

# Ballot Measures

The Scope of Authority  
in Statutory Counties

BY GAVIN WOLNY

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*Ballot measures in statutory counties are permitted in fewer contexts than at the state or municipal level. This article outlines where county measures are authorized, where they are not, and where the law remains unclear.*

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**E**ach year, voters in Colorado have the opportunity to decide ballot measures—sometimes pages of them.<sup>1</sup> These measures involve a range of subjects and can arise at nearly every rung of government, including at the county level.<sup>2</sup> Though often routine, county ballot measures have attracted their fair share of controversy<sup>3</sup> and have occasionally been the subject of lawsuits.<sup>4</sup>

Potential litigation aside, county ballot measures still require complicated legal work, from drafting the question or the ballot notice to advising on signature review or ballot certification. Yet before all that comes the basic and crucial task of determining whether a particular ballot measure is authorized or required in the first place. The authority for county measures is subject to unique parameters and is more limited than the authority for statewide and municipal measures.

This article will aid practitioners who advise county officials and other stakeholders in local policymaking by analyzing when ballot measures in statutory counties are required or authorized and when they are not. First it reviews the different forms of ballot measures and summarizes the nature of statutory counties. It then considers the power of county voters to initiate ballot measures before addressing the more complex question of county commissioners' authority to refer ballot measures.

### **What Kinds of Ballot Measures Are There?**

At the most basic level, ballot measures can be divided into referred measures and measures by citizen petition.<sup>5</sup> Referred measures are those placed on the ballot by the General Assembly or the governing body of a political subdivision—for counties, this is the board of county commissioners.<sup>6</sup> Measures by citizen petition, on the other hand, originate with a petition signed

by a set percentage of voters. These measures by petition include both initiated measures, which propose new legislation, and referenda, which seek to repeal existing legislation.<sup>7</sup>

Both referred measures and measures by petition can be further divided into ballot issues

contrast, is simply any ballot measure that is not a ballot issue.<sup>9</sup>

Accordingly, all ballot measures fall into one of four categories:

- referred ballot issues
- referred ballot questions
- ballot issues by citizen petitions
- ballot questions by citizen petitions.

These four categories not only matter for substantive reasons but also affect how measures appear on the ballot.<sup>10</sup> All measures from a given political subdivision are printed together, but the type of measure dictates its place within that group.<sup>11</sup> Referred measures precede all measures by petition, and within each of these subsets, ballot issues precede ballot questions.<sup>12</sup> At the county level, for example, referred measures (issues then questions) are numbered in the “1” sequence (e.g., 1A or 1C) and appear first.<sup>13</sup> They are followed by measures by petition, which are numbered in the “200” sequence (e.g., 201 or 204).<sup>14</sup>

### **Statutory Counties and the “Statutory Principle”**

In addition to the type of measure, the law governing county ballot measures depends on the type of county in which the measure arose. Colorado recognizes three types of county-level governments:

- statutory counties
- home rule counties
- consolidated cities and counties.

Of Colorado's 64 counties, 60 are statutory counties, two are home rule counties (Weld and Pitkin), and two are consolidated cities and counties (Denver and Broomfield).<sup>15</sup> As their disproportionate number might suggest, statutory counties are the original county type in Colorado.<sup>16</sup> Perhaps for this reason, the modifier “statutory” is generally not found in statutes or in the constitution but instead is used by county

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and ballot questions. A “ballot issue” is defined as a measure required by the Taxpayer Bill of Rights (TABOR), the Colorado constitutional provision limiting state and local government power over taxes and debt.<sup>8</sup> Ballot issues are subject to specific requirements, including rules on formatting, phrasing, pre-election notices, and financial estimates. A “ballot question,” by

officials and courts to distinguish this default class of counties from the two newer forms of county government.<sup>17</sup> Accordingly, unless otherwise indicated, this article uses the term “county” to refer to statutory counties alone.

