

COLORADO SUPREME COURT

2 East 14th Ave.
Denver, Colorado 80203

Original Proceeding
Pursuant to Colo. Rev. Stat. § 1-40-107(2)
Appeal from the Title Board

In the Matter of the Title, Ballot Title, and
Submission Clause for Proposed Initiative 2021-
2022 #75 (“Concerning Property Valuation”)

PETITIONER: Bernard Buescher,

v.

RESPONDENTS: Alex Valdez and Colin Larson,

and

TITLE BOARD: Theresa Conley, David Powell, and
Ed DeCecco.

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Case No.: 2022SA102

THE TITLE BOARD’S OPENING 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, the undersigned certifies 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 3,132 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).

Under a separate heading placed before the discussion of each issue, the brief contains statements of the applicable standard of review with citation to authority, statements whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised.

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/ Grant T. Sullivan

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STATEMENT OF THE ISSUES

1) Whether the Proponents' petition for review in this Court is untimely under § 1-40-107(2), C.R.S. (2021).

2) Whether the title as set by the Title Board satisfies the clear title requirement.

STATEMENT OF THE CASE AND FACTS

Alex Valdez and Colin Larson ("Proponents") seek to circulate Proposed Initiative 2021-2022 #75 ("#75") to obtain the requisite number of signatures to place a measure on the ballot that amends section 3 of article X of the Colorado Constitution, and adds and amends certain statutory provisions in Title 39 of the Colorado Revised Statutes governing property taxation. The proposed initiative caps annual increases in a property's value for property tax purposes at inflation or three percent, whichever is less, and allows a property to be reappraised when it suffers a decline in value or is located in a county that has suffered a sustained economic downturn. *Attachments to Buescher Petition for Review* ("Record") at 2-5.

The Title Board conducted an initial public hearing on March 16, 2022. The Proponents stated at the hearing that #75's single subject is limiting property's taxes by limiting the annual increase of a property's value by inflation or three percent, whichever is less.¹ The Board agreed that #75 contained a single subject and therefore proceeded to set a title. Because the measure limits property taxes, the title set by the Board included the language required by H.B. 21-1321, codified at section 1-40-106(3)(f): "Shall funding available for counties, school districts, water districts, fire districts, and other districts funded, at least in part, by property taxes be impacted by a reduction of (projected dollar figure of property tax reduction to all districts in the first full fiscal year that the measure reduces revenue) in property tax revenue . . .?" Record at 6.

The Proponents filed a motion for rehearing challenging the inclusion of the tax-reduction language. Record at 12-16. An objector, Bernard Buescher, also filed a motion for rehearing, asserting

¹ *Hearing Before Title Board on Proposed Initiative 2021-2022 #75* (March 16, 2022), available at <https://tinyurl.com/bddmpejk> (statement at minute 4:29:50).

objections based on violations of both the single subject requirement and the clear title requirement. Record at 9-11.

The Board conducted a rehearing on April 6, 2022.² The Board denied Objector Buescher's motion for rehearing. Record at 7. The Board also denied the portion of Proponents' motion for rehearing challenging the inclusion of the tax-reduction language but granted the motion to the extent the Board made minor changes to the original title. Record at 8. The title as fixed by the Board at the rehearing is:

Funding available for counties, school districts, water districts, fire districts, and other districts funded, at least in part, by property taxes shall be impacted by a reduction of \$1.3 billion in property tax revenue by an amendment to the Colorado constitution and a change to the Colorado Revised Statutes concerning the actual value of real and personal property for purposes of property taxation, and, in connection therewith, limiting the annual increase of a property's value to inflation or three percent, whichever is less; and allowing a property to be reappraised when a property suffers a decline in value or is in a county that has suffered a sustained economic downturn.

Record at 7.

² *Rehearing Before Title Board on Proposed Initiative 2021-2022 #75* (Apr. 6, 2022), available at <https://tinyurl.com/2p95v3x5> (beginning at minute 5:19:00).

Objector Buescher filed a timely petition for review in this Court on April 13, 2022, raising two clear title arguments. Buescher Pet. 3. Proponents' petition for review, however, was filed on April 14, 2022, after the seven-day deadline contained in section 1-40-107(2) had passed.

SUMMARY OF THE ARGUMENT

I. Proponents filed their petition for review in this Court more than seven days after the Board denied their motion for rehearing. Their petition is therefore untimely under section 1-40-107(2), C.R.S. As such, this Court should decline to consider Proponents' petition, including their challenge to the tax-reduction language inserted in the title as required by section 1-40-106(3)(f).

