
The Rocky Mountain Land Use Institute
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for

***Ballot Box Zoning Versus
Representative Government***

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BALLOT BOX ZONING VERSUS REPRESENTATIVE GOVERNMENT
Rocky Mountain Land Use Institute

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I. The Reserved Rights of Initiative and Referendum -- Overview.

A. Constitutional Provisions.

1. *Article V, Section 1. General assembly - initiative and referendum.* (1) . . . the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly and also reserve power at their own option to approve or reject at the polls any act or item, section, or part of any act of the general assembly.

(2) The first power hereby reserved by the people is the *initiative*, and signatures by registered electors in an amount equal to at least *five percent of the total number of votes cast for all candidates for the office of secretary of state at the previous general election* shall be required to propose any measure by petition

(3) The second power hereby reserved is the *referendum*, and it may be ordered, . . . against any act or item, section, or part of any act of the general assembly, either by a petition signed by registered electors in an amount equal to at least *five percent of the total number of votes cast for all candidates for the office of the secretary of state at the previous general election or by the general assembly*. . . .

(9) The initiative and referendum powers reserved to the people by this section are *hereby further reserved to the registered electors of every city, town, and municipality as to all local, special, and municipal legislation of every character in or for their respective municipalities*. The manner of exercising said powers shall be prescribed by general laws; except that cities, towns, and municipalities may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. *Not more than ten percent of the registered electors may be required to order the referendum, nor more than fifteen per cent to propose any measure by the initiative in any city, town, or municipality.*

B. Statutory Provisions.

1. *Article 40, Title 1, C.R.S.* – statewide initiative and referenda matters.

a. *§ 1-40-103. Applicability of article.* (1) This article shall apply to all state ballot issues that are authorized by the state constitution unless otherwise provided by statute, charter, or ordinance.

(2) The laws pertaining to municipal initiatives, referenda, and referred measures are governed by the provisions of article 11 of title 31, C.R.S.

(3) The laws pertaining to county petitions and referred measures are governed by the provisions of section 30-11-103.5, C.R.S.

(4) The laws pertaining to school district petitions and referred measures are governed by the provisions of section 22-30-104 (4), C.R.S.

2. **Part 5, Article 11, Title 30, C.R.S.** – initiative and referenda provisions governing home rule counties.

a. § 30-11-103(5). *County petitions and referred measures.* The procedures for placing an issue or question on the ballot by a petition of the electors of a county that is pursuant to statute or the state constitution or that a board of county commissioners may refer to a vote of the electors pursuant to statute or the state constitution shall, to the extent no such procedures are prescribed by statute, charter, or the state constitution, follow as nearly as practicable the procedures for municipal initiatives and referred measures under part 1 of article 11 of title 31, C.R.S. The county clerk and recorder shall resolve any questions about the applicability of the procedures in part 1 of article 11 of title 31, C.R.S.

b. § 30-11-501. *County home rule charters.* Any county in this state, pursuant to the provisions of this part 5, may establish the organization and structure of county government which shall be submitted to and adopted by a majority vote of the registered electors of the county which shall be known as a county home rule charter.

c. § 30-11-508. *Initiative, referendum, and recall.* Every charter shall contain procedures for the initiative and referendum of measures and for the recall of elected officers.

3. **Article 11, Title 31, C.R.S.** – initiative and referenda provisions governing municipalities.

a. § 31-11-101. *Legislative declaration.* It is the intention of the general assembly to set forth in this article the procedures for exercising the initiative and referendum powers reserved to the municipal electors in subsection (9) of section 1 of article V of the state constitution. It is not the intention of the general assembly to limit or abridge in any manner these powers but rather to properly safeguard, protect, and preserve inviolate for municipal electors these modern instrumentalities of democratic government.

b. § 31-11-102. *Applicability of article.* This article shall apply to municipal initiatives, referenda, and referred measures unless alternative procedures are provided by charter, ordinance, or resolution.

c. § 31-11-105. *Ordinances - when effective - referendum.* (1) No ordinance passed by the legislative body of any municipality shall take effect before thirty days after its final passage and publication, except an ordinance calling for a special election or necessary to the immediate preservation of the public peace, health, or safety, and not then unless the ordinance states in a separate section the reasons why it is necessary and unless it receives the affirmative vote of three-fourths of all the members elected to the legislative body taken by ayes and noes.

