DISTRICT COURT, PROWERS COUNTY, STATE OF COLORADO 301 South Main, Suite 300 Lamar, CO 81052 WANDA J. ROHLMAN, Plaintiff, v. CITY OF LAMAR, COLORADO, a Home Rule Municipality and LINDA WILLIAMS, as designated election official for the City of Lamar, Colorado, Defendants.	DATE FILED: March 24, 2022 3:56 PM ▲ FOR COURT USE ONLY ▲ Case Number: 2021 CV 30024 Div.: D

ORDER

A trial to the Court was held in this matter on January 11, 2022. The Plaintiff appeared in person together with her attorney, Darla Specht, Esq. The Defendants were represented by their attorney, Nicholas Poppe, Esq.

The Court has considered the testimony of the witnesses, exhibits entered into evidence, and the arguments of counsel. Based on the foregoing, the Court issues the following Order:

FINDINGS OF FACT

1. In her Amended Complaint, the Plaintiff seeks declaratory and injunctive relief with respect to City of Lamar Ballot Issues 2A and 2B from the November 2, 2021 election. These ballot issues presented the voters generally with the questions of whether to authorize the establishment of the sale of medical and retail marijuana products within the City of Lamar, and whether there should be a special sales tax on retail marijuana,

retail marijuana products, and retail marijuana accessories. These ballot measures were generated by the passage of ordinance numbers 1248 and 1249. *Exhibit 34*.

2. Ordinance numbers 1248 and 1249 were passed by the City Council because a company called SoCo Rocks had demonstrated an interest in the topics being referred to the voters of the City of Lamar at least as early as February, 2021. SoCo Rocks began corresponding with the Community Development Director for the City of Lamar. Among other things, they discussed how to proceed with a petition-initiated measure. The Community Development Director helped SoCo Rocks by telling them how many signatures she thought they would need and by providing them a sample petition question.
3. City Clerk Linda Williams also helped SoCo Rocks during the petition process. Ms. Williams told SoCo Rocks that they needed 221 signatures, representing 5% of the total ballots cast in the last election. However, Article VI Section 6-2 of the City of Lamar Charter requires that a petition contain signatures equal to at least 15% of the total ballots cast in the last election.
4. Ms. Williams received petitions from SoCo Rocks on May 18, 2021, but deemed them insufficient because the staples had been removed and they had to be re-stapled. She then received a second set of petitions containing 224 valid signatures of eligible electors of the City of Lamar on May 27, 2021. *Exhibit 63*. Ms. Williams certified these petitions as sufficient based on her erroneous belief that the petitions only had to contain signatures representing 5% of the total ballots cast in the last election. The certification suggested that a "PETITION REQUESTING THE CITY COUNCIL PUT A BALLOT QUESTION ON THE NOVEMBER 2, 2021 COORDINATED ELECTION TO ALLOW

MARIJUANA DISPENSARIES WITHIN THE CITY LIMITS OF LAMAR" was sufficient to refer a proposed ordinance to the voters. However, the petition did not present the question of whether marijuana dispensaries should be allowed in the City of Lamar. The petition presented only the question of whether the sale of marijuana should be taxed if the voters were to later approve the sale of marijuana. Ms. Williams told City Council that SoCo Rocks had obtained all the signatures needed and that the next step was to prepare ordinances.

5. Ms. Williams testified that if she had not certified the petition as sufficient, it would not have been an agenda item for the City Council. In his testimony, Mayor Crespin agreed that he stated at a June 14, 2021 City Council meeting that the City would not put a question on the ballot such as those reflected in ordinances 1248 and 1249 but for being presented with the petition. Therefore, ordinance 1248, authorizing the retail sale of marijuana in Lamar was linked solely to what was believed to be a sufficient petition that resulted in ordinance 1249. City Council had the authority to create their own ordinance on the topic, but did not do so, electing instead to pass ordinance 1248 as part of the petition-initiated ordinance 1249.
6. Mayor Crespin testified that he was not aware of the City Charter provision that sets forth the required number of signatures for a petition to be deemed sufficient. He believed that once the petition was certified, City Council would have to proceed as they did in enacting ordinances to refer the question to the voters. City Council created a work session to discuss the petition, including whether they should create a separate question on marijuana sales since the petition only presented the question of whether such sales should be taxed. City Council decided that there should be two questions referred to the

voters – whether to authorize the sale of marijuana, and if so, whether there should be a special tax on marijuana and marijuana products. This is how ordinances 1248 and 1249 were created and ultimately passed by the City Council on July 12, 2021. Theses ordinances were then referred to the voters in ballot questions 2A and 2B which were approved by the majority of voters in the November 2, 2021 election.