II. The title set by the Board for #75 satisfies the clear title rule. Contrary to Objector Buescher's argument, the Board was not precluded from setting title due to an alleged conflict within the measure itself. The Board is not required to determine #75's future construction, and in any event the measure's provisions can be read in

harmony with one another. The case authority relied on by Buescher does not suggest otherwise.

The Board also correctly summarized #75's central features by generally describing its annual cap on valuation increases for property tax purposes. The Board was not required to itemize each and every narrow category of property that is exempt from #75's annual cap. Doing so would violate the brevity requirement governing initiative titles and risk voter confusion.

ARGUMENT

I. Proponents' petition for review in this Court is time barred.

A. Standard of Review and Preservation.

Because it implicates this Court's jurisdiction, whether Proponents' petition for review was timely filed is a question of law that the Court reviews de novo. *Cf. In re Estate of Gadash*, 2017 COA 54, ¶¶15-16. Preservation is not at issue since the question first arose in this Court.

B. Proponents filed their petition for review after the seven-day appeal deadline expired.

Under Colorado law, a petition to review the Title Board's decision on a motion for rehearing must be "filed with the clerk of the supreme court within seven days thereafter" and must be "disposed of promptly" by this Court. § 1-40-107(2). The filing deadline runs from the date the Board decides the motion for rehearing, not the date the Secretary of State's office certifies the documents requested for appeal. *See Matter of Title, Ballot Title and Submission Clause, and Summary for 1997-98 No. 62*, 961 P.2d 1077, 1081 (Colo. 1998) (decided under prior statute imposing a five-day deadline).

Here, the Board issued its ruling on Proponents' motion for rehearing on April 6, 2022. Record at 7-8. The seven-day appeal deadline therefore expired on April 13, 2022. *See C.A.R. 26(a)* (explaining computation of period). But according to its date stamp, Proponents' petition for review was not filed in this Court until one day later, on April 14, 2022. As a result, this Court is without jurisdiction to review Proponents' untimely petition, including their challenge to the

tax-reduction language required by section 1-40-106(3)(f). *See, e.g., Bowles v. Russell*, 551 U.S. 205, 209 n.2 (2007) (stating “time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century.”); *accord Widener v. District Court*, 200 Colo. 398, 400, 615 P.2d 33, 34 (1980) (“Failure to file a notice of appeal within the prescribed time deprives the appellate court of jurisdiction and precludes a review of the merits.”).

Accordingly, this Court should reject Proponents’ untimely petition for review and affirm the title set by the Board.

II. The Board’s title for #75 is fair, clear, accurate, and complete.

Next, Objector Buescher asserts two clear title arguments: (1) #75 both subjects and exempts residential land from its cap on annual valuation increases, making the measure so inherently confusing that a title cannot be set, and (2) the Board’s title improperly omits that certain categories of land—agricultural land, mines, and oil and gas producing lands—are exempt from #75’s annual cap on valuation increases. Buescher Pet. 3. Both arguments should be rejected.

A. Standard of Review and Preservation

This Court does not demand that the Title Board draft the best possible title. *In re Title, Ballot Title and Submission Clause, and Summary for 2009-2010 #45*, 234 P.3d 642, 648 (Colo. 2010). Instead, the Court grants “great deference” to the Board in the exercise of its drafting authority. *Id.* This Court reads the title as a whole to determine whether it properly reflects the intent of the initiative. *Id.* at 649 n.3; *In re Proposed Initiative on Trespass-Streams with Flowing Water*, 910 P.2d 21, 26 (Colo. 1996). The Court will reverse the Board’s decision only if the titles are insufficient, unfair, or misleading. *In re Title, Ballot Title and Submission Clause, and Summary for 2009-2010 #45*, 234 P.3d at 648.

This Court also employs “all legitimate presumptions in favor of the propriety of the Board’s actions.” *In re Title, Ballot Title and Submission Clause, and Summary for 2009-2010 #91*, 235 P.3d 1071, 1076 (Colo. 2010). The Board is given considerable discretion in resolving the interrelated problems of length, complexity, and clarity in designating a title and submission clause. *In re Matter of Title, Ballot*

Title and Submission Clause Pertaining to Proposed Tobacco Tax, 872 P.2d 689, 694 (Colo. 1994). Only in a clear case will the Court reverse a decision of the Board. *In re Title, Ballot Title and Submission Clause, and Summary Pertaining to Casino Gambling Initiative*, 649 P.2d 303, 306 (Colo. 1982).

Objector Buescher preserved his clear title arguments in his motion for rehearing. Record at 9-10.

