DISTRICT COURT
JEFFERSON COUNTY, COLORADO
100 Jefferson County Parkway
Golden, CO 80401

Plaintiff:

STEVE DORMAN, Objector and Protester,

v.

▲ COURT USE ONLY ▲

Defendants:

CITY OF LAKEWOOD, COLORADO; MARGY GREER, in her capacity as CITY CLERK, CITY OF LAKEWOOD, COLORADO; and CATHY KENTNER, in her capacity as a Proponent.

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Case No: 17CV31437

Division: 14

Courtroom: 5A

Joint Motion to Dismiss Remaining Claims

Introduction

Following this Court's *Order Denying Plaintiff's Motion for Remand and Defendant's Motion to Dismiss and Affirming City Clerk's Sept. 18, 2017 Order*, issued on August 27, 2018, Dorman has asserted three remaining claims, in which he:

1. Seeks "an order from the Court addressing whether the proposed initiative impermissibly limits future city council's municipal powers;"

2. "Contend[s] that the initiative may violate various provisions of the federal Fair Housing Amendments Act . . . and the Colorado Fair Housing Act; and

3. "Contend[s] that the initiative's limit on growth and development effectuates a taking."[1]

All three claims should immediately be dismissed by this Court under directly controlling Colorado Supreme Court precedent that has been in effect for over a century.

Further, Kentner, Greer, and the City of Lakewood specifically request that this court issue an order forthwith. Through their exercise of the fundamental constitutional right of initiative, Lakewood voters who signed this initiative petition sought to trigger the political debate and, potentially, a legal change as to local limits on residential development. Only this litigation has stood in the way of a public vote in 2017 or 2018. An expedited ruling on this motion may allow voters to have their say in the foreseeable future, whether in the next regularly scheduled election or in a special election that would be called solely to consider this proposed measure.

[1] *Proposed Case Management Order*, dated September 26, 2018.

Argument

As an initial matter, Dorman's first claim – that the initiative improperly limits the city council's municipal powers – is not before this Court. Undersigned counsel has scoured Plaintiff's *Complaint*, *Amended Complaint*, *Motion to Remand*, *Opening Brief under C.R.C.P. 106*, *Reply Brief, and Response to Motion to Dismiss*. Plaintiff has not raised this claim in any of his pleadings. This alone warrants dismissal.

Second, in its *Order* on August 27, 2018, this Court found "that any alleged unconstitutionality on the Petition's face is to be more appropriately addressed once the measure is adopted."[2] This finding dismissed Plaintiffs Fifth Amendment takings claim, and that claim is improperly before the Court.

As a matter of longstanding Colorado law, all three claims must be dismissed, because the people of Lakewood, Colorado, have not adopted the proposed initiative. Accordingly, the proposal at this point has no force and effect, and there is nothing for this Court to adjudicate. Put simply, Dorman's claims are not ripe today.

In 1980, the Colorado Supreme Court rejected an effort to challenge the effect of a proposed municipal ordinance:

> Governmental officials have no power to prohibit the exercise of the initiative by prematurely passing upon the substantive merits of the initiated measure. Nor may the courts interfere with the exercise of this right by declaring unconstitutional or invalid a proposed measure before the process has run its course and the measure is actually adopted. Then and only then, when actual litigants whose rights are

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[2] *Order*, pp. 12-13.

> affected are before it, may the court determine the validity of the legislation.[3]

This principle is not new; it has limited court review since the very inception of the initiative process. Colorado first adopted the right of initiative in 1910, amending the Colorado Constitution to specifically grant the right of initiative to voters for statewide laws, as well as municipal ordinances.[4] Two years later, in 1912, the Colorado Supreme Court reviewed an effort to prevent a proposed Denver initiative from going forward, ruling that:

> future possibilities that a measure may be invalid, and that money spent by the public for its enactment will be spent in vain, count for nothing in the presence of the overwhelming necessity of obeying the plain mandates of the Constitution and of keeping inviolate the distribution of powers as made, until the people themselves, in their sovereign power, see fit to make a change. This proposed amendment is not yet adopted. The people of Denver, in their legislative discretion, may reject it, if an election is ordered; and in such an event the judicial department would have held moot court over a matter that never existed. *Not until the measure is adopted and made a part of the charter have the courts any power to determine its validity, and then only when actual litigants, whose rights are affected, are before them.*[5]

Forty-four years later, in 1956, the Colorado Supreme Court again held that "neither this, nor any other court, may be called upon to construe or pass upon a

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[3] *McKee v. City of Louisville*, 616 P.2d 969, 972-973 (Colo. 1980)(internal citations omitted) (district court erroneously "rule[d] upon the validity of the initiated measure before its adoption" and that an initiative, "if approved, would be invalid as beyond the legislative power" of the city council or the electorate; district court's holding was thus "premature").