7. A number of City Council members testified, each of whom said that they did not know what the requirement was for a sufficient petition, and if they had known the petition was insufficient, they would not have voted to pass ordinances 1248 and 1249.

8. The Plaintiff testified as a registered voter in the City of Lamar who voted in the November 2, 2021 election, that she has been harmed by the failure of the City officials to follow the Charter. The Plaintiff attended some City Council meetings, but did not fully understand what they were talking about. She did not ask any questions of the City Council members and did not file a protest on the clerk's certification of the petition.

CONCLUSIONS OF LAW

9. As a threshold matter, the Court considers whether it has jurisdiction to resolve the claims in Plaintiff's Amended Complaint, which was filed after the election. In conducting its own research, the Court became aware of some authority that raised the question of whether Plaintiff's claims were moot because the election had already occurred. Because the issue of mootness affects the Court's jurisdiction, it is proper for the Court to raise the issue and act on it *sua sponte*. *Thournir v. Buchanan*, 710 F.2d 1461, 1463 (10th. Cir. 1983). Instead of ruling on its own, the Court afforded both parties an opportunity to brief the issue. Despite Plaintiff's suggestion that the Court was attempting to take "the easy way" instead of the "right way," supported by a quotation

from a fantasy-fiction author, this was done to avoid the potential that one or both parties could be blindsided by a ruling based on a legal principle not raised or argued by either party.

10. When "the conduct sought to be redressed is peculiar to a particular election, the occurrence of the election itself will moot the controversy." *W-470 Concerned Citizens v. W-470 Highway Authority*, 809 P.2d 1041, 1043 (Colo. App. 1990); *Bruce v. City of Colorado Springs*, 971 P.2d 679 (Colo. App. 1998).

11. Plaintiff asserts that her claims are distinguishable from those in *W-470* and *Bruce* because those cases involved pre-election declaratory judgment challenges, and hers is a post-election challenge. Conceding that a preliminary injunction filed prior to the election might have been rendered moot by the election, Plaintiff cites *Bickel v. City of Boulder*, 885 P.2d 215 (Colo. 1994) to support her argument that a post-election challenge has been determined to not be moot by the Colorado Supreme Court. However, the doctrine of mootness was not addressed in *Bickel*. Further, as the Defendants observe, *Bickel* and *City of Aurora v. Acosta*, 892 P.2d 264 (Colo. 1995) relied upon the enforcement provisions in Article X, § 20 of the Colorado Constitution – the Taxpayer's Bill of Rights ("TABOR"). Here, Plaintiff failed to prove her TABOR claim at trial, and voluntarily dismissed that claim at the conclusion of the trial.

12. The Plaintiff's claims are based on alleged violations of the City of Lamar Charter that resulted in the passage of ordinances 1248 and 1249 which were approved by the voters at the November 2, 2021 election. Because the conduct sought to be redressed by the Plaintiff is peculiar to that election, the Court concludes that the Plaintiff's claims are rendered moot by the occurrence of the election.

13. "Colorado recognizes two exceptions to the mootness doctrine. First, a case which is otherwise moot will not be dismissed if it presents a controversy capable of repetition yet evading review." *W-470*, 1044. Plaintiff argues that the controversy is capable of repetition because the City of Lamar violated Lamar's Home Rule Charter "based upon wrongful representations that the law and home rule charter were followed which impeded discovery of the irregularities and the time to challenge certification of the petition and the ordinances to place questions on the ballot were too short to discover the misrepresentations and challenge the matters in a pre-election challenge." To invoke this exception for the reasons advanced by the Plaintiff, the Court would have to conclude that the City Clerk and the Mayor intentionally misrepresented that the petition satisfied Lamar's Home Rule Charter when they knew that it did not; a conclusion for which there was no evidence presented at trial.

