

<p>COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203</p>	
<p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2017-2018 #66 (Limit on Local Housing Growth)</p> <p>Petitioner: Scott Smith</p> <p>v.</p> <p>Respondents: Daniel Hayes and Julianne Page,</p> <p>and</p> <p>Title Board: Troy Bratton, Julie Pelegrin, and Melanie Snyder</p>	<p>▲ COURT USE ONLY ▲</p> <p>Case No.: 2017SA305</p>
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<p>TITLE BOARD'S OPENING BRIEF</p>	

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the Title Board (“Board”) erred in finding that Proposed Initiative #66 (“#66”) contains a single subject under Article V, § 1(5.5) of the Colorado Constitution.

STATEMENT OF THE CASE

Respondents Daniel Hayes and Julianne Page seek to circulate Initiative #66 to obtain the required number of signatures to place the measure on the general election ballot in November 2018. #66 is a proposed amendment to the Colorado Revised Statutes that would limit housing growth in Colorado. *See Attachment to Petition for Review at 6-7.* It seeks to accomplish this goal in two ways. First, the proposed statutory change would give to “the electors of every city, town, city and county, or local county, whether statutory or home rule...the right to limit housing growth by initiative and referendum without legislative inhibition or penalty.” *Id.* at 6 (section 1(2)). Second, it provides that residential housing growth in a certain set of jurisdictions—the Cities and Counties of Broomfield and Denver; and Adams, Arapahoe, Boulder, Douglas, El Paso, Jefferson, Larimer, and Weld Counties—

“shall not exceed one percent annually for the years 2019 and 2020,” and imposes a moratorium on residential housing units within these counties until January 1, 2019. *Id.* (section 1(3) and 1(4)). However, “[b]eginning 2021 such growth limitations may be amended or repealed by initiative and referendum or otherwise shall remain in effect.” *Id.*

The Title Board granted single-subject approval for #66 and set a title on December 6, 2017. *See* Attachment to Petition for Review at 8-9. Petitioner Smith filed a timely motion for rehearing. *Id.* at 10-13. The Board held another hearing on December 20, 2017, and denied the motion for rehearing. *Id.* at 15. The final version of the ballot title reads:

A change to the Colorado Revised Statutes concerning limitations on the growth of housing, and, in connection therewith, permitting the electors of every city, town, city and county, or county to limit housing growth by initiative and referendum; permitting county voters by initiative and referendum to limit housing growth uniformly within the county, including all or parts of local governments within the county; establishing procedural requirements for initiatives for local governments, whether statutory or home rule, concerning limits on housing growth; and for the city and counties of Broomfield and Denver, and in the counties of Adams, Arapahoe, Boulder, Douglas, El Paso, Jefferson, Larimer, and Weld: 1) prohibiting the

issuance of new permits for privately owned housing units by local governments located in whole or in part within such counties and such cities and counties until January 1, 2019, 2) limiting the growth of privately owned residential housing units to one percent annually starting in 2019, and 3) permitting the one percent growth limitation to be amended or repealed by initiative and referendum commencing in 2021.

Id. at 14-15. After the title and submission clause were set, Smith filed his petition for review in this Court.

SUMMARY OF THE ARGUMENT

The Title Board correctly found that #66 contains only a single subject: a limitation on local housing growth. As the Title Board noted, this Court approved the title set for a nearly identical title just last year. *See Matter of Title, Ballot Title, and Submission Clause for 2017-2018 #4*, 395 P.3d 318 (Colo. 2017). The fact that #66 is a statutory initiative, rather than a constitutional one, does not change its scope.

ARGUMENT

I. The Board correctly found that #66 contains a single subject.

A. Standard of review.

When this Court reviews “the Title Board’s single subject decision, [it] employ[s] all legitimate presumptions in favor of the propriety of the

Title Board's actions. [It] will only overturn the Title Board's finding that an initiative contains a single subject in a clear case." *In re Title, Ballot Title, & Submission Clause for 2011-2012, #45*, 274 P.3d 576, 579 (Colo. 2012) (quotation omitted).

