COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	DATE FILED: May 17, 2017 11:59 PM
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 #20 ("Severance Taxes on Oil and Gas") **Petitioners:** Andrew J. O'Connor and Mary E. Henry, v. **Respondent:** Chad Vorthmann, **and** **Colorado Ballot Title Setting Board:** Suzanne Staiert, Sharon Eubanks, and David Blake.	▲ **COURT USE ONLY** ▲ Case No.: 2017SA85
CYNTHIA H. COFFMAN, Attorney General LEEANN MORRILL, First Assistant Attorney General* 1300 Broadway, 6th Floor Denver, CO 80203 Tel: (720) 508-6159 Fax: (720) 508-6041 Email: leeann.morrill@coag.gov Reg. No.: 38742 **Counsel of Record*	

THE TITLE BOARD'S OPENING 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, standard of review, and preservation requirements set forth in those rules. I further certify that this brief complies with the word limit set forth in C.A.R. 28(g) or C.A.R. 28.1(g) because it contains 3,389 words.

I acknowledge that this brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ LeeAnn Morrill
LeeAnn Morrill, 38742
First Assistant Attorney General

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Respondents Suzanne Staiert, Sharon Eubanks, and David Blake, in their official capacities as members of the Title Board (collectively, the "Board"), by and through undersigned counsel, hereby submit the following Opening Brief.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Petitioners-Proponents waived any challenge to the Board's action based on a Board member's alleged bias by failing to raise the issue before the Board below?`

2. Whether the Secretary of State is authorized to convene a meeting of the Board at any location of his choosing provided that it is open to the public?

3. Whether the Petitioners-Proponents' claim to due process rights in having the Board rule on their Objections to Moving Rehearing from Secretary of State's Office in Violation of Section 1-40-106(1), C.R.S., Motion for Telephone Hearing, Motion for Continuance, and Motion to Dismiss Frivolous Motion for Rehearing and Request for

Sanctions, if properly preserved, is misplaced because the Board does not act in a quasi-judicial or adjudicative capacity?

4. Whether the Board properly determined that it lacked jurisdiction set a title for proposed initiative 2017-2018 #20 because the Petitioners-Proponents failed to comply with C.R.S. § 1-40-105(4)?

STATEMENT OF THE CASE

Petitioners-Proponents, Andrew J. O'Connor and Mary E. Henry (collectively "Proponents"), seek to circulate proposed initiative 2017-2018 #20 ("#20") to obtain the required number of signatures to place the measure on the ballot. The measure would increase existing severance tax rates on oil and gas extraction, and eliminate the existing *ad valoreum* tax deduction and stripper well exemption.

The Board conducted an initial public hearing regarding #20 on April 19, 2017, at which it determined that the measure satisfied the single subject requirement and set a title. On April 26, 2017, the Respondent-Objector, Chad Vorthmann ("Objector"), timely filed a motion for rehearing that the Board heard on April 28, 2017. Due to

security concerns on the part of the Board and the Proponents, the rehearing was held at the Ralph L. Carr Colorado Judicial Center, a secure government building that is open to the public, instead of at the Colorado Secretary of State's Office, which is located in a non-secure, private building that is open to the public.

Before the rehearing occurred, Proponents filed the following documents with the Board: Objections to Moving Rehearing from Secretary of State's Office in Violation of Section 1-40-106(1), C.R.S.; Motion for Telephone Hearing; Motion for Continuance; and Motion to Dismiss Frivolous Motion for Rehearing and Request for Sanctions. The Board did not expressly rule on any of these objections or motions either before or during the rehearing, and Proponents did not request rulings on or argue their objections and motions at the rehearing.

The rehearing time, but not date, was continued until both Proponents were able to be present at the meeting, and the Board considered arguments from the Objector and the Proponents regarding the motion for rehearing. Ultimately, the Board granted the motion for rehearing and denied title setting on the grounds that it lacked

jurisdiction to set a title for #20 "because changes made after review and comment were not highlighted or otherwise indicated in the amended draft contrary to 1-40-105(4), C.R.S." *See Pet. Rev. Ex. F.* At no time before or during the rehearing did Proponents allege bias or prejudice on Ms. Staiert's part, or move for her recusal.

On May 3, 2017, Proponents timely filed their appeal to this Court.

SUMMARY OF THE ARGUMENT

Proponents ask this Court to review allegations of bias and prejudice against Board member, Deputy Secretary of State Suzanne Staiert, and argue that the Board erred when Ms. Staiert failed to recuse herself from the August 28, 2017 rehearing. But Proponents neglected to raise these allegations before the Board below and did not move for Ms. Staiert's recusal either before or at the rehearing and, therefore, waived any right to raise such arguments for the first time on appeal to this Court.

