

BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Bernard Buescher, Objector,

vs.

Colin Larson and John Brackney, Proponents.

**MOTION FOR REHEARING ON INITIATIVE 2021-2022 #144
("Concerning Property Valuation")**

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 #144, and states:

The Board set a title for Initiative 2021-2022 #144 on April 21, 2022. The Board designated and fixed titles for this measure¹ but erred in doing so.

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).

¹

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 \$1.2 billion in property tax revenue by an amendment to the Colorado constitution and a change to the Colorado Revised Statutes concerning the actual value of real property for purposes of property taxation, and, in connection therewith, setting the actual value of real property for the 2023 property tax year at the current valuation or the most recent sale amount; thereafter, establishing the actual value to be equal to the prior year’s value adjusted for inflation up to 3%; allowing an additional increase if the annual inflation exceeds 5% and is approved by a board of county commissioners; establishing this adjusted value as a limit on the actual value; resetting the actual value of the property when it is sold; requiring the property to be reappraised if it is substantially improved, as defined, suffers a decline in value, or is in a county that has suffered a sustained economic downturn; authorizing the department of local affairs to issue rules on portability; defining a recent sale to include a transfer upon the death of the property owner to anyone other than a spouse; and requiring the provisions of this measure to expire on December 31, 2032.

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.

Proponents contend their single subject addresses predictability in property values for taxpayers. Their measure also has additional purposes.

A. The initiative’s added purpose: using fractional purchases prices as “sales”

The initiative states multiple times that a property’s valuation for tax purposes “shall equal the amount of the property’s most recent sale.” Proposed Colo. Const., Art. X, sec. 20(3); Proposed C.R.S. 39-1-103(5)(a), (15.5)(a); Proposed C.R.S. 39-1-104(10.2)(f). In other words, assessors must use that dollar amount that is paid for the property’s last “sale.”

As a reminder, “sale” is defined by this initiative.

“SALE” MEANS THE TRANSFER OF MORE THAN 50% OWNERSHIP OF REAL PROPERTY MADE EITHER: (1) IN THE ORDINARY COURSE OF BUSINESS FOR FULL AND ADEQUATE CONSIDERATION AND A TRANSACTION THAT IS (A) BONA FIDE, (B) AT ARM’S LENGTH, AND (C) FREE FROM ANY DONATIVE INTENT; OR (3) UPON THE DEATH OF THE PROPERTY’S OWNER, IF THE PROPERTY PASSES AT DEATH TO ANYONE OTHER THAN THE DECEASED’S SPOUSE.

Proposed C.R.S. 39-1-102.5(2). In other words, a “sale” occurs when over 50% of a property’s ownership interests is transferred for fair market compensation. For example, a sale of a property having a total market value of \$1 million occurs when a buyer pays \$501,000 for a 50.1% interest in a bona fide transaction, done at arm’s length, and without donative intent.

Under this measure, though, the property tax valuation of that \$1,000,000 property would be only \$501,000 because a qualifying “sale” occurred when that 50.1% interest changed hands. The sale of the 50.1% interest was a “transfer of more than 50% ownership of real property.” *Id.* As a result, Proponents’ initiative mandates sub-market valuations any time a partial interest over 50% is bought. The Proponents drafted this measure so, in this example, \$499,000 just disappears from what would otherwise be a property’s tax valuation.

The single subject requirement protects against measures that can result in “voter surprise or fraud.” *In re Title, Ballot Title & Submission Clause for 2007-2008 # 17*, 172 P.3d 871, 873 (Colo. 2007); *see also* C.R.S. § 1-40-106.5(1)(e)(II). Subjects need not be entirely unrelated to be separate; changing both the procedures and the substance associated with the same constitutional provision, or even matters grouped under “the same general area of the law,” is no cure for a single subject violation. *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 442-43, 445-46 (Colo. 2002). “The risk of uninformed voting caused by **items concealed within a lengthy or complex proposal** is what the single subject requirement seeks to avoid.” *In re Title for Initiative 1997-1998 #30*, 959 P.2d 822, 825 (Colo. 1998) (citations and internal quotation marks omitted) (emphasis added).

