

DISTRICT COURT, LARIMER COUNTY, COLORADO
201 LaPorte Avenue, Suite 100
Fort Collins, Colorado 80521

LARRY SARNER, an individual, *pro se*,

Plaintiff,

v.

CITY OF LOVELAND, a home rule city in the State of Colorado; and, ANGELA MYERS, in her official capacity as Clerk and Recorder of Larimer County,

Defendants.

▲ COURT USE ONLY ▲

Case Number: 2016CV230

Orders re Ballot Title Questions

INTRODUCTION

On August 25, 2016, Plaintiff Larry Sarner (hereinafter referred to as “Mr. Sarner”) filed an action titled, “A Contest Concerning the Form and Content of An Election Ballot Question, and for Enforcement of C.R.S. Section § 1-45-117 Prohibiting the Use of Public Funds for Electioneering” (“the Complaint”). He filed this action as a *pro se* plaintiff against the City of Loveland and Angela Myers, in her capacity as Clerk and Recorder of Larimer County, Colorado, pursuant to C.R.S. § 1-11-203.5, seeking

relief from alleged misleading ballot titles in matters to be voted upon on November 8, 2016 in the City of Loveland.

Defendant City of Loveland filed an Answer and other responses on August 30, 2016. Defendant Angela Myers filed a Motion to Dismiss on September 6, 2016.. The Complaint was initially dismissed by this Court on September 7, 2016 for Mr. Sarner's failure to file a bond as ordered by this Court. That ruling was appealed to the Colorado Supreme Court, and the Supreme Court reversed the dismissal and remanded this case back to this Court on October 27, 2016. The Supreme Court ordered, pursuant to C.R.S. § 1-11-203.5, that this matter be "summarily adjudicated" and that a hearing under this statute only considers the narrow issues of "the order on the ballot" and "the form or content of any ballot title". The Amended Mandate from the Supreme Court issued on October 28, 2016.

On that same date, this Court issued an Order to Mr. Sarner and counsel for Defendants concerning how this Court desired to proceed. On November 1, 2016, this Court conferred with Mr. Sarner, and counsel for the Defendants. During that conferral, this matter was set for a one day court trial or hearing on November 3, 2016. On November 2, 2016, this Court granted the Motion to Dismiss filed on behalf of Defendant Angela Myers. The court trial or hearing was held on November 3, 2016 and completed on that date. This Order is filed eight days after the mandate issued from the Supreme Court.

BACKGROUND

In 2014, the Loveland City Council adopted Ordinance 5906 which directed that an issue be submitted to electors about creation of a downtown development authority in accordance with Part 8, Article 51 Article 25?, Title 31, C.R.S (“DDA Act”). Exhibit B.¹ The measure was approved at a February 2015 special election, and the Loveland Downtown Development Authority (“DDA”) was created.

The purpose of the DDA is to promote public health, safety, and prosperity of the central business district, and to halt or prevent the growth of blighted areas. *Id.* at 1. To accomplish this purpose, the City Council adopted a Plan of Development for the DDA (“DDA Plan”) in accord with C.R.S. § 31-25-807(1)(d). Exhibit B.

The DDA Plan includes a funding tool called “tax increment financing” (“TIF”), which is authorized by C.R.S. § 31-25-807(3)(a). See, Ex. C at 13. TIF encourages development by allocating to the DDA a portion of increased property taxes and other tax activity deemed attributable to the establishment and operations of the DDA which are called “increment” revenues, with the remainder of the taxes to be allocated to other districts in the City of Loveland. The DDA is allowed to use the Increment revenues to fund projects within the DDA. *Id.*

On August 16, 2016, the City Council adopted Ordinance 6037 to direct that two ballot issues concerning the DDA be submitted to eligible electors in the DDA, as provided for in C.R.S. § 31-25-807(3)(b) and Colo. Const. Art. X, Section 20. Exhibit 1.

¹ Exhibits in these Orders are identified with numbers and letters as exhibits were identified and admitted at the hearing, which may be different than how identical documents were identified in pre-hearing filings.

The first issue (“First Ballot Issue”) seeks voter approval for the financing of the operations and undertakings of the DDA through a property tax of five mills assessed on property within the DDA, which tax is authorized by C.R.S. §§ 31-25-816(2)(b) and 31-25-817. The second issue (“Second Ballot Issue”) seeks voter approval for the issuance of \$75,000,000 of bonds secured by TIF revenues generated within the DDA, the proceeds of which would be used for improvements within the DDA, and which bonds are authorized by C.R.S. §§ 31-25-810 and 31-25-816(3)(b). The full texts of the ballot questions are set forth in Exhibit 1, pp. 2-3. Ordinance 6037 also contains Ballot Titles for the two ballot questions. *Id.* at 3.