On a range of subjects, statutory counties have less leeway in how they operate than their home rule and consolidated counterparts. This more constrained nature stems in part from what this article refers to as the “statutory principle,” which provides that counties possess only those powers expressly conferred by statute or the state constitution and the implicit authority reasonably necessary to carry out these express powers.<sup>18</sup> Among other things, the statutory principle helps to define the range of ballot measures permitted at the county level.<sup>19</sup>

### County Measures by Petition

Ballot measures by citizen petition have a long history in Colorado. In fact, section 1 of article V of the Colorado Constitution (section 1) has given voters the right to initiate statewide and municipal legislation for over a century.<sup>20</sup> At the county level, measures by petition have been available in certain contexts for decades.<sup>21</sup>

County ballot measures are authorized in a number of statutes and provisions of the state constitution. They include measures to propose a county sales and use tax,<sup>22</sup> alter the number of county commissioners,<sup>23</sup> modify the way commissioners are elected,<sup>24</sup> transform from a statutory to a home rule county,<sup>25</sup> and prohibit recreational marijuana establishments.<sup>26</sup> However, despite this range of possible measures—and in stark contrast to the municipal and state level—there is no general right to initiate county legislation.<sup>27</sup> Rather, county ballot measures by citizen petition are only permitted in those specific instances where they are expressly authorized by law.<sup>28</sup>

In *Dellinger v. Board of County Commissioners*, the Colorado Court of Appeals directly considered the question of the authority for county ballot measures by reviewing whether a citizen measure to limit new development in Teller County was proper when no specific statute authorized a citizen-initiated ballot measure on the subject.<sup>29</sup> The plaintiffs pointed to section 1, which gives *state and city* voters a

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general right to initiate legislation.<sup>30</sup> They argued that because the role of county government had been expanded in modern times, section 1 should be construed to guarantee *county voters* the same general right.<sup>31</sup>

The court disagreed, noting that section 1 says nothing about granting county voters the general power to initiate legislation.<sup>32</sup> The court also relied on the statutory principle, reasoning that such authority cannot be assumed where it has not been expressly granted by state law.<sup>33</sup> With this background, the court held that the initiative power is not generally reserved to county voters but rather is granted by the General Assembly or the state constitution in specific instances.<sup>34</sup>

The Tenth Circuit considered *Dellinger* and found that a contrary holding from the Colorado Supreme Court is unlikely.<sup>35</sup> That same court also held that the asymmetric division of the initiative power—with expansive rights at the city or home rule county level and limited rights at the statutory county level—presents no problem under the Equal Protection Clause.<sup>36</sup>

For attorneys considering the issue, *Dellinger* offers a clear rule on when county initiatives are permitted: a measure by citizen petition is only allowed where there is express statutory

or constitutional authorization for the specific measure.

### County Referred Measures

The power of a county government to refer ballot measures is both more expansive and more complex than its citizens’ authority to bring initiated measures. This section seeks to clarify the issue by outlining a continuum of potential referred measures, beginning with the simple case of expressly authorized measures and moving on to those measures arising from the unsettled limits of a county’s implied power.

#### *Express Authority to Refer Specific Decisions*

At one end of the spectrum is the relatively simple scenario where referred measures are expressly authorized by law. Like county ballot measures by petition, these measures are not derived from a single law giving counties the general authority to refer policy decisions.<sup>37</sup> Rather, most county referred ballot measures are authorized in a piecemeal fashion through various specific statutes or constitutional provisions.<sup>38</sup> Yet these expressly permitted referred measures differ from measures by citizen petition in two important ways.

First, while some provisions authorizing referred ballot measures also contemplate measures by petition, others do not. County citizens, for example, can initiate a measure on a general sales tax but not on a special marijuana sales tax.<sup>39</sup> The board of county commissioners, by contrast, can refer measures for both.<sup>40</sup> This means that at the county level, the range of expressly authorized referred measures is broader than the range of possible citizen-initiated measures. This wider scope, along with the logistical challenges inherent in measures by citizen petition, makes the issue of county referred ballot measures a far more common one for practitioners.

