DISTRICT COURT, LARIMER COUNTY, COLORADO Address: 201 LaPorte Avenue, Suite 100 Fort Collins, CO 80521-2761	
Plaintiff: PROTECT OUR LOVELAND, INC. v. **Defendants:** CITY OF LOVELAND, COLORADO; CITY COUNCIL OF LOVELAND, COLORADO.	▲ COURT USE ONLY ▲
Attorneys for Plaintiff: 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: 2013CV31142 Division/Ctrm: 5C
PROTECT OUR LOVELAND'S MOTION FOR PRELIMINARY INJUNCTION	

CERTIFICATION OF CONFERRING

Colo. R. Civ. P. 121 § 1-15 ¶ 8 Certification: Plaintiff's counsel has conferred in good faith with Defendants' counsel about this Motion. Defendants' counsel opposes this Motion.

INTRODUCTION

This is a case about protecting the constitutional rights of the citizens of Loveland to pursue petition initiatives, express their political opinions, and vote. Protect Our Loveland is a non-profit, grassroots organization seeking to give citizens a vote on a proposed ordinance directed to the issue of whether oil and gas extraction using hydraulic fracturing should be allowed in the City of Loveland for two years while health and environmental impact studies are being conducted. To meet the statutory requirements for placing its Proposed Ordinance on the November ballot, Protect Our Loveland circulated a petition, collected the required signatures from Loveland voters, and submitted the petition to the City Clerk of Loveland, Colorado. The Clerk later notified the group by letter that the petition contained the requisite number of valid signatures and was sufficient to be submitted to the Loveland City Council for future action. However, a Protest to the Petition was filed. Due to this Protest and pursuant to C.R.S. § 31-11-110(1), a hearing was held August 22, 2013.

Following the hearing, the Clerk issued a determination in which she rejected most of Protester's arguments and found that petition was in compliance with state and local law. Consequently, the Protester, Mr. Larry Sarner, sought review of the Clerk's decision denying his Protest by filing a complaint with this Court on September 3, 2013. Only a few hours after that filing, the City Council voted five to four to "take no action" with regard to the Proposed Ordinance—effectively preventing it to be placed on the ballot—until the judicial process runs its course. This decision by the City Council is in violation of the City Council's ministerial duty under state law to either adopt the proposed ordinance without alteration or publish the ordinance and refer it to the voters "forthwith" at a general or special election within a specified period of time.

Due to the City Council's inaction and the possibility of a lengthy legal process over Mr. Sarner's challenge to the Proposed Ordinance, it could be years before the electorate has a chance to vote on the proposal. This is simply contrary to the intent of the state legislature as expressed in Title 31 of the Colorado Revised Statutes. This action is also an infringement of the right of the people of Loveland to the initiative process without interference or hindrance by the City Council. The impact on the citizens of Loveland and Protect Our Loveland could be immense if this is allowed to continue.

RELIEF REQUESTED

Plaintiff, Protect Our Loveland, for the reasons stated below, respectfully moves the Court, pursuant to Colo. R. Civ. P. 65(a), to issue a preliminary injunction ordering Defendants, the City of Loveland and the Loveland City Council, to immediately publish the Proposed Ordinance, set the ballot title, and take all necessary actions to submit the Proposed Ordinance to the registered electors of Loveland at the November 5, 2013

election, as a special election under C.R.S. § 31-10-108, or as soon as practicable thereafter, but no later than January 24, 2014. This relief is necessary to avoid further irreparable injury to Protect Our Loveland pending a trial on the merits.

