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DISTRICT COURT, LARIMER (FT COLLINS) COUNTY, COLORADO
Address: 201 La Porte Avenue, Suite 100
Fort Collins, CO 80521-2761

Plaintiff: LARRY SARNER

v.

Defendants: CITY OF LOVELAND, COLORADO, *et al.*,

and

Intervenor: PROTECT OUR LOVELAND, INC.

▲ COURT USE ONLY ▲

Consolidated
Case Number: 2013CV31071

Courtroom: 4C

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PROTECT OUR LOVELAND'S RESPONSE BRIEF ON ISSUE OF FINAL DETERMINATION OF PETITION SUFFICIENCY

INTRODUCTION

On February 11, 2014, this Court issued an Order affirming the Loveland City Clerk's determination of petition sufficiency and denying all of Plaintiff's claims ("Order"). The City, apparently uncertain regarding whether to proceed with a special election, requested a status conference seeking clarification as to whether the Order constitutes a "final determination of petition sufficiency" under C.R.S. § 31-11-103. On February 25, 2014, a status conference took place ("Status Conference"), at which time the Court: (1) acknowledged that the Order should be clarified to show that the Court has issued a final judgment on Plaintiff's claims; (2) issued a tentative opinion that judicial review of the petition, as contemplated by C.R.S. § 31-11-110(3), is now complete, and, thus, the Order did constitute a "final determination of petition sufficiency"; and (3) stated its intent to issue a new order covering both of these issues. However, to provide one final opportunity for Plaintiff to demonstrate otherwise, the Court gave Plaintiff ten days to present any **on-point legal precedent** to support Plaintiff's otherwise bald assertion that a "final determination of petition sufficiency" does not occur until all appellate remedies have been completely exhausted.

On March 6, 2014, Plaintiff filed his Brief arguing that the determination of petition is not yet final. Plaintiff has entirely failed to find or present any case law directly, or even indirectly, supporting his position, or contradicting the otherwise plain reading of C.R.S. § 31-11-110(3). Instead, Plaintiff, who is clearly "disenchanted" with how his case is ending in the District Court, filed the written equivalent of a Rube Goldberg contraption—a confusing, complicating and, in this case, ineffective response to avoid addressing the Court's simple question of whether any case law controls the Court's decision on this point. As a result, this Court should enter final judgment, and declare that a "final determination

of petition sufficiency" has occurred and that the City must proceed with a special election as required by law.

ARGUMENT

A. The Legislature's Intent to Provide for a "Final Determination of Petition Sufficiency" upon Completion of Judicial Review in the District Court is Clear from a Plain Reading of C.R.S. §§ 31-11-103 and 110.

The legislature has defined the term "final determination of petition sufficiency" in C.R.S. § 31-11-103, which provides:

> "Final determination of petition sufficiency" means 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 pursuant to section 31-11-110 results in a finding of sufficiency, whichever is later.

While Protect Our Loveland previously argued that, under the statute, a final determination occurred when the Clerk issued a determination of petition sufficiency following a hearing on Plaintiff's protest, prior to judicial review, this Court did not agree. Order on Prelim. Inj. (Nov. 4, 2013). At issue now is a different question—how much judicial review did the legislature contemplate before the determination becomes final? The answer is stated plainly by the context and words of the statute.

In order to "avoid a strained or forced construction of a statutory term . . . [the Court] must look to the context in which a statutory term is employed." *Bodelson v. City of Littleton*, 36 P.3d 214, 215 (Colo. App. 2001). To understand the context of the term "final determination of petition sufficiency," the Court, in the Status Conference, correctly looked at C.R.S. § 31-11-110(3), which states:

> The determination as to petition sufficiency may be reviewed by the **district court** in which such municipality or portion thereof is located upon application of the protester . . . (emphasis added).

