

Initiatives & Referenda
in
Idaho Zoning Law

March 8, 2018

SPINK  BUTLER 
ATTORNEYS AT LAW

Outline of Discussion

- **Background**
- **Case Study & Context**
- **Idaho Statutory and Constitutional Rules re Initiatives and Referenda**
- **Comparison of Other States**
- **Quasi-Judicial vs. Legislative Distinction**
- **2018 Legislation**

Background

- **Initiatives & Referenda**
 - What are they?
 - Examples?

Background – Direct Democracy

- **Article VIII, Section 3 of Idaho Constitution:**
 - No county, city, board of education, or school district, or other subdivision of the state, shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, *without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose...*

Background

- **Boise-Focused Voting Questions**

Background

- **House Bill 217 (2019)**
 - Any time an urban renewal agency proposes to contribute anything to a “municipal building” or a “multipurpose sports stadium complex,” there must be a 55% vote
 - Previously only applied to “municipal buildings” and a vote was required only if the URA contributed more than 51% of total project cost
 - Just passed out of committee

“Direct Democracy”

- **Representative vs. Direct Democracy**

Zoning & Entitlements

- **Currently a Highly Charged Environment for Zoning Entitlements**
 - “Pitchforks and torches” abound
 - Neighborhood associations are highly active
 - Politicians are feeling pressure to deny

Zoning & Entitlements

- **How Do We Adopt Land Use Decisions?**
 - Local Land Use Planning Act
 - Processes:
 - Recommendation by Planning & Zoning
 - Decisions by City Council / Board of County Commissioners
 - Decisions in writing subject to due process standards

Zoning & Entitlements

- **How Do We Challenge Zoning Decisions?**
 - Local Land Use Planning Act and Administrative Procedures Act
 - Processes:
 - Must request reconsideration within fourteen days
 - Most approvals require judicial review within 28 days
 - Other:
 - Can request mediation under LLUPA
 - Can request a regulatory takings analysis

Zoning & Entitlements

- **Challenges to Zoning Decisions:**
 - Time-consuming
 - Costly
 - Bond required to stay
 - Typically result in a “do-over”
- **Look to other states for means to challenge directly or place a “cloud” over projects**

Setting the Stage – Dry Creek Ranch

- **About Dry Creek Ranch**
 - 1400 acres located east of SH55
 - Multiple planned communities in the area

Setting the Stage – Dry Creek Ranch

- **Development History**
 - **Planned community first proposed in 2005**
 - **First neighborhood meeting/application in 2006**
 - **Application deemed complete in 2008**
 - **Public meetings in May, June, and August 2008**
 - **Remanded to Staff in 2009 to reduce density (from 4,300 to 3,500 residential units)**

Setting the Stage – Dry Creek Ranch

- **Development History**
 - Application deemed complete (again) June 2009
 - Hearings in September and December 2009
 - Approval in February 2010 (four years after application)

Setting the Stage – Dry Creek Ranch

- **2010 Development Approvals**
 - 3,500 residential units
 - 800,000 square feet of commercial entitlement
 - Four (!) school sites
 - Grade-separated interchange at Highway 55
- **700-page (!) Development Agreement**

Setting the Stage – Dry Creek Ranch

- **Boise Hunter Homes' Modification**
 - Acquires property in 2016
 - Application to modify existing PC approval
 - Neighborhood meeting held and application submitted in July 2016

Setting the Stage – Dry Creek Ranch

- **Highlights of Application:**
 - Reduce residential from 3,500 units to 1,800
 - Reduce commercial from 800,000sf to 85,000sf
 - Reduced overall trips by 68%
 - Retained 467 acres of total open space (33%)
 - Significant open space and habitat mitigation fund

Setting the Stage – Dry Creek Ranch

- **Modifications Proposed to:**
 - DCR Comprehensive Plan
 - DCR Zoning Ordinance
 - Updated economic impact studies
 - Updated development plan
- **Also included a new preliminary plat**

Setting the Stage – Dry Creek Ranch

- **BHH Application Procedural History**
 - Applications submitted in July 2016
 - Hearing before P&Z on December 15, 2016
 - Hearing before BOCC on February 15, 2017
 - Approval by BOCC on February 21, 2017
 - 85 conditions of approval