The Board did not err in moving the meeting location of the rehearing from the Colorado Secretary of State's Office to the Ralph L. Carr Colorado Judicial Center because C.R.S. § 1-40-106(1) does not prescribe the location for Board meetings. Rather, the plain language of the statute authorizes the Colorado Secretary of State (the "Secretary") to convene the Board for meetings in any location that is open to the public.

If the Court first finds that the issue was properly raised and preserved below, it should reject Proponents' misplaced contention that they have due process rights in obtaining rulings on their various objections and motions because the Board does not act in an a quasi-judicial or adjudicative capacity that confers such rights.

And finally, the record reflects that the Proponents failed to comply with the requirements of C.R.S. § 1-40-105(4), which in turn deprived the Board of jurisdiction to set a title. Specifically, Proponents submitted an amended draft of #20 that failed to highlight or otherwise indicate what changes had been made after the review and comment period. As a result, this Court should affirm the Board's decision to

grant the Objector's motion for rehearing and to refrain from setting a title.

ARGUMENT

I. Proponents waived any challenge to the Board's action based on Ms. Staiert's alleged bias because they failed to raise and preserve the issue below.

A. Standard of review and preservation.

Proponents' Opening Brief failed to articulate the standard of review for a Title Board member's decision whether to recuse herself based on allegations of bias or prejudice, so there is nothing with which the Board may agree or disagree with here. And a search of this Court's decisions revealed no prior cases in which it has considered a similar challenge and decided the appropriate standard of review. But in lieu of arguing for the adoption of such a standard in this case, the Board instead notes that Proponent's Opening Brief failed to point to the precise location in the record where this issue was raised and ruled on by Ms. Staiert and/or the Board. And a review of the record before the Board reveals that Proponents neglected to raise and preserve this issue either before or during the April 28, 2017 rehearing.

B. This Court may not consider any arguments raised for the first time on appeal.

Proponents claim that statements allegedly made by Ms. Staiert in an April 25, 2017 interview with Denver television station KUSA were "improper public comments falsely portraying Petitioner as being dangerous and a security threat and accusing him of committing a crime and then demonizing Petitioner by moving the rehearing from the Secretary of State's Office to the Supreme Court Building." *Proponents' Opening Brief*, at 8. They further claim that both she and "by implication the Title Board" erred in not recusing herself from the rehearing based on this alleged "bias and prejudice." *Id.*

But as discussed under Section I(A) above, the record reflects that Proponents failed to raise this issue with Ms. Staiert and/or the Board either before or during the rehearing. In another case in which a proponent attempted to raise a different issue for the first time on appeal, this Court refused to consider the issue. *See In re Proposed Election Reform Amendment*, 852 P.2d 28, 33 (Colo. 1993) (noting that the proponent "complains that the titles set by the Board are too long,

and asks this court, apparently for the first time, to shorten the titles. Section 1-40-101(3) provides that a person presenting a petition who is not satisfied with the titles and summary set by the Board may file a motion for rehearing with the secretary of state within forty-eight hours after the return of the titles and summary. The record on appeal includes no indication of any such motion for rehearing by [proponent]. Because no such motion was filed with the Board, we have no jurisdiction, pursuant to section 1-40-101(3), to entertain [proponent's] complaints regarding the titles and summary set by the Board.").

The same logic should preclude the Proponents here from challenging the Board's action based on Ms. Staiert's alleged bias for the first time on appeal. Indeed, their Opening Brief concedes that the statements demonstrating her alleged bias occurred on April 25, which was one day before the deadline for a motion for rehearing to be filed under C.R.S. § 1-40-107(1)(a)(I), and three days before the actual rehearing occurred. And although the Proponents apparently were satisfied with the Board's decision to set a title for #20 at its initial hearing on April 19, and therefore had no basis to file a motion for

rehearing, they could have filed a conditional motion to recuse Ms. Staiert before the deadline elapsed as a prophylactic measure in the event that another party filed such a motion.

Alternatively, the Proponents could have waited until after such motion was timely filed on April 26, but before the April 28 rehearing occurred, to file such a motion to recuse Ms. Staiert, as they did with respect to several other issues. *See Pet. Rev. Ex. B – Objections to Moving Rehearing from Secretary of State's Office in Violation of Section 1-40-106(1), C.R.S.*, dated April 26, 2017; *Pet. Rev. Ex. C – Motion for Telephone Hearing*, dated April 26, 2017; *Pet. Rev. Ex. D – Motion for Continuance*, dated April 27, 2017; and *Pet. Rev. Ex. E – Motion to Dismiss Frivolous Motion for Rehearing and Request for Sanctions*, dated April 26, 2017.

