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<p>SUPREME COURT, STATE OF COLORADO Court Address: 2 East 14th Avenue Denver, Colorado 80203</p>				
<p>ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), C.R.S. (2006) Appeal from the Ballot Title Setting Board</p> <p>IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE, AND SUMMARY FOR 2005-2006, #76(a)</p> <p>Petitioners: CHRISTOPHER P. ELLIOTT, MARTIN F. RUSSELL, and PAUL D. NELSON, JR., Objectors,</p> <p>v.</p> <p>Respondents: DANIEL HAYES and ERIC LEVINE, Proponents, and</p> <p>Title Board: WILLIAM A. HOBBS, JASON DUNN, and DAN CARTIN</p>	<table border="1"><tr><td data-bbox="1016 365 1406 428">FILED IN THE SUPREME COURT</td></tr><tr><td data-bbox="1068 428 1360 537">MAR 28 2006</td></tr><tr><td data-bbox="1016 537 1406 600">OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK</td></tr></table> <p>▲ COURT USE ONLY ▲</p>	FILED IN THE SUPREME COURT	MAR 28 2006	OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
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<p>PETITIONERS' OPENING BRIEF</p>				

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I. STATEMENT OF ISSUES PRESENTED

(1) Does the measure contain a second subject, given that it surreptitiously restricts the constitutional power granted to all elected local officials, including those elected in home rule jurisdictions, by insulating voter-approved growth limit measures from any "legislative inhibition or penalty?"

(2) Did the Title Board err by failing to state in the ballot title that the proposed initiative restricts the constitutional power granted to all elected local officials, including those elected in home rule jurisdictions, by insulating voter-approved growth limit measures from any "legislative inhibition or penalty?"

(3) Did the Title Board err by failing to state in the ballot title that the proposed initiative mandates elections in the named counties for indefinite enactment of the Initiative's growth limitation?

(4) Did the Title Board err by failing to state in the ballot title that county-imposed growth limits must be applied uniformly among local governments within a county?

II. STATEMENT OF THE FACTS

Daniel Hayes and Eric Levine ("Respondents") are the proponents for Initiative 2005-2006 #76(a) ("Initiative"), which has a central purpose of enacting limitations on housing growth in Colorado. The Initiative creates a new section 15

to Article XVIII of the Colorado Constitution. The proposed constitutional amendment, in part: (1) reserves the right of electors of municipalities, whether statutory or home rule, to limit housing growth in Colorado by initiative and referendum "without legislative inhibition or penalty;" (2) requires that county-imposed housing growth limits are applied "uniformly" among local governments, whether statutory or home rule, within the county; and (3) mandates that the initial one percent annual growth limitation for counties named in the measure be called for indefinite enactment in the November 2010 general election. Initiative 2005-2006 #76(a) at ¶¶ 1 and 2.¹

The Title Board ("Board") designated and fixed the Initiative's title as follows:

An amendment to the Colorado constitution concerning a limitation on housing growth, and, in connection therewith, granting the electors of local governments the right to limit housing growth within their boundaries by initiative and referendum, allowing county voters to limit housing growth uniformly within a county, limiting privately owned residential housing in the counties of Adams, Arapahoe, Boulder, Douglas, El Paso, Jefferson, and Larimer for the years 2007 through 2010 to one percent annual growth, requiring at least thirty percent of the housing growth in such counties be affordable housing and affordable senior housing, implementing a moratorium until January 1, 2007, on the issuance of residential building permits in such counties following voter approval of the measure, and defining terms used in the measure.

¹ As submitted by the Respondents to the Colorado Secretary of State on February 2, 2006.

