

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 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, 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 1,026 words.

s/ Michael Kotlarczyk

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TABLE OF CONTENTS

INTRODUCTION..... 1

ARGUMENT 1

 I. Neither the Board nor the Court can determine the
 constitutionality of 2023-2024 #3 or whether it proposes a fee
 or a tax..... 1

 II. Petitioner’s single subject and clear title objections are
 without merit..... 5

CONCLUSION..... 6

TABLE OF AUTHORITIES

CASES	PAGES
<i>Colo. Union of Taxpayers Found. v. City of Aspen</i> , 2018 CO 36	4
<i>In re Title, Ballot Title & Submission Clause for 1997-98 #10</i> , 943 P.2d 897 (Colo. 1997).....	3
<i>In re Title, Ballot Title & Submission Clause for 1999-2000</i> #235(a), 3 P.3d 1219 (Colo. 2000)	2, 3
<i>In re Title, Ballot Title, & Submission Clause for 2013-2014 #76</i> , 2014 CO 52	2
<i>In re Title, Ballot Title & Submission Clause for 2019-20 #315</i> , 2020 CO 61	5
<i>Passarelli v. Schoettler</i> , 742 P.2d 867 (Colo. 1987).....	5

STATUTES

§ 1-40-107, C.R.S. (2022) 4

INTRODUCTION

Both the Petitioner and the Respondents argue at length about whether proposed initiative 2023-2024 #3 proposes a fee or a tax. But that question isn't presented here. The Title Board is not authorized to determine whether a proposed initiative contains a fee or a tax or to opine on the constitutionality of the initiative. The Title Board did not make any such determination here, nor is that question properly before the Court on this review of the titles set by the Board. Much of the argument in the opening briefs is thus beside the point.

The only matters before the Board—and now before this Court—were to determine whether #3 contains a single subject, and if so, to set a clear title. The Board appropriately made both determinations here. Therefore, the Board's actions should be affirmed.

ARGUMENT

I. Neither the Board nor the Court can determine the constitutionality of 2023-2024 #3 or whether it proposes a fee or a tax.

All of Petitioner's arguments are built on the same idea: that #3 imposes a tax rather than a fee. From this premise, Petitioner argues

both that the measure contains multiple subjects (because it purportedly attempts to amend the constitution as a statutory initiative) and that the title is not clear (because it doesn't say it is amending the constitution).

Petitioner thus asks this Court to construe #3 to determine whether it is a tax or a fee. But that is beyond the scope of this Court's review of the titles. In these limited, statutorily-authorized proceedings, the Court "do[es] not determine the initiative's efficacy, construction, or future application." *In re Title, Ballot Title, & Submission Clause for 2013-2014 #76*, 2014 CO 52, ¶ 8; see also *In re Title, Ballot Title & Submission Clause for 1999-2000 #235(a)*, 3 P.3d 1219, 1225 (Colo. 2000) (the Court "cannot answer this question without extending [its] inquiry into the legal effect of the Initiative"). This Court's "limited review of Title Board's actions" do not allow the Court to "determine the future application of an initiative in the process of reviewing the action of the Title Board in setting titles for a proposed initiative." *In re 1999-*

2000 #235(a), 3 P.3d at 1225. Accordingly, neither the Board nor the Court can construe #3 to determine whether it proposes a fee or a tax.

Petitioner also argues that #3 is contrary to provisions of the Colorado Constitution. *See Petr's Opening Br.* 7-8. But again, “[a]ny 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 Court thus cannot opine on whether #3 would be constitutional if enacted.

Nothing in the Title Board’s statutes authorize it or this Court to determine contested issues of whether a measure proposes a fee or a tax. Nor would it make sense to impose such a duty on the Title Board. Fee vs. tax determinations are often complicated and require judicial analysis of, at a minimum:

- the “stated purpose for the charge”;

- the “practical realities of how the charge operates to determine if this charge is in fact imposed to defray the direct or indirect costs of regulation and if the amount of the fee is reasonable in light of those costs, or if the charge’s primary purpose is to raise revenue for general governmental use”; and
- “whether the cost of the charge bears a reasonable relationship to the services” provided by the government.

Colo. Union of Taxpayers Found. v. City of Aspen, 2018 CO 36, ¶¶ 29-31.

The level of analysis required to make such determinations exceeds the scope of the expedited title setting process. Anyone dissatisfied with the titles set by the Board has only seven days to file a motion for rehearing, with the rehearing scheduled for the next Title Board meeting (which is often just seven days after the motion is filed). *See* § 1-40-107(1)(a), (c). These motions are generally, by necessity, brief, and do not delve into the nuances in case law. Here, for instance, Petitioner’s motion for rehearing was two pages. *See* Record at 14-15.

This expedited process for setting and reviewing titles is thus ill-equipped for the detailed analyses required to determine constitutional questions such as whether an initiative proposes a tax or a fee.

II. Petitioner’s single subject and clear title objections are without merit.

The Title Board is charged only with (1) determining whether a measure contains a single subject, and (2) if so, setting a clear title. The Board’s determinations here were correct. The proposed initiative creates and funds an attainable housing fund. The components of #3 are all “necessarily and properly related to . . . [the] single subject of creating and administering” an attainable housing fund. *In re Title, Ballot Title & Submission Clause for 2019-20 #315*, 2020 CO 61, ¶ 20.

Petitioner argues that #3 would amend the constitution by statute, which is a second subject. *See* Petr’s Opening Br. 17-18. But that’s impossible—a statute cannot amend the constitution. *See, e.g., Passarelli v. Schoettler*, 742 P.2d 867, 872 (Colo. 1987) (“where a statute and the constitution are in conflict the constitution is paramount law”). Therefore, both because (a) the Board and the Court cannot determine

the constitutionality of a proposed initiative and (b) a statute cannot amend the constitution, the Board correctly concluded that #3 contains a single subject of creating and funding an attainable housing fund.

Petitioner's clear title objection is substantively the same as her single subject objection. According to Petitioner, the title should state that it is "an attempt to amend the Colorado Constitution . . . by means of a statutory revision." Petr's Opening Br. 9. But a statute cannot amend the constitution, so it would be misleading to have the title say that it does. The Board thus acted well within its considerable discretion in setting the title for #3.

CONCLUSION

The Court should affirm the title set by the Title Board on 2023-2024 #3.

Respectfully submitted on this 21st day of February, 2023.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S ANSWER BRIEF** upon the following parties electronically via CCEF, at Denver, Colorado, this 21st day of February, 2023, addressed as follows:

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