

COLORADO TITLE SETTING BOARD

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE
FOR INITIATIVE 2023-2024 #291

MOTION FOR REHEARING – INITIATIVE #291

On behalf of Proponents Kevin Grantham and Cheri Jahn, registered electors of the State of Colorado and designated representatives of Proposed Ballot Initiative 2023-2024 #291, undersigned counsel hereby submit this Motion for Rehearing pursuant to C.R.S. § 1-40-107, and as grounds therefore states as follows:

I. Introduction

Initiative #291 is a nonpartisan measure brought by the Proponents, who are former Colorado state senators. They bring this measure to sustain and augment local control over land use regulations and decisions. Initiative #291’s central purpose is to empower local governance over land use.

The Title Board heard Initiative #291 on April 17, 2024, where it found that the measure contains a single subject. The Title Board set Initiative #291’s title as follows:

An amendment to the Colorado constitution granting local governments primary regulatory authority over public and private land within their jurisdictions, and, in connection therewith, granting a local government complete and exclusive control over zoning laws, regulations, and land use decisions within its jurisdiction, including energy production, roads and bridges, and environmental regulations, providing that local laws, regulations, and decisions override any conflicting state land use law, regulation, or decision; and prohibiting the state from taking adverse action against a local government for its land use decisions or withholding any state required approval.

II. Argument**a. Initiative #291’s Title Must Be Amended to Comply with the Clear Title Requirements.**

The clear title standard requires that the title “allow voters, whether or not they are familiar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose the proposal.” *In re Title, Ballot Title and Submission Clause for 2015-2016 #73*, 369 P.3d 565, 568 (Colo. 2016). Colorado law requires that the Title Board consider the confusion that may arise from a misleading title and to set a title that “correctly and fairly express[es] the true intent and meaning” of a measure. *Id.* (quoting C.R.S. § 1-40-106(3)(b)).

The Title Board must set a title that is “sufficiently clear and brief for the voters to understand the principal features of what is being proposed.” *In re Title, Ballot and Submission Clause, and Summary for 1999-2000 No. 258(A)*, 4 P.3d 1094, 1098 (Colo. 2000).

In order to set a clear title, the following changes must be made to the title adopted by the Title Board at the April 17, 2024 hearing:

1. The Inclusion of a Non-Exhaustive List of Covered Topics Will Sow Confusion.

The title adopted at the April 17, 2024 hearing highlights several categories covered by “zoning laws, regulations, and land use decisions,” including “energy production, roads and bridges, and environmental regulations.” While “zoning laws, regulations, and land use decisions” cover a range of land use activities, the topics highlighted in the title provide an unrepresentative sampling that will lead to voter confusion.

A title must fairly reflect “the proposed initiative such that voters will not be misled into supporting or opposing the initiative because of the words employed by the Title Board.” *Matter of Title, Ballot Title & Submission Clause for 2015-2016 #73*, 2016 CO 24, ¶ 24, 369 P.3d 565, 569. As drafted, the title will mislead voters that the initiative only includes land use regulations and decisions related to those activities listed in the title, or that these topics are emphasized over other land use decisions for some other reason not specified in the measure.

Indeed, “land use decisions” might include such topics as affordable housing, mining, conservation setbacks, and siting of renewable energy projects. In fact, affordable housing and occupancy limits is a hot button topic that is the subject of several recent bills introduced in the General Assembly, including House Bill 24-1007 that was recently signed by the Governor. Moreover, the definition of “land use regulation or decision” is descriptive enough to provide voters with a comprehensive idea of what categories may be implicated by the measure. Thus, the value of providing a non-exhaustive sampling of specific examples that could *potentially* be included under the measure’s purview is outweighed by the likelihood of misleading voters and causing voter confusion.

To balance brevity with the requirement that a title accurately and not misleadingly describe the measure to the public, the non-exhaustive list of land use decisions discussing “energy production, roads and bridges, and environmental regulations” must be removed from the title.

2. Alternatively, the Title Should be Amended to Clarify and Correct the Scope of Control Granted to Local Governments.

If the non-exhaustive list described above is not removed from the title, the title and its grammar must be amended to avoid voter confusion. If the Board elects to keep the exemplars, then the title requires amendment to correct both grammatical and substantive errors.

First, Initiative #291 would not grant, as the title seems to say, local government control over, for example, *energy production*. Rather, Initiative #291’s scope is narrowly tailored to cover only land use regulations and decisions, and thus would only grant local governments control over the *siting* of such energy projects.