B. The measure is not internally inconsistent, and the Board properly set title.

The Board understands Objector Buescher's first argument to be that the second sentence of #75's proposed section 39-1-103(5)(a) conflicts with its eighth sentence, and that such conflict renders it impossible for the Board to set a clear title under *In Matter of Title, Ballot Title and Submission Clause for 2015-2016 #156*, 2016 CO 56, ¶14 ("This confusion would hinder voters from ascertaining the initiative's intent and thus would prevent them from intelligently choosing whether to vote "yes/support" or "no/against" on the initiative."). The second and eighth sentences state as follows:

Second Sentence: The actual value of such property, other than agricultural lands exclusive of building improvements thereon and other than residential real property and other than producing mines and lands or leaseholds producing oil or gas, shall NOT BE INCREASED ANNUALLY BY MORE THAN INFLATION, LIMITED TO 3%, AND SHALL be that value determined by appropriate consideration of the cost approach, the market approach, and the income approach to appraisal.

Eighth Sentence: The actual value of residential real property shall NOT BE INCREASED ANNUALLY BY MORE THAN INFLATION, LIMITED TO 3%, AND SHALL be determined solely by consideration of the market approach to appraisal.

Record at 2-3. Thus, according to Objector Buescher, #75 is internally inconsistent on whether residential real property is subject to the inflation-or-3% cap on valuation increases.

This Court should reject Objector Buescher's argument for three reasons. *First*, Buescher's argument would require the Court to interpret #75's text to determine whether an actual irreconcilable conflict exists. But this Court has repeatedly explained it does not determine the initiative's efficacy, construction, or future application—that is a matter for judicial determination in a proper case should the voters approve the initiative. *In re Title, Ballot Title, Submission Clause for 2009-2020 No. 45*, 234 P.3d 642, 645 (Colo. 2010); *In re Title, Ballot*

Title and Submission Clause and Summary for 1999-2000 No. 200A, 992 P.2d 27, 30 (Colo. 2000).

Second, even if the Court were to interpret #75, the second and eighth sentences can easily be read in harmony with one another. *See Bickel v. City of Boulder*, 885 P.2d 215, 228 n.10 (Colo. 1994) (general rules of statutory construction apply to interpretation of citizen-initiated measures). Specifically, the second sentence lays out a broad general rule: the actual value of all real and personal property, with enumerated exceptions, shall be determined using the three approaches to appraisal (the cost approach, the market approach, and the income approach) but such value shall not increase annually by more than inflation or three percent, whichever is less. Residential real property is one of the enumerated exceptions that is not subject to this broad general rule. Record at 2.

Moving deeper into #75's proposed section 39-1-103(5)(a), the eighth sentence articulates a related but slightly different rule for residential real property only. It states the "actual value of residential real property shall not be increased annually by more than inflation,

limited to 3%, and shall be determined solely by consideration of the market approach to appraisal.” Record at 3. The eighth sentence therefore provides a narrower rule: residential real property is valued using only the market approach to appraisal but such value cannot be increased annually by more than inflation or three percent, whichever is less.

Although there is some overlap between the two rules (both include the inflation-or-3% cap), the coverage of the two rules is completely different. One applies broadly to all real and personal property with enumerated exceptions; the other applies narrowly to residential real property only. While #75 could have perhaps been drafted differently to avoid the confusion raised by Objector Buescher, the two rules can both be given effect and read in harmony.

Third, Objector Buescher reads *In re 2015-2016 #156* too broadly. There, the Court reversed the Board’s title setting because *the title* was too confusing. 2016 CO 56, ¶¶13-14. Buescher seeks to stretch that holding to prevent a title setting any time *the measure* itself is difficult to comprehend. Record at 10, ¶II.H. But the rule Buescher refers to is

narrower. The Board is prevented from setting title only if it “cannot comprehend the initiatives well enough to state their single subject.” *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 44*, 977 P.2d 856, 858 (Colo. 1999) (quotations omitted).

Here, the Board properly determined that #75 constitutes a single subject and therefore proceed to set title. The mere fact that #75 is a complex measure and perhaps difficult to understand does not automatically preclude title from being set so long as a clear title can be crafted. *See In re Proposed Initiative on “Obscenity”*, 877 P.2d 848, 850-51 (Colo. 1994) (instructing the Board to add clarifying language to the title where the Board’s original title, which copied the measure “virtually word for word,” caused confusion and ambiguity).

Accordingly, Objector Buescher’s first argument should be rejected and the Board’s title affirmed.

C. The Board’s title accurately summarizes #75’s central features.

Objector Buescher’s second argument is that the Board’s title fails to alert voters that certain categories of land—agricultural land, mines, and oil and gas producing lands—are exempt from #75’s annual cap on

valuation increases under the second sentence of proposed section 39-1-103(5)(a). Buescher Pet. 3. The Court should reject this argument.