(2) Within thirty days after final publication of the ordinance, a referendum petition protesting against the effect of the ordinance or any part thereof may be filed with the

clerk. The petition must be signed during the thirty-day period by at least five percent of the registered electors of the municipality registered on the date of final publication.

(3) If a referendum petition is filed, the ordinance or part thereof protested against shall not take effect, and, upon a final determination of petition sufficiency, the legislative body shall promptly reconsider the ordinance. If the petition is declared not sufficient by the clerk or found not sufficient in a protest, the ordinance shall forthwith take effect, unless otherwise provided therein.

(4) If, upon reconsideration, the ordinance or part thereof protested is not repealed, the legislative body shall submit the measure to a vote of the registered electors at a regular or special election held not less than sixty days and not more than one hundred fifty days after the final determination of petition sufficiency, unless otherwise required by the state constitution. The ordinance or part thereof shall not take effect unless a majority of the registered electors voting on the measure at the election vote in favor of the measure.

C. *Legislative versus Non-legislative Actions.*

1. The referendum powers reserved to the people under Article V of the Colorado Constitution apply “only to acts which are legislative in character.” *City of Aurora v. Zwerdinger*, 194 Colo. 192, 571 P.2d 1074, 1076 (1977); accord *Witcher v. Canon City*, 716 P.2d 445, 449 (Colo. 1986); *Margolis v. District Court*, 638 P.2d 297, 303 (Colo. 1981).

2. The determinative inquiry is whether the action “announces new public policy or is simply the implementation of a previously declared policy.” *City of Idaho Springs v. Blackwell*, 731 P.2d 1250, 1253 (Colo. 1987).

3. An amendment to a legislative act is a legislative act. *Margolis*, 638 P.2d 297 (Colo. App.1981) (expressly overruling *Snyder v. City of Lakewood*, 542 P.2d 371 (Colo. 1975) to the extent inconsistent).

4. In distinguishing between legislative and non-legislative acts, Colorado courts make an ad hoc determination by applying the following three pronged test:

a. First, actions that relate to subjects of a permanent or general character are legislative, while those that are temporary in operation and effect are not.

b. Second, acts that are necessary to carry out existing legislative policies and purposes or which are properly characterized as executive are deemed to be administrative, while acts constituting a declaration of public policy are deemed to be legislative.

c. Third, if an original act was legislative, then an amendment to the original act must also be legislative.

Witcher, 716 P.2d at 449-450; accord *Zwerdinger*, 571 P.2d at 1077; *Blackwell*, 731 P.2d at 1254 (Colo. 1987).

5. In applying the first prong of the test, “[t]he term ‘permanent’ is used to signify a public policy declaration of general applicability.” *Blackwell*, 731 P.2d at 1254. Accordingly, the determinative inquiry is whether the action “announces new public policy or is simply the implementation of a previously declared policy.” *Id.* at 1253.

II. Application to Particular Types of Land Use Decisions.¹

A. County (non home rule) Decisions.

1. *Dellinger v. Board of County Commr's*, 20 P.3d 1234 (Colo. App. 2000), cert. denied (Apr. 9, 2001).

a. Issue: Whether the right and power of initiative reserved to the people pursuant to Colo. Const. Art. V, § 1, apply to and are exercisable by electors of a non-home rule county.

b. Held: There is no constitutional right of initiative for electors at the county level.

2. *Save Palisade Fruitlands v. Todd*, 279 F.3d 1204 (10th Cir. 2002).

a. Issue: Whether Mesa County Clerk's denial of a petition for initiated land use measure restricting ability to subdivide property on basis that citizens of non-home rule counties do not have a right to initiate legislation under the State Constitution constituted violation of initiative proponents' rights under the Equal Protection Clause of the Federal Constitution.

b. Held: Distinction between non-home rule and home rule counties did not implicate a suspect class or fundamental right under the Federal Constitution, and was therefore subject to the rational relation standard and did not violate the Equal Protection Clause.

