

<input type="checkbox"/> Small Claims <input type="checkbox"/> County Court <input checked="" type="checkbox"/> District Court <input type="checkbox"/> Probate Court <input type="checkbox"/> Juvenile Court <input type="checkbox"/> Water Court SAN JUAN County, Colorado Court Address: PO Box 900, 1557 Greene St. Silverton, CO 81433 <hr/> Plaintiff: John H. Wright v. Defendant: Town of Silverton <hr/> Attorney or Party Without Attorney: (Name & Address) John H. Wright PO Box 308 Silverton, CO 81433 Phone Number: 970-387-0257 FAX Number: none E-mail: wrightjo9318@gmail.com Atty. Reg. #: n/a	DATE FILED: July 17, 2023 ▲ COURT USE ONLY ▲ <hr/> Case Number: 2023CV1 Div.:1
RESPONSE TO DEFENDANT'S ANSWER TO COMPLAINT	

Plaintiff responds directly to the defendant’s answer in the defendant’s order of presentation:

I. PARTIES, JURISDICTION AND VENUE

Clarification: Plaintiff seeks the District Court’s review of the validity of the petition, the subsequent Town Clerk’s finding of sufficiency despite the protest, and intercession in the matter by the Court if warranted (see 2023CV1 Complaint dated June 15, 2023, paragraph 4).

II. BACKGROUND AND FACTS

Correction: Defendant claims, “On June 6, 2023, the Town Clerk issued a final determination of petition sufficiency.”

Plaintiff never received any such notification from the Clerk, though such June 6 notification was promised by the Clerk at the hearing on June 1, 2023.

On June 14, plaintiff reviewed the “meeting packet” that had been published for the upcoming Town Board Regular meeting to be held on the evening of June 26. Within that packet, plaintiff discovered the Town Clerk’s declaration of sufficiency attached to the Town Lawyer’s memorandum to the Town Clerk on the matter. Neither the Town Clerk’s declaration, nor the

Town Lawyer's memorandum are dated. (These two documents are included in the Attachment to Complaint, submitted to the District Court.)

Also on June 14, plaintiff sent an e-mail query to the Town Clerk, with copy to the Town Administrator, asking had the Town Clerk ever sent the notification promised for June 6, by US Mail and/or by e-mail . The Town Administrator responded the Clerk had a medical emergency, and was absent from duty. The Administrator took up the matter and sent plaintiff hard copy that day of both the Clerk's determination and the Lawyer's memorandum via registered mail. Plaintiff received these, and notes that they remained undated.

The Administrator first asked what was the plaintiff's mailing address. The District Court reviewer will note on the Clerk's declaration that it was addressed to the two petitioners at their PO Box addresses. But that same declaration was addressed to the plaintiff's physical address. The Administrator questioned did the plaintiff have a PO Box mailing address, and was the Clerk aware of it? Nonplussed, the plaintiff answered "yes" and invited the Administrator to review the first paragraph of the protest letter (also included in the Attachment to Complaint), which plaintiff had delivered in person to the Clerk. Moreover, all plaintiff's correspondence from the Town originating from the Clerk's office – including utility bills, ballots, announcements of any kind – have always been delivered to plaintiff's PO Box. Nobody in Silverton receives home delivery US Mail, and that is common knowledge.

There is the question of e-mail transmittal of the Clerk's determination and the Lawyer's memorandum. Plaintiff received nothing via e-mail mode, even though on June 2, plaintiff e-mailed to the Clerk advisement of a change in plaintiff's e-mail address. Same day, Clerk acknowledged the change of e-mail address via e-mail reply, promising to update the Town records with the change.

On June 26, plaintiff completed the request to the District Court for Judicial Review, caused a copy to be served to the Town Administrator, and submitted the request to Rebecca Mathers, Clerk of District Court in Durango at about 1:00 PM.

On June 26, at 7:00 PM, commenced the town meeting which, among other things, took up the matter of OHV petition status.

III. STANDARD OF REVIEW

The Town Lawyer opens with "The Colorado Supreme Court has held 'substantial compliance' is the appropriate standard when examining sufficiency of petitions regarding the state initiative process." The Town Lawyer then offers three examples from case law to support that claim.

The plaintiff offers: "Good enough, except when 'substantial compliance' does not apply." Relevant comments on each of the case law citations follow.

Meyer v. Lamm (Supreme Court of Colorado, 1993)

This is a case involving vote counting in an election contest for Colorado State Representative, House District 13, 1993. Its subject matter is not directly analogous to the present matter of concern. Furthermore, it deals with election voting that has already taken place. No election had yet been ordered for the present matter when the protest was lodged. But the case does take up the matter of “substantial compliance” when it does apply.