Section 1-40-106(3)(b), C.R.S. (2021) establishes the standards for setting titles, requiring they be fair, clear, accurate, and complete. *See In re Title, Ballot Title and Submission Clause, and Summary for 2007-2008 #62*, 184 P.3d 52, 58 (Colo. 2008). Among other requirements, the title must “be brief,” it must be in the form of a question which may be answered “yes/for” or “no/against,” and it must “unambiguously state the principle of the provision sought to be added, amended, or repealed.” § 1-40-106(3)(b).

The Title Board is not required to set out every detail of the measure in the title. *In re Title, Ballot Title, and Submission Clause for Proposed Initiatives 2001-02 #21& #22*, 44 P.3d 213, 222 (Colo. 2002). Rather, the Board must summarize only the “central features” of the proposal. *In re Proposed Initiated Petitions*, 907 P.2d 586, 591 (Colo. 1995). In doing so, the Board must balance the need for brevity in the title against the need for completeness. *See In re Proposed Initiative Concerning Automobile Insurance Coverage*, 877 P.2d 853, 857 (Colo.

1994) (stating Title Board “must navigate the straits between brevity and unambiguously stating the central features”).

In this case, the Board correctly declined to itemize each and every category of property that is exempt from #75’s inflation-or-3% cap. As summarized in the title, #75’s key central feature is its annual cap on valuation increases for real and personal property for property tax purposes. Describing with specificity the narrow categories of property that the measure does *not* apply to would unduly lengthen the title, contrary to the General Assembly’s instruction that titles “be brief.” § 1-40-106(3)(b). This Court’s precedent makes clear that such detail is not required. *See, e.g., In re Matter of Title, Ballot Title & Submission Clause, Summary Clause for 1997-1998 No. 74*, 962 P.2d 927, 929-30 (Colo. 1998) (upholding title stating that school impact fee is imposed generally on “all new housing units,” rather than the narrower and more specific category of all “newly constructed housing units”); *see also In re Matter of Title, Ballot Title and Submission Clause for 2019-2020 #315*, 2020 CO 61, ¶32 (“[A]s to petitioner’s contention that the title at issue does not advise voters regarding major cuts to programs from

existing funds, we disagree that the Board was required to itemize in the title some or all of the programs that would face funding cuts.”); *Blake v. King*, 185 P.3d 142, 147 (Colo. 2008) (“[T]he failure to include in the titles each and every element of the affirmative defense provision is not confusing or misleading”).

Objector Buescher fails to grapple with the added title length that his argument would require. Contrary to his argument, describing “agricultural land” as an exempt category would not accurately describe the measure. Buescher Pet. 3. Only “agricultural lands exclusive of building improvements thereon” are exempt. Record at 2. Likewise, “mines” generally are not exempt, only “producing mines” are. *Id.* And properties with oil and gas wells are exempt only if they constitute “lands or leaseholds producing oil or gas.” *Id.* Accurately describing each of these categories would add at least 16 words, creating an unduly lengthy title and reducing the likelihood that voters will actually read it. *In re Second Initiated Constitutional Amendment Respecting the Rights of the Public to Uninterrupted Service by Public Employees*, 200 Colo. 141, 147, 613 P.2d 867, 871 (1980) (in the interest of brevity,

upholding title stating “binding arbitration” is prohibited, even though the measure did not apply to “grievance” arbitrations).

Finally, the exempt categories of property that Objector Buescher asserts must be included are narrow in scope. Buescher fails to explain how omitting these narrow exceptions from the title will alter a voter’s support or opposition for #75. *See In re 1997-1998 No. 74*, 962 P.2d at 930 (rejecting argument that title required more detail and stating “we find it highly unlikely that support for Initiative No. 74 would turn on whether it includes renovated apartments or condominiums”).

Rather than add undue length that may confuse voters, the Board sensibly elected to summarize only the most important features of #75. This middle-of-the-road approach appropriately balances the competing interests of brevity and completeness. *See In re Proposed Initiative Concerning Automobile Insurance Coverage*, 877 P.2d at 857. Voters wishing to receive more detail about #75’s precise coverage of course remain free to consult the Blue Book’s summary that accompanies the ballot or the language of the measure itself.

CONCLUSION

This Court should affirm the Title Board's actions in setting the title for #75.

Respectfully submitted this 3rd day of May, 2022.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S OPENING BRIEF** upon the following parties or their counsel electronically via CCE and/or via U.S. first class mail at Denver, Colorado this 3rd day of May, 2022, addressed as follows:

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