SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	DATE FILED: May 31, 2017 5:33 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 Initiatives 2017-2018 #23, #24, #25, #26, and #27 ("Transportation Funding") **Petitioner: Dennis Polhill,** **v.** **Respondents: Anthony Milo and James Moody,** **and** **Title Board: Suzanne Staiert; David Blake; and Sharon Eubanks**	▲ COURT USE ONLY ▲
Attorney for Respondents: 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 Nos. 2017SA86, 2017SA87, 2017SA88, 2017SA89, and 2017SA90**

RESPONDENTS' ANSWER BRIEF ON PROPOSED INITIATIVES 2017-2018 #23, #24, #25 , #26, AND #27 ("TRANSPORTATION FUNDING")

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).

Choose one:

X It contains 2,290 words.

☐ It does not exceed 30 pages.

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

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
Mark G. Grueskin
Attorney for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

SUMMARY OF ARGUMENT

On May 17, 2017, counsel for the Title Board and the Respondents (the petition proponents, Anthony Milo and James Moody) filed opening briefs with this Court. By email, the Petitioner transmitted his pleading to the Board's attorney and the undersigned. But his "brief" was nothing more than the motion for rehearing that he filed with the Title Board three weeks before. It provided no legal argument or analytical support for his arguments below and reflected claims far more numerous than those set out in his notice of appeal to this Court. For those reasons, his brief should be stricken and this appeal dismissed.

His arguments on the single subject of these measures were addressed in Respondents' Opening Brief and are not repeated here. However, as to the many clear title arguments raised, it is apparent that many of the arguments seek detail that is not required in a ballot title or statements that are not based in the measures themselves. The Board complied with TABOR in using the form for a tax increase ballot question, and Petitioner's additional arguments are not grounded in the Constitution or in case law. Thus, the Board's title is legally sufficient.

Finally, the "abstract" – a fiscal summary that must be included in initiative proponents' petition forms – was based on unquestioned data from the legislative offices that advised the Title Board. Petitioner provided no contrary evidence of

his own and thus violated the statute requiring the same. Thus, the Board properly upheld the abstract as drafted.

Given the lateness in the initiative cycle for the 2017 ballot, the Court should quickly dismiss this appeal or uphold the Board's decision.

LEGAL ARGUMENT

A. Petitioner's Opening Brief violates the plain requirements of C.A.R. 28(a) and should be stricken.

Petitioner's Opening Brief does not make a valid attempt at complying with the requirements of Colorado Appellate Rules. It does not contain a table of contents or table of authorities. C.A.R. 28(a)(2), (3). It does not state the issues presented for review or set forth the facts underlying Petitioner's appeal or the procedural history of the case. C.A.R. 28(a)(4), (5). It provides no summary of arguments or conclusion of the argument made. C.A.R. 28(a)(6), (8). There is no recitation of the proper standard of review or authority set forth in support of the proposed standard of review. C.A.R. 28(a)(7)(A).

In fact, the Petitioner's Opening Brief is simply a copy of the Motion for Rehearing that the Petitioner filed at the Title Board. Other than the captions used, the single difference between the two documents is that, in paragraph number 3, the Petitioner highlighted the following five words by underlining and placing

them in bold font: "Each text has many subjects…." Petitioner's Opening Brief at 1.

By presenting his arguments in this manner, Petitioner deprived the Respondents of the opportunity to respond to whatever legal arguments he might advance in support of his position.[1] The point of the briefing process is to facilitate this Court's evaluation of the legal merits of the claims in the appeal, and the process the Court has chosen here is simultaneous briefing, whereby both parties file opening and answer briefs. Petitioner's Opening Brief cannot be said to advance this goal.

In such cases, the Court is entitled to strike the brief and the appeal. *Bruce v. City of Colorado Springs*, 252 P.3d 30, 32 (Colo. App. 2010) (Court noted that striking a brief and dismissing an appeal may be appropriate remedies for failing to comply with the appellate rules); *see Mauldin v. Lowery*, 255 P.2d 976, 977 (Colo. 1953) (summarily affirming the judgment below where appellant's brief failed to comply with appellate rules); *see generally* C.A.R. 38(e) ("appellate court may dismiss an appeal… or impose other sanctions it deems appropriate… for the failure to comply with any of its orders or with these appellate rules... or file an opening brief").

[1] That Petitioner's Notice of Appeal indicated the only issue being appealed would be the single subject of the proposed initiatives had a similar effect as to notice to Respondents. *See* Respondents' Opening Brief at 7-8.

