

DISTRICT COURT, JEFFERSON COUNTY, COLORADO 100 Jefferson County Parkway Golden, CO 80401	DATE FILED: August 27, 2018 11:00 AM CASE NUMBER: 2017CV31437
Plaintiff: STEVE DORMAN, Objector and Protester v. Defendants: CITY OF LAKEWOOD, COLORADO; MARGY GREER, in her capacity as CITY CLERK, CITY OF LAKEWOOD, COLORADO; ANITA SPRINGSTEEN, in her capacity as a Proponent; and CATHY KENTNER, in her capacity as a Proponent.	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> Case No.: 2017CV031437 Div.: 14 Ctrm: 5A
ORDER DENYING PLAINTIFF’S MOTION FOR REMAND AND DEFENDANTS’ MOTION TO DISMISS AND AFFIRMING CITY CLERK’S SEPT. 18, 2017 ORDER	

This matter is before the Court on Plaintiff Steve Dorman’s September 26, 2017 Amended Complaint seeking, in part, this Court’s review of the Lakewood City Clerk’s findings and conclusions allowing a proposed initiative to limit residential growth to proceed to the ballot over Plaintiff’s formal objection and protest. After Plaintiff filed his initial complaint, one of the initial proponents withdrew, prompting Plaintiff’s November 16, 2017 Motion for Remand, in which he argued the City Clerk had to reconsider the sufficiency of the underlying petition because there were no longer two proponents as required by the Lakewood Municipal Code. Plaintiff filed his C.R.C.P. 106 opening brief on March 14, 2018, and Defendants City of Lakewood and Marcy Greer (the City Clerk) filed their combined answer brief on April 18, 2018 and Defendant Cathy Kentner (the remaining proponent of the underlying petition) filed her answer brief the same day. The Defendants also jointly filed a motion to dismiss on April 18 because Plaintiff’s brief was untimely. The parties appeared for oral argument on July 5, 2018.

Although Plaintiff’s brief was untimely, given the substantial nature of the issues in dispute and the lack of significant prejudice to Defendants, the Court denies Defendants’ motion to dismiss. And because the initiative proponents substantially complied with the requirements of the code, the Court also denies Plaintiff’s motion for remand. As to the merits of Plaintiff’s C.R.C.P. 106 appeal, the Court finds the City Clerk’s September 18, 2017 findings and

conclusions concerning the sufficiency Title and Submission Clause and Summary used on the petition; the adequacy of the form of circulator affidavit; her lack of authority to address the initiative's constitutionality; and the sufficiency of the petition; neither exceeded her jurisdiction nor were an abuse of discretion. Thus, the City Clerk's September 18, 2017 order is affirmed.

BACKGROUND AND PROCEDURAL HISTORY

In 2017, Cathy Kentner ("Kentner") and Anita Springsteen ("Springsteen") (*collectively the "Proponents"*) began the process to initiate an ordinance in the City of Lakewood. Pl.'s Op. Br., p. 1. On May 23, 2017, Proponents filed their draft ordinance with Margy Greer, the Lakewood City Clerk ("Clerk"). *Id.* at pp. 1-2. On May 30, 2017, Proponents filed the first draft of Title and Submission Clause with Clerk, which was amended one day later. *Id.* at 2. On June 2, 2017, the Clerk approved and finalized the title. *Id.* On July 28, 2017, Proponents circulated their petitions and filed petitions with the Clerk for inclusion on the November 2017 ballot. *Id.* On August 1, 2017, Steve Dorman ("Protestor"), a member of the Lakewood's electorate, submitted a letter to the Clerk informing Clerk of his concerns including the legality of the Petition's form, the sufficiency of the signors of the Petition, and the proposal's legal efficacy. *Id.*

