
Deputy Attorney General
Public Officials
State Services Section
Attorneys for Title Board
*Counsel of Record

AG ALPHA:
AG File: P:\SS\SSKNAIMG\RETAIN\SOS\INIT2006PAYTOPLAY.DOC

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within ANSWER BRIEF OF TITLE BOARD upon all parties herein by depositing copies of same in the United States mail, Express Mail postage prepaid, at Denver, Colorado, this 20th day of March 2006 addressed as follows:

Mark G. Grueskin
Edward T. Ramey
633 17th Street, Suite 2200
Denver, Colorado 80202

Mr. Jon Caldara
14142 Denver West Parkway
Golden, CO 80401

Mr. Dennis Polhill
49 South Lookout Mountain Road
Golden, CO 80401