Second, county referred measures are usually designed as a check on a county's legislative power. In most (but not all) cases where specific county measures are expressly authorized, they are also the only permissible way to enact such legislation.<sup>41</sup> Counties, for example, *must* obtain voter approval to adopt home rule status or impose a new tax.<sup>42</sup> This feature can confuse the discussion of a county's "authority" to refer, because voter approval might be seen as a precondition to be cleared rather than a classic exercise of power. But just because something is required in some cases does not mean it is permitted in all cases. Under the statutory principle, it remains necessary to identify the source of the county's authority for any decision it makes, even if exercising that authority is mandatory to achieve a specific policy change.<sup>43</sup>

### **The TABOR Mandate**

TABOR can also serve as the source of referred county measures. But unlike standalone voter-approval requirements, which are tied to individual policy changes, TABOR's mandate applies to a whole range of *possible* decisions.<sup>44</sup> TABOR provides that state and local governments "must have voter approval in advance" before imposing any new tax, tax rate increase, multiyear fiscal obligation, or tax policy change "directly causing a net tax revenue gain."<sup>45</sup>

Most statutes authorizing new county taxes contain their own voter-approval provisions that mirror TABOR's.<sup>46</sup> But because TABOR's requirement is by nature open-ended, it could serve as the only law requiring a referred mea-

sure. And in those cases, it might not always be clear when TABOR triggers a county referred ballot measure and when it does not.<sup>47</sup>

This dilemma is especially evident when it comes to a "tax policy change" that happens to result in a revenue increase. The problem is tricky enough to have merited review by the Colorado Supreme Court.<sup>48</sup> In *TABOR Foundation v. Regional Transportation District*, the Court considered a new law harmonizing special district tax exemptions with those of the statewide sales tax.<sup>49</sup> The new law was designed to simplify collection procedures, but it ended up leaving certain special districts with slightly increased revenues.<sup>50</sup> The law had no voter approval requirement, and the relevant special districts did not refer ballot measures before the change took effect.<sup>51</sup> A lawsuit followed, but the Court ultimately decided that TABOR requires no voter approval when the revenue increase is both *de minimis* and incidental to the purpose of the change.<sup>52</sup>

Although *TABOR Foundation* involved a special district, one could imagine the same situation arising at the county level. In fact, the General Assembly has made similar changes to harmonize the way the state and county marijuana excise taxes are calculated.<sup>53</sup> The lesson to practitioners is that any county decision—or even administrative change—on tax or debt deserves special attention. In those cases, TABOR might demand voter approval, even if no other law does.<sup>54</sup>

### **Implied Authority to Refer**

While most county referred ballot measures can arise from either the express authority of a specific statute or the express mandate of TABOR, the Colorado Supreme Court has recognized that a county can have the implied authority to refer a ballot measure if it is necessary to accomplish a specific policy change expressly authorized by law.<sup>55</sup>

In *Davidson v. Sandstrom*, the Colorado Supreme Court was asked to consider whether a county referred measure was the proper method to allow voters in the Tenth Judicial District to exempt their district attorney from term limits.<sup>56</sup> The Colorado Constitution clearly allows voters to remove term limits from certain

elected offices, but it provides no express power to the counties within judicial districts to refer measures on a district attorney's term limit.<sup>57</sup> The Court recognized this lack of express authority, but it reasoned that a county ballot measure was still necessary to enforce the constitutional provision with respect to district attorneys. For that reason, the Court held that the power to refer such measures had been implicitly granted to counties.<sup>58</sup>

There might not be many other situations where a court would find that an implicit power to refer ballot measures is necessary to effectuate an express provision of law, but the *Sandstrom* case is significant nonetheless for giving practitioners a place to start when dealing with potential measures with no express foothold in law.

