

<p>DISTRICT COURT, LARIMER COUNTY, COLORADO Address: 201 La Porte Ave., Suite 100 Fort Collins, CO 80521</p>	
<p>Plaintiff: LARRY SARNER</p> <p>v.</p> <p>Defendants: CITY OF LOVELAND, et al.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p><i>Attorneys for Protect Our Loveland</i> Names: Lauren Hammond (Student Attorney) Christopher Stork (Student Attorney) Michael Ray Harris (Professor and Supervising Attorney; CO Bar No. 35395) Kevin Lynch (CO Bar No. 39873) Address: Environmental Law Clinic University of Denver Sturm College of Law 2255 E. Evans Ave Denver, CO 80202 Phone: (303) 871-6140 FAX: (303) 871-6847 E-mail: elc@law.du.edu</p> <p>Name: James Daniel Leftwich, Esq. (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</p>	<p>Case Number: 2013CV31071</p> <p>Courtroom: 4C</p>
<p style="text-align: center;">PROTECT OUR LOVELAND'S MOTION TO INTERVENE AS A DEFENDANT</p>	

CERTIFICATION OF CONFERRING

Colo. R. Civ. P. 121 § 1-15 ¶ 8 Certification: Counsel for Protect Our Loveland has conferred in good faith with counsel for Plaintiff, Larry Sarner, who stated Plaintiff objects to this Motion and will resist it. Counsel for Proposed Intervenor has also conferred with counsel for Defendants the City of Loveland, et al., who stated Defendants do not oppose this Motion.

INTRODUCTION

This case involves the right of the citizens of Loveland, Colorado to have a fair opportunity to propose and vote on a citizen's ballot initiative to enact a moratorium on the industrial practice of oil and gas extraction through hydraulic fracturing (a.k.a., "fracking"), as well as the storage and disposal of fracking waste products, in the Loveland city limits. Proposed Intervenor, Protect Our Loveland, is the proponent and author of a Petition to submit a Proposed Ordinance to the electors of Loveland ("Petition"). After collecting signatures from over 2,500 Loveland residents, Protect Our Loveland filed the Petition with the Loveland City Clerk ("Clerk") for certification on July 8, 2013, with the intent of submitting the Proposed Ordinance to a public vote in the November 5, 2013 regular election ("November Election"). Plaintiff-Protester Larry Sarner ("Protester"), by bringing this lawsuit, is preventing or delaying a public vote on the Proposed Ordinance.

Protester purports to challenge the validity of Protect Our Loveland's Petition and the substance of the Proposed Ordinance. It is important to note that the Clerk rejected the bulk of Protester's arguments in a well-reasoned, 26-page opinion. Even so, Protester brings this action seeking to set aside the Clerk's denial of his protest. While Protester has the legal right to bring this action, **Protect Our Loveland also has a legal right to have such "review . . . determined forthwith"** in order to avoid, or at least minimize, any delay in referring the Proposed Ordinance to the voters. *See* C.R.S. § 31-11-110(3). Unfortunately, neither Protester nor the City have thus far brought the expedited nature of this case to the Court's attention or shown any desire to do so.

Protect Our Loveland respectfully moves to intervene as a defendant in this case to protect its right to place the Proposed Ordinance on the ballot within the statutorily required time. As the drafters, proponents, and circulators of the Petition at issue, Protect Our Loveland has a clear interest in this case. Additionally, Protect Our Loveland's members, as registered voters and property owners in Loveland, will be directly and adversely affected if Protester is successful and the Proposed Ordinance is not submitted to the voters at the November Election. While the City of Loveland ("City"), as a government entity, holds an interest in generally defending attacks against its sovereignty and the validity of determinations made by City officials, the City does not necessarily represent the individual interests of the citizens of Loveland, including Protect Our Loveland's members, in assuring that others such as Protester do not undermine the citizens' constitutional right of initiative to enact legislation that would prohibit practices that they believe are harmful. Pursuant to Rule 24(c), Protect Our Loveland files this motion along with a Proposed Answer to Protester's Complaint.

