

DISTRICT COURT, BROOMFIELD COUNTY, COLORADO Address: 17 Descombes Drive Broomfield, CO 80020 Phone: 720-887-2100	▲ COURT USE ONLY ▲
PLAINTIFF AND CONTESTOR: OUR BROOMFIELD v. DEFENDANT AND CONTESTEE: CITY AND COUNTY OF BROOMFIELD, COLORADO	
<i>Attorneys for Plaintiff:</i> Name: Michael Ray Harris (CO Bar No. 35395) Christopher Stork (Student Attorney) Lauren Hammond (Student Attorney) Address: Environmental Law Clinic University of Denver Sturm College of Law 2255 E. Evans Ave Denver, CO 80208 Phone: 303-871-6140 E-mail: elc@law.du.edu Name: James Daniel Leftwich, Esq. (CO Bar No. 38510) Address: MindDrive Legal Services, LLC 4730 Walnut Street Suite 110 (Office 2) Boulder, CO 80301 Phone: 720-212-0831 Email: dan@minddrivelegal.com	Case Number: 2013CV030221 Div.: A
CONTESTOR OUR BROOMFIELD'S RESPONSE TO MOTION TO DISMISS	

Plaintiff and Contestor Our Broomfield (“Contestor”), by and through counsel, submits its Response to the Motion to Dismiss filed by Defendant and Contestee the City and County of Broomfield, Colorado (“Contestee”). Contestee argues that Contestor’s Petition for Review was filed and served late, and the Court therefore lacks jurisdiction

over the claim. For the reasons below, Contestee's argument is without merit and should be denied.

ARGUMENT

A. **The Petition Was Timely Filed.**¹

Contestee alleges that the Petition was untimely because it was filed on the sixth calendar day after the ballot title was set. Mot. to Dismiss at 5. Contestee contends that the fact that the fifth day after the ballot title was set fell on a Sunday does not extend the filing time to the next business day. *Id.* Contrary to Contestee's contention, however, the statute and case law support the conclusion that the Petition was timely filed on the next business day after the five-day period. C.R.S. § 1-1-106 directs how time is to be computed under the election code, including actions brought C.R.S. § 1-11-203.5. As pertinent here, C.R.S. § 1-1-106 provides:

(1) In computing any period of days prescribed by this code, the day of the act or even from which the designated period of days begins to run shall not be included and the last day shall be included. Saturdays, Sundays, and legal holidays shall be included, **except as provided in subsection (4) of this section.**

...

¹ As an initial matter, the Motion to Dismiss should be summarily denied as an improper filing in this statutory proceeding. As Contestee asserts in its Motion to Dismiss, C.R.S. § 1-11-203.5 sets out "the exclusive procedure for contesting ballot titles in local elections" and its procedures govern over general provisions. Mot. to Dismiss at 1-2, 5; C.R.S. § 1-11-203.5(5). Yet in the same breath, Contestee has gone outside the bounds of the statutory procedures by filing a Motion to Dismiss, which is not contemplated in this special statutory proceeding. In light of the time-sensitive nature of elections, the statute provides for an expedited proceeding and provides that ballot-issue contests "shall be summarily adjudicated by the district court." *Id.* § 1-11-203.5(1). Neither the provisions of the statute nor the expedited timeframe allow for motions to dismiss or any other procedural motion that might otherwise be available to a party in a regular civil action. Instead, issues like those raised in the Motion to Dismiss should be raised by the defense at trial.

(4) If the last day for any act to be done or the last day of any period is a Saturday, Sunday, or legal holiday and completion of such act involves a filing or other action during business hours, **the period is extended to include the next day which is not a Saturday, Sunday, or legal holiday.**

C.R.S. § 1-1-106(1), (4) (emphasis added). Thus, the statute itself includes weekends in computing time, while expressly providing for an exception when the last day falls on a weekend or holiday.

