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APR 23 2014

COLORADO TITLE SETTING BOARD

ELECTIONS
SECRETARY OF STATE

S. WARD 4:50 P.M.

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE
FOR INITIATIVE 2013–2014 #126

MOTION FOR REHEARING

On behalf of Don Childears, a registered elector of the State of Colorado, the undersigned counsel hereby submits this Motion for Rehearing on Initiative 2013–2014 #126 and as grounds therefore states as follows:

On first glance, the measure appears to be a simple amendment relating to the evidentiary burden in foreclosure proceedings. But on closer inspection, it is apparent that the measure is so poorly drafted that it cannot be meaningfully interpreted for the purpose of setting a title. The measure's inherent vagueness is highlighted by the fact that the Title Board previously set a title for a virtually identical measure that was inconsistent with the title it set for this measure. To the extent that the Title Board may revert to its prior interpretation, that change in interpretation would consist of a substantive change in the content of the measure not directly responsive to comments made at review and comment. In addition, under any reasonable interpretation, it appears to encompass several conflicting subjects and will likely require substantive changes to disparate statutes and regulations that are not restricted to the foreclosure process. The title set by the Title Board does not—and cannot—accurately reflect any of these issues. Finally, the title also impermissibly contains an improper catch phrase.

I. The Title Board lacks jurisdiction because the measure is so vague that it is impossible to set a title that accurately reflects the true purposes of the measure.

Under Article I, Section 1(5.5) of the Colorado Constitution, ballot measures are void to the extent any subject embraced in the measure is not clearly expressed in the title. When there is an incomprehensible subject, a single subject in the title cannot be stated. *See In re Title, Ballot Title & Submission Clause, & Summary for 1999–2000 No. 44*, 977 P.2d 856, 858 (Colo. 1999) (“Here, perhaps because the original text of the proposed initiative is difficult to comprehend, the titles and summary are not clear.”).

When legislative staff analyzed the measure before its review and comment hearing, the staff believed that the measure required that “competent evidence” of a security interest be *recorded* with the county clerk before a foreclosure is commenced. This understanding is reflected throughout the review and comment memorandum. It is also reflected in the title set by the Title Board, which specifies that the measure defines “competent evidence that must be recorded with the county clerk and recorder.” This interpretation is entirely inconsistent, however, with the interpretation given to a virtually identical measure that was submitted two years ago. When the Title Board set a title for Initiative 2011–2012 #84, the operative language of which was *identical* to that of Initiative 2013–2014 #126 as submitted to legislative staff, it set the title as follows:

An amendment to the Colorado Constitution changing the existing evidentiary requirements for foreclosure of real property, and, in connection therewith, requiring evidence to be filed to sufficiently establish a party's right to enforce a valid recorded security interest prior to the foreclosure of any real property.

See Exhibit A. In fact, the proponents of Initiative 2011–2012 #84 argued emphatically before the Supreme Court that the measure would not require anything other than the security interest to be recorded. *See* Opening Br. of Respondents/Proponents at 3–4 & 6–9, *In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2011–2012 #84*, Case No. 2012SA134 (May 16, 2012) (arguing that requiring competent evidence to be recorded “makes little sense”). Ultimately, the Supreme Court upheld the Title Board’s title for Initiative 2011–2012 #84, which reflected the understanding that competent evidence would need to be filed, but not recorded.

The Title Board has now set two conflicting and irreconcilable titles for two virtually identical measures. That this is possible reflects the inherent ambiguity in the language of the measure. Given the lack of a plain meaning discernable from the measure’s text, the Title Board cannot set a clear title that accurately reflects the measure’s substance.

II. The measure was substantially amended after review and comment without being subjected to additional review and comment.

To the extent that the Title Board decides that the “competent evidence” need not be recorded, the Title Board lacks jurisdiction, and the title cannot be set, because the measure was substantially altered after review and comment but was not sent back for additional review and comment as required by C.R.S. § 1-40-105(2). The review and comment memorandum reflects an understanding that the “competent evidence” would be recorded, and several substantive comments in the memorandum are premised on this understanding. To the extent that the measure is now represented to require recording only for a security interest, that interpretation constitutes a substantive change to the meaning and intent of the measure that was not directly responsive to any substantive comments presented at the review and comment hearing.

III. The proposed measure impermissibly contains multiple subjects that are not necessarily connected.



The measure violates the single-subject requirement of Article 5, Section 1(5.5), of the Colorado Constitution, because it includes the following separate and distinct subjects:

1. Altering the evidentiary burden in foreclosure proceedings by requiring “competent evidence” and modifying the current standard permitted under C.R.S. § 38-38-101(1)(b)(I)–(III);
2. Eliminating substantive foreclosure rights in the event that there is any defect in assignments or indorsements of the evidence of debt, and thereby invalidating C.R.S. § 38-38-101(6)(b);
3. Prospectively prohibiting foreclosure pursuant to unrecorded security interests;

In addition, the title fails to reflect that the measure would impair substantive rights currently enjoyed by creditors and by borrowers, including federal rights to the benefits of the secondary mortgage market.

Please set this matter for rehearing, pursuant to C.R.S. § 1-40-107(1).