The First Ballot Issue and Second Ballot Issue were adopted by the Loveland City Council on August 16, 2016, effective August 20, 2016, and Mr. Sarner filed this Complaint on August 25, 2016.

In the Complaint, Mr. Sarner petitions for “timely review and amendment of the form and content of ballot titles by summary adjudication pursuant to...Colorado Revised Statutes [sic].... § 1-11-203.5.” A portion of the Complaint requested relief to prevent alleged electioneering, but Mr. Sarner withdrew that portion of the Complaint, contained in paragraphs 41-43. See, Motion to Amend Petition to Eliminate Collateral Issue, filed September 1, 2016. Mr. Sarner alleges that the ballot titles for First Ballot Issue and Second Ballot Issue are improper because they are misleading, and that such misleading ballot titles are prohibited under both C.R.S. § 1-11-203.5 and C.R.S. § 31-11-111(3).

Counsel for the City of Loveland contend that Mr. Sarner does not have standing to contest the propriety of the ballot titles here at issue because he is not an eligible elector; he is not a resident of the DDA, does not own property in the DDA, and, therefore, will not suffer an injury in fact to a legally protected interest, if the ballot proposals are passed, because he would not be subject to the tax increase contemplated by the First Ballot Issue, and his property taxes would not be included in the TIF allocations used to repay the bonds that are the subject of the Second Ballot Issue. Counsel for the City of Loveland also assert that the ballot titles are not misleading, and that Mr. Sarner's objections to the ballot titles are really camouflaged complaints as to the substance of the ballot questions.

The Ballot Title for the First Ballot Issue ("First Ballot Title") is as follows:

AUTHORIZATION FOR THE CITY TO INCREASE PROPERTY TAXES IN THE DOWNTOWN DEVELOPMENT AUTHORITY BY NOT MORE THAN 5.00 MILLS AND OF A VOTER-APPROVED REVENUE CHANGE AS AN EXCEPTION TO THE LIMITS OF ARTICLE X, SECTION 20 OF THE COLORADO CONSTITUTION OR ANY OTHER LAW.

See, Exhibit 1, p. 3.

The Ballot Title for the Second Ballot Issue ("Second Ballot Title") is as follows:

AUTHORIZATION FOR THE CITY TO INCUR DEBT OF UP TO \$75,000,000 FOR THE PURPOSE OF FINANCING THE COSTS OF DEVELOPMENT PROJECTS TO BE UNDERTAKEN BY OR ON BEHALF OF THE LOVELAND DOWNTOWN DEVELOPMENT AUTHORITY PURSUANT TO THE LOVELAND DOWNTOWN DEVELOPMENT AUTHORITY PLAN OF DEVELOPMENT, WITH SUCH DEBT PAYABLE FROM AND SECURED BY A PLEDGE OF THE SPECIAL FUND OF THE

CITY WHICH SHALL CONTAIN TAX INCREMENT REVENUES
LEVIED AND COLLECTED WITHIN THE BOUNDARIES OF THE
AUTHORITY.

Id.

APPLICABLE LAW

Mr. Sarner brought this action pursuant to C.R.S. § 1-11-203.5. This statute details the procedures for bringing an action to contest ballot titles, and states that, “The procedure provided in this section shall be the exclusive procedure to contest or otherwise challenge the order of the ballot or the form or content of the ballot title.” C.R.S. § 1-11-203.5(5). In its Order of Court dated October 27, 2016 remanding this matter back to this Court, the Supreme Court emphasized that “the summary adjudication hearing [pursuant to C.R.S. § 1-11-203.5] narrowly considers ‘the order on the ballot’ and ‘the form or content of any ballot title’....”. P. 1, Order of Court. The Court later in this same Order of Court emphasized the narrow scope of trial court review in this matter: “As noted above, a trial court’s review is limited to ‘the order on the ballot or the form or content of any Ballot Title.’” *Id.*

Mr. Sarner did not contest the “order on the ballot” of the ballot titles in the Complaint or in argument at the hearing.. As such, the scope of review here is limited to “the form or content of any ballot title”. *Id.* The review does not extend to the “substance” of the ballot issue, meaning the legality of the measure, if passed. See *Cacioppo v. Eagle Cnty. Sch. Dist. Re-50J*, 92 P.3d 453, 465 (Colo. 2004) (“If the claim alleges that the ballot issue as passed cannot stand under the laws of this state, it is substantive in nature and thus not subject to... § 1-11-203.5”).

C.R.S. § 31-11-111(3) provides guidance on how to evaluate ballot titles:

In fixing the ballot title, the legislative body or its designee shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a 'yes' or 'no' vote would be unclear...The ballot title shall correctly and fairly express the true intent and meaning of the measure.

Id.

