

COLORADO SUPREME COURT
2 East 14th Avenue
Denver, CO 80203

Original Proceeding Pursuant to
§ 1-40-107(2), C.R.S. (2021-2022)
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,

and

Title Board: Jason Gelender, Melissa
Kessler, and David Powell.

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Case No. 2023SA15

THE TITLE BOARD'S OPENING 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, I certify that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 1,751 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

The brief contains, under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

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/ Michael Kotlarczyk

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ISSUES ON REVIEW

Whether the Title Board correctly determined that Proposed Initiative 2023-2024 #3 contains a single subject.

Whether the Title Board acted within its discretion when it declined to include language for this statutory initiative saying that it would amend the Colorado Constitution.

STATEMENT OF THE CASE

Proposed initiative 2023-2024 #3 proposes a new statutory scheme to create a “Colorado Attainable Housing Fund” for constructing, maintaining, and financing attainable housing in Colorado. *See Record*, p 3, filed Jan. 12, 2023. If enacted, the fee will be assessed when a deed transferring real property is recorded. *Id.* at 4. The fee will be .1% of the amount by which the purchase price exceeds \$200,000. *Id.*

At its December 21, 2022, meeting, the Board concluded that the measure contained a single subject and proceeded to set a title. *Id.* at 7-8. Petitioner Rebecca Sopkin, as well as others, filed a timely motion for rehearing. *Id.* at 14-15. The Board considered the motions at its

January 4, 2023 hearing, granting Petitioner’s motion only to the extent that it revised the title. *Id.* at 10.

Petitioner now challenges whether #3 contains a single subject and whether its title needs to state that, if enacted, it would amend the Colorado Constitution.

SUMMARY OF ARGUMENT

Petitioner’s objections to #3 boil down to a single issue: she believes that #3, if enacted, would violate a provision of the Taxpayer’s Bill of Rights (“TABOR”) that generally precludes new or increased taxes on real property transfers. But her arguments are misplaced—the Title Board does not have the authority to determine whether a measure is unconstitutional. Such arguments may be raised in a challenge to the legality of this initiative if it ever becomes law, but not in a challenge to the Title Board’s actions. All the Title Board is charged with is determining whether a proposed initiative contains a single subject, and if it does, setting a clear title. The Title Board appropriately performed both tasks here and the Court should affirm.

Petitioner first argues that #3 contains a second subject of amending TABOR. But it doesn't amend TABOR—as a statute, it cannot amend the constitutional provisions of TABOR. If Petitioner is correct that #3 is inconsistent with TABOR—a matter about which the Title Board expressed no opinion—then that will impact the effectiveness of #3 if it is placed on the ballot and enacted by Colorado voters. But it does not create a second subject.

For the same reasons, Petitioner's argument that the title should say that #3 is attempting to amend TABOR fails. The proposed statutory initiative cannot amend the Colorado Constitution, so the title should not say otherwise. This argument also suffers from the fatal flaw that Petitioner did not make it in her rehearing motion or otherwise argue it at the rehearing, so the issue is not preserved.

ARGUMENT

I. The proposed initiative contains a single subject.

A. Standard of review and preservation.

The Title Board has jurisdiction to set a title only when a measure contains a single subject. *See* Colo. Const. art. V, § 1(5.5). The Court will

“overturn the Board’s finding that an initiative contains a single subject only in a clear case.” *In re Title, Ballot Title, & Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 9 (quotations omitted). “In reviewing a challenge to the Title Board’s single subject determination, [the Supreme Court] employ[s] all legitimate presumptions in favor of the Title Board’s actions.” *In re Title, Ballot Title, & Submission Clause for 2013-2014 #76*, 2014 CO 52, ¶ 8. In doing so, the Court does “not address the merits of the proposed initiative” or “suggest how it might be applied if enacted.” *In re Title, Ballot Title, & Submission Clause for 2019-2020 #3*, 2019 CO 57, ¶ 8. Nor can the Court “determine the initiative’s efficacy, construction, or future application.” *In re 2013-2014 #76*, 2014 CO 52, ¶ 8. Instead, the Court “must examine the initiative’s wording to determine whether it comports with the constitutional single-subject requirement.” *In re 2019-2020 #3*, 2019 CO 57, ¶ 8.

The Title Board agrees this issue is preserved. Petitioner did not specifically raise this argument as a single subject argument, but did argue that the new measure would violate TABOR and that the new

measure contained multiple subjects. *See* Record at 14-15. And the single subject argument she advances now was also raised by other motions for rehearing and denied by the Title Board. *See id.* at 17.

B. Petitioner’s constitutional arguments do not show that #3 has multiple subjects.

Petitioner argues that #3 contains multiple subjects because it is a disguised constitutional amendment. *See* Pet. 3-4. According to Petitioner, the measure labels a tax as a “fee” in an attempt to skirt the TABOR provisions that govern measures proposing new taxes, which is an “implied [second] subject.” *Id.*; *see generally* Colo. Const. art. X, § 20.

