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Supreme Court, State of Colorado Court Address: Colorado State Judicial Building 2 E 14th Avenue, Suite 400 Denver, CO 80203	
ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), 1 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, #86 **Petitioners:** MICHAEL A. BOWMAN and DOUGLAS B. MONGER, Objectors, **Respondents:** WILLIAM G. MOHRAM, JR. and BETTY S. LAMONT, Proponents **Title Board:** WILLIAM A. HOBBS, JASON DUNN, and DAN CARTIN.	**▲COURT USE ONLY▲**
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OPENING BRIEF	

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STATEMENT OF ISSUES PRESENTED

Whether the Title Board ("Board") erred by failing to inform voters that the measure adopts a new standard for the most important phrase, "land use regulation," contained in this initiative.

Whether the Board erred by failing to inform voters that the measure expressly applies to governmental entities that are not commonly perceived to be engaged in or associated with land use regulation.

Whether the Board erred by failing to state that the initiative's remedies apply to land use regulations enacted as long ago as 1970.

Whether the Board erred by failing to set forth the exemptions contained in the measure – land use regulations that apply to nuisances, protect the public health and safety, or comply with federal law – and, more importantly, the severe restrictions on the actual operation of these exemptions.

STATEMENT OF THE FACTS

William G. Mohram, Jr. and Betty S. LaMont ("proponents") are the two registered electors who have proposed Initiative 2005-2006 #86 which creates a new subsection 2 to Article II, section 15 of the Colorado Constitution. Initiative #86 mandates remedies for private landowners whose property or property interest is affected by a public entity that enacts or enforces a "land use regulation." The

measure provides for (1) compensation where a land use regulation reduces property value by twenty percent or more; or (2) an exemption from such regulation. The initiative redefines key phrases, such as "land use regulation" and "public entity." It applies to all "land use regulations" that were enacted beginning in 1970 if the property has not changed hands since the regulation was enacted. The measure exempts regulations that address public nuisances, protect public health and safety, or comply with federal law but erects barriers to the use of these exceptions. The public entity's declaration of such exceptions does not establish their existence; this matter can be addressed *de novo* at each level of review.

The title set by the Title Board for #75 reads as follows:

> An amendment to the Colorado constitution concerning a requirement that public entities provide remedies to owners of privately-owned real property for land use regulations that diminish the value of the property, and, in connection therewith, requiring public entities to provide compensation to an owner or exempt the owner from the land use regulations if a public entity enacts or enforces land use regulations that reduce the value of any portion of the property by twenty percent or more.

The ballot title and submission clause contains the same language, except that it is preceded by the words, "Shall there be," and the punctuation at the end of the title is changed to a question mark.

STATEMENT OF THE CASE

The Title Board met on March 15, 2006 to set a title for this measure. On March 22, 2006, Michael A. Bowman and Douglas B. Monger submitted a Motion for Rehearing, which was heard at the Board's April 5 meeting. The Board granted in part and denied in part that Motion for Rehearing.

The Board agreed with the Objectors that the phrase "just compensation" should be changed, given its use as a term of art within Article II, section 15 of the Constitution. The Board eliminated the word "just." The Board also agreed that the title had omitted any reference to the fact that the measure is triggered when a land use regulation is enacted *or enforced* and property values are affected. With the consent of the proponents, the Board added the words "or enforced."

In certain other regards, as set forth more fully in this Opening Brief, the Board did not revise the titles.

SUMMARY

The Board needed to refer to all key provisions in the initiative. For one, the measure establishes a totally new standard for "land use regulation." Because that standard would surprise voters, this deficiency must be remedied. Voter would never presume that such "land use regulations" encompass both the legislative and adjudicative acts of public entities. Second, the electorate should know that the

measure can be enforced against any state or local public entity whose actions qualify as "land use regulations." Third, the measure is not just prospective in nature. It applies to regulations in effect since 1970, a fact that voters would not understand if left to their own devices. And finally, the measure excepts certain land use regulations from the compensation/exemption provisions but sets up procedural barriers that undermine these exceptions. The ballot title refers to neither aspect and is thus insufficient.

The title should be returned to the Board to be corrected.

LEGAL ARGUMENT

A. A ballot title must inform voters of all key provisions contained in the initiative, and any title that fails to do so is misleading.

