

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

IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE, AND SUMMARY FOR 2005-2006, #76(a)

Petitioners:

CHRISTOPHER P. ELLIOTT, MARTIN F. RUSSELL, and PAUL D. NELSON, JR., Objectors,

v.

Respondents:

DANIEL HAYES and ERIC LEVINE, Proponents,
 and

Title Board:

WILLIAM A. HOBBS, JASON DUNN, and DAN CARTIN.

2006

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Mar 08	Petition for Review of Final Action of Ballot Title Setting Board Concerning Proposed Initiative 2005-2006 #76(a) ("Limitations on Housing Growth")		*	Answer Brief still DUE: 04/03/06	17
			*	Reply Brief still DUE: 04/14/06	28
		Apr 17		Answer Brief of Title Board. Filed.	✓
Mar 9	ORDER - Petitioners file Opening Brief on or before March 28, 2006; Respondents may file Answer Brief on or before April 17, 2006; and any Reply Brief must be filed on or before April 28, 2006.		*	Reply Brief DUE: 4/28/06	
		Apr 18		Proponents D. Hayes and E. Levine will not submit an Answer Brief in this matter. Filed.	
	FURTHER ORDERED- all briefs shall be filed and served upon opposing parties by hand delivery, or through an overnight delivery service.	Apr 28		Petitioner's Reply Brief filed.	
		May 3		<i>Circulated</i>	
	* Opening Brief DUE: 3/28/06	May 15		ORDER- Upon consideration of the Petition for Review of Final Action of Ballot Title Setting Board Concerning Proposed Initiative 2005-2006 #76(a) ("Limitations on Housing Growth"), together with the briefs filed herein, ORDERED- the actions of the Title Board are AFFIRMED., EN BANC. EID, J. does not participate.	
	* Answer Brief DUE: 4/3/06 4-17-06				
	* Reply Brief DUE: 4/14/06 4-28-06				
Mar 28	Petitioners' Opening Brief. Filed.				✓

SUPREME COURT, STATE OF COLORADO
Court Address:
2 East 14th Avenue
Denver, Colorado 80203

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

Petitioners:

Christopher P. Elliott, Martin F. Russell and Paul
D. Nelson, Jr., Objectors,

v.

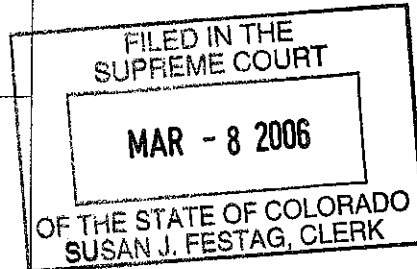
Respondents:

Daniel Hayes and Eric Levine, Proponents,
and

Title Board:

WILLIAM A. HOBBS, JASON DUNN, and DAN
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06SA73

▲ COURT USE ONLY ▲

Case No.:

**PETITION FOR REVIEW OF FINAL ACTION OF
BALLOT TITLE SETTING BOARD
CONCERNING PROPOSED INITIATIVE 2005-2006 #76(a)
("LIMITATIONS ON HOUSING GROWTH")**

Christopher P. Elliott, Martin F. Russell, and Paul D. Nelson, Jr. ("Petitioners"), being registered electors of the State of Colorado, through their undersigned counsel, respectfully petition this Court pursuant to § 1-40-107(2), C.R.S. (2006), to review the actions of the Ballot Title Setting Board with respect to the setting of the title, ballot title, and submission clause for proposed Initiative 2005-2006 #76(a) ("Limitations on Housing Growth").

I. Actions of the Ballot Title Setting Board

The Title Board conducted its initial public meeting and set titles for proposed Initiative 2005-2006 #76(a) on February 15, 2006. The Petitioners filed a Motion for Rehearing pursuant to § 1-40-107(1), C.R.S. (2005), on February 22, 2006. The Motion for Rehearing was heard at the next regularly scheduled meeting of the Title Board on March 1, 2006. At the rehearing, the Board granted in part and denied in part Petitioners' Motion. Petitioners hereby seek review of the final action of the Title Board with regard to proposed Initiative 2005-2006 #76(a) pursuant to § 1-40-107(2), C.R.S. (2006).

II. Issues Presented

- I. 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?"

- II. 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?"
- III. Did the Title Board err by failing to state in the ballot title that the proposed initiative fails to state that elections are mandated in the named counties for indefinite enactment of the initiative's growth limitation?
- IV. 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?

