SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	DATE FILED: November 18, 2019 3:24 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 Initiative 2019-2020 #122 ("Limits on Local Housing Growth") **Petitioner:** Scott E. Smith **v.** **Respondents:** Daniel Hayes and Charlotte R. Robinson **and** **Title Board:** Melissa Polk, David Powell and Julie Pelegrin	▲ COURT USE ONLY ▲
Attorney for Petitioner Scott E. Smith: Thomas M. Rogers III, #28809 RECHT KORNFELD, P.C. 1600 Stout Street, Suite 1400 Denver, CO 80202 Phone: 303-573-1900 Facsimile: 303-446-9400 Email: trey@rklawpc.com	**Case No. 2019SA224**

PETITIONER'S ANSWER BRIEF ON PROPOSED INITIATIVE 2019-2020 #122 ("LIMITS ON LOCAL HOUSING GROWTH")

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).

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s/ Thomas M. Rogers III
Thomas M. Rogers III
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SUMMARY

The Title Board erred in setting a title for Initiative #122, given the multiple subjects incorporated into the Initiative. Furthermore, the Title Board erred in setting a title which fails to accurately describe important elements of #122.

LEGAL ARGUMENT

A. The Initiative Contains Multiple Subjects.

1. New arguments concerning the affordable and senior housing provisions of #122 made in the Title Board's Answer Brief should not be considered by the Court.

In his Motion for Rehearing (the "Motion"), Petitioner Scott E. Smith ("Petitioner") argued that two provisions of Initiative #122 fall outside the subject of the measure (limiting the growth of privately owned residential housing in Colorado), in violation of Colo. Const. art. V, § 1(5.5). Petitioner's *Motion for Rehearing on Initiative 2019-2020 #122*, p. 2. Those two provisions modify the measure's one percent growth limit in eleven Front Range counties to 1) allow additional growth (by fifteen hundredths of one percent) of privately owned residential housing that meets the measure's definition of "affordable housing"; and 2) allow additional growth (by fifteen hundredths of one percent) of privately owned residential housing that meets the measure's definition of "senior housing". Initiative #122, §§ 1(4) and (5). Petitioner's single subject argument was the focus of his counsel's presentation to the Board at rehearing. *Recording of Rehearing*

Before Title Board on Proposed Initiative 2019-2020 #122 (October 2, 2019), available on Colorado Secretary of State's website at http://pub.sos.state.co.us/20191002134136A (argument of counsel for Scott E. Smith at 16:30—23:00). His Petition for Review filed with this Court identified Petitioner's single subject argument as one of two grounds for appeal. *Petition for Review of Final Action of Title Setting Board Concerning Proposed Initiative 2019-2020 #122*, p. 4. Indeed, an appeal to this Court can only be based on objections properly raised in the motion for rehearing. *In the Matter of the Proposed Initiative on Limited Gaming in Burlington*, 830 P.2d 1023, 1027 (Colo. 1992).

For these reasons, by the time it filed its Opening Brief, the Title Board was well aware of the basis of Petitioner's single subject argument. Inexplicably, however, the Title Board's brief does not address Petitioner's contention that the affordable and senior housing provisions of Initiative #122 fall outside the measure's subject, and only mentions these provisions in passing. *Title Board's Opening Brief*, p. 7-8. Instead, the Title Board devotes several pages of its brief to its contention that this Court's decision *In the Matter of the Title, Ballot Title and Submission Clause for 2017-2018 #4*, 395 P.3d 318 (Colo. 2017), concerning a similar measure, "governs" in this case. *Title Board's Opening Brief*, p. 5, and continuing through p. 10. The Title Board's brief fails to mention that the two

provisions of #122 on which Petitioner's single subject argument is based **were not included** in Initiative 2017-2018 #4. This omission was made after Petitioner's counsel expressly stated at rehearing that Petitioner would not rehash issues already decided by the Title Board concerning earlier versions of Proponents' initiative, but that the affordable and senior housing provisions of #122--which were not present in those earlier versions--violate the single subject requirement. *Recording of Rehearing Before Title Board on Proposed Initiative 2019-2020 #122, supra at 16:30--17:30.*

Briefing and argument at rehearing before the Title Board informs each party of arguments the other will raise on appeal. *See In the Matter of the Proposed Initiative on Limited Gaming in Burlington*, *supra*, at 1027 (Colo. 1992) (an appeal to this Court can only be based on objections properly raised in the motion for rehearing). Because each party knows the other's arguments from rehearing before the Title Board, this Court can and does require simultaneous opening briefs, and then simultaneous answer briefs, in title setting cases. This allows shorter briefing schedules and permits the Court to resolve these time-sensitive matters quickly. Each party has the opportunity to address the other party's arguments from rehearing in its opening brief. Then, each party has the opportunity to address the arguments made in the other's opening brief in its answer brief. In this type of

briefing schedule, the parties' answer briefs really serve as reply briefs—a last opportunity to address arguments made in the opponent's previous brief.

