SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	DATE FILED: March 26, 2018 4:42 PM
In the Matter of The Title, Ballot Title, and Submission Clause for Proposed Initiative 2017-2018 #97 ("Setback Requirement for Oil and Gas Development") **Petitioner:** Neil Ray, v. **Respondents:** Anne Lee Foster and Suzanne Spiegel, and **Title Board:** Suzanne Staiert, Glen Roper, and Jason Gelender	▲ COURT USE ONLY ▲
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PETITIONER'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 3,579 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my 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/ Jason R. Dunn

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Petitioner Neil Ray submits his Answer Brief and in support thereof states as follows.

ARGUMENT

I. BY COMBINING TWO PREVIOUS MEASURES, PROPOSED INITIATIVE #97 DIFFERS FROM PREVIOUS MEASURES APPROVED BY THIS COURT.

Petitioner Ray detailed in his Opening Brief the numerous reasons why Initiative #97 violates the single subject requirement. In their Opening Brief, Respondents argue first that the measure's single subject is the establishment of a statewide minimum distance requirement for new oil and gas development from structures intended for human occupancy and other listed areas. Resp'ts Opening Br., at 7. They next assert that the provisions allowing the state or a local government to increase the minimum distance requirement and designate additional areas to which the distance requirement applies are directly tied to the measure's central focus. *Id.* at 7–8. They then cite to case law addressing previous measures that reject Petitioner's arguments raised below—namely, that these provisions (1) would alter the long-standing relationship between the state and local governments

by permitting a state or local government to pass larger setbacks and (2) would provide that the greater setback in a geographic area trumps any others adopted by overlapping jurisdictions, overriding preemption case law. *Id.* at 10–11.

Respondents' argument suffers from at least one fatal flaw: the case law they rely upon concern either (1) a setback measure, or (2) a local control of oil and gas measure, but significantly, not both. Previous setback measures approved by this Court provided for a statewide setback of a certain distance only and did not empower local governments with additional control over oil and gas development.[1] Likewise, previous local control measures approved by this Court gave local governments the right to regulate oil and gas development within

[1] *See In the Matter of the Title, Ballot Title and Submission Clause for 2013-2014 #85*, 2014 CO 62 (affirming in an opinion the Title Board's decision to set title for a measure seeking to establish a 1,500-foot statewide setback); *In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2015-2016 #78*, 2016SA71 (Colo. Apr. 14, 2016) (affirming the Title Board's decision to set title for a measure seeking to establish a 2,500-foot statewide setback).

their geographic boundaries but did not include a statewide setback.[2] In notable contrast, Initiative #97 combines the previous setback initiatives with the unrelated local control initiatives in a single measure. Notwithstanding Respondents' argument to the contrary, this Court has yet to address whether a statewide setback measure that also provides local governments control of oil and gas development in their geographic areas (through setbacks or an outright ban) violates the single-subject requirement.

For example, *In the Matter of the Title, Ballot Title and Submission Clause for 2013–2014 #90*, 328 P.3d 155 (Colo. 2014), cited extensively by the Respondents, concerned a measure that involved only local government control over oil and gas development. In that context, this Court rejected single-subject challenges arguing that the measure fundamentally changed the constitutional home-rule provisions and state preemption law because such features comported with the

[2] *See In the Matter of the Title, Ballot Title and Submission Clause for 2013–2014 #90*, 328 P.3d 155 (Colo. 2014) (affirming in an opinion the Title Board's decision to set title for a measure granting local governments control over oil and gas development in their geographic areas).

measure's one subject—the expansion of local governments' authority to enact laws regulating oil and gas development that are more restrictive than state law. *Id.* at 161. This makes sense. To achieve the central purpose of the measure—local government control of oil and gas development—the measure needed to alter home-rule and preemption law. In other words, those features are necessarily and properly connected to the measure's main feature.

Here, in contrast, Initiative #97 is not merely a local control measure. At its heart, and as the Respondents have fully and repeatedly acknowledged during the title board process, the measure is a statewide setback initiative. The local control features are undeniably not necessary to effectuate this uniform statewide setback, which can be achieved regardless of whether there is local control of oil and gas development. In fact, the local control aspects could result in varying setback distances throughout the state, including outright bans on oil and gas development in various geographic areas, which ironically might frustrate the supposed purpose of this measure to allow oil and gas development but only outside the 2,500 setback area.

