BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Bernard Buescher, Objector,

vs.

Suzanne Taheri and Steven Ward, Proponents.

MOTION FOR REHEARING ON INITIATIVE 2021-2022 #110
("Property Taxes")

Bernard Buescher, registered elector of the County of Mesa and the State of Colorado, through his undersigned counsel, objects to the Title Board's (the "Board") title and ballot title and submission clause set for Initiative 2021-2022 #110.

The Board set a title for Initiative 2021-2022 #110 on April 21, 2022.[1] The Board designated and erroneously fixed titles for this measure.

I. This measure violates the constitutional single subject requirement.

The single-subject requirement in Article V, sec. 1(5.5) serves two purposes: (1) it ensures that the initiative "depends upon its own merits for passage"; and (2) it "protects against fraud and surprise occasioned by the inadvertent passage of a surreptitious provision 'coiled up in the folds' of a complex bill." *In re Title & Ballot Title & Submission Clause for 2005-2006 #55*, 138 P.3d 273, 277 (Colo. 2006) (citation omitted).

In applying this mandate, the Title Board must evaluate the measure to determine if it is constitutionally compliant. An initiative may not group "distinct purposes under a broad theme" to circumvent the single-subject requirement, nor can it "hide purposes unrelated to the [i]nitiative's central theme" to gain passage of a hidden provision. *Id.* at 277-78.

A. The initiative's ostensible purpose: property tax increase limit of 2%

Initiative #110 purports to only place a 2% cap on increases in any property's tax revenue. The proponents maintain that the single subject of their measure is limiting property tax increases for homeowners.

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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 $1.5 billion in property tax revenue by an amendment to the Colorado constitution limiting the annual increase in tax revenue on a property to no more than 2% unless the property is substantially improved by adding more than 10% square footage or its use changes.

B. The initiative's added purpose: reinstating the cost approach to appraisal for residential property

Since it was amended at the 1982 general election, Article, X, section 3 of the Colorado Constitution has provided, in relevant part:

> Valuations for assessment shall be based on appraisals by assessing officers to determine the actual value of property in accordance with provisions of law, which laws shall provide that actual value be determined by appropriate consideration of cost approach, market approach, and income approach to appraisal. However, the actual value of **residential real property** shall be **determined solely by** consideration of **cost approach and market approach to appraisal….**

Colo. Const., art. X, sec. 3(1)(a) (emphasis added.) Thus, from 1983 on, residential property could be valued in two ways, using either the cost or the market approach to appraisal.

In 1992, however, Colorado voters adopted TABOR, and that provision contained a provision to restrict valuation methodology for residential property. "**Actual value shall be** stated on all property tax bills and valuation notices and, **for residential real property, determined solely by the market approach to appraisal**." Colo. Const. Art. X, Section 20(8)(c) (emphasis added). Thus, instead of using cost *and* market approaches for residential valuation, assessors were to be limited to the market approach only.

A later-adopted measure that expressly conflicts with an earlier measure will be given effect as between the two. "Where an amendment to a constitution is anywise in conflict or in any manner inconsistent with a prior provision of the constitution, the amendment controls." *In re Interrogatories by General Assembly concerning House Joint Resolution No. 1008, Second Regular Session, Forty-Seventh General Assembly*, 467 P.2d 56, 59 (Colo. 1970); *Colorado Common Cause v. Bledsoe*, 810 P.2d 201, 212 (Colo. 1991) ("To the extent that there is a conflict,… the subsequently enacted constitutional amendment, takes precedence"); *see also People ex rel Attorney General v. Cassiday*, 117 P. 357, 362 (Colo. 1911) (citation omitted).

Since it was adopted, TABOR's change in the method of valuing residential property (limiting such valuations to the market approach) has been given full effect at all levels.

- The General Assembly amended state statute to reflect this fact. "The actual value of residential real property shall be determined solely by consideration of the market approach to appraisal." C.R.S. § 39-1-103(5(a).

