Planning by Direct Democracy: Initiative and Referendum in Land Use Planning

Colorado Chapter of the American Planning Association
Annual Conference
October 4, 2018
Keystone, Colorado
Your Presenters

**Brian Connolly**
Otten Johnson Robinson Neff + Ragonetti, P.C.
Denver, Colorado

**Tim Cox**
Michow Cox & McAskin, LLP
Greenwood Village, Colorado
Program Outline

- Why do we have initiative and referendum?
- Initiative and referendum legal overview
- Process of initiative and referendum
- Lakewood’s experience
- Discussion of major issues in initiative and referendum
- Questions and answers
Planning by Direct Democracy
Planning by Direct Democracy

Morrison neighbors to fight already-approved housing development at ballot box amid land squeeze around Denver
Voters will decide whether to scuttle 1,350-home project at Morrison’s doorstep

Voters will decide on Willowcroft
Planning by Direct Democracy

Referendum 1 passes

By Curtis Wackerle May 6, 2015 (0)

Voters amend charter to require elections on certain variances

Latest News
Terminology

• Initiative: citizen-initiated legislation
• Referendum: citizen-initiated electoral challenge to legislative action (as compared to a judicial challenge)
Purposes

- Initiative and referendum are the purest form of direct democracy
- Initiative allows petitioners to undertake legislation that the legislative body is unwilling to take
- Referenda allows for citizen-initiated challenges to legislative body’s actions
Initiative and Referendum in Contemporary Land Use Law

- Threat of initiative/referendum may encourage legislative body to take action that it otherwise would not.
- Initiative/referendum may take political pressure off of legislative body.
- Cost of initiative/referendum may be high on both petitioners and governments, depending on various factors:
  - (1) popularity/unpopularity of the issue to be referred/initiated;
  - (2) population/geographic size of the jurisdiction;
  - (3) methods used as part of the campaign;
  - (4) other characteristics of the local population.
- Initiative/referendum does not carry the same hurdles that feature in judicial challenges under C.R.C.P. Rule 106(a)(4) or declaratory judgments.
Sources of Law


• State statutes.
  - See, e.g., C.R.S. § 1-40-101 et seq. (statewide initiative and referendum); C.R.S. § 31-11-101 et seq. (municipal initiative and referendum). Note: C.R.S. § 30-11-103.5 (home-rule county initiatives and referenda are governed by C.R.S. § 31-11-101 et seq.).

• Local charters and ordinances
Who has the power?

- In a statewide initiative or referendum, anyone
- In a municipal initiative or referendum, anyone
- In a county, no one
  - But maybe in some situations
What may be initiated or referred?

- Power applies "only to acts which are legislative in character."  
  City of Aurora v. Zwerdlinger, 571 P.2d 1074, 1076 (Colo. 1977); accord 
  Witcher v. Canon City, 716 P.2d 445, 449 (Colo. 1986); Margolis v. 
  District Court, 638 P.2d 297, 303 (Colo. 1981)
  - The determinative inquiry is whether the action "announces new public 
    policy or is simply the implementation of a previously declared policy." 
- Three part test: (1) permanent and general character vs. temporary 
  operation and effect; (2) declaration of public policy vs. carrying out 
  previously-determined policy; (3) amendments to original legislative 
  acts are also legislative
What may be initiated or referred?

• Municipal annexation
• Repeal of annexation
• Disconnection
• Zoning
  – Presumably also includes PUD zoning
• Comprehensive plan
  – Only if adopted by the legislative body
• Conditional/special use permits
• Grant of vested property rights
  – Pursuant to C.R.S. § 24-68-103(1)(c)
What may not be initiated or referred?

- Government contracts
- Real estate sales or transfers
- Site plans
- Administrative/ministerial matters

Not clear whether subdivision plats are subject to referendum or initiative.
Initiative Process

- **Petition**
  - Must be approved by clerk; must have at least two proponents; must contain a summary of the issue to be initiated or referred; must contain the full text of the initiated measure or referred ordinance; affidavits of circulators
  - Requires 5% of registered electors (may be varied by charter)
- **Signature verification by the clerk, with an opportunity for protest**
- **Submission to the legislative body may occur within 180 days of the approval of the petition; the legislative body has 20 days to act on the legislation.**
- **Referral of the issue to the voters.**
- **Ordinance takes effect upon approval by a majority of the voters.**
Referendum Process

- **Petition**
  - Must be filed within 30 days of the legislature’s approval of ordinance
  - Must be approved by clerk; must have at least two proponents; must contain a summary of the issue to be initiated or referred; must contain the full text of the initiated measure or referred ordinance; affidavits of circulators
  - Requires 5% of registered electors (may be varied by charter)

- Signature verification by the clerk, with an opportunity for protest by any registered elector in the jurisdiction

- Reconsideration of the ordinance by the elected body following submission and approval of the petition

- Referral of the issue to the voters

- Ordinance takes effect upon approval by a majority of the voters.
“Smart Growth” Initiative

Would cap the number of permits issued for residential units at previous year’s number plus 1%

Would issue “allocations” to each developer to be exchanged for building permits and would limit each developer to 40 allocations

Would require residential projects proposing more than 40 units in a project over a certain size to see additional City Council approval
Factors that led to the initiative

- **Zoning changes:** City-wide text and map amendments in 2013 encouraged multi-family and mixed uses, especially in transit areas.