The Initiative's ballot title and submission clause, as designated and fixed by the Board, uses the same language as the Initiative's title, but adds the words "Shall there be" to the beginning of the first sentence and changes the punctuation at the end of the title to a question mark.²

III. STATEMENT OF THE CASE

On February 15, 2006, the Board conducted its initial public meeting and designated and fixed the Initiative's title. On February 22, 2006, Christopher P. Elliot, Martin F. Russell, and Paul D. Nelson, Jr. ("Petitioners") filed a Motion for Rehearing pursuant to C.R.S. § 1-40-107(1) (2005). On March 1, 2006, at the Board's next regularly scheduled meeting, the Board heard the Motion for Rehearing. The Board granted in part and denied in part Petitioners' Motion.

IV. SUMMARY OF ARGUMENT

This appeal addresses several deficiencies in the title set by the Board. First, the initiative violates the single subject argument because it surreptitiously restricts the exercise of representative government by limiting the power of elected officials to modify voter enacted housing growth limitations. Second, the title fails to adequately apprise voters of several of the Initiative's central features.

² The Initiative's title and ballot title and submission clause are referred to collectively as the Initiative's title throughout this brief.

This Court has rejected, under the single-subject requirement, initiatives that reallocate constitutional authority or powers. The Initiative limits the power of elected officials to "inhibit" or "penalize" growth limits enacted by voters. Voters would be surprised to learn that by voting for an Initiative purporting to deal with housing growth limitations, they had dramatically undercut the full right of self-government in key local and municipal matters addressed by local officials generally, and home rule cities specifically. Thus, the Initiative's largely unseen purpose of altering local elected officials' power to construct their own growth limits violates the single-subject requirement.

The title and ballot title and submission clause set by the Board for the proposed Initiative also do not fairly express the true meaning and intent of the proposed constitutional amendment on several grounds. A title must fairly reflect the proposed initiative so that petition signers and voters will not be misled into support for or against a proposition or left unaware of its central features. Here, the title fails to set forth that the Initiative reallocates local governmental authority and restricts the power of elected officials to modify growth limitations enacted by the voters. The title also fails to set forth that the Initiative mandates an election in the 2010 general election to permanently enact the Initiative's growth limitations. Lastly, the title also fails to set forth that application of the growth limits uniformly

within a county would give county voters control over all localities, including home rule jurisdictions, concerning such a peculiar matter of local concern. Thus, the title, in its present form, is misleading because it fails to set forth several of the Initiative's central features.

As such, the Court should reverse the actions of the Board and direct the Board to strike the title, ballot title, and submission clause and return the proposed Initiative to its proponents.

V. LEGAL ARGUMENT

- A. The Initiative violates the single-subject requirement because it surreptitiously restricts the exercise of representative government by limiting the power of elected officials to "inhibit" or "penalize" growth limits enacted by voters.**

No initiative can be proposed or enacted that contains more than one subject.

Colo. Const. art. V, § 1(5.5). Further, as article V, section 1(5.5) provides:

[i]f 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.

Id. Accordingly, the Title Board ("Board") erred when it fixed the ballot title for Initiative 2005-2006 #76(a) ("Initiative") if the Initiative contains more than one subject.

A proposed initiative violates the single subject requirement if: (1) it relates to more than one subject; and (2) it has "at least two distinct and separate purposes which are not dependent upon or connected with each other." *In re Ballot Title and Submission Clause for 2003-2004 # 32 & # 33*, 76 P.3d 460, 461 (Colo. 2003) (quoting *In re Public Rights in Waters II*, 898 P.2d 1076, 1078-79 (Colo. 1995)). One of the purposes of the single-subject requirement is to "prevent surreptitious measures and apprise the people of the subject of each measure by the title." C.R.S. § 1-40-106.5 (2005). Thus, the single-subject limitation protects against fraud and surprise occasioned by the inadvertent passage of a surreptitious provision "coiled up in the folds" of a measure. *See In re Breen*, 24 P. 3, 4 (Colo. 1890).³

The primary purpose of the proposed Initiative is the enactment of a constitutional restriction on housing growth in Colorado. Under the common umbrella of limiting housing growth, the Initiative provides for: (1) the right to limit housing growth on a countywide basis uniformly among local governments; (2) a moratorium on residential building permits until January 1, 2007 in specified counties; (3) a one percent (1%) annual growth limitation in specified counties

