DISTRICT COURT, LARIMER COUNTY, COLORADO 201 Laporte Avenue, Suite 100 Fort Collins, Colorado 80521-2761 (970) 494-3500	Filed in Clerk of Courts Larimer County, CO JM FEB 11 2014 Sherlyn K. Sampson Clerk of Court DATE FILED: February 11, 2014 CASE NUMBER: 2013CV31071
LARRY SARNER, Plaintiff v. **CITY OF LOVELAND, et. al.,** Defendants **PROTECT OUR LOVELAND, INC.,** Intervenor	**▲ COURT USE ONLY ▲** Case No. 2013CV31071 Courtroom: 4C
ORDER	

THIS MATTER comes before the Court on review pursuant to C.R.C.P 106 and C.R.S. § 31-11-110(3). Plaintiff Larry Sarner ("Plaintiff") seeks review of the City Clerk of Loveland's ("the City Clerk") determination of petition sufficiency ("the Clerk's determination") in favor of Intervenor Protect Our Loveland, Inc. ("POL"). The City of Loveland, the City Clerk, the mayor of Loveland, and individual members of the Loveland City Counsel are the named defendants in this action, and the Court will refer to them collectively as "the City Defendants." Having heard oral arguments, having reviewed the pleadings, the briefs of all parties, and the complete file in this matter, and being fully advised in the premises, the Court FINDS and ORDERS as follows:

I. FACTS AND PROCEDURAL HISTORY

POL is the proponent of a ballot initiative proposing a Loveland ordinance ("the proposed ordinance") that, if enacted, would "place a moratorium on hydraulic fracturing and the storage and disposal of its waste products within the city of Loveland for a period of two years in order to fully study the impacts of this process on property values and human health." Proposed Ordinance § 3. POL submitted its written notice of the proposed ordinance to the City Clerk on May 21,

2013. Before a proposed ordinance may be submitted to the legislative body of a municipality, the proponent of the ordinance must file a petition signed by at least five percent of the municipality's registered electors as of the date of the proponent's notice to the City Clerk. C.R.S. § 31-11-104(1). Pursuant to this requirement, the City Clerk made an inquiry to the Larimer County Clerk and Recorder's Elections Department ("the County Clerk's office") as to the number of registered electors of Loveland as of May 21, 2013. The County Clerk's office represented to the City Clerk that this number was 45,044 registered electors. On June 3, 2013, the City Clerk mailed a letter to POL approving the form of the petition and advising that the petition would require 2,523 signatures. On July 1, 2013, the City Clerk mailed POL a letter correcting a transposition of numbers in the original letter and clarifying that the petition would actually require only 2,253 signatures.

POL submitted 3,704 petition signatures to the City Clerk on July 8, 2013. After reviewing the petition, the City Clerk initially determined that the petition contained 2,743 valid signatures.

On July 19, a new list of Loveland registered electors was generated by the County Clerk's office. Although the later list contains the registration date of each elector, it is not possible to reproduce the list of registered electors that would have been generated based on the data that had actually been entered into the County Clerk's office's records on May 21, 2013. It appears that on July 29, 2013, Plaintiff's counsel contacted the City Clerk regarding the fact that the July 19 list contained approximately 3,000 more voters with registration dates of May 21 or earlier than the list actually generated on May 21, on which the City Clerk relied to calculate the 2,253 signature threshold. On July 31, 2013, the City Clerk recorded a voicemail message to Plaintiff's counsel stating that the City Clerk had contacted the County Clerk's office regarding this disparity. A representative of the County Clerk's office stated to the City Clerk that the originally-reported number of registered electors could be relied upon and that the disparity between the May 21 number and the July 19 number could be explained by new electors being added to the list in the course of ongoing data entry. Ex. 16-U.

On August 16, 2013, Plaintiff filed a written protest challenging the sufficiency of POL's petition pursuant to C.R.S. § 31-11-110(3). Plaintiff challenged the petition on the following grounds: 1) the City Clerk derived the threshold number of signatures from an inaccurate estimate of the total number of registered electors in Loveland; 2) the petition contained an additional 558 invalid signatures; 3) the proposed ordinance violates the single subject provision of the Loveland City Charter; 4) the proposed ordinance is preempted by state law; and 5) the proposed ordinance is unconstitutionally retroactive.

A hearing on Plaintiff's protest was held on August 22, 2013, at which the City Clerk functioned as the hearing officer. Plaintiff presented testimony and exhibits demonstrating his objections to the petition.