Justice Volland, concurring in part with the Court’s decision, and dissenting in part, cites the following from extant case law: “[A] court should look first to the plain language of the statute, and words used ‘should be given effect according to their plain and ordinary meaning.’” Further on in the same paragraph he cites: “Where the word ‘shall’ is used in a statute, it is presumed to be mandatory.”

Does “substantial compliance” apply when the word “shall” is used in a statute? Or is “strict compliance” mandatory when “shall” is used in a statute as Justice Volland holds? The point goes to support Ancillary Note #3 of the plaintiff’s protest in that the frequent use of “shall” in the statute is a high hurdle to overcome. And it underlies the statutory requirement: The clerk shall assure that the petition section contains only those elements required by this article and contains no extraneous material” (CRS 31-11-106(1), emphasis added).

Bickel v. City of Boulder (Supreme Court of Colorado, 1994)

This case involves disputes on ballot language for four separate ballot issues: a School District Question 1; City Question B; City Question C; and County Question A. Each issue asked if increased debt levels could be incurred by the governing entity, while simultaneously increasing taxes. Plaintiffs sought injunctive relief five days prior to election. The subject matter is not directly analogous to the present matter of concern. But it does take up discussion of “strict compliance” versus “substantial compliance” when applied in ballot questions prepared for an upcoming election.

The Town Lawyer refers to “factors outlined by the Colorado Supreme Court in *Bickel* in considering substantial compliance regarding the initiative process.”

The plaintiff points out *Bickel* does not take up that discussion of “strict compliance” versus “substantial compliance” in the matter of initial petition draft validity, the statutory instructions for which involve abundant use of the word: “shall” (CRS 31-11-106. Form of petition sections.)

Loonan v. Woodley (Supreme Court of Colorado, 1994)

This case deals with actual petition sufficiency in a matter of parental consent for an unemancipated minor’s abortion. The subject matter of the petition is not specifically analogous to the present matter of concern. Application of “substantial compliance” as the appropriate standard to apply in the context of the right to initiative and referendum produces analogous results.

The Secretary of State issued a Sufficiency Determination for Woodley's petition when Woodley was all done gathering signatures, and directed the proposed amendment would appear on the next November ballot. Woodley's circulator's affidavit, however, omitted then current language to the effect he, and his circulators "read and understood" election law. He used an outdated affidavit form that he later claimed substantially complied with the affidavit required by the 1993 statutory amendments.

The Supreme Court vacated the Secretary of State's determination of sufficiency, and enjoined the Secretary from certifying the proposed initiative for inclusion on the November ballot. The Court overturned the trial court's holding that strict compliance be the standard, and applied substantial compliance as a standard, while finding that Woodley did not achieve substantial compliance, and held that the "read and understand" requirement was constitutional.

Plaintiff points out this case demonstrates: 1) after a petition draft has been approved for circulation by the clerk, 2) even though clerk's basis for approval was faulty, failed to meet substantial compliance standards, or was overtly non-compliant, that 3) the determination of sufficiency could be overturned and/or corrected.

Else why even hold a 40-day protest period after determination of sufficiency?

Plaintiff, in closing this portion of the response, finds nothing in the above case law citations that permits a "substantial compliance" standard to be applied when a statute otherwise calls for a strict or mandatory standard by employing the word: "shall..."

IV. PLAINTIFF'S FIRST ASSERTION

The Town Lawyer's summary of plaintiff's first assertion is essentially correct, but incomplete. The Town Lawyer's answer states: "Thus, the Plaintiff concludes, the inclusion of the "Ballot Question" is *extraneous material* and must be held invalid in accordance with CRS 31-11-106(5), referencing CRS 31-11-106(1) which states... etc, etc."

Plaintiff notes: that makes twice the Town Lawyer has omitted to comment on the import of CRS 31-11-111(1) that the plaintiff cites as critical in declaring the inclusion of the Ballot Question in the petition is extraneous material: once in the original protest to which the Town Lawyer responded to the Town Clerk, and again in the complaint which the Town Lawyer presently addresses. Curious.

Once again, CRS 31-11-111(1) states "After an election has been ordered pursuant to section 31-11-104 or 31-11-105, the legislative body of the municipality or its designee shall promptly fix a ballot title for each initiative or referendum." Each time, the plaintiff has pointed out that 1) no election had been ordered at the time of delivering the protest, and 2) in any event, the prerogative to fix the ballot title fell to the legislative body, not to the clerk or the petitioners.