The Title Board is charged with crafting a brief yet accurate title that "fairly express[es] the true meaning and intent of the proposed state law or constitutional amendment." § 1-40-106(3), C.R.S. The title must summarize the key elements of an initiative so that voters can appropriately evaluate it. Properly crafted, a ballot title ensures the integrity of the election process for initiated measures. "The Board must simultaneously consider the potential public confusion that might result from misleading titles and exercise its authority in order to protect against such confusion." In the Matter of Title, Ballot Title and Submission Clause, and Summary for 1999-2000 # 25, 974 P.2d 458, 469 (Colo. 1999).

The ballot title is no mere formality. It is included on petitions, § 1-40-110(2), C.R.S., so that voters know what they are being asked to refer to a public vote. The title is the only information on the ballot itself that voters see when they vote on a proposed measure. As such, the Board's titles must "enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal." In re Proposed Initiative Concerning "State Personnel System", 691 P.2d 1121, 1123 (Colo. 1984). And after the election, the title will be reviewed by the courts to help discern what voters considered – or did not consider – in voting for the measure. City of Wheat Ridge v. Cerveny, 913 P.2d 1110, 1115 (Colo. 1996).

A ballot title must be concise. § 1-40-106(3)(b), C.R.S. However, the price of being succinct cannot be the omission of significant elements of an initiative. "[I]f a choice must be made between brevity and a fair description of the essential features of a proposal, the decision must be made in favor of full disclosure to the registered electors." In the Matter of Title, Ballot Title and Submission Clause, and Summary for Proposed Election Reform Amendment, 852 P.2d 28, 32 (Colo. 1993). The question for the Court is, then, whether full disclosure of an initiative's important aspects has been made.

The Court presumes that the Title Board has fulfilled its duties and provided the voting public with an accurate title. The Court will not revise a title merely because it could have been drafted differently or even more artfully. Nor will the Court analyze the meaning of the measure, beyond that indicated by its plain language and the statements of the proponents' intent, in order to evaluation the Title Board's handiwork. And the Board is not required to state all of an initiative's effects. Id. at 33.

Even so, the Court's review of a ballot title is not superficial. "Our duty is to 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." Id. Where the Board has not correctly and fairly expressed the true intent and meaning of the proposed, the title is returned to the Board to be corrected, based upon directions from this Court.

B. The initiative contains a new definition of "land use regulation," and this new standard is significant but is not reflected in the ballot title.

This measure dramatically expands the types of acts that qualify as a land use regulation. However, the title fails to inform voters of this vastly expanded

universe of governmental actions that could increase their exposure as taxpayers to demands for payment or exemption from such regulations.[1]

In many instances, an initiative's definitions are not key provisions about which voters need to be informed. There are occasions, however, where a ballot measure fundamentally alters the reach of the law through the meaning given to essential terms and does so in a way that is at the core of the proposal to be put before voters. Those changes must be set forth in the ballot title.

A measure's title need not refer to the definitions of terms used therein, unless the terms in question "adopt a new or controversial legal standard which would be of significance to all concerned" with the proposal. In re Proposed Election Reform Amendment, 852 P.2d 28, 34 (Colo. 1993). The question before this Court is, what types of terms qualify as those that would be of concern to the entire electorate?

In the past, this Court has held that the title of a measure that required parental notification of minors' intention to have an abortion must contain the revised definition of "abortion." In re Proposed Initiative on Parental Notification of Abortions for Minors, 794 P.2d 238 (Colo. 1990). The initiative set forth a new definition of abortion, stating that pregnancy occurred at the time of fertilization

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[1] This issue was raised in the Motion for Rehearing at p. 1, ¶6.

rather than fetal viability. Id. at 241-42. Because the legal status of the fetus would clearly be at the heart of the political debate over that measure, the Court noted that the definition of abortion was likely to be controversial and therefore had to be related by the titles. Otherwise, signors of the initiative petition and the persons voting on the initiative would not be "fully inform[ed]" about the measure, and the titles set could "not fairly reflect the contents of the proposed initiative." Id.

Under #86, "land use regulation" has an exceedingly broad meaning. It "includes any permanent or temporary actions taken by any public entity that affects ownership of, or an interest in, real property." Proposed Colo. Const., art. II, sec. 15(2)(c)(III). That language alone is extraordinary. A public entity's act need only "affect" property ownership or property interests in order to qualify as a land use regulation.