Petitioner is no novice to these appeals, having been involved in multiple Title Board appeals to the Supreme Court in the past. "While courts may take into account the fact that a party is appearing *pro se*, *pro se* parties are 'bound by the same rules of civil procedure as attorneys licensed to practice law.'" *Cornelius v. River Ridge Ranch Landowners Ass'n*, 202 P.3d 564, 572 (Colo. 2009), citing *Negron v. Golder*, 111 P.3d 538, 540 (Colo. App. 2004).

Given the Court's authority under C.A.R. 38(e), Respondents request that the Court dismiss this appeal or, in the alternative, strike the Petitioner's Opening Brief and his Answer Brief to the extent that it, too, fails to comply with the cited provisions of C.A.R. 28(a).

B. The Board properly set a title for measures that comprise a single subject.

As discussed in the Respondents' Opening Brief, the measures each reflect a single subject. Therefore, the Title Board properly accepted jurisdiction to set ballot titles, and Petitioner's claims are without merit.

C. The ballot title used acceptable wording and is neither confusing or misleading to voters.

1. Accuracy of TABOR revenue estimate

Petitioner complains the title communicates that the proposed sales and use tax increase will produce "the same fixed sum each year" when, in fact, the

revenue could grow in any of the twenty years that this temporary tax increase is effective. Opening Brief at ¶5. In this regard, the ballot title language reads: "Shall state taxes by increased $715,100,000 annually…?".

Ballot titles are only required to specify the first year revenue increase resulting from the tax in question. Colo. Const., art. X, § 20(3)(c) ("Ballot titles for tax or bonded debt increases shall begin, "SHALL (DISTRICT) TAXES BE INCREASED (FIRST, OR IF PHASED IN, FINAL, FULL FISCAL YEAR DOLLAR INCREASE) ANNUALLY...?"). The proposed sales and use tax is not a phased-in tax increase, and thus, the first rather than the final fiscal year dollar increase was required to be – and was – stated in the ballot title. Likewise, TABOR explicitly requires the inclusion of the term "ANNUALLY" in describing the tax increase in question. That requirement was met by the language chosen by the Title Board.

Further, the ballot title also states (and thus informs voters) that it covers any revenue growth, as "all revenue resulting from the tax rate increase" is to be treated as a voter-approved revenue change. The Title Board was not required by TABOR to speculate as to the amounts to be raised in future years, and thus the title set was legally sufficient. *In re Title, Ballot Title, & Submission Clause 2007-2008 # 62*, 184 P.3d 52, 60 (Colo. 2008) ("the Title Board may not speculate as to the measure's efficacy, or its practical or legal effects") (citations omitted).

On April 26, 2017, Respondents filed a motion for rehearing and asked the Board to review this issue, *see* Milo/Moody Motion for Rehearing at 1, ¶1, an issue that had been raised in Petitioner's April 23 motion for rehearing. *See* Polhill Motion for Rehearing at 1-2, ¶5. At the rehearing, the Board was convinced that there would be no voter confusion from the introductory language, given the totality of the circumstances. In light of TABOR's express language and the balance of the ballot title language, the Board's decision is defensible and consistent with TABOR, whether or not it is in the exact form that either the Petitioner or the Respondents might have drafted. Thus, the Board's decision should be upheld. "Our role does not include rewriting the titles and summary to achieve the best possible statement of the proposed measure's intent." *In re Proposed Initiative 1999-2000 #246(e)*, 8 P.3d 1194, 1197 (Colo. 2000).

2. Key terms used in the ballot title are not confusing to voters.

First, Petitioner argues that "multimodal" is not clear or plain English. Opening Brief at ¶10. Yet, the term "multimodal" is used in current statute without definition. *See* C.R.S. §§ 43-1-1003; 43-4-206, -207, -208; 43-4-802, -803, 808. "Multimodal" is not defined by the measures, although "multimodal transportation options" and "transportation options" are defined terms. *See* Proposed §§ 43-4-1102(7), (8). Petitioner does not argue that the definitions that are actually included in these measures represent a "new or controversial legal

standard which would be of concern to all concerned with the issue." *In the Matter of the Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo. 1990). Thus, it is not necessary that the definitions of phrases broader than "multimodal" be included in the ballot titles.

Second, Petitioner complains that the key phrase 'transportation projects' is undefined. Petitioner's Opening Brief at ¶11. The Board is not obligated to supply definitions for terms where those terms are not defined. *In re Proposed Constitutional Amendment re Unsafe Workplace Environment*, 830 P.2d 1031, 1034 (Colo. 1992). Thus, both as to "multimodal" and as to "transportation projects," the Board did not err.

