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ELECTIONS / LICENSING
SECRETARY OF STATE

COLORADO TITLE SETTING BOARD

In re Proposed Initiative 2007-2008 (“Amendment 41 Modifications/Lobbyist Tax”¹)

MOTION FOR REHEARING

On behalf of Andrea M. Hough, a registered elector of the State of Colorado, who lives at 53 West Maple Avenue, Denver, Colorado 80223, Fairfield and Woods, P.C. hereby files this Motion for Rehearing in connection with the Proposed Initiative 2007-2008 #21 (“Amendment 41 Modifications/Lobbyist Tax”, hereinafter described as the “Initiative”) which the Title Board heard on May 16, 2007.

1. The Board lacks jurisdiction to set a title for this Initiative as it contains multiple, unrelated, subjects in violation of Colo. Const. art. V, § 1(5.5) and Colo. Rev. Stat. § 1-40-106.5.

A simple examination of the title, containing 203 words, aptly evidences this point:

State taxes shall be increased \$20,000 annually by an amendment to the Colorado constitution concerning the implementation of state constitutional provisions imposing standards of conduct by persons involved with governmental activities, and, in connection therewith, imposing an occupational tax on professional lobbyists in the initial amount of twenty-five dollars annually to supplement moneys in the state’s general fund expended to support the independent ethics commission; permitting the general assembly, without future voter approval, to increase or decrease the occupational tax so long as revenues from the tax do not annually exceed ninety percent of general fund expenditures for the commission for the fiscal year in which the tax is to be paid; excluding the revenues raised by the tax from any existing restrictions on spending, revenues, or appropriations; clarifying that the

¹ Unofficially captioned “Amendment 41 Modifications/Lobbyist Tax” by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

existing constitutional provisions ban the solicitation, acceptance, or receipt of gifts or things of value by a public officer, member of the general assembly, local government official, or government employee if doing so constitutes a breach of the public trust for private gain; and reenacting specified provisions of article XXIX of the state constitution, as clarified by this measure, if the provisions are invalidated by a court before this measure is approved.

“The prohibition against multiple subjects serves to defeat voter surprise by prohibiting proponents from hiding effects in the body of an initiative. It also discourages placing voters in the position of voting for some matter they do not support to enact that which they do support.” *In the Matter of the Title and Ballot Title and Submission Clause for 2005–2006 #55*, 138 P.3d 273, 282 (Colo. 2006) (holding initiative violated single subject rule). “An initiative violates the single subject requirement when it (1) relates to more than one subject and (2) has at least two distinct and separate purposes that are not dependent upon or connected with each other. *Id.* at 277 (citing *In the Matter of the Title, Ballot Title, Submission Clause, and Summary Adopted April 5, 1995 by the Title Board Pertaining to a Proposed Initiative “Public Rights in Waters II”*, 898 P.2d 1076, 1078–79 (Colo. 1995)).

The Colorado Supreme Court rejected Initiative 55 under the single subject rule stating, “We identify at least two unrelated purposes grouped under the broad theme of restricting non-emergency government services: decreasing taxpayer expenditures that benefit the welfare of members of the targeted group and denying access to other administrative services that are unrelated to the delivery of individual welfare benefits.” *See In the Matter of the Title and Ballot Title and Submission Clause for 2005–2006 #55, supra*, 138 P.3d at 280; *see also, In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 104*, 987 P.2d 249 (Colo.

1999) (proposal that has at least two distinct and separate purposes, which are not dependent upon or connected with each other, violates the State Constitution's single-subject requirement).

Similarly, the Court rejected a proposed ballot initiative which sought to amend the Taxpayer Bill of Rights under the Colorado Constitution because it violated the constitution's single-subject requirement, where the proposed initiative created a tax cut, imposed new criteria for voter approval of revenue and spending increases, and imposed likely reductions in the state's spending on state programs. *See In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 37*, 977 P.2d 845 (Colo. 1999) (citing Colo. Const. art. V, § 1(5.5); art. X, § 20).

The Initiative contains multiple provisions that (1) relate to more than one subject and (2) have at least two distinct and separate purposes that are not dependent upon or connected with each other. *See In the Matter of the Title and Ballot Title and Submission Clause for 2005-2006 #55, supra*, 138 P.3d at 277. The numerous topics include:

(a) Imposition of an occupational tax on lobbyists: (i) "State taxes shall be increased \$20,000 annually by an amendment to the Colorado constitution concerning the implementation of state constitutional provisions imposing standards of conduct by persons involved with governmental activities, and, in connection therewith, imposing an occupational tax on professional lobbyists in the initial amount of twenty-five dollars annually to supplement moneys in the state's general fund expended to support the independent ethics commission."
Proposed Ballot Title.