³ "[C]ases interpreting the single-subject requirement in the context of legislative bills control the interpretation of the single-subject requirement in the context of initiatives and referendums." *In re Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43 and #45*, 46 P.3d 438, 440 (Colo. 2002).

through 2010; (4) a requirement that at least thirty percent (30%) of such housing growth be affordable housing and affordable senior housing; and (5) a requirement that the one percent (1%) annual growth limitation be submitted to voters for permanent enactment in the 2010 November general election. Altogether, the foregoing relate to the Initiative's central purpose of imposing constitutional limitations on housing growth in Colorado.

One provision of the Initiative, however, is such an impingement on the powers of elected officials as to constitute a violation of the single subject requirement. Paragraph 1 of the measure provides that "[t]he electors of every city, town, city and county, or local county, whether statutory or home rule, reserve the right to limit housing growth *without legislative inhibition or penalty* by initiative and referendum." (emphasis added). This provision itself appears to be in the distant orbit of the Initiative's primary subject of housing growth. In fact, the prohibition on the power of elected local officials to "inhibit" or "penalize" growth limits enacted by voters is such a fundamental reallocation of the power of local officials that it constitutes a separate subject. At the local level, a prohibition such as this is a fundamental restructuring of representative government.

This Court has rejected, under the single-subject requirement, initiatives that reallocate constitutional authority or powers. For example, in *In re Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43 and #45* (hereinafter "*Proposed Initiative #s 43 and 45*"), the Court considered an initiative with a primary purpose of altering the procedural aspects of the right to petition. 46 P.3d at 448. The initiative at issue, in part, prohibited referendum petitions that reduce private property rights. *Id.* The court held that this provision violated the single-subject requirement. *Id.* The court reasoned that "zoning matters are peculiarly a matter of local concern." *Id.* The court further reasoned that the initiative's restriction on the power to refer municipal legislation to the city's registered electors was a significant invasion of the "full right of self-government in both local and municipal matters" afforded home rule cities and towns by article XX, section 6 of the Colorado Constitution. *Id.*

Similarly, in *In re Ballot Title and Submission Clause, and Summary for 1999-2000 #29* (hereinafter "*Proposed Initiative # 29*"), the court considered an initiative with the central purpose of altering the qualifications of judicial officers. 972 P.2d 257, 263 (Colo. 1999). One provision of the initiative removed the jurisdiction of Denver county judges to serve as state judges for any purpose. *Id.* The court held that this provision improperly included a separate subject. *Id. at*

265. The court reasoned that altering the power vested in the City and County of Denver over the selection and authority of city and county judges served a separate purpose of reallocating governmental authority and control. *Id.*

Just as the court rejected in these cases, on single subject grounds, the reallocation of fundamental powers of government at the local level, here, the proposed Initiative severely restricts a pivotal legislative power vested in local elected officials- the right to act legislatively as to zoning and related matters. The Initiative's prohibition on the power of elected local officials to in any way modify growth limits enacted by voters is such a central, but hidden, objective that it constitutes a second purpose of the Initiative. Indeed, voters would be surprised to learn that by voting for an Initiative purporting to deal with housing growth limitations, they had dramatically undercut the full right of self-government in key local and municipal matters addressed by local officials generally, and home rule cities specifically.

This Court has recognized that a proposed change to the powers of home rule cities and towns in local and municipal matters constitutes a separate major subject in an initiative. *Cf. In re Proposed Initiative for 1997-98 # 95*, 960 P.2d 1204, 1209 (Colo. 1998). The distinct legislative power granted to home rule cities and towns by the Colorado Constitution to fully self-govern their affairs is well

recognized. See *Sanborn v. City of Boulder*, 221 P. 1077, 1080 (Colo. 1923) (noting that a home rule city "has the same legislative power in enacting ordinances as the General Assembly possesses"); *Witkin Homes, Inc. v. City and County of Denver*, 504 P.2d 1121, 1123 (Colo. Ct. App. 1972) (upholding city council's power to submit for referendum an ordinance which had already become effective). Indeed, unless otherwise limited by the Constitution or charter, home rule cities and towns may exercise all legislative power in local and municipal matters. *Laverty v. Straub*, 134 P.2d 208, 209 (Colo. 1943). Thus, the Initiative's largely unseen purpose of altering local elected officials' power to construct their own growth limits violates the single-subject requirement.