B. Annexation (and concurrent zoning).

1. **Article II, Section 30.** Pursuant to an initiated measure which became effective on December 19, 1980, Colorado voters approved an amendment to the Colorado Constitution which limits the ability of municipalities to annex unincorporated territory to three conditions:

a. The question of annexation has been submitted to the vote of the landowners and the registered electors in the area proposed to be annexed, and the majority of such persons voting on the question have voted for the annexation; or

b. The annexing municipality has received a petition for the annexation of such area signed by persons comprising more than fifty percent of the landowners in the area and owning more than fifty percent of the area, excluding public streets, and alleys and any land owned by the annexing municipality; or

c. The area is entirely surrounded by or is solely owned by the annexing municipality.

¹ For an excellent discussion of some of the unresolved legal issues in this area, see ANNEXATION AND DEVELOPMENT DETERMINATIONS BY INITIATIVE AND REFERENDUM: EMERGING LEGAL ISSUES; 2000 Rocky Mountain Land Use Institute Conference; Edward P. Sands, Esq., Carter & Sands, P.C.

2. ***McKee v. City of Louisville***, 616 P.2d 969 (Colo. 1980).

a. Issue: Whether an initiated measure seeking to repeal an annexation was a valid exercise of the right to initiative.

b. Held: “Our holding in this case is a narrow one. Where, as here, qualified voters of a municipality file protest referendum petitions before and immediately after the adoption of an annexation ordinance by a municipality, and municipal officials reject the referendum petitions on the basis of an emergency or safety clause incorporated in the ordinance, and immediately after the adoption of the ordinance and before it becomes effective under the municipal code, the qualified voters file initiative petitions for the repeal of the annexation ordinance, those qualified voters have a constitutional right to have that initiated measure submitted to the electorate in accordance with Article V, Section 1, of the Colorado Constitution, and section 1-40-116, C.R.S.1973, and municipal officials in such a case must take all necessary and proper measures to implement the submission of that measure to the electorate.” ***McKee***, 616 P.2d at 975.

c. Dissent: Justice Lohr, joined by Justice Lee, argued that (i) the powers of initiative and referendum under Section 1(9) of Article V of the Colorado Constitution are limited, in that they only pertain to local, special and municipal legislation; and (ii) because annexation is a matter of statewide concern within the legislature’s plenary power, and is not a subject of local, special and municipal concern, the power of initiative should not extend to annexations and disconnections.

3. ***Minch v. Town of Mead***, 957 P.2d 1054 (Colo. App. 1998).

a. Issue: Whether a citizen-initiated ordinance that required a popular vote prior effecting an annexation impermissibly conflicted with the Municipal Annexation Act.

b. Held: The additional requirement that the owners of property within the existing municipal limits must vote to approve or reject a proposed annexation does not conflict with the Municipal Annexation Act.

4. ***Other Issues***:

a. Since annexation is a legislative function that is subject to the constitutional right of initiative, can citizens initiate an annexation and bypass the town council or town board? If so, to what extent must an initiated annexation comply with the statutory procedures and eligibility criteria?

C. ***Zoning***.

1. ***Margolis v. District Court***, 638 P.2d 297 (Colo. 1981).

a. Issue: Whether establishment of the original zoning of newly annexed property was legislative in character and, therefore, a proper subject of an initiated measure.

b. Held: For purposes of initiative and referendum analysis, the original zoning or re-zoning of parcels, no matter what their size, is legislative in character because such zoning is of a general and permanent nature and involves a general rule or policy. Because zoning is legislative in character, the amendatory act of re-zoning is likewise legislative.

2. ***Fort Collins v. Dooney***, 496 P.2d 316 (Colo. 1972).

a. Issue: Whether an ordinance adopting an amendment to the City's zoning map was a legislative act subject to referendum.

b. Held: Yes, because a zoning map amendment is legislative in character.

