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COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	
Original proceeding pursuant to § 1-40-107(2), C.R.S. (2016) 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:** Daniel Hayes and Julianne Page, **and** **Title Board:** Suzanne Staiert, Sharon Eubanks, and Glenn Roper.	▲**COURT USE ONLY**▲ Case No.: 2017SA6
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THE TITLE BOARD'S SUPPLEMENTAL BRIEF

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 those rules. I further certify that this brief complies with the requirements of this Court's March 2, 2017 Order because it contains 2,500 words.

/s/ LeeAnn Morrill
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Respondents Suzanne Staiert, Sharon Eubanks, and Glenn Roper, in their official capacities as members of the Title Board (collectively, the "Board"), by and through undersigned counsel, hereby submit the following Supplemental Brief.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether this Court has the authority to review the abstract prepared pursuant to § 1-40-105.5, C.R.S. (2016), and, if so, what is the specific source of that authority?

2. If the abstract is reviewable by this Court, what is the appropriate standard of review?

SUMMARY OF THE ARGUMENT

When the Board's enabling statutes are read together as a whole, their plain language authorizes this Court to review the Board's final decision regarding the abstract required by § 1-40-105.5, provided that any challenges to the decision were first timely raised in a motion for rehearing by the Board under § 1-40-107.

And when reviewing the Board's final decision regarding the abstract, this Court should apply the same standard of review that it uses for titles set by the Board, which requires great deference to be given to the Board's decision and permits reversal only if the abstract is insufficient, unfair, or misleading.

ARGUMENT

I. If the challenge to the abstract was first raised in a motion for rehearing before the Board, then this Court is authorized to review the Board's final decision regarding the abstract.

Effective March 26, 2016, the General Assembly revised Article 40 of Title 1, C.R.S. to add a "fiscal impact statement" requirement. The new law provides that "[f]or 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). The statute's reference to "'director' means the director of research of the legislative council of the general assembly.'" § 1-40-105.5(1), C.R.S. (2016). The fiscal impact 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." §§ 1-40-105.5(2)(c)(I) and (II), C.R.S. (2016).

In addition, the fiscal impact statement must include an abstract, which must contain the following:

> **(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(2)(c)(III) and (3), C.R.S. (2016).

The director must provide the fiscal impact statement to the proponents' designated representatives on or before the date and time of the first meeting at which the proposed initiated measure will be considered by Board, and the Board is not permitted to conduct a hearing on the statement during its initial meeting. § 1-40-105.5(2)(a), C.R.S. (2016). Rather, "the director's abstract that is included in the

impact statement is final, unless modified in accordance with section 1-40-107." *Id.* The final "abstract for a measure, as amended in accordance with section 1-40-107, must be included in a petition section as provided in section 1-40-110(3)." § 1-40-105.5(4), C.R.S. (2016). And if the Board modifies the abstract upon a motion for rehearing, then the Secretary of State must provide the director with a copy of the amended abstract, which the director in turn must post on the legislative council's website. § 1-40-107(5.5), C.R.S. (2016).

If either the proponents' designated representatives or any registered elector "is not satisfied with the abstract prepared by the director . . . in accordance with section 1-40-105.5," then he or she may file a motion for rehearing within seven days after the Board sets the title and submission clause for the initiative petition "on the grounds that: (A) An estimate included in abstract is incorrect; (B) The abstract is misleading or prejudicial; or (C) The abstract does not comply with the requirements set forth in section 1-40-105.5(3)." § 1-40-107(1)(a)(II), C.R.S. (2016). The Board must consider the motion for rehearing at its next regularly scheduled meeting, and the Board's

decision "on any motion for rehearing shall be final," unless an appeal to this Court is timely filed under § 1-40-107(2). § 1-40-107(1)(c), C.R.S. (2016).

Such appeal must be filed with this Court within seven days after the Board's ruling on the motion, and may be filed by "any person presenting an initiative for which a motion for rehearing is filed, any registered elector who filed a motion for rehearing pursuant to [§ 1-40-107(1)], or any other registered elector who appeared before the title board in support of or in opposition to a motion for rehearing [who] is not satisfied with the ruling of the title board upon the motion[.]" § 1-40-107(2), C.R.S. (2016).

