COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	DATE FILED: April 7, 2020 3:37 PM
Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2019) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019-2020 #173 ("Setback Requirements for Oil and Gas Development") **Petitioner**: John Justman, **v.** **Respondents**: Anne Lee Foster and Suzanne Spiegel, **and** **Title Board**: Theresa Conley, David Powell, and Jason Gelender.	▲ **COURT USE ONLY** ▲ Case No. 2020SA72
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THE TITLE BOARD'S ANSWER BRIEF

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, I certify that:

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

It contains 1,964 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).

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.

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/ Michael Kotlarczyk

MICHAEL KOTLARCZYK, #43250
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SUMMARY OF ARGUMENT[1]

The Title Board's decisions concerning proposed initiatives 173-177 should be affirmed.

First, the measures contain a single subject: increasing statewide oil and gas setback requirements for new development. The additional "subjects" identified by Petitioner are necessarily and properly connected to this single subject. This Court has previously held that changes to the power of home rule municipalities in connection with the central feature of the measure is not a separate subject, so Petitioner's argument that such provisions create a second subject should be rejected. Nor does Petitioner's contention that the measure will operate as a near ban on new oil and gas development constitute a separate subject—potential effects of a measure are not appropriate matters for the Board or this Court to consider, and do not create a second subject.

Second, the abstracts approved by the Board comply with the statutory requirements for such abstracts. Petitioner's objection to the

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[1] This same answer brief is being filed for each of 2020SA68 through 2020SA72.

abstracts boil down to the Board's refusal to use quantitative data from a 2018 study that Petitioner favors. But qualitative statements are appropriate for an abstract when no reliable quantitative data can be determined, as the Board reasonably concluded here. And the Board is certainly under no obligation to use numbers generated by an outside study and advocated for by one particular side in a public debate.

Third, Petitioner's clear title challenge to #175 and #177 is without merit. The titles for those measures adequately describe the homeowner waiver provision, employing much of the same language as the measures themselves. The titles are not misleading.

Finally, Petitioner's attempt to disqualify one of the Title Board members based on past public statements should fail. The statutory scheme does not permit such motions, and the Court should not create a new remedy to allow them. Nor should the Board be subject to such motions, as it does not exercise judicial or quasi-judicial functions. And, even if such motions were proper in some instances, this Court has rejected that an individual's due process rights are implicated by a

decision-maker who has merely expressed an opinion on the same or similar subject in the past.

ARGUMENT

I. The Board correctly determined Nos. 173-177 contain a single subject.

Petitioner argues that the proposed initiatives violate the single subject rule both because they contain additional subjects "coiled up in the folds" of the measure and because they invite logrolling by garnering support for unrelated provisions of the same measure. Both arguments are wrong.

First, the measure does not pose a risk of voter surprise or fraud based on "surreptitious provisions coiled up in the folds of a complex initiative." *In re Title, Ballot Title & Submission Clause for 2013-2014 #89*, 2014 CO 66, ¶ 31. Here, the voters are advised that passage of the proposed measures would increase oil and gas setback provisions. Petitioner argues that voters will not be aware that the measure also removes powers from home rule municipalities. But the powers of home rule municipalities changed only with respect to how they affect oil and

gas setback provisions, the measure's single-subject. This Court has previously held that a change to home rule municipalities' powers connected to the central features of the measure is not a separate subject. *See In re Title, Ballot Title & Submission Clause for 2013-2014 #90*, 2014 CO 63, ¶ 18 ("The alteration of the existing power and authority of home rule and statutory cities to enact certain regulations pertaining to the central purpose of the initiative does not violate the single subject requirement."). Accordingly, this does not constitute a second subject "coiled up in the folds" of the proposed initiatives.

Petitioner also argues that a voter supporting the measures "may be unaware that the measures result in the shuttering of almost all oil and gas development." Pet. Op. Br. 23. But "the effects this measure could have on Colorado law if adopted by voters are irrelevant to [a] review of whether the proposed initiative and its Titles contain a single subject." *In re 2013-2014 #90*, 2014 CO 63, ¶ 17 (quotations omitted). Accordingly, Petitioner's speculation as to potential effects of the measure does not constitute an additional subject.

Finally, this measure does not pose any risk of logrolling such that a separate subject exists. Petitioner posits that different groups may support different aspects of the measures, but that is not the test for whether a measure contains a single subject. Pet. Op. Br. 23-24. Rather, the danger sought to be avoided is the "combining [of] subjects ***with no necessary or proper connection*** for the purpose of garnering support for the initiative from various factions—that may have different or even conflicting interests—[in order to] lead to the enactment of measures that would fail on their own merits." *In re Title, Ballot Title & Submission Clause for 2011-2012 #3*, 2012 CO 25, ¶ 11 (emphasis added). For the reasons given above and in the Board's opening brief, the parts of the measures that Petitioner posits as separate subjects are necessarily and properly connected to the increased setbacks. Therefore, the measures do not present a risk of impermissible logrolling, and contain a single subject.

