DATE FILED: February 21, 2023 8:00 PM

COLORADO SUPREME COURT 2 East 14th Avenue Denver, Colorado 80203	
Original Proceedings Pursuant § 1-40-107(2), C.R.S. Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2023-2024 #3 **Petitioner:** Rebecca R. Sopkin v. **Respondents:** Dalton Kelley and Dee Wisor, **Title Board:** Jason Gelender, Melissa Kessler and David Powell	▲COURT USE ONLY▲
ATTORNEYS FOR RESPONDENTS: Dalton Kelley, #53948 Dee P. Wisor, #7237 BUTLER SNOW LLP 1801 California Street, Suite 5100 Denver, CO 80202 Phone: 720-330-2300 Fax: 720-330-2301 E-mail: dalton.kelley@butlersnow.com dee.wisor@butlersnow.com	Supreme Court Case No.: 2023SA15

RESPONDENTS' ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limit set forth in C.A.R. 28(g).

It contains 5,784 words (answer brief does not exceed 9,500 words).

In response to each issue raised, the brief, under a separate heading before the discussion of the issue, states whether the Proponent's agree with the Petitioner's statements concerning the standard of review with citation to authority and preservation for appeal, and if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Dalton Kelley
Dalton Kelley, #53948

/s/ Dee P. Wisor
Dee P. Wisor, #7237

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

Respondents Dalton Kelley and Dee Wisor (the "Proponents"), registered electors of the State of Colorado (the "State"), and the designated representatives and proponents of Proposed Initiative 2023-2024 #3, unofficially captioned "Establishment of a New Attainable Housing Fee" ("Initiative #3"), respectfully submit this Answer Brief in support of the title, ballot title and submission clause (the "Title") set by the Title Board for Initiative #3 and in response to the Opening Brief submitted by Petitioner, Rebecca R. Sopkin (the "Petitioner").

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Proponents accept the substance of the Petitioner's statement of the issues, except (1). The Petitioner states as an issue "(1) whether the title set by the Title Board is misleading as it does not refer to that fact that the Proposed Initiative would in effect be amending the Colorado Constitution by instituting a real property tax, which is expressly forbidden by the constitution." Petitioner's Opening Br. at 1. The Petitioner's allegation that the Attainable Housing Fee is a real property tax does not appear in the body of her Opening Brief. Rather, the Petitioner asserts in the body of her Opening Brief that the Title is misleading by alleging that the Attainable Housing Fee is a real property transfer tax, which is a separate and distinct type of charge. Petitioner's Opening Br. at 5, 7. Therefore, the Court should focus on the

issue of whether the Attainable Housing Fee is a fee or a transfer tax on real property, rather than a real property tax.

The Proponents state the issues identified by the Petitioner to be the following:

1. Whether the Title set by the Title Board for Initiative #3 correctly and fairly expresses the true meaning and intent of the measure.

2. Whether the Title set by the Title Board for Initiative #3 contains a single subject.

STATEMENT OF THE CASE

The Proponents agree with the Petitioner's statement of the case, except for her statement about the language of the ballot title and submission clause set by the Title Board for Initiative #3. Petitioner's Op. Br. at 2-3. The Petitioner's recitation of the Title set by the Title Board failed to include the amendments that were made at the rehearing regarding the addition of rental property. R., p. 9-10[1]; Rehearing Before the Title Board on Proposed Initiative 2023-2024 #3 (January 4, 2023), (at 45:00) available at: https://csos.granicus.com/player/clip/350?view_id=1&redirect=true&h=6727bf9c59eb898b9371718dbbc555f2.

[1] Citations to the Title Board Record (the "Record") are to the certified copy of the Record submitted with the Petition for Review. Page number references are to the PDF page number since the Record is not paginated.

