

<p>SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203</p>	<p>DATE FILED: May 10, 2022 4:49 PM</p>
<p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2021-2022 #135 (“Local Approval Requirement for Expanded Liquor License”)</p> <p>Petitioners: Steven Ward and Levi Mendyk</p> <p>v.</p> <p>Respondents: Omar Malik and Christopher Fine</p> <p>and</p> <p>Title Board: Theresa Conley, Julie Pelegrin, and David Powell</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Attorney for Respondents:</p> <p>Mark G. Grueskin, #14621 Recht Kornfeld, P.C. 1600 Stout Street, Suite 1400 Denver, Colorado 80202 303-573-1900 (telephone) 303-446-9400 (facsimile) mark@rklawpc.com</p>	<p>Case Number: 2022SA138</p>
<p>RESPONDENTS’ OPENING BRIEF ON PROPOSED INITIATIVE 2021-2022 #135 (“LOCAL APPROVAL REQUIREMENT FOR EXPANDED LIQUOR LICENSE”)</p>	

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:

It contains 2,343 words.

It does not exceed 30 pages.

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

For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent'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 and C.A.R. 32.

s/ Mark G. Grueskin

Mark G. Grueskin

Attorney for Respondents

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ISSUES PRESENTED

Whether the title set for Initiative #135 “adequately describe(s) the changes to the local licensing authority public hearing process.”¹

Whether the title set for Initiative #135 adequately “describe(s) the new distance requirements as they apply to the classes of liquor licenses.”²

STATEMENT OF THE CASE

A. Statement of Facts

Christopher Ward and Omar Malik (“Proponents”) proposed Initiative 2021-2022 #135 (“Initiative #135” or the “Initiative”). Amidst a flurry of measures seeking to expand the availability of alcohol beverages at brick-and-mortar facilities and through third-party delivery, Proponents proposed a measure to ensure that expanded liquor licenses are granted and renewed only through a public process, subject to reasonable distances between licensees and other outlets selling alcohol at retail as well as certain public institutions (schools, churches, and daycare centers). The Title Board set titles for Initiative #135.

¹ Petition for Review of Final Action of Ballot Title Setting Board Concerning Proposed Initiative 2021-2022 #135 at 3 (citing Petitioners’ statement of Grounds for Review in this appeal).

² *Id.*

This initiative is not one of the 25 proposed ballot measures, seeking an unprecedented expansion of licensed retail outlets and unlicensed third-party delivery of alcohol beverages. The designated representatives behind 20 of those measures filed a motion for rehearing concerning the titles set for Initiative #135. The Title Board heard and addressed that motion, and this appeal followed.

B. Nature of the Case, Course of Proceedings, and Disposition Below

The Offices of Legislative Council and Legislative Legal Services conducted the required review and comment hearing of the initial draft of Initiative #135. Proponents then filed the original, amended, and final versions of Initiative #135 with the Secretary of State for consideration by the Title Board.

The Title Board met on April 20, 2022, at which time the Board set titles for the Initiative. On April 27, 2022, Steven Ward and Levi Mendyk (“Petitioners”)³ filed a Motion for Rehearing, alleging that the Title Board set misleading titles.

At the rehearing, the Board modified its earlier titling decision, granting in part the Petitioners’ motion, and set the following title:

Shall there be an amendment to the Colorado Revised Statutes concerning local licensing requirements for approval of licenses for retail sale of alcohol beverages, and, in connection therewith, requiring

³ See Initiatives 2021-2022 #66, #67, and #112-129. <https://www.coloradosos.gov/pubs/elections/Initiatives/titleBoard/index.html> (last viewed May 9, 2022).

a local licensing authority to hold a public hearing to consider a license conversion, modification, or other change that expands the types of alcohol beverages that may be sold at retail or revises the class of retail license and to determine whether the conversion, modification, or other change would meet the needs and desires of the inhabitants of the neighborhood and meet new minimum distance requirements from schools, daycare centers, churches, and other licensed retail sellers of alcohol beverages; and, for renewal of a license for retail sale of alcohol beverages for off-premises consumption, requiring the local licensing authority to hold a public hearing and find that the renewal will serve the public interest and is warranted by the license holder's operating history?

Record (“R.”) at 3.

SUMMARY OF ARGUMENT

Petitioners raise two issues about whether the titles accurately describe the initiative. Neither should present a material concern about the titles set by the Board.

First, the titles accurately state what this measure seeks to change in Colorado law. Initiative #135 mandates that certain retail liquor license changes that convert, modify, or otherwise alter a license to expand the types of alcohol beverages sold at retail licensing can be approved only after public hearings by the local licensing authority. Initiative #135 also requires public hearings for certain license renewals. That just means, going forward, there would be no liquor licensing decisions that are hidden from public view and input.

