SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	DATE FILED: May 10, 2023 4:04 PM
Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2023-2024 #21 ("Limitation on Property Tax Increases") **Petitioner: Dianne Criswell** **v.** **Respondents: Suzanne Taheri and Steven Ward** **and** **Title Board: Theresa Conley, Eric Meyer, and Ed DeCecco**	**▲COURT USE ONLY▲**
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PETITIONER'S ANSWER BRIEF ON PROPOSED INITIATIVE 2023-2024 #21 ("LIMITATION ON PROPERTY TAX INCREASES")

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:

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s/ Nathan Bruggeman
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INTRODUCTION

The Title Board contends that, because Respondents included a statement saying that a "purpose" of a provision supports the single subject, the measure passes single subject scrutiny. The implication of the Board's position breaks new ground: if proponents frame a concept (even if they do so inaccurately) as a purpose, there is no single subject violation. The single subject requirement was adopted to avoid this type of caprice—leaving it to proponents to decide how many subjects the voters should consider under a single rubric. And if the Board is correct, proponents can simply draft around single subject problems. But, as its case law establishes, the Court looks beyond how proponents frame a measure to its substance to determine whether the single subject requirement has been satisfied. The Title Board here failed to do so, as Initiative #21's authorization for state spending on fire protection reimbursements operates independently of the measure's single subject of limiting property tax increases.

Even if the Court disagrees that there is a single subject violation, it should return the measure to the Board to correct clear title errors related to the use of the word "offset" and misdescribing the measure as including exceptions to the property tax revenue cap. Accordingly, the Court should reverse the Title Board for lack of

jurisdiction or, in the alternative, remand to the Board with instructions to correct Initiative #21's title.

LEGAL ARGUMENT

I. The Initiative violates the single subject requirement because its substantive language does not condition state fire protection spending to replacing or backfilling lost local revenue.

The Title Board defends its jurisdiction to set a title for Initiative #21 on two grounds. First, it contends that, because the measure says a "purpose" of the fire protection reimbursements is to "offset" lost local revenue, the state spending authorization is properly connected to the measure's single subject. Second, the Board urges that jurisdiction is appropriate under the Court's precedent. Neither argument is persuasive.

A. A statement or declaration of purpose does not change the substance of a provision's plain language.

The Board's single subject defense rests on the inclusion in the spending authorization's introductory clause of a statement or declaration of purpose. (*See* Title Bd. Op. Br. at 6-7.) This clause reads as follows:

> ***For the purpose of offsetting revenue resulting from the cap in property tax*** and to fund state reimbursements to local government entities for fire protection, as authorized by the voters at the statewide election in the November 2023, in fiscal year commencing on July 1, 2024 the state shall be authorized to retain and spend up to one hundred million dollars per year in revenue exempt from limitations under section 20 of article X of the state constitution.

(Initiative #21, sec. 2, proposed C.R.S. § 24-33.5-1201(6) [Certified R. at 2] (emphasis added).) In effect, what the Board argues is that this statement of "purpose" should be construed as part of the provision's substantive or operative language. That is not, however, the role that a legislative statement of purpose plays in statutory construction—and it should not be used in the single subject context that way either. Rather than let proponents draft around the constitutional single subject requirement through statements of purpose, the analysis should focus on a measure's substantive language.

1. The Court should analyze a measure's substantive language to determine compliance with the single subject requirement.

A "purpose" describes, by definition, "[a]n objective, goal, or end." *People v. Ross*, 2019 COA 79, ¶ 31 (quoting Black's Law Dictionary); Ballantine's Law Dictionary (defining "purpose" as "[a]n aim. A design or plan. An intention.") A statement of "purpose" is, in other words, a legislative policy declaration. *See Zab, Inc. v. Berenergy Corp.*, 136 P.3d 252, 255 (Colo. 2006) ("The legislative declaration or purpose aids in our review."). Under Colorado law, a legislative declaration is ***not*** part of the substantive language of a statutory provision. A legislative declaration or policy is, instead, an interpretative tool that may be used when there is ambiguity in statutory language. *See* C.R.S. § 2-4-203(1)(g); *see also, e.g., Stamp v. Vail Corp.*, 172 P.3d 437, 443 (Colo. 2007).