Consistent with these statutory provisions, the Colorado Supreme Court held in *Ray v. Mickelson* that, when the fifth day after the date of a primary election was a Sunday, a petition contesting the election filed on the sixth day was timely. 584 P. 2d 1215, 1218 (Colo. 1978) (en banc). There, the relevant statute required that a petition “be filed and a copy served on the contestee within five days after the occurrence of the grounds of the contest.” C.R.S. § 1-11-203(2) (formerly C.R.S. § 1-10-114(2)). The Court looked to the statute relating to “computation of time,” (then C.R.S. §1-1-105) and stated that, “it was evident that that the legislature intended that the last day for the act—here, the act of serving a copy of the petition upon the contestee—be extended to the first business day following the fifth day...” *Id.* The Court thus held that the contest, although brought on the sixth day following the election, “was properly commenced within the allowable time by reason of C.R.S. § 1-1-105 and that the court had jurisdiction over the proceeding.” *Id.*²

Contestee cites to *Taxpayers Against Congestion v. Regional Transportation District*, 140 P.3d 343 (Colo. App. 2006), in support of its argument that the Petition was untimely,

² That ruling is consistent with the circumstances present here. Clearly, the legislature intended that the filing with the court of a Verified Petition, with a bond requirement, and service of a copy on the contestee, would not be feasible on a weekend or holiday. A copy of the Verified Petition, which required a notarized affirmation by Contestor, was required to be filed with the Court and served on Contestee on a day when the Court, a notary public, and Contestee all conduct business.

but that case is inapposite. There, the contestors sought declaratory and injunctive relief relating to the adequacy of a ballot issue notice. *Taxpayers*, 140 P.3d at 345. The contestors filed the action **before the election**, and after the referendum passed, the contestors argued that the action was not moot and should be decided as a post-election challenge, which are to be filed “within ten days after” an election has been certified. *Id.* at 346; C.R.S. § 1-11-213(4). The Court rejected the contestors’ contention that an action commenced before the election satisfied the provision that an election contest be filed not “more than ten days after” the election. *Id.* at 346; C.R.S. § 1-11-213(4). The Court reasoned that **“within ten days after” meant after certification of election results**, and an election contest brought before the election did not fall within this timeframe. 140 P.3d at 346 (emphasis added). Because the referendum passed based on the allegedly deficient ballot issue notice, and contestors did not raise a post-election challenge, the court ruled the case was moot. *Id.* at 347. Thus, the court did not look to C.R.S. § 1-1-106 relating to computation of time, nor was the court asked to decide whether a petition was filed too late. Although the Court did quote the dictionary in defining “within” as “not longer in time than... before the end or since the beginning of,” this reference was in the context of a completely different issue not relevant to the case at bar. *See* 140 P.3d at 347.

Contestee also points to C.R.S. § 1-1-106(5), which qualifies certain prepositional phrases related to time and specifies that these phrases shorten a time period to the previous business day. Mot. to Dismiss at 5. However, that provision specifically qualifies time requirements for actions that are to occur “prior to” or “before” the date of an election. *See* C.R.S. § 1-1-106(5). The phrase “within” is not mentioned in the statute, and it would not be reasonable to infer that “within” should be included, because this provision specifically relates to deadlines counting backward from an election, and shortens

timeframes to the prior business day before a weekend or holiday. To construe “within five days after” to end on the last business day before a weekend would create an anomaly whereby a person seeking to contest a ballot title would have only three days to file and serve the petition, where the legislature clearly intended that they have five days. *See Ray v. Mickelson*, 584 P.2d at 1218 (“In our view, it would be a constrained construction of the statute to compel a contestor to commence his suit and accomplish service of process within the first, second, or third regular business days following an election when the statute specifically allows five days in which to accomplish the required acts.”).

In sum, the express term of the statute and the case law demonstrate that there is no basis to conclude that “within five days after an election ballot title is set” does not extend to the next business day. The Petition was filed on the first business day following the five-day period and is therefore timely.

B. A Copy of the Petition Was Timely Served on Contestee.

Contestee further argues that the Petition should be dismissed on the ground that Contestor did not timely “serve” the Petition. Mot. to Dismiss at 3-5. It is Contestee’s position that compliance with C.R.S. § 1-11-203.5’s requirement that the “petition be filed and a copy served on contestee within five days after the title of the ballot issue” can only be achieved under Colorado Rule of Civil Procedure 4. But Contestee has confused the requirement of service of process—required to ensure jurisdiction of the court over a party—***with the additional procedural requirement*** in C.R.S. § 1-11-203.5(2) to serve a copy of the petition. The latter requirement serves its own purposes—to ensure that the contestee is put on prompt notice of the contest and to ensure resolution of the matter within the expedited time required by the legislature.