The Title Board agrees that Smith preserved the single-subject issue by raising it in his motion for rehearing.

B. #66 contains only one subject.

The Colorado Constitution provides that an initiative may relate to only one subject: "No measure shall be proposed by petition containing more than one subject" COLO. CONST., art. V, § 1(5.5). A proposed measure 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). In contrast, "to constitute more than one subject, the text of the measure must relate to more than one subject and it must have at least two distinct and separate purposes which are not dependent upon or connected with each other." *In re Title, Ballot Title, & Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 441 (Colo. 2002) (quotations omitted).

If #66 were a constitutional initiative, there would be no doubt that it would satisfy the single subject requirement. This Court approved a closely related and similarly structured constitutional initiative just last year. *See 2017-2017 #4*, 395 P.3d at 320-322. #66, however, proposes changes to the Colorado Revised Statutes. Those proposed statutory changes purport to alter certain constitutional provisions relating to ballot qualification for local initiatives and referenda. While #4 largely did the same thing, it did so by amending the Colorado Constitution. It is this difference that Petitioner maintains creates single-subject concerns.

Notwithstanding Petitioner's arguments, the Board correctly determined that #66 contains only one subject: limiting housing growth in Colorado. In *2017-2018 #4*, this Court held that the two central provisions of that initiative "limit housing growth to one percent annually in ten jurisdictions until 2021 and prohibit permits for new residential housing units in the same jurisdictions until 2019." 395 P.3d at 321. Both of these provisions, the Court held, "tend to carry out the one general objective of limiting housing growth in Colorado by

providing a means for reducing the number of new homes built.” *Id.* (internal quotation omitted).

#66 shares the same goal as #4, but because #66 is a statutory initiative, it both adds material to the Colorado Revised Statutes and purports to alter the extent to which certain municipalities may exercise their constitutional authority over the initiative and referendum process. Petitioner contends that this overlap between statutory and constitutional provisions is a single-subject violation. The Title Board maintains that concerns about the overlap relate only to the ultimate constitutionality of the initiative—a consideration outside the Board’s purview—and not to the number of subjects that the initiative contains.

Citing three cases from this Court, Petitioner’s motion for rehearing argued that including “[t]hese provisions in the initiative violate[s] the single subject requirement by making a procedural change to the home rule authority of municipalities regarding initiatives and referenda.” Attachment to Pet. for Review at 12 (citing *In re Title, Ballot Title & Submission Clause for Proposed Initiative 2001-2002 #43*,

46 P.3d at 445-45; *Matter of Title, Ballot Title & Submission Clause, & Summary with Regard to a Proposed Petition for an Amendment to Constitution of State Adding Section 2 to Article VII (Petition Procedures)*, 900 P.2d 104, 10 (Colo. 1995); *Matter of Title, Ballot Title & Submission Clause for 2013-2014 #76* 2014 CO 52, ¶ 30, 333 P.3d 76, 84 (Colo. 2014)). Each of these cases is distinguishable—and none holds that a proposed statutory initiative violates single-subject requirements by ostensibly limiting rights that are guaranteed by the Colorado Constitution.

In *2001-2002 #43*, for example, the Court considered an initiative that would both eliminate the single subject requirement *and* “establish new procedural measures by which initiatives are placed on the ballot.” 46 P.3d at 446. In holding that #43 contained multiple subjects, the Court noted that whereas “the procedural measures govern *how* a proponent exercises his right to petition,” the “single-subject requirement...controls *what* an initiative placed on the ballot may contain.” *Id.* (emphasis in original). As the Court noted, “A voter of average intelligence would be quite surprised to find out that an

initiative purporting to deal with procedural aspects of the right to petition drastically altered the substance of measures on the ballot.” *Id.*

The proposed initiative suffered from similar problems in *Matter of Title, Ballot Title & Submission Clause, & Summary With Regard to a Proposed Petition for an Amendment to Constitution of State Adding Section 2 to Article VII (Petition Procedures)*, 900 P.2d 104 (Colo. 1995).