FACTUAL BACKGROUND

As mentioned above, Protect Our Loveland is a non-profit, grassroots organization seeking to give citizens a vote on the issue of hydraulic fracturing. Protect Our Loveland began its petitioning process on May 24, 2013, by providing the Loveland City Clerk (Clerk) notice of its intention to seek a ballot initiative for the November 2013 general election. Affidavit of Ms. Sharon Carlisle in Support of Motion for Preliminary Injunction (hereinafter, "Carlisle Aff.") ¶ 14-15. Protect Our Loveland entitled the Proposed Ordinance the "Loveland Public Health, Safety, and Wellness Act." *Id.* ¶ 16. Following this notice, the Clerk advised Protect Our Loveland in a letter dated June 3, 2013, that the petition form was approved and notified Protect Our Loveland that the Larimer County Clerk and Recorder's Elections Department placed the number of registered voters at 45,044 as of May 21, 2013. *Id.* ¶ 16. In accordance with C.R.S. §31-11-104(1), the Clerk advised Protect Our Loveland that 5% of the population would be 2,256 signatures. Id. ¶ 19.

From June 3, 2013, until July 8, 2013, Protect Our Loveland members and volunteers worked around the clock to collect over 3,000 signatures on the Petition. *Id.* ¶ 17. On July 8 2013, Protect Our Loveland submitted the Petition sections containing the collected signatures. *Id.* ¶ 18. The deadline for submission of petition sufficiency was September 6, 2013. Therefore, Protect Our Loveland submitted its petition well in advance of the deadline with the clear intent that it would be placed on the November 5th Ballot. Protect Our Loveland's petition fully complied with § 31-11-104 and all other requirements under Article 11. On July 23, 2013, the Clerk notified Protect Our Loveland that she had determined there were 2,743 valid signatures, 490 more signatures than the required 5% of the registered electors' population. *Id.* ¶ 19. Clerk also provided Protect Our Loveland in that letter that pursuant to C.R.S. § 31-11-110(1), any registered Loveland elector could file a Protest to the Petition within forty days of July 8, 2013. On the final day of this protest period, August 16, 2013, Larry Sarner filed a protest challenging the Petition's sufficiency. *Id.* ¶ 20. This Protest came as a surprise to Protect Our Loveland, as it had complied with all applicable rules and procedures. *Id.* ¶ 21.

The Clerk followed the requirements under C.R.S. §31-11-110(1) and set a date for a hearing on the Protest. The Protest hearing was conducted on August 22, 2013, and the

Clerk filed her determination five days after the hearing. *Id.* ¶ 22. On August 27, 2013, and pursuant to the hearing and requirements of C.R.S. §31-11-110(3), the City Clerk submitted a thorough determination that the Petition is sufficient. Mr. Sarner is now appealing this decision. On September 3, 2013, the City Council held a meeting in which they elected to "take no action" and let the appeal run its course and not put the Proposed Ordinance on the ballot for the November 5 Election. *See* Minutes: Loveland City Council Meeting of Sept. 3, 2013, at 4 (attached as Ex. 2). This decision is contrary to the City Council's statutory duty and deprives Protect Our Loveland and the citizens of Loveland of their constitutional rights.

LEGAL BACKGROUND

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. This power is further reserved to "the registered electors of every city, town and municipality as to all local, special, and municipal legislation of every charter in or for their respective municipalities." COLO. CONST., Art. V, § 1(9). 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, 972 (Colo. 1980) (en banc). Also, the Court has held that, "[l]ike the right to vote, the power of initiative is a fundamental right at the very core of our republican form of government." *Id.*; *Bernzen v. City of Boulder*, 525 P.2d 416 (Colo. 1974) (en banc).

The right to initiative is also reserved in the Loveland City Charter § 7(a). The City Charter further explains in Article 7, Section 7-1(a) that "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." Section 7-1(b) further provides that "[a]n 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 in the City." Petition proponents have 90 days to collect the requisite number of signatures. City Charter § 7-1(c).

The City Charter also provides the details for elections. 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." Also, 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." 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.

Colorado Revised Statutes sections 31-11-101 to 118 ("Article 11") govern the manner of exercising initiative and referendum power at the local level. Article 11's purpose is to set forth "the procedures for exercising the initiative and referendum powers reserved to the municipal electors" in the Colorado Constitution and is 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. "Any 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." *Id*. § 31-11-104(1). Article 11 further provides that 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. *Id*. § 31-11-109(1)-(3).

Article 11 also details the process of protesting a proposed ordinance. Under Article 11, 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 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." *Id*. § 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*.

