

<p>COLORADO SUPREME COURT 2 East 14<sup>th</sup> Avenue Denver, CO 80203</p>	<p style="text-align: right;">DATE FILED: January 31, 2017 6:00 PM</p>
<p>Original proceeding pursuant to § 1-40-107(2), C.R.S. (2016) Appeal from the Ballot Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2017- 2018 #4 (“Limit on Local Housing Growth”)</p> <p><b>Petitioners:</b> Scott E. Smith and D. Michael Kopp,</p> <p>v.</p> <p><b>Respondents:</b> Daniel Hayes and Julianne Page,</p> <p><b>and</b></p> <p><b>Title Board:</b> Suzanne Staiert, Sharon Eubanks, and Glenn Roper.</p>	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p> <p>Case No.: 2017SA6</p>
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<p style="text-align: center;"><b>TITLE BOARD’S OPENING BRIEF</b></p>	

Respondents Suzanne Staiert, Sharon Eubanks, and Glenn Roper, in their official capacities as members of the Title Board (collectively, the “Board”), by and through the Colorado Attorney General and undersigned counsel, hereby submit their Opening Brief in this appeal:

## CERTIFICATE OF COMPLIANCE

I 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, I certify that:

A. The brief complies with C.A.R. 28(g) because it contains 2,928 words.

B. The brief complies with C.A.R. 28(a)(7)(A) because each issue it contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority and (2) a citation to the precise location in the record, and not to an entire document, where the issue was raised and ruled on.

*/s/ LeeAnn Morrill*  
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## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1. Whether the Title Board (“Board”) erred in finding that Proposed Initiative #4 (“#4”) contains a single subject under Article V, § (5.5) of the Colorado Constitution.
2. Whether the title the Board set for #4 complies with Colorado law.
3. Whether #4’s fiscal impact statement and abstract comply with Colorado law.

## **STATEMENT OF THE CASE**

Respondents Daniel Hayes and Julianne Page seek to circulate #4 to obtain the required number of signatures to place the measure on the ballot. Number 4 is a proposed constitutional amendment that would limit housing growth in Colorado. *See* Jan. 11, 2017 Smith Petition for Review Ex. 2, at 6-8. It accomplishes this goal in two ways. First, the proposed amendment would give “every city, town, city and county, or local county ... the right to limit housing growth by initiative and referendum ....” *Id.* at 6 (Section 17(1)). Second, it provides that residential housing growth in a certain set of jurisdictions—Broomfield, Denver, Adams, Arapahoe, Boulder, Douglas, El Paso, Jefferson,

Larimer, and Weld—“shall not exceed one percent annually for the years 2019 and 2020.” *Id.* (section 17(2)). However, “[b]eginning in 2021 such growth limitations may be amended or repealed by initiative and referendum ....” *Id.*

The board held a public hearing on an earlier version of #4 on December 7, 2016. *See* Jan. 11, 2017 Smith Petition for Review Ex. 1, at 10. The Board denied title setting after finding that the measure did not contain a single subject. *Id.* A revised version of #4 was submitted, and the Board held a hearing on December 21. *See* Jan. 11, 2017 Smith Petition for Review Ex. 2, at 17. At that hearing, the Board granted single-subject approval and set a title. *Id.* Both Petitioners filed a motion for rehearing. *Id.* at 10-15. The Board held another hearing on January 4, 2017 and made changes to #4’s title; the motions were denied in all other respects. *Id.* at 17. The final version of the ballot title reads:

An amendment to the Colorado constitution 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 cities 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 16. The Board also approved a fiscal impact statement and abstract provided by the director of research of the General Assembly's legislative council. *See* Ex. A (Dec. 14, 2016 Revised Initial Fiscal Impact Statement and Abstract).

After the title and submission clause were set, Smith and Kopp filed their petition for review in this Court.

### **SUMMARY OF THE ARGUMENT**

As a procedural matter, Kopp waived any argument that #4 violates the single-subject rule or that the title, fiscal impact statement,



or abstract are misleading when he failed to timely file his petition for review with this Court. But in any event, the Board correctly determined that Initiative #4 complies with the single-subject rule under Article V of the state constitution. Number 4 concerns just one subject: limiting housing growth in Colorado. Moreover, the title the Board set “correctly and fairly expresses the true intent and meaning” of #4 and would not lead to “public confusion.” Finally, both the fiscal impact statement and the abstract comply with Colorado law. As a result, the Board’s decision should be affirmed.