Initiative #135 also establishes minimum distances for licenses that have been converted or changed. The minimum distance must be the greater of the distance that was required for the licensee before the change in licensure or, alternatively, no less than 1,500 feet from any school, church, daycare center, or other retail alcohol beverage licensee. In other words, this measure provides a buffer to help ensure that neighborhoods won't become overrun with licensees offering expanded retail of alcohol beverages.

The contention that the Title Board should have used existing licensing procedures to describe these changes is not one that is recognized by this Court. In addition, the titles' disclosure that licensees would have to "meet new minimum distance requirements" from certain types of buildings was more than adequate to notify voters of this aspect of Initiative #135.

Therefore, the Court should uphold the Title Board's decision.

LEGAL ARGUMENT

- I. Initiative #135's title adequately describes the required public hearing process for liquor licensing changes.**
 - A. Standard of review; preservation of issue below.**

The Title Board sets ballot titles in order to summarize initiated constitutional amendments and statutory changes. Titles must briefly "summarize the central

features of a proposed initiative fairly” but are not required to “recite every detail of the proposed measure.” *In the Matter of the Title, Ballot Title and Submission Clause for 2019-2020 #315*, 2020 CO 61, ¶26; 2020 Colo. LEXIS 605. As such, the Board must “navigate the straits between brevity and unambiguously stating the central features of the provision sought to be added, amended, or repealed.” *Id.*, citing *In re Title, Ballot Title & Submission Clause & Summary for Proposed Initiative Concerning Auto. Ins. Coverage*, 877 P.2d 853, 857 (Colo. 1994).

The question the Court poses is whether the titles “contain a material and significant omission, misstatement, or misrepresentation.” *In re Ballot Title 1997-1998 #62*, 961 P.2d 1077, 1082 (Colo. 1998). Where they do not, the Title Board’s decision must be upheld.

Petitioners identified two issues for this appeal: (1) “[t]he title does not adequately describe the changes to the local licensing authority public hearing process;” and (2) “the title does not describe the new distance requirements as they apply to the classes of liquor licenses.” *Petition for Review of Final Action of Ballot Title Setting Board Concerning Proposed Initiative 2021-2022 #135* at 3.

Petitioners’ Motion for Rehearing does not specifically raise the first issue. It refers only to the alleged “revocation of local control” because licensing questions could no longer be handled “as an administrative matter.” *See R.* at 6; *Pet.’s Mot.*

for Reh’g on Initiative 2021-2022 #135 at 1.⁴ In other words, existing law allows retail liquor licensure and renewal *without* a public hearing, and Petitioners seem to argue here that the title should describe Initiative #135’s divergence from existing law. If that is the Petitioners’ issue here, the very general topic of “the hearing process” could be said to have been raised and preserved below.

Petitioners’ Motion for Rehearing raises the second issue above. *See* R. at 7; Pet.’s Mot. for Reh’g on Initiative 2021-2022 #135 at 2.

B. Initiative #135’s titles are not misleading.

1. *The titles accurately describe the measure’s requirement for a public hearing before expansion or renewal of liquor licenses for sale at retail is permitted.*

The Board addressed the issue of public hearings in the titles for Initiative #135 and did so twice. As to the public hearing requirement, the titles describe the changes to state statute by:

requiring a local licensing authority to **hold a public hearing to consider a license conversion, modification, or other change** that expands the types of alcohol beverages that may be sold at retail or revises the class of retail license and to determine whether the conversion, modification, or other change would meet the needs and desires of the inhabitants of the neighborhood and meet new minimum distance requirements from schools, daycare centers, churches, and

⁴ Petitioners also raised the question of “revok[ing] local authority to allow the expansion of existing licenses” in their Motion for Rehearing, *see* R. at 7; Pet.’s Mot. for Reh’g on Initiative 2021-2022 #135 at 2, but appear to have dropped that issue for purposes of this appeal.

other licensed retail sellers of alcohol beverages; and, **for renewal of a license** for retail sale of alcohol beverages for off-premises consumption, requiring the local licensing authority to **hold a public hearing** and find that the renewal will serve the public interest and is warranted by the license holder's operating history.

See R. at 3. While the titles state what the measure in fact does, they do not state the converse: that license changes and renewals would no longer be permitted by means of an administrative process undertaken outside of a public forum.

Titles do not need to say what an initiative would *not* authorize. A title is not misleading to voters “by failing to disclose that the proposed law would abolish authorization” that exists under current law. *In re Branch Banking Initiative*, 612 P.2d 96, 99 (Colo. 1980) (title for initiative that addressed the legality of operating certain new banking facilities was upheld and was not required to address how banking facilities were authorized by laws other than the proposed initiative). Where “[t]he language of the titles communicates precisely” what the measure seeks to achieve due to its change to the law, they are sufficient and will not mislead or confuse the electorate. *In re Proposed Initiative Concerning Drinking Age*, 691 P.2d 1127, 1131 (Colo. 1984) (titles were not legally infirm because they failed to address matters that were “only incidental to the main theme” of the initiative).