Plaintiff's case-in-chief included the testimony of Michael Hagihara, who identified himself as the voter registration manager of the Colorado Department of State. Mr. Hagihara testified that, although the data recorded in SCORE, the state's voter registration computer system, is not static because voter registration data is processed on a continual basis, the discrepancy in the County Clerk's voter registration records between May 21 and July 19 was outside the normal range of variation. Mr. Hagihara testifieded that the discrepancy "may" suggest that the May 21 number did not include registered electors who had failed to vote in a previous election. Prior to May 10, 2013, registered electors who failed to vote in a coordinated election were categorized as "inactive-failed to vote." However, H.B. 13-1303, 69th Gen. Assem. 1st Reg. Sess. (Colo. 2013) (codified at C.R.S. § 1-2-605(3)) amended the election code to state that "any registered elector whose registration record has been marked as 'Inactive-failed to vote' is, as of [May 10, 2013], an active elector." Mr. Hagihara testified that it was possible that the County Clerk's office had not implemented this change in the law by May 21, 2013, and mistakenly excluded registered electors marked as "inactive-failed to vote" from the number of registered electors originally provided to the City Clerk. Mr. Hagihara explained that it would be impossible to determine precisely how many registered voters would have been listed in the voter registration system on May 21, 2013. On cross-examination, Mr. Hagihara testified that he did not know whether there was an error in the number originally reported by the County Clerk, and that the City Clerk had a right to rely on the number of registered electors conveyed to her by the County Clerk. Protest Hr'g Tr. 48.

The City Clerk issued her findings on August 27, 2013. The City Clerk declined to accept Plaintiff's theory regarding the number of registered electors, and she adhered to the 2,253 threshold. Of the 558 signatures challenged by Plaintiff, the City Clerk found 224 signatures to be invalid. Subtracting this figure from the 2,743 signatures the City Clerk had previously determined to be valid, the City Clerk concluded that POL had submitted 2,519 valid petition signatures, exceeding the 2,253 threshold by 266 signatures. The City Clerk determined that the proposed ordinance complied with the Loveland City Charter's single subject provision. Finally, the City Clerk determined that she lacked the authority to determine whether the proposed ordinance was preempted by state law or whether the proposed ordinance was unconstitutionally retrospective, and that these issues could only be determined later by the judiciary if the proposed ordinance was adopted.

Plaintiff initiated the instant proceedings on September 3, 2013, seeking judicial review of the City Clerk's findings pursuant to C.R.C.P 106 and C.R.S. § 31-11-110(3). The Court heard oral argument from Plaintiff, the City Defendants, and POL on December 18, 2013.

II. STANDARD OF REVIEW

C.R.S. § 31-11-110(3) provides that "[t]he determination as to petition sufficiency may be reviewed by the district court for the county in which such municipality or portion thereof is located upon application of the protestor . . .." C.R.C.P. 106(a)(4)(I) directs the Court to review a government body or officer's exercise of a judicial or quasi-judicial function to determine "whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer."

The Court defers to the government body or officer's factual finding unless "no competent evidence" supports such findings, that is, unless the government body or officer's determination "is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." Ross v. Fire and Police Pension Ass'n, 713 P.2d 1304, 1309 (Colo. 1986). Generally, the Court's review of the applicable law is *de novo*. City of Commerce City v. Enclave West, Inc., 185 P.3d 174, 178 (Colo. 2008). Nevertheless, "a reviewing court should defer to the construction of a statute by the administrative officials charged with its enforcement," and the Court may not set aside the administrative official's construction of such a statute unless it lacks a "reasonable basis." Giuliani v. Jefferson County Bd. Of County Com'rs, 303 P.3d 131, 138 (Colo. App. 2012).

III. THE CLERK'S RELIANCE ON THE LIST OF REGISTERED ELECTORS CONVEYED ON MAY 21, 2013

In his oral argument, Plaintiff's counsel characterized the City Clerk's reliance on the County Clerk's office's representation that 45,044 resided in Loveland as of May 21, 2013 as a "systemic, fatal flaw" because the City Clerk was aware of the disparity of approximately 3,000 registered electors between the May 21 figure and the figure obtained on July 19, 2013. Plaintiff's counsel has identified this issue as Plaintiff's most important challenge to the validity of the Clerk's determination.