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BACKGROUND

Protect Our Loveland is a non-profit, grassroots organization seeking to give citizens a vote on the issue of fracking. Affidavit of Ms. Sharon Carlisle in Support of Motion to Intervene (hereinafter, “Carlisle Aff.”) ¶ 4. The group, composed of a large cross-section of the Loveland population, is focused on learning the facts about fracking, working to educate the public, and obtaining information about the risks of this industrial process before it is allowed within the city limits of Loveland. *Id.*

On May 24, 2013, Protect Our Loveland submitted a letter to the Clerk giving notice of its intent to circulate a petition to submit a proposed ordinance to the electors of Loveland at the November Election. *Id.* ¶¶ 14-15. Protect Our Loveland entitled the Proposed Ordinance the “Loveland Public Health, Safety, and Wellness Act.” *Id.* ¶ 16. On June 3, 2013, the Clerk received and approved the form and content of the Petition. *Id.* ¶ 15. On July 8, 2013, Protect Our Loveland submitted signatures in support of their Petition to the Clerk. *Id.* ¶ 14. On July 23, 2013 the Clerk notified the group by letter that she had determined that the Petition contained at least 2,256 valid signatures and thus was deemed sufficient to be submitted to the Loveland City Council for future action. *Id.* ¶ 18.

On August 16, 2013, the last day of the protest period, Protester submitted a Protest to the Petition (“Protest”). *Id.* ¶ 19. The Protest alleged several deficiencies in the Petition’s signatures and attached affidavits as well as substantive challenges to the Proposed Ordinance. *See* Protest, Ex. 2 to Pl.’s Compl. Due to this Protest and pursuant to C.R.S. § 31-11-110(1), a hearing was scheduled for August 22, 2013. *Id.* ¶ 20. Following the hearing, the Clerk issued a thorough determination in which she rejected most of Protester’s arguments. *Id.* ¶ 22. In this determination, the Clerk stated that she lacked authority to determine retroactive effect and preemption issues prior to the passage of the law, that the Petition did not violate the single-subject requirement, that there was a sufficient number of signatures in support of the Petition, and that the number of registered electors used to calculate the number of signatures used was entitled to a presumption of validity due to the absence of evidence to the contrary. Consequently, Protester sought review of this determination by filing a complaint with this Court on September 3, 2013.

Only a few hours after Protester filed his Complaint, the City Council voted five to four to “take no action” with regard to the Proposed Ordinance until the appeal process had fully run its course. Minutes: Loveland City Council Meeting of Sept. 3, 2013, at 4 (attached as Exhibit 2). The City Council stated that they were unconcerned about the cost of a possible special election, and the timing of when the Proposed Ordinance would be submitted to the voters does not appear to be a major factor in their decision. *See* Video: City Council Meeting, 2:40:07-2:41:40 (Sept. 3, 2013), *available at* http://atlas.fcgov.com/2013_09_03_Loveland_Council/index.htm. Due to the City Council’s decision and the possibility of a lengthy legal process over Protester’s challenge to the

Petition, it could be years before the electorate has a chance to vote on the proposal. The impact on the citizens of Loveland and Protect Our Loveland will be immense if this is allowed to happen. Protect Our Loveland followed the applicable rules and procedures as instructed regarding the Petition and a finding of petition sufficiency was issued by the Clerk. Protester's allegations were fully heard and, for the most part, his allegations were denied. Here, the people's constitutional right to propose initiatives and vote on such proposals is at stake and being unduly delayed.

ARGUMENT

A. STANDARDS FOR INTERVENTION

In Colorado, an applicant is permitted to intervene in an action if the application is timely, and: (1) the applicant claims an interest relating to the property or transaction that is the subject of the claim, and (2) the applicant's situation is so situated that the disposition of the action may as a practical matter impede his ability to protect that interest, unless (3) the applicant's interest is adequately represented by the existing parties. Colo. R. Civ. P. 24(a); *Feigin v. Alexa Grp., Ltd.*, 19 P.3d 23, 26 (Colo. 2001). "Furthermore, Rule 24 should be liberally interpreted to allow, whenever possible and compatible with efficiency and due process, issues related to the same transaction to be resolved in the same lawsuit and at the trial court level." *O'Hara Grp. Denver, Ltd. v. Marcor Hous. Sys., Inc.*, 595 P.2d 679, 686 (Colo. 1979).

