BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Bernard Buescher, Objector,

vs.

Colin Larson and John Brackney, Proponents.

MOTION FOR REHEARING ON INITIATIVE 2021-2022 #145
("Concerning Property Valuation")

Bernard Buescher, registered elector of the County of Mesa and the State of Colorado, through his undersigned counsel, objects to the Title Board's (the "Board") title and ballot title and submission clause set for Initiative 2021-2022 #145, and states:

The Board set a title for Initiative 2021-2022 #145 on April 21, 2022. The Board designated and fixed titles for this measure[1] but erred in doing so.

I. This measure violates the constitutional single subject requirement.

The single-subject requirement in Article V, sec. 1(5.5) serves two purposes: (1) it ensures that the initiative "depends upon its own merits for passage"; and (2) it "protects against fraud and surprise occasioned by the inadvertent passage of a surreptitious provision 'coiled up in the folds' of a complex bill." *In re Title & Ballot Title & Submission Clause for 2005-2006 #55*, 138 P.3d 273, 277 (Colo. 2006) (citation omitted).

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[1] *Funding available for counties, school districts, water districts, fire districts, and other districts funded, at least in part, by property taxes shall be impacted by a reduction of $1.2 billion in property tax revenue by an amendment to the Colorado constitution and a change to the Colorado Revised Statutes concerning the actual value of real and personal property for purposes of property taxation, and, in connection therewith, setting the actual value of real property for the 2023 property tax year at the current valuation or the most recent sale amount; thereafter, establishing the actual value to be equal to the prior year's value adjusted for inflation up to 3%; allowing an additional increase if the annual inflation exceeds 5% and is approved by the state legislature; resetting the actual value of real property when it is sold; requiring real property to be reappraised if it is substantially improved, as defined, suffers a decline in value, or is in a county that has suffered a sustained economic downturn; defining a recent sale to include a transfer upon the death of the property owner to anyone other than a spouse; prohibiting the consideration of the highest and best use of real and personal property in determining that property's actual value; repealing constitutionally required approaches to determine the actual value of property; and requiring the provisions of this measure to expire on December 31, 2032.*

In applying this mandate, the Title Board must evaluate the measure to determine if it is constitutionally compliant. An initiative may not group "distinct purposes under a broad theme" to circumvent the single-subject requirement, nor can it "hide purposes unrelated to the [i]nitiative's central theme" to gain passage of a hidden provision. *Id.* at 277-78.

Proponents contend their single subject addresses predictability in property values for taxpayers. Their measure also has additional purposes.

A. The initiative's added purpose: using fractional purchases prices as "sales"

The initiative states multiple times that a property's valuation for tax purposes "shall equal the amount of the property's most recent sale." Proposed Colo. Const., Art. X, sec. 20(3); Proposed C.R.S. 39-1-103(5)(a), (15.5)(a); Proposed C.R.S. 39-1-104(10.2)(f). In other words, assessors must use that dollar amount that is paid for the property's last "sale."

As a reminder, "sale" is defined by this initiative.

> **"SALE" MEANS THE TRANSFER OF MORE THAN 50% OWNERSHIP** OF REAL PROPERTY MADE EITHER: (1) IN THE ORDINARY COURSE OF BUSINESS FOR FULL AND ADEQUATE CONSIDERATION AND A TRANSACTION THAT IS (A) BONA FIDE, (B) AT ARM'S LENGTH, AND (C) FREE FROM ANY DONATIVE INTENT; OR (3) UPON THE DEATH OF THE PROPERTY'S OWNER, IF THE PROPERTY PASSES AT DEATH TO ANYONE OTHER THAN THE DECEASED'S SPOUSE.

Proposed C.R.S. 39-1-102.5(2). In other words, a "sale" occurs when over 50% of a property's ownership interests is transferred for fair market compensation. For example, a sale of a property having a total market value of $1 million occurs when a buyer pays $501,000 for a 50.1% interest in a bona fide transaction, done at arm's length, and without donative intent.

Under this measure, though, the property tax valuation of that $1,000,000 property would be only $501,000 because a qualifying "sale" occurred when that 50.1% interest changed hands. The sale of the 50.1% interest was a "transfer of more than 50% ownership of real property." *Id*. As a result, Proponents' initiative mandates sub-market valuations any time a partial interest over 50% is bought. The Proponents drafted this measure so, in this example, $499,000 just disappears from what would otherwise be a property's tax valuation.

The single subject requirement protects against measures that can result in "voter surprise or fraud." *In re Title, Ballot Title & Submission Clause for 2007-2008 # 17*, 172 P.3d 871, 873 (Colo. 2007); *see also* C.R.S. § 1-40-106.5(1)(e)(II). Subjects need not be entirely unrelated to be separate; changing both the procedures and the substance associated with the same constitutional provision, or even matters grouped under "the same general area of the law," is no cure for a single subject violation. *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 442-43, 445-46 (Colo. 2002). "The risk of uninformed voting caused by **items concealed within a** lengthy or **complex proposal** is what the single subject requirement seeks to avoid." *In re Title for Initiative 1997-1998 #30*, 959 P.2d 822, 825 (Colo. 1998) (citations and internal quotation marks omitted) (emphasis added).