The City Clerk considered this issue in her written determination. Central to the City Clerk's analysis was the proposition that "[t]he courts have long recognized a presumption of validity and regularity with respect to the official acts of state and local officials in Colorado and, in the absence of clear evidence to the

contrary, the courts will presume that these officials have properly discharged their official duties." Clerk's Determination 25 (citing Jensen v. City and County of Denver, 806 P.2d 381, 386 (Colo. 1991)). The City Clerk reasoned that the County Clerk's office's transmission to her of the number of registered electors in Loveland was an official act, and therefore it is entitled to a presumption of validity that may be rebutted through "clear evidence." All of the parties agree that this standard is applicable to the issue at hand.

The City Clerk concluded that the testimony of Mr. Hagihara did not rise to the level of "clear evidence" and adhered to the May 21 number. The City Clerk noted that although Mr. Hagihara testified that the disparity in the figures suggested that the May 21 number omitted "inactive-failed to vote" registered electors, the data as it existed on May 21 could not be recreated and that the various County Clerk and Recorders' offices, not Mr. Hagihara's office, were the primary custodians of voter registration records in their respective counties.

Plaintiff argues that the inability to precisely, retrospectively determine the number of Loveland registered electors that would have appeared in the County Clerk's office's records on May 21 did not excuse the City Clerk's reliance on the May 21 number after the July 19 number called the May 21 number into question. Plaintiff emphasizes the importance of precision in deriving the requisite number of signatures for a ballot initiative, and asserts that if the accuracy of that number on any given day is undermined by subsequently-discovered information and the exact number cannot be verified, then the initiative must be abandoned. Plaintiff also requests that the Court consider equities such as the "disenfranchisement" experienced by registered electors whose presence in Loveland is not counted toward the number of signatures required in order to submit a ballot initiative.

The Court is not persuaded that the interest in deriving a precise number of registered electors causes the City Clerk's reliance on the May 21 number to amount to an abuse of discretion under these circumstances. Although Plaintiff urges that Mr. Hagihara's testimony on the May 21 number was clear and unrebutted, the record contains conflicting evidence. In addition to the evidence explicitly referenced by the City Clerk in her written determination, the record also contains evidence that the City Clerk contacted the County Clerk's office to follow up on the disparity, and that the City Clerk was informed upon this inquiry that the May 21 number was reliable and attributable to continual data entry. Ex. 16-U. Furthermore, Mr. Hagihara was asked on cross-examination whether his testimony was "that there was some error in that number that was given to the Municipal Clerk of the City." Mr. Hagihara answered "that is one thing I do not know." Protest Hr'g Tr. 48. Mr. Hagihara's testimony did not establish that the May 21 number was inaccurate. Rather, Mr. Hagihara essentially testified that the disparity between the May 21 number and the July19 number suggested to him that

something had gone awry, and one prossible explanation was that the lower number omitted inactive voters.

As the hearing officer, the City Clerk was entitled to resolve conflicting evidence and to determine what weight to afford the evidence, and "the reviewing court may not substitute its judgment for that of the fact finder" absent an abuse of discretion. Stamm v. City and County of Denver, 856 P.2d 54, 57 (Colo. App. 1993). Here, the record shows that the City Clerk received conflicting evidence from Mr. Hagihara and from the County Clerk's office regarding whether the disparity between the May 21 and July 19 numbers could be explained by ongoing updates to the voter registration data or the omission of inactive voters. It was within the City Clerk's discretion to determine that the evidence in the record regarding inactive voters did not rise to the level of clear evidence.

City clerks must be permitted this discretion to ensure that participation in the initiative process is not stymied by continual second-guessing of the requisite number of signatures except where the existence of an error is apparent and clear. The record indicates that the number of registered voters associated with a given registration date may fluctuate as data is moved in and out of the record custodian's system. Therefore, the number of registered electors used to calculate the threshold number can only ever be a working approximation, and the need to facilitate the ballot initiative process requires that all participants be entitled to rely on the voter information available on the date certain that the proponent's notice of intent is submitted, pursuant to C.R.S. § 31-11-104(1). In this case, that date certain is May 21. The petition was approved for circulation on June 3, and by the time the July 19 list was generated the petitions had gone out and the circulation process was well underway with all parties involved relying on the May 21 number. Although the list of registered electors that was created on May 21 can not be recreated, there is competent evidence in the record to support the City Clerk's determination that the initial number reported was reliable, and that is where the Court's inquiry must end.

IV. SUFFICIENCY OF PETITION SIGNATURES

The Court will next address Plaintiff's challenges against the 334 disputed signatures that the City Clerk determined were valid. The Court upholds the Clerk's determination with respect to all of these signatures.