Respectfully submitted this 23rd day of April, 2014,

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4. Retroactively eliminating substantive foreclosure rights, as established by private contract, of current holders of unrecorded security interests or of interests obtained through unrecorded assignments or transfers;
5. Substantially burdening or eliminating access to the secondary mortgage market for loans issued on Colorado real property;
6. Substantially burdening or eliminating use of the modern MERS system for tracking ownership of loans and servicing rights;
7. Implicitly amending C.R.S. § 4-3-104 to exclude promissory notes as freely assignable negotiable instruments;
8. Requiring public filing of private financial data, possibly restricting the holding in *Charnes v. DiGiacomo*, 200 Colo. 94, 612 P.2d 1117 (Colo. 1980) and restricting individuals' privacy interests in certain financial data; and
9. Requiring counties to accept filings or recording of evidence of debt and related assignments and transfers.

IV. The title is misleading and does not accurately reflect the multiple subjects addressed by the measure.

The title also violates C.R.S. § 1-40-106(3) because it is misleading, is likely to create confusion among voters, does not correctly and fairly express the true intent and meaning of the initiative or the multiple subjects encompassed by it, and does not unambiguously state the principle of the provision sought to be added. For example, the purpose of the measure appears to be to “overrule” C.R.S. § 38-38-101(6)(b), which permits foreclosure in cases where the evidence of debt is without proper indorsement or assignment, but the title does not mention § 38-38-101(6)(b) or the function or purpose of that section. Nor does the title indicate that parties will no longer be permitted to foreclose by posting corporate surety bonds as currently permitted by § 38-38-101(1)(b)(I).

Moreover, given the numerous, unconnected substantive rights that will likely be altered or burdened by the measure, it is important that the title accurately reflect those substantive effects. Yet the title set by the Title Board does not clearly state, for example, that current holders of interests secured by real property stand to lose those rights if the measure is adopted. Nor does the title reflect the important substantive effect the measure will have on the public availability of personal financial data, including social security numbers and dates of birth, if promissory notes or other evidence of debt must be recorded with the county clerk.

V. The title contains an impermissible catch-phrase and fails to reflect key elements of the measure.

The title impermissibly contains a catch phrase—“competent evidence”—that could form basis of slogans for use by those who expect to carry out a campaign in favor of the measure. “Competent evidence” is impermissible because it suggests to an uninformed voter that “incompetent evidence” is currently permitted in foreclosure proceedings and does not accurately convey the nature of the evidence required.



STATE OF COLORADO

**DEPARTMENT OF
STATE**

CERTIFICATE

I, **SCOTT GESSLER**, Secretary of State of the State of Colorado, do hereby certify that:

the attached are true and exact copies of the filed text, motion for rehearing, titles, and the rulings thereon of the Title Board on Proposed Initiative "2011-2012 #84 'Foreclosure Process'"

..... **IN TESTIMONY WHEREOF** I have unto set my hand
and affixed the Great Seal of the State of Colorado, at the
City of Denver this 30th day of April, 2012.

A handwritten signature in cursive script, appearing to read "Scott Gessler", is written over a horizontal line.

SECRETARY OF STATE

EXHIBIT A

Ballot Title Setting Board

Proposed Initiative 2011-2012 #84¹

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

An amendment to the Colorado constitution changing the existing evidentiary requirements for foreclosure of real property, and, in connection therewith, requiring evidence be filed to sufficiently establish a party's right to enforce a valid recorded security interest prior to the foreclosure of any real property.

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

Shall there be an amendment to the Colorado constitution changing the existing evidentiary requirements for foreclosure of real property, and, in connection therewith, requiring evidence be filed to sufficiently establish a party's right to enforce a valid recorded security interest prior to the foreclosure of any real property?

*Hearing April 4, 2012:
Single subject approved; staff draft amended; titles set.
Hearing adjourned 10:35 a.m.*

*Rehearing April 27, 2012
Motion for rehearing denied except to the extent that the Board made changes to the title.
Hearing adjourned 11:35 a.m.*

¹ Unofficially captioned "Foreclosure Process" by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.

Foreclosure Due Process Initiative 2012

2011-2012 #84
Foreclosure Process
Final Text

Proponent representatives:

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9:00 A.M.
S.WARD

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SECRETARY OF STATE

Proposed text:

Be it Enacted by the People of the State of Colorado:

In the constitution of the state of Colorado, add section 25a to article II as follows:

Section 25a. Foreclosure due process. NO PERSON SHALL BE DEPRIVED OF REAL PROPERTY THROUGH A FORECLOSURE UNLESS THE PARTY CLAIMING THE RIGHT TO FORECLOSE IN THE FORECLOSURE PROCEEDING FILES COMPETENT EVIDENCE OF ITS RIGHT TO ENFORCE A VALID SECURITY INTEREST, RECORDED BEFORE THE FORECLOSURE IS COMMENCED WITH THE RECORDER OF DEEDS, CREATED BY SECTION 8 OF ARTICLE XIV OF THIS CONSTITUTION, IN THE COUNTY IN WHICH THE REAL PROPERTY IS LOCATED. COMPETENT EVIDENCE INCLUDES:

- (1) THE EVIDENCE OF DEBT;
- (2) ENDORSEMENTS, ASSIGNMENTS, OR TRANSFERS, IF ANY, OF THE EVIDENCE OF DEBT TO THE FORECLOSING PARTY; AND
- (3) DULY RECORDED ASSIGNMENTS, IF ANY, OF THE RECORDED SECURITY INTEREST TO THE FORECLOSING PARTY.