14. Because the evidence does not suggest that City of Lamar officials will actively attempt to violate the Charter in future elections, this controversy is not capable of repetition.

15. The second exception to mootness concerns a controversy involving a question of great public importance or an allegedly recurring constitutional violation. *Id*, citing *Humphrey v. Southwestern Development Co.*, 734 P.2d 637 (Colo. 1987). Contrary to the Defendants' assertion, this exception does not require the controversy to be both a matter of great public importance and an allegedly recurring constitutional violation. *W-470*, 1044; *Bruce*, 683. Instead, the controversy can be either a matter of great public importance *or* an allegedly recurring constitutional violation.

16. As the Plaintiff states in her RESPONSE TO DEFENDANTS' SUPPLEMENTAL BRIEF ON MOOTNESS, the passage of Lamar ballot questions 2A and 2B will "cause a change to the

very complexion of Lamar." Further, the statistics cited by the Plaintiff in her response show a significant increase in cannabis related motor vehicle fatalities, and marijuana use by juveniles in the Denver metro area after Denver authorized the retail sale of cannabis. On the other hand, municipalities that have authorized the retail sale of marijuana, and have assessed a special tax on such retail sale, have generated significant income from those taxes which has benefitted those communities. Finally, this controversy directly places the sanctity of Lamar's Home Rule Charter, its constitution, at issue. These consequences of the passage of Lamar Ballot Questions 2A and 2B, both positive and negative, and the applicability of Lamar's Charter are so significant as to render the issues in this controversy matters of great public importance. Whether the Charter must be followed in future elections does carry generalized weight and would affect future election related challenges. *W-470*, 1044. The Court therefore concludes that the second exception to the mootness doctrine applies and will address Plaintiff's claims.

17. Plaintiff's second claim for relief is governed by C.R.S. § 31-10-1301 et. seq., the Colorado Municipal Code.

18. Plaintiff's second claim in her Amended Complaint alleged a violation of TABOR, but that portion of the claim was dismissed by the Plaintiff at the conclusion of the trial. This confines the analysis of Plaintiff's Second Claim to the grounds for an election contest pursuant to C.R.S. § 31-10-108 and § 31-10-1301. C.R.S. § 31-10-1308 provides that, in an election contest on a ballot question, the grounds for such contest shall be as set forth in C.R.S. § 31-10-1301(1)(b), (1)(c), and (1)(d). That is, a Plaintiff must allege and prove:

- Illegal votes have been received or legal votes rejected at the polls in sufficient numbers to change the results;
- Error or mistake on the part of any of the judges of election or the clerk in counting or declaring the result of the election if the error or mistake would be sufficient to change the result; or
- Malconduct, fraud, or corruption on the part of the judges of election in any precinct or any clerk if the malconduct, fraud, or corruption would be sufficient to change the result.

19. Plaintiff has neither alleged nor proved that illegal votes were received at the polls in the election, mistake in the counting of the votes by the election judges, or fraud by the election judges that would have changed the result in the election. Instead, she focuses on deficiencies in the petition that led to the enactment of the ordinances which became the ballot measures voted on by the electorate in the November 2, 2021 election.

20. "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." C.R.S. § 31-11-106(5). The evidence at trial was unrefuted that the City Clerk erroneously accepted SoCo Rocks' second petition because it only contained 224 signatures – five percent of the number of voters from the last election instead of fifteen percent.

21. C.R.S. § 31-11-110(1) places a time limitation for challenges to an initiative like the petition initiative submitted by SoCo Rocks. "Within forty days after an initiative or referendum petition is filed, a protest in writing under oath may be filed in the office of the clerk by any registered elector who resides in the municipality, setting forth specifically the grounds for such protest." Plaintiff never filed such a protest within forty

days of the certification of the petition by the City Clerk. In her testimony at trial, Plaintiff testified that she attended or watched by video City Council meetings, but did not really understand what the Council members were talking about and has no specific recollection of what was said during the meetings. She did concede that she heard the topic of the petition discussed at City Council meetings.