On August 21, 2017, Protestor filed a protest to the Clerk's sufficiency decision asserting the legal insufficiency of the Petition's title and description of the ordinance, the insufficiency of the circulator affidavit, and certain constitutional and other legal objections as to the implementation and effect of the proposed ordinance. *Id.* On August 28, 2017, the Clerk determined Proponents had obtained enough signatures to place the initiative on the November 2017 ballot. *Id.* The initiative required at least 5,165 signatures and 6,192 signatures were collected. An. Br. of City of Lakewood and Margy Greer, p. 2. On August 31, 2017, the Clerk held an initial hearing regarding Protestor's protest. An. Br. of City of Lakewood and Margy Greer, p. 2. On September 7, 2017, the Clerk held an evidentiary hearing on the protest, which included over twenty-five witnesses. Joint Mot. to Dismiss, p. 6. On September 18, 2017, the Clerk issued an order rejecting the protest, finding the petition to be legally sufficient and in accord with the Lakewood Municipal Code ("LMC"). Pl.'s Op. Br., pp. 2-3.

On September 19, 2017, Protestor commenced this action, asserting claims under C.R.C.P. 106 for administrative review; declaratory judgment concerning the rights and obligations of the parties involved in the initiative process under the LMC; an injunction preventing the City Clerk and the City of Lakewood from placing the proposed initiative on the November 2017 ballot;¹ damages for constitutional violations; and violation of the Federal Fair Housing Act. Protester filed an Amended Complaint on September 26, 2017, adding a number of allegations but maintaining the same claims.

On October 20, 2017, Defendants filed their answers. On November 16, 2017, Protestor filed an opposed Motion for Remand to remand the matter back to the Clerk. On December 7, 2017, the City of Lakewood and Kentner responded to the Motion for Remand. On December 12, 2017, the Court dismissed Springsteen pursuant to C.R.C.P. 41(a)(1). On December 15, the Clerk responded to the Motion for Remand which Protestor replied to five days later. After the parties filed a certified record of the proceedings related to this case, Protestor filed his Op. Br. on March 14, 2018. On April 18, 2018 Defendants filed their Answer Brief and a Joint Motion to Dismiss for inexcusable delay under C.R.C.P. 106(a)(4)(VII). Protestor responded to the Joint Motion to Dismiss on May 5, 2018. On July 5, 2018, the Court heard oral argument on the pending motions. The Court now addresses Protestor's claims for review under C.R.C.P. 106.

JURISDICTION

District court review is available “[w]here any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law.” C.R.C.P. 106(4)(a)(I). Zoning and rezoning is quasi-judicial for purposes of judicial review. *Margolis v. Dist. Court, In & For Arapahoe Cty.*, 638 P.2d 297, 305 (Colo. 1981).

¹ Although the initial complaint was filed September 19, 2017, answers were not filed until October 20, 2017 and the C.R.C.P. 106 opening brief was not filed until March 14, 2018, months after the November 2017 election. And although Protestor asserted a claim for injunctive relief, he did not request a preliminary injunction. Neither party sought to expedite these proceedings before the November 2017 election or since.

ANALYSIS

A. Whether Protestor timely filed his Opening C.R.C.P. 106(a)(4) Brief.

A plaintiff shall file an opening brief within 42 days after the date a defendant files a certified record with the clerk. C.R.C.P. 106(a)(4)(VII). The court may, in its discretion, dismiss the matter as a sanction for untimely filing an opening brief. *Warren Vill., Inc. v. Bd. of Assessment Appeals*, 619 P.2d 60, 64 (Colo. 1980). In determining whether dismissal is the appropriate sanction for a party's failure to comply with a procedural requirement, the court must consider the substantiality of the issues raised on appeal and prejudice to the opposing party. *Harris v. Reg'l Transp. Dist.*, 155 P.3d 583, 587 (Colo. App. 2006).

Here, Defendants electronically filed the certified record on January 10, 2018. On March 14, 2018, sixty-four days later, Protestor filed his opening brief. In his response to Defendant's Joint Motion to Dismiss, Protestor concedes he untimely filed his opening brief, but argues the delay was excusable given the multiple record submissions and the pending motion for remand. Pl.'s Resp. to Defs.' Joint Mot. to Dismiss, p. 5. However, Protestor failed to seek an extension of the briefing deadline any time prior to filing his opening brief.