This Court has recognized the distinction between a provision's purpose and its substantive language in its ballot title case law. In *Fair Treatment of Injured Workers Amendment*, petitioners argued that the Board erred by failing to include a policy purpose for the proposed constitutional amendment in the measure's title. *In re Title, Ballot Title and Submission Clause, and Summary Approved January 19, 1994 and February 2, 1994, for the Proposed Initiated Constitutional Amendment Concerning the "Fair Treatment Of Injured Workers Amendment*," 873 P.2d 718, 720-21 (Colo. 1994). The Court explained that the Board's obligation was to "correctly and fairly express the true meaning of the proposed initiative" based on its "express language," and a policy reason for the initiative (providing benefits "at a reasonable cost to employers") did "not create a new legal standard which is likely to be controversial." *Id.* at 721. Although the case did not concern single subject, its analysis applies with equal force: a "purpose" for a provision is different from the provision's "true meaning," in other words, its substantive effect or operation. *See also In re Title, Ballot Title and Submission Clause for 2013-2014 #90*, 2014 CO 63, ¶ 21 (policy rationale is not part of the test for single subject compliance).

Properly construed, what this provision in the measure provides for is a new authority for the state "to retain and spend up to one hundred million dollars per year" "to fund state reimbursements to local government entities for fire

protection."[1] While Respondents say that a "purpose" for doing so may be for "offsetting" the property tax revenue cap, there is nothing in the provision's substantive language that in fact conditions, limits, or requires a relationship or any connection between the new spending authorization and lost local revenue. In other words, there is nothing in the provision's language that requires the state spending to "offset" lost local revenue for the state spending in order to be allowed. *See Browne v. Indus. Claim Appeals Office*, 2021 COA 83, ¶ 36 ("offset" means "to balance; to cancel by contrary claims or sums; to counteract" (quoting *Lalime v. Desbiens, 55 A.2d 121* (Vt. 1947))). Upon voter approval, the state can then retain and spend the $100 million.[2]

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[1] To the extent the Board argues that Petitioner "concede[d]" below that the provision operates as an offset, (*see* Title Bd. Op. Br. at 12), they misconstrue the discussion. Petitioner agreed that circumstances could arise in which the provision would have the effect of being an offset (i.e. the state spending in fact was used to backfill a loss of local revenue for fire protection), but explained that, for single subject purposes, that hypothetical happenchance is not the right consideration. Rather, the proper consideration is what the language in the statute authorizes, and the statute does not require those conditions to be present for the state to spend the $100 million each year. *See* Apr. 19, 2023, Hr'g before the Initiative Title Setting Rev. Bd., at 09:56 to 11:04, available at https://csos.granicus.com/player/clip/377?view_id=1&redirect=true&h=f0aff54d05746292d0c2c9a5899d391b.

[2] The Board contends that Petitioner is speculating about how the measure will operate, which is outside of the scope of this Court's review. (Title Bd. Op. Br. at 3, 7.) Petitioner isn't speculating at all but is, instead, addressing the language used in the measure to understand the subjects included in the measure. Although the scope of review of a proposed measure is limited, the Board and this Court "must, of

It is critical that, in assessing a measure's compliance with the single subject requirement, the Board's and Court's review focuses on the substantive language of a measure rather than a gloss proponents attempt to put on that language through a policy or purpose statement. If all proponents must do to satisfy the single subject requirement is state that a "purpose" of a provision is to support the measure's single subject, then the single subject rule will become a virtual nullity. Every proponent can evade the requirement through the inclusion of purpose statements. Not only is that facially inconsistent with the constitutional requirement, as the Court has recognized, proponents cannot evade the single subject requirement through artful drafting such as the use of an overly general theme. *See, e.g.*, *In re Titles, Ballot Titles, & Submission Clauses for Proposed Initiatives 2021-2022 #67, #115, & #128 ("In re 2021-2022 #67, #115, & #128")*, 2022 CO 37, ¶¶ 19-23 (regulation of alcohol too general of a theme for a single subject). In fact, this Court has held that the general theme of "revenue" or "government revenue changes" is too general a theme to satisfy the single subject requirement. *See In re Title, Ballot Title and Submission Clause, and Summary with Regard to a Proposed Petition for an*

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necessity, engage in a limited analysis of the meaning of each complex initiative to determine what is the subject or subjects of the initiative." *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 172, No. 173, No. 174, and No. 175*, 987 P.2d 243, 245 (Colo. 1999).

