

ORIGINAL

RECEIVED

APR 23 2008

ELECTIONS
SECRETARY OF STATE

DJB
4-24-08

COLORADO TITLE SETTING BOARD

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE
FOR INITIATIVE 2007-2008 #86

MOTION FOR REHEARING

On behalf of Robert Golden, a registered elector of the State of Colorado, the undersigned counsel hereby submits this Motion for Rehearing in the above referenced matter, and as grounds therefore states as follows:

I. The proposed measure contains at least six separate subjects.

At the initial hearing on April 17, 2008, the proponents were asked how they would characterize the single subject and major purpose of the measure. Kara Veitch, counsel to the proponents, answered that the purpose is to establish a fund "for the purpose of expanding the availability of affordable housing." While much of the measure seems to serve that underlying purpose, the measure contains at least five other distinct subjects that are unrelated to the expansion of the affordable housing stock:

1. Section 5 of the measure includes a constitutional mandate that the General Assembly enact, no later than the end of the 2009 legislative session, specific legislation controlling how the State of Colorado and its political subdivisions calculate the annual rate of inflation. As Ms. Eubanks argued during the initial hearing, this requirement has no connection or interdependency with the stated purpose of increasing the stock of affordable housing and is therefore an impermissible separate subject.

2. Section 3(2)(i) authorizes the use of transfer tax revenues to fund "foreclosure prevention" programs, a purpose unrelated to increasing the number of affordable housing units. Indeed, while the use of transfer tax revenues to fund affordable housing projects might reduce foreclosures, the contrary is not true: spending transfer tax revenues on "foreclosure prevention" programs, as this measure permits, does not serve the stated purpose of the measure to increase the stock of affordable housing. In fact, this provision may actually *reduce* the number of affordable housing units available as foreclosures are reduced. Section 3(2)(i) is therefore an impermissible separate subject.

3. Section 3(2)(i) contains yet another independent subject in that it allows the use of transfer tax revenues to fund "homelessness prevention" programs. While the result of using transfer tax revenues to increase the quantity of affordable housing may reduce homelessness, the contrary is not true: increasing transfer tax revenues to fund homelessness prevention programs does not increase the stock of affordable housing. Like the funding of "foreclosure prevention" programs, this provision may actually result in a *decrease* in the quantity of

available affordable housing because it may actually *increase* the number of low-income people that are no longer homeless.

4. The measure's fourth unrelated subject is its imposition of a transfer tax that will fund social programs commonly associated with "permanent supportive housing" (*see* § 2(2)), such as drug and alcohol treatment, job training, child care, treatment of mental illness, support for people with HIV/AIDS, and support for people with other physical disabilities. These programs are separate purposes unrelated to increasing the availability of affordable housing.

5. Finally, much like the mandate on the General Assembly to adopt a new inflation standard, the measure constitutionalizes a definition of "affordable housing" that is not used anywhere in the measure nor necessary to its provisions. As such, the definition is an impermissible separate subject.

II. The measure's ambiguous provisions make it impossible for the Title Board to set an accurate and complete title.

1. To the extent the measure's mandate on the General Assembly that it adopt a new statewide method of calculating inflation is not a separate subject, that provision creates an ambiguity making it impossible for the Board to set a title, and therefore divests the Board of jurisdiction. At the initial hearing on the measure, all three members of the Board acknowledged that this provision was unrelated to the purpose of the measure, with two members expressing confusion as to how the additional subject-matter could be read harmoniously with the rest of the measure, and whether a court might interpret the provision as requiring an inflationary adjustment of the measures fiscal components. If members of Title Board faced such confusion, there can be little doubt that the general public will surely face similar confusion. And because the Board is unable to adequately understand how this provision impacts the measure or reflect such effect in the title, a proper title cannot be set and the measure should be rejected.

2. The measure creates even greater confusion and ambiguity by imposing two conflicting effective dates for the same critical provision. Section 4 states that the transfer tax shall be applied to consideration paid after January 1, 2009. In contrast, Section 6 states that the effective date of Section 4 is July 1, 2009. When asked to address this confusion at the initial hearing, the proponents stated that despite the express language of Section 4 to the contrary, their intent was to have that provision be effective July 1, 2009. The Board then drafted the title to include a July 1, 2009 effective date.

Initiative proponents, however, must be held to the language they've chosen, and the Title Board may not re-write a substantive provision of the measure. If the Board cannot reconcile two conflicting provisions so as to understand the measure or set an accurate title, the measure must be rejected. Moreover, the distinction in this case is not academic or trivial, as a six month differential as to when the transfer taxes applies equates to over \$12 million in additional taxes imposed on the public in the first year (assuming the OSPB fiscal note is correct). The conflicting language will also result in tremendous confusion for local governments that must

implement this new tax. Thus, notwithstanding the proponents effort to amend a substantive provision of the measure at the Title Board stage, the measure is internally inconsistent and irreconcilable, and therefore precludes the setting of a title.