And, at an absolute minimum, the Proponents could have made such a motion at the outset of the April 28 rehearing. By failing to take any of the foregoing reasonable steps, they deprived Ms. Staiert and/or the Board of the opportunity to consider and decide whether her alleged bias merited recusal *before* taking action on the Objector's motion for

rehearing. As a result, Proponents should be precluded from challenging the Board's action based on Ms. Staiert's alleged bias for the first time on appeal to this Court.

II. The Board's enabling statute does not prescribe a specific location for its meetings.

A. Standard of review and preservation.

Proponents' Opening Brief failed to articulate the standard of review that applies to the Board's authority to convene in a certain location, so there is nothing with which the Board may agree or disagree with here. The Board's position on the matter is that any question regarding its authority to act "is a matter of statutory interpretation, and thus 'a question of law subject to de novo review.'" *In re Title, Ballot Title, and Submission Clause for 2013-2014 #103*, 328 P.3d 127, 129 (Colo. 2014) (quoting *MDC Holdings, Inc. v. Town of Parker*, 223 P.3d 710, 717 (Colo. 2010)).

Their Opening Brief also neglects to point to the precise location in the record below where this issue was raised and ruled on by the Board. The Board's position is that this issue was expressly raised by

Proponents in their Objections to Moving Rehearing from Secretary of State's Office in Violation of Section 1-40-106(1) C.R.S., *see Pet. Rev. Ex. B*, and was impliedly denied by the Board when it proceeded to conduct the April 28 rehearing at the Ralph L. Carr Colorado Judicial Center.

B. The Secretary has discretion to convene a meeting of the Board in any public location.

With respect to the logistics of its meetings, the Board's enabling statute states:

> For ballot issues, beginning with the first submission of a draft after an election, the secretary of state shall *convene* a title board consisting of the secretary of state, the attorney general, and the director of the office of legislative legal services or their designees. The title board, by majority vote, shall proceed to designate and fix a proper fair title for each proposed law or constitutional amendment, together with a submission clause, *at public meetings to be held at the hour determined by the title board on the first and third Wednesdays of each month* in which a draft or a motion for reconsideration has been submitted to the secretary of state. *...The first meeting of the title board shall be held no sooner than the first Wednesday in December after an election, and the last meeting shall be held no later than the third Wednesday in April in the year in which the measure is to be voted on.*

§ 1-40-106(1), C.R.S. (emphasis added).

In construing the foregoing statutes, a 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)). To do 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).

Contrary to Proponents' assertion otherwise, the Board's enabling statute does not fix the Secretary's Office as the sole location of its meetings. *See Proponents' Opening Brief*, at 9. Instead, the statute

only specifies that such meetings be "public," which simply means that they must be held in a location that is "open to all persons." "Public". *Dictionary.com Unabridged*. Random House, Inc. May17, 2017. <http://www.dictionary.com/browse/public>. And while the Proponents do not affirmatively state that the Ralph L. Carr Judicial Center is a location that is closed to the public, they do argue that moving the location of the meeting from the Secretary's Office "deprived the public of the opportunity to attend as there was substantial public interest in ... #20." *Proponents' Opening Brief*, at 10. This argument is wholly conclusory and, therefore, should be rejected by this Court. *See People v. Venzor*, 121 P.3d 260, 264 (Colo. App. 2005) (arguments presented to a court "only in a perfunctory or conclusory manner" are not subject to consideration).

The Board's statute expressly authorizes the Secretary to "convene" the Board at a public meeting, which means "to cause to assemble." "Convene". *Dictionary.com Unabridged*. Random House, Inc., May 17, 2017. <http://www.dictionary.com/browse/convene>. And given that the statute only dictates that meetings occur on specific days

of certain months, the Secretary has discretion to cause the Board to assemble at the location of his choosing, provided that it is one that is open to the public. As a result, his decision to do so here at the Ralph L. Carr Colorado Judicial Center was proper and should be sustained by this Court.

III. To the extent Proponents properly preserved their due process claims, such claims are misplaced because the Board does not act in a quasi-judicial or adjudicative capacity that confers such rights.

A. Standard of review and preservation.

Proponents' Opening Brief failed to articulate the standard of review that applies to the question of whether their due process rights were violated by not receiving rulings on their various objections and motions, so there is nothing with which the Board may agree or disagree with here. The Board's position on the matter is that whether an individual was denied due process is a matter of law that this Court reviews de novo. *See Quintano v. People*, 105 P.3d 585, 592 (Colo. 2005).

Their Opening Brief also neglects to point to the precise location in the record below where this issue was raised and ruled on by the Board. The Board's position is that this although Proponents' various objections and motions were expressly raised below, they failed to press the Board for rulings on those objections and motions at the rehearing or to articulate on the record their position that the Board's failure or refusal to do so violated their due process rights. Accordingly, for the same reasons and authorities discussed in Section I above, Proponents waived any due process claims because they did not raise them below.