Amendment to the Constitution of the State of Colorado Adding Subsection (10) to Section 20 of Article X (Amend Tabor 25), 900 P.2d 121, 125 (Colo. 1995).

Just as the Board and the Court must pierce an overly generalized theme to determine if the single subject requirement has been satisfied, the Board and the Court should look beyond a proponents' statement of purpose to the substantive language of a measure in determining whether it includes multiple subjects.

2. Respondents admitted that the authorization for fire protection spending does not operate as an offset.

Not only does the measure's plain language make clear how it will operate, Respondents admitted that the measure means what it says. As explained in Petitioner's opening brief, legislative staff discussed this exact issue with Respondents during the review and comment hearing for the Initiative. Respondents admitted that the authorization is for the state to spend a "flat" $100 million, and that the spending authority exists "irrespective" of local governments losing revenue for fire protection efforts. (*See* Mar. 24, 2023, Review and Comment Hr'g ("Review and Comment Hr'g"), at 10:33:25 to 10:35:07.[3]) Respondents agreed that the text and meaning of their measure parallel one another: the state spending authority exists

[3] The hearing recording is available at https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20230427/72/14286.

even if local government budgets for fire protection "don't actually experience any kind of revenue reduction as a result of the measure." (*Id.*) Respondents' "true intent" is consistent with the plain meaning of the provision, a fact which the Board does not acknowledge. *See* C.R.S. § 1-40-106(3)(b) (requiring that title "correctly and fairly express the true intent and meaning" of the measure); *In re Title, Ballot Title and Submission Clause, and Summary For 1999-2000 # 25*, 974 P.2d 458, 465 (Colo. 1999) (explaining that "the Board must give deference to the intent of the proposal as expressed by its proponent").

3. Respondents could have drafted Initiative #21 to include a reimbursement scheme as part of their single subject, but they did not.

If Respondents intended for the new state spending authority to operate as part of their measure's single subject, they could have drafted it so that the state's spending authority was limited or conditioned to replacing the amount of local revenue that is lost due to these tax cuts.

By way of example, the General Assembly has recently drafted just such a scheme. Last year, the General Assembly passed Senate Bill 22-238, which is a property tax reform bill. The bill included a state reimbursement program to cover revenue lost "as ***a result of*** the changes made in Senate Bill 22-238, enacted in 2022, that reduced valuations for assessment." C.R.S. § 39-3-210(2)(a) and (b) (emphasis

added). And at the conclusion of the 2023 session, the General Assembly considered another property tax reform bill that, while modifying the backfill mechanism established in Senate Bill 22-238, maintains the limitation that state reimbursements are for lost local property tax revenue resulting from the property tax reforms. *See* Senate Bill 23-303, "Reduce Property Taxes And Voter-approved Revenue Change,"[4] sec. 14, proposed amendments to C.R.S 39-3-210. These bills demonstrate how an actual offset provision works.

The critical distinction between Senate Bills 22-238 and 23-303 and Initiative #21 is that the bills do not provide an independent authority for the state to reimburse local governments. Rather, the state reimbursement authority in those bills is tied to lost local revenue that "results" from the tax changes. In contrast to Senate Bills 22-238 and 23-303, Respondents chose not to condition or tie their state fire protection reimbursements to any loss in fact experienced by local governments. As such, they created a second subject.

[4] The latest text of Senate Bill 23-303 may be found at https://leg.colorado.gov/bills/sb23-303.

B. This Court's precedent does not support the Board's position.

The Board argues that two cases from this Court support its position that the reimbursement scheme here is part of the measure's single subject. The cases upon which the Board relies do not support their position.

