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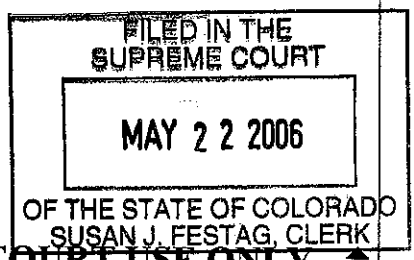
SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), 1 C.R.S. (2005), Appeal from Ballot Title Setting Board	**COURT USE ONLY**
IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE FOR 2005-2006 #86 MICHAEL A. BOWMAN AND DOUGLAS B. MONGER, OBJECTORS, Petitioners, v. WILLIAM G. MOHRAM, JR. AND BETTY LAMONT, PROPONENTS AND WILLIAM A. HOBBS, JASON DUNN AND DAN CARTIN, TITLE BOARD Respondents.	Case No.: 06 SA 113
JOHN W. SUTHERS, Attorney General MAURICE G. KNAIZER, Deputy Attorney General* 1525 Sherman Street, 5th Floor Denver, CO 80203 (303) 866-5380 Registration Number: 05264 *Counsel of Record	

ANSWER BRIEF OF TITLE BOARD

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STATUTES

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. Did the Board err by failing to include in the titles the definition of "land use regulation", set forth in the proposed measure?

2. Did the Board err by failing to include in the titles the definition of "public entity" set forth in the proposed measure?

3. Did the Board err by failing to state that the proposed measure applies to regulations enacted in 1970 under certain circumstances?

4. Did the Board err by failing to include in the titles a description of exemptions to the measure and a statement that the exemptions are extremely limited?

STATEMENT OF THE FACTS

The Objectors' description of the proposed measure contains some material errors. At page 1 of their Opening Brief, the Objectors state that the proposal "mandates remedies for private landowners whose property or property interest is *affected by* a public entity" that enacts or enforces a 'land use regulation.'" This summary broadly overstates the measure. The measure purports only to

"diminish[] the fair market value of any portion of privately-owned real property by twenty percent or more."

Moreover, the proposal does not implicitly or explicitly redefine terms such as "land use regulation" and "public entity". To the contrary, the terms used in the measure are consistent with their commonly-accepted meanings, both at common law and by statute.

STATEMENT OF THE CASE

The Board accepts the Objectors' statement of the case.

SUMMARY OF THE ARGUMENT

The phrases "land use regulation" and "public entity" are neither new nor unusual. The proposed measure adds a new subsection to Colo. Const. art. II, § 15. This Court has broadly interpreted this constitutional provision to encompass matters that are within the measure's definition of "land use regulation" The measure does nothing more than clarify rights already granted in article II, § 15. The Board did not err by refusing to include the definition of this term in the titles.

The definition of "public entity" is not new or unusual. It encompasses governmental entities that have long been involved in land use matters. The Board did not err by using the phrase "a public entity."

The Board properly refused to mention the retroactivity provision in the titles. The retroactivity provision is narrow and is not a central feature of the measure.

The Objectors contend that the exemptions are practically nonexistent because they are so difficult to achieve. Assuming that this conclusion is correct, the Board properly did not discuss the exemptions in the titles.

ARGUMENT

I. INTRODUCTION

The Board must set "fair, clear and accurate titles that do not mislead the voters through a material omission or misrepresentation." *In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 #256*, 12 P.3d 246, 256 (Colo. 2000). The titles must state only the central features of the measure. The Court will not rewrite the titles to achieve the best possible statement of the proposed measure's intent. The Court will reverse the Board only when the language chosen is clearly misleading. *Id.* at 255.

II. THE BOARD PROPERLY DECLINED TO INCLUDE THE DEFINITION OF "LAND USE REGULATION" IN THE TITLES.

A definition or explanation of a phrase must be included within a title if (1) the phrase constitutes a new or controversial legal standard which would be of

concern to all those interested in the issue or (2) it is a term which is not with the common understanding of the voters. *In re Title, Ballot Title and Submission Clause, and Summary Pertaining to the Proposed Initiative Designated "Governmental Business"*, 875 P.2d 871, 877 (Colo. 1994).

The Objectors contend that the measure expands the definition of "land use regulation" beyond its commonly accepted meaning and is not within the common understanding of the voters; therefore, the Board must place or summarize the definition within the titles. The Objectors fail to look at the term "land use regulation" in the context of the constitutional provision that is being amended. When viewed in the context of long-standing interpretations of Colo. Const. art. II, § 15, the measure's definition of "land use regulation" is not unusual or uncommon.