The Title Board set the ballot title and submission clause for Initiative #3 as follows:

> Shall there be a change to the Colorado Revised Statutes concerning funding to increase attainable housing, and, in connection therewith, on and after January 1, 2024, imposing a community attainable housing fee, payable by the purchaser, upon the recording of deeds for real property equal to 0.1% of the amount by which the purchase price exceeds $200,000; defining attainable housing as housing that is attainable by a household that makes between 80% and 120% of the area median income and is priced so that the household need not spend more than 30% of its income on housing costs; requiring the net fee revenue to be deposited in the Colorado attainable housing fund and used only to fund new and existing programs administered by the division of housing that support the financing, purchase, refinancing, construction, maintenance, rehabilitation, or repair of attainable housing in Colorado *for rental purposes or home ownership*; and exempting the fee revenue from the limitation on state fiscal year spending?

Id. (emphasis added).

SUMMARY OF ARGUMENT

Each of the issues identified by the Petitioner and the Petitioner's arguments can be disposed of by answering one question: whether the Attainable Housing Fee is correctly characterized, because the crux of each of the Petitioner's allegations is that Initiative #3 is imposing a transfer tax on real property rather than a fee and, therefore, the Title is misleading and contains multiple subjects.

Though the Court has previously determined that neither the Title Board nor the Court can choose whether a charge imposed by an initiative is tax or another type of charge, the Title Board now has a statutory duty to determine whether an initiative

that is being proposed constitutes a "tax change" for purposes of § 1-40-106(3)(i)(II), C.R.S. (2022). This new requirement was added to § 1-40-106, C.R.S. in 2021 by House Bill 21-1321 and has expanded the scope of the Title Board's responsibilities when it sets a ballot title for a tax change.

Initiative #3 does not constitute a tax change for purposes of § 1-40-106(3)(i)(II), C.R.S. (2022) because the Attainable Housing Fee imposed by Initiative #3 is a fee, not a tax. Therefore, the Title set by the Title Board for Initiative #3 fairly and correctly sets forth the true meaning and intent of the measure and Initiative #3 contains the single subject of making more revenue available for new or existing programs that support the provision of Attainable Housing by imposing an Attainable Housing Fee.

ARGUMENT

I. The Title set by the Title Board for Initiative #3 correctly and fairly expresses the true meaning and intent of the measure since the Attainable Housing Fee is a fee, not a tax, which determination is within the jurisdiction of the Title Board and the Court under § 1-40-106(3)(i)(II), C.R.S. (2022).

A. Standard of Review; Preservation of Issues.

The Petitioner's statement of the standard of review regarding the Court's review of a ballot title to determine whether it is misleading is accurate but incomplete. The Petitioner's statement fails to note the considerable discretion given

to the Title Board in setting ballot titles and does not discuss the scope of the Court's review, the criteria used by the Court, and the circumstances when the Court will determine that a ballot title is misleading.

"The Title Board is vested with considerable discretion in setting the title and the ballot title and submission clause, and [the Court] will reverse the Board's decision only when the title is insufficient, unfair, or misleading." *Matter of Title, Ballot Title & Submission Clause for 2019-2020 #315*, 500 P.3d 363, 366 (Colo. 2020) (internal quotations omitted). The Court takes a limited review of the Title Board's actions and does not address the merits of the proposed initiative. *Id.* Rather, the Court examines the initiative's wording by employing the general rules of statutory construction, giving words and phrases their plain and ordinary meanings, to determine whether the wording comports with the constitutional requirements. *Id.*

The scope of the Court's review is limited to ensuring that "the title, ballot title and submission clause, and summary fairly reflect the proposed initiative so that petition signers and voters will not be misled into support for or against a proposition by reason of the words employed by the Board." *Matter of Title, Ballot Title & Submission Clause, & Summary for 1997-1998 # 105 (Payments by Conservation Dis. To Pub. Sch. Fund & Sch. Districts)*, 961 P.2d 1092, 1096 (Colo. 1998), *as modified on denial of reh'g* (Aug 10, 1998). The Court will only reverse the Title

Board's action in preparing the title and submission clause for an initiative "if they contain a material and significant omission, misstatement, or misrepresentation." *In re Title, Ballot Title, Submission Clause, & Summary for 1999-2000 No. 29*, 972 P.2d 257, 266 (Colo. 1999).

Additionally, the issue of whether the Title Board has a statutory duty to determine whether a measure constitutes a "tax change" for purpose of § 1-40-106(3)(i)(II), C.R.S. (2022) is a question of law subject to de novo review. *See Matter of the Title, Ballot Title, & Submission Clause for 2013-2014 #103*, 328 P.3d 127, 129 (Colo. 2014).