The Court finds the substantiality of issues raised on appeal sufficient to hear the matter and the prejudice to the opposing party insufficient to dismiss the matter. The Court recognizes the significant prejudice suffered by the more than 6,000 signatories of the initiative petition, but notes that, even if the Court were to rule in Defendant's favor, the ballot measure would not go to voters until November 2018. Assuming *arguendo* there was no delay by any party, the required record submission and briefing schedule (which neither party requested be altered) would have delayed resolution of this matter until after the November 2017 election, in which the proposed initiative would have been included. Thus, Defendant's Joint Motion to Dismiss is denied and the Court proceeds to the merits of the C.R.C.P. 106 appeal.

B. Whether Ms. Springsteen's withdrawal as a proponent of the Petition renders the Petition facially deficient.

LMC Section 2.52.080.E. provides, in pertinent part, that "[e]ach petition shall designate by name and address two persons who shall represent the signers thereof in all matters affecting the same..." and that "[a]ny petition which fails to conform to the requirements of this chapter

or is circulated in a manner other than that permitted in this section shall be invalid.” Here, Springsteen withdrew as a representative of the petition on October 17, 2017. On November 14, 2017, Kentner named Dr. Rhonda Peters as a replacement for Springsteen. Resp. of City of Lakewood and Margy Greer to Mot. for Remand to the City Clerk for the City of Lakewood, pp. 9-10.

Protestor argues the plain language of the statute requires two representatives throughout *all* matters affecting the title, submission clause, and summary as designated and fixed by the City Clerk. Motion for Remand to the City Clerk for the City of Lakewood, p. 7. And that, despite the substitution, the Clerk should determine whether the lack of two representatives causes the initiative to be facially invalid before the Court proceeds to the merits of the case. *Id.* at pp. 7-8.

Defendants argue that the a petition does not become void if a representative withdraws after the evidentiary hearing on the petition’s sufficiency and that the statute is to be liberally construed, not obstructed by a hyper-technical reading of the statute. Resp. to City of Lakewood and Margy Greer to Mot. for Remand to the City Clerk for the City of Lakewood, p. 2. Defendants also assert that the petition has always had two representatives in compliance with the statute. Resp. to City of Lakewood and Margy Greer to Mot. for Remand to the City Clerk for the City of Lakewood, p. 9. Alternatively, if the Court disagrees with the supposition that two signatures were required at all times, that Defendants substantially complied with LMC Section 2.52.080.E., thus satisfying the purpose of the provision despite noncompliance. Response to City of Lakewood and Margy Greer to Mot. for Remand to the City Clerk for the City of Lakewood, pp. 6-9.

The Court agrees with Defendants’ argument that they substantially complied with LMC §2.52.080.E. for the reasons Defendants articulated in their response. The purpose of the provision is to allow signors to contact the proponents and for election officials to likewise be able to notify the proponents of key decisions or events; not to guard against fraud, abuse, or mistake. Accordingly, Defendants Protestor’s Motion for Remand is denied.

C. Whether the title, submission clause, and summary used on the Petition form reflected the measure’s central features.

1. *Standard of Review*

The court must uphold the decision of a governmental body “unless there is no competent evidence in the record to support it. No competent evidence means that the governmental body’s decision is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority.” *Board of County Commissioner of Routt County v. O’Dell*, 920 P.2d 48, 49 (Colo. 1996) (internal citations omitted). The court “must affirm any of the city clerk’s findings of fact that are supported by some evidence in the record.” *Griff v. City of Grand Junction*, 262 P.3d 906, 909 (Ct. App. 2010). The party challenging a governmental body’s action has the burden to overcome the presumption that the government’s acts were proper. *Kruse v. Town of Castle Rock*, 192 P.3d 591, 601 (Colo. App. 2008). The court interprets a city code *de novo*, applying ordinary rules of statutory construction. *Alpenhof, LLC v. City of Ouray*, 2013 COA 9.

