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Initiative 122: Another Anti-Growth Effort Threatens the Front Range

January 2020 • [Brittany Wiser](#) and [Brian Connolly](#)

[As we reported in December](#), a proposed anti-growth ballot initiative is one step closer to appearing on the Colorado ballot in November 2020. Now in the signature-gathering phase, Initiative 122 would have serious negative consequences for the Colorado economy.

[The initiative](#) would limit the increase in the number of residential housing units countywide to one percent per year in Adams, Arapahoe, Boulder, Broomfield, Denver, Douglas, Elbert, El Paso, Jefferson, Larimer and Weld counties. Under the measure, the growth cap would apply between January 1, 2021 and December 31, 2022, and would remain in effect after that time unless amended or repealed by voter initiative or referendum. The measure would require local governments, including home rule municipalities, to allocate building permits in such a manner as not to exceed the countywide growth cap. The final version of Initiative 122 increases the growth cap by 0.15% for housing units that qualify as “affordable housing” and by another 0.15% for housing units that qualify as “senior housing.”

The main proponent of Initiative 122, Daniel Hayes, has a track record of championing anti-growth efforts in Colorado. In 1995, he led a successful campaign to impose a growth cap in Golden, and in 2016 and 2018, he led unsuccessful campaigns to impose similar growth restrictions across the Front Range, including [Initiative 66](#). Hayes’s current effort follows on the passage, in July 2019, of a similar residential

growth limitation in the City of Lakewood.

Initiative 122 raises many of the same concerns as its predecessor anti-growth efforts. Besides having severe consequences for economic growth in Colorado, the proposed law is poorly drafted and raises more questions than answers. Below, we present a list of questions for which the proposed initiative offers no (or unsatisfactory) answers:

- **How will building permits be issued when the number of applications exceeds the number of available allocations under the growth cap?** The measure offers no guidance as to how building permits might be allocated.
- **Would banking be available? Could unused permits roll over?** The measure does not indicate whether building permits might be banked, such that a multi-phase project could be completed with some degree of certainty. It also does not address whether unused permits could be rolled over to future years.
- **How would the measure impact redevelopment and blight?** Initiative 122 does not indicate whether housing units that replace demolished housing units would be subject to the growth cap, although it appears that they would be. The measure also does not provide any exemption for properties in blighted or other redevelopment areas. Urban projects in redevelopment areas—which include everything from former industrial sites to the former St. Anthony’s and University of Colorado hospital campuses in Denver, and the Colfax Avenue corridor in Lakewood—appear to be subject to the initiative’s limitations. The initiative would thus seriously impair the redevelopment of key sites and areas of the Front Range.
- **How will the number of building permits be allocated among and between jurisdictions within a county?** Initiative 122 proposes limiting growth on a countywide basis in the 11 affected counties, yet offers no guidance as to how the limitation is to be applied between jurisdictions. For example, Douglas County contains five incorporated municipalities, each of which exercise their authority independently from the unincorporated county. The initiative offers no method for allocating permits among the jurisdictions.
- **How does Initiative 122 impact housing affordability?** Although the final initiative allows for “bonus” units for affordable housing, the measure suffers from an unclear definition of “affordable housing” and practical problems with respect to affordable housing finance. The definition of “affordable housing” contained in the measure differs greatly from the typical definition used by the U.S. Department of Housing and Urban Development, which determines housing affordability based on the area median income for a given household size. The initiative defines affordable housing as being 30% lower in price than “the average comparable housing within the same local government,” which is unclear at best. Additionally, while the affordable housing allowance would provide for additional development of affordable housing, the initiative ignores the fact that most affordable housing is supported by income tax credits allocated by the

Colorado Housing Finance Authority (“CHFA”). CHFA awards income tax credits in part based on “project readiness.” The uncertainty associated with building permit allocations would undermine a given project’s ability to compete for tax credits. What’s more, setting aside the affordable housing provisions of the initiative, the significant imbalances between housing supply and demand across the Front Range make it nearly certain that a growth measure legally and practically limiting housing construction would undermine efforts to reduce the region’s current affordability crisis.

- **What is the impact on home rule municipalities?** Although the proposed measure mentions home rule municipalities, it remains unclear whether a home rule municipality could opt to exempt itself from the initiative.
- **Can the measure be amended by the legislature?** The language of Initiative 122 indicates only that it can be amended by voters after 2021. However, the measure is a statutory initiative, meaning that the state legislature could likely amend it following passage.
- **What is the enforcement mechanism for the proposed measure?** The proposed measure does not indicate how it would be enforced. For example, if all municipalities in a particular county collectively issue more building permits than are permitted under the measure, it is not at all clear how a court would enforce it.
- **How would the measure impact vested property rights?** Projects that have secured vested property rights through a development agreement would be in a better position to defend against Initiative 122, should it pass. The Colorado Vested Property Rights statute prohibits local governments from impairing development of a project with vested rights, except under certain circumstances, including the payment of just compensation for costs incurred following approval of the underlying project.
- **What would a one percent growth cap mean in practice?** Obviously, a growth cap would allow large counties the ability to issue more permits than small counties. For example, Denver had 306,714 housing units in 2017, meaning that Initiative 122 would limit the annual increase in housing units to 3,067. Between 2010 and 2017, Denver averaged 2,988 new housing units per year, so a growth cap would have had little effect on Denver’s recent boom. Smaller counties would be more heavily impacted, however, particularly where development pressure is high. For example, Elbert County had just 9,325 housing units in 2017. Initiative 122 would limit building permits there to just 93 per year, stymieing growth.

For these reasons and others, Otten Johnson opposes Initiative 122 because of its potential for its uncertain and detrimental impacts on our region. However, we recognize that measures such as this initiative are born out of Coloradans’ frustration with the impacts of growth, such as traffic congestion and affordable housing. We therefore strongly support common sense state and local efforts—from road and transit improvements to increasing the production of affordable housing—aimed at easing

these concerns. In the meantime, we are available to assist our clients interested in further understanding the potential impacts of Initiative 122 on their projects and businesses.

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