The titles’ dual reference to public hearings communicates an important element of the measure: a public hearing before a local licensing authority is required

in order for a licensee to obtain a license change and/or a license renewal. These statements are more than adequate to make voters aware of the basic terms of the measure before them. They are also accurate restatements of Initiative #135 itself. *See R. at 2* (Proposed Section 44-3-314(1)(a) (public hearings required for specified changes to retail liquor licenses); 44-2-314(2) (public hearings required for retail liquor license renewals)).

Accordingly, the Board did not err in setting these titles.

2. *The titles accurately describe the measure's minimum distance requirements that apply where existing licensed premises seek a conversion, modification or other change.*

Initiative #135 establishes new minimum distance requirements where a licensee seeks to convert, change, or reclassify its license and thereby expand the allowed retail sale of alcohol beverages. Specifically, the measure requires compliance with one of two sets of distance parameters, “whichever is greater.” Given that constraint, a licensee proposing a change in its license must either: (1) meet “the minimum distance specified by law that applied to the previous class of license” when that license was approved; or (2) be 1,500 feet away from any public or private elementary, middle or secondary school, daycare center, church, or other licensee that sells alcohol beverages at retail for off-premises consumption. *See R. at 2* (Proposed Section 44-3-314(1)(b)(I), (II)).

The titles state that a licensee must “meet new minimum distance requirements from schools, daycare centers, churches, and other licensed retail sellers of alcohol beverages.” R. at 3. In response to Petitioners’ Motion for Rehearing, the Board added “daycare” centers to the list of covered entities in the second category. *See* R. at 7.

The Board did not add all of Petitioners’ proposed language to the title, but it correctly decided not to do so. The Petitioners’ Motion for Rehearing proposed that the title use this phrase: “expanding minimum distance requirements to 1,500 feet” or use “the much more easily grasped ‘over one quarter mile.’” *Id.*

Had the Board made the first change to only refer to 1,500 feet, voters would have been left with the impression that this distance was the **only** factor addressed in this measure. In so doing, the Board would have ignored Initiative #135’s other condition for determining distance—the original license’s minimum distance requirements. The omission of this alternative test for establishing minimum distances would have been misleading to voters. Nothing about the title’s description of the new distance requirements misstates that provision, confuses voters, or is unfair to proponents or opponents of the measure. Because Proponents’ requested additional language would have been an inaccurate change to the title, the Title Board properly refused to include it.

Petitioners’ suggestion that the distance be summarized as “over one quarter mile” carries its own risk of voter confusion. How would a person reading the title know how much “over” a quarter mile these minimum distances would be? And if the purpose of such a reference was to encourage them to go to the voters to read the measure itself to learn about its specifics, how is that signal any more telling than using the exact reference the Board chose: that an affected licensee would have to “meet new minimum distance requirements” from specified buildings? By using “new” to modify “minimum distance requirements,” the Board alerted voters to a change of interest to them.

The Board’s decision was also consistent with its previous titling decisions. The chosen phraseology for this title – “meet new minimum distance requirements from schools, daycare centers, churches, and other licensed retail sellers of alcohol beverages” – is similar to language used for other distance requirements imposed by initiative. For example, the title for an initiative that regulated swine operations stated the measure “establish[ed] minimum distances between new land waste application sites or impoundments and occupied dwellings, schools and municipal boundaries.” *In re Title, Ballot Title & Submission Clause for Initiative 1997-1998 #113*, 962 P.3d 970, 971 (Colo. 1998) (initiative set one-mile distance requirements for affected facilities) (per curiam). There, the Court summarily affirmed the

sufficiency of the titles set. Here, the Title Board did not abuse its discretion by using a similar reference in describing Initiative #135.

Therefore, the Title Board did not err by using title language that gave voters notice of “new minimum distance requirements” imposed by Initiative #135.

CONCLUSION

The Title Board’s decision should be sustained, and Proponents should be permitted to advocate for meaningful conditions on the licensure and renewal of licenses for the retail sale of alcohol beverages by circulating petitions to place this matter on the November, 2022 ballot.

Respectfully submitted, this 10th day of May, 2022.

s/ Mark G. Grueskin _____

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CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **RESPONDENTS' OPENING BRIEF ON PROPOSED INITIATIVE 2021-2022 #135 ("LOCAL APPROVAL REQUIREMENT FOR EXPANDED LIQUOR LICENSE")** was sent electronically to the Title Board and to the Petitioners via CCEF this day, May 10, 2022, to the following:

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