When (as the Title Board has here) one party fails to address the other's arguments in its opening brief, but instead (as Petitioner assumes the Title Board will here) holds its substantive arguments until its answer brief, the other is deprived of an opportunity to respond. When this happens in the course of a typical briefing schedule—that is, when a party makes new arguments in a reply brief, thus depriving the other party of the opportunity to address them, the Court will not consider the new arguments. *People v. Czemerynski*, 786 P.2d 1100, 1107 (Colo. 1990) (argument raised for first time in appellate reply brief will not be considered). Here, because the Title Board knew Petitioner's arguments were based on the affordable and senior housing provisions of #122 but failed to address these arguments in any substantive way in its opening brief, any new argument raised in the Title Board's answer brief specific to these provisions should not be considered by the Court.

2. The affordable and senior housing provisions of #122 fall outside the measure's single subject.

The provisions of #122 concerning affordable and senior housing fall outside the single subject of the measure, limiting the growth of privately owned residential housing in Colorado. These provisions are not "necessarily and

properly" related to the measure's single subject, but they are, rather "disconnected or incongruous" with that subject. *In the Matter of the Title, Ballot Title and Submission Clause, and Summary Adopted April 17, 1996* (1996-17), 920 .2d 798, 802 (Colo. 1996). Instead of limiting growth, these two provisions would set separate, higher limits for the growth of certain subsets of housing, limits that (at least in the case of affordable housing) Proponent Hayes argues will **increase** the growth of affordable housing. Mr. Hayes' *Request for Rehearing*, p. 1 (the measure's higher limit on affordable housing will lead to an "increase in this type of construction."). In their opening brief, Proponents concede that the provisions of #122 concerning affordable and senior housing are not intended to limit these types of housing but are instead "exceptions" to the initiative's growth limits. *See* Proponents' *Opening Brief*[1], p. 3. These two provisions are outside the measure's single subject and instead are disconnected from it and incongruent. *In the Matter of the Title, Ballot Title and 7 Submission Clause, and Summary Adopted April 17, 1996* (1996-17), *supra* at 802.

The purpose behind the inclusion of these affordable and senior housing provisions is clear. They represent impermissible "log rolling" or "Christmas tree

[1] To be clear, this is a citation to the filing by Proponents, Ms. Robinson and Mr. Hayes, titled "Reply Brief" which is identified in the document itself as Proponents' Opening Brief. The document's caption suggests it was filed by counsel for Petitioner, Scott Smith. It was not. The document's signature block correctly notes that it was filed by Proponents, Ms. Robinson and Mr. Hayes.

tactics" intended to appeal to supporters of affordable and senior housing, even if those voters may oppose a limitation on growth, generally. *See In the Matter of Title, Ballot Title and Submission Clause for Initiative 2013-2014 #76*, 2014 CO 52 at ¶32 (Colo. 2014). This is impermissible. *Id.*

Initiative #122 does not meet the single subject requirement of Colo. Const. art. V, § 1(5.5) and the Title Board did not have jurisdiction to set a title for the measure.

B. The Measure Contains Important Elements that are not Accurately Described in the Title.

1. The title fails to sufficiently alert voters that the measure would temporarily deprive voters in 11 Front Range counties of their rights of initiative and referendum on certain measures.

The title fails to state that, for two years (2021-2022), there is no right of initiative or referendum on growth limits in the 11 named Front Range counties, nor in the municipalities within those counties. This failure to expressly notify the voter that he or she will surrender important rights of local control for this two year period render the title deficient and require remand.

The Title Board argues that the language about the rights of initiative and referendum starting in 2023 is sufficient notice to the voter. A careful review of the title language shows that this is not the case.

The language at issue begins with a listing of the 11 impacted jurisdictions and then states that the measure would limit "privately owned residential housing countywide to one percent annually for the years 2021 and 2022 and for subsequent years unless amended or repealed by initiative and referendum starting in 2023…" The language "unless amended or repealed by initiative and referendum starting in 2023" appears to apply to the immediately-preceding language, "for subsequent years", not to the earlier language concerning years 2021 and 2022. Voters will be misled to believe that their powers of initiative and referendum within their local governments, reserved to the people by the Colorado Constitution, will remain available during these years. This renders the title deficient and requires remand.

2. The title fails to alert voters that the measure would override all inconsistent initiative and referendum requirements in county and local governments.

Initiative #122 would override all inconsistent local initiative and referendum procedures applicable to growth measures. The title's only notice to voters of this substantial impact on important rights of local control is a mention that the measure would "establish[] procedural requirements" for growth measures. The Title Board argues first that the title is sufficient because taking voters constitutionally-granted right to establish procedures for local initiatives and referenda is merely a detail of the measure. Colo. Const., art. V, § 1(9); *Title*

Board's Opening Brief, p. 11. The Title Board's position is inconsistent with precedent established by this Court.

