



Citizen's Local Growth Petitions

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Disclaimers

I am an attorney but I'm not your attorney. Consult your attorney. They are better positioned to help answer questions specific to your community.

The opinions expressed are my own and may not reflect the opinions of the City of Post Falls . . . or anyone else for that matter. Afterall, you get what you pay for.

Road Map

Discuss local initiative process.

Review relevant Idaho case law.

Discuss what the Post Falls petition addressed.

Review some of the issues with the petition.

Discuss liability issues arising from land use matters.

A quick word about the Fair Housing Act

Petition

March 2, 2021: Petitioner files an initiative petition seeking to limit growth in Post Falls.

Similar petition filed in Rathdrum by a different, but affiliated, petitioner. Petitions considered, but not filed, in Coeur d'Alene and Hayden.

Petition generally based on the growth management ordinance from Boulder City, Nevada

Petition

Until 2015 for cities and 2018 for counties, the process to pursue a local initiative petition was wholly a local matter.

In 2015, the legislature adopted uniform rules for cities.

In 2018, those changes were extended to counties. Among other changes we will discuss later.

The city process is spelled out in I.C. 34-1801B and the county rules are contained in I.C. 34-1801C.

I've provided citations to the city regulations, but the county rules are nearly identical.

Process

I.C. 34-1804(1): Signatures of 20 verified qualified electors required to start process.

I.C. 34-1801B/34-1809: Once signatures are verified, City Clerk routes petition to City Attorney to draft Certificate of Review.

I.C. 34-1801B/34-1809: City Attorney has 20 working days to issue opinion that reviews proposed measure for style and legal substance.

Process

I.C. 34-1809(1): Petitioner may accept or reject any comments in the Certificate of Review.

I.C.34-1809(2): Petitioner resubmits final measure to City Clerk within 15 working days of receiving Certificate of Review.

I.C. 34-1809(2): Within 10 working days City Attorney prepares short and long ballot titles and reviews form of petition.

Process

Many requirements for form of petition and rules for petition gatherers.

I.C.34-1801B(7): Petitioner must gather at least 20% of the total number of qualified electors voting in the last general election.

I.C.34-1801B(12): Signatures must be returned to City Clerk within 180 days or before April 30th of election year, whichever is earlier.

I.C.34-1801B(14): County Clerk verifies signatures.

Process

I.C.34-1801B(15): If sufficient signatures have been gathered, the City Council must hold a hearing on adopting the draft within 30 days.

I.C.34-1801B(3): If not adopted, the measure is placed on the ballot in November of odd numbered years.

I.C.34-1801B(17,18,19): If approved by a simple majority the Mayor must issue a proclamation declaring the measure adopted and the ordinance must be published within 30 days.

Case Law:
Gumprecht,
104 ID 615
(1983).

An initiative was proposed in Coeur d'Alene to prohibit construction of certain large structures near the shoreline.

Property owners filed suite, before the election, alleging land use matters cannot be addressed via the initiative process.

The Idaho Supreme Court determined that land use matters cannot be adopted using the initiative process and that the election could not be held.

Case Law:
Gumprecht,
104 ID 615
(1983).

“Local regulations must not [be] in conflict with the general laws.”

“The Local Planning Act establishes explicit and express procedures to be followed by the governing boards or commissions when considering, enacting and amending zoning plans and ordinances.”

“The comprehensiveness of zoning legislation in Idaho leaves no room for direct legislation by electors through an initiative election, and the initiative in question in this case is “in conflict with ... the general laws [LLUPA].”

Case Law:
*Keep the
Commandments,*
143 ID 254
(2006).

Idaho Supreme Court partially overruled *Gumprecht*.

Coalition filed petition to require City of Boise to reset a 10 commandments monument in Julia Davis Park that had been removed.

The Idaho Supreme Court determined that addressing the legality of the initiative, prior to the election, was not ripe for review because the initiative could be defeated and allowing pre-election challenges erected a barrier to the initiative process.

Case Law:
*Keep the
Command
ments,*
143 ID 254
(2006).

“Gumprecht takes the court into controversies that may never become realities. It may prevent the voters from articulating a view by the ballot that could be instructive. The benefits of public debate through the initiative process may be lost. The hard work of obtaining qualifying signatures may be wasted in the event the Court finds a single flaw in the initiative.”

“Doubtless there may be a cost in conducting an election on an initiative that is ruled invalid. However, the initiative process arises from the Idaho Constitution. It is not an inconvenience created by rabble rousers and malcontents to vex established authority. Sometimes it compels authorities to listen when nothing else will.”

