

District Court, Eighth Judicial District, Colorado

Larimer County Justice Center
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PLAINTIFF:

Larry Sarner, a registered elector of the City of Loveland,
State of Colorado.

v.

DEFENDANTS:

City of Loveland, a home-rule municipality, State of
Colorado; **Teresa Andrews**, in her official capacity as the
City Clerk for the City of Loveland; **Cecil Gutierrez**, in his
official capacity as the Mayor of the City of Loveland;
Daryle Klassen, in his official capacity as the Mayor Pro
Tem of the City of Loveland and as City Council Member
for the Ward I in the City of Loveland; **Chauncey Taylor**, in
his official capacity as the City Council Member for Ward I
in the City of Loveland; **Joan Shaffer**, in her official
capacity as the City Council Member for Ward II in the
City of Loveland; **Phil Farley**, in his official capacity as the
City Council Member for Ward II in the City of Loveland;
Hugh McKean, in his official capacity as the City Council
Member for Ward III in the City of Loveland; **John Fogle**,
in his official capacity as the City Council Member for
Ward III in the City of Loveland; **Ralph Trenary**, in his
official capacity as the City Council Member for Ward IV in
the City of Loveland; and **Dave Clark**, in his official
capacity as the City Council Member for Ward IV in the
City of Loveland.

Attorneys for Mr. Larry Sarner

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HOLSINGER LAW, LLC

▲ COURT USE ONLY ▲

Case Number: _____

Division:
Courtroom:

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COMPLAINT

COMES NOW the Plaintiff, Mr. Larry Sarner, by and through his undersigned counsel, Holsinger Law, LLC, and states as follows:

JURISDICTION AND VENUE

1. This Complaint is brought pursuant to the Loveland Home Rule Charter § 6-1, Colorado Revised Statutes (“C.R.S.”) § 31-11-110(3), and Colorado Rules of Civil Procedure (“C.R.C.P.”) Rule 106.
2. Venue is proper in the Eighth Judicial District pursuant to C.R.S. § 31-11-110(3) and C.R.C.P. Rule 98(c).

PARTIES

3. The Plaintiff, Mr. Larry Sarner, is presently a registered elector in the City of Loveland and has been a registered elector therein since approximately 1978. Mr. Sarner resides at 711 W. 9th Street, Loveland, Colorado 80537-4669.
4. The Defendant, the City of Loveland (“Loveland” or the “City”), is a home-rule municipality located in Larimer County, Colorado. The City is governed by its Home Rule Charter (“Charter”) and managed by the Loveland City Council (“City Council”).
5. The Defendant, Ms. Teresa Andrews, serves as the City Clerk for the City of Loveland (“Clerk”) and in this official capacity is charged with responsibility for all activities and duties relating to the City of Loveland’s elections.
6. The Defendant, Mr. Cecil Gutierrez, is the Mayor of the Loveland.
7. The Defendant, Mr. Daryle Klassen, is the Mayor Pro Tem and a City Council Member for Ward I of Loveland.
8. The Defendant, Mr. Chauncey Taylor, is a City Council member for Ward I of Loveland.
9. The Defendant, Ms. Joan Shaffer, is a City Council member for Ward II of Loveland.

10. The Defendant, Mr. Phil Farley, is a City Council member for Ward II of Loveland.
11. The Defendant, Mr. Hugh McKean, is a City Council member for Ward III of Loveland.
12. The Defendant, Mr. John Fogle, is a City Council member for Ward III of Loveland.
13. The Defendant, Mr. Ralph Trenary, is a City Council member for Ward IV of Loveland.
14. The Defendant, Mr. Dave Clark, is a City Council member for Ward IV of Loveland.

STANDARD OF REVIEW

15. Neither the Charter nor C.R.S. § 31-11-110(3) provide an applicable standard of review for this action; accordingly, the applicable standard of review is set forth under C.R.C.P. Rule 106, which provides that review shall determine whether the Clerk has exceeded her jurisdiction or abused her discretion based on the evidence on the record. C.R.C.P. Rule 106(a)(4).