D. ***Planned Unit Development (PUD) Zoning.***

1. The Planned Unit Development Act of 1972, § 24-67-101, *et seq.*, C.R.S., authorizes PUD zoning by both municipalities and counties. There are no published cases which directly address the question of whether municipal PUDs are subject to initiative and referendum.

2. § 24-67-104. *Implementation of article.* (1) Any county with respect to territory within the unincorporated portion of the county or any municipality with respect to territory within its corporate limits may authorize planned unit developments by enacting a resolution or ordinance . . .

(2) The enactment of the resolution or ordinance provided for in this section and the enactment of any amendment thereto shall be *in accordance with the procedures required for the adoption of an amendment to a zoning resolution or ordinance* as prescribed by section 30-28-116 or 31-23-305, C.R.S., whichever is applicable.

3. § 24-67-105. *Standards and conditions for planned unit development.* (1) . . . No planned unit development may be approved by a county or municipality *without the written consent of the landowner* whose properties are included within the planned unit development.

4. § 24-67-106. *Enforcement and modification of provisions of the plan.* (1) * * *(2) * * * (3) All those provisions of the plan authorized to be enforced by the county or municipality may be *modified, removed, or released by the county or municipality, subject to the following*:

(a) * * *

(b) No substantial modification, removal, or release of the provisions of the plan by the county or municipality shall be permitted *except upon a finding by the county or municipality, following a public hearing called and held in accordance with the provisions of section 24-67-104 (1) (e)* that the modification, removal, or release is consistent with the efficient development and preservation of the entire planned unit development, does not affect in a substantially adverse manner either the enjoyment of land abutting upon or across a street from the planned unit development or the public interest, and is not granted solely to confer a special benefit upon any person. * * *

5. § 24-67-107. *Application and construction of article.* (1) The provisions of this article shall apply to home rule municipalities unless superseded by charter or ordinance enactment.

6. *Citizens for Quality Growth Petitioners Committee v. City of Steamboat Springs*, 807 P.2d 1197 (Colo. App. 1990).

a. In dictum, the Court, stated that approval of a planned unit development constituted a re-zoning. Because action on a rezoning is legislative in character, this suggests that approval of a PUD is legislative in nature and, therefore, subject to referendum and initiative.

E. *Master Plans.*

1. *Margolis v. District Court*, 638 P.2d 297 (Colo. 1981).

a. Issue: Whether master plans are subject to the right of initiative and referendum.

b. Held: A master plan amendment was not legislative in nature, and was not subject to referendum.

F. *Conditional Use Permit.*

1. *Citizens for Quality Growth Petitioners Committee v. City of Steamboat Springs*, 807 P.2d 1197 (Colo. App. 1990).

a. Issue: Whether the decision to grant or deny a conditional use permit is a legislative act subject to referendum.

b. Held: The granting of a conditional use permit constituted a legislative act subject to the referendum because it effectively amended the legislatively established zoning scheme. Because initial approval of the zoning was legislative in nature, the granting of a conditional use in the zone was also legislative.

G. *Subdivision Plats*

There are no published cases which address whether municipal decisions regarding subdivision applications are subject to initiative and referendum. However, Article 23 of Title 31, C.R.S., authorizes the municipality's planning commission, not the municipality's governing body, to act on subdivision plats. There is no statutory requirement that final plats to be approved by ordinance. Is a subdivision plat approval a legislative act subject to the powers of initiative and referendum? If so, should the plat be included in the initiative or referendum petition and on the ballot? If not, how can voters know what they are voting on?

H. *Site Plan/Development Plan*

1. *Committee of the Petitioners North Boulder Village Center v. City of Boulder*, Case Nos. 96CV923, 96CV1567, Boulder County District Court.

a. Issue: Whether a site plan approval is a legislative act subject to initiative and referendum.

b. Held: Determining that action on a site plan application is non-legislative in character, the court stated that the “declaration of general public policy was announced when the standards guiding the site review process were set. Application of the standards to a site review application does not announce new public policy, but is merely an act that is ‘necessary to carry out’ the existing pronouncements of public policy.”