Case Law:
Davidson,
143 ID 616
(2006).

Davidson presented a petition to Sun Valley's Clerk to permit marijuana sales locally.

Clerk, on advice of City Attorney, refused to process initiative because it would clearly violate state and federal law if adopted.

Idaho Supreme Court ruled that clerk was required to process initiative but noted that pre-election challenges to initiative that did not follow procedural requirements could be brought.

Case Law:
Davidson,
143 ID 616
(2006).

"The City Clerk, even when acting on the advice of the City Attorney, lacked the authority to rule on the constitutionality of Davidson's proposed initiative. We therefore reverse the district court's determination that the City Clerk was not obligated to complete her ministerial duty."

"We are not signaling any sort of endorsement of the constitutionality or wisdom of Davidson's proposed initiative."

"Pre-election review of a challenged initiative remains appropriate where the procedures for placing the initiative on the ballot were not followed."

House Bill 568: The Empire Strikes Back

In 2015 the Idaho Legislature adopted I.C. 34-1801B to provide statewide procedures for city initiative and referendum elections. Previously, each city adopted their own procedures. County procedures were left up to the individual counties.

In 2018, in response to a referendum petition filed in Ada County by the Dry Creek Valley Coalition seeking to overturn an Ada County land use decision, HB 568 was introduced.

HB 568 added I.C. 34-1801C providing that counties must also follow the statewide initiative/referendum rules.

House Bill 568: The Empire Strikes Back

HB 568 also added a new subsection 22 to I.C.34-1801B (subsection 21 in I.C. 34-1801C) to codify the *Gumprecht* decision that land use matters cannot be addressed using the initiative/referendum process.

34-1801B. INITIATIVE AND REFERENDUM PROCEDURES FOR CITIES. Each city shall allow direct legislation by the people through the initiative and referendum. **Cities shall follow the procedures set forth in this chapter** subject to the following provisions:

(22) This section does not apply to any local zoning legislation including, but not limited to, ordinances required or authorized pursuant to chapter 65, title 67, Idaho Code. *(emphasis added)*.

House Bill 568: The Empire Strikes Back

Note that the requirements of I.C. 34-1801B are *procedural* requirements.

Meaning that under the *Davidson* decision, proposed initiatives/referendums regarding land use matters are subject to a challenge before the election for failing to follow the mandatory procedural requirements to be placed on the ballot.

House Bill 568: The Empire Strikes Back

Debate by Senator Rice:

"[M]emorandums [sic: initiatives] and referendums at the local level can't be brought on land use planning issues. That doesn't prohibit a state-wide initiative to change the land use planning act. That's available. That's still available. But local level initiatives and referendums cannot override state-wide law. Can't do it. And it is appropriate for the legislature to take action to make it absolutely clear that that kind of thing shouldn't be going on and that people shouldn't be put to the expense of testing this through the court over and over again.

Petition: What would it do?

Stated purpose of the petition was to:

- * Maintain a distinct and geographically separated city.
- * Emphasize preservation of open space.
- * Maintain a mix of housing types and prices.
- * Provide and maintain parks.
- * Maintain/augment public utilities.
- * Encourage quality schools.

Petition: What would it do?

Limit growth to 100 “allotments” for new dwelling units/hotel rooms per year. Must have an allotment to apply for a building permit.

Created a four-step development approval process:

* Planning Commission evaluates proposed development for conformity to “development control plan”.

* Allotment Committee, chosen at random rather than by appointment, evaluates utility availability, availability of other government services (police, fire, schools, streets etc.) and awards points.

* City staff evaluates “architectural continuity and appropriateness”.

* City Council awards allotments, if the allotment committee awards sufficient points, and hears appeals.

Petition: What would it do?

Petition exempted owner/builders from the allotment system but reduced the number of allotments available for each owner/builder permit issued.

Exempted up to 50 dwellings over 5 years for low income or senior housing.

Also exempted existing residential lots of record.

Exempted certain financial records submitted by developers from public records laws.

Petition: What's the problem?

Selection of Allotment Committee (at random) doesn't comport with the appointment process in I.C. 50-210.

Adoption process (petition) doesn't comply with LLUPA standard for adopting zoning ordinances or issuing permits.

Conflicts with Public Records Law.

Approval granting standards "innovative site design" or "color usage" are vague and don't comply with requirement in I.C. 67-6535 that approval standards be "express standards."