Between C.R.S. §§ 31-11-103 and 110, there can only be one reading of the legislature's intent: that a determination of petition sufficiency may be reviewed **by the district court** and after that, the determination is final and the city council's obligations under the statute are triggered, since no additional review is contemplated by the statute. Despite Plaintiff's arguments to the contrary, the statute **does not** contemplate that the determination be reviewed at every stage of the judicial process before the election may proceed. Plaintiff's interpretation would lead to the absurd result of requiring a petition to potentially be reviewed by the Colorado Supreme Court, or the United States Supreme Court, before it may proceed to an election. If this Court were to adopt this approach, all citizen initiatives would potentially be subject to years of delay before being submitted to the electorate. This type of scenario is something the Court has already acknowledged was not the intent of the legislature. *See* Order on Prelim. Inj. at 6 (noting that the General Assembly's intent was "to reduce the delay of the election during judicial review.").

B. Plaintiff Has Found No Legal Authority to Counter a Plain Reading of the Statute or Support His Argument that the Determination is Not Final Due to His Pending Appeal.

Plaintiff contends that the Court's finding of determination of petition sufficiency cannot be final until he has exhausted his appeals. Pl.'s Br. at 14. This is Plaintiff's only attempt to address the issue which the Court ordered to be the sole topic of this briefing. Of course, Protect Our Loveland does not suggest that the Court's affirmance of the Petition's sufficiency cannot be appealed. While Plaintiff certainly does have such a right, an appeal does not stall the election and related procedures set out in C.R.S. § 31-11-104. As set forth below, Plaintiff tries to create rights that are well beyond those provided to a protester under Title 31, Article 11 of the Colorado Revised Statutes.

In attempting to create these rights, Plaintiff relies heavily upon case law entirely outside the scope of the issues of this brief.[1] Specifically, Plaintiff relies upon *Rantz v. Kaufmann* and *Barnett v. Elite Properties of America, Inc.*, to demonstrate that a judgment cannot be final pending an appeal. Pl.'s Br. at 14. The reliance on those cases is misplaced. Those cases address specific circumstances where a trial court judgment is not final until the appeal process or certiorari is complete, particularly for purposes of issue preclusion. *See Rantz v. Kaufmann*, 109 P.3d 132, 141 (Colo. 2005); *Barnett v. Elite Properties of Am., Inc.*, 252 P.3d 14, 23 (Colo. App. 2010). The specific circumstances identified in these cases are not applicable here because there is a specific statute that only contemplates judicial review at the district court level when making a finding of "final determination of petition sufficiency," a term of art defined in the statute. *See* C.R.S. § 31-11-110(3). Thus, these cases do nothing to support Plaintiff's contention that the "final determination of petition

[1] The City also relies upon inapplicable case law, positing that the principles of *Buckley v. Chilcutt*, 968 P.2d 112 (Colo. 1998), "are at play here and must be considered by Court." *See* Def.'s Resp. Br. ¶¶ 3-5 (Mar. 13, 2014). Protect Our Loveland, however, has previously explained *Chilcutt*'s limited applicability to the instant case. *See* Reply in Supp. Pl.'s Mot. Prelim. Inj. at 8-10 (Oct. 28, 2013). Those points have even greater force now that this Court has affirmed the Petition's sufficiency. Most significantly, **in *Chilcutt*, there was never any determination of petition sufficiency**. *See* 968 P.2d at 114. The case involved a challenge brought by the **proponents of a statewide initiative** to the Secretary of State's finding of insufficiency following a flawed review of a sample of signatures. *Id*. The Supreme Court held that the Secretary must conduct a line-by-line review of the signatures and find the petition sufficient before placing the measure on the ballot. *Id*. at 121. Here, the City Clerk has conducted a line-by-line review of all signatures, and re-reviewed challenged signatures. In enacting C.R.S. § 31-11-110, the legislature balanced the benefits of facilitating the constitutional right of initiative with the statutory right to protest—and once a petition has been deemed sufficient three times, as here, it must go to a vote within 60 to 150 days. Similarly, this Court recognized that the legislature, in requiring judicial review be conducted as expediently as possible, "carefully balanced" the interest of avoiding a needless election with the interest in "swiftly bringing a proposed ordinance to a vote." Order on Prelim. Inj. at 6. The legislature could not have intended to allow any protester to drag out a vote indefinitely so long as he can afford the filing fees.