In construing the foregoing statutes, this Court's primary purpose is to "ascertain and give effect to" the General Assembly's intent. *Doubleday v. People*, 364 P.3d 193, 196 (Colo. 2016) (citing *People v. Diaz*, 347 P.3d 621, 624 (Colo. 2015)). In doing so, this Court must look first to the statutory language, "giving words and phrases their plain and ordinary meanings." *Id.* (citing *Robbins v. People*, 107 P.3d 384, 387 (Colo. 2005)). It also must read and consider the statute as a whole,

In re Marriage of Ikeler, 161 P.3d 663, 666-67 (Colo. 2007), and interpret the statute so as to effectuate the purpose of the entire legislative scheme. *Id.*, at 196 (citing *People v. Smith*, 254 P.3d 1158, 1161 (Colo. 2011)). To do so, this Court must read the scheme as a whole, and "giv[e] consistent, harmonious, and sensible effect to all of its parts." *Id.* (citing *Id.*). If the statute is unambiguous, then this Court need not conduct any further statutory analysis. *Id.* (citing *Diaz*, 347 P.3d at 624).

When these statutory construction principles are applied here, especially those requiring the Board's enabling statutes to be read as a whole and harmonized, it is clear that this Court is authorized to review the Board's final decision regarding the abstract. Indeed, although the Board is expressly prohibited from amending or modifying the director's original abstract at the first meeting in which it considers the proposed initiative, its enabling statutes contain three discrete references to the Board's ability to modify or amend the abstract upon a motion for rehearing filed in accordance with § 1-40-107. *See* §§ 1-40-105.5(2)(a) and (4), C.R.S. (2016); §1-40-107(5.5), C.R.S. (2016). And § 1-40-

107(1)(a)(II) in turn provides that the director's original abstract may be challenged in a motion for rehearing based on any of three enumerated grounds that is timely filed before the Board. Finally, § 1-40-107(2) authorizes this Court to review the Board's decision on any "motion for a rehearing pursuant to subsection (1) of this subsection," which encompasses challenges to the abstract timely raised under § 1-40-107(1)(a)(II). Thus, although somewhat circuitous, when the plain language of the Board's enabling statutes are read as a whole and harmonized, this Court's authority to review the Board's final decision regarding a challenge to the abstract becomes clear.

II. The Board's final decision regarding a challenge to the abstract is subject to a deferential standard of review by this Court.

For three reasons this Court should apply the same deferential standard of review to the Board's final decision regarding a challenge to the abstract as it applies to titles set by the Board.

First, because the plain language of the Board's enabling statutes supports doing so. The director's original abstract may be challenged

through a motion for rehearing filed before the Board based only on the following grounds: "(A) An estimate included in the abstract is *incorrect*; (B) The abstract is *misleading* or *prejudicial*; or (C) The abstract does not comply with the requirements[1] set forth in section 1-40-105.5(3)." § 1-40-107(1)(a)(II), C.R.S. (2016) (emphasis added). The emphasized language describing the grounds on which the director's original abstract may be challenged are strikingly similar to the grounds for challenging titles set by the Board. *See* § 1-40-106(3)(b), C.R.S. (2016) ("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 a 'yes/for' vote or 'no/against' vote will be *unclear*. The title for the proposed law or constitutional amendment . . . shall *correctly* and *fairly* express the true intent and meaning thereof[.]" (emphasis added). In other cases, this Court has found the General Assembly's use of substantially similar language in separate statutory provisions to be

[1] *See* Section I, at p. 4, above for the specific requirements of § 1-40-105.5(3).

"significant." *See People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1240 (Colo. 2003) (finding the use of substantially similar language to describe the timeframe for both legislative and congressional redistricting to be "significant"). For this reason, the Board argued here that "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.'" *Title Board's Opening Brief*, at p. 12 (quotation omitted).

Second, because the Board is in the best position to request and weigh the merits of any information presented by various, and in some instances competing and contradictory, sources about whether an abstract estimate is incorrect, the abstract is misleading or prejudicial, or some or all[2] of the requirements of § 1-40-105.5(3) could not be