## **ARGUMENT**

### **I. The Board correctly found that #4 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).

This issue was properly preserved as to Petitioner Smith, but not as to Petitioner Kopp. The Board found that #4 contained a single subject at its hearing on December 21, 2016. Jan. 11, 2017 Smith Pet. for Review, Ex. 2, at 17. Both Petitioners moved for rehearing, and the Board denied the requested relief on January 4, 2017. *Id.* Smith timely filed a petition for review in this Court on January 11, but Kopp did not file until January 12—8 days after the Board’s decision. Because a party must file a petition “within seven days” after the Board’s decision, § 1-40-107(2), C.R.S. (2016), Kopp’s petition was untimely. And because “[a]rguments not presented to or ruled upon by the district court cannot be raised for the first time on appeal,” this Court should not consider the issues raised by Kopp. *Silverview at Overlook, LLC v. Overlook at Mt. Crested Butte, LLC*, 97 P.3d 252, 257 (Colo. App. 2004) (citing *Estate of Stevenson v. Hollywood Bar & Café, Inc.*, 832 P.3d 718 (Colo. 1992)).

**B. Number 4 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).

The Board correctly determined that #4 contains only one subject: limiting housing growth in Colorado. It is true, as Smith and Kopp suggest, that the measure accomplishes this goal in two ways: by (1) affirmatively limiting housing growth to one percent annually in certain jurisdictions, and (2) providing local governments with the power to additionally limit growth through initiative or referendum. And it is

also true that #4 also includes certain new procedural mechanisms that, *inter alia*, create a new initiative right and establish new procedures and standards for initiatives. But none of these features constitutes an impermissible second subject.

Number 4 is best analogized to the initiative at issue in *In re Title, Ballot Title, & Submission Clause for 2013-14, #76*, 333 P.3d 76 (Colo. 2014). There, this Court took up a challenge to an initiative relating to the recall provisions for state and local officials. *Id.* at 78. The Court noted that the initiative would make “substantial changes to the manner in which state and local recall elections are triggered and conducted under constitutional and statutory law.” *Id.* at 81. These changes included “new enforcement provisions,” a new “threshold requirement for the number of valid petition signatures,” different rules regarding the “content of recall ballots,” a different “manner of filling vacancies caused by recall elections,” the “elimination of the application of existing campaign finance laws to recall petitions and elections,” and different “[r]equirements applicable to petition circulation.” *Id.* at 81-83. Despite the large number of procedural and substantive

amendments the initiative would make, the Court nevertheless held that “[c]ollectively, these changes to the manner in which recall elections are triggered and conducted constitute a single subject.” *Id.* at 83.

Just as in *In re #76*, Number 4 contains a number of different provisions, but they all relate to one overarching goal: limiting housing growth in Colorado. Because #4 has no “hidden purpose under a broad theme,” *In re Title, Ballot Title, & Submission Clause for 2007-08, #17*, 172 P.3d 871, 875 (Colo. 2007), it concerns only one subject.

## **II. The title the Board set for #4 was proper.**

### **A. Standard of review.**

This Court does not demand that the Board “set the best possible title.” *In re Title, Ballot Title, & Submission Clause for 2009-2010, #45*, 234 P.3d 642, 648 (Colo. 2010). Rather, it “give[s] great deference to the Title Board in the exercise of its drafting authority and will reverse its decision only if the titles, are insufficient, unfair, or misleading.” *Id.* (citation omitted).

This issue was properly preserved as to Smith, but not as to Kopp. As noted in Section I.A, Kopp did not file his petition for review until January 12—8 days after the Board’s decision. Jan. 11, 2017 Smith Pet. for Review, Ex. 2, at 17. Because a party must file a petition “within seven days” after the Board’s decision, § 1-40-107(2), C.R.S., Kopp’s petition was untimely.

**B. The title the Board set for #4 was proper.**

The Colorado Constitution requires that the subject of a proposed initiative “shall be clearly expressed in its title ....” COLO. CONST. art. V, § 1(5.5). Section 106(3)(b) establishes the standard for setting titles:

In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a “yes” or “no” vote will be unclear. The title for the proposed law or constitutional amendment... shall correctly and fairly express the true intent and meaning thereof .... Ballot titles shall be brief, shall not conflict with those selected for any petition previously filed for the same election, and shall be in the form of a question which may be answered “yes” (to vote in favor of the proposed law or constitutional amendment) or “no” (to vote against the proposed law or constitutional amendment) and which shall unambiguously state the

principle of the provision sought to be added, amended, or repealed.

§ 1-40-106(3)(b), C.R.S. (2016). In short, a title must be fair, clear, accurate, and complete. *In re Title, Ballot Title, & Submission Clause for 2007-2008, #62*, 184 P.3d 52, 58 (Colo. 2008).