As stated in our Opening Brief, the Proponents agree that the issues raised on appeal were preserved because the Petitioner is a registered elector who filed a motion for rehearing pursuant to § 1-40-107(1), C.R.S. (2022). R., p. 14-15.

B. Resolving the issue of whether the Title set for Initiative #3 is misleading because it uses the term "fee" is properly within the jurisdiction of the Title Board and the Court, because the Title Board has a statutory duty to determine whether an initiative constitutes a "tax change" as defined in § 1-40-106(3)(i)(II), C.R.S. (2022).

In its Opening Brief, the Title Board asserts that determining whether a measure proposes a fee or a tax is outside of its jurisdiction. *See* Title Board's Opening Br. at 6. The Court's holding in *Matter of Title, Ballot Title & Submission Clause & Summary Approved Apr. 6, 1994, & Apr. 20, 1994, for the Proposed*

Initiative Concerning "Automobile Insurance Coverage" supports the Title Board's conclusion. 877 P.2d 853, 856 (Colo. 1994) ("*Auto. Ins. Coverage*"). In *Auto. Ins. Coverage*, the petitioners argued that the title and the ballot title and submission clause were misleading because they referred to "premiums" rather than "taxes" and that the use of the word "premiums" created prejudice in favor of the proposed amendment. *Id*. The Court held that "[i]t is beyond the jurisdiction of the Board, and beyond the scope of [the Court's] review of the Board's actions to interpret or construe the language of a proposed initiative…Neither the Board nor this court can choose between the varying possible interpretations of the status of revenues ultimately collected." *Id.*

However, *Auto. Ins. Coverage* was decided in 1994, long before the adoption of House Bill 21-1321 ("HB 21-1321"). HB 21-1321 was signed into law in 2021 and it imposes new requirements for how ballot titles must be set by the Title Board when the proposed initiative imposes a "tax change." H.B. 21-1321, 73rd Gen. Assemb., First Reg. Sess. (Colo. 2021), § 1-40-106, C.R.S. (2022). "Tax change" is defined to mean "any initiated ballot issue or initiated ballot question that has a primary purpose of lowering or increasing tax revenues collected by a district, including a reduction or increase of tax rates, mill levies, assessment ratios, or other measures, including matters pertaining to tax classification, definitions, credits,

exemptions, monetary thresholds, qualifications for taxation, or any combination thereof, that reduce or increase a district's tax collections." § 1-40-106(3)(i)(II), C.R.S. (2022).

Thus, after the adoption of HB 21-1321, the Title Board must determine whether an initiative constitutes a tax change for purpose of § 1-40-106(3)(i)(II), C.R.S. (2022) in order to carry out its statutory duty of designating "a proper fair title for each proposed law." § 1-40-106, C.R.S. (2022). HB 21-1321 does not require the Title Board to interpret the constitutionality of a measure. HB 21-1321 does however require the Title Board to determine if a measure constitutes a tax change within the statutory definition, and if so, to include specific language in the ballot title depending on whether the tax change increases or reduces tax revenue for the State or a local district. § 1-40-106(3)(i)(II), C.R.S. (2022).

The Title Board is not required to "accept at face value the information provided to it" and is required to consider the public confusion that might be caused by misleading titles. § 1-40-106(3)(b), C.R.S. (2022); *In re Title, Ballot Title & Submission Clause, & Summary For 1999-2000 # 255*, 4 P.3d 485, 500 (Colo. 2000). Further, the Title Board is required to set a title for a proposed law or constitutional amendment that "correctly and fairly express[es] the true intent and meaning thereof." § 1-40-106(3)(b), C.R.S. (2022). In discharging its duty, the Court has

opined that the Title Board simply repeating the "operative language of an initiative in the title setting process does not necessarily satisfy the requirements that the title and the ballot title and submission clause clearly reflect the intent of the initiative." *Auto. Ins. Coverage*, 877 P.2d at 857.