2. *Applicable Law*

The city clerk shall designate and fix a fair title, submission clause, and summary to a proposed ordinance which correctly and fairly expresses and true intent and meaning of the proposed ordinance. LMC §2.52.030.A. In fixing a title, the title board must consider avoiding public confusion and express the true intent and meaning of the proposed law. C.R.S. §1-40-106(3)(b). The title must be brief, in the form of a question, not conflict with titles selected for any petition previously filed for the same election, and the public must generally understand the effect of a “yes/for” or “no/against” vote. LMC §2.52.030.A.; C.R.S. §1-40-106(3)(b). The title board must also give deference to the intent of the proposal as expressed by its proponent without neglecting its duty to consider public confusion from misleading titles. *In re Title, Ballot Title & Submission Clause, & Summary for 1999–2000 No. 25*, 974 P.2d 458, 465 (Colo.1999).

3. *Analysis*

Here, the ballot title read, “[s]hall the City of Lakewood limit residential growth to no more than one (1) percent per year by implementing a permit allocation system for new dwelling units, and by requiring City Council approval of allocation for projects of (40) or more units?” Plaintiff’s Op. Br., p. 9. Protestor and Defendants largely agree upon the legal standard to

determine whether the title, submission clause, and summary correctly and fairly express and true intent and meaning of the proposed ordinance; specifically, that the objective of the ballot title is to explain its central features, underlying purpose, and the intent of the initiative. *See generally In re Title for 1999-2000 #256*, 12 P.3d 246 (Colo. 2000); *In re Petition on School Finance*, 875 P.2d 207 (Colo. 1994); *In re Title, Ballot Title and Submission Clause for 2013-2014 #85*, 2014 CO 62, 328 P.3d 136; LMC §2.52.020.

Protestor argues that the circulators could not communicate the nature of the petition to the public because circulators did not fully understand the nature of the petition. Pl.'s Op. Br., p. 11. Also, that the summary's explanation was inadequate to explain the complexities associated with exceptions to the one percent growth cap; that, even considering Defendant's cited law, the title and summary are insufficient. *Id.* at 11-15. Defendants assert the title and summary are legally sufficient.

The Court does not find that the Clerk's determination that the title, submission clause, and summary as sufficient is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority. The Court defers to the Clerk and will not disturb her findings upon review as the record supports her determination.

D. Whether the circulator affidavit form was legally adequate or substantially complied with the criteria of the LMC.

Section 2.52.08.D. of the LMC states:

To each such petition shall be attached a signed, notarized affidavit of the circulator, stating his or her name, address, the date the affidavit was signed, that he or she circulated the petition, that each signature thereon was affixed in his or her presence, that each signature thereon is the signature of the person whose name it purports to be, that to the best knowledge and belief of the affiant each of the persons signing the petition was at the time of signing a registered elector of the city, and that he or she has not paid or will not in the future pay, and that he or she believes that no other person has so paid or will pay, directly or indirectly, any money or other thing of value to any signer for the purpose of inducing or causing such signer to affix his or her signature to such petition. Each circulator and representative of the petition signers shall sign an agreement in which each agrees to submit to the subpoena authority of the City Clerk.

The court begins with an analysis of the plain meaning of the code and finds the LMC does not define “affidavit” to include the requirement it be made under oath. Protestor argues that undefined terms must be determined by reference to other considerations like the context in which it is used and the apparent purpose for its use. *Marques*, 311 P.3d at 268; see also *Curious Theatre Co. v. Colo. Dep’t of Pub. Health & Env’t*, 220 P.3d 544, 549 (Colo. 2009). Protestor also argues the LMC defines “oath” to include “affirmation” and that the inverse must also be true. Pl.’s Op. Br., p. 18. The Court agrees with Defendants’ argument that the LMC’s specific requirement for a circulator’s affidavit does not include “oath” either generally or as defined, and that an oath may include an affirmation, but that the inverse is not indicated in the code.