22. In her supplemental brief, Plaintiff claims that misrepresentations by the City Clerk and the Mayor about the sufficiency of the petition "impeded discovery of the irregularities" of the petition and that the "time to challenge certification of the petition...[was] too short to discover the misrepresentations and challenge the matters in a pre-election challenge." The Court is not persuaded. The City Council was not proceeding secretly concerning the petition. The petition and its certification were available to the public, and with the exercise of reasonable diligence, Plaintiff could have obtained copies of the petition, counted the signatures, and determined them to be insufficient.

23. Because Plaintiff did not avail herself of the ability to protest the petition within the time required by C.R.S. 31-11-110(1), the Court concludes that Plaintiff's statutory claim must fail.

24. Plaintiff's declaratory judgment claim is not hampered by statutory deadlines. Declaratory judgment may be sought "to declare rights, status, and other legal relations whether or not further relief is or could be claimed." C.R.C.P. 57(a). "Any person interested under a...municipal ordinance... may have determined any question of construction or validity arising under the...ordinance... and obtain a declaration of rights, status, or other legal relations thereunder." C.R.C.P. 57(b). Constitutional questions and challenges to the overall validity of an ordinance are properly reviewed under C.R.C.P.

57. *Native Americans Rights Fund, Inc. v. City of Boulder*, 97 P.3d 283, 287 (Colo. App. 2004).

25. At trial, Plaintiff called multiple City Council members to establish their motives for voting for ordinances 1248 and 1249. Specifically, that but for the misrepresentation by the City Clerk that the petition was sufficient and the misrepresentation by the Mayor that City Council was required to pass ordinances because of the sufficient petition, most Council members would not have voted in favor of passing ordinances 1248 and 1249. However, the Court does not believe that it should wade into such murky waters. *United States v. O'Brien*, 391 U.S. 367, 384 (1968). This is because motives are difficult to ascertain objectively, and because what motivated a particular Council member to vote one way or another on an ordinance has no bearing on the ordinance's validity. Just like a United States Senator could not retract her vote to pass a piece of legislation because she did not take the time to read it or relied on what someone else told her the bill said, it is the obligation of a City Council member to educate themselves on proposed ordinances to the extent they deem proper. If a City Council member came to regret a vote because she relied on what the Mayor and/or City Clerk said, that is not a basis for the Council member to rescind their vote, or for the Court to strike down an ordinance as invalid.

26. To resolve Plaintiff's declaratory judgment claim, it is also irrelevant whether City officials were actively soliciting SocoRocks to start a petition initiative in Lamar, whether City officials helped SocoRocks prepare the petition question, or whether City officials were recommending the purchase of real estate to SocoRocks before the initiative passed in anticipation that real estate values would increase after the initiative passed. This case, and Plaintiff's claim for declaratory judgment comes down to one

simple question: Did the City Council violate the Lamar Home Rule Charter when it enacted ordinances 1248 and 1249?

27. "A city's charter is like its constitution, and all ordinances that a city passes must comply with the terms of its charter." *City of Boulder v. Public Service Company of Colorado*, 420 P.3d 289, 295 (Colo. 2018). Lamar is a home rule city, which means that its Charter is its "organic law [which extends] to all its local and municipal matters." Colo. Const. Article XX § 6. The Charter governs "[a]ll matters pertaining to municipal elections in such city or town, and to electoral votes therein on measures submitted under the charter or ordinances thereof." Id, § 6(d). The "intent of Colo. Const. Art. XX [is] to allow localities to govern themselves." *May v. Town of Mountain Village*, 969 P.2d 790, 794 (Colo. App. 1998) citing *People ex rel. Tate v. Prevost*, 134 P. 129, 134 (1913). Based on these authorities, the Court disagrees with the Defendants that Plaintiff's declaratory judgment claim must be "tethered" to either a State statute or the Colorado Constitution. This Article of the Colorado Constitution clearly provides the authority for a home rule City to proscribe its own Charter to govern the conduct of municipal elections.