Thus, in order to carry out its statutory duties in setting a ballot title for a proposed initiative, the Title Board is required to consider whether the measure constitutes a tax change for purposes of § 1-40-106(3)(i)(II), C.R.S. (2022). Otherwise, HB 21-1321's application and effectiveness would be greatly limited because the proponents for an initiative could avoid its requirements by simply avoiding any reference to taxes or tax revenues. The Title Board must consider the public confusion that might be caused if it sets a title for a charge that is misleading, whether it is statutorily required to include specific language because the measure constitutes a "tax change" and whether the title correctly and fairly expresses the true intent and meaning of the proposition. § 1-40-106, C.R.S. (2022). Further, the Title Board is not required to accept at face value the information provided to it, and it should consider whether it is satisfying its statutory duty to set a fair and correct title and whether it is required to include the specific language required for tax changes.

In conclusion, though it may have previously been beyond the jurisdiction of the Title Board, and beyond the scope of the Court's review of the Title Board's actions, to interpret or construe the language of a proposed initiative to determine whether the measure imposed a tax, that is no longer the case after the adoption of HB 21-1321. The Title Board, and the Court reviewing the Title Board's actions, should examine the wording of a proposed initiative by employing the general rules of statutory construction to determine whether a measure constitutes a tax change, as defined by § 1-40-106(3)(i)(II), C.R.S. (2022), and in doing so should apply the Court's previous holdings to determine whether an initiative has a primary purpose of lowing or increasing tax revenues collected by a district since terms such as "tax revenue" are not defined in § 1-40-106, C.R.S. (2022).

C. The Title set by the Title Board for Initiative #3 is not misleading since the Attainable Housing Fee is a fee, not a new transfer tax on real property.

The five issues identified by the Petitioner can all be resolved by determining whether the Attainable Housing Fee is correctly characterized, because the crux of each of the Petitioner's allegations is that Initiative #3 is imposing a transfer tax on real property rather than a fee. As illustrated above, it is within the Title Board's jurisdiction, and within the scope of the Court's review of the Title Board's actions, to determine whether a measure constitutes a "tax change" within the meaning of §

1-40-106(3)(i)(II), C.R.S. (2022). If the Court concludes that Initiative #3 does not constitute a tax change because the Attainable Housing Fee is a fee, and as such only increases fee revenues collected by the State, then the Title set by the Title Board is fair and correct and it is unnecessary for Initiative #3 to amend the Colorado Constitution or to include tax change language.

The Title set by the Title Board for Initiative #3 correctly and fairly expresses the true meaning and intent of the measure, because the proposed statute imposes a fee for supporting new or existing programs that fund Attainable Housing[2], rather than a new transfer tax on real property imposed for general governmental use. Further, Initiative #3's primary purpose is to impose the Attainable Housing Fee to finance Attainable Housing in Colorado communities, not to lower or increase tax revenues collected by the State.

i. The Petitioner's discussion of Colorado's race notice statute is misplaced because recording a deed is only the triggering event for when the Attainable Housing Fee is paid.

While it is true, as the Petitioner asserts in her Opening Brief, that a governmental entity is formally informed of the transfer of real property and the

[2] "Attainable Housing" is defined in Initiative #3 as "housing that is attainable by a household that makes between eighty percent and one hundred and twenty percent of the area median income and is priced so that the household need not spend more than thirty percent of its income on housing costs." R., p. 3.

consideration exchanged therefor when a deed is recorded, such facts have nothing to do with whether the Attainable Housing Fee is a fee. Petitioner's Opening Br. at 8. Colorado courts have never focused on when a charge is collected to determine whether a charge is a fee or a tax. *See Bloom v. City of Fort Collins*, 784 P.2d 304, 305 (Colo. 1989) (the transportation utility fee was imposed upon the owners and occupants of developed lots utilizing city utilities monthly as part of their utility bill, not when street maintenance occurred); *Colorado Union of Taxpayers Foundation v. City of Aspen*, 418 P.3d 506, 509-10 (Colo. 2018) ("*City of Aspen*") (the waste reduction fee was imposed upon customers at grocery stores for each non-reusable bag the customer chose to use, not when the recycling of the bag occurred, if ever); *TABOR Foundation v. Colorado Bridge Enterprise*, 353 P.3d 896, 899 (Colo. App. 2014) (the bridge safety surcharge was imposed upon individuals when their vehicles were registered, not when the individual used a Colorado Bridge Enterprise bridge or when bridge maintenance occurred).

