

DISTRICT COURT, LARIMER COUNTY, COLORADO Address: 201 La Porte Avenue, Suite 100 Fort Collins, CO 80521-2761	DATE FILED: September 26, 2013 4:40 PM FILING ID: F507EC8B83772 CASE NUMBER: 2013CV31142
Plaintiff: PROTECT OUR LOVELAND, INC. v. Defendant: CITY OF LOVELAND, COLORADO; LOVELAND CITY COUNCIL OF LOVELAND, COLORADO	▲ COURT USE ONLY ▲
<i>Attorneys for Plaintiff:</i> Name: Michael Ray Harris (CO Bar No. 35395) Kevin J. Lynch (CO Bar No. 39873) 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 FAX: (303) 871-6847 E-mail: elc@law.du.edu Name: James Daniel Leftwich (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: Ctrm:
COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND PETITION FOR WRIT OF MANDAMUS UNDER C.R.C.P. 106(a)(2)	

Comes now, the Plaintiff, Protect Our Loveland, Inc., by and through the undersigned counsel, and states as follows:

1. Protect Our Loveland brings this Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandamus under Colorado Rule of Civil Procedure 106(a)(2) seeking an order compelling the City Council of the City of Loveland, Colorado to

publish Protect Our Loveland's initiated measure forthwith and submit it to the City's electors as soon as practicable within the statutorily prescribed timeframe.

2. On July 8, 2013, Protect Our Loveland filed a petition, pursuant to Title 31, Article 11 of the Colorado Revised Statutes, seeking to submit to the voters of Loveland a proposed ordinance, entitled the "Loveland Public Health, Safety, and Wellness Act." The ordinance, if enacted, would place a two-year moratorium on the process of hydraulic fracturing, as well as the storage and disposal of waste products from hydraulic fracturing, in the Loveland city limits. In so doing, Protect Our Loveland followed in the footpath of many Front Range communities who are seeking to pass local measures to address the communities' concerns of health and safety risks, diminished property values, and environmental degradation posed by hydraulic fracturing. The Loveland City Clerk determined the petition proposing the ordinance was sufficient both upon initial review and after a hearing conducted on a protest to the petition. However, the City Council has unlawfully refused to take action on the petition, in violation of its duty under C.R.S. § 31-11-104.

JURISDICTION AND VENUE

3. This Court has jurisdiction pursuant to Colorado Rule of Civil Procedure 106(a)(2) and Rule 57(a). First, jurisdiction is proper under Rule 106(a)(2) because the Loveland City Council failed to perform an act that the law specially enjoins as a duty. Finally, jurisdiction lies pursuant to Rule 57(a) because Protect Our Loveland seeks a declaratory judgment pertaining to the legality of the City Council's decision to take no action on Protect Our Loveland's Proposed Ordinance.

4. Venue in this Court is proper under Rule 98(b)(2) because the claim arose in Larimer County, and this is an action against the City and its public officers acting in their official capacity for failure to perform an act or duty they are required by law to perform.

PARTIES

5. Protect Our Loveland is a non-profit, grassroots citizens organization composed of Loveland residents that formed to protect their rights to be healthy and have clean air, water, and soil. Protect Our Loveland's mission is: (1) to educate the citizens of Loveland on the process of hydraulic fracturing and the potential detrimental effects of this industrial practice; and (2) to support the efforts of citizens in an attempt to place a moratorium on the process of hydraulic fracturing and the storage and disposal of wastes therefrom within the city limits of Loveland until further information is obtained about the process of hydraulic fracturing and the potential risks involved.
6. To further the organization's mission, Protect Our Loveland drafted and circulated a Petition to place a Proposed Ordinance on the ballot of the November 5, 2013 election ("Petition"). The Proposed Ordinance would place a two-year moratorium on hydraulic fracturing and the storage of waste from hydraulic fracturing within the Loveland city limits .
7. Protect Our Loveland board members Sharon Carlisle and Judy Freeman were designated as representing the proponents of the Petition. Ms. Carlisle and Ms. Freeman are registered electors and residents of the City of Loveland, Colorado. The Petition Proponents have an interest in asserting their right to have their proposed ordinance placed on the ballot for the electorate of Loveland to vote on.