Third, the reference to "additional transportation revenue anticipation notes" is not "vague, deceptive, and illegal." Petitioner's Opening Brief at ¶12. It was included by the Board because other transportation revenue anticipation notes have been authorized by voters for purposes of effecting transportation network improvements. *See generally Submission of Interrogatories on House Bill 99-1325*, 979 P.2d 549 (Colo. 1999). The Board exercised its discretion to ensure that the ballot titles would not confuse or mislead voters. C.R.S. 1-40-10(3)(b) ("the title board shall consider the public confusion that might be caused by misleading titles").

Fourth, it was proper for the Board to include reference to the measure's de-Brucing language: designating the election as proof of "voter-approved revenue changes exempt from any limitations in law." *See* Petitioner's Opening Brief at ¶13. This aspect of the measures is clearly not a "second subject," *id*., as it is part and parcel of the proposed tax increase and how – in truth, whether – all of the voter-approved revenues will be able to be spent as the voters wish. The question of this provision's "illegal[ity]," *id*., is a post-election issue, although Respondents dispute such notion. The same is true as to the Petitioner's allegation about the measures' impact on local revenue limits. *See* Petitioner's Opening Brief at ¶7. This language certainly does not pose the concern raised that there could be taxpayer refunds and, in actuality, informs voters that such refunds will not be triggered by this measure. *See* Petitioner's Opening Brief at ¶9.

Finally, the concern that "equally," as it applies to county and municipal allocations of new revenue, is unwarranted. Petitioner's Opening Brief at ¶8. The Board removed this term from the ballot titles at the rehearing, a point not referenced at all by Petitioner.

D. The abstracts approved by the Board were legally sustainable.

The Petitioner argues that the abstracts were insufficient. He states they were incorrect, misleading, and prejudicial. Petitioner's Opening Brief at ¶2. However, he presented no economic studies, fiscal analyses, or any other evidence

to substantiate this allegation. Nor did he assert in his Opening Brief that any such evidence existed before the Board.

As such, Petitioner did not comply with the terms of C.R.S. § 1-40-107(1)(b).

> If the motion claims that an estimate in the abstract is **incorrect**, the motion **must include documentation that supports a different estimate**. If the motion claims that the abstract is **misleading or prejudicial** or does not comply with the statutory requirements, the motion **must specifically identify the specific wording that is challenged or the requirement at issue**. The title board may modify the abstract based on information presented at the rehearing.

(Emphasis added.) Having failed to fully litigate the matter before the Board, Petitioner cannot raise arguments about the abstracts' insufficiency for the first time in his Reply Brief.

Further, the Court defers to the Title Board's judgment as to the types of representations that must be made in a petition's fiscal abstract. In *In the Matter of the Title, Ballot Title and Submission Clause for 2017-2018 #4*, 2017 CO 57 (May 30, 2017), the Court applied the standard used in its other Title Board matters to the question of the abstract's sufficiency: "we draw all legitimate presumptions in favor of the propriety of the Title Board's decision and only overturn the Board's decision in a clear case." *Id*. at ¶20. Further, the Court held that the Board is "in a better position than this court to weigh the merits of evidence regarding the accuracy of an abstract." *Id*. at ¶22. As such, the Court gives credence to the

record established at the Board and yields to the Board's assessment of the best way to inform voters about the measures' fiscal effects, as provided by statute. Petitioner's Opening Brief raises no cause for the Court to revisit or require revision of the Board-approved abstract.

CONCLUSION

The Petitioner's Opening Brief was simply its Title Board motion for rehearing without any of the formalities or legal substance of an opening brief. This is not a case of technical noncompliance. Petitioner's act undercuts effective appellate review by this Court. As a result, and as authorized by the appellate rules, the Court should strike the brief or dismiss this appeal.

If the Court decides not to do so, it should find that the Title Board correctly held the proposed ballot measure comprises a single subject and also set a legally sufficient title, one that addressed the measure's central elements and accurately portrayed those key aspects of the measures for purposes of providing notice to petition signers and voters about these measures. The abstracts also meet the terms of the statute and were within the Board's discretion to approve.

The Court should sustain the decisions of the Title Board.

Respectfully submitted this 31st day of May, 2017.

/s Mark Grueskin
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
ATTORNEY FOR RESPONDENTS

CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **RESPONDENTS' ANSWER BRIEF ON PROPOSED INITIATIVES 2017-2018 #23, #24, #25 , #26, AND #27 ("TRANSPORTATION FUNDING")** was sent this day, May 31, 2017, via Colorado Courts E-Filing to counsel for the Title Board and via Federal Express overnight to the Petitioner at:

Matthew D. Grove
Assistant Solicitor General
Office of the Attorney General
1300 Broadway, 6th Floor
Denver, CO 80203

Dennis Polhill
49 S. Lookout Mountain Rd.
Golden, CO 80401

/s Erin Holweger