Here, the Board’s title plainly expresses the measure’s core purpose—to limit housing growth in Colorado. Smith suggests in his motion for rehearing that the title fails to include certain facts about the measure, including an explicit recitation of the fact that “for two years (2019-2021), there is no right of initiative or referendum on growth limits in the 10 named counties” and that the title does not “state the starting date of the moratorium on new permit issuance,” but says only that “it runs from ‘declaration of voter approval’ ....” Jan. 11, 2017 Smith Pet. for Review, Ex. 2, at 14. Similarly, Kopp quibbles with the order of the title, suggesting that because the one-percent limit on housing growth “is the predominant feature of the measure, it should appear upfront in the title and before the initiative process changes.” Jan. 11, 2017 Smith Pet. for Review, Ex. 2, at 11. He also suggests that

the *measure itself* is ambiguous in its use of the phrase “counties and cities and counties.” *Id.*

But the law requires only that the title “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 Title, Ballot Title, & Submission Clause for 2009-2010*, #24, 218 P.3d 350, 356 (Colo. 2009) (quotation omitted). The Board “need *not* include every detail” of the measure. *In re Title, Ballot Title, & Submission Clause for 2001-2002*, #22 & #23, 44 P.3d 213, 222 (Colo. 2002). The kinds of minute details that Smith and Kopp point to—including a proposed rearrangement of text already presented to voters in the title—are not enough to overcome the substantial discretion this Court gives the Board.

**III. No. 4’s fiscal impact statement and abstract are not misleading or prejudicial.**

**A. Standard of review.**

The fiscal impact statement and abstract requirements found in § 1-40-105.5, C.R.S. (2016) were adopted by the General Assembly in



2015 and did not become effective until March 26, 2016. 2015 Colo. Sess. Laws p. 676, § 3. As a result, they have never been reviewed by this Court. But the Court should adopt the same standard of review it uses for titles that the Board sets and “give great deference to the Title Board in the exercise of its drafting authority[, reversing] its decision only if the [statement and abstract] are insufficient, unfair, or misleading.” *In re #45*, 234 P.3d at 648. Drafting a fiscal impact statement and abstract, much like drafting a title, requires a substantial degree of discretion. The director of research of the General Assembly’s Legislative Council must synthesize a wide array of information and distill it down into a final report, which the Board must then evaluate. The Court should not review these kinds of decisions *de novo*, but should instead overturn the director’s and the Board’s judgments only if they constitute an abuse of discretion.

This issue was properly preserved as to Smith, but not as to Kopp. As noted above in Section I.A, Kopp did not file his petition for review until January 12—8 days after the Board’s decision. Jan. 11, 2017 Smith Pet. for Review, Ex. 2, at 17. Because a party must file a petition

“within seven days” after the Board’s decision, § 1-40-107(2), C.R.S., Kopp’s petition was untimely.

**B. The fiscal impact statement and abstract comply with state statute.**

The fiscal impact statement and abstract comply with Colorado law. The General Assembly recently revised Title 1 to add a “fiscal impact statement” requirement. The new law provides, “For every initiated measure properly submitted to the title board ..., the director shall prepare an initial fiscal impact statement ....” § 1-40-105.5(2)(a), C.R.S. (2016). That statement must “[b]e substantially similar in form and content to the fiscal notes provided by the legislative council of the general assembly” and “[i]ndicate whether there is a fiscal impact for the initiated measure.” §-40-105.5(2)(c), C.R.S. (2016). In addition, the fiscal impact statement must have an abstract; that abstract, in turn, must have five features:

- (a)** An estimate of the effect the measure will have on state and local government revenues, expenditures, taxes, and fiscal liabilities if the measure is enacted;
- (b)** A statement of the measure’s economic benefits for all Coloradans;

- (c) An estimate of the amount of any state and local government recurring expenditures or fiscal liabilities if the measure is enacted;
- (d) For any initiated measure that modifies the state tax laws, an estimate, if feasible, of the impact to the average taxpayer if the measure is enacted; and
- (e) [A specific statement quoted in this subsection of the statute].

§ 1-40-105.5(3), C.R.S. (2016).

The Petitioners argue in their motions for rehearing that the fiscal impact statement and abstract are misleading, prejudicial, and do not comply with state law. They allege that the statement “does not provide any current estimate or projected estimates of such revenue and spending” and does not “materially inform voters of any actual economic impact of the measure.” Jan. 11, 2017 Smith Petition for Review Ex. 2, at 14. Similarly, they say that the abstract “does not contain an estimate of the amount of any state and local government recurring expenditures” and “does not contain an ‘estimate of the amount of any state and local fiscal liabilities if the measure is enacted.’” *Id.* These objections all revolve around the same theme: the fiscal impact

statement and abstract do not give hard numbers, but instead only offer a qualitative assessment of #4's impact.

The Court should reject these arguments. As the Legislative Council's representative testified to at the Board's hearing, it simply is not possible to formulate a quantitative assessment for an initiative that would have such wide-ranging effects. *See* Jan. 4, 2017 Public Hearing on #4,

[http://www.sos.state.co.us/pubs/info\\_center/audioArchives.html](http://www.sos.state.co.us/pubs/info_center/audioArchives.html)

(testimony of Todd Herreid, Colorado Legislative Council, beginning at 1:28:56). Mr. Herreid testified that there is no way to predict which jurisdictions would exercise their new right to limit housing growth and in particular, to forecast whether and how the Front Range jurisdictions might keep, modify, or abolish the one-percent growth limit after 2021.