Many of the cases which provide guidance for how ballot title contests shall be determined are cases which involve statewide elections, as opposed to local election ballot titles. This Court, however, finds that these cases provide authority helpful in deciding the issues in this case.

Ballot titles must be "fair, clear, and accurate," and must not "mislead the voters through a material omission or misrepresentation." *In re Title No. 89*, 328 P.3d 172, 179 (Colo. 2014). These requirements do not mandate that ballot questions "contain every detail of the proposal" or "explain every possible effect of enacting the initiative." *Id.*; see also *In re Title No. 63*, 370 P.3d 628, 634 (Colo. 2016) ("titles need not spell out every detail of a proposal"). Courts review ballot title questions with deference and only correct a ballot question "where the language is 'clearly misleading.'" *In re Title No. 89*, 328 P.3d at 179. The question need not be drafted in the best possible form; it need only fairly reflect the proposed initiative. *In re Title No. 45*, 274 P.3d 576, 582 (Colo. 2012). (I couldn't find this case to double check quotes and page numbers.)

ANALYSIS

I. Standing.

Counsel for the City of Loveland contends that Mr. Sarner lacks standing to challenge both ballot titles. By his own admissions and testimony, he does not reside within the DDA, own property within the DDA or own a business within the DDA. The boundaries of the DDA in the City of Loveland are shown in Exhibit A.

C.R.S. § 1-11-202 limits election contests to eligible electors of the political subdivision which is holding the election: “The election of any candidate or the result of an election or any any ballot issue may be contested by any eligible elector of the political subdivision”. The political subdivision for this election is the DDA. C.R.S. § 29-1-901 defines “political subdivision” to include districts and authorities. Testimony was received at the hearing that only those who own property in the DDA, live in the DDA, or have a business in the DDA are eligible electors within the DDA. There was no testimony or evidence that Mr. Sarner is an eligible elector within the DDA.

As such, the Court concludes that Mr. Sarner must be an eligible elector within the DDA to vote in the City of Loveland elections, and that he is not an eligible elector.. Because he is not an eligible elector, the Court finds he lacks standing to object to ballot titles in the City of Loveland elections.

The Court also finds that Mr. Sarner lacks standing to contest ballot titles under long-standing, constitutional standing principles. The “proper inquiry on standing is whether the plaintiff has suffered injury in fact to a legally protected interest as contemplated by statutory or constitutional provisions.” *Cottrell v. City & Cnty. of*

Denver, 636 P.2d 703, 711 (Colo. 1981) (Denver residents could not challenge the water board's actions affecting residents outside the territory of Denver). Mr. Sarner lacks an "injury in fact" because he would not be subject to the tax increase contemplated by the First Ballot Issue, nor would his property taxes be included or raised in the TIF allocations used to repay the bonds that are the subject of the Second Ballot Issue. Plus, Mr. Sarner does not have a "legally protected interest" in an election in which he is not an eligible elector. As such, Mr. Sarner lacks standing.

Mr. Sarner's only response to the argument that he lacks standing was his contention at the hearing that counsel for the City of Loveland waited too long to assert the standing argument. The Court rejects that argument. "Standing is a jurisdictional prerequisite that can be raised at any time during the proceedings." *Hickenlooper v. Freedom from Religion Foundation, Inc.*, 338 P.3d 1002, 1006 (Colo. 2014).

Because Mr. Sarner lacks standing, this Court dismisses his Complaint.

II. Form and Content of the Ballot Titles.

Assuming *arguendo* Mr. Sarner has standing to contest the ballot titles, the court considers his argument that the ballot titles are misleading. In the Complaint, Mr. Sarner submits a First Ground for Contest, a Second Ground for Contest, and a Third Ground for Contest. In essence, these are his claims for relief. However, at the hearing he did not present evidence or argument in support of the First Ground for Contest or the Second Ground for Contest. As such, the Court finds that he has either withdrawn those grounds for contest or has failed to prevail on either of those grounds because neither evidence nor argument was introduced as to these grounds.

As to the Third Ground for Contest, Mr. Sarner initially argues that the Second Ballot Title is misleading and is confusing because the general understanding of the effect of a “yes” or “no” answer would be unclear. The Complaint, Par. 30. The Court finds that the Second Ballot Title is not confusing because the general understanding of the effect of a “yes” or “no” answer is clear. It is clear that a “yes” vote approves the authorization for a debt of up to \$75,000,000 to finance DDA projects, and a “no” vote does not approve the authorization for that debt.

Mr. Sarner next argues that the Second Ballot Title is misleading because the source of the repayment revenues for the TIF revenue funds is unclear. The Complaint, Par. 31-32. Mr. Sarner argues in Par. 36 and 49 of the Complaint that TIF revenues will be taken from property taxes levied by six other special districts. He contends that the Second Ballot Title is misleading because it does not explain the fact that, but for the ballot issue, the TIF revenues could benefit these other districts. *Id.* Par. 37.