III. The title includes impermissible catch phrases.

The phrases "affordable housing" and "affordable housing purposes" in the title are impermissible catch phrases. First, these two phrases are commonly associated with housing for low or very low income households, yet this measure provides housing assistance to individuals earning more than half of all income earners and to those earning as much as 120% of the mean income. *See* § 2(8) (defining "workforce household"). The average voter would not contemplate that "affordable housing" covers such an expansive group of citizens. Second, "affordable housing" implies that those benefiting from the tax pay some portion of their housing costs; yet the measure defines the types of housing provided as including shelters, transitional housing, and housing for people with special needs, all of which are typically provided at no cost to the resident. By using the phrase "affordable housing," the title incorrectly characterizes the measure as providing assistance with housing costs rather than providing free housing. Third, the average voter will not contemplate that "affordable housing" includes social programs for the disabled, mentally ill, and drug addicted, as this measure does by defining affordable housing to include "permanent support housing."

IV. The Title set by the Title Board is misleading.

The title is misleading for the following reasons:

1. The effective date in the title is not what is stated in Section 4 of the measure and is therefore misleading.
2. The title does not communicate that up to 100% of the transfer tax revenues may be used to fund social programs associated with "permanent supportive housing" (*see* § 2(2)), such as drug and alcohol treatment, job training, child care, treatment of mental illness, support for people with HIV/AIDS, and support for people with physical disabilities.
3. The title refers to the tax as \$.04 on each \$100, but the vast majority of real estate transactions in Colorado involve home purchases that have an average sale price of \$200,000 to \$300,000. Thus, a more appropriate way to describe the tax in the title is being "\$40 per \$100,000 of consideration."
4. The title refers to each \$100 "paid," but the measure contemplates any form of consideration, which might be cash, credit, personal or real property, forbearance, etc. The title should therefore reflect those alternative types of payments.
5. The title does not disclose that up to 100% of the tax proceeds can be used to fund large scale "energy efficiency improvements" such as solar panel fields, biomass projects or

thermal energy projects. *See* § 3(2)(g). Such potential uses should be disclosed in the title.

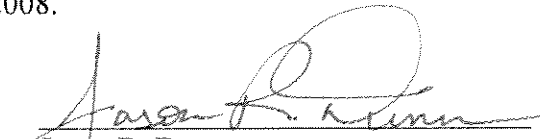
6. The title does not disclose that up to 100% of the tax proceeds can be used to fund "foreclosure and homelessness prevention" programs. *See* § 3(2)(i). Such potential uses are unrelated to affordable housing and should be disclosed in the title.

7. The title does not reflect that the measure authorizes the state to enter into loans as a means of subsidizing affordable housing projects and the array of social programs covered by the measure. *See* § 3(2). Such lending is typically a high risk venture that voters should be made aware of in the title.

8. The title should describe the purpose of the measure as increasing the "affordable housing stock" rather than "to expand the availability of affordable housing," as the measure defines those terms separately and provides funding only for the former.

Because the proposed Initiative #86 contains multiple subjects, ambiguous provisions, and catch phrases, the Title Board lacks jurisdiction to set a title. To the extent the Board determines that it does have jurisdiction to set a title, the title set is misleading and attempts to resolve irreconcilable provisions within the measure. Accordingly, the petitioner requests that the Motion for Rehearing be granted and the Board reject the measure or, alternatively, amend the title consistent with the concerns expressed above.

Respectfully submitted April 23, 2008.


Jason R. Dunn
Brownstein Hyatt Farber Schreck, LLP
410 17th Street, #2200
Denver, Colorado 80202
(303) 223-1100
(303) 223-0914
jdunn@bhfs.com

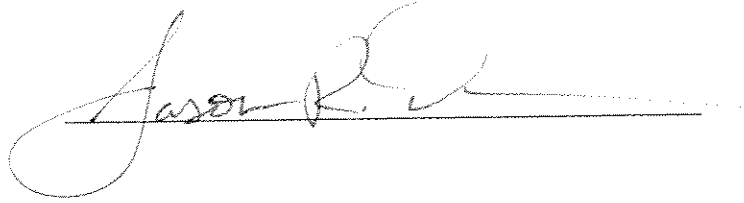
Attorneys for Robert Golden

Address of Petitioner:
309 Inverness Way South
Englewood, CO 80112

CERTIFICATE OF SERVICE

I hereby certify that on April 23 2008, a true and correct copy of the foregoing MOTION FOR REHEARING was placed in the United States mail, postage prepaid, to the following:

Kara Veitch, Esq.
Isaacson Rosenbaum, P.C.
633 17th Street, #2200
Denver, Colorado 80202

A handwritten signature in cursive script, appearing to read "Jason R. Veitch", is written over a horizontal line. The signature is fluid and extends slightly above and below the line.

CERTIFICATE OF SERVICE

I hereby certify that on April 23 2008, a true and correct copy of the foregoing MOTION FOR REHEARING was placed in the United States mail, postage prepaid, to the following:

Kara Veitch, Esq.
Isaacson Rosenbaum, P.C.
633 17th Street, #2200
Denver, Colorado 80202

A handwritten signature in black ink, appearing to read "Kara Veitch", is written over a horizontal line. The signature is cursive and stylized.