Despite Protestor’s arguments regarding the plain meaning of the term, the LMC does not define it. Instead, it requires a notarized affidavit, which proponents complied with by using an acknowledgement in the petition form. The Court notes that other provisions in the LMC expressly include an oath and further define the term, but that “oath” is not included in the provisions which set out the affidavit requirements.²

Thus, the Court finds it is the Clerk’s duty to determine what constitutes an “affidavit” under the code. Even if the Court were to conclude that the plain meaning of the term “affidavit” should be employed and the Code required a circulator to execute a sworn affidavit, the Court finds the Clerk substantially complied with the ordinance.

In determining whether substantial compliance is sufficiently met, the court is to consider whether: 1) any noncompliance was isolated or reflected a systematic disregard for the law; 2) the purpose of the provision violated was nevertheless substantially achieved; and 3) there was a good faith effort to comply or an intentional effort to mislead the electorate. *Loonan v. Woodley*, 882 P.2d 1380, 1384 (Colo. 1994). The Court addresses each factor in turn below.

The Court finds that any noncompliance was not a systematic disregard for the law. As previously discussed, the LMC does not clearly define “affidavit” and the acknowledgement in the petition has been an accepted practice in Lakewood since 1997. Protestor characterizes this

² LMC §1.04.010 (“Oath” includes affirmation”); LMC §2.52.090.E.(“All records and hearings shall be public under this section and all testimony shall be under oath”); LMC §2.20.050.D.(“Before entering upon the duties of his office, a Municipal Judge shall make an oath or affirmation that he will support the Constitution of the United States”).

ongoing practice as an example of how widespread noncompliance is; however, the Court agrees with Defendants' argument that Lakewood's consistent practices demonstrate compliance with the accepted interpretation of "affidavit".

Even if the code required such an affirmation, the Court finds that the purpose of LMC §2.52.08.D. was substantially achieved despite any noncompliance. Protestor argues the purpose of an "oath" is to instill in the Circulators the sanctities of the initiative process and prevent fraud. Specifically, that the signers of the petition were registered electors of the city and not signing based on bribe or other fraud. Pl.'s Op. Br., pp. 21-22. Protestor contrasts this purpose against the acknowledgement which simply verifies the identity of the person signing. *Id.* at 19. Protestor asserts fraud is of particular concern considering that Circulators in this matter were paid a dollar amount per signature. *Id.*

Defendants argue the acknowledgement proves that execution of the underlying document occurred, establishes the authenticity of the executed document, authorizes use of the acknowledged document in evidence without further proof of its execution by the parties signing it, and confirms that the signing of the document was the uncoerced act of the person executing it. An. Br. of City of Lakewood and Margy Greer, p. 11. Protestor asserts that Defendants' arguments summarize the problem itself – that the acknowledgement only proves the document was willingly signed by the person the signature represents. Pl.'s Reply Br., p. 9.

Defendants also maintain that fraud is prevented through the protest process as authorized by the LMC, including a requirement to conduct a hearing on a protest, authority to issue subpoenas to compel the attendance of witnesses and the production of documents, and the ability for a district court to compel the attendance of witnesses and the production of necessary documentary or other physical evidence. *See Billings v. Buchanan*, 555 P.2d 176, 177 (Colo. 1976); LMC §2.52.090.E.³

³ LMC §2.52.090.E.: "All records and hearings shall be public under this section and all testimony shall be under oath, and the City Clerk with whom such petition is filed shall have the power to issue subpoenas to compel the attendance of witnesses and the production of documents. Upon failure of any witness to obey the subpoena, the City Clerk may petition the District Court of Jefferson County and upon proper showing the court may enter an order compelling the witness to appear and testify or produce documentary evidence. Failure to obey the order of the court is punishable as a contempt of court."