A. SUBSTANTIAL COMPLIANCE STANDARD

The people's right to the initiative process is a fundamental right under the Colorado constitution. Loonan v. Woodley, 882 P.2d 1380, 1383 (Colo. 1994).

Thus, "constitutional and statutory provisions governing the initiative process should be liberally construed so that the constitutional right reserved to the people may be facilitated and not hampered by either technical statutory provisions or technical construction thereof, further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right." Fabec v. Beck, 922 P.2d 330, 341 (1996)(internal quotations omitted).

In order to safeguard the initiative process, the law does not require strict compliance with the provisions pertaining to the sufficiency of a petition; a petition need only meet the standard of substantial compliance. Fabec, 922 P.2d at 341. Substantial compliance is assessed by balancing the following considerations: "(1) The extent of the noncompliance, (2) the purpose of the applicable provision and whether that purpose is substantially achieved despite the alleged noncompliance, and (3) whether there was a good-faith effort to comply or whether noncompliance is based on a conscious decision to mislead the electorate." Id.

B. IMPROPER AFFIANT NAMED IN NOTARY'S CERTIFICATE

Plaintiff objects to ten petition sections, totaling 220 signatures, on the ground that the notaries who signed the corresponding circulators' affidavits wrote their own name in a field intended for the name of the petition circulator. Each petition section is accompanied by an affidavit in which the petition circulator makes certain statutorily-required affirmations. The affirmations are then followed by a signature of the circulator, which are all validly signed in the petition sections at issue here. Below the signature of the circulator is a notary's certificate that reads "Subscribed and sworn before me this __ day of ____, 2013, by _____." In this sentence, "me" denotes the notary. The blank space following the word "by" is intended to be filled in with the name of the person who circulated the petition, that is, the person who had subscribed and swore to the above affidavit before the notary. There is a separate signature line for the notary to sign underneath the certification.

In the notary certifications at issue here, the notary filled his or her own name, rather than the name of the circulator, in the blank following the word "by." If one reads the flawed certificates technically, they literally state that the notaries have sworn to the statements in the circulators' affidavits before themselves, and they do not state that the circulators have signed the affidavits in the presence of the notary. This flaw only affects the notaries' certificates attached to the circulators' affidavits. The circulators themselves properly signed their respective affidavits.

The City Clerk determined that this error did not invalidate the associated signatures. The City Clerk looked to the statutory form for a notary's certificate

found in C.R.S. § 12-55-119(1), which requires the following statement: "the document has been subscribed and affirmed, or sworn to before me in the county of _____, state of Colorado, this __ day of __, 20__. (Official signature, seal, and commission expiration date of notary)." The City Clerk noted that the statute does not require the certificate to state the name of the person affirming or swearing to the document, and that the certificates at issue fulfilled all of the elements of the statutory form. The City Clerk determined that the evidence did not show any bad faith on the part of the notaries or that they intentionally named themselves on the certificates to mislead anyone.

The City Clerk's conclusion did not constitute an abuse of discretion under the substantial compliance standard. First, the extent of the noncompliance is relatively minor. Although 220 signatures are affected, this is due to one line being filled in incorrectly on a small fraction of the petition sections. The line in question is not a line that the statutory model for notary certificates requires. Second, the purpose of the notarization requirement was substantially fulfilled. "The purpose of the 'notarized' affidavit provision is to prevent mistake, fraud or abuse in the initiative process by requiring that circulators' signatures be authenticated by persons authorized to administer oaths." Fabec, 922 P.2d at 345. There is no evidence that the notaries did not actually authenticate the circulators' signatures; Plaintiff's only allegation as to this issue seems to be that the notaries misread the form and mistakenly wrote an incorrect name on one line. The circulators signed the affidavits, and the notaries included all of the statutorily-required information. Third, Plaintiff has conceded the absence of bad faith as to all issues in this case. In the absence of bad faith, it is not plausible that the notaries believed that they were notarizing their own signatures, so the Court is confident that the notaries conducted a proper authentication of the circulators' signatures and merely failed to record the event with literal precision. As such, the Court concludes that the notaries' certificates adequately guard against the risk of fraud and mistake, and that the City Clerk properly declined to reject any signatures on this basis.

C. NOTARY SEAL NOT UNDER OR NEAR NOTARY'S SIGNATURE

C.R.S. § 12-55-112(2) requires a notary to place his or her seal "under or near" the notary's signature. Plaintiff challenges 85 signatures on the ground that the notaries who certified the corresponding circulators' affidavits signed near the bottom of the page containing the circulator's affidavit, but placed his or her seal near the top of the same page. Plaintiff argues that the seals on these pages are not "under or near" the signatures.