However, ballot titles do not require the level of detail argued by Mr. Sarner. The Colorado Supreme Court has often held that a ballot title is not misleading because it does not recite all consequences or effects, or an initiative’s interplay with existing laws. See, *In re Title No. 85*, 328 P.3d 136, 145 (Colo. 2014) (“a title is not unclear or misleading simply because it does ‘not refer to the initiative’s possible interplay with existing state and federal laws’”); *In re Title No. 63*, 370 P.3d at 632 (“this court has consistently required more than the omission of a full accounting of potential effects in order to conclude that an initiative may surprise voters”); *In re Proposed Initiative Designated ‘Governmental Business’*, 875 P.2d 871, 878 (Colo. 1994) (“*In re*

Governmental Business") ("Every effect that the proposed measure may have and each and every nuance and subtlety of a measure need not be set forth."). And, as explained above, ballot title requirements do not mandate that ballot questions "contain every detail of the proposal" or "explain every possible effect of enacting the initiative." *In re Title # 89, supra*, at p. 179.

In this case, the Court finds that the Second Ballot Title is clear and is not confusing, thus meeting requirements of C.R.S. § 31-11-111(3). There is nothing misleading about stating that debt will be repaid from a fund containing the TIF revenues. As explained above, TIF is a creation of state and local law designed to encourage development, and a ballot question need not explain the interplay between the initiative and the existing TIF system arising from state and local law. See, e.g., *In re Title No. 85*, 328 P.3d at 145. The ballot question must fairly represent the intent of the measure, but it need not explain every nuance, detail, or consequence of the initiative's enactment. See, *In re Governmental Business*, 875 P.2d at 878.

The Court also rejects Mr. Sarner's claim that the Second Ballot Title is misleading because it does not explain that the effect of the Second Ballot Issue will be to divert revenues from other districts. As the Colorado Supreme Court explained in *Denver Urban Renewal Authority v. Byrne*, 618 P.2d 1374, 1387 (1980), the incremental revenues under a TIF mechanism are deemed to be new money that does not deprive the taxing entities of tax revenues:

We have heretofore discussed the impact of the tax-allocation financing scheme upon Denver. It is not indebted, nor does Denver lose the benefit of its tax revenues which would have

otherwise been available for its use. The portion of tax revenues allocated to DURA represents the amount generated by virtue of increased property valuation which would not have existed but for the project. In this light, it becomes clear that the fiscal base of Denver is not impaired.

Therefore, Mr. Sarner's argument that the Second Ballot Issue diverts revenue, and that should be disclosed in the Second Ballot Title is not accurate.

Mr. Sarner next contends that the Second Ballot Title is infirm because it contains no "end date" for collection of TIF revenue. However, the related ballot question contains a "stop event", i.e., when the bonds are retired after a "repayment cost of no more than \$200,000,000, and it is logical for voters to infer such a "stop event" from the Second Ballot Title language which details how the debt is to be repaid.

Finally, Mr. Sarner argues that the Second Ballot Title is misleading because it fails to inform voters that sales tax revenue may be part of the TIF revenues. However, Mr. Krcmarik testified that a decision has not been made about whether sales tax revenues will be part of the TIF revenues, or not, and if they are, they are part of the "tax increment revenues" that are detailed in the Second Ballot Title.

And, as detailed above, ballot title requirements do not mandate that ballot titles contain every detail of the proposal or explain every possible effect of enacting the proposal. See *In re Governmental Business*, 875 P.2d at 878.

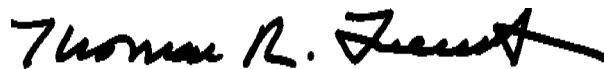
The Court finds, therefore, that the Second Ballot Title is proper because it is clear, not confusing, and correctly and fairly expresses the true meaning and intent of the Second Ballot Issue. The Court also finds that neither the absence of a "stop event"

in the Second Ballot Title nor a statement about sales tax revenues in the title invalidate the Second Ballot Title, for the reasons detailed above. Finally, the Court finds that the absence of every detail contained within the Second Ballot Issue or language that details every possible effect of that ballot issue in the Second Ballot Title does not invalidate that ballot title, for the reasons above detailed.

CONCLUSION

For the foregoing reasons, the Court orders that the Complaint be dismissed because Mr. Sarner lacks standing. In the alternative, the Court denies Mr. Sarner's requests for relief in Paragraphs 51-53 of the Complaint, declines to modify First ballot Title or Second Ballot Title, and finds that the form and content of First Ballot Title and Second Ballot Title conform to the requirements of the Colorado constitution and statutes. As such, judgment enters in favor of Defendant City of Loveland and against Mr. Sarner.

SO ORDERED: November 5, 2016.



Thomas R. French
District Court Judge