III. Supporting Documentation


As required by § 1-40-107(2), C.R.S. (2006), a certified copy of the Petition, with the titles and submission clause of the proposed constitutional amendment, together with a certified copy of the Motion for Rehearing and the rulings thereon, are submitted herewith.

IV. Relief Requested

Petitioners respectfully request this Court to reverse the actions of the Title Board with directions to decline to set a title and to return the proposed Initiative to the proponents.

Respectfully submitted this 8th day of March, 2006.

ISAACSON ROSENBAUM P.C.

By: 
Mark G. Grueskin, #14621
Daniel C. Stiles, #35695

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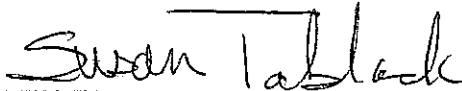
CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2006, a true and correct copy of the foregoing **PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE 2005-2006 #76(a) ("LIMITATIONS ON HOUSING GROWTH")** was placed in the United States mail, postage prepaid, to the following:

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Maurice G. Knaizer, Esq.
Deputy Attorney General
Colorado Department of Law
1525 Sherman Street, 5th Floor
Denver, Colorado 80203





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 #76(a)"

..

.....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 3rd day of March, 2006.

Ginette Dennis

SECRETARY OF STATE

Proposed Initiative #76(a)

Final

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FEB 02 2006

ELECTIONS / LICENSING
SECRETARY OF STATE

Ch
1/22/06
WCC

BE IT ENACTED BY THE PEOPLE OF THE STATE OF COLORADO:
ARTICLE XVIII OF THE CONSTITUTION OF THE STATE OF COLORADO IS AMENDED BY THE
ADDITION OF A NEW SECTION TO READ:

Section 15. Colorado growth limitation

(1) THE 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. 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.

(2) PRIVATELY OWNED RESIDENTIAL HOUSING GROWTH IN THE COUNTIES OF ADAMS, ARAPAHOE, BOULDER, DOUGLAS, EL PASO, JEFFERSON AND LARIMER SHALL NOT EXCEED ONE PERCENT ANNUALLY FOR THE YEARS 2007, 2008, 2009, AND 2010. IN SAID COUNTIES EACH LOCAL GOVERNMENT AND ANY PART OF SUCH, WHETHER STATUTORY OR HOME RULE, SHALL ALLOT BUILDING PERMITS SO THAT SAID HOUSING GROWTH DOES NOT EXCEED A ONE PERCENT ANNUAL GROWTH RATE IN THE TOTAL NUMBER OF DWELLING UNITS IN EACH SAID YEAR. AT LEAST THIRTY PERCENT OF THE HOUSING SUBJECT TO THE LIMITATION SHALL BE AFFORDABLE HOUSING AND AFFORDABLE SENIOR HOUSING AS SHALL BE DEFINED BY THE GENERAL ASSEMBLY AND SUBJECT TO INITIATIVE AND REFERENDUM IN EACH LOCAL GOVERNMENT. BETWEEN NOVEMBER 8, 2006, AND JANUARY 1, 2007, NO PERMITS TO BUILD NEW PRIVATELY OWNED RESIDENTIAL HOUSING UNITS SHALL BE ISSUED WITHIN SAID COUNTIES. 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.

(3) AS USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(a) "ANNUAL GROWTH" MEANS THAT WHICH OCCURS IN A PARTICULAR CALENDAR YEAR MEASURED IN THE TOTAL NUMBER OF DWELLING UNITS ABOVE THAT FOR THE PREVIOUS YEAR.

(b) "DWELLING UNIT" MEANS A BUILDING OR ANY PORTION OF A BUILDING DESIGNED FOR OCCUPANCY AS COMPLETE, INDEPENDENT LIVING QUARTERS FOR ONE OR MORE PERSONS, HAVING DIRECT ACCESS FROM THE OUTSIDE OF THE BUILDING OR THROUGH A COMMON HALL AND HAVING LIVING, SLEEPING, KITCHEN AND SANITARY FACILITIES FOR THE EXCLUSIVE USE OF THE OCCUPANTS. A DETACHED HOME HAS ONE DWELLING UNIT WHEREAS AN APARTMENT BUILDING WITH EIGHTY APARTMENTS HAS EIGHTY DWELLING UNITS.