- The courts held that the market approach is now the sole means of valuing residential property. *See, e.g., Antolovich v. Brown Group Retail, Inc.,* 183 P.3d 582, 595 (Colo. App. 2007) (citing TABOR's mandate for using only market approach for such property).

- Assessors value residential property based solely on the market approach. *See, e.g., Jet Black, LLC v. Routt County Bd. of County Comm'rs*, 165 P.3d 744, 749 (Colo. App. 2006)*;* https://moffatcounty.colorado.gov/government/elected-officials/county-

assessor/property-classification-and-valuation/real-property (last viewed April 24, 2022) ("By law, residential property is valued using only the market approach to appraisal").

Now, Initiative #110 seeks to amend subsection (1)(a) of article X, section 3, and, as is relevant here, expressly reenacts the sentence with which TABOR conflicted. Initiative #110 would readopt the provision in the Constitution, stating: "the **actual value of residential real property** shall be determined **solely by consideration of cost approach** and market approach **to appraisal**…." (Emphasis added.)

Voters who read Initiative #110 will see in that text the "cost approach" as a specifically authorized appraisal technique for residential property. When interpreting a voter-approved amendment to the Constitution, the courts strive to implement voter intent based, first, on a measure's plain wording. *In re Interrogatories Relating to the Great Outdoors Colo. Trust Fund*, 913 P.2d 533, 538 (Colo. 1996). To that end in interpreting such measures, "**each clause** and sentence must be presumed to have **purpose and use**." *Id*. at 542 (emphasis added); *see also Colo. Water Conservation Board v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 597 (Colo. 2005) ("In examining a statute's plain language, we give effect to every word and render none superfluous"). The single subject requirement protects against a "voter of average intelligence… (from being) surprised" by hidden "procedural aspects" in a measure that otherwise makes substantive changes to the law. *In re Title, Ballot Title & Submission Clause for 2001-2002 #43*, 46 P.3d 438, 446 (Colo. 2002). The average voter will read Initiative #110 and assume he is giving effect to its entire text.

If adopted, Initiative #110 would be the later-enacted measure, and thus the conflict with TABOR is resolved in favor of the new language requiring use of cost and market approaches to appraisal for residential property. Initiative #110 would trump the contrary language in TABOR, a valuation restriction homeowners are familiar with and rely on in their property tax valuations.

Had Proponents sought to only adopt their 2% cap on property taxes, they could have, for instance, added a new subsection (3) to Article X, section 3 and placed the new limit language there. But they didn't. And that decision must be deemed to have been intentional.

This change in the appraisal practice for one class of property (residential) is a separate subject from the overall, property-by-property tax cap, one that is not limited to any one class of taxable property. *See In re Title, Ballot Title & Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶39, 489 P.3d 1217, 1225 (single subject violation by animal cruelty initiative, where certain provisions dealt with one species of animal and other provisions dealt with all animals).

Given that, Initiative #110 puts the cost approach back in play in valuing residential property, and that topic is separate and distinct from an annual cap on property tax increases, this measure cannot be titled.

II. This measure violates the clear title requirement for initiative titles.

The titles are misleading in that:

A. They fail to state the initiative reestablishes the cost approach to appraisal as a means for valuing residential property;

B. They fail to state that, when a property experiences a change in use or a 10% square footage increase, such property will be reappraised in order to determine its valuation; and

C. The title's use of "is substantially improved" unnecessarily characterizes a property's change in use or its 10% increase in square footage, which changes may not, in reality, "substantially improve" that property, and thus this phrase is misleading and speculative, notwithstanding its use in the initiative text.

RESPECTFULLY SUBMITTED this 27th day of April, 2022.

RECHT KORNFELD, P.C.

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CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the **MOTION FOR REHEARING ON INITIATIVE 2021-2022 #110** was sent this day, April 27, 2022, via email to the proponents via their legal counsel:

Suzanne Taheri
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s/ Erin Holweger