I. ***Vested Property Rights***

1. ***Villa at Greeley v. Hopper***, 917 P.2d 350 (Colo. App.1996).

a. Issue: Whether an initiated measure precluding issuance of a certificate of occupancy for development within was enforceable, even though the municipality had granted statutory vested property rights in connection with the PUD approval.

b. Held: The referendum was enforceable, but the county was liable to the developer whose vested development rights were impaired for statutorily prescribed damages.

III. **Summary of Ballot Questions Relating to Growth Management – 1994 through approximately 2002.**²

A. ***Statewide Constitutional Growth Management Amendment.***

1. ***Amendment 24.*** An initiated growth control measure which would have amended the Colorado Constitution. Defeated by a wide margin in the November, 2000, general election.

B. ***Initiated Growth Caps.***

1. Adopted: Golden (1995), Lafayette (1995), Elizabeth (1996).

2. Rejected: Arvada (1999), Commerce City (1999), Estes Park (1998), Berthoud (1996), Longmont (1995), Boulder (1995), Brighton (2001).

C. ***Initiated Moratoria on Development.***

1. Adopted: Buena Vista (1998)

2. Rejected: Castle Rock (1998), Berthoud (1996), Loveland (1994).

² This section summarizes data which the Colorado Municipal League compiled and set forth in an April 2001 document entitled “Ballot Box Growth Management in Colorado Municipalities.” The author wishes to thank Sam Mamet and Carolynne White of the Colorado Municipal League for their offer of this information.

D. *Initiated Measures to Restrict Annexations.*

1. Adopted: Parker – requires unanimous consent of Town Council (1994), Greenwood Village – charter amendment requiring voter approval of residential annexations (1995), Buena Vista (1999), Erie – all annexations require voter approval at special or general election (2000), Mead – all annexations require voter approval at special or general election (1995), Manitou Springs – voter approval required for all annexations of greater than 3 acres (2000), Lyons – advisory question voter approval of annexations of 5 or more acres (2000) & requiring voter approval of all annexations (2001).

2. Rejected: Dillon (1996), Eaton – repeal of annexation election requirement imposed by voter initiative in 1995 (1997); Firestone (2001); Gypsum – would have required voter approval of all future annexations (2001).

E. *Referenda on Specific Annexations.*

1. Annexation Approved: Nederland (1999), Wellington (1999), Windsor (1996), Morrison (1996), Lakewood (1994), Erie – 2 different annexations @ special election (2000), Aspen – pre-annexation agreement (2000), Lyons (2000), Erie – 9 different annexations @ special election (2000); Gypsum – attempt to overturn specific annexation failed (2001).

2. Annexation Rejected: Carbondale (2000), Erie (1999), Mead (1999), Elizabeth (1996).

F. *Referenda on Specific Development Approvals.*

1. Development Approval Approved: Buena Vista (1994), Carbondale (1994), Loveland (1994), Lyons (2000).

2. Development Approval Rejected: Elizabeth (1996), Brighton (1997), Loveland (1995).

G. *Initiated Down-zoning.*

1. Approved: none

2. Rejected: Lakewood (1998), Colorado Springs (1997), Montrose (1997), Estes Park (1996), Greeley (1995), Cripple Creek (1995).

H. *Voter Review of Land Use Code.*

1. Approved: none

2. Rejected: Cedaredge (2000).

I. *Requiring Strict Compliance with Master Plan.*

1. Rejected: Gypsum (2001).

Ballot Box Zoning Vs. Representative Government

The growing importance of political strategies in land the land use industry.

David Kenney

The fact is Initiatives are here to stay

At its root; ballot box zoning is really not a new thing in Colorado politics. Rather, it is simply the most recent manifestation of a larger political phenomenon - the passionately held right of citizens to initiate legislation.

Colorado has long had a love / hate relationship with initiatives. In fact, the initiative and referenda process in Colorado began in 1890 by Mr. Persifor M. Cooke who was president of the Colorado Direct Legislation League. Due to the persistent efforts of Mr. Cooke and others, constitutional amendments were passed in 1910 that firmly established initiatives and referenda on the Colorado political scene. Coloradans made quick use of their new power. In the first year alone (1912), there were 22 initiatives and 6 referenda on the ballot.