- **Construction defects:** Condominiums still not a factor in the market despite recent legislation.

- **Impacts:** Several larger-scale apartment projects built or proposed – some are high-end, but some residents and city leaders see large rental developments as a negative trend.
Key provisions in Lakewood’s Code Initiative and Referendum

A protest to an initiative petition may be filed in the office of the City Clerk by any registered elector of the City within 30 days after the petition is filed with the City Clerk.
Key provisions in Lakewood’s Code Initiative and Referendum

The City Council ... shall not act on any petition presented to it during the pendency of any protest or proceedings provided for [herein], or any review thereof or appeal therefrom.
Key provisions in Lakewood’s Code Initiative and Referendum

Upon timely appeal to the District Court of Jefferson County of any decision of the City Clerk, all proceedings leading to any election upon any initiative petition shall be suspended until final disposition of such review.
Petition and Protest - Key Events

Petition form submitted to City Clerk (June 2017)
   Clerk finds petition, signatures valid
Letter of protest is sent by attorney for Mr. Dorman
   Clerk rejects letter
Dorman files formal protest (Rule 106, declaratory and injunctive relief, constitutionality)
   One of two petition representatives withdraws
Dorman files motion to remand
Parties file briefs on Rule 106 appeal
Defense files joint motion to dismiss
   City requests oral argument
   Argument held
Order issued upholding validity of petition, denying other claims (Aug 2018)
Issues for Discussion

• Stay, Just a Little Bit Longer
• Signed, Sealed, Acknowledged, I’m Yours
• Somebody’s Watching Me
• All By Myself
• They Can’t Take That Away from Me
• Fight for Your Right - to Petition? to Protest?
• We Just Disagree
• I’m Moving Out
Discussion Issue 1

*Stay, Just a Little Bit Longer*

Does it make sense to stay action on petition during protest?
Discussion Issue 2

Signed Sealed Acknowledged, I’m Yours
No challenge to signatures, just to affidavit forms
Discussion Issue 3

(I Always Feel Like) Somebody’s Watching Me

Clerk presides over protest hearing, reviews own decision
Discussion Issue 4

All By Myself
One of two petition representatives withdraws – is petition invalid?
Discussion Issue 5

They Can’t Take That Away from Me
Protester Files Premature Constitutional Challenges
Discussion Issue 6

*Fight for Your Right ... to Petition? to Protest?*

Whose rights are more important?
Discussion Issue 7

*We Just Disagree*
Council Split on Support for Initiative
Discussion Issue 8

I’m Moving Out
Do petition signatures become stale over time?
General Considerations

• Team assembly
  - Clerk, planners, lawyers, strategists, fundraisers all play a part
• Level of coordination between public and private players
• Methods of communication
• Fundraising and campaign finance law
• Endorsements, statements, etc.
Developer Considerations

• Referendum risk analysis
  – Risk is much higher in a municipality than in a county
  – Risk grows greater as municipal population decreases

• Referendum is pure politics
  – Rule 106 outcome is much easier to control

• Campaign finance issues
Opposition Strategy

- File a protest
- Challenge the clerk’s determination of sufficiency under Rule 106
- Hope for as much delay as possible
Planner’s Role

- **When the petition comes in...**
  - Work with local government lawyers to determine whether a petition can be filed, work with clerk regarding sufficiency issues
  - Advocacy: what is legally and politically permissible?
    - Planners have a role in advocacy, but political reality might sideline planners
  - Educational role of planners in initiatives and referenda that impact land use and other matters
  - Understanding the outcome of an initiative or referendum
    - Initiative or referendum may not have been carefully conceived or drafted—planners can assist in interpretation and implementation
Planner’s Role

• Before the petition comes in…
  – Consider initiative and referendum in planning processes
    • Underscores importance of ensuring community buy-in on planning issues
  – In home rule municipalities, consider limitations on initiative and referendum
    • Must be within constitutional limitations
    • Many home rule municipalities have increased the threshold for signatures, limit the time period in which petitions can be filed
  – Educating applicants and opponents about procedural matters
  – Do planners have a role in initiating or referring matters?
    • Local legislative bodies may want to refer matters to the voters
2018 Ballot Measures

• Amendment 74
  - Constitutional amendment to allow property owners to recover any loss of fair market value as a result of governmental regulation

• Proposition 109
  - Authorizes issuance of bonds for 66 designated highway projects, would require legislature to dedicate portion of general fund for bond repayment

• Proposition 110
  - Imposes a 0.62% statewide sales tax for transportation, including multi-modal projects, up to 40% of which would go to local government

• Proposition 112
  - Would impose 2,500-foot setbacks on new oil and gas wells from any existing occupied structure