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." *Id*. § 31-11-110(3). 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." *Id*. § 31-11-103(2). The statute makes no mention of a stay of the legislative body's duties pending review of a protest by the district court.

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." *Id*. § 31-11-104(1). After an election has been ordered, the city council "shall promptly fix a ballot title" for each initiative. *Id*. § 31-11-111. Moreover, except as otherwise provided in Article 11, the city clerk is charged with rendering all interpretations and making "all initial decisions as to controversies or other matters arising in the operation of this article." *Id*. § 31-11-118.

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 the setting of a ballot title, ballot printing, and all other aspects of the initiative process. In fact, the City Council is required to act "in a manner that facilitates the right of initiative instead of hampering it with technical statutory provisions or constructions." *Armstrong v. Davidson*, 10 P.3d 1278, 1281 (Colo. 2000) (en banc). Moreover, the Colorado Supreme Court "has always liberally construed this fundamental right, and, concomitantly, [has] viewed with the closest scrutiny any governmental action that has the effect of curtailing its free exercise." *McKee*, 616 P.2d at 972.

ARGUMENT

A. Legal Standard – Preliminary Injunction.

The granting of injunctive relief lies within the sound discretion of the trial court. *Rathke v. MacFarlane*, 648 P.2d 648, 653 (Colo. 1982) (en banc). A preliminary injunction protects a party's rights pending a final determination of the case on its merits. Similar to a temporary restraining order, a preliminary injunction's purpose is "to prevent irreparable harm prior to a decision on the merits of a case." *City of Golden v. Simpson*, 83 P.3d 87, 96 (Colo. 2004) (en banc); *McLean v. Farmers High Line Canal & Reservoir Co.*, 98 P. 16, 20 (Colo. 1908). Pursuant to Rule 65(a), a preliminary injunction may be granted after notice to the adverse party or his counsel on the following grounds: (1) that there is a reasonable probability of success on the merits; (2) that there is a real, immediate, irreparable injury which may be prevented by injunctive relief; (3) that there is no plain, speedy, and adequate remedy at law; (4) that the granting of a preliminary injunction will not disserve the public interest; (5) that the balance of equities favors the injunction; and (6) that the injunction will preserve the status quo pending a trial on the merits. *Rathke,* 648 P.2d at 653-54; *Tesmer v. Colo. High Sch. Activities Ass'n*, 140 P.3d 249, 252 (Colo. App. 2006).

Applying this standard to the present case, it is clear that Protect Our Loveland is entitled to relief in the form of a Preliminary Injunction as it satisfies all six elements as described below.

B. Protect Our Loveland Is Likely to Prevail on the Merits of Its Claim.

Given the Defendants' failure to comply with the clear statutory duties at issue, Protect Our Loveland is likely to prevail on the merits of its claim. To be entitled to preliminary injunctive relief, a "party must demonstrate that there is a reasonable probability of success on the merits." *Tesmer*, 140 P.3d at 252. Here, Protect Our Loveland has such a reasonable probability of success on the merits because the Defendants violated their statutory duty under C.R.S. § 31-11-104(1) when the City Council chose not to place the Proposed Ordinance on the ballot, and decided to defer the issue indefinitely. C.R.S. § 31-11-104(1) provides that the City Council was required by law to adopt the Proposed Ordinance without alteration or publish it "forthwith." In *Moreno v. People*, 775 P.2d 1184, 1186 (Colo. 1989), the Colorado Supreme Court adopted the Black's Law Dictionary definition of "forthwith," defining it as "immediately; without delay; directly."[1] The City Council, however, decided neither to adopt the Proposed Ordinance nor place it on the ballot for either the upcoming general election or a special election.