(c) "LOCAL COUNTY" MEANS THAT PART OF A COUNTY MOST GENERALLY KNOWN AS THE UNINCORPORATED OR STATUTORY COUNTY BUT MAY BE HOME RULE WHEN A CHARTER IS ADOPTED. LOCAL COUNTY IS A LOCAL GOVERNMENT WITH A DISTINCT ZONING JURISDICTION WHICH DOES NOT INCLUDE A CITY, TOWN, OR CITY AND COUNTY.

(d) "LOCAL GOVERNMENT" MEANS A CITY, TOWN, CITY AND COUNTY, OR LOCAL COUNTY, WHETHER STATUTORY OR HOME RULE.

(e) "PRIVATELY OWNED RESIDENTIAL HOUSING" MEANS A SUMMATION OF DWELLING UNITS WHICH ARE RESIDENTIALLY ZONED OR OTHERWISE INTENDED FOR PRIVATE RESIDENTIAL USE. THOSE OWNED BY A FEDERAL, STATE OR LOCAL GOVERNMENT ENTITY, OR AN EDUCATIONAL OR MEDICAL FACILITY ARE EXCLUDED.

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FEB 22 2006

ELECTIONS / LICENSING
SECRETARY OF STATE

COLORADO TITLE SETTING BOARD

In re Title and Ballot Title and Submission Clause Set For Initiative 2005-06 #76(a)

MOTION FOR REHEARING

On behalf of Christopher P. Elliot, Martin F. Russell, and Paul D. Nelson, Jr., registered electors of the State of Colorado, the undersigned hereby moves for a rehearing of the title, ballot title and summary for Initiative 2005-06 #76(a) at the Title Board ("Board") hearing held on February 15, 2006. As grounds, the Petitioners state as follows:

1. The Title Board lacked jurisdiction for the following reasons:
 - a. Proponents' removal of the proposed initiative's criminal enforcement provisions requires resubmission to the directors of the legislative counsel and office of legislative legal services.
 - b. Proponents failed to submit the amended proposed initiative to the directors of the legislative counsel and office of legislative legal services before submitting it to the secretary of state.
2. The title set by the Board violates the single subject requirement for initiated measures because the measure eliminates the home rule powers delegated to elected representatives to determine growth policies within their jurisdictions.
3. The title set by the Board is misleading, inaccurate, and incomplete for the following reasons:
 - a. The title fails to state that this measure eliminates the ability of elected representatives in home rule jurisdictions- both cities and counties - to determine growth policies within their jurisdictions.
 - b. The use of "or" rather than "and" between affordable housing and affordable senior housing implies that jurisdictions will have to choose between these two objectives, whereas the measure provides that the 30% goal can be met by an aggregation of the two types of housing.
 - c. The phrase "short-term moratorium" relating to the issuance of residential building permits is vague and uninformative.

d. The fact that there is a prohibition on issuing building permits for 2 months appears to relate to all counties, whereas it really only applies to the named counties.

e. The title fails to state that elections are mandated in the named counties for indefinite enactment of this limitation.

f. The title fails to state that county-imposed growth limits must be applied uniformly "among local governments" within a county.

Respectfully submitted this 22nd day of February, 2006.

ISAACSON ROSENBAUM P.C.



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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February, 2006, a true and correct copy of the foregoing **MOTION FOR REHEARING** was placed in the United States mail, postage prepaid, to the following:

Daniel Hayes
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Eric Levine
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Ballot Title Setting Board

Proposed Initiative 2005-2006 #76(a)¹

The title as designated and fixed by the Board is 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.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be 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?

Hearing February 15, 2006:

Single subject approved; staff draft amended; titles set.

Hearing adjourned 2:46 p.m.

Hearing March 1, 2006:

Motion for Rehearing granted in part to the extent Board amended titles; denied in all other respects.

Hearing adjourned 3:17 p.m.

¹ Unofficially captioned "Limitations on Housing Growth" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

CERTIFICATION OF WORD COUNT: 3,489

<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
FILED IN THE SUPREME COURT				
MAR 28 2006				
OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK				
<p>Attorneys for Petitioners: Mark G. Grueskin, #14621 Daniel C. Stiles, #35695 Isaacson Rosenbaum P.C. 633 17th Street, Suite 2200 Denver, Colorado 80202 Phone Number: 303-292-5656 Fax Number: 303-292-3152 E-mail: mgrueskin@ir-law.com; dstiles@ir- law.com</p>	<p>Case No.: 06 SA 73</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.