B. THE MOTION TO INTERVENE IS TIMELY.

Protect Our Loveland satisfies Rule 24's requirement that a motion to intervene be timely because this case is still in the very early stages, and Protect Our Loveland's intervention at this juncture will thus not disrupt the case proceedings. In assessing whether a motion to intervene is timely, the court considers all circumstances of the case. *Diamond Lumber, Inc. v. H.C.M.C., Ltd.*, 746 P.2d 76, 78 (Colo. App. 1978). The case is not ready for disposition; in fact, the case has only just begun. Protester filed his Complaint on September 3, 2013, less than three weeks ago. The City has not yet filed an Answer and has until September 30 to do so. Additionally, the City has until October 7, 2013 to submit and certify the record of the Protest proceedings. *See* Order Granting Unopp'd Mot. for Certification of the Record (Sept. 11, 2013). Moreover the Notice of Judicial Civil Case Management entered on September 4 stated that the case will be reviewed for trial-setting within 30-40 days of filing. There has been no substantive briefing, proposed scheduling orders, or other court proceedings that would be disrupted or delayed by Protect Our Loveland's intervention. Allowing Protect Our Loveland's intervention would not delay the proceedings or prejudice any of the parties; instead, acceptance of this swiftly filed motion would allow for greater justice to the people of Loveland.

C. PROTECT OUR LOVELAND HAS AN INTEREST IN THE PETITION'S SUFFICIENCY, AND THIS CASE MAY IMPAIR OR IMPEDE PROTECT OUR LOVELAND'S ABILITY TO PROTECT ITS INTEREST.

Colorado courts apply a “flexible approach” in determining whether a party has an interest in the subject of a lawsuit. *Feigin*, 19 P.3d at 29. As such, “[t]he existence of the interest of a proposed intervenor should be determined in a liberal manner” and “should not be viewed formalistically.” *Id.*; see also *O’Hara Grp. Denver, Ltd.*, 595 P.2d at 688. Moreover, the interest asserted need not be economic: interests in environmental protection and public safety also support intervention. See *Dillon Cos., Inc. v. City of Boulder*, 515 P.2d 627, 629 (Colo. 1973) (protecting children’s safety and concerns that additional asphalt would worsen storm-water drainage satisfied the interest prong of Rule 24(a)).

Here, Protester asks the Court to take an unmerited step and overturn the Clerk’s decision regarding his protest to the Petition. The Clerk heard Protester’s arguments at a hearing on August 22, 2013 and ruled against the Protest. Based on that decision, the present complaint was filed. That filing was not due to some procedural or legal error but due to Protester’s disagreement with the Clerk’s lengthy and reasoned decision. *Id.* ¶ 22. If this action is allowed to proceed with only the City and its officials as defendants, and the Proposed Ordinance is not allowed on the ballot, Protect Our Loveland’s interests will be seriously impaired. Therefore, Protect Our Loveland is entitled to intervene as a defendant in this action.

Several interests support Protect Our Loveland’s intervention. First, Protect Our Loveland and its members are proponents and drafters of the Petition. *Id.* ¶¶ 12-17. As the Petition’s sponsor, Protect Our Loveland has a major stake in the outcome of this action and has an interest that is distinctly separate from that of the City. *Id.* Members of Protect Our Loveland devoted their time, energy, and money into drafting the Petition and ensuring that it complied with all applicable requirements. *Id.* ¶ 13. Moreover, Protect Our Loveland printed, circulated, and gathered the requisite number of signatures on a timeline to place the Proposed Ordinance on the ballot for the November Election. *Id.* ¶¶ 13-14. Importantly, courts routinely grant intervention to petition proponents in challenges to a petition’s sufficiency. See *Armstrong v. Davidson*, 10 P.3d 1278, 1281 (Colo. 2000) (en banc); *Montero v. Meyer*, 795 P.2d 242, 243 (Colo. 1990) (en banc); see also *Yniguez v. State of Ariz.*, 939 F.2d 727, 733 (9th Cir. 1991) (“[I]t is worth noting that there is a virtual *per se* rule that the sponsors of a ballot initiative have a sufficient interest in the subject matter of litigation concerning that initiative to intervene pursuant to Fed. R. Civ. P. 24(a).”).