sufficiency" cannot be final until his appeals are exhausted, and only further demonstrate that Plaintiff could not find any on-point Colorado case law to support his position.[2]

Similarly, Plaintiff tries to further bolster this misguided argument by arguing that, in circumstances where the appellate court applies *de novo* review, a judgment is not final pending an outcome on appeal. Pl.'s Br. at 15. But Plaintiff is mistaken as to the applicable standard of review—which is whether the City Clerk abused her discretion or exceeded her jurisdiction in determining the petition to be sufficient. *See* C.R.C.P. 106(a)(4). This was the standard of review in this Court and will not change at the appellate level. Therefore, Plaintiff's *de novo* argument is without merit.

Furthermore, Plaintiff's argument is contradicted by his own admission that the judgment is final. Plaintiff filed a "Motion for Entry of Final Judgment" under C.R.C.P. 54(b) on February 12, 2014, one day after the Court's Order affirming the Clerk's determination of petition sufficiency. Plaintiff sought entry of final judgment because "three of the five claims against Defendants have been **finally determined** in favor of the Defendants." Pl.'s Mot. Entry of Final J. ¶6 (emphasis added). If the Court enters final judgment, as was implied in the Status Conference, "it cannot in the exercise of its discretion, treat as 'final' that which is not 'final.'" *Harding Glass Co., Inc. v. Jones*, 640 P.2d 1123, 1125 (Colo. 1982) (citing *Sears, Roebuck & Co. v. Mackey,* 351 U.S. 427, 437 (1956)). Thus, since Plaintiff has filed for entry of final judgment, he effectively proclaimed that the judgment is final. The judgment has a binding effect upon the parties because C.R.C.P. 62(a) does not provide for an automatic stay in these circumstances, and no discretionary stay has been requested or granted in this case.

[2] Additionally, Plaintiff improperly relies on *Edge v. Bd. of Cnty. Comm'rs*, 318 P.2d 621 (Okla. 1957), an Oklahoma case which is outside the scope of this Court's directive.

C. Plaintiff's Attempt to Use Irrelevant, Non-Legal Arguments to Bolster His Position is Also Outside the Scope of the Court's Directive.

Plaintiff makes two final attempts to distract from the issues at hand. First, Plaintiff discusses the financial impacts of holding a special election. Pl.'s Br. at 15. But Plaintiff completely disregards the fact that any increased cost to the taxpayers was caused by his protest and subsequent appeal to the district court, which kept the Proposed Ordinance off the November 2013 ballot. And it was the City that chose to take on the additional costs of a special election, while also improperly delaying a vote on the measure. The costs of a special election should not be used as additional justification for restricting the rights of Loveland citizens to participate in the electoral process. Moreover, there is no basis for Plaintiff to use the claim of higher costs as a tool to persuade the Court to find that the determination of petition sufficiency is not final until the appeals process is complete.

Second, Plaintiff completely misconstrues Protect Our Loveland's position on what constitutes a "final determination of petition sufficiency." *See* Pl.'s Br. at 9-10. Plaintiff's attempt to paraphrase statements made by Protect Our Loveland's counsel at the Status Conference and use them support his argument is improper. Protect Our Loveland has not interpreted C.R.S. § 31-11-103(2) in two different senses. Instead, Protect Our Loveland continues to believe that, under a plain reading of the statute, a "final determination of petition sufficiency" can occur prior to completion of some form of judicial review. However, the Court has already ruled on that issue, and the ruling is accepted for the purposes of determining the issue at hand. Further, it is completely separate question as to **what constitutes judicial review under the statute. As noted above, on that question, the statute is crystal clear, and such review is complete.**