B. Alternatively, Proponents do not have due process rights in receiving rulings on their objections and motions.

Even if this Court finds that Proponents properly raised and preserved their due process claims below, such claims fail as a matter of law. In *In re Proposed Amend. Entitled "W.A.T.E.R."*, 831 P.2d 1301, 1305-06 (Colo. 1992), this Court considered a petitioner's claim that the Board, as "an agency of the executive branch of government," was required to comply with certain provisions of the State Administrative

Procedure Act, § 24-4-101, *et seq.*, C.R.S. (1988). In rejecting this contention, the Court stated:

> When the Board holds a public meeting for the purpose of designating and fixing a title, ballot title and submission clause, and summary, it is not acting as an administrative agency functioning in an adjudicative capacity. The public meeting is not an adversarial proceeding designed to adjudicate the legal rights or duties of specific individuals vis-à-vis other parties through the application of legal norm to past or present facts developed through sworn testimony and other evidence. Nor is the Board acting as an administrative agency functioning in a rulemaking proceedings. The public meeting is akin to a public forum in which interested persons can present their views on a proposed measure of the purpose of enhancing the accuracy, clarity, and impartiality of the text ultimately selected by the Board for the title, ballot title and submission clause, and summary.

W.A.T.E.R., 831 P.2d at 1306. The Court further noted that the Board's enabling statute was "[f]ar from being designed either to further the adjudication of legal rights and duties or to implement a rulemaking function, but rather "create[s] a specific process and distinctive procedures applicable only to the unique functions of the Board." *Id.* Because the Board does not act in a quasi-judicial or adjudicative capacity, due process rights do not attach to its procedures. *Cf. City of*

Manassa v. Ruff, 235 P.3d 1051, 1056 (Colo. 2010) ("When decision-making by non-judicial officers bears sufficient similarities to the adjudicatory function performed by courts, we have characterized it as "quasi-judicial" and similarly subjected it to the basic requirements of due process) (citing *Cherry Hills Resort Dev. Co. v. City of Cherry Hills Vill.*, 757 P.2d 622, 625-26 (Colo. 1988)). Accordingly, even if this Court reaches the merits of Proponents' due process claims, they must be denied as a matter of law.

IV. The Board lacked jurisdiction to set a title for #20 because Proponents failed to comply with the requirements of C.R.S. § 1-40-105(4).

A. Standard of review and preservation.

Proponents' Opening Brief failed to articulate the standard of review that applies to the Board's jurisdiction to set a title, so there is nothing with which the Board may agree or disagree with here. The Board's position on the matter is that any question regarding its authority to act "is a matter of statutory interpretation, and thus 'a question of law subject to de novo review.'" *In re Title, Ballot Title, and Submission Clause for 2013-2014 #103*, 328 P.3d 127, 129 (Colo. 2014)

(quoting *MDC Holdings, Inc. v. Town of Parker*, 223 P.3d 710, 717 (Colo. 2010)).

Their Opening Brief also neglects to point to the precise location in the record below where this issue was raised and ruled on by the Board. The Board's position is that this issue was expressly raised by the Objector in his motion for rehearing, which was granted by the Board on August 28, 2017. Accordingly, this issue was properly raised and preserved below.

B. The Board joins in and adopts each of the arguments set forth in Sections I and II of the Argument in Objector's Opening Brief.

The Board hereby joins in, adopts, and incorporates by reference as if fully set forth herein each of the arguments raised in Sections I and II of the Argument in the Objector's Opening Brief. *See Respondent Vorthmann's Opening Brief*, at 8-18.

CONCLUSION

Based on the above reasons and authorities, this Court should affirm the Board's decision to grant the Objector's motion for rehearing and refrain from setting a title for #20.

DATED: May 17, 2017.

CYNTHIA H. COFFMAN
Attorney General

s/ LeeAnn Morrill
LEEANN MORRILL, 38742*
First Assistant Attorney General
Public Officials Unit
State Services Section
Attorneys for the Title Board
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I served the **THE TITLE BOARD'S OPENING BRIEF** upon the following counsel of record and parties either through ICCES on May 17, 2017, or via FedEx overnight delivery on May 18, 2017, addressed as follows:

Jason R. Dunn (via ICCES)
David B. Meschke (via ICCES)
Brownstein Hyatt Farber Schreck LLP
410 Seventeenth Street, Suite 2200
Denver, CO 80202
Attorneys for Respondent Chad Vorthmann

Andrew J. O'Connor (via FedEx overnight delivery)
1220 W. Devonshire Court
Lafayette, CO 80026
With a courtesy copy via email on May 17, 2017 to:
oconnorandrew@hotmail.com
Attorney for Petitioners

s/ LeeAnn Morrill