Using the effect on property ownership or property value as the measure's jumping off point, a land use regulation is virtually *any* official act done by a public entity. It includes, but is not limited to the following:

- any law;
- any regulation;
- any moratorium;

- any ordinance
- any rule;
- any guideline;
- any enforcement action;
- any deed restriction; or
- any other action taken in connection with an application or permit, including the denial of such application or permit.

Proposed Colo. Const., art. II, sec. 15(2)(c)(III).

A land use regulation is also defined to include two or more regulations. Id. A "regulation" thus can be comprised of both the standard passed by the public entity and any attendant enforcement actions, or a zoning application decision and the administrative or judicial review process leading to its denial.

While certain of the terms contained in this definition would come as no surprise to voters as being included within "land use regulation" (law, rule, regulation, and ordinance, for example), others would never occur to voters as triggering this new remedial scheme. For instance, how does an "enforcement action" qualify as a land use "regulation?" In all contexts with which voters are familiar, the enforcement of a regulation or ordinance is separate from the passage of a regulation, each with its own procedures, standing requirements, and remedies.

Similarly, how is a deed restriction a land use regulation? Deed restrictions are acts that reflect market transactions and need not apply to all similarly situated parties or land parcels. *See* Taylor v. Melton, 274 P.2d 977, 981 (Colo. 1954) (deed restrictions are effective even when they apply to a small percentage of a development's lots). And how does the denial of a permit or application qualify as a land use regulation? In such an instance, the public entity acts not in a legislative capacity but in its quasi-judicial role.

Voters know that not every action that pertains to real property, enacted or enforced by a governmental entity, amounts to a "land use regulation." For instance, where a municipality links new development to requirements for employees' affordable housing, the result is not a land use regulation but "economic legislation." The distinction resides in the difference between prescribing permissible uses, the key element of any land use regulation, and dictating the rate at which property can be used for a permissible use, a defining aspect of economic legislation. Town of Telluride v. Thirty-Four Venture, L.L.C., 3 P.3d 30, 39 n.9 (Colo. 2000). And this distinction is not insignificant. If a local ordinance that has the effect of controlling rents were found to be a "land use regulation," the ordinance could be upheld as an appropriate exercise of a jurisdiction's exercise of its inherent authority over land use matters instead of

being struck down because it conflicts with state statute. Id. at 45 (Mullarkey, J., dissenting).

However, a "land use regulation" under #86 need not establish, or even relate to, the delineation of permissible property uses. In fact, a "land use regulation" would not need to even address the "rubric of zoning and planning decisions" that are associated with that phrase. Id. Instead, it can be a deed restriction or anything else that virtually any part of state or local government does, as long as that action affects ownership interests in or value of real property. Proposed Colo. Const., art. II, sec. 15(2)(c)(III).

A land use regulation such as a zoning code is a legislative act. City of Colorado Springs v. Securcare Self Storage, Inc., 10 P.3d 1244, 1248 (Colo. 2000) . In contrast, Initiative #86's redefinition of "land use regulation" expands that phrase far beyond the setting of a standard that is generally applicable to similarly situated parties. By its express terms, that definition includes enforcement actions and an entity's quasi-judicial actions in denying applications or permits – actions that apply to a single party or a limited group of persons. Actions on permits and applications are adjudicative proceedings and are not legislative in nature or effect. Dillon Cos. v. Boulder, 515 P.2d 627, 630 (Colo. 1973); Bauer v. City of Wheat Ridge, 513 P.2d 203, 205 (Colo. 1973). Adjudicative decisions such as these

inherently lack the capacity to be deemed "regulations." Dolan v. City of Tigard, 512 U.S. 374, 385 (U.S. 1994) (land use regulations are "essentially legislative determinations classifying entire areas of the city" and are fundamentally different from "an adjudicative decision to condition petitioner's application for a building permit on an individual parcel"). Both the courts and the legislature embrace this clear line between legislative statements and adjudicative determinations. Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 696 (Colo. 2001). Initiative #86 erases the line between the two classes of government action by labeling them all "land use regulations."