Here, the City Council violated their statutory duty and the rights of Protect Our Loveland by voting not to put the Proposed Ordinance on the ballot after a finding of "final determination of petition sufficiency." This final determination was entered on August 27th, 2013, when the City Clerk issued her decision that the petition was sufficient. According to C.R.S. § 31-11-103(2), "[a] final determination of petition sufficiency means the date following the passage of time within which a protest must be filed pursuant to C.R.S. § 31-11-110 or the date on which any protest filed pursuant to C.R.S. § 31-11-110 results in a finding of sufficiency, whichever is later." Since the City Clerk found the Petition of the Proposed Ordinance to be sufficient on August 27th, 2013, the City Council had a duty to publish the Proposed Ordinance forthwith and place it before the voters. The City Council had until September 16, 2013, or sixty days before the November general

[1] Use of the term "forthwith" is not solely limited to Title 31. The U.S. Supreme Court has considered the term's meaning with regard to several federal statutes and rules and has cited *Black's Law Dictionary* to conclude that the term essentially means "without haste." *See Dickerman v. N. Trust Co.*, 176 U.S. 181, 193 (1900) (defining "forthwith" to mean "as soon as reasonably possible" and sometimes within twenty-four hours); *Precision Specialty Metals, Inc. v. United States*, 315 F.3d 1346, 1348 (Fed. Cir. 2003) (relying on *Black's Law Dictionary* definition of "forthwith").

election, to place the Proposed Ordinance on the November general election ballot. C.R.S. § 31-11-104(1). This deadline has now passed. Therefore, the City Council has a remaining duty to set a special election for the same day as the general election by October 4, 2013, or the City Council must choose a date for the special election within the one hundred and fifty day time period as required by C.R.S. § 31-11-104(1).

The City Council has stated its intention to allow the appeal filed against the City Clerk's Determination of petition sufficiency to be decided by the District Court before the City Council will even consider setting a date to put the Proposed Ordinance to a vote. This inaction by the City Council is illegal. Article 11 states that the City Council "shall forthwith" place the Proposed Ordinance to the electors. C.R.S. § 31-11-104(1). If the City Council permits the appeals process to run before even deciding whether and when to place the Proposed Ordinance before voters, then it will likely miss the one hundred and fifty day deadline for the Proposed Ordinance to be placed on a special election ballot as well, causing further irreparable injury to Protect Our Loveland. Given the constitutional mandate, "forthwith" is properly interpreted to mean that the process for to submit the measures to the measure to the voters occurs without delay. *Moreno*, 775 P.2d at 1186. Protect Our Loveland, and the voters who signed the Petition expecting the City Council to perform its duty, must now ask this Court for an equitable remedy.

As both a matter of public policy and preservation of a constitutional right, the Court should order the City Council to put the issue to the voters at the upcoming general election. 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*, 616 P.2d at 972; *Election Comm'n of City & Cnty. of Denver v. McNichols*, 565 P.2d 937, 939 (Colo. 1977) (en banc); *Burks v. City of Lafayette*, 349 P.2d 692, 694 (Colo. 1960) (en banc). A decision that allowed a delay in submitting an initiative to the voters pending resolution of a judicial appeal of a denied protest would have an immense impact on the right to initiative protected by the Colorado Constitution. Proposals that are of great importance to a portion of the electorate, often which is of a time sensitive manner, but that maybe subject of political disagreement within a community, could be stolen from the hands of the voters by a single protester. State law simple cannot be read to allow the initiative process to be held hostage in this manner. Instead, the judicial process should run concurrently with the election process. If a court upholds a protest appeal, then the remedy is to not count the votes or possibly set aside the results. *See Polhill v. Buckley*, 923 P.2d 119, 122 (Colo. 1996) (en banc) (finding post-

election review and invalidation of referendum if it is found to violate state law an adequate remedy for a challenge to a referendum).

In this case, the initiative process should be allowed to go forward as dictated by the Constitution and statutes, without further interference from the City Council. The Defendants have violated these rights, public policies and their statutory duty "to safeguard, protect, and preserve inviolate" the right of the people to engage in the initiative process in a timely manner. Therefore, Protect Our Loveland has showed a reasonable probability of success on the merits and as discussed below further is entitled to relief under a Preliminary Injunction.

C. Protect Our Loveland Faces the Threat of Real, Immediate, and Irreparable Harm Which May be Prevented by Injunctive Relief.