Rather, the focus has always been the primary purpose for which the charge is imposed. *City of Aspen*, 418 P.3d at 513; *Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008). The Court has held that "[t]o determine whether a government mandated financial imposition is a 'fee' or a 'tax,' the dispositive criteria is the primary or

dominant purpose of such imposition at the time the enactment calling for its collection is passed." *Barber*, 196 P.3d at 248.

Similarly, § 1-40-106(3)(i)(II), C.R.S. (2022) defines "tax change" to mean "any initiated ballot issue or initiated ballot question that *has a primary purpose* of lowering or increasing *tax revenues* collected by a district, including a reduction or increase of tax rates, mill levies, assessment ratios, or other measures, including matters pertaining to tax classification, definitions, credits, exemptions, monetary thresholds, qualifications for taxation, or any combination thereof, that reduce or increase a district's tax collections." (emphasis added). Thus, it is the primary purpose for which a charge is imposed, not when the charge is collected, that dictates whether the charge is a tax or a fee.

Additionally, Article X, Section 20(8)(a) of the Colorado Constitution ("Section (8)(a)") only prohibits "[n]ew or increased transfer tax rates on real property." Section (8)(a) does not prohibit the imposition of other types of charges, such as new fees, when real property is transferred. *See* Colo. Const. art. X § 20 (8)(a); *Chronos Builders, LLC v. Dep't of Lab. & Emp., Div. of Fam. & Med. Leave Ins.*, 512 P.3d 101, 105 (Colo. 2022) (finding that Section (8)(a) is only concerned with taxes). Thus, not every charge that is imposed when real property is transferred constitutes a transfer tax on real property.

ii. Proper application of Colorado caselaw regarding the differences between a "fee" and a "tax" demonstrates that the Attainable Housing Fee is a fee and, therefore, the Title set by the Title Board is not misleading.

Petitioner's argument that Initiative #3 is misleading rests on a misapplication of Colorado caselaw regarding the differences between a "fee" and a "tax." Proper application of the Court's holdings demonstrates that the Attainable Housing Fee is a fee under Colorado law imposed for the primary purpose of funding Attainable Housing programs, and therefore, the primary purpose of Initiative #3 is not to increase tax revenues collected by the State.

The Court has defined a "special fee" as a "charge imposed upon persons or property for the purpose of defraying the cost of a particular governmental service." *Barber*, 196 P.3d at 248 (quoting *Bloom*); *Bloom*, 784 P.2d at 308. "A special fee, however, might be subject to invalidation as a tax when the *principal purpose* of the fee is to raise revenue for general [governmental] purposes rather than to defray the expenses of the *particular service for which the fee is imposed*." *Barber*, 196 P.3d at 248-49 (quoting *Bloom*); *Bloom*, 784 P.2d at 308 (emphasis added).

The Court held in *Barber* that "a charge is a 'fee,' and not a 'tax,' when the express language of the charge's enabling legislation explicitly contemplates that the primary purpose is to defray the cost of services provided to those charged." 196 P.3d at 250. Initiative #3 explicitly states that "[t]he primary purpose of imposing a

Community Attainable Housing Fee upon the transfer of real property is to finance Attainable Housing in Colorado communities and is set at an amount that reflects the benefit enjoyed by the owners of real property as described [therein].” R., p. 3. The governmental service provided to the fee payers is the provision of funding for new or existing programs that support the provision of Attainable Housing. *See* R. p. 4. Further, the purchasers of property subject to the Attainable Housing Fee are reasonably likely to benefit from new or existing programs targeted at making more Attainable Housing available because they, as property owners, enjoy the benefits of stronger and more resilient communities where workers can live close to their jobs and be invested in the community, and enjoy a level of service achieved through fully staffed businesses, schools, hospitals, healthcare providers, emergency service provides, nonprofits, and government departments. R., p. 2.

