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Initiative 66: What It Is, Where It Stands, and How to Stop It

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A proposed statewide initiative would impose a strict 1% residential growth limit on ten Front Range counties—Adams, Arapahoe, Boulder, Broomfield, Denver, Douglas, El Paso, Jefferson, Larimer, and Weld—beginning in 2019. **Industry experts predict** that if Initiative 66 passes, the resulting decrease in housing supply would be disastrous to Colorado’s economy and exacerbate the area’s housing shortage and affordability crises.

On February 23, 2018, the Colorado Supreme Court affirmed the state Title Board’s single-subject approval of the Initiative, paving the way for proponents to begin gathering signatures. Real estate industry professionals should familiarize themselves about what exactly Initiative 66 proposes, what to expect between now and the November election, and what they can do to stop this ill-conceived proposal from becoming law in Colorado.

The Basics

Initiative 66 proposes a state statute that would:

- (i) Recognize the authority of voters, acting through local initiative or referendum, to limit housing growth;
- (ii) Impose a 1% residential unit growth cap in ten Colorado counties for at least the

next two years; and

(iii) Provide that, beginning in 2021, these limits could be amended or repealed, but only by voter initiative.

The first provision reserves, to “the electors of every city, town, city and county, or local county,” “the right to limit housing growth by initiative and referendum.” As applied to cities and towns, this provision is superfluous because the Colorado Constitution already reserves to electors the power to act by initiative and referendum. As applied to counties, this provision is important because the state constitution does not require counties to provide an initiative process, and some do not.

The second provision—the growth cap—would apply countywide in the ten covered counties, as well as to all local governments in those counties. The most striking aspect of the growth cap is its lack of detail. The Initiative says only, “Privately owned residential housing growth in [the ten counties], including all local governments within such counties, shall not exceed one percent annually....”

The third provision requires a voter initiative to repeal the growth cap in any covered municipality, and further requires that any initiative petition to repeal the growth cap must be signed by 5% of voters participating in the most recent general election. That’s legally problematic as applied to home rule municipalities (discussed below).

Daniel Hayes, a Golden real estate broker and landlord, is the principal proponent of Initiative 66. Hayes led the successful campaign to pass a **growth limitation initiative** in Golden in 1995 and organized **an unsuccessful campaign** to amend the state constitution to include similar growth restrictions in 2016.

For-sale home prices and apartment rental rates in the Front Range have already been increasing at almost twice the national average for the last five years. Many factors are driving housing prices higher, including, on the demand side, population growth. The state added about 570,000 new residents between 2009 and 2016. The state demographer estimates that the Front Range’s population will grow by 1.7% per year through 2020, and by 1.6% per year for 2021 to 2025. On the supply side, experts cite the high cost of land and municipal infrastructure, overly restrictive zoning codes and development regulations, the risk of construction defect litigation, and a shortage of skilled construction labor.

If the Initiative takes effect, the consequences on housing supply and affordability would be acute. A recent report estimates a current deficit of 32,000 housing units for seven Front Range counties, all of which would be subject to Initiative 66’s growth cap. Common Sense Policy Roundtable, an industry-sponsored think tank, submitted a memorandum to the Colorado Legislative Council that estimates Initiative 66 would result in 26,050 fewer housing units being built in a two-year period (2019 and 2020),

and would cost the Colorado economy between \$5.2 and \$7.8 billion in foregone construction activity alone.

The memorandum also points out that the effects of local growth restrictions, **like the one proposed in Lakewood**, are mitigated by the ability of neighboring jurisdictions to absorb spillover growth. A restriction throughout the metropolitan area would be inescapable. The effects of the Initiative would be most severe in Denver, Douglas, and Weld counties, all three of which have experienced residential population growth of more than 2% in recent years.

What About Vested Rights?

The effects of Initiative 66 on legislatively approved “site specific development plan[s]” are not entirely clear.

The Initiative says only that “each local government ... shall allot building permits so that housing growth does not exceed a one percent annual growth rate in the total number of housing units in each said year.”