The City Clerk determined that Plaintiff's strict interpretation of the word "near" would hamper the fundamental right of initiative. The City Clerk

determined that it was sufficient that the seals were placed on the same 8 1/2" x 11" page. The City Clerk reasoned that the purpose of the notarization requirement was to guard against "fraud or mistake," and the seal's presence anywhere on the page substantially fulfilled that purpose.

The Court finds that to invalidate petition signatures on this basis would frustrate the initiative process by employing an excessively technical reading of C.R.S. § 12-55-112(2). Even assuming that the notaries did not strictly comply with the requirement to affix their seals "near" their signatures, the notaries substantially complied with the applicable provisions. Their seals contain all of the required information, they are plainly visible on the page, and they adequately verify the notaries' credentials. Therefore, the extent of the noncompliance is minimal, the purpose of the statute is fulfilled, and bad faith is absent.

D. ILLEGIBLE AND INCOMPLETE SIGNATURES

C.R.S. § 31-11-108 requires that "[e]ach registered elector shall sign his or her own signature and shall print his or her name, the address at which he or she resides, including the street number and name, the city or town, the county, and the date of signing." In his original protest, Plaintiff asserted that thirty-two signatures failed to substantially comply with this provision. Of these, the City Clerk invalidated one. The Court now reviews the City Clerk's acceptance of the remaining thirty-one signatures objected to on this ground.

The case law construing the provisions applicable to initiatives at the state level is instructive. "The primary justification for requiring a petition signer to provide information with respect to identity and residence is to safeguard the integrity of the petition process" by allowing interested parties "to determine whether a particular petition signer is a qualified registered elector." McClellan v. Meyer, 900 P.2d 24, 32 (Colo. 1995). Thus, in reviewing the substantial compliance of signatures challenged on the ground that some required information is missing or illegible, the Court considers whether the identities and eligibility of the signers can nevertheless be ascertained based on the information that is included and is legible.

The Court has compared the signatures objected to under C.R.S. § 31-11-108 to the list of Loveland registered electors in the record. The Court finds that the identity and status as a Loveland registered elector of each individual associated with the challenged signatures can be readily ascertained. Plaintiff challenges many of these signatures on the ground that the signer did not write his or her name or other information legibly. However, the Court can confidently interpret the unclear handwriting with the aid of the printed names and addresses on the registered voters list. As to the signatures challenged on the ground that the

accompanying information is missing or incomplete, the Court finds sufficient evidence in the record to support the Clerk's determination. The Court finds that any deficiencies in these signatures are of a technical nature, rather than of a substantive nature, and do not interfere with the purpose of identifying and determining the eligibility of the voters who signed the petition.

E. SIGNATURES DO NOT MATCH LIST OF REGISTERED ELECTORS

Plaintiff's original protest challenged sixteen signatures on the ground that the information provided by the signesr did not match the information contained in the list of registered electors. The City Clerk invalidated twelve of these signatures, and thus the Court need only review the remaining four.

The information provided by a petition signer need not perfectly match the corresponding information in the voter registration records so long as the information is sufficiently accurate to safeguard the integrity of the petition process. McClellan, 900 P.2d at 33. The Court has reviewed the four signatures upheld by the City Clerk, and the Court finds sufficient evidence in the record to support the Clerk's determination.

Once again, any deficiencies in these signatures are of a technical nature, rather than of a substantive nature, and do not interfere with the purpose of identifying and determining the eligibility of the voters who signed the petition.

F. INCORRECT NOTARY COMMISSION EXPIRATION DATE

Plaintiff challenges one petition section containing one signature on the ground that the notary's certificate includes a handwritten date of the notary's commission expiration that does not match the expiration date on the notary's seal. The date on the seal is May 2, 2017. The handwritten date is May 2, 2013. The City Clerk reasonably inferred that the notary mistakenly wrote the present year rather than the actual year of her commission expiration. The Court does not find this inference by the City Clerk to be an abuse of discretion, nor does the Court find that this mistake compromises the integrity or reliability of the petition section in question.

V. SINGLE SUBJECT REQUIREMENT

Plaintiff contends that the proposed ordinance violates the single subject provision of the Loveland City Charter § 7-7.

A. JURISDICTION

POL suggests that the Court does not have jurisdiction to determine the single subject issue. POL argues that courts have only reviewed proposed ordinances for compliance with the respective municipal single subject provisions when explicitly granted authority to do so by statute or by a municipal provision. See, e.g., Bruce v. City of Colorado Springs, 252 P.3d 30 (Colo. App. 2010). POL asserts that no such grant of authority exists as to Loveland's single subject requirement.