The Petitioner implies that it is problematic for the benefits of the Attainable Housing Fee to not be specific to the property owners paying the fee and for the community to incidentally benefit from the fee. Petitioner’s Opening Br. at 11. However, the Court has made clear that “[a] charge may incidentally benefit the general public without becoming a tax.” *City of Aspen*, 418 P.3d at 515. Further, the Court has never required the government to demonstrate specific benefit to a particular fee payer for a charge to be a valid fee or to demonstrate that the amount

of the benefit to the fee payer was in an amount at least equal to the burden imposed. Demonstration of a special benefit to a charge payer in an amount at least equal to the burden imposed is the hallmark of a special assessment, not a fee. *Bloom*, 784 P.2d at 308 (finding that "[t]he essential characteristic of a special assessment is that it must confer a special benefit to the property assessed…[a] special assessment…must specially benefit or enhance the value of the premises assessed 'in an amount at least equal to the burden imposed'…a special fee…is a charge imposed upon persons or property for the purpose of defraying the cost of a particular governmental service.").

Several special fees approved by the Court were imposed for the purpose of defraying the costs of making specific governmental services available to the fee payer and the public generally, whether or not the fee payer chose to enjoy the benefits of the specific governmental service. For example, in *Bloom* the fees collected by the city were used for "the purpose of maintaining the network of city streets *without regard to whether the city's expenditures specifically relate[d] to any particular property from which the fees for said purpose were collected*." *Bloom*, 784 P.2d at 310 (emphasis added) (internal quotations omitted). As stated by the *Bloom* Court "[t]he owners and occupants of developed lots subject to the fee receive

the benefit of a program of city maintenance calculated to provide effective access to and from residences, buildings, and other areas within the city." *Id.*

Similarly, in *City of Aspen* the Court found that the fact that the regulatory scheme was more than just a recycling program, and that the benefits of the waste reduction program were shared by citizens and visitors to Aspen who never paid the charge because they never used a paper bag did not make the waste reduction fee a tax. 418 P.3d at 514-15. *See* Respondent's Opening Brief p. 17-18 for additional examples.

Last, the Petitioner correctly cites the test from *City of Aspen* but misapplies the test to Initiative #3. Petitioner's Opening Br. at 11-13. In *City of Aspen*, the Court opined that its prior decisions for determining whether a charge was a tax or a regulatory charge turned implicitly on "whether (1) the charge was imposed as part of a regulatory scheme enacted pursuant to the government's police powers and (2) the charge bore a reasonable relationship to the direct or indirect costs to the government of providing the service or regulating the activity." 418 P.3d at 512.

The Petitioner once again starts by focusing on which activity triggers the imposition of the Attainable Housing Fee, rather than following the Court's analytical framework by starting with determining "if the government is exercising its legislative taxation power or its regulatory police power." Petitioner's Opening

Br. p. 12; *City of Aspen*, 418 P.3d at 513. As we discussed in our Opening Brief, the Attainable Housing Fee would be imposed as part of the people's power to initiate proposed State legislation to provide services and regulate activities independent of the General Assembly, pursuant to Colo. Const. art. V, § 1, rather than the people's power to impose new taxes, pursuant to Colo. Const. art. X, § 20. *See* Respondent's Opening Br. p. 22-24.

The Petitioner continues her analysis by keeping her focus on the activity that triggers the imposition of the Attainable Housing Fee to assert that Initiative #3 is not creating a regulatory scheme for recording deeds. Petitioner's Opening Br. at 12. Once again, the Petitioner's focus on the event that triggers the imposition of the Attainable Housing Fee is misplaced. The Court's analysis has always centered on the primary purpose for which the charge is imposed, not the activity that triggers its payment. *See City of Aspen*, 418 P.3d at 513 (finding that the fee assessed on owners of developed lots fronting city streets in *Bloom* was part of a regulatory scheme enacted for the purpose of providing maintenance and upkeep of the city's local streets and related facilities without any mention of the fact that the triggering event for paying the fee was receiving a utility bill).