STATEMENT OF FACTS

16. On May 21, 2013, the non-profit organization, Protect Our Loveland (“POL”), submitted a letter to the Clerk giving notice that it intended to seek a ballot initiative that would be submitted to the Loveland electors at the regularly scheduled election to be held on November 5, 2013 (“November Election”).
17. In the letter of May 21, 2013, the ballot initiative was framed as an amendment to the Charter that would, inter alia, impose a two-year moratorium on hydraulic fracturing within the City.
18. On May 21, 2013, the Clerk obtained the number of registered electors in Loveland from the Larimer County elections official. The number obtained by the Clerk was 45,044. At this time, the Clerk did not request or receive a copy of the list of registered electors from which this number was derived or make any inquiry as to how the number was reached.
19. On May 24, 2013, POL submitted a second letter to the Clerk amending its letter dated May 21, 2013. This letter gave notice that the proposed ballot initiative would, if adopted, enact an ordinance instead of affecting an amendment to the Charter.
20. The letter of May 24, 2013 further indicated that in addition to the two-year moratorium on hydraulic fracturing, inter alia, the proposed ballot initiative would, if adopted, also impose a two-year moratorium on the storage and disposal of waste

products from hydraulic fracturing within the City (as a whole, the content of the proposed ballot initiative is referred to hereinafter as the “Ballot Initiative”).

21. The number of registered electors in Loveland as of May 24, 2013 was never requested or obtained by the Clerk from the Larimer County elections official. Instead, as of the date of this pleading, the Clerk has continued to rely upon the number of registered electors she obtained from the Larimer County elections official on May 21, 2013.
22. On June 3, 2013, the Clerk received a printer’s proof of the petition containing the text of the Ballot Initiative that would be circulated by POL for the purpose of gaining signatures in support of the Ballot Initiative (“Petition”). A copy of the Petition is attached hereto as EXHIBIT 1.
23. In a letter dated June 3, 2013, the Clerk notified POL that she had approved the form and content of the Petition.
24. In the letter dated June 3, 2013, the Clerk notified POL that the total number of registered electors in Loveland as of May 21, 2013 was 45,044.
25. The Clerk further notified POL in the letter of June 3, 2013 that pursuant to the Charter, the number of signatures POL was required to collect in support the Petition was five-percent (5%) of 45,044, which the letter stated was 2,523 signatures.
26. Also in the letter dated June 3, 2013, the Clerk notified POL that it would have 180 days after the approval of its Petition to collect signatures in support of the Petition.
27. In a letter dated June 4, 2013, the Clerk notified POL of an error in her June 3, 2013 letter: instead of 180 days to collect signatures, the Clerk notified POL that it would actually have 90 days to collect signatures pursuant to a Charter provision.
28. In a letter dated July 1, 2013, the Clerk notified POL of another error in her letter dated June 3, 2013: instead of 2,523 signatures needed to support the Petition, POL was required (based on the Clerk’s calculation) to collect 2,253 signatures.
29. On July 8, 2013, POL submitted signatures in support of its Petition to the Clerk. As of the date of this Complaint, it is the Plaintiff’s understanding that POL has made no further submission of signatures to the Clerk.
30. In a letter dated July 23, 2013, the Clerk Advised POL that she had examined some, but not all, of the signatures submitted by POL in support of its Petition and had determined that POL had submitted at least 2,256 valid signatures, which, by the Clerk’s calculation, exceeded the number of signatures required to support the Petition (“Clerk’s Statement of Petition Sufficiency”).

31. Also in the Clerk's Statement of Petition Sufficiency, the Clerk advised POL that she would continue to review the remainder of the signatures submitted by POL in support of the Petition for validity.
32. On or about July 26, 2013, the Clerk concluded her review of all of the signatures POL submitted in support of its Petition. According to the Clerk, she identified a total of 2,743 valid signatures in support of the Petition, which, based on the Clerk's calculations, exceeded the number of signatures needed to support the Petition by 490 signatures.
33. Subsequent to May 21, 2013 and prior to August 1, 2013, the Clerk became aware of inaccuracy in the number of registered electors provided by Larimer County on May 21, 2013.
34. Despite her awareness of the inaccuracy of the number of registered electors provided by Larimer County on May 21, 2013, the Clerk never made certain that this number correctly reflected the actual number of registered electors in Loveland at the time and continued to rely upon this number to carry out her responsibilities related to the Petition and the November Election.
35. On August 16, 2013, Mr. Sarnier submitted a timely protest to the Petition, the Ballot Initiative, and the Clerk's Statement of Petition Sufficiency pursuant to C.R.S. § 31-11-110 ("Protest") on the following grounds:
 - a. The Petition contained too many subject-matters to be considered valid under Loveland's single-subject rule;
 - b. The Petition improperly sought to become effective retroactively;
 - c. Too few signatures properly adhering to the standards set forth under Colorado law were submitted to the Clerk in support of the Petition; and
 - d. The matters addressed in the Petition were already covered by existing State-wide laws. A copy of the Protest is attached hereto as EXHIBIT 2.
36. Attached to the Protest was an appendix, titled "Appendix A," which identified each insufficiency with respect to the signatures and accompanying affidavits submitted by POL by section and line number as required by C.R.S. § 31-11-110(1). A copy of Appendix A is also contained in EXHIBIT 2.
37. Pursuant to C.R.S. § 31-11-110(1), a hearing on the Protest was noticed, and had as noticed, on August 22, 2013 (the "Hearing").
38. The Clerk presided over the hearing as the hearing officer pursuant to C.R.S. § 31-11-110(3).