The opinion noted that:

The most cursory examination of the text of the Initiative reveals that it includes several subjects. For example, it establishes the retroactive creation of substantive fundamental rights in all charter or constitutional petitions approved after 1990. It provides that in construing the effect of such petitions courts must in all cases consider the word “shall” as a mandatory command, regardless of whether the context might otherwise indicate. It establishes standards for judicial review of filed petitions, requiring “strictest scrutiny and full enforcement” of violations of such petitions, and provides that challenges to petitions on single-subject or ballot title grounds can be upheld “only if beyond a reasonable doubt to a unanimous supreme court.” In addition, the Initiative contains numerous and varied procedural and substantive provisions relating to recall, referendum, and initiative petitions.

Id. at 109. As in *2001-2002 #43*, the initiative would have affected both the process for petition qualification and review, and bestowed certain

fundamental rights on the citizens of the State of Colorado. The lack of a necessary and proper connection between the procedural and substantive aspects of the initiative was fatal to the proponent’s single subject arguments.

This Court cited the ruling in *Matter of Title, Ballot Title, & Submission Clause for 2013-2014 #76*, 2014 CO 52, ¶ 30, 333 P.3d 76, 84 (Colo. 2014), in its opinion in *2017-2018 #4*, noting that unlike in *2013-2014 #76*, “Initiative #4 does not, for example, simultaneously add to, repeal, replace, and preempt existing constitutional and statutory provisions.” 395 P.3d at 322. Initiatives that suffer from these shortcomings create logrolling problems—situations where unrelated constituencies may be convinced to support a measure that contains disparate, unrelated provisions. But as was the case in #4, “[t]here is no threat of logrolling here, because those who favor limits on housing growth would also favor establish procedures through which electors may implement those limits.” 395 P.3d at 322. That remains true whether the provisions appear in statute, the Colorado Constitution, or elsewhere. It is the substance of the proposed initiative, and not the

location of the laws that it amends or repeals, that should dictate the outcome of the single-subject inquiry.

In conclusion, the Title Board’s ruling should be affirmed because #66 does precisely the same thing that #4 attempted to do—the only difference was that, because #4 proposed a change to the Colorado Constitution, its changes could undoubtedly override preexisting constitutional provisions concerning municipal authority over local initiatives. But that issue goes to the ultimate constitutionality of the measure, not the single-subject question. As this Court noted with respect to #4, “the possibility” that a portion of the initiative that implements the initiative’s central goal “might alter the power of home-rule municipalities does not render it a distinct and separate subject.” 395 P.3d at 421. #66 contains similar implementation measures that, as with #4, apply “only in the context of local proposals to regulate housing growth.” *Id.* Because they are focused exclusively on the manner in which #66 would be effectuated, those provisions are not “a disconnected or incongruous attempt to shift voting powers broadly, but rather [are] properly connected to the central goal of limiting housing

growth in Colorado.” *Id.* (internal quotations omitted). To borrow the Court’s reasoning in *2001-2002 #43*, regardless of the location of the affected laws, voters would not be surprised to learn that an initiative seeking to place limits on local housing also includes provisions that are designed to implement the initiative’s goals. Because that is all that #66 does, it contains only a single subject and the Title Board’s ruling should be affirmed.

CONCLUSION

For the reasons given above, the Court should affirm the Board’s decision regarding #4.

Respectfully submitted on this 19th day of January, 2018.

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CERTIFICATE OF SERVICE

This is to certify that I served the **TITLE BOARD'S OPENING BRIEF** and related documents upon the following counsel of record and parties through either ICCES or FedEx overnight delivery this 19th day of January, 2018, addressed as follows:

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