As we discussed in our Opening Brief, Initiative #3 is a proposed statute that would be enacted as part of the State's comprehensive regulatory scheme for

providing housing. *See* Respondent's Opening Brief, p. 23-24. Initiative #3 seeks to address the acute shortage of Attainable Housing in Colorado in an equitable and responsible manner and with consideration of the impacts of Attainable Housing deficits in Colorado communities. R., p. 2-3. Initiative #3's scheme provides funding for new or existing programs administered by the Division of Housing within the Colorado Department of Local Affairs (the "Division of Housing") that support the provision of Attainable Housing. R., p. 5.

Last, contrary to Petitioner's assertions, the Attainable Housing fee bears a reasonable relationship to the direct and indirect costs to the State of providing funding for new or existing programs for the provision of Attainable Housing. Again, the Petitioner maintains her focus on the activity that triggers the imposition of the Attainable Housing Fee rather than analyzing the direct and indirect costs to the State of providing the service for which the fee is imposed—funding for new or existing programs for the provision of Attainable Housing. *See* Petitioner's Opening Br. at 13.

The Court has determined that a fee charged as part of a regulatory scheme "does not need to exactly match the costs of providing the service or regulating the activity, but only needs to bear a reasonable relationship to that cost." *City of Aspen*, 418 P.3d at 515; *Bloom*, 784 P.2d at 308 ("Mathematical exactitude, however, is not

required, and the particular mode adopted by a [governmental entity] in assessing the fee is generally a matter of legislative discretion."). The Court will not set aside the methodology chosen by an entity with ratemaking authority unless it is inherently unsound. *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687, 694 (Colo. 2001). The Court's analysis has focused on the cost to the governmental entity imposing the fee of providing the service, while keeping in mind the question of whether the class of persons liable for the fee is so limited in relation to the nature of the service as to render the legislation invalid. *See Bloom*, 784 P.2d at 310.

It is inherently difficult to determine how much it will cost the State to fund new or existing programs for the provision of Attainable Housing in order to remedy the acute shortage of Attainable Housing in Colorado, and the Petitioner has not demonstrated that the methodology chosen as part of Initiative #3's regulatory scheme is inherently unsound. The Petitioner takes issue with the fact that some fee payers will pay more than others. Petitioner's Opening Br. at 13. However, the fee payers in *Bloom, Krupp*, and *Chronos* would pay different amounts based on a variety of factors under the methodologies chosen by the different governmental entities providing the services. *Bloom*, 784. P.2d at 305-06; *Krupp*, 19 P.3d at 691; *Chronos*, 512 P.3d at 106. The fact that some fee payers pay more than others should

not matter unless there is evidence presented that the methodology is inherently unsound. *See Krupp*, 19 P.3d at 694.

The Petitioner also takes issue with the fact that the methodology chosen for calculating the Attainable Housing Fee takes into account the amount of the final actual consideration paid or to be paid for the real property. Petitioner's Opening Br. at 13. Though it might not be the methodology that the Petitioner would have chosen, the Petitioner has not demonstrated that the amount derived from the methodology bears no reasonable relationship to the direct or indirect costs to the State incurred to provide funding for new or existing programs for the provision of Attainable Housing.

Since the money deposited in the Colorado Attainable Housing Fund (the "Fund") can only be used on new or existing programs that support Attainable Housing, the amounts collected will bear a reasonable relationship to the direct and indirect costs to the State of funding up to 100% of new or existing programs that support the provision of Attainable Housing. *See* R., p. 5. Additionally, the Attainable Housing Fee is paid by purchasers of real property across the State. R., p. 4. While Initiative #3 could have been imposed on a larger segment of the public, the Petitioner has not demonstrated that the class of persons liable for the fee is so

limited in relation to the nature of providing funding for Attainable Housing as to render the Attainable Housing Fee invalid.

iii. The Title for Initiative #3 does not need to include language about amending the Colorado Constitution or "tax change" language, so remanding the matter to the Title Board is unnecessary.

As part of the fifth issue proffered by the Petitioner, she asserts that the Title for Initiative #3 should be remanded to the Title Board with instructions to include language about amending the Colorado Constitution. As demonstrated above and in our Opening Brief, the Attainable Housing Fee is a fee, not a tax. Therefore, it is unnecessary for the Title for Initiative #3 to provide for the amendment of the Colorado Constitution. Additionally, since the Attainable Housing Fee is a fee, not a tax, it is unnecessary for the Title to include the language required by § 1-40-106, C.R.S. (2022) for a tax change. Thus, the matter does not need to be remanded to the Title Board.

