

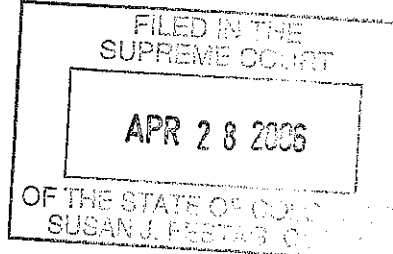
<p>SUPREME COURT, STATE OF COLORADO Court Address: 2 East 14th Avenue Denver, Colorado 80203</p>	
<p>ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), C.R.S. (2006) Appeal from the Ballot Title Setting Board</p> <p>IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE, AND SUMMARY FOR 2005-2006, #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>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
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<p>PETITIONERS' REPLY BRIEF</p>	

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I. ARGUMENT

A. **The Initiative cannot impose growth limits and reallocate fundamental powers of local officials without offending the single subject requirement.**

The Board maintains that an initiative's limitation on the inherent powers of home rule cities does not constitute a prohibited second subject. (Answer Brief at 4). To support this broad proposition, the Board relies on *In re Title, Ballot Title and Submission Clause and Summary for 1999-00 #256*, 12 P.3d 246 (Colo. 2000) and *In re Title, Ballot Title, and Submission Clause and Summary for 1999-2000 #235(a)*, 3 P.3d 1219 (Colo. 2000). The Board's reliance on these decisions, however, is misplaced.

The initiatives at issue in these two cases merely limited the procedures available to home rule jurisdictions in certain instances, not the substantive powers of the jurisdictions or local elected representatives. In #256, the initiative specified the ways and places in which development could be approved. #256, 12 P.3d at 250. For example, it required that future growth area maps be submitted to voters and specified certain election procedures be utilized when considering such matters. *Id.* These limited changes in the process used to obtain land use approvals were procedural adjuncts to the growth control format proposed by the initiative and therefore part of the same subject. *Id.* at 254-55.

Similarly, the initiative in #235 altered certain election dates that otherwise would have been set by home rule municipalities. #235, 3 P.3d at 1224. It also changed the number and qualifications of proponents of initiatives related to the conservation of undeveloped land. *Id.* No substantive rights or powers were implicated by this measure, and as such, the procedural changes proposed were deemed to be part of the broader scheme to regulate the conservation of undeveloped land. *Id.* at 1224-25.

Here, however, Initiative 2005-2006 #76(a) ("#76(a)" or "Initiative") places an unprecedented restriction on the ability of local officials to exercise their duties under law. Local officials would be flatly prohibited from providing any relief from (in the words of the measure, inhibiting or penalizing) growth limits enacted by the voters. In essence, a substantive area in which local elected officials have always acted – guiding growth decisions to respond to changing conditions – would forever be beyond their reach, notwithstanding their status and authority as elected representatives. Given the primacy of local officials in deciding land use matters, Colo. Const., art. XX, sec. 6, this proposal reallocates a key power that has long been within the province of local elected officials. *In re Ballot Title and Submission Clause for Proposed Initiative 2001-02, #43 and #45*, 46 P.3d 438, 448 (Colo. 2002) (recognizing "zoning matters are peculiarly a matter of local

concern"); *see also City of Colo. Springs v. Securcare Self Storage, Inc.*, 10 P.3d 1244, 1247 (Colo. 2000)(noting that Colo. Const. art. XX, sec. 6 grants home rule cities broad legislative power regarding local and municipal matters, including land use regulations); *Moore v. Boulder*, 484 P.2d 134, 136-37 (Colo. App. 1971) (holding the authority of a home rule city to enact zoning ordinances is a matter of purely local concern).

This provision in #76(a) is much closer in its effect on constitutionally granted and historically exercised authority to the provision in *In re Ballot Title and Submission Clause for Proposed Initiative 2001-02, #43 and #45*, 46 P.3d 438 (Colo. 2002). In #43 and #45, as part of a broader undertaking to change certain petition procedures, the proponents curtailed the right of referendum on zoning matters. *Id.* at 448. The Court held that this restriction was not tangentially related to the subject of petitions. *Id.* Rather, it was a substantive change to the right to make law on zoning matters. *Id.* Initiative #76(a) achieves the same end result by forever withdrawing an area of legislative authority from local elected officials where the citizens have imposed growth limits as provided under the measure.

