DISTRICT COURT SAN JUAN COUNTY, COLORADO Court Address: PO Box 900, 1557 Greene St. Silverton, CO 81433	DATE FILED: July 7, 2023 4:56 PM
Plaintiff: JOHN H. WRIGHT v. **Defendant:** TOWN OF SILVERTON	▲ COURT USE ONLY ▲
Attorney for Defendant Clayton M. Buchner, #50996 PO Box 3855, 444 Lewis St. Pagosa Springs, CO 81147 (970) 507-0227 cbuchner@silverton.co.us	Case No.: 2023CV1 Division: 1
DEFENDANT'S ANSWER TO COMPLAINT	

Defendant, Town of Silverton, Colorado, by and through its Attorney, Clayton M. Buchner, in response to Plaintiff's Complaint for Review of Petition Sufficiency regarding proposed citizen-initiated ballot measure allowing off highway vehicles to drive upon certain roads within Silverton, CO town limits ("OHV Petition").

I. PARTIES, JURISDICTION AND VENUE

Plaintiff seeks review of the sufficiency of the OHV Petition pursuant to C.R.S. § 31-11-110(3).

II. BACKGROUND AND FACTS

The OHV Petition was successfully protested and declared insufficient on or about December 5, 2022, and on or about March 27, 2023. On April 14, 2023, the OHV Petition was submitted a third time to the Silverton Town Clerk. On May 22, 2023, the Plaintiff filed a protest against the OHV petition in accordance with C.R.S. § 31-11-110(1). On June 1, 2023, the Town Clerk acting as Hearing Officer conducted a protest hearing. On June 6, 2023, the Town Clerk issued a final determination of petition sufficiency. On June 26, 2023, the Town of Silverton received Order Requiring Service and Expedited Answer, along with a copy of the Urgent Request for Review of Petition Sufficiency submitted to the Court.

III. STANDARD OF REVIEW

The Colorado Supreme Court has held "substantial compliance" is the appropriate standard to use when examining sufficiency of petitions regarding the state initiative process. See *Meyer v. Lamm*, 846 P.2d 862 (Colo.1993); *Bickel v. City of Boulder*, No. 94SA130, 1994 WL 493708 (September 12, 1994); *Loonan v. Woodley*, 882 P.2d 1380 (Colo.1994). "Given the similar nature of the right to vote and the right of initiative and referendum, and the common statutory goal of inhibiting fraud and mistake in the process of exercising these rights, we now hold that substantial compliance is the appropriate standard to apply in the context of the right to initiative and referendum." See *Loonan,* 882 P.2d at 1384. The Colorado Supreme Court in *Loonan* used and recognized the factors outlined by the Colorado Supreme Court in *Bickel* in considering substantial compliance regarding the initiative process. *Id.*

The *Bickel* factors are (1) the extent of the district's non-compliance in the particular ballot issue before the court, that is, a court should distinguish between isolated examples of district oversight and what is more properly viewed as systematic disregard for Amendment 1 requirements, (2) the purpose of the provision violated and whether that purpose is substantially achieved despite the district's noncompliance, and (3) whether it can reasonably be inferred that the district made a good faith effort to comply or whether the district's noncompliance is more properly viewed as the product of an intent to mislead the electorate. See *Bickel* at 17-18.

IV. PLAINTIFF'S FIRST ASSERTION

The Plaintiff first asserts "Inclusion of the Ballot Title (Identified as the "Ballot Question") in the petition section between the Summary of the Proposed Initiative and the Text of the Proposed Initiative on the first page of the petition, and included on every page thereafter following the Summary of the Proposed Initiative. The 'Ballot Question' has nothing to do with the either the Summary or the Text." Thus, the Plaintiff concludes, the inclusion of the "Ballot Question" is *extraneous material* and must be held invalid in accordance with C.R.S. § 31-11-106(5), referencing C.R.S. § 31-11-106(1), which states "The clerk shall assure that the petition section contains only those elements required by this article and contains no extraneous material."