Indeed, the statute itself makes it clear that the legislature intended the requirement in C.R.S. § 1-11-203.5(2) to be separate, but in addition to, service of process. C.R.S. § 1-11-203.5(1) provides that “[e]xcept as otherwise provided in this section, the style and form of process, [and] the manner of service of process and papers...shall be according to the rules and practice of the district court.” Service of process, of course, focuses primarily on the issuance of a summons and the delivery of the summons in a prescribed manner, most typically through personal service by a non-party. *See* Col. R. Civ. P. 4. In C.R.S. § 1-11-203.5(2), however, the legislature only requires that a copy of the petition be served within the five-day period. Nothing in this section suggests the legislature intended this requirement to be in lieu of service of process under Col. R. Civ. 4. Indeed, this section makes no mention of the issuance and service of a summons, or requires any specific manner of service.

In this case, following the filing of the Petition, Contestor emailed the Broomfield City Council, City and County Clerk, and City and County Attorney a copy of the Petition on August 19, 2013. *See* Mot. to Dismiss at 4. Subsequently, on August 21, Contestor, through a process-server, personally served the City and County Attorney and City Clerk with process under Rule 4. Nothing in C.R.S. § 1-11-203.5(2) prohibits the use of email in serving a copy of the petition within the five-day period. The real question is whether such service accomplished the requirement of placing Contestee on notice of the action. It is clear that it did have that effect.

Indeed, on August 20, 2013—the day after the Petition was filed with the Court and a copy served by email on Contestee—the City Council for Broomfield announced the scheduling of a “Special Meeting of the City Council,” to be held August 21, 2013. The announcement of the Special Meeting was distributed to the recipients on the “City Clerk –

City Council Agendas” list-serve on August 20, at 5:08 p.m. See Email Announcing Special Meeting of the City Council, Aug. 20, 2013 (attached as Exhibit A) (*also available at* <http://www.broomfield.org/list.aspx?MID=953>). The Special Meeting’s only substantive agenda item was a “Request for Executive Session to Receive Legal Advice Relative to a Contest of the Ballot Title Concerning a Proposed Charter Amendment on Oil and Gas Issues to be held on August 21, 2013.” See Agenda, *available at* http://broomfield.granicus.com/GeneratedAgendaViewer.php?view_id=6&clip_id=1030.

Thus, it is clear that the City Council and City Attorney’s Office were aware that the suit had been filed and the substance of the allegations on August 20, even before they had been served with the summons. See *Eagle Peak Farms, Ltd. v. Lost Creek Ground Water Mgmt. Dist.*, 7 P.3d 1006, 1009 (Colo. App. 1999), quoting *Danielson v. Jones*, 698 P.2d 240 (Colo. 1985)(“The purpose of requiring notice of a proceeding to an adverse party is to allow the parties an adequate opportunity to prepare for the proceedings.”).³

Respectfully submitted this 29th day of August, 2013.

/s/ Michael Ray Harris
Michael Ray Harris

³ It should be noted that even if the service of a copy of the Petition in this case under C.R.S. § 1-11-203.5(2) is found to have been insufficient, that finding should not be dispositive. Service is not a jurisdictional requirement and therefore, does not automatically result in dismissal of the Petition. *Eagle Peak Farms, Ltd.* 7 P.3d at 1009. “Language in a statute requiring that a particular procedure be followed ... does not amount to a subject matter jurisdictional requirement unless it is clear that the General Assembly so intended it.” *Id.* at 1010. Here, the statute does not state or imply that service is jurisdictional. The Court should only consider whether “the parties actually were served, and whether the delay prejudiced the parties...” *Id.* (citing *Nelson v. Blacker*, 701 P.2d 135 (Colo. App. 1985)). Thus, even if compliance with service of process was found to be required, the Petition should not be dismissed because Contestee suffered no prejudice.

/s/ James Daniel Leftwich
James Daniel Leftwich

*Counsel for Plaintiff & Contestor
Our Broomfield*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 29th day of August, 2013, a true and correct copy of the foregoing Contestor Our Broomfield's Response to Motion to Dismiss was served via ICCES on the following counsel of record:

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