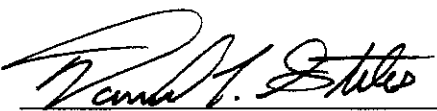
Accordingly, the ballot title is misleading because voters are not able to determine that application of the housing growth limitations uniformly within a county will give county voters control over localities and home rule jurisdictions concerning matters of local concern, including zoning and related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

ISAACSON ROSENBAUM P.C.

By: 
Mark G. Grueskin, #14621
Daniel C. Stiles, #35695

ATTORNEYS FOR PETITIONERS

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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<p>SUPREME COURT, STATE OF COLORADO</p> <p>2 East 14th Avenue Denver, CO 80203</p>	<p>FILED IN THE SUPREME COURT</p> <p>APR 17 2006</p> <p>CLERK OF THE STATE OF COLORADO SUSAN M. PESTON, CLERK</p>
<p>ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), C.R.S. (2006) Appeal from the Ballot Title Setting Board</p>	<p>▲ COURT USE ONLY ▲</p>
<p>IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE FOR 2005-2006, #76(A) CHRISTOPHER P. ELLIOT, MARTIN F. RUSSELL AND PAUL D. NELSON, JR., OBJECTORS,</p> <p>Petitioners,</p> <p>v.</p> <p>DANIEL HAYES AND ERIC LEVINE, PROPONENTS; WILLIAM A. HOBBS, JASON DUNN AND DAN CARTIN, TITLE BOARD,</p> <p>Respondents.</p>	<p>Case No.: 06 SA 73</p>
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<p>ANSWER BRIEF OF TITLE BOARD</p>	

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William A. Hobbs, Jason Dunn and Dan Cartin, in their capacities as members of the Title Board (hereinafter "Board"), hereby submit their Answer Brief.

STATEMENT OF THE ISSUES

- 1. Does proposed initiative #76(a) contain a single subject: a limitation on housing growth?**
- 2. Did the Board set clear and fair titles when the titles do not discuss limitations on the power of local governments to interfere with the voter-initiated measures concerning limits on housing growth?**
- 3. Did the Board set clear and fair titles when the titles do not state that the proposed initiative mandates elections in designated counties after 2010?**
- 4. Did the Board set clear and fair titles when the titles do not state that growth limits must be uniformly applied among local governments within the county?**

STATEMENT OF THE CASE

Proposed initiative #76(a), if enacted, would establish certain limitations on housing growth. It limits the number of building permits which can be issued by the counties of Adams, Arapahoe, Boulder, Douglas, El Paso, Jefferson and

Larimer counties for the years 2007 through 2010. In November 2010, the voters of these counties will be asked to vote on whether to extend these limits indefinitely, subject to future votes. The measure also extends to electors of every city, town, city and county, or local county, whether statutory or home rule, the right of initiative and referendum with regarding to housing growth. The measure prevents these local governments from inhibiting or penalizing the right of initiative and referendum.

The measure and the titles are attached to this brief.

SUMMARY OF THE ARGUMENT

The proposed initiative contains only one subject: limitations on housing growth. It places specific limits on growth in certain counties through 2010, after which the voters in these counties may vote to enact these limits indefinitely. It extends the right of initiative and referendum concerning housing growth to electors of every city, town, city and county, or local county. The provisions are directly related to the single subject of limitations on housing.

The titles set by the Board are fair, clear and accurate. Although the titles do not describe all of the details of the proposed measure, they do include its central features.

ARGUMENT

I. THE MEASURE INCLUDES ONLY ONE SUBJECT: LIMITATION ON HOUSING GROWTH.

The Objectors contend that the Board should not have set titles because #76(a) contains at least two subjects, 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 Initiatives 2001-02 #43*, 46 P.3d 438, 442 (Colo. 2002)(#43).

The Court will not address the merits of a proposed measure, 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 rule must be liberally construed to avoid unduly restricting the right of initiative. *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 the proposed measure has two subjects. In addition to the limitation on growth, they argue that the measure limits the inherent powers of home rule cities. (Objectors' Brief, pp. 5-10) This Court rejected a similar challenge in *In re Title, Ballot Title and Submission Clause and Summary for 1999-00 #256*, 12 P.3d 246 (Colo. 2000) (#256). In #256, the initiative

proposed to manage growth by limiting areas of development. The measure covered all statutory, charter and home rule cities and towns, as well as all home rule and statutory counties, and cities and counties. It prevented local governments from approving development outside of voter-approved growth areas. The initiative required that growth maps be coordinated among jurisdictions, thereby giving persons residing outside a home rule city a veto power over land in home rule cities. Opponents argued that the shift of decision-making power from the legislative bodies to the voters constituted a second subject. *Id.* at 253-54. The Court rejected this argument. “The referendum requirement reflects a choice that the voters have a more direct say in managing future development; the curtailment of home rule powers is a necessary result of that choice.” *Id.* at 254.

