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| SUPREME COURT OF COLORADO<br>2 East 14th Ave.<br>Denver, CO 80203 | DATE FILED: February 21, 2017 10:04 AM |
| Original Proceeding<br>Pursuant to Colo. Rev. Stat. § 1-40-107(2)<br>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")<br><br>**Petitioners: Scott E. Smith and D. Michael Kopp**<br><br>**v.**<br><br>**Respondents: Dan Hayes and Julianne Page**<br><br>**and**<br><br>**Title Board: SUZANNE STAIERT; SHARON EUBANKS; and GLENN ROPER** | ▲ COURT USE ONLY ▲ |
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**PETITIONER SCOTT E. SMITH'S**
**FIRST AMENDED**
**ANSWER 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 3,299 words.

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I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

*s/ Mark G. Grueskin*
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## SUMMARY

The Title Board erred twice – first in setting any title, given the multiple subjects incorporated into Initiative #4, and then in setting an abstract that materially departed from the requirements of state statute. For these reasons, its decisions on the title and abstract should be reversed.

## LEGAL ARGUMENT

A. #4 violates the single subject requirement for initiatives.

The Title Board maintains that the single subject of Initiative #4 is "limiting housing growth in Colorado." Title Board Opening Brief at 6, 9. In other words, the measure's subject is an approach for the entire state for restricting increases in residential housing stock.

The problem is, Initiative #4 is not about statewide growth control or even a statewide mechanism for limiting housing growth. This measure sets up a bifurcated system that establishes two unrelated substantive changes: (1) a strict, mandatory 1% cap for 10 named Front Range counties; and (2) a permissive, optional system of growth control, by means of local initiatives, for the other 54 counties. In other words, the measure establishes distinctive and functionally unrelated means of either requiring (in certain instances) or allowing (in all other instances) housing growth caps. There **will be** growth limits in 10 counties; there **might be** growth limits in the other 54. The overarching topic cited by the Board

in defense of its title actually highlights one of the reasons that this measure fails the single subject requirement: neither of its localized elements reflects the statewide subject that is summarized in the Board's Opening Brief.

Even the Board's title does not use the sweeping generalization reflected in the Board's Opening Brief. The title fixed by the Board relates to, "An amendment to the Colorado constitution concerning **limitations** on the growth of housing." Ex. 2 to Smith Opening Brief at 8 (emphasis added). The Board knew, and the title reflects, that Initiative #4 does not propose or implement a single, comprehensive system of residential housing growth limitation. It provides different and inconsistent routes toward achieving this generalized objective.

Further, as an additional subject, Initiative #4 undermines the control of home rule jurisdictions over their own residential planning processes. As addressed in Smith's Opening Brief, this measure allows counties to impose countywide growth controls – restrictions that bind all local government units, including home rule cities within their boundaries. Thus, it is possible for county voters who are located wholly outside of the county's home rule cities to initiate, circulate, and approve growth ceilings that bind the home rule cities, even though none of the home rule city voters advocated or supported such restrictions. Opening Brief of Scott Smith at 11-12. This transition from a home rule city's plenary control over a fundamentally local matter, such as the pace and amount of

growth, is a subject that inherently alters the historic decision making capacity of local voters on these key local issues. That this reconfiguration in local decision making is lumped in with a set of initiative procedures and housing growth limit mechanisms obscures this change from voters considering Initiative #4. Because of that fact, the measure violates the single subject requirement. *See In re Title, Ballot Title and Submission Clause for Proposed Initiative 1997-1998 #95*, 960 P.2d 1204, 1206-07 (Colo. 1998) (an initiative that dealt with the judicial branch of government violated the single subject requirement because, in so doing, it eliminated home rule cities control over the election, appointment, and retention of municipal court judges).

The irony of pairing an expansion of initiative rights and a reduction in local voting rights embodies the very type of surprise to statewide voters that the single subject requirement was intended to avoid. An expanded initiative right cannot also disenfranchise the municipal voters who, until Initiative #4, have controlled their own fates on issues such as land use matters. "[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 voters' exercise of the powers of referenda and initiative." *Margolis v. Dist. Court*, 638 P.2d 297, 303 (Colo. 1981), cited by *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 448 (Colo. 2002). It is no

surprise, then, that this Court has recognized that local voter control in this arena is a "fundamental right" that, when invaded, is a subject separate from mere procedures for initiated laws. *Id.*