And we didn't stop there. Over the course of the past ninety one years Colorado citizens have initiated legislation on everything from workers rights, to the Olympics, to bear hunting and marijuana, to growth management and land use policy. In recent decades we have averaged a healthy eight statewide ballot initiatives per each two year election cycle, and this figure does not include local municipal issues.

If you are wondering what the point of this brief history of the Colorado initiative process is, it is simply this. It is not new. It is not going away. A quick look at the Colorado political landscape confirms this reality: we have ballot box budgeting, ballot box capital expenditures, ballot box tax policy, and more recently, ballot box zoning.

Ballot Box Zoning is a reflection of a larger public dissatisfaction.

Not surprisingly, over our history the subject matter of initiatives follows the passionate issues of the day. In the early nineteen-hundreds there were several ballot initiatives regarding workers rights. In the 1970's there were several initiatives regarding environmental issues including the well known ban on the Olympic games. In the eighties and early nineties there were a series of failed tax relief measures that culminated in the eventual adoption of the TABOR Amendment in 1992. And of course, during the boom cycle of the nineties and into today, growth limitation measures and ballot box zoning have become the rage.

But the advent of ballot box zoning is more than just the logical next step in the evolutionary cycle of initiatives. It is a symptom of larger public discontent. The recent prominence of land use initiatives was borne out of a frustration with rapid growth, and a fundamental lack of faith in local and state government to properly handle the issue. Polling and focus group research continue to reinforce a widespread public frustration with growth, and a firm belief that public officials are not taking adequate steps to address the issue.

Putting aside political philosophy, the practical impacts of this trend on the land use community are significant:

- For public officials: This trend is a signal that the public doesn't have faith in the way land use decisions are being made.
- For developers: it causes uncertainty, lost time and increased development costs.
- For Land Use attorneys: Rejoice! It means you can afford that second home in Aspen.

Strategies for development in the new political context.

Clearly this trend toward ballot box zoning has broad ramifications on everyone involved in land use policy. To be successful in this new paradigm, smart people involved in land use, whether from the public sector or the private sector, will develop pro-active strategies that weigh public opinion and political strategy in addition to the principals of sound land planning and market economics.

The public sector needs to do a better job understanding the concerns of constituents, and a much better job of communicating with them.

Planners need to be sensitive to public opinion, and work to educate stakeholders about the rationale behind planning decisions.

The private sector needs to begin to employ more sophisticated political strategies and tactics early on in their development plans. It is simply too late to wait until your project has been placed on the ballot to begin to employ political strategies. Political factors should become a routine part of the due diligence process:

And the trend toward ballot box zoning has impacts on the normal approval process through representative government. The possible threat of an eventual election day must inform how we approach the regulatory process. Developers should use the normal approval process to inoculate and prepare for a possible fight at the ballot box. The old days of simply knowing the local city councilman are over. Because, increasingly, securing official approval of your entitlement is not the last stop in the process.

Simple rules for politically savvy developers:

- Know the political landscape going in. Who are the community leaders? How active has this community been on previous development issues. If a project appears to be potentially controversial consider using focus groups and polling.
- Include a pr firm / political experts as part of your development team early on – not after controversy has flared. A main objective of any good political firm is to help you avoid political controversy – not just successfully navigate it.
- Be proactive. Reach out to local “opinion leaders”.
- Define your project ... before your opponents define it for you.
- Use the “community process” as a strategic tool, not simply as a necessary evil that you need to “get through”.
- In some sense this process is essentially a public negotiation, understand what you can give, whether giving it will benefit you strategically, know when to give it and to who.
- Know your audience(s) communicate to the larger public, not just the opponents.

Conclusion:

Ballot Box zoning is a reality for the Colorado land use community. In order to succeed in this new political context, developers and land use officials alike must begin to understand how public opinion is shaping their profession, and begin to incorporate political strategies and tactics into their plans.