The proposed initiative seeks to amend article II, § 15 by adding section 2. Article II, § 15 presently states:

> Private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner divested; and whenever

> an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined without regard to any legislative assertion that the use is public.

This Court has expansively interpreted this provision to cover not only legislative matters, but also any activity that that may adversely affect property. Thus, this clause has been applied to situations in which government activity in an area adjacent to a person's real property. *Public Service Co. of Colo. v. Van Wyk*, 27 P.3d 377, 388 (Colo. 2001). The case of *Farmers Irrigation Company v. Game and Fish Comm'n,* 149 Colo. 318, 369 P. 2d 557 (1962) provides an example of the expansiveness of this provision. The Game and Fish Commission constructed a hatchery and directed river water to support the hatchery. When the water was returned to the river, the water quality was degraded. The irrigation district claimed that it had property rights in the water that was returned to the river and that it was entitled to just compensation. This Court agreed with the irrigation district, holding that the actions of the commission damaged the district's property interest. The irrigation district was entitled to compensation under article II, § 15. *Id.* 149 Colo. at 323, 369 P.2d at 560.

In *Board of County Comm'rs of Logan County v. Adler*, 69 Colo. 290, 194 P. 21 (1920), the county constructed a bridge that caused the flooding of abutting land owned by a citizen. The Court held that property owner was entitled to reimbursement under article II, § 15. Likewise, enforcement of special assessments are deemed to be within the scope of article II, § 15 when the assessments are not related to the owners' property. *Pomroy v. Board of Waterworks, Dist. No. 2, City of Pueblo*, 55 Colo. 476, 482, 136 P. 78, 81 (1913).

The measure's definition of "land use regulation" is consistent with similar land use provisions in existing statutes. The Regulatory Impairment of Property Rights Act, § 29-20-201 et seq., C.R.S. (2005) does not limit regulations affecting land use to legislative actions. "Land use approval" is defined as "any action of a local government that has the effect of authorizing the use or development of a particular parcel of real property." Section 29-20-202(1), C.R.S. (2005). The law is intended to determine "whether the property owner should be granted relief from the local government's enforcement or application of local law, regulation, policy, or requirement". Section 29-20-204 (2)(d), C.R.S. (2005).

The Vested Property Rights Act, section 24-68-101, et seq. (2005), governing vested rights in real property, covers more than just legislative actions.

The law is intended to protect the rights of property owners in the development and use of their property against intrusion by governments. The property owner is protected against any "land use action" that impairs the power of the owner to develop his property. Section § 24-68-105(1), C.R.S. (2005).

This Court has recognized that the term "regulation" in the land use context is not limited to legislative enactments. Thus, a water resources development fee is a "benign form of regulation.'" *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 697 (Colo. 2001)(quoting *Home Builders Ass'n v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997))

The broad definition of the term "land use regulation" in the measure is most likely understood by the voters. *In re Title, Ballot Title and Submission Clause and Summary Pertaining to the Initiative Concerning "Taxation III"*, 832 P. 2d 937, 941 (Colo. 1992). It is fair to assume that a voter who is not an attorney will not distinguish among legislative, judicial or executive actions to determine whether a particular activity is a regulation. Most voters will deem a mandate adversely affecting their property to be a regulation, irrespective of its source.

For these reasons, the Court must conclude that the Board properly declined to include the definition of "land use regulation" in the measure.

III. THE PHRASE "A PUBLIC ENTITY" FAIRLY DESCRIBES THE GOVERNMENTAL ENTITIES COVERED BY THE MEASURE

The Objectors next argue that the definition of "public entity" in the measure extends beyond governmental entities that the public usually associates with land use regulation. According to the Objectors the public does not assume that the state government or special districts are typically involved in land use regulations.