Setting the Stage – Dry Creek Ranch

- **Specific Modifications Following Approval**
 - **First Amendment to Development Agreement**
 - Adopted by Resolution 2215
 - Incorporates new approval and modifications to development plan
 - **Modifications to Dry Creek Ranch Zoning Code**
 - Adopted by Ordinance 864
 - Redline from original DCR zoning code

Setting the Stage – Dry Creek Ranch

- **Challenges from Opponents:**
 - **Reconsideration**
 - Filed March 6, 2017
 - Denied March 21, 2017
 - **Request to Order Mediation**
 - Filed April 17, 2017
 - Denied April 27, 2017
- **No petition for judicial review was filed**

Dry Creek Ranch Referendum

- **May 15, 2017 – Opponents File Referendum**
 - Sought to repeal Ordinance 864
 - Did not (could not) address Resolution 2215
- **May 19, 2017 – County Rejects Referendum**
- **June 2, 2017 – Opponents File Writ of Mandate (lawsuits begin...)**

Statutory and Code Background

- **Referendum only attacked Ordinance 864**
- **Ada County Code 1-5-1**
 - The people of Ada County shall have the right **to enact ordinances** through the initiative process, and **to repeal ordinances** through the referendum process, according to the procedures set forth herein (emphasis added)

Statutory and Code Background

- **Referendum initially rejected by the County**
- **Ada County Code 1-5-3-2.A**
 - “For Referendum: Initial petition for referendum containing not fewer than twenty (20) signatures of qualified electors of the county shall be filed ***not less than thirty (30) days following the final publication of the ordinance*** to be subject to referendum as provided in section 31-717, Idaho Code.” (emphasis added)

Statutory and Code Background

- **County Code Based on Prior Idaho Elections Law for Counties**
- **(Former) Idaho Code 31-717**
 - “Initial petitions for referendum containing not fewer than twenty (20) signatures of qualified electors of the county shall be filed ***not less than thirty (30) days following the final publication of the ordinance*** to be subject to referendum as provided in section 31-715, Idaho code...”
(emphasis added)

Authority for Initiatives, Generally

- **Idaho Constitution Article III, Section 1**

- ... The people reserve to themselves the power to approve or reject at the polls **any act or measure passed by the legislature**. This power is known as the referendum, and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, demand a referendum vote on any act or measure passed by the legislature and cause the same to be submitted to a vote of the people for their approval or rejection.
- The people reserve to themselves the **power to propose laws, and enact the same at the polls independent of the legislature**. This power is known as the initiative, and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, initiate any desired legislation and cause the same to be submitted to the vote of the people at a general election for their approval or rejection.

Other States' Treatment of Initiatives and Referenda in Zoning Matters

- **Series of Policy Choices that have Different Results in Different States**
 - Hawaii
 - California
 - Utah

Other States' Treatment of Initiatives and Referenda in Zoning Matters

- **Benefits?**
- **Challenges?**

Quasi-Judicial vs. Legislative

- **Revisit Idaho Code 31-717**
 - “... the right of the people at an election to approve or reject *legislation* adopted by the board of county commissioners.”
- **Raises an important distinction between “legislative” and “quasi-judicial” acts of local governments**

Quasi-Judicial vs. Legislative

- **Basic Distinction:**

- “Legislative activity by a zoning entity is differentiated from quasi-judicial activity by the result—legislative activity produces a rule or policy which has application to an open class whereas quasi-judicial activity impacts specific individuals, interests, or situations.”

Burt v. City of Idaho Falls, 105 Idaho 65, 67, 665 P.2d 1075, 1077 (1983) (citing *Cooper v. Board of County Com’rs of Ada County*, 101 Idaho 407, 410, 614 P.2d 947, 950 (1980))

Quasi-Judicial vs. Legislative

- **Why is this important?**
 - Previously the basis to decide if a matter was eligible for judicial review (*Cooper* adopted WA and OR approach)
 - Also applies to the question of whether an action of a local government is eligible for referendum or initiative