39. Audio recording was taken of the Hearing and is understood to be in the possession of the Clerk or other responsible City official or employee.
40. At the Hearing, the Plaintiff offered a prepared statement and the testimony of two witnesses: Mr. Michael Hagihara, Voter Registration Manager for the Colorado Department of State, and Ms. Luci Stremme, Paralegal at Holsinger Law, LLC. Both witnesses were subject to cross-examination by counsel for POL. During the Hearing:
 - a. Mr. Hagihara offered testimony to the effect that there was uncertainty regarding the accuracy of the number of registered electors provided by Larimer County to the Clerk on May 21, 2013; and
 - b. Ms. Stremme offered testimony regarding examination of the signatures' and accompanying affidavits' sufficiency submitted by POL in support of its Petition.
41. Also at the Hearing, the Plaintiff offered identical-in-content, three-ring notebooks ("Notebooks") to the Clerk, the City Attorney, and counsel for POL. The Notebooks contained copies of documents relevant to the proceeding and were intended for use by the Clerk in rendering her decision upon the Protest.
42. On August 27, 2013, the Clerk issued her Determination Pursuant to C.R.S. Section 31-11-110(3) ("Clerk's Protest Determination"), in which she made the following findings:
 - a. That she lacked the legal authority to determine issues of law including retroactive effect and preemption of the Ballot Initiative;
 - b. That the Petition did not violate the single-subject rule because all of the provisions of the Petition were necessarily and properly connected;
 - c. That a total of 224 signatures that were previously counted and challenged by the Protest should not be counted in support of the Petition, but that the remaining 341 signatures challenged by the Protest substantially complied with the applicable requirements and therefore should continue to be counted in support of the Petition; and
 - d. That the number of registered electors the Clerk used to calculate the number of signatures needed to support the Petition was entitled to a presumption of validity because there was no clear evidence to the contrary. A copy of the Clerk's Protest Determination is attached hereto as EXHIBIT 3.

CLAIMS FOR RELIEF

First Claim for Relief

The Clerk Exceeded her Jurisdiction and Abused her Discretion by Improperly Relying Upon a Number of Registered Electors in Loveland That is Inaccurate Under Applicable Law

43. Paragraphs 1 – 42 above are incorporated herein by reference.
44. The number of registered electors utilized by the Clerk to calculate the number of signatures needed to support the Petition improperly excluded certain types or classes of registered electors that should have been included in such calculation pursuant to applicable law, including the Charter §§ 1-1(m), 7-1(b); and C.R.S. §§ 1-1-104(35), 1-2-605(3). As a result:
 - a. The Clerk was unable to calculate with the mathematical certainty required by the Charter the number of signatures required to support the Petition because she was unable to accurately determine the number of registered electors in Loveland, which the calculation of signatures was based upon; and
 - b. The number of registered voters disenfranchised due to the Clerk's exclusion thereof in her calculations totaled over 3,700 registered electors. These registered electors were excluded from the Clerk's calculations for no other reason than they were categorized as "inactive."
45. The Clerk is not entitled to a presumption of validity with respect to the number of registered electors because the applicable law does not contemplate approximation; the Clerk was aware of inaccuracy in the number of registered electors; and the number of registered electors disenfranchised by the Clerk's actions was so substantially significant that no sufficient evidence could have been presented to support any reasonable reliance thereupon; and accordingly, there is sufficient evidence on the record to overcome such a presumption.
46. The Plaintiff is therefore entitled to an Order by the Court reversing the Clerk's Protest Determination and declaring that the Clerk exceeded her jurisdiction and abused her discretion by improperly relying upon on a number of registered electors in Loveland that is inaccurate under applicable law.