Yet, this hidden form of disenfranchisement is precisely the result of Initiative #4 and one reason that the single subject requirement, properly applied, should prevent its consideration until the two subjects are considered independently. Put slightly differently, voters who support Initiative #4 because Proposed Section 17(1) appears to provide autonomy to local governments to set their own growth controls would be surprised to discover that the very same Proposed Section 17(1) gives county voters, not municipal voters, a "countywide," binding say on land use and development matters pertaining to "all local governments[']" residential growth. Thus, voters who seek local control will be astounded that a countywide decision can displace those decisions about residential construction that have always been the province of home rule and statutory cities. *Id*. at 449 ("voters would be surprised to learn that by voting for an initiative purporting to deal with the procedural aspects of the right to petition, they had excluded zoning matters that 'reduce private property rights' from the right of referendum"). What passes for local control is, in fact, an exercise in preemption. As such, it is a legal mirage and thus violates the single subject requirement.

It is not enough, for single subject purposes, for a measure to use a common rubric in the place of a single subject. *In re Title, Ballot Title, & Submission Clause for 2015-2016 #132 and #133*, 2016 CO 55 at ¶¶29, 35 (Colo. 2016). Thus, this measure should be returned to its proponents for substantive correction.

B. The Title Board failed to approve a statutorily compliant abstract.

*1. The Title Board misstates the appropriate standard of review.*

As an initial matter, the Title Board argues that it should be accorded "a substantial degree of discretion" in determining what information to include in the abstract, a specific statement of fiscal effects as required by statute. Title Board Opening Brief at 12.

Where, as here, the Board failed to comply with specific statutory elements mandated for the abstract, this level of deference is not required. A government agency that is given a specifically delegated task must operate within that delegation of legislative power. The clearly enunciated standards in statute "protect against unnecessary and uncontrolled exercise of discretionary power." *Regional Transp. Dist. v. Colorado Dep't of Labor & Employment*, 830 P.2d 942, 948-49 (Colo. 1992), citing *Cottrell v. City & County of Denver*, 636 P.2d 703, 709 (Colo. 1981). Adherence to specifically delegated authority is critical to "insure that administrative action will be rational and consistent in the first instance and that subsequent judicial review of that action is available and will be effective."

*Id*. Thus, the Board has limited discretion in setting the abstract, but this Court need not defer to the Board where the Board failed to follow the pertinent statutory structure. *See Gessler v. Colo. Common Cause*, 2014 CO 44 ¶7 (Colo. 2014) (an appellate court's deference "is not warranted" where agency action contravenes constitutional and statutory law).

Finally, the abstract is drafted by the director of research of the Legislative Council of the General Assembly. C.R.S. § 1-40-105.5(1), (2)(a). Except upon the filing of a motion for rehearing, there is no discretion in the Board to modify the abstract that has been drafted to be part of the fiscal impact statement. *Id.* Thus, any discretion that is accorded to the judgment about the content of the abstract is discretion that is largely vested in legislative staff. The limited role of the Title Board minimizes the need to defer to the abstract as drafted. *See generally Colo. Ethics Watch v. Clear the Bench Colo.*, 2012 COA 42 at ¶41 (Colo. App. 2012) (opinion of Secretary of State's staff was not binding on appellate court).

*2. The format and substance of the abstract are deficient.*

For good reason, the Court gives substantial weight to the need for clarity and specificity in ballot initiative descriptions. That detail allows voters to understand the nature of the proposal before them. "[G]enerally stating in a title that the initiative specifies recall and successor election procedures without in any way describing those procedures does not provide sufficient information to allow

voters to determine intelligently whether to support or oppose the proposal." *In re Title, Ballot Title and Submission Clause for Initiative 2015-2016 #73*, 2016 CO 24 ¶32 (Colo. 2016). That failure to provide an adequate amount of detail violates the minimal statutory requirements that a title be "clear." *Id.*

This need for clarity and specificity is as applicable to the abstract as it is to the ballot title itself. Both the title and the abstract appear in a petition section circulated to obtain the requisite voter support to place a proposed initiative on the ballot. C.R.S. § 1-40-105.5(4). In previous election cycles, the Court acknowledged that a fiscal summary "should contain adequate data to allow the electorate to make informed decisions." *In re Title, Ballot Title & Submission Clause, & Summary for # 26 Concerning Sch. Impact Fees*, 954 P.2d 586, 593 (Colo. 1998) (citing legislative history). Where, instead, the Board-approved summary contained a "substantial omission from the fiscal statement," *id*., the appropriate relief was a remand to the Board "to obtain reasonably available information" from state agencies and "to include such an assessment" in the Board-approved description of the measure. *Id*. at 594.