That this partial valuation issue has not surfaced in hearings before the legislative offices and this Board on these measures is indicative of just how concealed this provision is. In all the hearings held on this and related matters, it has not been substantively aired. And voters would never think that the sum total of a property's "most recent sale" is actually the price paid for a little over half-interest of the property. They will be misled in voting to support or oppose this measure, only to find after the election that sales of partial interests of property within a county or district must be used and will produce reduced tax bases. "[P]rovisions causing voter surprise or uninformed voting also may constitute a single-subject violation." *In re Title, Ballot Title & Submission Clause for Initiative 1999-2000 #258(A)*, 4 P.3d 1094, 1107 n.6 (Colo. 2000) (Martinez, J., concurring).

Moreover, this valuation loophole masquerading as a definition is not a necessary element of the tax limit proponents highlight within this initiative. Proof of that fact lies in one of their companion measures, Initiative #75, that had no such definition and, in fact, no definition of "sale" at all.² Given the routine use of the market approach to appraisal for decades and its reliance on market sales of property and the commonly understood meaning of "sale," this special interest provision was clearly not needed to achieve proponents' stated goal of providing certainty in property tax valuation.

The Title Board is prohibited from titling a measure that misleads voters due to its unrelated facets, and this initiative should be returned to its proponents.

B. The initiative's added purpose: "portability" of property value

1. The provision in this initiative that makes property value "portable" is so uncertain as to its meaning that no title can be drafted for this measure.

This initiative allows "property owners" to "transfer some aspect of the value of one property **to another** under certain circumstances related to the taxation of that property."

This measure is so uncertain that no title can be set, as the Board cannot know what this means. Is value transferred from one property "to another" *property*? Or is some aspect of valuation (say, the improvements on a commercial site) transferred "to another" *property owner*? If it is the former, one can transfer value from one address in one county to another address in another county. If it is the latter, one can transfer value (presumably in exchange for consideration) to a property owner whose property has a lesser value or lower mill levy, thus producing tax savings for the transferor of property value and economic benefit that outweighs the added tax to the transferee.

The measure is purposefully vague. It allows both scenarios above, and because it allocates only rule making and provides no standards, there are no other guidelines for the Department of Local Affairs to use to know which of these approaches was intended by voters.

² <https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2021-2022/75Final.pdf>

Because of its murky design, voters would have no idea what they might be referring to the ballot or enacting. Frankly, they are in the same position as the Title Board which can – from the measure itself – have no idea what is actually being proposed.

Where the Board lacks an understanding of what a measure actually accomplishes, it cannot set a title. “If the Board ‘cannot comprehend the initiatives well enough to state their single subject in the titles . . . the initiatives cannot be forwarded to the voters and must, instead, be returned to the proponent.’” *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #44*, 977 P.2d 856, 858 (Colo. 1999), citing *In re Proposed Initiative for 1999-2000 No. 25*, 974 P.2d 458, 469 (Colo. 1999). As such, no titles may be set for this measure.

2. Making property value “portable” between properties is a new subject as it converts a property tax into a tax that is personal to the taxpayer rather than being imposed on site-specific property.

A “property tax” is based on actual property. Under the portability concept, a taxpayer with multiple properties can transfer value among properties to lower his tax burden without any reference to the property itself. This measure converts a property tax into something it is not, and that is a separate subject.

This provision means that a property isn’t valued based on the results of the applicable approaches to appraisal. It is valued based on its owner’s desire to reallocate value from some other property, potentially in some other remote part of the state. Thus, it is the financial decision of the property owner, not the intrinsic characteristics of the property itself, that will determine the tax base of the county, school district, municipality, or special district. By changing the nature of this tax from being one that is specifically connected to real property to one that is connected only to the property owner, Proponents have confused their measure by including this separate purpose and thus violated the single subject requirement.

3. Making property value “portable” between properties is a new subject as it allows property owners to transfer taxable value (outside of a county, school districts, and special districts), thus changing those entities’ tax revenue bases.

By allowing the property owner to transfer property value among its holdings, the property owner will determine the tax base of the public entity that collects property taxes in 2 jurisdictions – the place where value is transferred from and the place where value is transferred to. No longer is a county or a district able to count on property tax revenue based on the jurisdiction’s assessed value.

For instance, a property valued at \$1 million dollars whose improvement values of, say \$750,000, are transferred elsewhere will have a diminished tax base because that property now carries only \$250,000 of actual value. And the jurisdiction to which property is transferred will have its taxable value increased by that amount. How would voters possibly know, in voting for a tax reduction for themselves, they are also approving the potential for their local tax base to simply disappear at the property owner’s whim? By delegating to property owners what real property will be taxable by a public entity, Proponents diverged from their stated purpose of

providing added certainty to property owners over their property tax assessments and thus violated the single subject requirement.