The proponents are certainly permitted to rewrite the law to achieve this end, but they cannot do so without informing voters of this vital element of the measure. This definition is the centerpiece of the measure. It triggers the availability of #86's new remedies. Certainly, voters should be able to know that the universe of "land use regulations" is far beyond what is normally considered to fall under this heading. Just as a redefinition of abortion was important to voters who were to cast ballots on a measure dealing with the availability of that procedure to minors, the redefinition of land use regulation is critical to voters who will act to consider changes to the available remedies when a public entity acts.

C. The initiative's broad definition of a "public entity" engaged in land use regulation transcends these agencies that voters associate with this activity, but the title is silent about this change.

The measure provides compensation for (or exemption from) land use regulations by any "public entity" that enacts or enforces a land use regulation. The title is silent on the expanded list of public entities now engaged in "land use regulation" and therefore potentially liable for regulations that affect a property or its value.[2]

> "Public entity" is broadly defined and
>
> > includes the State of Colorado, any political subdivision of the state, any agency or department of the state government, a county, city and county, city, town, service authority, school district, local improvement district, law enforcement authority, city or county housing authority, or water, sanitation, fire protection, metropolitan, irrigation, drainage, or other special district, or any other kind of municipal, quasi-municipal, or public corporation organized pursuant to law, or any entity that independently exercises governmental authority. 'Public entity' shall include two or more public entities.

Proposed Colo. Const., art. II, sec. 15(2)(c)(V). Some of these public entities are typically associated with land use regulation – cities, counties, and towns, for instance – because land use regulation is inherently a local issue to be controlled by local governmental units. Local governments have broad authority to regulate virtually all forms of land use and development. *See* Voss v. Lundvall Bros., 830

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[2] This issue was raised in the Motion for Rehearing at p. 1, ¶5.

P.2d 1061, 1065 (Colo. 1992). Zoning, for instance, is "peculiarly a matter of local concern." In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43, 46 P.3d 438, 448 (Colo. 2002). And while there may be certain state interests that are implicated in some land use matters, the state simply is not the public entity that voters look to as one that enacts or enforces land use regulations. Yet, under #86, the state's application of its regulations will become compensable to the property owner, unless the state agrees to exempt such property altogether.

Besides state entities, the measure applies to local governmental units that voters would not consider to be within the realm of land use agencies. All special districts, including fire protection, irrigation, and drainage districts, are expressly included within this definition. So, too, are law enforcement agencies, school districts, and housing authorities. The business of these agencies has nothing to do with the delineation of permissible uses for property. Nor does it approach the rubric of planning and zoning. Yet, law enforcement authorities affect a property interest when they seize such real property. School districts and housing authorities affect a property value by locating a facility nearby a property owner. These acts can now result either in compensation to the property owner or an exemption from such act, where the latter is even possible. They are major

changes to the current system of land use regulation, but the title is silent as to the sheer expanse of entities covered. And the change to accomplish this end would be relatively simple: replace "a public entity" with "any public entity."

The proponents may seek to change the rules of the land use game to treat the state and every local subdivision of government as a regulating entity, but the voters should be informed of this aspect of the measure via the ballot title.

D. The title fails to inform voters that the measure applies retroactively to land use regulations in effect since 1970.

The measure specifically applies to land use regulations, as defined, enacted since 1970.[3] The title gives no hint to voters of this retroactive application.

An initiative's retroactivity need not be mentioned in the title if it is not expressly provided for in the measure or if it is not stated as an intended consequence by the proponents. In the Matter of the Title, Ballot Title and Submission Clause, and Summary Pertaining to Confidentiality of Adoption Records, 832 P.2d 229, 232 (Colo. 1992). Here, however, such retroactivity is clearly stated in the measure, Proposed Colo. Const., art. II, sec. 15(2)(a)(I)(A), and was echoed before the Board by the proponents.[4]

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[3] This issue was raised in the Motion for Rehearing at p. 1, ¶7.

[4] The transcript for the rehearing is being prepared and will be submitted to the parties and the Court as a supplemental exhibit.

Moreover, given the expansive definition of "land use regulation" and the fact that it may encompass two or more such "regulations," Proposed Colo. Const., art. II, sec. 15(2)(c)(III), the extent of government actions that are potentially affected by this proposal are important considerations for the electorate. Landowners, affected by decades-old "land use regulations," will be permitted to reach back across time to be compensated for those decisions. The ballot title can, and should, inform voters that this measure applies to historic as well as future government actions of various sorts.