The Initiative does not address its conflict with Colorado’s vested property rights statute, the key provision of which provides: “A vested property right ... precludes any ... land use action ... pursuant to an initiated measure which would alter, impair, prevent, diminish, impose a moratorium on development, or otherwise delay the development or use of the property as set forth in a site specific development plan.” The vested rights statute contemplates prospective application to “initiated measure[s]” like Initiative 66.

An example may be illustrative. The Town of Erie, Colorado is located in Boulder and Weld counties, and therefore would be subject to the Initiative’s growth cap. Erie currently has about 8,750 housing units. Under the 1% growth cap, it could add no more than about 88 housing units per year. If all developers with vested rights to develop housing units apply for 88 or less building permits in any given year, the cap is a non-issue.

However, if developers in Erie with approved site specific development plans seek more than 88 building permits in a year, the Town will find itself in a legal conundrum. If it fails to issue the permits, the Town will breach its duties under the approved development plans. If the Town issues more than 88 permits, it will violate Initiative 66.

Needless to say, Initiative 66 will leave some municipalities in a precarious legal position. Developers should review the vested property rights and default provisions in their development agreements closely.

Where It Stands

Proponents filed the final text of Initiative 66 on November 15, 2017. Once the final text of an initiative has been filed with the Colorado Secretary of State, the Initiative Title Setting Review Board decides whether the proposed measure satisfies the “single–subject requirement” in the Colorado Constitution, which requires that all bills (except general appropriation bills) contain only one subject.

The Title Board granted single–subject approval to Initiative 66 on December 6, 2017. Scott Smith, a Colorado Springs–based real estate developer, filed a **petition for review** with the Colorado Supreme Court on December 27. Smith argued that the Initiative’s requirements for repealing the growth cap would unconstitutionally usurp the authority of home rule jurisdictions to conduct municipal elections (discussed below).

In **an opinion** issued on February 23, the state supreme court declined to rule on the constitutionality of the Initiative and affirmed the actions of the Title Board. Proponents may begin gathering the 98,492 signatures required to get the Initiative on the ballot this November as soon as the Secretary of State approves the format of their petition. State law requires that these signatures be submitted to the Secretary of State by August 6, 2018. Hayes recently **claimed** that he is prepared to spend \$400,000 to ensure that the Initiative makes it onto the November ballot.

How to Stop It

Initiative 66 should not become law in Colorado.

Proponents may fail to gather the necessary number of signatures, in which case the Initiative will not appear on the ballot in November. Signature gathering is an expensive, time consuming, and uncertain enterprise.

Meanwhile, opponents should organize a “no” campaign in earnest. Elected leaders of both **political parties oppose** the Initiative. To those on the right, this type of regulation is anathema to the principles of free enterprise, private property rights, and local control of land use. To the left, the Initiative would hamper efforts to increase the supply of affordable housing and densify urban areas. The Colorado Association of Homebuilders, Colorado Association of REALTORS, and Denver Metro Chamber of Commerce should assume leading roles in fundraising, lobbying, and educating voters in the lead–up to the November election. Professionals in the affordable housing industry and fair housing advocates should likewise play leading roles in voter education.

If Initiative 66 passes in November, opponents will still have legal and political avenues of resistance. A serious legal question lingers about whether the Initiative’s “signature requirement[s]” “for ... repealing or amending proposals to regulate growth” unconstitutionally usurps home–rule powers guaranteed by Article XX, Section 6 of the

Colorado Constitution, which reserves to home rule municipalities the power to “conduct and control ... all matters pertaining to municipal elections....” If the repeal provision is found to be unconstitutional, local governments could repeal the growth cap through the normal course of legislative business starting in 2021.

As a state statute, the General Assembly could modify or repeal Initiative 66 when its next session begins in January 2019. But overruling the will of voters so quickly after an election is politically unsavory (as the Denver City Council has learned through its recent experience with the Green Roof Initiative).

Given its potential negative effects, real estate industry leaders should waste no time in educating themselves about Initiative 66 and organizing opposition to it. If passed, the Initiative’s costs to the local economy will be significant and long lasting.

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