8. Defendant the City of Loveland is a home-rule municipality located in Larimer County, Colorado. The City is governed by its Home Rule Charter and managed by the Defendant, the Loveland City Council.

LEGAL BACKGROUND

A. Colorado Constitution

9. Article V, section 1 of the Colorado Constitution vests the legislative power of the state in the general assembly, but reserves to the people the power to initiate statewide legislation.
10. This initiative power is further reserved to “the registered electors of every city, town, and municipality as to all local, special, and municipal legislation of every character in or for their respective municipalities.” *Id.* § 1(9).
11. This constitutional provision with respect to the initiative is intended to be self-executing in all respects. *Id.* § 1(10).
12. The Colorado Supreme Court has repeatedly held that the people’s constitutional right to the initiative process is to be liberally construed in a manner allowing the greatest possible exercise of that right. *McKee v. City of Louisville*, 616 P.2d 969 (Colo. 1980).

B. City of Loveland Home Rule Charter

1. Initiative Power

13. City Charter, Article 7, Section 7-1 provides that:
 - a. The registered electors of the City may initiate a proposed ordinance, pursuant to the initiative power reserved by Article V, Section 1(9) of the State Constitution, as to any legislative matter which is subject to said initiative power. Any initiated measure shall be in the form of an ordinance. The ordinance shall be initiated pursuant to the State statutes which establish procedures for a municipal initiative, except as otherwise provided in this Charter.

- b. An initiative petition shall be signed by registered electors of the City equal in number to at least five (5) percent of the total number of electors of the City registered to vote as of the date established by the State statutes for determining such percentage.
- c. The City Clerk shall not count as valid any signature on an initiative petition if more than ninety (90) days have elapsed between the date the form of the petition was approved by the City Clerk and the date of the signature.

2. Elections.

14. City Charter Article 6, Section 6-5 provides that the “City Clerk shall have charge of all activities and duties required by the Charter relating to the conduct of city elections and in a case where an election procedure is in doubt, the City Clerk is empowered to prescribe the procedure to be followed.”

15. By resolution, the City Council declared that the City Clerk “shall act as the City’s designated local election official in all matters related to the November 5, 2013, regular municipal election.”

16. City Charter Article 6, Section 6-3 provides that the City Council may call a special election by resolution adopted at least thirty days prior to the election, and that such resolution shall set forth the purpose of the special election.

C. Colorado Revised Statutes, Title 31, Article 11

17. C.R.S. sections 31-11-101 to 118 (“Article 11”) govern the manner of exercising initiative and referendum powers at the local level.

18. Article 11’s express purpose is to set forth “the procedures for exercising the initiative and referendum powers reserved to the municipal electors” in the Colorado Constitution. The statute states that it was not intended “to limit or abridge in any manner these powers but rather to properly safeguard, protect, and preserve inviolate for municipal elections these modern instrumentalities of democratic government.”

C.R.S. § 31-11-101.

19. Under C.R.S. § 31-11-104(1) “[a]ny proposed ordinance may be submitted to the legislative body of any municipality by filing written notice of the proposed ordinance with the clerk and, within one hundred eighty days after approval of the petition pursuant to section 31-11-106(1), by filing a petition signed by at least five percent of the registered electors of the city or town on the date of such notice.”
20. Loveland, through its Charter, adopted these provisions except to the extent that the state statute allows 180 days to gather signatures; the City Charter shortens this time period to 90 days.
21. After gathering the required number of signatures on a petition to submit a proposed ordinance, the petition proponents must file the petition with the city clerk, who is charged with inspecting the petition to determine whether a sufficient number of valid signatures have been submitted. The clerk’s statement as to the petition’s sufficiency or insufficiency must be issued within thirty days of the petition’s filing. C.R.S. § 31-11-109(1)-(3).
22. Within forty days of the filing of an initiative petition, a protest may be filed by any registered elector residing in the municipality. The city clerk must mail a copy of the protest to the petition proponents and set a hearing not less than five nor more than ten days after notice is mailed. C.R.S. § 31-11-110(1).
23. The city clerk serves as the hearing officer on the protest. The hearing “shall be summary and not subject to delay and shall be concluded within sixty days after the petition is filed.” C.R.S. § 31-11-110(3). No later than five days after the hearing is concluded, the city clerk must “issue a written determination of whether the petition is sufficient or not sufficient” which “shall be forthwith certified” to the protester and the petition proponents. *Id.*

