

<p>COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203</p>	<p>DATE FILED: May 3, 2023 4:11 PM</p>
<p>Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2021-2022) Appeal from the Ballot Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2023-2024 #21 (“Limitation on Property Tax Increases”)</p>	
<p><b>Petitioner:</b> Dianne Criswell,</p>	
<p>v.</p>	
<p><b>Respondents:</b> Suzanne Taheri and Steven Ward,</p>	<p>▲ COURT USE ONLY ▲</p>
<p><b>and</b></p>	
<p><b>Title Board:</b> Theresa Conley, Eric Meyer, and Ed DeCecco.</p>	<p>Case No. 2023SA109</p>
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<p><b>THE TITLE BOARD’S OPENING BRIEF</b></p>	

## 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 2,703 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

I. Whether the Title Board correctly determined that Proposed Initiative 2023-2024 #21 contains a single subject.

II. Whether the Title Board acted within its discretion to set a clear title when it used the words “offset” and “exception” to describe parts of the measure.

## STATEMENT OF THE CASE

Proposed initiative 2023-2024 #21 proposes to cap property tax increases to 3% annually. *See* Record, p 2, filed Apr. 26, 2023. The 3% cap does not apply if the property is substantially improved by adding at least 10% or more square footage or if the property’s use changes, in which case the property must be reappraised. *See id.* The measure also proposes to offset lost revenue caused by the cap by authorizing the state to retain and spend up to \$100 million per year to reimburse local governments for fire protection. *See id.*

At its April 5, 2023, meeting, the Board concluded that the measure contained a single subject and set a title. *Id.* at 4. Petitioner

Dianne Criswell, as well as the proponents, filed a timely motion for rehearing. *Id.* at 6-11. The Board considered the motions at its April 19, 2023 meeting, and denied both motions in their entirety. *Id.* at 4-5.

The title fixed by the Board for #21 is as follows:

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 \$2.2 billion in property tax revenue by an amendment to the Colorado constitution and a change to the Colorado Revised Statutes concerning a 3% annual limit on property tax increases, and, in connection therewith, creating an exception to the limit if a property's use changes or its square footage increases by more than 10%, in which case, the property is reappraised, and, beginning in fiscal year 2024-25, allowing the state to annually retain and spend up to \$100 million of excess state revenue, if any, as a voter-approved revenue change to offset reduced property tax revenue and to reimburse local governments for fire protection.

*Id.* at 4.

Petitioner now challenges whether #21 contains a single subject and whether the title complies with the clear title requirement.

### **SUMMARY OF ARGUMENT**

The proposed initiative contains a single subject of creating a 3% annual limit on property tax increases. Petitioner objects that the

provision offsetting revenue lost due to that limit creates a second subject. But that provision is necessarily and properly connected to the 3% limit, as the plain language of #21 states that the “purpose” of the offset is to replace the revenues lost by the limit. Record, p 2. Petitioner speculates that the offset may still apply even if the 3% limit doesn’t cause a loss in revenue. But the Court should not engage in such speculation as to the potential effects of the initiative in determining whether the single subject requirement is met. Additionally, #21 does not create the risk of logrolling or causing voter confusion, which are the principal ills the single subject rule seeks to avoid. The measure therefore satisfies the purposes of the single subject rule and the Court should affirm the Title Board here, as it has in other initiatives containing revenue offsets.

Petitioner’s clear title objections fail to overcome the strong deference this Court extends to the titles set by the Board. First, the use of the word “offset” to describe the revenue replacement mechanism does not rise to the level of making the title misleading or inaccurate.



The measure itself says the “purpose” of the revenue replacement mechanism is to “offset” the revenue lost as a result of the cap, and Petitioner’s speculation about the practical effects of how that offset may operate do not render the title misleading. *See* Record, p 2.

Petitioner also argues that the title should not use the word “exception” to describe part of the measure. But the title gives effect to the language actually used in #21, which contains the word “unless.” Petitioner’s argument to the contrary fails to give effect to the language actually chosen and is instead based on her own strained interpretation of how the measure may be implemented. This is not enough to sustain a clear title objection.

## **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. To satisfy the single-subject requirement, the “subject matter of an initiative must be necessarily and properly connected rather than disconnected or incongruous.” *In re 2013-2014 #76*, 2014 CO 52, ¶ 8.