B. The Title Board erred by failing to fix a ballot title that fairly expresses the Initiative's true intent and meaning.

The title and ballot title and submission clause set by the Title Board for the proposed Initiative do not "fairly express the true meaning and intent of the proposed . . . constitutional amendment." See C.R.S. §1-40-107(1) (2005). In reviewing actions of the Board, this Court grants deference to the Board's exercise of its drafting authority. *In re Proposed Ballot Initiative on Parental Rights*, 913 P.2d 1127, 1131 (Colo. 1996). However, the Court analyzes the title in "light of the board's statutory responsibilities as well as the import of the proposal." *In re*

Ballot Title and Submission Clause for Proposed Initiatives 2001-2002 #21 and #22, 44 P.3d 213, 219 (Colo. 2002).

The Board must "consider the potential public confusion that might result from misleading titles and exercise its authority in order to protect against such confusion." *In re Ballot Title and Submission Clause, and Summary for 1999-2000 # 25*, 974 P.2d 458, 469 (Colo. 1999); *see also* C.R.S. § 1-40-106(3)(b) (2005). Specifically, the Board must designate and fix a "proper fair title for each . . . constitutional amendment." C.R.S. § 1-40-106(1) (2005). The title for the proposed initiative must also "correctly and fairly express the [initiative's] true intent and meaning." C.R.S. § 1-40-106(3)(b) (2005).

In light of the Board's duties, the Court must "ensure that the title, ballot title, submission clause, and summary fairly reflect the proposed initiative so that petition signers and voters will not be misled into support for or against a proposition by reason of the words employed by the Board." *In re Ballot Title and Submission Clause, and Summary Adopted February 3, 1993, Pertaining to the Proposed Election Reform Amendment*, 852 P.2d 28, 32 (Colo. 1993). A ballot title must be concise, but must also provide a fair description of the essential features of a proposed initiative. *Id.* Accordingly, at issue is whether the Initiative's ballot title provides full disclosure of the Initiative's central features.

Here, the Initiative's ballot title fails to reflect adequately essential features of the proposed Initiative. *Id. at* 33-35. The Initiative's ballot title is misleading because there is a significant risk that voters statewide would misperceive the proposed Initiative's scope. *See Title v. Apple*, 920 P.2d 798, 803 (Colo. 1996). The Initiative's ballot title fails to set forth: (1) its restriction on the exercise of representative government concerning growth limits enacted by voters; (2) its mandate for local elections on the indefinite enactment of its growth limitations; and (3) its requirement of uniform application of county-imposed growth limits among local governments within the county. Accordingly, the Board erred in fixing the Initiative's title because the title does not fairly express the Initiative's true meaning and intent.

1. The Ballot Title is misleading because it fails to state its limitation on the power of elected officials to "inhibit" or "penalize" growth limits enacted by voters.

The proposed Initiative provides in part that there can be no legislative loosening of voter-enacted growth limits. *See Initiative at* ¶ 1. The title fixed by the Board does not reflect this explicit restriction. This provision of the Initiative involves more than an imposition of growth limitations. Rather, it alters the power already vested in local officials to set growth policies and contravenes principles of local control.

Altering the power of local elected officials is, as discussed, *supra*, arguably a second subject. However, at a minimum, this type of a restriction on the exercise of representative government is a change that should be made very clear to voters asked to approve this Initiative. Voters need to know that they are doing more than taking local growth management into their own hands by voting for this measure. They are also assuring that their elected representatives will be unable to exercise their own discretion to modify such limits. To think that this element of the measure is not important to voters is to deny the state's recent history in terms of voter approved measures that could not be tweaked legislatively when circumstances warranted. Voters need to know that the road they are being asked to travel is one from which there is no return. The title should be revised to reflect this extraordinary limitation on the authority of local elected officials.