II. The abstracts do not need to provide specific numbers because such numbers are unavailable.

Petitioner objects that the abstracts for the proposed measures are inadequate because they do not contain a specific quantitative "estimate." But the abstract "need not contain 'hard numbers or other quantitative data' regarding an initiative's expected economic impact." *In re Title, Ballot Title & Submission Clause for 2019-2020 #3*, 2019 CO 107, ¶ 34 (quoting *In re Title, Ballot Title & Submission Clause for 2017-2018 #4*, 2017 CO 57, ¶¶ 23-24). "[I]ndeterminate qualitative impact statements" may be used when such hard data is unavailable, as was the case here. *Id.*

Petitioner disputes that hard data was not available here, and says the Board should have adopted a 2018 Common Sense Policy Roundtable paper. But the Board was not required to accept that paper, which was both out of date and was previously rejected by the Board (affirmed by this Court) in the 2017-2018 cycle. *See In re 2017-2018 #97*, 2018SA31. The rule that permits the Board to adopt abstracts with indeterminate qualitative statements cannot be overcome anytime an

objector (or proponent) presents their own study. Here, the Board listened to Petitioner's expert and decided (again) not to use estimates from this third party. *See In re 2017-2018 #4*, 2017 CO 57, ¶ 22 ("The Title Board is . . . in a better position than this court to weigh the merits of evidence regarding the accuracy of an abstract."). These decisions were well-within the Board's discretion to make, and the Court should not overturn them.

Finally, Petitioner contends that the resulting abstract was misleading because, by failing to contain hard numbers, it does not accurately convey the impact of the measure. This argument fails for the same reasons. If there are no hard numbers to accurately convey whatever the impact of the measure may be, then such numbers cannot be included. In fact, if no such numbers can be determined, including numbers would itself be misleading.

III. The titles for Nos. 175 and 177 are not misleading.

Petitioner's opening briefs make clear that he is only challenging the title as to #175 and #177, the only two for which the challenge was preserved. Specifically, Petitioner challenges whether those titles

adequately describe the homeowner waiver provision. Using language that closely mirrors the language of the proposed measure, the title states that the measure "allow[s] a homeowner to waive the minimum distance requirement for the owner's single-family principal residence." Record, p 4.

Petitioner objects that the title will confuse some voters about how it applies to multigenerational families. But the measure itself does not reference multigenerational families, and this Court "may not interpret a proposed measure or speculate as to its future application if adopted." *In re Proposed Initiative on "Trespass—Streams with Flowing Water"*, 910 P.2d 21, 27 n.6 (Colo. 1996). The Board appropriately and succinctly described the central feature of the homeowner waiver provision in #175 and #177, using much of the same language as the measure itself. The resulting title is not misleading.

IV. The Board appropriately dealt with the motion to disqualify.

The Court should decline Petitioner's invitation to broaden the statutory bases for review of the Title Board's decisions. Contrary to the

authority cited by Petitioner, the Board is not "designed either to further the adjudication of legal rights and duties or to implement a rulemaking function." *In re Title, Ballot Title & Submission Clause for 2019-2020 #74*, 2020 CO 5, ¶ 22 (quotations omitted). Instead, the Board's enabling statutes "create a specific process and distinctive procedures applicable only to the unique functions of the Board." *Id.* (quotations omitted).

Petitioner cites cases concerning disqualification of judges in the judicial and quasi-judicial context. But the Board is not a court, or "an administrative agency functioning in an adjudicative capacity." *In re Proposed Amend. Entitled "W.A.T.E.R."*, 831 P.2d 1301, 1306 (Colo. 1992). The Administrative Procedure Act does not even apply to the Board. *See id.* The cases cited by Petitioner do not apply to the posture of the Title Board.

Even if a motion to disqualify may be permitted in some circumstances before the Board, this is not such a circumstance. The only basis of alleged bias identified by Petitioner is prior statements by Ms. Conley before she held her present position. This Court has rejected

that such statements demonstrate a biased decision maker, even in a judicial or quasi-judicial capacity. In *Mountain States Tel. & Tel. Co. v. Pub. Utils. Comm'n.*, the Court rejected a claim that a commissioner on the Public Utilities Commission should be disqualified based on prior statements he made as a commissioner. 763 P.2d 1020, 1028 (Col. 1988). The Court recognized that "there is a presumption of integrity, honesty, and impartiality in favor of those serving in quasi-judicial capacities." *Id.* Accordingly, "in the absence of a personal, financial, or official stake in the decision evidencing a conflict of interest on the part of a decision maker," the decision maker will be found to have acted impartially. *Id.* Contrary to Petitioner's claim that his due process rights have been violated, a "decision maker is not disqualified on due process grounds simply for having taken a position, even in public, on a policy issue related to the dispute, if there is no showing that the decision maker is incapable of judging the particular controversy fairly on the basis of its own circumstances." *Id.*

Here, Petitioner presented no evidence that past statements of a Board member actually affected the decisions of the Board. To the

contrary, the Board's decisions as to single subject, the abstract, and the actual title were all identical, or nearly identical, to those decisions it made (with different personnel on the Board) for 2017-2018 #97.

Finally, Petitioner contends that she was denied the opportunity to present evidence of bias at the hearing. Petitioner does not identify for the Court what that evidence is, or whether it differs in any way from the materials cited in his motion to disqualify. *See* Record, Ex. 2. And, to the extent Petitioner argues that judicial standards of recusal and disqualification apply to this non-judicial Board, Petitioner's failure to make an offer of proof as to what this excluded evidence would have shown is fatal. *See, e.g.*, *Vu v. Fouts*, 924 P.2d 1129, 1131 (Colo. App. 1996) ("To preserve for review an objection to the exclusion of evidence, a party must make a proper offer of proof which demonstrates the relevance and admissibility of the evidence.").

CONCLUSION

The Court should affirm the decisions of the Title Board.

Respectfully submitted on this 7th day of April, 2020.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S ANSWER BRIEF** upon the following parties or their counsel electronically via CCEF, at Denver, Colorado, this 7th day of April, 2020, addressed as follows:

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