### **The Grey Area**

It is unclear where exactly a county's implied authority to refer ballot measures ends, but it is at least possible to identify an absolute possible limit. Because a county's implied authority exists only in aid of its express authority, a county clearly can have no implied power to refer a decision to its voters if the decision itself falls beyond the limits of the county's legislative power.<sup>59</sup> For example, a county has no express power to ban aircraft from traveling through its airspace, so it cannot have the implied power to ask its voters to decide whether to adopt such prohibition. Yet between *Sandstrom* and this extreme limit, there is a grey area consisting of measures that do not exceed a county's legislative power but for which voter approval is neither contemplated nor required. Specifically, these measures include (1) nonbinding or "survey" questions and (2) policy changes a board of county commissioners could otherwise decide on its own.<sup>60</sup>

No case or statute appears to have considered these grey-area measures directly, so practitioners have some room in advising their clients. There are, however, reasons for caution. CRS § 30-11-103.5, which governs procedures for county ballot measures, applies only to measures that arise "pursuant to statute or the state constitution."<sup>61</sup> The Colorado Supreme Court even cited this provision in *Sandstrom*, stating that a "board of county commissioners

has authority to refer measures to its electors as authorized by statute or the constitution.”<sup>62</sup> Considered in light of the statutory principle, which grants implied authority only where necessary, this language could be read as limiting any implied power to refer ballot measures to situations like *Sandstrom*, where it is truly necessary to effectuate an express provision of law.

Yet this single sentence in *Sandstrom* contains no further analysis and is not part of the Court’s holding.<sup>63</sup> An argument could be made that such a brief discussion should not be read as fully resolving such a major issue. Furthermore, one could argue that CRS § 30-11-103.5, with its focus on procedures, was not drafted to foreclose a whole category of potential ballot measures—especially when there is arguably little harm in asking voters to decide a survey question or to approve a policy the county commissioners are already empowered to adopt.<sup>64</sup>

With no holding directly on point, however, the matter of these grey-area measures remains unresolved. If nothing else, practitioners should exercise caution and seriously consider the question of county authority when advising their clients in this uncertain sphere.

**Conclusion**

Referred and initiated ballot measures are so common and wide-ranging in the statewide and municipal contexts that the more limited scope of measures at the statutory county level might well come as a surprise. Practitioners advising county officials or groups advocating legislation at the local level should familiarize themselves with the basic question of which county measures are available and which are not. The task, of course, is easier said than done. The question might be basic, but the answer has plenty of uncertainty left to be explored. CL