The Court does not find Protestor's distinction between *Billings* and the case at issue persuasive. The Court finds persuasive Defendants' assertion that other adequate safeguards exist to preserve the integrity of the process without a circulator's oath, such as criminal liability for forgery, making false or misleading statements, or paying a person to sign a petition. Also, the top of each page of the petition warns signatories that it is a felony to forge a signature or sign when not qualified to vote. These facts sufficiently demonstrate that the acknowledgment and underlying processes substantially comply with the purpose of the statute, regardless of whether the acknowledgement is a sworn affidavit.

E. Whether Protestor timely challenged the measure title.

On June 2, 2017, the Clerk approved and finalized the title. On July 28, 2017, Proponents circulated their petitions and filed petitions with the Clerk for inclusion on the November 2017 ballot. On August 21, 2017, Protestor filed his verified objection and protest. Defendants argue that a complaint seeking review shall be filed in the district court not later than twenty-eight days after the final decision of the body or officer under C.R.C.P. 106(a)(4)(I),(II). And because the Clerk approved and finalized the title on June 2, 2017, Protestor should have filed any protest by June 30, 2017. *An. Br. of City of Lakewood and Margy Greer*, p. 8. Defendants reason that because LMC §2.52.030.B. affords the right for initiative proponents to appeal the question to the district court, there was an appeal right in law that Proponents did not use. *An. Br. of City of Lakewood and Margy Greer*, pp. 7-8. Additionally, Defendants argue that "after signature collection, a protest addresses only the sufficiency of the petition signatures and the way in which they were collected, including the practices of petition circulators" under LMC §2.52.090.D.⁴ *An. Br. of City of Lakewood and Margy Greer*, p. 9.

Protestor argues he timely filed his petition in accordance with LMC §2.52.090.D.⁵ He also argues the Court would have been without subject matter jurisdiction had Protestor not

⁴ LMC §2.52.090.D.: "A protest to an initiative petition may be filed in the office of the City Clerk by any registered elector of the city within thirty days after the petition is filed with the City Clerk. The protest shall set forth with particularity the grounds of such protest and the names protested. The City Clerk shall mail a copy of such protest to the petition representative, together with a notice fixing a time for hearing such protest not less than five nor more than twenty days after such notice is mailed."

⁵ See LMC §2.52.090.D. at n. 4.

exhausted the administrative remedies prescribed in the LMC. Pl.'s Op. Br. p. 16; Pl.'s Reply Br. p. 4.

Here, Defendants fail to show that the Clerk's approval of the Title and Submission Clause, and summary was published or made public in any way so as to provide Protestor with notice of the decision in order to appeal. The LMC limits protests by initiative proponents to occur within seven days after the return of the petition to the persons submitting it. LMC §2.52.03.B. Otherwise, the only protest afforded to the electorate in the initiative process is set out in LMC §2.52.090.D., which allows a protest to an initiative petition to be filed by any registered elector of the city within thirty days after the petition is filed with the City Clerk.

Protestor argues LMC §2.52.090.D. encompasses any or all alleged deficiencies in the Petition and Defendant argues that Protestor is limited to protest only the sufficiency of the signatures because the right to appeal the title passed as a matter of law under C.R.C.P. 106. Pl.'s Op. Br. p.16; An. Br. of City of Lakewood and Margy Greer, p. 9. Defendant cites to the language in the LMC §2.52.090.D., stating, "[a] protest to an initiative petition...shall set forth with particularity the grounds of such protest and the names protested." An. Br. of City of Lakewood and Margy Greer, p. 9. The Court is not persuaded by Defendants' argument.

The Court agrees with Protestor that some mechanism must exist for him to receive notice of the title determination by the clerk in order to timely object. Moreover, the language of LMC §2.52.090.D. does not exclusively limit the scope of the protest to signatures alone. Sections 2.52.03.B. and 2.52.090.D. of the LMC can be read in harmony regarding protests. LMC §2.52.090.D. establishes a procedure concerning signatures and LMC §2.52.03.B. establishes a procedure concerning the title, submission clause, and summary. But the plain language of LMC § 2.52.090.D. is not so narrow to as to expressly limit protests to the names protested or sufficiency of signatures. Thus, the Court finds Protestor's action timely, as he filed within thirty days of the filing of the Petition, as proscribed by the LMC §2.52.090.D.

