

July 13, 2016

Dear Ms. Schutt and Mr. Duval,

DATE FILED: July 19, 2016 7:52 AM
FILING ID: C0D84B7C17F2F
CASE NUMBER: 2016CV144

Subject: First Amended Complaint

In our phone conference on July 5 you said that once you see my amended complaint, which will be my First Amended Complaint, you will be able to decide how to respond to my motion for leave to amend. You asked to see a copy of it. I said that I am working on it and will send you a copy when it is done.

At this point I do not have the actual First Amended Complaint but I am working on it. I plan to send it to you late on July 19 or on July 20. What I have is the following letter describing it and how it will be different from my Complaint.

As you know my Complaint argued that the Fort Collins City Council has the sole authority to make policy on behalf of the City of Fort Collins including major utility projects such as the Advanced Meter Fort Collins (AMFC) Project (Project). And that, based on the City's responses to my Open Records Act request in 2015 including the letter from Jeff Mihelich to me summarizing the City's statements during a phone conference held in April, 2015, the City Council never approved an ordinance or resolution authorizing the Project. That is, authorizing the removal of all customers' analog electric meters and the installation on their homes and businesses of so called smart electric meters, or simply smart meters. As such the Project was unauthorized. It follows from that that the monthly meter reading charge, which was purportedly authorized by Ordinance of the City Council and which Plaintiff has been paying each month, is also unauthorized; the reason being that were it not for the Project there would never have been a need for the monthly meter reading charge. Those monthly charges are Plaintiff's injury / injuries, and they are continuing.

In Defendants' Answer, Defendants attached a copy of John Duval's letter of January 12, 2016 letter to Plaintiff. In that letter Mr. Duval claimed that the City Charter authorizes the City Council to "delegate" (although that word does not appear in the relevant section of the Charter) certain decision making authority to city agencies, and that section 2-504 of the City Code did or does in fact delegate certain decision making power to Utility Services and its Director including the authority to make the policy decision known as the Project. In other words Defendants argue that Utility Services has / had the authority to approve the Project and that no authorization was required from the City Council.

There are problems with Mr. Duval's argument in the wording of the relevant portion of the City Charter, the City Code, and in the fact that this interpretation conflicts with the Colorado Sunshine Act of 1972 and its requirements that public policy, broadly speaking, must be made openly and not in secret.

The First Amended Complaint will argue that the Defendant's position does nothing more than kick the can farther down the road. Because the City Council never authorized the Project, and was obviously bound and covered by the Colorado Sunshine Act of 1972,

Defendants are simply trying to relieve the City Council of any obligation (or argue that the law does so) by passing the buck to Utility Services. This begs the question of whether Utility Services is bound and covered by the Act. Plaintiff will argue that it is. Similar to the City Council, Utility Services was obligated to conduct its business including deliberations on and final approval of the Project in the open with full public notice of the proposal on an agenda of a regular meeting and meeting all the other requirements of the Act.

Unfortunately Utility Services failed to make public policy (the policy of authorizing the Project) openly and in fact did so in secret, which is contrary to Colorado law. Defendants' argument is, in effect, that they may treat Utility Services as a black box into which no resident can look. Residents are allowed to watch what goes into the black box and what comes out of it, but may not have any input nor knowledge of the processes inside that black box. This theory is antithetical to Colorado's system of open government.

Depending on what Defendants provide in their disclosures Plaintiff may argue that Utility Services made the decision to authorize the Project by secret ballot, which would be illegal.

The legal basis for Plaintiff's argument is the Open Meetings Law and case law.

Plaintiff will argue that (numbers and letters in parentheses refer to the Open Meetings Law):

Utility Services is a "local public body" as defined because, according to Defendants, the City Council delegated to Utility Services the authority to make decisions about the city's electric services. 1(a)(I)

Utility Services had "meetings" as defined when they were deciding whether to do the AMFC project and what the details would be: who, what, where, when, why and how. 1(b)

Those meetings were required to be public meetings and open to the public at all times. 2(b)

Utility Services was supposed to take minutes of those meetings, which they did not do. 2(d)(II)

Utility Services voted by secret ballot to do the AMFC Project, which they were not allowed to do. 2(d)(IV)

Plaintiff has the right to file an action for damages. 8

Case law supporting this argument includes but is not limited to:

The remedy in subsection (8) invalidates formal action taken in two circumstances. First, the open meetings law voids any resolution, rule, regulation, ordinance, or formal action of a state or local public body taken at a meeting that does not comply with the requirements of

subsection (2). But the open meeting law also voids any of these actions taken without a meeting of the state or local public body. *Wisdom Works Counseling v. Dept. of Corr.*, 2015 COA 118, 360 P.3d 262.

A meeting is part of the policy-making process when the meeting is held for the purpose of discussing or undertaking a rule, regulation, ordinance, or formal action. If the record supports the conclusion that the meeting is rationally connected to the policy-making responsibilities of the public body holding or attending the meeting, then the meeting is subject to the Open Meetings Law, and the public body holding or attending the meeting must provide notice. *Bd. of County Comm'rs v. Costilla County Conservancy Dist.*, 88 P.3d 1188 (Colo. 2004).