Idaho's Treatment of Referenda and Initiatives in Zoning Matters

- **Basic Rule:**
 - As a constitutional matter, initiatives and referenda are limited to legislative decisions
 - If Ordinance No. 864 was quasi-judicial = no referendum
- **Additional Restrictions in Local Land Use Matters**

Idaho's Treatment of Referenda and Initiatives in Zoning Matters

***Gumprecht v. City of Coeur d'Alene*, 104 Idaho 615, 661 P.2d 1214 (1983)**

“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 acts and procedures required by the Act include: holding advisory and informational meetings and hearings in developing plans and zoning structures, I.C. § 67–6507; conducting a comprehensive planning process to prepare, implement and update the comprehensive plan, which is to be based upon specific delineated components, *see* I.C. § 67–6508; and, giving notice to interested parties and holding public hearings prior to the recommendation, adoption or amendment of a plan or zoning ordinance, I.C. § 67–6509 and I.C. § 67–6511.”

Idaho's Treatment of Referenda and Initiatives in Zoning Matters

**“It is impossible for initiative zoning to
comply with these legislative mandates.”**

-- Gumprecht, at 618

Idaho's Treatment of Referenda and Initiatives in Zoning Matters

“The legislature clearly intended that the authority to enact comprehensive plans, establish zoning districts and adopt amendatory ordinances be exercised exclusively by city and county legislative or governing bodies and pursuant to specific prescribed procedures. ***Thus, 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 [the Local Planning Act of 1975].”*** (emphasis added).

So Could the Referendum Go Forward?

- **Quasi-Judicial** = Not Eligible for Initiative or Referendum (under the Idaho Constitution)
- **Action under LLUPA** = Not Eligible for Initiative or Referendum (under *Gumprecht*)

Ripeness

Ripeness

- Refers to whether a case is ready for adjudication
 - *“a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all...”*

Ripeness

- ***City of Boise City v. Keep the Commandments Coalition*, 143 Idaho 254, 141 P.3d 1123 (2006)**
 - Initiative to force Boise City to place a Ten Commandments display in a city park
- ***Davidson v. Wright*, 143 Idaho 616, 151 P.3d 812 (2006)**
 - Attempt to put marijuana legalization initiative on municipal ballot

Ripeness

“The subject was not ripe for resolution and might never become ripe. The Court concludes that the reasoning in *Noh* is sound. The approach in *Weldon*, *Gumprecht*, and *Perrault* takes the court into controversies that may never become realities, calling for rulings when the initiative might never pass or might be amended or set aside by the legislative authority.”

--*Keep the Commandments*

2018 Legislation

- **House Bill 568**

- Proposed by Ada County, backed by a wide coalition of interests, including Association of Counties, IACI, Realtors, Builders, etc.
- Intended to make county election procedures match cities AND to codify *Gumprecht* and help avoid future issues such as this

Current State of the Law

- **House Bill 568**

- *“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.”*

- **Effective July 1, 2018**

Current State of the Law

STATEMENT OF PURPOSE

RS26041

This bill amends the state laws related to county and city initiative and referendum elections in chapter 18, title 34, Idaho Code, by deleting section 31-717, Idaho Code, the current state law governing the county initiative and referendum process and adding a new section 34-1801C, Idaho Code, to update and harmonize the county initiative and referendum process with the current State and city initiative and referendum processes found in chapter 34, title 18, Idaho Code. The bill also codifies in the initiative and referendum law for counties (section 34-1801C, Idaho Code) and in section 34-1801B, Idaho Code, the city initiative and referendum law, the Idaho Supreme Court's decision in the 1983 case of *Gumprecht v. Coeur D'Alene*. In *Gumprecht* the Court determined that zoning conducted by initiative and by extension referendum elections was incompatible with the comprehensive statutory procedures mandated by the Local Land Use Planning Act, at chapter 65, title 67, Idaho Code. The bill also amends section 34-106, Idaho Code, to clarify the dates of certain city and county initiative and referendum elections.

Resolution of the Dry Creek Matter

- **Despite a months-long campaign, the Dry Creek referendum fizzled**
- **No signatures were submitted to the County by the deadline**

Current State of the Law

- **Idaho Constitution limits initiatives and referenda to legislative matters**
- **Idaho Code now explicitly states that initiatives and referenda may not be used in zoning matters**

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