As is relevant here, the abstract was required to contain three specific elements:

- an estimate of the amount of any state and local revenues, expenditures, taxes, and fiscal liabilities if the measure is enacted;

- a statement of the measure's economic benefits for all Coloradans; and
- an estimate of the amount of any state and local government recurring expenditures. C.R.S. § 1-40-105.5(3).

These requirements reflect "the legislature's clear and unambiguous intent to require" a certain format for an initiative petition-related document. *See In re Title, Ballot Title & Submission Clause for Proposed Initiatives 2011-2012 Nos. 67, 68, & 69*, 2013 CO 1 ¶19 (Colo. 2013) (mandating Title Board compliance with the requirement that both initiative proponents attend all Board hearings on their measure). Neither the estimate of revenues, expenditures, taxes, and fiscal liabilities nor the estimate of state and local recurring expenditures was included in #4's abstract. In the same vein, the Board approved an abstract that omitted a statement of the measure's "benefits" and instead replaced it with a statement of the measure's "impacts."

The Board is hard pressed to argue, based on the abstract it approved, that potential petition signers are in any better a position to understand an initiative such as #4 because of the disclosures in the abstract. Voters are told, first, that #4 "will reduce local government revenue from building permits, property tax revenue on new construction, and use taxes in districts with a binding housing growth limit." *See* Smith Opening Brief at 18-19. Yet, this statement incorrectly assumes that fees for building permits will remain stagnant, which is not required by law or

practice, and that property taxes will decrease, even though housing prices are likely to balloon where supply remains constant but demand may not. Voters are also told that "local government spending will be reduced because there will be less demand for services provided to new homes and residents such as roads, utilities, and fire and police protection." *Id.* The latter statement is flawed because it assumes the cost of government services will decrease due to "less demand for services" but makes no observation about the effect of cost increases that otherwise drive up such expenses.

The legislative staff and the Title Board could have simply analyzed the measure as written. The fiscal impact of #4 is certain at least as to the two-year, 1% growth cap in the 10 named Front Range counties. Instead, the staff explained that growth could spill over to other counties and thus did not find reason to conclude that overall construction would be reduced. Tr. at 67:8-13. However, it never made this statement in the abstract itself and thus erred.

The Board's failure to properly format the "benefits" section of the abstract is particularly problematic. This section allows for a degree of advocacy of the measure within the confines of the petition formatting process. It is, after all, the proponents who best know their measure. The two designated representatives are required to attend all Title Board meetings on their measure and are thus able to "ensur[e] that the Board has access to the information it needs to resolve the

substantive issues raised at any meeting concerning a proposed initiative." *Nos. 67, 68, & 69, supra*, 2013 CO 1 at ¶28. The input of an initiative's major proponents on such matters helps offset the reality that they are likely to employ professional circulators who are significantly less familiar with their proposal. *Cf. Independence Inst., v. Gessler*, 936 F. Supp. 2d 1256, 1261-62 (D. Colo. 2013) (initiative petition campaigns depend on itinerant professional circulators, many of whom simply "travel between states in search of the best compensation" rather than commit to petition circulation because they know and care about an issue).

Initiative #4's proponent spoke of asserted benefits of this measure, including its role to address "rapid growth," "increases [in] the price of land" for housing, and the lack of "adequate money for roads and schools." *See* Exhibit 3 (January 4, 2017 Title Board Transcript) ("Tr.") at 63:19-24 (statement of Daniel Hayes). This proponent also stated that the current growth "discourages" employers from locating in Colorado and fosters problems with traffic. *Id.* at 64:3-5. Thus, at minimum, the proponents felt that there are identified benefits of Initiative #4 that could be summarized in the abstract.

However, the Board ignored this input. This Court has looked to the joint concerns of proponents and opponents in terms of the Title Board's chosen title language. Where the parties are in agreement, this factor bears weight in the Court's decision. *#73, supra*, 2016 CO 24 at ¶36.

Here, the Board relied on legislative staff to assess the measure's benefits. By its own admission, staff did not attempt to determine any of the measure's "benefits." Because there was no purported benefit for "all Coloradans," the staff simply ended its inquiry.

> The abstract is also required to provide a statement of the measure's economic benefit for all Coloradans, and our attempt to meet that requirement is in the paragraph entitled ["]Economic impacts["] where we can't say conclusively whether this would be -- what the economic impacts would be for all Coloradans.
>
> You know, it depends on your individual economic circumstances, whether you're a homeowner, whether you're a landlord, whether you're looking to move into one of these ten Front Range counties.
>
> And so **because we can't identify an impact for all Coloradans, we tried to provide a narrative just explaining that there are going to be impacts, you know, in terms of jobs and population growth.** And it really depends on your economic circumstances what the impact would be on you.