A similar rationale applies to “roads and bridges” and “environmental regulations.” To be sure, Initiative #291 does not grant local government control over everything related to these topics, and, unlike energy projects, does not grant control over the *siting* of environmental regulations, which seems to create a non sequitur in the title. Given the fact that different land use activities could be implicated in different ways under the measure, to remain accurate, the title must carefully thread the needle if it is to incorporate specific land use activities. As written, the grammatical error appears to grant local governments much broader control than what the measure actually contemplates by not accurately specifying how the measure would affect the areas of activities listed.

Second, the phrasing is additionally misleading because it takes the defined term in the measure—“land use regulation or decision”—and summarizes that phrase as “zoning laws, regulations, and land use decisions.” Based on the measure’s plain text, “land use regulation or decision” is the umbrella category; “zoning laws” is an example of a *type* of land use decision. Indeed, Initiative #291 does not grant control over “zoning laws” as separate from land use regulations and decisions. Nevertheless, by referencing “zoning laws” first, the title erroneously suggests that “zoning laws” are separate from land use regulations and decisions. The title must be edited to avoid misleading voters.

Amending this portion of the title removes any confusion as to what type of control the initiative grants local governments and allows the title to flow accurately and consistently. *See Matter of Title, Ballot Title and Submission Clause, and Summary for 1997-98 No. 62*, 961 P.2d 1077, 1083 (Colo. 1998) (“The aim is to capture, in short form, the proposal in plain, understandable, accurate language . . .”). This construction also better reflects the Proponents’ intent as discussed at the initial hearing.

3. Use of “Exclusive Control” is misleading.

Finally, the title must be amended to accurately reflect the type of control granted to local governments over land use decisions. The title currently refers to the control granted to local governments as “complete and exclusive.” In the context of rights, “exclusive” is defined as “limited to a particular person, group, entity or thing.”¹ However, that is not how Initiative #291 operates.

While Initiative #291’s text uses the word “exclusive,” it does so within a specific context. The language in the Initiative states: “Local governments shall have plenary and exclusive control over land use regulations or decisions within their jurisdictions, including, without limitation, regulation of the siting, location of developments on and types of intensities of uses of land within their jurisdictions.” The next sentence discusses the interplay of local and state law governing land use, specifying that local control “shall have primacy and presumptive effect *over a state government entity’s conflicting determination*, rule, approval, permit, or statute regarding the same siting . . .” (emphasis added). Thus, holistically, the measure reads as providing exclusive control to local governments over land use decisions *only to the extent* that there is a conflict with state law.

¹ EXCLUSIVE, Black's Law Dictionary (11th ed. 2019).

The title as adopted does not contain this important nuance, but rather states that local governments shall have “complete and exclusive control” over a list of items including, “zoning laws, regulations, and land use decisions within its jurisdiction, including energy production, roads and bridges, and environmental regulations providing that local laws, regulations, and decisions override any conflicting state land use law” As written, the title’s exclusivity provision is divorced from the important interplay between state and local decision making and thus, is misleading.

Simply put, Initiative #291 is far more nuanced than the title would lead voters to believe. It would not grant local governments control over land use decisions at the exclusion of the state, but instead provides a framework for dealing with conflicts when they occur between the state and a locality. To provide necessary clarity on the type of control Initiative #291 grants to local governments, the Proponents request that the word “exclusive” be removed from the title as it does not accurately reflect how the measure works in practice.

b. The Proponents’ Updated Proposed Title For Initiative #291.

The title below illustrates the necessary changes to Initiative #291’s title in order to comply with the clear title requirements:

An amendment to the Colorado constitution granting local governments primary regulatory authority over public and private land within their jurisdictions, and, in connection therewith, granting ~~a~~ local government~~S~~ complete ~~and exclusive~~ control over ~~zoning laws, regulations, and~~ land use REGULATIONS AND decisions within THEIR jurisdiction~~S~~, ~~including energy production, roads and bridges, and environmental regulations,~~ providing that local laws, regulations, and decisions override any conflicting state land use law, regulation, or decision; and prohibiting the state from taking adverse action against a local government for its land use decisions or withholding any state required approval.

III. Conclusion

For the reasons stated above, the Proponents respectfully request that Title Board grant this Motion for Rehearing and amend the title accordingly.

Respectfully submitted this 24th day of April, 2024.

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