1. *Amend 32* authorizes state reimbursements for revenue lost by local districts "because of" a tax change.

As discussed in her opening brief, Petitioner recognizes that this Court in *Amend #32* held that a measure can combine a tax change with a state reimbursement scheme. (Pet.'s Op. Br. at 13-15 (discussing *In re Title, Ballot Title and Submission Clause, and Summary with Regard to a Proposed Petition for an Amendment to the Constitution of the State of Colorado Adding Paragraph (D) Subsection (8) of Section 20 of Article X ("Amend Tabor #32")*, 908 P.2d 125 (Colo. 1995)).) *Amend #32* does not, however, give ballot measure proponents unfettered freedom to do so.

The case recognizes the rule that "if an initiative effects one general object or purpose, it will satisfy the single-subject requirement," but if it combines "incongruous subjects" it will not. 908 P.2d at 128 (internal citation omitted). The measure there did not run afoul of this standard because state reimbursements were limited to "monthly state-replacement of local revenue impacts." *Id.* at 131 (quoting measure). In other words, the reimbursement obligation was limited to "local

revenues that are lost ***because of*** the tax credit provision." *Id.* at 129 (emphasis added); *see also In re Title, Ballot Title and Submission Clause, and Summary for 1997-98 # 84*, 961 P.2d 456, 460 (Colo. 1998) (explaining that the measure in *Amend #32* passed the single subject test because "[t]he state was simply required to replace the revenue that localities lost ***as a result of*** the tax credit" (emphasis added)).

Initiative #21 does not operate like the tax measure considered in *Amend #32*. Unlike that measure, the state fire protection reimbursement is not limited to replacing local revenue lost "because of" Initiative #21's tax change. The reimbursement scheme does not affect "one general object or purpose" as a result and is instead an impermissible coupling of "incongruous subjects."

2. <u>The Court is not bound by its summary affirmance in Initiative 2021-2022 #27 as it has no precedential value.</u>

The Board also relies on this Court's affirmance in Initiative 2021-2022 #27. *See In re Title, Ballot Title, and Submission Clause for Proposed Initiative 2021-2022 #27 ("2021-2022 #27")*, No. 2021SA151 (Colo. May 27, 2021). It urges that the measures' respective language are "closely mirror[ed]," and that the connection between the fire protection reimbursements and the single subject is even "closer" than were the homestead reimbursements included in #27. (Title Bd.'s Op. Br. at 9-10.) The Court should not consider its affirmance of #27.

First, the Court has explained that summary affirmances of the Title Board have no persuasive value in later appeals from the Board. In *2005-2006 #55*, the Court considered the effect of a prior affirmance of title setting for an earlier version of a measure on the title setting for a later version of the measure. *In re Title and Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.3d 273, 276 (Colo. 2006). The Court had affirmed the title setting of the earlier initiative version "without opinion." *Id.* In the appeal of the later version of the initiative, the Court explained that, as the prior decision was "not selected for publication," it had "no value as precedent." *Id.*; *cf.* Colo. App. R. 35(e) (only published opinions are binding); *Patterson v. James*, 2018 COA 173, ¶ 40 ("our supreme court has made it equally clear that unpublished opinions 'have no value as precedent'" (internal citation omitted)). Thus, as #27 was summarily affirmed without opinion, the Court should not consider that affirmance in this appeal.

Second, it is impossible to know how the Court construed the measure in #27 or the application of the single subject requirement to it because the Court issued only a one-sentence summary affirmance. *See 2021-2022 #27*, No. 2021SA151 (Colo. May 27, 2021) ("IT IS ORDERED that the actions of the Title Board are AFFIRMED."). While there may be some similarities in language between the measures, the reimbursement schemes differ. Initiative #27 addressed

reimbursements related to the homestead exemption, which are governed by existing state law, while Initiative #21 creates an entirely new state spending authorization. Whatever the drafting similarities, the substance of the reimbursements are not a "mirror" such that it can be assumed that the single subject requirement applies in the same manner. Because there was no written decision in #27, neither the Court, the Board, nor the parties can apply it to this Initiative. Accordingly, consistent with the Court's direction in *2005-2006 #55*, the Court should not consider its summary affirmance in #27 as it has "no value as precedent."