Second Claim for Relief

The Clerk Exceeded her Jurisdiction and Abused her Discretion by Failing to Invalidate Signatures Submitted in Support of the Petition that Do Not Meet the Standards Under Applicable Law and Are Not in Substantial Compliance Therewith

47. Paragraphs 1 – 46 above are incorporated herein by reference.

48. The Clerk improperly validated signatures submitted by POL in support of its Petition that should be invalidated pursuant to applicable law, including the Colorado Constitution Art. X, § 1(9); Charter § 7-1; C.R.S. §§ 1-40-111(2); 12-55-103; 12-55-112(2); 31-11-106(3)(e)(I), 31-11-108, 31-40-111(2)(b)(1); and 8 Colorado Code of Regulations (“C.C.R.”) 1501-1 Rule 17.
49. The signatures the Clerk validated which were submitted in support of the Petition are not in substantial compliance with the standards under applicable law.
50. The Plaintiff is therefore entitled to an Order by the Court reversing the Clerk’s Protest Determination and declaring that the Clerk exceeded her jurisdiction and abused her discretion by failing to invalidate signatures that do not meet the standards under applicable law and are not in substantial compliance therewith.

Third Claim for Relief

The Clerk Exceeded her Jurisdiction and Abused her Discretion by Determining that the Ballot Initiative Presents a Single-Subject to the Electors

51. Paragraphs 1 – 50 above are incorporated herein by reference.
52. The Ballot Initiative includes multiple subject matters in violation of applicable law requiring no more than one subject matter be presented to electors in a ballot initiative, including the Colorado Constitution Art. 1, § 5.5, Charter §§ 2-5, 7-7, 7-4; and C.R.S. § 1-40-106.6.
53. The Plaintiff is therefore entitled to an Order by the Court reversing the Clerk’s Protest Determination and declaring that the Clerk exceeded her jurisdiction and abused her discretion by determining that the Ballot Initiative presents a single-subject to electors.

Fourth Claim for Relief

The Plaintiff’s is Entitled to a Determination as to the Applicability and Timing Related to the Ballot Initiative’s Intended Retroactive Application

54. Paragraphs 1 – 53 above are incorporated herein by reference.
55. The Ballot Initiative’s provision that it would have retroactive application if passed is contrary to applicable law, including the United States Constitution, Art. I, § 10 and the Colorado Constitution, Art II, § 11.
56. C.R.C.P. Rule 106 provides that “[w]here claims other than claims under this Rule are properly joined in the action, the court shall determine the manner and timing of proceeding with respect to all claims.” C.R.C.P. Rule 106(a)(4)(VI).

57. The Plaintiff is therefore entitled to a determination from this Court with respect to the applicability and timing related to the resolution of the Ballot Initiative's intended retroactive application.

Fifth Claim for Relief

The Plaintiff is Entitled to a Determination As to the Applicability of His Claim with Respect to State Preemption of the Content of the Ballot Initiative Intended to Regulate Oil and Gas Production, Storage, and Disposal

58. Paragraphs 1 – 57 above are incorporated herein by reference.
59. The content of the Ballot Initiative pertaining to the regulation of oil and gas production, storage, and disposal is already governed, and, therefore, is preempted by existing State laws.
60. Pursuant to C.R.C.P. Rule 106(a)(4)(VI) (see ¶ 56, above) the Plaintiff is entitled to a determination from this Court with respect to the applicability of his claim with respect to State preemption of the content of the Ballot Initiative intended to regulate oil and gas production, storage, and disposal.

REQUESTS FOR RELIEF

WHEREFORE, the Plaintiff respectfully requests the following relief:

- A. On the Plaintiff's First Claim for Relief, for an Order and Judgment by the Court reversing the Clerk's Protest Determination and declaring that the Clerk exceeded her jurisdiction and abused her discretion by improperly relying upon on a number of registered electors in Loveland that is inaccurate under applicable law;
- B. On the Plaintiff's Second Claim for Relief, for an Order and Judgment by the Court reversing the Clerk's Protest Determination and declaring that the Clerk exceeded her jurisdiction and abused her discretion by failing to invalidate signatures that do not meet the standards under applicable law and are not in substantial compliance therewith;
- C. On the Plaintiff's Third Claim for Relief, for an Order and Judgment by the Court reversing the Clerk's Protest Determination and declaring that the Clerk exceeded her jurisdiction and abused her discretion by determining that the Ballot Initiative presents a single-subject to electors;
- D. On the Plaintiff's Fourth Claim for Relief, for an Order and Judgment as to a determination from this Court as to the applicability and timing related to the Ballot Initiative's intended retroactive application;

- E. On the Plaintiff's Fifth Claim for Relief, for an Order and Judgment as to a determination from this Court as to the applicability of state preemption of the content of the Ballot Initiative intended to regulate oil and gas production, storage, and disposal;
- F. For his costs, including reasonable attorneys fees; and
- G. For such other and further relief as this Court shall deem just and proper.

Respectfully submitted September 3, 2013.

HOLSINGER LAW, LLC

Signature on file with Holsinger Law, LLC

By: /s/ Kent Holsinger
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