V. DEFENDANT'S RESPONSE TO FIRST ASSERTION

The Town Lawyer states: "The Silverton Town Clerk chose to include an *example* "Ballot Question" (emphasis added) in the summary, per his discretion."

A reading of the petition does not pair the word "example" with the words "Ballot Question." It is simply not identified as an "example." It is identified solely as "**BALLOT QUESTION**" in bold, capitalized font which distinguishes it from the fonts used for "Summary of the Proposed Initiative" above, and "Proposed Initiative" below.

BALLOT QUESTION stands alone, not as an "example", and not as part of a summary.

Moreover, plaintiff questions the Clerk's discretion to include that, given the plaintiff's comments deriving from 31-11-111(1) above.

Elsewhere in the Town Lawyer's "Response to Second Assertion", he references the three *Bickel* factors for authority.

Plaintiff disagrees with their applicability, as follows:

1. "There is no evidence of systematic disregard of the statutes requirements."

Plaintiff's Ancillary Note #1 cites an undated, un-ascribed as to authorship or office of origin "Town of Silverton Initiative Petition Checklist" that states: "It is the responsibility of the petition representatives to ensure that all necessary information and form requirement are met." At the time, plaintiff did not know by whom that language was fabricated, and when. Plaintiff had already cited the statutory authority in plaintiff's original protest document that rendered the checklist claim false (CRS 31-11-106(1)).

Plaintiff has since determined the by whom and when by examining the metadata associated with the checklist's creation: originating as a word document on Town Clerk Matt Green's computer, converted to a PDF file on April 4, modified on April 5, 2023.

Screen shots of two pages of the checklist, and the superimposed metadata are here provided:

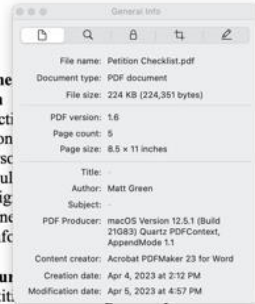
Town of Silverton
Initiative Petition Checklist
Pursuant to Colorado Revised Statutes, Title 31, Article 11

- Submit Notice of proposal of ordinance**
 - o CRS 31-11-104(1) Any proposed ordinance may be submitted to the legislative body of any municipality by filing written notice of the proposed ordinance with the clerk and, within one hundred eighty days after approval of the petition pursuant to section 31-11-106 (1)

Form of Petition

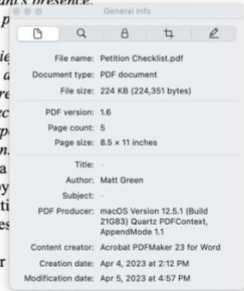
- Two registered electors must represent the petition. The addresses of both persons shall be listed on the petition**
 - o CRS 31-11-107. The circulation of any petition section by a circulator is prohibited. No section of a petition referendum measure shall be circulated by any person eighteen years of age at the time the section is circulated.
 - o CRS 31-11-106 (2) Each petition section shall designate two persons who shall represent the proponent affecting the petition and to whom all notices or information affecting the petition shall be mailed.
- Include the below italicized information in each signature**
 - o CRS 31-11-108. Any initiative or referendum petition by registered electors who are eligible to vote on the measure.

- *Each registered elector shall sign his or her own signature, and shall print:*
 - *his or her name,*
 - *the address at which he or she resides,*
 - *including the street number and name,*
 - *the city or town,*
 - *the county,*
 - *and the date of signing.*



Petition Checklist.pdf
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- Each petition section must have a notarized affidavit including the italicized items A through H below**
 - o CRS 31-11-106 (3) (e)
 - (I) Following the signature pages of each petition section, there shall be attached a signed, notarized, and dated affidavit executed by the person who circulated the petition section, which shall include the following:
 - (A) *The affiant's printed name, the address at which the affiant resides, including the street name and number, the municipality, the county, and the date the affiant signed the affidavit;*
 - (B) *That the affiant has read and understands the laws governing the circulation of petition;*
 - (C) *That the affiant was eighteen years of age or older at the time the section of the petition was circulated and signed by the listed electors;*
 - (D) *That the affiant circulated the section of the petition;*
 - (E) *That each signature thereon was affixed in the affiant's presence;*
 - (F) *That each signature thereon is the signature of the person for whose purposes to be;*
 - (G) *That, to the best of the affiant's knowledge and belief, signing the petition section was, at the time of signing, a true and correct statement of the facts stated therein;*
 - (H) *That the affiant has not paid or will not in the future pay, directly or indirectly, any money or other thing of value to any signer for the purpose of inducing such signer to affix the signer's signature to the petition.*
 - o (II) The clerk shall not accept for filing any section of a petition that has not been accompanied by a notarized affidavit required by paragraph (e). Any disassembly of a section of the petition separating the affidavit from the signature page or pages of the petition invalid and of no force and effect.
 - o (III) Any signature added to a section of a petition after the section has been executed shall be invalid.
- All sections of the petition must be numbered sequentially (ie, if there are two 'signature packets', they must be labeled section 1 of 2 and section 2 of 2)**
 - o CRS 31-11-106 (4) All sections of any petition shall be prenumbered serially.
- It is the responsibility of the petition representatives to ensure that all necessary information and form requirements of the petition are met.**
 - o CRS 31-11-106 (5) Any petition section that fails to conform to the requirements of this article or that is circulated in a manner other than that permitted by this article shall be invalid.