4. The portability provision does not serve the end proponents said was the measure's single subject: providing certainty to taxpayers about property values.

An initiative's provision must be related to the measure's central theme, *In re #55, supra*, 138 P.3d at 278, but the portability provision fails that test.

This aspect of this initiative allows for changes to property value at the whim of a property owner. A change once made is not necessarily permanent. Thus, this measure puts property values on a pendulum that can swing wildly based on the economic interests of the property owner. That variability in valuation and the place where the valuation is attributed is unrelated to providing certainty to taxpayers about property values.

Instead, the goal of portability is to allow, at the landowner's discretion, the transfer of value to minimize property tax payments. Proponents specifically made this point at Review and Comment hearing. Question 8.e. of the Review and Comment memo on Initiative #140, which set the stage for consideration of this initiative as well, asked:

What does it mean to "make the actual value of real property portable to another property"? **Does this refer to relocating real property, such as structures, or some financial transfer of that property's value in order to reduce the property owner's tax liability?**³

Through counsel, the Proponents responded: "**The latter is the intent**, and we've made changes to make that clear."⁴ So, according to Proponents, this provision operates to lower the taxes of taxpayers who own multiple properties that can swap property value among them.

Portability thus advances the purpose of landowner profitability and is distinct from predictability of property valuations. For example, where a jurisdiction increases its mill levy, property owners are given the incentive to shift value to property where that is not the case. Likewise, if a jurisdiction's mill levy is frozen or reduced, there is an incentive for the property value to be transferred back to such a county. The public entity's financial viability is transferred to property owners whose decision making is a matter of their own financial interest. Thus, portability is a second subject of this measure.

³ <https://www.coloradosos.gov/pubs/elections/Initiatives/titleBoard/filings/2021-2022/140ReviewComment.pdf> at 6.

⁴ <https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20220423/72/13195> at 1:43:45-1:44:05.

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

The titles set by the Board are incomplete or misleading in the following ways:

- (a) The titles incorrectly refer to “resetting the actual value of the property when it is sold” and thus fail to be clear that the measure expressly allows real property tax value to be substantially less than 100% of actual value, given that a “sale” – and thus the only relevant sale price for purposes of the initiative – is established at the point when more than 50% of an ownership interest is transferred.
- (b) The titles inaccurately state that all taxpayers will maintain a “current” property value, given that values for properties throughout the state change for multiple reasons including when unusual conditions affect the intervening year of a reassessment cycle, pursuant to C.R.S. 39-1-104(11).
- (c) The titles fail to state the measure exempts from its newly imposed limits on property valuation as to agricultural property, producing mines, and oil and gas producing lands or leaseholds.
- (d) The titles fail to refer to the repeal of the requirement that property owners receive notices of valuation on May 1 of each year to inform them of, among other things, the changes in value for the next property tax cycle, the ratios of assessment that apply to the property in question, and their appeal rights.
- (e) The titles fail to accurately state the definition and role of “portability.”

In all of these ways, the titles must be corrected.

III. Both the ballot title and the fiscal abstract must be corrected to reflect further revenue decreases to local governments, as transfers of partial property interests qualify as “sales” and will limit local government property tax collections beyond the \$1.2 billion projection in the titles and abstract.

Because use of partial (i.e., above 50%) property sales as the “most recent sale” to dictate a property’s value has not been previously addressed, the \$1.2 billion loss reflected in ballot title language and the fiscal abstract understate public entities’ revenue losses and must be corrected. C.R.S. §§ 1-40-105.5, -106(3)(f). This matter is appropriate for a motion for rehearing. *In re Title, Ballot Title & Submission Clause for 2017-2018 #4*, 2017 CO 57 ¶¶17-19, 395 P.3d 318.

RESPECTFULLY SUBMITTED this 27th day of April, 2022.

RECHT KORNFELD, P.C.

s/ Mark G. Grueskin

Mark G. Grueskin

1600 Stout Street, Suite 1400

Denver, CO 80202

Phone: 303-573-1900

Email: mark@rklawpc.com

Objector's Address:

4350 N. Club Ct., Unit B

Grand Junction, CO 81506

CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the **MOTION FOR REHEARING ON INITIATIVE 2021-2022 #144** was sent this day, April 27, 2022, via email to the proponents via their legal counsel:

Sarah Mercer

David Meschke

smercerc@bhfs.com

dmeschke@bhfs.com

s/ Erin Holweger