


<p>DISTRICT COURT, LARIMER COUNTY, COLORADO 201 Laporte Avenue, Suite 100 Fort Collins, Colorado 80521-2761 (970) 498-6100</p>	<p>Filed in Clerk of Courts Larimer County CO  DATE FILED: November 4, 2013 CASE NUMBER: 2013CV31071 Sherlyn K. Sampson Clerk of Court</p>
<p>LARRY SARNER, Plaintiff</p> <p>v.</p> <p>CITY OF LOVELAND, et. al., Defendants</p> <p>PROTECT OUR LOVELAND, INC., Intervenor</p>	<p>▲ COURT USE ONLY ▲</p> <p>Case No. 2013CV31071</p> <p>Courtroom: 4C</p>
<p style="text-align: center;">ORDER</p>	

THIS MATTER comes to the Court on issues pending in consolidated cases 2013CV31071 and 2013CV31142. The Court addresses two issues in this Order. First, having reviewed the written submissions of all parties and being fully advised, the Court finds as a matter of law that it is unable to hear the issues originally raised in 2013CV1142 prior to the resolution of the issues originally raised in 2013CV31071. Second, the Court institutes an expedited briefing and oral argument schedule for the issues originally raised in 2013CV31071.

FACTS AND PROCEDURAL HISTORY

Protect Our Loveland (hereinafter “POL”) is the proponent of a ballot initiative proposing a Loveland ordinance that POL describes to be “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.” POL circulated a petition in order to collect the signatures of Loveland registered electors required in order to submit the proposed ordinance. POL ultimately submitted the petition to the City Clerk of Loveland, who initially determined that the petition was sufficient.

Larry Sarner initiated a protest to the petition. The clerk held an evidentiary hearing on the protest, and issued a written determination finding the petition sufficient on August 27, 2013. The Loveland City Council then voted to take no action on the proposed ordinance until the completion of any judicial review of the clerk's determination of sufficiency.

Mr. Sarner filed the complaint in 2013CV31071 on September 3, 2013. Mr. Sarner seeks judicial review of the clerk's determination of petition sufficiency pursuant to C.R.C.P. 106.

On September 26, 2013, POL initiated 2013CV31142 by filing a Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandamus Under C.R.C.P. 106(a)(2) (hereinafter "Petition for Writ of Mandamus"). The Petition for Writ of Mandamus essentially alleges that the Loveland City Council failed to act in accordance with its legal duties when it voted not to act on the proposed ordinance until the completion of judicial review of the clerk's determination of petition sufficiency.

The Court ordered the consolidation of 2013CV31071 and 2013CV31142 on October 17, 2013.

**WHETHER THIS COURT CAN PROPERLY HEAR PROTECT OUR
LOVELAND'S MOTION FOR PRELIMINARY INJUNCTION BEFORE
THE C.R.C.P. 106 REVIEW OF THE CLERK'S DETERMINATION OF
SUFFICIENCY IS RESOLVED**

POL has filed a Motion for Preliminary Injunction, in which it requests that the Court issue a preliminary injunction to compel the City of Loveland and the Loveland City Counsel "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 . . . no later than January 24, 2014." Essentially, POL argues that it will be irreparably harmed if the submission of the proposed ordinance to Loveland's electors is delayed while the parties litigate the merits of its Petition for Writ of Mandamus.

Prior to the consolidation of these cases, Judge Thomas French directed the parties to address the issue of whether the Court could properly hear the motion for a preliminary injunction during the pendency of the C.R.C.P. 106 review of the clerk's determination of sufficiency. The parties have now amply briefed this issue in their pleadings pertaining to the motion for a preliminary injunction, and the Court is satisfied that it can determine that, as a matter of law, it cannot hear the Motion for Preliminary Injunction or rule on the merits of the Petition for Writ of Mandamus prior to the completion of the C.R.C.P. 106 review of the clerk's determination of sufficiency.

The opponents of the Motion for Preliminary Injunction argue that the Court's hearing that motion prior to the review of the clerk's determination of sufficiency would be premature under C.R.S. § 31-11-104(1), which requires that an election on a municipal initiative be held "not less than sixty days and not more than one hundred fifty days after the final determination of petition sufficiency, unless otherwise required by the state constitution." The opponents of the Motion for Preliminary Injunction argue that the "final determination of petition sufficiency" referred to in the statute occurs at the conclusion of the judicial review of the clerk's determination of sufficiency. Thus, the opponents contend, the City of Loveland and the Loveland City Counsel cannot, as a matter of law, be compelled to act on the proposed ordinance until after judicial review of the clerk's determination has completed.