In *In re Matter of the Title, Ballot Title and Submission Clause for 2015-2016 #73*, 369 P.3d 565 (Colo. 2016), the Court considered a very similar issue to the one presented here. The measure at issue in *2015-2016 #73* would have altered recall and successor election procedures for state and local elective officials much as #122 would alter initiative and referendum procedures for local growth measures. *Id.* at 569; Initiative #122, § 1(6)(a). The title for 2015-2016 # 73 noted that the measure "specifi[ed] recall and successor election procedures for state and local elective officials" much as the title for #122 notes that the measure would "establish[] procedural requirements for initiatives and referenda" for growth measures. *2015-2016 #73* at 567*;* Initiative #122, § 1(6)(a).

The Court held in *2015-2016 # 73* that the title was deficient because it did "not advise voters what those procedures are" nor did it "alert the voters to the fact that some of the proposed changes would significantly alter how recall elections are…conducted". *2015-2016 #73* at 569. The title for #122 suffers from the same defects. It would not notify the voters that any local initiative and referendum procedures inconsistent with #122 would be overridden, nor that the result in many cases would be to significantly change the procedures in a local jurisdiction.

Denver is an example of a local jurisdiction in which #122 would cause a significant change in initiative procedures applicable to growth measures. Denver's Charter currently requires valid signatures equal to two percent of the total number of active registered voters to submit a proposed ordinance to voters. *Charter of the City and County of Denver*, Art. VIII, § 8.3.1(B)[2]. Under that provision, 8,265 valid signatures are required to place an ordinance on the Denver ballot. *See Initiated Ordinance Quick Guide*[3], Step 7, viewed November 14, 2019 on the Denver Clerk and Recorder's web site: https://www.denvergov.org/content/dam/denvergov/Portals/778/documents/Petition%20for%20Initiated%20Ordinance%20Quick%20Guide__2019_Update.pdf. Under #122, growth proposals at the county level would require valid signatures equal to "five percent of the total number of voters participating in the most recent election for secretary of state in such county." Initiative #122, § 1(6)(a). Voters in Denver cast 305,306 votes for candidates for Colorado Secretary of State in the 2018 election. *See* Denver Clerk and Recorder's *Election Summary Report*,

[2] While the Court will not take judicial notice of a municipal ordinance, it does take judicial notice of municipal charters. *See Dallasta v. Department of Highways*, 387 P.2d 25, 26 (Colo. 1963) (taking judicial notice of the *Charter of the City and County of Denver*); *Concrete Contractors, Inc. v. City of Arvada*, 621 P.2d 320, 321 n.1 (Colo. 1981) (the Court takes judicial notice of municipal charters).

[3] The Court has taken judicial notice of official publications like this one found on government websites. *Colorado Department of Labor and Employment v. Dami Hospitality, LLC*, 442 P.3d 94, 103, n.6 (Colo. 2019) (taking judicial notice of "Employers Guide" found on government website).

General Election, Denver, November 6, 2018, Final Official Results[4], p. 2, viewed November 14, 2019 at https://www.denvergov.org/media/denverapps/electionresults/pdfs/20181106/Summary_Report_Denver_FinalOfficialResults.pdf. Five percent of that figure is 15,275. In other words, the number of valid signatures required to place a growth measure on the ballot in Denver under #122 would increase by 85%, from 8,265 to 15,275! This is the kind of significant change this Court determined warranted notice to voters in *2015-2016 #73. 2015-2016 #73* at 569-70. The failure of the #122 title to provide this notice is a serious deficiency and requires remand just as 2015-2016 #73 was deficient when it failed to "advise voters that the number of signatures required to trigger a recall would drop from 25% of the votes cast at the last preceding election" to only "5% of active registered electors in the recall area." *Id.*

Second, the Title Board argues that rewriting every locally-adopted initiative and referenda procedure in Colorado is merely a matter of the measure's "efficacy, construction or future application" and not part of its "core purpose." On the contrary, voters must be informed that the measure would deprive them of constitutionally reserved powers of local control. The "title, standing alone, should

[4] As noted above, the Court has taken judicial notice of official publications like this one found on government websites. *Colorado Department of Labor and Employment v. Dami Hospitality, LLC*, *supra* at 103, n.6.

be capable of being read and understood, capable of informing the voter of the major import of the proposal." *In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-2002 #21 and #22*, 44 P. 3d 213, 217.

CONCLUSION

Imitative #122 violates the single subject requirement, and the Title Board erred in setting a title for this measure. If the Court determines that the matter has a single subject, remand is required because the title set by the Board fails to accurately describe important elements of the measure.

Respectfully submitted this 18th day of November 2019.

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CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **PETITIONER'S ANSWER BRIEF ON PROPOSED INITIATIVE 2019-2020 #122 ("LIMITS ON LOCAL HOUSING GROWTH")** was sent this day, November 18, 2019, electronically via Colorado Courts E-Filing to counsel for the Title Board and via Federal Express overnight to the proponents at:

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