The Court reached a similar conclusion in a single subject challenge to another land use initiative. *In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 #235(a)*, 3 P.3d 1219 (Colo. 2000). In that case, the measure proposed a growth formula that limited the rate of future development. The opponents argued that the measure altered the powers of home rule municipalities by limiting their authority in areas that were not necessary to conserve land development and by prescribing certain election dates. *Id.* at 1224.

The Court held that these limitations and requirements related to limiting future development; therefore, they did not constitute a separate subject.

In the measure before this Court, the right of initiative and referendum is linked directly to the limitation on housing growth. It is the means by which housing growth limitations may be imposed. However, the right does not extend beyond voting to limit housing growth. Therefore, the provision regarding the right of initiative and referendum does not constitute a separate subject.

II. THE TITLES ARE FAIR, CLEAR AND ACCURATE.

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. #256, 12 P.3d at 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 measure's efficacy, or its practical or legal effects. #256, 12 P.3d at 257; *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 assert that the titles are flawed because they do not include the phrase "without legislative inhibition or penalty". They contend this phrase is significant because local governments will be unable to exercise their discretion to modify any limits imposed by voters through the initiative and referendum process. (Objectors' Brief, pp. 12-13)

The Court must reject this argument. The Objectors assume that this phrase precludes any legislative action by the local governmental bodies. However, this is not the only interpretation. It can be interpreted to mean that the local governments cannot impose undue burdens upon the ability of the voters to initiate or refer measures. *Cf. Yenter v. Baker*, 126 Colo. 232, 248 P.2d 311 (1952). Alternatively, it can mean, as the Objector's suggest, that legislative bodies may not amend or repeal the limits set by voters. Because this phrase is inherently ambiguous, the Board could rightfully decline to include the phrase in the titles. *In re Title, Ballot Title and Submission Clause, and Summary for No. 26 Concerning School Impact Fees*, 954 P.2d 586, 592 (Colo. 1998). To adopt the Objectors' position, the Board and this Court would necessarily become involved in the prohibited function of interpreting the meaning of proposed language or suggesting how it will be applied. *Id.*

Moreover, assuming that the Objectors' interpretation is accurate, the restriction is not particularly novel and is not a central feature of the measure. It is designed to ensure that a central feature of the measure, the right of initiative and referendum, is not undermined. The rights of initiative and referendum are "fundamental rights of a republican form of government which the people have reserved unto themselves." *Bernzen v. Boulder*, 186 Colo. 81, 525 P.2d 416

(1974). Limits on the power of initiative and referendum will be strictly construed. *Margolis v. District Court*, 638 P.2d 297, 302 (Colo. 1981). This is particularly true in the context of land use regulations. “Indeed, a heightened community sensitivity to the quality of the living environment and an increased skepticism of the judgment of elected officials provide much of the impetus for the voters’ exercise of the powers of referenda and initiative in the zoning context.” *Id.* at p. 303.

Any limits on the power of legislative bodies to reverse a decision of the electorate are not unusual or unexpected. As such, there is no need to mention this portion of the measure in the title.

The Objectors next contend that the titles are inaccurate and incomplete because they do not mention that the measure requires an election to extend, amend or repeal the limited moratorium in the counties named in the proposal. (Objectors’ Brief, pp. 13-14) This Court has rejected a similar claim. *In re Title, Ballot Title and Submission Clause, and Summary Adopted April 17, 1996 by the Title Setting Board Pertaining to a Proposed Initiative Statute Proposed by Arthur Apple and James Meeker*, 920 P.2d 798 (Colo. 1996). The proposed measure sought to revise the enhanced emissions testing program in the six-county metropolitan area. The measure had two caveats: (1) proposed changes to the

program must be submitted for approval under the federal Clean Air Act, and (2) the existing programs would be continued if the measure fails to achieve certain level of benefits. Each contingency affected the length and timing of the measure. Opponents charged that the titles were inaccurate because they failed to mention these subsequent contingencies. The Court rejected the claim, deeming neither feature central to the measure. *Id.* at p. 803.