24. After the result of the hearing is certified, “[t]he determination as to petition sufficiency may be reviewed by the district court” for the county in which the municipality is located upon application of the protester, the designated petition representatives, or the municipality, “but such review shall be had and determined forthwith.” C.R.S. § 31-11-110(3).
25. The “final determination of petition sufficiency” is defined as “the date following passage of the period of time within which a protest must be filed pursuant to section 31-11-110 or the date on which any protest filed pursuant to section 31-11-110 results in a finding of sufficiency, whichever is later.” The statute makes no mention of a judicial determination or appeal.
26. Following a “final determination of petition sufficiency” by the city clerk, the city council is required to act in one of two ways: (1) adopt the proposed ordinance without alteration within twenty days or (2) publish the proposed ordinance forthwith and refer the proposed ordinance to the city’s voters “at a regular or special election held not less than sixty days and not more that [sic] one hundred fifty days after the final determination of petition sufficiency.”
27. After the city council has ordered an election, the city council “shall promptly fix a ballot title” for each initiative. C.R.S. § 31-11-111.
28. C.R.S. § 31-11-118 provides that, “[e]xcept as other provided in this article, the clerk shall render all interpretations and shall make all initial decisions as to controversies or other matters arising in the operation of this article.”
29. Nothing in Article 11 suggests that the filing in the district court of an application of review of the determination as to petition sufficiency is meant to halt indefinitely setting of a ballot title, ballot printing, and all other aspects of the initiative process.

FACTUAL ALLEGATIONS

A. Oil and Gas Extraction and Related Activities

30. In the past decade, Colorado has experienced an historic boom in oil and gas drilling. There were a total of 51,420 new drilling permits approved between 2002 and 2012, compared to 16,368 from 1991 to 2001—an increase of more than 300 percent. In 2008 alone, the Colorado Oil and Gas Conservation Commission (“the Commission”) approved more than 8,000 drilling permits, an average of more than 30 permit approvals every business day. This level of drilling far exceeds the peak of any previous period in Colorado’s historically boom-and-bust energy industry. More than 50,055 active oil and gas wells currently cover much of Colorado’s landscape.
31. This drilling boom has transformed large areas of Colorado. The noise, chemical pollution, and earth-moving equipment associated with oil and gas development have resulted in numerous conflicts with landowners and threats to air and water quality.
32. Fracking is the process of drilling into the earth and creating explosions to shatter and crack hard shale rock in order to release the gas and oil inside. Each fracking well uses millions of gallons of water along with sand and toxic chemicals that are injected into the rock at extremely high pressure, which allows the gas or oil to flow up to the wellhead. The process is carried out through directional or horizontal drilling into the rock layer extending to 2,000 or more feet in any direction. Fracking with horizontal drilling is a relatively new process, only coming into widespread use during the past decade.
33. An increasing body of research indicates that there are health and safety hazards associated with the process of fracking, including air and water pollution.
34. In Colorado and elsewhere, fracking is occurring within the jurisdictional limits of many towns and cities, with fracking wells often being drilled in or near residential areas,

parks and even schools. Recent photographs and reports of submerged fracking rigs and leaking storage tanks resulting from the approval of fracking operations in flood plains and near river corridors have brought these threats to air and water quality to the public attention with even greater urgency.