The Court is not persuaded that it may not review this issue absent an explicit grant of authority. C.R.C.P. 106(a)(4) permits the Court to review for abuse of discretion a determination of "any governmental body or officer . . . exercising judicial or quasi-judicial functions" if there is "no plain, speedy and adequate remedy otherwise provided by law." The City Clerk's determination as to the single subject requirement constituted a judicial or quasi-judicial function, and the Court may therefore review it pursuant to Rule 106. Alternately, C.R.S. § 31-11-110(3) grants the Court jurisdiction to review a city clerk's determination of petition sufficiency following a protest hearing, and the Court finds that the Loveland City Clerk's determination of petition sufficiency in this case includes the City Clerk's single subject determination.

The Court notes that review for compliance with any applicable single subject requirement is exempt from the general restriction against determining the substantive legal validity of a statute or ordinance prior to its adoption. See In re Title, Ballot Title, Submission Clause for 2011-2012 No. 45, 274 P.3d 576, 579 (Colo. 2012) ("[O]ur limited role in this process prohibits us from addressing the merits of a proposed initiative, and from suggesting how an initiative might be applied if enacted. We will sufficiently examine the initiative, however, to determine whether or not it violates the constitutional prohibition against initiative proposals containing multiple subjects.").

B. SINGLE SUBJECT STANDARD

The Loveland City Charter § 7-7 imposes the applicable single subject requirement. The charter states that the City Clerk "shall approve for petition circulation measures proposing referred ordinances or initiated ordinances only when such measures contain a single subject," that is, "the matters in the measure submitted for voter approval are necessarily and properly connected and are not disconnected or incongruous."

The Loveland City Charter thus explicitly tasks the City Clerk with the role of approving or disapproving petitions for proposed ordinances based on the single

subject requirement. As the administrative officer charged with enforcing the single subject provision, the City Clerk's construction of that provision is entitled to deference. See Giuliani, 303 P.3d at 138. The Court reviews the City Clerk's single subject decision solely to determine whether it lacks a "reasonable basis." Id.

As the City Clerk observed, Bruce v. City of Colorado Springs, 252 P.3d 30 (Colo. App. 2010) found that the case law interpreting the state single subject rule is germane to the interpretation of substantially similar municipal single subject requirements. Loveland's single subject provision is similar to the Colorado Springs single subject provision held to be substantially similar to the state counterpart in Bruce, therefore the case law related to the state single subject rule is instructive in this case.

"An initiative violates the single subject requirement when it (1) relates to more than one subject and (2) has at least two distinct and separate purposes." Id. at 34. "In contrast, if the initiative tends to achieve or to carry out one general object or purpose, it constitutes a single subject." Id. "The single subject requirement must be construed liberally so as not to impose undue restrictions on the initiative process." Id. at 35.

The Court interprets the single subject requirement in light of its two purposes. First, the rule is intended to "ensure that each initiative depends on its own merits for passage" by preventing several disconnected initiatives that would not garner sufficient support on their own merits from being combined to attract coalitions of voters. Id. at 34. Second, "the single subject requirement is intended to prevent surreptitious measures . . . [so as] to prevent surprise and fraud from being practiced on the voters." Id.

C. ANALYSIS

At the protest hearing, Plaintiff presented the City Clerk with two exhibits intended to highlight what Plaintiff perceives as a multitude of subjects embedded in the proposed ordinance. The first such exhibit, marked as Exhibit 3 at the protest hearing, labels the following five "subjects" in the text of the proposed ordinance: (1) property values and aesthetics; (2) public health, safety and welfare; (3) inalienable civil rights; (4) environmental and wildlife protection; (5) oil and gas technology. The second of these exhibits, Exhibit 4, finds the following additional five "subjects" in the text of the proposed ordinance: (1) oil and gas development/extraction generally; (2) injection of non-native waters; (3) content of hydraulic fracturing fluid; (4) storage of hydraulic fracturing fluid; and (5) disposal of hydraulic fracturing fluid. The opening brief Plaintiff submitted for the purposes of this C.R.C.P. 106 review reiterates the same two lists of ten subjects total.