V. DEFENDANT'S RESPONSE TO FIRST ASSERTION

The Ballot Title (identified as the "Ballot Question" in the petition) is not extraneous material and should not invalidate the Petition. C.R.S. § 31-11-106(3)(b) states "A summary of the proposed initiative or ordinance that is the subject of a referendum petition shall be printed following the warning

on each page of a petition section. The summary shall be true and impartial and shall not be an argument, or likely to create prejudice, either for or against the measure. The summary shall be prepared by the clerk." The statute does not give the clerk any substantive parameters in preparing the summary, but only requires the summary be true, impartial, non-argumentative, and nonprejudicial. The Silverton Town Clerk chose to include an example "Ballot Question" in the summary per his discretion, and the inclusion of the Ballot Question is impartial, not argumentative, and does not create prejudice for or against the measure.

The inclusion of the Ballot Question meets with strict compliance of the standards outlined in C.R.S. § 31-11-106, thus, no substantial compliance analysis is needed. However, if applied, the *Bickel* factors clearly show the inclusion of the Ballot Question in the summary substantially complies with the statute. (1) There is no evidence of systematic disregard of the statutes requirements; (2) there is evidence that the purpose of this inclusion was for clarity of the issue for the voter; (3) there is a clear good-faith effort to meet the requirements of the code (as evidenced by the Town Clerk invalidating 2 previous initiatives by the petitioners) and no evidence of misleading the electorate. Thus, the inclusion of the Ballot Question meets strict compliance and/or substantial compliance with the form of the initiative requirements.

VI. PLAINTIFF'S SECOND ASSSERTION

The Plaintiff lastly asserts "Inclusion of irrelevant language at the bottom of each page," referring to the petition language found in the footer of the petition, is *extraneous material* which invalidates the petition in accordance with C.R.S. § 31-11-106(5), again referencing C.R.S. § 31-11-106(1), which states "The clerk shall assure that the petition section contains only those elements required by this article and contains no extraneous material." The Plaintiff recognizes that the Representative's names and addresses are allowed, referencing C.R.S. § 31-11-106(2), but asserts the "77 words altogether, in the footer…is…extraneous material." The 77 words are "the proposed ordinance in this initiative will be referred to the Board of Trustees of the Town of Silverton for consideration. If the Board of Trustees does not adopt the proposed ordinance, the petitioners request that the ordinance be referred to the registered electors of the Town of Silverton at a special election to be set between 60 and 150 days from the final determination of sufficiency if the proposed ordinance is not adopted by the town board."

VII. DEFENDANT'S RESPONSE TO SECOND ASSERTION

The "77 words" is not extraneous material, and even if it were, the "77 words" passes the substantial compliance test set out by the Colorado Supreme Court in *Bickel.*

The Plaintiff argues that the layperson's understanding of extraneous is "anything that is not required by C.R.S. 31-11-106." However, this definition fails to encapsulate the spirit of the statute and the Court's interpretation regarding initiatives such as the one in question. The right of initiative and referendum, like the right to vote, is a fundamental right under the Colorado Constitution. *See Clark v. City of Aurora,* 782 P.2d 771, 777 (Colo.1989) (right of initiative). Both the right to vote and right of initiative have in common the guarantee of participation in the political process. *See McKee v. City of Louisville,* 616 P.2d 969, 972 (Colo.1980). The Colorado Supreme Court has held that 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.' " *Montero v. Meyer,* 795 P.2d 242, 245 (Colo.1990) (citations omitted). The Colorado Supreme Court has further held "the exercise of the voting right [should not] be conditioned upon compliance with a degree of precision that in many cases may be a source of more confusion than enlightenment to interested voters." *Lamm,* 846 P.2d at 875 (citing *Erickson v. Blair,* 670 P.2d 749, 754 (Colo.1983)). Although the C.R.S. § 31-11-103 does not define "extraneous material," it is clear that such definition should be liberally construed so as not to hamper the political process.