Likewise, the titles set in proposal 76(a) state that the limits on housing will be imposed through 2010. There is no evidence in the record that the decisions of signers or voters in 2006 will be influenced by a requirement to hold an election to extend the limits four years hence. Therefore, the Board properly declined to mention this fact in the titles.

Finally, the Objectors contend that the titles are misleading because they do not disclose that the limitation must be applied uniformly among local governments within a county. (Objectors' Brief, pp. 15-16) According to the Objectors, "the explicit terms of the measure *will require* each city, town, and county within a county to cap their growth...." (Emphasis added) (Objectors' Brief, p. 15) The measure does not mandate that all growth limits in the county

must be uniform. Growth limits will be uniform only if county voters, in their discretion, vote to make the uniform.

Moreover, the effect of a county-wide vote on growth limits imposed by municipal voters is uncertain. The measure does not state whether county-wide vote limits apply only to those areas of the county that do not have growth limits or whether they will supersede existing growth limits.

Finally the titles do inform the signers and voters about the interplay between votes to impose municipal growth limits and votes to impose county-wide growth limits. The titles state:

...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.....

The first phrase indicates that the voters within local governments may impose growth limits. The second phrase states that all voters within a county may impose limits uniformly throughout a county. Thus, signers and voters are fairly informed about the relationship between the voter-imposed growth limits on municipalities and voter-imposed growth limits throughout the county.

CONCLUSION

For the above-stated reasons, the Board respectfully requests that the Court approve the titles set by the Board.

JOHN W. SUTHERS

Attorney General



MAURICE G. KNAIZER, 05264*

Deputy Attorney General

Public Officials

State Services Section

Attorneys for Title Board

*Counsel of Record

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 17th day of April

2006 addressed as follows:

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A handwritten signature in black ink, appearing to read "Daniel Dade", is written over a horizontal line.

11/2/06
Initiative
#76(a)

Final

RECEIVED

FEB 02 2006

ELECTIONS / LICENSING
SECRETARY OF STATE

Ch
1/22/06
WCC

BE IT ENACTED BY THE PEOPLE OF THE STATE OF COLORADO:
ARTICLE XVIII OF THE CONSTITUTION OF THE STATE OF COLORADO IS AMENDED BY THE
ADDITION OF A NEW SECTION TO READ:

Section 15. Colorado growth limitation

(1) THE 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. 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.

(2) PRIVATELY OWNED RESIDENTIAL HOUSING GROWTH IN THE COUNTIES OF ADAMS, ARAPAHOE, BOULDER, DOUGLAS, EL PASO, JEFFERSON AND LARIMER SHALL NOT EXCEED ONE PERCENT ANNUALLY FOR THE YEARS 2007, 2008, 2009, AND 2010. IN SAID COUNTIES EACH LOCAL GOVERNMENT AND ANY PART OF SUCH, WHETHER STATUTORY OR HOME RULE, SHALL ALLOT BUILDING PERMITS SO THAT SAID HOUSING GROWTH DOES NOT EXCEED A ONE PERCENT ANNUAL GROWTH RATE IN THE TOTAL NUMBER OF DWELLING UNITS IN EACH SAID YEAR. AT LEAST THIRTY PERCENT OF THE HOUSING SUBJECT TO THE LIMITATION SHALL BE AFFORDABLE HOUSING AND AFFORDABLE SENIOR HOUSING AS SHALL BE DEFINED BY THE GENERAL ASSEMBLY AND SUBJECT TO INITIATIVE AND REFERENDUM IN EACH LOCAL GOVERNMENT. BETWEEN NOVEMBER 8, 2006, AND JANUARY 1, 2007, NO PERMITS TO BUILD NEW PRIVATELY OWNED RESIDENTIAL HOUSING UNITS SHALL BE ISSUED WITHIN SAID COUNTIES. 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.

(3) AS USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(a) "ANNUAL GROWTH" MEANS THAT WHICH OCCURS IN A PARTICULAR CALENDAR YEAR MEASURED IN THE TOTAL NUMBER OF DWELLING UNITS ABOVE THAT FOR THE PREVIOUS YEAR.