By combining a statewide setback with features from previous local control measures, Initiative #97 presents the danger of garnering support from different and competing factions, which could cause it to pass even though its multiple subjects might not have been able to pass on their own. *See In Re Title, Ballot Title, Submission Clause for 2011-2012 #3*, 274 P.3d 562, 566 (Colo. 2012). While there might be voters who would vote for both the statewide 2,500-foot setback and a local control scheme where local setbacks are not preempted and home-rule municipalities do not have the ability to override greater county-wide setbacks, there certainly will be voters who would vote for the measure solely because they liked the statewide setback but not the local control, or vice versa. Indeed, the local control aspects of the measure may have been added for the specific purpose of gaining the support of anti-oil and gas voters who believe a 2,500-foot setback does not go far enough but will vote for the measure because it provides state and local governments the power to set greater setback distances that effectively prevent new oil and gas development.

Therefore, the Initiative #97 violates the single-subject requirement and thus the Title Board lacked jurisdiction to set a title.[3] Its decision to deny Petitioner's Motion for Rehearing should be reversed.

II. INITIATIVE #97'S REHEARING DEMONSTRATES WHY THE ABSTRACT FAILS TO MEET STATUTORY REQUIREMENTS AND WHY THIS COURT SHOULD PROVIDE THE TITLE BOARD WITH GUIDANCE TO ENSURE THAT VOTERS RECEIVE ROBUST FISCAL ESTIMATES.

Petitioner articulated in his Opening Brief detailed arguments regarding why Initiative #97's fiscal impact statement and abstract are inadequate and why the Title Board has authority to return them to Legislative Council. *See* Pet'tr's Opening Br., at 19–37. The following responds to Respondents' arguments in their Opening Brief and presents additional explanation for why this Court needs to provide

[3] As perhaps an admission that Initiative #97 contains single-subject issues, the Respondents recently filed Initiative #163, which eliminates the state's and a local government's ability designate additional areas subject to a setback, and removes the provision that permits the state or a local government to require larger-distanced setbacks and provides that the greater setback govern if there are multiple setback distances in a geographic area.

guidance to the Title Board when it receives inadequate fiscal estimates.

Initiative #97's fiscal impact statement and abstract placed the Title Board in a bind. On the one hand, the Title Board members all agreed that the measure's fiscal impact statement and abstract Legislative Council drafted fails to provide voters with any meaningful information, which therefore violates the requirements in section 1-40-105.5. On the other hand, the board members admitted that they lack the expertise to know what estimates should have been placed in the abstract when the board decided that the abstract needed to be modified, and they were unclear as to whether the board has the statutory authority to return the fiscal impact statement and abstract to Legislative Council for redrafting. In other words, the Title Board members agreed that the abstract needed to be redrafted to provide estimates and ranges but, absent clarification from this Court, felt that the board's only option was to modify the abstract based on material submitted to Legislative Council and presented during the rehearing.

This Court has the opportunity to clarify that when Legislative Council fails to meet its statutory duty to draft a meaningful fiscal impact statement and abstract where actual estimates are available and calculable, the Title Board may return the abstract to Legislative Council for redrafting and then consider the revisions at a new Title Board hearing. Such clarification is needed to meet the clear legislative intent to provide voters with meaningful fiscal information before they sign a petition to place the measure on the ballot.

A. Legislative Council has made it clear that it will not provide any estimates in the fiscal impact statement or abstract if it involves assumptions.

Initiative #97's abstract did not include any estimates or numbers demonstrating potential fiscal impact. Despite section 1-40-105.5's requirements that the abstract include estimates of the "effect the measure will have on state and local government revenues, expenditures, taxes, and fiscal liabilities" and "the amount of any state and local government recurring expenditures or fiscal liabilities," as well as "[a] statement of the measure's economic benefits for all

Coloradans," Legislative Council instead chose to provide a bland statement expressing no meaningful information.

When called before the Title Board to explain its statement, Legislative Council rationalized providing indeterminate impacts because any estimates with numbers would derive from a dynamic study that requires varying "assumptions." Resp'ts Opening Brief, Ex. A ("Transcript"), p. 43, *l.* 12 – p. 45, *l.* 12. Specifically, Natalie Mullis of Legislative Council explained that while the CU Study was based on the notion that a reduction of developable land is going to reduce production by given rate as specified in the State Findings, Legislative Council decided it could not rest any estimates on such a notion. Ms. Mullis elaborated that "[n]ot only would we have to make an assumption for how oil and gas production would change and how that would flow through the economy, but we would have to make an assumption for what those offsetting impacts are" and "quantify them." *Id.*, p. 45, *l.* 1–6.

Nothing, however, prevents Legislative Council from including in the abstract estimates with language specifying the information utilized

or the assumptions made in creating each estimate. In fact, Initiative #97's abstract already does just that, even if the conclusion reached is unhelpful: under "Economic Impacts," the abstract states that "[t]o the extent that the measure reduces development, there will be less oil and gas employment, less demand for associated services, reduced rent and royalty income to mineral owners, and reduced profits for operators." Pet. for Review, at 19. There is no reason why Legislative Council could not have provided estimates from the CU Study or their own sources after the phrase "[t]o the extent that the measure reduces development." Moreover, there was nothing preventing Legislative Council from including offsetting impacts or other positive impacts if that was the reason it chose not to use or include information from the CU Study in the abstract.