C. The Board does not consider the danger of log rolling.

With respect to the danger the measure presents for log rolling—the combining of different topics to improve the prospect of passage—the Board simply argues that, because the spending authorization is part of the measure's single subject, there is no danger of log rolling. (*See* Title Bd. Op. Br. at 7-8.) This argument might have purchase if the new spending authorization in fact operated as an offset to lost local revenue—but, as explained above, it does not.

Property tax cuts appeal to a distinct set of voters, namely, property owners, while a new pot of state money for fire protection is an inducement to voters who may not own property (or who do not care that much about property taxes) but who are affected by or afraid they will be affected by the risk of fire. Voters who support

one outcome must vote for the other outcome even if they do not support it. (*See* Pet.'s Op. Br. at 15-17 (discussing different political constituencies).) The Board does not address the different policy considerations and interests that various groups of voters will attach to the separate subjects of this measure, which is the central question behind the log-rolling prohibition—and as Petitioner explained, given the distinct policy choices implicated by the measure, the log rolling danger is real. *See In re 2021-2022 #67, #115, & #128,* 2022 CO 37, ¶¶ 21-23 (explaining, in holding a measure violated the single subject requirement, how a measure combined distinct "policy choice[s]" that appealed to the interests of different groups voters).

II. The Board's clear title arguments ignore the measure's plain language.

A. It is error to describe the fire protection reimbursement as an "offset" when it does not operate as an "offset."

The Board and Petitioner agree that, whether the Board erred in describing the fire protection spending authorization as offsetting revenue lost from the property tax cap, will turn on which interpretation of measure the Court adopts. For the reasons given in her opening brief and above, the Board erred in its interpretation of the provision. Petitioner notes that the Board is incorrect that it can use "offset" in the title simply because the language appears in the measure. (Title Bd. Op. Br. at 12.) *See In re Title, Ballot Title & Submission Clause for 2015-2016 #156*, 2016 CO

56, ¶ 15 (concluding that a title violated the clear title requirement even though it "substantially tracks language found in the initiative itself").

B. The Board ignores the language in the measure that dictates what happens if a property's use changes or square footage increases by more than 10 percent.

The Board contends that it properly described the measure's requirement for "reappraisal" of a property if its use changes or its square footage increases by more than 10 percent as exceptions to the measure's property tax revenue cap. Their argument rests on the measure's use of "unless" to introduce the circumstances requiring reappraisal. (Title Bd. Op. Br. at 14.) Petitioner and the Board generally agree on the meaning of "unless." (*Compare id. with* Pet.'s Op. Br at 21.) The Board's argument falters because it does not account for all of the measure's language. The Initiative does not only say "unless" but, instead, includes a final modifying clause. If one of the two circumstances arises, that modifying clause says what happens: "in which case the property's actual value shall be ***reappraised***."

The Board nowhere explains how a "reappraisal" means that the measure's property tax revenue cap will not apply or will apply differently—because, under the language of the measure, a reappraisal does not change the cap. The property tax revenue cap operates independently of the method by which a property tax is calculated, including the appraisal of the property. The tax cap does not change the

formula or process; it is a cap on the output of that formula or process. Changing the value of the property (a "reappraisal") does not change that limitation. It is confusing and misleading to describe the measure as including exceptions when it does not, and the Court should correct the Board's error.

CONCLUSION

Accordingly, for the reasons given in Petitioner's opening brief and above, Petitioner respectfully requests that the Court reverse the Board and hold that Initiative #21 violates the Constitution's single subject requirement or, in the alternative, return the title to the Board with instructions to modify the title to accurately describe the measure.

Respectfully submitted this 10th day of May, 2023.

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I, Nathan Bruggeman, hereby affirm that a true and accurate copy of the **PETITIONER'S ANSWER BRIEF ON PROPOSED INITIATIVE 2023-2024 #21 ("LIMITATION ON PROPERTY TAX INCREASES")** was sent electronically via CCEF this day, May 10, 2023, to the following:

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