28. Lamar's Home Rule Charter sets forth the requirements for petition-initiated ballot measures. Article VI § 6-2 states that "[i]f the petition accompanying the proposed ordinance is signed by qualified electors of the City equal in number to fifteen percent of the total ballots cast in the last general election" the petition is sufficient to be presented to the voters. The petition in this case met only one-third of that requirement, representing a number equal to only five percent of the ballots cast in the last general election.

29. Significantly, this was the second insufficient petition submitted by SoCo Rocks. Because the City Clerk deemed the first petition insufficient, and pursuant to the Charter, should have deemed the second petition insufficient, this should have triggered Article VI § 6-5 of Lamar's Charter, requiring the City Clerk to return the second insufficient petition to SoCo Rocks, and to not permit a subsequent petition to be refiled within one year. Had Lamar's Charter been followed, the petition and ballot question would not have been presented to City Council.

30. The certificate of sufficiency to accompany the petition, pursuant to Article VI § 6-2 of Lamar's Charter did not certify the question set forth in the petition, which proposed to ask voters whether the City of Lamar should add a special sales tax on the sale of retail marijuana products if the registered electors of Lamar were to decide to allow the sale of marijuana products. *Exhibit 28.* Instead, the certificate of sufficiency suggested that the petition requested that City Council place a ballot question on the November 2, 2021 election to allow marijuana dispensaries within the city limits of Lamar. *Exhibit 63.*

31. But for the violations of Lamar's Charter, its constitution, the proposed ordinance from the petition initiative would never have reached the City Council. Although the Defendants correctly observe that the City Council has the authority, pursuant to C.R.S. § 31-11-111(2) to submit ballot measures to the electorate regardless of whether it receives a valid petition, an invalid petition, or no petition at all, this is not what happened here. Both Mayor Crespin and City Clerk Williams testified that ordinances 1248 and 1249 would not have been an agenda item for City Council had there not been a petition deemed sufficient by the City Clerk. Further, at a City Council meeting on June 14, 2021, Mayor Crespin stated that historically, City Council has "stayed neutral" on

whether issues related to marijuana dispensaries should be placed on the ballot and that SoCo Rocks' petition would neither be supported nor declined.

32. Mayor Crespin testified that at the same City Council meeting he said, "we have left it up to the private citizen to bring it in at their own expense and to do their own work." Finally, Mayor Crespin testified that "we would never put it on the ballot ourselves." (Referring to whether City Council would enact an ordinance like ordinance 1248 authorizing the sale of marijuana on their own initiative). Thus, although City Council has the power under C.R.S. § 31-11-111(2) to submit a ballot measure without a petition, it is abundantly clear from the testimony that City Council was not acting under this authority. Instead, they acted only upon the invalid petition, and passed ordinance 1248, as Mayor Crespin testified, to provide "a clarification for the community" of the petition question that resulted in ordinance 1249.

33. Having found multiple violations of Lamar's Charter associated with the petition-initiated ballot measures presented to the voters on November 2, 2021, the Court must now determine whether it should require strict compliance with the Charter or substantial compliance. If the standard is substantial compliance, then the Charter's signature requirement could be satisfied with fewer than the minimum number of signatures proscribed by the Charter.

34. The Defendants argued in their original trial brief that substantial compliance was the appropriate standard, although this was in the context of Plaintiff's alleged TABOR violation which Plaintiff has dismissed. Substantial compliance is the proper standard when evaluating alleged TABOR violations. *Bickel v. City of Boulder*, 885 P.2d 215, 226 (Colo. 1994); *City of Aurora v. Acosta*, 892 P.2d 265, 267 (Colo. 1995). Generally,

substantial compliance is all that is required to satisfy Colorado's election code. "Substantial compliance with the provisions of this code shall be all that is required for the proper conduct of an election to which this code applies." C.R.S. § 1-1-103(3).