Petition: What's the problem?

Takings? Post Falls is issuing in excess of 1,000 residential permits annually. Developers could be required to wait over 10 years for an allotment to develop their property and may never receive one.

Impact to adopted master plans and impact fees? Such a major change in the assumed growth rate likely undermines validity of the plans.

References to "City Charter" and "City Manager" as well as other artifacts of Nevada law that don't exist in Idaho/Post Falls.

*Potential Fair Housing Act violation (disparate impact claim)?

Petition: Outcome

Our Certificate of Review identifying the issues with the proposed measure was provided to the petitioner.

We advised that because the petition was preempted by HB 568, we would not process the petition any further.

Petitioner elected not to pursue the matter any further. But others have continued to claim that the City should adopt measure.

Takeaways on Initiatives

Local initiatives on land use matters are foreclosed by I.C. 34-1801B and I.C. 34-1801C that can be challenged pre-election if necessary*.

What constitutes a land use matter may be in the eye of the beholder since the prohibition extends to ordinances required **or** authorized under LLUPA.

Petitioners alleged that the Boulder City model does not fall within LLUPA but just regulates building permits.

We were confident that it was a land use matter but we never had to defend that conclusion.

Takeaways on Initiatives

Locals concerned about growth have other avenues to consider:

Voting.

Becoming involved in the land use planning process.

Attending land use hearings.

Lobby for changes to LLUPA or local ordinances.

Run for office.

Seek appointment to the Planning Commission.

Pursue a statewide initiative.

Takeaways on Initiatives

*Unknown at this point is the impact of the recent Idaho Supreme Court decision in *Reclaim Idaho* issued on August 23, 2021.

The Court struck down changes to the statewide initiative/referendum process adopted this year because they created onerous procedural burdens on qualifying a measure for the ballot:

"We see no need to strain for an interpretation when the plain language of the Idaho Constitution is clear: the people have the power to propose and enact laws on any subject. This power is both equivalent to that of the legislature and one which the people possess independent of the legislature."

The changes made by HB 568 *should* survive, if challenged, since they simply codified Idaho Supreme Court precedent but as we've seen the Court can sometimes change direction.

Liability Issues

Can't insure against claims arising from land use actions because it is considered a self-inflicted injury. Most cities and counties insured through ICRMP:

"9. Eminent Domain. This policy does not cover any claim arising out of or in any way connected with the operation of the principles of eminent domain, condemnation proceedings, inverse condemnation, annexation, regulatory takings, **land use regulation, or planning and zoning activities or proceedings, however any such matters may be characterized, whether such liability accrues directly against you or by virtue of any agreement entered into by or on your behalf"**

Liability
Issues:
*Boise
County v.
Alamar
Ranch*

In 2007, Alamar Ranch sought a Conditional Use Permit in Boise County for a residential treatment center for teens.

Based on public testimony, the county attached onerous conditions to the approval:

- * Construction of a new bridge.
- * Construction of a heli-pad.
- * Purchase of a fire truck.

Liability
Issues:
*Boise
County v.
Alamar
Ranch*

Alamar Ranch filed suit alleging a violation of the Fair Housing Act.

Boise County lost. Court awarded a judgement of \$4 million dollars plus an award of attorney's fees of \$1.4 million.

Liability
Issues:
*Boise
County v.
Alamar
Ranch*

Boise County filed for Chapter 9 Bankruptcy, which was denied. The Federal Court ordered the County to levy a \$5.4 million dollar tax to satisfy the judgement.

By 2012, the County had paid \$2.25 million towards the judgement and interest was accruing at \$400 a day.

Liability
Issues:
*Boise
County v.
ICRMP*

Boise County sued ICRMP over the denial of insurance coverage and lost. The county was also ordered to pay ICRMP's costs. 151 ID 901 (2011).

“Alamar's claims did indeed arise out of the County's land use regulations. Alamar alleged that decisions made by the P & Z and Board on its land use application constituted violations of the FHA. However, Alamar's complaint could not more obviously allege “liability arising out of or ... connected with ... land use regulation or planning and zoning.”

*Liability Issues: A word about Fair Housing

The FHA protects against both intentional and unintentional discrimination in the provision of housing and can apply to land use regulations of cities and counties.

Some regulations that seek to limit growth may have the discriminatory effect of making it more difficult for protected classes to obtain housing by making housing more expensive.

Ex: Minimum floor space, lot sizes, limiting the number of permits, restricting multi-family units.

Proceed cautiously!