SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	DATE FILED: March 23, 2017 3:39 PM
Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2017-2018 #4 ("Limit on Local Housing Growth") **Petitioners: Scott E. Smith and D. Michael Kopp** **v.** **Respondents: Dan Hayes and Julianne Page** **and** **Title Board: SUZANNE STAIERT; SHARON EUBANKS; and GLENN ROPER**	▲ COURT USE ONLY ▲
Attorney for Petitioner Scott E. Smith: Mark G. Grueskin, #14621 RECHT KORNFELD, P.C. 1600 Stout Street, Suite 1400 Denver, CO 80202 Phone: 303-573-1900 Facsimile: 303-446-9400 Email: mark@rklawpc.com	**Case No. 2017SA6**

PETITIONER SCOTT E. SMITH'S SUPPLEMENTAL BRIEF ON PROPOSED INITIATIVE 2017-2018 #4 ("LIMIT ON LOCAL HOUSING GROWTH")

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

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X It contains 2,480 words.

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s/ Mark G. Grueskin
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

This Court ordered the parties, after briefing was completed, to file supplemental briefs by March 23, 2017. That order directed the parties to brief the following two issues:

> 1) whether the Colorado Supreme Court has the authority to review the abstract prepared pursuant to section 1-40-105.5, C.R.S. (2016), identifying specifically the source, if any, of such authority; and
>
> (2) if the abstract is reviewable by this Court, what standard of review applies to such review.

Order of Court at 1-2 (Case No. 2017SA6) (March 2, 2017).

Scott E. Smith, a petitioner in this matter, files this supplemental brief in response to the Court's order.

LEGAL ARGUMENT

A. The Supreme Court must review the adequacy of a petition abstract if a petitioner has appealed the matter to the Title Board.

The Court seeks guidance regarding whether it has jurisdiction to review an appeal of the Title Board's approved abstract for a ballot initiative.

The required process and substance pertaining to an initiative's abstract are set forth in C.R.S. § 1-40-105.5. A motion for rehearing may be filed by the initiative's designated representatives or by "any registered elector who is not satisfied with the abstract." C.R.S. § 1-40-107(1)(a)(II). The motion for rehearing may allege:

- an "estimate included in the abstract is incorrect;"
- the "abstract is misleading or prejudicial;" or
- the "abstract does not comply with the requirements set forth in section 1-40-105.5 (3)."

C.R.S. § 1-40-107(1)(a)(II)(A)-(C). The Title Board considers and rules on all issues raised in motions for rehearing, including whether the Board should "modify the abstract based on the information presented at the hearing." C.R.S. § 1-40-107(1)(b).

An appeal of the Board's decisions may be filed by:

> any person presenting an initiative petition for which a motion for a rehearing is filed, **any registered elector who filed a motion for a rehearing pursuant to subsection (1) of this section**, or any other registered elector who appeared before the title board in support of or in opposition to a motion for rehearing is not satisfied with the ruling of the title board upon the motion.

C.R.S. § 1-40-107(2) (emphasis added). Petitioners Smith and Kopp both qualify as registered electors who filed motions for rehearing pursuant to this statute. Both object to the abstract's failure to address specifically enumerated topics, *see* C.R.S. § 1-40-105.5(3), as well as the abstract's inaccuracies that will mislead voters. As noted above, these grounds for rehearing are authorized by statute. C.R.S. § 1-40-107(1)(a)(II).

In appeals from the Title Board, any matter that is timely filed with the Court "**shall be disposed of** promptly, consistent with the rights of the parties,

either affirming the action of the title board or reversing it, in which latter case the court shall remand it with instructions, pointing out where the title board is in error." C.R.S. § 1-40-107(4) (emphasis added). The Court's jurisdiction centers upon "the action of the title board" – whether such action is the Board's decision about a measure's single subject, the setting of a fair and accurate title, or the abstract's description of certain specific fiscal impacts of the measure and its benefits.

In assessing the basis for judicial review of these matters, this Court has held that such authority emanates from the General Assembly, based on the statute cited above, C.R.S. § 1-40-107(2). "The legislature has assigned to us the duty of reviewing whether the Title Board has discharged its responsibilities. *See* 1-40-107(2), 1 C.R.S. (1998)." *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #29*, 972 P.2d 257, 261 (Colo. 1999) (addressing Court's authority to review Board's single subject decisions).[1] Any such review is intended to ensure the Board performed its statutorily assigned duties "in accordance with applicable law." *In re Title, Ballot Title, & Submission Clause for Initiative 2013-2014 #76*, 2014 CO 52, ¶7 (Colo. 2014) (citing C.R.S. §

[1] C.R.S. § 1-40-107(2) is non-specific and does not specifically refer to appeals that relate to a single subject determination, the setting of a fair and accurate title, or the approval of an abstract.

1-40-107).[2] Thus, the scope of the Court's review is defined by the matters addressed in a motion for rehearing (and, of course, raised in the notice of appeal and the briefs). After the statute was amended, those matters clearly include the abstract's factual and legal sufficiency.

