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COLORADO TITLE SETTING BOARD

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR PROPOSED INITIATIVE 2017-2018 #111

MOTION FOR REHEARING ON PROPOSED INITIATIVE 2017-2018 #111

On behalf of Janette S. Rose, Susan McClain, and Georgiana Inskeep, registered electors of the State of Colorado, the undersigned counsel hereby submit to the Title Board this Motion for Rehearing on Proposed Initiative 2017-2018 #111 ("Initiative #111") pursuant to Section 1-40-107, C.R.S. (2017), and as grounds therefore state as follows:

I. THE TITLE SET BY TITLE BOARD AT FEBRUARY 7, 2018 HEARING

On February 7, 2018, the Title Board set the following ballot title and submission clause for Initiative #111:

> Shall there be an amendment to the Colorado constitution concerning government taking of private property, and, in connection therewith, declaring that property is taken for public use whenever the implementation of any law or regulation causes a reduction in the fair market value of property for uses that were allowed at the time the property owner acquired title to the property?

II. GROUNDS FOR REHEARING

A. The Initiative Impermissibly Contains Several Separate and Distinct Subjects in Violation of the Constitutional and Statutory Single Subject Requirement.

Under article V, section 1(5.5) of the Colorado constitution and section 1-40-106.5, C.R.S., proposed ballot measures must contain only a single subject. "[T]he Board may not set the titles of a proposed Initiative, or submit it to the voters, if the Initiative contains multiple subjects." *Aisenberg v. Campbell (In re Title, Ballot Title & Submission Clause 1990-2000 #104)*, 987 P.2d 249, 253 (Colo. 2000).

The single subject requirement serves two functions. First, the single subject requirement "is intended to ensure that each proposal depends upon its own merits for passage." *Johnson v. Curry* (In re Title, Ballot Title & Submission Clause for 2015-2016 #132), 374 P.3d 460, 465 (Colo. 2016). Second, the single subject requirement is intended to "prevent surprise and fraud from being practiced upon voters caused by the inadvertent passage of a surreptitious provision 'coiled up in the folds' of a complex initiative." *Id.* "If an initiative advances separate and distinct purposes, the fact that they both relate to the same general concept or subject is insufficient to satisfy the single subject requirement." *Id.*

Initiative #111 contains at least three separate subjects, in violation of article V, section 1(5.5) of the Colorado constitution and section 1-40-106.5, C.R.S. The Initiative does the following:

First, article II, section 15 of the Colorado constitution currently provides that private property "shall not be taken or damaged . . . without just compensation." Initiative #111 explicitly adds a third requirement – that implementation of any government law or regulation that reduces the fair market value of property for uses theretofore allowable will also be deemed a "taking." The addition of this new category of compensable "takings" would appear to be the Initiative's principal purpose and subject. "Coiled up in the folds," however, are two additional – and very distinct – purposes and subjects.

Second, to be considered compensable under article II, section 15, "damage" to property has long been held to require "a unique or special injury which is *different in kind, or not common to, the general public.*" *Claassen v. City & County of Denver*, 30 P.3d 710, 714 (Colo. App. 2000) (emphasis added); *Northglenn v. Grynberg*, 846 P.2d 175, 179 (Colo. 1993). "The damage must be *different in nature from, and not merely greater in degree than*, that suffered by the general public. In no case has mere depreciation in value been grounds to award compensation for a damaging of property." *Thompson v. City & County of Denver*, 958 P.2d 525, 528 (Colo. App. 1998) (emphasis added). The indisputable purpose and effect of adding this new category of "deemed" takings to article II, section 15, is to wholly eliminate the "unique or special injury" limitation upon compensable "damage" to property when fair market value is adversely impacted.

Third, a basic tenet of article II, section 15, has always been that "property owners are not entitled to receive just compensation when [a governmental action] reasonably restricts, but does not prohibit, all reasonable use of their property." *Nat'l Advertising Co. v. Board of Adjustment,* 800 P.2d 1349, 1351 (Colo. App. 1990). "Nor are they constitutionally entitled to obtain the highest and best use of their property or to gain maximum profits from its use." *Id.* This third surreptitious (albeit indisputable) purpose and effect of Initiative #111 is to wholly replace this "takings" predicate – across the board – with the "deemed" proposition that a mere reduction in "fair market value" from the time of acquisition of title by the owner arguably resulting from any governmental action will now per se constitute a compensable "taking."

B. <u>The Ballot Title and Submission Clause Is Misleading, and Does Not Correctly and Fairly Express Its True Intent and Meaning.</u>

The title of the Initiative #111 is misleading and does not correctly and fairly express the initiatives' true intent and meaning. Section 1-40-106(3)(b), C.R.S. provides:

> In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a "yes" or "no" vote will be unclear. The title for the proposed law or constitutional amendment, which shall correctly and fairly express the true intent and meaning thereof, together with the ballot title and submission clause. . . .

The title of Initiative #111 misleads the voters by failing to inform them that the measure wholly eliminates the "unique or special injury" limitation upon compensable "damage" to property under the takings clause when fair market value is adversely impacted. The title of Initiative #111 is also misleading because it fails to inform voters that the long-standing takings clause limitation that relieves the government from paying a property owner for the highest and best use of their property or for a gain of maximum profits will no longer apply, and instead the mere reduction in "fair market value" from the time of acquisition and arguably resulting from any governmental action will now per se constitute a compensable "taking."

The title does not enable voters to make an informed choice because it does not correctly and fairly express its true intent and meaning.

III. CONCLUSION

Based on the foregoing, Janette S. Rose requests a rehearing of the Title Board for Initiative 2017-2018 #111, because the initiative contains multiple subjects, and the title is misleading to voters because it fails to fairly express the initiative's true meaning and intent. As a result, the Title Board lacks jurisdiction to set a title and should return the measure to the proponents.

Respectfully submitted this 14th day of February, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 14th day of February, 2018, a true and correct copy of **MOTION FOR REHEARING ON PROPOSED INITIATIVE 2017-2018 #111** was filed and served via email or U.S. mail, postage prepaid, to the following:

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