(b) Permanently permitting the general assembly, without future voter approval, to increase or decrease the occupational tax, so long as revenues from the tax do not

annually exceed ninety percent of general fund expenditures for the commission for the fiscal year in which the tax is to be paid; and, excluding the revenues raised by the tax from any existing restrictions on spending, revenues, or appropriations. *See Proposed Ballot Title and Submission Clause, attached as Exhibit A.* Voter approval of the occupational tax at the 2007 general election constitutes permanent authorization for the General Assembly to increase the tax. *See id.*

(c) Amending article X, § 20(4)(a) of The Taxpayer’s Bill of Rights (“TABOR”), which requires voter approval for any tax rate increase or tax policy change directly causing a net tax revenue. *See id.* This amendment is a separate subject under the title.

(d) Attempting to modify amendment of the Colorado Constitution article XXIX, § 2 by: (i) providing definitions of “official act,” “private gain,” and “personal financial gain” for the article; and, (ii) specifying that the prohibitions in (article XXIX, § 3(1) and § 3(2)) do not apply to any public officer, member of the General Assembly, local government official, or government employee who solicits, accepts or receives a gift, thing of value, money, forbearance, or forgiveness of indebtedness that does not reflect a breach of the public trust for private gain as set forth in sections 1 and 6 of article XXIX.

(e) Implementing the independent ethics commission, by amendment of Colorado Constitution article XXIX, § 5 and, in doing so, eliminating the requirements that members be affiliated with certain political parties; and, further amending it in accordance with Senate Bill 07-210; and

(f) Re-enacting specified provisions of article XXIX of the state constitution, as modified by this measure, if the provisions are invalidated by a court before this measure is approved.

2. The only issue properly framed for an odd-year election is the proposed new “occupational tax” on lobbyists.² See C.R.S. § 1-41-102. This presents two problems. First, the “occupational tax” is really not a tax, but a fee. Second, the proposed initiative is an attempt to bootstrap a fix to the problems associated with Article XXIX by appending additional unrelated subjects to the “tax,” issue, which is the only proper subject of odd-year election initiatives. See C.R.S. § 1-41-101, *et seq.*, Colo. Const. art V, sec. 1(5.5): In fact, the “tax” is a *de minimus* fee that would only raise \$20,000 for the general fund. The proposed initiative would arguably raise \$20,000 for the general fund, when monies have already been appropriated by Senate Bill 07-210. See Proposed Ballot Title. In either event, the real thrust of the proposed initiative is to attempt to fix the problems associated with Amendment 41 (see argument 1 (c-e) above), which are not issues that can be raised in an odd-year election.

3. The text of the Initiative is inherently unclear as to its reach and purpose, such that the Board is precluded from setting a ballot title. See *In re Proposed Initiative 1999-2000 #37*, 977 P.2d 845, 846 (Colo. 1999) (holding that titles and summary may not be presented to voters because more than one subject and confusing). “In fixing titles and summary, the Board’s duty is ‘to capture, in short form, the proposal in plain, understandable, accurate language

² In its May 1, 2007 Memorandum, the Legislative Council Staff and Office of Legislative Legal Services raise many substantive questions about this tax, to-wit: (1) whether it is a fee or a tax; (2) what is meant by an “occupational tax”; (3) why the revenues not placed in a special fund; and, (4) what is the relationship between the occupational tax and registration fees already paid by lobbyists.

enabling informed voter choice.” *Id.* (quoting *In re Proposed Initiative for 1999-2000 No. 29*, 972 P.2d 257, 266 (Colo. 1999)); *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 104*, 987 P.2d 249 (Colo. 1999) (initiative’s “not to exceed” language, repeated without explanation or analysis in summary, created unconstitutional confusion and ambiguity).

4. The initiative is misleading, confusing and inaccurate for, among other things, the following reasons:

- a. The proposed initiative does not define “official act” in the text but only references currently existing statutory definition in the Colorado Revised Statutes, which may be changed or deleted in the future.
- b. The extent to which the definition of “private gain” or “personal financial gain” encompasses “lawful consideration” for a gift or thing of value received, is unclear.
- c. Provisions in Amendment 41 that forbid children of government employees and government officials from accepting scholarships and prizes are left unaddressed by the Initiative.
- d. What does it mean to say that the prohibitions in article XXIX do not apply to a covered individual who receives a gift or thing of value “that does not reflect a breach of the public trust for private gain?” Specifically, how does acceptance or receipt of a gift or thing of value “reflect” or “not reflect” a breach of the public trust for private gain?