The pertinent statute, C.R.S. § 1-40-107, was in effect prior to the adoption of the statutory provisions relating to abstracts that are at issue here. The General Assembly is deemed to have adopted the abstract requirement in light of this Court's decisions dealing with judicial review of the Title Board's decisions. "We presume the legislature is aware of existing case law precedent when it enacts or amends statutes." *People v. Laeke*, 2012 CO 13M, ¶15 (Colo. 2012). Because the General Assembly "could have easily" excluded from this Court's jurisdiction the Board's abstract decision but did not do so, an exclusion will not be implied. *See Concerned Parents of Pueblo, Inc. v. Gilmore*, 47 P.3d 311, 316 (Colo. 2002). Therefore, this appeal concerning Initiative #4's abstract is properly before the Court.

There was ample reason for the General Assembly to treat the abstract in the same manner as the other Title Board work products. The objective of including a fiscal estimate on a petition form is to "allow the electorate to make informed

[2] C.R.S. § 1-40-107 is all-encompassing and does address appeals from the Title Board as to the single subject determination, the setting of a fair and accurate title, as well as the approval of an abstract.

decisions." *In re Title, Ballot Title & Submission Clause, & Summary for # 26 Concerning Sch. Impact Fees*, 954 P.2d 586, 593 (Colo. 1998). Where statutorily required information is misleading or, worse, non-existent, the will of the legislature is thwarted and voters are deprived of critical information about a proposed initiative. If this Court does not review initiative abstracts, petition signers could very well authorize the entire electorate's consideration of statutory and constitutional changes based on faulty information or a failure by the Board to follow the statute's directive.

Given the clear language in the statute and the clear precedent relying on that broad legislative authority, this Court is authorized to review the Board's decision concerning the abstract approved for Initiative #4's petition.

B. The appropriate standard of review for petition abstracts is found in statute and precedent.

Under this statute, the Board should be permitted to exercise its discretion in light of the following.

- First, did the Title Board comply with the applicable statute and provide voters with the specific types of information required for an abstract?
- Second, does the abstract reflect credible evidence before the Board of the initiative's projected fiscal effects?

- Third, did the Board abuse its discretion by approving an abstract that provides the information mandated by C.R.S. § 1-40-105.5(3) but does so in a manner that is unfair, prejudicial, or misleading?

1. Addressing abstract's statutory elements

As to the first question, the abstract's statutory compliance is essential. Further, it is mandated by statute. An abstract may be challenged and reconsidered by the Board if the abstract "does not comply with the requirements set forth in section 1-40-105.5(3)." C.R.S. § 1-40-107(1)(a)(II)(C).

Statutory compliance is reviewed by this Court on a de novo basis. For example, the Board's decision that "benefits" actually means "impacts (both positive and negative) is a matter of statutory interpretation. "Statutory interpretation is… a question of law subject to de novo review." *Bd. of County Comm'rs v. Hygiene Fire Prot. Dist.*, 221 P.3d 1063, 1066 (Colo. 2009). The Court must, based on its own review of applicable law, determine if the Board acted in a way that was consistent with the stated statutory objectives for abstracts.

Where the Board misinterprets or incorrectly applies the law, its decision is owed no deference, and this Court must properly construe the statute in question.

> Courts are not bound by a Commission decision that misconstrues or misapplies the law. The construction of a statute is a question of law. While we recognize that construction of a statute by an administrative agency charged with its enforcement should be given great deference by the courts, we are not absolutely bound by the construction of the agency. Administrative construction of a statute should not be

> adopted where a different construction is plainly required, or where the result reached by the agency is clearly inconsistent with legislative intent.

Colo. Div. of Employment & Training v. Parkview Episcopal Hosp., 725 P.2d 787, 790-91 (Colo. 1986) (citations omitted). Here, the Court will correctly interpret and apply the law, based on the record below.

This standard cannot be met if the abstract does not specifically address any of the following required matters: (1) an estimate of the amount of any state and local revenues, expenditures, taxes, and fiscal liabilities if the measure is enacted; (2) a statement of the measure's economic benefits for all Coloradans; and (3) an estimate of the amount of any state and local government recurring expenditures. C.R.S. § 1-40-105.5(3)(a)-(c). Here, the abstract either affirmatively misstates what the statute required (converting the "benefit" analysis of the measure into a positive and negative "impact" analysis) or is silent rather than addressing such issues (failing to provide an "estimate" of state or local recurring expenditures or an "estimate" of state and local fiscal effects by means of a dollar estimate or a statement that such effects are indeterminate). The failure to comply with the statutory framework was error by the Board.

2. Basing abstract on evidence before the Board

The second inquiry relates to the nexus between the abstract's conclusions and some credible evidence upon which they are based. This matter, too, is

mandated by statute. An abstract may be challenged upon rehearing if any "estimate included in the abstract is incorrect." C.R.S. § 1-40-107(1)(a)(II)(A).