(b) "DWELLING UNIT" MEANS A BUILDING OR ANY PORTION OF A BUILDING DESIGNED FOR OCCUPANCY AS COMPLETE, INDEPENDENT LIVING QUARTERS FOR ONE OR MORE PERSONS, HAVING DIRECT ACCESS FROM THE OUTSIDE OF THE BUILDING OR THROUGH A COMMON HALL AND HAVING LIVING, SLEEPING, KITCHEN AND SANITARY FACILITIES FOR THE EXCLUSIVE USE OF THE OCCUPANTS. A DETACHED HOME HAS ONE DWELLING UNIT WHEREAS AN APARTMENT BUILDING WITH EIGHTY APARTMENTS HAS EIGHTY DWELLING UNITS.

(c) "LOCAL COUNTY" MEANS THAT PART OF A COUNTY MOST GENERALLY KNOWN AS THE UNINCORPORATED OR STATUTORY COUNTY BUT MAY BE HOME RULE WHEN A CHARTER IS ADOPTED. LOCAL COUNTY IS A LOCAL GOVERNMENT WITH A DISTINCT ZONING JURISDICTION WHICH DOES NOT INCLUDE A CITY, TOWN, OR CITY AND COUNTY.

(d) "LOCAL GOVERNMENT" MEANS A CITY, TOWN, CITY AND COUNTY, OR LOCAL COUNTY, WHETHER STATUTORY OR HOME RULE.

(e) "PRIVATELY OWNED RESIDENTIAL HOUSING" MEANS A SUMMATION OF DWELLING UNITS WHICH ARE RESIDENTIALLY ZONED OR OTHERWISE INTENDED FOR PRIVATE RESIDENTIAL USE. THOSE OWNED BY A FEDERAL, STATE OR LOCAL GOVERNMENT ENTITY, OR AN EDUCATIONAL OR MEDICAL FACILITY ARE EXCLUDED.

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Ballot Title Setting Board

Proposed Initiative 2005-2006 #76(a)¹

The title as designated and fixed by the Board is 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.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be 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?

Hearing February 15, 2006:

Single subject approved; staff draft amended; titles set.

Hearing adjourned 2:46 p.m.

Hearing March 1, 2006:

Motion for Rehearing granted in part to the extent Board amended titles; denied in all other respects.

Hearing adjourned 3:17 p.m.

¹ Unofficially captioned "Limitations on Housing Growth" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

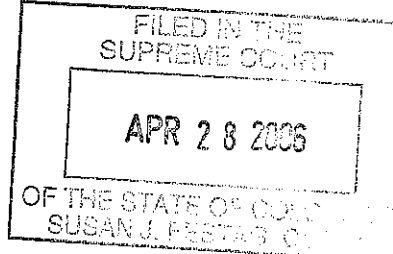
<p>SUPREME COURT, STATE OF COLORADO Court Address: 2 East 14th Avenue Denver, Colorado 80203</p>	
<p>ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), C.R.S. (2006) Appeal from the Ballot Title Setting Board</p> <p>IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE, AND SUMMARY FOR 2005-2006, #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>▲ COURT USE ONLY ▲</p>
<p>Attorneys for Petitioners: Mark G. Grueskin, #14621 Daniel C. Stiles, #35695 Isaacson Rosenbaum P.C. 633 17th Street, Suite 2200 Denver, Colorado 80202 Phone Number: 303-292-5656 Fax Number: 303-292-3152 E-mail: mgrueskin@ir-law.com; dstiles@ir- law.com</p>	<p>Case No.: 06 SA 73</p>
<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.

ISAACSON ROSENBAUM P.C.

By: 
Mark G. Grueskin, #14621
Daniel C. Stiles, #35695

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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Case No.06SA73

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

IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE, AND
SUMMARY FOR 2005-2006, #76(a)

Petitioners:

CHRISTOPHER P. ELLIOTT, MARTIN F. RUSSELL, and PAUL D. NELSON, JR.,
Objectors,

v.

Respondents:

DANIEL HAYES and ERIC LEVINE, Proponents,

and

Title Board:

WILLIAM A. HOBBS, JASON DUNN, and DAN CARTIN.

ORDER OF COURT

Upon consideration of the Petition for Review of Final
Action of Ballot Title Setting Board Concerning Proposed
Initiative 2005-2006 #76(a) ("Limitations on Housing Growth"),
together with the briefs filed herein, and now being
sufficiently advised in the premises,

IT IS ORDERED that the actions of the Title Board are
AFFIRMED.

BY THE COURT, EN BANC, MAY 15, 2006.
JUSTICE EID does not participate.



Copies mailed via the State's Mail Services Division on 5-16-06 NMT

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