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**NOTES**

1. See, e.g., Arapahoe County 2020 general sample ballot, <https://www.arapahoevotes.gov/sites/default/files/2020-12/2020%20General%20Sample%20Ballot.pdf> (containing three full pages of candidates and ballot measures).
2. See Colo. Const. art. X, § 20(2)(b), (4) (requiring ballot measures in Colorado in certain contexts for state government and “any local government, excluding enterprises”).
3. See Markus, “Should Pueblo Get Out of Recreational Pot? County Will Put It to a Vote,” CPR News (Oct. 4, 2016), <https://www.cpr.org/2016/10/04/should-pueblo-get-out-of-recreational-pot-county-will-put-it-to-a-vote>; Barabak, “Secession Drive Gathers Steam in Rural Colorado,” *L.A. Times* (Sept. 22, 2013), <https://www.latimes.com/nation/la-xpm-2013-sep-22-la-na-adv-colorado-rural-secession-20130923-story.html>.
4. See, e.g., *Dellinger v. Bd. of Cty. Comm’rs*, 20 P.3d 1234 (Colo.App. 2000); *Save Palisade Fruitlands v. Todd*, 279 F.3d 1204 (10th Cir. 2002).
5. See, e.g., CRS § 30-11-103.5 (dividing ballot measures into these two types); CRS § 1-1-104(2.7) (recognizing that “ballot questions” can be either a matter “involving a citizen petition or referred measures”).
6. CRS § 1-1-104(34.5) (A “[r]eferred measure” is any “ballot issue or question submitted by . . . the governing body of any political subdivision . . .”).
7. See, e.g., Colo. Const. art. V, § 1(2), (3) (reserving both initiative power and referendum power to state and city voters).
8. CRS § 1-1-104(2.3).
9. CRS § 1-1-104(2.7).
10. 8 CCR 1505-1, 4.5.2.
11. *Id.*
12. *Id.*
13. 8 CCR 1505-1, 4.5.2.e.3.
14. 8 CCR 1505-1, 4.5.2.e.2.
15. Colorado County Structure, [ccionline.org/about/counties](http://ccionline.org/about/counties).
16. All counties were “statutory” until 1901 when the Colorado Constitution was amended to establish the city and county of Denver. See Colo. Const. art. XX, § 1. Later amendments to the state constitution allowed for both home rule counties and the city and county of Broomfield. Colo. Const. art. XIV, § 16; art. XX, § 10.
17. Compare Colo. Const. art. XIV (omitting term “statutory”) with *Save Palisade Fruitlands v. Todd*, 279 F.3d 1204, 1212 (10th Cir. 2002) (using term “statutory” to distinguish from other county types).
18. See *Colo. Mining Ass’n v. Bd. of Cty. Comm’rs*, 199 P.3d 718, 729 (Colo. 2009); *Pennobscot, Inc. v. Bd. of Cty. Comm’rs*, 642 P.2d 915, 918 (Colo. 1982).
19. See *Dellinger v. Bd. of Cty. Comm’rs*, 20 P.3d 1234, 1237 (Colo.App. 2000). It is enough to say here that home rule counties and consolidated cities and counties allow for a far more expansive range of possible ballot measures and enjoy more discretion in how to handle them than do statutory counties. See CRS § 30-11-508; Colo. Const. art. V, § 1(2), (3).
20. Colo. Const. art. V, § 1.
21. See e.g., Colo. Const. art. XIV, § 16 (permitting, in 1969, a ballot measure by citizen petition on home rule status).
22. CRS § 29-2-104(1).
23. CRS § 30-10-306.5(3)(a).
24. CRS § 30-10-306.7(4).
25. CRS § 30-11-502(1).
26. Colo. Const. art. XVIII, § 16(5)(f).
27. *Dellinger*, 20 P.3d at 1238.
28. *Id.*
29. *Id.* at 1235.
30. *Id.* at 1236.
31. *Id.* at 1237.
32. *Id.*
33. *Id.*
34. *Id.* at 1238.
35. *Save Palisade Fruitlands*, 279 F.3d at 1212.
36. *Id.* at 1214.
37. Cf. CRS § 31-11-111(2) (permitting cities and towns to refer “any proposed or adopted ordinance or resolution or any question to a vote of the registered electors of the municipality”).
38. See Colo. Const. art. XVIII, § 11(2) (measure for defining term limits of county officials);

Colo. Const. art. X, § 20(5)(c) (measure to retain revenue in excess of first-year TABOR estimate); Colo. Const. art. X, § 20(7)(d) (measure to exempt county from certain annual spending and revenue limits under TABOR); Colo. Const. art. XVIII, § 16(5)(f) (measure to prohibit retail marijuana establishments); CRS § 44-10-104(1)(b) (measure to prohibit medical marijuana establishments); CRS § 29-2-114(1)(a) (measure to impose retail marijuana excise tax); CRS § 29-2-114(2)(a) (measure to adjust methodology on county retail marijuana excise tax); CRS § 29-2-115(4)(b) (measure to impose special sales tax on retail marijuana); CRS § 30-10-306.5(2) (referred measure to increase number of county commissioners); CRS § 30-10-306.7(1) (measure to change how commissioners are elected); CRS § 30-11-502(1) (measure to adopt home rule status); CRS § 30-11-505(1) (election on proposed home rule charter); CRS § 29-27-201(2) (measure to allow counties to provide cable television, telecommunication, or advanced services); CRS § 30-20-508(4)(a) (measure on whether to create local improvement district); CRS § 30-20-703(1)(b) (measure on whether to establish board with paid directors for recreation district); CRS § 29-2-103(1) (measure for countywide sales and use tax); CRS § 29-2-103.5(3)(a) (measure for sales tax for mass transit); CRS § 29-2-103.7(3)(a) (measure for special tax for water rights); CRS § 29-2-103.8(3)(a) (measure for special tax for health-care services); CRS § 29-2-103.9(3)(a) (measure for tax for mental health services); CRS § 29-2-112(1) (measure authorizing revenue bonds); CRS § 29-1-302(2)(b) (measure to increase levy on property taxes); CRS § 39-5-133(1)(b) (measure to comply with TABOR in response to changes to statewide property tax scheme).