This Court can best assess whether the estimate is correct based on the record established before the Board. *See, e.g., In re Title, Ballot Title & Submission Clause, and Summary Pertaining to a Proposed Initiative on "Trespass-Streams with Flowing Water,"* 910 P.2d 21, 27 (Colo. 1996) ("The fiscal impact statement prepared by the Board is supported by the evidence before the Board" and thus certain omissions did not make the fiscal impact statement misleading or inaccurate*); In re Title, Ballot Title & Submission Clause, and Summary Pertaining to the Sale of Table Win in Grocery Stores*, 646 P.2d 916, 923 (Colo. 1982) (in light of "substantial testimony" before the Board, "The Board's conclusion as to the fiscal impact on both state and local government is supported by the record"). In the past, fiscal impact statements in draft form were based on inaccurate data or assumptions. *See In re Title, Ballot Title and Submission Clause Respecting the Proposed Initiated Constitutional Amendment Concerning Limited Gaming in the City of Antonito*, 873 P.2d 733, 743 (Colo. 1994) (Department of Revenue initially based fiscal impacts on gross proceeds of gaming rather than net proceeds, as provided in the measure). Ultimately, the Board has discretion to consider the evidence presented and to draw appropriate conclusions from that evidence. *In re Title, Ballot Title & Submission Clause, and Summary for #25A*

Concerning Housing Unit Construction Limits, 954 P.2d 1063, 1066 (Colo. 1998) (Board was entitled to assess "conflicting evidence" and employ "its discretionary authority" to describe fiscal impact on certain local governments).

Moreover, if the Board knows there will be certain fiscal effects stemming from a proposed initiative, it must estimate those fiscal effects based on available evidence. Where certain other elements of an initiative defy accurate projection, the Board cannot simply inform voters that the measure's overall fiscal impact is indeterminate. In other words, the Board must use the evidence available to it to describe, as fully as possible, the measure's known fiscal effects.

> [T]he indeterminacy appears to result from the multitude of provisions having separate and sometimes conflicting fiscal impacts producing an indeterminate aggregate impact. In this situation, **the Board has sufficient information to assess the fiscal impact of** each provision, or **some provisions, in isolation**. **Therefore, it should state with specificity which provisions will have fiscal impacts which are capable of being estimated, and which are truly indeterminate.** Each distinct provision of the proposed amendment must be addressed individually.

In the Matter of the Title, Ballot Title and Submission Clause, and Summary Adopted Feb. 3, 1993, Pertaining to the Proposed Election Reform Amendment, 852 P.2d 28, 37 (Colo. 1993) (emphasis added). Thus, the Board is obligated to set forth the fiscal effects for which it has sufficient information that will give rise to an estimate.

Where a measure will stop all economic activity in a certain sector (e.g., housing) in a certain part of the state (the 10 named Front Range counties), the Board can – and must – provide specific fiscal projections associated with those aspects of the measure. *Id.* at 36-37. If there is no evidence of fiscal impacts, the Board may find the initiative's fiscal effect to be indeterminate.

3. Preventing abstract wording that is prejudicial, unfair, or misleading

If the abstract complies with the statutory statements that are required and it sets forth fiscal effects based on evidence before the Title Board, then the Board's decision will stand unless the Court finds it abused its considerable discretion because the abstract is unfair or will mislead voters. This element of review is also required statutorily. C.R.S. § 1-40-108(1)(a)(II)(B) (Board's decision regarding an abstract may be reconsidered where the "abstract is misleading or prejudicial").

This last inquiry goes to the heart of the Board's mission. Historically, when the fiscal impact statement was part of the summary prepared by the Board for the petition form, the Court's duty was to ensure that the Board's approved language would "**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.* at 32 (emphasis added); *see also In re Title, Ballot Title and Submission Clause for Initiative 2011-2012 #3*, 2012 CO 25, ¶7 (2012) (Board abuses its "considerable discretion" if its work product is "insufficient,

unfair, or misleading"). Thus, the Board has substantial latitude in deciding on the abstract's verbiage, but only so long as exercise of that discretion does not obfuscate, or prevent voter understanding of, the fiscal effects of the proposed measure.

CONCLUSION

Because the language of the statutes enacted before and after the abstract requirement was adopted are clear, the Court has jurisdiction to consider this appeal. The standard of review of such a matter allows for the Board to exercise discretion if it assures: (1) all abstract elements, required by statute, have been set forth; (2) the abstract is based on evidence before the Board; and (3) the abstract is not unfair, prejudicial, or misleading to potential signers of the petition.

Respectfully submitted this 23rd day of March, 2017.

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CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **PETITIONER SCOTT E. SMITH'S SUPPLEMENTAL BRIEF ON PROPOSED INITIATIVE 2017-2018 #4 ("LIMIT ON LOCAL HOUSING GROWTH")** was sent this day, March 23, 2017, via Colorado Courts E-Filing to counsel for the Title Board and via Federal Express overnight to the proponents at:

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