2. The Ballot Title is misleading because it fails to state that the proposed Initiative mandates elections in the named counties for indefinite enactment of the Initiative's growth limitation.

The final sentence of paragraph 2 of the Initiative provides that:

This measure shall be called for the 2010 November general election for countywide electors in each of the said counties *to enact indefinitely* subject to subsequent measures or repeal beginning in 2011.

Initiative at ¶ 2 (emphasis added). The Initiative's title fairly advises the voter that a central purpose of the Initiative is to enact a one percent limitation on private

housing growth in specified counties. The Initiative also advises the voter that the one percent limitation on private housing growth will be imposed "for the years 2007 though 2010."

A fair reading of the language of the Initiative's title thus leaves one with the impression that the one percent limitation on private housing growth will automatically expire at the end of 2010 without any further action required by the electorate. Yet, the measure clearly provides otherwise. The measure requires that voters decide whether to "enact indefinitely" the temporary growth limitation in the 2010 general election. There is no discretion in the calling of these local elections. In the named counties, such elections are absolutely mandated. Indeed, there is nothing express or implicit in the language of the ballot title that fairly informs a voter of this required vote to indefinitely maintain the altered *status quo* concerning housing growth limitations. Thus, the Initiative's title is misleading because it fails to fairly inform the voter that what appears to be a short-term limitation on housing growth is actually a starting point for indefinite enactment of the limitation.

3. *The Ballot Title is misleading because it fails to state that county-imposed growth limits must be applied uniformly among local governments within a county.*

The ballot title fails to fairly apprise the voter about how the proposed housing growth limitations are applied. *See In re Ballot Title and Submission Clause, and Summary for 1999-2000 #104*, 987 P.2d 249, 259 (Colo. 1999) (hereinafter "*Proposed Initiative # 104*"). The text of the measure provides:

This right is further reserved on a countywide basis whereby electors throughout a county may elect to limit housing growth *uniformly in every city, town, city and county, local county, and any part of such, whether statutory or home rule*, within such county.

Initiative at ¶ 1 (emphasis added). Yet, the ballot title fails to set forth that in order to apply the growth limits "uniformly" within a county, voters in localities, including home rule jurisdictions, must give county voters control over such localities.

The language of the ballot title is uninformative. The following example illustrates the misleading nature of the ballot title. The explicit terms of the measure will require each city, town, and city and county within a county to cap their growth uniformly such that the total growth within the county does not

exceed one percent. Thus, for example, a county with four local governments could restrict each to .25% growth.

A reading of the ballot title by a voter would not suggest to the voter that "uniformly within a county" actually means that, under the text of the measure, the limitation must be applied uniformly *among local governments* within a county. This application amounts to a restructuring of decision making authority over city and town affairs, including zoning and related issues, that are peculiarly of local concern. The ballot title does not fairly apprise the voters of this significant twist on the application of housing growth limits.

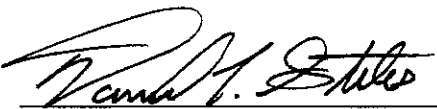
Accordingly, the ballot title is misleading because voters are not able to determine that application of the housing growth limitations uniformly within a county will give county voters control over localities and home rule jurisdictions concerning matters of local concern, including zoning and related issues.

V. CONCLUSION

For the reasons set forth above, Petitioners request the Court to reverse the actions of the Title Board and to direct the Board to strike the title, ballot title, and submission clause and return proposed Initiative to its proponents.

Respectfully submitted this 28th day of March, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 2006, a true and correct copy of the foregoing **PETITIONERS' OPENING BRIEF** was either hand delivered or sent via overnight delivery to the following:

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