39. Compare CRS § 29-2-104(1) with CRS § 29-2-115(1)(a).

40. *Id.*

41. See CRS § 30-10-306.5(3)(a); CRS § 30-10-306.7(4); CRS § 30-11-502(1); Colo. Const. art. X, § 20(4)(a). *But cf.* Colo. Const. art. XVIII, § 16(5)(f) (permitting but not requiring referred measure to prohibition categories of recreational marijuana licenses).

42. CRS § 30-11-502(1); CRS § 29-2-104(1).

43. See *Colo. Mining Ass'n*, 199 P.3d at 729.

44. Colo. Const. art. X, § 20(4)(a).

45. *Id.*

46. See, e.g., CRS § 29-2-115(1) (requiring voter approval in advance for new special sales tax on retail marijuana sales).

47. For example, CRS title 29, article 3, authorizes counties to issue bonds that would likely constitute multiyear fiscal obligations requiring voter approval under TABOR, but contains no direct voter-approval requirement. See e.g., CRS §§ 29-3-104(1)(c) and -106(1).

48. See *TABOR Found. v. Reg'l Transp. Dist.*, 416 P.3d 101 (Colo. 2018).

49. *Id.* at 102.

50. *Id.*

51. *Id.*

52. *Id.* at 107.

53. SB 2018-259, sec. 1 (codified at CRS § 29-2-114).

54. With respect to counties specifically, the Colorado Court of Appeals has considered whether a lease-purchase agreement between a county and a bank required voter approval under TABOR as a multiyear fiscal obligation. *Bd. of Cnty. Comm'rs v. Dougherty, Dawkins, Strand & Bigelow Inc.*, 890 P.2d 199, 208 (Colo. App. 1994). The court ultimately held that no referred measure was required given the structure of the agreement. Still, the case is noteworthy in demonstrating that the prospect of voter approval can arise even with decisions on the day-to-day operation of county government.

55. *Davidson v. Sandstrom*, 83 P.3d 648, 659 (Colo. 2004).

56. *Id.* at 651-52.

57. *Id.* at 659.

58. *Id.*

59. Under the statutory principle, a county's authority is either express or implied, but implied authority is derived for purpose of effecting an express power. *Colo. Mining Ass'n*, 199 P.3d at 729. For that reason, if there is no express authority to adopt a policy, then there is nothing an implied power to refer a measure would help to effect. This limitation, however, might well evade a judicial holding since any suit on the matter would likely be focused on invalidating the actual unauthorized policy that was adopted rather than attacking the decision to refer a ballot measure on the matter. See *City of Northglenn v. Bd. of Cty. Comm'rs*, 411 P.3d 1139, 1144 (Colo.App. 2016) (invalidating unauthorized county policy approved by ballot measure but making no analysis of county power to refer unauthorized policies).

60. See, e.g., CRS § 30-11-107 (enumerating a range of powers for a board of county commissioners but silent about the need or power of the board to refer such question to county voters).

61. CRS § 30-11-103.5.

62. *Sandstrom*, 83 P.3d at 660.

63. See *id.*

64. See CRS § 30-11-103.5 (making municipal procedures applicable to county measures).

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