35. However, the Colorado Supreme Court has held that there are some aspects of the Election Code that require strict compliance. Importantly, the Colorado Supreme Court has required strict compliance on a petition-initiated measure where the circulator of the petition did not obtain the requisite number of signatures. *Griswold v. Ferrigno Warren*, 462 P.3d 1081 (Colo. 2020). In *Griswold*, a candidate for the United States Senate sought access to the ballot by way of the petition process set forth in Colorado's Election Code. However, her signature collection efforts were impaired by the initial portion of the COVID-19 pandemic in March, 2020, and she failed to obtain the requisite 1,500 signatures in each congressional district. After the Secretary of State deemed the petitions to be insufficient, the candidate brought suit in the Denver District Court, alleging that she had substantially complied with the signature requirements, and that her name should be placed on the ballot. The District Court found substantial compliance, and the Secretary of State appealed to the Colorado Supreme Court.

36. On appeal, the Supreme Court held that the requirement that "a U.S. Senate candidate's petition include 1,500 signatures from each congressional district is more than simply a 'technical requirement.' Rather, it is the minimum threshold that the legislature has declared 'must' be met for a candidate to petition onto the ballot." *Griswold*, at 1085. The Court reasoned that "permitting substantial compliance in this context would 'require us to disregard the clear, unambiguous and mandatory language of the statute and graft onto it exceptions and limitations the legislature did not express.'" *Id*, 1086 citing

Jackson-Hicks v. E. St. Louis Bd. Of Election Comm'rs, 28 N.E. 3d 170, 179 (Ill. 2015). Simply put, a candidate, or petition-initiated ballot measure "either meets the minimum threshold or does not. There is no close enough." *Id.* Since Lamar's Charter is its constitution, its organic law, the Court concludes that strict compliance with its petition initiative sections must be required. To conclude otherwise would depreciate the significance of the Charter to the point where it would be rendered meaningless.

37. Even if the Court were to apply the substantial compliance standard, the failure to meet the clear, direct, and specific requirements of Article VI §§ 6-1 and 6-2 "could not be ignored in the name of substantial compliance." *Loonan v. Woodley*, 882 P.2d 1380, 1384-86 (Colo. 1994).

38. Article VI § 6-1 states that any "proposed ordinance may be submitted to the Council by petition signed by qualified electors of the City equal in number to the percentage hereinafter required." This is unambiguous and mandatory language establishing a minimum threshold that must be met for a petition initiative to be placed on the ballot. Article VI § 6-2 requires a "petition accompanying the proposed ordinance [to be] signed by qualified electors of the City equal in number to fifteen percent of the total ballots cast in the last general election." The Defendants admit that Soco Rocks' petition did not even come close to this requirement, generating signatures equal to only five percent of the total ballots cast in the last general election.

39. The Court recognizes that "[e]lections should not be lightly set aside and that, as a matter of public policy, courts should not invalidate the results of [an] election unless 'clear grounds' for such action is shown." *Bickel*, 227 citing *Felzien v. School District RE-3 Frenchman*, 380 P.2d 572, 574 (Colo. 1963). Here, clear grounds have been shown that

the election results on Lamar Ballot issues 2A and 2B must be invalidated because they were submitted to the electorate in direct violation of Lamar's Charter.

IT IS THEREFORE THE ORDER OF THE COURT:

I. On Plaintiff's First Claim for Relief:

A. That City of Lamar ordinances 1248 and 1249 are declared void *ab initio*;

B. That City of Lamar Ballot Issues 2A and 2B are declared void *ab initio*; and

C. That the results of the November 2, 2021 election concerning Lamar Ballot Issues 2A and 2B are set aside as invalid.

II. On Plaintiff's Second Claim for Relief:

A. This Claim for Relief shall be, and is hereby, DISMISSED for the reasons set forth in this order.

III. On Plaintiff's Third Claim for Relief:

A. That a permanent injunction shall issue enjoining the Defendants from implementing ordinances, rules, and regulations related to ordinances 1248 and 1249.

DATED this 24th day of March, 2022.

BY THE COURT:

MIKE DAVIDSON
DISTRICT JUDGE