2. "There is evidence that the purpose of this inclusion was for clarity of the issue for the voter."

The language of the **BALLOT QUESTION** given in the petition makes the question sound like a brand-new issue. It appears true, impartial, non-argumentative, and nonprejudicial. It is not entirely true.

In fact, the petition seeks to reinstate those elements of the Town of Silverton Municipal Code dealing with the operation of OHVs within the town limits that had been repealed as a result of the Town of Silverton municipal election held October 12, 2021. A statement that the measure seeks to reinstate code, or restore rights to OHV operation in town would be more true.

3. "There is a clear good-faith effort to meet the requirements of the code... and no evidence of misleading the electorate."

Plaintiff's disagreement with the Town Lawyer's applicability of *Bickel* factors given in #1 and #2 above in part address #3 here. Plaintiff has only to add comment to the "clear good-faith" factor by reciting EVENTS put forth in Plaintiff's response to the Town Lawyer's "**II. BACKGROUND AND FACTS**" above.

IV. PLAINTIFF'S SECOND ASSERTION

Plaintiff has nothing to say here.

VII. DEFENDANT'S RESPONSE TO SECOND ASSERTION

The question goes the validity of the petition only, not to the right of initiative and referendum and right to vote.

The Town Lawyer's response states: "The Plaintiff argues that the layperson's understanding of 'extraneous' is anything that is not required by CRS 31-11-106." That is not a correct statement.

Plaintiff explains that the phrase used does not apply to the definition of "extraneous," but to the application of "extraneous" as the statute applies the word in CRS 31-11-106: "The clerk shall assure that the petition section contains only those elements required by this article and contains no extraneous material."

The Town Lawyer states: "The 77 words is not 'extraneous material' because it does not tend to prejudice or cause impartiality among the voters."

Plaintiff responds: those 77 words, blended as they are between other words, and read as one paragraph, make the entire footer incomprehensible. That does not foster voter understanding, nor clarify much of anything.

VII. CONCLUSION

The Town Lawyer states: “The Plaintiff’s assertions regarding ‘extraneous material’ in the petitions are self-admittedly based on a ‘lay person’s’ understanding of the initiative process and self-serving definition of ‘extraneous’, meaning...”

The Plaintiff responds: The Plaintiff does not admit to being a lay-person. The Plaintiff admits only to being the plaintiff.

The Plaintiff has found no laxity in the standards of review that permits the use of the word “shall” to be interpreted as anything other than requiring mandatory compliance, based on the Town Lawyer’s answers.

Plaintiff questions: Why would there even be a 40-day protest period following a clerk’s initial determination of signature sufficiency? To what purpose? For checking petition signatures only? CRS 31-11-110 (Protest) says: “The grounds for protest may include, but shall not be limited to, the failure of any portion of a petition or circulator affidavit to meet the requirements of this article.”

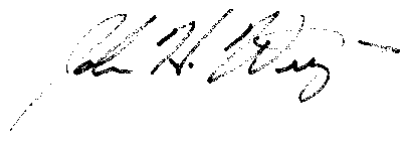
Plaintiff objects to the Town Lawyer’s characterization of Plaintiff’s request as “Plaintiff’s appeal.” Plaintiff merely asks for the Judicial Review as outlined in CRS 31-11-110(3):

“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 pursuant to section 31-11-106 (2), or the municipality, but such review shall be had and determined forthwith.”

IX. PRAYER

Plaintiff originally asked for the District Court’s review of the petition developments as concluded at that time. The request extended only to that review, it did not contemplate acquiring a respondent or defendant in the matter. The Plaintiff still asks for only that.

Signed:



Date: July 17, 2023