Action taken without full and timely notice is invalid. This section does not invalidate the formal action of a board for the failure to comply with notice to those persons on the "sunshine list", but it does invalidate an action taken where there is not full and timely notice to the public. *Hyde v. Banking Bd.*, 38 Colo. App. 41, 552 P.2d 32 (1976).

Some overt action must be taken by the board to give notice to the public that a meeting is to be held. At the very minimum, full and timely notice to the public requires that notice of the meeting be posted within a reasonable time prior to the meeting in an area which is open to public view. *Hyde v. Banking Bd.*, 38 Colo. App. 41, 552 P.2d 32 (1976).

As a citizen seeking to enforce open, public decision-making by the city council that represents him, plaintiff was precisely the type of plaintiff contemplated under the open meetings law's enforcement provisions. *Weisfield v. City of Arvada*, 2015 COA 43, 361 P.3d 1069.

The open meetings law creates a legally protected interest on behalf of Colorado citizens to have public business conducted openly in conformity with the statutory provisions. This section sets out specific requirements with which public bodies must comply, including providing notice and public access to meetings where public business is discussed, as well as a specific prohibition on taking formal action by the use of secret ballots. Finally, subsections (8) and (9) provide a legal remedy whereby private citizens may enforce its provisions. In sum, the open meetings law articulates an interest in having public business conducted openly and provides a mechanism for private citizens to protect that interest. *Weisfield v. City of Arvada*, 2015 COA 43, 361 P.3d 1069.

The First Amended Complaint will also argue that where section 2-504 of the City Code says, "Utility Services shall be in the charge of a Director who shall be directly responsible to the City Manager for the functions and duties of Utility Services" it means that Utility Services will implement policy decisions made by the City Council and communicated to Utility Services by the City Manager. This does not give Utility Services the authority to make policy decisions.

The First Amended Complaint will also argue that Section 6 of the Charter of the City of Fort Collins requires certain action even if and when Utility Services (or any other city agency) is making a policy decision, and that this was not done in the case of the Project.

"All legislative enactments and every act creating, altering, or abolishing any agency or office, fixing compensation, making an appropriation, authorizing the borrowing of money, levying a tax, establishing any rule or regulation for the violation of which a penalty is imposed, or placing any burden upon or limiting the use of private property, shall be by ordinance, which shall not be so altered or amended on the final passage as to change the original purpose."

In other words, despite the existence of Utility Services that is "directly responsible to the City Manager" as described above, the City was not allowed to authorize the Project without complying with the above requirement in Section 6. The alleged "delegation" of certain decision making authority from the City Council to Utility Services does not relieve the City of its obligation to comply with Section 6.

Based on the above I ask you to not object to my Motion for Leave to Amend my Complaint.

Also, on a separate item, as you probably know Rule 16.1(f) says:

(f) Case Management Orders. In actions subject to Simplified Procedure pursuant to this Rule, the case management order requirements of C.R.C.P. 16(b)(1), (2), (3) and (7) shall apply even though a proposed Case Management Order is not required to be prepared or filed.

My understanding of this is that we (the parties) are supposed to comply with Rule 16(b)(1), (2), (3) and (7). We have done 1, 2, and 7 but not all of 3, which says:

(3) Meet and Confer. No later than 14 days after the case is at issue, lead counsel for each party and any party who is not represented by counsel shall confer with each other in person, by telephone, or video conference about:

- (A) the nature and basis of the claims and defenses;
- (B) the matters to be disclosed pursuant to C.R.C.P. 26(a)(1);
- (C) the Proposed Case Management Order;
- (D) mutually agreeable dates for the case management conference; and
- (E) based thereon shall obtain from the court a date for the case management conference.

The proposed order shall state the date of and identify the attendees at any meet and confer conferences.

We did some of this but not (A). Defendants' answer listed several affirmative defenses described with the word "may", which also includes "may not". Those affirmative defenses are lacking in factual and legal basis, as stated. It appears to me that Defendants are

supposed to tell the Plaintiff about the "nature and basis" which as I read it includes the factual basis and legal basis. It appears there is more to do on this. Do you agree?

Last item: Because my First Amended Complaint will focus on Utility Services, the meetings held by the Director with his staff, meetings between staff not including the director, and so on, will you include in your disclosure any and all documents regarding those meetings, the planning and evaluation of different options for the AMFC Project, any recommendations by anyone in Utility Services, and generally documents of the decision making process, broadly speaking within Utility Services on the Project? Also communications between Utility Services and the City Manager or City Council about the Project. I don't know exactly how the disclosures are supposed to work but this subject area is going to be the subject of my First Amended Complaint as I said and what I have described here is evidence related to it.

Thank you.

Sincerely,

Virginia Farver