D. Plaintiff's Brief Attempts to Reargue Issues Already Decided and Best Left for Appeal.

Lastly, Plaintiff attempts to reargue many other issues that have already been considered by this Court. Most notably, Plaintiff continues to use the term "disenfranchisement," or some variation thereof. *See* Pl.'s Br. at 6, 16-17, 19. This is exceedingly inappropriate and, frankly, hypocritical provided that it is Plaintiff's continued actions that have delayed a vote on the Proposed Ordinance. Disenfranchisement is defined as "[t]he act of taking a way the right to vote in public elections from a citizen or class of citizens." BLACK'S LAW DICTIONARY 535 (9th ed. 2009). Essentially, disenfranchisement means denial of the right to vote.

Plaintiff continues to claim that some Loveland voters are being "disenfranchised" because they are being excluded from "having a voice" in this matter. Pl.'s Br. at 16-17. In clear contradiction to this purported concern is the overriding fact that Plaintiff's self-serving arguments, if accepted, would deny **all** citizens of Loveland the right to have a voice in this matter—by voting. Any denial of the right to vote that has occurred is a result of Plaintiff's actions, and not that of the City Clerk or Protect Our Loveland. Plaintiff ignores the fact that no vote on this issue has occurred due to actions he has taken and continues to take, and instead focuses on the alleged exclusion of inactive voters from the City Clerk's calculations. Pl.'s Br. at 17. All voters, including those allegedly excluded from a count and those that signed the Petition in support of the initiative, would be allowed to have a say in the matter if and when the Proposed Ordinance is put to vote. Furthermore, Plaintiff's actions have denied Protect Our Loveland's members the right of initiative, which "[l]ike the right to vote . . . is a fundamental right at the very core of our republican form of government." *McKee v. City of Louisville*, 616 P.2d 969, 972 (Colo. 1980). In short, Plaintiff

continues to use the word "disenfranchisement," but, it does not mean what he thinks it means.

Finally, Plaintiff attempts to argue over the meaning of the term "forthwith" as it is used in C.R.S. § 31-11-104(1). Pl.'s Br. at 18-19. Plaintiff cites to case law from various jurisdictions in an effort to support the assertion that "forthwith" does not mean "immediately." *Id*. at 18. This Court, however, has already stated that "[t]he provision that review shall be conducted 'forthwith' protects against unreasonably long delay, and any actions brought in bad faith may be dealt with through appropriate sanctions." Order on Prelim. Inj. at 6. Notwithstanding Plaintiff's disregard of this Court's findings, the meaning of "forthwith" is not at issue here. District Court review as contemplated by the statute is complete. The Court allowed circumscribed briefing on a very narrow issue, and Plaintiff's inclusion of this irrelevant argument is improper. Protect Our Loveland and the citizens of Loveland have already waited five months to exercise their right to participate in the electoral process. It is now time to submit this initiative to the electorate so the people may have the opportunity to decide on this important issue.

CONCLUSION

For the reasons stated above, Protect Our Loveland respectfully requests that this Court issue an order declaring that, through its February 11th Order, the "final determination of petition sufficiency" has been made, and requiring the City to submit the "Loveland Health, Safety, and Wellness Act" to the electorate within 60 to 150 days, as prescribed by law.

Dated this 14th day of March, 2014.

Respectfully submitted,

/s/ Kelly Deanne Davis

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Michael Ray Harris
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Counsel for Protect Our Loveland

In accordance with C.R.C.P. 121 § 1-26, ¶7, a printed copy of this document with original signatures is on file with the Environmental Law Clinic at the University of Denver Sturm College of Law and will be made available for inspection by other parties or the Court upon request.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 14th day of March, 2014, a true and correct copy of the foregoing *Protect Our Loveland's Response Brief on Issue of Final Determination of Petition Sufficiency* was served via the Integrated Colorado Court's E-filing System (ICCES) on the following counsel of record:

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