POL argues that the "final determination of petition sufficiency" occurred on August 27, 2013, the date the clerk issued its determination denying Sarner's protest. Thus, POL contends that the Loveland City Counsel became derelict in its statutory duties when it affirmatively voted to take no action on the initiative until the conclusion of the judicial review process. Under POL's interpretation, the election process is not stayed pending judicial review of the clerk's determination. That is, under this construction, the election on the proposed ordinance may very well be held and conclude while the review of the clerk's sufficiency determination is ongoing. POL contends that, in the event that the clerk's determination is overruled on judicial review after the election is held, then the appropriate remedy would be to "not count the votes or possibly set aside the results."

In order to resolve the controversy among the parties regarding whether it would be premature for the Court to consider the Petition for Writ of Mandamus and the associated Motion for Preliminary Injunction during the pendency of the C.R.C.P. 106 review of the clerk's determination of petition sufficiency, the Court must construe the term "final determination of petition sufficiency" as it is used in C.R.S. Title 31, Article 11.

Applicable Legal Standard

The Court finds that the general principles of statutory construction cited by the City of Loveland are correct:

In construing statutes, our primary duty is to give full effect to the intent of the General Assembly. Accordingly, we start with the plain language of the statute, because if courts can give effect to the ordinary meaning of words adopted by a legislative body, the

statute should be construed as written since it may be presumed that the General Assembly meant what it clearly said . . . Additionally, a statutory interpretation leading to an illogical or absurd result will not be followed, and we strive to construe a statute as a whole in order to give consistent, harmonious, and sensible effect to all of its parts.” Colorado Water Conservation Bd. V. Upper Gunnison River Water Conservancy Dist., 109 P.3d 585, 593 (Colo. 2005) (internal quotations and citations omitted).

Additionally, the Court is required to “construe constitutional and statutory provisions governing the initiative process 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, 1282 (Colo. 2000).

Analysis

The Court is called upon to construe the following statutory language:

[T]he legislative body shall forthwith publish the proposed ordinance as other ordinances are published and shall refer the proposed ordinance, in the form petitioned for, to the registered electors of the municipality at a regular or special election held not less than sixty days and not more than one hundred fifty days *after the final determination of petition sufficiency*, unless otherwise required by the state constitution. C.R.S. § 31-11-104(1) (emphasis added).

The term “final determination of petition sufficiency” is defined by statute as follows:

“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 filed pursuant to section 31-11-110 results in a finding of sufficiency, whichever is later. C.R.S. § 31-11-103(2).

Because a protest was filed before the limitations period elapsed, the “final determination of petition sufficiency” in this case occurred or will occur on “the date on which any protest filed pursuant to section 31-11-110 results in a finding of sufficiency.” Thus, the Court must construe which “finding of sufficiency”—that of the clerk or that of the judiciary—constitutes the “result” of a “protest filed pursuant to section 31-11-110.”

C.R.S. § 31-11-110 contains three subsections. Subsection (1) describes the time limit in which a protest may be filed, the possible grounds for protest, and the clerk’s duty to set a hearing and give notice to the protestor and the initiative’s proponent. Subsection (2) describes the clerk’s duty to furnish a list of registered electors to the protestor upon request. Subsection (3) contains the following language:

Every hearing shall be held before the clerk with whom such protest is filed. The clerk shall serve as hearing officer . . . The hearing shall be summary and not subject to delay and shall be concluded within sixty days after the petition is filed. No later than five days after the conclusion of the hearing, the hearing officer shall issue a written determination of whether the petition is sufficient or not sufficient. If the hearing officer determines that a petition is not sufficient, the officer shall identify those portions of the petition that are not sufficient and the reasons therefor. The result of the hearing shall be forthwith certified to the protester and to the persons designated as representing the petition proponents . . . The 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 protester, the persons designated as representing the petition proponents . . . or the municipality, but such review shall be had and determined forthwith.

The full statutory context suggests that the clerk’s “determination as to petition sufficiency” referred to in this passage is not synonymous with “finding of sufficiency” as it is used in the statutory definition of “final determination of petition sufficiency.” The definition of “final determination of petition sufficiency” refers to the “result” of a protest pursuant to C.R.S. § 31-11-110, and the process described in C.R.S. § 31-11-110 expressly includes a provision for judicial review.

The result of a protest pursuant C.R.S. § 31-11-110 must therefore be the date at which the this Court has completed the review contemplated by the statute.

The Court must also give effect to the modifier “final” in “final determination of petition sufficiency.” The City of Loveland has submitted ample case law from parallel areas of the law holding that determinations that are pending on review are not “final.” See People v. Robb, 215 P.3d 1253, 1263 (Colo. App. 2009); Rantz v. Kaufman, 109 P.3d 132, 141 (Colo. 2005); Martinez v. Indus. Comm’n, 746 P.2d 552, 558 n.6 (Colo. 1987); People v. McAfee, 160 P.3d 277, 281 (Colo. App. 2007); Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987). The Court finds that “final” takes a similar meaning in this context.