Whether it was due to lack of resources, time, or both, Legislative Council simply chose not to do *any* economic analysis of Initiative #97's likely fiscal impacts. This runs directly contrary to the General Assembly's purpose in passing House Bill 15-1057 to provide voters

with fiscal estimates early in the initiative process. *See* Pet'tr's Opening Br., at 19–20.

B. The Title Board members all agreed that the measure's fiscal impact statement and abstract were lacking but that they did not know what to do to remedy them.

At Initiative #97's rehearing, all three Title Board members unequivocally expressed frustration with Legislative Council and conveyed that the abstract did not provide voters with any meaningful fiscal information. First, Jason Gelender stated that "the abstract . . . doesn't provide any numbers at all." Tr., p. 32, *l.* 5–7.

Second, Glen Roper related that he was "troubled by the lack of numbers . . . in the statement and the abstract." *Id.*, p. 41, *l.* 16–18. He explained that he worries the abstract "just kind of say[s], yeah, things could go down, things could go up. We really aren't sure. And that's always going to be true because there are always some unknowns." *Id.*, p. 41, *l.* 22 – p. 42, *l.* 2. While he noted that "the purpose of [the abstract] is . . . intended to give some hard data or ranges or something that will enable the voters to be able to understand what the actual impact is going to be," he "worr[ied] looking at this abstract and the

statement that it really doesn't do that with respect to this measure." He then expounded that "the blandness of the abstract doesn't provide the voters with the information that we would hope it would or that I would hope it would to be able to enable them to evaluate the measure." *Id.*, p. 42, *l.* 22 – p. 43, *l.* 1.

Third, Suzanne Staiert related that she was "concerned that we're giving the voters really no information" and "[t]o the extent that we're giving them anything, we're making statements about, you know, may preserve and to the extent it improves health, it may increase – I don't know." *Id.*, p. 52, *l.* 18–22. She then concluded that the abstract is "a bit misleading and not very helpful." *Id.*, p. 52, *l.* 23–24.

Despite their universal conclusion that the statement failed to provide the required information, the Title Board seemed to not know how to remedy that defect. Mr. Roper stated that he had "some concerns" but that he did not "know what to do given what the statute says" because "[i]t feels odd for [the Title Board] to modify the abstract to include some of this information that's not even addressed in the

fiscal impact statement itself and just for us to put that back in and then send it back." *Id.*, p. 53, *l.* 2–8.

Therefore, contrary to Respondents' statement that "the Title Board did not conclude that the abstract failed to meet legal requirements," Resp't Opening Br. at 17, the Title Board had significant concerns, if not outright concluded, that the abstract failed to satisfy the requirements in section 1-40-105.5. The problem is the Title Board members felt "stuck" because its members were "not quite sure what [they] can do to get to [the point of providing helpful information to voters]." Tr., p. 53, *l.* 23 – p. 54, *l.* 2. They admitted that they did not have the technical expertise to know how to modify the abstract to include information from the economic assessment of a 2,500-foot oil and gas setback conducted in June 2016 by the University of Colorado's Leeds School of Business (the "CU Study") or the Colorado Oil & Gas Conservation Commission's findings from May 27, 2016 (the "State Findings"). *Id.*, p. 32, *l.* 1–4. (noting that "the Board itself . . . doesn't have the technical expertise to know what the correct number is for sure"); *see also id.*, p. 55, *l.* 7–10 ("I would suggest that we don't go down

a path of inserting any kind of numbers, or at least not for something this complex that no one can agree to"). But they do not know if they have the authority to return the fiscal impact statement and abstract back to Legislative Council and worried that, if they returned the abstract, Legislative Council would "come back with the same conclusion" if they could not provide further direction. *Id.*, p. 47, *l.* 21–25; p. 53, *l.* 9–15.

Because of their lack of expertise and the absence of clarity on what they could do, the Title Board members made only very modest changes to the abstract that did not fix the primary shortcoming they identified—that the abstract failed to provide meaningful information, estimates, and ranges. As Mr. Gelender lamented, what voters are left with in the abstract is "kind of sad." *Id.*, p. 57, *l.* 4.

C. The Title Board has continued to express its frustration with meaningless fiscal impact statements and abstracts and would like guidance from this Court.