B. The Petition

35. Given the risks posed by hydraulic fracturing to public health and private property, numerous communities in Colorado and elsewhere have adopted or plan to refer to popular vote local ordinances, charter amendments, and other laws aimed at regulating, or imposing a moratorium on, fracking and its impacts.
36. In Colorado, the Cities of Longmont and Boulder, as well as Boulder County, have enacted a moratorium or other legal restrictions on fracking to safeguard the public health, safety and welfare.
37. On May 21, 2013, Protect Our Loveland filed with the Loveland City Clerk's Office a letter dated May 20, 2013, giving notice of its intent to seek a ballot initiative to be submitted to the City's voters at the November 5, 2013 election ("May 21 Letter").
38. The initiative proposed in the May 21 Letter would have amended the City's Charter, if adopted, to impose a two-year moratorium on hydraulic fracturing to extract oil, gas, and other hydrocarbons within Loveland pending the results of studies to determine the impacts of hydraulic fracturing on property values and human health.
39. Protect Our Loveland subsequently filed with the City Clerk's Office a second letter dated May 24, 2013 ("May 24 Letter") amending the May 21 Letter and giving notice that the proposed ballot initiative would, if adopted, enact an ordinance instead of a Charter amendment and that, in addition to the two-year moratorium on hydraulic fracturing, the ordinance would impose a two-year moratorium on the storage and

disposal within the City of the waste products from hydraulic fracturing (the “Initiative”).

40. The Proposed Ordinance, in regulating oil and gas exploration, recognizes that it is the right of the people of Loveland to enact laws to protect their health and property, and the health and future property of their children.
41. The May 24 Letter also submitted Protect Our Loveland’s proposed petition form, pursuant to C.R.S. § 31-11-106(1).
42. The City Clerk reviewed Protect Our Loveland’s proposed petition form and, pursuant to C.R.S. § 31-11-106(1), mailed a letter dated June 3, 2013 to the representatives designated in the petition and to Protect Our Loveland’s counsel notifying them that the form of the submitted Petition was approved (“June 3 Letter”).
43. The June 3 Letter also notified Protect Our Loveland that the City Clerk’s Office had received from the Larimer County Clerk and Recorder’s Elections Department the number of Loveland’s registered electors as of May 21, 2013, that number being 45,044 registered electors.
44. The June 3 Letter advised Protect Our Loveland that, under C.R.S. § 31-11-104(1), the minimum number of valid signatures required on the Petitions would be 5% of 45,044, or 2,523 signatures.
45. In a letter dated July 1, 2013, the City Clerk advised Protect Our Loveland that the 2,523 number was in error due to a transposition of numbers and corrected this error to reflect that 2,253 signatures would be required.
46. On July 8, 2013, Protect Our Loveland submitted to the City Clerk’s Office over one hundred petition sections containing approximately 3,704 signatures.

47. Pursuant to C.R.S. § 31-11-109(1), the City Clerk conducted a review of the signatures contained in the petition sections.
48. In a letter dated July 23, 2013, the City Clerk, under C.R.S. § 31-11-109(2), advised Protect Our Loveland and its attorney that the City Clerk had determined that the petitions contained at least 2,256 valid signatures in petition sections 1 through 101, thereby exceeding the requirement for 2,253 signatures previously established (“July 23 Letter”).
49. The July 23 Letter also stated that the City Clerk would continue to review Protect Our Loveland’s remaining petition sections for valid signatures.
50. After completing review of all the petition sections, the City Clerk determined that the Petition contained a total of 2,743 valid signatures, 490 more signatures than the required 2,253 signatures.
51. On August 16, 2013, the last day of the protest period, Larry Sarner filed with the City Clerk’s Office his “Protest Pursuant to C.R.S. § 31-11-110 to Protect Our Loveland’s Petition in Support of a Ballot Measure Seeking an Ordinance Entitled: Loveland Public Health, Safety and Wellness Act,” dated August 16, 2013 (the “Protest”).
52. The Protester raised four “problems” to challenge the Clerk’s determination of the Sufficiency of the Petition. As stated in the protest, the Protester argued that the Petition should be rejected because:
- (1) The Petition contains too many subject-matters to be considered valid under Loveland’s single-subject rule;
 - (2) The Petition improperly seeks to become effective retroactively;
 - (3) Too few signatures properly adhering to the standards set forth under Colorado law were submitted to the Clerk in support of the Petition; and
 - (4) The matters addressed in the Petition are already covered by existing State-wide laws.