*Id.* at 1:29:00-1:30:00. He added, "Sometimes it's difficult to predict exactly what those numbers will look like," and that "Our feeling was, there's no way to get a precise estimate to put down on this." *Id.*

1:30:01; 1:30:50. Mr. Herreid further confirmed that the Legislative Council puts together impact statements on legislation that is

introduced in the General Assembly, and that it is the Council's standard practice to have indeterminate qualitative fiscal impact statements when precise numbers are not available. *Id.* at 1:29:34-1:30:15. Because #4's fiscal impact statement and abstract fit with longstanding precedent and provide all the information that is actually available, the Court should affirm the Board's decision.

### CONCLUSION

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

Respectfully submitted on this 31<sup>st</sup> day of January, 2017.

ATTORNEY GENERAL  
CYNTHIA H. COFFMAN

*/s/ LeeAnn Morrill* \_\_\_\_\_  
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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 31<sup>st</sup> day of January, 2017, addressed as follows:

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Colorado  
Legislative  
Council  
Staff

Initiative #4

REVISED  
INITIAL FISCAL  
IMPACT STATEMENT

Draft Staff: January 31, 2017 6:00 PM

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**Date:** December 14, 2016

**Fiscal Analyst:** Larson Silbaugh, 303-866-4720

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**LCS TITLE:** LIMIT ON LOCAL HOUSING GROWTH

**Note:** This *initial* fiscal impact estimate has been prepared for the Title Board. If the initiative is placed on the ballot, Legislative Council Staff may revise this estimate for the Blue Book Voter Guide if new information becomes available.

### Summary of Measure

The proposed ballot initiative limits housing growth, as measured by permits for housing units, to one percent in 2019 and 2020 in 10 front range counties, and the growth limit remains in place unless it is amended or repealed by voters within the applicable local government starting in 2021.

The measure also allows voters in the other counties to set local housing growth limits without legislative inhibition or penalty. Voter approved countywide growth limits would limit housing growth in municipalities within the county. Finally, the measure specifies the number of signatures needed to put housing limits on the ballot and specifies how the petitions can be challenged.

### Background

Zoning and building permit decisions are determined by counties, municipalities, and consolidated city-county governments in Colorado. Counties and municipalities adopt zoning and land use plans, which allow certain types of development in specific areas. Local governments issue building permits consistent with the zoning and land use plans. Some counties and municipalities issue more building permits than others. A one percent limit will be binding in some areas and not in others.

### Local Government Impact

Proposed Initiative #4 will have an indeterminate local government revenue and expenditure impact. The one percent housing unit limit in 10 front range counties may be binding in some counties or municipalities and not in others. The impact will depend on the growth patterns and plans in each community.

**Local government revenue.** To the extent that there are fewer building permits issued within these 10 counties, local governments will receive less revenue from building permits, property taxes on new construction, and from use tax revenue from building materials. If demand for housing continues to increase while the supply is limited, housing values may increase. Increased housing prices may increase local property tax revenue. To the extent that housing

growth is redistributed to other communities, local governments will receive more revenue from building permits, use taxes, and property taxes on new construction compared with what would have occurred without the measure. The revenue impacts will be different in each local district.

**Local government expenditures.** Local governments provide services to new housing units and new residents. New houses need services such as roads, utilities, and police and fire protection. Additional residents send students to schools. Fewer new homes will reduce the future amount of services required and local government expenditures. The spending impacts will differ by local jurisdiction.

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

## **Effective Date**

The proposed initiative takes effect after the date of the official declaration of the vote for the November 2018 election by proclamation of the Governor, not later than 30 days after the votes have been canvassed.

## **State and Local Government Contacts**

Local Affairs  
Counties

Municipalities  
Colorado Housing Finance Agency



## **Abstract of Initiative 4: Limit on Local Housing Growth**

**An initial fiscal estimate, prepared by the nonpartisan Director of Research of the Legislative Council as of December 2016, identifies the following impacts:**

The abstract includes estimates of the fiscal impact of the proposed initiative. If this initiative is to be placed on the ballot, Legislative Council Staff will prepare new estimates as part of a fiscal impact statement, which includes an abstract of that information. All fiscal impact statements are available at [www.ColoradoBlueBook.com](http://www.ColoradoBlueBook.com) and the abstract will be included in the ballot information booklet that is prepared for the initiative.

***Local government revenue and spending.*** Beginning in FY 2018-19, the proposed initiative 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. To the extent that property values increase because of the measure, local governments may receive additional property tax revenue. In addition, 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.

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