Tr. at 69:10-25 (emphasis added) (statement of Larson Silbaugh).

The statute does not call for a narrative of impacts; it specifically requires the abstract to address "benefits." And even though the proponents were able to identify benefits for the state's residents, legislative staff did not do so.[1]

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[1] The staff drafted, and the Board accepted, the following language:

> ***Economic impacts.*** The value of existing housing units may increase in communities where there are binding growth limits, impacting homeowners and landlords. For Colorado residents that would like to move into communities with binding housing limits, this measure may make it more expensive to find homes to buy or rent. Limits on

At bare minimum, if the legislative staff cannot identify any benefits at all, it is most likely within its purview to say so. If a fiscal impact can be indeterminate, then so can a statement of benefits for all Coloradans. But staff does not have the flexibility to reconfigure the legislature's mandate and turn "benefits" into "impacts." *See Gessler*, *supra*, 2014 CO 44 at ¶15 (agency rules were invalid where they conflicted with express provisions of state statute).

Identifying purported benefits of a measure such as this one was within the accumulated capacities of the legislative staff and the Title Board. For example, in 2000, the voters considered Amendment 24, a different growth management initiative. The "arguments for" section of the Blue Book set forth:

- citizen involvement in growth decisions;
- comprehensive decision making around growth alternatives;
- the "benefit" to "Colorado's environment" from encouraging compact development; and
- the "benefit" to "Colorado's economic future" by protecting quality of life, attracting clean industry and skilled workers, and saving taxpayer dollars by lowering infrastructure and public services costs.

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housing permits will also impact the distribution of construction employment, retail trade, and population within Colorado.

*See* Exhibit 2.

Legislative Council of the Colo. Gen. Assembly, *An Analysis of the 2000 Statewide Ballot Proposals* at 16-17 (Research Pub. No. 475) (2000).[2] These specific purported benefits may or may not reflect the operation of #4, but clearly, identifying such benefits was not beyond the capabilities of legislative staff or the Title Board. The task of finding benefits that apply to "all Coloradans" is not as daunting as legislative staff found it to be.

Another legislative staff person provided an additional explanation of why this part of the statute was addressed in this manner. The staff simply departed from the statutory approach. When asked why positive effects were not summarized instead of all possible effects, staff stated: "I think we took the position that we were interpreting that as **economic impacts as opposed to economic benefits.** For one, I guess our feeling was it's hard to find or to define exactly what that term exactly means from our standpoint." *Id.* at 71:11-16 (statement of Todd Harry) (emphasis added).

As addressed in Smith's Opening Brief, the term "benefit" has a clear and unambiguous meaning. It is an "advantage" arising as a result of a particular act. Opening Brief of Scott Smith at 22 (citing dictionary definition); *cf. In re Title, Ballot Title and Submission Clause for Initiative 2013-2014 #129*, 2015 CO 53 at ¶37 (Colo. 2014) (citing Black's Law Dictionary definition of "benefits" as used in

[2] *https://www.colorado.gov/pacific/sites/default/files/Blue%20Book%202000_1.pdf* (last viewed, Feb. 20, 2017).

initiative) (Hobbs, J., dissenting). Nevertheless, this meaning of "benefit" was rejected by staff, despite the clear position voiced by one Title Board member to the contrary. Tr. at 71:2 ("to me, benefits means positive and not negative") (statement of Sharon Eubanks).

By failing to adhere to this statutory standard, the Title Board erred in setting an abstract that deviated from the clear requirements of statute.

## CONCLUSION

Initiative #4 violates the single subject requirement. It holds out the prospect of local control, but in fact, gives over long-recognized municipal control to county voters. In so doing, it dramatically changes and undermines the authority of home rule municipalities. No overarching label is broad enough to allow for a principled statewide vote on these disconnected subjects.

Moreover, #4 presents for the first time the meaning of the abstract requirements adopted by the General Assembly. The legislative staff and the Title Board exceeded the statute by avoiding the topics specified by law and changing the description of Initiative #4's "benefits" to a description of its "impacts." The legislature's language is clear; the Board's refusal to adopt an abstract that reflects that language was error.

The initiative should be returned to the proponents, and the title should be returned to the Board.

Respectfully submitted this 21st day of February, 2017.

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## CERTIFICATE OF SERVICE

I, Mark Grueskin, hereby affirm that a true and accurate copy of the **PETITIONER SCOTT E. SMITH'S FIRST AMENDED ANSWER BRIEF ON PROPOSED INITIATIVE 2017-2018 #4 ("LIMIT ON LOCAL HOUSING GROWTH")** was sent this day, February 21, 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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