53. On August 16, 2013 the City Clerk notified Protect Our Loveland, the Protester and their respective counsel of the notice setting the date, time, and place for a Hearing to be held on the Protest, as required by C.R.S. § 31-11-110(1).
54. A Hearing on the Protest was held on August 22, 2013. An audio recording was taken at the Hearing.
55. At the Hearing, the Protester offered a prepared statement and the testimony of two witnesses: Michael Hagihara, Voter Registration Manager for the Colorado Department of State, and Luci Stremme, Paralegal at Holsinger Law, LLC. Both witnesses were subject to direct and cross-examination by the Protester and Protect Our Loveland.
56. On August 27, 2013, the City Clerk issued a thoroughly researched, twenty-six page “Determination Pursuant to C.R.S. Section 31-11-110” denying the Protest on all four grounds and declaring that the Petition contained the requisite number of signatures.
57. The City Clerk concluded in the Determination that, although 224 signatures were invalidated, “the Protest has not made a sufficient showing for me to reverse my previous statement of sufficiency issued” on July 23, 2013.
58. The City Clerk determined that the Petition still contained 2,519 valid signatures, 266 more signatures than the required 2,253 signatures. The City Clerk further noted that “the remaining number of valid signatures even exceeds by 96 signatures the 2,423 signature threshold argued by the Protester.”
59. The City Clerk thus concluded that the Petition “satisfied all of the applicable requirements in the City’s initiative process to proceed forward under C.R.S. § 31-11-104(1) for the presentation of the Initiative’s proposed ordinance to the City Council

for its consideration for adoption or referral to the City's voters at a municipal election."

60. The City Clerk's Determination constituted a "final determination of petition sufficiency" under C.R.S. § 31-11-103(2).

C. The City Council's Decision to Take No Action on the Petition

61. In a Memorandum dated August 3, 2013, City Attorney John Duval presented four options for the City Council to consider regarding the Petition. The Options laid out in the Memo were:

- a. Adopt the Ordinance on First Reading (results in adoption of the moratorium proposed in the initiative without referring it the voters)
- b. Adopt the Resolution referring the citizen-initiated ordinance to the voters (results in placement on the November 5 ballot but assumes the protester has waived his right to appeal the City Clerk's determination)
- c. Adopt the Resolution referring Council's proposed ordinance to the voters (results in placement on the November 5 ballot but avoids the issues related to a possible appeal); or
- d. Take none of these actions (results in deferral of the Council's decision on ballot placement to a later date, which could result in a special election).

62. On September 3, 2013 at approximately 4:44 p.m., the Protester filed a Complaint in the District Court of Larimer County seeking review of the City Clerk's Determination of Sufficiency.

63. Testimony provided by the City Clerk at the September 3 Meeting indicated that a special election would cost the City approximately \$50,000 to \$60,000. *See Videotape: City Council Meeting, 2:40-2:41:07 (Sept. 3, 2013), available at http://atlas.fcgov.com/2013_09_03_Loveland_Council/index.htm.*

64. At the City Council's regularly scheduled meeting on September 3, 2013, the City Council voted 5 to 4 to take no action on the issue pending the outcome of the Protester's suit in district court. In so doing, the City Council opted to stay their own

actions and allow the appeal of the City Clerk's decision to proceed in court before referring the measure to voters, thereby halting the entire initiative process.

FIRST CLAIM FOR RELIEF

Relief in the Nature of Mandamus to Compel the City Council to Submit the Proposed Ordinance to the Voters Without Further Delay

(Colo. R. Civ. P. 106(a)(2))