At the rehearing for another measure this year, the Title Board expressed similar frustrations about the fiscal impact statements and abstracts drafted by Legislative Council. After an objector challenged

Initiative #126's abstract for lack of information, Ms. Staiert stated that she "share[s] [the objectors] frustrations" and that she "[doesn't] know how [she is] supposed to uphold this provision when [she] get[s] nothing" from Legislative Council.[4] However, she expressed that the Title Board members, absent further direction from this Court, "have to take what we have and deal with it"[5] even though "it seems we are going to continue to get impacts with really no informational impact."[6]

A constant theme from the Title Board during this rehearing was that the members would like direction from the Colorado Supreme Court on what to do when an abstract lacks substantive information. Although the Title Board read section 1-40-105.5's requirement that the abstract must include "[a] statement of the measure's economic benefits for all Coloradans" to mean a statement on the measure's fiscal impact and "more than what we have been getting," the Title Board believes

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[4] *See* Audio of the March 7, 2018 Rehearing (9:30 a.m.) for Initiative #126, at 49:00–49:24. The audio can be found at https://www.sos.state.co.us/pubs/info_center/audioArchives.html.

[5] *Id.* at 48:45-49:00.

[6] *Id.* at 49:25-49:40.

that at this point it "does not have any authority" and that it is up to the Supreme Court to decide what to do about the situation.[7]

Because the Title Board's hands were again tied, its members reluctantly denied the motion for rehearing.[8] Issues regarding that measure's abstract are now before this Court on appeal.

D. This Court should clarify that the Title Board has the authority to return the fiscal impact statement and abstract to Legislative Council for redrafting and further review.

There is only one solution to remedy the Title Board's predicament. This Court must clarify that when a measure's fiscal impact statement and abstract fail to comply with statutory requirements and relevant fiscal information is available to either include in the statement and abstract or use in creating new estimates (such as the CU Study and State Findings), the Title Board has the authority to return them to Legislative Council for redrafting.

Here, while the Title Board should have modified the abstract and included the estimates in the CU Study, even if explained with caveats

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[7] *Id.* at 1:19:18-1:20:04.

[8] *Id.* at 1:24:00.

about why actual impacts might differ under this measure, if it did not feel comfortable in doing so, it should have the option to provide Legislative Council with direction to rewrite the fiscal impact statement and abstract to provide meaningful information, estimates, and ranges. This is not a situation where it is difficult or impossible to provide quantitative estimates. *See* Pet'tr's Opening Br., at 26–32. Voters should be provided the fiscal information available and necessary for them to make an informed decision to place a measure on the ballot. At minimum, the Title Board should have the authority to hold it over and request that Legislative Council attempt to redraft.

III. THE PHRASE "NEW OIL AND GAS DEVELOPMENT" EXEMPLIFIES WHY INITIATIVE #97'S TITLE IS MISLEADING.

In their Opening Brief, Respondents contend that the title's use of the phrase "new oil and gas development" is not misleading because the phrase is contained in and defined by the measure. Resp'ts Opening Br., at 7. This argument should be rejected. If the sole criterion for inclusion of a phrase in the title is that the phrase is contained in and defined in the measure, regardless of whether the phrase is a

misnomer, then the requirement that titles not be misleading is no longer relevant.

Here, the measure's setback applies not only to new oil and gas development but also to re-entry of existing oil or gas wells and drilling a new lateral or sidetrack. Therefore, the phrase "new oil and gas development" is misleading because it fails to capture this element regardless of the phrase's use or definition in the measure. Moreover, the definition in the measure is for "oil and gas development," not "new oil and gas development." As a result, "new oil and gas development" is not even defined in the measure. The title thus should state that the setback not only applies to new oil and gas development but also retroactively prohibits re-entry of existing wells.

CONCLUSION

For the reasons stated in his this brief and his Opening Brief, Petitioner Ray respectfully asks this Court to reverse the denial of the substantive parts of his Motion for Rehearing and hold that:

1. the measure violates the single-subject requirement, and thus the measure should return to the Proponents because the Title Board lacked the power to set title;
2. the measure's fiscal impact statement and abstract do not comply with section 1-40-105.5(3), and are misleading and prejudicial, and thus must be returned to Legislative Council for redrafting and reconsideration by the Title Board;
3. the Title Board has jurisdiction on rehearing to return the fiscal impact statement and abstract to Legislative Council when the they fail to meet legal requirements;
4. Legislative Council's failure to post on its website data that was submitted by the proponents, as required by C.R.S. § 1-40-105.5(6), divested the Title Board of jurisdiction to consider the measure;
5. the Title Board erroneously relied on proponent testimony in considering the abstract when that testimony related to economic data submitted by the proponents to Legislative

Council but was not posted on Legislative Council's website, as required by C.R.S. § 1-40-105.5(6), nor available to the Title Board or the Petitioner at the hearing; and

6. the title is misleading and thus violates the clear title requirement.

Respectfully submitted this 26th day of March 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2018, I electronically filed a true and correct copy of the foregoing **PETITIONER'S ANSWER BRIEF** via the Colorado Courts E-Filing System which will send notification of such filing and service on all listed below:

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