The Title Board agrees this issue is preserved. *See Record at 6-8.*

**B. The provision offsetting lost revenue to local governments for fire protection does not create a second subject.**

The single subject of 2023-2024 #21 is creating a 3% annual limit on property tax increases. The provision offsetting revenue lost as a result of that limit does not create a second subject. “[E]xamin[ing] the initiative’s wording to determine whether it comports with the constitutional single-subject requirement” makes clear that the offsetting provision is directly tied to the newly created limit on property tax increases. *In re 2019-2020 #3*, 2019 CO 57, ¶ 8. The initiative states that the reimbursements to local governments are “for the purpose of offsetting revenue resulting from the cap in property tax,” which is the primary focus of the measure. Record, p 2. This offset is therefore “necessarily and properly connected” to the tax limit “rather than disconnected or incongruous.” *In re 2013-2014 #76*, 2014 co 52, ¶ 8.

Petitioner objects that the offsetting provision may apply even when the tax limit doesn’t cause a loss in revenue, so it must be a second subject because the fit between the offset and the tax limit isn’t

perfect. But a perfect fit in every conceivable scenario is not required to satisfy the single subject test. Instead, “implementation details that are directly tied to the initiative’s central focus do not constitute a separate subject.” *In 2021-2022 #16*, 2021 CO 55, ¶ 29 (quotations omitted).

Here, the offset provision is directly tied to the initiative’s central focus: as the measure itself states, the offset is “for the purpose of” replacing the revenue lost by the 3% tax increase cap. Record, p 2. Petitioner’s argument that the offset may sometimes apply when there are no lost revenues is “mere speculation about the potential effects of the initiative,” and this Court should not “predict its application if adopted by the electorate.” *In re Title, Ballot Title, & Submission Clause for 2007-2008 #62*, 184 P.3d 52, 59 (Colo. 2008) (quotations omitted).

Additionally, the two purposes of the single-subject rule are satisfied by #21. First, the single-subject rule seeks to avoid “logrolling,” where the policy attempts to obtain support from various factions by combining unrelated subjects in a single matter. *See In re 2013-2014 #76*, 2014 CO 52, ¶ 32. But #21 presents no such risk. Because the

measure seeks only to offset some of the effects of a loss in revenue, it does not seek support from separate factions. Second, the measure does not contain hidden aspects “coiled up in the folds of a complex initiative.” *See id.* In a single page, this measure straightforwardly applies a cap on tax increases (subject to certain exceptions) and seeks to offset at least part of the revenue lost as a result of the cap. Voter confusion is not a serious risk with #21.

This Court has previously held that replacing revenue lost as a result of a change in tax policy does not create a second subject. In a prior case, the Court considered a measure that would have established a tax credit “that applies to six state or local taxes” and would “require[] the state to replace on a monthly basis local revenues that are lost because of the tax credit provision.” *In re Amend TABOR No. 32*, 908 P.2d 125, 129 (Colo. 1995). That measure contained a single subject because the “provision of the Initiative requiring mandatory replacement of lost local government revenues is dependent upon and closely connected to the \$60 tax credit.” *Id.* The same is true here: #21’s

cap on growth will decrease local revenues, at least in some instances, and permitting the state to retain revenue and replace the lost local revenue is “dependent upon and closely connected” to the cap that causes the lost revenue in the first place. *See id.*

This measure and title also closely mirror 2021-2022 #27, which appeared on the 2021 ballot as Proposition 120. That measure reduced residential property tax rates and contained a similar offsetting provision as that found here in #21:

<u>Proposition 120</u>	<u>2023-2024 #21</u>
<p><b>For the purpose of off-setting lost revenue</b> from a reduction in property tax to fund state reimbursements to local government entities for the application of the homestead exemption, . . . <b>the state shall be authorized to retain and spend</b> up to 25 million per year in revenue for warrants otherwise authorized under this section.</p> <p><i>See Record, p 2, 2021SA151 (May 7, 2021) (emphasis added).</i></p>	<p><b>For the purpose of offsetting revenue</b> resulting from the cap in property tax and to fund state reimbursements to local government entities for fire protection, . . . <b>the state shall be authorized to retain and spend</b> up to one hundred million dollars per year in revenue exempt from limitations under section 20 of article X of the state constitution.</p> <p>Record at 2 (emphasis added).</p>

As here, an objector in 2021 challenged this offset as a second subject, but this Court affirmed in an unpublished order, and the matter went to the voters. *See* Order, 2021SA151 (May 27, 2021). As Title Board member Ed DeCecco noted at the rehearing on #21, the connection between the cap and the offset here is even tighter than the connection between the rate reduction and the offset in Proposition 120:

Because in this instance, local protection districts actually will be losing or potentially losing the revenue as a result of the 3% cap. Whereas the homestead exemption seemed somewhat independent in that it was happening either way and frankly the state's already reimbursing the local governments so they weren't losing any money anyway. So if anything, the connection in this one seems tighter to me.