F. Whether Protestor's claims should be estopped under the doctrine of laches.

Defendants next seek to bar Protestor's lawsuit under the doctrine of laches claiming that Protestor's claim should have been brought sooner. *See* Kentner's An. Br.. Defendants assert that Protestor had full knowledge of the facts underlying his challenge to the petitions because the

approved form was a public document and copies of the petition form were circulated among the community for approximately two months. Kentner's An. Br., p. 2. Defendants next assert that Protestor did not promptly challenge the circulator affidavit or initiative description and instead delayed the matter until after the Clerk finalized and approved the petition. Kentner's An. Br., p. 3. Finally, Defendants argue that the voters relied upon the Clerk's approval and have been prejudiced by Protestor's delay. Kentner's An. Br., p. 3.

When the Court asked Defendants when Protestor should have filed, Defendant argued Protestor should have done so sooner than he did and certainly before the proposed initiative was submitted to the Clerk, after the requisite signatures had been collected – work which could have been avoided had Protestor timely filed an objection.

Without addressing Protestor's knowledge of the Petition, the Court finds that Protestor complied with the requirements of the remedy available to him under LMC §2.52.090.D. and therefore his claims are not barred on by the doctrines of laches or estoppel.

G. Whether the proposed initiative was facially unconstitutional.

The Court agrees with Defendants that the Clerk's role is to administer the initiative process as prescribed by the code and not assess or test the constitutionality of the proposed initiative. The issue is not ripe for determination at that stage of the process.

Protestor argues the proposed ordinance is unconstitutional on its face because it seeks to preclude future City Councils from amending or repealing the effects of the ordinance and that the Clerk, functioning in a quasi-judicial matter, has the authority to determine the matter unconstitutional. Plaintiff's Op. Br. p. 24. Protestor agrees with Defendants that the Clerk's role in establishing petition sufficiency is ministerial in nature and that the Clerk has no authority to address the constitutionality of proposed measures except in limited circumstances, but argues this is an applicable circumstance. Pl.'s Op. Br. p. 23.

The Court agrees that the Clerk and court have limited authority to address whether the title of a petition is unconstitutional, but disagrees as to the extent of this authority. In *re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-2002 No. 21 and No. 22*, 44 P. 3d 213, cited by Protestor in support of his position, the court limited its ruling to the issue of whether the title was dual-subject or unconstitutionally misleading or confusing. In *Vagneur v.*

City of Aspen, 232 P.3d 222 (Colo. App. 2009), the appellate court found that proposed initiatives concerning administrative, not legislative, matters are outside the scope of the initiative power and that the Clerk and trial court had authority to find as such.

However, without determining the extent of a Clerk's or the court's authority, the Court finds that any alleged unconstitutionality on the Petition's face is to be more appropriately addressed once the measure is adopted. The Court does not find persuasive Protestor's assertion that the title or proposed initiative is so constitutionally defective that the court or Clerk has authority to prematurely prohibit the exercise of the initiative. And given established legal authority limiting the Clerk's and court's scope of review, the Court finds her decision to decline to pass upon the substantive constitutional merits of the initiative measure appropriate and not an abuse of discretion.

CONCLUSION

For the above reasons, the Court denies Defendants' Joint Motion to Dismiss; denies Plaintiff's Motion for Remand to the City Clerk for the City of Lakewood; and affirms the City Clerk's September 18, 2017 order. By this order, the Court resolves Protestor's first, second and third claims, and arguably his fourth to the extent the requested injunctive relief relates to the initiative proceedings before the Clerk. The Court directs the parties to contact the Division Clerk by September 7, 2018 to schedule a Case Management Conference, at which time the case will be set for trial.

Date: August 27, 2018.

BY THE COURT:



Diego G. Hunt
District Court Judge