Specifically, Petitioner argues that this measure not only proposes a new tax, but that the tax it proposes is specifically barred by TABOR. Section 8(a) of TABOR provides that “[n]ew or increased transfer tax rates on real property are prohibited. No new state real property tax or local district income tax shall be imposed.” Colo. Const. art. X, § 20(8)(a). But this is not a single subject argument—it’s an argument that #3 is unconstitutional. Because #3 proposes a statutory change

only, and a statute is necessarily subordinate to the constitution, Petitioner's argument is that #3 would be unconstitutional if enacted.

The Title Board expressed no opinion on the constitutionality of #3, nor could it have. The statutes governing the Board do not give it any authority to pass on the constitutionality of the proposals before it. As this Court has said: "Any problems in the interpretation of the measure or its constitutionality are beyond the functions assigned to the title board . . . and outside the scope of [this Court's] review of the title board's actions." *In re Title, Ballot Title & Submission Clause for 1997-98 #10*, 943 P.2d 897, 901 (Colo. 1997). The Board recognized this at the rehearing as well. *See Hearing Before Title Board on Proposed Initiative 2023-2024 #3* (Jan. 4, 2023), <https://tinyurl.com/2w948pj4> (statement at 33:15) (determining whether a measure proposes a fee or a tax is "outside the Board's jurisdiction").

Regardless of whether #3 would survive a constitutional challenge if enacted, the measure contains a single subject because its components are all "necessarily and properly connected" to the creation

and funding of an attainable housing fund. *In re 2013-2014 #76*, 2014 CO 52, ¶ 8. The measure establishes a new fund, defines the purpose of the fund (supporting attainable housing in Colorado), and defines the manner in which the fund will be funded. In a similar case, this Court found a single subject when a new preschool program was funded by new and reallocated taxes on nicotine products because the various funding mechanisms were all “implementing provisions that are necessarily and properly related to Initiative #315’s single subject of creating and administering a Colorado preschool program funded by state taxes on nicotine and tobacco products.” *In re Title, Ballot Title & Submission Clause for 2019-20 #315*, 2020 CO 61, ¶ 20.

The same is true here—the funding mechanism for the Colorado Attainable Housing Fund is an implementing provision that is necessarily and properly connected to the single subject of creating an attainable housing fund funded by a fee assessed on recorded deeds. The measure thus satisfies the single subject requirement.

This analysis does not require the Court to determine whether #3 proposes a new tax or a fee because Petitioner’s objection does not raise any single subject concerns. *See In re 1997-98 #10*, 943 P.2d at 901 (constitutionality of initiative is “outside the scope of [this Court’s] review of the title board’s actions”). The Title Board’s statutes do not grant the Board jurisdiction to determine whether a measure proposes a new tax or fee, and the Board here made no such determination.

II. The title set by the Board satisfies the clear title standard.

A. Standard of Review and preservation.

When considering a challenge to a title, the Court does not “consider whether the Title Board set the best possible title.” *In re Title, Ballot Title & Submission Clause for 2019-2020 #3*, 2019 CO 107, ¶ 17. “The Title Board’s duty in setting a title is to summarize the central features of a proposed initiative.” *In re Title, Ballot Title, & Submission Clause for 2013-2014 #90*, 2014 CO 63, ¶ 24. The Board “is given discretion in resolving interrelated problems of length, complexity, and clarity in setting a title and ballot title and submission clause.” *Id.*

The Board does not agree that Petitioner preserved her challenge that #3's title should say that it is amending the Colorado Constitution. *See* Record at 8. The only clear title objection she raised before the Title Board was that the title should reference rental properties. *See id.* The Title Board agreed and granted her motion as to that issue. *Compare* Record at 7 *with* Record at 5. But she did not make the argument she now presents.

B. The title does not need to reference the Colorado Constitution.

Petitioner next argues that “the title must make it clear that this is an attempt to amend the Colorado Constitution as its provisions are in direct contradiction to existing Colorado Constitution Article X, Section 20 (8)(a).” Pet. 4. This argument is circular because it assumes as true its own conclusion: that the measure is an attempt to amend the Colorado Constitution. That is a determination the Title Board is not permitted to make, as shown above. And because the Title Board cannot make that determination, the title cannot assert it as true.

In any event, Petitioner’s apparent concern—that voters will not realize they are amending the constitution when they vote on #3—is misplaced. It is axiomatic that “where a statute and the constitution are in conflict the constitution is paramount law.” *Passarelli v. Schoettler*, 742 P.2d 867, 872 (Colo. 1987). So if #3 is ever enacted, it cannot be given any effect that “amends” the constitution.

Petitioner raised no other challenge to whether the title satisfies the clear title standard. It does, and the title should be affirmed.

CONCLUSION

The Title Board correctly determined that #3 contains a single subject and set an appropriate title. The Court should therefore affirm the title set by the Title Board on 2023-2024 #3.

Respectfully submitted on this 30th day of January, 2023.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S OPENING BRIEF** upon the following parties electronically via CCEF, at Denver, Colorado, this 30th day of January, 2023, addressed as follows:

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