History belies this assertion. Persons or entities have brought lawsuits against irrigation districts, *Riverside Irrigation Dist. v. Lamont*, 194 Colo. 320, 322, 572 P.2d 151, 152-53 (1977), and railroads, *Buck v. District Court,* 199 Colo. 344, 346, 608 P.2d 350, 352 (1980), in which they allege interference with their property interests. Existing statutes give eminent domain authority to special districts. Section 32-11-220(1)(b), C.R.S. (2005)(Urban Drainage and Flood Control District has power of eminent domain); § 32-14-107(1)(m), C.R.S. (2005) (Denver Metropolitan Major League Baseball District has power of eminent domain). Likewise, persons have brought suit against state agencies alleging damage to their property under article II, § 15. *Farmers Irrigation Dist. v. Game and Fish Comm'n, supra.*

The Objectors do not suggest that the entire definition be placed in the measure. Rather, they state that the lack of clarity can be resolved by substituting

the word adjective "any" for the article "a" before the phrase "public entity". The word "a" is an indefinite or generalizing word. *Brooks v. Zabka*, 168 Colo. 265, 269, 450 P.2d 653, 655 (1968). The word "any" means "without limitation or restriction". *National Farmers Union Property v. Estate of Mosher*, 22 P.3d 531, 534 (Colo. App. 2000). There is no real difference in the meaning of these words.

For these reasons, the Court must reject the Objectors' argument.

IV. THE RETROACTIVITY PROVISION IS NOT A CENTRAL FEATURE.

The Objectors next argue that the titles fail to mention that the measure applies retroactively to land use regulations since 1970. The Objectors imply that all land use regulations since 1970 are subject to the measure. Their argument misstates the content of the measure.

Section 2 of the measure states, "If any public entity enacts or enforces any land use regulation or any combination of land use regulations that diminishes the fair market value of any portion of privately-owned real property by twenty percent or more, the public entity shall either provide just compensation to the owner of the affected portion of real property, or exempt the owner from the land use regulation."

Section 2(a) of the measure establishes certain exemptions. The measure does not apply to any land use regulation that (1) was enacted prior to 1970 or after 1970 but prior to acquisition of the property by the owner or a family member of the owner, or (2) is necessary to restrict or prohibit common law nuisances, to protect the public health or safety, or to comply with federal law.

Section 2(b) establishes additional limitations. The owner must make a written demand within five years of the effective date of the measure, the date of the enactment of the land use regulation, or the date the public entity seeks to enforce the measure.

The retroactivity provision is extremely limited. Although the measure does have a five-year retroactive window for certain regulations existing at the time the measure becomes effective, the types of regulations and affected properties are limited. The retroactivity provision will affect only a fraction of the properties in Colorado. The provision will not apply to regulations that diminish the fair market value of real property by less than twenty percent. It does not apply to properties that have been acquired after the land use regulation has been enacted. It does not apply to a broad spectrum land use regulations that restrict or prohibit common law nuisances, protect public health and safety, or are appropriate under federal law.

The Board must set forth only the central features of the measure. In light of its very limited scope, the provision allowing persons to seek exemptions or reimbursement from a public entity for up to five years prior to the effective date of the measure is not a central feature.

V. THE BOARD PROPERLY REFUSED TO DISCUSS THE EXEMPTIONS.

The Objectors next contest the fact that titles do not list the exemptions set forth in section (2)(a)(II) of the measure. The Objectors contend that voters should be informed that the exemptions "are more apparent than real and thus included in the measure as bait for the voters." (Objectors' Brief, p. 18)

Assuming that the Objectors' assessment of the difficulty in qualifying for the exemptions is accurate,[1] the Board's refusal to mention the exemptions is consistent with its duty to fairly summarize the measure. If, as the Objectors contend, the exemptions are practically unachievable, then the Board properly

[1] The Board does not agree that the exemptions will be difficult to achieve. The measure only shifts the burden of proof. Under the measure, the owner may bring an action seeking just compensation or an injunction. The owner must establish that the diminution of value of is 20% or more. The public entity may assert an affirmative defense that at least one of three exemptions applies and must prove the affirmative defense by clear and convincing evidence. These requirements do not prevent the public entities from taking the property in emergency situations. The public entities must reimburse the owner if the preconditions to compensation are met and the land use regulation does not fall within any of the exemptions.

concluded that the exemptions should not be mentioned in the titles. The Board therefore has explained the true meaning and intent of the measure.

The Objectors contend that this Court has held that the titles must mention the exemption and then state why the exemption is difficult to achieve. *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). The Court did not so hold. It directed the Board to set titles that, "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." *Id.* at 222. If the measure sets forth exemptions but makes those exemptions impossible or impractical to achieve, then the Court has not required the Board to state the exemptions and then explain why the exemptions will never, or only rarely, be granted. It is only when difficult-to-achieve, or surreptitious, exemptions are mentioned in the titles that the Board must explain their practical impact.

CONCLUSION

The Board requests that the Court approve the titles set in this matter.

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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 22nd day of May 2006 addressed as follows:

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