Voters have good reason to presume that an initiated measure will become effective after the governor's official proclamation of the votes that were cast thereon. That is the format the Constitution prescribes. Colo. Const., art. V, sec. 1(4). If a measure is to be retroactive, therefore, the voters should be on notice of that fact in the process of being asked to enact it. And the best way to achieve this end is through a clear statement in the ballot title.

E. The Board failed to address the significant restrictions on the three exemptions to the measure.

Initiative #86 does not apply to all land use regulations. The measure expressly exempts certain regulations, which are not addressed in the title. Further,

there are severe restrictions on the three excepted categories of regulations that the title should, but does not, communicate.[5]

This measure applies to land use regulations that affect property ownership or value and provides the compensation/exemption remedies unless the regulation:

- restricts or prohibits activities historically recognized as a public nuisance;
- is necessary to protect the public health and safety; or
- complies with federal law.

Proposed Colo. Const., art. II, sec. 15(2)(a)(II). Provisions such as these that limit a measure's applicability can be significant aspects, deserving of mention in the ballot title. For example, where an initiative provided for English immersion and established an exemption through a limited waiver system, the limitations on that exemption had to be described in the title. In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-02 #21 and #22, 44 P.3d 213, 221-22 (Colo. 2002).

Here, the title does not reference the exceptions and is thus deficient. More problematic, though, is the fact that the ballot title does not inform voters that the exceptions will be difficult to invoke. First, the findings of public entities are insufficient in and of themselves to establish these exceptions. Proposed Colo.

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[5] This issue was raised in the Motion for Rehearing at p. 2, ¶¶8-10.

Const., art. II, sec. 15(2)(b)(VI). Second, an exception exists only if approved by a court of law, subject to *de novo* appellate review. Id.

Like #21 and #22, the exceptions are more apparent than real and thus are included in the measure as bait for voters. For the proponents to convince voters that there are reasonable limits on their measure, they must be able to represent that governmental entities affected by the measure can still address emergencies, such as public nuisances, dangers to the public health and safety, and matters mandated by federal law. But where such exceptions are a "sham," that fact must be put before the voters in the ballot title. #21 and #22, 44 P.3d at 220. Because #86 limits the ability of governments to establish such emergencies unless tested in the court and sustained on appeal, there is limited, if any, usefulness to a governmental finding of nuisance, for example, or necessity due to the needs of public health and safety.

As such, the limitations on these exemptions, like the limitation on the exemption in #21 and #22, 44 P.3d at 221, must be disclosed to voters. In this regard, the Court's admonition on the completeness and accuracy of the ballot title in the modern era is worth repeating.

> The initiative process in Colorado has proliferated, and accordingly, this court and the title board now deal with an increasing number of measures. More importantly, when the proposals acquire the requisite support to be placed on the ballot, the voters now deal with an

> increasing number of measures. Particularly in this climate, we conclude that the fixing of an understandable title is of great importance. **We recognize that fixing a title in cases like this, where the measure is both detailed and internally circuitous is a difficult task. However, the title board must nonetheless proceed.** We direct the board to begin the titles with a clear, general summary of the initiative, followed by a brief description of the major elements of the initiative. **The titles, standing alone, should be capable of being read and understood, and capable of informing the voter of the major import of the proposal**, but need not include every detail. They must allow the voter to understand the effect of a yes or no vote on the measure. When they do not, both the title board and this court fail in our respective functions.

Id. at 222 (emphasis added). Thus, it is incumbent on the Board to communicate the measure's key elements, including the exceptions and the conditions on their use, so that voters can cast an informed ballot. And here, because it cannot be said that this title, standing alone, communicates the import of this proposal, the Board did not fulfill its duty as provided by statute.

CONCLUSION

The Title Board's duty is a central one. Here, it failed to meet the obligations imposed on it by the General Assembly, and the title should be returned to the Board to be corrected.

Respectfully submitted this 2nd day of May, 2006.

ISAACSON ROSENBAUM P.C.

By: _____
Mark G. Grueskin

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of May, 2006, a true and correct copy of the foregoing OPENING BRIEF was served via hand delivery to the following:

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