Second, many of the members of Protect Our Loveland live near areas of oil and gas exploration. Carlisle Aff. ¶ 7. If denied their democratic right to vote on the matter, they would be denied their ability to choose for or against this practice and would be forced to deal with the effects of fracking such as unsightly rigs, waste pits, traffic, noise, and other disturbances on a daily basis. *Id.* ¶ 10. Additionally, Protect Our Loveland and its members

are aware of the possible health risks associated with fracking when done near residential areas. *Id.* ¶ 9. Protect Our Loveland members are residents of Loveland who breathe the air and drink the water of the City and will be directly impacted by decisions regarding oil and gas operations in the City limits.

Lastly, Protect Our Loveland's members have economic interests at stake in this action. There are very real concerns about fracking and its potential effects on surface property and property values. *Id.* ¶ 8. Property values can be adversely affected by the fumes, noise, and contamination resulting from oil and gas development. *Id.* ¶¶ 9-10. Fracking is currently legal in Loveland, and oil and gas developers may seek to fast-track their operations while the issue of the Petition's sufficiency winds through the court system. Thus, there may well be adverse effects upon property values within Loveland. Protect Our Loveland therefore has a direct interest in having the citizens of Loveland vote on the Proposed Ordinance as soon as practicable, so they have the choice as to whether these types of potential risks and harms to their interests are acceptable within their city.

D. THE CITY MAY NOT ADEQUATELY REPRESENT PROTECT OUR LOVELAND'S INTERESTS.

Protect Our Loveland also meets the inadequate representation element of Rule 24(a). The Colorado Supreme Court has held that a party's representation of an intervenor is inadequate "if the representative has or *represents some interest* adverse to that of the petitioner." *Denver Chapter of Colo. Motel Ass'n v. City & Cnty. of Denver*, 374 P.2d 494, 495-96 (Colo. 1962) (emphasis added); *Feigin*, 19 P.3d at 32 n.13. The Court has also held that intervention can be appropriate when the parties have similar, but not identical, interests. *Cherokee Metro. Dist. v. Meridian Serv. Metro. Dist.*, 266 P.3d 401, 407 (Colo. 2011) (quoting 7C Charles Alan Wright, Arthur R. Miller, Mary Kay Kane & Richard L. Marcus, *Federal Practice and Procedure* § 1909 (3d ed. 1997)). In making a determination on this issue, "all reasonable doubts should be resolved in favor of allowing the absentee ... to intervene." *Id.*

The City does not adequately represent Protect Our Loveland's interest in securing an expedient resolution to the action. Protect Our Loveland is interested in expediting the matter and has spent time and money preparing, gathering signatures for, and defending the Petition in order to submit the Proposed Ordinance at the November Election. *Carlisle Aff.* ¶¶ 13-24. Protect Our Loveland circulated the Petition with adequate time for validating the signatures and for the Clerk to certify the Petition's sufficiency. *Id.* ¶ 15. As discussed above, Protect Our Loveland, a non-profit organization, has limited resources to devote to campaigning for the Proposed Ordinance, and its resources may be exhausted if a vote on the measure is significantly pushed back. In contrast, the City Council is not interested in expediting the matter. This is evident from its vote on September 3, 2013 to "take no action on the citizen initiative petition" and rejection of a motion to approve a resolution submitting the Proposed Ordinance to a vote. *See Ex. 2, Minutes: Loveland City Council Meeting of Sept. 3, 2013*, at 5. Furthermore, City Council members have indicated

publically that they are willing to wait out the appeal process, even if this means calling a special election that will incur significant costs to the taxpayers. Video: City Council Meeting, 2:08:33 (Sept. 3, 2013), *available at* http://atlas.fcgov.com/2013_09_03_Loveland_Council/index.htm.