Finally, it establishes the General Assembly’s intent that the statute directs the Court to have and determine its review of the clerk’s determination of sufficiency “forthwith.” This provision demonstrates that the General Assembly perceived that the review process would be particularly time-sensitive. This sense of urgency—an urgency stronger than what is typically associated with judicial review of an ordinance subsequent to its enactment—tends to show that the General Assembly envisioned that the election on the proposed initiative would be stayed until the conclusion of judicial review. The General Assembly therefore enacted a measure to expedite the judicial process in this context, to reduce the delay of the election during judicial review.

The Court finds it to be the clear intent of the General Assembly that the District Court cannot compel a municipal legislative body to refer a proposed ordinance to the voters while a clerk’s determination of petition sufficiency is pending on judicial review. The Court discerns that the General Assembly sought to avoid a scenario in which the Court issues a writ of mandamus compelling an election that is later found to be a nullity because the clerk’s determination of sufficiency is reversed. The General Assembly carefully balanced the need to avoid such a scenario with the people’s interest in swiftly bringing a proposed ordinance to a vote by providing that the Court shall conduct the review process as expeditiously as reasonably possible.

POL argues with passion that the construction the Court adopts burdens the constitutional initiative process. In POL’s words, “[p]roposals that are of great importance to a portion of the electorate, often which is of a time sensitive manner . . . could be stolen from the hands of the voters by a single protester. State law simply cannot be read to allow the initiative process to be held hostage in this manner.” The Court understands POL’s concern, but finds the danger to be overstated. The 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. The Court’s construction does not unduly hamper the initiative process.

POL cites Polhill v. Buckley, 923 P.2d 119, 122 (Colo. 1996) in arguing that post-election review would be an adequate remedy. However, Polhill addressed a situation in which post-election review was *required* because the case concerned a challenge to the substantive legality of a referendum rather than a challenge to the pre-election procedure. Polhill merely stands for the longstanding disfavor directed toward judicial advisory opinions. The post-election review found to be “adequate” under the jurisdictional constraints faced in Polhill is not the remedy the General Assembly intended as to challenges against the sufficiency of an initiative petition.

The Court recognizes that its ruling here affects POL’s insistence that the election on the proposed ordinance must be held by January 24, 2014. This date was derived from the premise that the “final determination of petition sufficiency” occurred on the date of the clerk’s written determination of sufficiency. If that were the case, then the election would be required to occur by January 24, 2014, that is, within one hundred fifty days of August 27, 2013. Because the Court has determined as a matter of law that the final determination of petition sufficiency has not yet occurred, it necessarily follows that the Court does not agree that the January 24, 2014 date is binding. To the extent that POL’s Motion for Preliminary Injunction requests that the Court order that a special election be held by January 24, 2014, that portion of the motion is denied at this time. In a similar vein, the Court is not bound to resolve the Petition for Writ of Mandamus, or any issue in this matter, in time for a hypothetical January 24, 2014 special election.

EXPEDITED BRIEFING SCHEDULE FOR THE C.R.C.P. 106 REVIEW OF THE CLERK’S DETERMINATION OF SUFFICIENCY

Pursuant to C.R.C.P. 106(a)(4)(VIII), the Court may accelerate any action which, in the discretion of the Court, requires acceleration. The Court determines that the C.R.C.P. 106 review of the clerk’s determination of sufficiency requires acceleration.

The opening brief of Mr. Sarnier shall be submitted within the timeframe ordinarily required under C.R.C.P. 106(a)(4)(VII). That is, the opening brief must be filed within forty-two days after the date on which the record was filed. The record was filed on September 27, 2013, and so the opening brief shall be filed on or before November 8, 2013.

The subsequent briefs shall follow an expedited schedule. All answer briefs shall be filed on or before December 3, 2013. The reply brief shall be filed on or before December 10.

The Court anticipates scheduling oral arguments on the review of the clerk’s determination of sufficiency on December 11 or December 18. Counsel must notify the Court regarding availability as soon as possible, and the Court

respectfully requests that all counsel make every effort to clear their respective calendars.

ACCORDINGLY, the Court FINDS that it cannot hear the Petition for Writ of Mandamus or the associated Motion for Preliminary Injunction prior to the resolution of the C.R.C.P. 106 review of the clerk's determination of petition sufficiency. The Court directs the parties to comply with the expedited briefing schedule described above.

SO ORDERED November 4, 2013.



BY THE COURT:

DANIEL J. KAUP
District Court Judge