II. The Title Board had jurisdiction to set the Title for Initiative #3 because it contains a single subject.

A. Standard of review; Preservation of Issues.

The Proponents generally agree with the Petitioner's recitation of the standard of review for single subject, except that the Petitioner failed to recognize that the Court liberally construes the single subject requirement and "only overturn[s] the

Title Board's finding that an initiative contains a single subject in a clear case." *Matter of Title, Ballot Title, & Submission Clause for 2013-14 #89*, 328 P.3d 172, 176 (Colo. 2014).

As stated in our Opening Brief, the Proponents agree that the issues raised on appeal were preserved because the Petitioner is a registered elector who filed a motion for rehearing pursuant to § 1-40-107(1), C.R.S. (2022). R., p. 14-15.

B. Initiative #3 contains a single subject, therefore, the Title Board had jurisdiction to set the Title for Initiative #3.

The Petitioner alleges that the Title Board lacked jurisdiction to set the Title for Initiative #3 as the third and fourth issues proffered in her Opening Brief. Petitioner's Opening Br. p. 14-19. Each of the Petitioner's allegations are based on her belief that Initiative #3 is attempting to amend the Colorado Constitution without saying so.

As demonstrated above and in our Opening Brief, the Attainable Housing Fee is a fee, not a tax. Therefore, it is unnecessary for the Title for Initiative #3 to provide for amendment of the Colorado Constitution. As such, the Title Board had jurisdiction to set the Title for Initiative #3.

Further, Initiative #3 contains a single subject because it tends to effectuate the one general objective of making more revenue available for new or existing programs that support the provision of Attainable Housing by imposing a new

Attainable Housing Fee. The Attainable Housing Fee is a fee imposed as part of a proposed change to the Colorado Revised Statutes, which does not need to be imposed by a constitutional amendment.

Further, the Court has found the creation of a fund where revenues are to be held as part of an initiative that raises revenue to be an implementing provision that is necessarily and properly related to the revenue raising initiative. *See Matter of Title, Ballot Title & Submission Clause for 2019-2020 #315*, 500 P.3d at 368, Appendix Section 22(d). Here, the creation of the Fund where revenue from the Attainable Housing Fee is to be held and administered by the Division of Housing is an implementing provision that is necessarily and properly related to Initiative #3. The establishment of a separate fund to hold fee revenue with certain restrictions is critical to the fee versus tax analysis under Colorado caselaw. Therefore, the establishment of the Fund is critical for the Attainable Housing Fee's classification as a fee. As such, the creation of the Fund is necessarily and properly related to Initiative #3's single subject of making more revenue available for new or existing Attainable Housing programs by imposing an Attainable Housing Fee.

CONCLUSION

For the foregoing reasons, the Title Board correctly determined that Initiative #3 contains a single subject and the Title fairly and correctly reflects the meaning

and intent of Initiative #3. The Proponents respectfully request the Court to deny the relief request in the Petition for Review and in the Petitioner's Opening Brief, and affirm the Title Board's setting of the Title for Initiative #3.

Respectfully submitted this 21st day of February, 2023.

/s/ Dalton Kelley
Dalton Kelley, #53948

/s/ Dee P. Wisor
Dee P. Wisor, #7237
BUTLER SNOW LLP

CERTIFICATE OF SERVICE

I certify that on the 21st day of February, 2023, the foregoing document was filed with the court via CCEF. True and accurate copies of the same were served on the following via CCEF:

Rebecca R. Sopkin, Esq.
720 Kipling St. #12
Lakewood, CO 80215
Attorney for Petitioner

Michael Kotlarczyk
Office of the Attorney General
1300 Broadway, 6th Floor
Denver, CO 80203
Attorney for the Title Board

/s/ Dalton Kelley
Dalton Kelley, #53948

/s/ Dee P. Wisor
Dee P. Wisor, #7237