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[2] It is highly unlikely that the omission of the verbatim statement required by § 1-40-105.5(3)(e) would ever form the basis of an appeal to this Court because, if absent from the director's original abstract, the Board would simply correct the scrivener's error in the amended abstract upon a motion for rehearing or on its own initiative if no motion for rehearing was filed. *See In re Title, Ballot Title and*

included in the director's original abstract. *See In re Proposed Constitutional Amend. Concerning Unsafe Workplace Env't*, 830 P.2d 1031, 1034 (Colo. 1992) (If testimony from the proponent about the proposed initiative's true intent and meaning could not be considered by the Board, "the requirement of a public meeting would be meaningless."); *In re #255*, 4 P.3d 485, 500 (Colo. 2000) (In rejecting a challenge to information submitted to the Board by the Deputy Director of the Office of State Planning and Budgeting ("OSPB") and a representative of the Department of Public Safety for the first time at the rehearing, this Court stated "the Board may take evidence at the hearing from any interested party, not just the objectors."). Because the Board must hold public rehearings at which it may take and consider evidence, this Court should defer to the Board's acceptance of the director's original abstract without modification where, as here, the record supports the Board's finding that the proposed initiative would

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Submission Clause, and Summary for 1999-2000 #255, 4 P.3d 485, 493-94 (Colo. 2000) (holding that the same principle underlying C.R.C.P. 60(a), which allows a trial court to correct clerical mistakes at any time, applies to the Board's ability to do the same).

have an indeterminate fiscal impact, and any estimate or statement about "the measure's economic benefits for all Coloradans" included in the abstract would be purely speculative. *See Title Board's Opening Brief*, at p. 13-16.

And *third*, because this Court's precedent in a highly similar context supports a deferential standard of review. For many years before and until June 2000, the Board was required to "prepare a clear, concise summary of the propose law or constitutional amendment," that was "true and impartial" and not "likely to create prejudice, either for or against the measure." § 1-40-106(3)(a), C.R.S. (1999). And "if, in the opinion of the title board, the proposed law or constitutional amendment will have a fiscal impact on the state or any of its political subdivisions," the Board was authorized to request and receive fiscal impact information from OSPB or the Department of Local Affairs ("DOLA"), and was required to "include an estimate of any such fiscal impact, together with an explanation thereof," in its summary. *Id.*

Not surprisingly, this Court decided many appeals challenging the fiscal impact estimates and explanations contained in Board summaries

during this long-standing prior legislative scheme. In doing so, this Court consistently applied a deferential standard of review. *See In re Petition on School Finance*, 875 P.2d 207, 211-12 (Colo. 1994) ("The Board has discretion in exercising its judgment regarding how best to communicate that a proposed measure will have a fiscal impact on government without creating prejudice for or against the proposed measure."); *In re Proposed Initiative on Trespass-Streams with Flowing Waters*, 910 P.2d 21, 26 (Colo. 1996) (holding same); *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #215*, 3 P. 3d 11, 16 (Colo. 2000) (holding same); *In re #255*, 4 P.3d at 499 (holding same). The Court should likewise apply a deferential standard of review to the Board's abstract decisions under the current legislative scheme at issue here.

And despite the prior scheme's express requirement that the Board's summary contain an "explanation" of the fiscal impact, this Court repeatedly held that the Board "need not explain the fiscal impact of a proposed initiative if the impact cannot be determined from materials submitted to the Title Board due to uncertainties or variables

inherent in the particular issue." *In re Flowing Waters*, 910 P.2d at 26; *see also In re School Finance*, 875 P.2d at 211-12 (holding same); *In re Unsafe Workplace Env't*, 830 P.2d at 1035 (holding same). As a result, this Court repeatedly sustained Board summaries containing indeterminate fiscal impact conclusions. *See id.* Similarly, despite the express requirement that the summary contain an "estimate" of the fiscal impact, this Court held that the Board was "not limited by the estimates provided by the OSPB and DOLA; it can look at all of the evidence of costs before it," and that "the Board is not required to accept at face value the information provided to it." *In re #255*, 4 P.3d at 500 (citations omitted). It also held that "[w]e will not require the Title Board to consider speculative costs when assessing the fiscal impact of a proposed initiative." *In re #215*, 3 P. 3d at 17. As a result, this Court repeatedly sustained Board summaries that did not contain definitive fiscal impact estimates. *See id.* The Court should likewise sustain the Board's indeterminate fiscal impact conclusion and refusal to include purely speculative estimates and statements about "economic benefits for all Coloradans" in the abstract here.

CONCLUSION

Based on the above reasons and authorities, this Court should affirm the Board's acceptance of the director's original abstract without modification.

DATED: March 23, 2017.

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CERTIFICATE OF SERVICE

This is to certify that I served the **THE TITLE BOARD'S SUPPLEMENTAL BRIEF** upon the following counsel of record and parties through either ICCES or FedEx overnight delivery on March 23, 2017, addressed as follows:

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