The City Clerk observed that many of the listed topics were included in Sections 1 and 2 of the proposed ordinance. Section 1 states the "purpose" of the ordinance and Section 2 states the "findings" that the people of Loveland would be making if they passed the ordinance, and are analogous to a legislative declaration. These sections are intended to aid in the interpretation of the proposed ordinance, and do not by themselves impose any new obligations or restrictions. The City Clerk found that these sections were "both certainly necessarily and properly connected to the Ordinance and do not include within them any distinct and separate subject different from the rest of the ordinance." Clerk's Determination 9.

The City Clerk also addressed whether the ordinance covers multiple subjects because it would impose a moratorium on both the process of hydraulic fracturing itself and the storage and disposal of waste product resulting from hydraulic fracturing. The City Clerk determined that "[t]he clear purpose of the Ordinance is to impose a two-year moratorium on *all* activities related and connected to hydraulic fracturing. And since the Ordinance is not a lengthy or complex proposal, there is little likelihood that the voters will be surprised or have concealed from them the contents and purposes of the Ordinance." Clerk's Determination 10. The City Clerk also determined that "[i]t is unlikely that Loveland's voters would favor a moratorium on hydraulic fracturing but not on the storage and siposal of its waste products, or vice versa." Id.

The City Clerk compared this case to In re Title, 274 P.3d 576, in which the Colorado Supreme Court upheld against a multiple subject challenge a state ballot initiative concerning the "public control of waters." The initiative in In re Title contained various provisions related to "public control of waters," such as a provision allowing existing water rights to be limited or curtailed to protect the "natural elements of the public's dominant water estate" and an arguably separate requirement that appropriators return water to their natural streams unimpaired after use. The City Clerk considered the initiative in In re Title to be more complex than the initiative at issue in this case. As such, the City Clerk found that the initiative's proposing a moratorium on multiple activities related to hydraulic fracturing did not cause the initiative to contain multiple subjects.

The Court agrees with the City Clerk's determination regarding the topics listed in Exhibit 3. In referring to property values, public health, civil rights, wildlife protection, etcetera, the proposed ordinance merely declares that there is more than one reason a moratorium on hydraulic fracturing may be desirable. In order to violate the single subject requirement, a proposed ordinance must relate to more than one subject and have at least two distinct purposes. Bruce, 252 P.3d at 34. Even if each of these purportedly positive consequences of the proposed moratorium constituted a distinct purpose, they would not constitute distinct subjects. The Loveland City Charter's definition of "the single subject

requirement" requires a determination of whether the matters in the proposed ordinance are "disconnected or incongruous." The Court is not persuaded that a proposed ordinance becomes incongruous with itself because its proponents believe it to be beneficial for several reasons.

As to the topics listed in Exhibit 4, the Court finds the City Clerk's determination to have a reasonable basis. While acknowledging that the proposed ordinance would certainly impose more than one new legal restriction—one restriction against conducting hydraulic fracturing in Loveland and a second restriction against storing or disposing of certain associated products in Loveland—the Court finds that this distinction does not cause the proposed ordinance to contain two distinct purposes. Both restrictions are sufficiently related to the single, general object of placing a moratorium on all hydraulic fracturing-related activities in Loveland for a period of two years.

The City Clerk considered this issue according to the proper legal standard and exercised her discretion appropriately. The City Clerk considered both the plain language of Loveland City Charter § 7-7 itself as well as the case law interpreting the analogous state-level single subject requirement. Furthermore, the Clerk referred to the two purposes of the single subject requirement—preventing the rolling together of provisions that would not pass on their own merits and preventing voter surprise—and the City Clerk concluded that this proposed ordinance complies with these goals. The City Clerk thoroughly applied the correct legal principles to the proposed ordinance and her determination passes the test of reasonableness.

VI. STATE LAW PREEMPTION AND RETROACTIVITY

Plaintiff raises two issues that the City Clerk declined to address because they require a determination of the substantive legal validity of the proposed ordinance. First, Plaintiff asserts that the proposed ordinance is preempted by the Oil and Gas Conservation Act, C.R.S. § 34-60-101 to -126. Second, Plaintiff asserts that the ordinance is rendered unconstitutionally retrospective by its Section 4, providing that "[i]n the event the measure is adopted by the voters, its provisions shall apply retroactively as of the date the measure was found to have qualified for placement on the ballot." Plaintiff argues that although the City Clerk made no determinations as to these issues, the Court may address them because original claims may be joined to a C.R.C.P. 106 action.