65. Protect Our Loveland incorporates each allegation of the preceding paragraphs.
66. Colorado Rule of Civil Procedure 106(a)(2) authorizes judicial relief “[w]here the relief sought is to compel a lower judicial body, governmental body, board, officer or person to perform an act which the law specifically enjoins as a duty resulting from an office, trust, or station.”
67. Following a final determination of petition sufficiency, the City Council must either adopt the proposed ordinance or publish the proposed ordinance forthwith and submit it to the voters at a regular or special election between 60 and 150 days thereafter.
68. The August 27 Determination by the City Clerk constituted a “final determination of petition sufficiency” as defined in C.R.S. § 31-11-103(2), thus triggering this duty. The statute does not provide for a stay of the local legislative body’s required action pending appeal by a protester.
69. By postponing indefinitely the publication and submission to the voters of the Proposed Ordinance, the City Council violated its duty under Article 11.
70. Pursuant to Rule 106(a)(2), this Court should grant injunctive relief compelling the City Council to immediately publish the Proposed Ordinance, set a ballot title, and

submit the Proposed Ordinance to the electors of Loveland at the November 5, 2013 regular election, or as a special election held on that same day, pursuant to C.R.S. § 31-10-108, or as soon as practicable thereafter.

SECOND CLAIM FOR RELIEF

Declaratory and Injunctive Relief
(Colo. R. Civ. P. 57 and C.R.S. § 13-51-105-106 and 112)

71. Protect Our Loveland incorporates each allegation of the preceding paragraphs.
72. Colorado Rule of Civil Procedure 57(a) and C.R.S. § 13-51-105 provide that courts “have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed... The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.”
73. Colorado Rule of Civil Procedure 57(b) and C.R.S. § 13-51-106 state: “Any person ... whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.”
74. In addition to declaratory judgments, Rule 57(h) and C.R.S. § 13-51-112 allow for “further relief based on a declaratory judgment whenever necessary or proper.”
75. Article 11 specifically defines a “final determination of petition sufficiency” as the city clerk’s decision after a protest and hearing or after the time for a protest has expired. The statute does not contemplate judicial action in this definition.

76. The “final determination of petition sufficiency” occurred on August 27, 2013, when the City Clerk issued her Determination on the protest.
77. In voting to take no action on the Proposed Ordinance until the appeals process was exhausted, the City Council opted to interpret “final determination of petition sufficiency” in a manner contrary to the plain meaning and intent of Article 11.
78. By refusing to take any action on the Proposed Ordinance following the final determination of petition sufficiency, and instead opting to delay a vote for an indefinite amount of time pending judicial review, the City Council violated its duties under Article 11, the City Charter, and the Colorado Constitution.
79. This Court should issue a declaration that: (1) the final determination of petition sufficiency constituted the Clerk’s Determination on the Protest issued August 27, 2013 and (2) the City Council violated its duty under Article 11 and the Loveland City Charter by refusing to publish the proposed ordinance forthwith and submit it to the voters at a regular or special election between 60 and 150 days thereafter, and issue an injunction ordering the City Council to immediately publish the proposed ordinance, set a ballot title, and refer the matter to the voters no later than 150 days after August 27, 2013.

PRAYER FOR RELIEF

Based upon the allegations contained in the foregoing paragraphs, Protect Our Loveland respectfully requests that this Court:

- A. Compel the City Council, pursuant to Colo. R. Civ. P. 106(a)(2) and C.R.S. § 31-11-104(1), to immediately publish the proposed ordinance and refer the proposed ordinance to the registered electors of Loveland at the next regular election on November 5, 2013 or a special election to be held no later than January 24, 2013.

- B. Issue a declaration that the “final determination of petition sufficiency” occurred on August 27, 2013 when the Clerk issued her Determination following the Protest hearing.
- C. Issue a declaration that the City Council violated the City Charter, Article 11, and the Colorado Constitution by refusing to take action on the Proposed Ordinance.
- D. Issue an injunction compelling the City Council to immediately publish the proposed ordinance, set a ballot title, and refer the matter to the voters no later than 150 days after August 27, 2013.
- E. Grant further relief as may be just and proper; and
- F. Award Protect Our Loveland its costs of litigation and reasonable attorneys’ fees.

Respectfully submitted this 26th day of September, 2013.

/s/ Michael Ray Harris
Michael Ray Harris
Christopher Stork (Student Attorney)
Lauren Hammond (Student Attorney)

/s/ James Daniel Leftwich
James Daniel Leftwich

Counsel for Plaintiff Protect Our Loveland