That this partial valuation issue has not surfaced in hearings before the legislative offices and this Board on these measures is indicative of just how concealed this provision is. In all the hearings held on this and related matters, it has not been substantively aired. And voters would never think that the sum total of a property's "most recent sale" is actually the price paid for a little over half-interest of the property. They will be misled in voting to support or oppose this measure, only to find after the election that sales of partial interests of property within a county or district must be used and will produce reduced tax bases. "[P]rovisions causing voter surprise or uninformed voting also may constitute a single-subject violation." *In re Title, Ballot Title & Submission Clause for Initiative 1999-2000 #258(A)*, 4 P.3d 1094, 1107 n.6 (Colo. 2000) (Martinez, J., concurring).

Moreover, this valuation loophole masquerading as a definition is not a necessary element of the tax limit proponents highlight within this initiative. Proof of that fact lies in one of their companion measures, Initiative #75, that had no such definition and, in fact, no definition of "sale" at all.[2] Given the routine use of the market approach to appraisal for decades and its reliance on market sales of property and the commonly understood meaning of "sale," this special interest provision was clearly not needed to achieve proponents' stated goal of providing certainty in property tax valuation.

The Title Board is prohibited from titling a measure that misleads voters due to its unrelated facets, and this initiative should be returned to its proponents.

B. The initiative's added purpose: eliminating the "highest and best use" standard

There is no more fundamental concept for purposes of ensuring uniform taxation than the "highest and best use" of a property. According to the Colorado Property Tax Administrator who is responsible for administering the state's property tax systems, "A highest and best use analysis is **the foundation of all appraisal**." Assessor's Reference Library, Vol. 3 at 2.4 (emphasis added); *see Board of Assessment Appeals v. Colorado Arlberg Club*, 762 P.2d 146 (Colo. 1988) (for property tax purposes, vacant land's highest and best use is relevant to valuation to determine how a willing buyer and willing seller would value such developable land in its current condition) . The Court acknowledged that the highest and best use standard is "**a crucial determinant of value** in the market." *Id*. at 152 (emphasis added), citing American Institute of Real Estate Appraisers, *The Appraisal of Real Estate* 28, 243 (8th ed. 1983).

This initiative prohibits conducting a "highest and best use" analysis as to every property in the state when valued for tax purposes. Thus, vacant land need not be valued in light of its actual zoning, its approved development plans, or its likely uses in light of the uses to which surrounding properties are put. For that matter, an office building need not be valued as an office building if that is its highest and best use. The same is true for any other type of property.

Voters would not know that, in approving this part of a complex measure, they are reversing the Supreme Court's ruling in *Colorado Arlberg Club*. They would ultimately be surprised to learn that, in adopting a measure that is sold to them as a valuation freeze for their

[2] https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2021-2022/75Final.pdf

homes, they had actually adopted a loophole to allow evasion of the Supreme Court's standard in this case, a fundamental of all property valuation.

As counsel to proponents acknowledged to the Board, "voters are going to think about themselves first." (S. Mercer, April 22 Title Board Rehearing). Eliminating a basic, foundational aspect of property valuation for all categories of property is a concealed purpose that "run[s] the risk of surprising voters with a 'surreptitious' change,' because voters may focus on one change and overlook the other." *In re Title, Ballot Title & Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶41, 489 P.3d 1217, 1225 (statutory and case law citations omitted).

II. This measure violates the clear title requirement for initiative titles.

The titles set by the Board are incomplete or misleading in the following ways:

(a) The titles incorrectly refer to "resetting the actual value of the property when it is sold" and thus fail to be clear that the measure expressly allows real property tax value to be substantially less than 100% of actual value, given that a "sale" – and thus the only relevant sale price for purposes of the initiative – is established at the point when more than 50% of an ownership interest is transferred.

(b) The titles inaccurately state that all taxpayers will maintain a "current" property value, given that values for properties throughout the state change for multiple reasons including when unusual conditions affect the intervening year of a reassessment cycle, pursuant to C.R.S. 39-1-104(11).

(c) The titles fail to state the measure exempts from its newly imposed limits on property valuation as to agricultural property, producing mines, and oil and gas producing lands or leaseholds.

(d) The titles fail to refer to the repeal of the requirement that property owners receive notices of valuation on May 1 of each year to inform them of, among other things, the changes in value for the next property tax cycle, the ratios of assessment that apply to the property in question, and their appeal rights.

In all of these ways, the titles must be corrected.

III. Both the ballot title and the fiscal abstract must be corrected to reflect further revenue decreases to local governments, as transfers of partial property interests qualify as "sales" and will limit local government property tax collections beyond the $1.2 billion projection in the titles and abstract.

Because use of partial (i.e., above 50%) property sales as the "most recent sale" to dictate a property's value has not been previously addressed, the $1.2 billion loss reflected in ballot title language and the fiscal abstract understate public entities' revenue losses and must be corrected. C.R.S. §§ 1-40-105.5, -106(3)(f). This matter is appropriate for a motion for rehearing. *In re Title, Ballot Title & Submission Clause for 2017-2018 #4*, 2017 CO 57 ¶¶17-19, 395 P.3d 318.

RESPECTFULLY SUBMITTED this 27th day of April, 2022.

RECHT KORNFELD, P.C.

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CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the **MOTION FOR REHEARING ON INITIATIVE 2021-2022 #145** was sent this day, April 27, 2022, via email to the proponents via their legal counsel:

Sarah Mercer
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s/ Erin Holweger