"Extraneous" is defined as (1) Existing on or coming from the outside; (2) not forming an existing or vital part; (3) having no relevance. See "Extraneous." *Merriam-Webster.com*. 2023. https://www.merriam-webster.com (7 July 2023). In the context of the Colorado Supreme Court, "extraneous material" is most commonly synonymous with "extraneous prejudicial information" in the context of juries, instructions, and deliberations. See *People v. Wadle*, 97 P.3d 932, 936 (Colo. 2004); *People v. Harlan*, 109 P.3d 616, 624 (Colo. 2005); *Kendrick v. Pippin*, 252 P.3d 1052, 1065 (Colo. 2011). The Court in *Kendrick* determined that extraneous prejudicial information consists of (1) "legal content and specific factual information"; (2) "learned from outside the record"; (3) that is "relevant to the issues in a case"; and (4) whether there was a "realistic possibility" of prejudice. Id. at 1064 (quoting *Harlan*, 109 P.3d at 625). From the definition and the Court's application, it is clear the definition of "extraneous material" considers such material as "outside" information with the effect of "prejudice" or impartiality. This definition coincides with the only parameters given to the Town Clerk in determining sufficiency in C.R.S. § 31-11-106(3)(b) that "the summary shall be true and impartial and shall not be an argument, or likely to create prejudice, either for or against the measure."

The "77 words" is not "extraneous material" because it is not outside information, nor does it tend to prejudice or cause impartiality amongst the voters. The information contained in the footer is

taken from within the statute itself at C.R.S. § 31-11-104(1). The information, if anything, further clarifies and informs the voters of the initiative process in which they are participating. Further, the information taken directly from C.R.S. § 31-11-104 cannot be viewed as prejudicial or causing impartiality, as it is simply reciting the initiative process verbatim from the statute itself.

Finally, even if this Court considered the "77 words" as somehow extraneous, the addition of the "77 words" passes the substantial compliance test. (1) There is no evidence of systematic disregard of the statutes requirements; (2) there is evidence that the purpose of this inclusion was for clarity of the initiative process for the voter; (3) there is a clear good-faith effort to meet the requirements of the code (as evidenced by the Town Clerk invalidating 2 previous initiatives by the petitioners) and no evidence of intent to mislead the electorate. Thus, the inclusion of the "77 words" is not extraneous material and/or substantially complies with the form of the initiative requirements.

VIII. CONCLUSION

The Plaintiff's assertions regarding "extraneous material" in the petitions are self-admittedly based on a "layperson's" understanding of the initiative process and self-serving definition of "extraneous" meaning "anything that is not required by C.R.S. 31-11-106." See *Complaint* at 3. The statute clearly contemplates discretion by the Town Clerk to include material that "is not required" as it allows any material in the Summary section that is "true and impartial and shall not be an argument, or likely to create prejudice, either for or against the measure." See C.R.S. § 31-11-106(3)(b). Thus, the Plaintiff's definition of "extraneous" fails in its application.

Applying the Court's long-held view that that constitutional and statutory provisions governing the initiative process should be "liberally construed" to facilitate and not hamper the initiative process, and the clearly applied definition of "extraneous" material being from an "outside" source and tending to "prejudice" the issue, this Court should conclude that the material complained of is not "extraneous material" and deny the Plaintiff's appeal.

Finally, regardless of the issue of "extraneous material," the Plaintiff's assertions fail to show how any of the complained of additional language fails the "substantial compliance" test and standard of review. As outlined above, the application of the *Bickel* factors affirms the petition under review by this Court substantially complies with the statute and should not be invalidated on a strict compliance basis.

IX. PRAYER FOR RELIEF

Wherefore, for the reasons stated above, the Defendant prays that this Court deny the Plaintiff's appeal and uphold the final determination as to petition sufficiency for vote at special election.

DATED this 7th Day of July, 2023.

Respectfully submitted,

/s/ *Clayton M. Buchner*
Clayton M. Buchner #: 50996
Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that on July 7, 2023, I sent an exact copy of this document to all counsel of record via ICCES.

/s/ Clayton M. Buchner