However, such claims must still be ripe for judicial review. A longstanding body of case law favors allowing the political process, and specifically the initiative process, to run its course prior to any judicial determination of a proposed law's substantive validity or constitutionality. See Bd. of County Com'rs of

County of Archuleta v. County Road Users Ass'n, 11 P.3d 432, 438-39 (2000)(citing McKee v. City of Louisville, 616 P.2d 969, 972 (Colo. 1980); Polhill v. Buckley, 923 P.2d 119, 121-22 (Colo. 1996); City of Rocky Ford v. Brown, 293 P.2d 974, 976 (1956)). The Court "may not interfere with the initiative process to address challenges to the substantive validity of an initiative before it is actually adopted." Vagneur v. City of Aspen, 295 P.3d 493, 503 (Colo. 2013). Once an initiative is adopted, "[t]hen and only then, when actual litigants whose rights are affected are before it, may the court determine the validity of the legislation." McKee, 616 P.2d at 973. This longstanding precedent requiring the Court not to issue prospective rulings on the validity of ballot initiatives flows in part from the fundamental nature of the initiative right, which is a "right of the first order; it is not a grant to the people but a reservation by them for themselves." Id. at 972. Colorado courts have therefore "viewed with the closest scrutiny any governmental action that has the effect of curtailing [the initiative right's] free exercise." Id.

The Court is specifically directed not to consider "the initiative's efficacy, construction, or future application." In re Title, Ballot Title, Submission Clause for 2009-2010 No. 91, 235 P.3d 1071, 1076 (Colo. 2010). "[O]ur limited role in this process prohibits us from opining on how [an initiative] might operate if applied." In re Title, 274 P.3d at 581 n.2.

The Court cannot examine the proposed initiative for state law preemption without opining on how it might operate if passed and subsequently applied. The Court weighs the following four factors to determine whether state law preempts a home rule city's interest in regulating land use: "whether there is a need for statewide uniformity of regulation; whether the municipal regulation has an extraterritorial impact; whether the subject matter is one traditionally governed by state or local government; and whether the Colorado Constitution specifically commits the particular matter to state or local regulation." Colorado Min. Ass'n v. Board of County Com'rs of Summit County, 199 P.3d 718, 723 (Colo. 2009). Thus, to decide this issue the Court would necessarily need to construe the proposed ordinance's future application to determine whether the proposed ordinance would disrupt a needed statewide uniformity in oil and gas regulation, whether it would impact areas outside the City of Loveland, whether it would reach into regulatory areas traditionally applied by the state, and whether it would primarily concern matters constitutionally committed to state regulation. While the Court has serious concerns whether the proposed ordinance, if enacted, would withstand legal scrutiny with respect to the issue of state law preemption, the Court finds that it cannot address this issue at this time because it is not ripe for judicial review unless and until the ordinance is adopted.

Likewise, the Court is precluded from invalidating the proposed initiative on retroactivity grounds prior to its enactment. The Court is cognizant of why Plaintiff

finds the proposed ordinance's retroactivity clause troubling. On its face, the ordinance purports to prohibit conduct that will have already occurred if and when the ordinance becomes adopted. Ordinarily, a law violates Colo. Const. Art. II, § 11 if it is intended to apply retroactively and it impairs vested rights, creates a new obligation, imposes a new duty, or attaches a disability with respect to transactions or considerations already passed. American Compensation Ins. Co. v. McBride, 107 P.3d 973, 978 (Colo. App. 2004).

While the Court has serious concerns whether the proposed ordinance, if enacted, would withstand legal scrutiny with respect to state law preemption and retroactivity, the Court is committed to defending the people's fundamental right to the initiative process and will abide by the restriction against "declaring unconstitutional or invalid a proposed measure before the process has run its course and the measure is actually adopted." McKee, 616 P.2d at 972.

VII. CONCLUSION AND ORDER

Pursuant to C.R.C.P. 106 and C.R.S. § 31-11-110(3), the Court concludes that the City Clerk's determinations regarding the number of registered electors in Loveland as of May 21, 2013, the validity of the challenged signatures, and the single subject requirement did not constitute an abuse of discretion and did not exceed the City Clerk's jurisdiction. The Court finds that the issues of state law preemption and retroactivity are not ripe for judicial review unless and until the proposed ordinance is adopted. The Loveland City Clerk's determination of petition sufficiency is AFFIRMED. Plaintiff's Complaint is DENIED, both as to the above-described issues determined on their merits and as to the above-described issues denied on the ground that they are not ripe for judicial review.

SO ORDERED February 11, 2014.

COMBINED COURT SEAL LARIMER COUNTY COLORADO

BY THE COURT:

DANIEL J. KAUP
District Court Judge