Protect Our Loveland, and the voters of the City of Loveland, will suffer irreparable injury unless the Preliminary Injunction is granted. The harm is real and immediate.

First, Protect Our Loveland will be denied the full right of initiative provided for in the Colorado Constitution and state law. Protect Our Loveland has a right to have the Proposed Ordinance placed on the ballot for the public to engage in political debate and exercise the right to vote for or against the measure. *See Brown v. Davidson*, 192 P.3d 415, 421 (Colo. App. 2006) ("Ballot-access restrictions may burden two kinds of rights: the right of individuals to associate for the advancement of political beliefs and the right of qualified voters of all political persuasions to cast their votes effectively."); 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948.1 (2d. ed. 1995) ("When an alleged deprivation of a constitutional right is involved… most courts hold that no further showing of irreparable injury is necessary."). Further, Protect Our Loveland has a right under C.R.S. § 31-11-104(1) to have the Proposed Ordinance submitted to the voters within a prescribed time period, and they suffer harm if the submission to the voters is delayed for an indefinite amount of time. Because the initiative law favors placing matters before the voters, the statutory and constitutional right is harmed if the City is permitted to delay the entire initiative and ballot setting process indefinitely at the whim of a single protester. *See Armstrong v. Davidson,* 10 P.3d at 1281 (noting that initiative law favors placing matters before the voters in holding that petition-proponents could circulate petition even while a challenge to the ballot title was pending).

Second, Protect Our Loveland will suffer harm from being denied the right to try to prevent the harms from fracking that Protect Our Loveland sought to address in pursuing the initiative. Protect Our Loveland seeks a two-year moratorium on fracking pending the completion of a state-sponsored study to assess fracking's effects. But the delay caused by not promptly submitting this measure to the voters would completely destroy the

Proposed Ordinance's intended purpose by effectively permitting fracking to go forward without the benefit of the results of the study. Many of Protect Our Loveland's members live and own or lease property near known drilling sites. Carlisle Aff. ¶ 7. Members of Protect Our Loveland may be forced to endure the undisputable negative effects of fracking, such as dangerous fracking rigs near neighborhoods, wastewater storage pits, incessant truck traffic, extreme noise, and bright lighting on a 24-hour basis. *Id*. ¶ 10. Due to concerns over these effects on property values, Protect Our Loveland's members may suffer economic harm if their right to vote to end this practice is denied or interminably delayed. Moreover, Protect Our Loveland's members are aware of the air pollution caused by fracking and the possible health risks associated with fracking and the potential exposure to toxic chemicals as the fluids used in fracking are transported to drilling sites in the City. *Id*. ¶¶ 9-10. They are also concerned about the safety and health risks from accidents and spills and potential pollution of water sources. *Id*. ¶ 9. Without an opportunity to exercise their right to prevent these effects by voting on the Proposed Ordinance, Protect Our Loveland will suffer irreparable injury.

Furthermore, the current delay caused by Defendants provides a window of unknown length for rapid fracking within the community as oil and gas interests scurry to submit drilling permit applications while they know they still can. If those applications are approved before the initiative process is allowed to prevent them, the citizens may not be able to reverse that process. Thus, the City's residents would have to endure the negative effects of fracking described above, some of which are irreversible, while the issue of the petition's sufficiency winds its way through the court system, which could take years.

Finally, Protect Our Loveland will also suffer injury to its reputation, credibility, and goodwill with those who signed the petition and other voters if the Proposed Ordinance, which met all the statutory requirements, is not put on the November ballot as expected. Carlisle Aff. ¶ 26. The injury to Protect Our Loveland's reputation is made worse the longer voters have to wait to see if the Proposed Ordinance is going to be on the ballot at all. *Id.; see* Wright & Miller, *supra*, § 2948.1 ("Injury to reputation or goodwill is not easily measurable in monetary terms, and so often is viewed as irreparable. . .") (footnotes omitted). Colorado courts have found injury to reputation or goodwill to be an irreparable injury. *See Denver Firefighters Local No. 858, IAFF, AFL-CIO v. City & Cnty. of Denver*, 292 P.3d 1101, 1111 (Colo. 2013); *Am. Television & Commc'ns Corp. v. Manning*, 651 P.2d 440, 446 (Colo. App. 1982). "[T]he injury need not have been inflicted when application is made or be certain to occur; a strong threat of irreparable injury before trial is an adequate basis." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 51-52 (2008) (quoting Wright & Miller, *supra*, § 2948.1, at 155-56). Here, there is a strong threat that Protect Our Loveland's reputation will be irreparably harmed prior to a final resolution of this case.