*Hearing Before Title Board on Proposed Initiative 2023-2024 #21* (Apr. 19, 2023), <https://tinyurl.com/yy4sx2b9> (statement at 25:40).

Accordingly, this Court's precedent and recent history confirm what the plain language of #21 makes clear: that it contains a single subject and that its provisions are necessarily and properly connected.

**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 Court will reverse the title set by the Board “only if a title is insufficient, unfair, or misleading.” *Id.* ¶ 8.

The Title Board agrees this issue is preserved. *See Record* at 8-9.

**B. The Board acted within its discretion in using the word “offset.”**

Petitioner’s clear title objection to the use of the word “offset” largely mirrors her single subject objection addressed above. Because the provision may, in theory, operate in certain circumstances where it



does not strictly offset revenue lost by the tax increase cap, Petitioner contends it is misleading to use the word “offset.” *See* Record, p 8. But neither the Board nor this Court may “speculate as to the measure’s efficacy, or its practical or legal effects” *In re 2007-2008 #62*, 184 P.3d at 60. And even Petitioner concedes that it can operate as an offset.

*Hearing Before Title Board on Proposed Initiative 2023-2024 #21* (Apr. 19, 2023), <https://tinyurl.com/yy4sx2b9> (statement at 10:15). Further, #21 itself uses the word “offset” to describe what it is doing. Record, p 2. Petitioner may think another word or phrase would work better, but the Board need not “set the best possible title.” *In re 2019-2020 #3*, 2019 CO 107, ¶ 17. Because the title’s use of the word “offset” accurately describes both the purpose and effect of the measure, the title is not “insufficient, unfair, or misleading” and should be affirmed. *In re 2013-2014 #90*, 2014 CO 63, ¶ 8.

**C. The Board acted within its discretion in using the word “exception.”**

Finally, Petitioner takes issue with the title’s use of the word “exception” to describe part of the measure. But this language closely tracks the language actually used in #21, as shown in the table below.

<u>Proposed statutory language</u>	<u>Title language</u>
<p>“No tax revenue on a property will increase more than three percent annually <i>unless</i> the property is substantially improved by adding more than ten percent square footage to the existing buildings or structures or its use changed in which case the property’s actual value shall be reappraised.”</p> <p>Record at 2 (emphasis added).</p>	<p>“creating an <i>exception</i> to the [3% annual] limit if a property’s use changes or its square footage increases by more than 10%, in which case, the property is reappraised.”</p> <p>Record at 3 (emphasis added).</p>

Petitioner argues that the statutory language does not actually create an exception to the 3% cap, but instead merely creates an additional requirement that the property be reappraised when substantial improvements or changes in use occur. *See* Record at 9. This argument fails to give effect to the plain words of the measure. *See, e.g., In re 2013-2014 #90*, 2014 CO 63, ¶ 9 (when reviewing a proposed

initiative, the Court “employ[s] the general rules of statutory construction and give[s] words and phrases their plain and ordinary meaning”).

The proposed statute uses the word “unless.” Record at 2. The word “unless” means “except on the condition that.” See “Unless,” *Merriam-Webster*, <https://www.merriam-webster.com/dictionary/unless>. The word “exception,” which is used in the title instead of “unless,” accurately describes something that occurs “except on the condition that.” So when the proposed statute says that the 3% cap applies “unless” substantial improvements or a change in use occurs, the substantial improvements or change in use can fairly be characterized as an “exception” to the cap. “[P]etitioner’s argument is based on their interpretation of the proposed initiative, not on its express language,” and cannot sustain a clear title objection. *In re 2013-2014 #90*, 2014 CO 63, ¶ 31 (quotations omitted). The word “exception” thus accurately describes the measure and falls well within the Board’s discretion in setting a clear title. See *In re 2013-2014 #90*, 2014 CO 63, ¶ 24.

## CONCLUSION

The Title Board correctly determined that #21 contains a single subject and set an appropriate title. The Court should therefore affirm the title set by the Title Board on 2023-2024 #21.

Respectfully submitted on this 3<sup>rd</sup> day of May, 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 3rd day of May, 2023, addressed as follows:

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