The Board's attempt to equate one initiative that specifies certain procedures with another that undermines the substantive authority of elected officials is not compelling. The shift in the capacity of elected local officials to act with authority

over uniquely local matters is a second subject, and the title should be voided and the proposal returned to its proponents.

B. The ballot title fails to fairly express the Initiative's true intent and meaning.

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.

Notwithstanding Petitioners' argument that prohibiting local elected officials from legislatively inhibiting or penalizing growth limits enacted by voters constitutes a second subject, the ballot title should apprise voters of the significant fact that elected officials will have no role in dealing with growth limits. It is hardly an element of implementation or a secondary detail that the voters will occupy sole authority on the issue of growth limits, once they speak. Based on the present ballot title, state voters considering # 76(a) could not imagine that by authorizing local voters to enact growth limits, they are simultaneously precluding local elected representatives from having any subsequent ability to adjust or modify these limits. If providing the vehicle for change is important enough to include in the title, then the attendant prohibition on legislative involvement in growth limits is of equal stature and must also be reflected in the titles.

The Board argues that the following phrase in the text of the Initiative is inherently ambiguous: electors "reserve the right to limit housing growth *without*

legislative inhibition or penalty by initiative and referendum.” (Answer Brief at 8) (emphasis added). The Board attempts to interject ambiguity into the phrase by speculating that it could be interpreted to mean “that the local governments cannot impose undue burdens upon the ability of the voters to initiate or refer measures.” (Answer Brief at 8). Yet, this phrase plainly and unqualifiedly precludes any legislative loosening of voter-enacted growth limits. “Inhibit,” for example, has a very clear meaning: “1: to prohibit from doing something 2 a : to hold in check: RESTRAIN.” *Webster's Ninth New Collegiate Dictionary* 622 (1984). This definition does not permit an interpretation that would authorize a subsequent legislative role in connection with this issue.

As written, the title is clearly misleading because it fails to provide any description of this central feature of #76(a).

2. *The ballot title must state that the proposed Initiative mandates elections for indefinite enactment of the Initiative's growth limitations.*

The Board maintains that there was no need to state in the ballot title that the Initiative mandates elections for the indefinite enactment of its growth limitations in the November, 2010 general election. (Answer Brief at 9-10).

The Board's duty is to accurately state all of the major features of the Initiative. *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). The ballot title must give voters a clear impression about the magnitude of the change implemented by a proposed initiative. *See In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #104*, 987 P.2d 249, 259 (Colo. 1999). The indefinite enactment of the growth limitation in the instant Initiative is a major feature of the Initiative and should be addressed in the ballot title.

Much like the prohibition on local legislative involvement, the indefinite extension of growth limits will change the decision making landscape on land use issues. Because such an extension must be presented at the November, 2010 general election, this Initiative is no pilot program. It imposes a restriction that voters may readopt in 2010. If they do so, the limits will be an unchanging aspect of local land use planning. Whether this is sound policy is quite beside the point. Potential petition signers and general election voters should know that this measure is much more than a four year “experiment” of growth limitations in Colorado. As currently constructed, the title misleads the voter into believing he or she is voting for a short-term housing growth limitation.

The Initiative’s title should fairly inform voters that in four years they will be asked to “enact indefinitely” the temporary growth limitation.

3. ***The ballot title must state that the housing growth limitations must be applied uniformly among local governments within a county.***

The Board maintains that the ballot title need not state that electors may elect to limit housing growth limitations uniformly among local governments within a county. (Answer Brief at 10-11).

This element of the Initiative would permit county voters to control the prerogatives of the municipalities contained therein. All jurisdictions in such a county would be required to live within this uniform limit. Presumably, this change would extend to home rule jurisdictions. And as such, a county (through its voters) would have the ability to trump the autonomy otherwise given to home rule cities. Voters should know, yet again, that this measure redirects the fundamental political balance in this state.

Statewide voters should also know that a county's voters could require absolute uniformity among the cities and towns within its boundaries. This uniformity would not be affected by size, developable land, or specific municipal economic conditions of a city or town. All would be treated as if they were fungible entities with indistinct needs and conditions. Such inflexibility is one of those details that proponents are not likely to trumpet, and the ballot title does not fill this void because it is also mute on this important aspect of the measure. The


title should be revamped to allow voters to know that the measure is designed to be a precursor to a “one-size-fits-all” mentality of land use. And that is a radical shift of which votes should be apprised.

II. CONCLUSION

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

Respectfully submitted this 28th day of April, 2006.

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ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

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

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