

BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

In re Proposed Initiative for 2023-2024 #293
(Local Control Over Land Use)

Jessica Goad,
Movant

v.

Kevin Grantham and Cheri Jahn,
Designated Representatives of the Proponents

MOTION FOR REHEARING RE PROPOSED INITIATIVE FOR 2023-2024 #293

Jessica Goad, a registered elector of the State of Colorado, respectfully submits this Motion for Rehearing regarding Proposed Initiative for 2023-2024 #293 (Local Control Over Land Use):

At its hearing on April 17, 2024, the Title Board set the following ballot title and submission clause for Proposed Initiative for 2023-2024 #293:

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 but excluding any state statute, regulation, or decision that implements federal law or regulation and specified water and irrigation matters addressed by state law; providing that local laws, regulations, and decisions override any unexcluded conflicting state statute, 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.

In doing so, the Board determined that the Initiative contained a single subject as required by Colo. Const. art. V, §1(5.5). Movant respectfully submits that this determination was in error for the following reasons:

I. The Single Subject Requirement.

The Colorado Supreme Court has noted on frequent occasion that the “single subject” requirement embodied in Colo. Const. art. V, §1(5.5) is directed to avoiding two “dangers” in the ballot initiative process. “First, combining subjects with no necessary or proper connection for the purpose of garnering support for the initiative from various factions – that may have different or even conflicting interests – could lead to the enactment of measures that would fail on their own merits” (often referred to as “logrolling”). *In re Title, Ballot Title & Submission Clause for 2011-2012 #3*, 2012 CO 25, ¶11, 274 P.3d 562, 566 (Colo. 2012). “Second, the single subject rule helps avoid ‘voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision coiled up in the folds’ of a complex initiative.” *Id.*

In this context, the Supreme Court has noted that “mere implementation or enforcement details directly tied to the initiative’s single subject will not, in and of themselves, constitute a separate subject.” *In re Titles, Ballot Titles and Submission Clauses for Proposed Initiatives 2021-2022 #67, 115, & #128*, 2022 CO 37, ¶14, 526 P.3d 927, 930 (Colo. 2022). “However, attempting to ‘characterize an initiative under some general theme will not save [it] from violating the single-subject rule if the initiative contains multiple subjects.’” *Id.*, quoting *In re Title, Ballot Title & Submission Clause for 2019-2020 #315*, 2020 CO 61, ¶17, 500 P.3d 363, 367 (Colo. 2020). In *In re 2021-2022 #67, 115, & #128*, the proposed initiatives would have authorized both (1) the sale of wine in grocery stores and (2) home delivery of alcoholic beverages – under the general theme of “expanding the retail sale of alcohol beverages;” the Supreme Court – noting that “some voters might well support home delivery of alcohol while preferring to keep wine out of grocery stores, and others might feel precisely the opposite” – concluded that “[t]hese are simply two different subjects” and therefore reversed the Title Board and struck the titles. *Id.* at ¶23, 932.

II. The Multiple Subjects in Proposed Initiative for 2023-2024 #293 (“Local Control Over Land Use”).

Proposed Initiative #293 poses precisely the “single subject” trap noted above: (1) labelling the initiative with a broad “general theme” – “local control over land use regulations or decisions” – while (2) scooping multiple distinct subjects within its scope. Importantly, the multiple subjects are not readily evident in the text or title of this initiative – thus the concern with “surreptitious provision[s] coiled up in the folds” – and, if fleshed out, become an absolute banquet of “logrolling.”

This problem did not escape the Office of Legislative Legal Services and the Legislative Council Staff when they analyzed the measure and prepared (and presented to the Proponents)

their Review & Comment Memorandum.¹ The Memorandum noted that it incorporated substantive comments from the Review & Comment Memorandum regarding concurrently filed Proposed Initiative for 2023-2024 #291, identifying at least seven distinct policy areas that would be directly impacted by the initiative (though omitting water and irrigation matters included within #291 as well as state government implementation of federal law or regulation), and inquired whether it was the Proponents' intent to supersede state authority – by granting “local governments” “plenary and exclusive control over land use regulations and decisions” – in each of those policy arenas. The responses were generally affirmative – though noting, despite the clear grant of “plenary and *exclusive* control” to local governments, that there should only be an issue in the event of a conflict. No substantive changes were made to the text of the Initiative to alter this language in the wake of the Review & Comment session.

Similarly, the Fiscal Summary prepared by the Legislative Council Staff noted that “exclusive control” was being granted to local governments as to “land use within their jurisdictions” – thus impacting multiple areas currently subject to state regulation, including specifically “oil and gas and mining operations, alcohol beverage sales . . . and the management of state highways, lands and buildings in local jurisdictions.”²

At the initial hearing on Proposed Initiative #293, there was no real dispute that the initiative would grant “plenary and exclusive control” over “land use regulations and decisions” – including explicitly zoning, development regulations, approved plans or permits, siting permits, development agreements, “or any other land use approval designation as may be utilized by a local government” – with regard at least to (1) oil and gas exploration and operations (including set-backs, number of wells allowed, road construction, refineries, even complete operational bans); (2) mining operations; (3) location and operating restrictions on the sale of alcoholic beverages; (4) operations and locations of retail marijuana businesses and natural medicine healing centers; (5) use of state lands (agriculture, parks and recreation, natural resource extraction); (6) state buildings; (7) location and construction of state roads, highways, and bridges; (8) location, access requirements, and zoning for hospitals, (9) location and construction of airports, and (10) administration and regulation of tax-credit-backed conservation easements. There is no suggestion that this list is exhaustive.

Perhaps there is a method by which the structure of Colorado's core governmental processes can be disassembled and restructured in the fashion proposed by this initiative – encompassing the myriad “subjects” that such an “undoing” and “restructure” would impact. But that process is not by citizen initiative – which is constitutionally subject to and limited by the requirement that a single initiative may only address a “single subject.” Colo. Const. art. V, §1(5.5).

¹ A copy of the Review & Comment Memorandum for this Initiative is attached as Exhibit 1.

² A copy of the Fiscal Summary for this Initiative is attached as Exhibit 2.

III. The Ballot Title and Submission Clause are Misleading and Do Not Correctly and Fairly Express the Initiative's True Intent and Meaning.

The title of the Initiative is misleading and does not correctly and fairly express the initiative's true intent and meaning. Section 1-40-106(3)(b), C.R.S. provides:

In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a "yes" or "no" vote will be unclear. The title for the proposed law or constitutional amendment, which shall correctly and fairly express the true intent and meaning thereof, together with the ballot title and submission clause. . . .

Titles and submission clauses should "enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal." *In re Title, Ballot Title & Submission Clause for Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo. 1990). The purpose of reviewing an initiative title for clarity parallels that of the single-subject requirement: voter protection through reasonably ascertainable expression of the initiative's purpose. See *id.*

The Title for Initiative #293 does not apprise voters of the expansive reach of the measure, and how it changes the status quo with regard to all of the enumerated subjects identified above. Here, the title for Initiative #293 is one for which the general understanding of the effect of a "yes" or "no" vote will be unclear. See generally 1-40-106(3)(b). As a result, the title for Initiative #293 does not enable voters to make an informed choice because it does not correctly and fairly express its true intent and meaning.

Respectfully submitted April 24, 2024.

/s/ Martha M. Tierney

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 24th day of April 2024, a true and correct copy of **MOTION FOR REHEARING ON PROPOSED INITIATIVE 2023-2024 #293** was filed and served on Proponents Kevin Grantham and Cheri Jahn, via email to their counsel of record as follows:

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