- e. In terms of a breach of the public trust for private gain as stated on page 1, lines 21 and 22, what exactly is “set forth in sections 1 and 6 of this article”?
- f. Why is it necessary to place details of the type and kind specified in section 3 of the proposed initiative (page 1, line 27 through page 2, line 25) in the Colorado Constitution, particularly since many of these same provisions will now be codified in article 18.5 of title 24, Colorado Revised Statutes, with the passage of Senate Bill 07-210?
- g. Page 1, line 38 of the proposed initiative states that “the commission may appoint” the fifth and final member. To be faithful to the text of section 5 (2) (a) (V) of article XXIX, is it not more accurate to state that the other four members of the commission make the fifth and final appointment?
- h. What is the definition of “occupational tax”?
- i. What is meant by “professional lobbyist”? How does a person “act as a professional lobbyist” (page 2, line 35)?
- j. How will the occupational tax be paid by professional lobbyists? When will the tax be paid? Since the tax is assessed against more individuals than merely registered lobbyists, at what point would the department of revenue enforce and collect the tax? Why is the department of revenue charged with collecting the tax when the regulation of lobbyists in the state is currently within the purview of the department of state?

k. Why have the proponents placed the new tax under article XXIX instead of under the provisions on revenue contained in article X of the Colorado Constitution?

l. What is the relationship, if any, between the occupational tax and the registration fee currently paid by registered lobbyists codified at C.R.S. § 24-6-303 (1) (a)?

While the elector recognizes that this Board is not authorized to pass on the propriety of the content of the Initiative, these points of confusion underscore the fact that it is impossible to have a clear title which reflects an unclear initiative.

5. The title does not reflect the Initiative, as is required. *See In re Proposed Initiative 1999-2000 #37, supra*, 977 P.2d at 846 (“In fixing titles and summary, the Board’s duty is ‘to capture, in short form, the proposal in plain, understandable, accurate language enabling informed voter choice.’” *Id.* (quoting *In re Proposed Initiative for 1999-2000 No. 29*, 972 P.2d 257, 266 (Colo. 1999))).

As set out above, the Initiative contains several items that are not mentioned in the Title. By way of one example only, an initiative that amends TABOR should clearly state in its title that it is doing so, but the Title here does not.³

Please set a rehearing in this matter for the next Title Board Meeting, or as otherwise required by law.

³ Additionally, the Initiative is unconstitutional under the First Amendment to the United States Constitution, *Vermont Soc’y of Account Executives v. Milne*, 172 Vt. 375, 385, 779 A.2d 20, 21 (2001); the Fourteenth Amendment of the United States Constitution, *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) and Article I, Sec. 10 of the United States Constitution (prohibiting *ex post facto* laws).

Respectfully submitted this 23rd day of May, 2007.

FAIRFIELD AND WOODS, P.C.

By: *Susan F. Fisher*
Douglas J. Friednash, #18128
John M. Tanner, # 16233
Susan F. Fisher, #33174

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May, 2007, a true and correct copy of the foregoing was served by hand delivery, properly addressed as follows:

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Ballot Title Setting Board

Proposed Initiative 2007-2008 #21¹

The title as designated and fixed by the Board is as follows:

State taxes shall be increased \$20,000 annually by an amendment to the Colorado constitution concerning the implementation of state constitutional provisions imposing standards of conduct by persons involved with governmental activities, and, in connection therewith, imposing an occupational tax on professional lobbyists in the initial amount of twenty-five dollars annually to supplement moneys in the state's general fund expended to support the independent ethics commission; permitting the general assembly, without future voter approval, to increase or decrease the occupational tax so long as revenues from the tax do not annually exceed ninety percent of general fund expenditures for the commission for the fiscal year in which the tax is to be paid; excluding the revenues raised by the tax from any existing restrictions on spending, revenues, or appropriations; clarifying that the existing constitutional provisions ban the solicitation, acceptance, or receipt of gifts or things of value by a public officer, member of the general assembly, local government official, or government employee if doing so constitutes a breach of the public trust for private gain; and reenacting specified provisions of article XXIX of the state constitution, as clarified by this measure, if the provisions are invalidated by a court before this measure is approved.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall state taxes be increased \$20,000 annually by an amendment to the Colorado constitution concerning the implementation of state constitutional provisions imposing standards of conduct by persons involved with governmental activities, and, in connection therewith, imposing an occupational tax on professional lobbyists in the initial amount of twenty-five dollars annually to supplement moneys in the state's general fund expended to support the independent ethics commission; permitting the general assembly, without future voter approval, to increase or decrease the occupational tax so long as revenues from the tax do not annually exceed ninety percent of general fund expenditures for the commission for the fiscal year in which the tax is to be paid; excluding the revenues raised by the tax from any existing restrictions on spending, revenues, or appropriations; clarifying that the existing constitutional provisions ban the solicitation, acceptance, or receipt of gifts or things of value by a public officer, member of the general assembly, local government official, or government employee if doing so constitutes a breach of the public trust for private gain; and reenacting specified provisions of article XXIX of the state constitution, as clarified by this measure, if the provisions are invalidated by a court before this measure is approved?

Hearing May 16, 2007:

Single subject approved; staff draft amended; titles set.

Hearing adjourned 4:46 p.m.

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