An applicant's interests are not likely to be adequately represented if the current parties "are adverse to him." *Feigin*, 19 P.3d at 30. By affirmatively deciding not to take any action on the Proposed Ordinance until the appeal process is exhausted, the City has shown that it has no interest in resolving the issue expediently, while Protect Our Loveland has a clear interest in doing so. Thus, the City's interest is adverse to the interest of Protect Our Loveland in this respect, and the City cannot adequately represent such interest.

Moreover, Protect Our Loveland prepared for and presented evidence and arguments in favor of the Petition's sufficiency at the August 22, 2013 Protest Hearing, which led to the Clerk's Determination rejecting the Protest and upholding the finding of sufficiency. Carlisle Aff. ¶¶ 20-21. Thus, Protect Our Loveland is in the best position to defend against Protester's challenges and present legal arguments and point to evidence in the record demonstrating the Petition's compliance with law. Protect Our Loveland also believes that that it will raise arguments that the City may not put forth absent its intervention. Protect Our Loveland's attorneys currently advise and represent citizen groups in several Colorado municipalities who have successfully petitioned for the submission of local fracking proposals to a vote in the November Election.

Additionally, given that the City Council opted to "take no action" pending judicial review, over other options that would have allowed the measure to be put on the November ballot, it is possible the City will not provide a zealous defense of the Clerk's Determination of the Petition's sufficiency. Protect Our Loveland also may have an interest in appealing an adverse decision that the City may not share. *See County of Fresno v. Andrus*, 622 F.2d 436, 439 (9th Cir. 1980) (finding inadequate representation where party and intervenors had the same arguments, but party was reluctant to appeal an adverse ruling); *Dillon Cos., Inc.*, 515 P.2d at 629 (finding inadequate representation of landowners seeking intervention in a zoning dispute because city council opted not to appeal). For example, the City may determine that budgetary constraints weigh in favor of not pursuing an appeal of an adverse outcome. Finally, the City does not oppose this Motion to Intervene, suggesting the City recognizes that Protect Our Loveland can uniquely contribute to the case. For these reasons, Protect Our Loveland has met the minimum burden of demonstrating that it has distinct interests from the City and is not adequately represented by the City.

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E. ALTERNATIVELY, THE COURT SHOULD ALLOW PROTECT OUR LOVELAND TO PERMISSIVELY INTERVENE.

If the Court does not grant Protect Our Loveland's request to intervene as of right, it should allow permissive intervention. Rule 24(b) grants permissive intervention when: (1) "an applicant's claim or defense and the main action have a question of law or fact in common" unless (2) "the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Colo. R. Civ. P. 24(b)(2). The trial court has "considerable discretion" in deciding whether to allow permissive intervention. *In re Marriage of Paul*, 978 P.2d 136, 139 (Colo. App. 1998).

Protect Our Loveland easily satisfies the elements of Rule 24(b). First, Protect Our Loveland seeks to defend the Petition's sufficiency, as it did at the Protest Hearing, which is the subject of the main action. Second, as discussed above at page 4, Protect Our Loveland's intervention at this early stage of the proceedings will not unduly delay or prejudice the adjudication of the current parties' rights. Protect Our Loveland is prepared to move this case forward in accordance with the statutory mandate of C.R.S. § 31-11-110(3) that review "shall be had and determined forthwith."

CONCLUSION

Protect Our Loveland respectfully requests that this Court allow it to intervene as of right under Rule 24(a) as a defendant in this action. Alternatively, Protect Our Loveland requests that it be granted permissive intervention under Rule 24(b).

Respectfully submitted this 20th day of September, 2013.

/s/ Michael Ray Harris
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/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 20th day of September, 2013, a true and correct copy of the foregoing **PROTECT OUR LOVELAND'S MOTION TO INTERVENE AS A DEFENDANT** was served via the Integrated Colorado Courts E-Filing System (ICCES), on the following counsel of record:

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