D. Protect Our Loveland Lacks a Plain, Speedy, and Adequate Remedy at Law.

Third, there is a lack of a plain, speedy, and adequate remedy at law. Protect Our Loveland will suffer imminent harm, and a preliminary injunction is the only adequate solution to redress this issue. The City Council chose to delay the initiative process indefinitely by affirmatively voting not to take any action that would place the Proposed Ordinance on the November ballot or at a timely-held special election, due to the pending appeal. The City Council chose this course of action out of four possible options presented by City Attorney John Duval. *See* Agenda Item 5 Memorandum, John Duval to City Council, Sept. 3, 2013 (attached as Ex. 3). Moreover, the City Council chose this option despite the fact that a majority of the citizens who spoke at the September 3, 2013 Meeting supported referring the matter to the voters. *See* Ex. 2, Meeting Minutes at 4. This, however, is a time-sensitive matter and, absent injunctive relief, the proceeding before this Court will likely extend past the period that the City Council has to set a special election. Due to these circumstances, Protect Our Loveland lacks a plain, speedy, and adequate remedy at law, and a preliminary injunction is necessary because no other legal remedy will provide full, complete, and adequate relief. *Gitlitz v. Bellock*, 171 P.3d 1274, 1279 (Colo. App. 2007).

Furthermore, under Colo. R. Civ. P. 57(a) and C.R.S. § 13-51-105, "Courts of record within their respective jurisdictions have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action shall be open to objection on the ground that a declaratory judgment or decree is prayed for…" Thus, even if a Declaratory Judgment is within Protect Our Loveland's claim for relief, a Preliminary Injunction is not precluded by it. A Declaratory Judgment, by itself, is unlikely to be an adequate remedy at law as well because it also may not meet the deadline to place the Proposed Ordinance on the ballot in a timely manner.

E. Issuing a Preliminary Injunction Will Not Disserve the Public Interest.

No disservice to the public interest will occur as a result of granting this injunction. In actuality, the opposite is true here. Granting this injunction and compelling the City Council to do their statutory duty and put the proposed ordinance on the ballot will serve the public interest. The City Council's resolution to "do nothing" at the September 3, 2013, City Council meeting has effectively taken away the people of Loveland's right to vote on the issue of hydraulic fracturing and whether they want this industrial practice to take place in their city.

The citizens' right to express their political opinions and vote for or against the Proposed Ordinance is perhaps the most fundamental right in society. *McKee*, 616 P.2d at 972. That right is being threatened here. Granting a preliminary injunction will further the public interest by protecting this fundamental right and allow the public to vote on an issue that was wrongfully excluded from the November Ballot.

F. The Balance of Equities Favors Granting a Preliminary Injunction.

The threatened injury to Protect Our Loveland and its interests greatly outweighs any other possible injury. Protect Our Loveland is a non-profit, grassroots organization that put its time, money, passions, and efforts into getting the proposed ordinance approved and circulated to the required number of people for signatures. The group followed every rule and procedure as articulated by the City Clerk in pursuing their initiative. There was even a protest hearing after which the City Clerk rejected most of the Protester's arguments in her written opinion.