[4] Colo. Const. Art. V, § 1(9).

[5] *Speer v. People*, 122 P. 768, 774 (Colo 1912) (emphasis supplied).

legislative act until it has been adopted."[6] Twenty years later, in 1976, the Court reviewed a challenge to an initiative and affirmed that, as a matter of constitutional law, courts could not review the substance of proposed initiatives:

> [i]t is a general rule, which we reaffirm here, that courts should not take jurisdiction to pass upon the constitutionality of a proposed law prior to its enactment or adoption. Our own constitution recognizes this rule by restricting cases in which this court may render advisory opinions to interrogatories submitted by the general assembly or by the governor.[7]

Also that year, the Court held:

> courts do not have jurisdiction to pass upon the constitutionality of the substance of legislation prior to enactment of adoption. Our own constitution recognizes this rule by restricting cases in which advisory opinions may be rendered to interrogatories submitted by the General Assembly under certain conditions or by the Governor.[8]

Yet again, in 1994, the Supreme Court held that courts refuse to "address the merits of a proposed initiative, nor do [they] interpret its language or predict its application if adopted by the electorate."[9] As but one example, the Colorado Supreme Court declined to determine whether an initiative violated Amendment I of the Colorado Constitution, because such an analysis would "require us to interpret its

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[6] *City of Rocky Ford v. Brown*, 293 P.2d 974, 976 (Colo. 1956).

[7] *Billings v. Buchanan,* 555 P.2d 176, 179 (Colo. 1976).

[8] *CF&I Steel Corp. v. Buchanan*, 554 P.2d 1354, 1354 (Colo. 1976).

[9] *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for a Petition on Campaign and Political Finance,* 877 P.2d 311, 313 (Colo.1994); *see also In re Proposed Petitions*, 907 P.2d 586, 590 (Colo.1995).

language or predict its application if adopted by the electorate and this we will not do.[10] And more recently, the Supreme Court stated that it is not the judiciary's role "to speculate on the future effects the Initiative may have if it is adopted. Whether the Initiative will indeed have the effects the petitioner's claim is beyond the scope of our review."[11]

In the case at hand, Dorman asks this Court to determine that the initiative, if adopted by voters, would violate the U.S. Constitution, the Colorado Constitution, federal law, and municipal law. But the proposed ordinance has not been adopted, and this Court is without jurisdiction to review the merits of the proposed ordinance, particularly where there are no concrete facts to assist the Court in assessing the substantive legal questions posed by Dorman.

Conclusion

Dorman's claims are without any basis in fact or law, and this Court should promptly dismiss them. At bare minimum, such claims are clearly premature, given the fact that they are not – and may never be – part of Lakewood's municipal code.

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[10] *Matter of Title, Ballot Title and Submission Clause, and Summary Adopted May 21, 1997, by the Title Board Pertaining to Proposed Initiative 1997-98 No. 10*, 943 P.2d 897, 899 (Colo. 1997) (quotation omitted); *see also State Farm Mutual Auto. Insurance Co. v. City of Lakewood*, 788 P.2d 808, 816-817 (Colo. 1990).

[11] *In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 #256*, 12 P.3d 246, 247 (Colo. 2000).

Given the fundamental nature of the initiative right, this Court's prompt ruling will serve the constitutionally protected interests of Lakewood voters as well as those of the parties to this litigation.

It is urged, therefore, that the Court find that Dorman's claims addressed here, much like those that the Court has already weighed and held for another day, are not yet ripe and must not further delay an election on this measure.

Respectfully submitted this 5th day of October, 2018.

KLENDA GESSLER & BLUE LLC

By: *s/ Scott E. Gessler*
Scott E. Gessler

RECHT KORNFELD, PC

By: *s/ Mark G. Grueskin*
Mark G. Grueskin

CERTIFICATE OF SERVICE

I certify that on this 5th day of October, 2018, the foregoing **Joint Motion to Dismiss Remaining Claims** was electronically served via e-mail or ICCESS on the following:

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