If things are allowed to proceed as they stand now, Protect Our Loveland and the people of Loveland would be denied their constitutional right to vote on the Proposed Ordinance and the opportunity to either accept or reject the use of hydraulic fracturing within their town. Indeed, putting the Proposed Ordinance on the ballot for the general election in November would be the best decision for all parties because it would remove the additional costs associated with a special election and it would provide Protect Our Loveland its right to pursue an initiative and the people the right to vote in the least cumbersome manner. Here, Protect Our Loveland is being stripped of two fundamental rights: its initiative right and the right to vote. The balance of equities weighs tremendously in favor of Protect Our Loveland as it stands to lose everything that it has worked so hard for over the past year.

Finally, there is an alternative remedy for the City if ultimately the Court upholds the third-party protest—namely to not count the votes or set aside the election if that is ordered by the Court. *Polhill*, 923 P.2d at 122. Given this, the only possible injury to the City is the cost of the election itself. On this point, the City Council has already stated that it did not see such cost as injurious to the City.[2]

[2] City Council members indicated they were not concerned about the financial impact of their decision (potentially as much as $60,000 for a special election, as opposed to $16,000 to put the measure on the regular election ballot), or the timing of when the Proposed Ordinance would be submitted to the voters. *See* Video: City Council Meeting, 2:40:07-

G. An Injunction Will Preserve the Status Quo Pending a Trial on the Merits.

The purpose of a preliminary injunction is to maintain the status quo. *Combined Commc'ns Corp. v. City & Cty. of Denver*, 528 P.2d 249, 251 (1974) (en banc). Granting this preliminary injunction will serve to preserve the status quo pending a trial on the merits by allowing not only the members of Protect Our Loveland but all registered voters of the City of Loveland to vote on the Proposed Ordinance. Any action that does not allow the Proposed Ordinance onto the ballot will be a disservice to the people of Loveland as it would silence their voices in a matter that directly affects them and their community. And again, there already exists a remedy for the City if the Court rules in favor of the third-party protester.

H. A Nominal Security Should Be Permitted In Light Of The Facts In This Matter.

Protect Our Loveland should be ordered to provide nominal security, if any, for the Preliminary Injunction. Colorado Rule of Civil Procedure 65(c) states in pertinent part:

> (c) Security. No restraining order or Preliminary Injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

A trial court may properly order no bond or a nominal bond where the court finds that the facts of record show that the enjoined party will not suffer any harm based on the preliminary injunction if it turns out later that the party was wrongly enjoined. *See Kaiser v. Mkt. Square Disc. Liquors, Inc.*, 992 P.2d 636, 642 (Colo. App. 1999) (cert. denied) (holding that Rule 65(c) is satisfied by an order requiring that moving party post a nominal bond where trial court finds that the enjoined party will not suffer any damages from wrongful injunction). Because the purpose of a bond is to protect the enjoined party against damages and costs if it is later found that the injunction should not enter, an injunction secured by a $1.00 bond has been held valid, even where the moving party failed to post that nominal bond. *Id*. at 642-43.

Here, an injunction will only have the effect of requiring Defendants to perform a ministerial duty that is clearly set out by the statutes and the Constitution. Given the

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2:41:40 (Sept. 3, 2013), *available at* http://atlas.fcgov.com/2013_09_03_Loveland_Council/index.htm.

additional cost of a special election, an injunction may actually have the effect of saving Defendants costs they would otherwise incur.

CONCLUSION

For the above reasons, Protect Our Loveland respectfully requests that this Court grant its Motion for Preliminary Injunction under Rule 65(a).

Dated this 30th day September, 2013.

Respectfully submitted,

/s/ Michael Ray Harris
Michael Ray Harris (CO Bar No. 35395)
Lauren Hammond (Student Attorney)
Christopher Stork (Student Attorney)

/s/ James Daniel Leftwich
James Daniel Leftwich (CO Bar No. 38510)

Counsel for Protect Our Loveland

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of September, 2013, a true and correct copy of the foregoing **PROTECT OUR LOVELAND'S MOTION FOR PRELIMINARY INJUNCTION** was served via the Integrated Colorado Courts E-Filing System (ICCES) on the following counsel of record:

John Duval
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Attorney for Defendants

/s/ Michael Ray Harris
Michael Ray Harris